Australian Industry Group

Application to vary the Nurses Award 2010

Reply Submission
(AM2020/1)

29 September 2020

AM2020/1 APPLICATION TO VARY THE NURSES AWARD 2010

REPLY SUBMISSION

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in relation of its application of 6 January 2020 (**Application**) to vary the *Nurses Award 2010* (**Award** or **Nurses Award**). The submission is filed in response to submissions filed by the Australian Nursing and Midwifery Federation (**ANMF** or **Union**) on 31 July 2020 and 1 September 2020, opposing the Application.

2. These submissions should be read in conjunction with our submissions of 9 June 2020 (**June Submission**).

2. THE ANMF'S CASE, IN SUMMARY

3. The key contentions advanced by the ANMF in opposition to the Application are as follows.

4. *First*, the Award is not ambiguous as to the rate payable to casual employees for work performed on weekends, public holidays or during overtime.

5. *Second,* the interpretation of the relevant award clauses adopted by the Fair Work Commission (**Commission**) in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care*[1] (***Domain Aged Care***) is correct.

6. *Third*, the Commission is bound by the decision in *Domain Aged Care* as to how the relevant clauses are to be interpreted.

7. *Fourth*, a decision recently issued by the Commission in relation to the Overtime for Casuals matter[2] (***Overtime for Casuals Decision***) in the context of the 4 yearly review of modern awards lends support to the ANMF's position.

8. *Fifth*, the Award does not contain any errors as to the rate payable to casual employees for work performed during overtime.

9. *Sixth*, Ai Group's analysis of the relevant pre-modern awards is inaccurate.

10. *Seventh*, the proposed clauses are not necessary to ensure that the Award achieves the modern awards objective.

11. Ai Group responds to each of the above contentions in the submissions that follow.

[1] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2020] FWCFB 1716.

[2] *4 yearly review of modern awards – Overtime for Casuals* [2020] FWCFB 4350.

3. AMBIGUITY AND UNCERTAINTY ARISING FROM THE AWARD

12. The ANMF contend that the Award is not ambiguous as to the rate payable to casual employees for work performed on weekends, public holidays or during overtime.

13. In advancing this submission they seek to downplay the significance of a decision of Vice President Watson in the 2 year review adopting the view that the weekend penalty rates under the Award operate using the Cumulative Method.[3] They also rely heavily upon the decision in *Domain Aged Care* and in particular on what they describe as the finding of the Full Bench that the "relevant provisions are [in the Commission's] view clear" and that the relevant clauses are not ambiguous.

14. The Union points to the wording of clause 10.4 of the Award, and in particular clause 10.4(d), which they assert supports the interpretation adopted in *Domain Aged Care*. They also assert, in essence, that Ai Group's contention that the casual rate of pay is determined by two separate payments constituting an hourly rate of pay and a casual loading is not supported by the wording of clause 10.4(d) and seek to undermine our contention that transitional provisions regarding the phasing arrangements can be argued to provide further contextual support for the proposition that the casual loading was intended to form a separate entitlement to the ordinary time rate prescribed by the Award for casual employees.

15. The union argues that the "ordinary rate of pay" for a casual is comprised of two components; the prescribed hourly rate and the casual loading. The components are said to form part of a whole, which is disaggregated solely for the purposes of calculating shift allowances as set out in 10.4(d).

16. In the section that follows we respond to the detail of these submissions.

[3] *Re Aged Care Association Australia Ltd & Others* [2012] FWA 9420.

17. Our overarching contention is that the ANMF's submissions fall well short of establishing that the alternate interpretation of the relevant contentious clauses that we advance are not arguable. Moreover, they fail to engage with many of the arguments that we advance as to why to the clauses ought to be regarded as ambiguous or uncertain.

The ANMF's submissions regarding the 2 year review

18. The ANMF seek to dismiss the significance of the Commission's finding in the 2 year review that weekend penalty rates for casual employees were, in effect, to be calculated based on the Cumulative Method.

19. The reasoning of the Commission, as then constituted by a senior member who was on the Full Bench that made the Nurses Award, is sound. While the conclusion of the former Vice President conflicts with that of the Full Bench in *Domain Aged Care*, it does reveal an arguable alternate construction of the provisions of the Award relating to the calculation of weekend penalties. Read alongside the reasoning of the Full Bench in *Domain Aged Care*, it reveals how an objective assessment of the terms of the Award leads to the conclusion that they can be characterised as ambiguous.

20. It is, with respect, not sufficient for the ANMF to simplistically assert that the Commission's comments in the 2 year review were mistaken based on the decision in *Domain Aged Care*. They have not seriously engaged with why the logic of the Vice President could be said to not be arguable.

21. The Full Bench in *Domain Aged Care* does not appear to have taken the decision in the 2 year review into consideration.

The ANMF's submissions about clause 10 of the Award

22. The ANMF disputes Ai Group's contention that clause 10.4(b) of the Award prescribes an hourly rate of pay for a casual employee and an entitlement to a casual loading. The crux of their argument is that such a reading is not supported by the wording of clause 10.4(d).

23. Clause 10.4 is in the following terms:

> **10.4 Casual employment**
>
> **(a)** A casual employee is an employee engaged as such on an hourly basis.
>
> **(b)** A casual employee will be paid an hourly rate equal to 1/38th of the weekly rate appropriate to the employee's classification plus a casual loading of 25%.
>
> **(c)** A casual employee will be paid a minimum of two hours pay for each engagement.
>
> **(d)** A casual employee will be paid shift allowances calculated on the ordinary rate of pay excluding the casual loading with the casual loading component then added to the penalty rate of pay.

24. Ai Group's previous submissions articulate in detail our views as to the manner in which the Award provisions both should and can be interpreted. We do not repeat all of this detail here but make five key points in response to the Union's submissions.

25. *First*, the Union places far too much weight on the wording of clause 10.4(d). The provision deals with the application of shift allowances and it is taking a far too pedantic approach to the interpretation of the Award to read this provision as determinative of whether clause 10.4(b) prescribes an ordinary hourly rate and a casual loading or a loaded up ordinary rate of pay, or indeed the manner in which overtime, weekend and public holiday penalties should be calculated under the instrument.

26. *Second*, if the Union's interpretation was accurate (and permitted to stand as a consequence of the Full Bench declining to grant our variation) it would mean that clause 10.4 only prescribes an hourly rate for casual employees, rather than prescribing an hourly rate and a casual loading. This is not consistent with the context and purpose of the provision. We here point to the Part 10A Award Modernisation decisions dealing with the setting of a 25% casual loading across

awards[4] and the approach to be taken in relation to the interaction between overtime rates and the casual loading in the Nurses Award.[5]

27. For completeness, we also note that the wording of the aforementioned decisions of the Australian Industrial Relations Commission (**AIRC**) dealing with the application of weekend penalties and overtime penalties utilises the terms 'ordinary time rate' and 'ordinary rate' to describe the amounts casual employees receive under Award, not including the casual loading. Relevantly, the Full Bench said as follows:

> As a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.[6]

28. More specifically, in relation overtime rates in the Nurses Award (among others), the Full Bench said: (emphasis added)

> **[150]** Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.[7]

29. Having regard to this context, it should not be assumed that the reference to an employee being paid a loading of "50% of their ordinary rate of pay" in clause 26 of the Award, which deals with payment for weekend work, is intended to capture amounts that include the casual loading. Such an approach would not only be at odds with what we say is the intended operation of the Award but with the apparent understanding of the Full Bench as to what constitutes an 'ordinary rate of pay' or 'ordinary rate'. At the very least, this context further demonstrates the ambiguous nature of the current provisions. We note that this point alone should compel the Full Bench to depart from the finding in Domain that the extant provisions are clear.

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[4] *Award Modernisation* [2008] AIRCFB 1000 at [50].

[5] *Award Modernisation* [2009] AIRCFB 345 at [150].

[6] *Award Modernisation* [2008] AIRCFB 1000 at [50].

[7] *Award Modernisation* [2009] AIRCFB 345 at [150].

30. *Third*, we reiterate that the Union's approach is at odds with transitional arrangements governing the phasing in of wage rates, loadings and penalties under the Award and indeed inserted into most awards. These provisions assume that the ordinary rate of pay, loadings and penalties can all be disaggregated.

31. *Fourth*, we observe that the legislative context in which the Award operates assumes a distinction between wages payable for ordinary hours of work and separately identifiable payments such as casual loadings. Relevantly, s.139(1) of the *Fair Work Act 2009* (**Act**) separately provides for the capacity for awards to include terms about wages and provisions about types of employment (i.e. casual employment). The power to set a minimum wage flows from s.139(1)(a) while the power to include provisions about a casual loading flows from s.139(1)(b).

32. Moreover, s.206(1) assumes that an award covered employee will have a base rate of pay (which pursuant to s.16 cannot include a separately identifiable loading) which the section labels the "award rate".

33. The proposition that minimum wages and casual loadings are intended to be separate entitlements is reinforced by a consideration of the provisions of Act dealing with Annual Wage Reviews and National Minimum Wage Orders.[8]

34. We also note that the *Fair Work Regulations 2009* require the separate identification on pay slips of any loading that is payable and, if an employee is paid by the hour, the hourly rate of pay for the employee's ordinary hours.[9]

35. *Fifth*, by way of a broader contextual consideration, we also note that in the minority of awards which require the Compounding Method and which were identified as such in the ANMF's initial reply submission, the casual loading is typically identified as being payable for 'all purposes' or forming part of an employee's all-purpose rate. The absence of this descriptor in the Nurses Award

[8] See ss.285 – 299 of the Act.

[9] Regulation 3.46 of the *Fair Work Regulations 2009*.

is at least consistent with the proposition that it is not intended to be payable for all purposes.

The ANMF's submissions regarding Schedule A to the Award

36. The ANMF appears to draw some analogy between the Nurses Award and the *Racing Clubs Events Award 2010*. They extract a part of an AIRC decision declining to insert special provisions in that award notwithstanding that the award contained minimum wages for casual liquor employees expressed as dollar amounts and which were "loaded to take account of the casual nature of employment".

37. It is unclear how this could be said to assist the ANMF. The decision inserted the model transitional provisions in the *Racing Clubs Events Award 2010*, even though there was an apparent tension between the model transitional provisions dealing with minimum wages, penalties and loading separately and the adoption of loaded casual rates expressed in dollar amounts; this clearly turned on the fact that no party suggested that the rate for casual liquor employees would increase costs for employers and on the basis that the provision could be revisited should it be necessary to do so. The outcome reflects a pragmatic approach to the resolution of a particular award specific issue and should not be considered as having some broader significance.

38. Moreover, the casual rates contained within the *Racing Clubs Events Award 2010* are structured or expressed in an atypical way. The relevant extract does not suggest that the model provisions would be capable of interacting in a workable manner with a 'loaded casual rate' or detract from a contention that the approach taken to the model transitional provisions reinforces the proposition that awards containing such provisions, including the Nurses Award, were intended to set minimum rates (which would be payable for ordinary hours of work) and separate casual loadings.

39. The fact that Schedule A 'no longer operates' does not detract from its utility in providing contextual support for the proposition that the Award was intended to set an hourly rate of pay and separate 25% loading for a casual employee.

4. THE COMMISSION'S DECISION IN *DOMAIN AGED CARE*

40. The ANMF appears to argue that as a Full Bench of the Commission has recently found in the decision in *Domain Aged Care* that the relevant clauses are not ambiguous or uncertain, the Commission is bound "on the basis of consistency" to follow the decision. Indeed, they go further and argue that "s.160 cannot be enlivened with respect to whether the relevant clauses are ambiguous or uncertain."

41. In support of their position they point to relevant statements of principle articulated by a Full Bench of the Commission in *Grabovsky v UPA*. We do not take issue with the explanation extracted in that decision. We merely contend that in the present circumstances there are reasons that the Full Bench must depart from the conclusions in *Domain Aged Care*.

42. The current proceedings differ from those giving rise to *Domain Aged Care*. In the former proceedings, the Full Bench was grappling with the proper interpretation of the relevant provisions for the purpose determining an application to approve an enterprise agreement. In the current proceedings we have squarely put into contest the proposition that the current terms contain an ambiguity or uncertainty as contemplated by s.160.

43. In advancing these submissions we acknowledge that the Full Bench in *Domain Aged Care* did turn its mind to whether the contentious provisions were ambiguous and concluded that they were not.[10] We nonetheless respectfully contend that the various arguments articulated in our submissions ought to compel the Commission to conclude that the reasoning in *Domain Aged Care* in relation to this point was wrong.

44. Moreover, while we do not deny that we seek to advance *some* similar arguments as to the interpretation of the Award as those which appear to have been made by the employer in *Domain Aged Care*, we also seek to advance various arguments that do not appear to have been grappled with by the Full Bench in

[10] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2020] FWCFB 1716 at [21].

Domain Aged Care. Without here referring to all of these arguments, we note in particular the reasoning underpinning the Commission's interpretation of the extant provisions relating to weekend penalty rates in the 2 year review does not appear to have been taken into account in the context of *Domain Aged Care*.

45. The submission that "s.160 cannot be enlivened with respect to whether the relevant clauses are ambiguous or uncertain" should be rejected. There is no impediment under the legislation to a party advancing an application under s.160 in circumstances where the relevant clauses the subject of the application have been the subject of prior consideration by the Commission.

5. THE *OVERTIME FOR CASUALS DECISION*

46. On 18 August 2020, a Full Bench of the Commission issued the *Overtime for Casuals Decision*, in which it determined the entitlement of casual employees during overtime in a range of awards. The ANMF contends that the decision is relevant to the matter here before the Commission on the basis that:

    (a) The decision "specifically endorses the approach taken in *Domain Aged Care*";

    (b) The Commission "expressly rejected the concept of a 'general rule' with respect to the interaction of the casual loading with penalties";

    (c) As a result of the *Overtime for Casuals Decision*, the number of awards requiring the Compounding Method is greater than was first indicated by the ANMF; and

    (d) The Commission adopted a consistent approach to analysing each award to determine the relevant entitlements.

47. We deal with each of the propositions advanced by the ANMF in turn. In essence, we submit that the Commission as presently constituted should not rest its decision in relation to the Application on the *Overtime for Casuals Decision*. For the reasons set out in the submissions that follow, it is our respectful submission that the Commission erred in the approach that it adopted and the conclusions it reached in that matter, it reached some of those key conclusions without first giving interested parties an opportunity to be heard in relation to them and various conclusions reached in that decision are being contested by interested parties (including Ai Group).

The *Overtime for Casuals Decision* specifically endorses the approach taken in *Domain Aged Care*

48. The ANMF relies on the following part of the *Overtime for Casuals Decision*, which relates to the Commission's consideration of the *Aged Care Award 2010*: (emphasis added)

> **[25]** … As to the proposed clause 25.1(c)(iv), no employer party raised any question concerning the entitlement of casual employees to receive the casual loading in addition to overtime penalty rates (on a cumulative basis). The entitlement arises from the expressions "*time and a half*", "*double time*" and "*double time and a half*" in clause 25.1(b)(i). These are traditional industrial expressions which have a traditional meaning. The "*time*" referred to is the rate of pay that would be payable to the employee for ordinary hours. In the case of casual employees, the ordinary time rate is inclusive of the casual loading. Therefore, the overtime rate is calculated by reference to the ordinary time rate inclusive of that loading, unless there is some provision which expressly indicates otherwise. That means that the casual loading is included in the overtime rate on a compounding basis.
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> **[26]** This position was established in the Full Bench decision in *AMWU v Energy Australia Yallourn Pty Ltd* (*Yallourn*), which concerned the proper construction of a provision in an enterprise agreement which established a "*double time*" overtime rate of pay for casual employees. The Full Bench said:
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> > "[41] We are satisfied that the words in the Agreement are not ambiguous or uncertain. The clause sets out how you calculate the ordinary time rate for casual employees and that rate includes the casual loading. The Agreement provides that casual employees are entitled to double time for working overtime. We are satisfied that that double time means double the amount paid for working ordinary time. We are satisfied that, in the absence of express words excluding the casual loading from the calculation of overtime, on its ordinary meaning, the clause provides that the loading is included when calculating overtime payments."
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> **[27]** Similarly, the Full Bench majority in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* (*Domain*) interpreted the overtime provisions in clause 28.1 of the *Nurses Award 2010*, which prescribed overtime rates of "*time and a half*" and "*double time*", as meaning in respect of casual employees, that the rates were calculated on the ordinary time rate inclusive of the casual loading. The Full Bench said:
>
> > "[17] Clause 10.4(b) of the Award says that a casual employee will be paid an hourly rate equal to 1/38th of the weekly wage plus a casual loading of 25%. On a plain reading of the clause, the hourly rate includes the loading; the loaded casual rate is the 'ordinary rate of pay'. When a casual employee works ordinary hours on a Saturday or Sunday, clause 26 of the Award requires the weekend loading to be applied to the ordinary rate of pay. For casual employees, this rate is the casual rate. The same is the case with the public holiday penalty in clause 32.1.
> >
> > . . . .

> [19] The Commissioner's conclusion that overtime penalties are also paid on the loaded casual rates of pay is in our view also correct. Clause 28.1 simply speaks of 'time and a half for the first two hours and double time thereafter' for Monday to Saturday work, 'double time' for Sunday and 'double time and a half for public holidays.' The relevant 'time earnings' for a casual under clause 10.4 include the casual loading. Further, clause 28.1(c) provides that overtime rates are in substitution for and are not cumulative upon shift and weekend premiums. Nothing is said of the casual loading being excluded. We appreciate that this sub-clause is concerned with applying one penalty to the exclusion of another, rather than precluding the calculation of a penalty based on a loaded rate, which is the focus of the interpretative controversy in this instance. Nonetheless, clause 28.1(c) is a limitation on the interaction of different penalties, and nothing is said about confining the application of the casual loading."
>
> **[28]** We see no basis to depart from the approach taken in the above Full Bench decisions (which we will subsequently refer to as the *Yallourn/Domain approach*). Accordingly the proposed new clause 25.1(c)(iv) is unnecessary.[11]

49. Contrary to the ANMF's submission, the *Overtime for Casuals Decision* does not 'endorse' *Domain Aged Care*.

50. *First*, the decision in *Domain Aged Care* turned on the proper interpretation of the relevant provisions of the Nurses Award, having regard to the language used in various provisions of the Award. In the *Overtime for Casuals Decision*, the Commission did not consider whether the Full Bench's construction of the relevant provisions was correct or whether its reasoning was appropriate. This is apparent from paragraph [27] of the *Overtime for Casuals Decision*, at which the Commission simply extracted part of the decision and identified that the Commission had found that the Nurses Award requires the Compounding Method of calculation. It did not express any 'endorsement' of that decision or the Commission's reasoning in it.

51. *Second*, in our respectful submission, in the *Overtime for Casuals Decision*, the Commission appears to have erroneously relied upon *Domain Aged Care* in support of the proposition that the terms "time and a half" and "double time" have the "traditional meaning" described at paragraph [25] of that decision. The decision in *Domain Aged Care* was not based on any such proposition. As we understand it and as we observed above, the decision turned on the language used in various terms of the Award rather than any overarching industrial

[11] *4 yearly review of modern awards – Overtime for Casuals* [2020] FWCFB 4350 at [25] – [28].

principle or historical meaning ascribed to the terms “time and a half” or “double time”.

52. *Third*, to the extent that the Commission has decided that various awards, including the *Aged Care Award 2010*, require the Compounding Method based on the approach adopted in *Domain Aged Care*, this was, respectfully, inappropriate and erroneous. As we submitted to that Full Bench in the context of those proceedings, the awards are clearly distinguishable from the Nurses Award. The language used in those provisions is relevantly different. Accordingly, the decision in *Domain Aged Care* does not assist with the proper interpretation of those awards.

53. Accordingly, the *Overtime for Casuals Decision* does not lend support for the arguments here being advanced by the ANMF, including their reliance on *Domain Aged Care*.

54. The ANMF also relies on the treatment of *AMWU v EnergyAustralia Yallourn Pty Ltd*[12] (***Yallourn***) in the *Overtime for Casual Decision*. The decision states that the “position” described at paragraph [25] was “established” in *Yallourn*.

55. Respectfully, *Yallourn* did not establish that, as a general proposition:

    (a) The expressions “time and a half” or “double time” have a “traditional meaning”[13];

    (b) The aforementioned expressions traditionally require the calculation of the relevant rate by reference to the “rate of pay that would be payable to the employee for ordinary hours” or that for casual employees that rate is “inclusive of the casual loading”[14]; or

[12] *AMWU v Energy Australia Yallourn Pty Ltd* [2017] FWCFB 381.

[13] *4 yearly review of modern awards – Overtime for Casuals* [2020] FWCFB 4350 at [25].

[14] *4 yearly review of modern awards – Overtime for Casuals* [2020] FWCFB 4350 at [25].

(c) The relevant rate, when expressed as described above, is to be calculated on a rate that includes the casual loading "unless there is some provision which expressly indicates otherwise"[15].

56. So much is clear from the Commission's reasoning in *Yallourn*: (emphasis added)

> **[39]** Both parties accepted that the Commission should follow the approach set out in *Golden Cockerel* in regard to interpreting the Agreement and this was acknowledged by the Commissioner at first instance.
>
> **[40]** Paragraphs 4, 5 and 6 of Clause 5.3 provides as follows:
>
> > "A casual employee for working ordinary time shall be paid per hour one thirty-sixth of the weekly rate prescribed in this agreement for the classification of work performed plus a loading of 25% of that weekly rate. A casual employee is entitled to penalty rates applicable to rostered shifts work by the employee based on the ordinary rate of pay.
> >
> > The casual loading is in lieu of all paid leave, paid personal/carer's leave, compassionate leave, public holidays not worked, notice of termination and the other attributes of full-time and part-time employment. Nor a casual employee is entitled to parental leave except in circumstances provided by the FW Act.
> >
> > Casual employee shall be paid overtime for all hours worked in excess of ordinary hours on any day (i.e. eight hours/7 hours 12 minutes per day/ shift length). Except as provided by Clause 13 – Public Holidays of this agreement, all time worked which is in excess of ordinary daily as shall be paid at double time."
>
> **[41]** We are satisfied that the words in the Agreement are not ambiguous or uncertain. The clause sets out how you calculate the ordinary time rate for casual employees and that rate includes the casual loading. The Agreement provides that casual employees are entitled to double time for working overtime. We are satisfied that that double time means double the amount paid for working ordinary time. We are satisfied that, in the absence of express words excluding the casual loading from the calculation of overtime, on its ordinary meaning, the clause provides that the loading is included when calculating overtime payments.
>
> **[42]** We do not accept the submission that paragraph 5 of clause 5.3 supports EnergyAustralia's contention that the casual loading is not included in calculating overtime payments. That weekly employees do not accrue leave on overtime is not material. This paragraph does no more than describe the historical basis of the inclusion of the casual loading. For example such a provision is found in the *Electrical Power Industry Award 2010* yet that Award expressly provides that the casual loading is not included when calculating overtime and penalty rates. 54 If the construction put forward by EnergyAustralia were accepted then this exclusion would be unnecessary.

[15] *4 yearly review of modern awards – Overtime for Casuals* [2020] FWCFB 4350 at [25].

[43] There is nothing in the clauses relied upon by EnergyAustralia that assists the interpretation of clause 5.3. One because the clauses 18.4 and 18.5 do not apply to casual employees and further the clauses both include and exclude certain payments.

[44] We therefore find that Commissioner Gregory erred when he found that the clause was uncertain.

[45] Even if the clause is uncertain we consider that Commissioner Gregory erred when he relied upon the *Electrical Power Industry Award 2010* to support the interpretation put forward by EnergyAustralia. This is because the Agreement expressly excludes the Award and further the Award expressly excludes the payment of the casual loading from the calculation of overtime. So it is not a comparison of like for like. It could equally have been concluded that the parties were on notice of the need to expressly exclude the casual loading from the calculation of overtime and they did not.

[46] We also consider that Commissioner Gregory erred when he found that it was the common understanding of the parties that this was how the previous agreement had been interpreted and applied. We do so because there was no evidence before the Commission on which he could make this finding. We reject the submission that such a finding was able to be inferred from the evidence that the clause was in the same terms as the predecessor agreement; that the unions or the employees did not make any claim for the inclusion of casual loading in the overtime payment; and that this is how the predecessor agreement had been applied.

[47] Before Commissioner Gregory the parties made oral submissions in support of the written submissions filed. No evidence was called before Commissioner Gregory.

[48] In relation to the finding of Commissioner Gregory that there was a common understanding about how the previous agreement applied EnergyAustralia submitted at first instance that the relevant provision in predecessor agreement was in substantially the same terms. The AMWU was a signatory to both agreements and EnergyAustralia was not subject to any claims from the AMWU or any other signatory unions during the previous round of enterprise bargaining in 2012/13 to extend the 25% loading on the classification rate for working ordinary time to being applied for ‘all purposes” as they are asking the FWC to interpret the current words now.

[49] The AMWU submitted at first instance that the genesis of the dispute was that EnergyAustralia had not regularly employed casual employees but only recently started to do so more frequently, which had caused the clause to come under significant scrutiny. EnergyAustralia accepted that it had not employed as many casuals as it currently did.

[50] There was no evidence before the Commissioner that casual employees under the predecessor agreement worked overtime. There was no evidence before the Commissioner if they did work overtime what they were paid. There was no evidence before the Commissioner that the employees or the AMWU knew what the casual employees were paid under the predecessor agreement if they did in fact work overtime. It was not possible to conclude that there was any common understanding about how the clause was applied.

[51] We are satisfied that the decision at first instance is attended with sufficient doubt to warrant its reconsideration and we have decided to grant permission to appeal.

> **[52]** It was put that if we found there was uncertainty or ambiguity, then Full Bench should either remit the matter or hear and determine it ourselves. EnergyAustralia submitted in that circumstance that the parties should be provided with a further opportunity to put additional evidence and submissions.
>
> **[53]** However given our conclusion that clause is not uncertain or ambiguous we consider it appropriate to determine the matter ourselves without a further hearing.[16]

57. In *Yallourn*, the Commission made findings about the proper interpretation of the enterprise agreement before it, based on the language used in the relevant clauses and in accordance with the principles enunciated in *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited*[17]. It did not make any generally applicable finding about the meaning of terms such as "time and a half" or "double time"; nor did it decide as a matter of general principle that rates expressed in that way in industrial instruments are to be calculated on an hourly rate that includes the casual loading "unless there is some provision which expressly indicates otherwise"[18]. It is clear from paragraph [41] of *Yallourn* that though it adopted that approach to its interpretation, it expressly stated that its approach concerned the relevant enterprise agreement in the circumstances of the matter at hand, as opposed to industrial instruments at large.

58. Notwithstanding the ANMF's submissions, the approach adopted in *Yallourn* should not be applied here, for the reasons set out above. The decision cannot properly be extrapolated as providing a general industrial principle or approach to interpreting industrial instruments in this regard.

59. Finally, the submission that by virtue of the "endorsement of the Yallourn/Domain approach in the [*Overtime for Casuals Decision*]", there is "no basis for finding that there is an ambiguity or uncertainty" arising from the Nurses Award is plainly ill-founded.

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[16] *AMWU v EnergyAustralia Yallourn Pty Ltd* [2017] FWCFB 381 at [39] – [53].

[17] *The Australasian Meat Industry Employees Union v Golden Cockerel Pty Limited* [2014] FWCFB 7447.

[18] *4 yearly review of modern awards – Overtime for Casuals* [2020] FWCFB 4350 at [25].

60. The issue of whether there is an ambiguity or uncertainty is to be determined in accordance with the decisions summarised in the June Submission at paragraphs 31 – 39. The assessment turns on an objective assessment of the relevant provisions, read in their context. Self-evidently, it cannot be said that a term of an award is not ambiguous or uncertain on the basis that certain decisions of the Commission have determined the meaning of provisions in different terms in other awards dealing with the same subject matter (i.e. overtime entitlements for casual employees). Indeed in our submission, even if a decision of a Commission determines the meaning of the relevant provisions in issue, as was the case in *Domain Aged Care*, it does not necessarily follow that the provisions of the Award are not ambiguous or uncertain in the relevant sense. We continue to rely on our June Submission and the submissions made above at sections 3 and 4 in this regard.

The Commission's treatment of the 'general rule' expressed by the AIRC

61. During the Part 10A Award Modernisation Process, the AIRC dealt in general terms with certain issues concerning the casual loading as follows: (emphasis added)

> **[50]** In all the circumstances we have decided to confirm our earlier indication that we would adopt a standard casual loading of 25 per cent. We make it clear that the loading will compensate for annual leave and there will be no additional payment in that respect. Also, as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.[19]

62. The ANMF argues that in light of the comments made by the Commission in the *Overtime for Casuals Decision* about the paragraph extracted above, submissions previously made by Ai Group about it[20] "should be rejected".

[19] *Award Modernisation* [2008] AIRCFB 1000 at [50].

[20] June Submission at paragraphs 93 – 95, 100 and 163.

63. In the *Overtime for Casuals Decision*, the Commission found that the "modern awards made as a result of the award modernisation process are marked by a high degree of diversity" as to how the casual loading and overtime rates interact (if at all) based on the "analysis of the disputed awards" set out at paragraphs [8] – [298] of the decision.

64. The Commission went on to find that a significant proportion of the 'disputed awards' require the Compounding Method in respect of overtime rates payable to casual employees on the basis of its view that the expressions "time and a half" and "double time" have the relevant traditional meanings and the decisions of *Domain Aged Care* and *Yallourn*.

65. For the reasons outlined in this submission, we contend that to that extent the Commission's reasoning was, respectfully, flawed and that it ought not to have found that various awards require the Compounding Method. Whilst we accept that *some* awards require the Compounding Method[21], the extent of the diversity of approach that may be said to exist amongst the awards system and the proportion of awards that may be said to require the Compounding Method is overstated as a consequence of the *Overtime for Casuals Decision* in respect of the 'disputed awards'.

66. It therefore follows that the proposition that the 'general rule' adopted by the AIRC is not in fact prevailing across the modern awards system should not be accepted by the Commission. In our submission it remains the case that only a small number of awards require the Compounding Method.

Other awards requiring the Compounding Method

67. The ANMF submits that various awards require the Compounding Method of calculation based on the conclusions reached in the *Overtime for Casuals Decision*.

[21] For example, the awards listed at paragraph [302] of the *Overtime for Casuals Decision*.

68. Ai Group contests this submission in respect of various awards listed by the ANMF at paragraph 15 of its submission. Whilst we acknowledge that the Commission has determined that the awards there listed will be varied to expressly require the Compounding Method of calculation in relation to overtime entitlements for casual employees, in our respectful submission, the Commission erred in its interpretation of certain awards including the *Aged Care Award 2010*, the *Black Coal Mining Industry Award 2010*, the *Business Equipment Award 2010*, the *Contract Call Centres Award 2010*, the *Health Professionals and Support Services Award 2010* and the *Transport (Cash in Transit) Award 2010.*

69. The Commission's overriding consideration in relation to the entitlement afforded by each of the above awards appears to have been its finding that the expressions "time and a half" and "double time" have the "traditional meaning" described at paragraph [25] of the decision. Crucially, however, there was no evidence or other material in support of that proposition before the Commission. Indeed, it is not even clear that any party submitted that such a "traditional meaning" exists. No authority for the proposition was put before the Commission or cited in the decision in support of the proposition, nor was the Commission's view put to the parties by it before it made its decision, such that they may have had an opportunity to be heard in relation to it.

70. Ai Group strongly opposes the proposition that "time and half" and "double time" have the traditional meaning given to them by the Commission in the *Overtime for Casuals Decision*.

71. We note firstly that it is in direct contradiction with the widely accepted proposition that in general terms, a penalty rate is not to be applied on another such penalty or premium. This was clearly expressed by Vice President Watson in His Honour's decision about the Nurses Award during the two year review, which we dealt with in our June Submission. Relevantly, His Honour said:

> **[33]** No party sought to advance a case for alteration of the current meaning and intent of the Award. Rather, they simply argued for clarification in line with their respective interpretations, which are diametrically opposed. It is therefore necessary to have regard to the current meaning of the provisions in determining whether the justification advanced has merit.

[34] Casual employees are paid an hourly rate of 1/38th of the weekly rate plus a casual loading of 25%: clause 10.4(b). Clause 10.4(d) states:

> "(d) A casual employee will be paid shift allowances calculated on the ordinary rate of pay excluding the casual loading with the casual loading component then added to the penalty rate of pay."

[35] In my view, in the case of more than one loading applying, these provisions do not require the penalty to be calculated as a percentage of the loaded rate. Rather they require a calculation of each penalty on the base rate and the addition of the derived amounts onto the base rate. This reflects the normal notion that multiple penalties are often required to be applied, but that penalties are not applied on penalties.[22]

72. Other decisions of the Commission have also acknowledged that principle.[23]

73. Further, Ai Group has had extensive involvement in the redrafting of over 70 awards as part of the Commission's 'exposure draft' process during the 4 yearly review of modern awards. In our estimation, those awards very commonly used expressions such as "time and a half" and "double time". During the course of that process, we have engaged with countless employer organisations and unions about the proper interpretation of overtime and penalty rate provisions in a significant number of those awards, primarily in relation to how those rates should be calculated for the purposes of schedules to be appended to the awards that set out those rates. We are not aware of a single instance in which any industrial association has asserted in the context of those awards that there exists any overriding general principle in industrial parlance of the nature described in the *Overtime for Casuals Decision* at paragraph [25]. As a result, countless awards recently amended by the Commission now include schedules of rates that adopt the Cumulative Method of calculating overtime and penalty rates, after having been reviewed on numerous occasions by employer organisations and unions, without objection.

[22] *Re Aged Care Association Australia Ltd & Others* [2012] FWA 9420 at [33] – [35].

[23] See for example *"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) v UGL Pty Ltd T/A UGL Limited* [2020] FWC 889 at [55] (noting the apparent typographical error in the first sentence of paragraph [55]. Having regard to the decision cited by the Commission, it appears that the word 'unusual' should instead read 'usual') and *Transport Workers' Union of Australia v SCT Logistics* [2013] FWC 1186 at [16].

74. This is further exhibited by paragraph [300] of the *Overtime for Casuals Decision*, which documents that a 'consensus' position was reached between various industrial parties that the Cumulative Method of calculation applies in over 30 awards that were there being considered, many of which use the aforementioned expressions.

75. We also note that the Fair Work Ombudsman's (**FWO**) advice has not been to apply the Compounding Method to calculating casual overtime rates in many of the 'disputed awards', for example:

    (a) The *Aged Care Award*;[24]

    (b) The *Health Professionals and Support Services Award*;[25]

    (c) The *Business Equipment Award*;[26]

    (d) The *Contract Call Centre Award*;[27]

    (e) The *Telecommunications Services Award*;[28]

    (f) The *Black Coal Mining Industry Award*;[29] and

    (g) The *Transport (Cash in Transit) Award*.[30]

76. For the reasons above, this Full Bench should not accept the proposition that each of the awards listed at paragraph [15] of the ANMF's submissions require the Compounding Method or any of the union's submissions that flow from it.

The approach adopted by the Commission in the *Overtime for Casuals Decision*

[24] Fair Work Ombudsman, *Pay Guide – Aged Care Award* (published 1 July 2020).

[25] Fair Work Ombudsman, *Pay Guide – Health Professionals and Support Services Award* (published 15 July 2020).

[26] Fair Work Ombudsman, *Pay Guide – Business Equipment Award* (published 21 September 2020).

[27] Fair Work Ombudsman, *Pay Guide – Contract Call Centre Award* (published 26 June 2020).

[28] Fair Work Ombudsman, *Pay Guide – Telecommunications Services Award* (26 June 2020).

[29] Fair Work Ombudsman, *Pay Guide – Black Coal Mining Industry Award 2010* (published 26 June 2020).

[30] Fair Work Ombudsman, *Pay Guide – Transport (Cash in Transit) Award* (published 24 August 2020).

77. The ANMF argues that the approach adopted in the *Overtime for Casuals Decision*, as described at paragraph 18 of its submission "is appropriate and produces consistent and logical results". It is not clear whether the Union asserts that the Commission should adopt the methodology it has described at the aforementioned paragraph of its submission.

78. Without accepting that that element of its submission accurately describes the approach adopted by the Commission in the *Overtime for Casuals Decision*, for the various reasons outlined in this submission, neither that decision nor the approach taken by the Commission in it should be followed in this matter.

6. ERRORS IN THE AWARD

79. The ANMF contends that the Award does not contain any relevant errors on the basis that a decision of the AIRC, issued in April 2009, cannot be relied upon to establish that the AIRC intended that the Cumulative Method of calculation would apply to the calculation of overtime rates for casual employees.

80. The relevant extract of the decision is as follows:

> **[145]** We now publish four modern awards. They are the:
>
> - *Nurses Award 2010*
> - *Aged Care Industry Award 2010*
> - *Health Professionals and Support Services Award 2010*
> - *Medical Practitioners Award 2010*
>
> …
>
> **[150]** Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.[31]

81. The ANMF submits as follows:

> 51. The ANMF does not accept that the above paragraph means there is an error with respect to the Award. The paragraph in question [i.e. paragraph [150] of the aforementioned decision] does not particularise who had raised such concerns, nor for which award these concerns were raised for. Significantly, the paragraph does not identify specifically which awards this approach was meant to apply to.

82. This submission should not be accepted. Read in its context, it is apparent that paragraphs [146] – [157] relate generally to each of the awards listed at paragraph [145], subject to instances in which a specific award was identified. Paragraph [150] was not so confined.

[31] *Award Modernisation* [2009] AIRCFB 345 at [145] and [150].

83. We extract the relevant portion of the decision below for reference:

[145] We now publish four modern awards. They are the:

- *Nurses Award 2010*
- *Aged Care Industry Award 2010*
- *Health Professionals and Support Services Award 2010*
- *Medical Practitioners Award 2010*

[146] Each of the awards has been altered since the release of the exposure drafts. We have not adopted the proposal by the Health Services Union to create one award. This approach would have constituted a significant departure from the existing pattern of regulation. It would also have involved important work value considerations and posed a number of relativity issues.

[147] There were a number of key factors which the parties raised which require comment in this decision. One matter which was raised in all but the *Medical Practitioners Award 2010* related to the use of part-time employees. There are a number of common features for the use of part-time employees. To begin, they must have reasonably predictable hours of duty. Underlying provisions vary but generally there is a requirement to provide certainty when employing part-timers. We have included a relevant provision. The next issue is in relation to changes to working hours of part-timers. There are of course notice periods for roster changes contained in the underlying awards but these seem not to be used in relation to part-timers. Instead, part-time hours appear to be changed regularly on a daily basis where the employee consents. Many employers saw this as a necessary flexibility. The private hospital industry employer associations estimated that, on average, part-timers would work an extra six hours per week. The impact of this consent is that the employee does not receive overtime for working in excess of the rostered hours when requested but is paid at the ordinary time rate.

[148] We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates. From the submissions of the employers this is a major cost saving and used widely.

[149] Whilst all the relevant underlying awards have different provisions there is a general opportunity for part-time employees to consent to working additional hours at ordinary rates within an average of less than a 38 hour week. We have sought to provide some common provisions which retain cost savings for employers in the knowledge that any change requires written consent. There was never any suggestion that asking part-timers to work additional hours did not relate to unforseen circumstances on the day.

[150] Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation

of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.

[151] Another important matter related to annual leave for nurses. There was universal agreement that the history of annual leave for nurses is both complex and diverse. In the exposure draft we tentatively reached the conclusion that the provision of five weeks leave for all nurses was a reasonable balance between the existing award entitlements. This meant that there were some who may be entitled to an increase but clearly there were nurses whose annual leave would decrease. This quantum was raised as a cost increase in some areas however concern was expressed at the level of penalty rate for public holidays worked by nurses. The exposure draft contained a penalty of 250% for working on a public holiday. It was argued that there was a trade-off between extra leave and payment for a public holiday being reduced to 200%. The Australian Nursing Federation (ANF) submitted that no such trade-off existed. Whilst it appears true that no express trade-off is evident, nonetheless, where the greater annual leave amount is available there generally exists lower payments for public holidays. We have altered the exposure draft by reducing the payment of public holidays to 200%.

[152] In the *Nurses Award 2010* there is also a classification for nursing assistant. We were asked both to delete this classification and to make it more relevant. There were concerns about an overlap between this classification and the personal care worker. We have decided to retain the classification in the *Nurses Award 2010* and make it directly relevant to the work of nurses. In addition, we have adopted the suggestion of the ANF to provide an additional salary point at the Certificate III level.

[153] We have also provided an exclusion, at this stage, for nurses in secondary and primary schools. Our views are not fixed in this regard but we believe it preferable to hear from the participants in the consultations on education before a final decision is made on the employment of nurses in a school environment.

[154] Particular submissions were made on the span of hours for various private practices which reflected the underlying awards and the needs of the sectors. Whilst some rationalisation has taken place we have sought to maintain a specific spread in these areas.

[155] A number of submissions were made going to general flexibilities which should be expressly contained in the awards. Some of these requests do not currently apply in underlying awards. Where some of these can be accommodated in accordance with the flexibility clause we have not included them as we believe that it is better to use that clause with its attendant protections.

[156] The Department of Human Services in the State of Victoria invited us to conclude that relevant modern awards would apply to Victorian public hospitals as they do not represent and are not a part of the Victorian government. It was also suggested that, if such a finding were made, we should conclude that some matters in the awards were beyond the constitutional power of the Commonwealth. As we explained earlier in this decision, we see no benefit in attempting to define the limits of the Commission's jurisdiction in relation to Government or quasi-Government bodies or corporations generally. To that we add the observation that coverage of particular entities may depend upon the nature of the legislative provisions operating on 1 January 2010 and thereafter.

[157] The National Aboriginal Community Controlled Health Organisation (NACCHO) submitted that the aboriginal and Torres Strait islander controlled health services deliver primary health care services and are operated by local aboriginal communities with elected boards of management. It argued that the services need separate regulation and it opposed the "mainstreaming" of staff through the award modernisation process which may have the affect [sic] of divorcing staff from the existing governance structures. It raised current award provisions dealing with self-determination and ceremonial leave. We have included ceremonial leave provisions in the relevant awards. We deal with the question of separate award coverage at the end of this decision.[32]

84. We also note that the Commission accepted in *Domain Aged Care* that the AIRC's decision at [150] did relate to the Nurses Award:

[20] In arguing against the construction above, Opal sought to rely on the *Award Modernisation* decision of 2009, in which a Full Bench of the Australian Industrial Relations Commission stated that it considered the correct approach to the calculation of overtime for casual employees was to 'separate the calculations and then add the results together... rather than compounding the effect of the loadings'. The passage is referable to four modern awards that the Commission was publishing in that decision including the *Nurses Award 2010*. However, the explanation of the Commission for its decision to make an award in particular terms cannot properly be used to defeat the plain meaning of the instrument that it ultimately made. Section 160 of the Act establishes a process whereby application can be made to the Commission to vary a modern award to remove ambiguity or uncertainty or to correct an error. If a person considers that the text of a modern award contains an error, an application can be made under this provision to correct it.[33]

85. The Application before the Commission is precisely of the nature contemplated by it in the above passage.

[32] *Award Modernisation* [2009] AIRCFB 345 at [145] - [157].

[33] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2020] FWCFB 1716 at [20].

7. THE RELEVANT PRE-MODERN AWARDS

86. The ANMF has made various submissions in relation to Ai Group's analysis of pre-modern awards that preceded the Nurses Award.

87. *First*, the ANMF submits that we erroneously asserted in the June Submission that there were 49 federal and state pre-modern awards that preceded the Award. It submits that there were at least 66 such instruments and cites submissions filed by the Union during the Part 10A Award Modernisation process in support of this.

88. We note that our identification of the relevant awards is based on analysis previously undertaken by the Commission.[34] As we understand it, that analysis is intended to identify the pre-reform awards and NAPSAs which may have covered employers and employees prior to the making of each modern award.

89. *Second*, the Union argues that the analysis undertaken by Ai Group should not be afforded any weight "because it is not supported by evidence".

90. The analysis does not constitute factual assertions. Therefore, it is not a matter that requires an evidentiary basis.

91. *Third*, the Union also asserts that the "methodology used" for the purposes of our analysis was not "spelled out" in our submissions.

92. The basis upon which the analysis was undertaken is self-evident. It reflects what we say is the plain reading of the relevant text in each of those awards.

93. *Fourth*, it is evident from the Union's submissions that they contest Ai Group's interpretation of some of the relevant pre-modern awards.

[34] Fair Work Commission, *Draft Award Audit by Modern Award* (3 February 2012).

94. The proper interpretation of the various pre-modern awards is of course not a matter that the Commission need decide in relation to the Application. We simply note that:

(a) The Union's submissions deal with only a small proportion of the awards set out at Attachment A. There is no clear basis for concluding or inferring that Ai Group's interpretation of the balance of the awards is in fact different from that of the Unions or that it is incorrect.

(b) Notwithstanding the Unions' criticisms of the relevant aspects of the June Submission, it has neither 'called evidence' nor identified the manner in which it has reached the relevant conclusions in respect of the majority of awards it has dealt with in its submission. Its submissions about the *Nurses (Victorian Health Services) Award 2000* are an example of this. The basis upon which it has undertaken its analysis is not clear and should not be accepted by the Commission.

(c) Moreover, even if its analysis of the ten awards that it says "related to the vast bulk of nurses not employed in the public sector" was accepted, it demonstrates that only:

(i) Three of those awards required the Compounding Method in respect of overtime;

(ii) Three awards required the Compounding Method in respect of public holidays; and

(iii) Four awards required the Compounding Method in relation to weekends.

A clear majority of awards either required the Cumulative Method of calculation in relation to the various entitlements or contained a lesser entitlement (i.e. did not entitle casual employees to either the casual loading or the relevant penalty or overtime rate). It is clear that the Compounding Method did not commonly apply.

8. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

95. A central contention underpinning our claim is that the Compounding Method of calculating overtime, weekend and public holiday rates is, as a matter of merit, unjustifiable. Consequently, terms delivering such an outcome are not necessary to ensure that the Award achieves the modern awards objective. The retention of such provisions (noting that our primary contention is that the Award does not necessarily operate in this manner) is accordingly contrary to the operation of s.138 of the Act.

96. There is a glaring absence of any attempt in the ANMF's submissions to justify, as a matter of industrial merit, the Compounding Method of calculating the relevant penalties for casual employees. In our view the reason for this is obvious; there is no apparent sound justification as to why casual employees should receive a higher level of casual loading or a higher penalty compared to other employees when they are working during overtime, public holidays or weekends.

97. In broad terms, the Union's submissions do not appear to rise above repeated assertions that the current provisions are clear and therefore should not be changed, opposition to a perceived reduction in entitlements and a contention that Ai Group has not advanced the requisite evidentiary case to justify the variation.

98. In relation to the first point, we have exhaustively articulated reasons why the current terms should be regarded as far from clear. In relation to the second point, we reiterate that based on our preferred interpretation of the Award we are not seeking to reduce entitlements and, in any event, the mere fact that a variation may favour the interests of employers does not constitute an argument against a variation. Section 134(1) requires the Commission, as part of its considerations to strike a fair balance between the interest of employers and employees.

99. The criticisms about an evidentiary case not having been advanced are no answer to the arguments that we proffer as to the industrial merit of the proposed approach, which to a large extent do not rest upon factual propositions. Nor is it an answer to our contention that what we propose merely seeks to give effect to the intention of the AIRC in the Part 10A Award Modernisation process and the Commission in its review of weekend penalty rates in the Award during the course of the 2 year review of awards. We elaborate on each of these points in the section that follows.

100. The relative merit or otherwise of the Compounding Method and the Cumulative Method of calculating the relevant rates has not been the subject of significant consideration in the context of the 4 yearly review of modern awards. It is a significant matter of principle that this Full Bench must determine, in the context of the Nurses Award, in these proceedings.

101. Nonetheless, it is important that the Full Bench is mindful that the Cumulative Method has been endorsed or identified as the intended manner in which awards generally operate.

102. As previously identified, the AIRC in the Part 10A Award Modernisation Process held that:

> As a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.[35]

103. In relation to overtime rates in the Nurses Award (among others), the AIRC said:

> **[150]** Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.[36]

[35] *Award Modernisation* [2008] AIRCFB 1000 at [50]

[36] *Award Modernisation* [2009] AIRCFB 345 at [150].

104. We also note that the use of the phrases “ordinary time rate” and “ordinary rate” by the Full Bench in the context of the above extracts mitigates against any contention that such phrases, or similar wording, in an award should be read as being intended to capture or incorporate a casual loading.

105. The Cumulative Method also accords with what Vice President Watson described as the “normal notion that multiple penalties are often required to be applied, but that penalties are not applied on penalties” and with the manner in which he interpreted the weekend penalty rates as operating under the award.[37]

106. The adoption of the Cumulative Method is also consistent with the approach to the application of penalty rates to casual employees ultimately adopted by the Full Bench in the Penalty Rates Case and which, as noted in that decision, has been recommended by the Productivity Commission as a means of ensuring that penalty rates have a neutral impact on employer decisions regarding engagement of casual or permanent employees.[38]

107. The Compounding Method is also out of step with the approach taken in most modern awards. Whilst this is not a determinative consideration in and of itself, nothing has been advanced in the submissions of the ANMF to suggest that the characteristics of employees covered by the Nurses Awards, their employers or the circumstances of employment in the occupations covered by the Award would justify this approach.

108. A consideration of the purpose for which a casual loading is paid further reinforces the fairness of the Cumulative Method. We doubt that it will be contentious that in the modern awards system the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal/carer’s leave, notice of termination and redundancy benefits. Many of these benefits accrue by reference to ordinary hours of work rather than overtime and are unrelated to the

[37] Re Aged Care Association Australia Ltd & Others [2012] FWA 9420 at [35].

[38] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001. See in particular [333] – [338].

application of weekend or public holiday penalty rates. There is no justification for multiplying the quantum of the casual loading that a casual receives when working overtime, during weekends or public holidays.

109. Similarly, weekend and public holiday penalty rates compensate employees for the disutility of working on such days. There is no reason to conclude that casual employees incur a greater disutility for working on such days so as to justify a higher level of penalty.

110. For all of the aforementioned reasons, the variations that we have proposed are clearly justified. The ANMF's broad conclusion that there is no basis as to why the proposed variations are necessary to justify the modern awards objective cannot be sustained.

111. In the sections following we address the ANMF's specific submissions relating to each of the mandatory considerations specified in s.134(1) of the Act.

Section 134(1)(a): The relative living standards and needs of the low paid

112. The ANMF contends that lower paid employees are likely to be engaged as casuals, however the Union has provided no evidence in support of the proposition. The assertion is not accepted and should not be given any weight.

113. The ANMF contends that "employers, particularly in the aged care sector, have an incentive to engage lower paid staff to work on weekends and public holidays to minimise the base hourly rate upon which penalties are to be paid". Adopting the logic of the Union, it might be said that the variations we propose would remove a cost-based disincentive to the engagement of casual employees on these days. To the extent that this results in an increase to a casual employee's income, it must ameliorate concern over any adverse impact of the variation on such individuals.

114. It may be accepted that, to the extent that the variation results in a reduction in the pay of low paid employees, s.134(1)(a) would not support the claim. However, the significance of this proposition should not be overstated. We here refer to rather than repeat our June Submission at paragraphs 190 – 194.

115. As previously identified, prior to *Domain Aged Care*, the FWO, major industry associations (including the ANMF) and a key Commission decision relating to the 2 yearly review of the Award all pointed to the Cumulative Method as being what the Award requires. Given this context, there is no reason to assume that a significant proportion of employers currently applying the Award are adopting the interpretation in the *Domain Aged Care*.

116. Further, as previously advanced and acknowledged by the Commission, the needs of the low paid are better addressed through the setting and adjustment of minimum rates of pay than through penalty rates.[39] Penalty rates primarily serve the purpose of compensating employees for the disutility of working at certain times or on certain days.

117. The ANMF refers to certain academic material providing an analysis of the impact of the Penalty Rates Case on employment outcomes. Such material has no apparent relevance in the context of nurses and the authors of the material have not been called as witnesses in these proceedings so as to enable the material to be tested. It should be given no weight.

Section 134(1)(b): The need to encourage collective bargaining

118. The ANMF seek to downplay our submissions that a consideration of the need to encourage collective bargaining would weigh in favour of the proposed variations.

119. We have previously identified various agreements that have only been approved subject to the relevant employer giving an undertaking aligning the agreement with the decision of *Domain Aged Care*. Contrary to the submissions of the ANMF, this does not demonstrate that employers are still willing to engage in collective bargaining despite the decision in *Domain Aged Care*. The Commission will appreciate that an employer faced with the prospect of needing to give a undertaking to have an agreement approved that has already been supported by a majority of employees is potentially in a very different position to

[39] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [823].

an employer who in considering whether to bargain for the first time or to commence renegotiation of a new agreement.

120. Regardless, we accept that an employer's decision as to whether to engage in collective bargaining is a multifaceted one. What is required by s.134(1)(b) is a consideration of the need to *encourage* collective bargaining. If the current wording of the Award is retained, it will be a factor which has the potential to discourage employers from bargaining by raising the standard required for the agreement to pass the 'better off overall'. The risk of such a prospect is evidenced by the extent to which undertakings are being required; an outcome which suggests that the decision in *Domain Aged Care* does not reflect industry expectations. The perpetuation of the current situation would not be consistent with a need to *encourage* collective bargaining.

Section 134(1)(c): The need to promote social inclusion through increased workforce participation

121. We have addressed this consideration in our previous submission.

122. In short, we contend that addressing the current uncertainty, risks and costs associated with the potential requirement to apply the Compounding Method would encourage employers to provide additional employment opportunities to casual employees. At the very least it would remove a disincentive to the engagement of casual employees.

123. The ANMF appear to stop short of contesting that the variation will encourage the engagement of casual employment. Instead they put that "even if the Proposed Variation meant that more casuals were employed, this would be in substitution for part-time employees". There is no reason to conclude that this would occur.

124. The ANMF also point to an absence of evidence that the proposed variation will increase workforce participation. In response, it is observed that it is plainly difficult to produce such material in a context where the proper operation of the current provisions is contested and has been the subject of conflicting advice from the FWO and Commission decisions. Employers adopting the Cumulative

Method would be understandably reluctant to 'raise their head above the parapet' through involvement in these proceedings. The Commission should nonetheless accept the proposition that the provision of greater certainty as to the manner in which the Award operates, coupled with the removal of a risk that employers who may engage casual employee to work weekends, public holidays and overtime will be subject to the additional costs of the Compounding Method to the calculation of penalty rates, can only have a positive impact on the creation of employment opportunities, or at least assist in stemming the loss of such employment.

125. In the current economic environment, any measure that may assist with the creation of employment opportunities should be carefully considered.

126. Regardless, the ANMF rightly refrains from asserting that the variation would be contrary to the need to promote social inclusion through increased workforce participation. Rather they submit that s.134(1)(c) is a neutral consideration.

127. On balance, the consideration required by s.134(1)(c) weighs in favour of granting the claim.

Section 134(1)(d): The need to promote flexible modern work practices and the efficient and productive performance of work

128. The ANMF's submissions regarding this consideration do not properly grapple with the arguments we have advanced.

129. The potential imposition of additional costs for engaging casual employees on overtime, weekends and public holidays beyond those applicable to other types of employment and the casual loading creates a disincentive for employers utilising casual employees at such times. This has the potential to interfere with an employer's capacity/willingness to allocate work to employees in a manner that is conducive to the efficient and productive performance of work.

130. Imposing an additional cost penalty on employers for utilising casual staff rather than permanent employees certainly does not promote flexible work practices.

131. A consideration of the matters identified in s.134(1)(d) weighs in favour of the proposed variation.

Section 134(1)(da): The need to provide additional remuneration for employees working in the circumstances described at ss.134(1)(da)(i) – (iv)

132. The Union's submissions in relation to s.134(1)(da) fail to grapple with the submission that the Award will still provide additional remuneration for employees working in the circumstances contemplated by s.134(1)(da) even if it reflects the Cumulative Method of calculating the relevant rates. Indeed, the variation will ensure that they receive the same quantum of remuneration for working the kinds of hours contemplated under s.134(1)(da) as employees engaged in other types of employment, plus the casual loading.

133. Section 134(1)(da) does not support the proposition that casual employees should receive *more* remuneration than other types of employees as compensation for working in the circumstances contemplated by the section.

134. The ANMF also argue that casual employees are by definition engaged in insecure work encompassed by the criteria in s.134(1)(da). This is inaccurate. None of the matters specified in the relevant section of the Act are relevant to the definition of casual employment contained in the Award.

135. It must also be borne in mind that the legislation requires a consideration of s.134(1)(da) in the context of an overarching assessment of what constitutes a *fair* safety net of terms and conditions. In our submission, it is not consistent with the maintenance of a fair safety net for one cohort of employees to receive the kind of windfall gain that flows from the Compounding Method to the calculation of relevant rates. This means that one type of employee gets a higher level of penalty than others for no discernible reason of industrial merit. This does not result in fairness between employees and it certainly is not fair for employers to have to pay such additional amounts.

136. For completeness, we also observe that the ANMF's submissions assume that we are calling for a reduction in the level of remuneration currently payable to casual employees. In our respectful submission, notwithstanding the decision in *Domain Aged Care*, what is being proposed is that the Full Bench *clarify* that the Compounding Method is not required by the Award through granting the proposed variations. In our view, this will not result in any *reduction* in the Award derived entitlements of casual employees.

137. The ANMF's initial submissions rightly acknowledge that most modern awards adopt the Cumulative Method of calculation but identify a small number of awards that use the Compounding Method. In their more recent submission, they now point to a larger group of awards as falling into this category of awards in light of a recent *Overtime for Casuals Decision*. Those proceedings are not yet concluded, and Ai Group intends to contest various potential outcomes flowing from that decision in submissions to be filed shortly. We have also dealt with this issue at section 5 of this submission.

138. It is beyond the remit of this Full Bench to undertake an assessment of whether the maintenance of the Compounding Method in each of the awards identified is necessary to achieve the modern awards objective. This is not a matter that we seek to put in issue in these proceedings.

139. We do however observe that the context of each of the instruments referred to in the ANMF's initial reply submissions is relevantly distinguishable from the context of the Nurses Award in that in each instrument (with the exception of the *Children's Services Award 2010*) the casual loading is characterised as constituting part of the casual employee's 'all-purpose' rate of pay and as such, like 'all-purpose allowances' provided for elsewhere in such awards, is included in the calculation of relevant penalties. The justification or otherwise of the characterisation of the casual loading in each of these instruments in this manner is beyond the scope of these proceedings. Suffice it to say, there is no apparent reason to align the approach taken in the Nurses Award to the approach taken in the small minority of awards identified at paragraph 121 of the ANMF's initial submission.

140. Indeed we here note that the absence of any indication in the Nurses Award that the casual loading is payable for 'all purposes', or that it forms part of an employee's 'all-purpose rate of pay' reinforces our contention that the current provisions should not be interpreted as requiring that it be treated as though it applies in this manner.

141. The Full Bench should conclude that s.134(1)(da) is a neutral consideration.

Section 134(1)(e): The principle of equal remuneration for work of equal or comparable value

142. The ANMF disputes our contention that this is a neutral consideration. They point out that a significant proportion of certain roles covered by the Award are undertaken by women and therefore contend that any decision to reduce entitlements to remuneration under the Award will have a significant disproportionate effect on women.

143. The ANMF's submission appears to misconstrue the requirement flowing from s.134(1)(e). The operation of the provision was considered in the Penalty Rates Case:

> **[204]** Section 134(1)(e) requires that we take into account 'the principle of equal remuneration for work of equal or comparable value'.
>
> **[205]** The 'Dictionary' in s.12 of the FW Act states, relevantly: 'In this Act: equal remuneration for work of equal of comparable value: see subsection 302(2).'
>
> **[206]** The expression 'equal remuneration for work of equal or comparable value' is defined in s.302(2) to mean 'equal remuneration for men and women workers for work of equal or comparable value'.
>
> **[207]** The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of 'equal remuneration for men and women workers for work of equal or comparable value'.[40]

[40] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [204] – [207].

144. Section 134(1)(e) does not weigh against the proposed variation merely because it would result in the entitlements of a female dominated workforce being reduced, as appears to be contended by the ANMF. A consideration of the remuneration of both men and women workers for work of equal value is required. No such comparison has been undertaken by the Union. There is no basis for concluding on the material before the Full Bench that the proposed variation would cause employees covered by the Award to receive less than any other cohort of employees performing work of equal or comparable value.

145. The Union have also failed to establish why reducing penalties applicable to *casual* employees would undermine the principle of equal remuneration for work of equal or comparable value. In this regard we make two points. Firstly, we are essentially seeking greater alignment of the remuneration between casual employees and other types of employees and, secondly, we are not seeking that casual employees receive less than equal remuneration to that received by other employees for working overtime, weekends or public holidays. Indeed, under our proposal, casual employees will still receive higher levels of remuneration under the Award for working at those times than other types of employees.

146. Finally, we again reiterate our view that the variation we seek would not constitute a *reduction* in entitlements. In our view, we are instead proposing the that the Award more clearly articulate the proper approach to the calculation of the relevant penalties. This is of course the heart of the interpretive controversy underpinning these proceedings.

Section 134(1)(f): The likely impact on business, including on productivity, employment costs and the regulatory burden

147. The ANMF's contention that this is a neutral consideration cannot be accepted.

148. Section 134(1)(f) directs the Commission to a consideration of the impact of the proposed variation on business including in particular the impact on employment costs. To the extent that the provision relieves an employer from applying the Compounding Method to the calculation of the relevant penalties, it will reduce employment costs. This would clearly be a positive outcome for business.

149. Section 134(1)(f) weighs strongly in favour of the claim.

Section 134(1)(g): The need to ensure a simple, easy to understand, stable and sustainable modern awards system

150. The ANMF contend that s.134(1) weighs against the grant of the claim. They contend that Ai Group has not demonstrated why its preferred wording to make the "operation of relevant provisions plain" should be preferred over any other wording that maintains the Compounding Method.[41]

151. As to why our drafting should be preferred to an approach that maintains the Compounding Method; we say that this is warranted because the maintenance of the Compounding Method is not necessary to meet the modern awards objective. There is simply no justification for it. Accordingly, the approach we propose is necessary to bring the Award into conformity with s.138.

152. We further say that this approach rectifies ambiguities, uncertainties and errors in the Award in a manner that is consistent with the intent of the Full Bench of the AIRC that made the Award (at the very least in relation to overtime rates) and, importantly, the views of the Commission as to how the Award operated in relation to weekend penalties when it was the subject of the 2 year review.

153. The approach will also bring the Award into alignment with the approach taken in most awards (thereby assisting to make the modern awards system simpler and easier to understand) and with what was characterised by the Commission in the 2 year review as the "normal notion that multiple penalties are often required to be applied, but that penalties are not applied on penalties."[42]

154. It is unclear whether the submissions of the ANMF reflects any implicit acceptance that the wording is not sufficiently clear and consequently requires amendment (even if not in the manner we propose). For an abundance of caution we accordingly emphasise our view that the wording cannot stand given the

[41] ANMF initial submission in reply at paragraph 129 to 130

[42] Re Aged Care Association Australia Ltd & Others [2012] FWA 9420 at [35].

following seven developments demonstrating the confusion that has flowed from the current provisions:

(a) During the 2 year review the Commission (constituted by a senior member who was a part of the Full Bench that made the Award) determined that the weekend penalty rates were to be calculated for casuals using the Cumulative Method.

(b) No party in the 2 year review appears to have argued in favour of the Compounding Method in relation to weekend penalty rates. Indeed, the Union argued that the Award adopts the Cumulative Method.

(c) In the exposure draft process during the 4 yearly review of modern awards, the key parties (including the ANMF) and Commission appeared to have accepted that the Award adopts the Cumulative Method, prior to the decision in *Domain Aged Care*.[43]

(d) The conflicting/evolving advice of the FWO regarding the calculation of the relevant penalties, as previously identified.

(e) The controversy that arose in context of *Domain Aged Care*.

(f) The frequency with which undertakings are being required of employers covered by the Award who seek approval of a new agreement in order to reflect the outcome in *Domain Aged Care*. This at least suggests that the decision did not accord with the views of such parties when such agreements were struck.

(g) The ANMF's change in their interpretation of the Award following the decision in *Domain Aged Care*.[44]

[43] See for example correspondence from the ANMF dated 13 June 2019.

[44] See correspondence from the ANMF dated 13 June 2019.

155. It is of course no answer to suggest that the decision in *Domain Aged Care* rectified any lack of clarity in the Award. Parties should not have to be aware of decisions relating to the approval of enterprise agreements to understand the terms of the Award. The obligations and entitlements flowing from the Award should be readily ascertainable on the face of the Award.

156. Importantly, the approach that we propose will result in the Cumulative Method being adopted in relation to the application of shift allowances, overtime, weekend and public holiday entitlements. It is not only anomalous, but also confusing for the Award to adopt different approaches to the determination of each entitlement. Greater consistency of entitlements within the Award will assist in making it simpler and easier to understand.

157. The considerations mandated by s.134(1)(g) weigh strongly in favour of the amendments we propose.

Section 134(1)(h): The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

158. We have previously addressed this consideration. The ANMF's submission says no more than that they believe that this is a neutral consideration. There is no explanation provided for their belief.