FAIR WORK COMMISSION

Finalisation of Exposure Drafts - AM2019/17 AND AM2014/67

Black Coal Mining Industry Award 2010

Submissions by the Coal Mining Industry Employer Group (CMIEG)

Introduction

1. This submission by the CMIEG responds to the submissions of the CFMMEU, APESMA and CEPU, each dated 3 July 2020 (which will be referred to collectively as the **Union submissions**). It also responds to the witness statement of Andrew Vickers dated 1 July 2020. The CMIEG does not oppose the admission of that witness statement and does not wish to cross-examine Mr Vickers on his statement.

2. The submissions of the parties on the two issues which are dealt with in this submission have largely comprised of arguments about the intention of the terms of the current Black Coal Mining Industry Award 2010 (**Current Award**) and its predecessor awards. Before turning specifically to the two outstanding issues, the CMEIG makes the general submission that, whilst the terms of the current Award and its predecessor awards are important, they do not remove or diminish the need for the Commission to ensure that the terms of the award which it is to make satisfy the modern awards objective in section 134 of the *Fair Work Act 2009* (Cth) (**FW Act**).

3. The CMIEG has made previous submissions concerning these matters on 22 January 2016, (noting that references in that earlier submission to Clauses 18.3 and 18.4 of the then published exposure draft Award must be taken to be replaced now by references to Clause 29 of the present exposure draft), 30 June 2017; 30 March 2018 and 13 May 2020. The CMIEG refers to and relies upon those previous submissions.

Issue 1: Shiftwork and weekend penalties

4. The first issue is whether shiftwork penalty rates prescribed in clause 23.1 of the Commission's 2020 exposure draft Award and weekend penalty rates prescribed in clause 23.2 are to be treated as cumulative and therefore shown as such in Schedules C and D. The Unions submit that the penalty rates should be treated as cumulative while the CMIEG and AiGroup submit that they should not be treated as cumulative.

5. The Union Submissions rely on the proposition that, in clause 21.2 of the Current Award, the payments specified for work on Saturday and Sunday must be taken to include an entitlement to both the specified weekend penalty rates and the separate shift allowance from the current clause 22.2. They support this submission by reference to the history of

Lodged on behalf of: Coal Mining Industry Employer Group (**CMIEG**)
Address for Service:
Ashurst Australia
Level 11, 5 Martin Place
Sydney NSW 2000
Tel: (02) 9258 6313 / 6025
Fax: (02) 9258 6666
Email: trent.sebbens@ashurst.com / adrian.morris@ashurst.com
Ref: TZS AGM 02 3000 0722

the corresponding provisions in predecessor awards. They rely, in particular, on subclauses 13(c) and 13(d) of the *Coal Mining Industry (Production and Engineering) Interim Consent Award, September 1990*[1] (**1990 P&E Award**) and the decision of the Coal Industry Tribunal (**CIT**) dated 24 October 1988 (**1988 CIT Decision**) (Annexure AV3 in the Vickers Statement)[2]. That decision takes the form of a number of questions put to the CIT and the CIT's answers to them. That 1988 CIT Decision was given in the course of the processes that led to the CIT making the 1990 P&E Award. That Award was followed by counterpart awards for coal mining industry Staff and Deputies.[3]

6. Clause 13 of the 1990 P&E Award provided as follows:

> *(a) Rates*
>
> *For all time worked on afternoon or night shifts 15 per cent shall be added to ordinary rates.*
>
> *(b) Permanent Night Shift*
>
> *An employee who works night shift only; or remains on night shift for a longer period than 4 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 – 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.*

7. Question 3 of the CIT 1988 Decision and the answer are as follows:

> *Q3 Shift Penalties – Holidays*
>
> *Are shift penalties for the six (6) and seven (7) roster workers applied to the classification rate or the ordinary time earnings rate for Saturday, Sunday and public holidays?*
>
> *A 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 with CRB print No758.*

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1 See *United Mineworkers Federation of Australia; Federated Engine Drivers and Firemen's Association and Amalgamated Metal Workers; Union; Electrical Trades Union and Queensland Coal Association; New South Wales Coal Association; Cornwall Coal Company No Liability* [1990] ACIndT 4414 (CR4414) (23 November 1990)

2 *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 & Firemen's Association of Australasia* [1988] ACIndT 4101 (24 October 1988)

3 See APESMA submission paragraph [5]. Those awards were, ultimately, the Coal Mining Industry (Staff) Award, 2004 (AP835164) (**Staff 2004 Award**) and the Coal Mining Industry Award (Deputies and Shotfirers), 2002 (AP813783) (PR914401, AIRC, Cartwright SDP, C00624/89, C00612/99 & C2002/788, 15 February 2002) (PR948632, AIRC, Bacon C, C548/1989, C808/1998, C809/1998, 29 June 2004) (**Deputies 2002 Award**) being the relevant reference instruments for the Current Award.

8. The CMIEG accepts that the intention of the 1990 P&E Award and the counterpart 1990 Staff and Deputies awards that followed it was that shift penalties for six and seven day roster workers and weekend penalty rates for those employees were intended to be cumulative (that is, added to the weekend rates, rather than compounded). A similar cumulative operation was also intended for Monday to Friday employees members of the FEDFA.[4]

9. However, in subsequent coal mining industry awards there was no counterpart to subclauses 13(c) and (d) of the 1990 P&E Award. No such provision appears in the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997*[5] (**1997 P&E Award**). In the 1997 P&E Award, Clause 28 – Weekend Work of the 1997 P&E Award refers simply to Saturday and Sunday rates as being at "time and half" and "double time" (see tables in clause 28.2 and 28.3), with those phrases being clearly given its ordinary industrial meaning multiples of the "ordinary time" rate, or put differently the 150% and 200% of the classification rate

10. This omission from the 1997 P&E Award which is a relevant instrument for the Current Award, is most significant and must be properly taken into account. The CIT was abolished in 1995 and the 1997 P&E Award was made by the Australian Industrial Relations Commission, applying section 150A of the *Workplace Relations Act 1996* (Cth).[6]

11. Similarly, there are no such provisions in the Staff 2004 Award. As conceded by APESMA, there is also no reference to cumulative shift penalties and weekend rates in the predecessors to that award made in 1999.[7] Again, the omission of such terms is significant.

12. The unions appear to contend in their submissions that the omission from the 1997 P&E Award (and from subsequent counterpart awards for Staff) of an express provision that shiftwork and weekend penalties rates were cumulative did not alter the intention in the 1990 P&E Award and its counterparts. There is no contemporaneous support for this contention. Contrary to the Union Submissions, clause 7 of the 1997 P&E Award does not preserve the effect of clauses 13(c) and (d) from the prior awards.[8] That clause 7 does no more than preserve rights and liabilities that had accrued under former awards, and definitions from former awards.

13. The CMIEG submits that a contrary conclusion can and should be drawn, namely that the shiftwork and weekend penalty rates in the 1997 P&E Award (and its counterpart awards) were no longer intended to be cumulative as they had been, to the extent provided in clauses 13(c) and (d) of the 1990 P&E Award (and its counterpart awards). In none of the

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4 *Federated Engine Drivers and Firemen's Association of Australasia*.
5 Print P7386 (Boulton J, AIRC, C623/89 & C23909/97, 4 December 1997). See clauses 27 – Shift Work and 28 – Weekend Work.
6 CFMMEU 3 July submission paragraph [41].
7 APESMA Submissions at [18].
8 See for example APESMA submission paragraph [22].

Commission's coal mining industry awards made after the 1997 P&E Award were these penalty rates expressed to be cumulative.

14. The CFMMEU relies in paragraphs 50 to 59 of its submission on the well-established authorities on the interpretation of industrial instruments including as to the need to interpret the terms contained in them in the light of, and in the context of, their origins and history. The CFMMEU and the other unions, submit that the history of the shiftwork and penalty rates in the coal mining industry awards supports their contention that they are to be interpreted as intended to be cumulative in the current award. The CMIEG submits to the contrary, namely that the history of the provisions in the Commission's awards from the 1997 P&E Award onwards, which omit any prescription that shiftwork and weekend penalties are intended to be cumulative, leads properly to the inference that they were no longer intended to be cumulative and are not to be treated as cumulative in the current Award.

15. A natural and straightforward interpretation of the provisions in clauses 21.2 and 22.2 of the Current Award, taken together, is that the Saturday and Sunday penalty rates themselves compensate for the requirement to work on those days. The CMIEG submits that there is no persuasive reason, as a matter of interpretation of the terms of the Current Award, in the light of their history, for treating as cumulative the shift allowances in clause 22.2 of the current Award and the Saturday and Sunday penalty rates prescribed in clause 21.2 of the current Award.

16. The CMIEG restates its contention in its 13 May 2020 Submission:

> "in addition there is no basis for treating the shift allowances and weekend penalties as cumulative in order to ensure that the Award satisfies the modern Award objective in section 134 of the Act. This conclusion is supported by the observations of the Full Bench of the Commission in *Re 4 Yearly Review of Modern Awards-Penalty rates* [2017] FWCFB 1001 at [143] and following. More recently, as noted *Construction, Forestry, Maritime, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2019] FCA 1696 (Flick J) at [41]:
>
> > It has also long been accepted that where a shift allowance and the like has been prescribed for working (for example) on a weekend, the higher rate prescribed is to be taken as adequate compensation in itself for being required to work on a weekend or public holiday: Federated Engine-Drivers and Firemen's Association of Australasia and A I Amalgamated; Re Dorman Long & Co Ltd (1930) 29 CAR 229.
>
> (See also *In Re Engine Drivers and General (State) Interim Award* [1950] AR (NSW) 260 at 268, cited with approval in *Tahmoor*)."

17. The weekend penalty rates in the Current award and the Commission's 2020 exposure draft award are consistent with general industrial standards.

18. A further final point to note is that the awards of the CIT, including the 1990 awards were made in an era before the current regime of minimum safety net awards underpinning collective bargaining. They were made to settle industrial disputes between respondents at the time. The CIT awards were made substantially by consent; Mr Vickers' statement

attests to this, including in respect of the 1990 P&E Award[9]. Particular terms that may have been included in the CIT awards should therefore not necessarily be given conclusive weight when the Commission is determining the provisions of an award that satisfies the modern award objective of section 134 of the FW Act.

Issue 2: Clause 29.4 Employees required to work on a recognised public holiday

19. The second issue is whether the shiftwork penalty rates in clause 23.1 of the Exposure Draft Award and the rates for work on public holidays in clause 29.4 should be treated as cumulative.

20. The CMIEG relies on its previous submissions dated 13 May 2020 in paragraphs [9]-[13], which in turn repeat parts of the CMIEG submission dated 22 January 2016.

21. The Union Submissions, to the effect that the history of the corresponding provisions in predecessor awards support their contention that shift and public holiday penalty rates are cumulative, are wrong and should not be accepted by the Commission for the following reasons:

    (a) As is explained in paragraph 12 of the CMIEG 13 May 2020 submission (and the paragraphs from the CMIEG January 2016 submission reproduced there) the Public Holiday clause in the predecessors to the Current Award, going back to the 1990 Award (and its counterpart awards), are very clear that the penalty rate for working ordinary hours on a public holiday was added to the employees "classification rate". This was a clear, express provision and left no scope to argue that a shift allowance was also to be paid.

    (b) There is nothing to suggest that the current Award was intended to change the prescription in the predecessor awards and to make shift and public holiday penalties cumulative.

    (c) Question 3 and the answer to it in the 1988 CIT Decision quoted in paragraph 7 above, do not support the union contention (or Mr Vickers'[10] recollection) that public holiday penalties and shift allowances were intended to be cumulative in what became the 1990 P&E Award and its counterpart awards. Indeed they demonstrate the opposite. Whilst question 3 asked about rates for ordinary time earnings on "Saturday, Sunday and public holidays", the answer only states the position for "weekend work". It says nothing about public holidays. This is significant. The clear inference is that, in contradistinction to the intention in relation to weekend work, shift penalties were not intended to be applied to public holiday payments.

    (d) The Unions Submissions rely again on the terms of subclauses 13(c) and (d) from the predecessor awards (see paragraph 6 above). However those subclauses need

[9] Andrew Vickers Statement at [36]-[37].
[10] Andrew Vickers Statement at [33]-[37].

to be read carefully. They provide for shift penalties to be cumulative with penalty rates prescribed by the Award for respectively "7 day and 6 day roster workers" and for "Monday to Friday employees, members of the FEDFA". The Public Holiday payments for working ordinary hours on a public holiday are not a penalty rate prescribed for those specific categories of employees; they are prescribed generally for all employees.

(e) As noted in paragraph 9, of this submission subclauses 13(c) and (d) were not repeated in the 1997 P&E Award or any subsequent awards, including the Current Award.

(f) With due respect to the recollection of Mr Vickers, his recollections are not a substitute for the proper interpretation of the relevant awards or the 1988 CIT Decision as to the intention in respect of what became the 1990 P&E Award with which that decision was concerned.

22. Finally, as the CMIEG has previously submitted in its 13 May 2020 submission, treating the public holiday payments, of effectively triple time for both ordinary hours and overtime hours, as the maximum penalty for working on a public holiday, and not adding shift allowances on top is consistent with general industrial standards,[11] and there is no basis for treating them as cumulative in order to ensure that the modern award objective in section 134 of the FW Act is satisfied.

23. For the reasons contained in this submission, the CMIEG opposes the variation proposed by the CFMMEU in paragraphs [60]-[61] and Annexure A of its 3 July 2020 submission.

Trent Sebbens
Partner

Adrian Morris
Senior Consultant

Ashurst Australia
Legal representative for the CMIEG

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[11] See also the general principle restated in the Federal Court's recent decision in *Construction, Forestry, Maritime, Mining and Energy Union v Tahmoor Coal Pty Ltd* [2019] FCA 1696 (Flick J), and the cases cited therein, as referred to in paragraph 16 above.