Australian Nursing & Midwifery Federation

The Senate Education and Employment Legislation Committee

Inquiry into Penalty Rates

July 2017

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1. The Australian Nursing and Midwifery Federation (ANMF) thanks the Senate Education and Employment Legislation Committee; (the Committee) for providing this opportunity to make a submission on the Inquiry into penalty rates.

2. The ANMF is the national union for nurses, midwives and assistants in nursing with branches in each state and territory of Australia. The ANMF is also the largest professional nursing organisation in Australia. The ANMF's core business is the industrial and professional representation of its members.

3. As members of the union, the ANMF represents over 259,000 registered nurses, midwives and carers in nursing nationally. They are employed in a wide range of enterprises in urban, rural and remote locations, in the public, private and aged care sectors including nursing homes, hospitals, health services, schools, universities, the armed forces, statutory authorities, local government, and off-shore territories and industries.

Overview of Nursing and Carer workforce

4. In 2016 there were approximately 365,000 registered nurses, midwives and enrolled nurses and over 100,000 carers in the health and aged care workforce.

5. Nursing employment in the main is regulated under the Fair Work Act with the major exception being state public sector nursing (other than Victoria). All nurses and carers in the hospitals sectors and around 90% in the residential aged care sectors are covered by enterprise bargaining agreements.

6. While the delivery of health services may be found across a diverse range of businesses, a principal characteristic of the industries is that health and aged services are provided around the clock, 7 days a week.

7. Employers generally decide the days or nights upon which employees work and the times between which they work on those days or nights. While some facilities do have agreed rosters, in the main employers in health and aged care set the rosters with limited employee choice.

8. Most nurses, midwives and care workers work according to a roster with changing shift patterns and at anti-social periods day and night. Whether this be a hospital, aged care or community setting a nurse, midwife or assistant in nursing is required to ensure care is maintained , invariably working in a high pressure , stressful environment for employers who operate on a 24 hour a day, 7 days a week basis.

9. Given the business model in both health and aged care it is not surprising that nurses and care workers working within such organisational arrangements, attract through their award or agreement a substantial portion of their remuneration for payments such as overtime, shift loadings and weekend penalties, depending on the particular roster arrangement.

10. Analysis undertaken by Union and Community Data and Analytics estimates that the permanent nursing workforce in acute hospitals and nursing staff and direct care workers employed in residential aged care facilities derive around 20 percent of income from penalty rates *(The importance of penalty rates for our health workforce – A report by The McKell Institute 2015).*

11. With entry level rates of around $22 for carers and $25 for nurses, these are low paid workers who are extremely dependent on minimum pay rates and use their penalty rates to top up their wages to a reasonable level.

Terms of Reference

12. In addition to the comments on the Inquiry Terms of Reference we illustrate, by way of a case study, the history of agreement making between employees, the union and one national employer to demonstrate to the Committee the real-world shortcomings in the current regulatory framework that acts, in our view, to the detriment of employees and their bargaining representatives. The Sonic Health case study is set out at Appendix 1 of this submission

Term of Reference 1

Claims that many employees working for large employers receive lower penalty rates under their enterprise agreements on weekends and public holidays than those set by the relevant modern award, giving those employers a competitive advantage over smaller businesses that pay award rates

13. Nursing and midwifery employment conditions are in the main regulated by the Fair Work Act 2009 with the major exception being nurses employed in the public sectors in New South Wales, South Australia, Western Australia, Tasmania and Queensland and some nurses employed in the private sector in Western Australia which are regulated by the relevant state industrial bodies.

14. Put briefly, enterprise agreements apply to all nurses, midwives and carers in public and private hospitals and the vast majority employed in the residential aged care sector. In primary care (medical clinics, general practice etc.) the majority of employees are award dependent or have unregulated individual agreements.

15. The bargaining history in health and aged care generally demonstrates that better outcomes are achieved in workplaces of large employers. The collective industrial strength of nurses in large workplaces, particularly in public and private hospitals assists in achieving enterprise agreements that provide more beneficial outcomes.

16. Conversely where nurses are small in number, enterprise bargaining outcomes are generally reduced both in terms of wages and employment conditions. The absence of arbitral powers under the Fair Work Act has allowed many smaller employers to "surface bargain" or alternatively simply present employees with an agreement on a take it or leave it basis.

17. Nurses employed by smaller employers often languish on the modern award.

Term of Reference 2

The operation, application and effectiveness of the Better Off Overall Test (BOOT) for enterprise agreements made under the Fair Work Act 2009

18. The Better off Overall Test (BOOT) is deficient both in terms of its concept and application.

19. Enterprise agreements must pass the BOOT in order to be approved by the Fair Work Commission (FWC). An agreement passes the BOOT if the FWC is satisfied that each award covered employee, and prospective award covered employee, would be better off overall if they were employed under the agreement rather than the relevant modern award.

20. The statutory test of comparing the proposed agreement with the relevant modern award places employees at a distinct disadvantage in terms of bargaining as well as the potential consequences if an agreement cannot be reached and the expired agreement is subsequently terminated.

21. In nursing, along with many industries, enterprise bargaining has been the principle industrial vehicle for improvements in employment conditions since the mid 1990's. Since then most agreements have been regularly renegotiated and replaced, in some cases 8 times. Consequently the differences between the modern award wage rates and conditions (which are under constant attack through continuous statutory reviews) and wages and employment conditions in enterprise agreements are significant. For example:

Hourly wage rates (1 July 2017)

	Award	Average Agreement
AIN Entry	$19.96	$24.45 (Public Sector
EN Entry	$21.69	$27.71 (Public Sector)
RN Entry	$23.20	$31.50 (Public Sector)

22. In addition to wage rates there is now a range of employment conditions that are common place throughout health and aged care that are significantly better than the award.

23. The growing gap between awards and agreements provides many employers with a strong incentive to use the bargaining process to attempt to reduce labor costs and the current regulatory framework affords employees little or no protection against this outcome.

24. The principle objective of bargaining between the employer and the employees at the enterprise level to secure productivity benefits for the employer and employment improvements for the employees is compromised by modern awards that bear little resemblance to the contemporary rates of pay and conditions of employment in workplaces.

25. The application of the BOOT in comparing an agreement to the relevant modern award contributes to the undermining employment standards and the safety net of the award.

26. While Fair Work Commission tribunal members are now assisted by the Member Support Team to analyse agreements against the relevant award, such analysis may, in practice be deficient.

27. In its assessment process the FWC appears to place significant weight on the information contained in the statutory declarations before it. In circumstances where there is no union involvement the Commission almost exclusively relies on the declarations provided by the employer. Where the information is inaccurate, deficient or misleading, the Commission's capacity to fairly and accurately assess an agreement is compromised.

28. In the Sonic Health case study at Appendix 1, the ANMF notes that in the approval process for the 2013 agreement the employer lodged an incomplete Form 17: ***Employer's Declaration in Support of Application for Approval of Enterprise Agreement***. Section 185(2)((b) of the Act requires that applications for approval of enterprise agreements be accompanied by any declarations required by the procedural rules. The Form 17 as required by the Rules was not submitted in this case.

29. Significantly the declaration omitted the following question:

    Do you think that the agreement passes the better off overall test?

    [ ] I think the agreement does pass the better off overall test

    [ ] I don't think the agreement passes the better off overall test

30. Regardless of whether this omission was intentional or an oversight, the documentation/declaration as required under the FWC Rules (8(2)) was not provided.

31. This had two consequences:

    First, the Commission was deprived of the employer's answer to a question critical to the assessment and approval process. This was particularly important in this case where the employer had listed in the Form F17 a series of Clauses in the proposed agreement that were less beneficial to employees than the terms of the relevant modern award against which the agreement was to be assessed for the purposes of the better off overall test. Second, in the absence of the declarations required by the Rules the agreement should not have been approved (s.185(2)(b)).

Undertakings

32. An assessment of the application and effectiveness of the BOOT cannot be properly examined without regard to the role of Undertakings.

33. S.190 of the Act provides a specific mechanism to enable the Fair Work Commission to approve enterprise agreements which would otherwise have to be refused approval because the enterprise agreement did not meet the BOOT. The provision is in practice a clearly beneficial provision for an employer seeking approval of an agreement.

34. S.190(3) provides two limitations to acceptance of undertakings:

    1 The undertaking(s) is not likely to cause financial detriment.
    2. The undertaking(s) will not result in substantial changes to the Agreement.

35. Save for these specific limitations, undertakings are available at large and have been utilised extensively. This widespread use is arguably inconsistent with the legislative intention of providing a simple mechanism whereby the FWC may address limited or minor deficiencies in a proposed agreement as opposed to a mechanism where employers may redress an overwhelmingly substandard agreement.

36. However, in practice s.190 allows the employer to provide numerous undertakings to achieve approval of the agreement that in many cases was opposed to by bargaining representatives. The ANMF believes this to be inconsistent with the provision.

37. For example in granting approval of the 2017 Sonic Health agreement the FWC accepted nine separate undertakings in relation to the following matters:

    1. Hours of work for part time employees.

2. Requirement to pay on call allowances.
3. Requirement to pay recall allowances.
4. Maximum ordinary hours per day.
5. Employees to properly be defined as shift workers.
6. Requirement to pay meal allowance.
7. Requirement to give overtime provisions.
8. Requirement that overtime provisions apply to all relevant hours of work.
9. Requirement that the employer pay public holiday rates which falls on an RDO.

38. In our view the Sonic Health agreement approval process in 2017 was essentially characterised by the employer submitting for approval an agreement that clearly did not meet the BOOT and thereafter entering into a direct negotiation with the FWC to determine how many undertakings would be required to have the agreement approved. And while s.190 (4) requires that all bargaining representatives are consulted in this process, in our experience such consultation is tokenism at best.

Term of Reference 3

The desirability of amending the Fair Work Act 2009 to ensure that enterprise agreements do not contain terms that specify penalty rates which are lower than the respective modern award

39. Section 206 of the FWA provides that the base rates of pay in agreements shall not be less than the minimum wage rates as provided for in the relevant modern award or the NES. This provides some protection for employees particularly when the Agreement wage rates are at or near the prescribed minima.

40. However, the Act does not apply these provisions to other minimum standards such as casual loadings, overtime, weekend penalty rates, night and afternoon loadings and shift penalties. The Act is deficient in this regard.

41. In many industries including health and aged care, an employee's remuneration frequently reflects an irregular configuration of work across a seven day, 24 hour cycle. It is invariably a complicated wages matrix, usually administered by payroll firms with extensive experience and exposure to the particular industry.

42. Fair Work Commission members and support officers invariably lack this type of knowledge and yet are required to undertake a comprehensive analysis of the impact of a proposed agreement (as against the relevant award) that may cover a range of different classifications , working different shift patterns in a number of facilities.

43. Where the agreement weekend rates, shifts and other loadings are below the relevant award, or alternatively provide for different qualifying criteria, the Fair Work Commission must assess the impact of reductions/changes for the purposes of the BOOT.

44. In health and aged care such an assessment may require a detailed understanding of the application of shift allowances and loadings as set out below:

- Does the nurse receive both a shift and casual loading and if so how this to be calculated?
- Is the nurse's entitlement to the weekend penalty applicable during periods of overtime?
- What is the appropriate hourly rate(s) for a shift that commenced on the afternoon shift and finished on the night shift?
- The assessment of ordinary time earnings and overtime earnings for part time and casual employees.

45. The analysis of these entitlements would be far simpler and more accurate if s.206 of the Act was amended to provide protection in agreements of all modern award entitlements that recompense the employee. This would include all penalties, loadings and allowances.

46. To not do so will require the FWC to continue to undertake a statutory requirement that is often beyond them. Further it will continue to put at risk employee remuneration that extends beyond minimum/award wages and therefore the scope of s.206.

Term of Reference 4

The provisions of the Fair Work Amendment (Pay Protection) Bill 2017

47. The ANMF supports the passage of this Bill.

Term of Reference 5

Any other related matter related to penalty rates in the retail, hospitality and fast food sectors

48. The ANMF does not have a direct interest in these industries however we have followed with interest recent highly publicised tribunal and court reviews of a number of collective agreements in the retail and fast food sectors.

49. Sadly it does appear that the reviews have established, at least in some cases that the union and employer co-operated to achieve the approval of agreements that left hundreds of thousands of low paid employees with terms of conditions of employment less than they would otherwise have received under the relevant award.

50. While not in any way seeking to excuse this reprehensible conduct, we do believe the current regulatory arrangements that provide multiple avenues in the agreement bargaining and approval processes to reduce wages and conditions, may encourage this type of behaviour.

APPENDIX 1

Case study on the approval of the Sonic HealthPlus National Enterprise Agreement 2013–2016 and the Sonic HealthPlus Enterprise Agreement 2017

1. The purpose of this case study is to highlight the deficiencies in the Boot, its application and the flawed outcomes that result from in the processes leading to the approval of Sonic Health agreements in 2013 and 2017.

2. Sonic HealthPlus is a national provider of General Practice and Occupational health services and has facilities in all states and territories except Tasmania.

The 2013 agreement

3. The Sonic HealthPlus National Enterprise Agreement 2013 – 2016 (SHP EA) was approved by the Fair Work Commission (FWC) on 20 June 2014.

4. The agreement covered various employees including Enrolled and Registered Nurses, Administrative and business support positons, Physiotherapists and other Allied Health classifications. It covered a total of 513 employees and operated in all states and territories except Tasmania.

5. No union bargaining representatives were involved in the negotiation of the 2013-16 Agreement. It was approved without undertakings.

6. The ANMF's comments in this case study relate to employees classified as Enrolled Nurses (ENs) and Registered Nurses (RNs) who, in the absence of the enterprise agreement would be covered by the Nurses Award 2010.

7. It is clear from the content of the 2013 – 16 EA and the Employer's Form F17 Statutory Declaration attached to the application for approval that the agreement excluded a number of entitlements contained in the Nurses Award and also included provisions inferior to award entitlements. For example, the EA did not provide for payment of shift allowances, weekend penalties, 17.5% loading on annual leave or On-call allowance. The agreement also provided 1 week less of annual leave per year.

8. In addition, clause 13.3 of the EA provided that: *"The minimum rates of pay outlined in clause 30 Appendix: Rates of Pay, of this Agreement include all loadings, penalties and allowances other than those specified elsewhere in this Agreement."*

10. In these circumstances it should be expected that some analysis was provided by the employer to demonstrate the enterprise agreement passed the BOOT. In this case, it would appear from the documentation that no information was provided to the FWC addressing this matter in any detail. Nor was there any evidence that the FWC did any detailed assessment to establish that employees were better off overall.

11. Our own assessment indicates the agreement did not pass the BOOT. Even a conservative approach which takes into account only some of the reductions in the agreement such as the absence of shift allowances, weekend penalties, the 17.5% loading and loss of 1 weeks annual leave in the agreement shows employees are substantially worse off. For example, an RN with 8 years of experience working two afternoon shifts per week and every second weekend would be paid 23.9% more under the Award than the Agreement despite the higher rates of pay in the Agreement.

12. The above calculation does not take into account other less beneficial terms in the Agreement compared to the Award including changes to the span of hours; application of overtime to part time employees; more restrictive criteria to qualify for shift workers to qualify for 1 week additional annual leave; reduced access to payment for higher duties and no on-call allowance.

The 2017 Agreement

13. This Agreement has recently been replaced by a new Sonic HealthPlus Enterprise Agreement 2017 approved by the FWC on the 26 June 2017 with a number of undertakings following matters raised by the FWC and the ANMF.

14. The ANMF documented 16 items highlighting matters detrimental to employees compared to the Nurses Award. This covered both provisions in the Agreement that were less beneficial than the Award and Award provisions that were absent in the Agreement. Wage rates in the Agreement were higher than the Award however the loss of conditions would have left many nursing employees worse off.

15. The employer's documentation included information asserting the Agreement passed the BOOT. However their BOOT analysis only included some of the Award provisions that were less beneficial or not included in the Agreement. For example, the calculations covered three provisions not included in the Agreement: 1 additional week of annual leave; 17.5% loading on 4 weeks annual leave and the payment of a laundry allowance.

16. Other matters that should have been taken into account in the calculations concerning the BOOT include the following:

    - Changes to the span of ordinary hours of work for day workers that allowed hours to be worked at ordinary rates which would have been subject to overtime under the Award;

    - Hours of work provisions for part time employees that resulted in payment of ordinary rates of pay which would have been subject to overtime under the Award;

    - Shiftworkers that would have had access to an additional week of annual leave under the Award are not entitled to the additional week under the Agreement and are therefore losing 2 weeks of annual leave overall;

    - No clause providing for days off free from duty;

    - No On-call allowance or minimum payment for returning to duty;

    - No additional payment if an employee is required to remain available or on duty during a meal break;

    - No Meal allowance payable in certain circumstances where the employee works overtime and

    - No payment to full time employees where a public holiday falls on a rostered day off.

17. Undertakings subsequently provided by the employer to the FWC addressed a number of the deficiencies identified above.

Undertakings provided

1. Hours of work for part time employees.
2. Requirement to pay on call allowances.
3. Requirement to pay recall allowances.
4. Maximum ordinary hours per day.
5. Employees to properly be defined as shift workers.
6. Requirement to pay meal allowance.
7. Requirement to give overtime provisions.
8. Requirement that overtime provisions apply to all relevant hours of work.
9. Requirement that the employer pay public holiday rates which falls on an RDO.

Diagramatic Summary

Sonic HealthPlus Case Study