DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 yearly review of modern awards—Airline Operations—Ground Staff Award 2010

(AM2018/15)

Airline operations

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER CAMBRIDGE

SYDNEY, 4 OCTOBER 2019

4 yearly review of modern awards - Airline Operations - Ground Staff Award 2010 - substantive issues - payment for working overtime for shiftworkers.

[1] This decision concerns the overtime payment applicable to non-continuous shiftworkers under clause 32.1 in the *Airline Operations—Ground Staff Award 2010* (***Airline Operations Award***).

Background

[2] On 1 October 2018, the President issued a statement[1] constituting a Full Bench to consider the Transport Workers' Union (**TWU**) and the Australian Manufacturing Workers' Union (**AMWU**) claim to remove the word 'continuous' from clause 23.1(a) of the Airline Operations Exposure Draft (**the Exposure Draft**), with the effect that the overtime rate for all employees performing shift work will be double time.

[3] The subject of this decision was raised earlier in the proceedings as a technical and drafting issue. In a decision[2] dealing with Group 4 modern awards, the Full Bench confirmed that the outstanding substantive issue concerning overtime for shiftworkers was to be referred to this separately constituted Full Bench. The Full Bench also stated that the related issue of the interaction between clause 30.7, concerning shift penalty rates paid on weekends and public holidays, and clause 32.1, payment for working overtime, would be heard and determined by this separately constituted Full Bench.[3]

[1] [2018] FWC 6107.
[2] [2018] FWCFB 4175.
[3] [2018] FWCFB 4175 at [76].

[4] The Full Bench confirmed in [2018] FWCFB 4175 that other previously raised substantive claims[4] were not being pursued.[5]

Legislative context

[5] The legislative context for the 4 yearly review of modern awards (the Review) was canvassed in detail in the *4 yearly Review of Modern Awards: Preliminary Jurisdictional Issues* decision[6] (**the Preliminary Jurisdictional Issues Decision**). We adopt and apply that decision.

[6] Subsection 156(2) of the *Fair Work Act 2009* (**the Act**) deals with what must be done in the Review and provides that the Fair Work Commission (**the Commission**) must review all modern awards and may, among other things, make determinations varying modern awards.

[7] The 'scope' of the Review was considered in the Preliminary Jurisdictional Issues Decision.[7] In that decision, the Full Bench stated that during the Review, the Commission will proceed on the basis that *prima facie*, the modern award being reviewed achieved the modern awards objective at the time it was made.[8] Variations to modern awards should be founded on merit based arguments that address the relevant legislative provisions, accompanied by probative evidence directed to what are said to be the facts in support of a particular claim. The extent of the argument and material required will depend on the circumstances.[9]

[8] A number of provisions in the Act that are relevant to the Review operate to constrain the breadth of the discretion in s.156(2). It is important to note that the modern awards objective (in s.134) applies to the performance or exercise of the Commission's 'modern awards powers', which are defined to include the Commission's functions or powers under Part 2-3 of the Act. The Review function in s.156 is in Part 2-3 of the Act and so will involve the performance or exercise of the Commission's 'modern award powers'. Thus, the modern awards objective applies to the Review. The modern awards objective is set out in s.134(1) of the Act, as follows:

> '**134 The modern awards objective**
>
> What is the modern awards objective?
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and

[4] Summary of substantive issues, 28 March 2017.
[5] [2018] FWCFB 4175 at [75].
[6] [2014] FWCFB 1788.
[7] [2014] FWCFB 1788.
[8] [2014] FWCFB 1788 at [24].
[9] [2014] FWCFB 1788 at [23].

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.'

[9] Section 138 of the Act is also relevant to the Review;

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

[10] To comply with s.138, the terms included in modern awards must be 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case involves a value judgment taking into account the s.134 considerations, to the extent that they are relevant, having regard to the submissions and evidence directed to those considerations. Before varying a modern award in the Review, the Commission must be satisfied that the variation is necessary to achieve the modern awards objective.

[11] In *Shop, Distributive and Allied Employees Association v National Retail Association (No.2),*[10] Tracey J considered the proper construction of the expression 'the Commission is satisfied that making [a determination varying a modern award] … is *necessary* to achieve the modern awards objective', in s.157(1). His Honour held:

[10] *Shop, Distributive and Allied Employees Associates v National Retail Association (No.2)* (2012) 205 FCR 227.

> 'The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is 'necessary' in order 'to achieve the modern awards objective'. That objective is very broadly expressed: FWA must 'provide a fair and relevant minimum safety net of terms and conditions' which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.
>
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective …
>
> In reaching my conclusion on this ground I have not overlooked the SDA's subsidiary contention that a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action. Whilst this distinction may be accepted it must also be acknowledged that reasonable minds may differ as to whether particular action is necessary or merely desirable. It was open to the Vice President to form the opinion that a variation was necessary.'[11]

[12] The above observation, in particular, the distinction between that which is 'necessary' and that which is merely desirable, is apposite to our consideration of s.138. Further, we agree with the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable. It seems to us that what is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[12]

[13] In the *Preliminary Jurisdictional Issues Decision*, the Full Bench considered what had to be demonstrated by the proponent of an award variation and concluded that:

> 'To comply with s.138 the formulation of terms which must be included in modern awards or terms which are permitted to be included in modern awards must be terms 'necessary to achieve the modern awards objective' … In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.'[13]

---

[11] Ibid at [35]–[37] and [46].
[12] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.
[13] [2014] FWCFB 1788 at [36].

[14] The above proposition is supported by the terms of s.138 and the legislative context. Section 138 requires that a 'modern award may include terms … only to the extent necessary to achieve the modern awards objective'. The section focuses attention on the terms of a modern award, rather than on the terms of a proposed variation. Further, as we have mentioned, the jurisdictional basis for the Review is s.156. Section 157 deals with the variation of modern awards *outside* the system of 4 yearly reviews. Section 157(1) states, relevantly:

> **'FWC may vary etc. modern awards if necessary to achieve modern awards objective**
>
> (1) The FWC may:
>
> (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
>
> (b) make a modern award; or
>
> (c) make a determination revoking a modern award;
>
> if the FWC is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.
>
> Note 1: The FWC must be constituted by a Full Bench to make a modern award (see subsection 616(1)).
>
> Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
>
> Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
>
> (a) the variation of modern award minimum wages is justified by work value reasons; and
>
> (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.
>
> Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (3) The FWC may make a determination or modern award under this section:

(a) on its own initiative; or

(b) on application under section 158.

[15] Section 157(1) makes express reference to the Commission being satisfied that the 'determination varying a modern award' is necessary to achieve the modern awards objective. There is no such express reference in either s.138 or s.156.

[16] The Commission's task in the Review is to 'survey, inspect, re-examine or look back upon' a modern award as a whole to ensure that it, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account paragraphs (a) to (h) of s.134(1) of the Act.[14]

[17] It is not necessary for there to have been a material change in circumstances since the making of the modern award, or its last review, to empower the Commission to vary a modern award in a Review.[15] A modern award may be found not to achieve the modern awards objective for 'reasons other than changed circumstances, including where considerations, which were extant but unappreciated or not fully appreciated on a prior review, are properly brought to account.'[16] However, it is not necessary for the Commission to conclude that the modern award, or a term of it, does not meet the modern awards objective, to empower the Commission to vary a modern award in a Review.[17] Rather, the task in the Review is to 'review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.'[18]

[18] The Full Court of the Federal Court recently explained the function of the Commission in a Review as follows in the *Penalty Rates Case* (at [48]):

> '…the modern awards objective requires the FWC to perform two different kinds of functions, albeit that that modern awards objective embraces both kinds of function. The FWC must 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions' and in so doing, must take into account the s 134(a)-(h) matters. What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a 'fair and relevant minimum safety net of terms and conditions', they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range

[14] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, at [30] and [38] (*Penalty Rates Case*).
[15] Ibid at [23]-[40].
[16] Ibid at [34].
[17] Ibid at [45], applying *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, [28]-[29].
[18] Ibid.

of such matters 'must be determined by implication from the subject matter, scope and purpose of the Fair Work Act…'

[19] The composite phrase 'fair and relevant' in the chapeau to s.134(1) involves broad concepts.[19] The perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances which may be considered, in addition to the s.134(a) to (h) matters and other relevant facts, matters and circumstances, in determining whether a modern award, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.[20]

Variations proposed

TWU claim

[20] The TWU is seeking a variation to the overtime provisions in clause 32.1 of the *Airline Operations Award* to ensure it provides for a payment of double time to all employees performing shiftwork.[21] The *Airline Operations Award* currently distinguishes between the overtime rates payable to continuous and non-continuous shiftworkers.

[21] Clause 32.1(a) of the *Airline Operations Award* states:

> 'All work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. For a continuous shiftworker the rate for working overtime is double time.' (**emphasis added**)

[22] Clause 32 of the *Airline Operations Award*, concerning overtime, does not refer to clause 28.3(b), the ordinary hours of shiftwork.

[23] Clause 28.3 of the *Airline Operations Award* states:

> '**28.3 Ordinary hours of work—shiftwork**
>
> (a) **Continuous shiftwork** means work carried on with consecutive shifts of employees throughout the 24 hours of each of at least six consecutive days without interruption except for breakdowns or meal breaks or due to unavoidable causes beyond the control of the employer.
>
> (b) Subject to clause 28.3(c) the ordinary hours of shiftworkers are an average of 38 hours per week inclusive of meal breaks and must not exceed 152 hours in 28 consecutive days.
>
> (c) By agreement between the employer and the majority of the employees concerned, a roster system may operate on the basis that the weekly average of 38

[19] Ibid at [65].
[20] Ibid at [53] and [65].
[21] TWU submission, 29 January 2019.

ordinary hours is achieved over a period which exceeds 28 consecutive days but does not exceed 12 months.

(d) Except at the regular change-over of shifts, an employee must not be required to work more than one shift in each 24 hours.

(e) The employer and a majority of affected employees may agree to arrange shifts which require up to an average of 40 hours per week with one regular rostered day off in each four week cycle.'

[24] The *Airline Operations Award* does not define continuous and non-continuous shiftworkers. The ordinary hours of work for shiftworkers are the same regardless of whether they perform continuous or non-continuous shiftwork, and the same shift loadings and penalty rates apply for weekends and public holidays. The *Airline Operations Award* only provides different conditions for continuous and non-continuous shiftworkers in relation to overtime and the time provided for a meal break and crib break.[22]

[25] Clause 30.7 of the *Airline Operations Award* states:

'**30.7 Shift penalty rates—weekends and public holidays**

(a) Shiftworkers must be paid the following penalty rates for work on weekends and public holidays:

Shift type	Penalty rate
Saturday	Time and a half
Sunday	Double time
Public holidays (except Christmas Day and Good Friday)	Double time
Christmas Day and Good Friday	Double time and a half

(b) The rates in this clause are in substitution for and not cumulative upon the shift premiums prescribed in clauses 30.3, 30.4, 30.5 and 30.6.' (**emphasis added**)

[26] The TWU proposes to delete the existing clause 32.1 and insert the following clause:

'**32.1 Payment for working overtime**

(a) Day work – All work done outside ordinary hours (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work.

(b) Shift work – All time worked in excess of or outside ordinary hours or on a shift other than a rostered shift (except where the time is worked by arrangement between the employees themselves) must be paid double time.

[22] Clauses 29.2 and 29.3 *Airline Operations Award*.

(c) For the purposes of this clause, ordinary hours means the hours worked in an enterprise, fixed in accordance with clause 28.2 for a dayworker and 28.3 and 30.2 for a shiftworker.

(d) The hourly rate, when computing overtime, is determined by dividing the appropriate weekly rate by 38, even in cases when an employee works more than 38 ordinary hours in a week.

(e) In computing overtime each day's work stands alone.'

[27] The TWU submitted that under the existing *Airline Operations Award* ordinary hours worked on a Sunday by dayworkers and shiftworkers are paid at double time under clauses 28.2(g) and 30.7(a) respectively. However, the TWU submitted if clause 32.1 were interpreted to provide for overtime at time and half for the first two hours for non-continuous shiftworkers working on Sunday, this could result in the absurd situation where a non-continuous shiftworker working ordinary hours on a Sunday would receive double time, then drop to time and a half if they go into overtime.

[28] The TWU submitted that the different overtime payments provided to continuous and non-continuous shiftworkers was a result of an error or inadvertent change during award modernisation. The TWU submitted that clause 32.1, which was inserted following the Part 10A award modernisation processing, differs from the overtime provisions in the principal pre-reform awards as they all prescribed a payment for shift work of double time for all time worked in excess of or outside ordinary hours. It was submitted that the changes to the overtime provisions during the award modernisation were unintended by the parties and have resulted in a diminution of entitlements for employees working non-continuous shiftwork. The TWU tendered Ms Walton's evidence on the history of the negotiation of the *Airline Operations Award* to support their claim.

[29] The TWU submitted that its proposed variation to clause 32 will correct the anomaly that exists in the overtime payments for non-continuous shiftworkers and the tension between the overtime provisions and the Sunday rates. In Schedule B of the Exposure Draft of the *Airline Operations Award*, the rates in the tables B.2.3, B.3.3, B.4.3 and B.5.3 provide for penalty rates at double time for shiftworker working on Sundays. However, the rates in tables B.2.4, B.3.4, B.4.4 and B.5.5 provide for overtime rates of time and a half for the first two hours and double time thereafter for shiftworkers working overtime on a Sunday. The TWU submits that the overtime provisions in clause 32.1 refer to all work done outside the ordinary hours on any day or shift. The Sunday penalty rates for shiftworkers for work on a Sunday should be read as for all time worked.

[30] The TWU submitted that overtime penalty rates compensate employees for performing work in excess of ordinary hours and that the variation will fulfil the criteria in s.134(1)(da) of the Act. They submitted that shiftworkers are subject to a greater disability than day workers as a result of the time at which they commence and finish work on the different shift types, and that this disability is the same regardless of whether their roster pattern is over 24 hours or less than 24 hours. They submit that the existing overtime rates for shiftworkers working non-continuous shiftwork are not fair and are disproportionate to employees working continuous shiftwork.

[31] The TWU submitted that its proposed variation would assist in achieving the modern awards objective in s.134 of the Act and would fulfil the considerations in ss.134(1)(da) and 134(1)(g) of the Act. The TWU submitted that the variation would have minimal impact on business as most employers covered in the Airlines Operations Award have enterprise agreements in place, many of which reflect the overtime provisions in the pre-reform *Airline Operations (Transport Workers') Award 1998* (**Transport Workers' Award**).

TWU witnesses

[32] The TWU tendered three witness statements to the Full Bench. The witnesses were not required for cross-examination.[23]

Therese Walton

[33] Ms Therese Walton is the National Industrial Officer for the TWU. Ms Walton stated that she was involved in both the two and four yearly reviews of the *Airline Operations Award*. Ms Walton referred to the Schedule B – Summary Rates of Pay in the Exposure Draft where the tables for work performed on a Sunday were paid at 200%, whereas the overtime rate for non-continuous shiftworkers working on a Sunday was only 150%. She submitted that the tables in the Exposure Draft highlight the tension between clauses 30.7 and 32.1 in relation to the overtime rates and Sunday rates payable for non-continuous shiftworkers.

[34] Ms Walton stated that the current provisions were inserted during award modernisation, and did not reflect the principal pre-reform awards,[24] which prescribed a payment of double time for all employees performing shiftwork. She reviewed the various submissions and draft awards presented by various parties during the award modernisation to establish the history of clause 32.1. She stated that the following parties filed submissions and drafts:

- A proposed Qantas draft was based on the Transport Workers Award and provided for all overtime for shiftworkers to be paid at double time.
- An ACTU draft which contained overtime provisions that restricted the payment of overtime rates at double time to 'continuous shiftworkers'. The ACTU indicated in their submission that the award was intended to maintain the existing safety net of wages and conditions.
- A TWU draft that had overtime provisions based on the ACTU draft.

[35] Ms Walton stated that there was nothing in the draft proposals, in the evidence of any of the parties or the transcripts that indicate that the change to the overtime provisions for non-continuous shiftworkers was intended.

George Stella

[23] Transcript 24 June 2019 at PN12.
[24] *The Airline Operations (Transport Workers') Award 1998* (Transport Workers' Award); Airline Operations – Clerical and Administrative Award 1999; *Airline Operations (Domestic Airlines) Award; Overseas Airlines (Interim) Award 1999; Aircraft Engineers (General Aviation) Award 1999.*

[36] Mr George Stella is an employee of Dnata Catering at Melbourne International Airport and is covered by the *Qantas Airways Limited and Q Catering Limited – Transport Workers Agreement 2018* (**the Agreement**). Mr Stella stated that he prepares the bars which go out to the planes along with the required food for passengers and crew. He stated that the international operations at Melbourne airport are effectively operating on a 24-hour basis although in his section the roster pattern is not spread over 24 hours but rolling shifts of 8 hours duration. Under the Agreement, shiftworkers are paid double time for overtime. He stated that the impact of shiftworkers working overtime has a greater impact than it does on day workers who are more likely to have a regular sleeping pattern. He stated that the impact is the same for a person working as a shiftworker on a 24-hour roster pattern or less than 24 hours as both commence work at different times, have different sleeping patterns, fatigue more easily, eat meals at different times and do not have a regular family life.

Shane O'Brien

[37] Mr Shane O'Brien is the National Strategic Campaigns Lead for the TWU, and was previously Director of Aviation at the TWU from June 2013. He stated that he was responsible for the negotiation of enterprise agreements in aviation with companies that he estimated to represent 80 to 85 per cent of workers engaged in the transport stream of the *Airline Operations Award*. Mr O'Brien provided a list of enterprise agreements and their provisions on overtime for shiftworkers. He stated that with the exception of agreements that include loaded rates, most agreements operate to provide over award payments and provide payment of overtime rates at double time for all shiftworkers, regardless of whether they work continuous shiftwork or non-continuous shiftwork.

The Australian Workers' Union (AWU) claim

[38] The AWU filed a claim in relation to the overtime rates payable to non-continuous shiftworkers for performing work on Sundays.[25] The AWU submitted a claim to remove the distinction between continuous and non-continuous shiftworkers in clause 32.1(a) of the *Airline Operations Award* through removal of the word 'continuous' from clause 32.1(a). The result of the variation would be that non-continuous shiftworkers are entitled to 200% for working overtime.

[39] The AWU submitted that the addition of 'continuous' in clause 32.1(a) was made inadvertently, and is an arbitrary distinction without basis. They submitted that there is nothing to suggest that the Australian Industrial Relations Commission (**AIRC**) intended to reduce the overtime entitlements of non-continuous shiftworkers, and no parties to the process made submissions on this. To the contrary, it appears that the parties overwhelmingly made submissions to preserve the entitlements that existed in the principal pre-modern awards

[40] The AWU submitted it was inconsistent with the modern awards objective that an award make provisions for an employee to receive a lesser rate of pay on commencing overtime compared to the rate he or she was receiving immediately prior to such overtime.

[25] AWU submission, 29 January 2019.

[41] The AWU submitted that in the event that the Full Bench not make the application as requested in their draft determination[26] that any amendments ensure that non-continuous shiftworkers do not receive a lower rate of pay for performing overtime work than for performing work during ordinary hours; the overtime entitlements in the Award are clear and easy to understand; and the interpretation of overtime entitlements in the Exposure Draft are consistent for all types of worker.

[42] The AWU submitted that the variation fulfilled the considerations in ss.134(1)(da) and 134(1)(g). They submitted that s.134(1)(f) was relevant but not significant as the majority of employers in this sector are both large employers and covered by enterprise agreements. The AWU submitted that the other s.134 considerations were neutral.

AMWU claim

[43] The AMWU supports a variation to the *Airline Operations Award* in the same terms as the Draft Determination filed by the TWU.[27] The AMWU submits that the variation will resolve the tension to the operation of clauses 32.1 and 30.7 and restore the overtime entitlement for non-continuous shiftworkers which was diminished without explanation during the award modernisation process.

[44] The AMWU submitted, in the alternative, that clause 30 – Special provisions for shiftworkers should be varied to insert a new subclause 30.8 as follows:

> '30.8 The rate at which a shiftworker must be paid for all time worked on Sundays and public holidays is double time and on Christmas Day and Good Friday is double time and a half.'

[45] The AMWU submitted that the *Airline Operations Award* was not simple and easy to understand due to the tension between clauses 32.1 and 30.7. The AMWU submitted that it was significant that none of the identified pre-reform awards contained a distinction between continuous and non-continuous shiftworkers. The AMWU made similar submissions to the TWU concerning the history of overtime clauses in the airline operations industry.

[46] The AMWU submitted that the *Airline Operations Award* is not currently meeting the modern awards objective because of the accidental insertion of a distinction between continuous and non-continuous shiftwork for the purposes of overtime penalty rates.

[47] The AMWU submitted that its' primary position should be preferred because it is consistent with the award history, there was no apparent justification or merit case advanced for the diminution of the overtime entitlement for non-continuous shiftworkers when the modern award was made, and award modernisation was not intended to diminish employee entitlements.

[48] The AMWU submitted that the proposed variation is necessary to achieve the modern awards objective and ss.134(1)(da) and 134(1)(g). They submitted that the impact of business under s.134(1)(f) would be minimal. They submitted that the other considerations were neutral.

---

[26] See paragraph [38] of this decision.
[27] AMWU submission, 29 January 2019.

Australian Licenced Aircraft Engineers Association (ALAEA)

[49] ALAEA filed submissions supporting the TWU submission and draft determination.[28]

Submissions in reply

Australian Industry Group (Ai Group)

[50] Ai Group opposes the TWU, AWU and AMWU (**collectively, Unions**) submissions to amend clause 32.1 of the *Airline Operations Award*. They do not accept that there is any difficulty arising from the current provisions.[29]

[51] Ai Group submitted that the TWU and AWU variations would:

- increase the overtime rate payable to non-continuous shiftworkers such that they would be entitled to payment at double time for all overtime worked.[30]
- potentially re-characterise ordinary hours of work performed by shiftworkers as a result of a change to their roster where they have not been given at least two days' notice of the relevant change (in accordance with clause 30.2(c)) as overtime. This in turn has various other potential implications under the *Airline Operations Award*, the NES and superannuation entitlements.[31]

[52] In addition, Ai Group submitted that:

- the TWU claim would 'create a new entitlement to payment at double time where a shiftworker has had less than 48 hours' notice of the shift.'[32]
- the AWU claim would '[p]otentially require the payment of overtime to shiftworkers where they work outside the hours prescribed on their roster, pursuant to clause 30.2(a) and treat such hours as overtime; even if the roster is varied pursuant to clause 30.2(b).'[33]
- the Unions variation if made would amount to significant and substantive changes to employee entitlements and no justification or evidence has been proffered that provided the basis for these variations.[34]

[53] Ai Group submitted that the Transport Workers Award and the *Overseas Airlines (Interim) Award 1999*, contemplated the notion of 'continuous work' in the context of shiftwork in relevantly similar terms to the definition of 'continuous shiftwork' now found at clause 28.3(a) of the *Airline Operations Award*.

[28] ALAEA submission, 29 January 2019.
[29] Transcript 24 June 2019 at PN192.
[30] Ai Group submission, 1 March 2019 at para 22(a).
[31] Ai Group submission, 1 March 2019 at para 22(c).
[32] Ai Group submission, 1 March 2019 at para 22(b).
[33] Ai Group submission, 1 March 2019 at para 28.
[34] Ai Group submission, 1 March 2019 at para 23.

[54] Ai Group referred to the award modernisation process, which required the AIRC to adopt a 'swings and roundabouts' approach[35] whereby employee entitlements, in some respects, were enhanced through the process whilst in relation to other terms and conditions, the making of the modern awards saw some reductions to employee entitlements. Ai Group submitted that the Unions' claim in relation to the pre-modern award standard in some instruments, reflected merely a desire to cherry-pick a more beneficial element and reintroduce it to the modern awards system absent any proper foundation for doing so. They submitted that since the *Airline Operations Award* was made that various additional terms and conditions have been introduced that further enhance the safety net that it provides, and in this context the variation was unjustified and not necessary to ensure that the *Airline Operations Award* achieves the modern awards objective.

[55] Ai Group submitted that the Unions' assertion that the overtime provision contained in the ACTU and TWU draft awards were an 'error' is without foundation. They submitted that the evidence before the Commission was not probative and did not enable the Commission to reach the conclusion that it was an error. In the alternative, any alleged errors made by the parties in their draft awards is of little relevance as the AIRC Full Bench ultimately determined the Award ought to be made in the relevant terms in accordance with the statutory provisions governing its discretion.

[56] Ai Group submitted that in the event that there was an error, this does not enliven the Commission's power to now vary the Award as it requires consideration of the variations proposed in the context of the safety net in its current form. Ai Group submitted that the Unions had not overcome the legislative threshold established by ss.138 and 134(1) of the Act. Ai Group submits that granting the Unions' claim would be unfair to the employers covered by the Award.

[57] Ai Group referred to the *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 and submitted that the employer parties in these proceedings do not bear any onus to demonstrate the claim and that no adverse inference can or should be drawn from the absence of evidence called by employer parties or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

[58] Ai Group submitted that there is no material before the Commission that establishes that non-continuous shiftworkers are not afforded a fair and relevant minimum safety net or that the Award does not provide them with fair and relevant compensation for the disutility associated with working overtime.

[59] Ai Group submitted that s.134(1)(b) supported dismissing the claim as the absence of the entitlement encouraged bargaining and a continuing rise to the minimum floor of entitlements would ultimately have the effect of discouraging employers from engaging in collective bargaining.[36]

[60] Ai Group submitted that under s.134(da) that the proposed variations are not necessary as all employees who perform overtime are already entitled to additional remuneration beyond

---

[35] Re Rail Industry Award 2010 [2017] FWCFB 719 at [31] and Modern Awards Review 2012 – Penalty Rates [2013] FWCFB 1635 at [32], referenced in Ai Group submission, 1 March 2019 at [45].

[36] Ai Group submission, 1 March 2019 at para 78.

the base hourly rate prescribed by the Airline Operations Award. [37] Ai Group referred to the *Penalty Rates Decision* [2017] FWCFB 1001 (**Penalty Rates Decision**) to support the proposition that s.134(1)(da) is not a statutory directive and the requirement is one of a number of considerations which are required to be taken into account.

[61] Ai Group submitted in relation to s.134(1)(f) that the evidence before the Commission did not establish that the majority of employers covered by the Award are covered by enterprise agreements or evidence of the enterprise agreement. They submit that it also ignores that the minimum floor set by the Award has a bearing on an employer's labour costs notwithstanding the coverage of an enterprise agreement as a result of the application of the 'Better Off Overall Test' (**BOOT**).

Qantas Group

[62] The Qantas Group (**Qantas**) filed submissions in reply to the Unions' claims.[38] Qantas agreed with the claim that overtime for shiftworkers on Sundays should be paid at double time. They opposed the claim that overtime for all shiftworkers in respect of all shifts should be paid at double time.

[63] Qantas submitted that the substantive claim had its genesis in a technical and drafting issue concerning overtime rates payable to shiftworkers working Sundays but that the claim appeared to have expanded to include overtime rates payable for all shiftworkers in respect of all shifts should be double time.

[64] Qantas disagreed with the assertion that the differentiation in overtime rates payable to dayworkers and shiftworkers, as opposed to continuous shiftworkers, was an accident or a mistake. They submitted that the assertion that there had been a mistake fails to have regard to the level of rigour involved in the award modernisation process. Qantas referred to the award modernisation process concerning the *Airline Operations Award* as an example of this rigour, and the submissions made by Qantas, the ACTU and Ai Group concerning the payment for working overtime clause. Qantas proposed its own draft then agreed to the ACTU clause subject to some amendments. The AIRC then published the Exposure Draft with a payment for working overtime clause that reflected the ACTU draft award agreed to by Qantas and Ai Group.

[65] Qantas submitted that the purpose of award modernisation process was to create modern awards with a fair minimum safety net of enforceable terms and conditions of employment but that this did not mean that a modern award was intended to simply be a collation of the most beneficial terms from the primary pre-reform awards.

[66] Qantas disagreed with the TWU submission that the variation to clause 32.1 would have minimal impact on business as most employers covered by the *Airline Operations Award* have enterprise agreements in place which reflect the provision that the TWU is seeking. While as a general proposition, the enterprise agreements which cover employees within Qantas provide for double time overtime for shiftworkers, there were exceptions including the *Jetstar Airways*

[37] Ai Group submission, 1 March 2019 at para 88.
[38] Qantas Group submission, 26 February 2019.

Engineering & Maintenance Enterprise Agreement 2013 (**Jetstar Agreement**) and that part-time employees may have their rostered shifts extended at single time, up to 7.6 hours per day.

[67] Qantas submitted that the variation would have a substantial impact on the application of the BOOT in respect of employees covered by the Jetstar Agreement and part-time employees. In the case of part-time employees, the value of each extension hour would be compared against 200% from the first hour and following, as opposed to 150% for the first two hours, and 200% thereafter.

[68] In response to the statement that there was the same disutility associated with continuous and non-continuous shiftwork, Qantas submitted that there was a discernible difference between continuous and non-continuous shiftwork that is recognised in other modern awards. Continuous shiftworkers are paid double time for working overtime in modern awards such as the *Aquaculture Industry Award 2010*, *Legal Services Award 2010* and *Manufacturing and Associated Industries and Occupations Award 2010*.

[69] Qantas addressed the s.134 considerations and submitted that the existing *Airline Operations Award* met the modern awards objective. In relation to s.134(1)(da), Qantas submitted that this objective was already fulfilled as employees were already paid additional remuneration for employees working overtime.

[70] Qantas submitted that while it was generally opposed to an increase in overtime rates payable for all shiftworkers to double time, it would be undesirable for overtime hours on a Sunday to be paid at the rate of time and a half for the first two hours, in circumstances where the substantive portion of the regular Sunday shift is paid at double time.[39]

[71] Qantas proposed the following variation to clause 32.1(a) of the *Airline Operations Award* (proposed inserted text is underlined):

> '32.1(a) Subject to the following, ~~A~~all work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work.
>
> (i) For a continuous shiftworker the rate for working overtime is double time.
>
> (ii) For shiftworkers working on Sunday, the rate for working overtime is double time.'

[72] Qantas submitted that the Unions had failed to establish a substantive merits case.

AMWU

[73] The AMWU made submissions in reply to Qantas and Ai Group (**Employer parties**).[40] The AWU supported the AMWU submissions.[41]

[39] Qantas submission, 26 February 2019 at para 80.
[40] AMWU submission in reply, 24 March 2019.
[41] AWU submission in reply, 26 March 2019.

[74] The AMWU agreed with the Employer parties submissions that the *Airline Operations Award* was not intended to be simply a collation of the most beneficial terms or 'cherry picking' from the primary pre-reform awards but submitted that this did not assist their argument as the award had the same entitlement as 100% of the relevant pre reform awards and the vast majority of the enterprise awards.

[75] The AMWU did not necessarily disagree with the submission that the award was subjected to close scrutiny during the award modernisation process as a general proposition but stated it was evident even on Qantas' submission that the overtime rates were not considered by any of the parties, beyond an agreement by the Employer parties to adopt an overtime clause proposed by the ACTU.

[76] In response to the Employer parties' reliance on the modern awards objective and the *Preliminary Jurisdictional Issues Decision*[42], the AMWU submitted that given the disagreement between the parties on the proper construction of clauses 30.2 and 32.1, it is self-evident that the award is not providing a simple and easy to understand set of terms and conditions. The AMWU submitted it is self-evidently contrary to the requirement to provide additional remuneration for working overtime, when compared with the penalty rate for working ordinary hours on a Sunday.

[77] In relation to Qantas' submissions concerning the Jetstar Agreement and part-time employees in their enterprise agreements, the AMWU submitted that these agreements may have BOOT issues as the award stands.

[78] The AMWU submitted that Ai Group's submissions regarding s.134(1)(da) failed to recognise that non-continuous shiftworkers could receive less for working overtime compared with ordinary hours on a particular day (Sunday). According to the AMWU it is a false comparison to compare overtime to the base hourly rates in circumstances where the award permits ordinary hours to be worked on a Sunday, and ordinary hours worked on that day attract a penalty.

[79] The AMWU submitted that should its' primary position not be accepted, that its' proposed alternative variation should be accepted, rather than Qantas' proposal. The AMWU's alternative variation would cause less disruption to the overall *Airline Operations Award*, bring the clause dealing with specific provisions for shiftwork in line with the equivalent clause in the *Manufacturing and Associated Industries and Occupations Award 2010*, and would avoid a further absurdity of the Award being interpreted to provide an entitlement of merely time and a half for the first two hours of overtime performed on a public holiday.

TWU

[80] The TWU made submissions in reply[43] to the Qantas and Ai Group submissions. The TWU submitted that the only intended effect of the variation to clause 32.1 was to address the disparity in overtime rates between continuous and non-continuous shiftworkers and to avoid the potential anomaly between overtime and ordinary rates for Sunday work. The TWU

[42] [2014] FWCFB 1788.
[43] TWU submission, 11 June 2019.

submitted that the variation was not intended to, and does not have any of the additional consequences raised by Ai Group.

[81] The TWU submitted that the variation to reference clauses 28.3 and 30.2 in the ordinary hours of work clause merely reflected the fact that the ordinary hours for shiftworkers are fixed by the combined operation of these clauses and would not create a new entitlement to payment at double time when a shiftworker is given less than 48 hours' notice of shift change.

[82] The TWU submitted in reply to the Ai Group that while the variation goes beyond mere 'clarification' that is not a significant change to the award provisions but merely to align the overtime rates for continuous and non-continuous shiftworkers as had been the case prior to the award modernisation process. No industrial party has put forward any evidence that the proposed variation would cause any adverse effect on business, employment or industry except for speculation about a Jetstar Agreement without Qantas disclosing the pattern of work or payments made to Jetstar employees.

[83] The TWU submitted that Ai Group's assertion that the TWU relies on provisions in only two pre-reform awards to justify the variation sought is incorrect as each of the relevant pre-reform awards provided for the payment of overtime at a rate of double time for all shiftworkers.

[84] Further, the TWU said that the Employer parties' submission that the award modernisation was a 'swings and roundabouts' would have some force if there was evidence that the change to the overtime rate for non-continuous shiftworkers was drawn from a particular pre-reform award, was suggested by any employer group or stakeholder or was part of a compromise involving a change to some other provision of the Award.

[85] The TWU submitted that Ai Group and Qantas had not advanced any evidence that the variation sought would have a significant impact on business. In relation to s.134(1)(g), the TWU submitted that Qantas accepted that the interaction between clauses 32.1 and 30.7 was unclear and may lead to the undesirable result that overtime hours on a Sunday are paid at a rate which is less that the substantive portion of a regular Sunday shift.

[86] The TWU submitted in response to the assertion that it had failed to make a merit- based argument that they had a witness who referred to the difficulties of shiftworkers generally and the absence of any rationale for the distinction between continuous and non-continuous shiftworkers.[44]

Consideration

[87] We turn first to consider the Unions' claim that the *Airline Operations Award* should be varied so as to ensure that all shiftworkers working overtime are paid double time.

[88] The legislative context relevant to the Review has been set out in detail above[45] and we have applied the relevant legislative provisions in considering the Unions' applications. Our review proceeded on the basis that *prima facie*, the *Airline Operations Award* achieved the modern awards objective at the time it was made. Variations to modern awards should be

[44] Transcript 24 June 2019 at PN141.
[45] Paragraph [5] – [19] of this decision.

founded on merit-based arguments and accompanied by probative evidence, and for the reasons which follow we are not satisfied that the variations sought by the Unions displace this presumption.

[89] The award modernisation process, conducted by the AIRC under Part 10A of the *Workplace Relations Act 1996* (Cth), from which the *Airline Operations Award* emerged, and in particular the origin of clause 32.1, is relevant in considering the Unions' claim. During the hearing of this matter, an 'Exhibit Book' was tendered to assist the parties and the Full Bench.[46] The Exhibit Book comprised submissions, transcripts and key statements relevant to the award modernisation process. The current clause 32.1 of the *Airline Operations Award* emerged during this process, throughout which the relevant parties, including those who have advanced submissions in this Review, were heavily involved. In summary, the award modernisation process provided the opportunity for the relevant parties to file both submissions and drafts of the *Airline Operations Award* and included several public consultations.

[90] The AWU initially pursued their claim during the award-stage of the Review as a technical and drafting issue.[47] On 2 February 2017, the matter was referred as a substantive issue,[48] and then the Group 4 award stage Full Bench confirmed that the matter would be dealt with as a substantive issue.[49] As a substantive issue, it joined the Unions' respective applications and submissions that the changes to the overtime provisions during the award modernisation process, and the insertion of the words 'continuous shiftworkers' were unintended by the parties, and made in error. In this matter, both Ai Group and Qantas advanced submissions that the differentiation in overtime rates payable to continuous shiftworkers and day workers and non-continuous shiftworkers, set out in clause 32.1, did not arise in error, but rather as a result of the award modernisation process.[50]

[91] We have considered the material relevant to the award modernisation process, from which the *Airline Operations Award* emerged. We do not agree with the TWU that during this process, 'no one appears to have turned their minds to the changes and the consequences of the changes for shiftworkers working non-continuous shifts'.[51] The *Airline Operations Award* was made on 4 September 2009, and the current clause 32.1[52] reflected the corresponding payment for working overtime clause in the draft award proposed by the ACTU, with a slight amendment.[53] The rigour involved in the award modernisation process is evident through its timeline, which further confirms that the relevant parties filed numerous submissions that *inter alia* addressed the payment for overtime clause.

[92] We draw specific attention to the following sequence of events during the award modernisation process. On 6 March 2009, Qantas, together with Ai Group, submitted a draft award, which included the following payment for overtime clause:[54]

---

[46] Transcript 24 June 2019 at PN36.
[47] AWU submission, 29 January 2019 at paragraph 12; 15.
[48] Transcript 2 February 2017 at PN549-PN561.
[49] [2018] FWCFB 1548 at [114].
[50] See paragraph [50] – [72] of this decision.
[51] TWU submission, 29 January at para [24].
[52] As it then was clause 31.1(a) of the *Airline Operations Award.*
[53] ACTU, Aviation Industry Award 2010 – draft award, 18 March 2009; The current clause 32.1 includes the words "(except where the time is worked by arrangement between the employees themselves)".
[54] Qantas Group and Ai Group, Airline Operations and General Aviation Industry – Ground Operations Award 2010 – draft award, 6 March 2009.

‘**25.2 Payment for working overtime**

(a) Day work - All work done outside ordinary hours must be paid for at the rate of time and a half for the first two hours and double time thereafter.

(b) Shift work - All time worked in excess of or outside ordinary hours or on a shift other than a rostered shift must be paid for at the rate of double time unless the time is worked by arrangement between the employees themselves. (**Emphasis added**)

(c) Except as provided in clause 25.3 and 25.4, in computing overtime, each day's work stands alone.’

[93] On 18 March 2009 the ACTU submitted a draft award, which included the following payment for overtime clause:[55]

‘38.1 Payment for working overtime

(a) All work done outside ordinary hours on any day or shift must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. For a continuous shift worker the rate for working overtime is double time.’ (**Emphasis added**)

[94] The AIRC held public pre-drafting consultations on 18 and 19 March 2009. Qantas noted that submissions during those consultations did not deal with overtime payment rates in the Airline Operations Award.

[95] The ACTU filed further submissions on 1 April 2009 and attached a second draft award, which included the following payment for overtime clause: [56]

‘36.1 Payment for working overtime

(a) All work done outside ordinary hours on any day or shift must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. All time worked in excess of or outside the ordinary working hours, or on a shift other than a rostered shift, will be paid at the rate of double time’.

[96] As part of its submission, the ACTU provided a comparison of its draft award terms against the Qantas and Ai Group draft at Attachment C to its submissions. In relation to overtime, the comparison said:

QF/AiG	ACTU/combined unions
Day work < 2 hrs x 1.5 > 2 hrs x 2	Day work < 2 hrs x 1.5 > 2 hrs x 2 Shift work: x 2

[55] ACTU, Aviation Industry Award 2010 – draft award, 18 March 2009.
[56] ACTU, Aviation Industry Award 2010 - revised – draft award, 1 April 2009.

Shift work: x 2	

[97] Qantas filed further submissions and another draft award on 1 April 2009. The draft award included the following payment for overtime clause and a drafting note:

> **'26.2 Payment for working overtime**
>
> (a) All work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work. For a continuous shift worker the rate for working overtime is double time.'

[98] The drafting note suggested that Qantas agreed to support the insertion of the ACTU payment for overtime clause filed on 18 March 2009 subject to certain amendments.[57] Also as part of its submission, Qantas provided a comparison of its draft award terms against the ACTU draft dated 18 March 2009 at Attachment 1 to its submissions. Item 38 of the table compared the respective payment for working overtime clauses side by side. The AIRC then published the Exposure Draft with a payment for working overtime clause that reflected the ACTU draft award as at 18 March 2009, with amendments agreed to by Qantas and Ai Group in their draft award dated 1 April 2009. Following publication of the Exposure Draft, no parties sought to amend the payment for overtime clause.

[99] In respect of the above sequence of events, we note the following. It is evident that the Qantas and Ai Group comparative table did, by setting out the respective clauses side by side, distinguish the differences between the payment for working overtime clauses within their own first draft[58] and that of the ACTU.[59] The ACTU comparative table fails to distinguish the difference between the payment for working overtime clauses within the first ACTU draft award[60] and that of Qantas and Ai Group[61]. Clause 36.1 in the ACTU draft of 1 April 2009 did not reference shiftworkers at all.[62] However, the comparative tables were attached to the substantive submissions of the respective parties, and formed part of the broader award modernisation process. Further, the submissions and draft awards submitted on 1 April 2009 were the second of each for both the ACTU and Qantas and Ai Group.[63] Therefore, prior to the publication of the Exposure Draft on 22 May 2009, both the relevant parties and the AIRC had before it three different overtime clauses[64] and the comparative tables as submitted by the ACTU and Qantas with Ai Group.

---

[57] Qantas further submission, 1 April 2009.
[58] Qantas Group and Ai Group, Airline Operations and General Aviation Industry – Ground Operations Award 2010 – draft award, 6 March 2009.
[59] ACTU, Aviation Industry Award 2010 – draft award, 18 March 2009.
[60] ACTU, Aviation Industry Award 2010 – draft award, 18 March 2009.
[61] Qantas Group and Ai Group, Airline Operations and General Aviation Industry – Ground Operations Award 2010 – draft award, 6 March 2009.
[62] See paragraph [95] of this decision.
[63] The first Qantas and Ai Group submissions and draft were filed on 6 March 2009 and the first submission and draft of the ACTU were filed on 18 March 2009.
[64] Being the drafts of Qantas and Ai Group dated 6 March 2009, the ACTU dated 18 March 2009, and the ACTU dated 1 April 2009.

[100] On the basis of the matters identified above, we are satisfied that during the award modernisation process, the relevant parties and the award modernisation Full Bench had regard to clause 32.1 as it is currently drafted in the *Airline Operations Award*. Further, we note that during the two-yearly review of modern awards completed by the Commission, the Unions did not seek to vary the payment for overtime clause within the *Airline Operations Award*. We are of the view that there is no probative evidence that the current payment for working overtime provisions in the *Airline Operations Award* were made in error. Accordingly, the presumption that the *Airline Operations Award* achieved the modern awards objective at the time it was made is not displaced.

[101] Notwithstanding our above consideration of the award modernisation process and the regard had for the current clause 32.1 of the *Airline Operations Award*, the Unions' applications are to be considered in accordance with the principles relevant to the review of modern awards. Consistent with such principles, set out above,[65] applications to amend modern awards should be advanced on an evidentiary basis. For the reasons below, we are not persuaded that the variations to clause 32.1 of the *Airline Operations Award* as proposed in the respective Unions' applications are necessary to achieve the modern awards objective.

[102] We have had regard to the s.134 considerations, as matters of significance and with no particular primacy attached to any such considerations.[66] Having taken into account the relevant matters under this provision alongside the Unions' submissions and evidence, we are of the view that the Unions' proposed variations do not satisfy the requisite threshold of 'necessary' to ensure that the *Airline Operations Award* meets the modern awards objective. In particular, s.134(1)(da) requires the consideration of the need to provide additional remuneration for employees working overtime, unsocial irregular or unpredictable hours, weekends or public holidays, or shifts and s.134(1)(g) requires the consideration of the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards. We are satisfied that clause 32.1, in accordance with our decision in regards to the rates payable to all shiftworkers working Sundays,[67] ensures that the *Airline Operations Award* achieves that which is contemplated in s.134 of the Act.

[103] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a)–(h). We have taken into account those considerations, insofar as they are relevant to the matter before us. However, we are not persuaded that the proposal to make overtime payable to all shiftworkers at the rate of double time is necessary for the *Airline Operations Award* to achieve the modern awards objective. Accordingly, the respective applications of the TWU, supported by the AMWU and ALAEA, and of the AWU, are not granted.

[104] Notwithstanding our decision above, we turn to consider the Unions' claim insofar as it relates to overtime rate payable to shiftworkers working Sundays.

[105] The applications advanced by the TWU, supported by the AMWU and ALAEA, and by the AWU each identified and raised the situation whereby the rate of pay for a non-continuous

[65] Paragraph [5] – [19] of this decision.
[66] [2014] FWCFB 1788at [31] and [32].
[67] See paragraph [111] of this decision.

shiftworker working ordinary hours on a Sunday is double time, with the rate adjusting to time and a half for the first two hours of overtime and then double time thereafter.

[106] The proposed variations set out in the Unions' applications were submitted for reasons including the resolution of the *anomaly* that arises for non-continuous shiftworkers working overtime on Sunday. The TWU submitted that the proposed variation would 'also correct the tension between the overtime provisions and the Sunday rates which are highlighted in the Tables contained in Schedule B of the Exposure draft of the *Airline Operations Award*'.[68] The AWU application sought to vary clause 32.1 by removing the word 'continuous' and the variation was submitted to 'result in simple and easy to understand overtime entitlements devoid of absurd outcomes with no need for complex interaction'[69].

[107] Currently, where ordinary hours are worked by day workers on a Sunday, the loading is double time.[70] The loading for shiftworkers for work on a Sunday is also double time.[71] We are of the view that it is fair, and consistent with the modern awards objectives, to vary clause 32.1 of the *Airline Operations Award* so as to ensure that the rate payable to shiftworkers working overtime on Sunday, is double time. A variation to the *Airline Operations Award* of this kind removes the circumstance, as identified by the parties, whereby on a Sunday a non-continuous shift worker would be paid at double time for ordinary hours, at time and a half for the first two hours of overtime, and then double time for any hours thereafter.

[108] Qantas agrees with the Unions' claim that overtime for shiftworkers on Sundays should be paid at double time. We note here that Qantas did not accept the current clause 32.1 of the *Airline Operations Award* was an error, but rather that it 'appears to be an anomalous situation' whereby the rate payable to non-continuous shiftworkers drops down to time and a half for the first two hours of overtime on Sundays.[72] The effect of the proposed amendment to clause 32.1(a) advanced by Qantas[73] is that the overtime rate payable to shiftworkers working overtime on Sundays is double time, rather than time and a half for the first two hours and double time thereafter. We accept Qantas' proposed variation, and prefer it over the variation proposed in the alternative by the AMWU.[74] We are satisfied that the variation remedies the tension between clause 32.1 and 28.2(g) and 30.7(a) of the *Airline Operations Award* by providing that the rate for shiftworkers working overtime on Sunday is double time.

[109] Accordingly, the current clause 32.1(a) of the *Airline Operations Award* will be varied as follows, with amendments underlined:

> '(a) Subject to the following, ~~A~~all work done outside ordinary hours on any day or shift (except where the time is worked by arrangement between the employees themselves) must be paid at time and a half for the first two hours and double time thereafter until the completion of the overtime work:
>
> (i) for a continuous shiftworker the rate for working overtime is double time; and

[68] TWU submission, 29 January 2019 at para [26].
[69] AWU submission, 29 January 2019 at para [21].
[70] Clause 28.2(g) *Airline Operations Award.*
[71] Clause 30.7 *Airline Operations Award.*
[72] Transcript 24 June 2019 at PN420-PN423.
[73] See paragraph [71] of this decision.
[74] See paragraph [44] of this decision.

(ii) for shiftworkers working on Sunday, the rate for working overtime is double time.'

Conclusion

[110] We are not persuaded that the proposed amendments submitted by TWU, supported by the AMWU and ALAEA, or the AWU that would vary the *Airline Operations—Ground Staff Award 2010* in relation to increasing the overtime rates payable for all shiftworkers to double time, are necessary to achieve the modern awards objective. Accordingly, the amendments sought are refused and the applications are dismissed.

[111] We are persuaded that the proposed amendment submitted by the Qantas Group to vary clause 32.1(a) of the *Airline Operations—Ground Staff Award 2010* in relation to amending the overtime rates payable to shiftworkers working overtime on Sundays to double time is necessary to achieve the modern awards objective. A determination to this effect will be published separately.

[112] The exposure draft for the *Airline Operations—Ground Staff Award 2010* will also be updated in accordance with our determination.

VICE PRESIDENT

Appearances:

Mr M Gibian and *Ms Viviani* on behalf of the Transport Workers' Union.
Mr G Miller on behalf of the Australian Manufacturing Workers' Union.
Mr Z Duncalfe on behalf of the Australian Workers' Union.
Ms R Bhatt on behalf of the Australian Industry Group.
Ms K Srdanovic on behalf of the Qantas Group.

Hearing details:

24 June.
2019.
Sydney.

Final written submissions:

ALAEA submission dated 29 January 2019.
Qantas Group submission dated 26 February 2019.
Ai Group submission dated 1 March 2019.
AMWU submission dated 24 March 2019.
AWU submission dated 26 March 2019.

TWU submission dated 11 June 2019.

Printed by authority of the Commonwealth Government Printer

<PR711279>