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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1. This submission is filed in response to direction 4 contained within the Report issued by Justice Ross on 23 March 2020 in relation to matter AM2019/17, being the 4 yearly review of modern awards – *Black Coal Mining Industry Award 2010*. That Report, and these submissions, concern the Exposure Draft of the *Black Coal Mining Industry Award 2010* published by the Fair Work Commission on 29 January 2020 (**Exposure Draft**). It is a reply to the submissions of the Ai Group filed on 15 April 2020 (**April 2020 AI Group Submissions**) in relation to the finalisation of the 4 yearly review of the *Black Coal Mining Industry Award 2010* **BCMI Award**).

April 2020 AI Group Submissions

2. The April 2020 AI Group Submissions support the variation initially suggested in the Ai Group's 13 November 2015 Submission (**November 2015 AI Group Submission**) as a means to *"reflect the current meaning and intent of the BCMI Award and to clarify"* a range of matters which are as follows:
    a. that the holidays referred to are "public holidays";
    b. that the rates payable in the public holiday provision are references to the relevant minimum hourly rate set out in Schedule A and Schedule B of the Exposure draft, including:
        i. the payment prescribed (**Payment Prescribed**);
        ii. double time; and
        iii. treble time (together, **Reference Rate**); and
    c. that, as a corollary of the above, the loadings payable are paid in substitution for all other penalties.

Background

3. The CFMMEU (and its predecessor, the CFMEU) have provided submissions in relation to this issue as part of the 4 yearly review process, including:
    a. Joint submission of the Coal Mining Industry Employer Group (**CMIEG**) and the CFMEU of 20 October 2014;
    b. Submission of the CFMEU on 23 December 2014;
    c. Submission of the CFMEU on 23 January 2015;
    d. Submission of the CFMEU on 7 April 2016; and
    e. Submission of the CFMEU on 16 June 2016 and the further clarification on 17 June 2016.
4. This submission supplements, but does not depart from, the substance of submissions already made by the CFMMEU on this issue, as set out above.
5. Most relevantly, the CFMMEU repeats is submission of 23 January 2015 that the current award provisions have been repeated in the exposure draft, but for some superficial amendments to give effect to plain language provisions. The AI Group submit that the proposed variation is required to reflect the current meaning and intent of the BCMI Award, however – as set out below – this is largely

inconsistent with the terms, history, and the industrial context of the relevant provisions. Given the nature of the AI Group's proposal, it is incumbent upon them to advance a merit based argument in support of its variation proposal, supported by probative evidence.[1]

6. Consistent with the approach taken by the AI Group, these submissions respond only to the claim that the variations sought are to clarify existing conditions under the BCMI Award. In the event that a merits based argument is subsequently advanced, the CFMMEU respectfully requests it has the opportunity to fully respond to any matters raised in that context.

Reference to "public holidays"

7. The CFMMEU agree with [6] – [9] of the April 2020 AI Group Submissions.

Reference Rate

8. The AI Group mount two separate arguments as to why the Reference Rate for clause 29.4 in the BCMI Award should be changed in this drafting process, with a supplementary argument that submits, but does not fully argue, that the public holiday penalty is in substitute for other penalty rates (in particular, shiftwork rates).
9. The first complaint is that the appropriate reference rate for clause 29.4 is that it is "insufficiently clear" to refer to double or treble time as the entitlement for working on a public holiday. This submission cannot be accepted.
10. The terms "double time" and "treble time" have an ordinary meaning which has operated in the context of the black coal mining industry for decades. There is no ambiguity within their meaning and, given this, any purported lack of clarity cannot be used as the basis for departing from the current entitlement.
11. The AI Group mount a secondary argument which seeks the variation of that entitlement as it would amount to a more consistent approach. The CFMMEU's primary position is that a substantive change of this nature should not be sought without the merits of such a change being presented.
12. Notwithstanding this position, the CFMMEU submits that such a change is unwarranted, without merit, and would create unnecessary complexity at a time when Australia's workplace relations system is already under heavy scrutiny for its apparent complexity, including by the AI Group.[2]
13. The April 2020 AI Group Submissions set out a number of reasons as to why they say the references to double and treble time should be altered to 200% and 300% respectively.
14. The first of these is to establish an approach consistent with previous decisions of the Full Bench, citing the decision of [2015] FWCFB 4658 in relation to a

[1] [2014] FWCFB 1788, [23], [60].

[2] See, for example, AI Group Submission, *Improving protections of employees' wages and entitlements: strengthening penalties for non compliance* x .

preference to, for example, provide for 200% of the minimum hourly rate instead of double time.

15. This decision considered brief submissions on the point in a context of different awards with their own industrial history and context. It does not create a precedent of any kind when considering other modern awards.

16. In response to *this* application, the CFMMEU submits as follows.

17. Firstly, that the change sought would be inconsistent with the modern awards objective, set out at s 134 of the *Fair Work Act 2009* (Cth) (**FW Act**), which sets out the FWC's task to be achieved through modern awards, being:

> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
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> (a) relative living standards and the needs of the low paid; and
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> (b) the need to encourage collective bargaining; and
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> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
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> (da) the need to provide additional remuneration for:
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> (i) employees working overtime; or
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> (ii) employees working unsocial, irregular or unpredictable hours; or
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> (iii) employees working on weekends or public holidays; or
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> (iv) employees working shifts; and
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> (e) the principle of equal remuneration for work of equal or comparable value; and
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> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
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> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
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> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the modern awards objective.

18. While each of these matters must be considered, a number of them are fundamental to resolving the current question.

19. Firstly, the need to provide additional remuneration for employees working on public holidays. The relevance of this need not be explained, except to say that a loading determined on the relevant employee's actual income, not the minimum rates set out in the Award, ensures employees are appropriately rewarded and incentivised for working public holidays.

20. Secondly, the likely impact on business. Maintaining the current provision has no relevant impact on business as it continues existing practices. To accept the change advanced by the AI Group does the opposite.

21. While there may be a cost benefit for some businesses in the approach advanced by AI Group, the effect of this would be to create an unlevel playing

field among existing employers who have negotiated enterprise agreements reflective of current and long standing industry practices. A change of this nature has the potential to disrupt competitiveness and create an unfair advantage for employers who have heeded the strong preference of the FW Act and engaged in collective bargaining at the enterprise level.

22. Thirdly, the need to ensure a simple, easy to understand, stable and sustainable modern award system. The change being advanced by the AI Group would signal a departure from a simple mathematical equation to determine the appropriate award payment, instead requiring highly variable payments that cannot, by their nature, be determined by universal calculations to apply across a workforce. This is particularly relevant in an industry like black coal where market rates are well above the award minimum. This introduces unnecessary complexity which will increase the likelihood of incorrect payments to employees for time worked, and obscure the objective of ensuring a simple and easy to understand modern award.

23. Take, for example, an employee in receipt of a base rate of $42.44.[3] The variation proposed for this employee would see them receive an additional $52.30 for each ordinary hour worked on a public holiday, or an additional 123.2% of their base rate. Depending on the classification level of the worker, at that same workplace different Mineworkers could be in receipt of an additional $54.82 (Advanced) or $60.46 (Specialised) for each ordinary hour worked, or an additional 129.2% or 142.4%, respectively. These would change each year with the annual wage review, and involve regular reprogramming of payroll software, and convoluted explanations to the workforce to try and explain the variable differential.

24. The simpler, and fairer, framework is to continue with the current provision in both substance and form, which ensures that the penalty an employee receives has a direct relationship with their rate of pay.

25. The AI Group then advance a range of submissions to support their variation which, in our respectful submission, fail to provide any relevant rationale for the change sought.

26. The first is that other clauses throughout the BCMI Award have been changed in the Exposure Draft to reflect the changes sought by the AI Group. The CFMMEU submit that this is no justification to depart from the substance of an existing provision. It is further submitted that the CFMMEU have sought to remedy this in part through its submissions of 20 April 2020, and that it reserves its right to seek to further address these changes in line with the arguments set out in these submissions.

27. Second, the AI Group state that the rate applicable for work performed during ordinary hours on a public holiday is already referred to as being 200% of the minimum rate in clause 24.6(b) of the exposure draft, and that clause 29.4 of the exposure draft should be amended to ensure consistency.

28. This submission is misleading. What clause 24.6 states is that an employee who takes annual leave must be paid the greater of their ordinary rate of pay plus 20%, or:

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[3] As provided for in the *BMA Enterprise Agreement 2018* [2018] FWCA 2869, schedule 2, clause 11.

> the employee's rostered earnings for the period of annual leave, which includes all rostered overtime and rostered public holidays (paid at **200**%) but, not including shift allowances, except in the case of 7 day roster employees.
>
> (original emphasis)

29. A note to that section is also provided, which states:

> Where an employee is receiving over-award payments such that the employee's base rate of pay is higher than the rate specified under the award, the employee is be [*sic*] entitled to receive the higher rate while on a period of paid annual leave (see sections 16 and 90 of the Act).

30. Contrary to the AI Group's submission, clause 24.6 states that rostered public holidays are to be paid at 200% of the employee's ordinary rate of pay, not 200% of the minimum hourly rate. By the AI Group's own argument, the reference rate should not be changed in the manner which they advance to ensure consistency throughout the Exposure Draft.

31. The apparent motivation for the AI Group's submission becomes clearer at [18], where the submission appears to be based on a misapprehension of the correct interpretation of the BCMI Award, being that an entitlement to "double" or "treble" time would compensate employees twice for the same inconvenience when working on a public holiday, in what the CFMMEU understand to be a reading of the BCMI Award which suggests that, relevantly, shiftworker rates form the basis for the calculation of double or treble time.

32. The CFMMEU do not submit that penalty rates are factored in to the base rate to be used for clause 27.4 of the BCMI Award (and clause 29.4 of the Exposure Draft), except where there is the clear intention for that to be the case.

33. Subclause 29.4(a) provides that an employee is to receive the payment otherwise prescribed for ordinary hours. In addition to this, that employee is to receive a penalty for working ordinary hours on a public holiday (200%). Were the intention for the payment prescribed for ordinary hours to not include relevant penalty rates, this clause would be more effectively articulated as treble time. It is not. Instead, in drafting the BCMI Award and its predecessors, there was a clear intention to incorporate the specific amount that would otherwise be paid to employees for working the relevant ordinary hours, were those hours to have not fallen on a public holiday. In our respectful submission, this entitlement is clear, and is consistent with the background of the words of the provision, as set out below. Put another way, the penalty is cumulative, not compounding. The relevant shiftwork rate is used for determining the payment prescribed, but not the double time calculation.

34. For overtime performed on a public holiday, the rate of pay is treble time. Consistent with the above, that amount is calculated based on the employee's base rate of pay.

35. Contrary to the AI Group's submission, the words of the provision accommodate the cumulative nature of the shiftwork penalty, where compensation is received first for the inconvenience of working shiftwork, and second for the inconvenience of working on a public holiday. The clause is worded in such a way where this is the only sensible outcome. While the AI Group warn against the possibility of a cumulative overtime rate payable on a public holiday, it is clear from the words of the provision that this is not the intention – overtime is to be paid at treble time of the employee's rate of pay.

36. The authorities referred to by the AI Group are hardly on point, dealing with enterprise agreements both of which have wording that is different to the Award, and are not subject to the modern awards objective. While the AI Group rely on the judgment of Street J in *CFMMEU v Tahmoor Coal Pty Ltd* [2019] FCCA 292 as the basis for establishing that the public holidays penalty is in substitution of any other inconvenience, there is no basis for this extension. Instead, the application of the relevant penalties must be viewed within the context of the words of the provisions, the history of those provisions, and the modern awards objectives.

Payment Prescribed

37. The April 2020 AI Group Submissions deal with this matter differently to how it has been raised throughout the history of submissions in relation to this clause. These submissions respond only to the AI Group's submissions, and not to earlier submissions made by other parties. Should further submissions be made or reagitated, the CFMMEU respectfully requests it have the opportunity to respond to any additional matters.

38. The April 2020 AI Group Submissions refer only briefly to the history of the relevant provisions in the context of the Payment Prescribed, with a consideration of the *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* (**1997 Award**) and the *Coal Mining Industry (Staff) Award 2004*.

39. The CMIEG submissions of 22 January 2016 (**January 2016 CMIEG Submissions**) provide more detail, demonstrating the history of the relevant clause and the longstanding practices within the industry in support of the proposition that shift payments are not cumulative.

40. The January 2016 CMIEG Submissions identify the origin of the current wording, in the *Coal Mining Industry (Production and Engineering) Interim Consent Award, September 1990* [C0889] **(1990 Award**) which stated, relevantly:

> 14(f) Payment
>
> …
>
> (2) Employees not required to work. An employee not required to work on a recognised holiday and who qualifies shall be paid for that day at the employee's classification rate.
>
> (3) Employees required to work. In addition to the payment prescribed by sub-clause (f)(2) the rate for work performed during ordinary hours on a recognised holiday shall be double time. The rate for work performed in excess of ordinary hours on a recognised holiday shall be treble time.

41. The January 2016 CMIEG Submissions state further, at [13]:

> It is noted that the 1990 Award was a departure from certain awards in the black coal mining industry which preceded the making of that award. Two decisions of the Coal Industry Tribunal (**CIT**) in 1947 and 1951 adopted the view that there should be an additional or cumulative entitlement to both a shift penalty and a public holiday penalty.[4]

[4] See *The Federated Mining Mechanics Association of Australasia; the Amalgamated Engineering Union; the Blacksmiths Society of Australasia and J & A Brown and Abermain Seaham Colleries Limited* [1947] ACIndT 446 (29 August 1946); *The Australian Coal and Shale Employees' Federation and J & A Brown and Abermain*

42. In these submissions the CMIEG go on to identify the specific clauses within the relevant awards, with the *Coal Mining Industry Award (Mechanics), Coal Mining Industry Award (Miners)* and *Coal Mining Industry Award (Engine Drivers: Queensland)* all expressly providing that shift penalties were cumulative on other penalty rates.

43. These submissions are helpful to the extent that they identify some of the relevant history, but their characterisation of the 1990 Award as a departure from what was provided in certain awards in the black coal mining industry is incorrect. What the CMIEG's selective citations exclude is the express provision which provides for the cumulative nature of the shift penalty, where it is stated *"[t]he 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."*[5] The same was provided for Monday to Friday FEDFA employees.[6] Far from a departure, the P&E 1990 Award expressly provides for the status quo remaining.[7]

44. The *Coal Mining Industry (Production and Engineering) Consolidated Award 1997* (**1997 Award**) consolidated the 1990 Award as part of a broader consolidation and modernisation process. It set out its relationship with, relevantly, the 1990 Award at clause 7 where it is stated:

> This award consolidates the Coal Mining Industry (Production and Engineering) Interim Consent Award, September 1990 and all variations up to 4 December 1997. This award does not, however, affect any right, obligation or liability accrued or incurred under that former award. **In the event of a disagreement concerning definition, reference will be made to those in the award prior to consolidation**.
>
> [emphasis added]

45. The 1997 Award also sets out how conditions not dealt with by the Award are to be dealt with at clause 9:

> **9.1** This award is to be read as not interfering with existing customs and practices except insofar as it expressly interferes with them. These customs and practices being in substance agreements between the parties it is directed that any discontinuance of them which alters existing conditions shall entitle any of the parties to apply to have the award varied to fit the altered conditions.
>
> **9.2** Except insofar as it expressly interferes with them, this award is to be read as not interfering with any award, order or determination made or given by competent authority and in force prior to the date of operation of this award.

46. What is clear from these provisions is that:

    a. where a disagreement about a definition within the 1997 Award occurs, reference is to be made to its predecessors, particularly the 1990 Award; and

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Seaham Collieries Limited [1947] ACIndT 445 (29 August 1947); *The Federated Engine Drivers and Firemen's Associaton of Australasia and Aberdare Collieries Pty Ltd* [1951] ACIndT 758 (9 February 1951).

[5] P& E 1990 Award, cl 13(c).

[6] Ibid, cl 13(d).

[7] For completeness, it should be noted that these words also appear in *The Coal Mining Industry Award (Deputies and Shotfirers) 1990* and were retained throughout the award simplification process in *The Coal Mining Industry Award (Deputies and Shotfirers) 2002.*

b. the 1997 Award is to be read as not interfering with the 1990 Award, unless it is expressly stated.

47. The 1997 Award, as part of its consolidation and modernisation process, restructured aspects of how provisions of the 1990 Award had been put. It consolidated the various mentions of shiftwork into clause 27, including subclauses 27.1 and 27.2 which define shifts, and the relevant shiftwork rates. These rates provide for a loading to be paid on top of the relevant rate, be it the overtime penalty rate or the ordinary time rate, as appropriate. Apart from this provision, the 1997 Award is silent on whether the shiftwork rate is cumulative on any penalty rate. That the shiftwork rate is paid on top of the overtime penalty rate is, however, indicative of the fact that the shiftwork rate can operate alongside a penalty designed to compensate for some other disutility which also attracts a penalty payment.

48. Between the 1990 Award and the 1997 Award there was no change to the substance of the provision, just a change to the words used. Consistent with clause 9.2 of the 1997 Award, the absence of any words indicating an express departure from the 1990 Award provisions, no such departure is to be read into the drafting of the 1997 Award.

49. Between the 1997 Award and the BCMI Award the provisions in relation to shiftwork rates have remained unchanged, as has the substance of the relevant public holidays provisions. It is within this context that the AI Group's submissions must be considered.

50. From the outset, the submissions put at [24] – [27] must be rejected. They refer to the 1997 Award and the *Coal Mining Industry (Staff) Award 2004* as the basis for a submission that what an employee is entitled to is to receive double time *only*, despite the clear words of the current, Exposure Draft, and historical provisions. It cannot seriously be submitted that the words *"double time… in addition to the payment prescribed*" creates anything other than an entitlement to the payment prescribed *and* a payment equivalent to double time to be paid in addition to that amount.

51. The AI Group use this curious submission as justification for departing from the words in the Exposure Draft. This justification is misguided, as the issue which they purport to identify is not an issue at all.

52. Nevertheless, the AI Group seek to advance the submission that the "payment prescribed" should be replaced by the words *"to any amount payable in respect of the relevant minimum weekly rate prescribed by Schedules A and B".* This submission is advanced on the basis that it will "correct what is clearly an omission in the BCMI Award". It will not. The change sought departs from the current provision in a material way, the practical effect of which is to exclude the shiftwork loading from this entitlement. The AI Group's submissions have not been supported by any sensible argument in any way, making it difficult to respond to. Notwithstanding this, the CFMMEU disagree with the changes sought.

53. The BCMI Award, and the current drafting of the Exposure Draft, preserves longstanding conditions within the industry, as set out in paragraphs [38] – [48], above. These conditions, and this history, establishes the cumulative nature of the shiftwork penalty. There has been no proper argument put as justification for

departing from a practise that has existed in the industry for more than 70 years, and such a change ought not be entertained, especially not without a proper evidence based argument.

54. A variation of this kind would also, in our submission, be inconsistent with the modern award objective. In considering that objective, it is of assistance to consider s 134(da) in particular. This provision was introduced as part of the *Fair Work Amendment Act 2013*, in a context where the Federal Government were conscious of a battle around penalty rates being played out in the FWC. In the second reading speech to the Fair Work Amendment Bill 2013 the then Employment and Workplace Relations Minister said:

> It was this Government that established a strong safety net comprising the National Employment Standards and modern awards, providing all employees in the federal system with clear, comprehensive and enforceable minimum terms and conditions of employment.
>
> …
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> And that is why, as part of this Bill, the Government is seeking to ensure that work at hours which are not family friendly is fairly remunerated. This will be done by amending the modern awards objective to ensure that the Fair Work Commission, in carrying out its role, must take into account the need to provide additional remuneration for employees working outside normal hours, such as employees working overtime or on weekends. [8]

55. A five member Full Bench of the FWC considered the new provision in *4 yearly review of modern awards – Penalty Rates Decision* [2017] FWCFB 1001, where it was observed:

> [190] An assessment of 'the need to provide additional remuneration' to employees working in the circumstances identified in paragraphs 134(1)(da)(i) to (iv) requires a consideration of a range of matters, including:
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> > (i) the impact of working at such times or on such days on the employees concerned (i.e. the extent of the disutility);
> >
> > (ii) the terms of the relevant modern award, in particular whether it already compensates employees for working at such times or on such days (e.g. through 'loaded' minimum rates or the payment of an industry allowance which is intended to compensate employees for the requirement to work at such times or on such days);and
> >
> > (iii) the extent to which working at such times or on such days is a feature of the industry regulated by the particular modern award.
>
> [191] Assessing the extent of the disutility of working at such times or on such days (issue (i) above) includes an assessment of the impact of such work on employee health and work-life balance, taking into account the preferences of the employees for working at those times.
>
> [192] The expression 'additional remuneration' in the context of s.134(1)(da) means remuneration in addition to what employees would receive for working what are normally characterised as 'ordinary hours', that is reasonably predictable hours worked Monday to Friday within the 'spread of hours' prescribed in the relevant modern award. Such 'additional remuneration' could be provided by means of a penalty rate or loading paid in respect of, for example, work performed on weekends or public holidays. Alternatively, additional remuneration could be provided by other means such as a 'loaded hourly rate'.

56. What is clear from this is that the matters set out at s 134(1)(da) are not mutually exclusive concepts. There is a disutility in working shiftwork which is not obviated by the disutility of working a public holiday, and vice versa. A shift that finishes

[8] Commonwealth, *Parliamentary Debates,* House of Representatives (21 March 2013).

after midnight and before 8.00am is no less disruptive because it is worked on a public holiday.

57. Each disutility has a unique effect on employee health and work life balance and that effect accumulates. It is entirely appropriate and, in our respectful submission, necessary for the penalty for each to also accumulate.

Construction, Forestry, Maritime, Mining and Energy Union
Mining and Energy Division
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