

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Reply Submission**

Finalisation of Exposure Drafts  
Black Coal Mining Industry Award  
2010  
(AM2019/17)

**13 May 2020**

**Ai**  
GROUP

# FINALISATION OF EXPOSURE DRAFTS

## AM2019/17 - BLACK COAL MINING INDUSTRY AWARD 2010

### 1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to:
  - The Directions issued by the Fair Work Commission (**Commission**) in the [Report](#) published on 23 May 2020 (**Report**) pertaining to outstanding matters in the finalisation of the exposure draft of the *Black Coal Mining Industry Award 2020* (**BCMI Award**).
  - Submissions of the Construction, Forestry, Maritime, Mining and Energy Union, Mining and Energy Division dated 20 April 2020 (**CFMMEU Submission**).
  - Submissions of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia dated 21 April 2020 (**ETU Submission**).
2. Specifically, the points addressed in these submissions pertain to the issues raised in paragraphs [19] – [22] of the Commission’s 12 March 2020 [Statement](#) and summarised at paragraphs [7] and [8] of the Report.
3. The CFMMEU Submission, supported by the ETU, proposes variations to clauses 23.1, 23.2, C.1.2, D.1.2 and D.2.2 which would alter the reference rate for the calculation of rates applicable to shiftworkers from the ‘minimum hourly rate’ to the ‘ordinary time rate’ and aggregate the weekend and shift penalties where shiftwork is undertaken on a Saturday or a Sunday.
4. Ai Group opposes these variations on the grounds that they do not reflect the current BCMI Award, would be inconsistent with relevant pre-modern awards applicable to the industry and would effectively compensate employees for the same disability twice.

## 2. CURRENT PROVISIONS OF THE AWARD

5. The CFMMEU claims, at paragraph [12] of its submissions, that the wording in subclauses 23.1 and 23.2 of the Exposure Draft is ‘markedly different’ to the relevant provisions in the current award, specifically in that loadings in the exposure draft are calculated on the ‘minimum hourly rate’ as opposed to an ‘ordinary time rate’ and/or an ‘overtime penalty rate’. At paragraph [14] of the CFMMEU submissions, it is stated that:

A plain and ordinary interpretation of “ordinary time rate” in the context of clause 22.2 of the Current Award would be the rate earned for working ordinary time on the relevant shift were the worker not a shiftworker. Based on the Current Award, the relevant ordinary time rate would be determined by reference to the rates of pay which are set out at clause 21.2 of the Current Award and include an entitlement to different rates of pay across weekdays, Saturdays and Sundays. This interpretation is consistent with how “overtime penalty rate” is also understood in this context, being a reference to the various payment for overtime rates set out at clause 17.2 of the Current Award. The drafting in the Exposure Draft no longer refers to either expression, instead referencing terms that specifically confine the application of these provisions.

6. Ai Group disagrees with this interpretation of clause 22.2 of the current award. The rates applicable to shiftworkers, as reflected in this provision are reproduced below:

### Shiftwork rates

Type of Shift	Shift Rates
<i>Day shift</i>	Ordinary time
<i>Afternoon and rotating night shifts</i>	
(a) Ordinary hours	(a) 115% of the ordinary time rate
(b) Overtime hours 6 or 7 day roster	(b) Overtime penalty rate plus 15% of the ordinary time rate for time worked
(c) All others	(c) Overtime penalty rate
<i>Permanent night shift</i>	
(a) Ordinary hours	(a) 125% of the ordinary time rate
(b) Overtime hours 6 or 7 day roster	(b) Overtime penalty rate plus 25% of the ordinary time rate for time worked
(c) All others	(c) Overtime penalty rate

7. Clause 21.2 of the current award provides for rates of pay applicable for hours worked by an employee for ordinary hours of work:

Day of week	Rate of Pay
Monday to Friday	Single time
Saturday	First 4 hours at time and a half
	After 4 hours at double time
Sunday	Double time

8. Neither 'ordinary time rate' or 'overtime penalty rate' are defined in the current Award.
9. The general approach to the construction of industrial instruments is set out in the judgment of French J, as his Honour then was, in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*:<sup>1</sup>

The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '...the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken'

10. The structure of the BCMI Award strongly suggests that the rates mandated under clauses 22.1 and 22.2 of the current award are not to be applied concurrently. The remuneration for working on weekends, as well as for performing shiftwork are described in clauses 22.1 and 22.2 of the current award respectively as complete rates of pay rather than separate loadings which may be added together. Some ambiguity is inherent in the current wording of the Award in that there is no clear statement as to how the two provisions are to interact. This question caused some confusion in the earliest

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<sup>1</sup> [2006] FCA 813, [438].

stages of the 4-yearly review. The [first exposure draft](#) released for the BCMI Award on 26 September 2014 included two separate tables for penalty rates applicable to shiftwork (at clause 13.1) and weekend work (clause 13.2). The table which included the penalties payable on Saturday and Sunday was titled – “Weekend work – Other than shiftworkers”. A note underneath this table asked parties to confirm whether the penalties under clause 21 of the current award were applicable to employees “other than shiftworkers”.

11. Ai Group did not address this question in our submissions responding to the first exposure draft for the BCMI Award. However, both the Coal Mining Industry Employer Group (**CMIEG**) and the CFMEU, in a [joint submission](#) dated 20 October 2014, confirmed that each considered the penalties in clause 21 of the current award applied to “other than shiftworkers”. However, in a subsequent [submission](#) filed by the CFMMEU on 19 January 2015, the union stated that in that regard, the response was not intended to imply any exclusion of the application of the penalties to shiftworkers.<sup>2</sup> The CFMEU claimed that the heading at clause 13.2 was misleading and that as such the words “other than shiftworkers” should be deleted.
12. In its Decision of 23 October 2015, the Full Bench accepted the CFMEU’s submission and proposed to remove the reference to “other than shiftworkers” from the heading in clause 13.2.<sup>3</sup> This change was made in the 4 November 2015 iteration of the exposure draft.
13. Although the impact of this alteration to the drafting was not further explored in the decision, the CFMEU submitted on 3 December 2015 that rates be added to the tables in Schedules C and D of the exposure draft for afternoon and night shiftworkers who work on Saturday or Sunday.<sup>4</sup> The Commission determined to update the rates in the relevant schedules in a Decision issued on 28 June 2018.<sup>5</sup> The version of the exposure draft subsequently published on 13

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<sup>2</sup> AM2014/67, CFMMEU (Submission), 19 January 2015, [11].

<sup>3</sup> [2015] FWCFB 7236, [16].

<sup>4</sup> AM2014/67, [CFMEU \(Submission\)](#), 3 December 2015, [10].

<sup>5</sup> [2018] FWCFB 3802, [100].

February 2019 did not aggregate the weekend and shift penalties where ordinary hours are worked on a weekend but rather applied the relevant weekend penalty on its own.

14. Ai Group considers the updated rates which were inserted for afternoon and night shiftworkers who work ordinary hours on a Saturday or Sunday were appropriate. Where the Commission has determined that the rates applicable to weekend work in clause 23.2 of the exposure draft and shiftwork in clause 23.1 of the exposure draft are potentially relevant in respect of the same hours of work, any resulting ambiguity may be resolved in this case by applying the higher of the two. No words are currently present in the exposure draft which clearly state whether the rates in clause 23.1 and 23.2 are paid in substitution or concurrently. However, as the relevant provisions refer to complete rates of pay as opposed to separate loadings which may be aggregated, the ordinary meaning of the current provisions in the body of the exposure draft strongly suggest that no aggregation is intended. This reasoning may be applied equally in respect of clauses 22.1 and 22.2 of the current award.
15. A similar matter emerged in *Transport Workers' Union of Australia v Saputo Dairy Australia* [2020] FWC 1271 which concerned a dispute regarding whether public holiday and shift penalties in an enterprise agreement were to be paid concurrently. Colman DP considered that a requirement to pay employees fifteen to twenty per cent “more than ordinary rates” for certain types of shiftwork could be satisfied through the payment of a higher penalty rate applicable on public holidays. Colman DP said at paragraphs [20] –[21] of the decision:

First, the starting point is to consider the provisions which create the entitlement to shift penalties. Clauses 28.2.1 and 28.2.2 state that the company must pay employees working the prescribed shifts the relevant percentage ‘more than ordinary rates’ while the employees are working those shifts. These provisions do not prescribe an absolute entitlement to payment of a particular quantum whenever they work shifts. They do not state that, in recognition of performing shift work, employees are to be paid a shift allowance of an additional 15% or 20%. Instead they provide for a relative entitlement: employees must be paid 15% or 20% ‘more than ordinary rates.’

When employees perform shift work on a public holiday, they receive the public holiday loading that applies under clause 37 to the particular holiday in question, which is at least 150% of the ordinary rate. The company complies

with the obligation to pay 15% or 20% more than ordinary rates for shift work by observing the requirement under clause 37 of the Agreement to pay the relevant public holiday penalties. For example, an employee who works afternoon shift on Boxing Day is paid a loading of 150% under clause 37; this exceeds '15% more than the ordinary rate'.

16. Both clauses 23.1 and 23.2 of the exposure draft and 21.2 and 22.2 of the current award set minimum rates of pay in respect of shift work and weekend rates. Where each of these have been deemed applicable for the same workers in respect of the same work, it would be reasonable in this case, as the Commission as already reflected in the summary tables attached to the exposure draft to consider that the higher weekend penalty will satisfy the need to compensate employees for the lower shift penalty rates.

### **Meaning of 'ordinary time rate' and 'ordinary rate of pay'**

17. On the interpretation espoused by the CFMMEU and the ETU, shiftworkers would, on weekends, receive a rate of pay which is calculated on an 'ordinary time rate' which does not equate to 'single time' but would rather be a 'movable rate' which alters depending on whether 'ordinary time' is worked on a weekday, a Saturday for the first 4 hours, a Saturday after the first 4 hours or a Sunday. Ai Group considers that there is obvious complexity in applying this definition to the relevant reference rate for shiftworkers. It is also inconsistent with the ordinary meaning of the term 'ordinary time rate' which appears in clause 22.2. If the intent was for multiple rates to potentially be taken into account in calculating the shift rate, the award could as easily have been drafted to make this clear.
18. The term 'ordinary rate of pay' is relatively similar to the term 'ordinary time rate'. These terms have an industrial meaning which suggests that they do not usually include penalties. In *Kucks v CSR*<sup>6</sup>, Madgwick J considered the meaning of the phrase "ordinary rate of pay" under *CSR Staff (Consolidated) Award 1992*. The long service leave clause in the Award included the following provision (emphasis added): "Each employee shall be paid for each week of

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<sup>6</sup> *Kucks v CSR Ltd* (1996) 66 IR 182

*leave the employees ordinary rate of pay applicable at the date of taking the period of leave.*

19. Justice Madgwick rejected the argument that the phrase “ordinary rate of pay” included shift allowances and other penalties. The following extract from the decision is relevant:<sup>7</sup> (emphasis added)

In Australia, the term “ordinary pay” has, according to the Macquarie Dictionary (2nd ed) entered the language, as meaning:

“ordinary pay...remuneration for an employee’s normal weekly number of hours fixed under the terms of his employment but excluding any amount payable to him for shift work, overtime, or other penalty.”

That meaning of ordinary is even more apt in the context of the present award.

...

When the framer(s) of the award wished to indicate that full, usual pay should be paid, they had no difficulty in making their meaning plain. For example, in cl 16, in relation to annual leave, it was provided:

“(a) . . . annual leave shall be granted on full pay ...

...

Conclusion

For these reasons, the claim must fail.

20. Also, in *Fonterra Brands (Australia) Pty Ltd v AMWU*, a Full Bench of the Commission relevantly stated: (emphasis added):<sup>8</sup>

[16] The term ‘ordinary pay’ has a well-established and common industrial meaning and usage, namely remuneration for an employee’s weekly hours but excluding any amount paid for shift work, overtime or other penalty. Giving the words of the Agreement their ordinary and ‘industrial context’ meaning, we consider there is no room for a conclusion such as that which was reached by the Commissioner.

[17] The meaning of ‘ordinary pay’ in an award context was considered by Madgwick J in *Kucks v CSR Ltd* where it was held, having regard to the High Court decision in *Scott v Sun Alliance*, that terms like “ordinary rate of pay” and “standard hours” have well-known meanings in the sphere of industrial relations in this country. His Honour also referred to the definition in the Macquarie Dictionary:

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<sup>7</sup> Ibid, at 186-188.

<sup>8</sup> [2015] FWCFB 3423



“In Australia, the term “ordinary pay” has, according to the Macquarie Dictionary, 2nd edn, entered the language, as meaning:

“ordinary pay .... remuneration for an employee’s normal weekly number of hours fixed under the terms of his employment but excluding any amount payable to him for shift work, overtime, or other penalty.”

[18] The award provision in that case dealt with the payment to be made to employees on termination of employment in respect of untaken long service leave. His Honour said that the adoption of the generally accepted meaning of ‘ordinary pay’ in the provision was even more apt in the context of the award that was before the Court. In this regard reference was made to other provisions of the award dealing with matters such as annual leave and sick leave where it was provided that such leave shall be granted “on full pay”. It was said that when “the framer(s) of the award wished to indicate that full, usual pay should be paid, they had no difficulty in making their meaning plain.”

[19] The term ‘ordinary pay’ is not defined in the Agreement. In these circumstances, and unless there are strong contextual or other reasons for adopting a different approach, we consider that ‘ordinary pay’ as it is used in the Agreement should be given its generally understood and accepted meaning in industrial usage. This is also the meaning which can be construed from a consideration of the Agreement as a whole and which is generally in line with the purpose of providing redundancy entitlements.

[20] There is no consistent use of the term ‘ordinary pay’ in the Agreement that suggests that the term is to have anything other than its common industrial meaning. Indeed several provisions of the Agreement specifically identify whether or not various loadings, penalties and allowances are to be included in calculations for certain entitlements. For example, clause 5.1.4 of the Agreement provides that changes made in order to improve productivity “will not reduce an employee’s average ordinary weekly wages exclusive of any shift allowance.” Clause 18.1 provides that compassionate leave will be paid “at the full rostered shift wage rate, including shift penalties incorporated in the roster.”

21. In the present matter, the phrase ‘ordinary time rate’ only appears in clause 22.2 of the Award. The similar phrase ‘ordinary time hourly rate’ only appears in clause C.1 of the Award pertaining to a preserved allowance for ‘live sewer work’ and has not been included in the exposure draft. As such, there is no consistent usage of the term which would demonstrate that its intended meaning is other than the common industrial meaning referred to in *Kucks v CSR* and *Fonterra Brands (Australia) Pty Ltd v AMWU*.
22. It follows that the ‘ordinary time rate’ referred to in clause 22.2 of the current Award should not be interpreted as including the weekend penalties contained in clause 21.2 of the current Award. As the CFMMEU has not provided any arguments which should persuade the Commission in favour of the merits of

such an approach, Ai Group urges the Commission to reject the unions' claim that the shift and weekend penalties are to be paid concurrently.

23. Moreover, there appears to be an anomaly in the variation proposed by the CFMMEU. The proposed variations to clauses 23.1 and 23.2 would change the reference rate from the minimum hourly rate to the 'ordinary time rate' upon which the shift and weekend penalties are calculated in clauses 23.1 and 23.2 of the exposure draft respectively. However, the variations proposed to clauses C.1.2, D.1.2 and D.2.2 would aggregate the additional penalties applied in respect of shift and weekend work where applicable. These two approaches lead to different and inconsistent results.
24. For example, a full-time Mineworker receives a minimum hourly rate of pay under Schedule A of the exposure draft of \$26.15. If the 'ordinary time rate' for such an employee undertaking a permanent night shift on a Sunday is 200% of this minimum hourly rate i.e. \$52.30, the subsequent application of the 25% penalty on this figure under clause 23.1 pursuant to the variation proposed by the CFMMEU results in an hourly rate of \$65.38.
25. If the same parameters were applied to such an employee with the variations proposed by the CFMMEU to clause C.1.2, the calculation turns up a different result as the additional penalties are applied to the 'minimum hourly rate' as opposed to the CFMMEU's interpretation of the 'ordinary time rate':  $225\% \times 26.15 = \$58.84$ .
26. In addition, some further ambiguity in the CFMMEU's submissions is derived from the assertion (at paragraph [14]) that 'ordinary time rate' should include the relevant weekend penalties while the proposed variations to clauses 23.1 and 23.2 of the Award would calculate both of these rates on the 'ordinary time rate'. If both the shift penalty and the weekend penalty are to be calculated on the 'ordinary time rate', it is absurd to suggest that the weekend penalty is included in this rate.

27. Nevertheless, regardless of whether the CFMMEU is contending that the weekend penalty is to be incorporated into the reference rate for the purposes of calculating the shift penalty or that the shift and weekend penalties should be aggregated, for the reasons outlined in Ai Group’s submissions, such variations would not be consistent with the current BCMI Award.

**Pre-modern awards**

28. Further support is lent to Ai Group’s interpretation of the intended interaction between the shift and weekend penalties in the BCMI Award by the nature of those penalties and the usage of the terms ‘ordinary hours’, ‘ordinary time rate’ and ‘ordinary rate’ in the chief predecessor instruments which covered the black coal mining industry prior to the Award Modernisation process.

29. Similar provisions governing shift and weekend penalties to those which exist in the current BCMI Award were present in both the *Coal Mining Industry (Staff Award, 2004 (Staff Award)* and the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997 (Production and Engineering Award)*.<sup>9</sup>

30. The relevant provisions under the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* are reproduced below:

**The Coal Mining Industry (Production and Engineering) Consolidated Award 1997**

**27.2 Shift Work Rates**

Type of Shift:	Shift Rates:
Day Shift	Ordinary Time
Afternoon and Rotating Night Shifts:	
Ordinary Hours	115% of the ordinary time rate

<sup>9</sup> The *Coal Mining Industry (Production and Engineering) Consolidated Award 1997*, clause 27.2, 28.3; *Coal Mining Industry (Staff) Award, 2004*, clause 24.2, 25.4.

Overtime Hours	
6 and 7 day roster/or ex-FEDFA members	overtime penalty rate plus 15% of the ordinary time rate for the time worked
all others	overtime penalty rate
Permanent Night Shift	
Ordinary Hours	125% of the ordinary rate
Overtime Hours	
6 and 7 day roster/or ex-FEDFA members	overtime penalty rate plus 25% of the ordinary time rate for the hours worked
all others	overtime penalty rate

...

### **28.2 Payment for Weekend Work for Monday to Friday employees**

#### **Day of the Weekend:-**

#### **Rate of Pay:-**

Saturday

first 3 hours - time and a half

after 3 hours - double time

Sunday

double time

### **28.3 Payment for Weekend Work for 7, 6 or 5 Day Weekend Roster Employees**

#### **Day of the Weekend:-**

#### **Rate of Pay:-**

Saturday - ordinary hours

first 4 hours - time and a half

after 4 hours - double time

Saturday - overtime hours

double time

Sunday

double time

31. As can be seen from the extracted clauses above, the ‘ordinary time rate’ and the ‘ordinary rate’ are applicable reference rates for ascertaining the shift rate. The usage of the phrase ‘ordinary rate’ elsewhere in the Production and Engineering Award strongly indicates that the meaning was not intended to incorporate weekend penalties. Under clause 29.6 of the Award, employees covered by this Award were, when taking annual leave, to be paid the greater of: (emphasis added)
- The employee’s ordinary rate of pay plus a loading of 20% of that rate; or
  - The employee’s projected roster earnings for the period of the annual leave, which included, for 6 and 7 day roster employees ‘rostered Saturday, Sunday and Public Holidays (up to double time)’
32. The clear indication from the two options given above for annual leave payments under the Production and Engineering Award is that the latter option which expressly incorporated amounts including rostered Saturdays and Sundays would be included in the ‘annual leave payment’ only if this combined figure exceeded the ‘ordinary rate of pay’ plus 20%. If the weekend penalties were included within the definition of ‘ordinary rate of pay’, this would likely have been explicitly stated in the first, as it was in the latter bullet point.
33. A similar implication emerges from the definition of ‘ordinary time rate’ in the Staff Award. The key provisions of which are reproduced below:

**Coal Mining Industry (Staff) Award, 2004**

**24.2 What are the shift-work rates?**

<b>Type of shift</b>	<b>Shift rates</b>
<b>Afternoon and rotating night shifts</b>	
Ordinary hours	115% of the ordinary time rate
Overtime hours: six and seven day roster	Overtime penalty rate (plus 15% of the ordinary time rate for the time worked)
all others	Overtime penalty rate

Type of shift	Shift rates
<b>Permanent night shift</b>	
Ordinary hours	125% of the ordinary rate
Overtime hours: six and seven day roster	Overtime penalty rate (plus 25% of the ordinary time rate for the hours worked)
all others	Overtime penalty rate

...

### 25.3 Payment for weekend work for Monday to Friday employees

Day of the weekend	Rate of pay
Saturday	First three hours - time and a half After three hours - double time
Sunday	Double time

### 25.4 Payment for weekend work for seven, six or five day weekend roster employees

Day of the weekend	Rate of pay
Saturday – ordinary hours	First four hours - time and a half After four hours - double time
Saturday – overtime hours	Double time
Sunday	Double time

34. Similar to the Production and Engineering Award and the current BCMI Award, the applicable shift rates utilise a reference rate termed the 'ordinary time rate' and the 'ordinary rate'. Although these terms are undefined, clear indication is present within this award that the intent was not to include 'weekend penalties' within the concept of the 'ordinary time rate' or the 'ordinary rate'.
35. As for the Production and Engineering Award, clause 26.6 of the Staff Award requires an employee taking annual leave to be paid the greater of:
- the employee's ordinary rate of pay plus a loading of twenty per cent of that rate, or
  - the employee's projected roster earnings for the period of annual leave, including (for 6 and 7 day roster employees), rostered Saturday, Sunday and Public holidays (up to double time).

36. It is apparent that, as for the Production and Engineering Award, the ‘ordinary rate of pay’ was not intended to include weekend penalties. If this were not the case, this would have been clearly articulated as it was in the latter bullet point. Moreover, if penalties such as those applicable on weekends were included in the ‘ordinary rate of pay’, with the 20% loading added on top, it would be unlikely that there would ever be a contest between the two options – the former would in most, if not all cases be the greater.
37. Additionally, in the case of the Staff Award, there is further support for the contention that ‘ordinary time rate’ and ‘ordinary rate’ did not incorporate weekend penalties, because this is consistent with the following definition of ‘ordinary hours’ in clause 5.3.3 of the Award: (emphasis added)
- Ordinary hours means the hours required to be worked (in accordance with clause 21.1.1) for the payment of the minimum rates of pay applicable for the employee’s classification as set out in clause 16.2
38. Although this definition has not been transferred into the modern BCMI Award, it strongly implies that weekend penalties were, in this relevant pre-modern award excluded from the concept of an ‘ordinary rate’.
39. As the Production and Engineering Award and the Staff Award were each influential predecessors to the BCMI Award, this context is persuasive in the argument that shift rates were not intended to be calculated upon a reference rate which includes weekend penalties.

### **Proposed variation**

40. If the Commission is minded to accept Ai Group’s interpretation as to how clauses 23.1 and 23.2 of the exposure draft are intended to interact, it is proposed that a variation is necessary to clarify that the weekend and shift penalties are not to be aggregated.
41. In order to avoid further disputes or misapplication of the relevant award provisions, Ai Group submits that a Note should be inserted to clause 23.2 in the following words:

Note: The rates prescribed by clause 23.2 are in substitution for and not cumulative upon the shiftwork rates prescribed by clause 23.1 of this award.

#### **Further issue – overtime “in excess of ordinary hours”**

42. Clauses C.1.4 and D.1.4 list the relevant overtime rates for full and part-time 6 and 7 day roster employees. The final column of the tables in these clauses sets a relevant rate of pay at 200% of the ‘minimum hourly rate’ for time worked ‘in excess of ordinary hours’.
43. The CFMMEU submission, at paragraphs [21] – [22] proposes altering the heading in the final column to read “all other overtime”.
44. The provisions governing overtime for 6 and 7 day rostered employees are in clauses 21.2(b) and 21.3 of the exposure draft. Unless one of the specific circumstances in clause 21.3 apply, all time worked in excess of or outside the ordinary hours of any shift by 6 day roster employees or 7 day roster employees is to be paid for at 200% of the minimum hourly rate. Clauses 17.2 and 22.2 of the current BCMI Award have the same effect for 6 and 7 day roster employees.
45. Ai Group agrees with the CFMMEU’s proposal to change the heading of the final column in clauses C.1.4 and D.1.4 as the variation would more closely reflect the overtime provisions in the body of the exposure draft and the current award as they pertain to 6 and 7 day roster employees.

#### **Further issue – overtime for other shiftworkers**

46. Clause 21.2(b) of the exposure draft provides that all time worked in excess of or outside the ordinary hours of any shift by the following employees will be paid for at the rate of 200% of the minimum hourly rate:
  - Employees who are 6 day roster employees or 7 day roster employee;
  - Employees who work a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays; or
  - Employees who work a roster which requires ordinary shifts on Saturday



and Sunday where the majority of the rostered hours on the Saturday or Sunday shifts fall between midnight Friday and midnight Sunday.

47. Separate rates of pay apply in respect of overtime for 6 and 7 day rostered employees under the circumstances outlined in clause 21.3(a) and 21.3(b).
48. Clauses C.1.3 and D.1.3 include tables which summarise the overtime rates of pay for full and part-time employees other than 6 and 7 day roster employees.
49. Clauses C.1.4 and D.1.4 include tables which summarise the overtime rates of pay for full and part-time 6 and 7 day roster employees.
50. No account is made in these tables for the overtime rates mandated under clause 21.2(b) for the employees listed in subclauses 21.2(b)(ii) and 21.2(b)(iii). Ai Group agrees that this is liable to cause confusion for any party reading the relevant Schedules pertaining to minimum rates of pay.
51. However, Ai Group disagrees that this matter may be resolved by simply defining all employees who fall within subclause 21.2(b) as shiftworkers and updating the relevant provisions of the Schedules accordingly. Such an amendment would inappropriately introduce a new definition of 'shiftworker' into the award.
52. The variation proposed by the CFMMEU would also extend the overtime rates mandated under clause 21.2(b) to shiftworkers who do not fall into the categories listed in clause 21.2(b)(i)-(iii).
53. Ai Group considers that an appropriate course of action to resolve this issue raised by the CFMMEU would be to include a note to clauses C.1.3 and D.1.3 as follows:

Note: These rates do not apply to employees referred to in cl. 21.2(b)(ii) and 21.2(b)(iii). For such employees, all overtime will be paid for at the rate of 200% of the minimum hourly rate