ANMF
Tasmanian Branch

AUSTRALIAN NURSING AND MIDWIFERY FEDERATION (TASMANIAN BRANCH)

SUBMISSION

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020

Submission to Senate Enquiry

4 February 2021

Australian Nursing and Midwifery Federation (Tasmanian Branch)

Organisation Overview

The Australian Nursing and Midwifery Federation Tasmanian Branch (ANMF) is both the largest nursing and midwifery union and the largest professional body for the nursing and midwifery teams in Tasmania. We operate as the State Branch of the federally registered Australian Nursing and Midwifery Federation. The Tasmanian Branch represents around 8000 members and, in total, the ANMF represents over 280,000 nurses, midwives and care staff across Australia. ANMF members are employed in a wide range of workplaces (private and public, urban and remote) such as health and community services, aged care facilities, universities, the armed forces, statutory authorities, local government, offshore territories and more.

The core business of the ANMF is the industrial and professional representation of nurses, midwives and the broader nursing team, through the activities of a national office and branches in every state and territory. The role of the ANMF is to provide a high standard of leadership, industrial, educational and professional representation and service to members. This includes concentrating on topics such as education, policy and practice, industrial issues such as wages and professional matters and broader issues which affect health such as policy, funding and care delivery. The ANMF also actively advocates for the community where decisions and policy are perceived to be detrimental to good, safe patient care.

Contact Information

Emily Shepherd, Brach Secretary
Australian Nursing and Midwifery Federation (Tasmanian Branch)

182 Macquarie Street, Hobart TAS 7000
Ph: (03) 6223 6777
Fax: (03) 6224 0229

Email: enquiries@anmftas.org.au
Website: www.anmftas.org.au

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Introduction

The primary role of the Australian Nursing and Midwifery Federation is to support nurses, midwives and carers to provide better care for patients. The Australian Nursing and Midwifery Federation Tasmanian Branch (ANMF) is part of the wider Australian Nursing and Midwifery Federation. We are a professional organisation as well as an industrial one. Consequently, through our members, we have a complete understanding of the nursing and midwifery professions. Our members work with small and large employers, in public and private settings and in aged care facilities as well as in the provision of home-based care.

We thank the Senate Education and Employment Legislation Committee for the opportunity to comment on the provisions of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the Bill).

The ANMF fear that, if passed, the amendments will not support the jobs of nurses, midwives and care workers but rather will have the potential to undermine the conditions, pay and employment opportunities that have been negotiated by members over many years in reaching Enterprise Agreements with their employers. The ANMF are also of the view that the amendments are more beneficial for the employer and will allow, in particular, casual workers and part-time workers to be disadvantaged in their employment. This further undermines the intent of the Bill, to support jobs and economic recovery.

Nurses, midwives and care workers have been instrumental in managing, treating and preventing COVID-19 in Tasmania and have put their own health and wellbeing on the line to support the broader Tasmanian community. Many of our members have been on the frontline testing, receiving and treating Tasmanians who have contracted COVID-19 and it is incredibly distressing to our membership that, after such dedication and service to their community, they are now are having defend hard won entitlements to protect their employment conditions, especially where they have been so heavily relied upon during this pandemic. The ANMF are of the view the that proposed Bill does not consider nurses, midwives, care workers and their sacrifices and how vital they are in the continuing recovery and prevention of further COVID-19 outbreaks in Tasmania and indeed across Australia.

The ANMF therefore reject the Bill and the proposed amendments and will through this submission highlight that, if passed, this legislation will do nothing to support nurses, midwives, care workers or ensure security in their vital roles, will disadvantage them after displaying sacrifices during the COVID-19 pandemic and will do nothing to support their economic recovery and that of their families when many family members of nurses, midwives and care workers lost income during the COVID-19 pandemic in Tasmanian due to their partners, parents and other family members working with COVID-19 patients.

General Comment in relation to the Bill

1. In his second reading speech on the Bill[1], the Attorney-General, Minister for Industrial Relations and Leader of the House, Christian Porter stated:

> "*I am very pleased today to be introducing the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill to help Australia's recovery from COVID-19 by supporting productivity, jobs and economic growth. These reforms address known problems in the industrial relations system and will be crucial to securing Australia's economic recovery and safeguarding the workplace for future generations."*

The economic recovery from COVID-19 in Australia, and also supporting jobs, should not be at the detriment of those who are currently in employment, especially those who have been at the forefront of the COVID-19 response. Addressing industrial relations issues and safeguarding the workplace should not be about reducing entitlements, conditions and job security of current employees. In the alternate, making positive improvements to ensure job security for those in employment will likely increase spending and in turn create additional job opportunities, along with economic recovery.

2. Further, Christian Porter also stated with respect to the proposed reforms in the Bill:

> *"They are balanced and pragmatic and seek to create a fair and efficient industrial relations framework for all Australians..."*

Whilst potentially streamlining the industrial relations framework, the proposed reforms are not fair for employees. Being defined by an employer upon employment as a casual means any worker under these contractual arrangements will only be considered as such, even if they are working permanent part-time. Those part-time workers who help out an employer to work a shift where there is a staffing deficit (despite the impact this may have on their own family or needing secure care arrangements for children) will not be paid overtime unless they have exceeded full-time hours and, if the legislation passes, any employee covered by a new agreement that is not required to meet the Better Off Overall Test (BOOT) will lose conditions and entitlements. Any agreement struck in the two-year period has the potential to remain in place well after the two-year suspension has concluded. This gives rise to the risk of a new generation of the so-called 'zombie' agreements.

3. In addition, Christian Porter stated that:

> *"This bill is not ideologically based. Rather, it is founded on a series of practical, incremental solutions to key issues that are known barriers to creating jobs."*

From a nursing and midwifery perspective, this statement is incongruent with proposed reforms in the Bill and the effect these reforms are likely to have for nurses, midwives and care workers who work in the private sector. Already, the private sector struggle to secure Registered Nurses, often due to the disparity between the employment conditions and entitlements between the public sector and those in the private sector, particularly in aged care. In 2017, the Community Affairs References Committee Inquiry into the Future of Australia's aged care sector workforce highlighted in their report that:

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1 https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F8d35ad3a-06a6-4b15-b4bc-d5f91eeb30c9%2F0030;query=Id%3A%22chamber%2Fhansardr%2F8d35ad3a-06a6-4b15-b4bc-d5f91eeb30c9%2F0029%22

"To attract and maintain the right workforce, equitable pay conditions and appropriate career paths will be needed.[2]"

Similarly, the Royal Commission into Aged Care Safety and Quality highlighted in their interim report titled "Neglect", the statement of witness Lisa Maree Backhouse which was provided at the Darwin and Cairns hearing that:

"The workforce must be professionalised to improve standards and quality of care and, yes, that means regulation and appropriate funding and remuneration. It means developing proper career pathways to attract and retain the best employees. It is expensive and going to become more so as the baby boomers enter the system, but change must come and it must come quickly.[3]"

The proposed reforms in the Bill do not support the outcomes that nurses, care workers, residents, their families and the Royal Commission into Aged Care Quality and Safety have been calling for. In fact, passing these reforms will make recruitment and retention of nurses and care workers in the aged care sector even more difficult which will ultimately have a detrimental impact on residents' care and safety.

4. The ANMF submits that the proposed reforms in the Bill are unfair, will disadvantage workers and will not result in the intended outcomes of supporting jobs or the economic recovery in Tasmania or indeed across Australia. As an alternative, the ANMF propose that the industrial reform be re-considered to ensure that industrial processes ensure employee job security to enable them to continue contributing to the economy with confidence. In addition, focus should be on improving the working conditions of employees to ensure that sectors, like aged care, are able to retain the vital healthcare staff that they need and also recruit additional care staff to make aged care safer as well as implementing measures to ensure transparency on how employers like those in residential aged care are using significant Federal Government funding.[4]

Casual Employees

According to information released by the Australian Bureau of Statistics (ABS) in December 2020, 2.3 million workers (or 22% of all employees) are classified as being employed as a 'casual'.[5] That is nearly one quarter of the workforce. The ABS also note that these so-called casual employees were the hardest hit by job losses during COVID-19.[6] Many of our members

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[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/AgedCareWorkforce45/Report/c03 chapter 3.

[3] Royal Commission into Aged Care Quality and Safety, Interim Report: Neglect, Page 288.

[4] For example, see *CICTAR: New Report shows that Funding for Non-Profit Aged Care Operators Disappears in the dark*, published August 13, 2020. https://publicservices.international/resources/news/cictar-new-report-shows-that-funding-for-non-profit-aged-care-operators-disappears-in-the-dark?id=11012&lang=en

[5] https://www.abs.gov.au/statistics/labour/earnings-and-work-hours/characteristics-employment-australia/latest-release#:~:text=Key%20statistics,-Median%20employee%20earnings&text=2.3%20million%20casual%20employees%20(22,down%20from%2040%25%20in%201992.

[6] https://www.abs.gov.au/media-centre/media-releases/casuals-hardest-hit-job-losses-2020

are classified as being casual, even where they are allocated regular shifts and have done so for many years. One concern that became quite evident during the COVID-19 pandemic was that, in order to ensure an income that covered their livings costs, many of our members had no choice but to have several casual contracts at a number of sites – an issue that created difficulties, again particularly in the aged care sector. The reality is that many of these individuals could have more regular hours (and known hours) giving them security with the one employer but the employer wishes to ensure maximum flexibility having multiple individuals on either casual (no guaranteed hours) or low hour contracts (eight to 16 hours). These workers are already insecure in work and these provisions have the potential to increase their insecurity.

The proposed amendments pertaining to casual employees and their employment status gives rise to concern with respect to the definition of casual employment and the ongoing impact and limitation this will have on casual employees who may seek to change their employment status.

Excluding the basis for an employee undertaking regular and systematic shifts to be considered for casual conversion at the employer discretion is incredibly concerning. This is likely to reduce the opportunity for casual employees to achieve job security as permanent or permanent part-time employees as the decision is based upon the employers view, irrespective of the limitations also proposed to prevent changes by the employer that will preclude the employee from an offer of permanency. Given that an offer of casual conversion does not need to be made by an employer if the employer determines that there are reasonable grounds not to, it is unlikely that our members will be given an offer by their employer at all.

In addition, the fact that the proposed reforms exclude arbitration other than by mutual agreement will preclude any employee from taking their case to the Fair Work Commission (FWC) for consideration of review, again removing any rights from the employee and giving them all to the employer. Arbitration should be available in the case of any dispute because that is where an independent review is required. Mutual agreement to refer a matter for arbitration is highly unlikely to be reached.

Given the impact that COVID-19 has had on the health sector, in particular, aged care, this proposed reform will again adversely affect this sector where some facilities are staffed with 60% casual workers who are unable to secure permanent work despite there being ongoing needs for resident care.

The Centre for International Corporate Tax Accountability & Research (**CICTAR**) report, *"Caring for Growth Australia's Largest Non-Profit Aged Care Operators,*[7]*"* published in 2019, showed that Tasmania's largest not-for-profit aged care operator Southern Cross Care (TAS) Inc (SCCT) received $48.5 million dollars in the financial year ending 2019 from the Federal Government and this was in addition to the resident contributions for care. Yet, despite this income and the ability to annually pay $1.4 million dollars to key management and directors, along with significant care needs of residents that require continual support from care workers and nurses, SCCT choose to largely staff their facilities using casuals. In fact, over 64% of the SCCT nursing workforce, including care workers, is made up of casuals. Many of these staff members would like to have permanent full-time or part-time employment status to ensure job security and stability of income enabling them to make mortgage repayments and support their

[7] https://cictar.org/caring-for-growth-australias-largest-non-profit-aged-care-operators/

families. However, the reality is that staff at these facilities know that their employer will do whatever they can to keep staff as casuals rather than allow them to transition to permanent employment.

The reluctance of employers in the private sector to offer permanent positions to staff is highlighted below by a care worker, working in aged care, who stated that:

> *"We don't get a foot in the door without starting as a casual, almost everybody does. Yet we are so short staffed, and there are just not enough of us to provide quality resident care. Staff aren't staying as they are continuing to leave to seek permanent work or to seek better security. In fact, staff are leaving the industry to seek work that provides job security even though they love what they do, but they just can't get permanent positions. – Sandie, Extended Care Attendant, North West Tasmania"*

The determination of whether there are reasonable grounds not to make an offer of permanency should not sit solely with the employer and the option for arbitration to review any decision with respect to a permanent conversion should absolutely remain. Otherwise, there is no doubt that all casual employees will risk being disadvantaged when seeking to obtain more secure employment.

Proposed Award Changes

The majority of nurses, midwives and care workers choose to work part-time hours. The reasons are multi-factorial and, given that the nursing/care workforce is predominately female, these workers often have care responsibilities outside of work. Realistically, the demanding nature of the work is a contributing factor along with the essential need for quality downtime in order to continue the delivery of high-quality care and treatment to patients, clients and residents. However, nurses, midwives and care workers consistently report that employers will continually seek part-time workers to pick up extra shifts to cover rostered shortfalls, sick leave or when the employer's staffing model to staff the workplace with casuals fails as they can't secure casuals to work shifts.

The proposed Award reform to that will enable employers to pay part-time staff at a single rate rather than at overtime rates up until full-time hours is a significant concern for our members, as follows:

> *"It is through goodwill employees agree to work extra shifts in order to ensure that residents and colleagues are safe. We fear that these proposed reforms will allow the employer to use our goodwill as a way to staff short-staffed aged care facilities rather than employing more staff when it is absolutely needed, which will be to our disadvantage. – Sandie, Care Worker, North West Tasmania"*

This proposed reform again will disadvantage nurses, midwives and care workers who choose to work part time. It will allow employers to take advantage of our members goodwill and

concern for their colleagues and those who they are providing care to, as they will not want to leave a health facility or aged care facility short staffed. Employers will then be able to use this goodwill to staff their facilities (using double shifts at ordinary rates) rather than employ sufficient staffing numbers to ensure safe patient, client or resident care. Employees will not receive any additional renumeration for doing so at short notice or be provided with more money in order to cover any cost they may incur such as additional childcare fees.

Part-time staff choose to be part-time for a reason and if they agree to support their employer by picking up shifts at short notice, this inconvenience and potential cost to the employee must be renumerated with overtime rates. Employees often want and indeed need predictable working hours.

In addition, the two-year extension of the JobKeeper style payments will give wide ranging powers to the employer to direct employees on their duties or even location of work. In instances where nurses, midwives and care workers work for employers with multiple sites across the State, these directions, particularly with respect to work location, could essentially make their employment untenable if an employee from Burnie was directed to work in Hobart. If this creates an untenable situation for the employee and they feel they have no other option than to leave their position, then this contradicts the intent of the Bill in supporting jobs.

Agreements

The proposed reform of suspending the Better Off Overall Test (BOOT) for a period of two years will have an enormous impact on nurses, midwives and care workers. At a time when nurses, midwives and care workers have been battling to fight and protect others from COVID-19 at great personal risk and sacrifice, these reforms would see them having to fight to retain the conditions and entitlements that have been negotiated over many years in good faith. Members fear it would be a race to the bottom of the pile, as can be seen below:

> *"In this day and age, we shouldn't be having to fight so hard to improve our working conditions. Every second in our shift is critical to get our jobs done, any reduction in entitlements would be diabolical when we already feel like we are being crushed and residents feel like they can't ring the bell because they feel guilty when they see we are run off our feet." – Sandie, Care Worker, North West Tasmania*

Suspension of the BOOT will mean that Agreements are registered that will reduce conditions, entitlements and likely the wages of employees. Below are a number of examples of recent Agreements that were registered by the FWC only after the employer agreed to provide a number of undertakings in order to ensure that employees were not disadvantaged and to ensure that they were better off overall:

- ***Southern Cross Care (Tas) Inc and Mary's Grange Inc. Staff Enterprise Agreement 2017*** – approved by the FWC on 19 September 2018 with 17 undertakings for it to pass the BOOT. All of these undertakings would have had a negative impact

on employees if not met by the employer. The undertakings relate to a broad range of issues from overtime payment for day workers, breaks between shifts and the payment of annual leave on termination.

- ***Australian Red Cross Lifeblood Donor Services and Nursing Enterprise Agreement Victoria and Tasmania 2019*** – approved by the FWC on 11 August 2020 with an undertaking relating to dispute settlement procedure.
- ***Meercroft Care Inc Enterprise Bargaining Agreement 2017*** – approved by the FWC on 17 April 2018 with five undertakings.
- ***OneCare Ltd Nursing Employees Enterprise Agreement 2017*** – approved by the FWC on 24 April 2018 with one undertaking relating to the inclusion of the model consultation clause for the introduction of a major change.
- ***Regis Aged Care, ANMF & HACSU Enterprise Agreement – Tasmania 2017*** – approved by the FWC on 19 June 2018 with nine undertakings. These undertakings related to part-time workers being entitled to overtime when they are directed to work outside their rostered ordinary hours in circumstances where there has not been mutual agreement, allowances and the payment of loading to home care workers who work after 2000 hours.
- ***Wynyard Care Centre (Synovium Care Group) Nursing & General Staff Agreement*** – approved by the FWC on 13 November 2018 with 12 undertakings.
- **Uniting Agewell Enterprise Agreement (Tasmania) 2018 – 2022** – approved by the FWC on 1 November 2019 with 11 undertakings.

While the proposed reforms also plan to abolish 'zombie' agreements that were drafted under WorkChoices and are accepted to be of great detriment to employees, the suspension of the BOOT will allow the drafting and registration of more agreements that are likely to disadvantage employees significantly. The suspension of the BOOT by the FWC for two years is likely to allow agreements to be registered that significantly disadvantage employees and have the potential to remain in place for years as they will remain in force well after their nominal expiry date.

The ANMF negotiate agreements on behalf of nurses, midwives and care worker members. In recent years, the negotiation process has become protracted as employers in many instances aim to have agreements voted up that promote the employer's best interests rather than the interests of both the employer and the employees. If the proposed suspension on the BOOT was passed, nurses, midwives and care workers are likely to suffer the effects of any detrimental agreement lodged in this time period for years longer than the initial agreement period.

Below is an agreement example that the ANMF negotiated on behalf of members where the negotiations carried on well after the nominal expiry date of the agreement, meaning the agreement remained in force for that additional timeframe:

- After a protracted negotiation process, the **Eskleigh Foundation Nursing Agreement** was finally registered in December 2020 but the preceding agreements nominal expiry date was 31 December 2017.
- A poor wage offer and a reduction in entitlements relative to the current Agreement was rejected by employees which means that **The Gardens Nursing Enterprise**

Agreement of 2015 continues to have effect well past its nominal expiry date of June 2017.

In the above example, if the Eskleigh Foundation Nursing Agreement was registered without the BOOT analysis, the nurses at Eskleigh Foundation would have suffered the loss of conditions and entitlements for a further three years until a new agreement was struck and registered.

The BOOT should not be suspended for two years due to the detrimental impact on employees combined with the likelihood these impacts would last far longer than the agreement timeframe due to protracted bargaining processes. In addition, the creation of jobs and profit making by employers should not come at the expense of current employees. It is noted that the reference to the BOOT is only in relation to the entitlements available in the relevant modern award. The Award is the minimum an employer can provide along with the provisions of the National Employment Standards (NES). Any agreement reached must provide conditions and entitlements which see employees better off overall compared to the Award/NES. It is not an assessment of the Agreement which is in force against the new proposed Agreement. It is possible for an Agreement to be gradually eroded to the point that employees are only marginally better off than the relevant Award. Suspension of the BOOT would enable below Award entitlements to be approved by the Commission.

In addition to the proposed suspension of the BOOT, the proposed changes to Notification of Representation of Rights to employees would mean that many nurses, midwives and care workers will not be aware they have a right to a bargaining representative. Our members are incredibly busy and do not have time check the FWC website for this information. This will create further disadvantage to employees who may not be aware that they can be involved or represented during negotiations and may result in employers electing to put agreements out to vote without employees ever having had the opportunity to have input. The current Notification of Representation of Rights must remain. It cannot be a negotiation if employees are not notified they have rights to participate or be represented.

Conclusion

A large majority of proposed reforms in the Bill, if passed, will be counter-productive to the Bill's objective to support jobs and the economic recovery post-COVID-19. A number of the proposed reforms appear to only support the employer, in particular the large employer, to the employee's disadvantage. The economic recovery and supporting job creation should not come at the expense of Tasmanians and, indeed, all Australians when they have worked hard throughout the COVID-19 pandemic. Nurses, midwives and care workers have been on the frontline of the COVID-19 response and to pass legislation that would unfairly disadvantage them at a time when they are their families have often suffered great personal sacrifice is incredibly distressing, disrespectful and likely to result in negative impacts on the health system with regard to retention and recruitment in the private sector as nurse, midwives and care workers leave the sector to seek more secure work and jobs.

It is disturbing to employees that, at a time where other economies (for example the United States of America[8]) are considering an increase in minimum wage rates for employees, Australia is actively seeking to reduce the safety net for employees.

In summary, the ANMF are of the view that:

1. The current proposed reforms to the casual employment should not be passed and thought should be given as to how casuals can more easily attain permanent work in the interest of creating secure jobs.
2. The proposed Award amendments to only pay part-time staff single time rather than overtime rates must not be passed. This will not only have a detrimental effect on the nurses, midwives and care workers who feel compelled to pick up extra shifts but it will also impact the safety and quality of care that patients, clients and residents receive due to employers relying on part-time staff who become fatigued and stressed in staffing their facilities.
3. The JobKeeper style payments that will also allow employers to direct employees on their duties and location of work should not be supported. This is likely to mean that employees find themselves without a job due to not being able to meet the required directions of their employer. The current JobKeeper payment should be retained without the employer being able to subject employees to unreasonable and untenable demands.
4. The Better Off Overall Test (BOOT) must be retained by the FWC and any suspension should not be considered due to the risk that any Agreement poses to any employee during the time of the suspension to have their conditions and entitlements eroded and that this is likely to carry on for more than the Agreement's timeframe due to protracted bargaining processes.

4 February 2021

[8] 25 January 2021, Van Badham, *As Joe Biden moves to double the US minimum wage, Australia can't be complacent,* The Guardian.