

Submission by the Australian Nursing and Midwifery Federation

Secure Jobs, Better Pay Review

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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 326,000 nurses, midwives and care-workers across the country. Approximately 89% of the ANMF's membership is female, and this is reflective of the composition of the nursing and care workforce more broadly.
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 Review Panel and the Department of Employment and Workplace Relations for the opportunity to make written submissions on the Secure Jobs, Better Pay Review (the **SJBP Review**).
6. The ANMF has had the opportunity to review the submissions of the Australian Council of Trade Unions (**ACTU**) in advance. The ANMF is supportive of the ACTU's submission and recommendations. Where areas of the SJBP Review are not addressed in the following submissions, the ANMF expresses its support for the recommendations of the ACTU.



7. The ANMF is supportive of the amendments made by the *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022 (SJBPA Act)*, but notes at the outset of these submissions that several of the amendments are yet to be fully and broadly utilised, meaning we cannot comment on all the benefits and implications of the SJBPA Act.

Overview

8. The ANMF makes submissions on the following aspects of the Review:
 - Changes relating to gender equality and job security, specifically:
 - the objects and objectives of the Act;
 - work value and equal remuneration;
 - the constitution of expert panels;
 - the regulation of fixed term contract use;
 - sexual harassment;
 - flexible working arrangements; and
 - anti-discrimination measures.
 - Changes relating to bargaining including:
 - the sunset of zombie agreements;
 - changes to initiating bargaining;
 - intractable bargaining; and
 - protected action ballot order (PABO) mandatory conferences.



Gender Equality and Job Security

The Work Value Case – Expert Panels, Work Value, Objects and Objectives

9. The ANMF submits that the defining impact of the SJBPA Act for our membership has been the centralising of gender equality as a focal point of the *Fair Work Act 2009 (FW Act)*. The revised explanatory memorandum to the SJBPA Act explains that the amended objects clauses places gender equality “at the heart of the FWC’s decision-making”.¹ This new emphasis has been displayed most clearly by the joint application to amend the *Aged Care Award 2020*, the *Nurses Award 2020* and the *Social, Community, Home Care and Disability Services Industry Award 2020*, culminating in the post-SJBPA *Aged Care Work Value – Stage 3 Decision*.²
10. Prior to the SJBPA Act, work value applications were assessed only in accordance with s 157(2A) and related to the nature of the work, the level of skill and responsibility involved and the conditions under which the work was done. Rates were assessed for the present as compared to a specific datum point in the past, operating on the assumption that the previous datum point was correct at that point in time. This exercise excluded consideration of historical gender-based undervaluation.
11. Constituted by the new expert panel provisions, the Expert Panel in this decision set out a useful summary of the new work value considerations for the FWC:³

“... Section 157(2B) has given central importance to gender equality issues in the consideration of award wage increases based on work value considerations. Accordingly, we consider that a transparent process of reasoning and findings which demonstrates the way in which any gender-based assumptions have been dealt with and excluded from consideration of the outcome pursuant to paragraph (a) of the subsection is necessary to achieve the new provision’s policy purpose. That would in turn suggest that the

¹ *Fair Work Amendment (Secure Jobs, Better Pay) Bill 2022*, Revised Explanatory Memorandum at 330.

² [2024] FWCFB 150.

³ *Ibid* at [21].



consideration required by paragraph (b) must involve an explicit finding as to whether the work in question has historically been undervalued because of gender-based assumptions. Without such findings being made, it will not be demonstrable that gender undervaluation has properly been addressed and that past assumptions about gender have been removed from consideration.”

12. Given the new requirements of s 157(2B), the Expert Panel engaged in a historical analysis of gender undervaluation throughout the wage setting and Awards systems. This comprehensive exploration traced back to the initial stages of minimum wage setting in the 1907 *Harvester decision*, which held that the minimum wage should be sufficient for a typical worker described as a married man with three children.⁴ The distinction between male and female labour was then assessed in the 1912 *Fruit Pickers decision* concerning two groups of employees, the predominantly male fruit pickers and the predominantly female fruit packers. After considering the differences in the work and paying particular attention to gendered detail, the wages of the packers were set at 75% of the wages of the pickers to account for women not typically being required to “maintain dependents” on their own.⁵
13. The SJBP provisions enabled historical gender-based undervaluation, originating from the above cases, and perpetuated over decades to be properly assessed for the first time. By requiring the FWC to absolve itself of gender-based assumptions and recognise its institutional history of decision-making, the result of the *Stage 3 decision* was wide-ranging and substantial pay increases across the aged care industry of between 3% and 28.5%. These increases go directly to closing the gender pay gap and realising the new objects and objectives clauses at ss 3, 134 and 284 of achieving gender equality and eliminating gender-based undervaluation.
14. The formation of an Expert Panel in accordance with the SJBP changes was similarly pivotal for the outcome of the Stage 3 decision. The ANMF maintains it is essential for a combination

⁴ Ibid at [27], referencing [1907] CthArbRp12, 2 CAR 1 at 3.

⁵ Ibid at [31], referencing *Rural Workers’ Union and United Labourers’ Union v Mildura Branch of the Australian Dried Fruits Association and Others* [1912] CthArbRp 33, 6 CAR 61 at 73.



of both full-time FWC members and experts in pay equity or specific sectors to be present to achieve similar results for future matters.

15. The ANMF continue to progress our next work value matter⁶ before the FWC in relation to the remainder of our membership outside of aged care covered by the *Nurses Award 2020*. The findings in relation to gender-based undervaluation in the aged care matter after the SJPB reforms, sets an historical precedent which will be a key reference to not only the ANMF's work value case, but any other prospective cases, particular those that relate to award rates in female dominated industries. It is the ANMF's submission that the SJPB changes in relation to the objects and objectives of the Act, expert panels and work value achieve their aims and must be maintained in order to ensure the continued and accelerated reduction of the gender pay gap. We support the ACTU's recommendation that the expert panel reports be taken into account when the FWC is making an equal remuneration order, and the inclusion of gender pay equity as an area of knowledge relevant to the Annual Wage Review.

Fixed Term Contracts

16. The new limitations on the use of fixed term contracts have had less of a direct impact for the ANMF than other unions given the exceptions set out by regulation. However, Victorian public sector nurses did experience a reduction in the use of fixed term contracts despite the exception for government-funded positions. This may be indicative of a broader movement away from the use of fixed term contracts beyond the limits of the legislation. The ANMF submits that fixed term contracts are incompatible with the new object of job security, and the reduction in their use is a positive change brought about by the SJPB Act.
17. The above provides an example in which workforce practices have shifted away from the inappropriate and excessive use of fixed-term contracts, even in settings where the exemptions under sub-section 333F(f) of the FW Act would permit their use. Given the

⁶ Matter AM2024/11, listed as a major case at <<https://www.fwc.gov.au/hearings-decisions/major-cases/work-value-case-nurses-and-midwives>>.



apparent lack of utility for this exemption, the ANMF recommends that it be removed through further legislative amendment.

Sexual Harassment

18. The ANMF echoes the recommendations of the ACTU to make this aspect of the FWC's jurisdiction more accessible. The ANMF is supportive of expanding the instances whereby a stop sexual harassment order may be made to include circumstances where a third party may be responsible for the sexual harassment. This is particularly relevant to the membership of the ANMF as a female-dominated and public-facing workforce. The example raised by the ACTU of a young female nurse being sexually harassed by a male patient with dementia is a likely and unfortunate aspect of the role. Appropriate remedies can include redeployment of the nurse to other areas within a hospital or aged care facility, redesign of work spaces or ensuring staffing levels are sufficient to prevent exposure to risk. Enabling the FWC to make such orders improve the accessibility of this jurisdiction, generates better results for workers experiencing sexual harassment and assists in realising principles of gender equality in the workplace. Relatedly, expanding the vicarious liability of employers to third party acts ensures compensation would be made available for workers subject to conduct such as the example above and reinforce the positive duty of employers to manage their workforce so as to prevent sexual harassment.

19. The ANMF also supports the ACTU's recommendation to enable applicants in the sexual harassment jurisdiction to access arbitration without the consent of the other parties when seeking compensation or other remedies aside from a stop order. The FWC is a low cost and efficient jurisdiction that should be accessible for workers seeking alternative remedies if a stop order is not appropriate or possible. Funnelling workers to the Federal Court and subjecting them to additional time and cost decreases the likelihood of workplace sexual harassment matters being unearthed and perpetuates a culture of silencing victim survivors. The ANMF further supports the introduction of costs protection for workers in sexual harassment matters.



Flexible Working Arrangements

20. The ANMF is supportive of the inclusion of s 65B into the FW Act and of arbitration being incorporated into a dispute over flexible working arrangements. We support the recommendations of the ACTU to increase the accessibility of these arrangements and enable collective disputes pertaining to them.

Anti-Discrimination and Reproductive Health

21. The ANMF echoes the ACTU's support of the new anti-discrimination measures inserted by the SJPB Act and supports the ACTU's recommendation for reproductive health to be incorporated into the FW Act as a protected attribute. This measure will operate to improve the economic participation and security of the majority of our membership and that of other feminised professions and industries.

Bargaining Disputes and Industrial Action

22. The ANMF is largely supportive of the SJPB changes around bargaining and industrial action. Branches have reported that since the SJPB Act, bargaining has broadly become more productive.
23. The expiration of zombie agreements has assisted several branches to renegotiate new agreements with employers seeking to maintain certain conditions, and the changes to initiating bargaining has further complemented the increase in new enterprise agreements. Branches report that employers have been less likely to stall or avoid commencing bargaining since the implementation of the SJPB Act. Further contributing to this shift in bargaining behaviour is the threat of an intractable bargaining declaration (IBD) being made. The ANMF observes both employers and unions are more motivated to come to an agreement and engage more efficiently on contested points due to the inherent risk and uncertainty involved in an IBD.
24. Branches have reported largely negative experiences with the compulsory protected action ballot (PAB) conferences introduced by the new s 448A. The ANMF submits that these



conferences are resource intensive and often do not result in the progression of bargaining issues. The ANMF is of the view that these conferences undermine the significant bargaining tool of protected action and hinder momentum and organising efforts. The ANMF supports both recommendations made by the ACTU around industrial action, particularly removing the mandatory aspect of the PAB conferences.

Conclusion

25. The ANMF is of the view that the SJPB Act has been effective in addressing gender-based undervaluation of work and has had transformative results for workers in the aged care industry. The changes have generated an increase in enterprise bargaining consistent with the aims of the FW Act and the legislature. The ANMF otherwise supports the submissions and recommendations set out by the ACTU.