

## FAIR WORK COMMISSION

### Finalisation of Exposure Drafts - AM2019/17 AND AM2014/67 Black Coal Mining Industry Award 2010

#### Introduction

1. This submission is made on behalf of the Coal Mining Industry Employer Group (**CMIEG**) in response to the [Report](#) and Directions made by the Fair Work Commission (**Commission**) on 23 March 2020, in respect of the Exposure Draft of the Black Coal Mining Industry Award republished on [29 January 2020](#).

#### Direction 1

2. The CMIEG confirms its agreement to the matters set out in paragraph [5] of the Commission's Report of 23 March 2020.

#### Issue 1: Shiftwork rates Schedules C and D

3. The CMIEG disagrees with the submission of the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) dated [20 April 2020](#) and opposes the variations to the exposure draft which are proposed by the CFMMEU in Annexure A of that submission.
4. The CFMMEU contention appears to rest on the proposition that, in Clause 21.2 of the current Award the payments specified for work on Saturday and Sunday must be taken to include an entitlement to both the specified weekend penalty rates and the separate shift allowance from the current Clause 22.2.
5. A natural and straightforward interpretation of these provisions, taken together is that the Saturday and Sunday penalty rates themselves compensate for the requirement to work on those days. There is no persuasive reason, as a matter of interpretation of the terms of the current Award for treating as cumulative the shift allowances in Clause 22.2 of the current Award and the Saturday and Sunday penalty rates prescribed in Clause 21.2 of the current Award.
6. In addition there is no basis for treating the shift allowances and weekend penalties as cumulative in order to ensure that the Award satisfies the modern Award objective in section 134 of the Act. This conclusion is supported by the observations of the Full Bench of the Commission in *Re 4 Yearly Review of Modern Awards-Penalty rates* [2017] FWCFB 1001 at [143] and following. More recently, as noted *Construction, Forestry, Maritime, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2019] FCA 1696 (Flick J) at [41]:

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It has also long been accepted that where a shift allowance and the like has been prescribed for working (for example) on a weekend, the higher rate prescribed is to be taken as adequate compensation in itself for being required to work on a weekend or public holiday: Federated Engine-Drivers and Firemen's Association of Australasia and A I Amalgamated; Re Dorman Long & Co Ltd (1930) 29 CAR 229.

(See also In Re Engine Drivers and General (State) Interim Award [1950] AR (NSW) 260 at 268, cited with approval in *Tahmoor*).

7. It follows, in the CMIEG's submission that the tables C 1.2 in Schedule C and D 2.1 and 2.2 of Schedule D in the exposure draft Award are correct and should not be altered in the way proposed by the CFMMEU.
8. The CMIEG notes the further issues raised in paragraphs 21 to 24 of its submission and does not oppose those changes.

## **Issue 2: Clause 29.4 Employee required to work on a recognised public holiday**

9. The CMIEG supports the submission of the Australian Industry Group (**AiGroup**) dated [15 April 2020](#) and therefore supports the variations to the exposure draft set out in Annexure A of that submission.
10. The AiGroup submission is consistent with the earlier submission of the CMIEG, dated [22 January 2016](#), (in matter AM2014/67), noting that references in that earlier submission to Clauses 18.3 and 18.4 of the then published exposure draft Award must be taken to be replaced now by references to Clause 29 of the present exposure draft. The CMIEG made submissions on [30 June 2017](#) and [30 March 2018](#) summarising the position of the parties and opposing amendments by the CFMMEU.
11. The earlier submission of the CMIEG on 22 January 2016 delves further into the terms of the awards concerning payment for work on public holidays that preceded and were replaced by the corresponding terms of the current Award.
12. The terms of the predecessor awards in the black coal mining industry make it fully clear that the payments for working ordinary hours or overtime on a public holiday were to be added to the employees "classification rate" which was payable to an employee who was not required to work on a public holiday. The term "classification rate" means the minimum rate prescribed for the employee's classification and does not include any shift or other penalty rate.
13. For convenience this submission includes below relevant extracts from the CMIEG's earlier 22 January 2016 submission which deal with the history of the relevant predecessor award provisions (noting again that the earlier submission refers to the numbering of the then

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available exposure draft Award (references to Clause 18 may now be taken to be references to Clause 29));

8. The payment for work performed by any employee on a public holidays is prescribed in clause 18.4 of the BCMI Award exposure draft. This clause provides as follows:

**18.4 Employee required to work on a recognised public holiday**

(a) An employee who is required to work on a holiday is to be paid at the rate of double time for the work performed during ordinary hours, in addition to the payment prescribed.

(b) Work performed in excess of ordinary hours on a holiday is to be paid at the rate of treble time.

9 ...

**Clause 18.4(a) - work during ordinary hours - "Payment prescribed"**

10. The payment for work during ordinary hours on a public holiday is paid at the rate of "double time... in addition to the payment prescribed".

11. The reference to "payment prescribed" in clause 18.4 is to the payment prescribed in clause 18.3. Clause 18.3 provides as follows:

**18.3 Employee not required to work on a recognised public holiday**

(a) An employee who is not required to work on a holiday which would otherwise have been a working day for that employee will be paid for that day at the employee's classification rate.

12. That this is the intention is clear from the wording of predecessor awards in the black coal mining industry. The origin of the current wording in clause 18.4(a), is clauses 14(f)(2) and (3) of the *Coal Mining Industry (Production and Engineering) Interim Consent Award, September 1990* [C0889] (**P&E 1990 Award**). Those clauses provided as follows:

14(f) Payment

...

(2) Employees not required to work. An employee not required to work on a recognised holiday and who qualifies shall be paid for that day at the employees classification rate.

(3) Employees required to work. In addition to the payment prescribed by sub-clause (f)(2) the rate for work performed during ordinary hours on a recognised holiday shall be double time. The rate for work performed in excess of ordinary hours on a recognised holiday shall be treble time.

13. It is noted that the 1990 Award was a departure from certain awards in the black coal mining industry which preceded the making of that award. Two decisions of the Coal Industry Tribunal (**CIT**) in 1947 and 1951 adopted the view that there should be an additional or cumulative entitlement to both a shift penalty and a public holiday penalty.<sup>1</sup> The clauses dealt with in these decision related to the *Coal Mining Industry Award (Mechanics)* and *Coal Mining Industry Award (Miners)* which expressly provided:

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<sup>1</sup> See *The Federated Mining Mechanics Association of Australasia; the Amalgamated Engineering Union; the Blacksmiths Society of Australasia and J & A Brown and Abermain Seaham Collieries Limited* [1947] ACIndT 446 (29 August 1947); *The Australian Coal and Shale Employees' Federation and J & A Brown and Abermain Seaham Collieries Limited* [1947] ACIndT 445 (29 August 1947); *The Federated Engine Drivers and Firemen's Association of Australasia and Aberdare Collieries Pty Ltd* [1951] ACIndT 758 (9 February 1951)

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"... All time work on any day (including Sundays and holidays) outside the ordinary working hours on afternoon or night shift shall be paid for at the rate of 7 ½ per cent. Of the day shift rate in addition to the penalty rates prescribed herein" (emphasis added)

and the *Coal Mining Industry Award (Engine Drivers: Queensland) Award* which expressly provided:

"Such percentage [for shift penalties] shall be cumulative on any penalty rate elsewhere prescribed" (emphasis added).

14. However, the 1990 Award did not continue those prior CIT rulings as is evident from clauses 14(f)(2) and (3) of the 1990 Award, as set out above.

15. The 1990 Award was then replaced by The Coal Mining Industry (Production and Engineering) Consolidated Award 1997 [C2758] (**P&E 1997 Award**) (AP774609). The P&E 1997 Award provided as follows:

**37.3 Employee not required to work on a Public Holiday**

An employee who is not required to work on a holiday:-

...

37.3.2 is to be paid for that day at the employee's classification rate.

**37.4 Work on a recognised public holiday**

37.4.1 Work on a holiday is to be paid at the rate of double time for work performed during ordinary hours, in addition to the payment prescribed in 37.3.2.

16. Similarly, the Coal Mining Industry (Staff) Award, 2004 (AP835164) (**Staff 2004 Award**) provided as follows:

**33.3 Employee not required to work on a recognised public holiday**

An employee, other than a casual employee, who is not required to work on a holiday is to be paid for that day at the employee's classification rate.

**33.4 Employee required to work on a recognised public holiday**

33.4.1 An employee who is required to work on a holiday is to be paid at the rate of double time for work performed during ordinary hours, in addition to the payment prescribed in 33.3.

33.4.2 Work performed in excess of ordinary hours on a holiday is to be paid at the rate of treble time.

17. Further, the public holidays clause of The Coal Mining Industry Award (Deputies and Shotfirers), 2002 (AP813783) (Deputies 2002 Award) provided:

Public holidays

...

(c) Payment

(1) Employees not required to work.

An employee not required to work on a recognised holiday shall be paid for that day at the employee's classification rate.

(2) Employees required to work.

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In addition to the payment prescribed by sub-clause (c)(2) the rate for work performed during ordinary hours on a recognised holiday shall be double time. The rate for work performed in excess of ordinary hours on a recognised holiday shall be treble time.

18. Each of the P&E 1997 Award, Staff 2004 Award and Deputies 2002 Award were reference Federal Awards for the making of the BCMI Award (see Award Modernisation decision (20 June 2008) [2008] AIRCFB 550, Attachment B – "Coal Mining Industry").

19. The "employee's classification rate" referred to in each of the BCMI Award, P&E 1990 Award, P&E 1997 Award, Staff 2004 Award, Deputies 2002 Award must mean the minimum rate of wage specified for each classification in the respective wages clauses of those awards.

20. It is clear, from this analysis, that the following submission by the CFMEU in its submissions filed on 23 December 2014 (at [22(a)]) is not correct:

"the prescribed payment is the payment as prescribed in the award for working ordinary hours on that day."

21. There is no basis for adding any penalty, allowance or loading to the classification rate in applying clause 18.3 and 18.4. The public holiday clause deals fully with what the employee is to be paid in respect of a public holiday, whether working or not.

22. Critically, there is no distinction in clause 18.4(a) between six or seven day roster employees, and other employees. This reinforces the construction that the clause provides for a maximum penalty rate to be paid to employees, regardless of whether the employee might be a shiftworker. This is to be contrasted with other clauses in the BCMI Award where such a distinction is made (for example, clauses 14.2 and 14.3).

23. Similarly, clause 18.4(a) makes no distinction between public holidays falling on a Saturday or Sunday, and those falling upon weekdays. Again, this reinforces the construction that clause 18.4(a) provides a maximum penalty for a public holiday, regardless of the day of the week upon which the public holiday falls.

24. The operation of clauses 18.3 and 18.4(a) is consistent with the well established general standard applied in industrial awards that shift allowances/penalties are generally not payable for shifts in respect of which a penalty rate is already payable (eg weekend or public holiday work) because the latter rate is intended to take account of all the disabilities attached to that work and are sufficient compensation (see for example, Re Maritime Services Board (Misc Services) Award 1969 AR 476; Re Industry Aluminium Industry Award 102 CAR 623 at 668-9).

25. ...

**Clause 18.4(b) – work outside ordinary hours - "Treble time"**

26. It clear that the prescription of "treble time" for work performed outside or ordinary hours, has been consistently used throughout the BCMI Award, the P&E 1990 Award, P&E 1997 Award, Staff 2004 Award, Deputies 2002 Award. These clauses have provided a maximum penalty rate payable for work performed outside of ordinary hours on a public holiday.

27. The effect of both clauses 18.4(a) and (b), effectively provide a maximum penalty rate of treble time (or 300%) for all work performed on a public holiday, whether within ordinary hours or outside ordinary hours.

14. In the AiGroup's 15 April 2020 submission it refers in paragraphs 21 to 23 to the Judgment of Street J in *Construction, Forestry, Maritime, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2019] FCCA 292. We note that the decision of Street J was upheld on appeal by

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the Federal Court of Australia (Flick J) in *Construction, Forestry, Maritime, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2019] FCA 1696; see especially paragraphs [40] to [47]. In that decision, the Court held, in respect of the interaction of public holiday penalties and night shift rates in the relevant industrial instrument (at [40]):

And, although the two provisions [concerning public holidays and night shift rates] can be read as conferring on an employee who satisfies the requirements of both provisions an entitlement to be paid the two amounts, the industrial objective (it is considered) is to compensate an employee only once for having to work at a time outside of that normally recognised as a working day or, phrased differently, having to work what has been referred to as “unsociable and non-family friendly hours”: cf. *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd (t/a Appin Mine)* [2017] FWCFB 4487 at [64].

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