This decision relates to an application for the making of a new award titled Queensland Health Nurses and Midwives Award - State 2010 (the proposed Award). The application, filed on 26 February 2010, was made by Queensland Health and supported by an Affidavit of Michael Kalimnios, the then Deputy Director-General, Corporate Services, Queensland Health.

The application arises as a consequence of the former Workplace Relations Act 1996 (Work Choices) which resulted in nurses and midwives employed by Queensland Health moving out of the federal industrial jurisdiction into the jurisdiction of the Queensland Industrial Relations Commission (the Commission). This movement to the Queensland jurisdiction was initially achieved through the certification by the Commission of the Nurses (Queensland Health) Certified Agreement (EB6) 2006 (the EB6 Agreement) which incorporated the terms of three federal nursing awards into that enterprise bargaining agreement. As indicated in the EB6 Agreement it was the intention of Queensland Health and the Queensland Nurses' Union of Employees (QNU) to create a Queensland Award during the life of the EB6 Agreement. This however did not occur.

The Nurses and Midwives (Queensland Health) Certified Agreement (EB7) 2009 (EB7 Agreement) provided in Clause 3.1 that the agreement incorporated the provisions of the following awards of the Australian Industrial Relations Commission:

- Nurses (Queensland Public Hospitals) Award 2004, which was attached to the Agreement as Schedule 6;
- Nurses (Queensland Public Health Sector) Award 2004, which was attached as Schedule 7; and
- Nurses (Queensland Health) - Section 170MX Award, which was attached as Schedule 8.

Each of those federal awards contained an Application Clause binding the Australian Nursing Federation (and its members) and the Queensland Department of Health. Clause 3.2 of the EB7 Agreement provided that Queensland Health would make application to the Queensland Industrial Relations Commission for the proposed award. The current application is the outcome envisaged by clause 3.2 of the EB7 Agreement.

Queensland Health, the QNU and The Australian Workers' Union of Employees, Queensland (AWU) are parties to the EB7 Agreement.

The award coverage of nurses and midwives employed by Queensland Health had, during the period 1991/1992 to 2006, been within the jurisdiction of the then Australian Industrial Relations Commission rather than this jurisdiction. The AWU had not been a party to any of the relevant federal awards. During that time the AWU relied upon the provisions of s. 124 of the Industrial Relations Act 1999 (the Act) to have its industrial rights in respect of nurses and midwives in Queensland Health acknowledged.

Clause 6 of the EB7 Agreement identifies that one of the purposes of that Agreement is to recognise the QNU as the principal industrial and professional nursing union in Queensland. The AWU as a party to the EB7 Agreement must therefore be taken to have recognised that the QNU is the principal industrial and professional nursing union in Queensland.

The proposed award is structured in such a way as to identify those areas of nursing work which tend to stand outside the work undertaken by nurses and midwives in public hospitals. Nurses and midwives in public hospitals account for approximately 80% of the nurses and midwives whose employment is to be covered by the proposed award. The terms and conditions of these nurses are contained in Section B of the proposed award. The other discreet areas of nursing work covered by the proposed award are:

- in Psychiatric Hospitals and Eventide Homes, where the terms and conditions of employment are contained in Section C of the proposed award;
• in the Public Service, where the terms and conditions of employment are contained in Section D of the proposed award;
• Senior Nursing Staff in Psychiatric Hospitals, where the terms and conditions of employment are contained in Section E of the proposed award; and
• Certain Employees of the Alcohol and Drug Dependence Services, where the terms and conditions of employment are contained in Section F of the proposed award.

[9] This application came before the Commission initially on 23 March 2010. At this time the parties were advised that the Industrial Registry had difficulty with some of the formatting of the proposed award. The parties then conferred with the Industrial Registry and a number of amendments to the formatting were agreed to by the parties. On 19 August 2010, the AWU wrote to the Industrial Registrar attaching a copy of a letter that the AWU had forwarded to the QNU and copied to Queensland Health. In the correspondence to the QNU, the AWU advised that they sought a parties bound clause to be inserted into the proposed award. This was some six months after the application had been filed in the Industrial Registry.

[10] The Affidavit of Michael Kalimnios sworn on 22 February 2010 supporting the application for the proposed award contained the following paragraphs:

"(b) The award is made with two employee organisations.
(c) Both employee organisations are in agreement in respect to the content of the award.
...
(i) The Queensland Nurses' Union of Employees, Queensland will be consenting to the matter.
(j) The Australian Workers' Union of Employees, Queensland will be consenting to the matter …"

[11] When the matter was next listed for hearing on 16 March 2011, the Commission identified a number of issues in the proposed award which required amendment. On this date the Commission also heard the AWU's argument for the insertion of a parties bound clause and a union definition clause. The AWU pressed for the inclusion of the following clauses in the proposed award:

"This Award is binding on:

The Chief Executive Department of Health and/or the respective District Health Services as the employer in relation to employees covered by this Award.
The Australian Workers' Union, of Employees, Queensland;
The Queensland Nurses' Union of Employees; and
members of the above Unions."

and

"'Union' means:
The Australian Worker's Union, of Employees, Queensland;
The Queensland Nurses' Union of Employees."

[12] On this occasion, the QNU indicated that it was content not to include a parties bound or union definition clause in the proposed award as per the Affidavit of Michael Kalimnios filed in support of the application for the proposed award. If, however, the Commission was persuaded by the AWU's submission to include both a parties bound and a union definition clause, then the QNU proposed the following clauses be inserted into the proposed award:

"1.6 Parties Bound

This Award is binding on:
The Chief Executive, Department of Health as the employer on behalf of the various Health Service Districts in relation to all employees referred to in Clause 1.5, Application of Award.
The Queensland Nurses' Union of Employees in relation to all employees referred to in Clause 1.5, Application of Award, and its members."
The Australian Workers Union of Employees, Queensland, with respect to only those employees referred to in Clause 1.5.3, Section C - Psychiatric Hospitals etc. and Clause 1.5.5, Section E - Senior Nursing Staff (Psychiatric Hospitals), and its members.

and

"Union" means: The Queensland Nurses' Union of Employees, Queensland and, subject to the provisions of Clause 1.6, the Australian Workers Union of Employees, Queensland.”.

[13] On 16 March 2011 the matter was adjourned to enable, inter alia, the parties to reach agreement on those amendments sought by the Commission.

[14] On 28 April 2011 the Commission was provided by Queensland Health with a copy of the final draft of the proposed award which was said to have been agreed between Queensland Health and the QNU. That document forms part of Exhibit 21 in the proceedings.

[15] At the hearing on 16 March 2011 the AWU did not voice any opposition to the amendments sought by the Commission. At the resumed hearing on 5 May 2011 the AWU did not oppose any of the amendments contained in the proposed award sent to the Commission on 28 April 2011. However, the AWU continued to press for the inclusion of the parties bound clause as well as a union definition clause.

[16] The proposed award filed as Schedule 1 to the application did not contain a parties bound clause nor a union definition clause. The fact that there was agreement about the terms of the proposed award at the time of the filing of this application was confirmed by both Queensland Health and the QNU.

[17] The AWU did not file a Response to the Application disputing the claims made by Mr Kalimnios in his Affidavit that (i) the AWU was in agreement in respect to the content of the award and (ii) that the AWU would be consenting to the application. Further, the AWU did not seek to have Queensland Health make Mr Kalimnios available for cross-examination in respect to the content of his Affidavit. Thus the content of Mr Kalimnios' Affidavit is not in dispute.

[18] In the course of the hearing of this application I asked the advocates representing both Queensland Health and the AWU whether, to their knowledge, any difficulties had arisen with Queensland Health acknowledging the right of the AWU to represent its membership covered by the terms of the proposed agreement in Queensland Health. Mr Reeves, for Queensland Health, indicated that he was not aware of any issue about the AWU's right to represent such members. The response of Mr Broanda, as representative of the AWU, was "[n]ot a single instance that I'm aware of” although he did indicate that the AWU had had some difficulty in the past with a non-registered organisation titled the Health Workers' Association (an organisation which apparently displayed no interest in the nursing area within Queensland Health).

[19] The decision not to include a parties bound clause appears to have been a deliberate decision of the parties to this proposed award. The proposed award had been negotiated over a rather lengthy period of time. The proposed award has been on the Queensland Health intranet website and available to nurses and midwives employed by Queensland Health both prior to, and since, the application for a new award was filed in the Industrial Registry of the Commission.

[20] In support of its application for the inclusion of the parties bound and union definition clauses, the AWU referred the Commission to s. 331(a) of the Act which provides that the Commission may make a decision it considers just and can include a provision that it considers appropriate for preventing or settling an industrial dispute without being restricted to any specific relief claimed by the parties.

[21] However, in this instance there appears to have been no disputation about the rights of either the QNU or the AWU to represent their respective membership covered by the terms of the proposed award which would require the Commission to consider departing from granting the relief claimed in the original application. In particular, there is no evidence whatsoever of the AWU's representation rights of members, whose terms and conditions are to be covered by the proposed award, being adversely affected by the fact that that organisation was not bound by the three federal nursing awards during the period 1991/1992 to 2006. This is because Queensland Health has, during that time, apparently acknowledged the AWU's legitimate interest in representing its membership.

[22] In this case the employer, Queensland Health, and the "principal industrial and professional nursing union" in Queensland, the QNU, both consent to the terms of the proposed award for nurses and midwives employed by Queensland Health. In addition, it would seem that the AWU, at the time of the filing of the application, also
consented to the terms of the proposed award: see Affidavit of Mr Kalimnios. As noted previously, the application as filed did not contain a parties bound or a union definition clause.

[23] In all the circumstances I have not been persuaded by the AWU that a parties bound clause and/or a union definition clause is warranted in this proposed award. Further, the AWU has not been able to identify any issue in the past ten years where its legitimate industrial interests have not been acknowledged and acted upon by Queensland Health.

[24] As all the requirements of s. 126 of the Act have been met, I approve the content of the Queensland Health Nurses and Midwives Award - State 2011 which is now part of Exhibit 21 in the proceedings. The operative date of the new award, which I now formally make and title the Queensland Health Nurses and Midwives Award - State 2011, will be 16 March 2011.


D.M LINNANE, Vice President.

Hearing Details:  
2010  25 March  
2011  16 March  
      5 May  

Appearances:  
Mr M. Reeves, Ms. K Badke and Ms K. Anderson for Queensland Health. 
Mr M. Doherty and Mr D. Elder for the Queensland Nurses’ Union of Employees. 
Mr D. Broanda and Mr G. Hay for The Australian Workers’ Union of Employees, Queensland.

Released:  16 May 2011