

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. Specifically, this submission is made in reply to the below submissions made by the Australian Industry Group (“**AI Group**”) and the Coal Mining Industry Employer Group (“**CMIEG**”) (together, “**the Employer Associations**”):
 - a. AI Group Submission in Reply dated 29 January 2021; and
 - b. CMIEG Submission in Reply dated 29 January 2021.
3. The CSD repeats and continues to rely upon its earlier submission in this matter dated 15 January 2021, as well as that of the CFMMEU dated 15 January 2021. We submit that the submissions of the Employer Associations reveal no compelling arguments in opposition to the approach advocated by the Union submissions and should be rejected.

Yallourn/Domain Approach and Status Quo

4. It appears that AI Group’s submission is that unlike in the decision in Overtime for Casuals, there are contextual indicators specific to shiftwork and weekend rates in the BCMI Award which mean that the casual loading should not be applied on a compounding basis with those penalties.
5. At [4] of its submission, AI Group accepts that the Yallourn/Domain approach should apply unless there are “*sufficient textual contra-indicators*” to the contrary:

“Ai Group considers that there are sufficient textual contra-indicators within the BCMI Award that indicate the ‘Yallourn/Domain approach’... should not apply with equal force to weekend and penalty rates in the BCMI Award.”

6. The reference to “*textual contra-indicators*” can be encapsulated by the Full Bench decision in Overtime for Casuals which found at [59]:

*“...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. **(emphasis added)**”*

7. In effect, AI Group argues that whilst the Full Bench found there to be no indicators in the BCMI Award or historical industrial context which would mean that the overtime rate does not compound with the casual loading, the situation is different with respect to shift and weekend penalties.
8. Importantly, this position tacitly admits that the correct approach for the Fair Work Commission to take in respect of this issue is to apply the Yallourn/Domain approach (and consequently, that shift and weekend penalties should compound with the casual loading), unless it can be satisfied that there is evidence that the rates should not compound in the Award or historical context.
9. This is an argument that requires the Commission to be satisfied that there is sufficient evidence of a historical context so as to override the clear and unambiguous terms of the BCMI Award. No such evidence has been put before the Commission by the Employer Associations.
10. Consequently, we submit that the Commission should, in light of the Yallourn/Domain approach, consider the compounding methodology to be the status quo which should be explicitly included in the BCMI Award. We submit that the Commission should be reticent to depart from this approach as suggested by the Employer Associations, particularly given the lack of evidence provided.

Alleged Indicators

11. The ostensible indicators that AI Group highlight are largely concerned with the historical context. There has been no argument that the BCMI Award contains any language which would suggest the Commission depart from the compounding approach to the shift and weekend penalties.
12. The indicators AI Group appear to rely upon are:
 - a. That the CFMMEU made a submission on 20 April 2020 which proposed an amendment to wording in Schedule D.2.2 of the Exposure Draft, but not the rates included in that table;

¹ [2020] FWCFB 4350.

- b. That the Full Bench decision of 18 November 2020 did not alter the rates in that table to effect a compounding casual loading.
 - c. That the compounding of the casual loading and shiftwork/weekend penalties would result in the “*doubling up of the casual loading*”. They say this result would be “*inappropriate*” and “*would not be ‘fair’*”.
13. These submissions reveal no indicator capable of rebutting the clear and unambiguous words of the BCMI Award and in accordance with the principles distilled in the *Yallourn* and *Domain* should be rejected.
14. As conceded by AI Group, the reference to Schedule D.2.2 made in the CFMMEU submission was focused on the issue of the correct reference rate for the penalties to be applied – not the specific rates in that table. The question was whether the Award should employ the “*minimum hourly rate*” or the “*ordinary time rate*” as applicable rate.
15. It is absurd to suggest that the submission of the CFMMEU relating to a peripheral issue is evidence of a historical industrial context. That the CFMMEU submission is silent on the compounding question provides no persuasive evidence of the intention or purpose of the BCMI Award.
16. Similarly, the Full Bench decision of 18 November 2020² provides no assistance to the Employer Associations’ arguments. The Decision was concerned with propositions by the Employer Associations, correctly rejected by the Commission, that different penalties could not be payable at the same time. The issue of whether those penalties compound or accumulate was not explored.
17. Indeed, the Full Bench was appropriately cautious in respect of how the Award should reflect the interaction between the penalty rates, by providing the amendments to the table a “*preliminary view*”³. There had been no argument prior to this about whether the rates would compound or accumulate and consequently, it is not compelling to suggest that the preliminary view concretely rejected the former in favour of the latter. This is particularly so given that the *Yallourn/Domain* approach and the decision in *Overtime for Casuals* did not form part of submissions at that stage and was decided after submissions had been closed.
18. The parties were of course invited to comment on this preliminary view at which time the Unions raised the decision in *Overtime for Casuals* and the *Yallourn/Domain* approach. This series of events can hardly be said to provide any evidence of a historical context to the contrary.
19. AI Group also argues that the *Yallourn/Domain* approach would result in the “*doubling up*” of the casual loading. This is imprecise language as an employee would not receive double the loading. AI Group variously describes this compounding effect as

² [2020] FWCFB 5908

³ *Ibid* [60].

“inappropriate”, “absurd” and not “fair”. We submit that these are merits-based arguments, which should not be resolved through this process.

20. In any event, the reason that the casual loading compounds is because it forms part of the ordinary time rate. Pursuant to clause 10.4(b) of the Award, a casual employee working ordinary hours will receive an ordinary time rate which is the sum of 1/35th of their weekly rate plus a 25% loading. It is an all-inclusive rate that captures the sum paid to an employee for any hours worked. It necessarily follows that the entirety of that sum is compounded with any other penalty rate, and not just a portion.

Textual Indicators

21. CMIEG makes a corollary submission regarding the language used to describe the casual loading in clause 10.4(b) of the BCMI Award and clause 11.2 of the predecessor *Coal Mining Industry (Staff) Award 2004*. Clause 10.4(b) of the BCMI Award reads:

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

22. CMIEG suggests that because the BCMI Award (and the 2004 Staff Award before it in similar terms) uses the language *“plus a loading of 25%”*, this means that the casual loading was in addition to the weekly rate, it does not form part of the ordinary time rate. Consequently, the Yallourn/Domain approach would not apply.

23. This argument cannot be accepted. The clause in question in Yallourn was constructed in near identical terms to that of the BCMI Award, stating:

*“A casual employee for working ordinary time shall be paid per hour one thirty-sixth of the weekly rate prescribed in this agreement for the classification of work performed **plus** a loading of 25% of that weekly rate. **(emphasis added)**”*

24. In Yallourn, it was found that:

*“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.**”⁴*

25. The Full Bench found that language in near identical terms meant that the casual loading was incorporated into the ordinary time rate. Plainly, the CMIEG submission must be rejected.

⁴ [2017] FWCFB 381 at [41].

26. The CSD submits that no submissions have been presented by the Employer Associations that would satisfy the Commission that it should depart from the Yallourn/Domain approach in respect of shift and weekend penalties. Accordingly, those rates should be found to be compounding with the casual loading and the BCMI Award amended accordingly.

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

5 February 2021