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

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Introduction

1. These submissions are filed in response to Direction 1 of the directions issued by Deputy President Gostencnik on 31 July 2020 (**Directions**).
2. While the scope of these submissions is confined, they exist within the broader context of how this matter has been dealt with to date, particularly that these issues emerged in response to the Exposure Draft of the Black Coal Mining Industry Award 2014, published by the Fair Work Commission on 26 September 2014 (**2014 Exposure Draft**). The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) and its predecessor have provided submissions in relation to these two issues as part of the 4 yearly review process dating back to 20 October 2014. The CFMMEU continues to refer to and rely upon those previous submissions.
3. Each of the relevant issues has arisen as a result of the exposure draft process, designed to address structural and drafting issues identified through this process. The CFMMEU understands that the current process is principally one of interpretation of the relevant provisions of the BCMI Award and it has approached each of these issues in this way. In the event that the Commission intends to consider either of the applications made as an application to vary the substance of the BCMI Award, the CFMMEU repeats its submission that such an application should be formally made and supported by a merit based argument in the ordinary way.
4. This matter therefore concerns the interpretation of several clauses of the *Black Coal Mining Industry Award 2010* (**BCMI Award**), and proposed amendments in response to the 2014 Exposure Draft. They are, in brief:
    a. whether shiftwork penalties are cumulative upon other penalties under the BCMI Award, in particular for the purposes of both weekend and public holiday penalties; and
    b. whether the references to double and treble time payment for public holidays worked are references to the base rate of pay set out in the Award, or the employee's ordinary rate of pay.
5. These submissions concern only the cumulative nature of shift penalties, and respond to the following submissions of the Coal Mining Industry Employer Group (**CMIEG**) in their submissions of 24 July 2020 (**CMIEG Submissions**):
    a. at [8] – [15] of the CMIEG Submissions, being, broadly, that the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* (**1997 Award**) departed from the relevant provisions of the *Coal Mining Industry (Production and Engineering) Interim Consent Award, September 1990* (**1990 Award**); and
    b. at [18] of the CMIEG Submissions, and the submission that terms that may have been included in the Coal Industry Tribunal (**CIT**) awards should not be given conclusive weight given they were made by consent.

Award interpretation

6. As set out in *City of **Wanneroo** v Australian Muncipal, Administrative, Clerical and Services Union* (2006) 153 IR 426, at 438:

The construction of an award, like that of a statute, begins with a consideration of the ordinary meaning of its words. As with the task of statutory construction regard must be paid to the context and purpose of the provision or expression being construed. Context may appear from the text of the instrument taken as a whole, its arrangement and the place in it of the provision under construction. It is not confined to the words of the relevant Act or instrument surrounding the expression to be construed. It may extend to '...the entire document of which it is a part or to other documents with which there is an association'. It may also include '... ideas that gave rise to an expression in a document from which it has been taken'

(citations omitted)

7. French J, as he then was, went on to emphasise the importance of interpreting the provisions of an award in a manner which was not divorced from industrial realities. His Honour continued:

There is a long tradition of generous construction over a strictly literal approach where industrial awards are concerned. It may be that this means no more than that courts and tribunals will not make too much of infelicitous expression in the drafting of an award nor be astute to discern absurdity or illogicality or apparent inconsistencies. But while fractured and illogical prose may be met by a generous and liberal approach to construction, I repeat what I said in City of Wanneroo v Holmes (at 380):

> *"Awards, whether made by consent or otherwise, should make sense according to the basic conventions of the English language. They bind the parties on pain of pecuniary penalties."*

(citations omitted)

8. Within this, as was observed by Madgwick J in *Kucks v CSR Limited*[1], a search of the evident purpose is permitted with a narrow, pedantic approach to be avoided. However:

. . . the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.[2]

9. It is within this context that the relevant provisions must be understood. It is counterproductive, and contrary to the ordinary principles of award interpretation, to arbitrarily rule out, as the CMIEG suggest, consideration of the industrial reality in which the BCMI Award was made, as discussed below.

1997 P& E Award

10. An interpretation of the 1997 Award must consider the ordinary meaning of its words, having regard to the context and purpose of the provision, extending to *other documents with which there is an association.*

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[1] *Kucks v CSR Limited* (1966) 66 IR 182

[2] Ibid, at 184.

11. The CMIEG, at [9] – [10] of the CMIEG Submissions, make much of the purported omission in the 1997 Award of any clause which corresponded with subclauses 13(c) and (d) of the 1990 Award. This submission is a red herring. The provisions have not been omitted, they have been redrafted and restructured, removing unnecessary detail, as part of a process specifically designed for that purpose.[3]

12. The consequence of that redrafting is that clause 27.2 of the 1997 Award can be interpreted in one of two ways – it either absorbs, or displaces, that entitlement.

13. The first is the position advanced by the CFMMEU, being that the reference to "ordinary time", "ordinary time rate" and "ordinary time rate for the time worked" are all references to the rate payable for ordinary time on the shift worked. Under this interpretation, in the event the shift was worked on a public holiday or on a weekend, that would be the ordinary time rate payable inclusive of those loadings.

14. The plain words of the 1997 Award provide for shift work rates determined at the ordinary time rate at clause 27.2. At clause 28.3 it sets out the rate for weekend roster employees. At clause 37.4 it sets out the rate for working on a public holiday. There is no provision disentitling an employee from being paid shift allowances for hours worked on a weekend or a public holiday. Instead, there is work for each provision to do in the relevant circumstances. As was observed by a Full Bench of the Fair Work Commission in *Construction, Forestry, Mining and Energy Union* v *Endeavour Coal Pty Ltd t/a Appin Mine*[4] (***CFMEU v Appin***), at [65]:

> *The need to potentially consider more than one "component" of the "payment rule" to determine an employee's entitlement for working particular hours is not unique to ordinary hours worked on a public holiday*.

15. Under the CFMMEU's interpretation, the proper interpretation of the shiftwork rates in the 1997 Award requires that same approach, where the penalties are treated as components, none of which are mutually exclusive unless an employee is expressly entitled to one at the exclusion of the other.

16. This interpretation takes on particular force when considering the rest of the context of the 1997 Award, as discussed below.

17. The second possible interpretation is the position advanced by the CMIEG, being that the reference to "ordinary time", "ordinary time rate" and "ordinary time rate for the time worked" are instead references to the rate payable under clause 18.2 of the 1997 Award, which sets out the minimum rates. Under this interpretation there is no relationship between clause 27.1 and any other penalty within the 1997 Award.

18. The interpretation advanced by the CMIEG requires one to read clause 27 in a vacuum divorced of the industrial reality of the 1997 Award. Within the terms of that award alone one must disregard clause 7, which requires reference to be made to the 1990 Award in the event of any disagreement, and clause 9.2, which provides that the award is not to be read as interfering with any award already in force (including the 1990 Award), unless expressly stated to do so.

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[3] IR Act, s 150A(2).

[4] [2017] FWCFB 4487.

19. There is also a particular absurdity that arises from this approach. The CMIEG Submissions, at [15], state that the Saturday and Sunday penalty rates compensate for the requirement to work on those days in their entirety. This would mean, however, that six or seven day shift worker working overtime on a Saturday is paid *less* for working overtime on a weekend, consistent with the provisions of clause 28.3, than during the week in accordance with clause 27.2. It is unclear what possible rationale would lead to such an outcome, especially one which was reached by consent.

20. This interpretation also requires one to completely disregard the reference to "ordinary time rate *for time worked*" which features in clause 27.2, as it relates to overtime for certain shift workers. There can be no ambiguity about this entitlement – it makes clear the relationship between the rate payable and the specific time at which the hours were worked. Those same words appear at clause 22.2 of the BCMI Award and make it clear that, at a minimum in relation to overtime for 6 or 7 day roster workers, they are to be paid 15% of the ordinary time rate *for time worked*, in addition to the overtime penalty rate.

21. Similarly, the specific references to 6 and 7 day roster workers and ex-FEDFA members must have work to do. Their inclusion alone favours an interpretation where clause 27.2 was intended to incorporate subclauses 13(c) and (d) of the 1990 Award. The 1990 Award contains only one other reference to the FEDFA, in relation to application of that award at clause 4. The reference to ex-FEDFA members in clause 27.2 of the 1997 Award (as made) can only be understood as being intended to capture clause 13(d) of the 1990 Award. That inference can be extended to the reference to six and seven day roster workers, and clause 13(c) of the 1990 Award.

22. Outside of the express terms of the 1997 Award, however, it is submitted that the association the 1997 Award has with the 1990 Award is of the kind considered by Burchett J in ***Short*** *v Hercus* [1993] FCA 51; (1993) 40 FCR 511, at 518, as cited by French J in *Wanneroo*, at 438. Burchett J went further in *Short* to say:

> *Context may also include, in some cases, ideas that gave rise to an expression in a document from which it has been taken. When the expression was transplanted, it may have brought with it some of the soil in which it once grew, retaining a special strength and colour in its new environment. There is no inherent necessity to read it as uprooted and stripped of every trace of its former significance, standing bare in alien ground. True, sometimes it does stand as if alone. But that should not be just assumed, in the case of an expression with a known source, without looking at its creation, understanding its original meaning, and then seeing how it is now used.*[5]

23. The 1990 Award, and the 1988 Restructuring Decision, are the necessary context – to continue the metaphor, the *soil* – within which the shiftwork provisions of the 1997 Award are to be understood. It is not correct to say, as the CMIEG does, that the absence of a direct counterpart to subclauses 13(c) and (d) of the 1990 Award is a significant omission, particularly in light of the industrial reality within which both the 1997 and 1990 Awards were made.

24. That context similarly includes the process which led to the making of the 1997 Award, including:

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[5] *Short*, at 518.

a. the process used to determine the terms of the 1997 Award, being one which commenced under s 150A of the then *Industrial Relations Act 1988* (Cth) (**IR Act**), which was confined to identifying certain deficiencies, not reviewing or altering the substance of the award provisions at large;[6]

b. the stated objectives of the s 150A Review Working Party which formed to consider and determine the terms which would come to form the 1997 Award, which reflected the statutory provisions set out at s 150A of the IR Act;[7]

c. the application for the making of that award that was made by parties representing the employer interests at the time;[8] and

d. the decision of Justice Boulton that accompanied its making and specifically referenced the background to its making, the purpose of the variations, and that its making was a consolidation of its predecessor.[9]

25. In contrast to the ordinary principles of award interpretation, the CMIEG interpretation requires one to read the 1997 Award in isolation from the context in which it was made, and requires a strained interpretation that seeks to fit an inferred removal of cumulative shiftwork penalties within the rubric of a plain language and restructuring process.

26. It is also an interpretation which requires one to accept that the unions involved in the s 150A process consented to the removal of an entitlement to shiftwork penalties being paid on a cumulative basis, despite continuous processes being relatively new to the industry,[10] having been the subject of significant contest less than a decade prior,[11] and there being direct evidence to the contrary,[12] with no evidence filed to support the CMIEG contention.

27. The 1997 P&E Award was a consolidation of, not a departure from, the 1990 Award. The context to the 1997 P&E Award necessarily includes the 1990 Award and, applying the proper principles of award interpretation, there is no basis for concluding that a 6 or 7 day roster worker working on a weekend or a public holiday was not entitled to penalties for each disutility.

The role of terms determined by the CIT in the BCMI Award

28. The CMIEG submit, at [18] of the CMIEG Submissions, that the consent awards of the CIT should not necessarily be given conclusive weight in interpreting the provisions of the BCMI Award.

29. On 1 July 1995 the Commonwealth Government, through the *Industrial Relations Legislation Amendment Act (No 2) 1994* (Cth) (**Amendment Act**), abolished the CIT and Local Coal Authorities.

30. Section 92A of the Amendment Act provided:

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[6] See CFMMEU Submissions, [41].
[7] Vickers Statement, AV24.
[8] CFMMEU Submissions, [46]. See, also, Vickers Statement, AV23, ground 3.
[9] See *Coal Mining Industry (Production and Engineering) Interim Consent Award, September 1990* (C0889 Dec 1477/97 M Print P7166).
[10] Vickers Statement, [20] – [37].
[11] Ibid.
[12] Vickers Statement, [64] – [65].

Subject to this Act, the Commission, in performing its functions in relation to the coal mining industry, is to have regard to any decisions of the Coal Industry Tribunal that are relevant to the matters before the Commission.

31. Clause 15 to Schedule 1 to the Amendment Act dealt with existing awards of the CIT, and provided that an award made under the *Coal Industry Act* (such as the 1990 Award) had the effect, and was taken to be, an award made by the Commission under the IR Act.

32. What is clear from this is that decisions of the CIT are not to be arbitrarily separated from decisions made by the AIRC or its successors. The position advanced by the CMIEG ignores both the legal and industrial status of the 1990 Award, its relationship with the 1997 Award, and as a consequence, the BCMI Award. The idea that its value as an interpretive tool is somehow diminished because it was made by consent belies the aspiration of cooperative industrial relations in this country, both historically and in the present. That minimum safety net requirements and the modern award objective have been overlayed upon those conditions does not alter the approach to the interpretation of those conditions.

Correction to CMIEG Submissions

33. While it goes slightly beyond the matters the CFMMEU has been permitted to address in these submissions, it is noted that at [13] of the CMIEG Submissions the CMIEG submit that, following the making of the 1997 Award, none of the Commission's coal mining industry awards expressed that penalty rates would be cumulative. The inference understood to be behind this submission is that there was an intentional departure from the cumulative nature of shiftwork penalties for six and seven day roster workers at this time.

34. This submission is in error. *The Coal Mining Industry Award (Deputies and Shotfirers) 2002,* made as part of the award simplification and safety net adjustment process, replicates subclause 13(c) of the 1990 Award as subclause 15(c) of that Award. *The Coal Mining Industry Award (Deputies and Shotfirers) 2002* was a pre-reform award which was replaced by the BCMI Award.[13]

Determination of the matter

35. The CFMMEU notes direction 3 of the Directions. Noting the CFMMEU's understanding of the current matters as being interpretive, and for the purposes of finalising the current exposure draft only, the CFMMEU does not request an oral hearing.

36. In the event that a variation of the BCMI Award is contemplated as a consequence of this matter the CFMMEU confirms that it wishes to be heard further, in the context of an oral hearing or as directed by the Commission.

Construction, Forestry, Maritime, Mining and Energy Union
Mining and Energy Division
6 August 2020

[13] *Award Modernisation* [2008] AIRCFB 550, Attachment B.