SUBMISSION TO
FAIR WORK COMMISSION

Matter No:

AM2014/207

4 YEARLY REVIEW OF MODERN AWARDS

NURSES AWARD
Exposure draft

AUGUST 2019

SUBMISSION IN RESPONSE TO
ANMF SUBMISSION OF 13 JUNE 2019
Re: Further submission relating to payment of casual employees for work performed on Saturday and Sunday

SUBMISSION BY
PRIVATE HOSPITAL INDUSTRY EMPLOYER ASSOCIATIONS

Australian Private Hospitals Association
Australian Private Hospitals Association – South Australia
Australian Private Hospitals Association – Tasmania
Australian Private Hospitals Association – Western Australia
Australian Private Hospitals Association – Victoria
Catholic Health Australia
Day Hospitals Australia
Private Hospitals Association of Queensland
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INTRODUCTION

[1] On page 3 of its submission of 13 June 2019, the ANMF states that it "*wishes to withdraw its submission dated 21 July 2016 as it was founded on an incorrect interpretation of the Award, which has since been clarified by the Full Bench in ANMF v Opal Aged Care.*"

The ANMF has proposed an amendment to clause 6.4(d) in the Exposure Draft of the Nurses Award as noted below with underlined words as additions and strikethroughs for removal:

(d) *A casual employee will be paid shift ~~allowances~~ penalties ~~and Saturday and Sunday rates~~ calculated on the minimum rate of pay applicable to their classification and pay point, excluding the casual loading with the casual loading component then added to the penalty rate of pay.*

[2] With respect, PHIEA disagrees with the ANMF's view that the approach adopted by VP Watson is not the correct interpretation of the Award [2012] FWA 9420.

BACKGROUND

[3] In opposing the ANMF's proposal, PHIEA considers it relevant to refer to the complete extract from VP Watson's decision in [2012] FWA 9420 concerning Casual Loadings and Weekend Penalties as it provides some context to our position.

[30] *Aged Care Employers and ABI seek to insert a new clause 26.3 as follows:*

> *"**26.3** Casual employees will be paid in accordance with clauses 26.1 and 26.2. The rates prescribed in clauses 26.1 and 26.2 will be in substitution for and not cumulative upon the casual loading prescribed in clause 10.1(b)."*

[31] *The intention of the clause is to clarify that the loadings for Saturday and Sunday work are in substitution for and not cumulative on the casual loading in clause 10. It was argued that the current meaning is ambiguous and the intended meaning is consistent with the proposed variation. The employers did not seek to argue that the change was justified in any event.*

[32] *The ANF asserts that casual employees are currently entitled to the casual loading and the relevant weekend loadings and the variation will alter the legal effect of the clause.*

[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. [emphasis added]

[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. [emphasis added]

[38] *It follows that the justification advanced by the employers is not valid and their case must fail.*

Whilst this decision clarified that the same method of calculation applies to weekends as in the case of shift allowances, no amendment to the award was made at that time.

[4] As part of this 4 year review process in relation to the Nurses Award, there was considerable discussion between the parties, both formal and informal, regarding the wording of the weekend penalty clause and its lack of clarity in respect of the correct method of calculation in respect of casual employee entitlements.

The parties agreed that in order to remove any ambiguity, and to reflect VP Watson's decision regarding the correct method of calculation of both shift and weekend rates,

clause 6.4 (d) of the Exposure Draft should be amended as under to expressly state the correct calculation method of both shift and weekend penalties for casual employees:

> *6.4 (d) a casual employee will be paid shift allowances and Saturday & Sunday rates calculated on the minimum rate of pay applicable to their classification and pay point, excluding the casual loading with the casual loading component then added to the penalty rate of pay*.

[5] This agreed wording was subsequently endorsed by the Full Bench and incorporated into the Exposure Draft.

[6] The ANMF is now seeking to withdraw its original agreement and propose a new clause 6.4 (d) which would remove reference to Saturday and Sunday rates in the explanation concerning the method of calculation and cites the Full Bench decision in *ANMF v Opal Aged Care [2019] FWCFB 1716* as the relevant authority and considers that it overrides VP Watson's decision in [2012] FWC 9420.

With respect, as previously stated, we do not agree with the ANMF's opinion, for reasons which we will articulate in the following paragraphs.

[7] In paragraph [18] of its decision in *ANMF v Opal Aged Care [2019] FWCFB 1716* the Full Bench stated that:

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. [emphasis added].

The Full Bench went on to say:

However, in our view, it is not so much a case of applying an interpretive 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 not 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.

In paragraph [20] the Full Bench stated:

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.

[8] The Full Bench in *ANMF v Opal Aged Care* made its decision based on '*reading clause 10.4 in an ordinary and logical way*' which, based on the wording of the existing Nurses Award 2010 was a correct interpretation.

However, as previously noted, during the 4 year review process, the parties acknowledged that whilst existing clause 10.4 (d) of the Nurses Award expressly stated the calculation method for casuals working shifts; clause 26 – weekend penalties, was not sufficiently clear in terms of the correct method of calculation which should be applied to casuals working on weekends. In order to provide the necessary clarity, the parties agreed to amend the clause which now appears as clause 6.4 (d) of the Exposure Draft and which has been endorsed by a Full Bench the Fair Work Commission.

PHIEA concurs with the view of the Full Bench based on the wording of clause 10.4 (d) of the existing Nurses Award it was assessing in the appeal decision in *ANMF v Opal Aged Care*.

[9] In paragraph [22] the Full Bench stated that: *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.* [emphasis added]

Clause 6.4 (d) of the Exposure draft states:

A casual employee will be paid shift allowances and Saturday and Sunday rates calculated on the minimum rate of pay applicable to their classification and pay point, excluding the casual loading, with the casual loading component then added to the penalty rate of pay.'

[10] In view of the comments expressed by the Full Bench in ANMF v Opal Aged Care at paragraph [22], with respect, PHIEA considers that it is possible that the Full Bench may have come to a different conclusion, had the Exposure Draft wording of clause 6.4 (d) been the subject of its assessment in this case, and not the current clause 10.4 (d), as the Exposure Draft clause clearly states that these penalties are not calculated on the loaded casual rate.

[11] As the Full Bench in ANMF v Opal Aged Care noted, 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.

PHIEA is of the view that the 4 Year Review of the Nurses Award has provided that opportunity to remove ambiguity and uncertainty in relation to the correct calculation method and therefore we strongly oppose the recent ANMF proposal to amend Exposure Draft clause 6.4 (d).

[12] In the absence of any further 4 year reviews, PHIEA is concerned that if the ANMF's proposed clause became embedded in the Modern Award it may preclude the opportunity for review in the future.

[END OF SUBMISSION]