

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Finalisation of Exposure Drafts and
variation determinations –

Nurses Award 2010

(AM2019/17)

30 November 2020

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS
AM2019/17 FINALISATION OF EXPOSURE DRAFTS AND
VARIATION DETERMINATIONS – TRANCHE 3 – NURSES AWARD
2010

1. INTRODUCTION

1. This submission is filed in relation to the decision of the Full Bench issued on 5 November 2020¹ (**the November Decision**) concerning the Nurses Award 2010 (**the Award**) and the associated Exposure Draft (**ED**) and Draft Award Variation Determination (**DVD**). It is jointly filed on behalf of the following associations (**the Employer Parties**):
 - (a) The Australian Industry Group;
 - (b) The Australian Private Hospitals Association;
 - (c) The Private Hospitals Association of Queensland;
 - (d) The Australian Private Hospitals Association – New South Wales Branch;
 - (e) The Australian Private Hospitals Association – South Australia Branch;
 - (f) The Australian Private Hospitals Association – Western Australia; and
 - (g) Day Hospitals Australia
2. The submission responds to the matters raised in the ANMF’s submission of 19 November 2020. It does not seek to raise any concerns as to aspects of the ED or DVD unrelated to AM2020/1.
3. The submission also seeks to identify what the employer parties perceive to be difficulties related to the Commission issuing a final variation determination for the Nurses Award prior to the issuing of any decision in AM2020/1, should this

¹ [2020] FWCFB 5883

be the Full Bench's intention. In short, these potential difficulties relate to the following matters:

- A concern that the determination would vary clauses in the award that were not the subject of proposed variations advanced in AM2020/1 but which were nonetheless referred to in argument in those proceedings as contextual considerations relevant to the proper construction of certain contentious provisions and/or the existence of an ambiguity or uncertainty in the terms of the award.
 - A concern that the approach of replacing the current terms of the Award with the contents of the proposed schedule (as opposed to simply not altering provisions relevant to AM2020/9) may alter the capacity of a party to press an argument that it contains an error, as contemplated under s.160 and asserted by the Employer parties in AM2020/1
 - A concern that the Commission may not have power to vary a final determination once issued.
4. The submission ultimately proposes that the Full Bench should refrain from issuing a final variation determination prior to the resolution of AM2020/1 and notes that the ANMF do not oppose this course. The Employers Parties do not wish to cause any unnecessary delay to the progress of proceedings related to the exposure draft process, but are anxious to avoid any step being taken that may impact upon the resolution of AM2020/1 or prejudice the parties to those proceedings.

2. Background

3. As recorded in the November Decision, Ai Group has filed an application (AM2020/1) seeking a retrospective variation to certain clauses dealing with Saturday, Sunday and public holiday penalty rates and overtime rates in the award. That matter has now been heard and the relevant Full Bench's decision is reserved.

4. The Ai Group application seeks variations pursuant to s.160 on the basis of ambiguity, uncertainty and, in the context of the proposed change to over-time rates, error. In the alternate, the variations are sought pursuant to s.157 on the basis that the changes were necessary to achieve the modern awards objective.
5. In a joint note filed by the Ai Group and ANMF, and referenced in the November Decision, the parties identified terms of the ED and DVD that clearly related to AM2020/1 and foreshadowed that they may seek to raise any additional clauses that they identify as relevant to the proceedings.
6. In a decision issued on 6 October² the Full Bench indicated that a revised exposure draft and draft award variation determination would be published in which any clauses the subject of AM2020/1 would appear as they do on the current Nurses Award and that parties would then be afforded an opportunity to comment on the aspects of the draft award variation determination unrelated to AM2020/1 before a final variation determination was issued.
7. The amended DVD was published along with the November Decision which adopts the wording from the current Nurses Award in relation to the clauses identified in the parties' note. The Full Bench has indicated that the final variation determination may be varied in line with the Determination of the Full Bench in AM2020/1.

3. RESPOSE TO THE ANMF SUBMISSION

7. The ANMF has proposed variations to the draft award variation determination in light of the recent Full Bench decisions in the Overtime for Casuals Common Issues proceedings. It has also proposed variations to the rates contained in Schedule B of the DVD. We deal with these two issues separately.

² 2020 FWCFB 58883

Matter's raised by the ANMF related to the the Overtime for Casuals Common Issues Proceedings

8. The ANMF propose two specific variations to the DVD to give effect to the Overtime for Casuals Common Issues proceedings (AM2017/51).
9. The first matter raised by the ANMF relates to the proposed variation of clause 11.2 in the DVD. As observed by the ANMF, this is the equivalent provision in the DVD to clause 10.4(b) of the current Nurses Award.
10. As identified by the ANMF, the provision in the current award has been recently amended as a consequence of the Overtime for Casuals Common Issues Proceedings (AM2017/51).
11. Clause 10.4(b) is a provision that Ai Group has sought be varied as a product of the proceedings in AM2020/1, with retrospective effect.
12. We acknowledge that the provisions may need to be amended in any final variation determination in order to reflect the outcome of the common issues proceedings, but the approach that should be taken may be affected by the outcome in AM2020/1. Accordingly, the change proposed by the ANMF should not be considered at this stage.
13. The other variation raised by the ANMF relates to cl.19.1(a) of the draft award variation determination and which is the corresponding provision to clause 28.1(a) of the current award. The variation proposed does not appear to create any difficulty.

ANMF Proposed Changes to Schedule B of the DVD

14. The second matter that the ANMF proposes be addressed is Schedule B of the DVD. As observed by the ANMF, Schedule B would be a new element in the Award.
15. The ANMF has proposed that the rates for casual employees be amended to reflect what may be described as the compounding approach (as opposed to cumulative approach) to the calculation of overtime and weekend and public

holiday penalty rates, if the Full Bench is inclined to publish a final variation determination including Schedule B.

16. The Employer Parties dispute that the approach adopted by the ANMF reflects the proper interpretation of the current provisions of the Award related to the calculation of such rates and would seek to head further in relation to the matter if the Full Bench, as currently constituted, intended to determine this controversy in the course of settling the terms of Schedule B. However, we suggest that this should not be necessary as the issue is clearly a matter that is related to AM2020/1 and will potentially be impacted by any decision in those proceedings.
17. We further observe that any variation to the Award to include Schedule B prior to the resolution of AM2020/1 may impact the finalisation of that matter.
18. Given the circumstances, it would be prudent to not include schedule B in any final variation determination issued prior to the resolution of AM2020/1 or to refrain from issuing a final variation determination at this stage.

Difficulties with the Full Bench issuing a final variation determination prior to the conclusion of AM2020/1

19. The Employer Parties seek leave to identify three potential difficulties with the Full Bench proceeding to issue a final variation determination prior to the resolution of AM2020/1. We do not wish to unduly delay the resolution of the current proceedings but raise such matters out of a concern to ensure that these proceedings not complicate the resolution of AM2020/1 or prejudice any party's interest in that matter. We acknowledge that the Full Bench has adopted a course in the current proceedings which had been directed at achieving such an outcome while still progressing the development of the exposure draft of the award. The three difficulties that we raise are as follows.
20. *Firstly*, the Employer Parties are concerned that if a final determination took effect prior to any determination issued in AM 2020/1 it would vary clauses in the Award that were not the subject of proposed variations pursued in AM2020/1, but which were nonetheless referred to in argument in those proceedings as contextual considerations relevant to the proper construction of certain

contentious provisions and/or the existence of an ambiguity or uncertainty in the terms of the Award. This may then impact upon whether the jurisdictional fact of an ambiguity, uncertainty or error could be said to exist so as to permit a variation to the Award pursuant to s.160.

21. One such clause as referred to above is cl. 14 Minimum weekly wages. The current provision does not include minimum hourly rates. This was an aspect of the instrument that was pointed to by the Employer Parties in arguments in support of the claims in AM2020/1. The ED and DVD propose to alter this through the inclusion of minimum hourly rates and related provisions in proposed cl.15. We would not oppose such a change ultimately being made, but contend that this should not occur prior to the resolution of AM2020/1.
22. A further potentially problematic proposed variation is the deletion of *Schedule A Transitional Provisions*. The substantive content and language utilised in the schedule was the subject of significant attention by the parties in AM2020/1. Again, the application in AM2020/1 did not seek to amend Schedule A but it was referred to by the Employer Parties in support of the claims advanced in the proceedings. Given the schedule no longer has operative effect we would support its ultimate removal from the Award, but again we suggest that it should not occur prior to the resolution of AM2020/1.
23. *Secondly*, we are concerned that the approach of replacing the current terms of the Award with the contents of the proposed schedule (as opposed to simply not altering provisions relevant to AM2020/9) may affect the consideration in AM2020/1 of whether the instrument contains an error, as contemplated under s.160 and asserted by the Employer Parties in AM2020/1. That is, we are concerned that the contents of the award could no longer be said to be in a form that did not reflect the tribunal's intention³, as we have argued in AM2020/1. At the very least, we are concerned that a party opposed to the changes pursued in AM2020/1 may raise an argument to this effect. Accordingly, for abundant

³ This was the approach to identification of an error pursuant to s.160 adopted in 4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2020 [2016] FWCFB 4418 at [73].

caution we contend that the Award ought not be varied in the manner proposed by the variation determination until AM2020/1 is finalised.

24. *Thirdly*, we raise a concern that the Commission may not have power to vary a final determination once issued. The November Decision suggests that the approach of the Commission would be to issue a final determination and to subsequently vary its terms in light of any Determination of the Full Bench in AM2020/1. At the risk of being overly cautious, we note that we have not identified any provision in the Act that expressly affords the Commission a power to vary an issued variation determination. There may be ways of addressing any such limitation, such as issuing a further variation determination if necessary, but we nonetheless identify this as a further complication weighing against proceeding to finalise an award variation determination at this stage.
25. Regardless of any technicalities as to whether any issued variation determination can be varied, we note that it would undoubtedly be simpler for the parties that apply the award for any variations flowing from the exposure draft process and AM2020/1 to be operative at the same time.

Conclusion

26. For the reasons outlined above, we propose that the Full Bench should refrain from issuing a final variation determination until the outcome of AM2020/1 is known. Without indicating that the ANMF's views as to the veracity of each of the matters addressed in these submissions, Ai Group notes the ANMF has indicated that it does not oppose this course of action.