

FAIR WORK COMMISSION

**Coal Export Terminals Award 2010
AM2014/220**

**Submission on behalf of the Coal Terminals Group in relation to the Exposure Draft of
the Coal Export Terminals Award 2016**

Introduction

1. This submission is made on behalf of the Coal Terminals Group (**CTG**) concerning the exposure draft of the Coal Export Terminals Award 2016 (**CET Award**) issued on 15 January 2016.
2. The CTG consists of:
 - (a) Hay Point Services Pty Limited;
 - (b) Port Kembla Coal Terminal Limited; and
 - (c) Abbot Point Bulkcoal Pty Ltd.

Clauses 8.3 – Penalty rates – day workers

3. The Commission has requested the parties to *"clarify how the penalty rates for work on a Saturday in clause 8.3(b) interact with overtime rates in clause 13.1"*.
4. There is no interaction between clauses 8.3(b) and clause 13.1 of the CET Award.
5. Clause 8.3(b) deals with "ordinary hours" worked by Dayworkers on Saturdays and Sundays. Clause 13.1 – "Payment for overtime" deals with payment for "[a]ll time worked in excess of or outside of ordinary hours of any shift" on specified days. The two clauses deal with different matters, being payment for work during ordinary hours (clause 8.3(b)) and payment for work outside of ordinary hours (clause 13.1), respectively.

Clauses 8.4(b) – Shiftwork rates

6. The Commission has requested the parties to *"make submissions regarding whether Saturday, Sunday and public holiday rates should be provided for shiftworkers. The pre-reform Stevedoring Industry Award 1999 [AP796113] provided weekend and public holiday penalties for shiftworkers in clause 17.3"*.

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7. This question is most appropriately addressed together with the variation proposed to clause 16 – "Ordinary hours of work" which is pressed by the CFMEU (see below at paragraphs 18 to 24).
8. At the outset, the CTG notes that, contrary to the drafting note, the pre-reform *Stevedoring Industry Award 1999* [AP796113] is not an appropriate comparator. That pre-reform award had not at any time applied to any coal export terminal and it was not adopted by the parties as a reference point in drafting the Coal Export Terminals Award 2010. Clause 8.4 was primarily based on clause 20.5 of the Mining Industry Award 2010,¹ which at the time of preparation of modern awards in Stage 3 (including the Ports and harbour services group (AM2008/49)), had already been made by a Full Bench of the Australian Industrial Relations Commission.²
9. The Coal Export Terminals Award 2010 was made based on a consent draft of the award jointly prepared by the interested parties, which did not provide for weekend and public holiday penalty rates for shiftworkers.³
10. Any variation to now include in the CET Award weekend or public holiday penalties for shiftworkers would need to satisfy the modern awards objective prescribed in section 134 (1) of the *Fair Work Act 2009* (Cth): see *Shop, Distributive and Allied Employees Association v National Retail Association (No 2) (SDA v NRA (No 2))* [2012] FCA 480; (2012) 205 FCR 227. The issue of weekend and public holiday penalty rates is more than a mere "drafting or technical issue".
11. The CTG wishes to be heard further on any variation to include weekend and public holiday penalty rates for shiftworkers in the CET Award. It is a matter which, in the ordinary course, requires determination by a Full Bench of the Commission.

Clauses 10.2 – Apprentices

12. The Commission has requested the parties to "*clarify what the "applicable adult weekly wage" is for the purpose of clause 10.2(b)*".
13. It is noted that these words were inserted by the Commission into the Apprentices clause (then clause 13.4(b)) on 22 April 2014,⁴ as a result of the decision of the Commission on 22 August 2013 in *Re Modern Awards Review 2012—Apprentices, Trainees and Juniors*

¹ See submissions of the CTG on 6 March 2009 in AM2008/49 at p9 (regarding clause 19 – Shift Work) (http://www.airc.gov.au/awardmod/databases/port/Submissions/CTG_port.pdf)

² See *Re Award Modernisation* [2008] AIRCFB 1000 (19 December 2009) at [193]-[219], [300] (<http://www.airc.gov.au/awardmod/databases/mining/Decisions/2008aircfb1000.htm>) and Attachment A (Mining Industry Award 2010 – at that time the current clause 20.6 – "Weekend work" was numbered as clause 18.6) (<http://www.airc.gov.au/awardmod/awards/mining.pdf>)

³ See decision *Re Stage 3 Modern Award* [2009] AIRCFB 826 (see [213]-[214]) (<http://www.airc.gov.au/awardmod/databases/port/Decisions/2009aircfb826.htm>); Order PR988689 (4 September 2009) ((see clause 16.3(b)) (<https://www.fwc.gov.au/documents/awardsandorders/html/PR988689.htm>))

⁴ Order PR549879 (<https://www.fwc.gov.au/documents/awardsandorders/html/PR549879.htm>)

[2013] FWCFB 5411⁵ (**Apprentices Decision**) and pursuant to Item 6, Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**FW (TPCA) Act**).

14. For consistency with clause 10.2(c), the CTG proposes that the words "applicable adult weekly wage" be amended to refer to the "Maintenance Trades – Competent Rate".

Clause 10.3 – Adult apprentices

15. The Commission has asked the parties "*whether the term 'lowest adult classification' in clauses 10.3(c) and (e) should be more specific and instead be replaced with 'Entry Level – Introductory in the Maintenance Trades classification'*".
16. It is noted that these words were inserted by the Commission into the CET Award (by inserting a new clause 13.5) on 22 November 2013,⁶ as a result of the Apprentices Decision and Item 6, Schedule 5 of the FW (TPCA) Act.
17. As a matter of construction, the CTG understands that the reference to the "*lowest adult classification*" is to the classification of "Entry Level – Introductory" appearing under the heading "Maintenance Trades" in the table in clause 10.1(a) of the CET Award. This classification is the "lowest" relevant classification appearing in that table.

Proposed variations – CFMEU

18. On 2 March 2015, the CFMEU filed submissions setting out proposed variations to clauses 10.3(c) – "Casual employment" and 16 – "Ordinary hours of work" of the CET Award.⁷ The CTG understands that these variations continue to be pressed by the CFMEU.
19. In respect of the variation to clause 10.3(c) the CTG does not have any submission to make.
20. In respect of the variation to clause 16, it is not clear from the Statement issued by the Commission on 21 October 2015 concerning the Stage 3 Awards ([2015] FWC 7235)⁸ how such substantive variations are to be dealt with by the Commission. The Statement requests that parties file "*comprehensive written submissions on any drafting or technical issues*" arising from the exposure drafts in Group 3, which includes the CET Award. The

⁵ [2013] FWCFB 5411 (<https://www.fwc.gov.au/documents/decisionssigned/html/2013fwcfb5411.htm>)

⁶ Order PR544172 (<https://www.fwc.gov.au/documents/awardsandorders/html/PR544172.htm>)

⁷ CFMEU Submissions filed on 2 March 2015

(<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/submissions/AM2014220-sub-CFMEU-020315.pdf>)

⁸ Statement [2015] FWC 7235 (<https://www.fwc.gov.au/documents/decisionssigned/html/2015FWC7253.htm>)

separate Statement issued on 24 February 2016 confirms this limitation on the scope of submissions ([2016] FWC 1191 at [21]).⁹

21. It is noted that the Statement issued on 24 February 2015 indicates that, in relation to "substantive claims", conferences would be convened "after the exposure drafts had been published" and that "this is the course that will be adopted" ([2016] FWC 1191 at [3], [5]).
22. The variation proposed by the CFMEU is not a "drafting or technical issue" but a "substantive claim" to include Saturday, Sunday and public holiday penalty rates for shiftworkers. The CFMEU has submitted that the variation reflect the terms of the Black Coal Mining Industry Award 2010 in respect of public holiday penalty rates, being triple time for ordinary hours.¹⁰
23. The CTG confirms¹¹ that it opposes the variation proposed by the CFMEU in respect of clause 16 of the CET Award. The CTG wishes to be heard on any variation to the CET Award to provide for weekend and public holiday penalty rates (as noted in paragraphs 10 and 11 above). Any variation to include weekend or public holiday penalties for shiftworkers would need to satisfy the modern awards objective, and would need to be considered by a Full Bench of the Commission.
24. Without concession to its position that it opposes the variation and wishes to be heard on the matter, the CTG notes that the more general standard for work performed on public holidays is 250% of the ordinary time rate.

Proposed approach for dealing with matters

25. The CTG respectfully suggests that the unresolved matters concerning the CET Award may be most efficiently dealt with by the parties and the Commission in conference, or at a mention (in accordance with the Statement issued on 24 February 2016 ([2016] FWC 1191 at [5])).

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⁹ Statement [2106] FWC 1191 (as corrected)
(https://www.fwc.gov.au/documents/decisionssigned/html/2016FWC1191_pr577551.htm)

¹⁰ CFMEU Submission filed on 2 March 2015 (see footnote 7 above). It is noted that CFMEU has put a different position in its submissions filed on 14 April 2016 (<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/AM2014220-sub-CFMEU-140416.pdf>)

¹¹ Noting the earlier indication of the opposition of the CTG to the variation at the mention on 30 March 2015, at PN32
(https://www.fwc.gov.au/documents/documents/Transcripts/20150330_AM2014220.htm)