

FAIR WORK COMMISSION

FOUR YEARLY REVIEW OF MODERN AWARDS

AM2014/67 – BLACK COAL MINING INDUSTRY AWARD

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION,
MINING AND ENERGY DIVISION (“CFMEU”)

EXPOSURE DRAFT – REPUBLISHED 4 NOVEMBER 2015

1. On 20 November 2015, the CFMEU filed a submission making a number of comments on the republished draft of the Black Coal Mining Award 2015.
2. Since filing that submission, the CFMEU has come across three matters in that republished draft that need to be addressed.

Casual Employment – Production and Engineering Employees

3. The first matter concerns the inclusion of C.2 Casual Employees in Schedule C to the republished exposure draft. This section provides two tables for the various hourly rates for “Casual production and engineering employees”. As neither the Black Coal Mining Industry Award 2010 (“BCMI Award 2010”) nor the republished exposure draft provide for the employment of production and engineering employees on a casual basis, the two tables serve no purpose. Sub clause 10.1 (c) of the BCMI Award 2010 and sub clause 6.1 (c) of the republished exposure draft provide that casual employment applies only to staff employees. For that reason the reference to C.2 Casual Employees and the subsequent two tables should be deleted.

Overtime – six and seven day roster employees

4. The second matter concerns the entitlements of 6 day and 7 day roster employees when working hours in excess of or outside the ordinary hours of an afternoon or night shift (rotating or permanent) and a public holiday. The proposed wording in the republished exposure draft does not reflect the current situation in the BCMI Award 2010 and needs to be amended accordingly.

5. Sub clause 14.3 of the republished exposure draft (the amendments are printed in italics) should read as follows:
 - (a) All time worked in excess of or outside *the* ordinary hours of any afternoon or any rotating night shift by a six day roster employee or a seven 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 *the* ordinary hours of any permanent night shift by a six day roster employee or a seven day roster employee will be paid at 225% of the employee's hourly base rate of pay.
 - (c) *All time worked in excess of or outside the ordinary hours of any afternoon or a rotating night shift on a public holiday by a six day roster employee or a seven day roster employee will be paid at 315% of the employee's hourly base rate of pay.*
 - (d) *All time worked in excess of or outside the ordinary hours of any permanent night shift on a public holiday by a six day roster employee or a seven day roster employee will be paid at 325% of the employee's hourly base rate of pay.*
6. For the purpose of clarity, the words "*Subject to sub clauses 14.3 (c) and (d)*" should be inserted at the commencement of sub clause 18.4(b) of the republished exposure draft so as to identify that six and seven day roster employees are paid in accordance with those sub clauses.
7. The amendments in paragraphs 5 and 6 reflect the current award.
8. The amendments in paragraphs 5 and 6 are necessary because:
 - 8.1. The BCMI Award 2010 provides in sub clause 22.2 that when six day or seven day roster employees work overtime during hours as defined as an afternoon or night shift, the employees are entitled to the overtime penalty rate of 200\$ plus 15% or 25% (whichever is applicable).
 - 8.2. There is no qualification on the payment of overtime plus the applicable shift allowance. The overtime plus the shift penalty is paid in circumstances where the overtime is rostered or

unrostered, worked either before or after ordinary hours and when the overtime is not continuous with ordinary hours.

- 8.3. The overtime rate for a six day or seven day roster employees is double time (sub clause 17.2 (b) of the BCMI Award), other than when worked on a public holiday when it is treble time (sub clause 27.4(b)) of the BCMI Award).
- 8.4. In the republished exposure draft, sub clause 14.3 (a) states: "All time worked in excess of or outside ordinary hours after an afternoon shift or a rotating night shift by a six day roster employee or a seven day roster employee will be paid at 215% of the employee's ordinary base hourly rate of pay." Sub clause 14.3 of the republished exposure draft (b) states "All time worked in excess of or outside ordinary hours after an permanent night shift by a six day roster employee or a seven day roster employee will be paid at 225% of the employee's ordinary base hourly rate of pay." There is no provision in the republished exposure draft concerning overtime worked by a six or seven day roster employee on any public holiday.
- 8.5. The use of the term "after" in the republished exposure draft provides a limitation on the entitlement that the current BCMI Award provision does not apply. The term "after" provides that the entitlement is confined to overtime that is worked "after" the ordinary hours of an afternoon or night shift have been worked. In that case, it would exclude the entitlement when an employee works overtime before a shift or where it is no continuous with a afternoon or night shift. Such a distinction does not exist in the current BCMI Award
- 8.6. The provision of either 215% or 225% of the employee's ordinary base hourly rate fails to take into account the overtime penalty rate for public holidays. Again such a distinction does not exist in the current BCMI Award. Sub clause 22.2 of the BCMI Award refers to the "Overtime penalty rate" plus the afternoon or night shift allowance. As such it encapsulates the payment of treble time

on a public holiday. The republished exposure draft does not cover this current BCMI Award situation. Accordingly, additional sub clauses have been added to remedy that situation.

- 8.7. In addressing the appropriate wording to remedy the problems identified herein, the CFMEU has adopted the wording that is used in sub clause 14.2 (a) and 14.2(b) of the republished exposure draft, namely: "All time worked in excess of or outside of the ordinary hours of any.....". This maintains consistency throughout the clause.
9. It is also noted that in an earlier submission by the CFMEU on Payment for Work Performed on Public Holidays (filed in the FWC on 23 December 2014), the CFMEU mentions that the payment for working overtime on a public holiday is treble time only (see paragraph 21 and 22(c) of that submission). This was taken from sub clause 27.4(b) of the BCMI Award, which provides for overtime payment of treble time on a public holiday. However, that position needs to be qualified or corrected in light of sub clause 22.2 of the BCMI Award 2010. Sub clause 17.4(b) of the BCMI Award needs to be read subject to sub clause 22.2 of the BCMI Award. The award entitlement is that six or seven day roster employees will receive payment at treble time plus any applicable shift allowance if overtime is performed on a public holiday (and any other day), whereas employees who are not six or seven day roster employees will be paid at the overtime rate for the day. Sub clause 22.2 makes a distinction between "overtime hours 6 or 7 day roster" and "All others". It is this distinction that sub clause 14.3 on the republished exposure draft seeks to address, albeit incorrectly as it currently stands.

Schedule C and D – Summary of Hourly Rates of Pay

10. Schedules C and D in the republished exposure draft do not provide an hourly rate when an employee works an afternoon or night (rotating or permanent) shift on a Saturday or Sunday. For example, Table C.1.1 and C.1.2 deal with weekend rates and shift rates separately (as do Tables D.1.1, D.1.2, D.2.1 and D2.2 in Schedule D). The position in the BCMI Award 2010 is that an employee working an afternoon or night shift on a

weekend will receive payment at the weekend rate plus the relevant shift allowance. For clarity, Tables C.1.2 in Schedule C and Tables D.1.2 and 2.2 in Schedule D should be amended to identify the appropriate rate when afternoon or night shift is worked on a Saturday or Sunday.

11. Schedules C and D do not provide for an hourly rate where a 6 or 7 day roster employee works overtime on an afternoon or night shift that falls on a public holiday. As noted in this submission the employee in this situation is entitled to either 315% or 325%. As such, Table C.1.4 in Schedule C and Table D.1.4 in Schedule D require amendment.
12. Schedule D, does not provide for a casual employee who works as a 6 or 7 day roster employee. The Schedule requires amendment in that respect as well as providing for overtime when worked by a 6 or 7 day roster casual employee.
13. It is noted that the term “other than six day roster and seven day roster shiftworkers” is used in Table C.1.3 and Table D.1.3 and the term “six day roster and seven day roster shiftworkers” is used in Table C.1.3 and D.1.4. It is submitted that for consistency’s sake the term “employee” be used rather than “shiftworker” (see definitions in Schedule G and sub clause 14.3 of the republished exposure draft).
14. It is also noted that the Ai Group has raised with the FWC the issue of payment when work is performed on public holidays. In the absence of the determination of that matter, there may or may not be any requirement to insert additional hourly rates for ordinary hours worked on a public holiday. Notwithstanding earlier submissions, the CFMEU will formulate its position upon consideration of the Ai Group submission on the issue.

Summary

15. The objective in this submission is to ensure that the Black Coal Award 2015 is consistent with the Black Coal Mining Industry Award 2010, with respect to the entitlement of the provision of casual employment; entitlements for six and seven days roster employees to shift allowances and overtime; and the use of hourly rates in Schedules C and D.

16. In summary, the CFMEU submits that for the purposes of maintaining the current BCMI Award 2010 position in the republished exposure draft in circumstances where the republished exposure draft “does not seek to amend any entitlements” (see the preface to the republished exposure draft), where there has been an inadvertent inclusion of casual employment for production and engineering employees, and where the Full Bench has sought the inclusion of hourly rate tables, the republished exposure draft needs to be amended as identified in paragraph 3 above, paragraphs 5 and 6 above and paragraphs 10 to 13 above.
17. It is acknowledged that this is the first time these matters have been raised and that an opportunity has not been given to other interested parties to comment.

CFMEU Mining and Energy Division
3 December 2015