



# STATEMENT

*Fair Work Act 2009*

s.156—4 yearly review of modern awards

## **4 yearly review of modern awards**

(AM2019/17)

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER BISSETT

MELBOURNE, 4 DECEMBER 2020

*4 yearly review of modern awards – finalisation of Exposure Drafts and draft variation determinations – Tranche 3 – Nurses Award 2010.*

[1] This Full Bench is dealing with the finalisation of exposure drafts produced during the 4 yearly review of modern awards (the Review). This statement deals with the *Nurses Award 2010* (Nurses Award).

### **Background**

[2] In a decision issued on 5 November 2020 (the *November 2020 Decision*)<sup>1</sup>, we outlined the background to the finalisation of the exposure draft for the Nurses Award,<sup>2</sup> we need not repeat that background here.

[3] In the *November 2020 Decision* we decided to incorporate a number of changes into the draft variation determination, and noted that any clause that was the subject of ongoing proceedings in AM2020/1 would appear in the draft variation determination as it currently appears in the Nurses Award. The claim in AM2020/1 affects a number of clauses in the award relating to casual loadings. AM2020/1 was heard on 20 October 2020 and a decision in the matter is reserved.

[4] A revised draft variation determination was published with the *November 2020 Decision* and interested parties were directed to provide any submissions on the aspects of the draft award variation determination unrelated to AM2020/1 before a final variation determination would be issued. We indicated that the final variation determination would be varied in line with any determination of the Full Bench in AM2020/1.

[5] The ANMF, Ai Group and Australian Business Industrial, the NSW Business Chamber and Leading Age Services Australia Ltd filed submissions in response to the November decision.

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<sup>1</sup> [\[2020\] FWCFB 5883](#)

<sup>2</sup> [2020] FWCFB 5883 at [2] – [7]

## Submissions

### *'Shiftwork Loadings'*

[6] ABI noted that the following inconsistencies appear in terminology used for shiftwork loadings in the following clauses:

- clause 11.4 provides for the payment of 'shift allowances';
- clause 19.1(c) refers to 'shift loadings'; and
- clause 20.2 characterises these payments as 'shiftwork loadings'.<sup>3</sup>

[7] For consistency, the ABI proposed the terminology be amended across the clauses and prefers the term 'shiftwork loadings' is used.

[8] The ANMF agrees with the ABI in relation to this issue<sup>4</sup> and notes that the use of the phrase 'shiftwork loadings' is also preferable because the name of the clause from which the entitlement is derived is '20.2 Shiftwork loading'. The ANMF also submit the phrase 'shiftwork loadings' is used at clause 28.6(b) and in Schedule B at clauses B.3.1 and B.3.3 of the draft determination.<sup>5</sup>

[9] We agree with the proposed amendment. The terminology at clause 11.4 and 19.1(c) will be changed to 'shiftwork loadings' in the variation determination.

### *'Overtime for casuals' decisions (AM2017/51)*

[10] The ANMF refers to two decisions issued by the Overtime for Casuals Full Bench in AM2017/51 on 18 August 2020<sup>6</sup> and 30 October 2020<sup>7</sup>. The ANMF notes the subsequent determination based on these decisions, effective from 20 November 2020, provides that the Nurses Award should be varied in the following ways:

1. By inserting the words "for each ordinary hour worked" at the end of clause 10.4(b)
2. By inserting the words "by full-time, part-time and casual employees" after the words "Hours worked" appearing in clause 28.1(a).<sup>8</sup>

[11] The ANMF submits these changes to clauses 10.4(b) and 28.1(a) should be reflected in the equivalent clauses in the most recently published determination and that clause 11.2 is the equivalent clause for 10.4(b) and should read as follows:

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<sup>3</sup> ABI and NSWBC [Submission](#) 19 November 2020 at [1]

<sup>4</sup> ANMF [Submission](#) 26 November 2020

<sup>5</sup> [Ibid](#)

<sup>6</sup> [\[2020\] FWCFB 4350](#)

<sup>7</sup> [\[2020\] FWCFB 5636](#)

<sup>8</sup> *4 yearly review of modern awards – common issue – overtime for casuals – Nurses Award 2010*, PR723938 30 October 2020

‘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% for each ordinary hour worked.’

[12] The ANMF submits that clause 19.1(a) is the equivalent clause for 28.1(a) and should read as follows:

‘Hours worked by full-time, part-time and casual employees in excess of the ordinary hours on any day or shift prescribed in clause 13—Ordinary hours of work are to be paid as follows.’

[13] Ai Group submits that while clause 10.4(b) may need to be amended to reflect the outcome of common issue proceedings, 10.4(b) is a clause it has sought to vary in Matter AM2020/1 and the approach taken may be affected by the outcome of those proceedings.<sup>9</sup>

[14] Ai Group submits the amendment to clause 28.1(a) proposed by the ANMF does not raise any difficulties.<sup>10</sup>

[15] The changes flowing from the determination issued by the Overtime for Casuals Full Bench were not incorporated into the draft variation determination published on 5 November 2020 as the determination issued by the Overtime for Casuals Full Bench was not operative at that time. These changes will now be incorporated in the draft variation determination. Any subsequent variation made by the Full Bench dealing with AM2020/1 will also be incorporated.

#### *Incorrect rates of pay in Schedule B*

[16] The ANMF submits<sup>11</sup> that the rates of pay in the new provision, Schedule B, are incorrect with respect to casual employees. It submits that the correct approach is that taken by the Full Bench in *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care*<sup>12</sup> which was endorsed by another Full Bench in the October ‘overtime for casuals’ decision.<sup>13</sup> In *Domain Aged Care* the Full Bench said:

‘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.’<sup>14</sup>

[17] The ANMF submit that Schedule B was a clause identified by it and Ai Group as one relating to AM2020/1. Schedule B has only been updated to factor in the Annual Wage Review 2019-20, and does not reflect the approach to casual loadings endorsed by the Overtime for Casuals Full Bench in the October decision.<sup>15</sup>

[18] The ANMF submits if the Full Bench is inclined to publish the final determination with Schedule B incorporated then the rates must be corrected to reflect the status quo. It says that unless the decision in AM2020/1 changes the Nurses Award then the status quo is that weekend

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<sup>9</sup> Ai Group [Submission](#) 30 November 2020 at [8]-[12]

<sup>10</sup> Ibid at [13]

<sup>11</sup> ANMF [Submission](#) 19 November 2020 at [7]-[18]

<sup>12</sup> [\[2019\] FWCFB 1716](#)

<sup>13</sup> [\[2020\] FWCFB 5636](#)

<sup>14</sup> [\[2019\] FWCFB 1716](#) at [17]

<sup>15</sup> ANMF [Submission](#) 19 November 2020

penalties and public holiday penalties are compounded when worked by an employee receiving the casual loading as ‘the ordinary rate for casuals is the loaded rate’.<sup>16</sup>

[19] The ANMF did not include the overtime rates for casuals in Schedule B on the basis of its understanding that this is a separate issue which will be dealt with by the Full Bench in Matter AM2017/51 in due course.

[20] Ai Group disputes that the approach adopted by the ANMF reflects the proper interpretation of the current provisions of the award relating to the calculation of rates.<sup>17</sup> Ai Group said it would seek to be heard further in relation to the matter if the Full Bench intends to determine this issue in the course of settling the terms of Schedule B. Ai Group also states the issue is clearly a matter related to AM2020/1 and will potentially be impacted by any decision in those proceedings. It therefore submits Schedule B should not be included in any final variation determination prior to the resolution of AM2020/1.<sup>18</sup>

*Issuing the final variation determination*

[21] Ai Group submits that the Commission should refrain from issuing a final variation determination prior to the resolution of AM2020/1 and notes that the ANMF do not oppose this course. Ai Group raises the following concerns with the Commission issuing a final variation determination prior to the determination of AM2020/1:

- the possibility the determination would vary clauses in the award that were not the subject of proposed variations advanced in AM2020/1, but which were nonetheless referred to in argument in those proceedings as contextual considerations relevant to the proper construction of certain contentious provisions and/or the existence of ambiguity or uncertainty in the terms of the award. Ai Group submits this may then impact upon whether the jurisdictional fact of an ambiguity, uncertainty or error could be said to exist so as to permit a variation to the Award pursuant to s.160 of the *Fair Work Act 2009*;
- the approach of replacing the current terms of the Award with the contents of the proposed schedule (as opposed to simply not altering provisions relevant to AM2020/9) may alter the capacity of a party to press an argument that it contains an error, as contemplated under s.160 and asserted by the Employer parties in AM2020/1; and
- that the Commission may not have power to vary a final determination once issued as it cannot identify any provision in the Act that expressly affords the Commission a power to vary an issued variation determination.<sup>19</sup>

[22] ABI also note that numerous clauses may be affected by the forthcoming decision in AM2020/1 and would like the opportunity to provide further comment on any amendments made.<sup>20</sup>

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<sup>16</sup> ANMF [Submission](#) 19 November 2020

<sup>17</sup> Ai Group [Submission](#) 30 November 2020

<sup>18</sup> [Ibid](#) at [16]-[18]

<sup>19</sup> [Ibid](#) at [19]-[26]

<sup>20</sup> ABI and NSWBC [Submission](#) 19 November 2020

**Next steps**

[23] In light of the parties' submissions we do not propose to issue the final variation determination for the Nurses Award at this time. We will await the decision of the Full Bench in AM2020/1.

[24] Interested parties will be provided with an opportunity to comment on the revised draft final variation determination which will incorporate the determination issued by the Full Bench in AM2017/51 and any determination issued by the Full Bench in AM2020/1.

PRESIDENT

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