Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission in Reply

Black Coal Mining Industry Award 2010

(AM2020/25)

29 January 2021

4 YEARLY REVIEW OF MODERN AWARDS
AM2020/25 BLACK COAL MINING INDUSTRY AWARD

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) makes this reply submission in relation to a remaining outstanding issue pertaining for the *Black Coal Mining Industry Award* (**BCMI Award**), specifically regarding the interaction between the casual loading and the weekend and shift rate provisions in the award.

2. The resolution of this issue determines whether the rates denoting the casual shift and weekend penalties in proposed clauses 23.1 and 23.2 of the Exposure Draft as reflected in the Report submitted by the parties to the Fair Work Commission (**Commission**) on 7 December 2020 (**Report**) are correct or whether they should be amended to compound the relevant penalties with the casual loading as argued in:

   - Submission by the Construction, Forestry, Maritime, Mining and Energy Union (Mining and Energy Division) filed on 15 January 2021 (**CFMMEU Submission**)

   - Submission by the Association of Professional Engineers, Scientists and Managers Australia (Collieries Staff Division) filed on 15 January 2021 (**APESMA Submission**)

3. Ai Group files this Reply Submission in response to the CFMMEU Submission and the APESMA Submission. These submissions have been reviewed and Ai Group considers that no materials contained therein are persuasive of the position that weekend penalties and shift loadings in the BCMI Award necessarily compound with the casual loading.

4. Ai Group considers that there are sufficient textual contra-indicators within the BCMI Award that indicate that the 'Yallourn/Domain approach' as described in

paragraphs [25] – [27] of the Commission's 18 August 2020 Decision[1] (**August Decision**) should not apply with equal force to weekend and penalty rates in the BCMI Award.

5. As such, the rates for casual shift and weekend work should not be altered from those proposed by the Employer groups in the Report. These are consistent with the Full Bench's provisional views with respect to the relevant penalties at paragraph [60] of its 18 November 2020 Decision (**November Decision**).[2]

Background

6. On 20 March 2020, a Conference was held in the Commission in relation to the finalisation of the Exposure Draft of the BCMI Award. As a result of the Conference, a report was issued by the Commission on 23 March 2020 which summarised the remaining outstanding matters relevant to the preparation of a final variation determination. Issue 1, as outlined in the Commission's report, related to a CFMMEU claim to amend the rates in cl. C.1.2, D.1.2 and D.2.2 of the Exposure Draft. Specifically, the CFMMEU called for the relevant rates for shiftworkers on a weekend to be amended as follows:

(i) for the first 4 hours on a Saturday: 165% for an afternoon and rotating night shift and 175% for hours worked on a permanent night shift; and

(ii) on a Saturday after the first 4 hours: 215% for an afternoon and rotating night shift and 225% for hours worked on a permanent night shift.

7. This would have the effect of aggregating the applicable weekend penalty with the shift penalty, taking a cumulative approach.

8. Although the CFMMEU sought amendments, consistently with this position, to D.2.2, which provides rates of pay for casual staff employees performing shift

[1] [2020] FWCFB 4350.

[2] [2020] FWCFB 5908.

work, the CFMMEU did not call for variations to the schedule at this time that would compound the casual loading with the shift or weekend penalties.

9. The proposed variation and submission filed by the CFMMEU on 20 April 2020, in response to the Commission's report, argued that the issue with the rates in the relevant tables was that they were based on the "minimum hourly rate" as opposed to the "ordinary hourly rate". As such, the CFMMEU proposed that the applicable reference rate for the penalties in clauses 23.1 and 23.2 be varied to refer to the ordinary time rate. The CFMMEU's proposed variations to clauses 23.1 and 23.2 are outlined below:

23.1 *An employee will be paid the following rates for all ordinary hours worked during the following periods:*

Shift	***Penalty Rate***	***Casual Penalty Rate (includes casual loading)***
	% of ~~minimum hourly~~ ordinary time rate	
Day	*100%*	*125%*
Afternoon and rotating night	*115%*	*140%*
Permanent night	*125%*	*150%*

23.2 *Weekend work*

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

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

10. Importantly, the CFMMEU did not argue, at this time, for an amendment to be made to the penalties themselves for casual shiftworkers or casual employees working on a weekend. The rates applicable for casual employees in the above tables, as the CFMMEU proposed to amend them, incorporated a 25% casual loading that was calculated on an 'ordinary time rate'. The CFMMEU's proposed amendments therefore appear to have recognised that the reference rate i.e. the 'ordinary time rate' did not itself incorporate the casual loading.

11. In its decision issued on 18 November 2020, the Full Bench of the Commission agreed with the CFMMEU with respect to the aggregation of the shift penalties with weekend penalties however, at paragraph [60], expressed the view that an appropriate variation would utilise the minimum hourly rate as the reference rate for calculation of the applicable penalty rates for full and part-time employees and for casual employees. No question of the compounding of the casual loading with the weekend or shift penalties arose. However, the Commission's reasons for expressing the view that the 'minimum hourly rate' was a more appropriate reference rate for calculation of these penalties as opposed to the 'ordinary time rate' was to avoid confusion. The Commission, at this time, saw no reason to alter the applicable percentage rates to accommodate any incorporation of the casual loading within the 'ordinary time rate'.

12. A separate issue relating to the BCMI Award emerged in the context of the 'overtime for casuals' common issue which was dealt with in two decisions made by the Commission on 18 August 2020[3] and 30 October 2020[4]. The Commission determined, at paragraphs [55] - [59] of its August Decision that, applying the Yallourn/Domain approach, the 25% casual loading compounds on the overtime penalty rate in the BCMI Award. This conclusion was reached on the basis that clause 17.2 of the Current Award confers overtime entitlements expressed as "time and a half" and "double time" on casual employees. In the absence of any countervailing considerations that would otherwise provide, the Commission determined that the applicable reference rate incorporated the casual loading.

13. Following this decision, the CFMMEU claimed that the provisional view articulated by the Commission in its November Decision that clauses 23.1 and 23.2 should be amended in the manner reflected at paragraph [60] of the November Decision, would result in the applicable penalties for casual employees being incorrectly calculated.[5]

14. In short, the CFMMEU's argument that the casual loading compounds on the weekend and shift penalties referred to in cl. 23.1 and 23.2 contradict both its earlier proposed variations as outlined in its 20 April 2020 submission and the Full Bench's acceptance of the CFMMEU's position in its November Decision. The claim that the casual loading compounds with the shift and weekend penalties should be rejected as a new claim that has been brought late in the context of the finalisation of the BCMI Award and should not be entertained at this stage.

Textual Consideration

15. In their respective submissions filed on 15 January 2021, the CFMMEU and APESMA argue that Yallourn/Domain approach should be applied to:

[3] [2020] FWCFB 4350.

[4] [2020] FWCFB 5636.

[5] AM2020/25, *Report of the Australian Industry Group* (7 December 2020).

- The reference to ‘time and a half’ and ‘double time’ in cl. 21.2 which provides applicable penalties for weekend rates under the BCMI Award;

- The references to the ‘ordinary time rate’ in cl. 22.2 upon which the shift penalties are calculated.

16. The unions’ assertion that the casual loading and the penalties for weekend and shiftwork necessarily compound as a result of the application of the Yallourn/Domain approach cannot be supported on an ordinary reading of the words in the relevant provisions of the BCMI Award.

17. In *AMWU v Energy Australia Yallourn Pty Ltd* [2017] FWCFB 381, the Full Bench of the Commission considered that a clause which calculated an entitlement at “double time” referred to double the amount paid for working ‘ordinary time’ and that, in the absence of express words excluding the casual loading, on its ordinary meaning, the casual loading was included.[6]

18. In *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716, the Full Bench similarly determined that the ‘ordinary rate of pay’ for a casual employee incorporated the casual loading for the purposes of calculation of weekend and overtime penalties under the *Nurses Award 2010*.[7] For the purposes of interpreting and entitlement to payment at ‘time and a half’ and ‘double time’, the relevant ‘time earnings’ was interpreted as incorporating the casual loading.[8]

19. The *Yallourn/Domain* approach was applied in the August Decision to interpret provisions in a significant number of modern awards as compounding the overtime penalty on the casual loading. Significantly, in this decision, the approach was only applied where there was no clear basis to depart from this interpretation. Where textual contra-indicators were found to suggest that the *Yallourn-Domain* approach was not to be applied this was, in numerous cases,

[6] *AMWU v Energy Australia Yallourn Pty Ltd* [2017] FWCFB 381, [41].

[7] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716, [17].

[8] *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716, [19].

sufficient to find that a reference to 'time and a half' and 'double time' did not include the casual loading.

20. The *Yallourn*/*Domain* approach is therefore not a blanket rule applying across all industrial instruments which provide for penalties calculated using the terms 'double time' or 'time and a half'. Nor does it, in all cases, indicate that a reference rate that is defined as the 'ordinary time rate' will necessarily include a casual loading, where applicable. Whether these terms denote calculation of a penalty rate on a figure that includes the casual loading will depend on a close examination of the 'ordinary meaning' of the penalty provisions in clauses 21.2 and 22.2 of the BCMI Award.

21. The principles of award interpretation are well settled. It has been established that construction of an award begins with an ordinary meaning of its words.[9] In finding the ordinary meaning, regard must be paid to the context and purpose of the provision or expression being construed. Although context is not confined to the relevant words of the award, 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.

22. In the case of the BCMI Award, the reference to payment of weekend penalties at 'time and a half' and 'double time' and the calculation of the shift penalties on the 'ordinary time rate' cannot be considered as each incorporating the casual loading. At paragraphs [41] – [60] of the November Decision, the Full Bench agreed with the CFMMEU's claim that the exposure draft reduced the rate of pay for shiftworkers by not allowing for aggregation of the shift loading with the weekend penalty. As such, the Commission determined to amend the Exposure Draft to accommodate concurrent payment of these penalties.

23. If the shift and weekend penalties are, as the unions assert, both calculated on a figure that includes the casual loading, on the basis that each utilises the 'ordinary hourly rate' as the reference rate, then with the Full Bench's finding that these penalties are aggregated where both applicable, this would result in

[9] *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362 at 378

doubling up of the casual loading. It should necessarily be recognised that such an outcome would be inappropriate and unlikely to be the intention of the drafters of the Award.

24. To avoid any assumption that employees are compensated twice for the casual nature of their employment, the Commission should find that the shift and weekend penalties do not both impliedly incorporate the casual loading.

25. The absurd result that would necessarily arise out of the unions' interpretation of the calculation of the weekend and shift penalty provisions in the Current Award constitutes a sufficient textual contra-indicator to persuade the Commission that the reference to 'time and a half' and 'double time' in s. 21.2 and the reference to the 'ordinary time rate' in cl. 22.2 of the Current Award do not result in the compounding of the casual loading with these respective penalties.

26. Simply on the basis of the merits of the unions' proposed variation to the Exposure Draft, it would not be 'fair' within the meaning of the modern awards objective, to effectively require payment of the casual loading twice under circumstances where the weekend and shift penalties apply.

27. The CFMMEU and APESMA's claims regarding the compounding of the casual loading with these penalties should be rejected and as such clauses 23.1 and 23.2 of the Exposure Draft should be varied consistently with the employer groups' comments in the 7 December 2020 Report.