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**Sent:** Friday, 15 January 2021 3:30 PM

**To:** AMOD <AMOD@fwc.gov.au>

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**Subject:** AM2020/25 Black Coal Mining Industry Award

Dear AMOD

We refer to the directions of Commissioner Bissett of 18 December 2020. Please see **attached** submissions of the Mining and Energy Division of the CFMMEU in accordance with Direction 1 of those Directions.

I understand that my colleagues from the AMWU and CEPU (ETU) are currently on leave. They have, however, had an opportunity to review these submissions prior to them being filed and have indicated their support. I have copied their colleagues in to this email who should be able to confirm that support in their absence.

Kind regards

Eliza Sarlos

National Legal Officer

CFMMEU Mining and Energy Division

**IN THE FAIR WORK COMMISSION**

**Matter Number:** AM2020/25 – 4 yearly review of modern awards – finalisation of exposure drafts – *Black Coal Mining Industry Award 2010*

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

**MINING AND ENERGY DIVISION**

15 January 2021

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## Introduction

1. These submissions are filed in response to Direction 1 of [the directions issued by Commissioner Bisset on 18 December 2020 \(Directions\)](#). They are confined to addressing the issue of the interaction between the casual loading and shift work and weekend penalty rates, in light of the Full Bench decisions in [\[2020\] FWCFB 4350 \(Overtime for Casuals Decision\)](#), concerning overtime for casuals, and [\[2020\] FWCFB 5908 \(Shiftwork Decision\)](#), concerning shiftwork rates in the *Black Coal Mining Industry Award 2010 (BCMI Award)*.
2. The Overtime for Casuals Decision found that, in relation to the BCMI Award, the 25% casual loading was payable when overtime was worked, and that it was to be calculated in a manner that was compounding (rather than cumulative).<sup>1</sup> This decision did not expressly consider whether the casual loading was payable in a compounding manner in any other circumstance, but considered only the payment for overtime rates set out at clause 17.2 of the BCMI Award and how they interacted with the casual loading provided at clause 10.4(b) of the BCMI Award.
3. The Shiftwork Decision found that the relevant shiftwork penalties in the BCMI Award were payable in addition to the relevant rates for ordinary hours worked at the relevant time, and that they were added separately to the relevant rate (that is, that they were cumulative).
4. The Shiftwork Decision did not consider how the casual rate and shift and weekend penalties should be calculated when they were to be applied together, however the Full Bench provided a preliminary view as to the way in which the entitlement should be expressed. That view, at [60] of the Shiftwork Decision, adopted the approach of including a casual penalty rate in relation to clauses 23.1 and 23.2 as they appear in previous exposure drafts of the BCMI Award, including the 29 January 2020 version of the [Exposure Draft](#) of the Black Coal Mining Industry Award (**2020 Exposure Draft**), with the relevant tables treating the casual penalty rate as cumulative without any express consideration of that issue.

## Interaction between casual rates and other penalties

5. The proper construction of clauses 21 and 22 of the BCMI Award was considered in the Shiftwork Decision. In this decision, the Full Bench found that the meaning of those provisions was clear:

*We consider that the plain and ordinary meaning of the provisions in clauses 21 and 22 of the Black Coal Award as concern the rate of pay for ordinary hours of work is clear. The rate of pay for ordinary hours worked is variable depending on the day on which that work is performed. So much is abundantly clear from the text of clause 21.2. 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. If the phrases “ordinary time” and “ordinary time rate” were intended to mean the rate of pay for working ordinary hours on Monday through Friday the term “single time” or “base rate of pay” could have been used. Indeed “single time” is used to convey [sic] that very meaning in clause 21.2. Its use to convey that meaning in clause 21.2 stands in contradistinction*

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<sup>1</sup> At [59].

*to the use in the very next clause (clause 22) of different phrases – “ordinary time” and “ordinary time rate”. This is because the phrases were intended to convey a broader meaning, namely the one we have earlier described which includes single time but is not confined to single time.*

(Emphasis added)

6. The appropriate rate for casual employees is set out at clause 10.4(b) of the BCMI Award, and provides that:

*A casual employee, for working ordinary hours, will be paid 1/35th of the appropriate weekly rate, plus 25% instead of the leave entitlements under this award, with a minimum four hours payment on each engagement.*

7. When considering how clause 10.4(b) was to be read alongside clause 17.2 of the BCMI Award in relation to overtime for casuals, the Full Bench found:

*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.<sup>2</sup>*

8. The Yallourn/ Domain approach identified by the Full Bench is a reference to the approach taken by different Full Benches in *AMWU v EnergyAustralia Yallourn Pty Ltd* [2018] FWCFB 381; 262 IR 300 and *Australian Nursing and Midwifery Federation v Domain Aged Care (QLD) Pty Ltd T/A Opal Aged Care* [2019] FWCFB 1716.

9. In *Domain*, the Full Bench considered drafting which was similar to clause 10.4(b) of the Black Coal Mining Award, finding that:

*[17] Clause 10.4(b) of the Award says that a casual employee will be paid an hourly rate equal to 1/38<sup>th</sup> of the weekly wage plus a casual loading of 25%. On a plain reading of the clause, the hourly rate includes the loading; the loaded casual rate is the ‘ordinary rate of pay’. When a casual employee works ordinary hours on a Saturday or Sunday, clause 26 of the Award requires the weekend loading to be applied to the ordinary rate of pay. For casual employees, this rate is the casual rate. The same is the case with the public holiday penalty in clause 32.1.*

...

*[19] The Commissioner’s conclusion that overtime penalties are also paid on the loaded casual rates of pay is in our view also correct. Clause 28.1 simply speaks of ‘time and a half for the first two hours and double time thereafter’ for Monday to Saturday work, ‘double time’ for Sunday and ‘double time and a half for public holidays.’ The relevant ‘time earnings’ for a casual under clause 10.4 include the casual loading. Further, clause 28.1(c) provides that overtime rates are in substitution for and are not cumulative upon shift and weekend premiums. Nothing is said of the casual loading being excluded. We appreciate that this sub-clause is concerned with applying one penalty to the*

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<sup>2</sup> Overtime for Casuals Decision, [59].

*exclusion of another, rather than precluding the calculation of a penalty based on a loaded rate, which is the focus of the interpretative controversy in this instance. Nonetheless, clause 28.1(c) is a limitation on the interaction of different penalties, and nothing is said about confining the application of the casual loading.*

### **Casual loading and weekend work**

10. In relation to the interaction between casual rates and penalties for weekend work, the point is directly comparable. As in *Domain* and in the Overtime for Casuals Decision, clause 21.2 of the BCMI Award confers entitlements expressed as “*time and a half*” and “*double time*” on employees. These clauses both refer to “*all ordinary hours worked by an employee*” on the relevant day as the base upon which the entitlement is calculated, without distinction.
11. Following the ordinary principles of Award interpretation, this includes casual employees. That is, the loaded casual rate set out at clause 10.4(b) of the BCMI Award is the ordinary rate of pay for a casual worker, being the rate of pay a casual employee receives for working ordinary hours on a particular day (before any other loading is applied).<sup>3</sup>
12. It follows that the approach taken in *Domain* and in the Overtime for Casuals decision should be directly applied in relation to determining whether weekend penalties are to be treated as compounding or cumulative upon the casual loaded rate.

### **Casual loading and shiftwork**

13. In relation to clause 22.2 of the BCMI Award and clause 23.1 of the 2020 Exposure Draft the principle remains the same, even though the wording is not identical.
14. The meaning of “ordinary rate of pay” in the context of *Domain* is, in essence, the same meaning ascribed by the Full Bench in the Shiftwork Decision to the expression “ordinary time rate”<sup>4</sup>. It follows that the “ordinary time rate” for a casual under the BCMI Award is, on any view, the loaded rate set out at clause 10.4(b) of that Award.
15. Applying that meaning to clause 22.2 of the current award, the shiftwork rates for a casual worker are to be calculated on a compounding basis.
16. The Shiftwork Decision found that the expression ordinary time rate “*conveys a collective description of the different rates at which ordinary hours of work are paid under clause 21.2*”. For a casual worker the base upon which those different rates are to be calculated, as set out above, is in a manner which is inclusive of the 25% loading.
17. The current drafting is consistent with this, and nowhere is there wording to suggest that the shiftwork penalty is to be separately added to that rate – as much is clear from the phrasing “*115% of the ordinary time rate*” and “*plus 15% of the overtime rate for time worked*”. As set out above, the ordinary time rate is the loaded rate, and any other applicable loading that may apply (such as the loadings to apply for weekend work). As made clear in the Overtime for Casuals Decision, the overtime rate is calculated on the loaded rate, rather than in

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<sup>3</sup> Overtime for Casuals Decision, [59].

<sup>4</sup> Shiftwork Decision, [55].

addition to it. Were the intention that these rates be calculated as cumulative, that phrasing would need to be drafted in an entirely different way, such as “15% *in addition to* the ordinary time rate”. It was not.

18. In line with the above, the CFMMEU respectfully proposes one of two possible approaches to ensure that the next iteration of the exposure draft reflects the correct interpretation of the BCMI Award as currently drafted.
19. Firstly, it is open to remove the references to the casual penalty rates in clauses 23.1 and 23.2 of the 2020 Exposure Draft entirely, so that it is only the penalty rate calculated as a percentage of the minimum hourly rate that appears. This would, in turn, be calculated upon the minimum hourly rate of a casual employee which is necessarily the loaded rate.
20. Alternatively, the rates set out at [60] of the Shiftwork Decision could be adjusted so they reflect the compounding nature of the entitlement. These amendments would be as follows.
21. In relation to clause 23.1 of the 2020 Exposure Draft, incorporating the amendments set out as the preliminary view of the Full Bench at [60] of the Shiftwork Decision:

Shift	Penalty Rate	Casual penalty rates (includes casual loading)
	% of minimum hourly rate	
Afternoon and rotating night	15%	40% <u>43.75%</u>
Permanent night	25%	50% <u>56.25%</u>

22. In relation to clause 23.2 of the 2020 Exposure Draft, incorporating the amendments set out as the preliminary view of the Full Bench at [60] of the Shiftwork Decision:

Day	Period	Penalty Rate	Casual penalty rates (includes casual loading)
		% of minimum hourly rate	
Saturday	First 4 hours	150%	175% <u>187.5%</u>
	After first 4 hours	200%	225% <u>250%</u>
Sunday	All hours	200%	225% <u>250%</u>