



Australian
Nursing &
Midwifery
Federation

Fair Work Commission

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AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

SUBMISSION IN REPLY

AI GROUP APPLICATION TO VARY THE NURSES AWARD 2010

31 July 2020

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Introduction

1. The Australian Nursing and Midwifery Federation (**ANMF**) files this submission in response to the submission filed by The Australian Industry Group (**Ai Group**) on 9 June 2020.
2. Ai Group seeks to vary the *Nurses Award 2010* (the **Award**) by reducing the rate of pay for a casual employee when they:
 - a. perform overtime;
 - b. perform ordinary hours of work on weekends; and
 - c. perform work on public holidays.
3. For the sake of conciseness, the ANMF adopts the definitions used by Ai Group in its submission with respect to the following:
 - a. **Compounding Method**;
 - b. **Cumulative Method**;
 - c. **Proposed Variations**; and
 - d. **Relevant Clauses**
4. The ANMF is opposed to the variations sought by Ai Group as set out in the draft determination filed by them on 24 April 2020.
5. The ANMF submits that the Relevant Clauses of the Award, the subject of this application, are clear and do not give rise to ambiguity, uncertainty or error. In the circumstances, the ANMF submits that the grounds required to enliven s.160 of the *Fair Work Act 2009* (**FW Act**) have not been made out.
6. In the alternative, Ai Group relies on s.157 of the FW Act as the basis of variation of the Award. The ANMF submits that there is no evidence or basis to satisfy that the Proposed Variations, as defined in the Ai Group submission, are necessary to achieve the objectives of a modern award as set out in s.134 of the FW Act.
7. The application should be dismissed.

Application of Award

8. The Award covers employers throughout Australia in the health industry and their employees in the classifications listed in Schedule B and employers who employ a nurse/midwife, principally engaged in nursing/midwifery duties.¹
9. Schedule B of the Award provides descriptions for nurses and midwives in the following classifications:
 - Nursing assistant
 - Student enrolled nurses

¹ Clauses 4.1(a)-(b) of the Award

- Enrolled nurses
- Registered nurses
- Occupational nurses
- Nurse practitioners

10. The Award defines nursing care to include care provided by midwives.²
11. Nursing, midwifery and nursing assistants' employment conditions are largely regulated by the FW Act with the exception of those employed in the public sectors in New South Wales, South Australia, Western Australia, Tasmania and Queensland, and some employed in the private sector in Western Australia which are regulated under the relevant state industrial laws.
12. The Australian Bureau of Statistics (ABS) produces data on the number of employees with and without paid leave entitlements which is the most reliable measure of casual employment in the nursing and midwifery industries. Data based on an ABS customised report³ in Table A below, shows that in May 2020 there were over 29,000 registered nurses and midwives and over 23,000 nursing support and personal care workers without paid leave entitlements. These figures provide an estimate of the number of employees engaged as casual workers.

Table A

Customised report of 6291.0.55.003 - Labour Force, Australia, Detailed, Quarterly, May 2020 for employees by paid leave entitlements status by select occupations					
Paid leave entitlements status	Occupation (ANZSCO)	Aug-19	Nov-19	Feb-20	May-20
Employee without paid leave entitlements	Midwifery and Nursing Professionals (254)	38,172	42,263	31,615	29,334
	percentage of total employees	11%	12%	9%	8%
	Enrolled and mothercraft nurses (4114)	5,392	2,184	3,571	3,272
	percentage of total employees	21%	11%	15%	16%
	Nursing Support and Personal Care Workers (4233)	22,011	28,326	31,845	23,248
	percentage of total employees	24%	27%	32%	27%
Employee with paid leave entitlements	Midwifery and Nursing Professionals (254)	305,108	302,960	314,139	319,105
	Enrolled and mothercraft nurses (4114)	19,802	17,028	19,622	17,163
	Nursing Support and Personal Care Workers (4233)	69,893	75,283	68,832	61,969
Total Employees	Midwifery and Nursing Professionals (254)	343,280	345,223	345,754	348,439
	Enrolled and mothercraft nurses (4114)	25,195	19,213	23,234	20,435
	Nursing Support and Personal Care Workers (4233)	91,904	103,610	100,678	85,218

² Clause B.2

³ Refer to Appendix A

13. Whilst most nurses, midwives and nursing assistants are employed under state industrial laws, a substantial proportion are employed under the FW Act and are therefore covered by the Award⁴. The Award provides an important safety net for those workers who do not have the benefits of enterprise bargaining and plays an important role in underpinning enterprise agreements that apply to nurses, midwives and nursing assistants.

Award interpretation

14. The ANMF agrees that the key principles of how awards are to be interpreted are well summarised in *CEPU v Excelior*⁵:

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 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. *Amtcor 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].

15. These principles were also recently endorsed in *CFMMEU v DP World*⁶:

54. It is necessary to say succinctly something about the principles regarding interpretation of industrial agreements (which are essentially the same as those for awards).
55. In interpreting the Agreement the Court must begin with a consideration of the ordinary meaning of the words of the Award: *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813 (2006) 153 IR 426 at [53] per French J (“*City of Wanneroo*”), and generally give ordinary or well-understood words their ordinary or usual meaning: *Kucks v CSR Ltd* [1996] IRCA 166; (1996) 66 IR 182 (“*Kucks*”) at 184 per Madgwick J.

⁴ Except for those workers covered by state reference public sector transitional awards or the *Educational Services (Schools) General Staff Award 2020* [MA000076]

⁵ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Excelior Pty Ltd* [2013] FCA 638 at [27] to [30]

⁶ *Construction, Forestry, Maritime Mining and Energy Union v DP World (Fremantle) Limited* [2019] FCCA 2879

The Court must have regard to the context and purpose of the provision being construed, where context may appear from the whole of the text of the Agreement, the arrangement of the text, or the place in the text of the relevant provision: *Amcors Ltd v Construction, Forestry, Mining and Energy Union & Ors* [2005] HCA 10 (2005); 222 CLR 241 at [2] per Gleeson CJ and McHugh J; *City of Wanneroo* at [53] per French J, and also, as a contextual consideration, to the fact that it is an industrial agreement being construed, and therefore not open to literal, narrow or pedantic construction: *George A Bond & Co Ltd (In liq) v McKenzie* [1929] AR (NSW) 498 (“Bond”) at 503-504 per Street J; *City of Wanneroo* at [57] per French J; *Kucks* at 184 per Madgwick J.

The power to vary the Award under section 160 of the FW Act

16. Section 160 of the FW Act provides as follows:

Variation of modern award to remove ambiguity or uncertainty or correct error

- (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
- (2) The FWC may make the determination:
 - (a) on its own initiative; or
 - (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
 - (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
 - (d) if the modern award includes outworker terms--on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

17. Few cases have considered s.160 of the FW Act in detail. In *MBA v CFMEU*⁷ the Full Bench of Fair Work Australia re-affirmed previous case law when it rejected the employer’s applications to amend the *Building and Construction General On-Site Award 2010*.

18. The Full Bench of the Fair Work Commission (**Commission**) set out the principles applicable to the interpretation and application of s.160 by agreeing with the decision of Asbury C in *Property Sales Association of Queensland, Union of Employees re Real Estate Industry Award 2010*⁸ when she stated:

- [14] The power in s.160 of the Act to vary a modern award is discretionary. The exercise of the power first requires consideration of whether there is an ambiguity, uncertainty or error in an award. If it is established that this is the case, further consideration is required as to whether the discretion should be exercised. Where there is no ambiguity or uncertainty, or where the

⁷ *Master Builders Australia Limited and another v Construction, Forestry, Mining and Energy Union and others* [2012] FWA 3210

⁸ [2012] FWA 10134

Tribunal is not satisfied that there is an error in the terms of an award, there is no jurisdiction to vary a modern award under s.160 of the Act...⁹

19. For Ai Group to demonstrate that it has enlivened the provisions of s.160 of the FW Act its interpretation must be sustainable when the relevant terms of the Award are objectively assessed.¹⁰ It is not merely enough that two parties have different points of view as to what particular clauses in an award should mean.
20. The ANMF submits that the Award is not ambiguous or uncertain and that it does not contain errors.

Award is not ambiguous and/or uncertain

Prior consideration as part of 2012 award review

21. The Ai Group submission at paragraphs 66-70 discusses the 2012 decision of Vice President Watson (*Two Year Review Decision*)¹¹. This decision concerning the casual loading to be paid on weekends is as follows:

Casual loadings and weekend penalties

[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

⁹ 4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010 [\[2016\] FWCFB 4418](#) at [66]

¹⁰ *Ibid.*, at [42]

¹¹ [\[2012\] FWA 9420](#)

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. (Emphasis added).

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

22. In the *Two Year Review Decision*, Vice President Watson was primarily addressing the employer organisations’ argument that casuals should not be paid a casual loading at all when working weekends. This morphed into an argument about the correct interpretation of the interaction of clauses 10.4 (Casual employment) and 26 (Saturday and Sunday work) of the Award.
23. The decision of VP Watson was only concerned with an award review exercise. The comments he made concerning the correct way to calculate the rate of pay for casuals working on weekends was *obiter dicta*, as it was not essential to the decision and therefore had no precedent value.
24. In any event, the Vice President Watson’s comments that the Cumulative Method was the correct approach to calculating weekend penalty rates was mistaken as the decision of the Full Bench below demonstrates.

Domain Aged Care

25. The Ai Group submission at paragraphs 14-19 details the provisions which are relevant to their application, being clauses 10.4, 26, 28.1, 29.1, and 32.1 of the Award (the **Relevant Clauses**).
26. The Award as it is currently worded, is not 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.

27. The decision of the Full Bench of the Commission in *Domain Aged Care*¹² is resounding in that it has expressly dealt with the clauses in question and found that “the relevant provisions are in our view clear.”¹³
28. The ANMF will not repeat all of the decision, however we direct the Commission’s attention to paragraph 74 of the Ai Group Submission which contains the relevant passages, which we repeat below:
- [17] ... On a plain reading of the clause [10.4(b)], 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] ... 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... 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.
- [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.
- [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. (Emphasis added)
29. The existence of rival interpretations does not mean there is an ambiguity or uncertainty that enlivens s.160 of the FW Act. As the Full Bench of the Australian Industrial Relations Commission found in 1995, the “...Commission will generally err on the side of finding an

¹² *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716

¹³ *Ibid.*, at [21]

ambiguity or uncertainty where there are rival contentions advanced and an arguable case is made out for more than one contention”¹⁴ (Emphasis added).

Precedent set

30. With respect to the Relevant Clauses, Ai Group is seeking to use its application under s.160 of the FW Act to re-agitate matters that have already been recently decided by a Full Bench of the Fair Work Commission. Specifically, Ai Group is seeking to re-agitate the decision in *Domain Aged Care* and say that it:

...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.¹⁵

31. Whilst the Fair Work Commission is not bound by obligations to uphold previous rulings of the Commission it has as a general rule followed previous Full Bench decisions. This was noted by a Full Bench of the Commission in *Grabovsky v UPA*¹⁶. In this case, the Appellant argued that the Full Bench of the Commission should refrain from using authority (precedents). In response, the Full Bench stated:

[24] We reject the proposition that we should determine the matter without regard to authority. The Commission is, of course, bound to apply relevant judgments of the Federal Court and the High Court.

[25] Further, as the High Court has observed, justice requires consistency in decisions unless a difference can be articulated and applied:

‘The law must keep an order and form which admit of practical application, for justice requires both consistency in decisions and discrimination between cases on bases that can be articulated and applied.’

[26] Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

‘When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq.’

[27] The public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. (Footnotes removed)

32. The ANMF respectfully submits that a Full Bench of the Fair Work Commission has already very recently determined that the Relevant Clauses in the Award are not ambiguous or uncertain and on the basis of consistency is bound to follow the decision in *Domain Aged Care*.

¹⁴ *Re Victorian Public Transport Corporation*, [Dec 1253/95 M Print M2454](#), (7 June 1995)

¹⁵ Ai Group submission at [76]

¹⁶ *Inna Grabovsky v United Protestant Association of NSW Ltd T/A UPA* [\[2018\] FWCFB 4362](#)

Therefore s.160 of the FW Act cannot be enlivened with respect to whether the relevant clauses are ambiguous or uncertain.

Further grounds to establish clause 10 of the Award is not ambiguous or uncertain

33. Analysis of the wording of clause 10.4(d) of the Award supports the position of the Full Bench in *Domain Aged Care* that the clause is clear and unambiguous.
34. Ai Group contends that a possible interpretation is that the casual rate of pay is determined by two separate payments:
 - a. the prescribed ordinary rate of pay; and
 - b. the casual loading.

35. This contention is not supported by the wording of clause 10.4(d) of the Award:

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 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. (Emphasis added)
36. Clause 10.4(d) refers to "excluding" the casual loading. The ordinary meaning of excluding is "except" or take out of consideration¹⁷. This supports the contention that the hourly rate described in 10.4(b) is to be considered as a whole before the casual loading is to be excluded for the purposes of 10.4(d).
 37. Clause 10.4(d) further refers to the casual loading component then being added to the penalty rate of pay.
 38. The definition of "component" is "a constituent part"¹⁸. Reading the clause in its entirety and in relation to 10.4(b) conveys by the use of the words "excluding" and "component", that the ordinary rate of pay for a casual is comprised of two components:
 - a. the prescribed hourly rate and;
 - b. the casual loading.

The two components form part of a whole, which is disaggregated solely for the purposes of calculating shift allowances as set out in 10.4(d).

¹⁷ Macquarie Dictionary Online, 2020, Macquarie Dictionary Publishers, an imprint of Pan Macmillan Australia Pty Ltd, www.macquariedictionary.com.au

¹⁸ Macquarie Dictionary Online, *op. cit.*

39. In the absence of any wording to the contrary, in all other circumstances the two components are treated as a whole rate of pay for casual employees. In other words, the ordinary rate of pay for a casual employee is the base hourly rate of pay together with the casual loading.
40. The contention of Ai Group that the hourly rate of pay and the casual loading are separate payments is not supported by a plain reading of clause 10.4.
41. Clauses 10.4(b) and (d) are the only clauses that describe how casual employees are to be paid. There is no further ambiguity or uncertainty arising in other clauses; they simply say when overtime and penalties are to be paid to employees.

Schedule A of the Award

42. Ai Group submits at paragraphs 103-108 of its submission that Schedule A of the Award should be considered as demonstrating ambiguity and/or uncertainty. The purpose of Schedule A was to provide transitional provisions over a set period of time. ANMF submits that the wording of Schedule A has no useful relevance to the application that Ai Group has made.
43. Schedule A was inserted into the Award as part of the Award Modernisation process per a decision of the Australian Industrial Relations Commission Full Bench on 2 September 2009 (the *Model Provisions Decision*).¹⁹ The provisions no longer operate pursuant to clause A.7.4 of the Award, which states they "...cease to operate from the beginning of the first full pay period on or after 1 July 2014".
44. The *Model Provisions Decision* inserts model transitional provisions into the Award at Schedule A. The *Model Provisions Decision* provides:

[18] ...Although we have decided not to introduce a statement of principles, the model provisions will serve a similar purpose. This should minimise the potential for confusion and promote consistency of outcomes. It is our intention that the model provisions be applied generally although some modern awards will require special provisions. While the model provisions can be departed from to meet the circumstances of a particular case, departures should be limited...²⁰ (emphasis added)

45. Concerning the Award, the Full Bench said in the *Model Provisions Decision*:

Nurses Award 2010

[150] Submissions by employers in relation to nurses came from the aged care sector and private hospitals. Concern was expressed at a number of changes to conditions or employment which it is said reduced flexibility. The ANF drew our attention to changes from the existing regulation to the new award. For the most part the ANF sought to challenge the employers' view of the cost impact of the modern award.

[151] We have addressed many of the issues raised by the employers in the earlier part of this decision. The question is whether or not to include any or all of the model provisions in this award. In light of the submissions we will include all of the model provisions.

¹⁹ *Award Modernisation process - transitional provisions in priority and Stage 2 modern awards* [2009] AIRCFB 800

²⁰ *Ibid.*, at [18]

46. The wording referred to by Ai Group at paragraph 106 of its submission is virtually identical to the wording found in Schedule A of the Model Provisions Decision. The only difference being that Ai Group has incorrectly referenced the schedule.
47. At no point did any party direct the AIRC's attention to how the schedule would interact with other provisions in the Relevant Clauses. Even if the AIRC did direct its attention to the issue it may have come to the same conclusion with respect to the wording in the clause in any event as its decision with respect to the *Racing Clubs Event Award 2010* demonstrates:

[86] ...The second matter concerns minimum wages for casual liquor employees. Clause 14 of the award contains minimum wages expressed as dollar amounts. Clause 14.8 sets out the method by which increases in minimum wages should be reflected in those rates. It is clear that the rates are loaded to take account of the casual nature of employment and the times at which the work is performed. The model transitional provisions deal with minimum wages and penalties and loadings separately. No one suggested, however, that the rates for casual liquor employees would of themselves lead to increases in costs for employers. While noting the issue, in the circumstances we do not intend to make any special provision. The position can be revisited should it be necessary to do so. (Emphasis added)

48. In light of the fact that:
- a. Schedule A no longer operates;
 - b. Schedule A was a model schedule inserted into most awards without any change; and
 - c. when the AIRC considered an example of an award with casual loadings that were not separated it still inserted the same model clause.

The ANMF submits that no weight should be placed on the wording within it.

Claimed errors in the Award

49. In its Full Bench decision of 3 April 2009²¹ (the **April 2009 Decision**) the AIRC created four awards with respect to health. The relevant extracts are as follows:

Health and welfare services (excluding social and community services)

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

Nurses Award 2010

Aged Care Industry Award 2010

Health Professionals and Support Services Award 2010

Medical Practitioners Award 2010

[150] Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the

²¹ *Award Modernisation* [2009] AIRCFB 345 at [150]

calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.

50. Ai Group says that "...the AIRC expressly determined that the Cumulative Method of calculation was to apply in respect of overtime rates and the casual loading."²² Accordingly, "...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."²³
51. The ANMF does not accept that the above paragraph means there is an error with respect to the Award. The paragraph in question does not particularise who had raised such concerns, nor for which award these concerns were raised for. Significantly, the paragraph does not identify specifically which awards this approach was meant to apply to.
52. As demonstrated in Appendix B below, clause 10.4(d) of the Award is worded in a distinctively different way to all other awards in the health group. There is no indication in the *April 2009 Decision* that it was intended to alter the specific wording of the Award.
53. The table contained in Appendix B shows what each health award stated with respect to the casual loading when made in April 2009 and the previous exposure draft in January 2009.
54. The *April 2009 Decision* concerns overtime only. Ai Group makes the inference that the reasoning with respect to overtime should also be applied to the calculation of weekend rates and public holidays.²⁴ There is no basis to suggest there has been an error perpetuated with respect to weekend rates and public holidays. In any event, the ANMF contends there is no error with respect to any of the penalties addressed in the Ai Group application.
55. In the limited decisions that relate to correction of error under s.160 of the FW Act it is apparent that the nature of an error that can be subject to correction as anticipated in s.160 is that of a mistake having been made between the relevant decision of the Commission and the intent of that decision being expressed in the drafting of the award.
56. Deputy President Watson, at the initiative of the Commission (then Fair Work Australia), corrected an error in the *Restaurant Industry Award 2010*. The error was corrected on the basis that the Award Modernisation Full Bench in making the award had expressed a clear view as to the classification structure to be adopted into the award, preferring one proposed structure over another.²⁵
57. The relevant clause in which an error was identified concerned the definition for a Food and Beverage Attendant. Deputy President Watson referred to the decision of the Award Modernisation Full Bench and noted "The omission of the word 'not' from the definition of the in the modern award was clearly an error."²⁶ This decision illustrates that the error corrected

²² Ai Group submission at [163]

²³ *Ibid.*, at [169]

²⁴ *Ibid.*, at [171(b)]

²⁵ [\[2011\] FWA 4435](#) at [13]

²⁶ *Ibid.*, at [14]

was a simple drafting mistake that was readily discernible when reading the decision and the subsequent award as initially drafted.

58. In the *Vehicle Award Decision*²⁷ the Shop, Distributive and Allied Employees Association (SDA) sought to enliven s.160 to correct an error with respect to how some casual employees were to be paid. The SDA argued that an error had been imported into the award as a result of historical errors in previous awards:

[71] Second, the SDA identifies the relevant “error” for the purpose of s.160 to have occurred in 1994 when the casual console operator hourly rate was first introduced. Immediately prior to this there was no separate hourly rate for casual console operators, but there was an hourly allowance for casual driveway operators who used a console. The SDA’s submissions assert that the new casual console operator was calculated by taking the casual driveway attendant hourly rate, adding the console allowance, and then increasing this amount by the percentage increase in the permanent weekly rate (in accordance with the traditional adjustment formula).

[72] We are prepared to accept that this was in fact how the new rate was calculated, although we have not been provided with any record of the proceedings which makes this clear. The SDA submits that this approach was erroneous because the console allowance “did not have any factors of casual loading or penalty loading included but was applied to a rate that did have these factors in it”. It proposed an alternate calculation which, if used, would have avoided that difficulty.

[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. (Emphasis added)

59. The ANMF submits that the *Vehicle Award Decision* supports the contention that the nature of the error must be one of mistake as suggested by the wording “some mathematical error was made in calculating the rates”.
60. Further, s.160 of the FW Act is not intended to provide a vehicle for one party to obtain a preferred outcome or resolve disagreement with a previous decision concerning an award. The intended purpose is to correct an error that can be demonstrated by evidence to show the award does not express the intention of the Award Modernisation decision makers. The ANMF submits there is no evidence of such an error in respect of the Ai Group application.

Retrospective variation to the Award

61. In the event that the application is granted under any of the grounds set out in s.160, the ANMF is opposed to any retrospective variation of the Award pursuant to s.165(2).

²⁷ 4 Yearly review of modern awards-Vehicle Manufacturing, Repair Services and Retail Award 2010 [2016] [FWCFB 4418](#) at [71]-[73]

It is submitted that the Applicant has not established the existence of any exceptional circumstances that would warrant retrospective operation of any variation.

62. It is, however, submitted the question of retrospective operation of any variation will be better capable of being addressed once the scope of any variation is established. To this end, the ANMF reserves its right to make further submissions subject to the substantive outcome of the application pursuant to s.160.

Relevant pre-modern awards

63. Ai Group is erroneous in asserting that there were “some 49 federal and state pre-modern awards preceded the Nurses Award”²⁸. There were more awards, at least 66, that exclusively applied to nurses around Australia²⁹.
64. ANMF rejects most of the basis upon which Ai Group makes its claims in Section 5 of its submission.
65. At the table provided in Attachment A of the Ai Group submission there are numerous factual errors with respect to whether the casual loading in an award had the Compounding Method or the Cumulative Method applied.
66. No referencing to specific clauses has been provided in the analysis by Ai Group nor has the methodology used been spelled out. Ai Group have made their own judgement as to how the casual loading interacts with ordinary hours on a weekend, work on a public holiday and overtime.
67. The ANMF suggests that no weight should be placed on the table at Attachment A of the Ai Group submission and the analysis of it provided by Ai Group at paragraphs 57-61 as it is not supported by evidence.
68. In addition, the weight given to these awards is clearly not equal. Some awards had very broad application to most nurses in the state, whilst others applied to very few workers. At Appendix C to this submission is a copy of the relevant provisions of the awards the (then) Australian Nursing Federation (**ANF**) used for its draft occupational award in 2008³⁰.
69. In its submission of 31 October 2008 at Attachment 3³¹ the ANF identified the 10 awards that related to the vast bulk of nurses not employed in the public sector. These were:
- a. Nurses’ Aged Care Award – State 2005 (Queensland) (**NACAS**)
 - b. Private Hospital Nurses’ Award – State 2003 (Queensland) (**PHNAS**)
 - c. Nurses Private Employment (A.C.T.) Award 2002
 - d. Nurses (Northern Territory) Private Sector Award 2002

²⁸ Ai Group submission at [57]

²⁹ ANF, [Further submissions](#) re AM2008/13 ([2 December 2008](#)). See also submission of 6 June 2008 at [Attachment B](#) re AM2008/1

³⁰ ANF, [Exemplar Nursing Occupational Award](#) (31 October 2008)

³¹ ANF, [Submissions re AM2008/13](#) (31 October 2008)

- e. Nurses' (ANF – WA Private Hospitals and Nursing Homes) Award 1999
- f. Nurses (Victorian Health Services) Award 2000
- g. Nurses (ANF – South Australian Private Sector) Award 2003
- h. Nurses (Tasmanian Private Sector) Award 2005
- i. Nursing Homes, &C., Nurses' (State) Award (NSW)
- j. Private Hospital Industry Nurses' (State) Award (NSW)

70. As can be seen from the analysis in Appendix C:

- a. 4 of the awards required the application of the Compounding Method with respect to ordinary hours of work on a weekend (3 with respect to enrolled nurses).
- b. 3 of the awards required the application of the Compounding Method with respect to hours of work on a public holiday (2 with respect to enrolled nurses).
- c. 3 of the awards required the application of the Compounding Method with respect to overtime.

71. Despite what Ai Group asserts, the Relevant Clauses in the Award have not disturbed a "longstanding industry practice"³² because there was no consistent pre-modern award standard industry practice.

72. As demonstrated from analysis of the pre-modern awards in Appendix C, there was a range of variation in how the casual loading was to be treated with respect to its interactions with penalties, overtime and public holidays, which the AIRC took into consideration when making the Award. The Compounding Method was one of the methods of calculation used in the relevant pre-modern awards.

73. The wording in two Queensland awards is directly relevant. The wording contained in the PHNAS and the *Hospital Nurses' Award – State 2003 (HNAS)*, both awards of the Queensland Industrial Relations Commission (**QIRC**) were very similar to clause 10.4(d) of the Award as shown in Table B below.

Table B

Nurses Award 2010	Private Hospital Nurses' Award – State 2003	Hospital Nurses' Award – State 2003
10.4 Casual employment (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.	6.4 Shift work - Extra payment for afternoon and night shifts 6.4.3 In the instance of a casual employee the shift allowance prescribed herein shall be calculated on the relevant rate of pay exclusive of the casual loading.	6.4.3 <i>Casual employees</i> - In the case of a casual employee the shift allowance shall be calculated upon the relevant wage rate exclusive of the casual loading.

³² Ai Group submission at [176(b)], [184(d)] and [221(b)]

74. The AIRC did not explain the reasons for choosing the words it did with respect to casual loading in the Award. However, it is apparent that the words in the Award have been drawn from the PHNAS and HNAS, albeit in a slightly modified form. The PHNAS and the HNAS are discussed in further detail below.

Queensland awards

75. An example that demonstrates how Ai Group is incorrect in its table at Attachment A of its submission, is a QIRC decision in 1977 concerning the *Hospital Nurses Award – State*³³ (the **HNAS Case**). Commissioner Clark considered the interaction of casual loading and public holiday penalty for a nurse who worked at a nursing home (the *Nurses’ Aged Care Interim Award – State* and NACAS did not yet exist). The relevant wording of this decision in this case is contained at Appendix D.
76. Commissioner Clark ruled that the HNAS provided for casual loading and public holidays to be calculated using the Compounding Method:
- ...the casual rate arrived at in accordance with clause 4 (14) is to be regarded as the employee's ordinary time for the purposes of calculating the payment due to the employee for work performed on a Statutory Holiday. By reason of the provision of clause 8 (viii) such employee would be entitled to 2 ½ times the casual rate prescribed by clause 4 (14) for each hour worked on the Statutory Holiday.³⁴
77. The equivalent provisions of those discussed in the HNAS Case in the HNAS are clauses 4.3.2 and 7.6.10 which are contained in Appendix E. The provisions in the HNAS relating to shift work, overtime and weekend penalties are also contained in Appendix E.
78. The ANMF submits that clauses from the HNAS for all intents and purposes have the same meaning as those found in the 1977 *Hospital Nurses Award – State*, with updated language. Both awards refer to a casual being paid using the Compounding Method when calculating the rate payable on a public holiday.
79. In Queensland, before the advent of WorkChoices³⁵ and then the FW Act, the NACAS and the PHNAS were the awards applicable to nearly all nurses in the private sector in that state. Both awards were made subsequent to the creation of the HNAS, which is considered the “parent” award of the latter creations.
80. Appendix C of this submission contains the relevant wording of the PHNAS.
81. The HNAS and the PHNAS clearly provided that the casual loading was to be compounded with respect to its interaction with overtime, public holidays and weekend work but not shift work. In effect they provide the same Compounding Method entitlement as the current Award does.

³³ *Re Hospital Nurses Award – State* (1977) 94 QGIG 907 at 907-908. As this case is not electronically available, a copy of the relevant pages of the Queensland Government Industrial Gazette have been provided directly after the wording in Appendix D.

³⁴ *Ibid.*, at [908]

³⁵ *Workplace Relations Act 1996* (Cth) as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth)

82. The NACAS provided the wording as specified in Appendix C of this submission. Its predecessor award, the *Nurses' Aged Care Award – State 2003* contained the same provision. The award before the 2003 award was the *Nurses' Aged Care Interim Award – State* (the **Interim Award**).
83. When made in 1990³⁶, the Interim Award stipulated the relevant wording contained in Appendix F.
84. The Interim Award clearly provided that the casual loading was to be compounded with respect to its interaction with overtime, public holidays and weekend work but not shift work. In effect it provided the same as the current Award does now.
85. As part of the creation of the NACAS, the Interim Award was completely rewritten after a Full Bench of the QIRC determined an application by the then Queensland Nurses' Union of Employees (**QNU**)³⁷ to amend the Interim Award. On 15 April 2002 the Full Bench granted a range of matters including new classification structures for the NACAS, which replaced the Interim Award.³⁸
86. The insertion of wording that excluded casual loading being compounded at clause 4.1.3 was a negotiated outcome between the then QNU and employer representatives as directed by the QIRC³⁹. It replaced the standard provisions found in the previous Interim Award, the PHNAS and the HNAS.

Victorian awards

87. In Victoria, registered nurses were covered by the state *Registered Nurses Award* (an award made under the now repealed *Industrial Relations Act 1979* (Vic)) until 1992 when the federal *Nurses (Victorian Health Services) Award 1992* (**1992 Award**) came into operation. This award was replaced by the *Nurses (Victorian Health Services) Award 2000* (**2000 Award**).
88. In Victoria, enrolled nurses were covered by the state *Hospitals and Benevolent Homes Award* (an award made under the now repealed *Industrial Relations Act 1979* (Vic)) until the 1992 Award came into operation. Enrolled nurses were also covered by the 2000 Award.
89. The 1992 Award provided the relevant conditions spelled out in Appendix G and the 2000 Award provided the relevant conditions specified in Appendix C.
90. Regarding registered nurses in Victoria, it can be seen in the 1992 Award and 2000 Award that registered nurses were paid on using the Compounding Method with respect to the interaction of the casual loading with weekend penalties, public holidays and overtime.

³⁶ (1990) 134 QGIG 831

³⁷ Name changed to Queensland Nurses and Midwives' Union of Employees in 2017

³⁸ *Queensland Nurses' Union of Employees v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers & Ors* [2002] QIRC 54; 169 QGIG 769

³⁹ *Ibid.*, at [91]

91. This contrasts with the entitlements of enrolled nurses where the interaction of weekend penalties and public holidays with the casual loading uses the Cumulative Method with the provision of a specific amount of loading being 75%. Enrolled nurses were paid using the Compounding Method with respect to the interaction of the casual loading with overtime.
92. In the 1992 Award and 2000 Award afternoon and night shift penalties were calculated as a fixed dollar amount.
93. These Victorian and Queensland examples demonstrate that it is incorrect to state, as Ai Group have done, that “(t)he 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.”⁴⁰
94. Ai Group also stated that there was “...a very limited practice of remunerating such employees (using the Compounding Method)”⁴¹. This is also incorrect.
95. Ai Group’s claims around the history of nursing awards have not been substantiated by the available evidence. The ANMF has demonstrated that some of the information in the Ai Group submission was plainly incorrect. For example, Ai Group’s assertions around the lack of the Compounding Method in pre-modern awards has been demonstrated by ANMF to be erroneous.

Modern awards objective

96. As an alternative argument, Ai Group has argued that the Award should be amended in accordance with s.157 of the Act. It has outlined its reasons in section 12 of its submission.
97. The ANMF rejects the assertions in the Ai Group submission in section 12, many of which are untested and not supported by any evidence.

A fair and relevant safety net

98. In the *Penalty Rates Case* the Full Bench noted that “fairness in this context (of s.134 of the FW Act) is to be assessed from the perspective of the employees and employers covered by the modern award in question” (Emphasis added).⁴²
99. The ANMF believes it is necessary to address the points raised by Ai Group in its submission at paragraph 184 which asserts why Ai Group believes its proposed provisions are fair. The ANMF responds to the sub-paragraphs using the same numbering system used by Ai Group. The Ai Group argument is repeated in bold first with the ANMF response underneath:

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

The provisions proposed do not remove an “existing uncertainties and ambiguities as to the entitlement of casual employees when working overtime, on weekends and public

⁴⁰ Ai Group submission at [60]

⁴¹ *Ibid.*, at [61]

⁴² *4 yearly review of modern awards – Penalty Rates* [\[2017\] FWCFB 1001](#) at [117].

holidays”. If such uncertainties or ambiguities existed then s.160 of the Act would be the means to address this. An argument about fairness is a separate issue.

- 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.**

By and large, employers which comply with the law are not “exposed to claims or litigation”. The Ai Group argument amounts to stating that employers should be rewarded for not obeying the law.

- 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. 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.**

There are no ambiguities or uncertainties. This argument appears to conflate the employer’s argument with automatically meaning there is ambiguity or uncertainty. We refer to paragraphs 21-60 above. The basis for payment of casual employees is set out in the Award at the relevant clauses. More to the point, there is no apparent basis why casual employees should not be compensated in accordance with the Award and as confirmed in the *Domain Aged Care* decision.

- d. They would reflect longstanding industry practice.**

Ai Group have provided no evidence of this supposed “longstanding industry practice”. As has been demonstrated by the ANMF previously under the section ‘Relevant pre-modern awards’ there was a wide range of industry practice, depending on the relevant state and the applicable award.

- 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.**

As previously discussed the ANMF does not believe that there is “clear intent” with respect to the decision Ai Group refers to, which the ANMF assumes is the *April 2009 Decision*.

- 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.**

Refer to our response at (e) above.

- 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.

The ANMF rejects this submission. Ai Group has led no evidence to suggest that employers have been deterred from engaging casuals to perform work on overtime, weekends and public holidays.

100. The ANMF makes the following submissions with respect to the matters the Commission must take into account pursuant to s.134 of the FW Act when considering an application to vary an award under s157(1).

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

101. Ai Group identifies the classifications in the Award which would meet the definition of being low paid as follows:

- Nursing Assistants
- Student Enrolled Nurses
- Enrolled Nurses;
- Registered nurse level 1, pay points 1-2.⁴³

102. In the recent *Health Sector Awards - Pandemic Leave* matter⁴⁴ the Full Bench noted the following with respect to low paid employees under the Award:

[55] In respect of s 134(1)(a) (relative living standards and the needs of the low paid), the needs of the low paid constitute a significant matter in our consideration. In defining the “low paid” for the purpose of our consideration, we adopt the benchmark used in recent Annual Wage Review decisions, namely two-thirds of median full-time earnings as measured by the ABS Characteristics of Employment Survey. The most recent of these surveys shows that, as at August 2019, median weekly earnings for full-time employees was \$1,375.13 Two-thirds of this figure is \$916.67. The full-time minimum weekly wages of grades 1-5 in the Aged Care Award are below this amount, as are the rates for nursing assistants and the lower pay points for enrolled nurses under the Nurses Award. The residential aged care sector has a relatively high proportion of employees paid at the award rate. Accordingly, we proceed on the basis that the sector employs significant numbers of low-paid employees.⁴⁵ (Footnotes omitted)

103. Ai Group suggests that a reduction in the method of calculation of payment for casuals as proposed would be “unlikely to have a material impact on the living standards of the low paid”⁴⁶. The ANMF does not accept this proposition. Noting the employees affected by this application are casual employees, the ANMF submits that it is lower paid employees who are more likely to be engaged as casuals. For example, student nurses engaged in casual work as Nursing Assistants or Student Enrolled Nurses to support themselves while studying to become fully qualified nurses.

⁴³ Ai Group submission at [190]

⁴⁴ AM2020/13

⁴⁵ [\[2020\] FWCFB 3940](#) at [55]

⁴⁶ Ai Group submission at [194]

104. Employers, particularly in the aged care sector, have an incentive to engage lower paid staff to work on weekends and public holidays to minimise the base hourly rate upon which penalties are to be paid. It is clear that adopting a method of calculation as to how casual employees are paid penalties on weekends, public holidays and overtime will have a material impact on the living standards of those low paid workers. Indeed, it is the payment of penalties that for many lifts earnings out of being low paid.

105. Table C below shows the dollar amount difference between the Compounding Method and Cumulative Method for a sample of classifications under the Award. Those classifications that would be low paid under the base weekly rate as at August 2019 are highlighted.

Table C

Classification	Saturday / time and a-half (overtime)			Sunday			Public Holiday / Double time (overtime)		
	Compounded per hour	Cumulative per hour	Diff per hour	Compounded per hour	Cumulative per hour	Diff per hour	Compounded per hour	Cumulative per hour	Diff per hour
NA Year 2 Hrly: \$22.01 Cas: \$27.51	\$41.27	\$38.52	\$2.76	\$48.14	\$44.02	\$4.12	\$55.02	\$49.52	\$5.50
NA Cert 3 Hrly: \$23.09 Cas: \$28.86	\$43.29	\$40.41	\$2.89	\$50.51	\$46.18	\$4.33	\$57.72	\$51.95	\$5.77
EN pp 1 Hrly: \$23.52 Cas: \$29.40	\$44.10	\$41.16	\$2.94	\$51.45	\$47.04	\$4.41	\$58.80	\$52.92	\$5.88
EN pp 5 Hrly: \$24.74 Cas: \$30.93	\$46.40	\$43.30	\$3.10	\$54.13	\$49.49	\$4.65	\$61.86	\$55.67	\$6.19
RN level 1 pp 2 Hrly: \$25.68 Cas: \$32.10	\$48.15	\$44.94	\$3.21	\$56.18	\$51.36	\$4.82	\$64.20	\$57.78	\$6.42
RN level 1 pp 6 Hrly: \$28.64 Cas: \$35.80	\$53.70	\$50.12	\$3.58	\$62.65	\$57.28	\$5.37	\$71.60	\$64.44	\$7.16

106. In addition, the full paragraph for the *Penalty Rates Case* referred to by Ai Group states as follows:

[822] The extent to which lower wages induce a greater demand for labour on Sundays (and hence more hours for low-paid employees) will somewhat ameliorate the reduction in income, albeit by working more hours. We note the Productivity Commission’s conclusion that, in general, most existing employees would probably face reduced earnings as it is improbable that, as a group, existing workers’ hours on Sundays would rise sufficiently to offset the income effects of the penalty rate reduction. (Emphasis added)⁴⁷

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

107. An analysis of the decision in the *Penalty Rates Case* by researchers from Macquarie University and the University of Wollongong concluded that “...In the short run we find that there was no discernible positive impact on affected workers’ employment outcomes... our findings do not support any of the potential beneficial employment and hours effects provided by the FWC as rationale for their penalty rate decision.”⁴⁸
108. Ai Group has produced no evidence to demonstrate that employers will employ nurses for additional hours as hinted at in paragraph 194 of their submission. The evidence suggests that employers will merely keep the difference.
109. The ANMF rejects the assertion that s.134(1)(a) is “neutral consideration in this matter”⁴⁹. It is the ANMF’s submission that section 134(1)(a) is factor that weighs against granting Ai Group’s application.

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

110. Ai Group has shown little evidence that 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”.⁵⁰
111. The list of agreements provided by Ai Group demonstrates that in spite of the decision in *Domain Aged Care* employers are willing to participate in collective bargaining and still have their agreement approved. Employers are under no obligation to provide undertakings and in any of those cases could have refused to provide the undertakings requested by the Fair Work Commission.
112. In any event a range of employers paid the casual loading using the Compounding Method for overtime, weekends and/or public holidays before the decision in *Domain Aged Care* but after the Award came into operation. These include, but are not limited to:
- a. *Healthscope - Victoria - Nurses and Midwives Agreement 2016-2020*⁵¹
 - b. *Health Care (Victorian Hospitals) Nurses Enterprise Agreement 2016*⁵²
 - c. *St John of God Health Care Inc. (Victoria) Nurses Enterprise Agreement 2016*⁵³
 - d. *Healthscope & QNMU/ANMF - Queensland - Nurses - Enterprise Agreement 2019-2021*⁵⁴.

⁴⁸ Martin O’Brien, Raymond Markey, Labour regulation reform and sectoral employment outcomes: a case study of public holiday penalty rate reductions in Australia, *Applied Economics Letters*, 10.1080/13504851.2019.1640857, 27, 7, (559-563), (2019).
<<https://onlinelibrary.wiley.com/doi/full/10.1111/1759-3441.12221>>

⁴⁹ Ai Group submission at [195]

⁵⁰ *Ibid.*, at [199]

⁵¹ [AE419490](#)

⁵² [AE421532](#)

⁵³ [AE422691](#)

⁵⁴ [AE506181](#)

- e. *Healthscope - Tasmania - Nurses - Enterprise Agreement 2016-2020*⁵⁵
- f. *Calvary Health Care Tasmania (Lenah Valley and St John's Campuses) Nursing Staff Enterprise Agreement 2016*⁵⁶
- g. *Calvary Health Care Tasmania (St Luke's and St Vincent's Campuses) Nursing Staff Enterprise Agreement 2017*⁵⁷
- h. *Health Care Australia Pty Ltd – North West Private Hospital Nurses' Enterprise Agreement 2019*⁵⁸
- i. *St Vincent's Private Hospitals Ltd Victoria and the Australian Nursing and Midwifery Federation and Health Services Union Nurses Enterprise Agreement 2016*⁵⁹
- j. *St Andrew's Toowoomba Hospital and QNU - Nurses - Enterprise Agreement 2015-2018*⁶⁰
- k. *Epworth HealthCare Nurses Enterprise Agreement 2016 - 2020*⁶¹

113. Section 134(1)(b) does not support the grant of the Ai Group application.

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

114. Ai Group has led no evidence to suggest that the Proposed Variations will increase workforce participation by encouraging employers to engage casual employees.

115. Even if the Proposed Variations meant that that more casuals were employed the ANMF submits that this would be in substitution for existing part-time employees. The Award is already flexible in allowing employers to provide extra hours to part-time staff without necessarily having to pay overtime.⁶²

116. The ANMF submits that this consideration is a neutral factor in whether to grant Ai Group's application.

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

117. Merely asserting that there is "uncertainty" in the Award as Ai Group have done with respect to this element of their application does not make it the case. The decision in *Domain Aged Care* provides absolute certainty as to how the Relevant Provision are to be interpreted.

⁵⁵ [AE421594](#)

⁵⁶ [AE421776](#)

⁵⁷ [AE426925](#)

⁵⁸ [AE505809](#)

⁵⁹ [AE420712](#)

⁶⁰ [AE423843](#)

⁶¹ [AE422324](#)

⁶² Clause 10.3 of the Award

118. Ai Group have not demonstrated that their application has met this criteria in the FW Act.

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

119. The ANMF acknowledges that the principles spelled out in the *Penalty Rates Case* do not automatically mean that rates of pay for working irregular hours cannot be made lower as 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 but is a consideration which the Commission is required to take into account.⁶³

120. However, s.134(da) of the FW Act requires the Commission to take into account the need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends or public holidays or shifts. Any decision to reduce additional remuneration provided for working in the circumstances set out in 134(da) must be considered in light of the Modern Award objectives. The ANMF submits that for casual employees, who are by definition engaged in insecure work encompassed by the criteria set out in s.134(da) they would be negatively impacted by any such reduction to the relevant safety net of terms and conditions.

121. Ai Group have not demonstrated that payment of weekend, public holiday and overtime rates in conjunction with the casual loading using the Cumulative Method is mandated by the FW Act. Whilst most modern awards of the FWC calculate penalties using the Cumulative Method, a number of awards use the Compounding Method, including:

- *Children’s Services Award 2010*
- *Coal Export Terminals Award 2020*
- *Food, Beverage and Tobacco Manufacturing Award 2010*
- *Graphic Arts, Printing and Publishing Award 2010*
- *Horse and Greyhound Training Award 2020*
- *Manufacturing and Associated Industries and Occupations Award 2020*
- *Mining Industry Award 2020*
- *Port Authorities Award 2020*
- *Professional Diving Industry (Industrial) Award 2020*
- *Real Estate Industry Award 2020* (public holidays only)
- *Salt Industry Award 2010*
- *Seafood Processing Award 2020*
- *Supported Employment Services Award 2020*
- *Timber Industry Award 2010*

122. Section 134(1)(da) is a consideration that weighs against the Ai Group application.

⁶³ 4 yearly review of modern awards – Penalty Rates [\[2017\] FWCFB 1001](#) at [195].

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

123. The ANMF does not agree with the Ai Group submission that this is a neutral consideration in this matter. As at 2018, workforce data shows that 89% of employed registered nurses, enrolled nurses and midwives are female.⁶⁴ Any decision to reduce entitlements to remuneration under the Nurses Award will have a significant disproportionate negative effect on women.
124. The ANMF submits that s.134(1)(e) is a consideration that weighs against the Ai Group application.

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

125. It is telling that Ai Group states that “It is axiomatic that the grant of the Application would have a positive impact on business.”⁶⁵ It clearly demonstrates that Ai Group believe “positive impact” is to be expressed largely in terms of how much profit business will make.
126. The Regulatory Burden will not be impacted if the Ai Group application is successful. Employers will still need to abide by the terms of the Award, albeit in terms more favourable to them.
127. As previously raised repeatedly by the ANMF in this submission, there is no uncertainty within the Award so this is not a factor concerning Regulatory Burden.
128. The ANMF believes this is a neutral consideration in this matter.

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

129. Ai Group have not demonstrated why their preferred wording to make the “operation of relevant provisions plain”⁶⁶ should be preferred over any other wording that maintains the Compounding Method.
130. The ANMF submits that s.134(1)(g) is a consideration that weighs against the Ai Group application

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

131. The ANMF believes that this is a neutral consideration in this matter.

⁶⁴ National Health Workforce Data Sets (NHWDS), 2015 and 2018

⁶⁵ Ai Group submission at [217]

⁶⁶ *Ibid.*, at [220]

Conclusion

132. Ai Group has made its application on two separate bases, although it has at times attempted to conflate the two. The first basis was that there was alleged ambiguity or uncertainty and there was error, in accordance with s.160 of the FW Act. The second basis was that the Proposed Variations were claimed to be necessary to ensure that the Award achieves the modern awards objective, pursuant to s.157 of the FW Act.
133. For reasons set out above, the Relevant Clauses in the Award are not ambiguous or uncertain. The ANMF submits the wording of Clause 10.4 is clear in its intent and does not on plain reading of the clause result in any uncertainty as to how casual employees are to be paid. The Relevant Clauses with respect to when casual employees are entitled to receive penalty payments for work performed on overtime on weekends and public holidays are equally clear and unambiguous.
134. Any controversy that exists is principally a contrivance by some employers in an attempt to undermine the decision of the Full Bench in *Domain Aged Care*. In this regard, Ai Group has largely tried to re-litigate the decision in *Domain Aged Care*. It is clear from the authority in the case that the Award is not ambiguous nor uncertain with respect to the Relevant Clauses.
135. With regards to the alleged error in the Award concerning the Compounding Method being used for the calculation of overtime, the ANMF submits that no such error exists and refers to paragraphs 49-60 above. To the extent that Ai Group submit that the same error can be discerned with respect to payment for weekends and public holidays, the ANMF submits there is no basis to draw a conclusion that the Modern Award does not reflect the intention of the Award Modernisation Full Bench.
136. In the circumstances, the ANMF submits that the Commission can be satisfied that the grounds required to enliven s.160 of the FW Act have not been made out.
137. Alternatively, Ai Group relied on s.157 of the FW Act as the basis of variation of the Award. Ai Group has provided many points to consider but very little evidence to substantiate the claims it has made. The submissions are unsupported by evidence and largely amount to assertions about possibilities.
138. The ANMF submits that there is no evidence or basis to satisfy that the Proposed Variations are necessary to achieve the objectives of a modern award as set out in s.134 of the FW Act. The ANMF submits that with respect to the objectives to be considered under s.134, when viewed overall, the Proposed Variations would be contrary to achieving the modern award objectives.
139. With respect to whether any variation made under s.160 should operate retrospectively, the ANMF seeks to reserve its rights to address this matter in further submissions pending determination of the substantive application.
140. The ANMF respectfully requests that the application be dismissed in its entirety.

Australian Nursing and Midwifery Federation
31 July 2020

Appendix A

ABS Labour Force Survey (2014): detailed, quarterly, August 2019 onwards

		Employed total ('000)	Employed total ('000)	Employed total ('000)
Month	ANZSCO	Employees	Employee with paid leave entitlements	Employee without paid leave entitlements
August Quarter 2019	SELECTED_254 Midwifery and Nursing Professionals	343.3	305.1	38.2
August Quarter 2019	SELECTED_2541 Midwives	20.1	18.0	2.2
August Quarter 2019	SELECTED_2544 Registered Nurses	297.9	262.6	35.3
August Quarter 2019	SELECTED_4114 Enrolled and Mothercraft Nurses	25.2	19.8	5.4
August Quarter 2019	SELECTED_4231 Aged and Disabled Carers	190.0	119.9	70.1
August Quarter 2019	SELECTED_4233 Nursing Support and Personal Care Workers	91.9	69.9	22.0
November Quarter 2019	SELECTED_254 Midwifery and Nursing Professionals	345.2	303.0	42.3
November Quarter 2019	SELECTED_2541 Midwives	20.9	18.9	2.0
November Quarter 2019	SELECTED_2544 Registered Nurses	295.9	256.7	39.2
November Quarter 2019	SELECTED_4114 Enrolled and Mothercraft Nurses	19.2	17.0	2.2
November Quarter 2019	SELECTED_4231 Aged and Disabled Carers	204.1	123.8	80.2
November Quarter 2019	SELECTED_4233 Nursing Support and Personal Care Workers	103.6	75.3	28.3
February Quarter 2020	SELECTED_254 Midwifery and Nursing Professionals	345.8	314.1	31.6
February Quarter 2020	SELECTED_2541 Midwives	21.5	20.4	1.1
February Quarter 2020	SELECTED_2544 Registered Nurses	296.0	266.3	29.7
February Quarter 2020	SELECTED_4114 Enrolled and Mothercraft Nurses	23.2	19.7	3.6
February Quarter 2020	SELECTED_4231 Aged and Disabled Carers	214.6	132.9	81.7
February Quarter 2020	SELECTED_4233 Nursing Support and Personal Care Workers	100.7	68.8	31.8
May Quarter 2020	SELECTED_254 Midwifery and Nursing Professionals	348.4	319.1	29.3
May Quarter 2020	SELECTED_2541 Midwives	22.2	20.6	1.6
May Quarter 2020	SELECTED_2544 Registered Nurses	297.6	270.8	26.8
May Quarter 2020	SELECTED_4114 Enrolled and Mothercraft Nurses	20.4	17.2	3.3
May Quarter 2020	SELECTED_4231 Aged and Disabled Carers	202.9	122.7	80.2
May Quarter 2020	SELECTED_4233 Nursing Support and Personal Care Workers	85.2	62.0	23.2

Note: The data for 4114 Enrolled and Mothercraft Nurses and 2541 Midwives is volatile. Sampling error is measured by relative standard errors (RSEs). The RSEs for these occupations were above 25%. As a rule, RSE of 25% or greater are subject to high sampling error and should be used with caution.

Appendix B

Award	Wording from 3 April 2009	Wording from 23 January 2009
<p><i>Nurses Award 2010</i>⁶⁷</p> <p><i>Nurses Occupational Industry Award 2010 (Exposure Draft—January 2009)</i>⁶⁸</p>	<p>10.4 Casual employment</p> <p>(a) A casual employee is an employee engaged as such on an hourly basis.</p> <p>(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%.</p> <p>(c) A casual employee will be paid a minimum of two hours pay for each engagement.</p> <p>(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.</p> <p>...</p> <p>28.1 Overtime penalty rates</p> <p>(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:</p> <p>(i) Monday to Saturday (inclusive)—time and a half for the first two hours and double time thereafter;</p> <p>(ii) Sunday—double time;</p>	<p>10.4 Casual employment</p> <p>(a) A casual employee is an employee engaged as such on an hourly basis.</p> <p>(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%.</p> <p>(c) A casual employee will be paid a minimum of two hours pay for each engagement.</p> <p>(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.</p> <p>...</p> <p>27.1 Overtime penalty rates</p> <p>(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:</p> <p>(i) Monday to Saturday (inclusive)—time and a half for the first two hours and double time thereafter;</p> <p>(ii) Sunday—double time;</p>

⁶⁷ <http://www.airc.gov.au/awardmod/databases/health/Modern/nurses.pdf>

⁶⁸ http://www.airc.gov.au/awardmod/databases/health/Exposure/nurses_exposure.doc

Award	Wording from 3 April 2009	Wording from 23 January 2009
	<p>(iii) Public holidays—double time and a half.</p> <p>(b) Overtime penalties as prescribed in clause 28.1(a) do not apply to Registered nurse levels 4 and 5.</p> <p>(c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork.</p> <p>(d) Part-time employees</p> <p>All time worked by part-time employees in excess of the rostered daily ordinary full-time hours will be overtime and will be paid as prescribed in clause 28.1(a).</p>	<p>(iii) Public holidays—double time and a half.</p> <p>(b) Overtime penalties as prescribed in clause 27.1(a) do not apply to Registered nurse levels 4 and 5.</p> <p>(c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 28—Shiftwork.</p> <p>(d) Part-time employees</p> <p>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).</p>
<p><i>Aged Care Award 2010</i>⁶⁹</p> <p><i>Aged Care Industry Award 2010</i> (Exposure Draft—January 2009)⁷⁰</p>	<p>10.4 Casual employees</p> <p>(a) A casual employee is an employee engaged as such on an hourly basis, other than as a part-time, full-time or fixed term employee, to work up to and including 38 ordinary hours per week.</p> <p>(b) A casual employee will be paid per hour worked at the rate of 1/38th of the weekly rate appropriate to the employee’s classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements accrued by full-time employees.</p>	<p>10.4 Casual employees</p> <p>(a) A casual employee is an employee engaged as such on an hourly basis, other than as a part-time, full-time or fixed term employee, to work up to and including 38 ordinary hours per week.</p> <p>(b) A casual employee will be paid per hour worked at the rate of 1/38th of the weekly rate appropriate to the employee’s classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements accrued by full-time employees.</p>

⁶⁹ <http://www.airc.gov.au/awardmod/databases/health/Modern/aged.pdf>

⁷⁰ http://www.airc.gov.au/awardmod/databases/health/Exposure/aged_care_exposure.doc

Award	Wording from 3 April 2009	Wording from 23 January 2009
<p><i>Health Professionals and Support Services Award 2010</i>⁷¹</p> <p><i>Health Professionals and Support Services Industry and Occupational Award 2010 (Exposure Draft— January 2009)</i>⁷²</p>	<p>10.4 Casual employment</p> <p>(a) A casual employee is an employee engaged as such on an hourly basis, other than as a part-time, full-time or fixed-term employee, to work up to and including 38 ordinary hours per week.</p> <p>(b) A casual employee will be paid per hour calculated at the rate of 1/38th of the weekly rate appropriate to the employee’s classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements of fulltime employees.</p> <p>(c) The minimum period of engagement of a casual employee is three hours with the exception of cleaners employed in private medical practices who will be engaged for a minimum of two hours.</p> <p>...</p> <p>28.1 Overtime rates</p> <p>(a) An employee who works outside their ordinary hours on any day will be paid at the rate of:</p> <p>(i) time and a half for the first two hours; and</p> <p>(ii) double time thereafter.</p> <p>(b) All overtime worked on a Sunday will be paid at the rate of double time.</p>	<p>10.4 Casual employment</p> <p>(a) A casual employee is an employee engaged as such on an hourly basis, other than as a part-time, full-time or fixed-term employee, to work up to and including 38 ordinary hours per week.</p> <p>(b) A casual employee will be paid per hour calculated at the rate of 1/38th of the weekly rate appropriate to the employee's classification. In addition, a loading of 25% of that rate will be paid instead of the paid leave entitlements of full-time employees.</p> <p>(c) The minimum period of engagement of a casual employee is three hours with the exception of cleaners employed in private medical practices who will be engaged for a minimum of two hours.</p> <p>...</p> <p>28.1 Overtime rates</p> <p>(a) An employee who works outside their ordinary hours on any day will be paid at the rate of:</p> <p>(i) time and a half for the first two hours; and</p> <p>(ii) double time thereafter.</p> <p>(b) All overtime worked on a Sunday will be paid at the rate of double time.</p>

⁷¹ <http://www.airc.gov.au/awardmod/databases/health/Modern/professionals.pdf>

⁷² http://www.airc.gov.au/awardmod/databases/health/Exposure/health_professionals_exposure.doc

Award	Wording from 3 April 2009	Wording from 23 January 2009
	<p>(c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 29—Shiftwork.</p> <p>(d) Part-time employees Where agreement has been reached in accordance with 10.3(c), a part-time employee who is required by the employer to work in excess of those agreed hours must be paid overtime in accordance with this clause</p>	<p>(c) These extra rates will be in substitution for and not cumulative upon the shift loading prescribed in clause 29—Shiftwork.</p>
<p><i>Medical Practitioners Award 2010</i>⁷³</p> <p><i>Medical Practitioners Occupational Award 2010 (Exposure Draft—January 2009)</i>⁷⁴</p>	<p>10.4 Casual employment</p> <p>(a) A casual employee is an employee who is engaged as such and is paid on an hourly basis.</p> <p>(b) A casual employee will be paid per hour worked at the rate of 1/38th of the weekly salary prescribed for the class of work performed. In addition, a loading of 25% of that rate will be paid.</p>	<p>10.4 Casual employment</p> <p>(a) A casual employee is an employee who is engaged as such and is paid on an hourly basis.</p> <p>(b) A casual employee will be paid per hour worked at the rate of 1/38th of the weekly salary prescribed for the class of work performed. In addition, a loading of 25% of that rate will be paid.</p> <p>...</p> <p>23.1 Overtime rates</p> <p>(a) For all medical practitioners, except Senior Doctors, hours worked in excess of 38 per week will be deemed overtime. Such hours will be paid at the rate of time and a half for the first two hours and double time thereafter between Monday and Saturday.</p>

⁷³ <http://www.airc.gov.au/awardmod/databases/health/Modern/practitioners.pdf>

⁷⁴ http://www.airc.gov.au/awardmod/databases/health/Exposure/medical_practitioners_exposure.doc

Award	Wording from 3 April 2009	Wording from 23 January 2009
		<p>(b) Overtime worked on a Sunday will be paid at the rate of double time.</p> <p>(c) Overtime worked on a public holiday will be paid at the rate of double time and a half.</p>

Appendix C

Award (state/ territory)	Wording		Interaction of casual loading		
Nurses Private Employment (A.C.T.) Award 2002 / (Australian Capital Territory)	9.	OVERTIME	Afternoon/night shift: AINs. Not paid ENs/RNs. Compounding Weekend: No casual loading paid Public holiday: No casual loading paid Overtime: No casual loading paid		
	...				
	9.5.2	Part-time and casual employees			
	...				
	9.5.2(d)	For the purposes of this clause, the hourly rate of pay for overtime duty shall be calculated by dividing the full time weekly rate of pay for the employee's classification by 38.			
	...				
	10.	SHIFT WORK			
	10.1	Assistants in Nursing (aged care)			
	10.1.1	Assistants in Nursing (aged care) other than those provided for in 10.1.4, who work afternoon or night shift shall be paid the following percentages additional to the ordinary rate for such shift, provided that part-time and casual employees shall only be entitled to the additional amounts provided herein where his or her shift commences prior to 6.00 a.m. or finishes after 6.00 p.m.			
				Afternoon shift commencing at 10.00 a.m. and before 1.00 p.m.	10%
				Afternoon shift commencing at 1.00 p.m. and before 4.00 p.m.	12.5%
				Night shift commencing at 4.00 p.m. and before 4.00 a.m.	15%
				Night shift commencing at 4.00 a.m. and before 6.00 a.m.	10%
10.1.2	Ordinary rate and ordinary time shall not include any percentage addition by reason of the fact that an employee is a part-time or casual employee.				
...					
10.1.6	Registered nurses (levels 1, 2 and 3) and enrolled nurses				

Award (state/territory)	Wording	Interaction of casual loading
	<p>10.1.6(a) For all ordinary time worked between midnight Sunday and midnight Friday on a shift commencing at or after 12.00 noon and ceasing after 6.00 p.m., each Registered nurse levels 1, 2 or 3 and enrolled nurse shall be paid an additional 12.5% penalty rate for the shift.</p> <p>10.1.6(b) For all ordinary time worked between midnight Sunday and midnight Friday on a shift falling wholly within the hours of 6.00 p.m. and 7.30 a.m., each Registered nurse levels 1, 2 or 3 and enrolled nurse shall be paid an additional 15% penalty rate for the shift.</p> <p>10.1.6(c) The penalty rates prescribed in this subclause shall be paid to all such employees including part-time and casual employees.</p> <p>...</p> <p>11. WEEKEND WORK</p> <p>11.5 The additional rates for ordinary working hours prescribed in 11.1 and 11.2 shall apply to casual employees, but no such employee shall be entitled to be paid in addition the casual loading of 15%, in respect of their employment between midnight Friday and midnight Sunday.</p> <p>...</p> <p>20. TERMS OF EMPLOYMENT</p> <p>...</p> <p>20.1.3 Casual employees</p> <p>20.1.3(a) When the employment available to a casual employee in any week is less than thirty eight hours duration she/he shall be paid 15% in addition to the relevant rates by this award except on public holidays when casual employees shall be paid 100% in addition to the relevant rate.</p>	
<p>3. Private Hospital Industry Nurses' (State) Award / (New South Wales)</p>	<p>13. PENALTY RATES FOR SHIFT WORK AND WEEKEND WORK</p> <p>(i) Employees working afternoon or night shift shall be paid the following percentages in addition to the ordinary rate for such shift: Provided that employees who work less than 38 hours per week shall only be entitled to the additional rates where their shifts commence prior to 6.00 am or finish subsequent to 6.00 pm.</p> <p>Afternoon shift commencing at 10.00 am and before 1.00 pm - 10%</p> <p>Afternoon shift commencing at 1.00 pm and before 4.00 pm - 12.5%</p> <p>Night shift commencing at 4.00 pm and before 4.00 am - 15%</p> <p>Night shift commencing at 4.00 am and before 6.00 am - 10%</p>	<p>Afternoon/night shift: Cumulative (paid 10% plus annual leave loading)</p> <p>Weekend: Not paid casual loading</p> <p>Public holiday: Cumulative (paid annual leave loading)</p> <p>Overtime: Not paid casual loading</p>

Award (state/territory)	Wording	Interaction of casual loading
	<p>(ii) "Ordinary rate" and "ordinary time" shall not include any percentage addition by reason of the fact that an employee works less than 38 hours per week but shall include amounts payable under Clause 8, Salaries; and Clause 12, Special Allowances subclause (iii).</p> <p>(iii) For the purposes of this clause day, afternoon and night shifts shall be defined as follows: "Day Shift" means a shift which commences at or after 6.00 am and before 10.00 am. "Afternoon shift" means a shift which commences at or after 10.00 am and before 4.00 pm. "Night Shift" means a shift which commences at or after 4.00 pm and before 6.00 am on the day following.</p> <p>(iv) Employees whose ordinary working hours include work on a Saturday and/or Sunday, shall be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and one half and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of time and three quarters. These extra rates shall be in substitution for and not cumulative upon the shift premiums prescribed in the subclause (i) of this clause. The foregoing paragraph shall apply to employees who work less than 38 hours per week, but such employees shall not be entitled to be paid in addition any allowance prescribed by Clause 22, Part-time, Casual and Temporary Employees, of this award in respect of their employment between midnight on Friday and midnight on Sunday.</p> <p>(v) The additional payments prescribed by this clause shall not form part of the employee's ordinary pay for the purposes of this award, except as provided in Clause 23, Annual Leave, of this award.</p> <p>(vi) (a) This subclause shall only apply to nurses who work an entire ordinary time shift in a discrete designated day procedure ward or unit which routinely functions between the hours of 7.00 am and 6.00 pm. (b) This subclause shall not apply to any nurse whose employment commenced prior to 15 December 1994 and who has been employed on a continuous basis since that date.</p> <p>(c) A nurse to whom this subclause applies shall not be entitled to an additional penalty rate payment for ordinary time worked prior to 6.00 pm on any week day.</p> <p>(d) A nurse to whom this subclause applies shall be paid, in addition to their ordinary rate, a penalty payment at the rate of 15% for all ordinary time worked after 6.00 pm on any week day.</p> <p>...</p> <p>22. PART-TIME, CASUAL AND TEMPORARY EMPLOYEES</p> <p>...</p> <p>PART II - Casual Employees</p> <p>(i) A casual employee is one engaged on an hourly basis otherwise than as a permanent part-time or full-time employee.</p> <p>(ii) A casual employee shall be paid an hourly rate calculated on the basis of one thirty-eighth of the appropriate rate, prescribed by Clause 8, Salaries, of this award and where applicable one thirty- eighth of the appropriate allowance or allowances prescribed by Clause 12, Special Allowances, of this award plus 10 per centum thereof, with a minimum</p>	

Award (state/territory)	Wording	Interaction of casual loading								
	<p>payment of 2 hours for each start, and one thirty-eighth of the appropriate allowances prescribed by Clause 16, Uniform and laundry Allowances, of this award.</p> <p>(iii) With respect to a casual employee the provisions of Clause 32, Deputy Director of Nursing, Assistant Director of Nursing; Clause 4, Hours of Work and Free Time of Directors of Nursing; Clause 6, Rosters; Clause 18, Overtime; Clause 30, Special Provisions Relating to Trainee Enrolled Nurses; Clause 23, Annual Leave and Public Holidays and Clause 14, Fares and Expenses of this award, shall not apply. Further, casual employees shall not be entitled to an additional day off or part thereof as prescribed by subclauses (iii) and (v) of Clause 3, Hours of Work and Free Time of Employees Other Than Directors of Nursing.</p> <p>(iv) For the entitlement to payment in respect of annual leave, see <i>Annual Holidays Act 1944</i>.</p> <p>(v) A casual employee who is required to and does work on a public holiday as defined in sub-clauses (iii) and (iv) of Clause 23, Annual leave, shall be paid for the time actually worked at the rate of double time and one-half such payment being in lieu of weekend or shift allowances which would otherwise be payable had the day not been a public holiday; provided that a casual employee shall not be entitled to be paid in addition the allowance of 10 per centum prescribed in subclause (ii) of Part II in respect of such work.</p> <p>(vi) For the entitlement to payment in respect of long service leave, see the <i>Long Service Leave Act 1955</i>.</p>									
<p>Nursing Homes, &C., Nurses' (State) Award / (New South Wales)</p>	<p>12. PENALTY RATES FOR SHIFT WORK AND WEEKEND WORK</p> <p>(i) Employees working afternoon or night shift shall be paid the following percentages in addition to the ordinary rate for such shift. Provided that employees who work less than 38 hours per week shall only be entitled to the additional rates where their shifts commence prior to 6.00 a.m. or finish subsequent to 6.00 p.m.</p> <table border="0" data-bbox="468 885 1583 1047"> <tr> <td>Afternoon shift commencing at 10.00 a.m. and before 1.00 pm</td> <td>10 per cent.</td> </tr> <tr> <td>Afternoon shift commencing at 1.00 p.m. and before 4.00 pm</td> <td>12.5 per cent.</td> </tr> <tr> <td>Night shift commencing at 4.00 p.m. and before 4.00 am</td> <td>15 per cent.</td> </tr> <tr> <td>Night shift commencing at 4.00 a.m. and before 6.00 am</td> <td>10 per cent.</td> </tr> </table> <p>(ii) "Ordinary rate" and "ordinary time" shall not include any percentages addition by reason of the fact that an employee works less than 38 hours per week, but shall include amounts payable under clause 6, Salaries, subclauses (i) and (ii) of clause 10, Special Allowances, and subclauses (i) and (ii) of clause 11, Climatic and Isolation Allowance.</p> <p>(iii) For the purposes of this clause, day, afternoon and night shifts shall be defined as follows:</p> <p style="padding-left: 40px;">"Day shift" means - a shift which commences at or after 6.00 a.m. and before 10.00 a.m.</p> <p style="padding-left: 40px;">"Afternoon shift" - means a shift which commences at or after 10.00 a.m. and before 4.00 p.m.</p> <p style="padding-left: 40px;">"Night shift" means - a shift which commences at or after 4.00 p.m. and before 6.00 a.m. on the day following.</p> <p>(iv) Employees whose ordinary working hours include work on a Saturday and/or Sunday, shall be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and one-half and for ordinary hours</p>	Afternoon shift commencing at 10.00 a.m. and before 1.00 pm	10 per cent.	Afternoon shift commencing at 1.00 p.m. and before 4.00 pm	12.5 per cent.	Night shift commencing at 4.00 p.m. and before 4.00 am	15 per cent.	Night shift commencing at 4.00 a.m. and before 6.00 am	10 per cent.	<p>Afternoon/night shift: Cumulative (paid 10% plus annual leave loading)</p> <p>Weekend: Not paid casual loading</p> <p>Public holiday: Cumulative (paid annual leave loading)</p> <p>Overtime: Not paid casual loading</p>
Afternoon shift commencing at 10.00 a.m. and before 1.00 pm	10 per cent.									
Afternoon shift commencing at 1.00 p.m. and before 4.00 pm	12.5 per cent.									
Night shift commencing at 4.00 p.m. and before 4.00 am	15 per cent.									
Night shift commencing at 4.00 a.m. and before 6.00 am	10 per cent.									

Award (state/ territory)	Wording	Interaction of casual loading
	<p>worked between midnight on Saturday and midnight on Sunday at the rate of time and three-quarters. These extra rates shall be in substitution for and not cumulative upon the shift premiums prescribed in subclause (i) of this clause.</p> <p>The foregoing paragraph shall apply to employees who work less than 38 hours per week, but such employees shall not be entitled to be paid in addition any allowance prescribed by clause 21, Part-time, Casual and Temporary Employees, in respect of their employment between midnight on Friday and midnight on Sunday.</p> <p>(v) The additional payments prescribed by this clause shall not form part of the employee's ordinary pay for the purposes of this award, except as provided in clause 22, Annual Leave.</p> <p>...</p> <p>21. PART-TIME, CASUAL AND TEMPORARY EMPLOYEES</p> <p>...</p> <p>PART II - CASUAL EMPLOYEES</p> <p>(i) A casual employee is one engaged on an hourly basis otherwise than as a permanent part-time or full-time employee.</p> <p>(ii) A casual employee shall be paid an hourly rate calculated on the basis of one thirty-eighth of the appropriate rate prescribed by clause 6, Salaries, and, where applicable, one thirty-eighth of the appropriate allowance or allowances prescribed by clause 10, Special Allowances, plus ten per cent thereof, with a minimum payment of two hours for each start, and one thirty-eighth of the appropriate allowances prescribed by clause 16, Uniform and Laundry Allowance.</p> <p>(iii) With respect to a casual employee, the provisions of clause 3, Hours of Work and Free Time of Directors of Nursing; clause 5, Rosters; clause 13, Expense Allowance for Directors of Nursing; clause 18, Overtime; clause 22, Annual Leave; clause 23, Annual Leave Loading; clause 24, Sick Leave; clause 25, Long Service Leave; clause 26, Compassionate Leave; clause 32, Deputy Director of Nursing and Assistant Director of Nursing; clause 34, Fares and Expenses, shall not apply. Further, casual employees shall not be entitled to an additional day off or part thereof as prescribed by subclauses (iii) and (v) of clause 2, Hours of Work and Free Time of Employees Other than Directors of Nursing.</p> <p>(iv) For the entitlement to payment in respect of annual leave, see <i>Annual Holidays Act 1944</i>.</p> <p>(v) For the entitlement to payment in respect of long service leave, see <i>Long Service Leave Act 1955</i>.</p> <p>(vi) A casual employee who is required to and does work on a public holiday as defined in subclauses (i) and (ii) of clause 15, Public Holidays, shall be paid for the time actually worked at the rate of double time and one-half, such payment being in lieu of weekend or shift allowances which would otherwise be payable had the day not been a public holiday; provided that a casual employee shall not be entitled to be paid, in addition, the allowance of ten per cent prescribed in subclause (ii) of this Part in respect of such work.</p>	
5. Nurses (Northern	<p>11.2 Casual employment</p> <p>11.2.1 A casual employee is an employee engaged as such.</p>	Afternoon/night shift: Cumulative

Award (state/territory)	Wording	Interaction of casual loading
Territory) Private Sector Award 2002 / (Northern Territory)	<p>11.2.2 A casual employee must be paid at the ordinary hourly rate, as defined by this award, plus 20%.</p> <p>11.2.3 On each occasion a casual employee is required to attend work he or she is entitled to a minimum payment of three hours work.</p> <p>11.2.4 A casual employee's employment can be terminated by either the employee or employer without the requirement of prior notice by either party.</p> <p>11.2.5 A casual employee is entitled to receive the appropriate allowances contained in this award.</p> <p>11.2.6 A casual employee is not entitled to any leave with the exception of leave required for caring responsibilities in accordance with clause 11.2.7, parental leave or overtime provisions contained in this award.</p> <p>...</p> <p>24. SHIFT WORK</p> <p>This clause applies to the classifications of Enrolled nurse, Registered nurse Level 1, Registered nurse Level 2, Registered nurse Level 3A and Registered nurse Level 3B.</p> <p>24.1 For all ordinary time worked between midnight Friday and midnight Saturday an additional 50% penalty rate must be paid.</p> <p>24.2 For all ordinary time worked between midnight Saturday and midnight Sunday an additional 75% penalty rate must be paid.</p> <p>24.3 For all ordinary time worked between midnight Sunday and midnight Friday on a shift commencing at or after 12.00 noon and ceasing after 6.00 p.m., an additional 12-1/2% penalty rate must be paid for the shift.</p> <p>24.4 For all ordinary time worked between midnight Sunday and midnight Friday on a shift falling wholly within the hours of 6.00 p.m. and 7.30 a.m. an additional 15% penalty rate must be paid for the shift.</p> <p>24.5 By agreement between the employer and the majority of employees concerned, the spread of hours referred to in 24.4 may extend to 8.00 a.m. without loss of entitlement to the 15% penalty rate. Employees who are members of the Federation may be represented by the Federation in meeting and conferring with the employer about extending the spread of hours, and the employer must give the Federation a reasonable opportunity to meet and confer about the matter. Federation involvement in this process does not mean that the consent of the Federation is required prior to the implementation of agreements.</p> <p>24.6 The prescribed penalty must be paid to all employees, including part-time employees and casual employees.</p> <p>24.7 Additional payment for rostered time of ordinary duty, as provided by this clause must be made in respect of any such duty which an employee would have performed had he or she not been on approved annual leave.</p> <p>24.8 The penalty rates prescribed in 24.1 and 24.2 are in substitution for, and not cumulative upon, the shift penalties prescribed in 24.3 and 24.4 and/or the casual loading prescribed in 11.2.2.</p>	<p>Weekend: Not paid casual loading</p> <p>Public holiday: Cumulative</p> <p>Overtime: Not paid overtime</p>

Award (state/territory)	Wording	Interaction of casual loading
	<p>24.9 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</p> <p>34. PUBLIC HOLIDAYS</p> <p>...</p> <p>34.11 Casual employees who work on a public holiday must receive payment of 70% in addition to the ordinary rate. The public holiday loading is in substitution for, and not cumulative upon, the casual loading prescribed in 11.2.2.</p>	
Nurses' Aged Care Award - State 2005 (Queensland)	<p>4.1.3 Casual employee</p> <p>A casual employee means an employee who is engaged as such for not more than 76 hours per fortnight with a minimum payment as for 2 hours' work in respect of each engagement.</p> <p>The rate of payment to casual employees shall be 1/76th of the fortnightly wage for the classification in which they are engaged plus an additional 23% per hour and the pro rata payment of any allowance applicable pursuant to clause 5.4 based upon the number of hours worked in relation to a 38 hour week.</p> <p>The casual loading shall not be compounded by penalties contained within this Award. Penalties shall be calculated on the base rate of pay, excluding the casual loading, with the casual loading component then added on to the penalty rate of pay.</p>	Afternoon/night shift, Weekend, Public holiday, Overtime: Cumulative
Private Hospital Nurses Award - State 2003 (Queensland)	<p>4.3 CASUAL EMPLOYMENT</p> <p>4.3.1 A casual employee is an employee who is engaged on an hourly basis for fewer than 76 ordinary hours per fortnight.</p> <p>4.3.2 Casual employees shall be paid per hour at the rate of 1/38 of the weekly rate of wages prescribed for the class of work upon which they are engaged plus an additional 23%, with a minimum payment as for 2 hours' work in respect of each engagement. Such employees shall be further entitled to <i>pro rata</i> payment of any allowance applicable pursuant to clause 5.6 the Award, based upon the number of hours worked in relation to 38 per week.</p> <p>4.3.3 A casual employee's hours of work may be increased or decreased on each engagement: Provided that the on-call allowance in clause 6.7 shall be payable in full.</p> <p>...</p> <p>6.3 EXTRA PAYMENT FOR WEEKEND WORK</p> <p>6.3.1 All rostered ordinary hours worked by any employee other than a Registered Nurse Level 4 or Level 5, between Midnight Friday and Midnight Sunday up to and including 10 ordinary hours in any one shift shall be paid for at the rate of ordinary time plus the additional percentage of the employee's ordinary time rate as follows:</p>	Afternoon/night shift: Cumulative Weekend, public holiday, overtime: Compounding

Award (state/ territory)	Wording	Interaction of casual loading
	<p>Midnight Friday to Midnight Saturday 50%</p> <p>Midnight Saturday to Midnight Sunday 75%</p> <p>6.3.2 All time worked by an employee during the above week-end period in excess of ordinary hours in any one shift shall be paid at the appropriate overtime rate in lieu of the above additional percentages.</p> <p>6.4 SHIFT WORK - EXTRA PAYMENT FOR AFTERNOON AND NIGHT SHIFTS</p> <p>6.4.1 Subject to clauses 6.4.3 and 6.4.4 shift workers shall be paid in addition to their ordinary rate a shift allowance as specified for each shift of ordinary hours as follows:</p> <p style="padding-left: 40px;">(a) Afternoon shift 12.5%</p> <p style="padding-left: 40px;">(b) Night shift 15%</p> <p>6.4.2 For the purpose of clause 6.4 an “afternoon shift” is a shift, other than a night shift as defined herein, commencing at or after 12 midday; a “night shift” is a shift commencing at or after 6.00 p.m. or before 7.30 a.m. the following day, the major portion of which is worked between 6.00 p.m. and 7.30 a.m.</p> <p>6.4.3 In the instance of a casual employee the shift allowance prescribed herein shall be calculated on the relevant rate of pay exclusive of the casual loading.</p> <p>6.4.4 The shift allowance prescribed herein shall not apply to a Registered Nurse Level 4 or Level 5 nor to shift work performed by any employee on Saturday or Sunday where the extra payments prescribed by clause 6.3.1 apply.</p> <p>...</p> <p>6.9 OVERTIME - OTHER THAN LEVEL 4 AND LEVEL 5 REGISTERED NURSES</p> <p>...</p> <p>6.9.3 <i>Overtime penalty rate</i></p> <p>All authorised time worked in excess of rostered ordinary hours of work on any day shall be deemed to be overtime and shall be paid at the following rates:</p> <p style="padding-left: 40px;">(a) For all authorised overtime on Monday to Saturday inclusive, payment shall be made at the rate of time and a-half for the first 3 hours and double time thereafter.</p> <p style="padding-left: 40px;">(b) For all authorised overtime on a Sunday, payment shall be made at the rate of double time:</p> <p style="padding-left: 40px;">Provided that an employee works at least 8 hours on that shift or more than 76 hours in a fortnight.</p> <p>7.2 OPTION ‘A’ COMBINATION</p>	

Award (state/ territory)	Wording	Interaction of casual loading
	<p>...</p> <p>7.2.8 <i>Public holidays</i></p> <p>...</p> <p>(i) Casual employees - Casual employees required to work on public holidays shall be paid at the rate of double time and a-half for all time worked on such days.</p> <p>...</p> <p>7.3 OPTION 'B' COMBINATION</p> <p>...</p> <p>7.3.8 <i>Public holidays</i></p> <p>...</p> <p>(i) Casual employees - Casual employees required to work on public holidays shall be paid at the rate of double time and a-half for all time worked on such days.</p>	
<p>Nurses (ANF - South Australian Private Sector) Award 2003 / (South Australia)</p>	<p>4.2 CASUAL EMPLOYEES</p> <p>4.2.1 A casual employee must be paid the hourly rate as defined for the work performed plus a loading of 20% for ordinary working hours.</p> <p>4.2.2 Casual employees are not entitled to annual leave, sick leave or payment for public holidays not worked.</p> <p>4.2.3 Casual employees will not, unless temporarily replacing a full-time employee, work more than 76 hours in any one fortnight.</p> <p>...</p> <p>6.3 SHIFT WORK</p> <p>6.3.1 Definitions</p> <p>In this award:</p> <p>6.3.1(a) Afternoon shift means a complete rostered shift commencing not earlier than 12.00 noon and finishing after 6.00 p.m. on the day of the shift.</p> <p>6.3.1(b) Night shift means a complete rostered shift worked between the hours of 6.00 p.m. and 7.30 a.m.</p> <p>6.3.2 Penalty rates</p> <p>All employees, with the exception of RN-4's and RN-5's, are to be paid the following penalty rates when working on shifts:</p> <p>6.3.2(a) For all ordinary time worked on an afternoon shift Monday to Friday inclusive: 12-1/2%.</p>	<p>Afternoon/night shift, Weekend: Compounding Public holiday, Overtime: Cumulative</p>

Award (state/ territory)	Wording	Interaction of casual loading
	<p>6.3.2(b) For all ordinary time worked on night shift Monday to Friday inclusive: 15%.</p> <p>6.3.2(c) For all ordinary time worked between midnight Friday and midnight Saturday: 50%.</p> <p>6.3.2(d) For all ordinary time worked between midnight Saturday and midnight Sunday: 75%.</p> <p>6.3.3 The additional payments specified above will not form part of an employee's ordinary pay for the purposes of this award. The rates in 6.3.2(c) and 6.3.2(d) are in substitution of and not cumulative upon the rates prescribed in 6.3.2(a) and 6.3.2(b).</p> <p>...</p> <p>6.4 OVERTIME</p> <p>...</p> <p>6.4.3 Calculation of payments</p> <p>6.4.3(a) The hourly rate to be used for such calculations defined in 5.3.2.</p> <p>6.4.3(b) Casual employees working overtime will continue to receive the 20% casual loading based on the hourly rate as prescribed in 6.4.3(a) above, so that:</p> <p>6.4.3(b)(i) where time and a half is applicable the rate of pay will be 170% of the hourly rate;</p> <p>6.4.3(b)(ii) where double time is applicable the rate of pay will be 220% of the hourly rate.</p> <p>6.4.3(c) In computing overtime payments, each days work will stand alone.</p> <p>...</p> <p>7.3 PUBLIC HOLIDAYS</p> <p>7.3.2(d) Casual employees</p> <p>7.3.2(d)(i) Ordinary time worked on any public holiday will be paid at the rate of 170% (inclusive of the 20% prescribed in 4.2.1) of the ordinary hourly rate.</p> <p>7.3.2(d)(ii) All time worked on any public holiday in excess of the ordinary daily hours as prescribed in clauses 6.1 - Ordinary hours of work (other than psychiatric hospitals) and 6.2 - Psychiatric hospitals, will be paid at the rate of 270% of the ordinary hourly rate (inclusive of the 20% prescribed in 4.2.1).</p>	
Nurses (Tasmanian Private Sector) Award 2005 / (Tasmania)	<p>4. DEFINITIONS</p> <p>4.15 Relevant award rate means the rate specified for the appropriate year of service applicable to the employee in the appropriate classification in 14.2, excluding all allowances, loadings etc.</p> <p>...</p> <p>13. EMPLOYMENT CATEGORIES</p>	<p>Afternoon/night shift, Weekend, Public holiday: Compounding</p> <p>Overtime: Cumulative</p>

Award (state/ territory)	Wording	Interaction of casual loading
	<p>13.1 Casual employees</p> <p>13.1.1 Terms of engagement</p> <p>13.1.1(a) Casual employees terms of engagement shall be by the hour and they shall be provided with a minimum of two hours work or, alternatively, paid for a minimum of two hours on each occasion they are required to attend for work.</p> <p>13.1.1(b) However, where work practices are such that it is inappropriate to apply the conditions stipulated by this provision, such conditions may be varied by mutual agreement between the employees and the employer.</p> <p>13.1.2 Payment for ordinary time</p> <p>A casual employee for working ordinary time shall be paid per hour 1/38th of the weekly rates prescribed for the work which he/she performs. In addition thereto a casual employee shall receive 20% of the ordinary hourly rate in respect of each hour for which he/she is paid; such additional amount to be payment in lieu of annual leave, sick leave and public holidays.</p> <p>...</p> <p>17. PAYMENT OF WAGES</p> <p>...</p> <p>17.6 Allowances not taken into account</p> <p>17.6.1 Allowances prescribed by this award other than higher duties allowance, certificate and/or diploma allowance shall not be taken into account in the compilation of overtime and penalty rates prescribed herein.</p> <p>17.6.2 Notwithstanding the foregoing, the 20% loading payable to casual and part-time employees working less than 20 hours per week shall be taken into account before calculating penalty rates payable for weekend and public holiday shifts, but shall not be taken into account when calculating overtime payments.</p> <p>...</p> <p>21. OVERTIME</p> <p>...</p> <p>21.5 Calculation of overtime penalty to be based on award rates</p> <p>The calculation of the overtime penalty prescribed in 21.2 in the case of an employee in receipt of a loading in lieu of sick leave, annual leave and public holidays shall be based upon the relevant award rate.</p> <p>...</p> <p>23.3 Afternoon and night shift allowances</p> <p>23.3.1 Subject to existing customs and practices:</p> <p>23.3.1(a) Shift workers shall be paid the following loading on their ordinary rate for such shifts:</p>	

Award (state/territory)	Wording	Interaction of casual loading
	<p>Afternoon shift - 12.5%;</p> <p>Night shift - 15.0%</p> <p>23.3.1(b) A shift worker who works on any afternoon or night shift which does not continue for at least five consecutive afternoons or nights shall be paid for each shift 50% more than his/her ordinary rate for the remaining hours thereof.</p> <p>...</p> <p>23.5 Sunday and holiday shifts</p> <p>23.5.1 Shift workers, for work on a rostered shift, the major portion of which falls on a Sunday or public holiday, shall be paid as follows:</p> <p>23.5.1(a) Sundays - at the rate of time and three quarters;</p> <p>23.5.1(b) Holidays as prescribed in 23.3 at the rate of double time.</p> <p>The above rates shall be in substitution for, and not cumulative upon the shift allowance set out in 23.4.</p> <p>...</p> <p>23.11 Calculation of overtime penalty to be based on award rates</p> <p>In the case of an employee in receipt of a loading in lieu of sick leave, annual leave and public holidays, the period of overtime shall be paid for at the rate of double the relevant award rate.</p>	
<p>Nurses (Victorian Health Services) Award 2000 / (Victoria)</p>	<p>PART B - COMMON CONDITIONS</p> <p>...</p> <p>24. PUBLIC HOLIDAYS</p> <p>...</p> <p>24.3 All other employees, including casuals</p> <p>...</p> <p>24.6 Any Registered Nurse or Mothercraft Nurse (other than an employee of a Community Health Centre or a Registered Nurse or Mothercraft Nurse employed in an out-patients, pathology, X-ray or blood bank department as referred to in 17.1.1 of this part) who is required to be on duty on a day referred to in 24.1 to 24.3, or agreed to under 24.5:</p> <p>24.6.1 Shall be allowed another half day off in lieu thereof and shall receive an additional half ordinary day's pay; or</p> <p>24.6.2 Shall receive an additional sum equal to a day's ordinary pay for that day.</p> <p>...</p>	<p><u>Registered nurses</u></p> <p>Afternoon/night shift: Fixed amount loading</p> <p>Weekend, Public holiday, Overtime: Compounding</p> <p><u>Enrolled nurses</u></p> <p>Afternoon/night shift: Fixed amount loading</p> <p>Weekend, Public holiday: Cumulative</p> <p>Overtime: Compounding</p>

Award (state/territory)	Wording	Interaction of casual loading
	<p>24.9 For the purpose of this clause ordinary pay per hour with respect to time worked by a casual Registered or Mothercraft Nurse is an amount equal to 1/38th of the weekly wage rate appropriate to the class of work performed plus 25%.</p> <p>...</p> <p>25. SPECIAL RATES FOR SATURDAYS AND SUNDAYS</p> <p>25.1 All rostered time of ordinary duty performed between midnight on Friday and midnight on Sunday shall be paid for at the rate of time and a half.</p> <p>25.2 Provided that the following rate of payment shall be made where the Saturday or Sunday duty involves:</p> <p>25.2.1 Work in excess of the prescribed rostered hours - double time for the excess period;</p> <p>25.2.2 Work performed by a State Enrolled Nurse of broken shifts outside a spread of nine hours from the time of commencing work - time and three-quarters, and outside a spread of twelve hours from the time of commencing work - double time.</p> <p>25.3 This clause shall not apply to Director of Nursing and Deputy Director of Nursing.</p> <p>...</p> <p>PART C - REGISTERED AND MOTHERCRAFT NURSES</p> <p>...</p> <p>30. MODES OF EMPLOYMENT</p> <p>...</p> <p>30.3 Casual employee</p> <p>30.3.1 A casual employee is one who is engaged in relieving work or work of a casual nature and whose engagement is terminable by an employer in accordance with the employer's requirements without the requirement of prior notice by either party, but does not include an employee who could properly be classified as a full-time or part-time employee under 30.1 and 30.2.</p> <p>30.3.2 A casual employee shall be paid per hour worked an amount equal to 1/38th of the weekly salary appropriate to the class of work performed plus 25%.</p> <p>30.3.3 In addition, a casual employee shall be entitled to receive the appropriate uniform and other allowances prescribed herein.</p> <p>30.3.4 The provisions of clause 17 - Annual leave, clause 20 - Long service leave, and clause 16 - Termination of employment, shall not apply in the case of a casual employee.</p> <p>...</p> <p>42. OVERTIME</p>	

Award (state/ territory)	Wording	Interaction of casual loading
	<p>42.1 Except in the case of a Director of Nursing in an institution where a Deputy or Assistant Director of Nursing is also employed all work done in excess of the ordinary hours prescribed shall be paid at the rate of time and a half for the first two hours and double time thereafter. For the purpose of this clause each day or shift shall stand alone.</p> <p>...</p> <p>43. ALLOWANCES</p> <p>43.6 Shift allowance</p> <p>43.6.1 In addition to any other rates prescribed elsewhere in this part of this award an employee whose rostered hours of ordinary duty finish between 6.00 p.m. and 8.00 a.m. or commence between 6.00 p.m. and 6.30 a.m. shall be paid an amount equal to 2-1/2% of the rate for Registered Nurse Grade 1 in 32.4.1 per rostered period of duty or for Mothercraft Nurses 2, 5% of the rate for "Registered Mothercraft Nurse during 1st year of experience" per rostered period of duty.</p> <p>43.6.2 Provided that in the case of an employee working on any rostered hours of ordinary duty, finishing on the day after commencing duty or commencing after midnight and before 5.00 a.m. he or she shall be paid an amount equal to 4% of the rate for Registered Nurse Grade 1 in 32.4.1(b) or for Mothercraft Nurses 4% of the rate for "Registered Mothercraft Nurse during 1st year of experience" per rostered period of duty for any such period of duty and provided further that in the case of an employee permanently working on any such rostered hours of ordinary duty shall be paid an amount equal to 5% of the rate for Registered Nurse Grade 1 in 32.4.1 or for Mothercraft Nurses 5% of the rate for "Registered Mothercraft Nurse during 1st year of experience" per rostered period of duty for any such period of duty.</p> <p>43.6.2(a) Permanently working shall mean working for any period in excess of four consecutive weeks.</p> <p>43.6.3 Provided that the shift allowance shall be calculated to the nearest 10 cents, an exact amount of 5 cents in the result going to the higher figure.</p> <p>43.6.4 Provided further that this clause shall not apply to Director of Nursing and Deputy Director of Nursing.</p> <p>...</p> <p>PART D - ENROLLED NURSES</p> <p>47. MODE OF EMPLOYMENT</p> <p>...</p> <p>47.3 Casual employment</p> <p>47.3.1 A casual employee is one who is engaged in relieving work or work of a casual nature and whose engagement is terminable by an employer in accordance with the employer's requirements, without the requirement of prior notice by either party, but does not include an employee who could properly be classified as a full-time or part-time employee under 47.1 and 47.2 of this clause.</p>	

Award (state/territory)	Wording	Interaction of casual loading
	<p>47.3.2 A casual employee shall be paid for all work done on weekdays an amount equal to 1/38th of the weekly wage appropriate to the employee's classification per hour plus 25% and for all work done on Saturdays, Sundays and public holidays an amount equal to 1/38th of the weekly wage appropriate to the employee's classification per hour plus 75%.</p> <p>...</p> <p>58. OVERTIME</p> <p>58.1 The following overtime rates shall be paid for all work done:</p> <p>58.1.1(a) in excess of the number of hours fixed as a day's, a week's or a fortnight's work as the case may be - time and a half for the first two hours and double time thereafter;</p> <p>58.1.1(b) as overtime outside a spread of twelve hours from the commencement of the last previous rostered period of duty provided that the overtime is not continuous with the next succeeding period of duty - double time;</p> <p>58.1.1(c) outside a spread of nine hours from the time of commencing work by an employee rostered to work broken shifts - time and a half, and outside a spread of twelve hours from the time of commencing work - double time.</p> <p>58.2 Any period of overtime involving a recall to duty during an off duty period and which is not continuous with the next succeeding rostered period of duty shall be paid at a minimum of three hours at the appropriate overtime rate.</p> <p>58.3 Subject to 58.5 overtime worked shall be paid for, and an employee shall not be allowed or required to take time off in lieu thereof.</p> <p>58.4 An employer may require any employee to work reasonable overtime at overtime rates and such employee shall work overtime in accordance with such requirement.</p> <p>...</p> <p>61. ALLOWANCES</p> <p>61.1 Shift allowance</p> <p>61.1.1 In addition to any other rates prescribed elsewhere in this part an employee whose rostered hours of ordinary duty finish between 6.00 p.m. and 8.00 a.m. or commence between 6.00 p.m. and 6.30 a.m. shall be paid 2.5% of the allowance rate per rostered period of duty.</p> <p>61.1.1(a) Provided that in the case of an employee working on any rostered hours of ordinary duty finishing on the day after commencing duty or commencing after midnight and before 5.00 a.m. she/he shall be paid for any such periods of duty an amount equal to 4% of the allowance rate and provided further that in the case of an employee permanently working on any such rostered hours of ordinary duty she/he shall be paid for any such period of duty an amount equal to 5% of the allowance rate.</p> <p>61.1.1(a)(i) Permanently working shall mean working for any period in excess of four consecutive weeks.</p> <p>61.1.1(b) Provided further that in the case of an employee who changes from working on one shift to working on another shift the time of commencement of which differs by four hours or more than from that of the first she/he shall be paid an</p>	

Award (state/ territory)	Wording	Interaction of casual loading												
	<p>amount equal to 4% of the allowance rate on the occasion of each such change in addition to any amount payable under the preceding provisions of this clause.</p> <p>61.1.1(b)(i) Notwithstanding the provisions of 61.1.1(b) the change of shift allowance is not payable where an employer agrees to a request in writing made on behalf of one or more of his/her employees for changes in shifts and/or;</p> <p>61.1.1(b)(ii) In the Private Sector where there is an intervening period of more than 48 hours off duty, inclusive of all leave, weekends, accrued days off, rostered days off and public holidays.</p> <p>61.2 The allowances payable pursuant to 61.1 shall be calculated to the nearest 5 cents, portions of a cent being disregarded.</p> <table border="0" data-bbox="373 493 1031 786"> <tr> <td>Allowance rate</td> <td style="text-align: center;">%</td> </tr> <tr> <td>Morning shift</td> <td style="text-align: center;">2.5</td> </tr> <tr> <td>Afternoon shift</td> <td style="text-align: center;">2.5</td> </tr> <tr> <td>Night shift</td> <td style="text-align: center;">4.0</td> </tr> <tr> <td>Permanent night shift</td> <td style="text-align: center;">5.0</td> </tr> <tr> <td>Change of shift</td> <td style="text-align: center;">4.0</td> </tr> </table>	Allowance rate	%	Morning shift	2.5	Afternoon shift	2.5	Night shift	4.0	Permanent night shift	5.0	Change of shift	4.0	
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Permanent night shift	5.0													
Change of shift	4.0													
<p>Nurses' (ANF - WA Private Hospitals and Nursing Homes) Award 1999 / (Western Australia)</p>	<p>6. DEFINITIONS</p> <p>6.17 Ordinary rate means the base classification rate excluding shift and weekend penalties.</p> <p>...</p> <p>8. OVERTIME</p> <p>8.1 All time worked in excess of the limits prescribed in subclauses 7.1 to 7.4 of clause 7 - Hours shall be deemed overtime and paid for as hereunder:</p> <p>8.1.1 Time and one half for the first 3 hours on any day Monday to Saturday, both inclusive, and double time thereafter.</p> <p>8.1.2 Double time on a Sunday.</p> <p>8.1.3 Double time for all overtime worked consecutively with a rostered shift on a Saturday, or public holiday as prescribed in clause 10 - Public holidays of this award.</p> <p>...</p> <p>18. CASUAL EMPLOYEES</p> <p>18.1 A casual employee shall be paid 1/38th of the rate of their classification for each hour worked, plus 20% additional loading.</p>	<p>Afternoon/night shift, Weekend: Cumulative</p> <p>Overtime, Public holiday: Compounding</p>												

Award (state/ territory)	Wording	Interaction of casual loading
	<p>18.2 A casual employee who works on a public holiday (as defined in clause 10 - Public holidays) shall be paid at the rate of time and one half the rate specified in 18.1.</p> <p>18.3 A casual employee shall not receive any of the entitlements prescribed in clauses 9 - Annual leave; 10 - Public holidays; 11 - Personal leave; 19 - Long service leave; and 23 - Location allowance of this award.</p> <p>18.4 Notwithstanding clause 18.3, while casual employees are not entitled to personal leave, subject to satisfying the requirements of clause 11.5, casual employees are entitled to not be available to attend work, or to leave work for the purposes of caring responsibilities.</p> <p>...</p> <p>25. SHIFT WORK</p> <p>25.1 Where on any weekday an employee works a complete rostered afternoon shift commencing at 12 noon or after, and finishing after 6 p.m., the employee shall be paid a loading of 12.5% on the ordinary rates of pay.</p> <p>25.1.1 Where on any weekday an employee works a complete rostered night shift between the hours of 6 p.m. and 7.30 a.m., the employee shall be paid a loading of 15% on the ordinary rates of pay.</p> <p>25.1.2 The provisions of 25.1 of this clause do not apply where the employee commences her/his ordinary hours of work after 12.00 noon and completes those hours at or before 6.00 p.m. on that day.</p> <p>25.1.3 Where an employee works a broken shift each portion of that shift shall be considered a separate shift for the purpose of this clause.</p> <p>25.2 Where an employee is rostered to work ordinary hours between midnight Friday and midnight Saturday, the employee shall be paid a loading of 50% on the ordinary rates of pay for the actual hours worked during this period.</p> <p>25.3 Where an employee is rostered to work ordinary hours between midnight Saturday and midnight on the following Sunday, the employee shall be paid a loading of 75% on the ordinary rates of pay for the actual hours worked during this period.</p> <p>25.4 The provisions of this clause shall not apply to any registered nurse level 4 or 5.</p>	

Appendix D

Queensland Government Industrial Gazette, 12 March 1977, 94 QGIG 907, page 907

Principal.

GENERAL

8. Payments due under this Industrial Agreement shall be made at the conclusion of each semester or term, provided that payment for the first semester may be made after 1st July in the year concerned.

9. This Industrial Agreement shall take effect and have the force of law throughout the State of Queensland as from the first day of January, 1977, and shall remain in force for a period of twelve (12) months.

10. Industrial Agreement Registered No. A102 of 1976 is hereby cancelled.

Signed for and on behalf of
the Permanent Head of the
Department of Education. } R. H. FIELDS.

In the presence of—G. FLETCHER.

Signed for and on behalf of
the Councils of the Colleges of
Advanced Education. } T. LOVE.

In the presence of—J. LLOYD, J.P.

Signed for and on behalf of
the Queensland Teachers' } E. P. CLARK.
Union of Employees.

In the presence of—M. E. BYWATER, J.P.

Pursuant to section 89 of the *Industrial Conciliation and Arbitration Act 1961-1976*, the provisions of this Industrial Agreement are approved.

A. GIBSON, Commissioner.

3rd March, 1977.

THE INDUSTRIAL CONCILIATION AND ARBITRATION COMMISSION OF QUEENSLAND

Industrial Conciliation and Arbitration Act 1961-1976

WATER SUPPLY AND SEWERAGE LABOURERS' AWARD—STATE (EXCLUDING BRISBANE)

VARIATION (CORRECTION OF ERROR)

Industrial Registrar's Office,
Brisbane, 3rd March, 1977.

WHEREAS errors occurred in the copy of the reprint of the abovenamed Award as published in the *Queensland Government Industrial Gazette* of 20th December, 1976, No. 32, folios 835-851, the following corrections are hereby made:—

1. By deleting subclause (9) of clause 9 (Disability and Site Allowances) and inserting the following in lieu thereof:—
“(9) *Additional Payment—Awoonga High Dam.*—In addition to all payments otherwise due employees employed on site on the construction of the Awoonga High Dam Project shall be paid an amount of \$11 per week of forty hours which shall be taken into consideration for the purposes of calculating annual leave, statutory holiday pay, sick pay and long service leave payments:

Provided that only \$7.10 of the said \$11.00 per week additional payment shall be taken into account for the purposes of calculating overtime payments.”

2. By deleting subclause (5) of clause 19 and inserting the following in lieu thereof:—

“(5) *Accommodation and Living-Away-From-Home Allowance—Awoonga High Dam Project.*—Notwithstanding the provisions contained in clause 18 of this Award, employees employed on site on the construction of the Awoonga High Dam Project who are required either by direction of the Employer or by reason of the distance from their homes to reside in accommodation provided by the Employer shall be provided by the Employer with board and accommodation free of charge:

Provided that any employee who would otherwise be entitled to be provided by the Employer with the accommodation and board herein prescribed, and who does not avail himself of such accommodation and board because of his desire to reside and/or board separately with his family on site shall be entitled to an additional payment of \$17.50 per week.”

C. G. HANCOCK,
Industrial Registrar.

MR. E. J. CLARKE,
MR. D. R. BIRCH,
Commissioners

Industrial Conciliation and Arbitration Act 1961-1976

In the matter of the Printing Trade—Regional Dailies of Australia (Queensland Division)—Industrial Agreement, published in the *Queensland Government Industrial Gazette* of 28th February, 1974, and variations thereof; and

In the matter of an application by the Printing and Kindred Industries Union of Employees, Queensland Branch for a variation of the said Industrial Agreement.

PRINTING TRADE—REGIONAL DAILIES OF AUSTRALIA (QUEENSLAND DIVISION)

INDUSTRIAL AGREEMENT

DECISION

THE claim sought one week's additional annual leave. The claim sought that annual leave provided in the Agreement be extended by one week which would provide for non-shift workers employed under this Agreement an annual leave provision equal to annual leave granted to continuous shift workers. The claim was based on the grounds that there were special circumstances existing in their employment necessitating the increase.

In support of the claim reference was made to decisions of the Queensland Commission which, because of special circumstances, had awarded to non-continuous shift workers annual leave equal to continuous shift workers. Reference was also made to decisions of Industrial Tribunals in other States. Evidence was given advising of the work roster at two of the regional dailies, whilst work rosters from all the regional dailies was provided by the respondent. This information disclosed that there was both day work and night work that generally rotated and also there was some permanent night work, that there was no rostered Saturday work and a limited amount of Sunday work. The Union made no claim that other awards or industrial agreements in the printing industry contained provisions similar to what is claimed by this application.

The respondents assured the Commission that there were no such provisions in any Awards or Agreements covering similar undertakings anywhere in the Commonwealth. As there is no suggestion that the employees covered by this Agreement are shift workers the only possible support for the claim stems from decisions of the Commission granting the extra week's leave to other than continuous shift workers.

We have given serious consideration to this aspect and find that in no way can a fair and reasonable comparison be made with the facts of this claim and the four Commission decisions which have been referred to in the submissions.

We find there is no way the claim could be granted.

G. W. PONT.
E. J. CLARKE.
D. R. BIRCH.

1st March, 1977.

THE INDUSTRIAL CONCILIATION AND ARBITRATION COMMISSION OF QUEENSLAND

No. B490 of 1976

MR. E. J. CLARK, Commissioner

Industrial Conciliation and Arbitration Act 1961-1976

In the matter of the Hospital Nurses' Award—State, published in the *Queensland Government Industrial Gazette* of 28th February, 1974, and variations thereof; and

In the matter of an application by the Royal Australian Nursing Federation (Queensland Branch), Union of Employees, for an interpretation of the said Award.

HOSPITAL NURSES' AWARD—STATE

INTERPRETATION

THIS was an application by the Royal Australian Nursing Federation (Queensland Branch), Union of Employees for interpretation of the Hospital Nurses' Award—State in relation to (1) the correct method of payment to a casual employee who worked on a Statutory Holiday, and (2) the amount of shift work allowance due to such employee for the work done between 5 p.m. and 10 p.m. on that day.

In relation to (1) it was agreed by the parties that “on 11th August, 1976, a day appointed under *The Holidays Acts, 1912 to 1961*”, to be kept as a holiday in the City of Brisbane, Judith Anne Teicher, a casual employee employed as a Registered Nurse, fifth year and thereafter at the Mount Gravatt Nursing Home commenced duty at 5 p.m. and ceased duty at 10 p.m.”

Clauses 4 (14) and 8 (viii) govern the matter.

Clause 4 (14) reads:—

"(14) Casual employees shall be paid 19 per cent. in addition to the ordinary weekly rates of pay prescribed in this Award and shall be further entitled to any allowances applicable based pro rata on the number of hours worked in relation to 40 in any week:

Provided that casual employees shall not be entitled to this additional 19 per cent. in respect of work to which subclause (15) hereof applies."

Clause 8 (viii) reads:—

"8. (viii) Casual employees required to work on statutory holidays shall be paid at the rate of double time and a-half for all time worked on any such statutory holiday."

It was contended by the employer that the proper interpretation of clause 4 (14) and clause 8 (viii) is that the employee should be paid at an hourly rate being the product of multiplying one fortieth of the weekly rate of wages prescribed at 11th August, 1976, for a Registered Nurse Fifth Year and Thereafter by 269 per cent., the percentage figure arrived at by adding 19 per cent. to 250 per cent.

The applicant Union contended that the meaning of clause 8 (viii) is that the employee should be paid at the rate of double time and a-half of the rate which the employee would be paid if the day were not a Statutory Holiday, that the meaning of clause 4 (14) is that a casual employee shall be paid 119 per cent. of the rate applicable to an employee who is not a casual employee, and that the employee should be paid at an hourly rate being the product of multiplying one fortieth of the weekly rate of wages prescribed at 11th August, 1976, for a Registered Nurse Fifth Year and Thereafter by 297.5 per cent., the percentage figure arrived at by multiplying 119 per cent. by 250 per cent. -

The question submitted for interpretation therefore was:—

"Is Ms. Teicher entitled to be paid at an hourly rate being the product of multiplying one-fortieth of the weekly rate of wages prescribed at 11th August, 1976, Registered Fifth Year Nurse and thereafter by 297.5 per cent. for work performed on that day."

Clause 8 (viii) provides that "casual employees required to work on statutory holidays shall be paid at the rate of double time and a-half for all time worked on any such holiday".

To ascertain the correct payment for the work performed by Ms. Teicher on the day in question it is necessary to ascertain what her ordinary time rate is. Clause 4 of the Award fixes the ordinary rate payable to the various classes of employees under the Award. By subclause (14) it is provided that casual employees shall be paid 19 per cent. in addition to the weekly rates prescribed. That rate would be an hourly rate found by dividing the weekly rate for the particular classification by forty and adding 19 per cent. It is contended by the applicant that this becomes the ordinary time rate of the casual employee.

This question was considered by O'Mara J. on an interpretation of the Metal Trades Award of the Australian Commission (C.A.R. Vol. 46 1941-42, f. 331). The Metal Trades Award provided that a casual employee be paid one fortieth of the weekly rate which was then prescribed for a forty-four hour week. This meant that the casual rate was loaded by ten per cent. In his judgment which dealt with the question of the correct rate to be paid to a casual employee when working overtime His Honour said:—

"In my opinion casual employees under clause 18 (d) of the Metal Trades Award get an hourly rate fixed for working ordinary time and that rate is regarded as their ordinary rate of pay for purposes of calculating overtime and penalty rates. For the purposes of clause 13 it is necessary to calculate time and a-half or double time, the calculation is made on the hourly rate prescribed by clause 18 (d) and not on any lesser amount reached by deducting the allowance of ten per cent. made because of the casual nature of the employment. So that once again, in calculating time and a-half, the formula would be: the hourly rate ascertained in accordance with clause 18 (d) multiplied by three and divided by two, the resultant rate would be the rate of time and a-half for the purposes of clause 13."

I would similarly interpret the Award before me as meaning that the casual rate arrived at in accordance with clause 4 (14) is to be regarded as the employee's ordinary rate for the purpose of calculating the payment due to the employee for work performed on a Statutory Holiday. By reason of the provision of clause 8 (viii) such employee would be entitled to 2½ times the casual rate prescribed by clause 4 (14) for each hour worked on the Statutory Holiday.

I hold accordingly.

In relation to the matter of shift allowance which is governed by clause 4 (14) and clause 5 (3) of the Award the employer contended:—

"that the proper interpretation of clause 4 (14) and clause 5 (3) is that the employee should be paid the sum of \$2.03 extra payment for afternoon and night shift for time worked between 5 p.m. and 10 p.m., being five-eighths of \$3.25."

The applicant Union contended:—

"that the meaning of clause 5 (3) is that the employee should be paid the sum of \$3.25 for working a shift between 4 p.m. and 8 a.m. the following day, irrespective of the number of hours worked, that the Award does not define a shift as being of eight hours duration and that clause 4 (14) has no application to this matter in that shift allowance is related to each shift standing alone, not to a working week of 40 hours."

The employer contended that clause 4 (14) applies, that subclause (3) of clause 5 provides for an allowance of \$3.25 per shift where an employee worked an afternoon or night shift, and therefore as the employee worked 5 hours on an afternoon shift she is entitled to five-eighths of \$3.25.

Subclause (14) of clause 4 contains a particular provision relating to casual employees. It provides that the casual shall be entitled to any allowance applicable, based pro rata on the number of hours worked in relation to 40 in any one week.

Clause 5 (3) provides:—

"(3) Extra payment for afternoon and night shifts—\$3.25 per shift in addition to ordinary rates shall be paid to afternoon and night shift workers where the major portion of any shift is worked between the hours of 4 p.m. and 8 a.m. the following day . . ."

The subclause provides for an allowance to be paid to afternoon and night shift workers. The Award does not fix starting or ceasing times but it is clear that for the purposes of this provision where the major part of a shift is worked between the hours set out the shift is regarded as an afternoon or night shift.

There was nothing placed before the Commission to show that the employee concerned was a shift worker. It was agreed that she did a five-hour period or shift of work between the hours mentioned in subclause (3) of clause 5. That, in my opinion, does not show that she is a shift worker within the ordinary meaning of "shift worker" as used in relation to "shift allowances". In the absence of some specific provision it is difficult to see a casual employee as a shift worker. However, the employer did not wish to take this point and in effect I was asked to interpret the Award on the assumption that clause 5 (3) did apply to the casual employee.

I am of the opinion that clause 4 (14) is a particular provision fixing the wage rate and the amount of allowance to be paid to casual employees. As such it qualifies any general provision in the Award that prescribes allowances that are applicable to casual employees.

Assuming that subclause (3) of clause 5 is such a provision then I am of opinion that it is subject to subclause (14) of clause 4 which provides ". . . and shall be further entitled to any allowance applicable, based 'pro rata' on the number of hours worked in relation to 40 in any week".

It was contended by the Union that the provision of subclause (3) of clause 5 has no relationship to the forty hour week because a shift is not necessarily a period of eight hours. It would follow that it would be impossible to calculate the amount payable in accordance with subclause (14) of clause 4 because the Award does not define a shift and therefore it cannot be said that the allowance is payable in respect of any particular period of time worked.

Clause 6 makes provision for ordinary working hours. It provides that ordinary working hours "shall not exceed 8 hours per day and 80 hours per fortnight, exclusive of meal times, and shall be worked within a spread of 12 hours calculated from the commencing time . . . Provided further that no employee shall be required to work more than ten consecutive shifts at any one time unless it is mutually agreed otherwise."

Clause 7 provides for payment of overtime rates for all time worked in excess of the ordinary working hours prescribed by clause 6 by day workers and shift workers. The ordinary daily hours are therefore limited to 8 per day. The fortnightly hours are limited to 80 per fortnight and no more than ten shifts may be worked consecutively.

Subclause (3) of clause 5 provides for extra payment for afternoon and night shift work performed by shift workers. The period is between 4 p.m. and 8 a.m. the following day, a period of sixteen hours. Afternoon and night shifts are distinguished from day shift which must constitute the other 8 hours in the 24-hour cycle, that is the time between 8 a.m. and 4 p.m. The subclause does not require that shifts must be worked between 8 a.m. to 4 p.m., 4 p.m. to midnight and

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midnight to 8 a.m. It allows for some flexibility. It therefore provides for the payment of the allowance so long as the major part of the shift is worked between the hours normally regarded as afternoon and night shift hours. However, in this context it appears clear that the allowance is prescribed in relation to a three shift system, that is day shift, afternoon shift and night shift in a period of 24 hours.

I would therefore interpret the Award as prescribing a shift allowance of \$3.25 for a shift of eight hours.

I would interpret the Award as meaning (assuming that subclause (3) of clause 5 is applicable to casual employees) that in accordance with subclause (14) of clause 4 the employee in question was correctly paid the *pro rata* amount due to her.

I hold accordingly.

E. J. CLARKE.

28th February, 1977.

THE INDUSTRIAL CONCILIATION AND ARBITRATION COMMISSION OF QUEENSLAND

Nos. B12, B19 and B451 of 1976

Mr. P. J. SELF,
Mr. E. J. CLARKE,
Mr. A. GIBSON,
Commissioners

Industrial Conciliation and Arbitration Act 1961-1976

In the matter of the Railway Award—State, published in the *Queensland Government Industrial Gazette* of 9th April, 1974, and variations thereof; and

In the matter of an application by the Australian Railways Union of Employees, Queensland Branch, for a variation of the said Award; and

In the matter of an application by the Australian Federated Union of Locomotive Enginemen, Queensland, Union of Employees, for a variation of the said Award; and

In the matter of an application by the Queensland Railway Station Officers' Union of Employees for a variation of the said Award.

RAILWAY AWARD—STATE
VARIATION

THIS matter coming on for hearing before the Commission at Brisbane on 1st March, 1977: This Commission doth order that the said Award be varied as follows as from the third day of January, 1977:—

By deleting clause 81 and inserting the following in lieu:—

“SHIFT WORK ALLOWANCES

81. (1) *Definitions*.—For the purpose of this clause:—

“Afternoon Shift” means a shift which commences before 6 p.m. and concludes at or after 6.30 p.m.;

“Night Shift” means a shift which commences at or between 6 p.m. and 3.59 a.m.;

“Early Morning Shift” means a shift which commences at or between 4 a.m. and 5.30 a.m.

(2) (a) *Shift Work Allowances*.—Except as otherwise provided, for all paid time on duty not subject to overtime penalty on the day on ordinary shifts on days other than a Saturday or Sunday an employee in receipt of an adult male rate shall be paid:—

- (i) 53 cents per hour for an afternoon shift;
- (ii) 62 cents per hour for a night shift;
- (iii) 53 cents per hour for an early morning shift.

(b) Other employees shall be paid half the allowance herein prescribed for the same time on duty.

(3) In calculating the allowances herein prescribed, broken parts of an hour of less than 30 minutes shall be disregarded and 30 minutes to 59 minutes shall be paid for as an hour.

(4) (a) In addition to the allowances prescribed herein, an employee in receipt of an adult male rate who signs on or off at or between 1.01 a.m. and 3.59 a.m. on Monday to Friday shall be paid for that shift a loading of 62 cents, provided that such loading is not payable on an overtime (or excess) shift.

(b) Other employees shall be paid half the loading herein prescribed for the same turn of duty.

(5) Drivers, firemen, cleaners acting as firemen, guards and shunters shall be paid the allowance prescribed in sub-clause 2 (a) when working overtime between the hours of 6 p.m. and 6 a.m. on days other than Saturdays, Sundays and Holidays.

(6) The allowance and/or loading shall not be payable to employees covered by clauses 52 and 80 of this Award or to employees engaged on passive duty.”

Dated this third day of March, 1977.

By the Commission,
[L.S.] C. G. HANCOCK,
Industrial Registrar.

THE INDUSTRIAL CONCILIATION AND ARBITRATION COMMISSION OF QUEENSLAND

No. B10 of 1976

Mr. P. J. SELF,
Mr. E. J. CLARKE,
Mr. A. GIBSON,
Commissioners

Industrial Conciliation and Arbitration Act 1961-1976

In the matter of the Railway Refreshment Rooms Award—State, published in the *Queensland Government Industrial Gazette* of 5th October, 1972, and variations thereof; and

In the matter of an application by the Australian Railways Union of Employees, Queensland Branch, for a variation of the said Award.

RAILWAY REFRESHMENT ROOMS AWARD—STATE
VARIATION

THIS matter coming on for hearing before the Commission at Brisbane on 1st March, 1977: This Commission doth order that the said Award be varied as follows as from the third day of January, 1977:—

By deleting clause 32 and inserting the following in lieu thereof:—

SHIFT WORK ALLOWANCES

32. (1) *Definitions*.—For the purpose of this clause:—
Afternoon Shift means a shift which commences before 6 p.m. and concludes at or after 6.30 p.m.

Night Shift means a shift which commences at or between 6 p.m. and 3.59 a.m.

Early Morning Shift means a shift which commences at or between 4 a.m. and 5.30 a.m.

(2) (a) *Shift Work Allowances*.—Except as otherwise provided, for all paid time on duty not subject to overtime penalty on the day on ordinary shifts on days other than a Saturday or Sunday an employee in receipt of an adult male rate shall be paid:—

- (i) 53 cents per hour for an afternoon shift;
- (ii) 62 cents per hour for a night shift;
- (iii) 53 cents per hour for an early morning shift.

(b) Other employees shall be paid half the allowance herein prescribed for the same time on duty.

(3) In calculating the allowances herein prescribed, broken parts of an hour of less than 30 minutes shall be disregarded and 30 minutes to 59 minutes shall be paid for as an hour.

(4) (a) In addition to the allowances prescribed herein, an employee in receipt of an adult male rate who signs on or off at or between 1.01 a.m. and 3.59 a.m. on Monday to Friday shall be paid for that shift a loading of 62 cents, provided that such loading is not payable on an overtime shift.

(b) Other employees shall be paid half the loading herein prescribed for the same turn of duty.

(5) The allowance and/or loading shall not be payable to employees engaged on passive duty.”

Dated this third day of March, 1977.

By the Commission,

[L.S.] C. G. HANCOCK,
Industrial Registrar.

Department of Labour Relations
and Consumer Affairs,
Brisbane, 10th March, 1977.

NOTIFICATION OF SPECIFICATION AS DISTRICTS FOR PURPOSES OF PROVISIONS OF SUBSECTION 3 OF SECTION 14 OF THE INDUSTRIAL CONCILIATION AND ARBITRATION ACT 1961-1976, AND RELATING TO SHOW HOLIDAYS

WHEREAS by the *Industrial Conciliation and Arbitration Act 1961-1976*, it is amongst other things provided that all work done by employees in a District specified from time to time by the Minister by notification published in the *Gazette* on the day appointed under “*The Holidays Acts, 1912 to 1961*”, to be kept as a holiday in relation to the annual Agricultural, Horticultural or Industrial Show held at the principal city or town as specified in such notification of such District, shall be paid for at the rate of double the time: And whereas it is desirable in pursuance of the said provisions to specify the Districts hereinafter appearing and the principal city or town of each of such Districts:

Appendix E

Hospital Nurses' Award – State 2003 (No. AR139 of 2002)

4.3.2 Casual employees shall be paid at the rate of 1/38th of the weekly rate of wages prescribed for the class of work upon which they are engaged plus an additional 23% per hour, with a minimum payment as for 2 hours work in respect of each engagement; and shall be further entitled to *pro rata* payment of any allowance applicable, pursuant to clause 5.3 of the Award based upon the number of hours worked in relation to 38 per week.

...

6.4 Shift work and weekend work

6.4.1 Levels 1, 2 and 3 Registered Nursing Classifications, Enrolled Nurses and Pupil Nurses

For the purpose of clause 6.4 an afternoon shift is a shift other than a night shift, commencing at or after 12 midday. Afternoon shift workers shall be paid an allowance of 12.5% for each shift of ordinary hours. Night shift is a shift commencing at or after 6.00 p.m. or before 7.30 a.m. the following day, the major portion of which is worked between 6.00 p.m. and 7.30 a.m.; and Night shift workers shall be paid an allowance of 15% for each shift of ordinary hours.

6.4.2 Other than Levels 1, 2 and 3 Registered Nursing Classifications, Enrolled Nurses and Pupil Nurses Afternoon and night shift workers shall be paid an allowance of 15% for each shift of ordinary hours where the major portion of such shift is worked between the hours of 4.00 p.m. and 8.00 a.m. the following day.

6.4.3 *Casual employees* - In the case of a casual employee the shift allowance shall be calculated upon the relevant wage rate exclusive of the casual loading.

...

6.4.6 Extra payment for weekend work

(a) Levels 1, 2 and 3 Registered Nursing Classifications and Enrolled Nurses

All rostered time worked in any one duty period as prescribed in clause 6.1 between midnight Friday and midnight Saturday shall be paid for at the rate of time and a-half and between midnight Saturday and midnight Sunday at the rate of time and three-quarters.

(b) Other than Levels 1, 2 and 3 Registered Nursing Classifications, Enrolled Nurses and Pupil Nurses

All rostered time worked between midnight on Friday and midnight on Sunday, in any one duty period as prescribed by clause 6.1, shall be paid for at one 1/2 times the ordinary rate.

(c) Where more than 8 hours are worked in any one duty period, or more than 10 hours where 10 are worked by mutual agreement, double ordinary rates shall be paid for all time in excess of 8 hours or 10 hours, as the case may be:

Provided that extra payments for weekend work shall not be payable to Directors of Nursing and Assistant Directors of Nursing.

...

6.8 Overtime

6.8.1 For all authorised overtime worked in excess of rostered ordinary hours of work Monday - Saturday inclusive, other than by Registered Nurses level 4 or 5, shall be paid for at the rate of time and a-half for the first 3 hours and double time thereafter:

Provided that an assistant nurse rostered to work shift work shall be paid at the rate of double time for all authorised overtime.

6.8.2 For all authorised overtime worked on a Sunday, other than by Registered Nurses level 4 or 5, payment shall be made at the rate of double time.

6.8.3 For all authorised overtime worked on a public holiday other than by a Registered Nurse level 4 or 5 payment shall be made at the rate of double time and a-half.

...

7.6.10 Casual employees required to work on public holidays shall be paid at the rate of double time and a-half for all time worked on any such public holiday.

Appendix F

Nurses' Aged Care Interim Award – State ((1990) 134 QGIG 831)

Ordinary Rates of pay

6. The minimum rates payable to the following classes of employees shall be:—

...

(12) *Additional Payments to Fortnightly Rates of Pay* —

...

(d) *Weekend Work — Extra Payment.*— All time worked between midnight on Friday and midnight on Sunday, up to and including eight (8) hours in any one duty period, or ten (10) hours where extended night duty is worked, shall be paid for at one and a-half times the ordinary rate.

Where more than eight (8) hours are worked in any one duty period, or more than ten (10) hours where extended night duty is worked, double ordinary rates shall be paid for all time in excess of eight (8) hours or ten hours, as the case may be:

Provided that extra payments for weekend work shall not be payable to Directors of Nursing and Assistant Directors of Nursing.

(e) *Casual Loading.* — Casual employees shall be paid at the rate of one-eightieth of the fortnightly rate of pay prescribed for the class of work upon which they are engaged plus an additional 19 per cent per hour, with a minimum payment as for two hours' work in respect of each engagement; and shall be further entitled to *pro rata* payment of any allowances applicable, pursuant to clause 8 (Allowances) hereof based upon the number of hours worked in relation to eighty per fortnight.

(f) *Afternoon and Night Duty — Extra Payment.* — Where the major portion, (over 50 percent of the hours worked in any one duty period) is worked between 4.00 p.m. and 8.00 a.m. the following day, an additional payment of fifteen percent (15%) shall be paid for all hours worked:

Provided that in the case of casual employees, the amount shall be calculated upon the relevant rate of pay less the casual loading of nineteen percent (19%):

Provided further that extra payments for afternoon and night duty shall not be payable to Directors of Nursing and Assistant Directors of Nursing or to afternoon and night duty work performed on Saturday and Sunday where the extra payments prescribed by subclause (12)(d) of clause 6 apply.

...

Overtime

10. (1) All time worked in excess of eight (8) hours daily duty, or ten (10) hours where extended night duty periods are worked, excluding meal breaks, shall be paid for at the following rates of pay:—

(a) *Shift Workers.* — At the rate of double time. For the purpose of this subclause a shift worker is defined as an employee able to be rostered over three duty periods per day and over seven days per week.

(b) *All other Employees.* — At the rate of time and a-half for the first three (3) hours and double-time thereafter on any one day.

...

(4) All overtime worked on weekends shall be paid for at the rate of double the ordinary rate

...

Statutory Holidays

11.

...

(5) Casual employees shall have not entitlement to pay or leave for Statutory Holidays, however all work completed by a casual employee shall be paid for at the rate of double-time and a-half.

Appendix G

Nurses (Victorian Health Services) Award 1992

4 MODES OF EMPLOYMENT

...

Casual employee

(c)

...

(ii) A casual employee shall be paid per hour worked an amount equal to one thirty eighth (1/38th) of the weekly salary appropriate to the class of work performed plus 25%.

...

19 – OVERTIME

(a) All work done in excess of the ordinary hours prescribed shall be paid at the rate of time and a half for the first two hours and double time thereafter. For the purpose of this clause each day or shift shall stand alone.

20 - SATURDAY AND SUNDAY WORK

- (a) Payment for all ordinary work performed between midnight Friday and midnight Sunday (inclusive) shall be paid for at the rate of time and one half.
- (b) If the Saturday and Sunday work involves duty in excess of the prescribed ordinary rostered hours the excess period shall be paid at the rate of double time.
- (c) This clause shall not apply to Director of Nursing and Deputy Director of Nursing.

...

22 - PUBLIC HOLIDAYS

- (a)
 - (i) Any employee other than a nurse employed in an out-patients, pathology, x-ray or blood bank department (as referred to in Clause 26 -Annual leave of this part) who is required to be on duty on the following days- New Year's Day, Australia Day, Labour Day, Good Friday, Easter Saturday, Easter Monday, Anzac Day, Queen's Birthday, Melbourne Cup Day, Christmas Day, Boxing Day and such other day or days as from time to time may be proclaimed throughout the State as public holidays:
 - (ii) shall be allowed another half day off in lieu thereof and shall receive an additional half ordinary day's pay; or
 - (iii) shall receive an additional sum equal to a day's ordinary pay for that day.
 - (iv) Provided that in respect of Melbourne Cup Day any other day may be substituted by mutual consent in the case of one or more employees.
 - (v) Provided that employees rostered to work on public holidays and who fail to do so shall not be entitled to holiday pay for the said holiday.

- (vi) For the purposes of this Clause ordinary pay per hour with respect to time worked by a casual employee is an amount equal to 1/38th of the weekly wage rate appropriate to the class of work performed plus 25 per cent.

...

PART C ENROLLED NURSES

...

43 - MODE OF EMPLOYMENT

...

- (ii) A casual employee shall be paid for all work done on weekdays an amount equal to one thirty eighth (1/38th) of the weekly wage appropriate to the employee's classification per hour plus 25 per cent and for all work done on Saturdays, Sundays and public holidays an amount equal to one thirty eighth (1/38th) of the weekly wage appropriate to the employee's classification per hour plus 75 per cent.

...

55 - OVERTIME

- (a) The following overtime rates shall be paid for all work done:
- (i) In excess of the number of hours fixed as a day's, a week's or a fortnight's work as the case may be - time and a half for the first two hours and double time thereafter;
 - (ii) As overtime outside a spread of twelve hours from the commencement of the last previous rostered period of duty provided that the overtime is not continuous with the next succeeding period of duty - double time.
 - (iii) Outside a spread of nine hours from the time of commencing work by an employee rostered to work broken shifts - time and a half, and outside a spread of twelve hours from the time of commencing work - double time;