



17 February 2012

The Fair Work Act Review Panel  
Australian Government Department of  
Education, Employment and Workplace Relations  
[fairworkactreview@deewr.gov.au](mailto:fairworkactreview@deewr.gov.au)

Dear Panel,

**Fair Work Act Review**

Please find attached a submission from the Australian Nursing Federation to the above inquiry.

We would welcome an opportunity to address the Panel on the submission.

Yours sincerely

A handwritten signature in black ink that reads "Andrew McCarthy".

Andrew McCarthy  
Industrial Officer

Encl.

The industrial and professional organisation for nurses and midwives in Australia

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**ANF Journals**

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Fair Work Act Review

February 2012

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## **BACKGROUND ON THE ANF**

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

The ANF has over 215,000 members and 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.

The ANF participates in the development of policy in nursing and midwifery, nursing and midwifery regulation, health, community services, veterans affairs, education, training, occupational health and safety, industrial relations, immigration and law reform.

Nurses, midwives and assistants in nursing are the backbone of service provision in health and aged care.

## **INTRODUCTION**

The Australian Nursing Federation (ANF) welcomes the opportunity to make a submission to the Fair Work Act Review.

In many respects, the Fair Work Act is an improvement on the Workplace Relations Act, particularly in its Workchoices form. However there are aspects where the operation of the legislation is not consistent with the objects of the Act and/or operating as intended, and could be improved.

The Act essentially applies to all nurses and midwives except those in the public sectors of NSW, Queensland, SA, Tasmania and WA. Most nurses covered by the Act work in the public sectors of Victoria, NT and ACT and in residential aged care, with others in general practice, Commonwealth employment, etc.

The ANF does not intend to make comments about the effect of the Fair Work Act on labour productivity, except to say briefly that in the nursing context the concept of productivity is problematic. It is our experience that very few employers, particularly in aged care, seek 'productivity' improvements apart from expecting more work from fewer staff and the substitution of qualified staff for less qualified staff. If this is to be considered "productivity", it has the negative effect of compromising patient outcomes and increasing work intensification for nursing staff.

Our comments below are set out broadly in order of the structure of the Act. We have referred to the questions raised in the Background Paper where appropriate.

#### **SAFETY NET (NATIONAL EMPLOYMENT STANDARDS AND MODERN AWARDS)**

The safety net under the Act is vastly improved from the Workchoices period of stripped-down awards and inadequate Fair Pay and Conditions Standard.

#### ***Disputes relating to right to request provisions***

The ANF considers that Fair Work Australia (FWA) should have the power to deal with disputes over whether an employer has reasonable business grounds to reject employee requests for flexible working arrangements and extensions of parental leave. Under subsections 65(5) and 76(4) an employer can refuse employee requests "only on reasonable business grounds".

Except in one circumstance, employees are unable to challenge such refusals at FWA or through the courts. Subsection 44(2) makes it clear that a Court cannot make any order in relation to a contravention of these provisions, while subsection 739(2) provides that FWA cannot deal with a dispute over whether an employer had reasonable business grounds unless the parties have agreed in a contract of employment or enterprise agreement that FWA can deal with the dispute. This subsection does not say that FWA can deal with a dispute arising under a dispute resolution clause in an award.

The model term for dealing with disputes under enterprise agreements contained in Schedule 6.1 of the *Fair Work Regulations*, which is frequently included in enterprise agreements, does not, or does not clearly provide, FWA with the power to deal with disputes.

In these circumstances, all award-reliant employees and many agreement-covered employees are not able to challenge a refusal in FWA. ANF members in both the public sector and private aged care have as a result experienced problems challenging refusals they believed to be unreasonable.

The ANF contends that FWA should have jurisdiction in all circumstances to determine whether a refusal was based on reasonable business grounds, and should not be limited to situations where a term of an enterprise agreement or other instrument has given FWA jurisdiction. A breach of these provisions should also be a civil penalty provision like other contraventions of the NES.

Question 8 of the Background Paper asks whether the safety net is fair and relevant. The ANF considers that in this respect it is not. There is no reason why there should be no redress. On such a fundamental issue, one that has been deemed important enough to be enacted as a National Employment Standard, it makes no sense for the enforcement of the right to be referred off as a matter for bargaining, leaving those employees not able to bargain through lack of bargaining strength or through employer refusal to bargain without a remedy. It also undermines the whole concept of a national standard if part of that standard is unenforceable, especially if all other provisions of that Standard are enforceable.

The ANF's experience is that even when an employer bargains, it is difficult to get employers to understand the technical issue involved and, even if understood, to include a clause providing for redress. Rather employers during bargaining are inclined to stick to the model term without amendment and the issue tends to get overshadowed among other issues like pay and leave.

The exclusion is unfair and is inconsistent with one of the objects of the Act (s.3(d)), ie. 'assisting employees to balance their work and family responsibilities by providing for flexible working arrangements'. Providing a 'right to request' without a means to enforce it does little to 'assist' employees.

#### **Accrual of leave while receiving workers compensation**

The ANF considers that an employee should be able to take or accrue leave during a period when they are absent from work because of a personal illness or injury for which they are receiving workers' compensation. Currently section 130 of the Fair Work Act prohibits the taking or accrual of leave unless it is allowed by the relevant workers' compensation legislation, which is generally silent on the issue. The ANF considers, firstly, that the appropriate place to deal with leave issues is in industrial, not workers' compensation, legislation (where leave issues are likely to be overlooked). Secondly, employees should accrue leave while on workers' compensation: but for the work-related injury, the employee would have been accruing leave (including, generally, if the employee had been on other types of leave). Thirdly, the provision appears to have reversed the corresponding provision in the Workplace Relations Act and for unclear reasons. Section 237 of the WR Act had the effect that accrual rules in that Act applied unless workers' compensation laws specified that leave could not accrue or be taken.

## **BARGAINING AND AGREEMENT-MAKING**

In general terms, the ANF considers that the bargaining provisions of the Act are a major improvement on the provisions contained in the Workplace Relations Act and provide unions with more options to encourage employers to bargain.

The ANF supports the wider range of matters that can now be included in enterprise agreements. The removal of the list of 'prohibited content' prescribed by the previous Act has had a beneficial impact on employees. Employees now have greater ability to assert their rights as union members, for example by being able to undertake paid union training. The 'prohibited content' restrictions under the previous legislation also undermined the ability of the parties to include items that had the potential to improve efficiency, for example relating to the use of agency nurses. This would have been prohibited previously because it involved a third party arrangement.

As unions are now the default bargaining representatives for their members by virtue of paragraph 176(1)(b), the bargaining process is not delayed by unnecessary arguments about whether unions can assume this role. This gives unions the opportunity to represent and inform their members more effectively.

### ***Multi-employer bargaining***

Despite the improvements to the Act, the ANF opposes the continued restrictions on bargaining with more than one employer and engaging in pattern bargaining (clauses 409(4), 412). Protected industrial action cannot be taken in pursuance of a multi-employer agreement (s413(2)) unless the group of employers agrees to obtain a single interest authorisation, and cannot be taken even if a low paid bargaining order is in place. Good faith bargaining rules do not apply even if employers agree to bargain for a multiple-employer agreement, except in the case of single interest employer authorisations (s172(5)(c)) and low paid bargaining (s229(2)).

Pattern, industry or sector wide bargaining is important in many industries, including the health industry, on sound industrial, commercial and public interest grounds.

Prohibiting pattern bargaining ignores consideration of the needs of the health industry. Pattern or industry wide industrial standards are often preferable to enterprise differences because they benefit employers, employees and the community generally. There are benefits in consistent wages and working conditions or in other words pattern outcomes.

Nursing and midwifery is an essential service provided to the Australian community and the quality of nursing care provided affects people from all walks of life. Nurses and midwives, wherever they work, need adequate resources to enable the provision of best quality care. Nurses and midwives need a secure and stable working environment to provide quality care and this is ensured by the ongoing recognition of the professions of nursing and midwifery. The value of the nurse or midwife is not determined by the setting in which they are employed, but by the consistent application of standards, including industrial standards.

The industrial and professional history of nursing and midwifery is founded on a recognition that the professions work across a range of settings in the health and welfare sectors. Nurses and midwives are a highly mobile workforce where staff shortages remain entrenched and ever growing. The impact of these characteristics on the nursing labour market has in part resulted in federal and state tribunals favouring consistent safety net wage and employment conditions in awards. As professions nurses and midwives strongly identify with each other regardless of the sector in which they work. This also serves to make them a clearly identifiable group by employers and the public. Common issues across the sectors such as labour shortages, workload management and wages and conditions bond us professionally and assist in maintaining standards of care. Further, common national training and registration requirements facilitate labour mobility and further strengthen the justification to bargain on a multi-employer or industry basis, and take industrial action in support of bargaining.

The ANF considers that the level of bargaining should be decided by the workers involved and not dictated by the legislation. We believe the current legislation is in breach of ILO Conventions and therefore one of the objects of the Act (section 3(a)), and notes the report and recommendations of the International Labour Organisation's Freedom of Association Committee (357<sup>th</sup> Report of the Committee on Freedom of Association, Geneva, June 2010) which recommended at paragraph 229:

*(d) Taking into account its conclusions on such matters reached in previous cases concerning Australia, the Committee requests the Government to review sections 409(1)(b), 409(4) and 413(2) of the FWA, in full consultation with the social partners concerned.*

### **Single interest employer authorisations (SIEAs)**

The single interest employer authorisation (SIEA) is the only form of multi-employer bargaining during which protected industrial action is allowable. The problem with this is that rather than the workers concerned determining who is included in the multi-employer group, only the employers (and controlling third parties, eg government) can make an application to the Minister for a declaration pursuant to s 247 of the Act, and to FWA for the authorisation itself.

This effectively means the employer is determining the level at which workers bargain. In addition, employees and unions/bargaining representatives have no say on the scope of bargaining. This has been demonstrated in the current Victorian public sector bargaining round, where the government excluded community health centres from bargaining for the new public sector agreement, despite them being covered by the existing agreement, and despite ANF requests for them to be included.

The ANF considers that there is no need for such a provision and that employees should be able to choose the level of bargaining they engage in. Alternatively, if the provision is retained, then either party (a group of employers or the relevant union/s or bargaining representatives) should be able to bring an application before FWA or should be able to make submissions on the criteria that the Minister and FWA have to consider. The interests and views of employees and their bargaining representatives should also be added to the criteria which the Minister and FWA must take into account in s.247(4) and 249.

### ***Good faith bargaining***

Question 29 of the Background Paper asks if there are ways in which good faith bargaining requirements could be improved to better facilitate bargaining and whether FWA powers are adequate to remedy breaches.

The good faith bargaining provisions in the Fair Work Act have had a positive impact on bargaining. To some extent they have been a useful tool that unions have used in discussions with employers and, if necessary, via letters setting out concerns. Highlighting the provisions can be enough to prompt employers to, for example, respond to a log of claims or schedule a meeting. The rules provide some minimal statement as to what is *fair* bargaining.

Having said that, the provisions are limited, especially if a claim is made. Decisions made by Fair Work Australia have tended to be conservative and process-oriented, although this is partly due to the limited nature of the provisions themselves. We have concerns that the provisions do not adequately address the issue of 'surface bargaining'. Employers have to do the bare minimum to show that they are responding to proposals, attending meetings, etc, but there is still too much scope for employers to just go through the motions.

A recent FWA decision in relation to public sector nurses in Victoria demonstrates the limitations. Delays in negotiations or unwillingness to negotiate meaningfully has been very evident in this dispute. Despite this, FWA rejected an application for a bargaining order against the employer representative (*ANF v VHIA* ([2012] FWA 285 PR518962, 10 January 2012). In the case the ANF Victorian Branch gave the employers a



comprehensive list of questions in August 2011. As of December 2011 there had been partial response to the request for information which in most cases was readily available to each employer through their payroll system.

This and other decisions illustrates the lack of pressure on employers through the legislation and the unwillingness of the tribunal to regard anything except virtually complete inaction as breaching the good faith bargaining principles. This means there is less incentive for employers to actually *reach an agreement* with bargaining representatives, thereby undermining collective bargaining and the concept of bargaining representatives [and the objects of the Act, in particular section s3(e) and (f)].

Accordingly, the ANF considers that the good faith bargaining provisions need to be strengthened and there needs to be more emphasis on the bargaining representatives reaching agreement to rectify the problem of employers engaging in surface bargaining. In this respect we believe the New Zealand legislation at s 33 of the *Employment Relations Act 2000* should be adopted:

**Duty of good faith requires parties to conclude collective agreement unless genuine reason not to**

- (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.
- (2) For the purposes of subsection (1), **genuine reason** does not include—
  - (a) opposition or objection in principle to bargaining for, or being a party to, a collective agreement; or
  - (b) disagreement about including in a collective agreement a bargaining fee clause under Part 6B.

Strengthening good faith bargaining rules to *require* an agreement to be reached (unless exceptional reasons otherwise) would be one way to ensure that bargaining is genuine.

A related issue is that bargaining representatives should be able make good faith bargaining applications at least 120 days before the nominal expiry date of an existing agreement (s 229(a)(i)). The ANF's experience is that where an employer wants to engage in surface bargaining, the 90 days provided by the Act is insufficient.

### **Majority support orders**

The ANF supports the introduction of majority support orders into the Act and considers it a worthwhile innovation. As with good faith bargaining orders, it is the experience of the ANF that the existence of majority support orders has induced some employers to bargain where they might not have otherwise done so. While some employers initially reject an invitation to bargain with the ANF, a letter noting the presence of the majority support provisions is sometimes enough for an employer to agree to start bargaining without the need to actually apply for the order. The provisions are therefore assisting to encourage enterprise bargaining, an object of the Act.

### **Low paid bargaining**

In general terms the low paid bargaining provisions are intended to allow low paid employees to access the recognised benefits of collective bargaining (see objects of Division 9 of Part 2-4, especially paragraph 241(a)). Unfortunately, the provisions have not to date been widely utilised and it is therefore difficult to gauge their effectiveness.

In specific circumstances the low paid bargaining provisions are intended to allow access to FWA to assist in securing a multi-employer or enterprise agreement and in the absence of agreement access to arbitration. This can only occur where the Tribunal is satisfied that, among other things, the employees are low paid, have had a history of difficulty in bargaining, there is a commonality in the business or the services of the employer and where the wages of employees are significantly controlled by a third party.

So far there has been one application determined under the provisions which relates to certain employees engaged in the residential aged care sector (*Application by United Voice & AWU Queensland* [2011] FWAFB 2633, 5 May 2011). The ANF was involved in these proceedings and supported the application because we have a strong view that aged care is a sector where generally the employees are low paid, large numbers have not had access to collective bargaining and in many cases, even where they have been able to secure an agreement, the outcomes are often very similar to the terms of the award.

We were somewhat surprised that in this case FWA decided to make an authorisation but excluded all employers currently subject to agreements with their aged care employees. This was not our understanding of how the low paid provisions were intended to apply and we are sceptical that the outcome of these proceedings will result in aged care workers receiving substantially improved terms and conditions of employment.

We are also concerned that the Full Bench in this case appeared to endorse the employers submissions that an applicant must provide a forensic analysis of wages of the employees for each and every respondent employer prior to securing an authorisation.

To have a reasonable chance of addressing the inability of low paid workers to access the enterprise bargaining provisions available under the Act, the low paid bargaining stream must assist and not unnecessarily prevent access to the assistance of the tribunal.

### **EQUAL REMUNERATION**

Section 302(1) provides that FWA *may* make an order to ensure that there will be equal remuneration for work of equal or comparable value, ie. the legislation gives FWA a discretion whether to make an order or not. To ensure that the intention of the legislation is achieved, the ANF considers that if FWA is satisfied that there is not equal remuneration for work of equal or comparable value, then it should be required to remedy that situation, ie. the legislation should replace the word 'may' with 'must'.

### **TRANSFER OF BUSINESS**

The ANF broadly supports the transfer of business provisions under the Fair Work Act. They are a vast improvement on the provisions in the Workplace Relations Act as they are clearer in describing when a transfer of business occurs, and have moved away from artificial distinctions under the previous Act to a more logical test, ie. whether the work performed by transferring employees is the same or substantially the same (s311(1)(c)).

### **GENERAL PROTECTIONS**

Question 37 of the Background Paper asks if the general protections provisions provide adequate protection of employee workplace rights. The ANF considers that the provisions are an improvement on the provisions in the Workplace Relations Act, especially in relation to workplace rights, which were very restrictive and convoluted.

There are still some issues however. Despite the Act having been operational for some time, the scope of the Workplace Rights Division (Division 3 of Part 3-1) is unclear, in particular regarding s.341(1)(c)(ii), which states that an employee has a workplace right if he or she is able to make a complaint or inquiry in relation to his/her employment.

The Explanatory Memorandum of the *Fair Work Bill* provided illustrative examples that imply that this particular subsection of the Act is to have broad meaning and apply, for example, where adverse action is taken against an employee as a result of their making any complaint or enquiry of any nature to their employer. Paragraph 1370 of the Explanatory Memorandum states:

1370. Subparagraph 341(1)(c)(ii) specifically protects an employee who makes **any inquiry or complaint in relation to his or her employment**. Unlike existing paragraph 659(2)(e) of the WR Act, it is not a pre-requisite for the protection to apply that the employee has 'recourse to a competent administrative authority'. It would include situations where an employee makes an inquiry or complaint to his or her employer. [emphasis added]

The Memorandum also provides some examples of situations which would fall specifically within section 341(1)(c)(ii), including where an employee raises a safety concern with her employer, and an employee who mistakenly complains to the ACCC about a wage underpayment.

The ANF supports the broader wording of the provision, ie. the wider wording than the unnecessarily restrictive phrase 'competent administrative authority' under the WR Act. The ANF had the experience however, in representing a member in such a matter, that an FWA Commissioner was of the view that the subsection only applies where the complaint or enquiry was in relation to the benefit of a workplace right that the employee *had an entitlement to*, ie. if the employee was not actually entitled to the entitlement they were enquiring or complaining about, then they would not be protected by the subsection. For example, if the employee thought that they were entitled to a night shift loading, and made a complaint or enquiry about it to his/her employer, but in reality was not entitled to the loading, then the subsection would not apply. Given the lack of precedent on this particular point, and the known views of some members of FWA, the ANF is cautious to proceed to hearing in such matters as the prospects of success cannot be appropriately determined.

The ANF considers that this is an example of a provision where the operation of the legislation is not operating, or may not operate, as intended (the intention of which is demonstrated by the Explanatory Memorandum outlined above). Accordingly, the ANF recommends that the provision be amended to remove any doubt about the intention, for example by including some words to the effect of 'whether or not the employee has a particular entitlement'.

### ***Union representation of members***

Despite the existence of the general protections provisions, which should have had the effect of reestablishing or reaffirming the important role of unions in the employment relationship, many employers continue to maintain that the only role of union officials in attending meetings with members is to act as a support person.

In our experience, these employers will disregard any arguments we put to them regarding the rights of members to union representation under the Act, and also to precedent cases in this regard. We have had examples where industrial officers have been advised by employers that they can only remain at a meeting if they agree not to advocate on behalf of a member.

We would like to see an amendment made to the Act that makes it unlawful for an employer to limit or attempt to limit or threaten to limit the role of unions in providing advocacy on behalf of individual members, without the need to prove that adverse action was experienced by the member concerned as a result of the employer's actions. Such acts, if made unlawful, should come under the civil remedy provisions, thus incurring penalties.

Such an amendment would be consistent with furthering the objects of section 3(e) which refers to representation at work.

### **UNFAIR DISMISSAL**

The ANF supports the increased unfair dismissal jurisdiction under the Fair Work Act as compared to the Workplace Relations Act, and generally rejects employer and employer group criticisms of the provisions as unfounded.

#### ***Qualifying employment periods***

One issue that still remains of concern to the ANF however, is the situation of loss of recognition of prior service for unfair dismissal purposes in a transfer of business situation.

Question 46 of the Background Paper asks what has been the impact of the introduction of *qualifying employment periods* before an employee is eligible to make a claim for unfair dismissal, and whether the period provides sufficient time for employers to assess the suitability of an employee for a role.

Section 383 of the Act provides that an employee is protected from unfair dismissal if they have completed 6 months (or 12 months if a small business employer) of employment with their employer. Section 384 provides that continuous service with a previous employer is counted for the purposes of the minimum employment period. However cl384(2)(b) provides an exception to this situation, allowing an employer to refuse to recognise an employee's prior service for unfair dismissal purposes provided the employer informs the employee in writing of this before the employee starts work with the new employer.

The ANF considers that the new employer should not be able to unilaterally decide that a transferring employee, often with years of prior service, should have no unfair dismissal rights during their first 6 or 12 months with the new employer. If the old employer would have been required to dismiss the employee fairly, the new employer should be required to do the same.

What makes this situation worse is the provision could actually, and perversely, *encourage* employers to terminate transferring employees during the minimum period of employment. The ANF has had a number of examples both under the WR Act and under the Fair Work Act where an employer has taken on transferring employees and then terminated their employment before the expiry of six months. The employee was not then able to exercise any redress under the legislation.

One situation involved an aged care provider who was purchasing Commonwealth funded residential aged care facilities, at the rate of 4 or 5 a month, all over Victoria. The company typically entered into a commercial contract with the seller whereby it committed to employing all the employees of the old employer on the same or similar conditions, thus overcoming any obligation on the old employer to pay severance pay (section 122(3) of the Fair Work Act is now the applicable provision). In return, the old employer compensated the company for the accrued or contingent liabilities of the transferring employees. In practice this meant the purchase price of the nursing home was reduced by the amount of employee entitlements for which the company became responsible for.

The ANF was in the Australian Industrial Relations Commission in one instance with an employer who was selling the business to the company. They advised that they paid the company (via the reduced sale cost of the nursing home) pro-rata long service leave for each transferring employee. As long service leave is not a legal entitlement until a certain period of service (ten years in this case), the minimum employment period creates a perverse encouragement for a new employer to take employees on as transferring employees, collect compensation from the old employer for contingent long service leave, advise the employee that prior service will not be recognised, and then terminate the employee during the minimum period of employment before any entitlement to take leave arises. Thus the new employer can simply pocket the pay. The worst example was one ANF member who was terminated on the first day following a transmission of business.

A similar situation can arise with redundancy entitlements.

The ANF considers that the capacity of a new employer to insist on a new minimum period of employment should be abolished, thus ensuring that any service with the first employer counts for all purposes with the second employer, including the minimum period of employment.

Secondly, with the effect on redundancy entitlements, it should be made clear within section 122 that the insistence on a new minimum period of employment by the second employer means that any offer of employment does not constitute terms and conditions substantially similar to, or no less favourable than, the position with the first employer and therefore, even where the offer of employment is accepted, a redundancy payment must be paid by the first employer.

### ***Unfair dismissal process***

The Background Paper asks a series of questions relating to the process of handling unfair dismissal claims by FWA (questions 44, 45, 47). The ANF has found that since the Fair Work Act began operating, the processes for dealing with unfair dismissal applications at conciliation has become inflexible and frustrating. Conciliation conferences now take place only via teleconference. Commissioners do not participate in conciliation. It is very difficult to get a conciliation conference rescheduled in the event that an ANF member cannot participate at the time scheduled. We have had requests for rescheduling rejected even when our members have been overseas at the time of the conciliation conference.

Having conciliation take place via teleconference makes negotiations regarding potential settlement difficult, as neither party can read the non-visual cues that each give during the negotiation. This can lead to misunderstandings and also a longer period of time required for negotiations. Conciliators only have the discretion to 'hold' (i.e. not refer an unsuccessful conciliation conference to arbitration) for a maximum of 7 days, with the consent of both parties. If a matter does not settle at conciliation or very soon afterwards, FWA sends out dates very quickly which the parties must comply with regarding the provision of witness statements, exhibits, outlines of evidence, and precedent cases. The timeframe can be as little as 2.5 weeks. This is a very short time frame to comply with when carrying a full case load. It is also very costly to brief this type of work out.

### ***Union representation***

Following on from our comments above (in the general protections section) in relation to union representation, the ANF considers that the words 'or representative' should be added after the phrase 'support person' in section 387(d).

## **INDUSTRIAL ACTION**

### ***Suspension/termination of industrial action***

The ANF is concerned that the effect of the Fair Work Act's provisions dealing with the termination and suspension of industrial action mean that the ability of the ANF and its members to take protected industrial action for the purposes of enterprise bargaining is severely constrained. The provisions leave nursing employees with effectively little right to take protected industrial action and in fact make unprotected industrial action more likely.

Particularly relevant to the ANF is the ability of FWA to suspend or terminate protected industrial action on the grounds that it is threatening to endanger the life, personal safety or health or the welfare of the population or a part of it (section 424(1)(c)).

The ANF notes that in relation to the internationally-recognised right to take industrial action, the International Labour Organisation's Freedom of Association Committee (357<sup>th</sup> Report of the Committee on Freedom of Association, Geneva, June 2010) stated:

*224. These indications notwithstanding, as regards the right to strike, the Committee must recall that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions and problems facing the undertaking which are of direct concern to the workers. Furthermore, the right to strike may only be restricted or prohibited: (1) in the public service only for public servants exercising authority in the name of the State; or (2) in essential services in the strict sense of the term (that is, services the interruption of which would endanger the life, personal safety or health of the whole or part of the population) (see Digest, op. cit., paras 526 and 576). In the light of the above-noted principles, the Committee requests the Government to provide detailed information on the application of these provisions and to review them, in consultation with the social partners, with a view to their revision, where appropriate.*

From the ANF perspective we note two matters.

Given the nature of nurses' work inherently relates to the health or welfare of the population, any industrial action taken by the ANF and its members may raise issues. However even if some restriction on the right to take industrial action can be justified on the basis of endangering the life, personal safety or welfare etc, we note that the evidentiary base used by FWA in deciding these matters is often weak. For example, even where the action of the union is extremely mild and/or deliberately conscious of avoiding danger to life or health, it currently only takes a couple of examples of delay or cancellation across the whole system to induce FWA to terminate or suspend lawful industrial action, and even in the face of ample evidence that existing practices in for example hospitals (eg. closure of beds and inadequate funding) may be endangering the health or welfare of patients.

In both 2007 and 2011, the Tribunal's suspension or termination of industrial action taken by nurses and midwives in the Victorian public sector shows the difficulties of nurses and midwives exercising their legitimate right to pressure employers and governments through industrial action.



There are other examples where the tribunal has terminated protected action in circumstances where the industrial action involved had an even more tenuous link to patient/resident care than, for example, the closure of hospital beds. For example, bans on activity related to aged care paperwork was found by the AIRC to be a threat to endanger the life, personal safety, health or welfare of aged care residents (*Lutheran Homes Inc. Retirement Services v ANF*, AIRC, 31 July 2003, PR935607 – note this related to then section 170MW(3)(a) of the Workplace Relations Act, but the wording is substantially the same as the existing wording).

The ANF suggests that, in these circumstances, there ought to be stronger criteria within the legislation against which to judge the impact of the industrial action. These would include:

- That the impact, delays or cancellations which are alleged to endanger the safety, health or welfare of the population are proved to be a net result of the industrial action taken and not a result of either government decisions taken independently of the industrial action or accidental factors which would probably have occurred irrespective of the industrial action; and
- That the endangering of safety, health or welfare is demonstrated by multiple examples across the system or a significant part of it and leads the tribunal to a conclusion that the danger is not isolated, is systematic and is a direct result of the industrial action.

Secondly we note that where there is a prohibition on workers in essential services taking industrial action there are meant to be ‘compensatory mechanisms’ provided to ensure that those workers have access to full, independent and transparent arbitration. The ILO Committee of experts has noted:

**If the right to strike is subject to restrictions or a prohibition, workers** who are thus deprived of an essential means of defending their socio-economic and occupational interests **should be afforded compensatory guarantees, for example conciliation and mediation procedures leading, in the event of a deadlock, to arbitration machinery seen to be reliable by the parties concerned**. It is essential that the latter be able to participate in determining and implementing the procedure, which should furthermore provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and once issued should be implemented rapidly and completely (ILO, 1994a, para. 164). [emphasis added]

Arguably this is not the case in respect to health (and other public services) provided by the Victorian government (or other State governments which might in future fall within the federal system), where it is possible to argue that *Re AEU: ex parte Victoria* (1995)184 CLR 188 (HCA 1995) applies, i.e. there are constitutional limitations on a Commonwealth body imposing certain terms and conditions on a State Government in respect to state employees, where those conditions threaten to impair “a State’s ‘integrity’ or ‘autonomy.’” The High Court said at paragraph 58 of their decision:

*It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation.*

It may ultimately be the view of the High Court that this limitation only applies to senior office holders and senior employees of the Crown. However, the jurisprudence is unclear. The ANF can currently have no confidence in arbitration as the compensatory mechanism, should compulsory arbitration result from the termination of industrial action pursuant to s 266 of the Fair Work Act. Many issues which are at the heart of industrial and professional life for nurses in Victoria and in other states – nurse to patient ratios or nursing hours per patient day, use of unregulated workers as part of ratios etc. – are arguably caught within the limitation identified by the High Court in *Re AEU*.

Given these constitutional restrictions and the need for adequate compensatory mechanisms where the right to take industrial action is restricted, the ANF recommends that industrial action cannot be terminated under section 424 unless the bargaining representatives have agreed that all issues in dispute between them are able to be dealt with by way of arbitration.

We note further that the International Labour Organisation Nursing Personnel Convention 1977 (ILO Convention 149) provides as follows:

Article 5

1. Measures shall be taken to promote the participation of nursing personnel in the planning of nursing services and consultation with such personnel on decisions concerning them, in a manner appropriate to national conditions.
2. The determination of conditions of employment and work shall preferably be made by negotiation between employers' and workers' organisations concerned.

3. The settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought through negotiations between the parties or, *in such a manner as to ensure the confidence of the parties involved*, through independent and impartial machinery such as mediation, conciliation and voluntary arbitration. [emphasis added]

Again, in the current circumstances the ANF has no confidence that any formal arbitration under the Fair Work Act will have the jurisdiction to deal with all relevant matters in dispute.

### ***Protected action ballots***

Question 52 of the Background Paper asks if the process for conducting protected action ballots is simpler under the new system and question 57 asks if employees are able to resort to protected industrial action more quickly or easily since the passage of the Fair Work Act.

The ANF responds to these questions with an emphatic no. Contrary to recent employer and employer group claims that the Fair Work Act has made industrial action easier, the Act made minimal changes to the Workplace Relations Act, and nothing that actually made taking action easier. Unnecessarily bureaucratic procedures, including compulsory secret ballots and an unnecessary quorum for voting, remain in place.

ANF officers are usually bargaining in many places at once so to take the actions required to first organise and obtain a protected action ballot order, ensure that members vote so the 50% quorum requirement is met, and then take the actual industrial action is resource-intensive and time-consuming. Industrial action is not taken lightly.

The unnecessary difficulty of the 50% quorum requirement in paragraph 459(1)(b) is demonstrated by ballots recently held by the ANF's Victorian Branch in relation to the current public sector bargaining round, which is ongoing.

As part of the bargaining process and in order to take protected industrial action the ANF sought a protected action ballot order from FWA. The ballot to approve the forms of industrial action involved over 45,000 public sector nurses across Victoria. There were a number of ballots, the largest being of approximately 30,000 nurses employed by the 86 employers (the large hospital networks and regional/rural hospitals) who had obtained a single interest employer authorisation from FWA. This has been one of the largest ballots ever undertaken in Australia.

The hurdle of 50% +1 participation in the ballot was excessively high and burdensome. In our case it involved ringing virtually every single member over a one week period. This absorbed enormous resources for a vote which resulted in an overwhelming support for industrial action to be taken (a result which was not in doubt based on pre-ballot meetings and feedback from members).

The Act's provision in this respect is inconsistent with the right to exercise industrial action under the International Labor Conventions. We note the discussion by the International Labour Organisation's Freedom of Association Committee (357<sup>th</sup> Report of the Committee on Freedom of Association, Geneva, June 2010):

*225. As regards the complainant's allegation that the provisions in Part 3-3, Division 8, of the FWA governing the secret ballot procedures for the calling of a strike are unduly burdensome and complicated, the Committee notes that according to the Government, the said procedures are designed to be fair, have been simplified compared to the previous workplace relations laws, and are not intended to frustrate or delay the taking of industrial action. In respect of this matter, **the Committee recalls that the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and, in any event, not such as to place a substantial limitation on the means of action open to trade union organizations. Furthermore, the requirement of a decision by over half of all the workers involved in order to declare a strike is excessive and could excessively hinder the possibility of carrying out a strike, particularly in large enterprises** (see Digest, op. cit., paras 547 and 556). The Committee requests the Government to ensure respect for these principles in practice, as well as to provide detailed information on the practical application of the secret ballot procedure provisions.*

Therefore paragraph 459(1)(b) in particular is inconsistent with Australia's international obligations (section 3(a)) and the requirement should be changed, if secret ballots are to remain, to a simple majority of those who vote.

## **RIGHT OF ENTRY**

Question 63 of the Background Paper asks if the right of entry provisions balance the right of unions to meet with employees and investigate breaches with the right of employers to go about their business without undue inconvenience.

The ANF has concerns with some of the right of entry provisions, in particular those provisions relating to where a permit holder may hold discussions with employees (members and/or non-members). Section 492 provides that a permit holder must comply with any reasonable request by the occupier of the premises to hold discussions in a particular room or area of the premises and outlines some situations where a request might be unreasonable.

One of the objects of the Act (section 3(e)) is the enabling of fairness and representation at work and the recognition of the right to freedom of association and the right to be represented.

Several decisions of FWA have prevented unions from meeting employees in lunchrooms or other common areas. Employer requests to meet in other rooms/areas have been found to be reasonable. These provisions and decisions have the effect of not allowing unions to adequately represent members and to speak to and recruit non-members. In particular, we consider they are not consistent with the objectives of Part 3-4 outlined in section 480 to provide for the right of organisations to represent their members in the workplace and hold discussions with potential members, and for the right of employees to receive, at work, information and representation from officials of organisations.

In the ANF's instance, we have had examples where we have been restricted to holding discussions in cafeterias in hospitals.

Section 480 also refers to the right of occupiers of premises and employers to go about their business without undue *inconvenience*, however section 492 goes much further than this object: it does not require an employer to show that holding discussions in a particular area is *inconvenient* but allows an employer to direct a permit holder to hold discussions in any area they want, provided the direction is not unreasonable.

Right of entry is about the right of unions to organise and to speak to workers (whether they request it or not) and not about the right of protection for non-union members from being spoken to: *Australian Workers' Union v Rio Tinto Aluminium (Bell Bay) Limited* per Commissioner Lewin [2011] FWA 3878 see paras 59-65.

We also consider that the observations of Commissioner Roe in *AMIEU v Somerville Retail Services* [2010] FWA 6737 at paras 41 and 42 are important:

- [41] The right of entry for the purpose of discussions with those who wish to participate is a *right of the AMIEU permit holder*. It cannot be reduced to a *right of employees* to be able to request to hold discussions with the permit holder. An organiser approaching an employee to participate in discussions is not contrary to the legislative scheme unless that organiser unreasonably persists after that employee has made it clear that they don't wish to participate in discussions. Such persistence it could be argued might bring into question the purpose of holding the discussions and might in some circumstances lead to disruption to the business.

[42] An arrangement for right of entry for discussion purposes which requires the employee to advise the employer that they wish or do not wish to participate in discussions with the permit holder is in my view **contrary to the Objects of the Act and of Part 3-4 in particular**. Such a restriction is not inherent or implied in the other provisions of Part 3-4. [emphasis added]

For these reasons, the ANF considers that the provisions lean too far towards the desires of the employer to the detriment of unions and the right of employees to be represented, and are inconsistent with the the objects of the Act and of Part 3-4.

We recommend therefore that amendments should be made to the Act to address these concerns. Firstly, we suggest that in paragraph 492(2)(b), the word 'effect' replace 'intention': if an employee is intimidated or discouraged from participating in, or finds it difficult to attend discussions, then their ability to be effectively represented in the workplace is undermined, even if there is no intention on the part of the employer to intimidate or discourage.

Secondly, there could be further factors outlined in section 492 which go to whether the request is *reasonable* (not just specifying what is *unreasonable*), including the size of the workplace, the distance of the proposed meeting venue from the actual site of work, whether staff have set/uniform lunchbreaks, whether all staff get meal breaks together (or in a rolling, ad hoc manner) etc.

The Act could specify that the general principle is that as far as practicable the permit holder should be allowed to hold meetings as close as possible to the work site of the employees with whom the meeting or discussions are intended to occur. In addition, the fact that non-union members may be present or do not wish to participate in discussions does not mean that discussions should not be held in a crib or meal room.