

Submission by the Australian Nursing and Midwifery Federation

Review of the Closing Loopholes Acts

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**Australian
Nursing &
Midwifery
Federation**



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Introduction

1. The Australian Nursing and Midwifery Federation (**ANMF**) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 356,000 nurses, midwives and care-workers across the country.
2. Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.
3. Our strong and growing membership and integrated role as both a trade union and professional organisation provides us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.
4. Through our work with members, we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.
5. The ANMF thanks the Department of Employment and Workplace Relations for the opportunity to provide feedback on the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (together the **Closing Loopholes Acts**) and the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* (the **FDV Leave Act**).



Overview

6. The Closing Loopholes and FDV Leave Acts have been welcome reforms to Australia's industrial relations landscape. Many of the amendments have not yet been utilised by the ANMF but, as submitted during the 'Secure Jobs, Better Pay' Review, the shadow effects of the changes have been felt by the union movement.
7. The ANMF is broadly supportive of the reforms introduced by these Acts. We have had the opportunity to review the submissions of the Australian Council of Trade Unions (**ACTU**) and some other affiliates in advance. Where any reforms included in the Acts are not addressed in this submission, the ANMF refers to and supports the submissions of the ACTU.

Delegate's Rights, Model Terms for Enterprise Agreements and Intractable Bargaining Determinations

Delegates Rights

8. The Closing Loopholes legislation introduced a requirement for the Fair Work Commission (**FWC**) to create a delegate's rights term to be inserted into all modern awards that reflects the rights outlined at s 350C of the FW Act. As outlined in the ACTU's submission, this term has been the subject of a major case by the FWC to design the term, then judicial review from the Federal Court of Australia on application from several unions, and subsequently remitted back to the FWC to amend the terms.
9. Despite the extensive litigation, the ANMF finds the model term as it currently exists to be unsatisfactory in properly facilitating the rights of our delegates. While the precise content of the delegates rights term may be outside the scope of this review, given it is for the FWC to design the term, the ANMF submits that several improvements could be made to the FW Act to improve the effectiveness of the delegates rights framework.
10. In making this submission, the ANMF recognises that having a mandatory model term for delegates rights is inherently a positive step in the national industrial relations framework and has assisted us in achieving these entitlements in negotiations they would otherwise be



outright denied by the employer.

11. Due to the mandatory nature of the delegates rights term, it has joined the flexibility, consultation and dispute resolution terms in being difficult to negotiate above the entitlements granted in the base term. For example, the granting of delegates training leave in the model clause provides for 5 days of initial training in a delegate's first year of appointment, then 1 day for each subsequent year. After the first year, this entitlement is not sufficient to meet any of the ANMF's branch delegates conferences, which generally run for 2 or 3 days. Despite this, the ANMF has found some limited success in increasing the quantum of delegates training leave in enterprise bargaining.
12. The ANMF has also encountered a related problem whereby only 1 delegate per 50 employees is permitted to take delegate training leave under the model clause. For health or aged care providers with multiple sites each employing less than 50 employees, or indeed where several unions have delegates, this restricts the capacity for the ANMF to ensure delegates are appropriately trained and supported in their roles. This in turn reduces the opportunities for worker representation and collaboration. The ANMF continues to negotiate in enterprise bargaining to address this issue.
13. To address these issues, the ANMF submits that the FW Act be amended to ensure that superior delegates rights provisions in enterprise agreements are not wholly superseded but rather supplemented by the model term. In this the model term can apply but only to the extent that it is more favourable, in a similar manner to how NES precedence clauses operate. In pursuit of this, the ANMF supports the ACTU's specific wording at Recommendation 10 of their submission.

Model Terms for Enterprise Agreements

14. The Closing Loopholes reforms transferred the design of the mandatory model terms for enterprise agreements (being consultation, flexibility and dispute resolution) from delegated legislation in the FW Act Regulations to the remit of the FWC.



15. The ANMF engaged in the FWC's major case to create the new model terms. While there were not many significant changes to the terms from their form in the FW Regulations, the ANMF is nonetheless supportive of the design of these terms being moved to the FWC's jurisdiction, and looks forward to engaging in the upcoming proceedings on the consultation term. This amendment is already achieving its intention in providing an opportunity to modernise and revisit these essential enterprise agreement terms.

Workplace Determinations for Intractable Bargaining Disputes

16. The bulk of the intractable bargaining dispute (**IBD**) framework was introduced in the *Secure Jobs, Better Pay Act*. The Closing Loopholes reforms introduced an amendment to include s 270A, which operates to prevent existing and more beneficial enterprise agreement terms and conditions from being reduced or eliminated as part of the FWC making a workplace determination.

17. An unintended consequence of this reform is that the FWC has determined that the model terms at Division 5 of Part 2-4 and s 737 of the FW Act must be inserted into any workplace determination where they are the subject of disagreement between the parties engaged in an intractable bargaining dispute. This means that on flexibility, consultation, dispute resolution and delegates rights, a less beneficial term may be inserted into the workplace determination purely for being the subject of disagreement. This is fundamentally incompatible with the intent of s 270A which was to preserve superior conditions in workplace determinations.

18. The ACTU submissions expand upon this further, and the ANMF fully supports their proposal for further reform to address this deficiency in the FW Act.

Minimum Standards Orders for Employee-Like Workers

19. The new Minimum Standards Orders (**MSOs**) framework for employee-like workers in Part 3A-2 of the Act operates to provide a baseline set of minimum standards for workers engaged in 'gig economy' work or similar. No MSOs have been made to date.



20. As of writing this submission, the ANMF has not yet utilised these new provisions. We have an interest in a potential application covering digital labour providers in the care economy, but at this stage are awaiting the outcomes of the Transport Workers' Union (**TWU**) matters currently before the FWC. The ANMF has had the opportunity to review the reforms sought by the ACTU and TWU and supports them.

Right to Disconnect

21. The ANMF supports the inclusion of the right to disconnect at Division 6 of Part 2-9 of the FW Act. We do note, however, for the purposes of this review that there remain incompatibilities with the *Nurses Award 2020* and its recall provision at Cl 19.7.

22. Cl 19.7 expressly provides an employer with the ability to recall an employee to work, even if they are not on call. Recall during on call is dealt with separately by Cl 19.6. Our members report that recall does occur in practice and as a result they cannot enjoy the same right to disconnect as other workers. Clause 13A.5 of the Nurses Award notes specifically that the right to disconnect does not prevent an employer from contacting or attempting to contact a worker to notify them of a recall to work.

23. While this scenario has not been tested in dispute proceedings, our members are understandably reticent to enforce their purported right to disconnect and ignore contact from their employer given the express provision at 13A.5 and the time critical healthcare environment they often work in.

24. The ANMF raised this issue in a submission to the FWC during proceedings to consider whether the right to disconnect terms were operating appropriately or should be subject to a review. The FWC noted that this was a matter for the Nurses Award specifically and as such an application could be made to amend the recall provisions in the award.

25. The ANMF acknowledges this is an issue unique to our members but submits it is worth noting in this Review.



Expansion of Protected Attributes

26. This reform amended the FW Act to include ‘subjection to family and domestic violence’ as a protected attribute for the purposes of the FW Act’s general protections and anti-discrimination provisions.

27. Our branches have reported success utilising the inclusion of ‘subjection to family and domestic violence’ to assist in preventing employers from commencing disciplinary action against our members. Reduced performance in the workplace can be a natural consequence of experiencing FDV. The *Nurses and Midwives (Victorian Public Sector) Single Interest Employer Agreement 2024-2028* expressly addresses this issue at Clause 64.4(d):

No adverse action will be taken against an Employee if their attendance or performance at work suffers as a result of experiencing family and domestic violence.

28. The ANMF is firmly in support of this reform and recommends it is retained. The ANMF also recommends a further reform be made to include reproductive health as a protected attribute under the existing anti-discrimination scheme in the FW Act. This reform would complement the increasing prevalence of reproductive health leave entitlements and the object of the FW Act to promote gender equality at s 3(a).

Paid FDV Leave Act

29. Paid family and domestic violence leave remains a welcome addition to the FW Act. The ANMF made a submission ([available here](#)) to the initial review of the Paid FDV Leave Act and we reiterate our positions put for further reform there in this submission.

30. As our membership is overwhelmingly comprised of women, including many from culturally diverse backgrounds, it is an unfortunate reality that many ANMF members are at an increased risk of experiencing family and domestic violence (FDV). A study cited in our previous submission found that nurses, midwives and carers experience FDV up to 4.5 times



more than the rest of the Australian population.¹ As a result the ANMF has a particular interest in ensuring this entitlement operates as effectively as possible to ensure the security, health and wellbeing of our membership is protected.

31. At the outset, the ANMF recommends:

- Increasing the entitlement to 20 days paid leave;
- Expanding access to the entitlement to all employee-like workers;
- Introducing a broader 'gender-based and sexual violence' leave entitlement to capture workers who experience impacts of violence by a perpetrator unknown to them or known through a different relationship outside of the home;
- Expanding the availability of FDV leave so that workers can use the entitlement to support a family member or cultural/kinship relation experiencing FDV;
- Expanding who constitutes a perpetrator of FDV to include kinship or cultural relations; and
- Amending the current definition of FDV to remove the double threshold that requires FDV to be both behaviour that 'seeks to coerce or control the person' *and* 'causes the person harm or to be fearful' by replacing the 'and' with an 'or'.

Increasing quantum of entitlement to 20 days

32. This is a straightforward and essential amendment which would greatly improve the entitlement to FDV leave. 10 days of leave is not typically sufficient for workers experiencing FDV to address the physical, financial and emotional impacts of FDV.

33. The ANMF continues to negotiate for 20 days of FDV leave across enterprise agreements.

¹ Elizabeth McLindon et al., ““You can’t swim well if there is a weight dragging you down”: cross-sectional study of intimate partner violence, sexual assault and child abuse prevalence against Australian nurses, midwives and carers”, *BMC Public Health*, no. 22/1731 (2022): 8. <https://doi.org/10.1186/s12889-022-14045-4>.



Expanding access to all workers

34. This amendment would ensure our members working exclusively in the gig economy are able to maintain their income while dealing with FDV. Given the prevalence and seriousness of FDV it is essential this entitlement is available to as many workers as possible regardless of their work arrangements.

Broadening entitlement to include gender-based and sexual violence

35. This amendment seeks to broaden the entitlement to capture workers who experience any form of gender-based and/or sexual violence, including forms perpetrated in the workplace or in public. For ANMF members who regularly experience workplace violence that can often be gendered in nature, this amendment would enable appropriate recovery from incidents that can be complex and traumatic.

Facilitating 'solidarity' leave to support family members experiencing FDV

36. Several ANMF members have reported an inability to access FDV leave to support family members. This has arisen particularly for our members seeking to support their daughters in attending appointments, organising their financial affairs and pursuing legal action. While employers have at times been sympathetic to these circumstances, these members have needed to exhaust other leave entitlements to support their family members.
37. As such the ANMF recommends that FDV leave be accessible to both the family members and cultural or kinship relations of workers experiencing FDV.

Broadening definition of perpetrators

38. By amending who counts as a perpetrator for the purposes of enlivening the entitlement to FDV leave, a broader range of cultural relationships can be captured. In diverse communities, FDV does not always fit into the existing categories of close relative, member of a worker's household or current or former intimate partner. It is welcomed that the FW Act currently makes explicit provision for Aboriginal and Torres Strait Islander kinship relations within the definition of close relative, but the definition needs to be expanded so other culturally diverse



relationships are captured.

Amending definition of FDV

39. This amendment is concerned with overly onerous drafting that adds an additional burden for our members in proving that the FDV they are dealing with enlivens the entitlement to paid leave. By replacing the 'and' with an 'or' in the definition of FDV, accessing the leave will be made simpler.

Conclusion

40. The ANMF reiterates its broad support for the Closing Loopholes and FDV Acts. The ANMF is particularly interested in pursuing applications in the future under the new provisions, namely the minimum standards orders for employee-like workers.

41. The ANMF once again thanks the Review for the opportunity to provide these submissions and looks forward to reading the draft report in May.