

IN THE FAIR WORK COMMISSION

Matter Number: AM2019/17 – 4 yearly review of modern awards – finalisation of exposure drafts – *Black Coal Mining Industry Award 2010*

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION
MINING AND ENERGY DIVISION

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Introduction

1. This submission is filed in response to the directions contained within the [Report](#) issued by Justice Ross on 23 March 2020 in relation to matter AM2019/17, being the 4 yearly review of modern awards – *Black Coal Mining Industry Award 2010*. That Report, and these submissions, concern the Exposure Draft of the *Black Coal Mining Industry Award 2010* published by the Fair Work Commission on 29 January 2020 (**Exposure Draft**).
2. In respect of the first direction, the CFMMEU confirms its agreement with the matters set out at [5] of the Report.

Background and issues in dispute

3. The Report identifies the first issue, which is the subject of these submissions, as being the shiftwork rates in Schedules C and D.
4. As set out in the [CFMMEU's submissions of 4 March 2020 \(CS\)](#), these rates predetermine issues that remain in dispute between the parties.¹ Those issues are dealt with below.
5. Until those substantive issues are dealt with the relevant rates set out in Schedules C and D of the Exposure Draft should be omitted in the same way that rates relating to other issues in dispute have also been omitted from the rates schedules of the Exposure Draft.²
6. These submissions deal with those substantive issues as they relate to shiftwork rates in the Exposure Draft, noting that clause 29.4 is to be dealt with separately, in accordance with direction 4 of the Report.

Shiftwork rates

7. Clause 22.1 of the Exposure Draft relates to shiftwork and is identical to clause 22.1 of the Current Award, except for the inclusion of clause 22.1(d).
8. Clause 22.2 of the Current Award provides:

Rates for shiftwork are payable as follows:

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

¹ [23].

² See, for example, clause D.2 of Schedule D which omits any overtime rates for casual employees engaged in staff classifications subject to the resolution of AM2017/51.

Permanent night shift

<i>(a) Ordinary hours</i>	<i>(a) 125% of the ordinary time rate</i>
<i>(b) Overtime hours 6 or 7 day roster</i>	<i>(b) Overtime penalty rate plus 25% of the ordinary time rate for time worked</i>
<i>(c) All others</i>	<i>(c) Overtime penalty rate</i>

9. Clause 22.2 of the Current Award does not appear in the Exposure Draft. It is ostensibly absorbed by other provisions, with ordinary hours dealt with at clause 23.1, and overtime hours dealt with at clause 21.3.

10. Clause 21.3 of the Exposure Draft, as to be amended in accordance with the Report, will read:

(a) All time worked in excess of or outside ordinary hours of an afternoon shift or a rotating night shift by a 6 day roster employee or a 7 day roster employee will be paid at 215% of the employee's ordinary base hourly rate of pay.

(b) All time worked in excess of or outside ordinary hours of a permanent night shift by a 6 day roster employee or a 7 day roster employee will be paid at 225% of the employee's ordinary base hourly rate of pay.

11. Clause 23 of the Exposure Draft sets out penalty rates. It does this in language which is different from that which appears in the Current Award, providing:

23.1 An employee will be paid the following rates for all ordinary hours worked during the following periods:

Shift	Penalty rate	Casual penalty rate (includes casual loading)
	% of minimum hourly rate	
Day	100%	125%
Afternoon and rotating night	115%	140%
Permanent night	125%	150%

23.2 Weekend work

An employee will be paid the following rates for all ordinary hours worked during the following periods:

Day	Period	Penalty rate	Casual penalty rate (includes casual loading)
		% of minimum hourly rate	
Saturday	First 4 hours	150%	175%
	After first 4 hours	200%	225%
Sunday	All hours	200%	225%

12. The wording in subclauses 23.1 and 23.2 of the Exposure Draft are markedly different to the relevant provisions in the Current Award, referring to a “minimum hourly rate” rather than the words used in the current provisions, by which the interpretation of these clauses is contingent on the application of an “ordinary time rate” and/ or an “overtime penalty rate”.
13. While neither of the relevant expressions are defined terms within the Current Award, “minimum hourly rate” is defined in the Exposure Draft³. This change in language appears to be where the controversy arises.
14. 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.
15. The effect of this is evident in the rates set out in clauses C.1.2, D.2.1 and D.2.2 of Schedules C and D respectively, where the rates set out for time worked on weekends disregards shiftwork rates in their entirety, in a manner which is inconsistent with the Current Award, but is arguably consistent with the wording and structure of the Exposure Draft.
16. It is submitted, as it was in the CS, that the rates set out in these tables is incorrect. This submission has accurately been reflected by the FWC in the Report at [22], with the exclusion of the relevant rates at D.2.2, which should include the relevant shiftwork loading for shiftwork casual staff employees working on a Saturday or a Sunday.
17. The issue with the rates in each of these tables as currently drafted is that they are based on the “minimum hourly rate” rather than considering an ordinary time rate which may be based on a rate which is different to the minimum hourly rate and may include penalty rates. The consequence of this change in language, and how it has been applied in the schedules to the Exposure Draft, is that 6 or 7 day roster employees no longer get the benefit of their shiftwork rates when performing weekend work under the Exposure Draft. This is despite the Current Award providing no such exclusion, no application having been made to vary the Current Award in this respect, and the substance of this matter having not been otherwise determined by the FWC throughout the four yearly review process.
18. The CFMMEU respectfully submits that such a change should not be accepted. The penalties owed to an employee in relation to working shiftwork are to address a detriment different to that which is paid in respect of working a Saturday or a Sunday. There is no basis, nor has any argument been made, for why one penalty should now cancel out the other in this review process or why

³ Exposure Draft, clause A.4 of Schedule A.

the entitlement should be interpreted to be capped based on one of two concurrent entitlements.

19. The CFMMEU proposes a variation to the current Exposure Draft provisions in order to resolve the ambiguity or uncertainty arising from the current drafting, as set out in Annexure A, attached to this submission.
20. Additionally, the FWC may consider including a further subclause to clause 23 which makes clear that subclauses 23.1 and 23.2 may apply concurrently.

Further issue – overtime “in excess of ordinary hours”

21. In preparing these submissions the CFMMEU has identified an ambiguity at C.1.4 of Schedule C and D.1.4 of Schedule D, in that the final column of each of these tables refers to overtime worked “in excess of ordinary hours”.
22. It is submitted that these columns create ambiguity which would be resolved by changing their header to refer to “all other overtime”. This change has been incorporated in the proposed variations set out at Annexure A.

Further issue – overtime for other shiftworkers

23. In preparing these submissions the CFMMEU has identified an ambiguity at C.1.3 of Schedule C and D.1.3 of Schedule D and associated errors at C.1.4 and D.1.4, in that each of these tables erroneously confines the application of clause 21.2(b) to employees that fall within the definition of clause 21.2(b)(i).
24. These tables need to be amended to, in the case of C.1.3 and D.1.3, exclude employees that fall within clause 21.2(b)(ii) and (iii) and, in the case of the tables at C.1.4 and D.1.4, to include those employees. The most convenient way to give effect to this would be to define all employees who fall within subclause 21.2(b) as “shiftworkers” for the purposes of the Exposure Draft, and amend the relevant provisions of the Schedules accordingly.
25. These suggested changes have not been included in the proposed variations set out at Annexure A, but can be provided upon the request of the FWC if the suggested approach is endorsed.

**Construction, Forestry, Maritime, Mining and Energy Union
Mining and Energy Division
20 April 2020**

ANNEXURE A

CFMMEU's proposed variation

The CFMMEU proposes the following variations to the exposure draft of the Black Coal Mining Industry Award 2010 as published by the Fair Work Commission on 29 January 2020 in order to address the issues set out in the above submissions.

1. Clause 23.1 of the Exposure Draft to be varied as follows:

23.1 An employee will be paid the following rates for all ordinary hours worked during the following periods:

Shift	Penalty rate	Casual penalty rate (includes casual loading)
	% of minimum hourly <u>ordinary time</u> rate	
Day	100%	125%
Afternoon and rotating night	115%	140%
Permanent night	125%	150%

2. Clause 23.2 of the Exposure Draft to be varied as follows:

23.2 Weekend work

An employee will be paid the following rates for all ordinary hours worked during the following periods:

Day	Period	Penalty rate	Casual penalty rate (includes casual loading)
		% of minimum hourly <u>ordinary time</u> rate	
Saturday	First 4 hours	150%	175%
	After first 4 hours	200%	225%
Sunday	All hours	200%	225%

3. Clause C.1.2 of Schedule C of the Exposure Draft to be varied as follows (and should include variations to the corresponding rates as calculated in the table):

**C.1.2 Full-time and part-time production and engineering employees—
shiftwork**

Day shift	Afternoon shift	Rotating night shift ¹	Permanent night shift ¹	Saturday (<u>Afternoon and Rotating Night Shift</u>)		Sunday (<u>Afternoon and Rotating Night Shift</u>)
				First 4 hours	After 4 hours	
% of minimum hourly rate						
100%	115%	115%	125%	150 165%	200 215%	200 215%

Saturday (<u>Permanent Night Shift</u>)		Sunday (<u>Permanent Night Shift</u>)
First 4 hours	After 4 hours	
150 175%	200 225%	200 225%

4. Clause C.1.4 of Schedule C of the Exposure Draft to be varied as follows (and should include variations to the corresponding rates as calculated in the table):

Afternoon and rotating night shift		Permanent night shift		In excess of ordinary hours All other overtime
Monday to Saturday	Sunday	Monday to Saturday	Sunday	
% of minimum hourly rate				
215%	215%	225%	225%	200%

5. Clause D.1.2 of Schedule D of the Exposure Draft to be varied as follows (and should include variations to the corresponding rates as calculated in the table):

D.1.2 Full-time and part-time staff employees—shiftwork

Day shift	Afternoon shift	Rotating night shift ¹	Permanent night shift ¹	Saturday (<u>Afternoon and Rotating Night Shift</u>)	Sunday (<u>Afternoon and Rotating Night Shift</u>)
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				First 4 hours	After 4 hours	<u>Night Shift</u>
% of minimum hourly rate						
100%	115%	115%	125%	150 165%	200 215%	200 215%

Saturday (<u>Permanent Night Shift</u>)		Sunday (<u>Permanent Night Shift</u>)
First 4 hours	After 4 hours	
150 175%	200 225%	200 225%

6. Clause D.1.4 of Schedule D of the Exposure Draft to be varied as follows (and should include variations to the corresponding rates as calculated in the table):

Afternoon and rotating night shift		Permanent night shift		<u>In-excess-of ordinary hours-All other overtime</u>
Monday to Saturday	Sunday	Monday to Saturday	Sunday	
% of minimum hourly rate				
215%	215%	225%	225%	200%

7. Clause D.2.2 of Schedule D of the Exposure Draft to be varied as follows (and should include variations to the corresponding rates as calculated in the table):

D.2.2 Casual staff employees—shiftwork

Day shift	Afternoon shift	Rotating night shift¹	Permanent night shift¹	Saturday (<u>Afternoon and Rotating Night Shift</u>)		Sunday (<u>Afternoon and Rotating Night Shift</u>)
				First 4 hours	After 4 hours	

% of minimum hourly rate						
125%	140%	140%	150%	175 <u>190%</u>	225 240%	225 240%

Saturday (Permanent Night Shift)		Sunday (Permanent Night Shift)
First 4 hours	After 4 hours	
175 200%	225 250%	225 250%