

# IN THE FAIR WORK COMMISSION

**FWC Matter No:** AM2014/220

*Fair Work Act 2009*

s.156 – 4 yearly review of modern award

## COAL EXPORT TERMINALS AWARD 2010

### INTRODUCTION

1. The following submissions are made by the Construction, Forestry, Mining and Energy Union Mining and Energy Division (“**the CFMEU**”) in accordance with the directions of Senior Deputy President Hamberger of 7 July 2016. The submissions are made in support of the changes to the *Coal Export Terminals Award 2010* (“**the Award**”) identified at paragraph 2 of the Commission’s directions. The changes are described in the directions as follows:

- “1 Clause 8 - apply Saturday and Sunday penalty rates to shiftworkers; apply public holiday penalty rates to all employees for ordinary hours at the rate of double time and a half;
2. Clause 13 – provide that continuous shift workers receive overtime at a rate of double time and a half on a public holiday;
3. Clause 14.4(b) – vary 200% to 250%;
4. Clause 18 - apply public holiday penalty rates to shiftworkers.”

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2. Following the making of the directions, the CFMEU has had further discussions with the Coal Export Terminal Group and the parties have reached a consent position with respect to a proposed variation of the Award. That position is reflected in the proposed changes to the Award contained in schedule 1 to these submissions. The consent position is made without prejudice to either parties' position regarding similar issues in other modern awards.
3. The proposed changes are, in part, responsive to a request contained in the Exposure Draft of the Coal Export Terminals Award 2016 published by the Commission on 15 January 2016. In particular, the Exposure Draft contained the following request:

“Parties are asked 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.”

## **THE LEGISLATIVE SCHEME**

4. The Commission must conduct the 4 yearly Award Review pursuant to s.156 of the *Fair Work Act 2009* (“the Act”). In considering any variation to a modern award, the Commission must be satisfied that a determination varying a modern award is necessary to achieve the modern awards objective.<sup>1</sup>
5. The modern awards objective is contained in s.134 of the Act. Subsection 134(1) provides:

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<sup>1</sup> See comments of Full Bench in [2014] FWCFB 1788 at paragraphs [38] to [39]; and s.138 of the Act.

### 134 The modern awards objective

*What is the modern awards objective?*

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) **the need to provide additional remuneration for:**
  - (i) employees working overtime; or
  - (ii) employees working unsocial, irregular or unpredictable hours; or
  - (iii) **employees working on weekends or public holidays; or<sup>2</sup>**
  - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.

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<sup>2</sup> Emphasis added.

6. A Full Bench of the Commission when considering preliminary jurisdictional issues in relation to the Award Review observed in relation to the modern award objective<sup>3</sup>:

[31] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’ *taking into account* the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

“To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.”

[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[33] There is a degree of tension between some of the s.134(1) considerations. The Commission’s task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.”

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<sup>3</sup> [2014] FWCFB 1788 at paragraph [31] to [34].

## EARLIER DECISIONS REGARDING THE COAL EXPORT TERMINALS AWARD AND SUBSEQUENT LEGISLATIVE CHANGE

7. The *Coal Export Terminals Award 2010* was made by the Australian Industrial Relations Commission pursuant to Part 10A of the *Workplace Relations Act 1996*, including the Award Modernisation Request made in accordance with s.596C(1) of the *Workplace Relations Act 1996*. Neither the Full Bench decision accompanying the exposure draft of the Coal Export Terminals Award, nor the Full Bench decision accompanying the making of the *Coal Export Terminals Award 2010* referred to the matters the subject of the variations sought by the CFMEU: see paragraph [170] of the decision of the Full Bench of 22 May 2009 in [2009] AIRCFB 450 and paragraphs [213] and [214] of the decision of the Full Bench of 4 September 2009 in [2009] AIRCFB 826.
8. At the time the *Coal Export Terminals Award 2010* came into operation on 1 January 2010, the process under Part 10A of the *Workplace Relations Act 1996*, did not include an equivalent requirement as that contained in paragraph 134(1)(da), which expressly requires the Commission to, amongst other things, take into account the need to provide additional remuneration for “employees working on weekends or public holidays”.<sup>4</sup> Nor did the modern award objective contain paragraph 134(1)(da) at the time the *Coal Export Terminals Award 2010* was reviewed as part of the 2012 Award review.<sup>5</sup>
9. Paragraph 134(1)(da) was inserted into s.134 of the Act by item 1 of Schedule 2 to the *Fair Work Amendment Act 2013*. The CFMEU submits that the insertion of paragraph 134(1)(da) is a substantive alteration in the legislative scheme and the Commission therefore approaches the matters before it in the context of the provisions of the *Coal Export Terminals Award 2010* with respect to ordinary

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<sup>4</sup> See part 10A of the *Workplace Relations Act 1996* and the consolidated Award Modernisation Request made pursuant to s.576C(1) of the *Workplace Relations Act 1996*:

[http://www.airc.gov.au/awardmod/download/request\\_cons\\_121109.pdf](http://www.airc.gov.au/awardmod/download/request_cons_121109.pdf)

<sup>5</sup> See the decision of Deputy President Smith of 27 September 2012 in [2012] FWA 8271

hours of work on weekends and public holidays having not been considered by the Commission in circumstances where it has been required to take into account “the need to provide additional remuneration” for employees who work on a weekend or public holiday.

## **COAL EXPORT TERMINALS IN AUSTRALIA**

10. Australia’s coal export terminals are located at: Abbot Point, Dalrymple Bay, Hay Point, Gladstone, Brisbane, Port Kembla and Newcastle (Port Waratah Coal Services and Newcastle Coal Infrastructure Group). Operations at the terminals take place 24 hours a day, 7 days a week. As a result, shift work is ubiquitous throughout the industry.
11. As far as the CFMEU is aware, all employers and employees in the industry are covered by enterprise agreements which contain terms and conditions more favourable than those found in the *Coal Export Terminals Award 2010*.

## **PROPOSED VARIATION TO PROVIDE PENALTY RATES TO SHIFTWORKERS FOR ORDINARY HOURS ON WEEKENDS**

12. The Exposure Draft published by the Commission on 15 January 2016 sought submissions concerning whether or not the Award should be varied to provide weekend penalty rates for shiftworkers. The CFMEU submits that the Award should be so varied. The CFMEU submits that such a variation is necessary for the Award to meet the modern award objective on the following basis.

### **Penalty Rates Apply to Non-Shift Workers for Weekend Work**

13. The existing clause 16.2(b) of the Award provides penalty rates to employees, other than shift workers, for work on weekends. The Award provides no

compensation for shift workers working ordinary hours on weekends. There is no justification for this disparity in the treatment of employees under the Award. The variation proposed would provide shiftworkers with the same penalties as employees other than shiftworkers under the Award.

### **Shiftworker Remuneration in Awards Covering Employees in Related Industries**

14. All modern awards covering employees in related industries and/or performing similar work, including those that cover employees who do work at a port, or in connection with the black coal mining industry, or the mining industry, provide shiftworkers with penalty rates for weekend work.

#### *Black Coal Mining Industry Award 2010*

15. The *Black Coal Mining Industry Award 2010* covers a broad range of employers and employees in the black coal mining industry.
16. Under the *Black Coal Mining Industry Award 2010*, all employees who work ordinary hours on weekends are to be paid: on Saturday, time and a half for the first 4 hours and double time thereafter; and on Sunday, double time: clause 21.2.

#### *Mining Industry Award 2010*

17. The *Mining Industry Award 2010* covers a very broad range of work performed in the mining industry including but not limited to extraction, processing, smelting, refining, transporting, loading and handling of metals, minerals and ores. The award expressly covers ports where the infrastructure is owned by a mine operator or a related company.
18. Under the *Mining Industry Award 2010*, all employees who work ordinary hours on a Saturday before 12pm are to be paid an additional 50% of the ordinary hourly base rate of pay for the first three hours, and an additional 100% of the

ordinary hourly base rate of pay thereafter. Employees who work ordinary hours on a Sunday are to be paid an additional 100% of the ordinary hourly base rate of pay: clause 20.6.

*Stevedoring Industry Award 2010*

19. The *Stevedoring Industry Award 2010* covers employers and employees in the stevedoring industry other than those covered by the *Port Authorities Award 2010*, the *Coal Export Terminals Award 2010* and the *Sugar Industry Award 2010*.
20. Under the *Stevedoring Industry Award 2010*, all shiftworkers are entitled to receive double time for work on a Saturday and double time and a half for work on a Sunday: clause 18.5.

*Port Authorities Award 2010*

21. The *Port Authorities Award 2010* covers employers who are port operators and employees within the classifications of the award.
22. Under the *Port Authorities Award 2010*, employees working on a Saturday are to receive time and half: clause 21.2(b). Employees working on a Sunday are to be paid double time: clause 21.5.

*Manufacturing and Associated Industries and Occupations Award 2010*

*Electrical, Electronic and Communications Contracting Award 2010*

23. The *Manufacturing and Associated Industries and Occupations Award 2010* and the *Electrical, Electronic and Communication Contracting Award 2010* cover, amongst other employers and employees, maintenance contractors who may from time to time undertake work at Coal Export Terminals.

24. Under the awards, shiftworkers who work on a Saturday are to be paid time and a half: clause 37.4 (MAIOA 2010) and clause 24.14 (EECEA 2010). Shiftworkers, other than continuous shiftworkers, who work on a Sunday are paid double time. Continuous shift workers who work a shift that predominantly falls on a Sunday are to be paid double time: clause 37.5 (MAIOA 2010) and clause 24.14 (EECEA 2010).

### **Remuneration of Shiftworkers in Enterprise Agreements Covering Coal Terminals**

25. The CFMEU is not aware of any operators of coal terminals in Australia that are not covered by an enterprise agreement. Each of the enterprise agreements applying to a coal export terminal contain rates for shiftworkers that compensate for work performed on weekends.

#### *The Dalrymple Bay Coal Terminal*

26. The *Dalrymple Bay Coal Terminal Pty Ltd Bulk Handling Enterprise Agreement 2014* applies to Dalrymple Bay Coal Terminal Pty Ltd in Queensland and employees engaged in or in connection with the unloading and/or stockpiling and/or loading of coal at Hay Point, Queensland.
27. Both day work and shift work employees under the enterprise agreement are paid what is defined as a “Stable Income”. The “Stable Income” takes into account, amongst other factors, “Weekend Penalties”: clause 3.1(5).

#### *Hay Point Coal Terminal – BHP Coal*

28. The *Hay Point Services Pty Ltd Enterprise Agreement 2013* applies to Hay Point Services Pty Ltd and employees employed at the Hay Point Coal Terminal in a variety of operations and maintenance classifications.

29. The annualised aggregate wage under the enterprise agreement for all shift workers includes a component for weekend penalties: Appendix 2.

#### *Queensland Bulk Handling*

30. The *Queensland Bulk Handling Enterprise Agreement 2016* applies to Queensland Bulk Handling Pty Ltd in Queensland and employees employed as Logistics Operators or Maintainer Operators.
31. All full time employees under the enterprise agreement work regular weekend shifts and public holidays and are paid a “Total Salary”: clause 7. The “Total Salary” expressly compensates for “all wages, overtime, penalty rates, allowances / disabilities”: see also Appendix A of the agreement where Saturday and Sunday shifts are separately itemised.

#### *Abbot Point*

32. The *Abbot Point BulkCoal Enterprise Agreement 2012* applies to Abbot Point BulkCoal Pty Ltd and employees in Queensland in operator and trade classifications.
33. The enterprise agreement provides for Monday to Friday workers and 7 day shift workers. Where ordinary time is worked on weekends, employees receive 1.75 times the ordinary rate on Saturday and double time on Sunday: clause 5.2. Seven day shiftworkers receive a roster allowance that expressly compensates them for weekend work: Appendix 1.

#### *Mackay Region Apprentice Employment – Applicable to Coal Terminals*

34. The *MRAEL – Coal Terminals Enterprise Agreement 2015* applies to MRAEL and apprentices employed by MRAEL who are hosted at a coal terminal.

35. Apprentices who are engaged on continuous shift work on Saturday are entitled to 1.75 times the ordinary rate for the first 8 hours of ordinary hours and double time thereafter. Apprentices who are engaged on continuous shift work on Sunday are entitled to double time: clause 13.1(a).

*Wiggin Island Coal Export Terminal (Port of Gladstone)*

36. The *OTOT Agreement 2014* is a greenfields enterprise agreement that applies to the operations of WICET Services Ltd and its employees at the Wiggin Island Coal Export Terminal (Port of Gladstone) employed in technician classifications whose duties include unloading operations, stockyard management, ship loading operations and SCADA control systems and other site specific systems.
37. Under the enterprise agreement, roster payments to employees are provided to compensate for, amongst other things, shift work and working on weekends: clause 3.1(c).

*Port of Gladstone (including RG Tanna Coal Terminal)*

38. The *Gladstone Ports Corporation Enterprise Agreement 2012* is an enterprise agreement that applies to the Gladstone Port Corporation and all employees of the corporation except for senior executives.
39. All employees under the enterprise agreement receive an aggregated salary. Production employees working continuous shifts or 12 hour shifts receive double time for working on a weekend: Schedule A clause 1(c) & 2(d). Maintenance employees working shift work receive double time for working on a weekend: Schedule B clause G(2)(d) & G(3)(d).

*Port Waratah Coal Terminal*

40. The *Port Waratah Coal Services Limited Enterprise Agreement 2015* applies to Port Waratah Coal Services Ltd and Port Waratah employees in operator, technical and trade classifications.
41. The Weekly Roster Allowance under the enterprise agreement takes into account weekend work: clause 15.3(a)(ii). Shift payments for any new rosters must take into account amongst other things the proportion of weekend and night work: clause 20.1(b).

*Newcastle Coal Infrastructure Group Pty Ltd*

42. The *CET 3 Operations Workplace Agreement 2014* applies to Newcastle Coal Infrastructure Group Pty Ltd and employees employed in technician classifications whose duties include yard operations and services, train unloading, ship loading, site systems and SCADA operations.
43. Under the *CET 3 Operations Workplace Agreement 2014*, employees are paid Annual Base Salaries as well as Work Pattern Allowances. The Work Pattern Allowance does not indicate on the face of the agreement precisely how they are calculated however the allowance is said to include “payment for shift and other penalty rates”: clause 16.4.

*Port Kembla Coal Terminal*

44. The *Port Kembla Coal Terminal Limited Enterprise Agreement 2012-2015* applies to Port Kembla Coal Terminal Limited and employees who are members of the CFMEU and/or who are employed in the Operator, Technical/Lubrication or Finance / Administration / Stores streams.
45. Employees working shift work as compared to day work receive a higher rate. Day workers are not rostered for weekends whereas Shiftworkers are regularly

rostered on weekends. There appears to be nothing on the face of the agreement that explicitly gives a breakdown of the differences in pay rate for full time workers. Casual employee working on a Sunday or public holiday are paid twice the ordinary rate of pay: clause 15.2.7. Casual employees working on a Saturday are paid 1.5 times the ordinary rate of pay for the first 4 hours and twice the ordinary rate of pay thereafter: clause 15.2.7.

### **Remuneration of Shift Workers in Pre-Reform Instruments**

46. A survey of relevant pre-reform awards demonstrates that shiftworkers covered by those instruments were compensated for working on weekends.

#### *Port Waratah Coal Services Consent Enterprise Award Federal 2002*

47. Under the *Port Waratah Coal Services Consent Enterprise Award Federal 2002*, a shiftworker required to work on a Saturday was to be paid double time: clause 21.7. A shift worker required to work on a Sunday was to be paid double time and a half: clause 21.8.

#### *Bulk Loading – Hay Point Services Pty Ltd Award 1998*

48. Under the *Bulk Loading – Hay Point Services Pty Ltd Award 1998*, the aggregate wage for shift workers was calculated using, amongst other components, “weekend penalties”: clause 10.1.

#### *Bulk Terminal Services Bulk Handling Award 1998*

49. Under the *Bulk Terminal Services Bulk Handling Award 1998*, shift operators did not work ordinary hours outside of Monday to Friday: clause 15. Overtime rates applied to work outside of ordinary hours: clause 16.

## **PROPOSED VARIATION TO PROVIDE PENALTY RATES FOR ORDINARY HOURS ON PUBLIC HOLIDAYS**

50. Under the current terms of the *Coal Export Terminals Award 2010*, employees do not receive penalty rates for working ordinary hours on a public holiday. Employees do however receive additional penalty rates for working *overtime* on a public holiday. Pursuant to subclause 18.1 of the Award, employees receive double time and a half for working overtime on a public holiday. This overtime rate is higher than that for overtime worked on Monday to Saturday, which is time and a half for the first 3 hours and double time thereafter; or for a Sunday, where the overtime rate is double time for any time worked.
51. The CFMEU submits that it is anomalous that additional penalty rates apply for overtime but no penalty rate applies to ordinary time worked on a public holiday. The CFMEU further submits that for the modern award object to be met, including the need to provide additional remuneration for employees working on public holidays, it is necessary that the Award provide for penalty rates for public holidays.
52. As earlier indicated in these submissions, the proposed variations with respect to the public holidays are contained in Schedule 1. In particular, the CFMEU parties propose a new clause 16.5 in the terms appearing in Schedule 1.
53. The CFMEU presses for the proposed variation on the following basis.

### **Shiftworker Remuneration in Awards Covering Employees in Related Industries**

54. All modern awards covering employees in related industries and/or performing similar work, including those that cover employees who may work at a port, or in connection with the black coal mining industry or the mining industry, provide penalty rates for ordinary time worked on a public holiday.

*Black Coal Mining Industry Award 2010*

55. Under the *Black Coal Mining Industry Award 2010*, an employee required to work on a public holiday must be paid double time for ordinary hours and treble time for work in excess of ordinary hours: clause 27.4.

*Mining Industry Award 2010*

56. Under the *Mining Industry Award 2010*, employees are paid a loading of 150% of the ordinary hourly base rate of pay, for any ordinary hours worked on a public holiday: clause 20.7.

*Stevedoring Industry Award 2010*

57. Under the *Stevedoring Industry Award 2010*, where an employee works on a public holiday the time worked must be paid at the rate of double time and a half of the ordinary rate provided that where an employee works the night shift he or she must be paid at the rate of triple time: clause 25.2.

*Port Authorities Award 2010*

58. Under the *Port Authorities Award 2010*, an employee will be paid a loading of 150% of the ordinary hourly minimum rate of pay for any hours, ordinary and overtime, worked on a public holiday: clause 21.6.

*Manufacturing and Associated Industries and Occupations Award 2010*

*Electrical, Electronic and Communications Contracting Award 2010*

59. Under the *Manufacturing and Associated Industries and Occupations Award 2010*, a day worker, or a shiftworker who is not a continuous shiftworker, who works a public holiday is to be paid double time and a half: clauses 36.2 & 37.5.

A continuous shift worker who works on a public holiday is to be paid double time: clause 37.5. Similar rates are payable under the *Electrical, Electronic and Communications Contracting Award 2010*: see clause 24.14.

### **Remuneration for Public Holidays in Enterprise Agreements Covering Coal Export Terminals**

60. Each of the enterprise agreements applying to a coal export terminal contains rates for employees that compensate for work done on public holidays.

#### *The Dalrymple Bay Coal Terminal*

61. Under the *Dalrymple Bay Coal Terminal Pty Ltd Bulk Handling Enterprise Agreement 2014*, both day work and shift work employees under the enterprise agreement are paid what is defined as a “Stable Income”. The “Stable Income” includes a consideration of “Payment for Public Holidays” and “Overtime for Public Holidays”: clause 3(5).

#### *Hay Point Coal Terminal – BHP Coal*

62. Under the *Hay Point Services Pty Ltd Enterprise Agreement 2013*, the aggregate wage for shift workers includes compensation for working public holidays: clause 16.1. Day workers receive twice the excess overtime rate for time worked on a public holiday: clause 16.3.

#### *Queensland Bulk Handling*

63. Under the *Queensland Bulk Handling Enterprise Agreement 2016*, all full time employees under the enterprise agreement work regular weekend shifts and public holidays and are paid a “Total Salary”: clause 7. The “Total Salary” expressly compensates for “all wages, overtime, penalty rates, allowances / disabilities”.

Where an employee's roster includes work on a public holiday, the employee is expressly compensated for working on the public holiday as part of the Total Salary: clauses 10.1 & 16. Non-rostered overtime worked on a public holiday attracts a higher rate than overtime not worked on a public holiday: clause 7.2. Casual employees who work on public holidays receive a higher rate for working on a public holiday: Appendix B.

*Abbot Point*

64. Under the *Abbot Point BulkCoal Enterprise Agreement 2012*, employees receive double time for working on a public holiday and triple time for overtime on a public holiday: clause 5.4. Seven day shiftworkers receive a roster allowance that expressly compensates them for weekend and public holiday work: Appendix 1.

*Mackay Region Apprentice Employment – Applicable to Coal Terminals*

65. Under the *MRAEL – Coal Terminals Enterprise Agreement 2015*, an apprentice who works on a public holiday is entitled to double time and a half: clause 18.

*Wiggin Island Coal Export Terminal (Port of Gladstone)*

66. Under the *OTOT Agreement 2014*, employees working on public holidays receive an additional payment of time and a half for each hour worked: clause 6.4(d).

*Port of Gladstone (including RG Tanna Coal Terminal)*

67. Under the *Gladstone Ports Corporation Enterprise Agreement 2012*, all employees under the enterprise agreement receive an aggregated salary which may include, amongst other things, “shift loading” and “public holiday penalties”.

*Port Waratah Coal Terminal*

68. Under the *Port Waratah Coal Services Limited Enterprise Agreement 2015*, employees receive penalty rates or other additional payments for time worked on public holidays: clause 32 & Appendix 2 (Table 5).

*Newcastle Coal Infrastructure Group Pty Ltd*

69. Under the *CET 3 Operations Workplace Agreement 2014*, the Annual Base Salaries paid to employees under the enterprise agreement and Work Pattern Allowance for shift workers includes provision for, amongst other things, public holidays: clause 16.3 & Schedule B (Table 2).

*Port Kembla Coal Terminal*

70. Under the *Port Kembla Coal Terminal Limited Enterprise Agreement 2012-2015*, employees on an annualised wage are expressly compensated for public holidays: clause 15.2.4 and clause 18. Casual employees working on a public holiday are paid twice the ordinary rate of pay: clause 15.2.7.

**Public Holiday Remuneration Paid in Pre-Reform Instruments**

71. A survey of relevant pre-reform awards demonstrates that employees covered by those instruments were compensated for working on public holidays.

*Port Waratah Coal Services Consent Enterprise Award Federal 2002*

72. Under the *Port Waratah Coal Services Consent Enterprise Award Federal 2002*, payment for all hours worked on public holidays was paid at triple time, except

for Christmas and Good Friday which was paid at triple time and a half: clause 28.1.

*Bulk Loading – Hay Point Services Pty Ltd Award 1998*

73. Under the *Bulk Loading – Hay Point Services Pty Ltd Award 1998*, the aggregate wage for employees was calculated using, amongst other components, “statutory holiday penalties”: clause 10.1. Day workers who worked ordinary hours on a public holiday were entitled to an excess overtime rate: clause 17.1.2

*Bulk Terminal Services Bulk Handling Award 1998*

74. Under the *Bulk Terminal Services Bulk Handling Award 1998*, full time employees received annualised salaries. The salaries incorporated “all loadings, allowances, penalties, bonus and any other existing monetary benefits”. Part-time employees and temporary employees who worked on a public holiday were paid at a higher rate than for regular day or shift work: clauses 12.2 & 12.3.

**OTHER CHANGES PROPOSED IN SCHEDULE 1**

75. The parties propose to vary the Award to provide penalty rates to shiftworkers for work performed on weekends and to provide penalty rates for all employees for work performed during ordinary time on public holidays. The parties propose to do this by the deletion of the current clause 16.2(b) and the insertion of a new clause 16.5 (see Schedule 1). In addition, the parties propose two further changes in Schedule 1. First, an alteration to the current clause 18.3 to the effect that a continuous shift worker will receive double time and a half for overtime on a public holiday. Secondly, an alteration to the current clause 19.4(b) to the effect that an employee’s rostered earnings takes into account rostered public holidays

being paid at a rate provided in the new clause 16.5 instead of double time). Both changes are consequential to the other variations sought.

76. The parties have also agreed on the insertion of a new clause 16.5(b) and clause 18.3(b) as follows:

“(b) The rates in this clause are maximum rates, and are in substitution for and not cumulative upon any other rate in this award (including shiftwork rates in clause 16.3).”

77. The CFMEU notes that the parties have agreed on the clause on the basis that its application is not intended to exclude the payment of allowances contained in clause 14 of the Award.

#### **LIKELY IMPACT OF THE PROPOSED VARIATIONS**

78. The CFMEU submits that as all operators of coal export terminals in Australia are covered by enterprise agreements, and that as the enterprise agreements already provide for compensation for ordinary hours worked on weekends and/or public holidays, there is likely to be very little or no negative impact in terms of costs to the operators of those terminals or on employment growth, performance or competitiveness should the CFMEU’s proposed variations be adopted.

79. As the coal export terminals are required to be operated on weekends and public holidays, the CFMEU further submits that it is necessary that the safety net include incentives for employees to work on weekends and public holidays for the performance and sustainability of the industry.

## CONCLUSION

80. The CFMEU submits that in all the circumstances, in order that the *Coal Export Terminal Award 2010* meet the modern awards objective it is necessary that the Award be varied to provide for penalty rates for shiftworkers who work ordinary hours on weekends and, further, to provide that all employees who work ordinary hours on weekends receive penalty rates for that work. In summary, the CFMEU submits that the proposed variations are necessary to ensure that the *Coal Export Terminal Award 2010* provides fair and relevant minimum safety net of terms and conditions given:

- (a) the express requirement that the Commission take into account the need to provide additional remuneration for employees who work weekends or public holidays in paragraph 134(1)(da) of the Act;
- (b) the 24/7 operations of coal export terminals in Australia and the associated use of shift work to accommodate such operations;
- (c) in relation to the proposed variation of the Award to provide for penalties for shiftworkers working ordinary hours on weekends, the provision under the current Award of penalty rates for day workers working ordinary hours on weekends;
- (d) the additional overtime under the current Award for overtime worked on a weekend or on a public holiday;
- (e) the prevalence of penalty rates for shiftworkers and day workers working on weekends and public holidays in related modern awards;
- (f) the prevalence of enterprise agreements at Australia's coal export terminals and the compensation paid to employees who work ordinary hours on weekends and/or public holidays under those agreements;

- (g) the history of compensation being paid to employees who work ordinary hours on weekends and/or public holidays at coal export terminals pursuant to pre-reform industrial instruments; and
- (h) the likely minimal cost of the proposed variations.

**CFMEU - Mining and Energy Division**  
**5 August 2016**

# IN THE FAIR WORK COMMISSION

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*Fair Work Act 2009*

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## COAL EXPORT TERMINALS AWARD 2010

### SCHEDULE 1

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## Part 1—Hours of Work and Related Matters

### 16. Ordinary hours of work and rostering

16.1 The ordinary hours of work will be an average of 35 hours per week. For the purposes of the NES an employee's ordinary hours may be averaged over the roster cycle (not more than 26 weeks) for shiftworkers or a period of up to four weeks for day workers.

#### 16.2 Employees other than shiftworkers

(a) Employees, other than shiftworkers, may be required to work up to 10 ordinary hours per day, between the hours of 6.00 am and 6.00 pm Monday to Sunday. If the employer and a majority of affected employees agree, up to 12 ordinary hours per day may be worked.

~~(b) All ordinary hours worked by an employee other than a shiftworker on the following days will be paid for at the following rates:~~

<del>Day</del>	<del>Rate of pay</del>
<del>Monday to Friday</del>	<del>Single time</del>
<del>Saturday</del>	<del>First 4 hours at time and a half After 4 hours at double time</del>
<del>Sunday</del>	<del>Double time</del>

#### 16.3 Shiftwork

##### (a) Definitions

(i) **Afternoon shift** means any shift, the ordinary hours of which finish after 7.00 pm and at or before midnight.

(ii) **Night shift** means any shift, the ordinary hours of which finish after midnight and at or before 8.00 am.

(iii) **Permanent night shift employee** is an employee who:

- works night shift only;
- stays on night shift for a longer period than four consecutive weeks; or
- 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.

##### (b) Shiftwork rates

(i) A shiftworker or a continuous shiftworker whilst on afternoon shift or night shift must be paid a loading of 15% of the ordinary hourly base rate of pay.

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- (ii) A shiftworker or a continuous shiftworker whilst on permanent night shift must be paid a loading of 25% of the ordinary hourly base rate of pay.

### 16.4 Rostering

#### (a) Rostering of hours and length of shifts

- (i) The employer can determine the type of rosters to be worked.
- (ii) The employer can determine the shift length to be worked as long as the ordinary hours do not exceed 10. Shifts of more than 10 ordinary hours can only be implemented by agreement between the employer and the majority of employees affected or, in the absence of agreement, as resolved in accordance with clause **Error! Reference source not found.** of this award.

#### (b) Shift starting and finishing times

The start and finish times of shifts up to 10 ordinary hours may be determined by the employer. Shifts in excess of 10 ordinary hours will be worked between the starting and finishing times that are agreed between the employer and the majority of employees affected or, in the absence of agreement, as resolved in accordance with clause **Error! Reference source not found.** of this award.

#### (c) Roster and shift changes

- (i) An employer may vary an employee's days of work or start and finish times to meet the needs of the business by giving at least 48 hours' notice, or such shorter period as is agreed between the employer and an individual employee.
- (ii) Where an employee is performing shiftwork, the employer may change shift rosters or require an employee to work a different shift roster upon 48 hours' notice. These time periods may be reduced where agreed by the employer and the employee or at the direction of the employer where operational circumstances require.
- (iii) The employer must consult with directly affected employees about any changes made under this clause.
- (iv) Notwithstanding anything elsewhere contained in this clause, an employer may vary or suspend any roster arrangement immediately in the case of an emergency.

### 16.5 -Weekend and Public Holiday Rates – All Employees

- (a) All ordinary hours worked by an employee ~~other than a shiftworker~~ on the following days will be paid for at the following rates:

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<u>Day</u>	<u>Rate of pay</u>
<u>Monday to Friday</u>	<u>Single time</u>
<u>Saturday</u>	<u>First 4 hours at time and a half</u> <u>After 4 hours at double time</u>
<u>Sunday</u>	<u>Double time</u>
<u>Public Holiday</u>	<u>Double time and a half</u>

(b) The rates in this clause are maximum rates, and are in substitution for and not cumulative upon any other rate in this award (including shiftwork rates in clause 16.3).

**17. Breaks**

- 17.1 An employee, other than a shiftworker, is entitled to an unpaid meal break of 30 minutes after every five consecutive hours worked.
- 17.2 A shiftworker working 10 hours or less will be entitled to a paid meal break of 30 minutes per shift.
- 17.3 A shiftworker working for longer than 10 hours will be entitled to paid meal breaks totalling 60 minutes per shift.
- 17.4 Breaks will be scheduled by the employee's supervisor based upon operational requirements so as to ensure continuity of operations. The employer will not require an employee to work more than five hours before the first meal is taken or between subsequent meal breaks if any.
- 17.5 An employee may take a paid rest break of 20 minutes after each four hours of overtime worked, if the employee is required to continue work after the rest break.
- 17.6 The employer and an employee may agree to any variation of this clause to meet the circumstances of the workplace, provided that the employer is not required to make any payment in excess of or less than what would otherwise be required under this clause.

**18. Overtime**

**18.1 Payment for overtime**

All time worked in excess of or outside the ordinary hours of any shift on the following days will be paid for at the following rates:

<b>Day</b>	<b>Rate of pay</b>
Monday to Saturday	First 3 hours at time and a half After 3 hours at double time
Sunday	Double time

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<b>Day</b>	<b>Rate of pay</b>
Public holidays	Double time and a half

**18.2 Method of calculation**

When computing overtime, except for clause 18.5, each day or shift worked will stand alone.

**18.3 Overtime—continuous shiftworkers**

**(a)** A continuous shiftworker will be paid for all work done in addition to the ordinary hours at the rate of double time except on a public holiday when the rate will be double time and a half.

**(a)(b)** The rates in this clause are maximum rates, and are in substitution for and not cumulative upon any other rate in this award (including shiftwork rates in clause 16.3).

**18.4 Rest period after working overtime**

**(a) Length of the rest period**

When overtime work is necessary it will be arranged where possible for employees to have at least 10 consecutive hours off duty between the work of successive days.

**(b) Where the employee does not get a 10 hour rest**

**(i)** The following conditions apply to an employee who works so much overtime that the employee has not had at least 10 consecutive hours off duty between the end of the employee's rostered hours of work on one day and the start of the employee's rostered hours of work on the next day:

- the employee will be released from duty after that overtime is finished until the employee has had 10 consecutive hours off duty; and
- there will be no loss of pay for rostered hours of work time which occur during this absence.

**(ii)** The following conditions apply to an employee who, on the instructions of the employer, resumes or continues work without having had 10 consecutive hours off duty in accordance with clause 18.4(b)(i):

- the employee will be paid at double time during rostered hours and after that until the employee is released from duty;
- the employee will then be entitled to be absent for 10 consecutive hours; and
- there will be no loss of pay for rostered hours of work time which occur during this absence.

**18.5 Call-back**

**(a) Payment for call-back**

- (i)** An employee who is recalled to work overtime after leaving the coal export terminal (whether the employee was notified before or after leaving it) will be paid for at least four hours' work at the appropriate rate for each time the employee is recalled.
- (ii)** Except where unforeseen circumstances arise, the employee will not be required to work the full four hours if the job to be performed is completed within a shorter period.
- (iii)** The provisions of this clause do not apply in the following cases:
  - where it is customary for an employee to return to the coal export terminal to perform a specific job outside the employee's ordinary working hours; or
  - where the overtime is continuous (subject to a reasonable meal break) with the end or start of ordinary working time.

**(b) Call-back less than four hours**

Overtime worked in the circumstances specified in clause 18.5(a) will not be regarded as overtime for the purposes of a rest period as set down in clause 18.4 if the actual time worked is less than four hours on any recall or on each of any recalls.

**Part 2—Leave and Public Holidays**

**19. Annual leave**

**19.1** Annual leave is provided for in the NES. This clause supplements those entitlements and provides industry specific detail.

**19.2 Definition of shiftworker**

For the purpose of the additional week of annual leave provided for in the NES, a shiftworker is a continuous shiftworker as defined in clause **Error! Reference source not found.**

**19.3 Deduction of annual leave**

For each period of annual leave taken the ordinary hours of rostered shifts that would have been worked by an employee will be deducted from the employee's accrued annual leave entitlement.

**19.4 Payment for annual leave**

An employee taking annual leave must be paid either:

- (a)** the employee's ordinary rate of pay plus a loading of 17.5% of that rate; or

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- (b) the employee's rostered earnings for the period of annual leave, which includes all rostered overtime and rostered public holidays (paid at ~~double time and a half~~ the rate in clause 16.5), but does not include shift allowances, other than for seven day roster employees,

whichever is the greater.

**19.5 When payment will be made for annual leave**

An employee will be paid for a period of annual leave in accordance with the employee's normal pay periods, unless an employee requests that payment of the entire period of annual leave be made prior to the employee commencing leave.

**19.6 Taking of annual leave during shut downs**

An employer may direct an employee to take paid annual leave during all or part of a period where the employer shuts down the business or part of the business where the employee works. If an employee does not have sufficient accrued annual leave for the period, then the employee may be required to take leave without pay. A minimum of four weeks notice will be given for a shutdown under this clause.

**19.7 Taking of annual leave on excessive accrual**

If an employer has genuinely tried to reach agreement with an employee as to the timing of taking annual leave, the employer can require the employee to take annual leave by giving not less than four weeks' notice of the time when such leave is to be taken if:

- (a) at the time the direction is given, an employee has eight weeks or more of annual leave accrued in the case of an employee entitled to four weeks annual leave per annum or 10 weeks or more of annual leave accrued in the case of an employee who is entitled to five weeks annual leave per annum; and
- (b) the amount of annual leave the employee is directed to take is less than or equal to a quarter of the amount of leave accrued.