

FAIR WORK COMMISSION

***Four yearly review of modern awards – Black Coal Mining Industry Award –
Exposure Draft
AM2014/67 and AM2020/25***

Submissions in Reply - Coal Mining Industry Employer Group

1. These submissions are made by the Coal Mining Industry Employer Group (**CMIEG**) in reply to the submission of the Construction, Forestry, Mining, Maritime and Energy Union, and the Association of Professional Engineers, Scientists and Managers Australia – Collieries Staff Division, as supported by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia, each filed on 15 January 2020, concerning the interaction between the casual loading and the weekend and shift rate provisions in the Black Coal Mining Industry Award (**BCMI Award**).
2. The CMIEG supports the submissions of the Australian Industry Group filed on 29 January 2020. The CMIEG makes the following additional submission.
3. Clause 22.1 concerning weekend penalties, and clause 22.2 concerning shift penalties, of the BCMI Award make reference to the relevant penalties being reckoned as "time and a half"/"double time" and calculated upon the "ordinary time rate" respectively. Those clauses are now clauses 23.1 and 23.2 of the Exposure Draft of the proposed BCMI Award.
4. Each of the CFMMEU and APESMA contend that both shift and weekend penalties should be compounding with the casual loading, relying on the *Yallourn/Domain* principle (which relates to overtime for casuals, and not shift or weekend penalties).
5. That construction, and the proposed amendments in the Exposure Draft to reflect it, should be rejected.
6. Clause 10.4(b) of the current BCMI Award provides:

A casual employee, for working ordinary hours, will be paid 1/35th of the appropriate weekly rate, plus a loading of 25% instead of the leave entitlements under this award, with a minimum four hours payment on each engagement.
7. That clause, and the payment of casual loading, has its origin in the *Coal Mining Industry (Staff) Award, 2004* (**Staff Award 2004**).

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8. It is because of this origin, that the payment of casual loading in the BCMI Award relates only to Schedule B – Staff Employees, and not the Schedule A – Production and Engineering Employees. That is, only the Staff Award 2004 provided for employment of casuals, and payment of casual loading, and not the other predecessor awards to the BCMI Award, namely the *Coal Mining Industry Award (Deputies and Shotfirers) 2002* and *Coal Mining Industry (Production and Engineering) Consolidated Award 1997*.
9. Similar to the current BCMI Award, the Staff Award 2004 provided that casual loading would be 1/35th or 1/37.5th of the *weekly rate plus* a 25% loading. Clause 11.2 provided:

11.2.2 A casual employee, for working ordinary hours will be paid 1/35th (NSW and Tasmania) or 1/37.5th (Qld) of the appropriate weekly rate, plus 25 percent in lieu of the entitlements under Part 7 of this award (other than Long Service Leave for long term casuals), with a minimum of four hours payment on each engagement.

The clause indicates that the 25% loading is in compensation of the entitlements under Part 7 which relate to various forms of leave (excepting long service leave) and public holidays. That is now reflected in the current BCMI Award, although perhaps more clearly expressed in the Staff Award 2004 by specifying the relevant leave and other entitlements that are being paid in lieu by the casual loading.

10. It is clear, from the use of the expression "plus" in the Staff Award 2004 (which language is reflected in the current BCMI Award) that the casual loading rate was in addition to the weekly rate (ie. additive to it) and not incorporated into it.
11. Each of clauses 24.2 (shift work rates) and 25 (weekend work) of the Staff Award 2004 used the phrases "time and a half"/"double time" and "ordinary time rate" respectively. Again, those phrases are reflected in the correspondingly clauses of the BCMI Award. There is no warrant, given the additive nature of the casual loading to the weekly/hourly rate, to then construe the reference to "time" or "ordinary time rate", as incorporating the casual loading into the time rate of pay for the purpose of calculating those penalties, such that the casual loading is then compounded with the shift and weekend loading. The casual loading in addition to that weekly/hourly rate (being "plus" that rate) and not built into it.
12. Those considerations, and the historical provisions, are contra-indicators that the phrases "time" or "ordinary time rate" should include the casual loading (cf [2020] FWCFB 4350 at [59]).
13. Further, having regard to the clear purpose of the casual loading as described in clause 11.2.2 of the Staff Award 2004, and as reflected in clause 10.4(b) of the BCMI Award, namely that the casual loading is compensation for the incidents of permanent employment foregone, it does not follow that this compensatory effect should be compounded simply by the performance of work on shiftwork or weekends by a casual. Indeed, the purpose of the loadings for shift and weekend work are to compensate for the working of unsociable hours. It is accepted that casuals should be compensated for those disabilities, as well as being

compensated, in addition, for the incidents of permanent employment foregone. That is done by paying those shift and weekend penalties as additive to the casual loading, so that they are aggregated and not compounded.

14. That approach, and construction, is entirely consistent with achieving the modern awards objectives of providing additional remuneration for unsocial hours (section 134(1)(da)(ii)), work on weekends (134(1)(da)(iii)), and shift work (section 134(1)(da)(iv)), as well as providing additional remuneration for working irregular and unpredictable hours as a casual (section 134(1)(da)(iii)). It also promotes a simple, easy to understand modern award (section 134(1)(d)).

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