

**IN THE FAIR WORK COMMISSION**

**AM2014/226 - 4 YEARLY REVIEW OF MODERN AWARDS - ELECTRICAL  
POWER INDUSTRY AWARD 2010**

**SUBMISSION BY THE CONSTRUCTION, FORESTRY, MINING AND ENERGY  
UNION - MINING AND ENERGY DIVISION**

**REVISED EXPOSURE DRAFT - JULY 2017**

The CFMEU - Mining and Energy Division, makes the following comments on the revised exposure draft Electrical Power Industry Award 2010 ('Award'), as released by the Fair Work Commission on 14 July 2017 and the subject of a decision by the Full Bench on 6 July 2017.<sup>1</sup>

**Clause 1 - Title and Commencement**

1. As set out in our recent submission regarding the exposure draft Coal Export Terminals Award 2010, the CFMEU understands that as changes to modern awards as part of the 4 yearly review will be expressed in the form of variations to existing awards rather than the creation of a new award, the title of the awards should remain unchanged.<sup>2</sup>
2. Accordingly, for the same reasons, it is submitted that the Award should remain as the Electrical Power Industry Award 2010, rather than the Electrical Power Industry Award 2016. This is also consistent with clause

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<sup>1</sup> [2017] FWCB 3433

<sup>2</sup> See Submission on the Revised Exposure Draft Coal Export Terminals Award 2010, dated 25 August 2017

1.2 with it reference to the commencement date of the Award being 1 January 2010.

**Clause 9.4 and 9.6 - Meal Breaks during Overtime**

3. The CFMEU agrees with the position of the ETU in its submission dated 28 July 2017.
4. Clause 9.4 deals specifically with overtime that is continuous with ordinary hours, whereas clause 9.6 deals with overtime generally. The clauses complement each other, with the exception of clause 9.6 (b), which has no application to overtime in conjunction with continuous ordinary hours.

**Clause 10.1 - Minimum Wages**

5. The CFMEU agrees with the AiGroup that there is a formatting issue at pay level 8 and in particular the reference to 'Operations Grade 8' should be moved to the next line.

**Clause 10.7 (b) and 14.3 - Higher Duties**

6. The CFMEU agrees with the position of the ETU in its submission of 28 July 2017.

**Clause 13.1 - Overtime**

7. The CFMEU agrees with the position of the ETU that each day stands alone as set out in its submission of 28 July 2017.

#### **Clause 14.4 - Illness during a period of annual leave**

8. The CFMEU agreed with the submission of the AiGroup as set out at paragraphs 30 and 31 of that submission dated 2 August 2017.

#### **Clause 14.9 - Payment on annual leave upon termination of employment**

9. Two issues arise here.
10. Firstly, there is the question of defining the payment of annual leave upon termination of employment.
11. Clause 14.9 describes how payment of annual leave is paid upon termination of employment. On our reading, the payment as set out is inconsistent with the National Employment Standards (NES).
12. Clause 14.9 confines payment to annual leave at the ordinary time rate, provided that if a shift worker the employee is also paid the shift allowance and any weekend penalty rates.
13. On the other hand the NES provides for payment of annual leave upon termination of employment at *the amount payable to the employee had the employee taken that period of leave.*<sup>3</sup>
14. For a day worker clause 14.9 is inconsistent with clause 14.3, which provides for the payment of an annual leave loading of 17.5%, and it may be inconsistent with payment to a shift worker depending on whether the loading is greater than the alternative payment including the relevant penalty rates.

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<sup>3</sup> NES, s 90 (2)

15. Further, to the extent that the terms of an enterprise agreement result in a higher payment than the terms of clause 14.9, inconsistency with the NES arises. It would also be inconsistent in circumstances where there is no enterprise agreement but employees are paid over award wages including for overtime purposes.
16. There is a history to this issue that is contiguous with the modern award review. The matter of *payment of annual leave entitlements upon termination* was one for consideration as part of the annual leave common issues case.<sup>4</sup>
17. Contemporaneously there was broader disputation concerning the meaning of s 90 (2) of the NES. It was ultimately determined by the Federal Court.<sup>5</sup>
18. As a consequence of the decisions of the Federal Court, the Coalition Government introduced a Bill to Parliament that would, amongst other things, amend s 90 (2) in a manner urged upon it by the employers.<sup>6</sup>
19. The Fair Work Amendment Bill 2014 eventually found its form of expression of the will of Parliament in the Fair Work Amendment Act 2015. This Act was a much-truncated version of the 2014 Bill and in particular, did not contain the 2014 proposed amendments to s 90 (2).
20. As such s 90 (2) remains unchanged from the day it became law.
21. In an earlier submission regarding this Award, the CFMEU identified that we understood at the time that the FWC had this matter on its agenda as part of the common issues for annual leave.<sup>7</sup>

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<sup>4</sup> 4 yearly review of modern awards - annual leave, [2014] FWC 2279 @ PN [2]

<sup>5</sup> Centennial Northern Mining Services v CFMEU (No. 2), 2015 FCA 136, Centennial Northern Mining Services v CFMEU, 2015 FCAFC 100

<sup>6</sup> Fair Work Amendment Bill 2014. The Bill sought to amend s 90 (2) to the effect that *the rate must not be less than the rate that, immediately before the termination time, is the employee's base rate of pay (expressed as an hourly rate)*.

22. It is our submission that the effluxion of time and circumstances is such that it is now settled that the NES is clear in its meaning and intent. And on that basis the provision of clause 14.9 is inconsistent with the NES and requires amendment such that it reads that an employee is entitled upon termination of employment to the amount payable as if the employee had taken that period of leave.
23. It is recognised in this context that the Full Bench in the annual leave common issues matter addressed the award/NES interaction regarding payment of annual leave upon termination in one of its decisions. The Full Bench gave a history of the issue to that point and noted the surrounding uncertainty.<sup>8</sup> The Full Bench expressed the view that any interested party may seek to have the matter called back on for further programming and submission.<sup>9</sup> The CFMEU will follow up on this matter.
24. The second issue concerns the insertion of the term *annual before* the term *leave* in clause 14.9. The AiGroup, relying on the report to the Full Bench, say that it should be inserted.<sup>10</sup> The ETU position is that the term should not be included because it may remove the payment of other forms of accrued leave upon termination.<sup>11</sup>
25. The CFMEU understands clause 14.9 to be confined to addressing the payment of annual leave upon termination. This is because it is part of the annual leave provision and the reference to payment of shift/weekend penalties are relevant to the payment of annual leave for shift workers. As such clause 14.9 does not address other forms of leave where an entitlement to payment upon termination may exist. It is for that reason

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<sup>7</sup> See Summary of Submissions at point 29. See also the CFMEU submission, dated April 2016 on an earlier exposure at paragraph 31.

<sup>8</sup> [2015] FWCFB 3406 @ PN [416]-[429]

<sup>9</sup> [2015] FWCFB 3406 @ PN [429]

<sup>10</sup> AiGroup, Submission - General issues and Group 3 Revised Exposure Drafts, 2 August 2017, paragraph 32 - 34

<sup>11</sup> ETU Submission, paragraph 9

the CFMEU did not have an issue with the term *annual* being included in clause 14.9, as it was essentially a term of clarification. If it is to have broader application we would seek an opportunity to look at other award provisions to ensure that the amendment does not have an inadvertent impact elsewhere.

**Construction, Forestry, Mining and Energy Union**

**Mining and Energy Division**

**29 August 2017**