

FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

AM2020/25 Black Coal Mining Industry Award

Submissions pursuant to Directions issued 18 December 2020

SUBMISSION BY THE ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS AUSTRALIA, COLLIERIES STAFF DIVISION

1. This submission is made by the Association of Professional Engineers, Scientists and Managers Australia, Collieries Staff Division (“**the CSD**”) in relation to the directions issued by Commissioner Bisset on 18 December 2020.
2. The directions sought submissions from the parties on the interaction between the casual loading with shiftwork and weekend penalties for employees covered by the *Black Coal Mining Industry Award 2010* (“**the BCMI Award**”). Specifically, the parties are at issue as to whether these rates should be calculated on a compounding or cumulative basis.
3. For the reasons that follow, the CSD submits that the proper construction of the BCMI Award dictates that these rates must be calculated on a compounding basis. Accordingly, the draft variations proposed by the Commission on 27 November 2020 should be updated to reflect this intention.

Ordinary Time Rate

4. The answer to the disputed question will depend on whether the casual loading is taken to form part of the base rate (however described) for the respective penalty clauses. Tritely, this is a matter of construction.
5. The current clause 22.2 of the BCMI Award with respect to shiftwork rates provides the following for all employees:

22.2 Shiftwork rates

Rates for shiftwork are payable as follows:

<i>Type of shift</i>	<i>Shift rates</i>
<i>Day shift</i>	<i>Ordinary time</i>
<i>Afternoon and rotating night shifts</i>	

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

6. The shiftwork penalties attach to the "ordinary time rate" payable to the employee working the shift in question. This phrase is not defined within the BCMI Award.
7. This phrase was helpfully discussed by the Full Bench in this Award Review process in its decision of 18 November 2020¹. At [55] it was held:

"The reference to "ordinary time" and "ordinary time rate" in clause 22.2, conveys a collective description of the different rates at which ordinary hours of work are paid under clause 21.2. In effect the phrases mean the applicable rate for working ordinary time set out in clause 21.2. (emphasis added)"

8. Clause 21.2 sets out the applicable rate of pay (i.e. the ordinary time rate) for employees working on different days of the week:

21.2 All ordinary hours worked by an employee on the following days will be paid for at the following rates:

<i>Day of week</i>	<i>Rate of pay</i>
<i>Monday to Friday</i>	<i>Single time</i>
<i>Saturday</i>	<i>First 4 hours at time and a half</i>
	<i>After 4 hours at double time</i>
<i>Sunday</i>	<i>Double time</i>

9. The effect of this definition is that the ordinary time rate applicable to shiftwork penalties refers to the rate payable to employees based on the day of the week the work is performed. Consequently, whether the casual loading is compounding for shiftwork and for weekend work penalties is dependent on whether the loading is captured by the

¹ [2020] FWCFB 5908.

phrases “single time”, “time and a half” and “double time” in clause 21.2. The CSD submits that this is the case.

Single Time, Time and a Half, and Double Time

10. The question as to whether the casual loading is captured by these phrases in the context of the BCMI Award was directly considered and determined by the Full Bench in the *Overtime for Casuals* decision of 18 August 2020². The Full Bench found at [59]:

“There is no doubt that clause 10.4(b), read in isolation, only operates to confer an entitlement to the casual loading in ordinary time. However clause 17.2 confers overtime entitlements expressed as “time and a half” and “double time” on employees without distinction, including casual employees. We see no reason why the Yallourn/Domain approach should not be applied to these provisions since there is no other indicator arising from the text or the historical industrial context which suggests that a different approach should be taken.”

11. As clause 21.2 utilises the same language of “time and a half” and “double time” as is found in clause 17.2, there is no reason why the same consistent approach should not be adopted to this clause.
12. The only caveats foreshadowed by the Full Bench that could limit this entitlement would be where an express provision seeks to exclude the casual loading from these calculations or there is a demonstrable historical context to the contrary. Neither of these limitations are applicable in these circumstances.
13. As described in the extracted paragraph, the Full Bench’s approach is adopted from the principles set out in its decisions in *AMWU v EnergyAustralia Yallourn Pty Ltd (“Yallourn”)*³ and *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care (“Domain”)*⁴ respectively.
14. At [41] in *Yallourn* it was held:

“We are satisfied that the words in the Agreement are not ambiguous or uncertain. The clause sets out how you calculate the ordinary time rate for casual employees and that rate includes the casual loading. The Agreement provides that casual employees are entitled to double time for working overtime. We are satisfied that that double time means double the amount paid for working ordinary time. We are satisfied that, in the absence of express words excluding the casual loading from the calculation of overtime, on its ordinary meaning, the clause provides that the loading is included when calculating overtime payments.”

² [2020] FWCFB 4350.

³ [2017] FWCFB 381.

⁴ [2019] FWCFB 1716.

15. The CSD submits that there is no reason to distinguish this approach from the interpretation of clause 21.1 of the BCMIA and the consequential effect on weekend and shiftwork rates.
16. Clause 21.1 is constructed to apply to “*all ordinary hours*” and makes no differentiation between types of employment. There is no provision excluding the inclusion of the casual loading from the rates of pay outlined therein. Consistent with the findings of the Full Bench in *Yallourn*, the rate of pay is not ambiguous or uncertain and must be determined to include the casual loading as part of the ordinary time rate.

Conclusion

17. The CSD submits that the clear and unambiguous construction of the BCMI Award is that the casual loading is to be included in the ordinary time rate for the purposes of weekend and shiftwork rates. Consequently, the weekend and shiftwork rates should be calculated on a compounding basis with the loading for casual employees.
18. Accordingly, with respect to the proposed variations to the Exposure Draft, we submit that the proposed variations to clauses 23.1 Penalty Rates, 23.2 Weekend Work and D.2.2 Casual staff employees—shiftwork should be amended to reflect the compounding nature of the casual loading.

Association of Professional Engineers, Scientists and Managers Australia
Collieries' Staff Division

15 January 2021