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12 August 2020

Deputy President Gostencnik
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

Dear Deputy President,

Re. AM2020/25 – Four Yearly Review of Modern Awards – *Black Coal Mining Industry Award 2010*

We refer to the above matter and to the submission filed by the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) on 6 August 2020 in response to the Directions issued by the Fair Work Commission (**Commission**) on 31 July 2020 (**Directions**).

This Correspondence is sent in response to the CFMMEU's submission and to the invitation at paragraph [2] of the Directions for parties representing employer interests to file a short note in the Commission by 12 August 2020 relating to outstanding matters concerning the *Black Coal Mining Industry Award 2010* (**BCMI Award**).

As outlined in Ai Group's Correspondence of 27 July 2020, it is not accepted that the points which the CFMMEU sought to raise in its 6 August 2020 submission are new issues in relation to which the union had not yet had an opportunity to respond. However, in response to the points raised in that submission, Ai Group wishes to note the following arguments in reply.

The degree of weight to be afforded to the meaning of pre-modern awards in interpreting the BCMI Award

It is not disputed that in construing a modern award, regard must be paid to the context and purpose of the provision or expression being construed.[1] An inquiry into the relevant entitlements which subsisted under pre-modern instruments is a relevant consideration, as is the development of relevant entitlements in determining the meaning of the current BCMI Award. However, it is incorrect to assert that such contextual considerations are necessarily determinative of the matter.

As stated in paragraph [50] of Ai Group's 24 July 2020 Submission, the context of the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* (**1997 Award**) and the *Coal Mining Industry (Production and Engineering) Interim Consent Award 1990* (**1990 Award**) is not the context of the BCMI Award. The modern award was made under a very different legislative regime to that which governed the industrial relations system when the 1997 Award and the 1990 Award were made. The considerations which were relevant to making the modern award were contained in the award modernisation request and the objects located in s. 576A of the *Workplace Relations Act 1996* (Cth). The Commission should be slow to infer that there would be no distinction between the contextual considerations relevant to interpreting the BCMI

[1] *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union* [2006] FCA 813, [52].

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Award and the relevant pre-modern awards. For awards which apply to employers across an entire industry, regardless of their involvement in the negotiations and disputes which resulted in making relevant pre-modern awards, it may be expected that cumulative or concurrent payment of various loadings would be clearly articulated. The subjective intentions of the parties engaged in negotiating the relevant pre-modern awards would not be widely known to all entities covered by the BCMI Award and, as such, should be afforded less weight in construing the BCMI Award than they would be in construing pre-modern awards made by consent.

Whether the relevant penalties under the 1997 Award were cumulative

With respect to the CFMMEU's arguments at paragraphs [10] – [32] of its 6 August 2020 Submission, Ai Group does not resile from the position as outlined at paragraphs [16] – [44] of its 24 July 2020 Submissions. If it is accepted that the 1997 Award was not intended to represent a material departure from the 1990 Award on the question of whether relevant penalties are cumulative, this provides limited assistance to the CFMMEU's argument that a cumulative entitlement was intended to apply as broadly as the union contends.

As already stated in Ai Group's 24 July 2020 submissions, cl. 13 of the 1990 Award applied a division between 6 and 7-day roster employees, FEDFA members and other shiftworkers in relation to how shift penalties interacted with other penalties payable under the Award. This division was preserved under cl. 27.2 of the 1997 Award, with the separate treatment for FEDFA members continuing for ex-FEDFA members.

Nevertheless, it is apparent that any preserved cumulative entitlement was consciously restricted under the 1997 Award to 6 and 7-day roster employees and ex-FEDFA members, and only then for the overtime and shift penalties as reflected in the table in cl. 27.2. In response to the CFMMEU's contentions, at paragraph [18] of its submission, regarding clauses 7 and 9.2 of the 1997 Award, Ai Group states that these provisions cannot, nor were they intended to, support an interpretation of the award which its provisions cannot sustain. Clause 7 of the 1997 Award mandated reference to the 1990 Award in the context of disagreements concerning a 'definition'. The current matter pertains to the relationship between shift and other penalties under the Award and cannot be construed as such a disagreement. Clause 9.2 of the 1997 Award clearly contemplated that entitlements may not be identical under the 1990 Award and the 1997 Award. This provision read (emphasis added):

> **9.2 Except insofar as it expressly interferes with them**, this award is to be read as not interfering with any award, order or determination made or given by competent authority and in force prior to the date of operation of this award.

If cl. 9.2 is interpreted as impacting terms and conditions of employees covered by the 1997 Award, to the extent that the cumulative treatment of penalties under the 1997 Award does not precisely reflect that which subsisted under the 1990 Award, the words of cl. 27.2 may be considered an express interference as contemplated under cl. 9.2. Moreover, it is noted that cl. 9.2 of the 1997 Award was removed by a decision of the Full Bench of the Australian Industrial Relations Commission (**AIRC**) in 1998 where it

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was found, on appeal, that the clause was not permitted under the *Workplace Relations Act 1996* (Cth).[2] The Full Bench said, despite the CFMEU's opposition,:

> The subclause operates to prevent the award from interfering with any award, order or determination (except insofar as it expressly interferes with them) made or given by a competent authority in force prior to the date of operation of the Consolidated Award.
>
> …
>
> His Honour's conclusion that such a clause assists in "the determination of the proper operation and interpretation of the award" in our view is not in accordance with the decision of the Award Simplification case referred to above. To allow the retention of an award provision in accordance with s.89A(6) it must be able to be shown that the provision is incidental to matters in s.89A(2) and necessary for the effective operation of the award. There is nothing in it which purports to confine its operation to the matters referred to in s.89A(2).
>
> Accordingly, we are unable to conclude that the subclause is incidental to any of the matters in s.89A(2) and necessary for the effective operation of the award…

In response to paragraph [20] of the CFMMEU's submissions, the words 'ordinary time rate <u>for the time worked</u>' in cl. 27.2 of the 1997 Award do not in any way suggest a differential ordinary time rate to be applied based on the specific time worked. Ai Group considers it unhelpful to read this implication into the words on such a superficial basis. Moreover, if the CFMMEU's argument were to be accepted, the absence of the words "for the time worked" in the fifth and eleventh row of the same table in cl. 27.2 which also refer to a percentage of the 'ordinary time rate' would suggest a different interpretation. Ai Group considers such an outcome to be absurd. Moreover, for the reasons expressed in paragraphs [28] – [33] of Ai Group's 13 May 2020 Submissions, the usage of the phrase 'ordinary rate' elsewhere in the 1997 Award strongly indicates that the meaning was not intended to incorporate weekend penalties.

With respect to cl.15(c) of the *Coal Mining Industry Award (Deputies and Shotfirers), 2002*, Ai Group notes that the cumulative application of relevant penalties was restricted only to 6 and 7-day roster employees, applying a similar distinction for such penalties to that which subsisted in the 1990 Award, in respect of these employees only. This provides limited assistance to the CFMMEU's position and Ai Group's arguments at paragraphs [16] – [44] of its 24 July 2020 submissions are relevant.

In response to the CFMMEU's reference, at paragraph [14] of its 6 August 2020 Submission, to the decision of the Full Bench of the Commission in *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd T/A Appin Mine*,[3] Ai Group notes that the relevance of this case has already been explored in these proceedings at paragraphs [19] – [23] of Ai Group's 15 April 2020 Submissions which considered this case in the light of the later judgment by Street J in *Construction, Forestry, Maritime,*

[2] Q7842.
[3] [2017] FWCFB 4487.

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Mining & Energy Union & Ors v Tahmoor Coal Pty Ltd[4] which was upheld on appeal by the Federal Court.[5] Ai Group continues to rely on these submissions.

The points raised in the CFMMEU's 6 August 2020 submission do not raise any new points of substance. They simply restate or elaborate upon arguments which have been dealt with earlier in these proceedings. Ai Group considers that none of the arguments raised therein should persuade the Commission that shift penalties are cumulative upon weekend or public holiday penalties under the BCMI Award. As such, any amendment to the exposure draft consistent with the CFMMEU's interpretation would constitute a substantive amendment which requires justification by making a merit-based case in support.

Ai Group does not request an oral hearing in relation to this matter of interpretation and is content for the relevant outstanding issues to be resolved on the papers.

Yours sincerely

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[4] [2019] FCCA 292.
[5] *Construction, Forestry, Maritime, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2019] FCA 1696