



Australian
Nursing &
Midwifery
Federation

Fair Work Commission

4 Yearly Review of Modern Awards

Matter No.: AM2019/17

4 YEARLY REVIEW OF MODERN AWARDS – FINALISATION OF EXPOSURE DRAFTS AND
VARIATION DETERMINATIONS – TRANCHE 3 – NURSES AWARD 2010

SUBMISSION OF THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION
REGARDING THE NURSES AWARD DRAFT VARIATION DETERMINATION



1. This submission is lodged on behalf of the Australian Nursing and Midwifery Federation (**ANMF**) in response to the Decision¹ and the Draft award Variation Determination (**DVD**)² of the Full Bench issued on 5 November 2020.
2. The ANMF has identified two issues which need to be addressed in order to finalise AM2019/17 with respect to the *Nurses Award 2010* (**Nurses Award**).

A. 'Overtime for casuals' decision (AM2017/51)

3. On 30 October 2020, a Full Bench of Hatcher VP, Catanzariti VP and Bull DP made a decision³ (**OFC October Decision**) concerning the overtime for casuals matter⁴ for all outstanding awards, including the Nurses Award. With respect to the Nurses Award, the Full Bench relied on what their decision of 18 August 2020⁵ provided. Collectively these two decisions are the **OFC Decisions**.
4. The subsequent **OFC Determination**⁶ based on the OFC Decisions is effective from 20 November 2020. The OFC Determination provides that the Nurses Award should be varied:

- “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).”⁷

5. Clause 11.2 is the equivalent clause in the DVD for clause 10.4(b) of the current Nurses Award. The ANMF submits that the published determination in this matter needs to include the OFC Determination so that clause 11.2 reads as follows:

“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.”

6. Clause 19.1(a) is the equivalent clause in the DVD for clause 28.1(a) of the current Nurses Award. The ANMF submits that the published determination in this matter needs to include the OFC Determination so that the clause 19.1(a) reads 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”

¹ [\[2020\] FWCFB 5883](#) (5 November 2020)

² [Draft award variation determination - Nurses Award - 5 November 2020](#)

³ [\[2020\] FWCFB 5636](#) (30 October 2020)

⁴ [AM2017/51](#)

⁵ [\[2020\] FWCFB 4350](#) (18 August 2020)

⁶ *4 yearly review of modern awards – common issue – overtime for casuals – Nurses Award 2010*, [PR723938](#) (30 October 2020)

⁷ *Ibid.*, at [A]



B. Schedule B of the DVD

7. Schedule B of the DVD is a new provision, in line with most other awards that have been reviewed pursuant to the 4 yearly review.
8. As the Full Bench has identified this schedule is a new addition to the Nurses Award.⁸ However, the rates in the schedule are incorrect, with respect to casual employees. This is made clear in the decision in *Domain Aged Care*⁹ which has subsequently been followed in the OFC Decisions.
9. In *Domain Aged Care* the Full Bench stated:

“[17] Clause 10.4(b) of the Award says that a casual employee will be paid an hourly rate equal to 1/38th of the weekly wage plus a casual loading of 25%. On a plain reading of the clause, the hourly rate includes the loading; the loaded casual rate is the ‘ordinary rate of pay’. **When a casual employee works ordinary hours on a Saturday or Sunday, clause 26 of the Award requires the weekend loading to be applied to the ordinary rate of pay. For casual employees, this rate is the casual rate. The same is the case with the public holiday penalty in clause 32.1.**”

[18]...It is already clear that the ordinary rate for casuals is the loaded rate. Clause 10.4(d) specifies a different arrangement in respect of shift allowances, because otherwise they would 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...” (Emphasis added).

10. In the OFC October Decision, the Full Bench explicitly endorsed the approach of *Domain Aged Care* stating:

[3]...(W)e expressed the conclusion that the overtime penalty rates prescribed in clause 25.1(b) (of the Aged Care Award 2010) were, in the case of casual employees, to be applied to the casual rate inclusive of the casual loading (i.e. the compounding approach). We took this approach because the entitlement to overtime in clause 25.1(b) was prescribed by use of the expressions “*time and a half*”, “*double time*” and “*double time and a half*”. On the basis of the Full Bench decisions in *AMWU v Energy Australia Yallourn Pty Ltd* and *ANMF v Domain Aged Care (QLD) Pty Ltd*, we said:

“These are traditional industrial expressions which have a traditional meaning. The “*time*” referred to is the rate of pay that would be payable to the employee for ordinary hours. In the case of casual employees, the ordinary time rate is inclusive of the casual loading. Therefore, the overtime rate is calculated by reference to the ordinary time rate inclusive of that loading, unless there is some provision which expressly indicates otherwise. That means that the casual loading is included in the overtime rate on a compounding basis.”

...

⁸ [2020] FWCFB 5883 at [12]

⁹ [2019] FWCFB 1716 (17 April 2019)



[13] ... We reject the submissions that no general proposition concerning the meaning of the expressions “*time and a half*”, “*double time*” and “*double time and a half*” can be derived from the *Yallourn* and *Domain Aged Care* decisions. Both decisions proceeded on the basis that the “*time*” referred to in these expressions, on their ordinary meaning, is the employee’s ordinary time rate of pay.

...

[17] Nor do we agree with the Ai Group’s submission that clauses 10.4(d) and 28.1(c) of the *Nurses Award* render the conclusion reached in *Domain Aged Care* inapplicable to the *Aged Care Award* (or other awards generally)... (Footnotes removed)

11. With respect to casual employees determined to be paid overtime on a compounding basis, subsequent determinations flowing from the OFC Decisions have converted the expressions “time and a half”, “double time” and “double time and half” into the figures of 187.5%, 250% and 312.5% of the hourly rate respectively.¹⁰
12. On 22 May 2020, the ANMF and The Australian Industry Group (**Ai Group**) filed the **Joint Note**¹¹ in response to the Full Bench decision of 27 April 2020.¹² The purpose of the Joint Note was to identify “...the terms of the Exposure Draft (ED) and Draft Variation Determination (DVD) of the Nurses Award 2010 (Award) which are related to AM2020/1”¹³.
13. At paragraph 5(b) of the Joint Note the ANMF and Ai Group identified the then ‘Schedule B— Summary of Hourly Rates of Pay’ of the DVD as relating to AM2020/1. Schedule B of the DVD published on 5 November 2020 is identical to the DVD discussed in the Joint Note except the rates have been updated to factor in the Annual Wage Review 2019-20.
14. If the Full Bench is inclined to publish the final determination with Schedule B then the rates within it must be corrected to reflect the status quo.
15. Ai Group have made an application¹⁴ to amend the Nurses Award, with the decision being reserved in that matter. Unless the decision in that matter changes the Nurses Award then the status quo is that weekend 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”.¹⁵

¹⁰ See for example [PR723844](#) at [6] and [PR723909](#) at [7] (30 October 2020)

¹¹ [Joint Note in response to Fair Work Commission Decision \[2020\] FWCFB 2124](#) (22 May 2020)

¹² [\[2020\] FWCFB 2124](#) at [330]

¹³ Joint Note at [1] (references removed)

¹⁴ [AM2020/1](#)

¹⁵ [2019] FWCFB 1716 at [18]



16. Please find attached to this submission at Attachment A an updated copy of the correct rates of pay for Schedule B with respect to casual employees. The tables at clauses B.1.3, B.2.3, B.3.3, B.4.3 and B.5.3 have been updated. Those rates which have been changed are highlighted.
17. The ANMF has not included the overtime rates for casuals in Schedule B as it is our understanding that this separate issue will be dealt with by the Full Bench in matter AM2017/51 in due course.¹⁶ The status quo position is that the overtime rates for casuals will also be calculated based on the compounding method.
18. The ANMF also notes that the rates in Attachment A are identical to those identified by the Fair Work Ombudsman as the correct rates since the *Domain Aged Care* decision, as seen in their pay guide published on 1 July 2020.¹⁷

¹⁶ [2020] FWCFB 5636 at [117]

¹⁷ <<https://www.fairwork.gov.au/ArticleDocuments/872/nurses-award-ma000034-pay-guide.pdf.aspx>>



ATTACHMENT A

B.1.3 Casual employees—ordinary and penalty rates

	Minimum casual hourly rate	Monday to Friday		Saturday	Sunday	Public holiday
		Afternoon shift	Night shift			
	% of minimum hourly rate					
	125%	137.5%	140%	187.5%	218.75%	250%
	\$	\$	\$	\$	\$	\$
1st year	27.06	29.77	30.31	40.59	47.36	54.12
2nd year	27.51	30.26	30.81	41.27	48.14	55.02
3rd year and thereafter	27.96	30.76	31.32	41.94	48.93	55.92
Experienced (the holder of a relevant certificate III qualification)	28.86	31.75	32.33	43.29	50.51	57.72



B.2.3 Casual employees—ordinary and penalty rates

	Minimum casual hourly rate	Monday to Friday		Saturday	Sunday	Public holiday
		Afternoon shift	Night shift			
	% of minimum hourly rate					
	125%	137.5%	140%	187.5%	218.75%	250%
	\$	\$	\$	\$	\$	\$
Student enrolled nurse						
Less than 21 years	25.05	27.56	28.06	37.58	43.84	50.10
21 years and over	26.36	29.00	29.53	39.54	46.13	52.72
Enrolled nurse						
Pay point 1	29.40	32.34	32.93	44.10	51.45	58.80
Pay point 2	29.79	32.77	33.36	44.69	52.13	59.58
Pay point 3	30.19	33.21	33.81	45.29	52.83	60.38
Pay point 4	30.63	33.69	34.30	45.95	53.60	61.26
Pay point 5	30.93	34.02	34.64	46.40	54.13	61.86



B.3.3 Casual employees—ordinary and penalty rates

	Minimum casual hourly rate	Monday to Friday		Saturday	Sunday	Public holiday
		Afternoon shift	Night shift			
	% of minimum hourly rate					
	125%	137.5%	140%	187.5%	218.75%	250%
	\$	\$	\$	\$	\$	\$
Registered nurse— level 1						
Pay point 1	31.45	34.60	35.22	47.18	55.04	62.90
Pay point 2	32.10	35.31	35.95	48.15	56.18	64.20
Pay point 3	32.89	36.18	36.83	49.34	57.56	65.78
Pay point 4	33.76	37.14	37.81	50.64	59.08	67.52
Pay point 5	34.80	38.28	38.98	52.20	60.90	69.60
Pay point 6	35.80	39.38	40.10	53.70	62.65	71.60
Pay point 7	36.84	40.52	41.26	55.26	64.47	73.68
Pay point 8 and thereafter	37.80	41.58	42.34	56.70	66.15	75.60
Registered nurse— level 2						
Pay point 1	38.80	42.68	43.46	58.20	67.90	77.60
Pay point 2	39.41	43.35	44.14	59.12	68.97	78.82
Pay point 3	40.10	44.11	44.91	60.15	70.18	80.20
Pay point 4 and thereafter	40.76	44.84	45.65	61.14	71.33	81.52
Registered nurse— level 3						
Pay point 1	42.08	46.28	47.12	63.12	73.64	84.16
Pay point 2	42.85	47.14	47.99	64.28	74.99	85.70
Pay point 3	43.59	47.95	48.82	65.39	76.28	87.18
Pay point 4 and thereafter	44.36	48.80	49.69	66.54	77.63	88.72
Registered nurse— level 4¹						
Grade 1	48.03	–	–	72.05	84.05	96.06
Grade 2	51.46	–	–	77.19	90.06	102.92



	Minimum casual hourly rate	Monday to Friday		Saturday	Sunday	Public holiday
		Afternoon shift	Night shift			
	% of minimum hourly rate					
	125%	137.5%	140%	187.5%	218.75%	250%
	\$	\$	\$	\$	\$	\$
Grade 3	54.46	–	–	81.69	95.31	108.92
Registered nurse— level 5¹						
Grade 1	48.46	–	–	72.69	84.81	96.92
Grade 2	51.03	–	–	76.55	89.30	102.06
Grade 3	54.46	–	–	81.69	95.31	108.92
Grade 4	57.86	–	–	86.79	101.26	115.72
Grade 5	63.81	–	–	95.72	111.67	127.62
Grade 6	69.83	–	–	104.75	122.20	139.66
Minimum entry rates						
4 year degree	32.84	36.12	36.78	49.26	57.47	65.68
Masters degree	33.98	37.37	38.05	50.97	59.47	67.96

¹ Shiftwork loadings do not apply to Registered nurse levels 4 and 5 in accordance with clause 20.2(e).



B.4.3 Casual employees—ordinary and penalty rates

	Minimum casual hourly rate	Monday to Friday		Saturday	Sunday	Public holiday
		Afternoon shift	Night shift			
	% of minimum hourly rate					
	125%	137.5%	140%	187.5%	218.75%	250%
	\$	\$	\$	\$	\$	\$
1st year	48.41	53.25	54.22	72.62	84.72	96.82
2nd year	49.85	54.84	55.83	74.78	87.24	99.70



B.5.3 Casual employees—ordinary and penalty rates

	Minimum casual hourly rate	Monday to Friday		Saturday	Sunday	Public holiday
		Afternoon shift	Night shift			
	% of minimum hourly rate					
	125%	137.5%	140%	187.5%	218.75%	250%
	\$	\$	\$	\$	\$	\$
Occupational health nurse—level 1						
Pay point 1	33.76	37.14	37.81	50.64	59.08	67.52
Pay point 2	34.80	38.28	38.98	52.20	60.90	69.60
Pay point 3	35.80	39.38	40.10	53.70	62.65	71.60
Pay point 4	36.84	40.52	41.26	55.26	64.47	73.68
Pay point 5	37.80	41.58	42.34	56.70	66.15	75.60
Occupational health nurse—level 2						
Pay point 1	38.80	42.68	43.46	58.20	67.90	77.60
Pay point 2	39.41	43.35	44.14	59.12	68.97	78.82
Pay point 3	40.10	44.11	44.91	60.15	70.18	80.20
Pay point 4	40.76	44.84	45.65	61.14	71.33	81.52
Senior occupational health clinical nurse	40.76	44.84	45.65	61.14	71.33	81.52
Occupational health nurse—level 3						
Pay point 1	42.08	46.28	47.12	63.12	73.64	84.16
Pay point 2	42.85	47.14	47.99	64.28	74.99	85.70
Pay point 3	43.59	47.95	48.82	65.39	76.28	87.18
Pay point 4 and thereafter	44.36	48.80	49.69	66.54	77.63	88.72