

FAIR WORK COMMISSION

Black Coal Mining Industry Award 2010 AM2014/67

Submission on behalf of the Coal Mining Industry Employer Group

Introduction

1. This submission is made on behalf of the Coal Mining Industry Employer Group (**CMIEG**) in accordance with the decision issued by the Full Bench of the Fair Work Commission on 9 June 2017 ([\[2017\] FWCFB 3177](#)), concerning the amended [Exposure Draft](#) of 13 June 2017 of the Black Coal Mining Industry Award (**BCMI Award**).
2. The CMIEG continues to rely on the submissions it has filed in respect of the [Exposure Draft](#) of 26 September 2014 and the [Exposure Draft](#) of 4 November 2015, of the BCMI Award.¹

Exposure Draft of the BCMI Award

3. The Exposure Draft of 13 June 2017 generally reflects the position of the parties, as noted in the report to the Full Bench on 23 December 2014,² and the other amendments identified by the parties in subsequent submissions³ and determinations arising from "common issue" proceedings.

Outstanding issues

4. The CMIEG confirms that the matters set out at [13] and [17] of the Commission's decision of 23 October 2015 ([\[2015\] FWCFB 7236](#)) relying upon Attachment B to the report to the Full Bench on 23 December 2014 ([PR553005](#)) remain outstanding.

¹ Noting that the CMIEG has subsequently changed its position in respect of clause 18.4, as confirmed in the [CMIEG submission](#) of 22 January 2016 (which departs from the [CMIEG and CFMEU joint submission](#) of 20 October 2014 at [3.8] (referring to clause 18.5 in the [Exposure Draft](#) of 26 September 2014, which was numbered as clause 18.4 in the [Exposure Draft](#) of 4 November 2015)).

² [PR553005](#).

³ [AiGroup correspondence](#) of 14 January 2015; [CFMEU submissions](#) of 19 January 2015; [CFMEU correspondence](#) of 23 January 2015; [AiGroup correspondence](#) of 13 November 2015; [CFMEU submission](#) of 20 November 2015; [CMIEG submission](#) of 20 November 2015; [APESMA submissions](#) of 20 November 2015; [APESMA correspondence](#) of 20 November 2015; [AiGroup submission](#) of 20 November 2015; [CFMEU submission](#) of 3 December 2015; [AMWU submission](#) of 4 December 2015; [AiGroup submission](#) of 7 December 2015; [CFMEU submissions](#) of 21 December 2015; [CMIEG submission](#) of 22 January 2016; [CFMEU submission](#) of 7 April 2016; [CFMEU submission](#) of 16 June 2017; [CFMEU correspondence](#) of 17 June 2016.

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5. Those issues have been the subject of further submissions by the parties since that decision was published. The subsequent submissions appear to be properly summarised in the "Summary of Submissions on Revised Exposure Draft".⁴
6. A summary of the CMIEG's position in relation to those outstanding issues is set out in the **Annexure** to these submissions.
7. There are a number of other matters that have been dealt with by the CFMEU, APESMA and AiGroup in submissions each of them have filed, including in relation to typographical or formatting errors in the Exposure Draft, minor matters flowing from the "common issue" proceedings (excepting those referred to below), or in respect of which the CFMEU/APESMA and the AiGroup are agreed.⁵ The CMIEG does not wish to make any submission about those matters.

Additional proposed drafting amendments

8. In addition, however, the CMIEG proposes that for consistency of drafting that further minor amendments be made to the BCMI Award. These proposed drafting amendments are set out in the **Annexure** to these submissions.

Other unresolved issues affecting the BCMI Award

9. There are a number of other issues relating to the BCMI Award which are being dealt with separately by the Commission as part of the four yearly review of modern awards, in respect of which the CMIEG has made submissions or taken an active interest, and which remain unresolved. These issues are as follows:

Accident Pay

10. In matter AM2014/190, the CMIEG has made an application concerning clause 18 – Accident Pay of the BCMI Award, arising from the decision of the Commission on 18 August 2015 ([\[2015\] FWCFB 3523](#)) in matter AM2014/190. (It is noted that the Exposure Draft re-inserts clause 18 as clause 10A). That matter is presently listed for hearing on 5 and 6 October and 24 November 2017.

Annual leave

11. In matter AM2104/47, the CMIEG, AiGroup, CFMEU and APESMA have each made submissions concerning clause 25 – Annual leave (clause 15, Exposure Draft) of the BCMI Award, and the variation of that clause to include model terms on annual leave arising from the decision of the Commission on 15 September 2015 ([\[2015\] FWCFB 5771](#)) and

⁴ [Summary of Submissions](#) on Revised Exposure Draft published 13 June 2017.

⁵ Namely, clauses 7, 8.1, 8.7(f)(ii), 13.1, 13.2, 13.3(a)(i), 14.2(b), 15.3, 16.2, Schedules A.8.2, B.2.1, B.3.1, C and D (except to the extent that the CFMEU contends that consequential amendments should be made to Schedules C and D based upon its contention about the proper construction of clause 18.4, and its proposed variation to clause 14.3 – see [CFMEU submission](#) of 3 December 2015 at [11]).

further variations dealing with the sub-clause concerning shutdowns. The parties are waiting for the Commission to advise how the matter will now be dealt with.

Payment of wages

12. In matter AM2016/8, the CMIEG, AiGroup and CFMEU have each made submissions concerning the model term on payment of wages on termination, as it relates to the BCMI Award. In those proceedings, a further issue concerning payment of wages generally, is being considered. The matter is listed for mention on 5 July 2017 (see Statement [\[2017\] FWCFB 2729](#) at [27]).

Redundancy

13. In addition, we note that the Federal Court currently has before it a joint application of the CFMEU, APESMA and AMWU for judicial review (NSD352/2017), in respect of the determination of a Full Bench of the Commission to vary the redundancy pay clause of the BCMI Award.⁶ That matter is listed to be heard before a Full Court of the Federal Court on 2 August 2017.

Proposed approach for dealing with outstanding matters

14. The Commission has previously expressed an expectation that outstanding matters relating to the Exposure Draft would be "finalised on the papers" ([\[2015\] FWCFB 7236](#) at [358]).
15. The CMIEG respectfully suggests that the unresolved matters described at paragraphs 4 to 8 (above) may be most efficiently dealt with by the parties and the Commission in conference, or at a directions hearing, convened by a delegated member of the Full Bench.⁷
16. The outstanding matters described at paragraphs 9 to 12 will, of course, take their own course.

Ashurst Australia

Legal representative for the CMIEG

30 June 2017

⁶ See the decision published on 27 January 2017 ([\[2017\] FWCFB 584](#)), and the variation published on 20 May 2017 ([PR589930](#)).

⁷ See also [CMIEG submission](#) of 20 November 2015 and [CMIEG submission](#) of 22 January 2016.

ANNEXURE – SUMMARY OF CMIEG POSITION

Clause	Amendment/Issue	CMIEG position
Outstanding matters		
9.2(a) and 9.2(c) – Paid meal break – non-rostered overtime	<p>Query of the Commission in the Exposure Draft of 26 September 2014 concerning whether the 30 minute paid meal break before starting overtime should be paid either at ordinary time or double time (clause 9.2(a) and whether the words "of 30 minutes duration" after "further crib break" should be added (clause 9.2(c)).</p> <p>Joint CFMEU and CMIEG submissions made in response, including proposed wording changes.⁸</p>	<p>CFMEU and CMIEG have made a joint submission about the correct construction of the clause, and proposed wording changes.</p> <p>No application to vary has been made by any party in accordance with the 23 October Decision [2015] FWCFB 7236 at [14].</p> <p>The current clause would accordingly be retained.</p> <p>The CMIEG is, in any event, content with the current clause.</p>
12.1(d) – Rotating night shift	<p>Query of the Commission in the Exposure Draft of 26 September 2014 concerning whether the definition of "rotating night shift employee" should be renamed "non-permanent night shift employee".</p> <p>Submissions of CFMEU made in response.⁹</p>	<p>CMIEG does not wish to make submissions about the clause.¹⁰</p> <p>No application to vary has been made by any party in accordance with the 23 October Decision [2015] FWCFB 7236 at [14].</p> <p>The current clause would accordingly be retained.</p>
14.3(c) and (d) - Six day and seven day roster employee (Schedules C and D – Summary of Hourly Rates of Pay) (consequential amendments)	<p>CFMEU proposes amendment to insert new paragraphs (c) and (d) concerning overtime worked on public holidays by six day and seven day roster employees.¹¹</p> <p>CFMEU also proposed consequential amendments to Schedules C and D.¹²</p>	<p>CMIEG opposes amendments sought by the CFMEU.¹³ (AiGroup also opposes amendment.)¹⁴</p>

⁸ [CMIEG and CFMEU joint submission](#) of 20 October 2014; note also that the CFMEU also filed supplementary submissions concerning clause 18.5 on [23 December 2014](#); the AiGroup dealt with this clause in email correspondence to the Commission of [14 January 2015](#).

⁹ [CFMEU submission](#) of 20 November 2015 at [14]-[16].

¹⁰ [CMIEG submission](#) of 20 November 2015 at 3(d).

¹¹ [CFMEU submission](#) of 3 December 2015 at [5].

¹² [CFMEU submission](#) of 3 December 2015 at [11].

¹³ [CMIEG submission](#) of 22 January 2016 at [28]-[29].

¹⁴ [AiGroup submission](#) of 7 December 2015

Clause	Amendment/Issue	CMIEG position
15.3 – Accrual of annual leave	<p>Query of the Commission in the Exposure Draft of 26 September 2014 concerning whether annual leave should accrue based on completed weeks of "employment" or "service".</p> <p>Submissions of CFMEU made in response.¹⁵</p>	<p>CMIEG does not wish to make submissions about the clause.¹⁶</p> <p>No application to vary has been made by any party in accordance with the 23 October Decision [2015] FWCFB 7236 at [14].</p> <p>The current clause would accordingly be retained.</p>
16.2 – Evidence required (Personal/carer's leave and compassionate leave) (as renumbered)	<p>Query of the Commission in the Exposure Draft of 26 September 2014 concerning whether employees should only accrue personal/carers' leave in accordance with NES.</p> <p>Submissions of CFMEU made in response.¹⁷</p>	<p>CMIEG does not wish to make submissions about the clause.¹⁸</p> <p>No application to vary has been made by any party in accordance with the 23 October Decision [2015] FWCFB 7236 at [14].</p> <p>The current clause would accordingly be retained.</p>
18.4 - Employee required to work on a recognised public holiday (previously clause 18.5 in the Exposure Draft of 26 September 2014)	<p>CFMEU has made submissions about the interpretation of the clause.¹⁹ CFMEU also seeks corresponding amendment to clause 14.3 (see above).</p> <p>AiGroup seeks an amendment to the clause.²⁰</p>	<p>CFMEU and CMIEG made a joint submission about clause.²¹ CMIEG now disagrees with the CFMEU about the construction of the clause, and opposes the corresponding amendment to clause 14.3 (see above).²²</p> <p>AiGroup has sought an amendment to clause 18.4. The amendment accords with the CMIEG's construction of the clause.</p>

¹⁵ [CFMEU submission](#) of 20 November 2015 at [20]-[24].

¹⁶ [CMIEG submission](#) of 20 November 2015 at 3(d).

¹⁷ [CFMEU submission](#) of 20 November 2015 at [25]-[29].

¹⁸ [CMIEG submission](#) of 20 November 2015 at 3(d).

¹⁹ [CFMEU submission](#) of 20 November 2015.

²⁰ [AiGroup submission](#) of 20 November 2015.

²¹ [CMIEG and CFMEU joint submission](#) of 20 October 2014.

²² As confirmed in the [CMIEG submission](#) of 22 January 2016 at [3]-[27]; cf [CMIEG and CFMEU joint submission](#) of 20 October 2014.

Clause	Amendment/Issue	CMIEG position
Additional drafting amendments		
14.11 – Time off instead of payment for overtime	<p>Each of the references to "clause 14.11" within the clause itself, read "this clause 14.11".</p> <p>Each of the cross-references within the clause should set out the complete reference, for example, the reference in sub-paragraph 14.11(c)(iv) to "subparagraph (iii)" should read "subparagraph 14.11(c)(iii)".</p>	CMIEG proposed drafting amendment.
16.3 – Evidence required (personal/carer's leave and compassionate leave)	The reference in paragraph (b) to the "dispute resolution procedure" should refer to "clause 23 – Dispute resolution" as appears elsewhere in the BCMI Award.	CMIEG proposed drafting amendment.
21.6 – Variation to retrenchment pay	The reference to the "dispute resolution procedure" should refer to "clause 23 – Dispute resolution" as appears elsewhere in the BCMI Award.	CMIEG proposed drafting amendment.