

Black Coal Mining Industry

A Report on the Fair Work Ombudsman's
investigation under the Fair Work Act 2009

The Fair Work Ombudsman acknowledges the Traditional Custodians of Country throughout Australia and their continuing connection to land, waters, skies, and community.

We pay our respect to them, their Cultures, and Elders past and present, and extend that respect to all Aboriginal and Torres Strait Islander people today.



Our artwork: Stepping forward

Stepping forward represents taking the next step on the journey towards reconciliation and the potential possible when everyone is included.

Connecting with diverse peoples; meeting, listening and sharing together, can build respect and trust. Working in concert for a common purpose and united in the mission to make meaningful change.

It serves as a reminder of the dynamism and vibrancy of First Nations peoples and the lands from which they come, making the emergence of new ideas and ways of being possible that enables the envisioning of a brighter future.

Artist: Timothy Buckley

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Background

On 6 August 2024, the then Minister for Employment and Workplace Relations, Senator the Honourable Murray Watt, wrote to the Fair Work Ombudsman (**FWO**) requesting we consider undertaking an investigation into the payment of casual coal miners working under enterprise agreements in the Black Coal Mining Industry (**BCMI**).

This request followed a second reading amendment passed by the Senate on 16 May 2024 in connection with the Fair Work Amendment Bill 2024.

The amendment arose from Senator Malcolm Roberts' (Senator for Queensland) allegations of extensive underpayments within the BCMI, including assertions there may be underpayments exceeding \$100 million, arising from five labour hire companies negotiating enterprise agreements with a union that do not provide casual employees with the standard 25 per cent loading.

Objective

Following the Ministerial correspondence and in accordance with the FWO's [Compliance and Enforcement Policy](#), the FWO commenced an investigation under the *Fair Work Act 2009* (Fair Work Act) into the payment of workers in the BCMI, including casuals engaged under enterprise agreements.

Enhancing awareness of the investigation

On 14 May 2025, the BCMI Investigation page was published on our website ([Black Coal Mining Industry Investigation - Fair Work Ombudsman](#)).

On 21 May 2025, Facebook and LinkedIn posts were shared with details of the BCMI investigation and a link to the FWO website. The website included a link to our anonymous report form that allows information to be shared anonymously.

On 4 September 2025, we also wrote to BCMI employers who were identified by way of membership with the Minerals Council of Australia and encouraged them to review their compliance with workplace laws and, if required, report any non-compliance.

Investigation Description

Following those awareness enhancing activities, the investigation ultimately encompassed 56 cases in total. This included responding to 52 requests for assistance from individual BCMI employees alleging underpayment and 4 self-reported cases of non-compliance.

Our investigation involved¹ examining 2 key elements particular to the BCMI sector, which this report deals with in turn below:

1. the role of the Black Coal Mining Industry Award 2020 (BCMI Award)² and enterprise agreements in the BCMI
2. the engagement and classification of casual workers in the BCMI.

Applying these 2 key elements, this report also sets out our findings in relation to the nature, type and extent of any underpayments involving coal miners.

¹ Investigations were not limited to agreement entitlements but extended to alleged breaches of the BCMI Award.

² This includes the former version of the BCMI Award, being the *Black Coal Mining Industry Award 2010*.

The investigation involved the collection of evidence to identify the:

- correct employing entity
- type of employment (casual, part-time, full-time)
- relevant industrial instrument(s)
- period of employment
- employee classification / job role / duties
- relevant interactions between the BCMI Award and agreements and
- compliance with, or any contraventions of workplace laws.

Characterisation of investigation cohorts

Broadly, the 56 cases investigated fell into three cohorts:

1. The **first cohort** included the majority of cases [38], which concerned a number of issues within the FWO's jurisdiction including potential underpayment or other concerns relating to individual worker's employee entitlements.
2. The **second cohort** related to self-reports [4] by companies, each of which broadly related to leave entitlements and base rates of pay.
3. The **third cohort** comprised 14 cases, which largely involved historical complaints regarding the interaction between casual employment in operational roles under a number of enterprise agreements and the BCMI Award.

We note that the majority of the claims for individuals in the third cohort concerned alleged underpayments or other breaches of the Fair Work Act which are substantially or entirely outside the six-year statutory limitations period (as set out in section 544 and 545 of the Fair Work Act). Some of these cases stretched as far back as 10 years or more. While the FWO was able to investigate these claims, the historical nature of the underpayments (in addition to other potential issues) limited the enforcement options available to the FWO or other parties with standing for any entitlements identified.

1. The role of the BCMI Award and enterprise agreements in the BCMI

A particular issue arises in the black coal mining industry regarding the interaction between casual employment and the BCMI Award, which covers black coal mining employees and their employers. The BCMI Award provides for casual employment only in respect of classifications in Schedule B (Staff Employees). The BCMI Award does not provide for casual employment for employees in classifications in Schedule A (Production and Engineering Employees).³

Further, a range of enterprise agreements within the black coal mining industry expressly include provision for casual employment in production and engineering roles. Where an enterprise agreement applies to an employee, the BCMI Award will not apply, such that wages and entitlements are derived from the applicable enterprise agreement and not the Award.

As the national workplace relations regulator, the FWO applies the law as it stands, which includes

³ The Fair Work Commission amended modern award terms relating to casual employment from 27 September 2021 in accordance with the *Fair Work Amendment (Supporting Australia's Jobs and Economic Security) Act 2021*, which required the Commission to vary modern awards to make them consistent and operate effectively with the then statutory definition in section 15A and the new casual conversion provisions in the National Employment Standards. In this review, the Fair Work Commission noted that the Black Coal Mining Award only provides for casual employment for Schedule B – Staff Employees and did not make any variations with respect to this arrangement (see the provisional views in *Casual terms award review 2021* [2021] FWCFB 4928 at [21] which were confirmed in *Casual terms award review 2021* [2021] FWCFB 5366 at [12]).

the terms of enterprise agreements that have been approved by the Fair Work Commission.⁴

For completeness, even where an enterprise agreement does not apply to an employee and the BCMI Award would otherwise apply, it is not clear what the legal consequences are when they are engaged as a casual employee in a position covered by Schedule A to the BCMI Award.⁵ There are a number of possibilities depending on how the BCMI Award is interpreted, including:

- **the employee is a casual and the BCMI Award does not apply:** the BCMI Award does not apply to the person, such that they are award/agreement-free and their minimum entitlements stem from the Fair Work Act and the National Minimum Wage Order
- **the BCMI Award does apply and they are still casual, but there has been a technical breach of the award in their engagement:** the employee's engagement constitutes a breach of the engagement clause of the BCMI Award but the employee remains casual and is only entitled to the benefit of provisions of the BCMI Award that apply to all employees (in effect, this may mean they have few entitlements arising under the Award, including no minimum rates of pay), or
- **different employment types for different purposes:** the employee must be paid and treated as a full time or part-time employee for the purposes of the BCMI Award but would remain a casual employee under the Fair Work Act and therefore not entitled to statutory entitlements as an ongoing employee.

For the purposes of our investigation, we considered the following issues and applied the following principles where applicable during our investigation:

- the statutory definition of casual employment under the Fair Work Act, including as amended over time, applies for all purposes and therefore displaces any inconsistent award or enterprise agreement definition (discussed further under point 3 below)
- where we identified an enterprise agreement operating in relation to an employee, the BCMI Award does not apply to the employment of the employee,⁶ and as such the employment status of the employee should be determined under, and wages and entitlements of the employee should be derived from, the applicable enterprise agreement, not the BCMI Award, during the relevant periods
- in determining the threshold issue of the true identity of an employee's employer during a relevant period, including under labour hire arrangements, our approach aligned with established judicial authorities in emphasising the primacy of written contracts which

⁴ We note that a number of the historical complaints have raised concerns about whether the relevant enterprise agreements were validly made. Standing to challenge a decision of the Fair Work Commission to approve an enterprise agreement is limited to a party 'aggrieved' by that decision, which does not extend to the FWO.

⁵ This issue has arisen in two proceedings, but neither involved judicial determination of how employees who are casuals under the Fair Work Act should be treated/paid under the Black Coal Mining Award.

- *Secretary, Attorney-General's Department v Warren* [2022] FCAFC 118: at first instance in the Administrative Appeals Tribunal, this matter proceeded on the basis of an agreement between the parties that the employee, who had been purportedly engaged as a casual, was full-time for the purposes of the Black Coal Mining Award. The case on appeal concerned only whether amounts paid to the employee as a purported casual were 'attributable' to entitlements to annual leave and severance pay for the purposes of the Fair Entitlements Guarantee Scheme and did not consider the treatment of the employees under the Award.
- *Ridge v Hays Specialist Recruitment (Australia) Pty Limited (No 2)* [2024] FCA 328: This proceeding related to settlement of a class action, which required Court approval. In considering whether to approve the proposed settlement, the Court was required to consider the Applicant's risks of proceeding to judgment. In this context, Justice Murphy of the Federal Court relevantly found the applicants in the class action had reasonable prospects of establishing that the Black Coal Mining Award does not permit casual employment of production and engineering employees, however his Honour did not determine the issue at law.

⁶ Section 57 of the Fair Work Act provides that a modern award does not apply to an employee in relation to particular employment at a time when an enterprise agreement applies to the employee in relation to that employment.

comprehensively set out the terms and conditions of the employment relationship, unless later conduct can be identified which amounts to a variation of that contract and subject to the application of orthodox contractual principles.

For completeness, we note that none of the 56 cases in this investigation engaged the amendments to the Fair Work Act made by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) which allow employees, unions and host employers to apply to the FWC for a Regulated Labour Hire Arrangement Order (**RLHAO**), sometimes known as Same Job, Same Pay orders.⁷ To date a number of RLHAOs have been made by the FWC in relation to the BCMI.⁸

2. Engagement and classification of workers as casual employees in the BCMI

In some cases (or for certain periods of employment), difficulties arose in determining whether employees had been correctly identified as casual and for what purposes that classification applied.

Definition of casual employment

Section 15A of the Fair Work Act, which was introduced on 27 March 2021, sets out a statutory definition of casual employment. Under the original section 15A, the definition of casual employment focused on the offer of employment that was made to and accepted by the employee. A person was a casual employee if they accepted an offer of employment made on the basis that the employer made no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person. Section 15A(2) set out a confined list of factors that had to be considered in working out whether there was such a firm advance commitment. The original section 15A(4) of the Fair Work Act expressly precluded considering post-contractual conduct when determining the nature of the offer that was made and accepted. This means that the terms of an employee's contract will be critical to determining the basis on which employment was offered and accepted for the purposes of the original statutory definition.

When the original section 15A was introduced it applied **with retrospective effect** to offers of employment given before commencement.⁹ As a result, even in circumstances where an employee's employment period preceded the introduction of the original section 15A (i.e. the majority of the third cohort), the FWO was still required to assess their status as a casual or ongoing employee by reference to that provision, focusing only on the offer of employment that they accepted.¹⁰

This definition was amended from 26 August 2024,¹¹ **with prospective effect only**, such that a person is a casual employee if the employment relationship has no firm advance commitment to continuing and indefinite work (taking into account a number of factors) and the employee is entitled to a casual loading or specific casual pay rate under an award, agreement, or employment contract.

⁷ Under a RLHAO, labour hire employees must be paid at least what they would receive under a host business's enterprise agreement if they were employed directly by the host and doing the same kind of work. These changes came into effect in December 2023. These orders entitle labour hire employees at the host employer to the 'protected rate of pay', which is most typically the rate which would otherwise apply under the relevant enterprise agreement.

⁸ By way of example regulated labour hire order [LH200076 PR791037](#) was made in relation to BCMI participants OS MCAP Pty Ltd performing work for BHP Coal Pty Ltd on 26 August 2025 and came into force on 14 September 2025.

⁹ Section 15A was inserted by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021*, with the retrospective application of the amendments provided for by item 46 of Part 10 of Schedule 1 to the Fair Work Act.

¹⁰ The High Court's decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 (**Rossato**) concerning the meaning of 'casual employment' at common law is very similar, in effect, to the operation of the original section 15A definition. As a consequence, even if section 15A did not have retrospective application, the FWO would apply that similar common law approach determined by *Rossato* (that is, focusing on the terms of the employment that were offered and accepted).

¹¹ *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024*.

However, as noted above, the third cohort primarily consisted of historical cases that pre-dated the August 2024 amendments to the casual employment definition. This means that the prior meaning of casual employment largely applied.

Interaction between casual employment definitions in the Fair Work Act, enterprise agreements and relevant awards

Given the retrospective application of the original section 15A definition of casual employee, difficulties arose in relation to the interaction between casual status under the Fair Work Act and:

- the BCMI Award, that contained an inconsistent definition of casual employment prior to being amended from 27 September 2021 to refer to section 15A (noting that changes to the award casual definitions do not operate retrospectively), and
- enterprise agreements that contain an inconsistent definition of casual employment.

As noted above, the investigation proceeded on the basis that the section 15A definition of casual employment applies for all purposes and therefore displaces any inconsistent award or enterprise agreement definitions, though this has not been authoritatively determined by a court. This approach accords with the structure of the Fair Work system, in which the hierarchy of entitlements is underpinned and given meaning by the Fair Work Act, with entitlements in instruments building on and complementing that statutory framework.

Findings

In several cases, the investigation involved uncertainty regarding the identity of a person's employer where labour hire providers operated as part of corporate structures involving multiple different entities. In such cases where the employing entity was in dispute, we began by making a finding on this question as it is crucial to establishing an employee's minimum entitlements (for example, determining the application of any industrial instrument). In line with the High Court's consistent approach that where parties have entered into a written contract that comprehensively sets out the terms of their relationship, the starting point is the employee's contract and not the parties' subsequent conduct.¹²

In these instances, our investigative approach can be summed as follows:

- where an employee entered into a comprehensive employment contract for a particular job with one corporate entity but subsequently was paid for that job by another entity and/or receives employment documents in the name of another entity (for example, a holding company of the first entity), it is likely that the person is employed by the entity with whom they entered into the contract of employment, unless later conduct can be identified which amounts to a variation of that contract
- if an employer has made employment records or issued pay slips that do not contain the name and ABN of the employer (including where those documents contain a different name and ABN), this can give rise to contraventions of the Fair Work Act relating to record keeping.¹³

¹² See *Rossato, Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

¹³ The FWO has the power to issue an infringement notice in relation to certain breaches of the *Fair Work Regulations 2009*, however reg 4.04(2) provides that an infringement notice must be given within 12 months after the date the contraventions are alleged to have taken place.

First cohort

Of the 38 cases in the first cohort, non-compliance was identified in 7 cases, resulting in the issuing of 6 compliance notices and 1 infringement notice.

The non-compliance identified related to annual leave/annual leave upon termination, public holiday payments, personal leave, payment in lieu of notice of termination and pay slip/record-keeping contraventions.

Case study

A BCMI employer was investigated following requests for assistance from 2 employees alleging unpaid overtime and non-payment of public holidays that occurred on the employee's rostered days off.

Our investigation found that the employees were underpaid due to failure to make payment for public holidays, resulting in contraventions of sections 90(2) and 116 of the Fair Work Act. The employer was found to be compliant in relation to the overtime allegations.

A Fair Work Inspector issued 2 compliance notices requiring the employer rectify the identified contraventions. The employer complied with the compliance notices back-paying over \$19,000 to the 2 employees.

Second cohort

Of the 4 self-reported cases, employers have admitted to breaches regarding annual and personal leave entitlements; and base rates of pay, overtime entitlements, local public holidays and progression of apprentices and trainees under the BCMI Award and or an enterprise agreement.

Of the 4 cases, a compliance notice has been issued in respect of one case, and an enforceable undertaking has been executed with Peabody Energy Australia Coal Pty Ltd (**Peabody**).

Two cases remain under investigation.

Case study

Peabody is a coal producer that operates 4 black coal mines in Queensland and New South Wales. Peabody self-reported its non-compliance to the FWO in May 2023.

In July 2026, Peabody gave an undertaking which was accepted by the FWO pursuant to section 715 of the Fair Work Act. The execution of an enforceable undertaking followed Peabody's self-report of non-compliance with the Fair Work Act and the BCMI Award.

Peabody has back paid \$4.9 million, including interest and superannuation, to 197 underpaid employees. The underpayments relate to employees that were not paid out their accrued personal leave balance and allowances upon termination of employment between 1 January 2016 to 30 April 2023.

Among a range of undertakings, Peabody must ensure future compliance with workplace laws by arranging for a future independent audit, establishing a complaints and review mechanism for its workforce, enhancing its governance framework and introducing a joint staff consultative committee.

[Peabody Energy Australia signs Enforceable Undertaking after nearly \\$5m back-payments - Fair Work Ombudsman](#)

Third cohort

Of the 14 cases in this cohort, the allegations typically involved a claim that the relevant enterprise agreements were unlawful and therefore the BCMI Award applied (such that claims to underpayments due to BCMI Award contraventions of hourly rates, casual loading, penalty and overtime provisions were made).

This cohort of employees had employment periods spanning 2013 to 2024, which meant that if any findings of contraventions were established:

- these may be partially or fully outside the 6-year statute of limitations set out in section 544(5) of the Fair Work Act
- where we identified an enterprise agreement as applying to an employee, as stated above, the BCMI Award will not apply, and wages and entitlements should not be derived for the purposes of any comparison from the version of the BCMI Award applying during the relevant period(s).

Of the 14 cases,¹⁴ we found:

- 8 cases as compliant
- 2 cases did not proceed as the businesses were no longer registered, limiting investigative action that could be taken
- 4 cases where we identified non-compliance. The identified non-compliance related to small historical underpayments (largely beyond the 6-year limitation period in sections 544 and 545 (5) of the FW Act) regarding the application of rates in the applicable enterprise agreements and a single confined record-keeping breach of the FW Act.

Of the 4 cases where non-compliance was identified, we issued:

- 1 contravention letter
- 3 closure and caution letters.

Enforcement outcomes

As of 2 September 2026, investigations have resulted in the following enforcement outcomes:

Compliance notice	7
Infringement notice	1
Enforceable undertaking	1
Compliance notice recoveries	\$26,526 (for 4 employees)
Monies recovered in response to self-reports of non-compliance	\$8,238,085 (for 1,102 employees)

¹⁴ In numerous cases in this third cohort, employees were not fully aware of, or unable to clearly identify, their employing entity, including circumstances where multiple entities may have been involved over particular periods of employment. Where cases involved pre-2019 employment periods, we found reduced availability of documentary evidence, from both employers and employees.

Conclusion

Our investigation into employment arrangements within the BCMI found:

- workers employed as casual employees were, on the information available, engaged in a manner consistent with the applicable statutory definition of casual employment and relevant legal principles, noting that casual status must be considered on a case-by-case basis
- in the majority of cases, employees were paid a casual loading of 25 per cent, or a higher 'loaded' or 'all-in' rate, incorporating a range of prescribed entitlements, under enterprise agreements, with no evidence of widespread failure to apply an identifiable casual loading entitlement
- an assessment of remuneration outcomes in the historical cases indicated employees were generally better off overall when compared to the minimum entitlements of the enterprise agreement, due to the employees being paid a loaded rate significantly higher than the minimum rates provided for in the enterprise agreements.

While isolated instances of non-compliance were identified, these were limited in number and scope and have been addressed through appropriate compliance and enforcement action. The issues identified do not, on the available evidence, demonstrate systemic non-compliance in the BCMI.

Acknowledgements

We acknowledge and thank the stakeholders who participated in consultation and/or investigations through sharing their time, experience and learnings to assist the FWO's investigation. This includes employees, employers, unions and employer associations as well as the following government agencies and departments:

- Coal Mining Industry (Long Service Leave Funding) Corporation
- Department of Employment and Workplace Relations
- Independent Workers Union of Australia
- Mining and Energy Union
- Minerals Council Australia
- NSW Resources Regulator
- Queensland Labour Hire Licencing Compliance Unit
- Recruitment, Consulting & Staffing Association
- Resources Safety & Health Queensland.