IN THE FAIR WORK COMMISSION

FWC Matter No.: AM2014/190

Applicant: CMIEG

Respondent: APESMA and CFMEU

SUBMISSIONS OF THE RESPONDENTS ON THE THRESHOLD ISSUE

A. Introduction

1. These submissions are filed on behalf of the Association of Professional Managers, Engineers and Managers Australia (**APESMA**) and the Construction, Forestry, Energy and Mining Union (**CFMEU**). The submissions address the application of the Coal Mining Industry Employer Group (**CMIEG**) to revisit the accident pay provisions of the Black Coal Mining Industry Award (**BCMI Award**). The application is contained in CMIEG correspondence of 22 September 2015 to the effect that:

> The CMIEG requests an opportunity to put submissions to the Commission about the limitation of accident pay entitlements in the *Black Coal Mining Industry Award 2010* (Black Coal Award) to a period of 52 weeks, consistent with the decision of the Full Bench of the Commission dated 18 August 2014 *sic*; [2015] FWCFB 3523…
>
> The Full Bench decision of 18 August 2015 effectively to limit accident pay entitlements to 52 weeks clearly raises for consideration the question why the Black Coal Award should not also conform to this limitation.
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> The CMIEG and other parties interested in the Black Coal Award have not had an opportunity to be heard as to whether or not the 52 week limitation period, determined by the Commission in its consideration of accident pay as a common issue, should apply to the Black Coal Award.

2. The accident pay provisions of the BCMI Award were recently considered by a Full Bench.[1] The CMIEG could have, but chose not, to participate meaningfully in those proceedings. It was not denied any opportunity to be heard, yet it now seeks to re-agitate the issue. For the reasons which follow, its application should be rejected.

B. Chronology of the proceedings

The BCMI Application

3. In 2013 the CFMEU made an application seeking removal of the transitional or "sunset" provision attached to the accident pay provision of the *Black Coal Mining Industry Award 2010* (**BCMI Application**). The relevant transitional provision in the BCMI Award was not a model

[1] [2014] FWCFB 7767; [2015] FWCFB 644.

provision but was unique to the BCMI Award. The application was not made as part of the four yearly review.

4. The BCMI Application, which received matter number AM2013/20, was opposed by employer groups including CMIEG. A timetable was set for the exchange of material and the matter listed for hearing over three days on 17–19 March 2014.[2]

5. Some time later, the ACTU made a series of applications seeking removal of model transitional provisions dealing with accident pay, district allowances and redundancy from various awards. The ACTU applications as part of the four yearly review.

6. In the interests of efficiency, the existing hearing dates were vacated and the BCMI Application consolidated with the ACTU applications.[3]

7. Both sets of applications were heard on 29–31 October 2014. At the time of the hearing The ACTU had indicated that affiliate Unions may make further applications dealing with the substantive aspects of accident pay provisions in particular awards, including quantum and time limits.[4]

8. APESMA and the CFMEU advanced a substantial case which explored, through evidence, the provenance, history and merits of the BCMI accident pay provisions. As the Full Bench later noted,[5] the Unions' evidence:

   (a) provided a detailed explanation of the history of accident pay provisions in the coal mining industry;

   (b) indicated that accident pay has a long and largely uncontroversial history as an award provision in the coal mining industry; and

   (c) explained that the key decisions of industrial tribunals introducing or enhancing accident pay standards in the industry have had regard to the special characteristics of the industry and, in particular, its inherent safety hazards and associated high risk of injury to employees.

9. The Australian Industry Group (**AIG**) opposed the BCMI Application on the basis that the BCMI Award's accident pay provisions contravened a prohibition on state-based differences. The CMIEG filed a short submission indicating support for the submissions put by AIG. Neither AIG nor the CMIEG contested the merit case advanced by the Unions. CMIEG did not

[2] See notice of listing at https://www.fwc.gov.au/documents/documents/awardmod/var010110/nol_17-190314_20.pdf.
[3] See transcript of discussion at https://www.fwc.gov.au/documents/documents/awardmod/var010110/am201320_100214.pdf.
[4] See the comments of the Full Bench to that effect in [2015] FWCFB 3523 at [152]–[154].
[5] [2015] FWCFB 644 at [68]–[69].

argue that the quantum or period of accident pay should be reduced, nor that the BCMI Award should abide by the result of the award-specific applications foreshadowed by the ACTU.

10. At the conclusion of the hearing the Full Bench determined to allow the BCMI application and dismiss the ACTU applications. It said in the course of short reasons ([2014] FWCFB 7767):

> [7] In relation to the CFMEU application regarding the *Black Coal Mining Industry Award 2010*, we have decided to delete clause 18.8 of that Award with effect from 31 December 2014. In this regard, we consider that the accident pay provision in the Award provides a clear national standard for the particular industry as described in the *Award Modernisation Decision 2008*.

11. The Full Bench issued more fulsome reasons for its decision ([2015] FWCFB 644) in February 2015. After noting the competing submissions of the Unions and the employer groups, the Full Bench concluded:

> [71] As stated in our decision, we consider that the accident pay provision in the Black Coal Award provides a clear national standard for the particular industry as described in the Award Modernisation Decision 2008. In this regard, there was a significant amount of material presented by the CFMEU in the proceedings regarding the history and application of the provision and relevant decisions of industrial tribunals. The application of the provision is understood in the industry and does not depend on reference to other industrial instruments. The provision does not in our view include State-based terms or conditions of employment contrary to s.154 of the Act. As stated above, we do not consider that the fact that the provision may operate in the context of different State workers' compensation schemes, and that the level of make-up payments may therefore vary for workers in different States, would of itself lead to the conclusion that the provision contravenes s.154.
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> [72] For these reasons, we decided to remove the sunset provision in clause 18 of the Black Coal Award.

12. That is to say, the Full Bench determined the BCMI Application on the basis of detailed evidence focussed on the circumstances of the particular industry.

Union claims for accident pay provisions

13. As had been foreshadowed, a number of unions later applied to vary particular awards by inserting accident pay provisions. Those applications were determined by a Full Bench in August 2015 ([2015] FWCFB 3523). The Full Bench introduced its reasons by explaining that:

> [1] The *Fair Work Act 2009* (the Act) provides that the Commission must conduct a 4 yearly review of modern awards (s.156(1)). As part of the present 4 yearly review, applications have been made by several unions to vary modern awards to include provisions for accident make-up pay.
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> [2] The applications relate to some 37 modern awards and seek to insert into those awards an entitlement to accident make-up pay applying to all employees covered by each award.

14. The BCMI Award was, for obvious reasons, not one of the 37 awards subject of application.

15. The Full Bench determined to include accident pay provisions in some awards but not others. In reaching that conclusion it adverted to the various circumstances of different industries:

> [211] In general we consider that the safety net accident pay entitlement should only apply for a period of 26 weeks from the time of incapacity for work due to injury or illness. This is the period of accident pay entitlement under many of the pre-reform instruments to which we have been referred. We consider that this is the appropriate period to be included as part of the minimum safety net in the awards unless there are special circumstances relating to particular awards which warrant a departure from this standard…
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> [212] We recognise that there are special circumstances relating to the awards in the first category listed earlier in this decision. The pre-reform instruments in these industries provided a generally applicable accident pay entitlement of 39, 52 or 104 weeks. The accident pay provisions in those awards provided what might be considered to be a clear national standard for the particular industries as described in the *Award Modernisation Decision 2008*. For similar reasons as were given in relation to the *Black Coal Mining Industry Award 2010* we have decided that the previous accident pay entitlements in these award areas should be maintained as part of the minimum safety net. However, having regard to the evidence and submissions in the present proceedings, and given the purpose of modern awards in setting minimum terms and conditions for employees in particular industries or occupations consistent with the statutory objectives, we do not consider that the accident pay entitlement in any of the awards should exceed 52 weeks. We consider that there is a difference in inserting such provisions in awards by arbitral determination at this time and in the context of the present proceedings and a decision to maintain provisions which were still in operation in an award. We do not consider that it is necessary for the minimum award safety net to provide for a period beyond 52 weeks. In so deciding, we note that the evidence presented suggests that there is considerable scope in some of the industries for the safety net entitlement to be supplemented through collective bargaining.

16. The Full Bench—being the same Full Bench which made the earlier decisions, dealing with the same matter—was conscious of its earlier conclusion in relation to the BCMI Award. That is apparent *inter alia* from its reference at [212] above to its earlier decision in relation to the BCMI Award. There is nothing to suggest that the Full Bench intended its later conclusions to affect the earlier decision. As it observed at [212]:

> We consider that there is a difference in inserting such provisions in awards by arbitral determination at this time and in the context of the present proceedings and a decision to maintain provisions which were still in operation in an award.

17. In support of that proposition the Full Bench cited (at footnote 67) its earlier decision in relation to the BCMI Award.

18. In other words, the Full Bench did not consider that a cap of 52 weeks should apply to the BMCI Award, which it considered to be in a different category to the awards before it at that point in the proceedings.

19. Indeed it is apparent that the Full Bench was focussed on the particular awards the subject of the applications. Its conclusions were reached "*having regard to the evidence and submissions in the present proceedings*".[6] It noted that the history of award coverage and the circumstances of the different awards were important considerations.[7] It referred throughout to "*the awards*"

[6] [212].
[7] [168].

and "*the relevant awards*". It did not purport to establish any general standard or reach a conclusion in respect of any award not before it.

20. In other words, it is clear that the Full Bench was:

    (a) aware of the decision in respect of the BCMI Award;

    (b) intentionally distinguishing that circumstance that led to that outcome to the one that was being determined in this case; and

    (c) doing so based on the particular evidence and submissions in the present proceedings.

C. Determination of the CMIEG application

21. The CMIEG request should be refused for two reasons.

22. **First**, the BCMI Application was determined on 31 October 2014. There is no other extant application to vary the BCMI Award. The effect of the CMIEG request is therefore to re-open a matter determined almost two years ago.

23. It may be accepted that concepts of a tribunal being *functus officio* apply more flexibly in an administrative tribunal than in the courts, and that the principle will not be strictly applied in cases where the tribunal has failed to exercise its statutory function.[8] That has not, however, been suggested in the present case. It is not suggested, nor could it sensibly be suggested, that the Full Bench decision of 31 October 2014 was affected by jurisdictional error or was *per incuriam*. There is no basis to re-open the earlier proceedings.

24. **Second**, and assuming the Commission is not *functus*, the request should be refused on discretionary grounds. Although concepts of issue estoppel are imperfectly adapted to the case of an award which may be repeatedly varied over time, the public interest considerations underpinning the concept apply with equal force in this case.

25. The BCMI Application squarely put in issue the merits of the accident pay provisions of the BCMI Award. Those merits were closely examined and a decision made about them. CMIEG therefore proposes to vary a provision which was examined and determined in October 2014.

26. Whilst industrial instruments can always be varied, as a general principle to ensure certainty and to avoid the Commission falling into disrepute, there needs to be a proper basis to take a different course than that which has been determined. The general requirement of cogent reasons for departure from an earlier determination applies *a fortiori* when the very issue has been recently determined.

[8] *Spotless Cleaning Services Australia Ltd v Wookey and Topham* PR929400.

27. CMIEG could have put submissions in that part of the proceeding before the Full Bench which dealt with the other awards. The CFMEU did exactly that on 30 March 2015 when it filed submissions in answer to AIG's contentions that accident pay provisions generally contravened s154 and that the provisions could not apply in a post-employment scenario. CMIEG did not take the opportunity to have any further involvement.

28. No relevant new event has occurred. The only matter identified by CMIEG is the statement in [212] that the Full Bench did not consider when inserting provisions into awards *by arbitration* a necessity for their accident pay to be a period beyond 52 weeks. That finding was one based on the particular evidence of the submissions placed before them in that case in respect of awards that did not contain accident pay provisions. It is clear from the text of [212] that that was not a finding intended to apply to the BCMI Award nor is there any reason to think it is a finding that should apply to that award.

29. Of course there is not necessarily only "*one set of provisions*" which can be said to provide a fair and relevant minimum safety net of terms and conditions and "*There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern award's objective*".[9]

30. Even if the Commission takes the view that it could reconsider the Full Bench decision determining accident pay for the Black Coal Award notwithstanding the matters set out above, the question of whether it *should* do so at this time, which is a discretionary decision, would take into account the following matters:

    (a) the opportunity that CMIEG had prior to October 2014 to put any case it wished to put as to the quantum of accident pay, which it did not do;

    (b) the fact that the CFMEU put on extensive evidence and submissions which led to the said decision, and CMIEG chose not to respond to them;

    (c) the fact that CMIEG did not make any application thereafter until after the conclusion of proceedings in respect of other awards;

    (d) the nature of the exercise of considering quantum of accident pay for the Black Coal Award which would involve a significant amount of time and expenditure on behalf of the parties and a significant amount of time on behalf of the Commission, so much being clear from:

        i. the fact that extensive evidence was put before the Commission by APESMA and the CFMEU;

[9] *Preliminary Issues Decision* [2014] FWCFB 1788 at [60(6)].

ii. the scope, complexity and length of the proceedings that led to decision [2015] FWCFB 3523, which the Commission will note involved expert evidence and a variety of further witness statements; and

iii. the nature and extent of the evidence that both parties have put on in proceedings concerning altering the BCMI Award's redundancy provisions in matter no. AM2014/67, in which APESMA and CFMEU have filed 22 witness statements, an expert report and the results of a sophisticated survey.

31. It is not in the public interest to require the parties to engage in such an extensive process. That is particularly the case given that in light of the Full Bench decisions there seems to be no likely prospect that any different result would eventuate at this time.

D. Conclusion

32. For the reasons set out above, the Full Bench should refuse the CMIEG request to reopen the proceedings.