Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Finalisation of Exposure Drafts

Black Coal Mining Industry Award 2010

(AM2020/25)

24 July 2020

Ai GROUP

FINALISATION OF EXPOSURE DRAFTS
BLACK COAL MINING INDUSTRY AWARD 2010
AM2020/25

1. INTRODUCTION

1. Ai Group makes these submissions pursuant to paragraph [2] of the Directions issued by Deputy President Gostencnik on 12 June 2020 following a request by the Construction, Forestry, Maritime, Mining and Energy Union (Mining and Energy Division) (**CFMMEU**) and the Collieries, Staff and Officials Association (**APESMA**) for an additional opportunity to file evidence and submissions.

2. These submissions respond to:

   - CFMMEU submissions dated 3 July 2020;
   - APESMA submissions dated 3 July 2020;
   - Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia submissions supporting those of the CFMMEU and APESMA dated 3 July 2020.

3. Broadly, the outstanding matters which are the focus of these submissions pertain to the applicable rates payable to employees engaged under the *Black Coal Mining Industry Award 2010* (**BCMI Award**) on public holidays and for shiftworkers engaged on weekends. This is for the purpose of ascertaining the appropriate wording in clauses 29.4 and 23.1 of the *Black Coal Mining Industry Award* 2020 (**Exposure Draft**) and the associated rates in Schedules C and D.

4. Ai Group continues to rely upon our previous submissions in relation to these outstanding matters, particularly submissions made on 15 April 2020 and reply submissions made on 13 May 2020.

5. With respect to the applicable rates payable on public holidays under the BCMI Award, Ai Group asserts that:

- 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.

6. With respect to the rates applicable to shiftworkers who perform work on weekends, Ai Group contends that:

- The applicable reference rate for the calculation of rates undertaken by shiftworkers and employees working on weekends contained in clauses 23.1 and 23.2 of the Exposure Draft respectively is the minimum hourly rate;

- The penalties applicable for weekend work and shift work are not aggregated;

- The rates prescribed by clause 23.2 for weekend work are in substitution for and not cumulative upon the shiftwork rates prescribed by clause 23.1 of the Exposure Draft.

7. Consistent with our earlier submissions, Ai Group continues to press these interpretations on the basis that they are supported by:

- The Commission's consistent approach to penalties in the context of the 4 yearly review;
- The approach taken by the Commission in redrafting other provisions of the BCMI Award in the 4 yearly review;
- The accepted principles of Award construction which begin with the ordinary meaning of the relevant words;
- The need to avoid employees being, in effect, compensated twice for the disutility of working the same hours;
- The approach taken by the Federal Circuit Court in interpreting similar provisions in an enterprise agreement in *Construction, Forestry, Maritime, Mining & Energy Union & Ors v Tahmoor Coal Pty Ltd* [2019] FCCA 292;
- The context of the relevant provisions of the BCMI Award, extending to its origins in cognate provisions in predecessor awards.

8. It is this last point that is the primary focus of the unions' latest submissions dealing with these matters. Although Ai Group recognises that in construing the meaning of the BCMI Award, the historical development of various predecessor instruments is merely a relevant point of consideration, it is nevertheless necessary to address the points raised in the union parties' submissions.

Filing of further submissions and evidentiary material

9. Some relevant discussion of the background to this latest round of submissions is relevant to the Full Bench's consideration of the appropriateness of accepting the further evidence and submissions called for in the Directions issued on 12 June 2020.

10. The controversy between the relevant parties with a significant interest in these matters is not new. The genesis of the matter pertaining to the applicable rates for shiftworkers engaged under the BCMI Award in the 4 yearly review was dealt with in paragraph [10] – [13] of Ai Group's reply submissions of 13 May 2020. With respect to the parties' disagreement pertaining to the applicable rates for public holidays, Ai Group first raised this issue in our 13 November 2015 Submissions.

11. The two main issues relevant to these submissions were the subject of a Statement issued by the Commission on 12 March 2020.[1] The Statement was followed by a Conference held on 20 March 2020 at which Ai Group confirmed that it continued to press its claim relating to clause 29.4 of the BCMI Award and the CFMMEU submitted that certain rates relevant to shift workers should be amended. On 23 March 2020, a report was published by the Commission confirming Ai Group and the CFMMEU's positions which contained directions inviting the parties to file draft determinations and supporting submissions by 15 April 2020 with an opportunity for any party to file a reply by 13 May 2020.

12. APESMA attended the Conference on 20 March 2020 and could have foreshadowed an intent to file submissions and supporting evidence at the time. It was also open to APESMA to seek an amendment to the directions issued in the Commission's 23 March 2020 report once these had been issued. None of these avenues were taken.

13. Ai Group and the CFMMEU took the opportunity to file submissions in response to those directions and each filed submissions in reply. APESMA filed a reply to Ai Group's primary submission on 15 May 2020 supporting the CFMMEU's position.

14. In short, the outstanding matters pertaining to the BCMI Award have been live for a considerable period of time in the course of the 4 yearly review and have been the subject of two dedicated rounds of submissions. Ai Group considers the issues relevant to this matter to have been sufficiently ventilated and

[1] [2020] FWCFB 1297, [19] – [22], [35] – [35].

queries the logic in the CFMMEU's understanding, expressed at paragraph [17] of its 3 July 2020 submission, that the matter was to be looked at 'afresh' and that it was not clear the time for filing evidence had passed. It appears absurd that the CFMMEU would assert that it has not had the opportunity to consider or respond to Ai Group's 13 May 2020 reply submission which was itself filed pursuant to the directions issued by the Commission on 23 March 2020 responding to the CFMMEU's submissions of 20 April 2020. No additional matters were raised in Ai Group's 13 May 2020 reply submission. If all parties are to require an opportunity to respond to each reply submission, one may query where the matter is to end.

15. Nevertheless, Ai Group has considered the issues raised by the CFMMEU and APESMA in their latest submissions and submits that these should not dissuade the Commission from making the variations Ai Group has proposed to clauses 29.4 and 23.2 of the Exposure Draft.

Development of relevant provisions in the BCMI Award

16. The CFMMEU submission puts forward an historical argument in support of their contentions regarding concurrent payment of shift rates with other penalties in the BCMI Award. Decisions reaching back into the middle of the last century are quoted in support of the argument that where shift work was performed, employees received shift penalties on a cumulative basis with other penalties in the award.

17. Two decisions which stand out in the CFMMEU's submissions include *The Australian Coal and Shale Employees' Federation and J & A Brown and Abermain Seaham Collieries Limited* [1947] ACIndT 445 (**1947 Case**) and *The Federated Engine Drivers and Firemen's Association of Australasia and Aberdare Collieries Pty Ltd* [1951] ACIndT 758 (**1951 Case**). Referring to the latter, Andrew Vickers' witness statement, at paragraph [20] states that the 'cumulative nature of shiftworker penalties' dates back to at least 1951. This assertion must be looked at from a broader perspective.

18. The decision of the Coal Industry Tribunal in the 1947 Case arose out of an application by the Australian Coal and Shale Employees' Federation for interpretation or variation of subclause 11(a) of Part 11 and clause 10 of Part III of the Consolidated Miners' Award[2] which provided relevantly as follows:

> PART II.
>
> 11. (a) For all time worked on afternoon or night shifts, 7 ½ per cent. shall be added to ordinary rates. Such percentage shall not be cumulative on any penalty rate prescribed by this award.
>
> PART III.
>
> 10. For all time worked on afternoon or night shift 7 ½ per cent. Shall be added to ordinary rates. Such percentage shall not be cumulative on any penalty rate prescribed by this award …

19. The relevant controversy pertained to whether the obligation of employers was adequately discharged by payment of penalty rates prescribed in the award in respect of time worked on Saturdays, Sundays or public holidays or outside ordinary hours on Mondays to Fridays or whether such hours entitled an employee to receive the additional shift allowance of 7 ½ per cent. Finding that the abovementioned clauses did not entitle such employees to receive the additional shift allowance, the Tribunal determined that the award should be read and construed as if it were further varied to state (emphasis added):

> 11.(a) For all time worked on any day (including Sundays and holidays) during ordinary working hours on afternoon or night shift 7 ½ per cent. shall be added to the day shift rates. All time worked on any day (including Sundays and holidays) outside the ordinary working hours on afternoon or night shift, shall be paid for at the rate of 7 ½ per cent. of the day shift rate in addition to the penalty rates prescribed herein.
>
> 10. For all time worked on any day (including Sundays and holidays) during ordinary working hours on afternoon or night shift 7 ½ per cent. shall be added to the day shift rates. All time worked on any day (including Sundays and holidays) outside the ordinary working hours on afternoon or night shift, shall be paid for at the rate of 7 ½ per cent. of the day shift rate in addition to the penalty rates prescribed herein…

[2] C.R.B. No 185.

20. Although the CFMMEU appears to argue that this decision marks a point at which cumulative payment of shift and weekend or public holiday penalties became the norm in the coal mining industry, such a contention is hardly supportable by the outcome of this decision. That the underlined section of the extract above was considered necessary tends to support an interpretation in the industry generally that, in the absence of a clear statement otherwise, shiftwork penalties are not to be paid concurrently with weekend and public holiday loadings.

21. The 1951 Case concerned an application by the Federated Engine Drivers and Firemen's Association of Australasia for variation of the Engine Drivers Award Queensland[3] to vary the working conditions for employees in underground and open-cut mines in Queensland. In this context, a controversy arose concerning the meaning of the words "such percentages shall be cumulative on any penalty rate elsewhere prescribed" which appeared in the provisions of the award which governed afternoon and night shift. The Queensland local reference board expressed the opinion that "cumulative" meant "additional" and that the word was inserted to make clear that "the application of the percentage would not efface any other penalty". It said:

> Both could be applied, but the percentage is calculated on the ordinary rate. Of any dispute arose that would be my interpretation.

22. To the extent that the CFMMEU utilises this decision as providing persuasive context to an assertion that the BCMI Award provides for concurrent payment of the shift penalties with weekend and public holiday loadings, Ai Group considers it to be of limited assistance. Not least so due to the vastly different wording contained in the relevant provision in the BCMI Award which does not contain the words "such percentages shall be cumulative on any penalty rate elsewhere prescribed".

[3] C.R.B. 247.

23. If the CFMMEU suggests that the 1951 case establishes a decision rule in respect of shift penalties which subsequently applied throughout the black coal mining industry, this is misguided. The award dealt with in that decision was made for members of the Federated Engine Drivers and Firemen's Association (**FEDFA**) in the State of Queensland.[4] Moreover, as late as 1973, the Coal Industry Tribunal observed, in a decision determining a dispute arising from a log of claims submitted by all unions (except the Collieries Staff Association) with members working in the coal mining industry, that cumulative payment of shift allowances were not ubiquitous across the industry. It said:[5]

> The present provision in the 'FEDFA' award which provides that shift allowances are to be cumulative on other penalty rates will continue to apply in that award but no sound case has been established for its extension to other awards.

24. The early decisions quoted in paragraph [34] of the CFMMEU's submissions do not provide context which is capable of supporting the contention that the current wording of the shiftwork provisions in the BCMI Award is consistent with the unions' interpretation.

25. The CFMMEU's further exploration of the background to the development of the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* (**Production and Engineering Award**) in their submissions is intended to persuade the Commission that such relevant context indicates that the shift penalties in the BCMI Award are intended to be paid concurrently or cumulatively with the weekend and public holiday loadings. These arguments are only of possible relevance to the rates applicable to 6 and 7-day roster employees and have little to no impact on the assessment of the proper interpretation of the interaction between shift and other penalties more generally.

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[4] C.R.B. 247, p. 1.

[5] C.R.B. 2183.

26. The CFMMEU refers to a case of the Coal Industry Tribunal in 1988 which resulted in a decision dealing with award restructuring in the coal mining industry (**Award Restructuring Decision**).[6] This arose from applications by the Queensland Coal Association (**QCA**), the New South Wales Coal Association (**NSWCA**) and a log of claims served by a number of mining unions. The applications by the QCA and the NSWCA sought changes to most coal mining industry awards.

27. The CFMMEU submissions and the witness statement of Andrew Vickers refer to an Award Restructuring Questions and Answers document, marked as AV-3 which was issued subsequent to the Award Restructuring Decision.[7] This document records questions asked by various parties following the Tribunal's decision issued on 8 September 1988. The CFMMEU refers to the following query made to the Tribunal by FEDFA:

> Are shift penalties for the six (6) and seven (7) day roster workers applied to the classification rate or the ordinary time earnings rate for Saturday, Sunday and Public Holidays?

28. The answer provided by the Tribunal was as follows:

> The position on shift penalties for weekend work is to be generally that which obtains in Queensland and which is described in exhibit B1. Application is to be consistent with the decision in CRB print No 758.

29. The case referred to in the Tribunal's answer is the 1951 Case, an extract from which is included above, where 'cumulative' payment of shift and other penalties in the Engine Drivers award in Queensland was interpreted to mean that such penalties are paid on top of one another.

30. The subsequent inclusion of clauses 13(c) and (d) in the *Coal Mining Industry (Production and Engineering) Interim Consent Award 1990* (**1990 Consent Award**) provided for cumulative payment of the afternoon, night and permanent night shift penalties on "any penalty rate" prescribed by the award in respect of

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[6] *Queensland Coal Association and the Australasian Coal and Shale Employees Federation; Electrical Trades Union of Australia; the Amalgamated Metal Workers Union; the Federated Engine Drivers and Firemen's Association of Australasia* [1988] C.R.B. 4071.

[7] C.R.B. 4101.

7 and 6 day roster employees. The CFMMEU's attention to the history of the entitlement is selective. Such cumulative treatment of the shift penalties in this award only extended beyond 7 and 6 day roster employees to Monday to Friday employees where they were members of FEDFA. This is apparent from the following extract which reproduces the relevant parts of the provision: (emphasis added):[8]

13 - AFTERNOON AND NIGHT SHIFTS

(a) Rates

For all time worked on afternoon or night shift 15 per cent shall be added to the ordinary rates

(b) Permanent Night Shift

An employee who works night shift only or remains on night shift for a longer period than four consecutive weeks; or works on a roster which does not give at least one-third of the employee's working time off night shift in each roster cycle; shall, during such period be paid an additional 25% for all time worked during ordinary working hours on such night shift.

(c) 7 Day and 6 Day Roster Employees

The above percentages shall be cumulative on any penalty rate prescribed by this award for 7 day and 6 day roster workers and shall be calculated on the ordinary rate.

(d) Monday to Friday Employees - <u>FEDFA only</u>

The above percentages shall be cumulative on any penalty rate prescribed by this award for Monday to Friday employees, <u>members of the FEDFA</u> and shall be calculated on the ordinary rate.

31. It is inaccurate to purport that the 1990 Consent Award carried through any entitlement to concurrent or cumulative payment of shift penalties beyond 6 and 7 day roster employees or members of FEDFA. This restricted application of the aggregation of shift penalties with other loadings is consistent with the limited concession made in the Question and Answer document which was itself confined to 6 and 7 day roster employees as well as the earlier decision of the Tribunal from 1973 which had much earlier refused to extend cumulative

[8] C.R.B. 4414, cl. 13.

payment of shift with other penalties beyond the 'FEDFA award'.[9] It should be noted that only a minority of employees covered by the BCMI Award fall under classifications which would have made FEDFA membership likely at the time the Consent Award was made.

32. The 1990 Consent Award did not, as asserted at paragraph [36] of Andrew Vickers' witness statement, make clear that shift penalties were paid in addition to penalties for Saturday, Sunday and Public Holidays. To the contrary, that such cumulative payment of these penalties was expressly confined to certain employees should persuade the Commission in favour of finding that these contextual matters suggest that, unless otherwise stated, the assumption is that penalties would not be paid cumulatively or aggregated in the BCMI Award and its predecessors.

33. The 1990 Consent Award was subsequently consolidated and republished in 1995 with a number of alterations in the terminology used to describe the shift penalties. Crucially, the cumulative treatment of the penalties was again restricted to 6 day and 7 day roster employees and members of FEDFA (emphasis added):[10]

> 13 - AFTERNOON AND NIGHT SHIFTS
>
> (a) Rates
>
> Subject to sub-clause (b), all time worked on afternoon or night shift shall be paid at 115% of the ordinary rate.
>
> (b) Permanent Night Shift
>
> An employee who works night shift only or remains on night shift for a longer period than four consecutive weeks; or works on a roster which does not give at least one-third of the employee's working time off night shift in each roster cycle; shall, during such period be paid at 125% of the ordinary rate for all time worked during ordinary working hours on such night shift.
>
> (c) 7 Day and 6 Day Roster Employees
>
> The above percentages shall be cumulative on any penalty rate prescribed by this award for 7 day and 6 day roster workers and shall be calculated on the ordinary

[9] C.R.B. 2183.

[10] C.R.B. 4852, cl. 13.

rate.

(d) Monday to Friday Employees - FEDFA only

The above percentages shall be cumulative on any penalty rate prescribed by this award for Monday to Friday employees, members of the FEDFA and shall be calculated on the ordinary rate.

34. Attached to the CFMMEU's submissions and marked AV-24 is an amended application by the Queensland Mining Council and the New South Wales Minerals Council for variation of the 1990 Consent Award. The application was framed as seeking a consolidation of the award to include all relevant variations and to 'incorporate' the modernisation of the award by the removal of obsolete and employer specific provisions, identification and addressing of certain issues with respect to discrimination and the rewriting of allowable provisions in plain English. The union argues that the Consolidated Award which was subsequently made by the Australian Industrial Relations Commission (**AIRC**) by consent on 10 December 1997 was not therefore intended to represent a material departure from the 1990 Consent Award in terms of the question of whether shift penalties are cumulative on other penalties in the Award.

35. If this argument is accepted, Ai Group considers that it cannot assist the CFMMEU in persuading the Commission that the Production and Engineering Award provided for cumulative payment of the shift penalty to all employees. The Production and Engineering Award which was made by the AIRC retained the division between 6 and 7 day roster employees and other shiftworkers in how the shift penalty interacted with other penalties in the award.

36. Clause 27.2 of the Production and Engineering Award applied a similar division which formerly applied between FEDFA members and other employees as had formerly subsisted in clause 13 of the 1990 Consent Award, except the Production and Engineering Award referred to ex-FEDFA employees. Clause 27.2 relevantly provided:

27.2 Shift Work Rates

Type of Shift:	Shift Rates:
Day Shift	Ordinary Time
Afternoon and Rotating Night Shifts: • Ordinary Hours • Overtime Hours o 6 and 7 day roster/or ex-FEDFA members o all others	 115% of the ordinary time rate overtime penalty rate plus 15% of the ordinary time rate for the time worked overtime penalty rate
Permanent Night Shift • Ordinary Hours • Overtime Hours o 6 and 7 day roster/or ex-FEDFA members o all others	 125% of the ordinary rate overtime penalty rate plus 25% of the ordinary time rate for the hours worked overtime penalty rate

37. This provision appears to have preserved aggregation of the relevant shift penalty with the overtime penalty rate in respect of 6 and 7 day roster employees or ex-FEDFA members. No intent is apparent from this provision in the Production and Engineering Award to extend any concurrent payment of the shift penalty with any other loading in respect of employees which did not fall into one of these two categories. It is unclear why the aggregation was restricted only to the shift and overtime penalties for such employees. However, it is apparent that the Production and Engineering Award did not preserve any concurrent or cumulative payment in respect of the shift penalty with either the public holiday or weekend penalties for employees other than 6 and 7 day roster employees or ex-FEDFA members.

38. In the second stage of the award simplification process, the Queensland Mining Council and the New South Wales Minerals Council lodged an application for the setting aside and the making of a new award. Harrison C determined to vary

the Consolidated Award after determining the matter against criteria set out in Item 51(6) of Part 2 Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* and in accordance with the principles established by the Full Bench of the Commission in the *Hospitality Decision* (P7500).[11] Pursuant to this decision, all references to separate treatment of ex-FEDFA employees were removed in clause 27.2. of the Production and Engineering Award. From this point on, the separate treatment in respect of shift penalties was confined only to 6 and 7 day roster employees. On the ordinary meaning of this provision, such aggregation was confined to the shift and overtime penalties.

39. At the time the BCMI Award was made in the course of the award modernisation proceedings, the Production and Engineering Award did not provide for aggregation of shift and overtime penalties for any employees other than 6 and 7 day roster employees. Nor did the Production and Engineering Award provide for cumulative payment of the shift, public holiday and weekend penalties.

40. The contextual arguments outlined by the CFMMEU which pertain to predecessor awards covering 'production and engineering' functions have been applied by APESMA in its 3 July 2020 submission in favour of an historical basis for cumulative application of the shift and weekend penalties for 'staff employees'.

41. APESMA's arguments are limited to a claim that the presence of specified provisions which mandated cumulative payment of shift and weekend penalties for 6 and 7 day roster employees in various pre-modern awards evince a clear intention that such entitlements were intended to extend to all shiftworkers. Beyond bare assertion, there is little to support this argument. To the extent that APESMA relies on the reasoning referred to in the CFMMEU's submission, Ai Group considers that, for the same reasons, this cannot be used to support the unions' argument.

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[11] Print R4611, [19].

42. A provision which mandates cumulative application of shift and other penalties in respect of 6 and 7 day roster employees cannot, without more, suggest this entitlement was intended to apply to all shiftworkers covered by the award. Moreover, such an explicit entitlement for a narrow subset of workers would tend to suggest that the same treatment did not extend to other employees absent a clear provision providing for such.

43. No clear statement was included in the *Coal Mining Industry (Staff) Award 2004* (**Staff Award**) indicating whether the shift penalties incorporated within relevant rates in clause 24.2 were intended to be cumulative with other penalties. However, that the Staff Award explicitly preserved a concurrent entitlement present in predecessor provisions in respect of 6 and 7 day roster employees only (and only then for the shift and overtime loadings) suggests that cumulating or aggregating the shift penalty with other penalties for other categories of employee was not intended. Clause 24.2 of the Staff Award is reproduced below:

24.2 What are the shift-work rates?

Type of shift	**Shift rates**
Afternoon and rotating night shifts	
Ordinary hours	115% of the ordinary time rate
Overtime hours:	
six and seven day roster	Overtime penalty rate (plus 15% of the ordinary time rate for the time worked)
all others	Overtime penalty rate
Permanent night shift	
Ordinary hours	125% of the ordinary rate
Overtime hours:	
six and seven day roster	Overtime penalty rate (plus 25% of the ordinary time rate for the hours worked)
all others	Overtime penalty rate

44. The relevant contextual considerations to the interpretation of clauses 22.1, 22.2 and 27.4 the BCMI Award as they concern 'staff employees' do not support the contention that shift penalties are to be aggregated with or paid cumulatively with other penalties.

Construction of the relevant provision in the BCMI Award

45. Consistent with Ai Group's earlier submissions in this matter, the meaning of the current provisions of the BCMI Award are best reflected in the Exposure Draft by:

- Including a note to clause 23.2 as follows:

> Note: The rates prescribed by clause 23.2 are in substitution for and not cumulative upon the shiftwork rates prescribed by clause 23.1 of this award.

- Amending clause 29.4 as follows:

> **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.

46. As Ai Group has already expressed in past submissions, there is clearly some ambiguity in the BCMI Award in relation to the manner in which the shift and weekend penalties are to interact. There is nothing in the CFMMEU's submissions which demonstrate that the provisions align with their interpretation.

47. Courts and industrial commissions have devised detailed principles for determining the proper meaning of provisions contained within industrial instruments. These have been applied for many years and are relatively settled.

48. In 2006, French J handed down an influential and often-quoted decision dealing with the interpretation of awards in *City of Wanneroo v Australian Municipal, Administrative, Clerical and Services Union*. French J made the following points which are relevant to construing a modern award:[12]

- The construction of an award begins with an ordinary meaning of its words;
- 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;
- Context may extend to the entire document of which it is a part or to other documents with which there is an association; and
- Context may also extend to ideas that gave rise to an expression in a document from which it has been taken.

49. Importantly, although most often the immediate context, being the clause, section or part of the award in which the words to be interpreted appear, will be the clearest guide, the relevant "context" to be considered in interpreting an award extends to the origins of a particular clause.[13]

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

[13] *Short v FW Hercus Pty Limited* (1993) 40 FCR 511 at 517-19; *Swissport Australia Pty Ltd v Australian Municipal Administrative Clerical and Services Union* (No 3) [2019] FCA 37, [52].

50. Contrary to the CFMMEU's assertion at paragraph [57] of its submissions, the context of the Production and Engineering Award is not the context of the BCMI Award. The context of the current BCMI Award includes the award modernisation process conducted by the former AIRC under Part 10A of the *Workplace Relations Act 1996* (Cth) (**WR Act**). Distinctly from the manner in which pre-modern awards were made by the predecessors of the Commission, modern awards were to be made consistently with the award modernisation request and the objects contained in s. 576A of the WR Act which included a requirement for the instruments to be simple to understand and easy to apply. Such awards apply to employers regardless of their involvement in the original dispute out of which the award arose or any respondency schedule. In such a context where a modern award is intended to have broad application for an occupation or an industry, it should be noted that cumulative or concurrent payment should not be inferred unless clearly articulated.

51. Nevertheless, for the reasons already outlined in these submissions, Ai Group does not consider the relevant contextual considerations relating to the Production and Engineering Award or the Staff Award to assist the CFMMEU in persuading the Commission that shift loadings were aggregated with public holiday or weekend penalties generally.

52. Ai Group urges the Commission to make the proposed variations to the Exposure Draft to avoid significant confusion emerging in respect of the manner of payment of the relevant penalties in this award.

53. Ai Group's proposed approach is consistent with the modern awards objective, including s.134(1)(d), (f) and (g). The unions' proposed approach is inconsistent with these elements of the modern awards objective.