

IN THE FAIR WORK COMMISSION

Matter Number: AM2019/17 – 4 yearly review of modern awards – finalisation of exposure drafts – tranche 3 awards.

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION
MINING AND ENERGY DIVISION

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Introduction

1. These submissions are filed in response to the decision of a Full Bench of the Fair Work Commission (**FWC**) in *4 yearly review of modern awards* [2020] FWCFB 421 and, in particular, the request at [8] of that decision that submissions be filed in response to the draft determinations set out at Attachment C to that decision.
2. These submissions are concerned only with the *Black Coal Mining Industry Award 2010 (Current Award)* and the exposure draft that the aforementioned draft determinations seek to give effect to (**Exposure Draft**).

Definitions (clause 2)

3. The definition of “ordinary week’s pay” has been altered in the Exposure Draft to read:

ordinary week’s pay means minimum weekly rate in the table of minimum rates in the clause A.4 for the award classification rate in respect of 35 ordinary hours.

4. This definition confines the definition of an ordinary week’s pay to Schedule A employees only. It is submitted that this can’t have been the intention of the drafting of the Exposure Draft, and that the definition ought not to be changed from the wording in the Current Award.
5. Alternatively, the following amendments would also resolve the concern:

ordinary week’s pay means the minimum weekly rate in the tables of minimum rates in clauses A.4 and B2 for the award classification rate in respect of 35 ordinary hours.

Six and seven day roster employees – overtime and public holidays (clauses 21.3 and 29.4)

6. The Exposure Draft requests, in respect of clauses 21.3 and 29.4, that parties confirm if claims previously pressed on this point continue to be pressed. The CFMMEU confirms that it continues to press its claim and respectfully requests that the opportunity to discuss the issue in conference is provided to all parties, as was foreshadowed in *4 yearly review of modern awards—Award stage—Group 1* [2018] FWCFB 3802, at [97].

Clause 21.3

7. In relation to clause 21.3 of the Exposure Draft, the CFMMEU submits that the effect of drafting in the Exposure Draft alters the meaning of the entitlement under the Current Award, and that this matter should be addressed prior to finalising the exposure draft or, alternatively, that the current wording is not changed until the matter is resolved.
8. As set out in the CFMMEU’s submission of 3 December 2015, at [4], the proposed wording does not reflect the situation in the Current Award.
9. The relevant concern is in relation to the temporal reference in both subclauses of clause 21.3, being that each of 21.3(a) and (b) refer to “*All time worked in excess of or outside ordinary hours after [relevant shift]*”.

10. Clause 21.3 is the product of the culmination of the following provisions in the Current Award:

17.2 Payment for overtime

...

(b) All time worked in excess of or outside the ordinary hours of any shift by employees:

- (i)** who are six day roster employees or seven day roster employees;
- (ii)** who work a roster which requires ordinary shifts on public holidays and not less than 272 ordinary hours per year on Sundays; or
- (iii)** who work a roster which requires ordinary shifts on Saturday and Sunday where the majority of the rostered hours on the Saturday or Sunday shifts fall between midnight Friday and midnight Sunday;

will be paid for at the rate of double time.

and

22.1 Definitions

(a) Afternoon shift means any shift, the ordinary hours of which finish after 6.00 pm and at or before midnight.

(b) Night shift means any shift, the ordinary hours of which finish after midnight and at or before 8.00 am.

(c) Permanent night shift employee is an employee who:

- (i)** works night shift only; or
- (ii)** stays on night shift for a longer period than four consecutive weeks; or
- (iii)** works on a roster that does not give at least one-third of the employee's working time off night shift in each roster cycle.

22.2 Shiftwork rates

Rates for shiftwork are payable as follows:

Type of shift	Shift rates
Day shift	Ordinary time
<i>Afternoon and rotating night shifts</i>	
(a) Ordinary hours	(a) 115% of the ordinary time rate
(b) Overtime hours 6 or 7 day roster	(b) Overtime penalty rate plus 15% of the ordinary time rate for time worked
(c) All others	(c) Overtime penalty rate
<i>Permanent night shift</i>	
(a) Ordinary hours	(a) 125% of the ordinary time rate
(b) Overtime hours 6 or 7 day roster	(b) Overtime penalty rate plus 25% of the ordinary time rate for time worked

11. Read together, the effect of these two provisions is that:
- a. a six or seven day roster worker will have overtime hours paid at the rate of double time; and
 - b. if that overtime is worked on:
 - i. an afternoon or rotating night shift, that employee will receive that overtime rate plus 15% of the ordinary time rate for time worked; or
 - ii. a permanent night shift, that employee will receive that overtime rate plus 25% of the ordinary time rate for time worked.
12. It is understood that clause 21.3 seeks to clarify how these clauses relate. The corresponding clauses in the Current Award contain nothing to the effect of the temporal limitation introduced by the inclusion of the word “after” in the subclauses of 21.3 of the Exposure Draft.
13. It is submitted that the inclusion of “after” has the potential to be interpreted as limiting the application of the provision, and that this is not the intention of the drafting proposed. Consequently, the CFMMEU propose that the clause be changed in a manner consistent with the Current Award, in the terms similar to those proposed by the CFMMEU at paragraphs [5](a) and (b) in its submissions of 3 December 2015. By reference to the current drafting, this would result in the following changes:
- (a) *All time worked in excess of or outside ordinary hours ~~after~~ of an afternoon shift or a rotating night shift by a 6 day roster employee or a 7 day roster employee will be paid at **215%** of the employee’s ordinary base hourly rate of pay.*
 - (b) *All time worked in excess of or outside ordinary hours ~~after~~ of a permanent night shift by a 6 day roster employee or a 7 day roster employee will be paid at **225%** of the employee’s ordinary base hourly rate of pay.*
14. While noting that there is some dispute as to the terms of the six and seven day roster provisions, the CFMMEU is not presently aware of any party holding a different view on the correct interpretation as it relates to the above.

Public Holidays for six and seven day rosters

15. The CFMMEU note, as above, that this matter is still pressed. Unlike the above matter, the CFMMEU sees no issue with the current drafting that must be remedied prior to the contested issues being resolved.

Shutdown (clause 24.9)

16. The CFMMEU understands that the shutdown clause in the Exposure Draft is meant to replicate the provision in the Current Award, at clause 25.12. On reviewing the provision, the CFMMEU has identified that the cross-references to sub-clauses within clause 24.9 do not replicate the corresponding cross-references in the Current Award and proposes that they be amended as follows.

(a) *Despite the terms of clauses ~~24.4~~ 24.10 to 24.12, clause 24.9 applies if an employer intends to shutdown all or part of its operation for a particular period...*

(h) ...

(i) *Clauses ~~24.4~~ 24.10 to 24.12 do not apply to a period of annual leave that an employee is required to take during a temporary shutdown period in accordance with clause 24.9.*

Personal/ carer's leave and compassionate leave

17. The Current Award personal/ carer's leave entitlement is set out at clause 26, including at clause 26.1 which provides:

Personal/carer's leave entitlements are provided for in the NES. This clause supplements those entitlements and deals with evidence required to be provided by an employee when taking paid personal/carer's leave.

18. The Exposure Draft, at clause 25.1, excludes the explanation that the relevant clause supplements those entitlements. This amendment is unnecessary given the clear words of the current clause, particularly where the current explanation provides necessary context for the provision and similar entitlements which supplement the NES in the Exposure Draft have retained similar language¹. It is submitted that the wording in the Current Award at clause 26.1 should be retained.

Schedule C

Shiftwork rates

19. C.1.2, D.1.2 and D.2.2 set out the rates for shiftwork performed on, relevantly, a Saturday and a Sunday by different kinds of employees. The effect of the rates set out in the table at C.1.2 is that no shiftwork rate has been applied to hours worked on these days, with employees instead set to receive the ordinary time rate even when performing shiftwork. This is despite the clear entitlement at clause 22.2 of the Current Award and clause 23.1 of the Exposure Draft which provides that the relevant loading (15% or 25%) is paid on the ordinary time rate.

20. It is submitted that the current drafting is inaccurate, and the correct rates would be:

- a. for the first four hours on a Saturday, 165% for an afternoon and rotating night shift and 175% for hours worked on a permanent night shift; and
- b. on a Sunday, after the first four hours, 215% for an afternoon and rotating night shift and 225% for hours worked on a permanent night shift.

Overtime rates for six and seven day roster employees

21. C.1.4 sets out overtime rates for six and seven day roster employees. Given these matters are still in dispute and subject to further proceedings before the FWC (see clauses 21.3 and 29.4 of the Exposure Draft), in our view the inclusion of these rates departs from the is premature, has the capacity to mislead. Given

¹ See, for example, clause 24 on annual leave, clause 33 on termination of employment.

this, the FWC should follow the approach adopted in respect of public holidays worked by six and seven day roster employees, and delay the inclusion of these rates following the determination of these matters.²

Proposed approach for dealing with matters

22. The above submissions at [6] – [15] and [19] – [20] are responsive to questions raised by the FWC throughout the Exposure Draft. As set out above, in respect of the issues arising in relation to six and seven day rosters these matters continue to be pressed.
23. In the event it is determined that the shiftwork rates set out at the tables in C.1.2, D.1.2 and D.2.2 of the Exposure Draft were not a drafting error, the CFMMEU respectfully submits that the appropriate rate for shiftworkers working on a weekend is also an unresolved matter requiring the attention of the parties. Should this be the case, it may be that this issue is most efficiently dealt with by the parties and the Commission in the context of any conference convened to address the appropriate rates for six and seven day roster employees.

**Construction, Forestry, Maritime, Mining and Energy Union
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² 4 yearly review of modern awards – Award stage – Group 1 [2018] FWCFB 3802, [101].