

IN THE FAIR WORK COMMISSION

Matter No: AM2020/25

Four Yearly Review of Modern Awards –Finalisation of Exposure Drafts and variation determinations – Tranche 3 awards – *Black Coal Mining Industry Award*

REPORT OF THE AUSTRALIAN INDUSTRY GROUP

7 December 2020

1. This report is made pursuant to the request by Commissioner Bissett for a report of the positions reached by parties regarding variations to the exposure draft of the *Black Coal Mining Industry Award 2020* to implement the conclusions reached in the Fair Work Commission's Decision of 18 November 2020 (**November Decision**).¹
2. The Australian Industry Group (**Ai Group**) and the Coal Mining Industry Employer Group (**CMIEG**) – collectively referred to as the Employers - have agreed on variations which reflect the outcome of the November Decision.
3. The Employers' proposed variations have been circulated to the Construction, Forestry, Maritime, Mining and Energy Union – Mining and Energy Division (**CFMMEU**), the Australian Manufacturing Workers' Union (**AMWU**), Professionals Australia and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia (**CEPU**) – collectively referred to as the **Union Parties**.
4. Annexed to this report are the employers' proposed variations. Commentary from the Employers and the Union Parties is included.
5. Agreement has been reached between the Employers and the Union Parties regarding proposed variations to clauses 29.3, 29.4, 29.5, C.1.2, C.1.4. D.1.2 and D.1.4.
6. The Employers and the Union Parties currently differ on the appropriate variations to be made to clauses 23.1, 23.2, C.1.3, D.1.3 and D.2.2.

Ai GROUP

7 December 2020

¹ [2020] FWCFB 5908)

On the basis of the Decision issued by the Fair Work Commission on 18 November 2020 and subsequent discussions between the parties, the following variations are proposed by the Employers to the exposure draft of the Black Coal Mining Industry Award 2020

23. Penalty rates

23.1 An employee will be paid the following ~~rates~~ additional penalties for all ordinary hours worked during the following periods

Shift	<u>Shift Penalty rate</u>	<u>Casual shift penalty rate (includes casual loading)</u>
	% of minimum hourly rate	
<u>Day</u>	100%	125%
Afternoon and rotation night	15% 115%	40% 140%
Permanent night	25% 125%	50% 150%

Employer Comments: These proposed variations reflect the Full Bench's conclusion in paragraph [60] of the [18 November 2020 Decision](#). However, the reference to 'rates' has been replaced by 'additional penalties' to reflect the amendment which removes the 'single time' component.

Union Parties Comments:

Agree to wording, however given the FB decision in [2020] FWCFB 4350 we are of the view that the casual shift penalty is incorrectly calculated, in that it is instead to be calculated on a compounding, rather than cumulative, basis and there is no basis for departing from the approach taken by the Full Bench in that decision.

In our view, the appropriate resolution of this would be to either provide alternative calculations consistent with the decision in [2020] FWCFB 4350, or to exclude the final column and alter cl 10.4(c) accordingly.

23.2 Weekend work

An employee will be paid the following rates for all ordinary hours worked ~~on~~ during the following days/periods:

Day	Period	Penalty rate	Casual penalty rate (includes casual loading)
		% of minimum hourly rate	
Saturday	First 4 hours	150%	175%
	After first 4 hours	200%	225%
Sunday	All hours	200%	225%

Employer Comments: The proposed variations to clause 23.2 are consistent with those made to this clause in the variations circulated to the parties by the Fair Work Commission on 27 November 2020.

Union Parties Comments:

As above, re cl 23.1.

29.3 Employee not required to work on a public holiday

An employee who is not required to work on a public holiday which would otherwise have been a working day for that employee will be paid for that day at the employee's classification rate.

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 – Production and Engineering Employees and B – Staff Employees for work performed during ordinary hours, in addition to the payment prescribed by clause 29.3.
- (b) Work performed in excess of ordinary hours on a public holiday is to be paid at the rate of ~~treble time~~ 300% of the relevant minimum hourly rate prescribed by Schedules A – Production and Engineering Employees and B – Staff Employees.

29.5 Notice of public holidays to be worked (other than employees working shifts of up to 8.5 ordinary hours)

- (a) On a date agreed, the employer will nominate which public holidays will be worked in the following 12 months by employees (other than employees working shifts of up to 8.5 ordinary hours on weekdays), provided that work will not be carried out on 2 of such public holidays.
- (b) If the employer does not require employees to work on a public holiday (as nominated in clause 1.1(a)) the employer must give the employees as much notice as possible of this decision.
- (c) If the notice required by clause 1.1(b) is less than 4 weeks inclusive of the public holiday, an employee who was rostered to work on the public holiday is to be paid for ordinary hours as if the public holiday had been worked.

Employer Comments: Proposed variations to clauses 29.3, 29.4 and 29.5 reflect the Full Bench's conclusion in [99] – [104] and [116] of the 18 November 2020 Decision.

Union Parties Comments:
Agreed.

...

C.1.2 Full-time and part-time production and engineering employees – shiftwork

Day Shift	Afternoon Shift	Rotating night shift	Permanent night shift	Saturday <u>(Afternoon and Rotating Night Shift)</u>		Sunday <u>(Afternoon and Rotating Night Shift)</u>	Saturday <u>(Permanent Night Shift)</u>		Sunday <u>(Permanent Night Shift)</u>
				First 4 hours	After 4 hours		First 4 hours	After 4 hours	
% of minimum hourly rate									
100%	115%	115%	125%	150 165%	200 215%	200-215%	150 175%	200 225%	200-225%

D.1.2 Full-time and part-time staff employees—shiftwork

Day Shift	Afternoon Shift	Rotating night shift	Permanent night shift	Saturday <u>(Afternoon and Rotating Night Shift)</u>		Sunday <u>(Afternoon and Rotating Night Shift)</u>	Saturday <u>(Permanent Night Shift)</u>		Sunday <u>(Permanent Night Shift)</u>
				First 4 hours	After 4 hours		First 4 hours	After 4 hours	
% of minimum hourly rate									
100%	115%	115%	125%	150 165%	200 215%	200-215%	150 175%	200 225%	200-225%

Employer Comments: Proposed variations to clauses C.1.2 and D.1.2 reflect the Full Bench's conclusion in [55] of the 18 November 2020 Decision.

Union Parties Comments:
Agreed.

D.2.2 Casual staff employees—shiftwork

Day Shift	Afternoon Shift	Rotating night shift	Permanent night shift	Saturday (<u>Afternoon and Rotating Night Shift</u>)		Sunday (<u>Afternoon and Rotating Night Shift</u>)	Saturday (<u>Permanent Night Shift</u>)		Sunday (<u>Permanent Night Shift</u>)
				First 4 hours	After 4 hours		First 4 hours	After 4 hours	
% of minimum hourly rate									
125%	140%	140%	150%	175 190%	225 240%	225-240%	175 200%	225 250%	225 250%

Employer Comments: Proposed variations to clause D.2.2 reflect the Full Bench's conclusion in [55] of the 18 November 2020 Decision.

Union Parties Comments: As above re cl 23. Rates must reflect compounding rather than cumulative nature of casual penalty.

C.1.3 Full-time and part-time production and engineering employees other than 6 day roster and 7 day roster employees—overtime rates

	Monday to Saturday		Sunday	Public holiday
	First 3 hours	After 3 hours		
	% of minimum hourly rate			
	150%	200%	200%	300%
	\$	\$	\$	\$

...

Note: These rates do not apply to employees referred to in cl. 21.2(b)(ii) and 21.2(b)(iii). For such employees, all overtime will be paid for at the rate of 200% of the minimum hourly rate

%

D.1.3 Full-time and part-time staff employees other than 6 day roster and 7 day roster employees—overtime rates

	Monday to Saturday		Sunday	Public holiday
	First 3 hours	After 3 hours		
	% of minimum hourly rate			
	150%	200%	200%	300%

...

Note: These rates do not apply to employees referred to in cl. 21.2(b)(ii) and 21.2(b)(iii). For such employees, all overtime will be paid for at the rate of 200% of the minimum hourly rate

Employer Comments: This proposed variation seeks to address the issue raised by the CFMMEU at paragraphs [23] – [25] of its [20 April 2020 submission](#).

The solution proposed by the CFMMEU was not accepted by Ai Group. However, an alternative solution was raised in [Ai Group's submission of 13 May 2020](#) [46] – [53]. The proposed variations to clauses C.1.3 and D.1.3 are consistent with Ai Group's proposed solution.

Union Parties Comments: these provisions are better reflected within a table than within a note. Note the AIG concern re C.1.4 and suggest a new table at C.1.5 to deal with employees referred to in cl 21.2(b)(ii) - (iii).

C.1.4 Full-time and part-time production and engineering employees—6 day roster and 7 day roster employees—overtime

	Afternoon and rotating night shift ¹		Permanent night shift ¹		In excess of ordinary hours <u>All other overtime</u>
	Monday to Saturday	Sunday	Monday to Saturday	Sunday	
	% of minimum hourly rate				
	215%	215%	225%	225%	200%
	\$	\$	\$	\$	\$

...

D.1.4 Full-time and part-time staff employees—6 day roster and 7 day roster employees—overtime

	Afternoon and rotating night shift ¹		Permanent night shift ¹		In excess of ordinary hours <u>All other overtime</u>
	Monday to Saturday	Sunday	Monday to Saturday	Sunday	
	% of minimum hourly rate				
	215%	215%	225%	225%	200%

Employer Comments: This proposed variations to clauses C.1.4 and D.1.4 reflect the Full Bench's conclusion in [63] of the 18 November 2020 Decision.

Union Parties Comments: Agreed