Fair Work Commission

Matter No: AM2020/1

AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

SUPPLEMENTARY SUBMISSION ON THE

AI GROUP APPLICATION TO VARY THE NURSES AWARD 2010

1 September 2020

1. The ANMF makes this supplementary submission in response to the updated directions issued by the Commission on 21 August 2020. The ANMF relies upon its previous submission dated 31 July 2020 (the **July Submission**[1]) and adopts the definitions used by that submission in this submission.

2. On 18 August 2020 a Full Bench of the Commission handed down its decision in the *4 yearly review of modern awards – Overtime for casuals* [2020] FWCFB 4350 (the **OFC Decision**[2]).

3. The significance of the OFC Decision is that it addresses some of the matters raised in the application by Ai Group in AM 2020/1 and the subsequent submission of Ai Group dated 10 June 2020.

4. The ANMF submits the OFC Decision has direct bearing on Matter AM2020/1 in relation to four key matters which we seek to draw attention to in this supplementary submission:

    a. The Full Bench of the Commission specifically endorses the approach taken in *Domain Aged Care*;

    b. The Full Bench expressly rejected the concept of a 'general rule' with respect to the interaction of the casual loading with penalties;

    c. The number of awards with Compounding Method is greater than first indicated in the July Submission; and

    d. The Full Bench adopts a consistent approach to analysing each award to determine entitlements.

Full Bench endorsement of the approach in Domain Aged Care

5. The Full Bench in the OFC Decision, composed of different members of the Commission to those comprising the Full Bench in *Domain Aged Care*, specifically endorsed the approach in that case. The relevant passages state:

> **[25]** …The entitlement (to overtime) arises from the expressions "time and a half", "double time" and "double time and a half" in clause 25.1(b)(i). These are traditional industrial expressions which have a traditional meaning. The "time" referred to is the rate of pay that would be payable to the employee for ordinary hours. In the case of casual employees, the ordinary time rate is inclusive of the casual loading. Therefore, **the overtime rate is calculated by reference to the ordinary time rate inclusive of that loading, unless there is some provision which expressly indicates otherwise**. That means that the casual loading is included in the overtime rate on a compounding basis.

[1] ANMF submission in reply (31 July 2020)
[2] [2020] FWCFB 4350

[26] This position was established in the Full Bench decision in *AMWU v Energy Australia Yallourn Pty Ltd (Yallourn)*, which concerned the proper construction of a provision in an enterprise agreement which established a "double time" overtime rate of pay for casual employees. The Full Bench said:

> "[41] We are satisfied that the words in the Agreement are not ambiguous or uncertain. The clause sets out how you calculate the ordinary time rate for casual employees and that rate includes the casual loading. The Agreement provides that casual employees are entitled to double time for working overtime. We are satisfied that that double time means double the amount paid for working ordinary time. We are satisfied that, in the absence of express words excluding the casual loading from the calculation of overtime, on its ordinary meaning, the clause provides that the loading is included when calculating overtime payments."

[27] Similarly, the Full Bench majority in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care (Domain)* interpreted the overtime provisions in clause 28.1 of the *Nurses Award 2010*, which prescribed overtime rates of "time and a half" and "double time", as meaning in respect of casual employees, that the rates were calculated on the ordinary time rate inclusive of the casual loading. The Full Bench said:

> "[17] Clause 10.4(b) of the Award says that a casual employee will be paid an hourly rate equal to 1/38th of the weekly wage plus a casual loading of 25%. On a plain reading of the clause, the hourly rate includes the loading; the loaded casual rate is the 'ordinary rate of pay'. When a casual employee works ordinary hours on a Saturday or Sunday, clause 26 of the Award requires the weekend loading to be applied to the ordinary rate of pay. For casual employees, this rate is the casual rate. The same is the case with the public holiday penalty in clause 32.1. . . . .
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> [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."
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> **[28]** We see no basis to depart from the approach taken in the above Full Bench decisions (which we will subsequently refer to as the *Yallourn/Domain approach*)…[3] (Emphasis added).

6. As seen from the above passages, in addition to following the precedent of *Domain Aged Care* the Full Bench was also following the precedent of the approach in *Yallourn*. In that case the Full Bench stated the correct construction of "double time" for casual employees. The *EnergyAustralia Yallourn Enterprise Agreement 2013*[4] provided that casual employees are entitled to double time for working overtime. The ordinary time rate for casual employees included the casual loading. In the absence of express words excluding the casual loading from the calculation of overtime, the loading is included when calculating overtime payment.[5] The same principles apply when calculating "time and a half", "double time and a half", "time and three quarters" and similar phrases.

7. The Yallourn/Domain approach is directly relevant to the issues in the Ai Group application concerning s.160 of the FW Act, relating to whether there is any ambiguity or uncertainty in the Award. As the Full Bench states in the OFC Decision "…the overtime rate is calculated by reference to the ordinary time rate inclusive of that loading, unless there is some provision which expressly indicates otherwise. That means that the casual loading is included in the overtime rate on a compounding basis."[6]

8. The same principles applicable to calculating overtime payment for casuals are applied when calculating any penalty that uses the expressions "time and a half", "time and three quarters", "double time" and "double time and a half". This includes penalty rates for working on weekends and public holidays. The underlying logic is identical in this respect, therefore the principles are directly relevant to the Ai Group application to vary the Award.

9. In light of the Full Bench's endorsement of the Yallourn/Domain approach in the OFC Decision, the ANMF submits there is no basis for a finding that there is an ambiguity or uncertainty to be corrected or removed pursuant to s160 of the FW Act. The case law is clear that no such ambiguity or uncertainty exists. This would relevantly entail not relying upon sections 8 and 9 of the Ai Group submission.

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[3] [2020] FWCFB 4350 at [25] – [28] (footnotes removed)
[4] [2013] FWCA 9364
[5] [2017] FWCFB 381 at [41]
[6] [2020] FWCFB 4350 at [25]

No 'general rule' concerning interaction of casual loading with penalties

10. The AIRC award modernisation Full Bench decision of 19 December 2008 (**2008 Decision**)[7] stated that "…as a general rule, where penalties apply the penalties and the casual loading are both to be calculated on the ordinary time rate."[8]

11. The Full Bench in the OFC Decision directly addressed points raised by the Ai Group submission concerning the 2008 Decision. They relevantly stated:

> **[5]** We note at the outset that in respect of a number of awards, various parties have submitted that the Full Bench of the Australian Industrial Relations Commission which conducted the award modernisation process pursuant to Part 10A of the *Workplace Relations Act 1996* (AIRC award modernisation Full Bench) adopted a standardised approach or "general rule" as to the payment of the casual loading and overtime penalty rates. This standard approach was said to be discernible in the following passage of a decision issued on 19 December 2008:
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> > "[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."
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> **[6]** While it is certainly the case that the 25% casual loading is, with a few exceptions, the standard in modern awards, it cannot be said notwithstanding the above passage that any standard or general approach was actually applied by the AIRC award modernisation Full Bench concerning the relationship between the casual loading and overtime penalty rates. The modern awards made as a result of the award modernisation process are marked by a high degree of diversity in this respect, as will become apparent in the analysis of the disputed awards. Some modern awards, at least originally, did not provide for casual employees to receive overtime penalty rates at all. Of those that provide for overtime penalty rate entitlements for casual employees, they may be divided into three categories:
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> 1. awards where overtime penalty rates are payable in substitution for the casual loading;
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> 2. awards where the casual loading and the overtime penalty rate are added separately to the minimum hourly rate (the cumulative approach);

[7] [2008] AIRCFB 1000
[8] *Ibid*., at [50]

3. awards where the overtime penalty rate is applied to an ordinary hourly rate consisting of the minimum hourly rate and the casual loading (the compounding approach).

[7] Accordingly we do not consider that the issues in dispute in the Category 1 awards can be resolved by reference to any "general rule".[9]

12. The disputes in the category 1 awards referred to in the OFC Decision are the interpretation of those awards and the method of calculating the overtime penalty rate for casual employees, being either no casual loading, the Cumulative Method or the Compounding Method.

13. Due to the reasoning in paragraphs 5-7 of the OFC Decision, the assertions at paragraphs 91-94 in the Ai Group submission concerning the 2008 Decision should be rejected. Specifically where Ai Group have indicated that the 2008 Decision "weighs in favour"[10] of their preferred interpretation of the Award, this is clearly not evident.

Number of awards with Compounding Method is greater than first indicated

14. In paragraph 121 of the ANMF July Submission, we referred to 14 awards as having the Compounding Method applied with respect to casual loading and its interaction with weekend penalties, public holidays and overtime.

15. In consideration of the OFC Decision, the ANMF submits that the following awards must also be included in having the Compounding Method applicable, with respect to the calculation of overtime payment for casuals:

    a. *Aged Care Award 2010*[11]
    b. *Business Equipment Award 2020*[12]
    c. *Contract Call Centres Award 2020*[13]
    d. *Concrete Products Award 2020*[14]
    e. *Health Professionals and Support Services Award 2020*[15]
    f. *Labour Market Assistance Industry Award 2020*[16]

[9] [2020] FWCFB 4350 at [5]-[7]
[10] Ai Group submission (10 June 2020) at [94]
[11] [2020] FWCFB 4350 at [25]
[12] *Ibid*., at [70]
[13] *Ibid*., at [74]
[14] *Ibid*., at [302]
[15] *Ibid*., at [114]
[16] *Ibid*., at [126]

g. *Marine Tourism and Charter Vessels Award 2010*[17]

h. *Marine Towage Award 2020*[18]

i. *Professional Diving Industry (Recreational) Award 2020*[19]

j. *Sugar Industry Award 2020*[20]

k. *Stevedoring Industry Award 2020*[21]

l. *Transport (Cash in Transit) Award 2020*[22]

16. In light of the OFC Decision, the ANMF submits that the following awards must also be included in having the Compounding Method applicable, not only with respect to the calculation of overtime payment for casuals but also for weekend and public holiday penalties for casuals:

a. *Asphalt Industry Award 2020*[23]

b. *Black Coal Mining Industry Award 2010*[24]

c. *Broadcasting, Recorded Entertainment and Cinemas Award 2010*[25]

d. *Electrical, Electronic and Communications Contracting Award 2010*[26]

e. *Pastoral Award 2010*[27]

f. *Surveying Award 2020*[28] (public holidays only)

g. *Telecommunications Services Award 2010*[29]

17. The Full Bench analysis of each award has resulted in a finding that a greater number of awards adopt the Compounding Method with respect to payment of overtime for casuals and in some instances, penalties on weekends and public holidays, than was originally submitted by the ANMF. The ANMF submits a finding that the Award supports the Compounding Method would not make it an 'outlier' award, but rather one of a number of awards for which this is the method of payment.

[17] *Ibid*., at [146]
[18] *Ibid*., at [153]
[19] *Ibid*., at [210]
[20] *Ibid*., at [302]
[21] *Ibid*., at [250]
[22] *Ibid*., at [278]
[23] *Ibid*., at [302]
[24] *Ibid*., at [59]
[25] *Ibid*., at [65]
[26] *Ibid*., at [318]
[27] *Ibid*., at [302]
[28] *Ibid*., at [302]
[29] *Ibid*., at [256]

Consistent approach to analysing each award

18. Reading the OFC Decision shows that the Full Bench analysed each award considered by firstly looking at the wording of the relevant clauses. Where these are clearly consistent with the Yallourn/Domain approach, this approach is adopted. Where this first step does not produce a clear result, the Full Bench considers the context of the relevant clause firstly in light of related clauses within the award and secondly, where ambiguity is still apparent, by reference to the historical industrial context of the relevant clauses and awards.

19. The ANMF submits that the methodology of the Full Bench analysis in the OFC Decision, to determine whether the Compounding Method applies in line with the Yallourn/Domain approach, is appropriate and produces consistent and logical results.

20. The Full Bench in the OFC Decision adopts the above consistent analysis of each award even where this may displace previous agreement between parties in the course of the 4 Year Review,[30] or where substantive changes have been made to awards in the course of the Review.[31]

21. As addressed in our July Submission, analysis of the Award with respect to the wording of Clause 10.4 and the context of the clause, supports a finding that the Compounding Method applies with respect to overtime, weekend and public holiday penalties for casual employees. It is submitted, given the clarity of the wording in Clause 10.4 and the context of the award, it is not necessary to look further to the historical industrial context.

[30] *Ibid*., at [110]
[31] *Ibid*., at [115]