

FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

Finalisation of Exposure Drafts – Tranche 3 Awards

AM2019/17 – Black Coal Mining Industry Award

Submissions Pursuant to Directions made 12 June 2020

SUBMISSION BY THE ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS AUSTRALIA, COLLIERIES STAFF DIVISION

1. This submission is made by the Association of Professional Engineers, Scientists and Managers Australia, Collieries Staff Division (“**the Association**”) in relation to the directions made by DP Gostencnik on 12 June 2020
2. In addition to the submissions made herein, the Association supports the submissions of the Construction, Forestry, Maritime, Mining and Energy Union – Mining and Energy (“**the CFMMEU**”) Division filed in relation to the issues under consideration dated 20 April 2020, 13 May 2020 and 3 July 2020. For matters not addressed by this submission, the Association refers to and relies on those previous submissions.
3. The Association’s coverage non-exhaustively includes employees engaged in work in the black coal mining industry in supervisory, professional, administrative, clerical and technical capacities. These workers are typically referred to as “staff” employees.
4. Members of the Association are highly reliant on the *Black Coal Mining Industry Award 2010* (“**the BCMI Award**”) to provide their base entitlements and conditions. The Association estimates that approximately 85% of its membership base are covered by the BCMI Award without an Enterprise Agreement.
5. The Association has had the benefit of reviewing the submissions and evidence adduced by the CFMMEU. This submission supplements those submissions by providing context in relation to the “staff awards” as they existed at the relevant times. Those awards include:
 - a. The Coal Mining Industry (Supervision and Administration) Interim Consent Award 1990, New South Wales and Tasmania (“**the 1990 NSW Staff Award**”);
 - b. The Coal Mining Industry (Supervision and Administration) Interim Consent Award 1990, Queensland (“**the 1990 Queensland Staff Award**”);
 - c. The Coal Mining Industry Interim Consent Award (Deputies and Shotfirers), 1990 (“**the 1990 Deputies Award**”);

- d. The Coal Mining Industry (Supervision and Administration) Interim Consent Award 1999, New South Wales and Tasmania (“**the 1999 NSW Staff Award**”);
- e. The Coal Mining Industry (Supervision and Administration) Interim Consent Award 1990, Queensland (“**the 1999 Queensland Staff Award**”);
- f. The Coal Mining Industry Award (Deputies and Shotfirers), 2002 (“**the 2002 Deputies Staff Award**”);
- g. Coal Mining Industry (Staff) Award, 2004. (“**the 2004 Staff Award**”)

1990 Staff Awards

- 6. As to the cumulative nature of shift loadings and penalty rates, the *Coal Mining Industry Interim Consent Award (Production and Engineering), 1990* relevantly provides:

“13-AFTERNOON AND NIGHT SHIFTS

(a) Rates

For all time worked on afternoon or night shift 15 per cent shall be added to ordinary rates.

(b) Permanent Night Shift

An employee who works night shift only; or remains on night shift for a longer period than four consecutive weeks; or works on a roster which does not give at least one-third of the employee's working time off night shift in each roster cycle; shall, during such period be paid an additional 25% for all time worked during ordinary working hours on such night shift.

(c) 7 Day and 6 Day Roster Employees

The above percentage shall be cumulative on any penalty rate prescribed by this award for 7 day and 6 day roster workers and shall be calculated on the ordinary rate.”

- 7. This clause 13(c) is replicated in identical terms in the 1990 NSW Staff Award (clause 15(e)), the 1990 Queensland Staff Award (clause 15(c)) and the 1990 Deputies Award (clause 12(c)).
- 8. These clauses evince a clear intention that shift loadings were to be cumulative with weekend penalty rates. This is particularly the case where there is no proscriptive clause to the contrary.
- 9. The Association notes that the clause is stated to apply to “*7 day and 6 day roster workers*”. The Association submits that this clause was included to make this entitlement explicit for those workers and not to disentitle other shiftworkers.

10. The submission is supported by the materials filed by the CFMMEU on 3 July 2020, specifically the statement of Andrew Vickers.
11. Exhibit AV-3 to Mr Vickers statement is a 1988 document containing questions from relevant parties which were answered by the Coal Industry Tribunal. On page 2, it contains the following question from the Miners Federation which was answered by the Tribunal as follows:

Q 3 Shift Penalties – Holidays

Are shift penalties for the six (6) and (7) day roster workers applied to the classification rate or the ordinary time earnings rate for Saturday, Sunday and Public Holidays?

A The position on shift penalties for weekend work is to be generally that which obtains in Queensland and which is described in exhibit B1. Application is to be consistent with the decision in CRB print No 758.

12. Mr Vickers states at [33] that the “Exhibit B1” referred to is the document attached to his Statement and marked AV-2. Exhibit AV-2 contains the following statement regarding penalty rates:

“Penalty Rates for Rosters

As per current Queensland Coal Mining Industry FEDFA Award and Queensland custom and practice.”

13. Mr Vickers states at [28] that this statement “*was a reference to the conditions set out in the 1951 Decision, referred to above*”. This in turn is a reference to the decision of *The Federated Engine Drivers and Firemen’s Association of Australasia and Aberdare Collieries Pty Ltd* [1951] ACIndT 758 (9 February 1951).
14. At [20] of his Statement, Mr Vickers states of this decision that “*it was determined that afternoon and night shift rates would be cumulative of any penalty rate which was prescribed elsewhere in the Coal Mining Industry Award (Engine-Drivers: Queensland).*”
15. Accordingly, the CIT’s answer in reference to 6 and 7 day roster employees was to confirm that shift rates were cumulative with any other penalty rates as was consistent with the practice for other employees. The Association submits that this was included in the 1990 Awards to make this point explicit rather than to exclude other employees.
16. This rationale is complemented by Mr Vickers at [37] of his statement where he states:

“To the best of my knowledge this issue of shift penalties on rostered hours on weekends and public holidays was never contested by employers – it was conceded in the 1988 process which lead to the Restructuring Decision, and it was incorporated into the development of the 1990 Consent Award.”

17. An explicit statement that shiftwork penalties would be cumulative with weekend penalties was not included in the 1990 Awards because it was not in issue between the parties and had been settled in the industry for many years. We submit that the question asked and subsequent clause included in the 1990 Award was merely to make this matter clear for 6 and 7 day roster employees following the introduction of 7 day production.

1999 Awards

18. Both the 1999 NSW and Queensland Staff Awards are silent as to the cumulative nature of shift loadings and other penalties.
19. The CFMMEU submissions dated 13 May at [44]-[48] helpfully illustrate that the purpose of the 1997 Production and Engineering Award was consolidation rather than substantive change. The Association submits that the same is true for the 1999 Staff Awards.
20. The 1999 Staff Awards were consolidated and modernised after the same process was finalized for the Production and Engineering Award. This process was reflected upon by Commissioner Bacon in Coal Mining Industry (Supervision and Administration) Interim Consent Award (C No. 00808 of 1998) [Aw772793] (8 October 2003). The Commissioner summarised the relevant position at [8] by stating:

“The simplification of the Staff Awards was then delayed whilst employer efforts were concentrated on the simplification of the P&E Award. This was a lengthy process, however the employers felt that whatever principles were established in the simplification of the P&E Award would or could flow to the Staff Awards, thus making their simplification easier.”

21. Accordingly, the parties at the time considered the process through which the Production and Engineering Award was consolidated was at least instructive as to the process which would be followed by the Staff Awards.
22. To that end, the 1999 Staff Awards were unambiguously made with the same intention to not disturb former entitlements as was demonstrated in the Production and Engineering Award. This relationship is made explicit within the Awards:

“7. RELATIONSHIP WITH OTHER AWARDS

This award will succeed the Coal Mining Industry (Supervision & Administration) Interim Consent Award, 1990, New South Wales and Tasmania as varied. This award does not however affect any right obligation or liability accrued or incurred under that former award.

In the event of a disagreement concerning definition, reference will be made to those in the earlier award.”

23. The 1999 Awards outline the shiftwork rates whilst remaining silent on the question of accumulation. The relevant clause, extracted below is essentially identical to the clause in corresponding clause in the 2004 Staff Award and ultimately, the clause adopted by the BCMI Award:

24.2 What are the shift-work rates?

Type of shift	Shift rates
Afternoon and rotating night shifts	
Ordinary hours	115% of the ordinary time rate
Overtime hours: six and seven day roster	Overtime penalty rate (plus 15% of the ordinary time rate for the time worked)
all others	Overtime penalty rate
Permanent night shift	
Ordinary hours	125% of the ordinary rate
Overtime hours: six and seven day roster	Overtime penalty rate (plus 25% of the ordinary time rate for the hours worked)
all others	Overtime penalty rate

24. As a further point, the Association notes that the 2002 Deputies Award retained the language from the 1990 Deputies Award regarding cumulative shift penalties as below:

"15 - AFTERNOON AND NIGHT SHIFTS

...

(c) 7 Day and 6-Day Roster Employees

The above percentages shall be cumulative on any penalty rate prescribed by this award for 7 day and 6 day roster workers and shall be calculated on the ordinary rate."

25. Accordingly, the Association submits that:

- a. The Award is sufficiently unambiguous and clear that shiftwork rates are to be cumulative with any other penalty rate.
- b. To the extent that the history of the Award is considered, it was the intention of 1990 Awards that shiftwork rates would be cumulative with other penalty rates including weekend penalties.

- c. The 1997 and 1999 Awards, whilst altering the language regarding shiftwork, were not intended to substantively alter the entitlement to cumulative shiftwork rates.
- d. This entitlement has not been altered between those Awards and the BCMI Award.
- e. Additionally, where the Award is silent on the cumulative nature of entitlements, those entitlements should not be read down as to being exclusive to each other. In the absence of an express provision to the contrary, the shiftwork and weekend penalties must be considered cumulative.

Association of Professional Engineers, Scientists and Managers Australia
Collieries' Staff Division

3 July 2020