



Australian  
Nursing &  
Midwifery  
Federation

Fair Work Commission

4 Yearly Review of Modern Awards

Matter No.: AM2019/17

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

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

8 JUNE 2021



1. This submission is lodged on behalf of the Australian Nursing and Midwifery Federation (**ANMF**) in response to the Decision<sup>1</sup>, Exposure Draft<sup>2</sup> and Draft award Variation Determination (**DVD**)<sup>3</sup> of the Full Bench issued on 18 May 2021.
2. The ANMF has identified some outstanding issues which need to be addressed in order to finalise AM2019/17 with respect to the *Nurses Award 2010* (**Award**).

#### A. Definition of “casual hourly rate”

3. Inserting a definition of the “casual hourly rate” into the Award is appropriate. However, as currently worded in the DVD, the new award will effectively have two definitions of “casual hourly rate”:
  - a. One in clause 2, which references rates at clause 15 (which do not contain casual hourly rates)
  - b. One at clause 11.2, which in details spells out how the “casual hourly rate” is calculated.
4. To avoid confusion, the **ANMF recommends** there should be only one definition of the “casual hourly rate” and that this should be the detailed wording at clause 11.2. This can be done by changing the wording in clause 2 so that it refers readers to clause 11.2. The wording in clause 2 would be changed as follows (underline for additions and strikethrough for removal):

**casual hourly rate** ~~has the meaning given in clause 11.2 means the hourly rate for a casual employee’s classification and pay point specified in clause 15, inclusive of the casual loading.~~

#### B. Interaction of casual loading and shiftwork

5. Clause 11.5 in the DVD states:

A casual employee will be paid shiftwork loadings calculated on the minimum rate of pay applicable to their classification and pay point, excluding the casual loading with the casual loading component then added to the penalty rate of pay.
6. Clause 11.5 of the DVD is currently clause 10.4(d) in the Award, which states:

A casual employee will be paid shift allowances calculated on the ordinary rate of pay excluding the casual loading with the casual loading component then added to the penalty rate of pay.
7. In updating the language of Award clause 10.4(d) to new clause 11.5 in the DVD the phrase “calculated on the minimum rate of pay applicable to their classification and pay point” has been equated with “calculated on the ordinary rate of pay”. With respect to casual employees, this is not the same concept, as the ordinary rate of pay for casual employees *includes* the casual loading, whereas the minimum rate of pay applicable to the classification and pay point *does not*

<sup>1</sup> [\[2021\] FWCFB 2800](#) (18 May 2021)

<sup>2</sup> [Exposure draft - Nurses Award - changes tracked - 17 May 2021](#) (18 May 2021)

<sup>3</sup> [Draft award variation determination - Nurses Award - 17 May 2021](#) (18 May 2021)



include the casual loading. This concept of the ordinary rate for casual employees was spelled out in *Domain Aged Care*<sup>4</sup> when the Full Bench stated:

“[18]...It is already clear that the **ordinary rate for casuals is the loaded rate**. Clause 10.4(d) specifies a different arrangement in respect of shift allowances, because otherwise they would have been subject to the general position that penalties are applied to the loaded casual rate, and this was not intended to be the case of shift allowances...” (Emphasis added)

8. In order to use consistent language and ensure clause 11.5 of the DVD accurately reflects the current conditions for the Award, the **ANMF recommends** that clause 11.5 be drafted as follows (underline for additions):

A casual employee will be paid shiftwork loadings prescribed in clause 20.2 calculated on the minimum hourly rate of pay applicable to their classification and pay point, (i.e. excluding the casual loading) with the casual loading component prescribed in clause 11.2(b) then added to the penalty rate of pay.

### C. Consistency of language concerning rates of pay

9. Throughout the DVD there are various descriptions used to describe the hourly rates of pay for full-time and part-time employees. These include:
- “minimum hourly rate applicable to their classification and pay point”<sup>5</sup>;
  - “the minimum hourly rate”<sup>6</sup>; and
  - “their minimum hourly rate”<sup>7</sup>
10. Throughout the DVD there are various descriptions used to describe the casual hourly rates of pay. These include:
- “casual hourly rate applicable to their classification and pay point”<sup>8</sup>; and
  - “casual hourly rate”<sup>9</sup>; and
11. The ANMF considers that using consistent language throughout the Award is important for clarity. The “minimum hourly rate applicable to their classification and pay point” should be used for full-time and part-time employees whenever describing the rate of pay as this is the clearest wording.
12. For casual employees, “casual hourly rate” at clause 11.2 of the DVD already includes as part of its definition the concept of “the minimum hourly rate applicable to their classification and pay point”. Therefore, describing rates for pay for casual employees can simply be the “casual hourly rate”.

<sup>4</sup> [2019] FWCFB 1716 (17 April 2019)

<sup>5</sup> Clauses 11.2(a), 11.2(b), 11.5, 19.1(a)(i), 19.1(a)(ii), 19.1(a)(iii), 19.4(c), 28.2(a)(i) and 28.6(a)

<sup>6</sup> Clauses 19.3(b), 21.1 and 21.2

<sup>7</sup> Clauses 20.2(a) and 20.2(b)

<sup>8</sup> Clauses 19.2(a)(i), 19.2(a)(ii), 19.2(a)(iii) and 28.2(a)(ii)

<sup>9</sup> Clauses 11.2, 19.3(b), 21.1 and 21.2



13. Based on the above criteria, the **ANMF recommends** the following changes for consistency:

Clause number	Wording changed. <u>Underline</u> for additions. <del>Strikethrough</del> for removal.
19.2(a)(i)	Monday to Saturday (inclusive)— <b>150%</b> of the casual hourly rate <u>applicable to their classification and pay point</u> for the first 2 hours and <b>200%</b> <u>of the casual hourly rate</u> after 2 hours;
19.2(a)(ii)	Sunday— <b>200%</b> of the casual hourly rate <del>applicable to their classification and pay point</del> ; and
19.2(a)(iii)	Public holidays— <b>250%</b> of the casual hourly rate <del>applicable to their classification and pay point</del> .
19.3(b)	EXAMPLE: By making an agreement under clause 19.3 an employee who worked 2 overtime hours at 150% of the minimum hourly rate <u>applicable to their classification and pay point</u> (150% of the casual hourly rate in the case of casual employees) is entitled to 3 hours' time off.
20.2(a)	Where an employee works a rostered afternoon shift between Monday and Friday, the employee will be paid a loading of <b>12.5%</b> of <del>their the</del> minimum hourly rate <u>applicable to their classification and pay point</u> .
20.2(b)	Where an employee works a rostered night shift between Monday and Friday, the employee will be paid a loading of <b>15%</b> of <del>their the</del> minimum hourly rate <u>applicable to their classification and pay point</u> .
21.1	Where an employee is rostered to work ordinary hours between midnight Friday and midnight Saturday, the employee will be paid <b>150%</b> of the minimum hourly rate <u>applicable to their classification and pay point</u> ( <b>150%</b> of the casual hourly rate in the case of casual employees) for the hours worked during this period.
21.2	Where an employee is rostered to work ordinary hours between midnight Saturday and midnight Sunday, the employee will be paid <b>175%</b> of the minimum hourly rate <u>applicable to their classification and pay point</u> ( <b>175%</b> of the casual hourly rate in the case of casual employees) for the hours worked during this period.
28.2(a)(ii)	For a casual employee, <b>200%</b> of the casual hourly rate <del>applicable to their classification and pay point</del> .



#### D. References to “time” not converted correctly

14. Clause 13.4(c) in the DVD states:

- (c) 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 **200%** until released from duty for such period.

15. Clause 13.4(c) of the DVD is currently clause 23.3 in the Award, which states:

- 23.3** If, on the instruction of the employer, an employee resumes or continues to work without having had ten consecutive hours off duty, or eight hours as agreed, they will be paid at the rate of double time until released from duty for such period.

16. Clause 19.4(c) in the DVD states:

- (c) If, on the instruction of the employer, an employee resumes or continues to work without having had 10 consecutive hours off duty, they will be paid at the rate of **200%** of the minimum hourly rate applicable to their classification and pay point until released from duty for such period. The employee will then be entitled to be absent until they have had 10 consecutive hours off duty without loss of pay for rostered ordinary hours occurring during the absence.

17. Clause 19.4(c) of the DVD is currently clause 28.3(c) in the Award, which states:

- (c) If, on the instruction of the employer, an employee resumes or continues to work without having had 10 consecutive hours off duty, they will be paid at the rate of double time until released from duty for such period. The employee will then be entitled to be absent until they have had 10 consecutive hours off duty without loss of pay for rostered ordinary hours occurring during the absence.

18. Clause 28.2(b) in the DVD states:

Businesses that operate seven days a week shall recognise work performed on 25 December which falls on a Saturday or Sunday and, where because of substitution, is not a public holiday within the meaning of the NES with the Saturday or Sunday payment (as appropriate) plus an additional loading of **50%** of the employee’s ordinary time rate for the hours worked on that day. All work performed on the substitute day by an employee will receive an additional loading of **50%** of the ordinary time rate for the hours worked on that day instead of the rate referred to in clause 28.2(a).

19. Clause 28.2(b) of the DVD is currently clause 32.2 in the Award which is worded identically, except the reference to clause 28.2(a) is instead clause 32.1.

20. In *Domain Aged Care*<sup>10</sup> the Full Bench stated:

“[19] The Commissioner’s conclusion that overtime penalties are also paid on the loaded casual rates of pay is in our view also correct. **Clause 28.1 simply speaks of ‘time and a half for the first two hours and double time thereafter’ for Monday to Saturday work, ‘double time’ for Sunday and ‘double time and a half for public holidays.’ The relevant ‘time earnings’ for a casual under clause 10.4 include the casual loading.** Further, clause 28.1(c) provides that overtime rates are in substitution for and are not cumulative upon shift and weekend premiums. Nothing is said of the casual loading being excluded. We appreciate that this sub-clause is concerned with applying one penalty to the exclusion

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<sup>10</sup> [\[2019\] FWCFB 1716](#)



of another, rather than precluding the calculation of a penalty based on a loaded rate, which is the focus of the interpretative controversy in this instance. Nonetheless, clause 28.1(c) is a limitation on the interaction of different penalties, and nothing is said about confining the application of the casual loading.” (Emphasis added)

21. In the *OFC October Decision*<sup>11</sup>, the Full Bench endorsed the approach of *Domain Aged Care* stating:

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

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

...

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

22. The decision in *Domain Aged Care*, which has subsequently been followed in the *OFC Decisions*<sup>12</sup> and the *January 2021 decision*<sup>13</sup>, makes it clear that “*time*” in the context of casual employees is calculated on a compounding basis unless there is some provision which expressly indicates otherwise.<sup>14</sup>
23. Clause 13.4(c) in the DVD provides for the payment at the “...rate of **200%**...” as opposed to the current clause which provides for the “...rate of double time...”. Similarly, clause 19.4(c) in the DVD provides for payment at the “...rate of **200%** of the minimum hourly rate applicable to their classification and pay point...” as opposed to the current clause which provides for the “...rate of double time...”
24. The wording in the DVD with respect to clauses 13.4(c) and 19.4(c) would disadvantage casual employees who currently are paid double time on their casual rate of pay (i.e. the ‘compounding method’) per *Domain Aged Care*, the *OFC Decisions* and the *January 2021 Decision*.

<sup>11</sup> [\[2020\] FWCFB 5636](#) (30 October 2020)

<sup>12</sup> [\[2020\] FWCFB 4350](#) (18 August 2020) and [\[2020\] FWCFB 5636](#)

<sup>13</sup> [\[2021\] FWCFB 115](#) (13 January 2021)

<sup>14</sup> [\[2020\] FWCFB 4350](#) at [25]



25. The wording in the DVD with respect to clause 28.2(b) uses language that is inconsistent with the rest of the Award. The decisions referred to above have made it clear what “ordinary time” means in the context of casual employees and their penalty rates.
26. The **ANMF recommends** the following clauses are changed to be consistent with language used throughout the DVD.

Clause number	Wording changed. <u>Underline</u> for additions. <del>Strikethrough</del> for removal.
13.4(c)	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 <u>at the rate of 200% of the minimum hourly rate applicable to their classification and pay point (200% of the casual hourly rate in the case of casual employees)</u> until released from duty for such period.
19.4(c)	If, on the instruction of the employer, an employee resumes or continues to work without having had 10 consecutive hours off duty, they will be paid <del>at the rate of 200%</del> of the minimum hourly rate applicable to their classification and pay point <u>(200% of the casual hourly rate in the case of casual employees)</u> until released from duty for such period. The employee will then be entitled to be absent until they have had 10 consecutive hours off duty without loss of pay for rostered ordinary hours occurring during the absence.
28.2(b)	Businesses that operate seven days a week shall recognise work performed on 25 December which falls on a Saturday or Sunday and, where because of substitution, is not a public holiday within the meaning of the NES with the Saturday or Sunday payment (as appropriate) plus an additional loading of <b>50%</b> of the <u>minimum hourly rate applicable to the relevant classification and pay point (50% of the casual hourly rate in the case of casual employees)</u> <del>employee’s ordinary time rate</del> for the hours worked on that day. All work performed on the substitute day by an employee will receive an additional loading of <b>50%</b> of the <u>minimum hourly rate applicable to the relevant classification and pay point (50% of the casual hourly rate in the case of casual employees)</u> <del>ordinary time rate</del> for the hours worked on that day instead of the rate referred to in clause 28.2(a).

#### E. Additional leave days by mutual agreement

27. Clause 28.6(a) in the DVD states:

- (a) Instead of being paid **200%** of the minimum hourly rate applicable to their classification and pay point under clause 28.2(a), where the employer and employee mutually agree in writing at the time the public holiday is worked, an employee may be paid their ordinary rate of pay for time worked on a public holiday and have the same number of hours worked accrued, to be taken as leave. This leave may be taken in conjunction with a period of annual leave.



28. Clause 28.6(a) of the DVD is currently clause 32.5(a) of the Award, which states:

- (a) In lieu of being paid double time under clause 32.1, where the employer and employee mutually agree in writing at the time the public holiday is worked, an employee may be paid their ordinary rate of pay for time worked on a public holiday and have the same number of hours worked accrued, to be taken as leave, including in conjunction with a period of annual leave.

29. Based on the language in the clause concerning existing leave arrangements, it appears clause 28.6(a) of the DVD (clause 32.5(a) of the current Award) is not applicable to casual employees. However, the clause does not specifically state this.

30. The **ANMF recommends** it is made clear that clause 28.6 is not applicable to casual employees. This can be done by inserting clause 28.6(f) as follows:

- (f) The provisions of clause 28.6 will not apply to casual employees.