IN THE FAIR WORK COMMISSION

Matter Number: AM2020/25 – 4 yearly review of modern awards – finalisation of exposure drafts – *Black Coal Mining Industry Award 2010*

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION

MINING AND ENERGY DIVISION

5 February 2021

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Introduction

1. These submissions are filed in response to the submissions in reply filed by each of the Coal Mining Industry Employer's Group (**CMIEG**) and the Australian Industry Group (**AIG**) on 29 January 2021. They concern the interaction between the casual loading and the weekend shift rate provisions of the *Black Coal Mining Industry Award 2010* (**BCMI Award**).

2. The CFMMEU supports the submissions of the Association of Professional Engineers, Scientists and Managers Australia, Collieries Staff Division (**APESMA**) filed on 5 February 2021 (**APESMA Submissions**), and make the following additional submission.

Reply to the AIG

3. The AIG submissions of 29 January 2021 (**AIG Submission**) proceed on the basis that there are *"sufficient textual contra-indicators"* to justify not applying the "Yallourn/ Domain approach" as it was described in the Commission's Decision in [2020] FWCFB 4350 (**Overtime for Casuals Decision**).[1] That approach is, in summary, that the ordinary rate of pay for a casual employee includes the relevant casual loading.[2] The purpose of these "textual contra-indicators" is to distinguish the application of the Yallourn/ Domain approach in respect of overtime for casuals in the BCMI Award to what, it is said, should reply in respect of how the casual loading is to be applied where a casual performs work on a weekend and/ or works shiftwork. It is said that, in its place, a new formula is to apply whereby in those instances the 25% loading is to apply on a compounding, rather than cumulative, basis.

4. With respect, this distinction is arbitrary and unwarranted. The argument for this distinction appears to be because:

    a. the CFMMEU has not earlier called for this to be the case;[3] and

    b. to do so would result in doubling up of the casual loading in circumstances where a casual employee works shiftwork on a weekend.[4]

CFMMEU earlier submissions

5. The AIG Submissions critiques the CFMMEU's position on that basis that it had not earlier advanced this position in the context of considering overtime and public holiday rates for shiftworkers under the BCMI Award, in response to the the BCMI Award exposure draft of 29 January 2020 (**Exposure Draft**). This critique is misplaced.

6. The first of these submissions sought to have the relevant shiftwork loading paid on the ordinary time rate.[5] This is entirely consistent with what is currently sought.

7. The second of these submissions was made in response to the directions of Justice Ross on 23 March 2020 where the primary issue was about whether

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[1] For more detail on that approach see the CFMMEU's submissions of 15 January 2021 (**CS January 2021**).

[2] See, for example, *ANMF v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716.

[3] AIG Submissions, [6] – [14].

[4] Ibid, [23] – [24].

[5] See the CFMMEU's submissions of 4 March 2020 (**CS March 2020**),

shiftwork rates were to apply in circumstances where workers were in receipt of penalties for working weekends. In these submissions the CFMMEU sought a variation which would rely on the ordinary time rate being the reference rate for calculating the relevant penalty, as it was then and still is under the BCMI Award. Again, this is entirely consistent with what is currently sought. These submissions paid minimal attention to the rates set out in the tables because, at that time and in this context, they were entirely concerned with what the base of that loading would be.

8. Relevantly, at the time of each of these submissions, the Overtime for Casuals decision, had not yet been handed down. In relation to that matter, the CFMMEU and APESMA had both advanced a submission that the casual ordinary time rate included the 25% penalty and that any other penalty was to be calculated on a cumulative basis, factoring in that 25%. That submission was accepted in that decision in August 2020. Had the CFMMEU's earlier submissions been accepted a different issue would have arisen in relation to the casual penalty rates. Instead, we have the present issue. It is entirely appropriate that it be considered now as any earlier consideration would have resulted in unnecessary duplication, with a substantively similar issue coming before two separate full benches concurrently.

9. The submissions of the CFMMEU in this matter are entirely consistent with the foundation of the argument submitted in relation to [2020] FWCFB 5908 (**Shiftwork Decision**). They are issues which it is appropriate to ventilate at this juncture precisely because of the way in which the authorities of the Shiftwork Decision and the Overtime for Casuals Decision are sensibly to interact. To suggest that this matter should not be entertained is to ignore the realities of the award modernisation process and the interrelated nature of issues of this nature in the context of modern awards.

Textual consideration

10. The AIG Submissions accept that, absent a clear basis to depart from this interpretation, the Yallourn/ Domain approach will apply.[6]

11. The only textual consideration that the AIG point to is that, if the penalty is to be applied in a compounding manner, a complication arises in respect of a casual employee working shiftwork on a weekend, in that they will be in receipt of the casual loading twice. This submission proceeds on the basis that the only answer to this complication is that the rate cannot be sensibly calculated on a compounding basis. Relevantly, the submission is not that the calculation should be compounding, and there has been no argument that has been advanced by the AIG to suggest that it should be. Instead, the highest the argument is put is that a complication arises where it is compounding.

12. The foundation of this submission ignores the outcome of two recent Full Bench decisions and their necessary interaction, instead mounting an apparent merits argument as the basis for completely departing from that authority on the correct interpretation. This position completely disregards that the 125% for casual employees *is* the ordinary time rate in the BCMI Award,[7] and that the use of the

[6] AIG Submissions, [19].

[7] Overtime for Casuals Decision.

term “minimum hourly rate… has the effect of maintaining the rate for ordinary hours worked.”[8]

13. In any event, the submission is a red herring. There is no necessary duplication of the casual loading in circumstances where the rates are compounding. One can add the 25% penalty on at the beginning or the end of the calculation and the result will be the same. It is still a penalty which compensates for the detriments of casual employment, which applies equally where one is working shiftwork, where one works on a weekend or, as the case may be, where a casual employee works shiftwork on a weekend.

Reply to the CMIEG

14. The CMIEG supplement the AIG Submissions by raising a reference to one of the predecessors to the BCMI Award, being the *Coal Mining Industry (Staff) Award 2004* (**Staff Award**). The CMIEG Submissions of 29 January 2021 (**CMIEG Submissions**) place great significance on the use of the word “plus” in both the relevant clause of the Staff Award, clause 11.2.2, and clause 10.4(b) of the BCMI Award, being that the use of the word plus means it is to be paid in addition to the weekly rate, not incorporated into it.

15. The CMIEG places far too much weight on the significance of the word “plus”. While plus can mean *“with the addition of*”, it also means *“an additional quantity”, “additional, extra”* and *“having gained”.*[9] An extra 25% does not sit as an outlier, detached from the original 100% by virtue of the word *plus*. Instead, the original amount *gains* the 25%. As the Full Bench found in the Overtime for Casuals Decision, for a casual employee that 125% is the ordinary rate of pay. It is upon that ordinary rate of pay that each of the amounts an employee is entitled to

16. The CMIEG’s interpretation of the function of the word “plus” gives the word too much work to do. That work is not borne out of a historical industrial context, but out of a confined interpretive argument. It is respectfully submitted that this interpretation should be rejected. The use of *plus* in clause 10.4 of the BCMI Award has instead been used in exactly the way the Full Bench has already interpreted it – to add *and* incorporate the 25% loading into a casual employee’s ordinary rate of pay. There has been no proper basis advanced to justify departing from this authority.

Conclusion

17. It is submitted that no textual indicators have been presented as a compelling reason to depart from the Domain/ Yallourn approach. Accordingly, the CFMMEU submits that the Exposure Draft should be updated to incorporate a compounding approach in respect of how casual rates are taken to interact with shiftwork and weekend rates.

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[8] Shiftwork Decision, [60].

[9] *The Australia Concise Oxford Dictionary Fourth Edition,* 2006, Oxford University Press, 1083.