Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Nurses Award 2010

(AM2016/31)

22 May 2017

4 YEARLY REVIEW OF MODERN AWARDS

AM2016/31 *NURSES AWARD 2010*

1. INTRODUCTION

1. This submission is filed by the Australian Industry Group (**Ai Group**) in response to a raft of substantive variations sought by the Australian Nursing and Midwifery Federation (**ANMF**) in the context of the 4 yearly review (**Review**) of the *Nurses Award 2010* (**Nurses Award** or **Award**) in accordance with the directions issued by Vice President Catanzariti on 23 November 2016 and a subsequent extension of time granted on 9 May 2017.

2. The submissions that follow deal with each of the variations sought by the ANMF in turn, which are strongly opposed by Ai Group.

2. THE STATUTORY FRAMEWORK

3. The various claims here before the Commission are being pursued in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the *Fair Work Act 2009* (**Act**).

4. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

5. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h).

6. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

7. We later address each element of the modern awards objective with reference to the numerous claims for the purposes of establishing that the provisions sought by the ANMF are not necessary in the sense contemplated by s.138 of the Act.

3. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

THE PRELIMINARY JURISDICTIONAL ISSUES DECISION

8. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*[1] provides the framework within which the Review is to proceed.

9. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

> **[23]** The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[2]

10. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> **[24]** In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In 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 that it was made.[3]

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[2] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[3] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

11. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue unless there are cogent reasons for not doing so: (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
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> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
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> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
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> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[4]

12. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net": (emphasis added)

> **[36]** … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to

[4] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

> achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. 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.[5]

13. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted 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.

14. Accordingly, the Preliminary Jurisdictional Issues decision establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;
- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable; and
- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

15. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following

[5] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

comments, which we respectfully commend to the Full Bench (emphasis added):

> **[8]** While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[6]

16. The claims mounted by the ANMF conflict with the principles in the Preliminary Jurisdictional Issues Decision. Further, it has not discharged the evidentiary burden described in the above decision. Accordingly, their claims should be rejected.

CONSIDERATIONS ASSOCIATED WITH PROCEDURAL FAIRNESS

17. We are of course mindful of the nature of the Review and the Commission's repeated observation that it is not bound by the terms of a proponent's claim. It is relevant to note, however, that a respondent party at this stage of the proceedings can deal only with that which has been put before us. That is, these submissions only relate to the variations sought and the material filed by the ANMF in support of them. It is not incumbent upon us to provide a response (or a hypothetical response) to any potential derivative of the clauses sought. Such an approach would render the task here before us virtually impossible to undertake, particularly within the timeframes imposed upon us by the Commission and the resource constraints we face due to the conduct of the Review generally.

[6] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

18. Should the ANMF or the Commission during the course of these proceedings seek to vary the relevant awards in terms that differ to those which have been proposed as at the time of drafting these submissions, notions of fairness dictate that respondent parties such as Ai Group be afforded a further opportunity to make submissions and/or call evidence. Absent such a process, it may be argued that procedural fairness has not been afforded to those who oppose the claim as they have not been granted a chance to be heard in relation to the variations sought to be made, which may well have implications that have not otherwise been put before the Full Bench.

4. IN-CHARGE ALLOWANCE

19. The submissions that follow relate to the ANMF's claim to introduce a new in-charge allowance.

THE VARIATION SOUGHT

20. The ANMF is seeking the inclusion of a new clause in the Award which would require the payment of an allowance where a registered nurse is "designated to be in charge of a facility". It is in the following terms:

> **16.6 In charge allowance**
>
> **(a)** A registered nurse who is designated to be in charge of a facility during the day, evening or night shall be paid in addition to his or her appropriate salary, whilst so in charge, the per shift allowance set out as follows:
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> **(i)** in charge of facility of less than 100 beds – 2.75% of standard rate
>
> **(ii)** in charge of facility, 100 beds or more – 4.44% of standard rate
>
> **(iii)** in charge of a section of a facility – 2.75% of standard rate
>
> **(b)** This clause shall not apply to registered nurses holding classified positions of a higher grade than registered nurse – level 2.

21. The variation proposed is opposed by Ai Group.

22. The provision proposed applies to employees classified as 'Registered nurse – level 1 (RN1)' and 'Registered nurse – level 2 (RN2)' who have been "designated in charge of a facility". We understand this to mean that the provision applies only where an employee is required by their employer to be in charge of a facility. The clause would not apply where an employee assumes such responsibility of their own motion.

23. Having regard to the standard rate as at the time of drafting this submission, an employee would be entitled to an allowance pursuant to the proposed clause as follows for each shift that the employee is so designated to be in charge:

In charge of a facility of less than 100 beds	$23.47
In charge of a facility, 100 beds or more	$37.89
In charge of a section of a facility	$23.47

24. The purpose and effect of the reference to "the day, evening or night" is unclear. It appears that the clause applies regardless of the time at which an employee is required to work; which would be conveyed even absent the inclusion of the relevant words.

25. We similarly do not understand the basis for including a reference to the "appropriate salary". The Award does not of itself contemplate the payment of a salary. Rather, it prescribes weekly rates of pay that are to be paid to part-time and casual employees on a pro-rata basis.[7]

THE ANMF'S CASE

26. The gravamen of the ANMF's case is summarised in the following paragraph of its submission:

> The proposed variation seeks to address the situation where a Registered Nurse of a lower classification (RN 1 or 2) is required to take charge of a facility (or a section of a facility), for example an aged care facility. The ANMF submits that the registered nurse taking charge takes on additional responsibilities in addition to their normal duties without appropriate compensation under the Award.[8]

[7] See clause 10.3(d) and clause 10.4(b).

[8] ANMF submission dated 17 March 2017 at paragraph 8.

PRIOR CONSIDERATION OF THE RELEVANT ISSUES

27. During the Part 10A Award Modernisation process, the ANMF proposed the inclusion of an in-charge allowance in a submission it filed after the AIRC published its exposure draft [9]. Notwithstanding, the allowance was not ultimately included in the Award when it was made.

28. The issue was again agitated by the union during the two year review of modern awards, however the claim was rejected by Vice President Watson. His Honour gave the following reasons: (emphasis added)

> **[23]** I do not consider that a case has been established for inserting this allowance. The matter was addressed in the award modernisation process. In my view, in an award such as this with wide-ranging application, there are sound reasons for leaving matters of this nature to the agreement or overaward area where the precise circumstances can be considered and appropriate compensation can be given to the extent that it is agreed to be warranted. I will not make the variation sought.[10]

29. As can be seen, the issue here raised by the ANMF has twice been considered and determined by the Commission's predecessors.

30. As stated in the Commission's Preliminary Jurisdictional Issues decision, previous Full Bench decisions should be followed unless there are cogent reasons for departing from them.[11] The ANMF has here failed to establish any such cogent reasons.

THE ANMF'S EVIDENCE

31. We here propose to deal briefly with the relevant witness statements filed by the ANMF.

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[9] See submission dated 4 March 2009.

[10] *Aged Care Association Australia Ltd & Others* [2012] FWA 9420 at [23].

[11] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [27].

Susan Elizabeth Fletcher

32. At paragraphs 4 – 11 of her statement, Ms Fletcher gives evidence that pertains to the issue of being "in charge".

33. **Firstly,** Ms Fetcher's evidence does not reveal whether the Nurses Award applies to her or whether there is in fact an enterprise agreement in place that applies to her instead. This places an obvious limitation on the probative value of her evidence.

34. **Secondly,** Ms Fletcher's evidence does not reveal her classification level under the Award, regardless of whether it applies to her. This is relevant because, as we later come to, certain classification levels (i.e. Registered nurse - level 3 and above) under the Award contemplate the duties described by the witness at paragraphs 7 – 8 of her statement. The ANMF's proposal would not entitle an employee classified as such to the allowance it seeks. In such circumstances, Ms Fletcher's evidence is not of any relevance to these proceedings.

35. **Thirdly,** to the extent that it is alleged that Ms Fletcher is classified as a registered nurse level 1 or 2 under the Award, the relevant issue here may be one of appropriate classification rather an assessment as to whether Ms Fletcher ought to be entitled to an additional allowance.

36. **Fourthly,** if the ANMF takes the view that Ms Fletcher should be classified at a higher level under the Award, that is a matter for another forum. The Review should not be used as a vehicle to prosecute such a dispute.

37. **Fifthly**, if an enterprise agreement applies, Ms Fletcher's classification level under that agreement, the classification description for that level and the minimum rate payable to her is not known. In the absence of such crucial information, little weight can be attributed to her evidence as the Commission cannot properly assess its relevance to these proceedings. As articulated above, if Ms Fletcher is classified under an enterprise agreement such that the rate payable to her is intended to compensate her for the performance of

the duties described in her statement, her evidence is not of any relevance to these proceedings.

38. **Sixthly,** at paragraph 11 of her statement, Ms Fletcher states that she is paid "a supervisor allowance for 2 hours per fortnight, though her hours are 44 hrs per fortnight". Such an allowance is not contained in the Award. It is not clear whether the allowance is paid to her pursuant to an enterprise agreement that applies to her. In any event, the statement does not reveal the circumstances in which the allowance is payable or the factors for which it is intended to compensate an employee. Therefore, such evidence is of little probative value to the Commission.

Sonia Le Compte

39. We refer to paragraphs 3 – 8 of Ms Le Compte's statement. Ms Le Compte is employed as a Registered nurse – level 2, although the industrial instrument applying to her is not identified.

40. Ms Le Compte's evidence in relation to the issue at hand is as follows:

> 5. As I work night duties, starting at 2245 and finishing at 0715 hrs, and I am the only RN on site. My role includes delegation of duties, replacing staff for the following morning shift if someone calls in sick, dispensing all medications throughout the hospital, assessments, care planning, audits and general nursing.
>
> 6. I am also responsible to assess all patients, to be competent enough to recognise a deteriorating patient, to know when to call a doctor (we do not have doctors on side) and when to call '000'.
>
> 7. This is standard practice for every shift I do, but I do not get paid any allowance for the additional responsibilities derived from being the only RN in the hospital on my shift.

41. It would appear to us that many if not all of the "additional" duties described by the witness are in fact contemplated by the classification definition under the Award for a 'Registered nurse – level 2'. For example, the Award states that the duties of a 'Clinical nurse' will substantially include but will not be limited to, amongst other things:

- "delivering direct and comprehensive nursing care and individual case management to a specific group of patients or clients in a particular area of nursing practice within the practice setting";

- "providing support, direction, orientation and education to RN1's, EN's, student nurses and student EN's"; and

- "being responsible for planning and coordinating services relating to a particular group of clients or patients in the practice setting, as delegated by the Clinical nurse consultant".

42. Accordingly, the minimum rate payable to the witness under the Award is intended to compensate her for such work. They are not "responsibilities or skills that are not taken into account in [the] rates of pay" (s.139(1)(g)(ii)) as alleged by the ANMF.

Sherrelle Fox

43. Ms Fox's evidence in relation to this issue is set out at paragraphs 2 – 3 of her statement.

44. Once again, the absence of any information as to the industrial instrument applying to her necessarily renders her evidence of little probative value to the Commission. Further, as we noted in relation to the evidence of Ms Fletcher, to the extent that the issue here is one regarding the appropriate level at which she should be classified, that is a separate matter that is not relevant to a consideration as to whether the allowance sought is necessary to ensure that the Award is achieving the modern awards objective.

Cherise Nicole Matthews

45. Ms Matthews states that she is "a Registered Nurse Level 1 Pay Point 4", however she does not identify whether the Nurses Award applies to her or whether an enterprise agreement applying to her is in place.

46. At paragraph 12 she states:

> For the in charge duties I receive a supervisory allowance of $12.40 per shift. I do not believe this amount compensates the amount of extra duties I am undertaking and the consequent stress involved. I am exhausted all the time.

47. **Firstly,** the Award does not contain a "supervisory allowance". Therefore, the payment described by Ms Matthews appears to be an above-award one.

48. **Secondly,** the subjective views of an employee as to whether she believes that the amount paid to her adequately compensates her for the work she performs is of little cogency. Indeed it would be highly unusual if an employee (whether award covered or otherwise) took the view that they are adequately remunerated. It is trite to observe that employees (including those that are by no means 'low paid') very commonly consider that they ought to be entitled to a higher amount of pay and/or more beneficial entitlements.

49. **Thirdly**, we cannot identify the relevance of Ms Matthews' evidence to these proceedings. It serves only to establish that notwithstanding the absence of the award-derived entitlement proposed by the ANMF, in some instances employers are nonetheless making above-award payments to employees who are placed "in charge". Such evidence, in our view, undermines any argument that the allowance sought is "necessary" to ensure that the Award provides a fair and relevant minimum safety net.

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

50. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

51. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary

in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

52. The 'necessary' test must be considered with respect to each element of every proposal put by the ANMF. By way of example, the union must establish that:

- An allowance where an employee is in charge of a facility of less than 100 beds is necessary; and
- In such circumstances, an allowance of the quantum proposed is necessary; and
- An allowance where an employee is in charge of a facility of 100 beds or more is necessary; and
- In such circumstances, an allowance of the quantum proposed is necessary.

53. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in adverse consequences for business. 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.

54. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that the Award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

55. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> 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 (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[12]

56. It is therefore for the ANMF to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, the ANMF has *not* overcome that threshold. It has failed to mount a case that establishes that the provision proposed is necessary to ensure that the Award achieves the modern awards objective.

57. We also note that:

- The case mounted by the ANMF does not establish the extent to which employees to whom the Award applies, and who are classified as 'Registered nurse – level 1' or 'Registered nurse – level 2' are in fact being placed in charge as alleged by the ANMF. The evidence called by the union relates only to a small number of employees and in most cases, the industrial instrument applying to the employee and their classification under the Award is not clear. In such circumstances, it is difficult to conceive as to how the Commission might be able to reach the view that the provision sought is *necessary*.

- The basis upon which the specific quantum of the allowance is sought is most certainly not clear. No material has been presented by the ANMF that might explain the formula applied in order to derive the monetary amounts sought. An entirely arbitrary approach appears to have been taken in this regard. The union has not so much as attempted to establish that the quantum of the allowance sought is *necessary*.

[12] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

A 'Fair' Safety Net

58. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[13]

59. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[14]

60. The grant of the ANMF's claim would be unfair to employers in various ways.

61. **Firstly**, the proposed allowance would visit additional costs upon employers in circumstances where they are not "necessary" to ensure that the Award is achieving the modern awards objective and therefore, is unwarranted.

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[13] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

[14] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

62. **Secondly**, the Award already contemplates circumstances in which an employee is placed in charge or is, in some way, required to perform duties that require a degree of oversight and/or management. For instance, the classification definition for a 'Registered nurse – level 2' is in the following terms: (emphasis added)

> **(a)** An employee at this level:
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> > **(i)** holds any other qualification required for working in the employee's particular practice setting; and
> >
> > **(ii)** is appointed as such by a selection process or by reclassification from a lower level when the employee is required to perform the duties detailed in this subclause on a continuing basis.
> >
> > An employee at this level may also be known as a Clinical nurse.
>
> **(b)** In addition to the duties of an RN1, an employee at this level is required, to perform duties delegated by a Clinical nurse consultant or any higher level classification.
>
> > Duties of a Clinical nurse will substantially include, but are not confined to:
> >
> > - delivering direct and comprehensive nursing care and individual case management to a specific group of patients or clients in a particular area of nursing practice within the practice setting;
> > - providing support, direction, orientation and education to RN1's, EN's, student nurses and student EN's;
> > - being responsible for planning and coordinating services relating to a particular group of clients or patients in the practice setting, as delegated by the Clinical nurse consultant;
> > - acting as a role model in the provision of holistic care to patients or clients in the practice setting; and
> > - assisting in the management of action research projects, and participating in quality assurance programs and policy development within the practice setting.

63. It appears to us that the classification definition of a 'Registered nurse – level 2' contemplates the performance of certain duties (without confining the classification description to those duties) that might be performed by an employee if they were placed in charge. Some of those duties are described by the witnesses called by the ANMF. To this extent, the allowance proposed

cannot be said to be for "responsibilities or skills that are not taken into account in rates of pay" set by the Award (s.139(1)(g)).

64. The grant of the ANMF's claim in such circumstances would result in an employee double dipping. That is, the employee would be entitled to a minimum rate of pay prescribed by the Award which is paid in clear contemplation of the performance of a range of duties including all of those that are described above *as well as* a separate allowance that compensates the employee for the performance of the very same work. Quite clearly, this is an unfair and inappropriate outcome.

65. **Thirdly**, it is not clear if the ANMF is arguing that, notwithstanding the contemplation of the performance of such duties in the position description, the minimum rate of pay prescribed by the Award for a 'Registered nurse – level 2' does not adequately compensate an employee in those circumstances. However if that is so, the ANMF is effectively seeking to advance work value reasons but in doing so falls well short of establishing that the minimum rate for the relevant classification either:

- Does not reflect the relevant work value reasons; or
- No longer reflect the relevant work value reasons because of a change in circumstances.

66. In such circumstances, the grant of the claim would be extremely unfair to employers.

67. **Fourthly**, to some degree it appears that the matter in question relates to the appropriate classification of employees. In addition to the observations we have earlier made regarding the classification description of 'Registered nurse – level 2', we note that the description of a level 3 registered nurse deals further with the performance of such duties: (emphasis added)

> **(a)** An employee at this level:
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> > **(i)** holds any other qualification required for working in the employee's particular practice setting; and

(ii) is appointed as such by a selection process or by reclassification from a lower level when that the employee is required to perform the duties detailed in this subclause on a continuing basis.

An employee at this level may also be known as a Clinical nurse consultant, Nurse manager or Nurse educator.

(b) In addition to the duties of an RN2, an employee at this level will perform the following duties in accordance with practice settings and patient or client groups:

(i) Duties of a **Clinical nurse consultant** will substantially include, but are not confined to:

- providing leadership and role modelling, in collaboration with others including the Nurse manager and the Nurse educator, particularly in the areas of action research and quality assurance programs;
- staff and patient/client education;
- staff selection, management, development and appraisal;
- participating in policy development and implementation;
- acting as a consultant on request in the employee's own area of proficiency; for the purpose of facilitating the provision of quality nursing care;
- delivering direct and comprehensive nursing care to a specific group of patients or clients with complex nursing care needs, in a particular area of nursing practice within a practice setting;
- coordinating, and ensuring the maintenance of standards of the nursing care of a specific group or population of patients or clients within a practice setting; and
- coordinating or managing nursing or multidisciplinary service teams providing acute nursing and community services.

(ii) Duties of a **Nurse manager** will substantially include, but are not confined to:

- providing leadership and role modelling, in collaboration with others including the Clinical nurse consultant and the Nurse educator, particularly in the areas of action research and quality assurance programs;
- staff selection and education;
- allocation and rostering of staff;
- occupational health;

- initiation and evaluation of research related to staff and resource management;
- participating in policy development and implementation;
- acting as a consultant on request in the employee's own area of proficiency (for the purpose of facilitating the provision of quality nursing care);
- being accountable for the management of human and material resources within a specified span of control, including the development and evaluation of staffing methodologies; and
- managing financial matters, budget preparation and cost control in respect of nursing within that span of control.

(iii) Duties of a **Nurse educator** will substantially include, but are not confined to:

- providing leadership and role modelling, in collaboration with others including the Clinical nurse consultant and the Nurse manager, particularly in the areas of action research;
- implementation and evaluation of staff education and development programs;
- staff selection;
- implementation and evaluation of patient or client education programs;
- participating in policy development and implementation;
- acting as a consultant on request in the employee's own area of proficiency (for the purpose of facilitating the provision of quality nursing care); and
- being accountable for the assessment, planning, implementation and evaluation of nursing education and staff development programs for a specified population.

68. If the ANMF's grievance in fact relates to the manner in which employees are being classified under the Award (that is, the relevant employees should be classified at level 3 or higher), that is a separate issue that should not colour the exercise of the Commission's discretion to vary the Award to include an additional allowance as sought. Indeed that is not a matter that is relevant to the Commission's assessment as to whether the proposed provision is necessary to ensure that the Award achieves the modern awards objective. It is a matter that the ANMF may elect to pursue in individual cases through

other avenues that are readily available to it such as the dispute resolution procedure under the Award or any enterprise agreement.

A 'Minimum' Safety Net

69. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

70. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provision here sought by the ANMF. Matters such as these are more appropriately dealt through enterprise bargaining.

71. Further, a 'minimum' safety net necessarily applies to all relevant employers and employees. In this instance, given that the Award is occupational in nature, it has application to a range of operations including, for instance, private hospitals and aged care facilities, which are necessarily very different in terms of their operational requirements.

72. An award that applies in such a range of circumstances must be sufficiently flexible and must not be so prescriptive as to render its application problematic in any one of the very broad range of cases in which it is applied. It is trite to observe that the ANMF has called evidence from a very select group of employers covered by the Award, which does not provide the Commission with an adequate understanding of matters such as:

- The extent to which registered nurses are placed in charge in different types of operations;
- The nature of the duties performed by such nurses;
- Whether those duties are otherwise contemplated by the classification structure;

- Whether a registered nurse appropriately classified is otherwise compensated for the performance of such work; and

- The impact of the proposed clause on different types of operations.

73. As observed by Vice President Watson in His Honour's decision regarding the two year review of the Nurses Award, "in an award such as this with wide-ranging application, there are sound reasons for leaving matters of this nature to the agreement or overaward area where the precise circumstances can be considered and appropriate compensation can be given to the extent that it is agreed to be warranted."[15]

74. It is not appropriate to include the provision sought by the ANMF in a *minimum* safety net.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

75. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[16]

76. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those

[15] *Aged Care Association Australia Ltd & Others* [2012] FWA 9420 at [23].

[16] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[17]

77. The Commission's Penalty Rates Decision provides the most recent data for in relation to 'two-thirds of medium full-time earnings':[18]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

78. The C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010* as at the time of drafting this submission is $783.30.

79. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The ANMF has not, however, presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which employees covered by the Award are reliant on the minimum rates prescribed by them.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the Award are "low paid" in the sense contemplated by the above decision.
- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.
- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

[17] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[18] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

80. Further, and in any event, we note that:

- An employee classified as a '**Registered nurse – level 2**' must be paid at least $1052.70 per week (pay point 1) - $1105.80 (pay point 4). Self-evidently, the minimum rates prescribed in relation to this classification are well above the C10 rate and two-thirds of median adult ordinary-time earnings and therefore, no such employee is 'low paid' in the sense contemplated by s.134(1)(a).

- An employee classified as a '**Registered nurse – level 1**' at pay point pay point 5 or higher are entitled to a minimum of $944.10 or more each week. Such employees are similarly not 'low paid' for the purposes of s.134(1)(a).

81. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

82. The ANMF's submissions in the current proceedings, and their repeated attempts to seek the inclusion of the relevant entitlement (or one very similar in nature) in prior proceedings, suggests that this is an issue of extreme importance to the union, which, absent its inclusion in the awards system, would encourage it and its members to engage in enterprise bargaining. To this extent, a decision to dismiss the claim is consistent with the need to encourage collective bargaining.

83. Further, a continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

84. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the Award, each of which would have the effect of introducing additional costs and inflexibilities.

85. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will be lifted significantly, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

86. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

87. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[19]

88. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission

[19] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

89. Accordingly, s.134(1)(c) cannot be relied upon in support of the ANMF's claim.

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

90. The provision proposed by the ANMF is potentially contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work. It seeks to impose an additional payment that must be made by employers and as a result an additional cost that must be borne in circumstances where an employee is required to be in charge. To the extent that the introduction of the entitlement sought results in an employer making amendments to the manner in which the relevant work is performed in its operations such that it is less efficient and/or productive, the ANMF's claim is inconsistent with s.134(1)(d) of the Act.

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

91. This is a neutral consideration in this matter.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

92. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

93. The clause sought by the ANMF would adversely impact business in various ways. In so submitting we note that s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses. It involves microeconomic considerations, as well as consideration of the likely impact of the claim on businesses at large.

94. The absence of evidence as to the extent to which award-reliant employees classified at levels 1 and 2 are in fact performing this work renders it impossible for the Commission to assess the precise cost of the claim. To this extent, the ANMF has failed to overcome the onus it bears. In any event, it is trite to observe that the claim would result in the imposition of an additional cost that is not insignificant in quantum. To that extent, it self-evidently would have an adverse impact on business.

95. For the reasons articulated in relation to s.134(1)(d), the proposal may also have an adverse impact on productivity.

96. By virtue of the fact that the claim would require an employer to record the specific shifts during which the employee was placed in charge, it would increase the regulatory burden.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

97. The need to ensure a stable and sustainable modern awards system tells against the grant of a claim that is not properly supported by cogent submissions or probative evidence, as is here the case.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

98. To the extent that the claim is contrary to ss.134(1)(b), (c), (d), (f) and (g), the it may also adverse impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

CONCLUSION

99. For all of the reasons here stated, the ANMF's claim should not be granted.

5. LEADING HAND ALLOWANCE

100. The submissions that follow relate to the ANMF's claim to introduce a new leading hand allowance.

THE VARIATION SOUGHT

101. The ANMF is seeking the inclusion of a new clause in the Nurses Award which would require the payment of an allowance where an enrolled nurse or nursing assistant is "placed in charge of not less than two other employees of the classification of enrolled nurse or nursing assistant". It is in the following terms:

> **16.7 Leading hand allowance**
>
> **(a)** A leading hand is an enrolled nurse or nursing assistant who is placed in charge of not less than two other employees of the classification of enrolled nurse or nursing assistant.
>
> **(b)** A leading hand will be paid weekly allowance of the amount specified in the following scale:
>
> | **Leading hand in charge of:** | **% of standard rate** |
> |---|---|
> | 2 – 5 other employees | 2.67 |
> | 6 – 10 other employees | 3.81 |
> | 11 – 15 other employees | 4.81 |
> | 16 or more employees | 5.88 |
>
> **(c)** This clause will be part of salary for all purposes of this award. (sic)
>
> **(d)** An employee who works less than 38 hours per week will be entitled to the allowances prescribed by this clause in the same proportion as the average hours worked each week bears to 38 ordinary hours.

102. The variation proposed is opposed by Ai Group.

103. The provision proposed applies to employees classified as an 'enrolled nurse' or 'nursing assistant' who have been "placed in charge". We understand this to mean that the provision applies only where an employee is required by their employer to be in charge as described by the proposed clause. The clause would not apply where an employee assumes such responsibility of their own motion.

104. Having regard to the standard rate as at the time of drafting this submission, an employee would be entitled to an allowance pursuant to the proposed

clause as follows for each shift that the employee is so designated to be in charge:

Leading hand in charge of:	**$ per week**
2 – 5 other employees	22.78
6 – 10 other employees	32.51
11 – 15 other employees	41.04
16 or more employees	50.17

THE ANMF'S CASE

105. The essence of the ANMF's case can be summarised as follows:

- Enrolled nurses and nursing assistants are "*sometimes*" placed in supervisory roles.[20] We note that the incidence of such employees being placed in supervisory roles is put no higher than this somewhat tentative submission by the union.

- Such supervisory responsibilities "are not currently recognised or compensated for in the Award and are not taken into account in rates of pay under the Award".[21]

- Leading hand allowances are common in other modern awards.[22]

THE ANMF'S EVIDENCE

106. There is not so much as a skerrick of evidence filed by the ANMF in support of this claim. There is no material before the Commission that establishes that employees in the relevant classifications are in fact being required to perform supervisory functions or that might lend support to the proposition that to the extent that employees are so required, the introduction of the allowance sought is necessary in the relevant sense.

[20] ANMF submission dated 17 March 2017 at paragraph 27.

[21] ANMF submission dated 17 March 2017 at paragraph 30.

[22] ANMF submission dated 17 March 2017 at paragraph 33.

107. It would be entirely inappropriate for the Commission to conclude that a significant new entitlement should be inserted in the Award in such an evidentiary vacuum.

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

108. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

109. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

110. The 'necessary' test must be considered with respect to each element of every proposal put by the ANMF. By way of example, the union must establish that:

- An allowance where an employee is placed in charge of 2 – 5 employees is necessary; and
- In such circumstances, an allowance of the quantum proposed is necessary; and
- An allowance where an employee is in charge of 6 – 10 employees is necessary; and
- In such circumstances, an allowance of the quantum proposed is necessary; and
- The allowance should be paid for all purposes of the award; and so on.

111. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in adverse consequences for business.

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.

112. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that the Award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

113. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> 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 (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[23]

114. It is therefore for the ANMF to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, the ANMF has *not* overcome that threshold. It has failed to mount a case that establishes that the provision proposed is necessary to ensure that the Award achieves the modern awards objective.

[23] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

115. We also note that:

- The case mounted by the ANMF does not establish the extent to which employees to whom the Award applies, and who are classified as enrolled nurses or nursing assistants are in fact being placed in charge as alleged by the ANMF, if at all. In such circumstances, it is difficult to conceive of how the Commission might be able to reach the view that the provision sought is *necessary*.

- The basis upon which the specific quantum of the allowance is sought is most certainly not clear. No material has been presented by the ANMF that might explain the formula applied in order to derive the monetary amounts sought. The union has not so much as attempted to establish that the quantum of the allowance sought is necessary but has instead adopted a seemingly arbitrary approach in formulating its claim.

- The existence of a leading hand allowance in some other modern awards does not advance the ANMF's case. It remains incumbent upon the union to establish that it is necessary in *this* Award, bearing in mind that each modern award must be reviewed in its own right (s.156(6)).

A 'Fair' Safety Net

116. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[24]

[24] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

117. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[25]

118. The grant of the ANMF's claim would be unfair to employers. It would visit additional costs upon employers in circumstances where they are not "necessary" to ensure that the Award is achieving the modern awards objective and therefore, is unwarranted.

A 'Minimum' Safety Net

119. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

120. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provision here sought by the ANMF. Matters such as these are more appropriately dealt through enterprise bargaining.

[25] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

121. Further, a 'minimum' safety net necessarily applies to all relevant employers and employees. In this instance, given that the Award is occupational in nature, it has application to a range of operations including, for instance, private hospitals and aged care centres, which are necessarily very different in terms of their operational requirements.

122. An award that applies in such a range of circumstances must be sufficiently flexible and must not be so prescriptive as to render its application problematic in any one of the very broad range of cases in which it is applied. It is trite to observe that as a result of the complete absence of any evidence in this regard:

- The extent to which enrolled nurses and nursing assistants are placed in charge in different types of operations is not known;
- The nature of the duties performed by any such nurses is not known; and
- The impact of the proposed clause on different types of operations is not known.

123. It is not appropriate to include the provision sought by the ANMF in a *minimum* safety net.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

124. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[26]

[26] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

125. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[27]

126. The Commission's Penalty Rates Decision provides the most recent data for in relation to 'two-thirds of medium full-time earnings':[28]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

127. The C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010* as at the time of drafting this submission is $783.30.

128. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The ANMF has not, however, presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which the relevant employees covered by the Award are reliant on the minimum rates prescribed by them.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the Award are "low paid" in the sense contemplated by the above decision.
- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to

[27] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[28] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

engage in community life, assessed in the context of contemporary norms.

- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

129. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

130. A continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

131. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the Award, each of which would have the effect of introducing additional costs and inflexibilities.

132. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will be lifted significantly, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

133. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the

unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

134. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[29]

135. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

136. Accordingly, s.134(1)(c) cannot be relied upon in support of the ANMF's claim.

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

137. The provision proposed by the ANMF is potentially contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work. It seeks to impose an additional payment that must be made by employers and as a result, an additional cost that must be borne in circumstances where an employee is required to be in charge. To the extent that the introduction of the entitlement sought results in an employer making amendments to the manner in which the relevant work is performed in its operations such that it is less efficient and/or productive, the ANMF's claim is inconsistent with s,134(1)(d) of the Act.

[29] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

138. This is a neutral consideration in this matter.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

139. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

140. The clause sought by the ANMF would adversely impact business in various ways. In so submitting we note that s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses. It involves microeconomic considerations, as well as consideration of the likely impact of the claim on businesses at large.

141. The absence of evidence as to the extent to which award-reliant employees are in fact performing the relevant work renders it impossible for the Commission to assess the precise cost of the claim. To this extent, the ANMF has failed to overcome the onus it bears. In any event, it is trite to observe that the claim would result in the imposition of an additional cost that is not insignificant in quantum. To that extent, it self-evidently would have an adverse impact on business.

142. For the reasons articulated in relation to s.134(1)(d), the proposal may also have an adverse impact on productivity.

143. The application of the proposed clause 16.7(d) requires the employer to calculate the "average hours worked each week" where an employee works less than 38 hours per week. For the reasons articulated below, the provision clearly imposes a regulatory burden on employers.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

144. The proposed clause 16.7(d) is not simple or easy to understand. It requires the employer to calculate the average number of hours worked each week. The provision:

- does not specify the period of time by reference to which the average is to be calculated;
- does not confine the hours to be included in that calculation to *ordinary* hours and therefore appears to include overtime; and
- appears to deal with the prospect that the average number of hours worked by an employee may change week to week by requiring that the necessary calculation be undertaken each week.

145. The provision is, in some respects, ambiguous and in others, particularly onerous. It is neither simple nor easy to understand or apply.

146. The need to ensure a stable and sustainable modern awards system tells against the grant of a claim that is not properly supported by cogent submissions or probative evidence, as is here the case.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

147. To the extent that the claim is contrary to ss.134(1)(b), (c), (d), (f) and (g), the it may also adverse impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

CONCLUSION

148. For all of the reasons here stated, the ANMF's claim should not be granted.

6. TELEPHONE AND OTHER REMOTE RECALL

149. The submissions that follow relate to the ANMF's claim to vary clauses 28.5 and 28.6 of the Nurses Award in relation to the performance of work remotely, for instance by telephone.

THE CLAIM

150. Clause 28.5 of the Award provides for circumstances in which an employee is recalled to work whilst on call. The provision provides that in such circumstances an employee must be paid at the overtime rate for a minimum of three hours:

> **28.5 Recall to work when on call**
>
> An employee, who is required to be on call and who is recalled to work, will be paid for a minimum of three hours work at the appropriate overtime rate.

151. The ANMF is seeking an extension to the application of the above clause to circumstances in which an employee performs work without attending the workplace:

> **28.5 Recall to work when on call**
>
> An employee, who is required to be on call and who is recalled to work, will be paid for a minimum of three hours work at the appropriate overtime rate. To avoid doubt, this includes any occasion where the work can be managed without the employee having to return to the workplace, such as by telephone.

152. A similar variation is sought to clause 28.6(a), which applies where an employee is not on call:

> **28.6 Recall to work when not on call**
>
> **(a)** An employee who is not required to be on call and who is recalled to work after leaving the employer's premises will be paid for a minimum of three hours work at the appropriate overtime rate. To avoid doubt, this includes any occasion where the work can be managed without the employee having to return to the workplace, such as by telephone.
>
> **(b)** The time spent travelling to and from the place of duty will be deemed to be time worked. Except that, where an employee is recalled within three hours of their rostered commencement time, and the employee remains at work, only the time spent in travelling to work will be included with the actual time worked for the purposes of the overtime payment.

(c) An employee who is recalled to work will not be obliged to work for three hours if the work for which the employee was recalled is completed within a shorter period.

(d) If an employee is recalled to work, the employee will be provided with transport to and from their home or will be refunded the cost of such transport.

153. Ai Group opposes the changes proposed.

154. The ANMF relies on a recent decision of the Federal Court of Australia (**FCA**) in support of the proposition that clauses 28.5 and 28.6 presently apply "to situations where an employee is required to perform work away from the usual workplace including, for example, by receiving telephone calls at home or another location". Accordingly, it's claim is couched as one that seeks to simply clarify the application of the relevant clauses.

155. It is trite to observe that the FCA's decision in *Polan v Goulburn Valley Health*[30] turned on the interpretation of the specific provisions found in multiple enterprise agreements that applied to the relevant employee. They did not relate to the terms of the Nurses Award and, importantly, the relevant terms of the enterprise agreements were not comparable to that found in the Award. Accordingly, the FCA's decision is of little relevance to these proceedings.

156. We do not consider that clauses 28.5 and 28.6 apply where an employee is required to perform the type of work that is contemplated by the ANMF's claim. So much is made clear by clauses 28.6(b) and 28.6(d), which apply where an employee is recalled to work "after leaving the employer's premises" and quite clearly contemplate an employee travelling to and from the employee's place of duty when they are recalled to work. It appears to us that clauses 28.5 and 28.6 require the payment of a higher rate for the performance of work only where the employee is directed to perform such work by their employer and such work necessitates attendance at the workplace.

157. The ANMF's arguments regarding the proper interpretation of the relevant award clauses appear to rely solely on the FCA decision. The union has not

[30] *Polan v Goulburn Valley Health* [2016] FCA 440.

so much as endeavoured to deal with the construction of the clauses by reference to their specific terms, their context or their history.

158. We note that an issue may arise as to whether clause 28.1 of the Award applies in the relevant circumstances. That is, whether the work constitutes "hours worked in excess of ordinary hours on any day or shift" and therefore is to be remunerated at overtime rates. The ANMF's submissions do not, however, seek to grapple with this issue.

159. For the reasons set out above, the changes sought by the ANMF must be understood to be substantive ones. That is, the issue here being considered is not limited to whether the provisions should be 'clarified' by inserting references to work performed where an employee does not return to the workplace. Rather, the issue is whether, as a matter of merit, new entitlements (found at clauses 28.5 and 28.6) should be afforded to employees who perform certain duties remotely, without attending the workplace, whilst they are on call and whilst they are not on call.

THE ANMF'S CASE

160. The union's rationale for the variations it seeks is set out in the following paragraphs of its submissions:

> Currently ambiguity exists regarding the existing clauses and the appropriate compensation for 'remote work'.
>
> In these circumstances, the ANMF submits that the appropriate course is to clarify that the existing clauses apply to these situations or otherwise clearly specify the compensation that applies.[31]

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

161. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

[31] ANMF submission dated 17 March 2017 at paragraphs 45 – 46.

162. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

163. The 'necessary' test must be considered with respect to each element of every proposal put by the ANMF. By way of example, the union must establish that:

- In the relevant circumstances, it is necessary that an employee be paid at overtime rates; and
- A minimum payment for three hours at those rates is necessary.

164. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in adverse consequences for business. 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.

165. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that the Award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

166. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> 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 (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[32]

167. It is therefore for the ANMF to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, the ANMF has *not* overcome that threshold. It has failed to mount a case that establishes that the provision proposed is necessary to ensure that the Award achieves the modern awards objective.

A 'Fair' Safety Net

168. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[33]

169. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of

[32] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[33] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[34]

170. The grant of the ANMF's claim would be unfair to employers in various ways.

171. **Firstly**, the proposed allowance would visit additional costs upon employers in circumstances where they are not "necessary" to ensure that the Award is achieving the modern awards objective and therefore, are unwarranted.

172. **Secondly**, it is extremely unfair that an employee would be entitled to payment for three hours at overtime rates in circumstances where the work performed may be completed in as little as ten minutes, without so much as having to leave the employee's home. Any alleged disutility associated with travelling from an employee's home to their workplace in order to perform the relevant duties is not in fact suffered. It may even be the case that the relevant work does not have to be performed at a specific time. That is, the tasks to be undertaken may be such that they do not require immediate action but could be completed later at the employee's convenience. A proper basis for requiring an employer to nonetheless pay an employee for a minimum of three hours each time an employee is recalled to duty by way of answering a telephone call has certainly not been made out by the ANMF.

173. **Thirdly**, the unfairness described above is exacerbated by the fact that the proposed clauses would appear to apply each time an employee performs the relevant work. For instance, if over a 12 hour period an employee answers three phone calls, it would appear on a plain reading of the proposed clause that the minimum three hour payment would be attracted in relation to each phone call received, even if all three phone calls (and any other work

[34] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

associated with them) is performed within a period of one hour. This is quite clearly unjustifiable and entirely unfair to employers.

174. **Fourthly**, the ANMF's proposal does not contain any element that would require an employee to provide verification that the said work was in fact performed. The clause does not require the provision of any proof. The absence of any award-derived right for an employer to require the provision of proof or an express obligation on an employee to provide such proof is inherently problematic. The Award would not create an ability for the employer to ensure that the employee in fact entitled to overtime rates prescribed by clauses 28.5 and 28.6. The prospect of disputation arising between employers and employees as a result is self-evident.

A 'Minimum' Safety Net

175. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

176. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provision here sought by the ANMF. Matters such as these are more appropriately dealt through enterprise bargaining.

177. Further, a 'minimum' safety net necessarily applies to all relevant employers and employees. In this instance, given that the Award is occupational in nature, it has application to a range of operations including, for instance, private hospitals and aged care centres, which are necessarily very different in terms of their operational requirements.

178. An award that applies in such a range of circumstances must be sufficiently flexible and must not be so prescriptive as to render its application problematic in any one of the very broad range of cases in which it is applied. It is trite to observe that the ANMF has called evidence from a very select group of employers covered by the Award, which does not provide the Commission

with an adequate understanding of how the clause would affect the full gamut of employers covered by the Award.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

179. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[35]

180. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[36]

181. The Commission's Penalty Rates Decision provides the most recent data for in relation to 'two-thirds of medium full-time earnings':[37]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

182. The C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010* as at the time of drafting this submission is $783.30.

[35] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[36] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[37] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

183. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The ANMF has not, however, presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which employees covered by the Award are reliant on the minimum rates prescribed by them.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the Award are "low paid" in the sense contemplated by the above decision.
- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.
- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

184. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

185. A continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

186. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the Award, each of which would have the effect of introducing additional costs and inflexibilities.

187. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will be lifted significantly, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

188. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

189. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[38]

190. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission

[38] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

191. Accordingly, s.134(1)(c) cannot be relied upon in support of the ANMF's claim.

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

192. The provision proposed by the ANMF is potentially contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work. It seeks to impose an additional payment that must be made by employers and as a result an additional cost that must be borne in circumstances where an employee is required to be in charge. To the extent that the introduction of the entitlement sought results in an employer making amendments to the manner in which the relevant work is performed in its operations such that it is less efficient and/or productive, the ANMF's claim is inconsistent with s.134(1)(d) of the Act.

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

193. The ANMF seeks to rely upon s.134(1)(da) in support of its claim.

194. It is important to note that to the extent that the Commission determines that the above provision lends support to the ANMF's claim, this is not determinative of the matter. It is but one of many other factors which we have here addressed, many of which weigh against making the variation sought. As the Commission stated in its Preliminary Jurisdictional Issues decision: (emphasis added)

> **[32]** No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.
>
> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different

modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.[39]

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

195. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

196. The clause sought by the ANMF would adversely impact business in various ways, which we have earlier articulated, including increased employment costs and, for the reasons articulated in relation to s.134(1)(d), an adverse impact on productivity. The application of the clause is also likely to give rise to an additional regulatory burden upon employers, who would necessarily need to receive and record information about the instances in which the employee performed the relevant work in order to calculate the appropriate payment due.

197. In so submitting we note that s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses. It involves microeconomic considerations, as well as consideration of the likely impact of the claim on businesses at large.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

198. The need to ensure a stable and sustainable modern awards system tells against the grant of a claim that is not properly supported by cogent submissions or probative evidence, as is here the case.

[39] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32] – [33].

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

199. To the extent that the claim is contrary to ss.134(1)(b), (c), (d), (f) and (g), the it may also adverse impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

CONCLUSION

200. For all of the reasons here stated, the ANMF's claim should not be granted.

201. Should the Commission decide that it is necessary to address the issue of employees performing work remotely, we consider that the more modest proposal of the Aged Care Employers (**ACE**) in its submissions of 17 March 2017 should be preferred to that which has been sought by the ANMF. We note however that the ACE's submissions do not establish that a minimum payment of one hour at overtime rates is *necessary* in the relevant sense.

7. ‘EXCESSIVE’ ON CALL

202. The submissions that follow relate to the ANMF’s claim to introduce an entitlement to additional annual leave where an employee is required to be on call.

THE VARIATION SOUGHT

203. The ANMF has proposed the insertion of a new clause that provides for the accrual of additional annual leave where an employee is placed on call for 10 or more times in any one year. The proposed entitlement would accrue in addition to the payment of the on call allowance at clause 16.4:

> **16.4 On call allowance**
>
> **(a)** An on call allowance is paid to an employee who is required by the employer to be on call at their private residence, or at any other mutually agreed place. The employee is entitled to receive the following additional amounts for each 24 hour period or part thereof:
>
> **(i)** between rostered shifts or ordinary hours Monday to Friday inclusive–2.35% of the standard rate;
>
> **(ii)** between rostered shifts or ordinary hours on a Saturday–3.54% of the standard rate; or
>
> **(iii)** between rostered shifts or ordinary hours on a Sunday, public holiday or any day when the employee is not rostered to work–4.13% of the standard rate.
>
> **(b)** For the purpose of this clause the whole of the on call period is calculated according to the day on which the major portion of the on call period falls.
>
> **(c)** Employees shall accrue up to an additional 5 days of annual leave if they are placed on call for 50 or more times in anyone year, according to the following:
>
> Placed on call for 10 or more times in any one year – 1 day additional annual leave
>
> Placed on call for 20 or more times in any one year – 2 days additional annual leave
>
> Placed on call for 30 or more times in any one year – 3 days additional annual leave
>
> Placed on call for 40 or more times in any one year – 4 days additional annual leave

Placed on call for 50 or more times in any one year – 5 days additional annual leave

This leave is paid at ordinary rates and is exclusive of leave loading.

204. The variation proposed is opposed by Ai Group.

THE ANMF'S CASE

205. The policy objective driving the union's case is set out in the following paragraphs of its submissions:

> The evidence of excessive levels of on-call being performed demonstrates that the existing levels of compensation are not acting sufficiently as a disincentive to employers to rostering employees on for excessive amounts of on-call. The rates of on-call represent a serious intrusion into the work/life balance of employees and a risk to health and safety.
>
> The amounts of compensation for employees should therefore be improved and the proposed ANMF clause is necessary to achieve the modern awards objective.[40]

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

206. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

207. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

[40] ANMF submission dated 17 March 2017 at paragraphs 62 – 63.

208. The ‘necessary’ test must be considered with respect to each element of every proposal put by the ANMF. By way of example, the union must establish that:

- An additional 1 day of annual leave is necessary where an employee is placed on call 10 or more times in any one year; and
- An additional 2 days of annual leave is necessary where an employee is placed on call 20 or more times in any one year; and
- Payment at ordinary rates for any such leave is necessary; and so on.

209. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in adverse consequences for business. 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.

210. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that the Award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

211. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> 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 (see s.138). What is ‘necessary’ in a particular case is a value judgment based on an assessment of the

considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[41]

212. It is therefore for the ANMF to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, the ANMF has *not* overcome that threshold. It has failed to mount a case that establishes that the provision proposed is necessary to ensure that the Award achieves the modern awards objective.

A 'Fair' Safety Net

213. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[42]

214. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out

[41] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[42] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[43]

215. The grant of the ANMF's claim would be unfair to employers in various ways.

216. **Firstly**, the proposed allowance would visit additional costs upon employers in circumstances where they are not "necessary" to ensure that the Award is achieving the modern awards objective and therefore, is unwarranted. Those costs would be both direct (i.e. the additional amount payable to an employee where they seek to take annual leave accrued pursuant to the proposed clause) and indirect (i.e. costs associated with managing staff absences). We turn to these matters in greater detail below.

217. **Secondly**, the Nurses Award already entitles employees covered by it to an annual leave entitlement that exceeds that which is afforded by the NES. Clause 31.1(a) of the Award states:

> **(a)** In addition to the entitlements in the NES, an employee is entitled to an additional week of annual leave on the same terms and conditions.

218. As a result, all employees covered by the Award have an entitlement to an additional week of annual leave and where the employee is a shiftworker as defined by clause 31.1(b), an employee is entitled to yet another week of annual leave. Accordingly, some employees covered by the Nurses Award are already entitled to six weeks of annual leave. It is not fair that employers be required to provide their employees with yet another week of annual leave and as a result have visited upon them greater direct and indirect costs.

219. **Thirdly**, it must be remembered that where an employer requires an employee to be on call, the Award already requires that the employer must pay the employee an allowance, as prescribed by clause 16.4. The amount due ranges from $20.05 - $35.24 for each 24 hour period or part thereof. It is not fair that, absent any cogent reason, an additional entitlement be inserted in the Award in relation to the performance of the very same work. A case has not been made out that would justify an employee receiving both the

[43] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

allowance pursuant to the current clauses 16.4(a) and (b) and additional annual leave by virtue of the proposed clause 16.4(c). The subjective views of the ANMF's witnesses as to whether they consider that they are adequately remunerated is of little relevance to the Commission's determination of this matter.

220. **Fourthly**, the ANMF submits that the current on-call allowance is not serving its purpose of disincentivising employers from "rostering employees on for excessive amounts of on-call". In response, we note that:

- The ANMF has not identified any arbitral authority for the proposition that the on call allowance at clause 16.4 is intended to serve as a disincentive. It cannot be assumed that any additional amount due under a modern award for the performance of certain work is included for the purposes of deterring employers. For instance, in the Commission's recent decision regarding penalty rates, it concluded that "deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates":

  > **[39]** Having regard to more recent authority, the terms of the modern awards objective, and the scheme of the FW Act, we have concluded that deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates. We accept that the imposition of a penalty rate may have the *effect* of deterring employers from scheduling work at specified times or on certain days, but that is a consequence of the imposition of an additional payment for working at such times or on such days, it is not the *objective* of those additional payments. Compensating employees for the disutility associated with working on weekends and public holidays is a primary consideration in the setting of weekend and public holiday penalty rates.[44]

  Absent any arbitral authority, the Commission should not proceed on the assumption that the on call allowance at clause 16.4 has been set *for the purposes of* deterring employers from requiring employees to be on call.

- Further, and in any event, the evidence does not establish that the on-call allowance is *not* deterring employers from unnecessarily or

[44] *4 yearly review of modern awards – Penalty rates* [2016] FWCFB 1001 at [39].

excessively requiring employees to be on call, or that the ANMF's proposed clause would have the effect of so deterring employers.

- The ANMF's submission does not set out any consideration of whether, in an operational sense, the extent to which employees are required to be on call could in fact be reduced. That is, there is no examination in the material before the Commission of whether requiring employees to be on call to a lesser extent is in fact feasible or workable in a practical sense.

221. **Fifthly**, the grant of the ANMF's claim would result in an excessively generous outcome which would be out of step with other modern awards that make provision for the payment of an allowance (however characterised) where an employee is required to be on call but does not contain an additional entitlement to paid leave. For instance, clause 18.10 of the *Health Professionals and Support Services Award 2010* requires the payment of an on-call allowance, but does not confer any other benefit upon employees covered by it. Clause 20.9 of the *Social, Community, Home Care and Disability Services Award 2010* contains a similar provision. The ANMF has not established that a different approach is warranted in the Nurses Award.

222. In so submitting, we note that the Commission adopted similar logic when recently deciding to vary the *Joinery and Building Trades Award 2010* as sought by the Ai Group so as to reduce the entitlement due to employees when they are on annual leave. The issue pertained to the manner in which the annual leave loading was to be calculated. The Full Bench observed as follows:

> **[194]** In short, the existing terms in the *Joinery Award* are:
>
> - inconsistent with the norm in respect of annual leave payments;
> - out of step with the annual leave payment terms in other construction awards and in modern awards generally; and

- not justified on the basis of special circumstances pertaining to the *Joinery Award*.[45]

A 'Minimum' Safety Net

223. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

224. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provision here sought by the ANMF. Matters such as these are more appropriately dealt through enterprise bargaining.

225. Further, a 'minimum' safety net necessarily applies to all relevant employers and employees. In this instance, given that the Award is occupational in nature, it has application to a range of operations including, for instance, private hospitals and aged care centres, which are necessarily very different in terms of their operational requirements.

226. An award that applies in such a range of circumstances must be sufficiently flexible and must not be so prescriptive as to render its application problematic in any one of the very broad range of cases in which it is applied. It is trite to observe that the ANMF has called evidence from a very select group of employers covered by the Award, which does not provide the Commission with an adequate understanding of how the clause would affect the full gamut of employers covered by the Award.

[45] *4 yearly review of modern awards – Payment of Wages* [2016] FWCFB 8463 at [194].

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

227. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[46]

228. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[47]

229. The Commission's Penalty Rates Decision provides the most recent data for in relation to 'two-thirds of medium full-time earnings':[48]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

230. The C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010* as at the time of drafting this submission is $783.30.

231. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The ANMF has not, however,

[46] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[47] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[48] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which employees covered by the Award are reliant on the minimum rates prescribed by them.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the Award are "low paid" in the sense contemplated by the above decision.
- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.
- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

232. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

233. A continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

234. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the Award, each of which would have the effect of introducing additional costs and inflexibilities.

235. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will be lifted significantly, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

236. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

237. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[49]

238. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

239. Accordingly, s.134(1)(c) cannot be relied upon in support of the ANMF's claim.

[49] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

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

240. The provision proposed by the ANMF is potentially contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work. It seeks to impose an additional payment that must be made by employers and as a result an additional cost that must be borne in circumstances where an employee is required to be in charge. To the extent that the introduction of the entitlement sought results in an employer making amendments to the manner in which the relevant work is performed in its operations such that it is less efficient and/or productive, the ANMF's claim is inconsistent with s.134(1)(d) of the Act.

241. Further, virtually any form of leave taken by employees can have an adverse impact upon the need to promote flexible modern work practices and the efficient and productive performance of work. This is because staff absences have an impact not only on employment costs incurred by an employer, but can also cause disruption to an employer's operations.

242. In some circumstances, it may not be possible for an employer to engage relief staff to cover the absent employee. To the extent that this adversely affects the efficiency with which the relevant work is performed in the employee's absence or the indeed whether the work can be performed at all, the creation of a new form of leave is inconsistent with s.134(1)(d).

243. However, an employer's access to relief staff is not necessarily the end of the matter. For instance, if the replacement employee does not possess the necessary skills, knowledge or experience to undertake the work ordinarily performed by the absent employee, this self-evidently will undermine the need to promote flexible modern work practices and the efficient and productive performance of work.

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

244. This is a neutral consideration in this matter. The ANMF's proposal is not to provide additional *remuneration*.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

245. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

246. The clause sought by the ANMF would adversely impact business in various ways, which we have earlier articulated. This includes the direct and indirect employment costs associated with an additional leave entitlement and the productivity losses that would likely result.

247. In so submitting we note that s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses. It involves microeconomic considerations, as well as consideration of the likely impact of the claim on businesses at large.

248. For the reasons articulated below in relation to s.134(1)(g), the proposed provision would also increase the regulatory burden imposed upon employers. Employers would also be required to record and consider the number of times an employee is placed on call in order to ascertain an employee's entitlement under the proposed clause, which further exacerbates the regulatory burden imposed by the clause.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

249. The need to ensure a stable and sustainable modern awards system tells against the grant of a claim that is not properly supported by cogent submissions or probative evidence, as is here the case.

250. Further, the provision proposed is not simple or easy to understand or apply. For instance:

- The provision states that employees shall "accrue" additional annual leave, however it is not clear how or when the leave would accrue. That is, does the additional annual leave accrue once the employee has been placed on call for a specific number of days? Does the annual leave accrue progressively? Or does the annual leave accrue at the end of the year?

- The proposed clause expresses the entitlement as a number of "days", however the meaning of a *day* of annual leave is not clear. For example, does a day of leave mean that an employee is entitled to be absent on any one calendar day or does it entitle the employee to a certain number of hours of leave? If the latter, how many hours?

- The proposed clause refers to the number of times an employee is placed on call in a *year*. It is not clear whether this is a reference to a calendar year or a year of service.

251. As a result of such complexities, the proposed clause is inconsistent with s.134(1)(g).

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

252. To the extent that the claim is contrary to ss.134(1)(b), (c), (d), (f) and (g), the it may also adverse impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

CONCLUSION

253. For all of the reasons here stated, the ANMF's claim should not be granted.

8. FREE FROM DUTY

254. The submissions that follow relate to the ANMF's claim to vary clause 21.4 of the Nurses Award.

THE VARIATION SOUGHT

255. Clause 21.4 of the Nurses Award prescribes a minimum period of time that employees must have "off duty":

> **21.4** Each employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28-day cycle. Where practicable, such days off must be consecutive.

256. The ANMF is seeking to expand the application of the clause as follows:

> **21.4** Each employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28-day cycle. Where practicable, such days off must be consecutive. <u>For the purposes of this sub-clause, duty includes time an employee is on call.</u>

257. The variation proposed is opposed by Ai Group.

THE ANMF'S CASE

258. The ANMF's case rests primarily on the following propositions:

> It is submitted that the purpose of the existing clause is to enable employees to have a certain period in each work cycle completely free from work commitments to enable adequate rest and recuperation.
>
> …
>
> The ANMF proposal would ensure (or make more likely) the taking of adequate breaks from work.[50]

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

259. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

[50] ANMF submission dated 17 March 2017 at paragraphs 68 and 70.

260. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

261. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in adverse consequences for business. 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.

262. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that the Award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

263. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> 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 (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[51]

[51] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

264. It is therefore for the ANMF to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, the ANMF has *not* overcome that threshold. It has failed to mount a case that establishes that the provision proposed is necessary to ensure that the Award achieves the modern awards objective.

A 'Fair' Safety Net

265. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[52]

266. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[53]

[52] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

[53] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

267. The grant of the ANMF's claim would be unfair to employers in various ways.

268. **Firstly**, the proposed allowance would visit additional inflexibilities upon employers in circumstances where they are not "necessary" to ensure that the Award is achieving the modern awards objective and therefore, is unwarranted.

269. **Secondly**, the proposed clause has the potential to seriously disturb existing rostering arrangements. That is, where an employer has implemented rosters that require employees to remain on call such that they do not have time off as prescribed by the current clause 21.4, the changes sought would require an employer to make amendments that might be potentially significant to the manner in which it structures its rosters and the times at which its employees are required to work.

270. This is quite clearly unfair to employers. The Commission should not lightly disrupt the existing arrangements that employers may have in place. This is particularly so given that the material filed by the ANMF in these proceedings does not constitute a proper examination of the rostering arrangements adopted by employers in the range of industries in which the Award applies and the precise impact on the provision sought.

A 'Minimum' Safety Net

271. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

272. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provision here sought by the ANMF. Matters such as these are more appropriately dealt through enterprise bargaining.

273. Further, a 'minimum' safety net necessarily applies to all relevant employers and employees. In this instance, given that the Award is occupational in

nature, it has application to a range of operations including, for instance, private hospitals and aged care centres, which are necessarily very different in terms of their operational requirements.

274. An award that applies in such a range of circumstances must be sufficiently flexible and must not be so prescriptive as to render its application problematic in any one of the very broad range of cases in which it is applied. It is trite to observe that the ANMF has called evidence from a very select group of employers covered by the Award, which does not provide the Commission with an adequate understanding of the potential impact of the clause.

275. It is not appropriate to include the provision sought by the ANMF in a *minimum* safety net.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

276. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[54]

277. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[55]

[54] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

[55] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

278. The Commission's Penalty Rates Decision provides the most recent data for in relation to 'two-thirds of medium full-time earnings':[56]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

279. The C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010* as at the time of drafting this submission is $783.30.

280. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The ANMF has not, however, presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which employees covered by the Award are reliant on the minimum rates prescribed by them.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the Award are "low paid" in the sense contemplated by the above decision.
- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.
- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

281. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim.

[56] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

The Need to Encourage Collective Bargaining (s.134(1)(b))

282. A continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

283. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the Award, each of which would have the effect of introducing additional costs and inflexibilities.

284. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit of some or all of these proposed award variations, the minimum safety net will be lifted significantly, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

285. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

286. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[57]

287. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

288. Accordingly, s.134(1)(c) cannot be relied upon in support of the ANMF's claim.

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

289. The provision proposed by the ANMF is contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work. It effectively places an additional limitation on the manner in which an employer may roster its employees.

290. To the extent that the introduction of the clause sought would result in an employer making amendments to the manner in which the relevant work is performed in its operations such that it is less efficient and/or productive, the ANMF's claim is inconsistent with s.134(1)(d) of the Act.

[57] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

291. This is a neutral consideration in this matter.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

292. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

293. The clause sought by the ANMF would adversely impact business. In so submitting we note that s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses. It involves microeconomic considerations, as well as consideration of the likely impact of the claim on businesses at large.

294. For the reasons articulated in relation to s.134(1)(d), the proposal may have an adverse impact on productivity and as a consequence, on employment costs.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

295. The need to ensure a stable and sustainable modern awards system tells against the grant of a claim that is not properly supported by cogent submissions or probative evidence, as is here the case.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

296. To the extent that the claim is contrary to ss.134(1)(b), (c), (d), (f) and (g), the it may also adverse impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

CONCLUSION

297. For all of the reasons here stated, the ANMF's claim should not be granted.

9. REST BREAKS BETWEEN ROSTERED WORK

298. The submissions that follow relate to the ANMF's proposed variations to clause 23 of the Nurses Award.

THE VARIATION SOUGHT

299. Clause 23 of the Award is in the following terms:

> **23. Rest breaks between rostered work**
>
> An employee will be allowed a rest break of eight hours between the completion of one ordinary work period or shift and the commencement of another ordinary work period or shift.

300. As can be seen, the provision prescribes with the minimum period of time that must lapse between the cessation of ordinary hours of work and the commencement of the following period or shift of ordinary hours. The provision requires that at least eight hours must pass.

301. The ANMF is proposing that clause 23 be varied as follows:

> **23. Rest breaks between rostered work**
>
> **23.1** An employee will be allowed a rest break of ~~eight~~ ten hours between the completion of one ordinary work period or shift and the commencement of another ordinary work period or shift.
>
> **23.2** By mutual agreement between employer and employee, the ten hour rest break may be reduced to eight hours.
>
> **23.3** If, on the instruction of the employer, an employee resumes or continues to work without having had 10 consecutive hours off duty, or 8 hours as agreed, they will be paid at the rate of double time until released from duty for such period.

302. The variations sought are opposed by Ai Group.

303. On its face, the effect of the variation proposed would be as follows:

- An employee would be entitled to a break of at least 10 hours between the completion of one ordinary work period/shift and the commencement of another ordinary work period/shift.

- By agreement between an employer and individual employee, the 10 hour rest break may be reduced to eight hours.

- If an employee was required to resume or continue to work without having 10 hours off duty (or eight, if so agreed), they would be entitled to payment at 'double time' until they are released from duty for such period.

THE ANMF'S CASE

304. The ANMF's case is based on the following propositions:

- The existing eight hour break prescribed by clause 23 is insufficient to allow employees an adequate period of rest and recuperation before recommencing work.[58]

- A 'penalty' needs to be inserted into the Award to provide a disincentive for employers to schedule a break shorter than the minimum period specified.[59]

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

305. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

306. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

[58] ANMF submission dated 17 March 2017 at paragraph 76.

[59] ANMF submission dated 17 March 2017 at paragraph 87.

307. The ‘necessary’ test must be considered with respect to each element of every proposal put by the ANMF. By way of example, the union must establish that:

- A provision that requires a minimum rest break of 10 hours is necessary;
- A provision that requires the payment of a higher rate where such a rest break is not provided is necessary; and
- In such circumstances, a rate of ‘double time’ is necessary.

308. The employer parties in these proceedings do not bear any onus to demonstrate that the claim will result in adverse consequences for business. 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.

309. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that the Award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

310. As the Full Bench stated in the Preliminary Jurisdictional Issues Decision: (emphasis added)

> 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 (see s.138). What is ‘necessary’ in a particular case is a value judgment based on an assessment of the

considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[60]

311. It is therefore for the ANMF to overcome the legislative threshold established by ss.138 and 134(1). For all the reasons we have here set out, the ANMF has *not* overcome that threshold. It has failed to mount a case that establishes that the provision proposed is necessary to ensure that the Award achieves the modern awards objective.

A 'Fair' Safety Net

312. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> **[109]** … It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a *fair* and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.[61]

313. Similarly, when considering the appropriate penalty rate for the performance of ordinary hours of work on Sundays by employees covered by the *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, Justice Giudice observed that in making safety net awards, the AIRC was to be guided by s.88B of the WR Act. That provision stated that in performing its functions under Part VI of the WR Act, the AIRC was to ensure that a safety net of fair minimum wages and conditions of employment is established and maintained having regard to, amongst other factors, the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community. Having referred to s.88B, His Honour stated:

> In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out

[60] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[61] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109]. See also *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [118].

the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. …[62]

314. The grant of the ANMF's claim would be unfair to employers in various ways.

315. **Firstly**, the proposed allowance would visit additional inflexibilities and costs upon employers in circumstances where they are not "necessary" to ensure that the Award is achieving the modern awards objective and therefore, are unwarranted.

316. **Secondly**, the proposed clause has the potential to seriously disturb existing rostering arrangements. That is, wherever an employer has implemented rosters that enable a break of less than 10 hours, the changes sought would require an employer to make changes that might be potentially significant to the manner in which it structures its rosters and the times at which its employees are required to work. In the alternate, the proposed clause 23.3 would impose a significant new expense.

317. This is quite clearly unfair to employers. The Commission should not lightly disrupt the existing arrangements that employers may have in place. This is particularly so given that the material filed by the ANMF in these proceedings does not constitute a proper examination of the rostering arrangements adopted by employers in the range of industries in which the Award applies and the precise impact on those employers of increasing the length of the minimum rest break between ordinary hours/shifts.

A 'Minimum' Safety Net

318. Modern awards are intended to afford employees with a minimum safety net, which is to include the very basic entitlements to be provided to employees covered by the relevant awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)).

319. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable,

[62] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

such as the provision here sought by the ANMF. Matters such as these are more appropriately dealt through enterprise bargaining.

320. Further, a 'minimum' safety net necessarily applies to all relevant employers and employees. In this instance, given that the Award is occupational in nature, it has application to a range of operations including, for instance, private hospitals and aged care centres, which are necessarily very different in terms of their operational requirements.

321. An award that applies in such a range of circumstances must be sufficiently flexible and must not be so prescriptive as to render its application problematic in any one of the very broad range of cases in which it is applied. It is trite to observe that the ANMF has called evidence from a very select group of employers covered by the Award, which does not provide the Commission with an adequate understanding of the potential impact of the proposed clause.

322. It is not appropriate to include the provision sought by the ANMF in a *minimum* safety net.

The Relative Living Standards and Needs of the Low Paid (s.134(1)(a))

323. The Annual Wage Review 2014 – 2015 decision dealt with the interpretation of s.134(1)(a): (emphasis added)

> **[310]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> **[311]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.[63]

324. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> **[362]** There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was

[63] *Annual Wage Review 2014 – 2015* [2015] FWCFB 3500 at [310] – [311].

the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[64]

325. The Commission's Penalty Rates Decision provides the most recent data for in relation to 'two-thirds of medium full-time earnings':[65]

Two-thirds of median full-time earnings	*$/week*
Characteristics of Employment survey (Aug. 2015)	818.67
Employee Earnings and Hours survey (May 2016)	917.33

326. The C10 rate in the *Manufacturing and Associated Industries and Occupations Award 2010* as at the time of drafting this submission is $783.30.

327. Section 134(1)(a) requires the Commission to take into account relative living standards and the needs of the "low paid". The ANMF has not, however, presented to the Commission the information that is necessary in order for it to do so. Specifically, the union has not:

- Considered the extent to which employees covered by the Award are reliant on the minimum rates prescribed by them.
- Undertaken a comparison of such employees with other groups of employees that are deemed relevant.
- Identified the extent to which employees covered by the Award are "low paid" in the sense contemplated by the above decision.
- Demonstrated the extent to which such employees are able (or not able) to purchase the essentials for a "decent standard of living" and to engage in community life, assessed in the context of contemporary norms.

[64] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

[65] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [168].

- Established the effect that the proposed clause would have on relative living standards and the needs of the low paid.

328. As a consequence, the Commission cannot be satisfied that s.134(1)(a) lends support to the union's claim.

The Need to Encourage Collective Bargaining (s.134(1)(b))

329. The ANMF's submissions in the current proceedings, and their repeated attempts to seek the inclusion of the relevant entitlement (or one very similar in nature) in prior proceedings, suggests that this is an issue of extreme importance to the union, which, absent its inclusion in the awards system, would encourage it and its members to engage in enterprise bargaining. To this extent, a decision to dismiss the claim is consistent with the need to encourage collective bargaining.

330. Further, a continuing rise to the minimum floor of entitlements will, over time, have the effect of precluding employers from engaging in collective bargaining. It is inevitable that multiple award variations that increase employment costs and impose additional operational constraints will have a cumulative effect, as a result of which there is less scope for employers to engage in bargaining. Conversely, a more generous safety net will not incentivise employees to engage in enterprise bargaining.

331. We make this submission in the context of the current Review, as a result of which a number of variations may be made to the Award, each of which would have the effect of introducing additional costs and inflexibilities.

332. For instance, in addition to the proposals here before the Commission, the unions are seeking very restrictive casual conversion provisions, increased minimum engagement periods for casual and part-time employees, limitations on the circumstances in which additional casual and part-time employees can be engaged, paid family and domestic violence leave, an absolute right to part-time work or reduced hours if an employee has parenting or caring responsibilities and more. If the union movement is successful in their pursuit

of some or all of these proposed award variations, the minimum safety net will be lifted significantly, which would undoubtedly have a bearing on the extent to which employers and employees seek to participate in collective bargaining.

333. In our view, in the context of this Review, it is appropriate that the Commission bears in mind the potential cumulative impact of the many claims that the unions are pursuing which, if granted, will ultimately undermine the need to encourage collective bargaining.

The Need to Promote Social Inclusion through Increased Workforce Participation (s.134(1)(c))

334. A Full Bench of the Commission, in the context of the 'award flexibility' common issues, considered the proper interpretation of s.134(1)(c). It stated: (emphasis added)

> **[166]** The first point is not relevant to the consideration identified in s.134(1)(c), namely the promotion of 'social inclusion *through* increased workforce participation'. The social inclusion referred to in this context is employment. In other words, s.134(1)(c) requires the Commission to take into account the need to promote increased employment.[66]

335. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

336. Accordingly, s.134(1)(c) cannot be relied upon in support of the ANMF's claim.

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

337. The provision proposed by the ANMF is contrary to the needs to promote flexible modern work practices and the efficient and productive performance of work. It effectively places an additional limitation on the manner in which an employer may roster its employees, by requiring that a longer period of time

[66] *4 yearly review of modern awards – Common issue – Award Flexibility* [2015] FWCFB 4466 at [166].

than that which is presently prescribed by the Award must lapse before an employee can be required to commence a subsequent period of ordinary hours of work.

338. To the extent that the introduction of the clause sought would result in an employer making amendments to the manner in which the relevant work is performed in its operations such that it is less efficient and/or productive, the ANMF's claim is inconsistent with s,134(1)(d) of the Act.

The Need to Provide Additional Remuneration for Working at Certain Specified Times or under Certain Specified Circumstances (s.134(1)(da))

339. This is a neutral consideration in this matter.

The Principle of Equal Remuneration for Work of Equal or Comparable Value (s.134(1)(e))

340. This is a neutral consideration in this matter.

The Likely Impact on Business, including on Productivity, Employment Costs and the Regulatory Burden (s.134(1)(f))

341. The clause sought by the ANMF would adversely impact business. In so submitting we note that s.134(1)(f), in our view, involves a consideration of the likely impact of the claim on different types of businesses. It involves microeconomic considerations, as well as consideration of the likely impact of the claim on businesses at large.

342. For the reasons articulated in relation to s.134(1)(d), the proposal may have an adverse impact on productivity and on employment costs.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g))

343. The need to ensure a stable and sustainable modern awards system tells against the grant of a claim that is not properly supported by cogent submissions or probative evidence, as is here the case.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

344. To the extent that the claim is contrary to ss.134(1)(b), (c), (d), (f) and (g), the it may also adverse impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

CONCLUSION

345. For all of the reasons here stated, the ANMF's claim should not be granted.

10. TIMING OF MEAL BREAKS

346. The submissions that follow relate to the ANMF's claim to introduce new restrictions regarding the time at which a meal break is to be taken.

THE VARIATION SOUGHT

347. The ANMF is seeking to vary clause 27.1(a) of the Nurses Award as follows:

> **27.1 Meal breaks**
>
> **(a)** An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes. Such meal breaks will be taken between the fourth and the sixth hour after beginning work, unless otherwise agreed by the majority of employees affected. Provided that, by agreement of individual employees, employees who work shifts of six hours or less may forfeit the meal break.
>
> **(b)** Where an employee is required to remain available or on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.

348. The variation sought would have the following effect:

- It would require, in a temporal sense, that the unpaid meal break must be taken between the fourth and sixth hour after beginning work. That is, the clause would seek to regulate *when* the break is taken in circumstances where that is a matter that is presently not prescribed by the Award.

- The provision would enable an employer and majority of employees to agree to depart from the proposed restriction.

- The provision would also enable an employer and an individual employee to agree that the employee will forfeit the meal break if the employee works a shift of six hours or less. We note that Ai Group has sought a similar variation to clause 27.1(a) of the Award, as set out in our submission of 14 March 2017. Irrespective of the fate of the ANMF's claim, the Award should be varied to allow an employee to forego their meal break where they work a shift of six hours or less. We continue to rely on our aforementioned submissions in this regard.

THE ANMF'S CASE

349. The gravamen of the ANMF's case is summarised in the following paragraphs of its submission:

> The existing clause does not specify *when* the meal break must be taken. On its face, the clause may mean that a meal break could occur at any time during a shift, even if it resulted in an employee working excessive hours before taking a break or finishing their shift.
>
> To ensure that long periods are not worked without a meal break, the ANMF proposes to clearly specify that meal breaks will be taken between the fourth and sixth hour after beginning work, unless otherwise agreed by the majority of employees affected.[67]

PRIOR CONSIDERATION OF THE RELEVANT ISSUES

350. The issue here before the Commission was agitated by the union during the two year review of modern awards, however the claim was rejected by Vice President Watson. His Honour gave the following reasons:

> **[41]** The employers contend that a similar claim was made and rejected during the award modernisation process. They contend that the claim is a further restriction on rostering that removes the flexibility that operates around operational needs and employee preferences. They submit that any further issues about the timing of meal breaks should be dealt with at the enterprise level. The employers accepted that the current award provision requires a meal break to be provided, either by rostering it or otherwise, and if the employer requires the employee to work through the meal break, it must pay the employee at overtime rates until a meal break is given.
>
> **[42]** In my view the employers have correctly acknowledged the obligations under the Award. Any practice whereby an employee is not provided with a meal break must result in overtime payments being made until the scheduled meal break is given. A small amount of give and take based on operational requirements is understandable, but a failure to provide a break, or overtime payments until the end of the shift would not be consistent with the intent of the clause. Nevertheless, I do not consider that a case has been made out for regulating the time for the meal break in the way proposed by the [ANMF]. Such an approach would inhibit the existing flexibility which is no doubt necessary in many operations covered by this Award. The clarification of obligations in this decision and the availability of the disputes procedure should assist in the event of further difficulties and the availability of the disputes procedure should assist in the event of further difficulties with regard to meal breaks.[68]

[67] ANMF submission dated 17 March 2017 at paragraphs 91 - 92.

[68] *Aged Care Association Australia Ltd & Others* [2012] FWA 9420 at [41] – [42].

351. We respectfully adopt the arguments of the employer parties as summarised in paragraph [41] above and His Honour's reasons for dismissing the claim at paragraph [42].

352. As stated in the Commission's Preliminary Jurisdictional Issues decision, previous Full Bench decisions should be followed unless there are cogent reasons for departing from them.[69] The ANMF has here failed to establish any such cogent reasons.

SECTION 138 AND THE MODERN AWARDS OBJECTIVE

353. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

354. In our view, the ANMF has not made out a proper case for imposing the additional restrictions that it seeks in relation to when a meal break is to be taken. The simplistic assertions made in its submissions do not establish that the clause proposed is *necessary* to ensure that the Award achieves the modern awards objective.

355. It does not appear to be contentious that employees covered by the Nurses Award work in a variety of environments under a range of different circumstances and are often met with unforeseen demands. So much can be made out from the evidence of the ANMF's witnesses.

356. The union's proposal and the case mounted in support of it erroneously assume that the imposition of a requirement that the meal break must be taken between the fourth and sixth hour could reasonably be accommodated, without regard for the legitimate need for greater flexibility as to when a meal break is taken for various reasons. For instance, the clause ignores the prospect of a nurse working in a hospital who is called to attend a medical

[69] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [27].

emergency and, as a result, cannot take a meal break within the prescribed timeframe. To this end, the clause is inconsistent with:

- Section 134(1)(d): the need to promote flexible modern work practices and the efficient and productive performance of work; and

- Section 134(1)(f): the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

357. We urge the Commission to take a cautious approach when considering whether the ANMF's claim ought to be granted. In our view, there is a clear risk associated with introducing the requirements sought in circumstances where a proper examination has not been undertaken of the potential impact of the proposed clause in the range of operations in which nurses work. The Commission cannot be satisfied that the significant change that is here being pursued will not have major ramifications for employers' operations, the prospect of which in fact warrants the retention of the flexibility presently available under clause 27.1(a).

Position in the Alternate

358. If, despite our submissions, the Commission determines that it is necessary to regulate when the meal break is to be taken, we make the following submissions in the alternate.

359. **Firstly**, the clause should, at the very least, accommodate for circumstances in which it is not practicable for an employee to take a break between the fourth and sixth hour as contemplated by the proposed clause. We refer to the example previously articulated regarding a medical emergency. We suggest that in order to accommodate such circumstances, any new requirement imposed by clause 27.1(a) should apply only where it is *reasonably practicable*. For instance:

> An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes. Such meal breaks will, wherever reasonably practicable, be taken between the fourth and the sixth hour

after beginning work, unless otherwise agreed by the majority of employees affected. Provided that, by agreement of individual employees, employees who work shifts of six hours or less may forfeit the meal break.

360. **Secondly**, the proposal to permit agreement between an employer and the majority of employees to depart from clause 27.1(a) should be included, as well as the ability to agree to forego a meal break. They would provide some reprieve from the limitation that would otherwise be cast by clause 27.1(a).

11. REMAINING AVAILABLE DURING A MEAL BREAK

361. The ANMF is seeking a variation to clauses 27.1(b) of the Nurses Award, and the introduction of a new clause 27.1(c) as follows:

> **27.1 Meal breaks**
>
> **(a)** An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes.
>
> **(b)** Where an employee is required to ~~remain available or~~ be on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.
>
> **(c)** Where an employee is required by the employer to remain available during a meal break, but is free from duty, the employee will be paid at ordinary rates for a 30 minute meal break. If the employee is recalled to perform duty during this period the employee will be paid overtime for all time worked until the balance of the meal break is taken.

362. We do not oppose the variation sought by the ANMF. We consider that there is some merit to the proposition that an employee required to remain available during a meal break should be paid at a rate that differs from circumstances in which an employee is in fact required to perform work during their break.