

IN THE FAIR WORK COMMISSION

Matter No: AM2016/34

Applicant: Construction, Forestry, Mining and Energy Union

SUBMISSIONS OF THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION ('CFMEU')

Introduction

1. This matter concerns an application by the CFMEU to vary the *Black Coal Mining Industry Award 2010* ('BCMI Award') pursuant to s158 of the *Fair Work Act 2009* (Cth) ('FW Act').
2. The application seeks to vary the BCMI Award by the inclusion of a number of provisions to specifically apply to employees of Mines Rescue Services. The effect of the application is to bring the relevant employees, who currently are either covered by an enterprise award or are award free, under the coverage of the BCMI Award.
3. This submission deals with a number of matters relevant to the above application under the headings that follow.

Response to Draft Determination proposed by the FWC

4. The CFMEU supports the Draft Determination posted by the FWC on 1 December 2016, with one exception. That is, the CFMEU believes that the proposed clause 15.2 (and consequential renumbering of existing clause 15) is unnecessary and confusing, for the following reasons:

- a) The proposed Schedule H is not a classification structure as the proposed clause 15.2 asserts, but rather, is a collection of conditions of employment that are specific to Mines Rescue Service employees; and
 - b) The actual classifications structure relevant to Mines Rescue Service employees is the existing Schedule B – Staff Employees of the BCMI Award, as amended by the proposed insertion of a number of classifications.
5. In other words, the inclusion of the proposed Clause 15.2 in the BCMI Award is confusing because proposed Schedule H is not a classification structure. In fact, as detailed below, the relevant classifications introduced as part of the proposed variations fit entirely within the existing classification grades contained in Schedule B – Staff Employees of the BCMI Award.
 6. Accordingly, Clause 15.2 (and the consequential renumbering of Clause 15) should be deleted.
 7. Otherwise, the CFMEU supports the Draft Determination for the reasons that follow.

Jurisdiction

8. Section 158(1) (Item 1) of the FW Act provides that an organisation that is entitled to represent the industrial interests of one or more employees covered by a modern award may make an application to vary the award. Similarly, Section 158(1) (Item 3) provides that an organisation that is entitled to represent the industrial interests of one or more employees covered by a modern award may apply to vary the award to increase the range of employers or employees covered by the award.
9. The CFMEU is entitled to represent employees covered by the BCMI Award.

10. Similarly, the BCMI Award is a modern award for the purposes of s158 of the FW Act.
11. This application seeks to both expand the coverage of the BCMI Award to cover employees engaged in Mines Rescue Services and to provide for certain specific terms and conditions relevant to those employees.
12. Accordingly, it is submitted that the application is properly made and the FWC has jurisdiction to hear and decide the matter.

The terms of the application

13. The BCMI Award currently does not provide terms and conditions of employment for Mines Rescue Service employees.
14. Employees involved in mines rescue are currently employed by two employers, namely Queensland Mines Rescue Service (**‘QMRS’**) and Coal Services Pty Ltd (**‘CSPL’**) in NSW.¹
15. In addressing the issue of covering these employees by the BCMI Award, a review was undertaken of their current terms and conditions of employment, together with a comparison of those terms and conditions with the terms and conditions of the BCMI Award.
16. Historically there has been a close relationship between a number of terms and conditions in the coal mining industry generally and the terms and conditions of employment of employees of the Mines Rescue Services.²
17. Between 2014 and 2016 a number of meetings were held involving representatives of the CFMEU, APESMA Collieries Staff Division and QMRS to discuss award coverage of Mines Rescue Services employees. These meetings

¹ For a history of the work undertaken by Mines Rescue Service employees and their employment arrangements, see the Statement of Andrew Vickers, PN 22 – PN 29.

² See the statement of Andrew Vickers, PN 49.

addressed the requirement for terms and conditions for Mines Rescue Services employees required in addition to those in the BCMI Award.

18. As a consequence of those meetings, the parties ultimately reached agreement on a “without prejudice” basis on an appropriate package of minimum safety net conditions for Mines Rescue Service employees to be covered by the BCMI Award. It was also agreed that the CFMEU would be the moving party by making an appropriate application to the FWC reflecting this level of agreement.
19. Accordingly, this application seeks to give effect to a number of new provisions in the BCMI Award relevant to Mines Rescue Service employees only.³ They are:
 - a) A definition of “Mines Rescue Service” in clause 3.1. This is necessary to clearly define the relevant employing entities, which are those entities undertaking mines rescue activities in accordance with relevant legislation (see Item 2 of the Application).
 - b) The coverage clause (clause 4) is varied to expressly extend coverage to employees of a Mines Rescue Service (see Item 3 of the Application). The language used in this provision is similar to that found in section 4 of the *Coal Mining Industry (Long Service Leave) Administration Act 1992*, which similarly applies to Mines Rescue Service employees.
 - c) The insertion of a number of classifications into the existing classification structure of Schedule B to the BCMI Award relevant to mines rescue activities. The classifications cover training officers, occupational hygienist/statutory dust sampler, technical officers and superintendent/assistant superintendent (see Items 5, 6, 7, 8, 9, 10, 11).⁴ There is also a provision to ensure the ongoing training of mines rescue employees (see Item 12) and the inclusion of a definition of a training

³ See the statement of Andrew Vickers, PN 49-PN 58.

⁴ Item 6 of the Application involves correcting an existing typographical error in the BCMI Award.

officer (see Item 4). These classifications reflect the current character and skill levels of work undertaken by Mines Rescue Service employees.⁵

d) The insertion of a number of extant provisions for Mines Rescue Service employees that are unique to their situation and not covered elsewhere in the BCMI Award. By their inclusion in a proposed Schedule H confined to employees of Mines Rescue Services, these terms and conditions do not have general application. The terms and conditions of employment are:

- A sub clause explicitly confining the application of the Schedule to Mines Rescue Service employees only (see Item 13, sub clause H.1).
- The provision of stand by allowances and their operation (see Item 13, sub clause H.2 and H.3).
- The provision of payment and/or applicable conditions when engaged in overnight travel (see Item 13, sub clause H.4 and H.5).
- The provision for the suspension of certain award provisions in the case of an emergency (Item 13, sub clause H.6).
- The provision of an additional entitlement in the event of medical retirement (see Item 13, sub clause H.7).

Relevant Provisions of the FW Act

20. To vary the BCMI Award as sought by this application, the FWC must be satisfied that the making of the determination is “...*necessary to achieve the modern awards objective*” (s 157(1)).

⁵ For a summary of the work performed by coal rescue employees and the statutory functions on the QMRS and CSPL, see the statement of Andrew Vickers, PN 22- PN 33

21. The FWC has, on a number of occasions, considered applications to vary modern awards outside of the 4 year review and hence the need to ensure any determination is necessary to meet the modern awards objective.
22. The following considerations can be gleaned from a number of decisions:
- a) Any decision to vary a modern award must be based on a proper evidentiary foundation.⁶ It is for the applicant to show that the proposed variation is necessary for the modern awards objective to be met.⁷
 - b) The consideration of whether an application meets the modern award objective involves a broad judgment taking into account a number of considerations.⁸ Included amongst these considerations is the content of pre-existing instruments.⁹ Similarly, the position taken by the parties to an application is a relevant consideration.¹⁰
 - c) Whilst the FWC is required to take into account the matters adumbrated in s134(1) not all of those factors will be relevant to each application.¹¹
23. This submission is supported by a witness statement of Andrew Vickers, General Secretary of the CFMEU Mining and Energy Division. Mr Vickers is a witness with substantial industry experience, having spent most of his working life involved in matters going to the terms and conditions of coal mine workers and the regulation of those terms and conditions of employment by the various industrial tribunals since the 1970's.¹²

⁶ *Re Appeal by National Retail Association Ltd and Anor* [2010] FWAFB 7838, PN [23]

⁷ *Re VECCI* [2012] FWAFB 6913, PN [10]

⁸ *AMWU v Australian Business Industrial* [2013] FWCFB PN [9]

⁹ *Application to vary Building and Construction On-Site Award 2010* [2010] FWA 2894, PN [30]

¹⁰ *Application by the National Retail Association and Anor* [2010] FWAFB 7838, PN [23], [27]

¹¹ *Application by the SDA* [2011] FWAFB 6251, PN[18]

¹² See Statement of Andrew Vickers, PN 1 - 22

24. Beyond his own recollection of events, the statement of Andrew Vickers appends a number of documents (including pre-existing industrial instruments) that describe the regulatory framework applicable to Mines Rescue Employees.
25. This evidence of Andrew Vickers provides support for the making of a determination in the form sought in the application. His evidence supports the contention that the determination is necessary to meet the modern awards objective. This is because the proposed variations are consistent with the historical regulation of Mines Rescue Service employees and will serve to provide a fair and relevant award safety net.
26. In contrast, the evidence before the Commission is that in the absence of a determination that varies the BCMI Award to cover Mines Rescue Service Employees, there will be a group of employees – namely, the employees of CSPL - who will not have the protection of a safety net of fair and relevant minimum terms and conditions of employment. This is a compelling argument in favour of the present application being “necessary” to meet the modern awards objective.
27. Further, whilst the QMRS has an application before the FWC for the making of an enterprise award, there is no guarantee that the FWC will make that award. The creation of modern enterprise awards has been a relatively rare occurrence under the FW Act. However, the current application contains a minimum safety net that is acceptable to the QMRS and therefore there exists an opportunity to establish a uniform, simple and easy to understand set of safety net terms and conditions for all Mines Rescue Service employees.
28. The application before the FWC takes into account the content of the pre-existing awards applying to Mines Rescue Service employees. As noted in the evidence of Mr Vickers, the application is effectively an amalgamation of provisions that applied to both the coal mining industry generally as reflected in the BCMI Award and relevant provisions that have their origins in pre-existing awards applying to Mines Rescue Services employees.

29. It is also submitted that the application is consistent with the modern awards objective when the various criteria in s134 of the FW Act are considered. In that regard, we make the following submissions:

- a) Section 134(1)(a): The application is neutral in this respect as the employees covered by the application would not be regarded as low paid as described in the latest *Annual Wage Review Decision*.¹³
- b) Section 134(1)(b): By establishing a set of minimum terms and conditions of employment for the relevant classifications with each of the two employers, it provides an appropriate base for negotiating enterprise agreements.
- c) Section 134(1)(c): The application is neutral in this respect.
- d) Section 134(1)(d): The application, by including Mines Rescue Service employees in a modern award covering the coal industry, sets a proper base for the consideration of the conduct of work in the industry.
- e) Section 134(1)(da): The application is positive in respect of this consideration because it brings employees under a modern award that contains additional remuneration for overtime, shift work, weekend work, work on public holidays, and changing shifts at short notice.
- f) Section 134(1)(e): The application is neutral in respect of equal remuneration for work of equal or comparable value.
- g) Section 134(1)(f): The application reflects the consolidation of appropriate conditions for Mines Rescue Service employees into the BCMI Award. The application will not result in any increase in costs to either employer given the existence of either an enterprise agreement or a common law arrangement over and above the operation of the provisions

¹³ [2016] FWCFB 3500, PN [359], [360],[363]

in the BCMI Award. As such the impact of any exercise of modern award powers in this case is neutral.

- h) Section 134(1)(g): The application is positive in this respect. It consolidates terms and conditions in the coal mining industry under one modern award; it covers a group of employees who are currently award free and it provides coverage in the place of an enterprise award.
- i) Section 134(1)(h): The application is neutral in this regard; it will have no impact on broader economic considerations of inflation, employment and the sustainability, competitiveness and performance of the Australian economy.

Conclusion

- 30. This application seeks a determination varying the BCMI Award by increasing its coverage to employees engaged in mines rescue activities and employed by entities established for that purpose, pursuant to the relevant State legislation. The application also seeks to insert a number of relevant terms and conditions covering aspects of employment of Mines Rescue Service employees in the BCMI Award.
- 31. The application is accompanied by probative evidence establishing the history and contemporary operation of the Mines Rescue Service in both New South Wales and Queensland; the considerations that led to the making of this application; and evidence relevant to the test of the necessity to meet the modern awards objective.
- 32. The application is made in accordance with s158 of the FW Act. In that respect it is submitted that the jurisdictional requirements necessary for the FWC to exercise its power to make the determination sought and vary the BCMI Award, have been fulfilled.

33. The application meets the requirement of s157 of the FW Act, namely that the determination varying the BCMI Award to insert relevant terms and conditions for employees performing mines rescue activities is necessary to meet the modern awards objective.
34. The application brings together under the auspices of the BCMI Award a group of employees who are currently award free and another group who are covered by an enterprise award. The application seeks to put in place appropriate modern award coverage of these employees in a way that rationalised award coverage into an appropriate single award that was made as part of the modern award process.
35. The application is consistent with the modern awards objective when the various considerations set out in s134(1) are taken into account.
36. For the reasons as set out in the application, the evidence and this submission, the CFMEU seeks the FWC make the determination as sought.

Construction, Forestry, Mining and Energy Union

13 December 2016

Witness statement of Andrew Vickers

[Part 1](#)

[Part 2](#)

[Part 3](#)