Australian Industry Group

Application to vary the Nurses Award 2010

Submission
(AM2020/1)

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AI GROUP

AM2020/1 APPLICATION TO VARY THE NURSES AWARD 2010

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1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission in support 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 amended directions issued by the Fair Work Commission (**Commission**) on 20 May 2020.

2. The Application concerns the rate at which casual employees covered by the Award are to be remunerated for:

   (a) The performance of overtime;

   (b) Ordinary hours of work performed on weekends; and

   (c) Work performed on public holidays.

3. The specific variations proposed are as set out in the draft determination filed by Ai Group on 24 April 2020 (**Proposed Variations**), which, for convenience, we set out at section 3 of our submission.

4. The Proposed Variations would make clear that the overtime, weekend and public holiday rates payable to casual employees are <u>not</u> to be calculated on an hourly rate that *includes* the casual loading. We refer to that method of calculation as the **Compounding Method**. Rather, the Award would require that a casual employee is entitled to the sum of the casual loading and the relevant penalty rate or weekend loading, with all amounts to be calculated on the base rate of pay. We refer to this method of calculation as the **Cumulative Method**.

5. The Application and these submissions are supported by:

   (a) The Australian Private Hospitals Association;

   (b) The Private Hospitals Association of Queensland;

   (c) The Australian Private Hospitals Association – New South Wales Branch;

   (d) The Australian Private Hospitals Association – South Australia Branch;

(e) The Australian Private Hospitals Association – Western Australia Branch; and

(f) Day Hospitals Australia.

2. Ai GROUP'S CASE

6. The Application is advanced by Ai Group on the basis of the following key contentions.

7. The Award is ambiguous and / or uncertain as to how the rate payable to a casual employee for work performed during overtime, weekends and public holidays is to be calculated. Our submissions in this regard are set out at sections 8 – 9 of this submission. In essence, we submit that the proper construction of the extant provisions of the Award require that the rate payable for work during overtime, weekends and public holidays be determined using the Cumulative Method.

8. The Award should be varied to clarify the proper construction identified above on the basis that such a variation is necessary to ensure that the Award meets the Modern Awards Objective, having regard to the existence of inconsistent decisions of the Commission in relation to interpretive controversy regarding the above provisions; the divergent and changing views of the Fair Work Ombudsman (**FWO**), major industrial parties and employers with an interest in the Award and the imperative of maintaining a simple, easy to understand, stable and sustainable modern awards system.[1]

9. In addition, the relevant Award provisions concerning amounts payable to casual employees during overtime are erroneous in the sense that they have been found to not reflect the expressly stated intent of the Australian Industrial Relations Commission (**AIRC**) when the Award was made as to how the relevant rates were to be calculated. Our submissions in this regard are set out at section 10 of this submission.

10. The grant of the Application would result in the Award containing only those provisions that are necessary to ensure that the Award achieves the modern awards objective, consistent with s.138 of the Act. Our submissions in this regard can be found at section 12 of this submission.

[1] 134(1)(g) of the Act.

11. The Proposed Variations should be made on the aforementioned bases pursuant to s.160 of the Act with retrospective effect from 1 January 2010, in accordance with s.165(2)(b) of the Act. Our submissions in this regard are set out at section 11 of this submission.

12. In the alternate, the Proposed Variations should be made because they are necessary to ensure that the Award achieves the modern awards objective, pursuant to s.157 of the Act. Section 138 of the Act would also be satisfied by the grant of the Application. Our submissions in this regard are set out at section 12 of this submission.

3. THE RELEVANT AWARD PROVISIONS AND THE PROPOSED VARIATIONS

13. Various provisions of the Award are relevant to the Application. In this section of our submission, we set out those provisions and subsequently outline the variations proposed by Ai Group.

3.1 The Relevant Award Provisions

14. Clause 10.4 of the Award concerns casual employment. It states: (our emphasis)

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.

15. Clause 14 of the Award prescribes minimum rates payable to employees covered by the Award. We need not replicate the provision but note that those rates are expressed as weekly amounts.

16. Clause 26 of the Award prescribes a loading payable for ordinary hours of work performed on a weekend: (our emphasis)

26. Saturday and Sunday work

26.1 Where an employee is rostered to work ordinary hours between midnight Friday and midnight Saturday, the employee will be paid a loading of 50% of their ordinary rate of pay for the hours worked during this period.

26.2 Where an employee is rostered to work ordinary hours between midnight Saturday and midnight Sunday, the employee will be paid a loading of 75% of their ordinary rate of pay for the hours worked during this period.

17. Clauses 28.1(a) – (c) of the Award deal with the rates payable for overtime worked:

28.1 Overtime penalty rates

(a) Hours worked in excess of the ordinary hours on any day or shift prescribed in clause 21—Ordinary hours of work, are to be paid as follows:

(i) Monday to Saturday (inclusive)—time and a half for the first two hours and double time thereafter;

(ii) Sunday—double time; and

(iii) Public holidays—double time and a half.

(b) Overtime penalties as prescribed in clause 28.1(a) do not apply to Registered nurse levels 4 and 5.

(c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift and weekend premiums prescribed in clause 26—Saturday and Sunday work and clause 29—Shiftwork.

18. Clause 29 of the Award prescribes the rates payable for shiftwork: (our emphasis)

29.1 Shift penalties

(a) Where an employee works a rostered afternoon shift between Monday and Friday, the employee will be paid a loading of 12.5% of their ordinary rate of pay.

(b) Where an employee works a rostered night shift between Monday and Friday, the employee will be paid a loading of 15% of their ordinary rate of pay.

(c) The provisions of this clause do not apply where an employee commences their ordinary hours of work after 12.00 noon and completes those hours at or before 6.00 pm on that day.

(d) For the purposes of this clause:

(i) **Afternoon shift** means any shift commencing not earlier than 12.00 noon and finishing after 6.00 pm on the same day; and

(ii) **Night shift** means any shift commencing on or after 6.00 pm and finishing before 7.30 am on the following day.

(e) The shift penalties prescribed in this clause will not apply to shiftwork performed by an employee on Saturday, Sunday or public holiday where the extra payment prescribed by clause 26—Saturday and Sunday work and clause 32—Public holidays applies.

(f) The provisions of this clause will not apply to Registered nurse levels 4 and 5.

19. Finally, the rates payable for work performed on a public holiday are prescribed by clause 32.1 of the Award: (our emphasis)

32.1 Payment for work done on public holidays

(a) All work done by an employee during their ordinary shifts on a public holiday, including a substituted day, will be paid at double time of their ordinary rate of pay.

(b) Businesses that operate seven days a week shall recognise work performed on 25 December which falls on a Saturday or Sunday and, where because of substitution, is not a public holiday within the meaning of the NES with the Saturday or Sunday payment (as appropriate) plus an additional loading of 50% of the employee's ordinary time rate for the hours worked on that day. All work performed on the substitute day by an employee will receive an additional loading of 50% of the ordinary time rate for the hours worked on that day instead of the rate referred to in clause 32.1.

3.2 The Proposed Variations

20. The Application seeks that a number of variations be made to the Award. The specific variations sought were set out in our draft determination of 24 April 2020. We set out those variations here for convenience.

21. *First*, the extant clause 10.4(b) of the Award should be deleted and replaced with the following:

(b) A casual employee will be paid an hourly rate equal to 1/38th of the minimum weekly rate prescribed by this Award, appropriate to the employee's classification, plus a casual loading of 25% of that hourly rate.

22. *Second*, the extant clause 10.4(d) of the Award should be deleted and replaced with the following:

(d) Where a loading or a specified rate is payable to a casual employee for work performed during a shift, a weekend, a public holiday or overtime; it must be calculated on 1/38th of the minimum weekly rate prescribed by this Award. The 25% casual loading prescribed by clause 10.4(b) must be added to the rates payable during a shift, on a weekend, on a public holiday and during overtime.

23. *Third*, a new clause 26.3 in the following terms should be inserted in relation to ordinary hours worked on a weekend:

26.3 The amount payable to a casual employee under clause 26 must be calculated in accordance with clause 10.4(d).

24. *Fourth*, a new clause 28.1(e) in the following terms should be inserted in relation to the performance of overtime:

> **(e) Casual employees**
>
> The amount payable to a casual employee under clause 28 must be calculated in accordance with clause 10.4(d).

25. *Fifth*, a new clause 32.1(c) in the following terms should be inserted in relation to work performed on a public holiday:

> **(c)** The amount payable to a casual employee under clause 32.1 must be calculated in accordance with clause 10.4(d).

26. If made, the Proposed Variations would result in the Award expressly requiring that:

    (a) For the performance of overtime, a casual employee is entitled to the sum of the casual loading and the relevant overtime rates; both calculated on the base rate of pay prescribed by the Award.

    (b) For the performance of ordinary hours of work on a weekend, a casual employee is entitled to the sum of the base rate of pay, the casual loading and the relevant weekend penalty rates prescribed by the Award; with the casual loading and weekend penalty rates being calculated on the base rate of pay prescribed by the Award.

    (c) For the performance of work on a public holiday, a casual employee is entitled to the sum of the casual loading and the relevant public holiday penalty rates; both calculated on the base rate of pay prescribed by the Award.

27. For avoidance of doubt, we note that by virtue of the extant clause 10.4(d), the Award makes clear that shift premiums prescribed by the Award are calculated in accordance with the Cumulative Method. The Application does not seek to disturb this position.

4. THE STATUTORY FRAMEWORK

28. The Application and the grounds upon which it is advanced concern the Commission's power to vary the Award pursuant to ss.160, 157 and 165(2) of the *Fair Work Act 2009* (**Act**).

29. In this section of our submission, we set out the key legislative provisions relevant to the Application and outline the authorities concerning those legislative provisions upon which we rely.

4.1 Section 160 of the Act

30. Section 160(1) of the Act gives the Commission power to vary a modern award to remove an ambiguity or uncertainty and to correct an error:

> (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

Prior Consideration of the Meaning of 'Ambiguity' and 'Uncertainty'

31. Various decisions of the Commission and its predecessors have considered the concept of ambiguity and uncertainty in the context of industrial instruments and more particularly, modern awards.

32. In the often-cited decision of *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004*[2] (***Tenix***) a Full Bench of the AIRC considered the application of s.170MD(6) of the *Workplace Relations Act 1996*, which relevantly provided as follows:

> The Commission may, on application by any person bound by a certified agreement, by order vary a certified agreement:
>
> (a) for the purpose of removing the ambiguity or uncertainty.

[2] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* (PR917548).

33. The AIRC made the following observations about how s.170MD(6) was to be applied: (footnotes removed, our emphasis)

> **[28]** Before the Commission exercises its discretion to vary an agreement pursuant to s.170MD(6)(a) it must first identify an ambiguity or uncertainty. It may then exercise the discretion to remove that ambiguity or uncertainty by varying the agreement.
>
> **[29]** The first part of the process - identifying an ambiguity or uncertainty - involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in *Re Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997*:
>
> > *"The identification of whether or not a provision in an instrument can be said to contain an 'ambiguity' requires a judgment to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the 'parent' award with which a complimentary provision is to be read."*
>
> **[30]** We agree that context is important. Section 170MD(6)(a) is not confined to the identification of a word or words of a clause which give rise to an ambiguity or uncertainty. A combination of clauses may have that effect.
>
> **[31]** The Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced *and* an arguable case is made out for more than one contention.
>
> **[32]** Once an ambiguity or uncertainty has been identified it is a matter of discretion as to whether or not the agreement should be varied to remove the ambiguity or uncertainty. …
>
> **[33]** We agree with Tenix that the first step in dealing with a s.170MD(6)(a) application - the identification of an ambiguity or uncertainty - requires the determination of a *"jurisdictional fact"*. In *Corporation of the City of Enfield v Developmental Assessment Commission* the joint judgment of Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ described the term *"jurisdictional fact"* in these terms:
>
> > *"The term 'jurisdictional fact' (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion."*
>
> **[34]** Similarly in *Re: CFMEU - Termination of Bargaining Periods*, Lee and Madgwick JJ said:
>
> > *". . . the question presents as one of whether the Commission may have erred as to a 'jurisdictional fact', that is, the existence or non-existence of a state of affairs which was a statutory precondition to the Commission acting. . ."*
>
> **[35]** In the context of s.170MD(6)(a) the Commission must *first* identify the existence of an ambiguity or uncertainty *before* exercising its discretion to vary the agreement. We agree with the Full Bench in *Re: CFMEU Appeal* which described the

existence of an ambiguity or uncertainty as *"a necessary statutory prerequisite to any variation being made."*[3]

34. Although the approach adopted in *Tenix* concerned a different statutory framework and an instrument of a different nature to modern awards, it has been adopted by the Commission as the appropriate approach to be applied when considering whether an award should be varied pursuant to s.160 of the Act.

35. For instance, in *Re Australian Nursing Federation and others*[4], a Full Bench of Fair Work Australia (**FWA**) adopted the approach in *Tenix*[5] when considering an application made by Ai Group seeking a variation to the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) pursuant to s.160 of the Act.

36. The Full Bench observed that there were "rival contentions between [Ai Group] and others, including the FWO, about the import of"[6] the relevant provision of the Manufacturing Award and determined that "each of the contentions [was] arguable"[7]. The Full Bench concluded that:

> **[30]** Given the rival contentions about the import of clause 44.2 and our view that an arguable case has been made out for more than one contention, we find the current clause 44.2 of the modern Manufacturing Award is a source of ambiguity or uncertainty. We turn then to consider exercising our discretion to remove the ambiguity or uncertainty.[8]

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[3] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* (PR917548) at [28] – [35].

[4] *Re Australian Nursing Federation and others* [2010] FWAFB 9290.

[5] *Re Australian Nursing Federation and others* [2010] FWAFB 9290 at [26].

[6] *Re Australian Nursing Federation and others* [2010] FWAFB 9290 at [27].

[7] *Re Australian Nursing Federation and others* [2010] FWAFB 9290 at [27].

[8] *Re Australian Nursing Federation and others* [2010] FWAFB 9290 at [30].

37. In a subsequent decision[9] of another Full Bench of FWA when considering an appeal of a decision in which FWA had declined to grant a variation to the *Building and Construction General On-Site Award 2010* pursuant to s.160 of the Act, FWA again relied upon *Tenix*:

> **[16]** In particular, before the tribunal can exercise its discretion to vary an award it must first identify an ambiguity or uncertainty. Identifying an ambiguity or uncertainty '*involves an objective assessment of the words used in the provision under examination. The words used are construed having regard to their context, including where appropriate the relevant parts of a related award. As Munro J observed in* Re - in Linfox - CFMEU (CSR Timber) Enterprise Agreement 1997:
>
> > "The identification of whether or not a provision in an instrument can be said to contain an 'ambiguity' requires a judgement to be made of whether, on its proper construction, the wording of the relevant provision is susceptible to more than one meaning. Essentially the task requires that the words used in the provision be construed in their context, including where appropriate the relevant parts of the 'parent' award with which a complementary provision is to be read".[10]

38. More recently, in the context of the 4 yearly review of modern awards, Ai Group pursued a variation to the coverage of the *Horticulture Award 2010* on various bases including s.160 of the Act. In its decision[11] (***Horticulture Award Decision***), the relevant Full Bench cited *Tenix* with approval.[12]

39. The Commission went on to rely on the decision of *Re Public Service (Non-Executive Staff – Victoria) (Section 170MX) Award 2000*[13] for further guidance in relation to the meaning of 'uncertainty' for the purposes of s.160 of the Act: (our emphasis)

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[9] *Master Builders Australia Limited; Housing Industry Association Ltd v Construction, Forestry, Mining and Energy Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2012] FWAFB 3210.

[10] *Master Builders Australia Limited; Housing Industry Association Ltd v Construction, Forestry, Mining and Energy Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; The Australian Workers' Union; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)* [2012] FWAFB 3210 at [16].

[11] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037.

[12] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [151].

[13] *Re Public Service (Non-Executive Staff – Victoria) (Section 170MX) Award 2000* (Print T3721).

[152] The decision of Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000* provides further clarity on the meaning of 'uncertainty'. In this case, an award clause was varied on the basis that the clause was uncertain. In doing so, His Honour adopted the following definition of 'uncertainty':

> 'In that respect I respectfully adopt the submission made by the State of Victoria that the term "uncertainty" means the quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness. Those are extracts for the Concise Oxford Dictionary adopted by Commissioner Whelan in *Re: Shop Distributive and Allied Employees Association v. Coles Myer* [Print R0368]. In my view, as I have indicated, this provision clearly falls within that definition.'[14]

Prior Consideration of the Meaning of 'Error'

40. In the context of the 4 yearly review of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, the Shop Distributive and Allied Employees' Association proposed a variation to the award pursuant to s.160 of the Act on the basis that it contained an 'error' as to the manner in which certain rates had been calculated. In its decision[15] (***Vehicle Award Decision***), a Full Bench of the Commission dealt with the relevant aspect of the unions' submissions as follows: (our emphasis)

> **[73]** With respect to the SDA, this is not demonstrative of any error. It only demonstrates that a methodology was used which the SDA, with the benefit of hindsight, would prefer not to have been used. Nothing was placed before us to suggest that the AIRC did not intend to use that methodology, or that some mathematical error was made in calculating the rates in accordance with that methodology. We do not accept that disagreement - even a well-founded disagreement - with a previous decision concerning an award is sufficient to establish an error for the purpose of s.160. What is necessary is to show that some sort of mistake occurred, in that a provision of the award was made in a form which did not reflect the tribunal's intention. There is nothing to suggest that this occurred here. Accordingly the SDA's application under s.160 must be dismissed.[16]

[14] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [152].

[15] *4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418.

[16] *4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418 at [73].

4.2 Sections 157 of the Act

41. Section 157 of the Act empowers the Commission to make a determination varying an award if it is satisfied that making the determination outside the system of 4 yearly review of modern awards is necessary to achieve the modern awards objective.

42. The power afforded by s.157 of the Act is enlivened only if the Commission is satisfied that the making of the determination is *necessary* to achieve the modern awards objective, as defined by s.134(1) of the Act.

43. In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)*[17] (***SDA v NRA***) Tracey J considered the proper construction of s.157(1) of the Act. His Honour said: (our emphasis)

> 35. The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective." That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> 36. The sub-section also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.
>
> …
>
> 46. In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. <u>That which is necessary must be done. That which is desirable does not carry the same imperative for action.</u> Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.[18]

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[17] *Shop, Distributive and Allied Employees Associates v National Retail Association (No.2)* [2012] FCA 480.

[18] *Shop, Distributive and Allied Employees Associates v National Retail Association (No.2)* [2012] FCA 480 at [35] – [36] and [46].

4.3 Sections 134 of the Act

44. The modern awards objective is contained in s.134(1) of the Act:

> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
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> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern awards system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the ***modern awards objective.***

45. The modern awards objective applies to the performance or exercise of the Commission's functions of powers under Part 2-3 of the Act.[19] This includes the Commission's powers to vary an award pursuant to ss.157 and 160 of the Act.

[19] Section 134(2)(a) of the Act.

46. In its decision[20] concerning a number of claims to reduce penalty rates in a range of modern awards (***Penalty Rates Decision***), the Commission said as follows about s.134(1) of the Act: (footnotes removed)

> **[115]** The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.
>
> **[116]** While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions. As to the proper construction of the expression 'a fair and relevant minimum safety net of terms and conditions' we would make three observations.
>
> **[117]** First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. So much is clear from the s.134 considerations, a number of which focus on the perspective of the employees (e.g. s.134(1)(a) and (da)) and others on the interests of the employers (e.g. s.134(1)(d) and (f)). Such a construction is also consistent with authority. In *Shop Distributive and Allied Employees Association v $2 and Under (No. 2)* Giudice J considered the meaning of the expression 'a safety net of fair minimum wages and conditions of employment' in s.88B(2) of the *Workplace Relations Act 1996* (Cth) (the WR Act). …
>
> …
>
> **[120]** Second, the word 'relevant' is defined in the Macquarie Dictionary (6th Edition) to mean 'bearing upon or connected with the matter in hand; to the purpose; pertinent'. In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:
>
>> '527 … the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations*.' (emphasis added)
>
> **[121]** Finally, as to the expression 'minimum safety net of terms and conditions', the conception of awards as 'safety net' instruments was introduced by the *Industrial Relations Reform Act 1993* (Cth) (the 1993 Reform Act). The *August 1994 Review of Wage Fixing Principles decision* summarised the changes made to the legislative framework by the 1993 Reform Act. In particular, the Commission noted that:

[20] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001.

‘The Act now clearly distinguishes between the arbitrated award safety net and the bargaining stream. It intends that the actual wages and conditions of employment of employees will be increasingly determined through bargaining at the workplace or enterprise.

Under the Act the Commission, while having proper regard to the interests of the parties and the wider community, is now required to ensure, so far as possible, that the award system provides for ‘secure, relevant and consistent wages and conditions of employment’ (s 90AA(2)) so that it is an effective safety net ‘underpinning direct bargaining’ (s 88A(b)).’

…

[125] The objects of the FW Act are set out in s.3 (see [108]), relevantly s.3(b) speaks of:

‘ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and minimum wage orders.’

[126] It is apparent from the scheme of the FW Act that modern awards and the NES ‘underpin’ enterprise agreements, through the operation of s.55 and the ‘better off overall test’ (s.186(2)(d) and s.193). Under s.57 a modern award does not apply to the extent that an enterprise agreement applies to a particular employment relationship, even where the award deals with matters not covered in the agreement.[21]

47. It then went on to consider the various considerations listed at s.134(1): (footnotes removed)

[162] In order for the Commission to be satisfied that a modern award is *not* achieving the modern awards objective it is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations. Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives. As the Full Court of the Federal Court said in *National Retail Association v Fair Work Commission*:

> ‘It is apparent from the terms of s.134(1) that the factors listed in (a)–(h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s.134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor (“relative living standards and the needs of the low paid”)? Furthermore, it was common ground that some of the factors were inapplicable to the SDA’s claim.’

[163] There is a degree of tension between some of the s.134 considerations. The Commission’s task is to balance the various considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. This balancing exercise and the diverse circumstances pertaining to particular modern

[21] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [115] – [126].

awards may result in different outcomes in different modern awards. As the Full Bench observed in the *Preliminary Jurisdictional Issues decision*:

‘The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.’

…

[165] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. This consideration incorporates two related, but different, concepts. As explained in the *2012–13 Annual Wage Review* decision:

> ‘The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.’

[166] In successive Annual Wage Reviews the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’, within the meaning of s.134(1)(a). There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The surveys that provide the information about the distribution of earnings from which a median is derived vary in their sources, coverage and definitions in ways that affect the absolute values of average and median wages (and, accordingly, what constitutes two-thirds of those values). The two main Australian Bureau of Statistics (ABS) surveys of the distribution of earnings are the ‘*Employee Earnings, Benefits and Trade Unions Membership* (the ‘EEBTUM’) and the survey of *Employee Earnings and Hours* (the ‘EEH’). We note that the EEBTUM is no longer published and the relevant data is now produced as part of the *Characteristics of Employment Survey* (the ‘CoE’). Some data is also available from the HILDA survey.

[167] In the *2015–16 Annual Wage Review* decision the Expert Panel noted that the submissions provided different estimates of the ‘two-thirds of median (adult) ordinary time earnings’ threshold. The relevant extract from that decision, and the Expert Panel’s conclusion, are set out below:

> ‘In its submission, the Australian Government provided two estimates to identify low-paid workers:
>
> - $18.67 per hour (or about $710.00 per week over a 38-hour week), using the May 2014 EEH data; and
>
> - $18.42 per hour (or about $700.00 per week over a 38-hour week) using the 2014 HILDA survey data.

The Australian Government contended that there were about 1.3 million low-paid employees in 2014 (or 13.3 per cent of all employees), with around one-third of award-reliant workers being low paid in the EEH data. Their analysis took explicit account of the number and the level of pay of junior workers.

The ACTU used unpublished ABS EEH data on the distribution of award only workers by hourly earnings to estimate the number of employees at each award classification level. On the basis of the May 2014 data, the ACTU estimated that 43 per cent of award only employees had hourly earnings at or below the C10 rate of pay in May 2014 ($724.50).

Research Report 6/2013 found that around 75 per cent of adult award-reliant employees in the non-public sector were earning below the C10 rate of $18.60 per hour.

Whilst no specific conclusion is available, the information as a whole suggests that a sizeable proportion—probably a majority—of employees who are award reliant are also low paid by reference to the two-thirds of median weekly earnings benchmark.' (footnotes omitted)

[168] The most recent data for the 'low paid' threshold is set out below:

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

[169] The assessment of relative living standards focuses on the comparison between award-reliant workers and other employed workers, especially non-managerial workers. As noted in the 2015–16 Annual Wage Review decision:

> 'There is no doubt that the low paid and award reliant have fallen behind wage earners and employee households generally over the past two decades, whether on the basis of wage income or household income.'

[170] Award reliance is a measure of the proportion of employees whose pay rate is set according to the relevant award rate specified for the classification of the employee and not above that rate. Table 4.8 from the *2015–16 Annual Wage Review* decision sets out the extent of award reliance by industry. Relevantly for present purposes, the most recent data identify the Accommodation and food services and Retail trade industries as among the most award reliant in that they are the industries in which the highest proportion of employees are award reliant (42.7 per cent and 34.5 per cent, respectively).

[171] The relative living standard of employees is affected by the level of wages they earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live. As a general proposition, around two-thirds of low-paid employees are found in low income households (i.e. in the bottom half of the distribution of employee households) and have lower living standards than other employees. Many low-paid employees live in households with low or very low disposable incomes.

[172] In taking into account 'relative living standards' in the context of Annual Wage Reviews, the Expert Panel has paid particular attention to changes in the earnings of all award-reliant employees compared to changes in measures of average and median earnings more generally.

[173] In the *2015–16 Annual Wage Review* decision the Expert Panel also observed that increases in modern award minimum wages have a *positive* impact on the relative living standards of the low paid and on their capacity to meet their needs. It seems to us that the converse also applies, that is, the variation of a modern award which has the effect of reducing the earnings of low-paid employees will have a *negative* impact on their relative living standards and on their capacity to meet their needs.

[174] Section 134(1)(b) requires that we take into account 'the need to encourage collective bargaining'.

…

[178] It seems to us that the observations made by the Expert Panel in the context of Annual Wage Reviews are also apposite to the present context. A reduction in penalty rates is likely to increase the incentive for employees to bargain, but may also create a disincentive for employers to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award.

[179] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively '*through* increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).

[180] However, we also accept that the level of penalty rates in a modern award may impact upon an employee's remuneration and hence their capacity to engage in community life and the extent of their social participation. The broader notion of promoting social inclusion is a matter that can be appropriately taken into account in our consideration of the legislative requirement to 'provide a fair and relevant minimum safety net of terms and conditions' and to take into account 'the needs of the low paid' (s.134(1)(a)). Further, one of the objects of the FW Act is to promote 'social inclusion for all Australians by' (among other things) 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through … modern awards and national minimum wage orders' (s.3(b)).

[181] The likely impact of any exercise of modern award powers on 'employment growth' is also one of the considerations we are required to take into account, by s.134(1)(h). It is these considerations (i.e. ss.134(1)(c) and (h)) which have led us to assess the likely impact of any proposed change to penalty rates on employment growth, that is the creation of new jobs or an increase in hours worked.

[182] Section 134(1)(d) requires that we take into account 'the need to promote flexible modern work practices and the efficient and productive performance of work'.

[183] We deal further with this consideration later in our decision when addressing the review of the particular modern awards before us.

[184] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for:

> '(i) employees working overtime; or
> (ii) employees working unsocial, irregular or unpredictable hours; or
> (iii) employees working on weekends or public holidays; or
> (iv) employees working shifts.'

…

[188] Five observations may be made about s.134(1)(da).

[189] First, s.134(1)(da) speaks of the 'need to provide additional remuneration' for employees performing work in the circumstances mentioned in s.134(1)(da)(i), (ii), (iii) and (iv).

[190] An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) requires a consideration of a range of matters, including:

> (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
>
> (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days); and
>
> (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.

[191] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times.

[192] The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a 'loaded hourly rate'.

[193] As mentioned, s.134(1)(da) speaks of the 'need' to provide additional remuneration. We note that the minority in *Re Restaurant and Catering Association of Victoria* (the *Restaurants 2014 Penalty Rates decision*) made the following observation about s.134(1)(da):

> 'This factor must be considered against the profile of the restaurant industry workforce and the other circumstances of the industry. It is relevant to note that the peak trading time for the restaurant industry is weekends and that employees in the industry frequently work in this industry because they have other educational or family commitments. These circumstances distinguish industries and employees who expect to operate and work principally on a 9am-5pm Monday to Friday basis. Nevertheless <u>the objective requires additional remuneration for working on weekends</u>. As the current provisions do so, they meet this element of the objective.' (emphasis added)

[194] To the extent that the above passage suggests that s.134(1)(da) '*requires* additional remuneration for working on weekends', we respectfully disagree. We acknowledge that the provision speaks of 'the *need* for additional remuneration' and that such language suggests that additional remuneration is required for employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv). But the expression 'the need for additional remuneration' must be construed in context, and the context tells against the proposition that s.134(1)(da) *requires* additional remuneration be provided for working in the identified circumstances.

[195] Section s.134(1)(da) is a relevant consideration, it is *not* a statutory directive that additional remuneration must be paid to employees working in the circumstances mentioned in paragraphs 134(1)(da)(i), (ii), (iii) or (iv). Section 134(1)(da) is a consideration which we are required to take into account. To take a matter into account means that the matter is a 'relevant consideration' in the *Peko-Wallsend* sense of matters which the decision maker is bound to take into account. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

> 'To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously disregarded as irrelevant'.

[196] Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'.

[197] A further contextual consideration is that 'overtime rates' and 'penalty rates' (including penalty rates for employees working on weekends or public holidays) are terms that *may* be included in a modern award (s.139(1)(d) and (e)); they are not terms that *must* be included in a modern award. As the Full Bench observed in the *4 yearly review of modern awards – Common issue – Award Flexibility* decision:

> '… s.134(1)(da) does not amount to a statutory directive that modern awards must provide additional remuneration for employees working overtime and may be distinguished from the terms in Subdivision C of Division 3 of Part 2-3 which *must* be included in modern awards…'

[198] Further, if s.134(1)(da) was construed such as to *require* additional remuneration for employees working, for example, on weekends, it would have significant consequences for the modern award system, given that about half of all modern awards currently make no provision for weekend penalty rates. If the legislative intention had been to mandate weekend penalty rates in all modern awards then one would have

expected that some reference to the consequences of such a provision would have been made in the extrinsic materials.

[199] Third, s.134(da) does not prescribe or mandate a fixed relationship between the remuneration of those employees who, for example, work on weekends or public holidays, and those who do not. The additional remuneration paid to the employees whose working arrangements fall within the scope of the descriptors in s.134(1)(da)(i)–(v) will depend on, among other things, the circumstances and context pertaining to work under the particular modern award.

[200] Fourth, s.134(1)(da)(ii) is not to be read as a composite expression, rather the use of the disjunctive 'or' makes it clear that the provision is dealing with separate circumstances: 'unsocial, irregular or unpredictable hours' (emphasis added).

[201] Section 134(1)(da)(ii) requires that we take into account the need to provide additional remuneration for employees working in each of these circumstances. The expression 'unsocial … hours' would include working late at night and or early in the morning, given the extent of employee disutility associated with working at these times. 'Irregular or unpredictable hours' is apt to describe casual employment.

[202] Fifth, s.134(1)(da) identifies a number of circumstances in which we are required to take into account the need to provide additional remuneration (i.e. those in paragraphs 134(1)(da)(i) to (iv)). Working 'unsocial … hours' is one such circumstance (s.134(1)(da)(i)) and working 'on weekends or public holidays' (s.134(1)(da)(iii)) is another. The inclusion of these two, separate, circumstances leads us to conclude that it is not necessary to establish that the hours worked on weekends or public holidays are 'unsocial … hours'. Rather, we are required to take into account the need to provide additional remuneration for working on weekends or public holidays, irrespective of whether working at such times can be characterised as working 'unsocial … hours'. Ultimately, however, the issue is whether an award which prescribes a particular penalty rate provides 'a fair and relevant minimum safety net.' A central consideration in this regard is whether a particular penalty rate provides employees with 'fair and relevant' compensation for the disutility associated with working at the particular time(s) to which the penalty attaches.

…

[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'.

…

[215] Further, even if it was shown that a reduction in Sunday penalty rates disproportionately impacted on women workers that fact would not necessarily enliven s.134(1)(e). Section 134(1)(e) requires that we take into account the principle of equal remuneration for men and women workers 'for work of equal or comparable value'. Any reduction in Sunday penalty rates in these awards would apply equally to men and women workers.

[216] However, if it was shown that a reduction in penalty rates did disproportionately affect female workers then it is likely to have an adverse impact on the gender pay gap. Such an outcome may well be relevant to an assessment of whether such a change would provide a '*fair* and relevant minimum safety net', but it does not necessarily enliven s.134(1)(e).

[217] Section 134(1)(f) requires that we take into account 'the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden'.

[218] We note at the outset that s.134(1)(f) is expressed in very broad terms. We are required to take into account the likely impact of any exercise of modern award powers 'on business, including' (but not confined to) the specific matters mentioned, that is, 'productivity, employment costs and the regulatory burden'.

[219] It is axiomatic that the exercise of modern award powers to vary a modern award to reduce penalty rates is likely to have a positive impact on business, by reducing employment costs for those businesses that require employees to work at times, or on days, which are subject to a penalty rate. The impact of a reduction in penalty rates upon productivity is less clear.

…

[221] 'Productivity' is not defined in the FW Act but given the context in which the word appears it is clear that it is used to signify an economic concept.

…

[224] The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the *Schweppes Australia Pty Ltd v United Voice – Victoria Branch*:

> '… we find that 'productivity' as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.'

[225] While the above observation is directed at the use of the word 'productivity' in s.275, it is apposite to our consideration of this issue in the context of s.134(1)(f).

[226] Section 134(1)(g) requires that we take into account 'the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards'.

[227] We deal further with this consideration later in our decision when addressing the review of the particular modern awards before us.

[228] Section 134(1)(h) requires that we take into account 'the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy'.

[229] We note that the requirement to take into account the likely impact of any exercise of modern award powers on 'the sustainability, performance and competitiveness *of the national economy*' (emphasis added) focuses on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers. We deal further with this consideration later in our decision when addressing the review of the particular modern awards before us.[22]

48. Though the *Penalty Rates Decision* was issued in the context of the 4 yearly review of modern awards, the observations made by the Commission about s.134(1) of the Act are equally apposite to a matter advanced outside the scope of the award review.

4.4 Section 138 of the Act

49. Finally, s.138 of the Act requires that a modern award can contain provisions only to the extent that they are necessary to achieve the modern awards objective:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

[22] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [162] – [229].

50. Section 138 imposes an additional requirement to those considered above and effectively limits the scope of the provisions that may be included in a modern award. Ultimately, a modern award cannot include a term if it is not *necessary* to achieve the modern awards objective.

51. In the *Penalty Rates Decision*, the Commission cited the aforementioned passage from *NRA v SDA* and said as follows:

> **[136]** The above observation – in particular the distinction between that which is 'necessary' and that which is merely desirable – is apposite to our consideration of s.138. Further, we agree with the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable. It seems to us that what is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[23]

4.5 Section 165(2) of the Act

52. Section 165 of the Act concerns when a determination varying an award comes into operation.

53. Per s.165(1) of the Act, a determination comes into operation on the day specified in the determination. Section 165(2) requires that the specified day must not be earlier than the day on which the determination is made unless:

    (a) The determination is made under s.160 of the Act; and

    (b) The Commission is satisfied that there are exceptional circumstances that justify specifying an earlier day.

[23] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [134] – [136].

54. In the *Horticulture Award Decision*, the Commission determined to grant the variations sought with retrospective effect from 1 January 2010 on the following bases: (our emphasis)

> (a) For the reasons set out above, the Horticulture Award was not intended to be limited to work carried on behind a physical 'farm gate'; and
>
> (b) The evidence demonstrates that many employers in the horticulture industry have been applying the Horticulture Award to work undertaken at washing, grading and packing facilities, regardless of whether any produce is grown at the site on which the facility is located. Absent retrospective operation of the variation, we are satisfied there will inevitably be disputation and likely litigation over whether producers have during the past almost eight years (subject to limitation periods) being making underpayments to workers in their packing facilities. Such disputation, litigation and potential back pay orders has the potential to have a significant impact on the viability and/or sustainability of a number of producers in the horticultural industry.[24]

55. In 2011 a variation was made by FWA to adult apprentice provisions in the *Plumbing and Fire Sprinklers Award 2010* with effect from 1 January 2010. In its decision, FWA explained its reasons as follows:

> **[87]** The variations approved in this decision will have effect from 1 January 2010. I am satisfied that there are exceptional circumstances for the retrospective operation of the variations in circumstances where they correct error and ambiguity and where employers in New South Wales would be exposed to potential non-compliance with s.7(3)(d) of the ATA in relation to the continuing engagement of trainee apprentices in that State since the making of the modern award.[25]

56. Similarly, in November 2010, FWA determined that the *Telecommunications Services Award 2010* should be varied to include the standard national training wage schedule effective 1 January 2010. In so determining, FWA accepted Ai Group's submissions about the basis for a retrospective variation: (our emphasis)

> **[4]** I accept the submission of Mr Smith for AiG that there are employers in the industry who have engaged trainees in accordance with the provisions of the *National Training Wage Award* in the period since 1 January 2010 and it is necessary to give the variation a retrospective operation to 1 January 2010 as a reasonable protection for those employers. However, I am concerned that the retrospective variation should not be used as a basis for any employer making a claim for restitution of an overpayment of wages where a 'trainee' was employed in a substantive classification under the Award and received wages and other wage related payments in excess of those due under the National Training Wage schedule in the period between 1 January 2010 and the date the variation determination was made. Such employees should not be obliged to repay

[24] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [170].

[25] *Re The Master Plumbers' and Mechanical Services Association of Australia* [2011] FWA 4781 at [87].

wages and other wage related payments solely because the present variation has a retrospective effect (of course, an employer should be free to pursue the recovery of overpayments arising for other reasons). I have included an additional paragraph 14.4(b) designed to achieve that outcome. None of the ‘parties’ that appeared raised any objection to the wording of clause 14.4(b).[26]

[26] *Re Australian Industry Group, The* [2010] FWA 9833 at [4].

5. THE RELEVANT PRE-MODERN AWARDS

57. According to an audit undertaken by Commission staff[27], some 49 federal and state pre-modern awards preceded the Nurses Award.

58. Of those 49 instruments, 10 did not contain substantive entitlements concerning work performed during overtime, weekends and public holidays.[28] The remaining 39 are set out at **Attachment A** to this submission. In respect of each award, we have set out whether, on a plain reading of its terms, it required:

    (a) The payment of the casual loading during ordinary hours of work performed on a weekend and if so, whether the weekend rates (however described) and the casual loading were to be calculated using the Cumulative Method or the Compounding Method.

    (b) The payment of the casual loading during work performed on a public holiday and if so, whether the public holiday rates (however described) and the casual loading were to be calculated using the Cumulative Method or Compounding Method.

    (c) The payment of the casual loading during overtime and if so, whether the overtime rate and the casual loading were to be calculated using the Cumulative Method or Compounding Method.

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

[28] Charitable Institutions Catholic Personal/Carer's Leave (State) Award; Health and Community Services Industry Sector - Minimum Wage Order - Victoria 1997; Nurses (ANF - Victorian Private Prisons) Interim Award 1998; Nurses (Country Recognised (Public) Hospitals) Superannuation Award; Nurses (Private Sector) Redundancy (State) Consolidated Award; Nurses (Private Sector) Superannuation Award; Nurses' (Private Sector) Training Wage (State) Award; Nurses (Royal District) Occupational Superannuation Award; Nurses Private Sector Superannuation (State) Award and Other Services (Catholic Personal/Carer's Leave) (State) Award.

59. As can be seen from the analysis:

(a) In relation to ordinary hours of work on a weekend:

(i) None of the awards clearly required the application of the Compounding Method.

(ii) Two-thirds of the awards (26) required the application of the Cumulative Method.

(iii) Seven awards either did not entitle casual employees to the casual loading for any work performed on weekends or did not entitle casual employees to weekend penalty rates (however described).

(b) In relation to work performed on a public holiday:

(i) Only one award (the *Nurses' (ANF - WA Private Hospitals and Nursing Homes) Award 1999*) clearly required the application of the Compounding Method.

(ii) Just over half of the awards (20) required the application of the Cumulative Method.

(iii) Thirteen of the awards either did not entitle casual employees to the casual loading for any work performed on public holidays or did not entitle casual employees to public holiday penalty rates (however described).

(c) In relation to work performed during overtime:

(i) None of the awards clearly required the application of the Compounding Method.

(ii) Almost 50% of the awards (23) required the application of the Cumulative Method.

(iii) 11 of the awards either did not entitle casual employees to the casual loading for any work performed during overtime or did not entitle casual employees to overtime rates (however described).

60. The analysis supports the proposition that the critical mass of pre-modern awards afforded an entitlement that was less beneficial than the Compounding Method of calculation would afford. The majority of awards required the Cumulative Method and indeed some awards did not provide for the payment of the casual loading or the relevant premium during overtime, weekends and / or public holidays as a result of which the question of whether the Cumulative Method or the Compounding Method applied does not arise.

61. We later come to the issue of industry practice amongst employers and employees covered by the Award. For present purposes we note that the analysis at Attachment A suggests that there was not a widespread industry practice prior to the operation of the Award of remunerating casual employees for work in the relevant circumstances in accordance with the Compounding Method, based on award derived obligations. Indeed, it is suggestive of there having been a very limited practice of remunerating such employees in that way.

6. THE PART 10A AWARD MODERNISATION PROCESS

62. The Nurses Award is a product of the 'Award Modernisation' process undertaken by the AIRC pursuant to Part 10A of the *Workplace Relations Act 1996* (**Award Modernisation Process**).

63. Submissions filed by various parties during that process reveal that the issue of how the casual loading would interact with overtime rates, weekend penalty rates and public holiday penalty rates in the Award was a live one.

64. At **Attachment B** to this submission, we have summarised the relevant submissions made by interested parties as well as statements, exposure drafts and decisions issued by the AIRC that considered the pertinent issues.

65. In our submission, the developments that unfolded during the Award Modernisation Process, as summarised at Attachment B, support the following contentions advanced by Ai Group:

    (a) Various submissions were made by employee and employer interests during the Award Modernisation Process about what the entitlement of casual employees should be for work performed during overtime, weekends and public holidays.

    (b) The submissions and draft awards filed variously proposed that:

        (i) The Cumulative Method should be implemented to calculate the rates payable to casual employees in relation to work performed during overtime, weekends and public holidays.

        (ii) The Compounding Method should be implemented to calculate the rates payable to casual employees in relation to work performed during overtime, weekends and public holidays.

        (iii) The casual loading should not be payable for ordinary hours of work performed on weekends or public holidays.

        (iv) The casual loading should not be payable during overtime.

(v) A casual employee should not be entitled to overtime rates.

(vi) The term ‘ordinary rate of pay’ should be replaced with ‘base rate of pay’.

(c) The AIRC decided that overtime rates in the Nurses Award were not to compound on the casual loading but rather that the Cumulative Method was to be utilised for calculating overtime rates for casual employees.

(d) Despite having made this decision, the AIRC did not include provisions in the Nurses Award that expressly stated its intended position.

(e) The AIRC did not expressly deal with the issues raised by interested parties about the calculation of the casual loading and relevant penalty rates in relation to work performed on a weekend or a public holiday; either in its decisions or in the Award as made.

7. PRIOR CONSIDERATION OF THE RELEVANT ISSUES

66. The issue of the proper interpretation of the relevant provisions of the Award concerning the rate payable to casual employees for work performed during overtime, weekends and public holidays has been the subject of prior consideration by the Commission.

67. In this section of our submission we outline of the relevant decisions of the Commission.

7.1 The Commission's Decision in the Two Year Review of Modern Awards

68. As part of the two year review of modern awards, various employer bodies pursued a variation to the Award which was intended to "clarify that the loadings for Saturday and Sunday work are in substitution for and not cumulative on the casual loading in clause 10"[29]. It was agreed between the employer parties and argued before the Commission that the provisions of the Award (which were in the same terms as the current provisions) were ambiguous and the proposed variation would give effect to the intended meaning of the provisions.[30]

69. In opposition**,** the Australian Nursing Federation (**ANF**) asserted that casual employees were entitled to the casual loading and the relevant weekend loadings using the Compounding Method of calculation. They argued that the proposed variations would alter the legal effect of the relevant provisions which were not, in its submission, ambiguous.[31]

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[29] *Re Aged Care Association Australia Ltd & Others* [2012] FWA 9420 at [31].

[30] *Re Aged Care Association Australia Ltd & Others* [2012] FWA 9420 at [31].

[31] ANF submission dated 7 September 2012 at paragraphs 19 – 29.

70. In his decision (***Two Year Review Decision***) Vice President Watson held that the relevant provisions were not ambiguous and that they operated so as to provide for the calculation of the weekend loadings and the casual loading using the Cumulative Method. The Vice President expressly dismissed the ANF's contention that the Compounding Method applied: (our emphasis)

> **[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.
>
> **[36]** Clause 10.4 however only refers to shift penalties. Shift penalties are provided for in clause 29.1. Clause 29.1(e) provides:
>
>> "**(e)** The shift penalties prescribed in this clause will not apply to shiftwork performed by an employee on Saturday, Sunday or public holiday where the extra payment prescribed by clause 26—Saturday and Sunday work and clause 32—Public holidays applies."
>
> **[37]** The loadings for Saturday and Sunday work in clause 26 are expressed to be applicable to "an employee" and calculated on the basis of their ordinary rate of pay. There is no exclusion of casual employees from the entitlement to receive weekend penalties. It is not disputed that casual employees are entitled to shift penalties for shiftwork and weekend penalty payments on weekends. The disagreement concerns the status of the casual loading on weekends. In my view there is no basis in the Award to exclude the application of the casual loading on weekends and therefore it continues to apply when a casual works on a weekend. The loading is not however applied to the loaded weekend rate. In my view the same method of calculation applies to weekends as in the case of shift allowances. Each penalty is calculated on the base rate. The resultant amounts are added together.[32]

[32] *Re Aged Care Association Australia Ltd & Others* [2012] FWA 9420 at [33] – [37]. .

7.2 The Commission's Decisions in *Domain Aged Care*

71. More recently, the interpretation of the relevant extant provisions of the Award was the subject of consideration in a decision[33] of Commissioner McKinnon in the context of an application by Domain Aged Care (Qld) Pty Ltd and DPG Services Pty Ltd trading as Opal Aged Care for approval of an enterprise agreement and a subsequent Full Bench decision[34] concerning an appeal of Commissioner McKinnon's decision (***Domain Aged Care***). Relevantly, the employer in those proceedings pressed the view that the current provisions do not require the application of the Compounding Method to the calculation of the relevant premiums and the casual loading. The position of the Australian Nursing and Midwifery Federation (**ANMF**) was that the Award currently operates in a manner consistent with the Compounding Method.

72. The reasoning and conclusion of Commissioner McKinnon at first instance as to the controversy was as follows:

> **[22]** There is a dispute between the parties about whether the 25% casual loading is paid on all hours worked under the relevant modern awards, including where other loadings or penalties are paid. Opal says the casual loading is only paid on ordinary hours of work while the ANMF says the casual loading compounds on other penalties including overtime (but not shift allowances). The ANMF says as a result, the Agreement is less beneficial than the relevant modern awards.
>
> **[23]** Clause 10.5 of the Agreement provides for the casual loading to be paid on ordinary hours. Shift, public holiday and weekend penalties are calculated on the ordinary rate of pay excluding casual loading and the casual loading is then added to the penalty rate of pay. The casual loading is not compounded by penalties in the Agreement.
>
> **[24]** Clause 10.4 of the Nurses Award is similar to the Agreement. Casual employees are paid an "hourly rate equal to 1/38th of the weekly rate appropriate" to their classification "plus a casual loading of 25%". Shift allowances are calculated on the ordinary rate of pay excluding casual loading, with the casual loading then added to the penalty rate of pay. Weekend and public holiday penalties are calculated on the loaded casual rate of pay, which is the "ordinary rate of pay" for casual employees (clauses 10.4, 26 and 32). Overtime penalties are also paid on the loaded casual rate of pay because the Award simply provides for "time and a half", "double time" and "double time and a half" as the case may be (clause 32) and does not exclude payment of casual loading on those rates.[35]

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[33] *Re Opal Aged Care (QLD) Enterprise Agreement 2017* [2018] FWCA 7388.

[34] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716.

[35] *Re Opal Aged Care (QLD) Enterprise Agreement 2017* [2018] FWCA 7388 at [22] – [24].

73. The Commissioner accepted that, under the Award, casual employees who work overtime, on a weekend or public holiday receive the applicable penalty calculated on the loaded casual rate of pay, as the ANMF contended.

74. The Full Bench reached the same conclusion and dealt the controversy as follows: (our emphasis)

> **[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.
>
> **[18]** Furthermore, clause 10.4(d) makes very clear that casual employees are paid shift allowances on the ordinary rate of pay 'excluding the casual loading', with the casual loading then added to the penalty rate of pay. No such exclusion is made in respect of other penalties. Opal contended that it would be wrong to apply the maximum *expressio unius est exclusio alterius* to this provision, and referred to the Full Bench decision in *AMWU v Berri Pty Limited* which warned against too ready an application of cannons of statutory interpretation to the task of construing an enterprise agreement. However in our view, it is not so much a case of applying an interpretative presumption but of reading clause 10.4 in an ordinary and logical way. It is already clear that the ordinary rate for casuals is the loaded rate. Clause 10.4(d) specifies a different arrangement in respect of shift allowances, because otherwise they would have been subject to the general position that penalties are applied to the loaded casual rate, and this was not intended to be the case of shift allowances. It is also significant that clause 10.4(d) speaks of 'the ordinary rate of pay excluding the casual loading', which also reaffirms that in the context of this clause, for casual employees, the casual loading is part of the ordinary rate; otherwise it would not make sense to speak of 'excluding' the casual loading from it.
>
> **[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.
>
> **[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.

[21] Opal also relied on the *Award Modernisation Decision* (AM 2008/1-12) in which the Full Bench said that 'as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.' A general statement such as this might be of some assistance in cases of ambiguity, but that is not the case in the present matter. The relevant provisions are in our view clear.

[22] We note that the penalty rates that apply to Saturday and Sunday work, and the triggers for overtime at time and a half and double time, are essentially the same under the Award and the Agreement. However, under the Agreement, most employees receive double time for overtime on a public holiday, whereas the Award provides for double time and a half. The Agreement provides that casual employees are paid overtime penalties in accordance with clause 26(a) of the Agreement, which are 'in substitution for and not cumulative upon the casual loading' (cl. 26.1(d)). Clause 24(d) of the Agreement provides that 'casual employees will be paid weekend penalties calculated on the ordinary rate of pay, excluding the casual loading. The casual loading component will then be added to the penalty rate.' In these respects, the Agreement states expressly what the Award does not say expressly or impliedly, namely that these penalties are not calculated on the loaded casual rate.

[23] The Commissioner's analysis of the Award provisions concerning casual rates of pay and penalty rates for weekend, public holidays and overtime was correct. It is then necessary to consider how the Commissioner applied that analysis to the circumstances of employees covered by the Agreement. As noted earlier, the Commissioner illustrated her interpretation of the Award by setting out its application to 'assistant in nursing, advanced'. She concluded that, although the overtime rate for this classification was less favourable than the Award, the employees were still better off under the Agreement than under the Award because of the higher 'ordinary' casual rate.[36]

75. In essence*:*

(a) The Full Bench ruled on the proper interpretation of the Award in relation to the entitlements it provides for amounts payable to a casual employee for work performed during overtime, weekends and public holidays.

(b) More specifically, it ruled that the Compounding Method is to be applied in the aforementioned circumstances.

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[36] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 at [17] – [23].

(c) The Commission’s decision turned on its plain reading of clauses 10.4(b), 10.4(d), 26, 28.1 and 32.1.

(d) The Full Bench did not find that the terms of the Award are ambiguous or uncertain.

(e) The Full Bench determined that the AIRC’s decision during the Award Modernisation Process regarding the intended operation of the overtime entitlement for casual employees could not be relied upon to displace the ‘plain meaning’ of the Award.

(f) The Commission observed that if an interested party considered that there was an error in the Award in this regard, an application pursuant to s.160 of the Act could be made to rectify that error.

8. THE PROPER INTERPRETATION OF THE RELEVANT AWARD PROVISIONS

76. Ai Group respectfully disagrees with the interpretation of the extant provisions pertaining to the calculation of overtime, weekend and public holiday penalties for casual employees adopted by the Commission in the context of *Domain Aged Care*, both at first instances and on appeal. In advancing this position we do not entirely deny the force of the reasoning adopted by the Full Bench. The current provisions are arguably ambiguous, uncertain and far from simple and easy to understand.

77. We below identify what we say to be the proper construction of the relevant provisions, address the pertinent principles of award interpretation and, against this backdrop, set out our reasoning in detail.

78. In simple terms, we contend that clause 10.4(b) creates an obligation to pay casual employees a minimum hourly rate of 1/38th of the weekly rate and a separate 25% casual loading. It is important to appreciate that the clause creates two distinct entitlements, as this has a bearing on the manner in which the provisions operate in conjunction with other clauses, including clause 26, clause 28.1 and clause 32.1. Both the minimum hourly rate and casual loading prescribed by clause 10.4(b) are payable in respect of all hours worked, save that the application of the hourly rate provisions is displaced when the Award otherwise provides for payment of a different hourly rate in more specific circumstances (i.e. in the context of overtime work or work on ordinary shifts on a public holiday).

79. In relation to work during ordinary hours on Saturday or Sunday, clause 26 requires payment of a loading which is calculated on an employee's 'ordinary rate of pay', which we contend is 1/38th of the applicable weekly rate specified by the Award. Employees still receive payment of both the hourly rate and casual loading prescribed by clause 10.4 on a weekend, in addition to the loading prescribed by clause 26.

80. In relation to public holidays, all employees are entitled to the penalty rate which is double the 'ordinary rate of pay' otherwise prescribed the Award, which we contend is calculated by reference to 1/38th of the applicable weekly rate specified by the Award. Casual employees are also entitled to the casual loading prescribed by clause 10.4(b).

81. In relation to overtime, employees receive the penalty rates prescribed by clause 32.1, which we contend is calculated by reference to 1/38th of the applicable weekly rate specified by the Award. Casual employees are also entitled to the casual loading prescribed by clause 10.4(b).

8.1 The Bases for Ai Group's Contended Construction

82. In the section below we set out the reasoning for the adoption of the above approach in detail.

83. By way of overview, we contend that this interpretation is available on a plain reading of the document and is also supported by a consideration of the text of the relevant clauses, the broader scheme of the Award and historical considerations including aspects of the Award Modernisation Process (including relevant decisions of the AIRC and the typical approach adopted in the drafting of awards in relation to the treatment of casual loadings and the calculation of penalty rates).

84. The key principles relevant to the construction of awards were summarised by Justice Katzman in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd*[37]:

> 27. The principles relating to the construction of awards are not in doubt.
>
> 28. Like any statute, the task of construing an award begins with the text: *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* (2006) 153 IR 426 ("*Wanneroo*") at [53] per French J. But the words of the award "must not be interpreted in a vacuum divorced from industrial realities" (*Wanneroo* at [57]). Regard must be had to the context and purpose of the clause (*Shop Distributive and Allied Employees' Association v Woolworths SA Pty Ltd* [2011] FCAFC 67 at [14]) and the intention of the parties who made the

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[37] *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638, at [27] to [30].

agreement (*Kucks v CSR* (1999) 66 IR 182 ("*Kucks*") at 184 per Madgwick J). The context includes the history (*Short v F W Hercus Pty Limited* (1993) 40 FCR 511 ("*Short*") at 517–518 per Burchett J). It also includes the legislative background against which the award was made and in which it was to operate: cf. *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at [30] per Gummow, Hayne and Heydon JJ.

29. An award is not a law but it has the force of a Commonwealth law. As it is neither a legislative instrument nor a rule of court but an instrument made by an authority, unless the contrary intention appears its interpretation is covered by the provisions of the *Acts Interpretation Act 1901* (Cth): *Wanneroo* at 438 [51] – [52]; *Acts Interpretation Act,* s 46. That means that a construction that would promote the purpose or object underlying the award is to be preferred to one that would not: *Acts Interpretation Act,* s 15AA.

30. A narrow or pedantic approach is to be eschewed, but "[a] court is not free to give effect to some anteriorly derived notion of what is fair or just regardless of what has been written in the award" (*Kucks* at 184*,* approved in *Ansett Australia Limited (subject to Deed of Company Arrangement) v Australian Licensed Aircraft Engineers' Association* [2003] FCAFC 209 at [8]). Cf. *Wanneroo* at [57] and *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) ALJR 1806; [2003] HCA 55 ("*ACX Ltd v DCT*") per Hayne J at [115].

85. Clause 10.4(a) of the Award deals with the nature of casual engagement under the Award and provides that a casual employee is engaged "on an hourly basis". There is accordingly a need for the Award to set an 'hourly rate' for casual employees.

86. Clause 10.4(b) deals with the amount a casual will be paid:

> 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%.

87. We accept that, on its face, clause 10.4(b) can be read two ways. Firstly, it could be read as requiring payment of an hourly rate for casual employees that must amount to a quantum that at least equates to the sum of 1/38th of the weekly rate for the applicable classification and a casual loading of 25%. This is the approach adopted by the Full Bench in *Domain Aged Care*. A ramification of adopting this interpretation is that the entitlement that flows from the provision is in the nature of an hourly rate that is simply required to be calculated in accordance with the methodology set out in the provision.

88. Alternatively, the clause can be read as prescribing an obligation to pay an hourly rate of pay and a separate casual loading of 25%. If the clause is to be read in this manner we respectfully contend that it would wrong to conclude, as the Full Bench has in *Domain Aged Care*, that the 'hourly rate' prescribed by the Award "includes the loading" or that there is a "loaded casual rate" prescribed the award.[38] To the extent that our proposed reading is available, it provides an alternate interpretation of the provision to that which was adopted by the Full Bench and one which, in part, undermines the validity of the Full Bench's conclusion that the 'ordinary rate of pay' as contemplated in the Award must necessarily include the casual loading.

89. Adopting this alternate approach, the hourly rate and loading required to be paid by clause 10.4(b) are separate entitlements which are distinct in nature. One is an hourly rate of pay and one is a loading. As already indicated, this has ramifications for how the provision operates in conjunction with other award clauses that are calculated by reference to hourly rates – a point to which we will return.

90. The use of the words 'hourly rate' and the composite term 'casual loading' in the text of the clause provides support for our alternate interpretation. That is, the text of clause 10.4(b) itself suggests that the two components of a casual employee's remuneration are intended to constitute different entitlements. If the 25% component of the casual employee's remuneration was not intended to be separate in nature to the hourly rate it would not be necessary or appropriate for the Award to describe it as a 'loading'.

91. The force of our proposed alternate approach to the interpretation of clause 10.4(b) is reinforced by broader contextual considerations associated with the proceedings giving rise to the development of the current provision. Relevantly, in the Award Modernisation Process, the Commission adopted an approach of

[38] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 at [17].

implementing a casual loading in Awards providing for casual employment. The quantum of the loading was standardised at 25%.

92. The AIRC described their intended approach to casual loadings in a Statement issued in September 2008:

> **[20]** We have adopted a general standard of 25 per cent for the casual loading in Statement drafts. In some areas transitional arrangements may be necessary to cushion the impact of the change.[39]

93. In a subsequent decision the Bench said as follows in relation to the general approach that would be taken in relation to the casual loading and payment of penalties to casuals: (emphasis added)

> **Types of employment**
>
> **[47]** In our statement of 12 September 2008 we indicated that we intended to adopt a standard loading of 25 per cent for casual employees. We received many representations in relation to that indication. For example, a number of employer representatives submitted that we should not adopt a standard casual loading or that if we did so 25 per cent was too high.
>
> **[48]** There is great variation in the casual loadings in NAPSAs and federal awards. In some cases the situation is complicated by the fact that casuals receive an annual leave payment, usually through an additional loading of one twelfth, although in most cases casuals do not receive annual leave payments. To take some examples, a casual loading of 25 per cent is common throughout the manufacturing industry, casual loadings in the retail industry vary from 15 per cent to 25 per cent. A loading of 25 per cent is very common, although not universal, throughout the hospitality industry. A number of pre-reform awards currently provide for a 33⅓ per cent loading and higher when the annual leave payment is taken into account. It seems to us to be desirable to standardise provisions to apply to casuals where it is practicable to do so to avoid claims in the future based on unjustified differences in loadings. We appreciate that there are casual employees in some industries in some States receiving loadings less than 25 per cent and we understand that employers of those employees will experience an increase in labour costs if the loading is standardised to 25 per cent. Equally, there will be reductions in labour costs where the loading, including the annual leave loading where it applies, exceeds 25 per cent currently.
>
> **[49]** In 2000 a Full Bench of this Commission considered the level of the casual loading in the *Metal, Engineering and Associated Industries Award 1998* (the Metal industry award). The Bench increased the casual loading in the award to 25 per cent. The decision contains full reasons for adopting a loading at that level. The same loading was later adopted by Full Benches in the pastoral industry. It has also been adopted in a number of other awards. Although the decisions in these cases were based on the circumstances of the industries concerned, we consider that the reasoning in that case

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[39] *Award Modernisation* [2008] AIRCFB 717 at [20].

is generally sound and that the 25 per cent loading is sufficiently common to qualify as a minimum standard.

> **[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.[40]

94. Paragraph [50] of the decision, extracted above, weighs in favour of approaching any controversy as to the proper approach of reading an award's provisions pertaining to the application of penalty rates to casuals on the basis that the Full Bench's intention was for both the penalty and the casual loading to be applied to base hourly rate, absent the context of the specific wording of the award or some indication in the decision making the award that clearly indicates otherwise. It also reinforces our contention that the Full Bench intended that casual employees receive a discrete casual loading.

95. We here note that the 'general rule' expressed above is consistent with the reasoning of Vice President Watson in the *Two Year Review Decision* concerning the Award. Vice President Watson was a member of Full Bench that made the Award.

96. Subsequently, in the context of the making of the Nurses Award, the Full Bench addressed a controversy that had arisen as to the appropriate rate of pay for a casual employee in the context of four proposed health sector awards (including the Nurses Award): (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.[41]

[40] *Award Modernisation* [2008] AIRCFB 1000at [47] – [50].

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

97. Is clear from the language of the above extracts and the approach of the AIRC to the setting of conditions for casual employees in the Award Modernisation Process generally, that the casual loading ought be considered a discrete entitlement, capable of being applied separately to the hourly rate prescribed in the Award when calculating a penalty. The loading was not merely a part of a casual employee's hourly rate.

98. It also is clear from this passage that the overtime entitlements were to be calculated based on a cumulative method. The decision did not indicate any intent to deviate from either this approach or the general rule described above when it came to calculating other penalties or premiums under the Award.

99. We note that as an outcome of the 4 yearly review modern awards, most awards will now include 'minimum hourly rates of pay' and 'ordinary hourly rates of pay' (which will *not* include the casual loading, except in the minority of awards where the loading constitutes an all-purpose amount). Both rates have generally been calculated by dividing the weekly rates by 38. Relevant penalties will typically be referrable to the 'minimum hourly rate' or the 'ordinary hourly rate'. This is reflective of the typical approach adopted in modern awards of not calculating penalties on award rates that include a casual loading.

100. It should not be assumed that the phrase 'ordinary rate of pay' as used in the Award includes the casual loading so as to cause relevant premiums to be calculated on a compounding basis. This is out of step with the approach that was generally intended and taken in the Part 10A Award Modernisation Process[42] and which has been typically maintained in the context of the 4 Yearly Review of Awards.

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

8.2 Other Relevant Provisions of the Award

101. The force of our alternate interpretation of clause 10.4(b) is reinforced by a consideration of the terms of the Award more broadly.

Clause 10.4(a) of the Award

102. As already identified, clause 10.4(a) defines a casual as engaged "on an hourly basis." However, the minimum rates provisions only prescribe weekly rates.[43] Consequently, the first part of clause 10.4(b) is necessary to establish a minimum hourly rate for casual employees.

Schedule A to the Award

103. Our contentions that the Award is intended to provide a discrete casual loading rather than a "loaded casual rate" is further strengthened when regard is had to the existence of transitional arrangements pertaining to the casual loading in the Award when it was first made.[44]

104. In essence, the transitional arrangements provided for the phased implementation of the 25% casual loading during the period up until 1 July 2014 in circumstances where the quantum of an equivalent loading in relevant predecessor instruments was either higher or lower than the 25% loading contained in the Award, or where there was no applicable casual loading in those instruments.

105. The fundamental premise upon which such an approach operated appears to have been that the Award prescribed an entitlement to a casual loading rather than an hourly rate or "loaded casual rate" as it was described by the Full Bench in *Domain Aged Care*.[45] The transitional arrangements required a mathematical comparison between the respective loadings – not rates that included the loading.

[43] Clause 14 of the Award.

[44] Schedule A to the Award.

[45] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 at [17].

106. The language adopted in the schedule reflects the Full Bench’s assumption that casuals received a ‘casual loading’ both under the Award and the relevant predecessor transitional instrument. By way of example, an extract from the transitional arrangements contained in the Award when it was first made is set out below: (emphasis added)

1.1 General

1.1.1 The provisions of this schedule deal with minimum obligations only.

1.1.2 The provisions of this schedule are to be applied when there is a difference, in money or percentage terms, between a provision in a transitional minimum wage instrument (including the transitional default casual loading) or an award-based transitional instrument on the one hand and an equivalent provision in a modern award on the other.

…

1**.4 Loadings and penalty rates**

For the purposes of this schedule loading or penalty means a:

- casual or part-time loading;
- Saturday, Sunday, public holiday, evening or other penalty;
- shift allowance/penalty.

A.5 Loadings and penalty rates – existing loading or penalty rate lower

A.5.1 The following transitional arrangements apply to an employer which, immediately prior to 1 January 2010:

(a) was obliged,

(b) but for the operation of an agreement-based transitional instrument or an enterprise agreement would have been obliged, or

(c) if it had been an employer in the industry or of the occupations covered by this award would have been obliged

by the terms of a transitional minimum wage instrument or an award-based transitional instrument to pay a particular loading or penalty at a lower rate than the equivalent loading or penalty in this award for any classification of employee.

A.5.2 Prior to the first full pay period on or after 1 July 2010 the employer must pay no less than the loading or penalty in the relevant transitional minimum wage instrument or award-based transitional instrument for the classification concerned.

A.5.3 The difference between the loading or penalty in this award and the rate in clause A.5.2 is referred to as the transitional percentage.

A.5.4 From the following dates the employer must pay no less than the loading or penalty in this award minus the specified proportion of the transitional percentage:

First full pay period on or after	
1 July 2010	80%
1 July 2011	60%
1 July 2012	40%
1 July 2013	20%

A.5.5 These provisions cease to operate from the beginning of the first full pay period on or after 1 July 2014.

A.6 Loadings and penalty rates – existing loading or penalty rate higher

…

107. For completeness, it should also be acknowledged that the transitional arrangements applied to not only the casual loading but also to Saturday, Sunday and public holiday penalty rates and shift allowances or penalties.

108. The transitional arrangements clearly operate on the basis that the casual loading is separate to the minimum wages payable to a casual employee. This undermines any contention that the Award was intended to provide a loaded hourly rate for casual employees and, by extension, that the various references to the ordinary rate of pay in the Award included the casual loading.

Clause 10.4(d) and References to the 'Ordinary Rate of Pay'

109. This then brings us to what is the intended meaning of the phrase 'ordinary rate of pay' as utilised in the Award, related issues concerning the proper interpretation of clause 10.4(d) and the extent to which this provision can be viewed as colouring the interpretation of the phrase.

110. It must firstly be observed that clause 10.4 does not expressly identify the 'ordinary rate of pay' for a casual. Indeed, no provision expressly provides that the term 'ordinary rate of pay' for a casual employee includes the casual loading.

111. Nor does the Award define what constitutes the ‘ordinary rate of pay’ for any type of employee. A reader is accordingly left to glean its meaning from other provisions.

112. We contend that an employee’s ‘ordinary rate of pay’ is simply the rate of pay that the employee receives pursuant to the instrument for working ordinary hours to the exclusion of any penalties, loadings or allowances that may also be paid in respect of those hours of work. For casual and part-time employees, the ‘ordinary rate of pay’ is calculated by dividing the weekly rate by 38.[46] There is no specific provision that identifies how to calculate the ‘ordinary rate of pay’ for full-time employees on an hourly basis, but, adopting a consistent approach in the context of all types of employment we contend that it would simply be determined by dividing the minimum weekly rates in the Award by 38.

113. Clause 10.4(d) was central to the Full Bench’s conclusion in *Domain Aged Care* that the casual loading is part of a casual employee’s ordinary rate of pay.[47]

114. We respectfully suggest that the Full Bench’s conclusion overlooks the alternate interpretation of clause 10.4(b) and of what constitutes an employee’s ‘ordinary rate of pay’ outlined above and as such the Commission’s conclusion that “clause 10.4(d) specifies a different arrangement in respect of shift allowances, because otherwise they would have been subject to the general proposition that penalties are applied to the loaded rate”[48] is not sound.

115. Nonetheless, we accept that clause 10.4(d) *could* be read in such a way that *suggests* that a casual employee’s ‘ordinary rate of pay’ includes the casual loading, particularly given the use of the word ‘excluding’. In this respect we contend that the provision contributes to the ambiguity and uncertainty in the Award’s articulation of the entitlements of casual employees. There is an arguable deficiency in the drafting of clause 10.4(d); it lacks sufficient clarity.

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[46] Clauses 10.4(b) and 10.3(d) of the Award.

[47] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 at [18].

[48] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 at [18].

116. Regardless, the Commission should not extrapolate from the wording of clause 10.4(d) a determinative assumption about the intended meaning of the term 'ordinary rate of pay' as used elsewhere in the Award.

117. Moreover, we respectfully suggest that the Full Bench's reasoning that "it would make no sense to speak of 'excluding' the casual loading" if it were not part of the ordinary hourly rate of pay" adopts an unduly narrow reading of the term 'excluding' and a similarly narrow presumption as to the intent or purpose of the provision. It also assumes a degree of rigor in the drafting of the Award that was not consistent with the nature of the proceedings associated with the making of the modern awards.

118. Clause 10.4(d) can be viewed as an attempt to simply articulate the manner in which shift penalties will be calculated in the context of casual employees, rather than as constituting a mechanism by which the casual loading is removed from the 'ordinary rate of pay'. In this regard we reiterate that no provision of the Award expressly provides that the 'ordinary rate of pay' includes the casual loading.

119. Put another way, clause 10.4(d) can just as easily be read as an articulation of the fact that the 'ordinary rate of pay' does not include the casual loading, rather than as a provision that serves to actually remove the entitlement to the casual loading from the 'ordinary rate of pay'.

120. The purpose of the provision is to define how shift allowances are calculated in the context of casual employment, not to define the term 'ordinary rate of pay' in the context of casual employment for all purposes under the Award, and as such care should be taken to not read too much into an arguably imprecise and ambiguous use of the word 'excluding'.

121. The Full Bench's reasoning in *Domain Aged Care* reflects an assumption about the level of rigor in the drafting of award clauses that does not account for the nature of the proceedings leading to the making of the awards. The Award Modernisation Process entailed effectively distilling thousands of awards down to just 122 modern awards in an extremely short timeframe. Without criticism of those involved, we make what we assume to be an uncontentious observation

that the drafting of awards was at times far from ideal and has been the catalyst for extensive proceedings and subsequent variations to awards in the context of the two year review of modern awards and the 4 yearly review of modern awards.

122. The scope of the Award Modernisation Process was outlined in a decision of the Commission in the context of 4 yearly review of the *Stevedoring Industry Award 2010*:

> **[72]** The context of making the original modern Stevedoring Award is relevant. When making the award in 2009, the scope to challenge the merit of existing award provisions was severely limited. I have observed in other proceedings that award modernisation was a process conducted by the Australian Industrial Relations Commission (AIRC) under the terms of Part 10A of the *Workplace Relations Act 1996* (the WR Act). Pursuant to that part of the WR Act, the AIRC was required to perform its functions having regard to the factors in s.576B and in accordance with an award modernisation request made by the Minister under s.576C (the Ministerial Request). The s.576B factors included the desirability of reducing the number of awards operating in the workplace relations system. The original Ministerial Request was issued on 28 March 2008 and was varied on eight occasions during the process. The Ministerial Request contained additional objects of the process, including that the creation of modern awards was not intended to disadvantage employees or increase costs for employers. The award modernisation request required the award modernisation process to be completed by 31 December 2009.
>
> **[73]** As a result of the award modernisation process, approximately 1,560 federal and state awards were reviewed over a period of about 18 months and replaced by 122 modern awards by the award modernisation Full Bench of which I was a member. A further 199 applications to vary modern awards were made during this period. It is clear from any review of the process that the objects of rationalising the number of awards and attempting to balance the seemingly inconsistent objects of not disadvantaging employees and not leading to increased costs for employers attracted the vast majority of attention from the parties and the AIRC. It was clearly not practical during the award modernisation process to conduct a comprehensive review of the industrial merit of the terms of the awards. Matters that were not put in issue by the parties were not subject to a merit determination in the conventional sense. Rather, terms were adopted from predecessor awards that minimised adverse changes to employees and employers. As the Full Bench explained on a number of occasions, the general approach was as follows:
>
>> **"[3]** In general terms we have considered the applications in line with our general approach in establishing the terms of modern awards. We have had particular regard to the terms of existing instruments. Where there is significant disparity in those terms and conditions we have attached weight to the critical mass of provisions and terms which are clearly supported by arbitrated decisions and industrial merit. We have considered the impact of the provisions based on the information provided by the parties as to current practices."[49]

[49] *Re Stevedoring Industry Award 2010* [2015] FWCFB 1729 at [72] – [73].

123. Having regard to the nature of the Award Modernisation Proceedings leading to the making of the Award and the absence of any specific reasoning in the relevant decisions addressing the intention underpinning the approach adopted to the drafting of clause 10.4(d), Ai Group respectfully contends the Full Bench in *Domain Aged Care* placed an unwarranted amount of weight on this provision as guiding its interpretation of the relevant provisions.

Clause 26.1 of the Award

124. Clause 26.1 deals with payment for ordinary hours of work on a weekend. It requires payment of casual loading of "50% of the employee's ordinary rate of pay for the hours worked" during the weekend.

125. The provision can be read as requiring that the 50% loading be applied to the 'hourly rate' referred to in clause 10.4(b) and not the additional casual loading also referred to in that same provision. In support of this we point to the common use of term 'rate' in both provisions.

126. We contend that the term 'rate', as it is used in clause 26 of the Award, does not encompass any additional allowances or loadings that may be payable. Nothing in clause 26.1 indicates that it is intended, in the context of casual employees, to incorporate a separate loading (or indeed any other allowance) or to apply differently in the context of casual employees so as to deliver them a higher loading for working on a Saturday or Sunday than would attach to other employees.

127. Adopting this approach, an employee working on a weekend would receive the hourly rate (i.e. 1/38th of the minimum weekly rate), a casual loading and a separate loading for working on a Saturday or Sunday in accordance with the Cumulative Method of calculation. Accordingly, all employees would, pursuant to clause 26, receive the same payment for reason of working on a weekend.

128. We note in relation to clause 26 that the description of the payment prescribed by the clause as "a loading" is significant. It enables the element of clause 10.4(b) that prescribes an hourly rate for a casual employee to continue to operate. This reinforces our contention that there is an intended difference between an entitlement that is described as a 'rate' and an entitlement that is described as a 'loading', both in the context of the manner in which those terms are used in clause 26.1 and the Award more broadly.

Clause 32.1 of the Award

129. Clause 32.1 deals with payment for working ordinary shifts on public holidays. It requires that all work done by an employee during their 'ordinary shift' on a public holiday will be paid at double time of their ordinary rate of pay.

130. The provision differs from the approach adopted in clause 26 in that it sets a rate of pay for work, rather than a separate loading.

131. In our submission, the public holiday provisions require the calculation of the prescribed rate by reference to the hourly rate to which an employee would otherwise be entitled to under the Award for ordinary hours of work and the payment of those penalty rates on an hourly basis in substitution for the hourly rates that would otherwise be applicable in the specific circumstances of the performance of work on such days (for all types of employees). This is consistent with the application of the *generalia specialibus non derogant* principle of interpretation, in that, for casual employees, the specific provisions of clause 32.1 setting rates for work on public holidays should be read as prevailing over other more general approach in clause 10.4 of setting a minimum hourly rate for casuals of general application.

132. We do not however contend that penalty rates prevail over the casual loading. Instead, the casual loading (not being part of the employee's hourly rate) nonetheless remains payable pursuant to clause 10.4(b) for work performed on those days.

133. Adopting this proposed interpretation, casual employees receive the same rate of pay as other employees for work performed on public holidays, plus the casual loading contemplated by clause 10.4(b) (i.e. the Cumulative Method of calculation).

Clause 28.1 of the Award

134. The Award requires a similar approach be adopted in the context of payment for overtime work performed by a casual to that which applies in relation to work on a public holiday. Clause 28.1 deals with "overtime penalty rates". The hourly rates prescribed by the provision should be calculated by reference to, and applied in place of, the hourly rate that would otherwise apply to an employee under the Award. That is, an employee should be paid at the rate of time and half or double the hourly rate otherwise payable for ordinary hours of work.

135. Consistent with the approach proposed in relation to weekend and public holiday penalties, we contend that although clause 28.1 sets the hourly rate that applies during overtime for casuals, and indeed all employees, the casual loading continues to be payable during overtime; noting that clause 10.4(b) does not limit the obligation to pay the casual loading to work performed during ordinary hours.

136. This interpretation is consistent with the intended approach to the calculation of overtime rates for casual employees, as identified in the reasoning of the AIRC's decision dealing with the making of the Nurses Award.[50]

137. The interpretation we propose also results in a consistency of approach to calculating entitlements for work on weekends, public holidays, overtime and payments for performing shiftwork, save to the extent that in some instances the premium for working at such times will be a penalty rate while in others it will a separate loading. A construction of the Award that requires different treatment of the casual loading in the context of the separate contentious entitlements would be anomalous and ought not be readily accepted, especially in circumstances where the relevant AIRC decisions during the Award Modernisation Process do

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

not reveal any intention to adopt such an approach or to depart from the ‘general rule’ in relation to such matters.

138. Central to the reasoning of the Full Bench appears to be that the references to ‘double time’ and ‘time and a half’ in clause 28.1 should be read in the context of clause 10.4 providing that the ‘time earnings’ for a casual employee includes the casual loading. In response we submit that clause 10.4 does not refer to or define the ‘time earnings’ of a casual employee. For the reasons articulated above, it should be interpreted as setting an hourly rate and a separate casual loading.

139. The Full Bench also places some weight on clause 28.1(c) dealing with the interaction between overtime rates and shift and weekend premiums but not excluding the casual loading.[51] Adopting the interpretation of clause 10.4(d) that we have advanced, the approach in clause 28.1(c) is entirely understandable as the casual loading remains payable during overtime in addition to the overtime rates. This undermines the force of the Full Bench’s reasoning in relation to the significance of clause 28.1(c).

140. At the very least, the alternate reading of the Award provisions relevant to the calculation of overtime rates justifies departing from the Full Bench’s view that the provisions are “clear”[52] and as such a reading which is consistent with the Award Modernisation decisions discussed above should be adopted.

8.3 Summary of conclusions as to the proper interpretation of the Award

141. We have identified how the relevant award can, and should, be read as requiring the application of relevant premiums and the casual loading using the Cumulative Method.

142. The crux of our approach is that clause 10.4(b) creates an entitlement to an hourly rate of pay and a casual loading and that, in the context of casual employment, references to the ‘ordinary rate pay’ operate so as to capture the

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[51] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 at [19].

[52] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716 at [20] and [21].

hourly rate of pay prescribed by clause 10.4(b) and not the casual loading, thereby delivering a consistent entitlement to premiums for overtime work and ordinary hours of work on Saturdays, Sundays and public holidays to all employees.

143. The text of the relevant clauses, the overall scheme of the Award's treatment of rates and loadings, the AIRC's reasoning in decisions associated with the making of the Award and the normal approach typically adopted to such matters in other awards all support this approach.

9. AMBIGUITY AND UNCERTAINTY ARISING FROM THE AWARD

144. Ai Group's primary contention is that the terms of the Award should be interpreted in accordance with the construction urged at section 8 of this submission. We understand that the ANMF disputes this contention and will advance a contrary interpretation.

145. If such a contention is not accepted, we argue, in the alternate, that the extant terms of the Award give rise to an ambiguity or uncertainty which ought to be removed pursuant to s.160 of the Act.

9.1 Is the Award Ambiguous or Uncertain?

146. In our submission, the Award is ambiguous and / or uncertain in respect of the approach that is to be adopted to the calculation of casual employees' entitlements to remuneration for work during overtime, weekends and public holidays.

147. The existence of an ambiguity or uncertainty is established by the divergent interpretations adopted in the *Two Year Review Decision* and by that adopted in *Domain Aged Care*, as well as the decision of Commissioner McKinnon that was there being appealed. It is further established by the interpretation that we have advanced at section 8 of this submission.

148. The ambiguity or uncertainty arises from the combined effect of the various aspects of clauses 10.4, 26, 28.1 and 32.1 operate and the language used in those provisions. More specifically, we contend that the ambiguity and uncertainty is in part a product of the following five major deficiencies in the provisions.

149. *First*, the use of the vague words 'ordinary rate of pay' as the identification of the rate upon which Saturday, Sunday and public holiday premiums are to be calculated and the absence of a clear articulation as to how to identify this rate or, if the words are intended to constitute a composite term, any definition of the term.

150. *Second*, an arguable lack of clarity as to whether clause 10.4(b) operates so as to merely establish an hourly rate, the quantum of which is calculated in accordance with the provision, or whether it establishes separate entitlements to an hourly rate and a casual loading.

151. *Third*, the wording of clause 10.4(d) and in particular the multiple meanings that can be ascribed to the word ‘excluding’ in the context of that clause.

152. *Fourth*, the incompatibility of the assumption reflected in clause 10.4(d) that an employee’s ‘ordinary rate of pay’ includes a casual loading with the absence of any provision establishing this entitlement.

153. *Fifth*, the absence of any explanation as to how to apply the words ‘double time’ and ‘time and half’ in clause 28.1 are to be applied in order to calculate the entitlement, other than the specification in clause 28.1(c) that they are paid in substitution of and not in addition to the shift and weekend premiums prescribed by clauses 29 and 26 of the Award, respectively. In respect of this issue we reiterate that clause 28.1 simply does not provide any indication as to whether the overtime rates are to be calculated on the casual loading or on a rate that does not include the casual loading. Both interpretations are arguable, on the face of the document. Clause 28.1(c) merely deals with the application of one penalty to the exclusion of another; it is silent as to the amount to which the penalty should be applied.

154. Having regard to the above considerations, an objective assessment of the terms of the Award inevitably leads to the conclusion that the current terms of the Award give rise ambiguity and / or uncertainty.

155. We here note and rely upon the observation in *Tenix* that the “Commission will generally err on the side of finding an ambiguity or uncertainty where there are rival contentions advanced *and* an arguable case is made out for more than one contention.”[53]

[53] *Re Tenix Defence Systems Pty Limited Certified Agreement 2001-2004* (PR917548) at [31].

156. Our contention that the relevant provisions are susceptible to more than one meaning, or at that they are at the very least uncertain, is reinforced by the extent to which the FWO and major industrial parties have adopted contrasting and indeed evolving interpretations of the provisions.

(a) The FWO's 'pay guide' published on 24 January 2019 (the last iteration to be published prior to the decision of *Domain Aged Care*) did not reflect a requirement to compound the relevant premiums on the casual loading.[54] However, a subsequent iteration of the same pay guide published on 1 August 2019 (with effect from 17 April 2019) contained higher rates for casual employees in respect of overtime, weekend and public holiday work, which had been calculated using the Compounding Method.[55]

(b) Major industrial parties (including the ANMF) during the early stages of the 4 yearly review of modern awards had agreed that the Cumulative Method reflected the proper interpretation of the Award in relation to the relevant entitlements and that the 'exposure draft' reflecting the Commission's redrafting of the Award should reflect this. The ANMF's position in the context of those proceeding changed only after *Domain Aged Care* was handed down.[56]

157. The provisions can also be said to be uncertain in the sense contemplated in *Re Public Service (Non-Executive Staff – Victoria) (Section 170MX) Award 2000*[57]*.* That is, for the reasons articulated above, the relevant provisions suffer from "not being definitely known or perfectly clear, doubtfulness or vagueness".

158. The Full Bench can in our submission be satisfied of the existence of the jurisdictional fact that enlivens the potential for the Commission to exercise its power under s.160.

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[54] Fair Work Ombudsman, *Pay Guide – Nurses Award 2010* (24 January 2019).

[55] Fair Work Ombudsman, *Pay Guide – Nurses Award 2010* (1 August 2019).

[56] Correspondence from the ANMF to the His Honour, Justice Ross dated 13 June 2019 in relation to AM2019/1 and AM2014/207.

[57] *Re Public Service (Non-Executive Staff – Victoria) (Section 170MX) Award 2000* (Print T3721).

9.2 Should the Commission Exercise its Discretion to Vary the Award?

159. In our submission, the Commission should exercise its discretion to vary the Award as proposed by Ai Group. The Proposed Variations would remove the current ambiguity or uncertainty that has been the subject of much controversy.

160. Furthermore, the proposed variations and proposed provisions are necessary in the sense contemplated by ss.157 and 138 of the Act respectively. We refer to and rely upon our submissions at section 12 in this regard. In particular, we submit that:

    (a) There is no justification for requiring the payment of multiples of the casual loading during overtime, weekends or public holidays. Such an outcome is unfair and cannot be said to form a *necessary* part of the minimum safety net.

    (b) If the ambiguity or uncertainty is remedied in the terms proposed, the Award will be simple and easy to understand.

    (c) The grant of the Application will have a positive impact on business.

10. ERRORS IN THE AWARD

161. In our submission, the Award contains errors in relation to the rate payable to casual employees for the performance of overtime and the Commission should exercise its discretion to correct those errors by varying clauses 10.4(b) and 10.4(d) as proposed by Ai Group; as well as inserting the proposed new clause 28.1(e). Combined, the proposed provisions would result in the Award expressly requiring that for the performance of overtime, a casual employee is entitled to the casual loading and overtime rates prescribed by clause 28.1(a), consistent with the Cumulative Method.

10.1 Does the Award contain Errors?

162. As identified in section 6 of our submission; during the Award Modernisation Process, the AIRC expressly stated its intention for how the Award was to be applied to casual employees in relation to the performance of overtime. Specifically, having considered submissions made by interested parties about this very issue, the Full Bench ruled as follows: (our emphasis)

> **[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.[58]

163. As can be seen from the above passage, the AIRC expressly determined that the Cumulative Method of calculation was to apply in respect of overtime rates and the casual loading. This was consistent with the 'general approach' that the AIRC had determined would apply at an earlier stage in the process: (our emphasis)

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

> **[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.[59]

164. In our view, the extant terms of the Award reflect the AIRC's intention. Our submissions about the proper interpretation of the Award in this regard are set out at section 8 of this submission.

165. However, as earlier outlined, the Award has been found to require the contrary in *Domain Aged Care*. In that decision, the Commission determined that in fact the Award requires the application of the Compounding Method to the calculation of overtime rates and the casual loading.[60]

166. Whilst the Commission acknowledged the AIRC's statement of intent, it found that it could not properly have regard to those decisions in the context of the task that was before it, which was to rule on the proper interpretation of the relevant provisions of the Award. The Full Bench nevertheless acknowledged that to the extent that the extant provisions are erroneous, an application could be made pursuant to s.160 of the Act to correct the error(s): (footnotes removed, our emphasis)

> **[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.

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

[60] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1916 at [19].

> **[21]** Opal also relied on the *Award Modernisation Decision* (AM 2008/1-12) in which the Full Bench said that 'as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate.' A general statement such as this might be of some assistance in cases of ambiguity, but that is not the case in the present matter. The relevant provisions are in our view clear.[61]

167. The Application is of the very nature contemplated by the Commission in the aforementioned decision.

168. To the extent that the Award is read to require the Compounding Method for calculating overtime rates for casual employees, the relevant provisions are erroneous in the sense contemplated in the *Vehicle Award Decision*, cited at section 4 of this submission. Specifically, having regard to the AIRC's decisions, it is clear that a mistake occurred; in that a provision or provisions of the Award were made in a form that do not reflect the AIRC's intention.[62]

169. Accordingly, in our submission, the Award contains errors of the nature contemplated by s.160 of the Act and the Commission's discretion to vary the Award is enlivened.

10.2 Should the Commission Exercise its Discretion to Vary the Award?

170. In our submission, the Commission should exercise its discretion to vary the Award as proposed by Ai Group. The relevant variations proposed would ensure that the Award reflects the AIRC's intention as to how overtime rates for casuals are to be calculated.

171. The proposed variations and proposed provisions are necessary in the sense contemplated by ss.157 and 138 of the Act respectively. We refer to and rely upon our submissions at section 12 in this regard. In particular, we submit that:

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[61] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1916 at [20] – [21].

[62] *4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418 at [73].

(a) It is unfair that employers are required to pay or may be required to pay casual employees at a higher rate than that which was intended by the AIRC by virtue of the fact that its intention was not made express in the terms of the Award.

(b) There is no justification for requiring the payment of multiples of the casual loading during overtime, weekends or public holidays. Such an outcome is unfair and cannot be said to form a *necessary* part of the minimum safety net.

(c) If the error is remedied in the terms proposed, the Award will be simple and easy to understand.

(d) The grant of the Application is consistent with the need to ensure a stable system.

(e) The grant of the Application will have a positive impact on business.

11. RETROSPECTIVE VARIATIONS TO THE AWARD

172. As identified earlier, the Commission may issue a determination varying an award with retrospective effect in accordance with s.165(2) of the Act. Ai Group submits that the Commission should exercise the discretion afforded to it by that provision to vary the Award in the manner proposed with effect from 1 January 2010; that is, the date upon which the Award commenced operation.

173. A retrospective variation to the Award may be granted by the Commission only if ss.165(2)(a) and 165(2)(b) are satisfied.

174. The Application is advanced primarily on the basis that the Commission should grant the Proposed Variations pursuant to s.160 of the Act. If the Commission accepts Ai Group's submissions in this regard, the requirement at s.165(2)(a) is clearly satisfied.

175. In addition, the Commission should in our submission be satisfied that there are exceptional circumstances as required by s.165(2)(b) that warrant the variation commencing retrospectively from 1 January 2010 and that it should exercise its discretion to order so.

176. In particular:

    (a) As set out in section 10 of this submission, the Award contains errors to the extent that it has been found to require the calculation of overtime rates for casual employees in a manner that is inconsistent with the clearly expressed intent of the AIRC when the Award was made. Consistent with the approach adopted by a Full Bench of the Commission in the recent *Horticulture Award Decision*,[63] a retrospective variation should be made to ensure that the Award has had the intended effect since the Award commenced operation.

[63] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [170](a).

(b) Many employers covered by the Nurses Award have been applying the relevant provisions on the basis of the Cumulative Method rather than the Compounding Method. We do not anticipate that this proposition is contentious or disputed by other interested parties. Nor is this proposition surprising given the position under the vast majority of pre-modern awards, the views previously expressed by the Commission in the *Two Year Review Decision* and the FWO's advice. The grant of a retrospective variation would ensure that the Award reflects the longstanding industry practice, consistent with the approach adopted in the *Horticulture Award Decision*[64].

(c) The Proposed Variations would correct errors and address ambiguities which may otherwise leave employers "exposed to potential non-compliance … since the making of the [Award]"[65]. Absent retrospective operation of the variation, there will likely be disputation and litigation in relation to the relevant ambiguities and uncertainties[66]. Such disputation and litigation could include claims for backpay[67], applications to Courts of competent jurisdiction seeking declaratory relief, concerns as to whether enterprise agreements pass the 'better off overall' test[68] (**BOOT**) when compared against the Award and disputation concerning the proper interpretation of enterprise agreements that use similar language. Such disputation and litigation is not in the public interest, may compromise the viability of businesses (especially small businesses), cause disharmony at the enterprise level and / or result in significant uncertainty for employers and employees.

[64] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [170](b).

[65] *Re The Master Plumbers' and Mechanical Services Association of Australia* [2011] FWA 4781 at [87].

[66] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [170](b).

[67] *Re The Master Plumbers' and Mechanical Services Association of Australia* [2011] FWA 4781 at [87] and *Re Australian Industry Group, The* [2010] FWA 9833 at [4].

[68] Section 193 of the Act.

177. In our submission, the circumstances pertaining to the Proposed Variations are exceptional in the relevant sense and necessitate a retrospective date of operation from 1 January 2010.

12. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

178. The modern awards objective, as identified at s.134(1) of the Act is relevant to the issue of whether the Commission should vary the Award in the manner proposed pursuant to s.160 of the Act.

179. Further, Ai Group also submits that if the Commission is not satisfied that it has power to vary the Award pursuant to s.160, it can and should vary the Award pursuant to s.157 of the Act. This is because the Proposed Variations are necessary to ensure that the Award achieves the modern awards objective.

180. Section 138 of the Act would also be satisfied if the Award was varied as sought. That is, the Award would include only those provisions that are necessary to ensure that the Award achieves the modern awards objective.

181. Central to these arguments is the proposition that there is simply no basis or justification for the payment of multiples of the casual loading for work performed during overtime, weekends or public holidays. Any disutility for performing work at those times is compensated for by the specific premiums payable for such work. A requirement that the casual loading be multiplied up by to two and a half times is illogical, without merit and cannot be said to form a *necessary* part of the safety net.

182. In this section of our submission, we deal with each of the mandatory considerations identified at s.134(1) of the Act. In so doing we note that consistent with the Commission's prior consideration of those provisions:

    (a) No particular primacy is attached to any of the considerations[69];

    (b) Not all of the considerations will necessarily be relevant[70]; and

    (c) There is a degree of tension between some of the considerations. The Commission's task is, respectfully, to balance the various considerations[71].

[69] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [115].
[70] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [115].
[71] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [163].

A Fair Safety Net

183. Fairness is to be assessed from the perspective of employers and employees.[72]

184. The provisions proposed are fair because:

(a) They remove existing uncertainties and ambiguities as to the entitlement of casual employees when working overtime, on weekends and public holidays.

(b) They would ensure that employers are not exposed to claims or litigation by or on behalf of employees for payment in accordance with the Compounding Method.

(c) Moreover, they would rectify the extant uncertainties and ambiguities in a fair way. There is no justification for requiring that employers pay casual employees a casual loading that has been multiplied by up to two and a half times. It is generally accepted that the casual loading as provided in the modern awards system is intended to compensate employees for matters including the absence of leave accruals, other NES entitlements and certain attributes associated with casual employment[73]. There is no apparent basis for the proposition that a casual employee should be compensated for the aforementioned matters at a higher rate during the performance of work at certain times. To the extent that there is a disutility associated with the performance of that work, the relevant overtime and penalty rates compensate employees for this.

(d) They would reflect longstanding industry practice.

(e) In respect of overtime, they reflect the AIRC's clear intent. It is particularly unfair that employers are exposed to the prospect of being required to pay employees at a higher rate because the language used in the Award potentially does not reflect that intent with sufficient clarity.

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[72] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117].

[73] *Award Modernisation* [2008] AIRCFB 1000 at [49].

(f) In the circumstances, the application of the overtime provisions using the Compounding Method amounts to a windfall gain for casual employees. The resulting cost implications for employers are clearly unfair.

(g) The cost implications of the Compounding Method may in fact be unfair to casual employees to the extent that it deters employers from engaging them or it leads employers to preference full-time or part-time employees for the performance of work during overtime, weekends and public holidays, thereby depriving casual employees of the opportunity to earn the higher rates that are payable in those circumstances as compared to the rates payable for ordinary hours on Monday – Friday.

185. The Proposed Variations are, for these reasons, consistent with the objective of ensuring that the Award affords a fair safety net.

A Relevant Safety Net

186. In the *Penalty Rates Decision*, the Commission concluded that the word 'relevant' is intended to convey that an award should be suited to "contemporary circumstances"[74].

187. A requirement that overtime, weekend and public holiday rates be calculated using the Cumulative Method would be consistent with the manner in which the vast majority of modern awards require the calculation of such rates of pay. The corollary renders the Award out of step with a significant proportion of modern awards. As a result, the Award does not provide a safety net that is consistent with contemporary circumstances.

188. The Proposed Variations are consistent with the provision of a relevant safety net.

[74] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [120].

Section 134(1)(a): The Relative Living Standards and Needs of the Low Paid

189. The appropriate threshold for determining whether award covered employees are 'low paid' was most recently dealt with by a Full Bench of the Commission in the context of the 'Payment of Wages' proceedings in the 4 yearly review of modern awards as follows:

> **[312]** A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid,' within the meaning of s.134(1)(a).
>
> **[313]** The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is $920.00. Data on median weekly full-time earnings are also available from the EEH survey for May 2018, and two-thirds of median earnings is equal to $973.33.[75]

190. The weekly base rate of pay prescribed by the Award in relation to the vast majority of classifications and pay points exceeds two-thirds of median full-time wages (adopting the data cited above).[76] It appears that the weekly base rate payable to only the following classifications is *lower* than two-thirds of median full-time wages, as derived from the Survey of Employee Earnings and Hours of May 2018:

    (a) Nursing assistants;

    (b) Student enrolled nurses;

    (c) Enrolled nurses;

    (d) Registered nurse – level 1, pay points 1 – 2.

191. The minimum weekly rates payable to the balance of classifications and pay points under the Award range from $982.60 - $2086.

[75] *4 yearly review of modern awards—Payment of wages [2020] FWCFB 1131* at [312] – [313].

[76] Registered nurse – Level 3, Pay point 3 onwards.

192. Accordingly, we acknowledge that *some* employees covered by the Award may be considered 'low paid'. Section 134(1)(a) is relevant only to that class of employees. Further, in the context of these proceedings, the relevant class of employees is to be further narrowed to include only casual employees who are required to work overtime, on weekends and public holidays.

193. In our submission, the Proposed Variations would not have a substantial impact on the relative living standards or needs of the low paid. To the extent that the Proposed Variations simply reflect the current practices of employers, the grant of the variations sought would not have any implications for the earnings of their employees.

194. Even if an employee's earnings were reduced (for instance, because the employer was applying the Award in accordance with *Domain Aged Care* but proceeds to apply a Cumulative Method of calculation as a product of the Application being granted), given the limited circumstances in which the relevant entitlements apply and the extent of any reduction, it is unlikely to have a material impact on the living standards or needs of the low paid. Furthermore, to the extent that the grant of the Proposed Variations induces a greater demand for casual labour during overtime, weekends and public holidays, this would "somewhat ameliorate" any reduction in income[77].

195. In our submission, s,134(1)(a) is a neutral consideration in this matter.

196. In any event, s.134(1)(a) reflects but one of many competing considerations that must be taken into account. Consistent with the approach adopted by the Commission in the *Penalty Rates Decision*, even if the Commission were to form the view that the Proposed Variations are inconsistent with s.134(1)(a), this is not of itself fatal to the Application. Despite finding that employees covered by the relevant awards were 'low paid', the Commission there determined that Sunday and public holiday penalty rates would be reduced, noting the following:

[77] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [822].

> **[823]** The 'needs of the low paid' is a consideration which weighs against a reduction in Sunday penalty rates. But it needs to be borne in mind that the primary purpose of such penalty rates is to compensate employees for the disutility associated with working on Sundays rather than to address the needs of the low paid. The needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay (independent of penalty rates).[78]

197. The Full Bench's reasoning is apposite to the Application. As the Full Bench stated, the needs of the low paid are best addressed by the setting and adjustment of modern award minimum rates of pay rather than through the prescription of other separately identifiable amounts or indeed as is the case here, the manner in which such amounts are to be calculated.

Section 134(1)(b): The Need to Encourage Collective Bargaining

198. An 'information note' published by the Commission on 9 April 2020 (**Commission's Information Note**) identifies that of the 754,700 employees covered by the *Nurses Award 2010*, approximately 48% are not covered by an enterprise agreement.[79] It is trite to observe that this constitutes a significant proportion of all employees. The need to encourage collective bargaining is particularly important in this context. However, the consideration mandated by s.134(1)(b) is not confined to employees and their employers who are not covered by an enterprise agreement. It applies also to employees and employers covered by an enterprise agreement who may choose engage in further collective bargaining to make another agreement.

199. The interpretation of the relevant Award provisions that was determined by the Commission in *Domain Aged Care* may deter employers from engaging in collective bargaining out of concern that if the Compounding Method is to be applied, the threshold against which their enterprise agreement is to be assessed will be substantially higher than what was previously a commonly understood and accepted interpretation of the relevant provisions. The decision in *Domain Aged Care* has obvious potential ramifications for the application of the BOOT. Employers may be concerned that their enterprise agreement may not be

[78] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [823].

[79] Fair Work Commission, *Information note – Health industry awards* (9 April 2020) at page 2.

approved or at the very least, may not be approved without undertakings, in light of *Domain Aged Care*.

200. Such concern would not be without cause. Since *Domain Aged Care* was handed down by the Commission, a significant number of enterprise agreements have been approved with undertakings that require that overtime, weekend and / or public holiday penalty rates payable to casual employees pursuant to the agreement must be calculated using the Compounding Method. For example: (noting that this is not exhaustive list)

    (a) The *Ramsay Health Care Australia Pty Limited and NSW Nurses & Midwives' Association and ANMF NSW Branch Enterprise Agreement 2018 – 2020*;[80]

    (b) The *Ramsay Health Care Australia Pty Limited and NSW Nurses & Midwives' Association and ANMF NSW Branch Enterprise Agreement 2018 – 2020*;[81]

    (c) The *Aged Care Deloraine Inc. Enterprise Agreement 2017*;[82]

    (d) The *IBIS Care Miranda, Australian Nursing and Midwifery Federation NSW Branch, Health Services Union NSW Branch & NSW Nurses & Midwives' Association Enterprise Agreement 2019*;[83]

    (e) The *Keith and District Hospital Inc Nurses Enterprise Agreement 2018*;[84]

    (f) The *Illaroo Co-operative Aboriginal Corporation, NSWNMA and HSU NSW Enterprise Agreement 2017 – 2020*;[85]

    (g) The *Regional Imaging Gippsland Nurses Enterprise Agreement 2018*;[86]

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[80] AE503534.
[81] AE503534.
[82] AE503653.
[83] AE504065.
[84] AE504737.
[85] AE504850.
[86] AE504917.

(h) The *Wuchopperen Health Service Ltd Enterprise Agreement 2019*;[87]

(i) The *Eva Tilley Memorial Home Inc, Enterprise Agreement 2018*;[88]

(j) The *Euroa Health Inc. and the Australian Nursing & Midwifery Federation and the Health Workers Union, Nurses and Allied Health Services Collective Agreement 2018*;[89]

(k) The *Menarock Aged Care Services Group (McGregor Gardens, Greenway Gardens and Camberwell Gardens), ANMF and HSU Enterprise Agreement 2019*;[90]

(l) The *Hamley Bridge Memorial Hospital Nursing Staff and ANMF Enterprise Agreement 2019*;[91]

(m) The *Cheltenham Manor Pty Ltd (trading as Cheltenham Manor) and Greenwood Manor Pty Ltd (trading as Greenwood Manor) Enterprise Agreement 2018*;[92]

(n) The *Cootamundra Nursing Home, NSWNMA and HSU NSW Enterprise Agreement 2017 – 2020*;[93]

(o) The *Hope Aged Care Group, ANMF and HSU Enterprise Agreement 2018*;[94]

(p) The *Catholic Healthcare Residential Aged Care Enterprise Agreement (New South Wales) 2018 – 2021*;[95]

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[87] AE504786.
[88] AE504924.
[89] AE505055.
[90] AE505166.
[91] AE505226.
[92] AE505318.
[93] AE505357.
[94] AE505408.
[95] AE506141.

(q) The *St John of God Health Care NSW Hospitals and New South Wales Nurses and Midwives' Association / ANMF – NSW Branch, Nurses Enterprise Agreement 2019*;[96]

(r) The *St John of God Health Care Hawkesbury District Health Service and New South Wales Nurses and Midwives' Association / ANMF NSW Branch Nursing and Midwifery Enterprise Agreement 2019*;[97]

(s) The *[redacted] Home Enterprise Agreement 2019*;[98] and

(t) The *Goulburn Valley Hospice Care Service Inc. Nurses Enterprise Agreement 2019-2023*.[99]

201. If the Award-derived entitlements for casual employees during overtime, weekends and public holidays are clarified as proposed, thereby ensuring that employers are not exposed to the uncertainty of having their enterprise agreement assessed against the Award as interpreted in *Domain Aged Care*, employers may be encouraged to engage in the enterprise bargaining process.

202. Section 134(1)(b) supports the grant of the Application.

Section 134(1)(c): The Need to Promote Social Inclusion through Increased Workforce Participation

203. Section 134(1)(c) of the Act is concerned with persons *obtaining* employment.[100]

204. The Proposed Variations are self-evidently not *inconsistent* with promoting social inclusion through increased workforce participation. There is no logical basis for concluding that the variations sought would have an adverse effect of workforce participation.

[96] AE506238.

[97] AE506237.

[98] AE506409.

[99] AE506531.

[100] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [179].

205. On the contrary, the Proposed Variations may *increase* workforce participation by encouraging employers to engage casual employees under the Award as a consequence of:

(a) There being greater certainty as to the entitlements payable to casual employees for work performed during overtime, weekends and public holidays;

(b) The mitigation of the risk of potential claims being made against the employer if the Compounding Method is not applied to the calculation of the relevant rates; and

(c) The employment costs associated with engaging casual employees being clearly lower than those arising from the Compounding Method.

206. The existing uncertainties, risks and employment costs associated with the Compounding Method may deter employers from engaging casual employees.

207. Section 134(1)(c) supports the grant of the Application.

Section 134(1)(d): The Need to Promote Flexible Modern Work Practices and the Efficient and Productive Performance of Work

208. Both the uncertainty associated with the operation of the relevant Award provisions and the Commission's decision in *Domain Aged Care* regarding the proper interpretation of the relevant provisions are apt to deterring employers from engaging casual employees to during overtime, weekends and public holidays. To the extent that this results in an inefficient allocation of labour, this is clearly inconsistent s.134(1)(d).

209. The Proposed Variations would remedy this issue. They would remove such a deterrence or disincentive to allocating casual labour to such work.

210. The Proposed Variations are consistent with s.134(1)(d).

Section 134(1)(da): The Need to Provide Additional Remuneration for Employees working Overtime; Unsocial, Irregular or Unpredictable Hours; Weekends or Public Holidays or Shifts

211. The Award provides for the payment of additional remuneration for employees working in the circumstances contemplated by s.134(1)(da). The Application does not propose to disturb this position. The Proposed Variations are clearly not inconsistent with s.134(1)(da).

212. Further, the issues to be considered pursuant to s.134(1)(da) do not justify the Compounding Method. There is no apparent basis for requiring that a casual employee be compensated for any disutility associated with working on a weekend, public holiday or during overtime at a rate that includes multiples of the casual loading. The need to provide additional remuneration is satisfied by the Cumulative Method of calculation.

213. Finally and in any event, as was articulated by the Commission in the *Penalty Rates Decision*, s.134(1)(da) is not a statutory directive for including additional rates of pay in an award for work performed in the described circumstances.[101] It is one of many competing considerations that must be taken into account by the Commission, however it does not mandate the inclusion of higher rates of pay for work performed at specific times.

214. Section 134(1)(da) is a neutral consideration in this matter.

Section 134(1)(e): The Principle of Equal Remuneration for Work of Equal or Comparable Value

215. We respectfully adopt paragraphs [204] – [207] of the *Penalty Rates Decision* cited earlier at section 4 of our submission, which concerns the meaning of s.134(1)(e) of the Act.

216. In our submission, s.134(1)(e) is a neutral consideration in this matter.

[101] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [195].

Section 134(1)(f): The Likely Impact of Any Exercise of Modern Award Powers on Business including on Productivity, Employment Costs and the Regulatory Burden

217. It is axiomatic that the grant of the Application would have a positive impact on business. The Proposed Variations would permit an employer to remunerate a casual employee in accordance with the Cumulative Method of calculation for work performed during overtime, weekends and public holidays and as a result:

(a) Expressly reduce employment costs when compared to the position reached in *Domain Aged Care*. The extent of the difference between the Cumulative Method and the Compounding Method should not be underestimated. The Compounding Method of calculation results in rates that are 7% - 14% higher than the Cumulative Method:

	50% loading / time and a half	**75% loading**	**double time**	**double time and a half**
% difference between Cumulative Method and Compounding Method	7%	9%	11%	14%

The impact on an employer flowing from the varying employment costs may be significant, particularly when multiplied by a number of employees.

(b) Lower the threshold that might otherwise apply in respect of the BOOT.

(c) Provide employers with greater certainty as to the relevant entitlements prescribed by the Award.

(d) Reduce the regulatory burden by clarifying the relevant entitlements.

(e) Enable employers to access the flexibility afforded by casual employment without incurring the significantly higher costs associated with the Compounding Method of calculation.

218. The aforementioned impacts may be particularly pronounced for small employers. We refer to and rely on the Commission's Information Note in this regard which identifies that of 8312 businesses covered by the Award, the overwhelming majority (approximately 96%) are small businesses[102].

219. Section 134(1)(f) lends support to the Application.

Section 134(1)(g): The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System for Australia that Avoids Unnecessary Overlap of Modern Awards

220. The Proposed Variations are clearly supported by s.134(1)(g) of the Act. For the reasons set out in section 9 of this submission, the relevant provisions are ambiguous and uncertain as to how the rates payable to casual employees during overtime, weekends and public holidays are to be calculated. The controversy concerning the proper interpretation of the relevant provisions and the competing contentions advanced evidence that the Award is not simply or easy to understand. The Proposed Variations would make the operation of relevant provisions plain. They would also provide for the same method of calculation in relation to work performed during overtime, weekends and public holidays which furthers the objective at s.134(1)(g).

221. The Proposed Variations are also in keeping with the need to ensure a stable and sustainable modern award system. The Proposed Variations are:

(a) In relation to overtime, consistent with the clearly stated intent of the AIRC when the Award was made; and

(b) In relation to overtime, weekends and public holidays, consistent with the widely understood meaning of the relevant provisions, subject to the decision in *Domain Aged Care*, and longstanding industry practice.

222. Section 134(1)(g) supports the grant of the claim.

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[102] Fair Work Commission, *Information note – Health industry awards* (9 April 2020) at page 2.

Section 134(1)(h): The Likely Impact of any Exercise of Modern Award Powers on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy

223. Though the precise impact is difficult to assess, the Application is unlikely to have a negative impact on employment growth, inflation and the national economy and, having regard to our submissions above in relation to ss.134(1)(b), 134(1)(c), 134(1)(d), 134(1)(f) and 134(1)(g), may in fact have a positive impact.

Attachment A: Analysis of Pre-Modern Awards

	Pre-Modern Award	State / Territory	Code	Ordinary hours on a weekend		Ordinary hours / all work on a public holiday		Overtime	
				Casual Loading payable?	Cumulative or Compounding?	Casual Loading payable?	Cumulative or Compounding?	Casual Loading payable?	Cumulative or Compounding?
1	A.C.T. Nurses Award 2000	ACT	AP768760	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
2	Nurses Private Employment (A.C.T.) Award 2002	ACT	AP818792	No	NA	Yes	Cumulative	In some instances – yes	Where payable - Cumulative
3	Charitable Institutions (Professional Paramedical Staff) (State) Award[1]	NSW	AN120116	Unclear[2]	Unclear[3]	NA[4]	NA	NA[5]	NA
4	Nurses on Wheels Inc. Nurses' (State) Award	NSW	AN120381	Yes	Unclear	Yes	Unclear	Yes	Unclear
5	Nurses, Other Than In Hospitals, &c., (State) Award	NSW	AN120385	No	NA	No	NA	No	NA
6	Nursing Homes, &c., Nurses' (State) Award	NSW	AN120387	No	NA	No	NA	Yes	NA – Overtime rates not payable
7	Occupational Health Nurses (State) Award	NSW	AN120389	No	NA	No	NA	No	NA
8	Private Hospital Industry Nurses' (State) Award	NSW	AN120435	No[6]	NA	No	NA	Yes	NA – Overtime rates not payable
9	Aboriginal and Community Controlled Health Services (Community Health Nursing Staff) Award 2002	NT	AP814131	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
10	Aboriginal Organisations Health and Related Services (Northern Territory) Award 2002	NT	AP818988	Yes	Unclear	Yes	Unclear	Yes	Cumulative
11	Doctors' Nurses (Northern Territory) Award 2003	NT	AP823362	Yes	Cumulative	Yes	Cumulative	No	NA

[1] Clause 12.3 sets out amounts payable to casual employees for work performed at various times through the week. The award does not, as such, contain a 'casual loading' of a single quantum.
[2] It is unclear how the rates at clause 12.3 interact with clause 9.
[3] It is unclear how the rates at clause 12.3 interact with clause 9.
[4] Clause 12.3 specifies the rate payable to a casual employee for work performed on a public holiday. The award does not, as such, contain a 'casual loading' of a single quantum. No other penalty rate applies.
[5] Clause 12.3 specifies the rate payable to a casual employee for work performed. The award does not, as such, contain a 'casual loading' of a single quantum. Separate overtime rates do not apply.
[6] Save where a casual employee works 38 ordinary hours in a week, in which case the employee would be entitled to the casual loading on a cumulative basis. See clause 13(iv).

12	Nurses (Northern Territory) Private Sector Award 2002	NT	AP819211	No	NA	No[7]	NA	Yes	NA – Overtime rates not payable
13	Hospital Nurses' Award - State 2003	QLD	AN140145	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
14	Nurses' Aged Care Award - State 2005	QLD	AN140193	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
15	Nurses' Award - State 2005	QLD	AN140195	Yes	Cumulative	Yes	Cumulative	No	NA
16	Nurses' Domiciliary Services Award - State 2003	QLD	AN140194	Yes	NA – Weekend penalty rates not payable	Yes	Cumulative	Yes	Cumulative
17	Private Hospital Nurses' Award - State 2003	QLD	AN140223	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
18	Nurses (ANF - South Australian Private Pathology) Award 2003	SA	AP818851	Yes	Cumulative	No	NA	No	NA
19	Nurses (ANF - South Australian Private Sector) Award 2003	SA	AP825646	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
20	Nurses (Medical Practitioners' Rooms) Award	SA	AN150094	Yes	Cumulative	Yes	Cumulative	No	NA
21	Nurses (SA) Award	SA	AN150097	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
22	Nurses (South Australian Public Sector) Award 2002	SA	AP817220	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
23	Medical Practitioners (Private Sector) Award	TAS	AN170061	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
24	Nurses (Tasmanian Private Sector) Award 2005	TAS	AP838634	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
25	Nurses (ANF - Victorian Local Government) Award 2002	VIC	AP825442	Yes	Cumulative	NA[8]	NA	Yes	Cumulative
26	Nurses (Private Pathology Victoria) Award 2004	VIC	AP833250	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
27	Nurses (Victorian Health Services) Award 2000	VIC	AP790805	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
28	Nurses (Victorian Medical Centres and Clinics) Award 2000, The	VIC	AP806312	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative
29	Enrolled Nurses and Nursing Assistants (Private) Award No. 8 of 1978	WA	AN160123	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative

[7] Although clause 34.11 requires the payment of a higher rate for work performed on a public holiday by a casual employee in substitution for the casual loading, it appears to incorporate the 20% casual loading prescribed by clause 11.2.2.
[8] The award does not appear to contemplate the performance of work on a public holiday.

30	Nurses' (Aboriginal Medical Services) Award No. A 23 of 1987	WA	AN160233	Yes	Cumulative	Yes	NA – Public holiday penalty rates not payable	Yes	Unclear
31	Nurses' (ANF - WA Private Hospitals and Nursing Homes) Award 1999	WA	AP790754	Yes	Cumulative	Yes	Compounding	Yes	Cumulative
32	Nurses (ANF- WA Public Sector) Award 2002	WA	AP814962	Yes	Cumulative	Yes	NA - Public holiday penalty rate not payable	Yes	NA – Overtime rates not payable
33	Nurses (Child Care Centres) Award 1984	WA	AN160229	Yes	Cumulative	Yes	NA – Public holiday penalty rate note payable	Yes	Cumulative
34	Nurses' (Day Care Centres) Award 1976	WA	AN160234	Yes	NA – Weekend penalty rates not payable	Yes	NA – Public holiday penalty rate note payable	Yes	Cumulative
35	Nurses (Dentists Surgeries) Award 1977	WA	AN160230	No[9]	NA	No[10]	NA – Public holiday penalty rate note payable	No[11]	NA
36	Nurses (Doctors Surgeries) Award 1977	WA	AN160231	No[12]	NA	No[13]	NA – Public holiday penalty rate note payable	No[14]	NA
37	Nurses' (Private Hospitals) Award	WA	AN160236	Yes	Cumulative	Yes	NA - Public holiday penalty rate not payable	Yes	Cumulative
38	Nurses (WA Mental Health Services) Award 2003	WA	AP821252	Yes	Cumulative	Yes	NA – Public holiday penalty rate not payable	Yes	NA – Overtime rates not payable
39	Nursing Assistants' Award 2002	WA	AP817075	Yes	Cumulative	Yes	Cumulative	Yes	Cumulative

[9] Save where a casual employee’s hours are based on a 40 hour week, in which case the employee would be entitled to the casual loading on a cumulative basis. See clause 14.
[10] Save where a casual employee’s hours are based on a 40 hour week, in which case the employee would be entitled to the casual loading. See clause 14.
[11] Save where a casual employee’s hours are based on a 40 hour week, in which case the employee would be entitled to the casual loading on a cumulative basis. See clause 14.
[12] Save where a casual employee’s hours are based on a 40 hour week, in which case the employee would be entitled to the casual loading on a cumulative basis. See clause 14.
[13] Save where a casual employee’s hours are based on a 40 hour week, in which case the employee would be entitled to the casual loading. See clause 14.
[14] Save where a casual employee’s hours are based on a 40 hour week, in which case the employee would be entitled to the casual loading on a cumulative basis. See clause 14.

Attachment B: Summary of Part 10A Award Modernisation Process

	Organisation	Date	Summary
1	Australian Nursing Federation (**ANF**)	31 October 2008	The ANF filed a draft award in which it proposed two proposed clauses dealing with the interaction between the casual loading and other premiums. The first proposed clause would have required the Compounding Method for calculating overtime rates, weekend penalty rates and public holiday penalty rates. The latter proposed clause would have required the Cumulative Method of calculation. ***x.3.5*** *For purposes of calculating penalties, including shift allowances, the penalty rate will be calculated on the ordinary rate of pay excluding the casual loading, with the casual loading component added to the penalty rate of pay.* OR ***x.3.5*** *For purposes of calculating penalties, including shift allowances, the ordinary rate for a casual employee is the ordinary rate of pay plus the 25% casual loading.* Immediately below the proposed provisions, the draft award contained the following note: *In WA TAS and VIC (except for VIC ENs re public holidays), the ordinary rate for casuals includes the casual loading and the penalty is applied to that rate.* *In NSW and ACT, the standard weekend shift penalties apply with no casual loading.* *In the middle is the situation in QLD, SA and NT where penalties are calculated on ordinary time with the casual loading component added. Eg. NT Private sector award:* *24. The additional penalty rates referred to in 24.3 and 24.4 do not include any percentage addition by reason of the fact that an employee is a casual employee. That is, the shift penalty is calculated upon the ordinary rate, prior to the addition of the 20% casual loading. For example, if the ordinary rate = $8.00, the payment is calculated as follows:* *$8.00 + 15% = $9.20 + $1.60 ($8.00 x 20%) = $10.80*

2	Private Hospital Industry Employers Association (**PHIEA**)	31 October 2008	A draft award filed by PHIEA contained the following relevant provisions: • Clause 15.12.3 dealt with the interaction between shift allowances and the casual loading: *In the instance of a casual employee the shift allowance prescribed herein shall be calculated on the relevant base rate of pay exclusive of the casual loading.* • Clause 15.11 required the calculation of the weekend loadings on the 'base rate of pay': *All rostered ordinary hours worked by any employee between midnight Friday and midnight Sunday up to and including ten ordinary hours in any one shift shall be paid for at the base rate of pay plus the additional percentage of the employee's base rate as follows: …* • Clause 21.1 required the calculation of the proposed public holiday penalty rate on the 'base rate of pay': *All work done by any employee during their ordinary shifts on a public holiday including a substituted day, shall be paid at double time and a half of their base rate of pay with a minimum payment for four hours.*
3	Australian Federation of Employers and Industries (**AFEI**)	6 November 2008	At paragraph 46, AFEI submitted as follows: *In our submission, the 25% loading should not be payable in addition to the weekend penalties for time and one-quarter and time and one-half.*
4	AFEI	12 November 2008	AFEI filed a draft award that relevantly included the following clause, which would have required the payment of a 25% loading only during ordinary hours on Monday – Saturday: ***13.2*** *For each ordinary hour worked, a casual employee will be paid no less than 1/38th of the minimum weekly rate of pay for his or her classification in clause 17— Classifications and minimum wages, plus a casual loading of 25%, Monday to Saturday, 50% on a Sunday and 150% on a public holiday.* Further, though not abundantly clear, it appeared that casual employees would not be entitled to overtime rates (see clause 25.3).

5	AFEI	12 November 2008	A second draft award dated 12 November 2008 was filed by AFEI. It contained clause 13.2 in the same terms as set out above. It also contained an additional clause that expressly stated that overtime rates would not apply to casual employees (second paragraph of clause 13.3).
6	ANF	2 December 2008	The ANF filed a further submission in which it identified the 'source' of each of the proposed clauses in its draft award. Relevantly, in relation to the casual employment provisions, the ANF submitted: *Casual - 2 options included: 1. based on WA & TAS private fed awards & VIC fed award; and 2. based on QLD state and SA and NT private fed awards. Casual loading as per Commission standard.* In relation to the overtime clause, the ANF submitted: *Variety awards used for different components: Rates – adapted from Vic, Tas and NSW awards Min break after OT – adapted from Vic & Qld* In relation to shift allowances and penalty rates, the ANF referred only to the '*SA Private sector fed award*'. Finally, in relation to the public holidays clause, the ANF identified it as being a '*hybrid clause*'.
7	AIRC	19 December 2008	In a decision[1] issued by the AIRC regarding various issues of general implication to all awards, the Full Bench said as follows regarding the casual loading: (our emphasis) ***[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.*

[1] *Award Modernisation* [2008] AIRCFB 1000.

8	AIRC	23 January 2009	The AIRC issued a statement and exposure draft. The statement did not make express reference to any of the relevant issues concerning casual employees. The exposure draft contained the following provisions at clause 10.4 concerning casual employment generally: ***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 added to the penalty rate of pay.* At clause 25 of the exposure draft, it set out rates payable to shiftworkers for work performed on a weekend. The exposure draft did not contain a clause requiring the payment of penalty rates for ordinary hours of work performed on a weekend by a day worker. It did not deal expressly with casual employees. Clause 25 was in the following terms: ***25. Saturday and Sunday work*** ***25.1*** *Where an employee, other than a day worker, is rostered to work ordinary hours between midnight Friday and midnight Saturday, the employee will be paid a loading of 50% of their ordinary rate of pay for the hours worked during this period.* ***25.2*** *Where an employee, other than a day worker, is rostered to work ordinary hours between midnight Saturday and midnight Sunday, the employee will be paid a loading of 75% of their ordinary rate of pay for the hours worked during this period.*

At clause 27.1 of the exposure draft, it prescribed overtime rates in the terms that follow. It did not deal expressly with casual employees.

> ***27.1 Overtime penalty rates***
>
> ***(a)*** *Hours worked in excess of the ordinary hours on any day or shift prescribed in clause 21—Ordinary hours of work, are to be paid as follows:*
>
> > ***(i)*** *Monday to Saturday (inclusive)—time and a half for the first two hours and double time thereafter;*
> >
> > ***(ii)*** *Sunday—double time;*
> >
> > ***(iii)*** *Public holidays—double time and a half.*
>
> ***(b)*** *Overtime penalties as prescribed in clause 27.1(a) do not apply to Registered nurse levels 4 and 5.*
>
> ***(c)*** *Overtime rates under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 28—Shiftwork.*
>
> ***(d)*** *Part-time employees All time worked by part-time employees in excess of the rostered daily ordinary full-time hours will be deemed to be overtime and will be paid as prescribed in clause 27.1(a).*

At clause 31.1 of the exposure draft, it prescribed the rate that would be payable for work performed on public holidays by all employees:

> ***31.1*** *Payment for work done on public holidays All work done by an employee during their ordinary shifts on a public holiday, including a substituted day, will be paid at double time and a half of their ordinary rate of pay.*

9	Business SA	12 February 2009	Business SA filed a submission in response to the exposure draft. At paragraph 6.6, it submitted as follows about the overtime provision: *While Clause 27 in the exposure draft provides for overtime penalty rates that apply to full-time and part-time employees, it is unclear as to its impact on casual employees.*
10	CCIWA	13 February 2009	CCIWA filed a submission in response to the exposure draft. In it, CCIWA noted that: *It is not clear from the wording in subclause (d) as to what the method of calculation should be, i.e. is it compounded or calculated separately and then added up?* *$17 p/h + 15% (shift loading) = $2.55* *$17 p/h + 25% (casual loading) = $4.25* *Total hourly rate = $17 + $2.55 + $4.25 = $23.80* *As opposed to: $17 p/h x 115% x 125% = $24.44* *As overtime has never counted towards accrual of leave entitlements, and as the casual loading is paid in lieu of leave entitlements, a casual employee working overtime should be entitled to overtime penalties only in lieu of casual loading.* CCIWA submitted that an example should be included in the award explaining how the relevant rates are to be calculated and that an additional clause 10.4(e) should be included: *The casual loading prescribed in subclause (b) shall not be payable where the employee is entitled to be paid overtime penalty rates in accordance with clause 27 of this Award.*

11	PHIEA	13 February 2009	Referring to a controversy before the AIRC about the quantum of the casual loading that should be included in the Nurses Award (with some employer representatives arguing that it should be of a lower quantum to reflect the pre-modern award standard in various instruments), PHIEA submitted as follows at page 10 of its submission: *On the assumption that the casual loading percentage will remain at 25% in the final version of the Nurses Occupational Industry Award 2010 we would ask the Commission to carefully review some of these other draft clauses, so that the overall financial impact of Award Modernisation for employers is minimised and in keeping with the Request under Section 576C (1) 2 (d) that Award Modernisation is .... "Not intended to increase cost for employers.* PHIEA went on to make the following relevant submissions on pages 10 – 11: ***Casual Employment - Clause 10.4 (d)*** *10.4. (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 added to the penalty rate of pay.* *Private hospital employers seek clarification regarding the correct interpretation of this clause as we believe in its current form it could be interpreted in one of two ways as per the example noted below:* ***Example:*** *Assuming the base rate of pay is $10.00 and we are referring to a 15% night shift penalty:* *Method One:* *$10.00 x 1.15% = $11.50 + ($10 x .25% = $2.50). Applicable rate = $14.00* *Method Two:* *$10.00 x 1.15% x 25%. Applicable rate = $14.38*

			We have interpreted the wording of clause 10.4 (d) to mean that the 'Method One' form of calculation is the correct way to calculate the penalty but given the potential for uncertainty and miscalculation we recommend that the AIRC provide a worked example within the Award to clarify the correct method of calculation ***<u>RECOMMENDATION 6</u>*** ***It is recommended that a worked example of the correct method of calculation for Clause 10.4 (d) – Casual Employment - is included in the Award to minimise any potential for confusion or incorrect calculation of entitlement.*** ***<u>REFERENCES TO ORDINARY RATE OF PAY</u>*** *Throughout the NOIA there are references to 'ordinary rate of pay' however there is no definition contained within the award regarding 'ordinary rate of pay'. The NES contain a detailed definition of 'base rate of pay' which explicitly describes its meaning.* ***<u>RECOMMENDATION 7</u>*** ***In the interests of consistent terminology between awards and the NES and to alleviate any potential for misinterpretation it is recommended that all references to 'ordinary rate of pay' should be replaced with the words 'base rate of pay.'***
12	SA Aged Care G10 Group and Aged Care Association Australia – South Australia Incorporated	13 February 2009	The submission filed in response to the exposure draft said as follows at page 4 regarding clause 10.4(d) of the exposure draft: *The clause limits the correct calculation of casual pay to shift allowances, which technically only includes the provisions of clause 28.1.* It was submitted that clause 10.4(d) should be amended to apply also to overtime and penalty rates.

13	AFEI	19 February 2009	AFEI submitted that the 25% casual loading proposed by the AIRC would result in a significant cost increase in relation to many employees and employers covered by pre-modern awards that contained a casual loading of 10%. At paragraph 5, AFEI went on to submit as follows: *… We therefore submit that the 25% casual loading shall not apply where the time worked by an employee attracts a higher penalty or loading. This will provide some mitigation of the substantial increase in labour costs incurred by the move to a standard 25% casual loading across all industries. This amendment to the Award is contained in Attachment A to this submission.* In the draft award AFEI submitted accompanying the exposure draft, it proposed the following clause 10.4(d) in lieu of that which was contained in the exposure draft: *The 25% casual loading shall not apply where the time worked by an employee attracts a higher penalty or loading.*

	AIRC	3 April 2009	The AIRC issued a decision regarding the making of the Award along with a consolidated version of the Award. In its decision[2], the AIRC specifically dealt with the calculation of overtime rates for casual employees in the Nurses Award and other health sector awards: (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.* The AIRC did not go on to identify any changes that had been made to what was previously the exposure draft to reflect its clearly expressed intent at paragraph [150] above. The consolidated Award was in relevantly similar terms to the previously published exposure drafts, subject to the following: • A minor amendment was made to clause 10.4(d), as marked below: ***(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.* • The public holiday penalty rates prescribed by clause 31.1 was reduced from “double time and a half” to “double time” for all employees: ***32.1*** *Payment for work done on public holidays All work done by an employee during their ordinary shifts on a public holiday, including a substituted day, will be paid at double time of their ordinary rate of pay.*

[2] *Award Modernisation* [2009] AIRCFB 345.