



STATEMENT

Fair Work Act 2009

s.156—4 yearly review of modern awards

4 yearly review of modern awards

(AM2019/17)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 12 MARCH 2020

4 yearly review of modern awards – finalisation of exposure draft and draft variation determinations – Tranche 3 – Black Coal Mining Industry Award

[1] This Statement concerns the finalisation of the Exposure Draft and variation determination in respect of the Black Coal Mining Industry Award 2020 (the Black Coal Award). A conference in respect of the issues raised will be convened for **Friday 20 March 2020** at **9:15am**. A listing notice will be published separately.

[2] The Black Coal Award is one of the Tranche 3 awards¹. On 29 January 2020 exposure drafts and draft variation determinations were published for each of the Tranche 3 awards. On the same day we published a decision² in which we expressed the *provisional* view that the variation of the modern awards in Tranche 3 in accordance with the draft variation determinations was, in respect of each of these awards, necessary to achieve the modern awards objective. Interested parties were invited to comment on that *provisional* view and on the Tranche 3 exposure drafts and draft variation determinations.

[3] Ai Group, APESMA, CEPU and the CFMMEU (M&E) have made submissions in respect of the Black Coal Award. APESMA and the CEPU simply state that they support the submissions of the CFMMEU (M&E). ABI support the provisional view expressed in the 29 January decision and make no additional comments about the draft variation determination. The AMWU did not identify any issues with the draft variation determination.

[4] Ai Group identifies the following errors in the exposure draft:

- the reference to ‘20XX’ should be replaced with ‘2020’ in the title of the award, the header and clause 1.1’
- the reference to clause 14 in clause 7.2(a) (the index to facilitative provisions) should be deleted and replaced with a reference to clause 15;

¹ See generally [2019] FWCFB 6077

² [2020] FWCFB 421

- in clause 17.4, each time ‘20XX’ appears it should be replaced with ‘2020’;
- in clause 24.9(a), 24.9(i) and 24.10, the reference to clause 24.4 should be replaced with a reference to clause 24.10;
- in clause A.1.5 Note, the reference to clause 31 should be deleted, consistent with the note following the extant A.1.5;
- in clause A.8.2 Wage related allowances and reimbursements – height money, the final column should be amended to reflect the fact that height money is payable per shift, not per hour.

[5] It is our *provisional* view that the draft variation determination be amended to correct the above errors.

[6] Five other issues are raised in the submissions.

(i) *Definitions of the ‘black coal mining industry’ in clause 2*

[7] Ai Group submits that the following amendment be made to the definition:

‘black coal mining industry has the meaning given in clauses 4.2 and 4.3 and in the Note that appears in clause 4.3’

[8] In support of the amendment sought Ai Group submits that clause 4.2 only addresses types of work that are *included* in the ‘black coal mining industry’; whereas clause 4.3 addresses types of work that are *excluded from the ‘black coal mining industry’*. Further, Ai Group submits that the Note in clause 4.3 is ‘very important’ to interpreting the expression ‘black coal mining industry’.

[9] Clauses 4.2 and 4.3 of the Exposure Draft state:

4.2 For the purposes of this award, black coal mining industry has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal. Subject to the foregoing, the black coal mining industry includes:

- (a) the extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods;
- (b) the processing of black coal at a coal handling or coal processing plant on or adjacent to a coal mining lease;
- (c) the transportation of black coal on a coal mining lease; and
- (d) other work on a coal mining lease directly connected with the extraction, mining and processing of black coal.

4.3 The black coal mining industry does not include:

- (a) the mining of brown coal in conjunction with the operation of a power station;
- (b) the work of employees employed in head offices or corporate administration offices (but excluding work in town offices associated with the day-to-day operation of a local mine or mines) of employers engaged in the black coal mining industry;
- (c) the operation of a coal export terminal;

- (d) construction work on or adjacent to a coal mine site;
- (e) catering and other domestic services;
- (f) haulage of coal off a coal mining lease (unless such haulage is to a wash plant or char plant in the vicinity of the mine); or
- (g) the supply of shotfiring or other explosive services by an employer not otherwise engaged in the black coal mining industry.

NOTE: The coverage clause is intended to reflect the status quo which existed under key pre-modern awards in relation to the kinds of employers and employees to whom those awards applied and the extent to which the awards applied to such employers and employees.

An example of the types of issues and some of the case law to be considered when addressing coverage matters can be found in Australian Collieries Staff Association and Queensland Coal Owners Association – No. 20 of 1980, 22 February 1982 [Print CR2297] and in the Court decisions cited in this decision.

[10] It is our *provisional* view that the definition be amended as follows:

‘black coal mining industry has the meaning given in clause 4.2 and **clause 4.3’**

[11] Contrary to Ai Group’s proposal, we do not think it is necessary to refer expressly to the Note that appears in clause 4.3 as it is part of clause 4.3.

(ii) *Definition of ‘ordinary week’s pay’ in clause 2*

[12] The definition in the exposure draft and draft variation determination is as follows:

‘ordinary week’s pay means minimum weekly wage rate in the table of minimum rates in clauses A.4 and B.2 for the award classification rate in respect of 35 ordinary hours.’

[13] The defined term is used in the award provisions which prescribe the amounts payable to employees in the event of redundancy. The relevant provisions are not limited to ‘production and engineering employees’ and hence the definition should not be confined to the table of minimum rates in clause A.4. Ai Group and the CFMMEU (M&E) both agree that the definition requires amendment to address this issue; though they proffer slightly different solutions.

[14] It is our *provisional* view that the definition be amended as follows:

‘ordinary week’s pay means **the** minimum weekly wage rate in the tables of minimum rates in clauses **A.4 and B.2** for the award classification rate in respect of 35 ordinary hours.’

(iii) *Personal carers leave and compassionate leave: clause 25.1*

[15] Clause 25.1 includes the following explanatory words that appear in clause 26.1 of the current award:

‘Personal/carer’s leave entitlements are provided for in the NES. This clause supplements those entitlements and deals with evidence required to be provided by an employee when taking paid personal/carer’s leave.’

[16] The CFMMEU (M&E) seek the retention of these explanatory words on the basis that they provide ‘necessary context for the provisions and similar entitlements which supplement the NES in the Exposure Draft have retained similar language’.

[17] We note that an explanatory statement in similar terms has been inserted in clauses 24 (Annual leave) and 33 (Termination of employment).

[18] It is our *provisional* view that the explanatory words that appear in clause 26.1 of the current award be inserted into clause 25.1 of the Exposure Draft and that the draft variation determination be amended accordingly.

(iv) *Shiftwork rates: Schedule C and D*

[19] Clauses C.1.2, D.1.2 and D.2.2 set out the rates for shiftwork by different kinds of employees, as set out below:

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		Sunday
					First 4 hours	After 4 hours	
% of minimum hourly rate							
	100%	115%	115%	125%	150%	200%	200%

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

	Day shift	Afternoon shift	Rotating night shift ¹	Permanent night shift ¹	Saturday		Sunday
					First 4 hours	After 4 hours	
% of minimum hourly rate							
	100%	115%	115%	125%	150%	200%	200%

D.2.2 Casual staff employees—shiftwork

	Day shift	Afternoon shift	Rotating night shift ¹	Permanent night shift ¹	Saturday		Sunday
					First 4 hours	After 4 hours	
% of minimum hourly rate							
	125%	140%	140%	150%	175%	225%	225%

[20] The CFMMEU (M&E) submits that no shiftwork rates have been applied to the rates for shiftwork performed on a Saturday or a Sunday in these clauses ‘despite the clear entitlement at ... clause 23.1 of the Exposure Draft which provides that the relevant loading (15% or 25%) is paid on the ordinary time rates’.

[21] Clause 23.1 and 23.2 states:

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

Salt	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 on the following days:

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%

[22] The CFMMEU (M&E) submits that the rates in clauses C.1.2, D.1.2 and D.2.2 should be amended, as follows:

- (i) for the first 4 hours on a Saturday: 165% for an afternoon and rotating night shift and 175% for hours worked on a permanent night shift; and
- (ii) on a Saturday *after* the first 4 hours: 215% for an afternoon and rotating night shift and 225% for hours worked on a permanent night shift.

Question for all other parties: Are the amendments proposed by the CFMMEU (M&E) opposed by any other party and, if so, on what basis?

(v) *Six and seven day roster employees – overtime and public holidays (clauses 21.3 and 29.4)*

[23] In a decision³ published on 28 June 2018 the Group 1 Full Bench addressed some technical and drafting issues concerning the overtime and public holiday provisions for six and seven day roster employees in the Black Coal Award. The relevant extracts from that decision are as follows:

Items 14 and 19 – Overtime and public holidays – six or seven day roster employees

³ [2018] FWCFB 3802

‘Item 14 relates to overtime on six and seven day rosters when working hours in excess of or outside the ordinary hours of an afternoon or night shift (rotating or permanent) on a public holiday. Item 19 also relates to the issue of the payment of public holidays. It is convenient to deal with these items together.

On 30 March 2018 the CMIEG made a submission in response to the Statement published on 21 March 2018⁴ noting that there are two interlinked matters of particular significance that remain outstanding, namely those described at Items 14, 19 and 26 of the summary document. The matters concern public holiday payments. In their submission, CMIEG provide a brief summary of the issues as follows:

‘(a) **Clause 14.3(c) and (d)** (relating to six day and seven day roster employees) and **Schedules C and D – Summary of Hourly Rates of Pay**, as well as consequential amendments.

The CFMEU has proposed an amendment to insert new paragraphs (c) and (d) concerning overtime worked on public holidays by six day and seven day roster employees, and also proposes consequential amendments to Schedules C and D. The CMIEG opposes amendments sought by the CFMEU, and the Ai Group also opposes the amendments. The CFMEU has confirmed that it presses its amendments, and each of the CMIEG and Ai Group maintain their opposition to those amendments.

(b) **Clause 18.4** relating to an employee required to work on a recognised public holiday, previously clause 18.5 in the Exposure Draft of 26 September 2014.

The CFMEU has made submissions about the interpretation of the clause, and also has sought a corresponding amendment to clause 14.3 (see above). That amendment is opposed by the CMIEG and Ai Group. Ai Group has also sought, and continues to seek, its own amendment to the clause, which is opposed by the CFMEU in relation to payment of shift allowances when ordinary hours are worked on a public holiday. The Ai Group amendment accords with the CMIEG's construction of the clause.⁵

The CMIEG seeks to be heard on the outstanding matters concerning public holiday payments.⁶ They suggest a brief hearing would permit the interested parties to be heard and also be of benefit in assisting the Commission in determining the matters. The CMIEG propose an interim or alternative step could be a conference convened by a delegated member of the Full Bench.⁷

We propose to grant the request of the CMIEG.

A conference will be convened before Vice President Hatcher in due course.’⁸

[24] The conference referred to in the extract set out above has not yet been convened.

[25] Clause 21.3 of the Exposure Draft states:

⁴ [2018] FWC 1631

⁵ CMIEG [submission](#), 20 March 2018 at para 3

⁶ CMIEG [submission](#), 20 March 2018 at para 4

⁷ CMIEG [submission](#), 20 March 2018 at para 5

⁸ [2018] FWCFCB 3802 at [93] – [97]

21.3 Six day and seven day roster employees

Overtime—six and seven day roster issue to be discussed at conference see [\[2018\] FWCFB 3802](#) at [93]-[97].

Parties are asked to confirm if this claim is pressed. This may be addressed in the Tranche 3 submission process.

(a) All time worked in excess of or outside ordinary hours after 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. Exposure draft—Black Coal Mining Award 20XX 22 MA000001

(b) All time worked in excess of or outside ordinary hours after 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

[26] The CFMMEU submits that clause 21.3 alters the meaning of the entitlement under the current award, and that this matter should be addressed prior to finalising the exposure draft or, alternatively, that the current wording is not changed until the matter is resolved. The CFMMEU continues to rely on its [submission](#) of 3 December 2015.

[27] The relevant concern is in relation to the temporal reference in both subclauses of clause 21.3, in that each of 21.3(a) and (b) refer to 'All time worked in excess of or outside ordinary hours after [relevant shift]'.

[28] The CFMMEU submits that clause 21.3 is the product of the culmination of the following provisions in the current award:

17.2 Payment for overtime

...

- (b) All time worked in excess of or outside the ordinary hours of any shift by employees:
- (i) who are six day roster employees or seven day roster employees;
 - (ii) who work a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays; or
 - (iii) 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;

will be paid for at the rate of double time.

and

22.1 Definitions

- (a) Afternoon shift means any shift, the ordinary hours of which finish after 6.00 pm and at or before midnight.
- (b) Night shift means any shift, the ordinary hours of which finish after midnight and at or before 8.00 am.
- (c) Permanent night shift employee is an employee who:

- (i) works night shift only; or
- (ii) stays on night shift for a longer period than four consecutive weeks; or
- (iii) works on a roster that does not give at least one-third of the employee's working time off night shift in each roster cycle.

22.2 Shiftwork rates

Rates for shiftwork are payable as follows:

Type of shift	Shift rates
Day shift	Ordinary time
Afternoon and rotating night shifts	
(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
Permanent night shift	
(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

[29] The CFMMEU submits that, read together, the effect of these two provisions is that:

- (a) a six or seven day roster worker will have overtime hours paid at the rate of double time; and
- (b) if that overtime is worked on:
 - (i) an afternoon or rotating night shift, that employee will receive that overtime rate plus 15% of the ordinary time rate for time worked; or
 - (ii) a permanent night shift, that employee will receive that overtime rate plus 25% of the ordinary time rate for time worked.

[30] Clause 21.3 seeks to clarify how these clauses relate but the CFMMEU submits that the corresponding clauses in the current award contain nothing to the effect of the temporal limitation introduced by the inclusion of the word 'after' in the subclauses of 21.3 of the exposure draft.

[31] The CFMMEU submits that the inclusion of 'after' has the potential to be interpreted as limiting the application of the provision and consequently proposes that the clause be changed in a manner consistent with the current Award, in the terms similar to those proposed by the CFMMEU at paragraphs [5](a) and (b) in its submissions of 3 December 2015. By reference to the current drafting, this would result in the following changes:

- (a) All time worked in excess of or outside ordinary hours after 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 after 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.

[32] While noting that there is some dispute as to the terms of the six and seven day roster provisions, the CFMMEU submits that it is not presently aware of any party holding a different view on the correct interpretation as it relates to the above.

[33] The CFMMEU notes that the matter is still pressed but see no issue with the current drafting that must be remedied prior to the contested issues being resolved.

Clause 29.4: Employee required to work on a recognised public holiday

[34] Clause 29.4 of the exposure draft states:

29.4 Employee required to work on a recognised public holiday

Overtime and public holidays issue to be discussed at conference see [\[2018\] FWCFB 3802](#) at [93]-[97].

Parties are asked to confirm if this claim is pressed. This may be addressed in the Tranche 3 submission process.

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

[35] In response to the question posed, Ai Group confirms that the claim is pressed and that it continues to rely on the [submission](#) filed on 13 November 2015; however given the renumbering of provisions in the exposure draft, references in that submission to 'clause 18.4(a)' should be read as 'clause 29.4(a)' and 'clause 18.4(b)' should be read as 'clause 29.4(b)'.

[36] As mentioned earlier, a conference is to be held at **9:15am on Friday 20 March 2020**. At that conference, interested parties will be invited to comment on the *provisional* views at [5], [10], [14] and [18] and to respond to the question posed at [22]. A process for resolving the outstanding issues in respect of six and seven day roster employers (see [23] – [35] above) will also be discussed.

PRESIDENT

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