

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

AM2019/17

Finalisation of Exposure Drafts
Black Coal Mining Industry Award

15 April 2020

Ai
GROUP

FINALISATION OF EXPOSURE DRAFTS
BLACK COAL MINING INDUSTRY AWARD 2010
AM2019/17

1. INTRODUCTION

1. This submission is made by the Australian Industry Group (**Ai Group**) in response to the directions issued by the Fair Work Commission (**Commission**) included in a [Report](#) published on 23 March 2020 (**Report**) relating to outstanding matters concerning the finalisation of the exposure draft of the *Black Coal Mining Industry Award 2010* (**BCMI Award**).
2. Ai Group confirms that, as stated at the Conference held on 20 March 2020 (**Conference**), the proposed courses of action pertaining to the matters outlined at paragraph [5] of the Report are agreed to.
3. Ai Group also confirmed at the Conference that our suggested variation to the provision which governs the applicable penalty for public holidays, originally outlined in [Ai Group's 13 November 2015 Submission](#), is still pressed. At the time our original submission was filed, clause 18.4(a) was the relevant clause. As stated in our [6 March 2020 Submission](#), owing to alterations in the numbering of the exposure draft, the proposed variation is now to clause 29.4(a). Some additional minor alterations have been made to the draft variation to take into account further renumbering and tables containing minimum rates outside of clauses A.4 and B.2.
4. For the reasons outlined below, Ai Group submits that proposed variation to the exposure draft is necessary to reflect the current meaning and intent of the BCMI Award and to clarify the following:
 - The holidays to which clauses 29.4(a) and (b) refer are 'public holidays' consistent with other references to the term in the BCMI Award;

- The rate payable to employees required to work on a public holiday is 200% of the relevant minimum hourly rate prescribed in Schedule A and Schedule B;
 - The amount payable for work performed in excess of ordinary hours on a public holiday is to be paid at the rate of 300% of the relevant minimum hourly rate prescribed by Schedule A and Schedule B;
 - The “amount prescribed” referred to in clause 29.4(a) is any amount which is payable in respect of the relevant minimum weekly rate prescribed in Schedule A and Schedule B of the Award;
 - The loadings payable pursuant to clause 29.4 are paid in substitution for rather than being cumulative on the overtime rates in clause 21 and the penalties payable under clause 23 of the exposure draft.
5. Ai Group submits that the above matters should be addressed via the draft variation attached to this submission and marked **Annexure A**.

‘Public holidays’

6. Clause 29.4 of the exposure draft to the BCMI Award pertains to the applicable rates payable on *public* holidays. That this is the case is clear from the title to the clause:

‘29.4 Employee required to work on a recognised public holiday’

7. All other references to ‘holidays’ in the Award clearly relate to ‘public holidays’.
8. Ai Group’s draft variation would amend the clause to refer to a ‘public holiday’ in clause 29.4(a) and 29.4(b). This ensures that no confusion arises from the slightly different wording in the clause which may otherwise mislead employers into applying the penalties on days which are not public holidays as defined under the *Fair Work Act 2009* (Cth) (**FW Act**).

9. Ai Group's proposed variation also reflects clause 27 of the current award which is titled 'Public Holidays'. This contains clause 27.4 'Employee required to work on a recognised public holiday' from which clause 29.4 in the exposure draft has been derived.

Reference rate for application of penalties in clauses 29.4(a) and 29.4(b)

10. Clauses 29.4(a) and 29.4(b) provide that payment for work during and in excess of ordinary hours on a public holiday is to be at 'double time' and 'treble time' respectively.
11. The clause, as currently drafted, is insufficiently clear as to the appropriate reference rate to be applied in calculating the relevant loading. The terms 'double time' and 'treble time' are undefined in either the current BCMI Award or the most recent exposure draft.
12. The Commission's approach to penalties described as 'double time' has been consistent throughout the 4 yearly review. These penalties equate to a requirement to pay an employee 200% of the relevant minimum rate. The Full Bench referred to this in its 13 July 2015 Decision relating to the ordinary hourly rate of pay:¹

Modern awards provide a safety net of minimum entitlements. The modern award prescribes the minimum rate an employer must pay an employee in given circumstances. Overaward payments, while permissible, are not mandatory. Further, if an employer chooses to pay an employee more than the minimum amount payable for ordinary hours worked, the employer is not required to use that higher rate when calculating penalties or loadings.

13. The Commission has, so far, applied this approach in its redrafting of the BCMI Award. The following table shows where the usage of the word 'double time' has been replaced with '200% of the minimum hourly rate' in the exposure draft:

¹ [2015] FWCFB 4658, [95].

Relevant clause in current BCMI Award	Equivalent clause in the 29 January 2020 exposure draft
<p>Clause 17.2(a) – Payment for overtime</p> <p>Monday to Friday, Saturday, Sunday – After 3 hours at double time</p>	<p>Clause 21.2(a) – Payment for overtime</p> <p>Monday to Friday, Saturday, Sunday – After first 3 hours at 200% of minimum hourly rate</p>
<p>Clause 17.2(b) – Payment for all time worked in excess of or outside the ordinary hours of any shift by the categories of employee listed in clause 17.2(b)(i)-(iii) is at the rate of double time</p>	<p>Clause 21.2(b) – Payment for all time worked in excess of or outside the ordinary hours of any shift by the categories of employee listed in clause 21.12(b)(i)-(iii) is at the rate of 200% of the minimum hourly rate.</p>
<p>Clause 17.6(b)(ii) - Employees to be paid at double time during ordinary hours after having resumed or continued work without having had 10 consecutive hours off duty</p>	<p>Clause 21.7(b)(ii) - Employees to be paid at 200% of the minimum hourly rate during ordinary hours after having resumed or continued work without having had 10 consecutive hours off duty</p>
<p>Clause 21.2 – Payment for ordinary hours to be at double time after 4 hours on a Saturday and for all hours on Sunday</p>	<p>Clause 23.2 - Payment for ordinary hours to be at 200% of the minimum hourly rate after 4 hours on a Saturday and for all hours on Sunday</p>

14. It is clear that the rate applicable for work performed during ordinary hours on a public holiday is to be the same as that for other penalty rates described in the award as being payable at ‘double time’. Clause 25.9 of the current BCMI Award describes an employee’s rostered earnings during a period of annual leave for a rostered public holiday as ‘double time’. That such payment is to be at 200% of the minimum hourly rate is consistent with the way this payment is described in clause 24.6(b) of the exposure draft.
15. The same approach should apply to clause 29.4 of the exposure draft. The applicable rate for working ordinary hours during a public holiday should be 200% of the minimum hourly rate.

16. For the same reason as that outlined above, clause 29.4(b) should be amended to clarify that the applicable rate for time worked in excess of ordinary hours on a public holiday is 300% of the minimum hourly rate.
17. In each case, Ai Group proposes that the reference rate be described as the minimum hourly rate prescribed in Schedules A and B of the Award.
18. Payment at 'double' or treble' time is inconsistent with an assertion that overtime or other penalty rates are to be cumulative on, instead of paid in substitution for, the penalties prescribed by clauses 21 and 23 of the exposure draft. To interpret the provision otherwise would lead to compensation twice for the same inconvenience when working on a public holiday.
19. Similar matters have been dealt with by the Commission and the Federal Circuit Court in the context of enterprise agreements which provide for both shift and public holiday loadings.
20. A Full Bench of the Commission in *Construction, Forestry, Mining and Energy Union v Endeavour Coal Pty Ltd T/A Appin Mine (CFMEU v Endeavour)* determined that an agreement required the employer to pay a shift loading in addition to public holiday penalties to covered employees who performed shift work on a public holiday.² This decision was made on the basis of reasoning which took into account the following points:
 - At least some normal rostered hours to be worked by an employee under the agreement on a public holiday were likely to be ordinary hours. Nothing in the agreement expressly disentitled employees from being paid shift allowances on ordinary hours worked on a public holiday when such hours were worked within the definition of afternoon or night shift in the agreement;³

² [2017] FWCFB 4487.

³ [2017] FWCFB 4487, [62].

- Payment for public holidays under the Agreement was determined according to a series of payment rules in an appendix which applied both the public holiday and the shift loadings;⁴ The only method of determining when shift allowances were payable was by looking at these ‘payment rules’;⁵
 - The rationale for paying the shift allowances was considered to apply with equal force to a shift worked on an ordinary day as it did to a shift worked on a public holiday.⁶
21. The abovementioned points, specifically regarding the bespoke manner of determining the appropriate rate payable under the agreement which was the subject of the dispute in *CFMEU v Endeavour*, are relevant only to that agreement and have no bearing on the matter currently before the Commission concerning the BCMI Award. To the extent that the Decision may inform the Commission on more general principles, it is important to have regard to it in the light of the later decision of the Federal Circuit Court in *Construction, Forestry, Maritime, Mining & Energy Union & Ors v Tahmoor Coal Pty Ltd (CFMMEU v Tahmoor)*.⁷
22. Judge Street in *CFMMEU v Tahmoor* considered the FWC Full Bench decision in *CFMEU v Endeavour* in a dispute concerning another enterprise agreement which also provided for separate shift and public holiday rates. Street J distinguished the facts of the case before him from those which were before the FWC Full Bench in *CFMEU v Endeavour*. In the FWC case, payment rules applicable to the circumstances which gave rise to the public holiday and shift rates governed the relevant additional payments and could be applied together. These payment rules were located in an appendix to the enterprise agreement. No separate provision outside in the body of the enterprise agreement dealt with the relevant rate payable during a public holiday. The Agreement which

⁴ [2017] FWCFB 4487, [63].

⁵ [2017] FWCFB 4487, [66].

⁶ [2017] FWCFB 4487, [64].

⁷ [2019] FCCA 292.

Street J was required to interpret expressly referred to employees being paid a rate of triple time “for all time worked on a recognised public holiday”. Street J said:

The words “for all time worked” must be given their natural and ordinary meaning, and their natural and ordinary meaning may displace the entitlement that might otherwise arise in respect of employees working a roster where the ordinary hours of that shift end after 1 am and before 9 am. Those words “for all time worked”, in the context of the agreement, and other provisions as a whole, do not support the applicant’s contention that they are entitled to night shifts on top of triple time in respect of public holidays, so far as concerns the third and fourth applicants.

23. Similarly, clauses 29.4(a) and 29.4(b) of the exposure draft indicate an intention that the rates referred to therein are to be exhaustive in respect of work performed during ordinary hours on a public holiday and in excess of ordinary hours on a public holiday respectively. For these reasons, Street J’s judgment is persuasive that the public holiday rates in clause 29.4(a) and 29.4(b) of the exposure draft are paid in substitution for rather than cumulative upon the overtime and penalty rates in clauses 21 and 23 of the exposure draft.

‘In addition to the payment prescribed’

24. Clause 29.4 of the exposure draft provides that an employee who is required to work on a public holiday is to be paid at the rate of double time for work performed during ordinary hours, in addition to the payment prescribed. These underlined words are of little assistance to employers in ascertaining the appropriate rate of pay for an employee.
25. The words underlined above are derived from similar clauses which appeared in the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* and the *Coal Mining Industry (Staff) Award 2004*. The relevant provisions are reproduced below:

The Coal Mining Industry (Production and Engineering) Consolidated Award 1997

37.3 Employee not required to work on a Public Holiday

An employee who is not required to work on a holiday:-

37.3.1 and who, without good and sufficient reason, fails to work on the employee's –

(a) last working day immediately before the holiday, or

(b) first working day after the holiday, is not entitled to payment for such holiday;

37.3.2 is to be paid for that day at the employee's classification rate.

37.4 Work on a recognised public holiday

37.4.1 Work on a holiday is to be paid at the rate of double time for work performed during ordinary hours, in addition to the payment prescribed in 37.3.2.

37.4.2 Work performed in excess of ordinary hours on a holiday is to be paid at the rate of treble time.

Coal Mining Industry (Staff) Award, 2004

33.3 Employee not required to work on a recognised public holiday

An employee, other than a casual employee, who is not required to work on a holiday is to be paid for that day at the employee's classification rate.

33.4 Employee required to work on a recognised public holiday

33.4.1 An employee who is required to work on a holiday is to be paid at the rate of double time for work performed during ordinary hours, in addition to the payment prescribed in 33.3.

33.4.2 Work performed in excess of ordinary hours on a holiday is to be paid at the rate of treble time.

26. For each of the above pre-modern awards, it is apparent that an employee who was required to work ordinary hours on a public holiday received the daily amount due to them at their classification rate. In addition to this, for any hours actually worked on the public holiday, these would be paid with a 100% loading i.e. at double time.

27. In order to correct what is clearly an omission in the modern BCMI Award, Ai Group proposes that the words “in addition to the payment prescribed” be replaced with “in addition to any amount payable in respect of the relevant minimum weekly rate prescribed by Schedules A and B”. These words direct the employer to the applicable minimum rates payable under the relevant tables in the Award and clarify that the loading applicable to the hours worked on a public holiday is paid in addition to the relevant employee’s minimum weekly rate.

ANNEXURE A

Ai Group's proposed variation to clause 29.4 of the exposure draft of the Black Coal Mining Industry Award

29.4 Employee required to work on a recognised public holiday

- (a) *An employee who is required to work on a public holiday is to be paid at the rate of ~~double-time~~ 200% of the relevant minimum hourly rate prescribed by Schedules A and B for work performed during ordinary hours, in addition to ~~the payment prescribed~~ any amount payable in respect of the relevant minimum weekly rate prescribed by Schedules A and B.*
- (b) *Work performed in excess of ordinary hours on a public holiday is to be paid at the rate of 300% of the relevant minimum hourly rate prescribed by Schedules A and B ~~treble-time~~.*
- (c) *The rates prescribed by this clause are paid in substitution for, and are not cumulative upon, the overtime rates in clause 21 and the penalty rates in clause 23 of this award.*