

FAIR WORK COMMISSION

Four yearly review of modern awards – Family Friendly Work Arrangements
AM2015/2

SUBMISSION ON BEHALF OF COAL MINING INDUSTRY EMPLOYER GROUP

1. The Coal Mining Industry Employer Group (**CMIEG**) supports the submissions filed by the Australian Industry Group (**AiGroup**) in this matter in respect of family friendly work arrangements.¹
2. Without derogating from the submissions of the AiGroup, the CMIEG makes the following submissions in addition concerning the black coal mining industry and the Black Coal Mining Industry Award 2010 (**BCMI Award**).
3. It is not apparent that the provisions sought by the ACTU² are "necessary" to achieve the modern awards objective in respect of the BCMI Award, as required by section 138 of the *Fair Work Act 2009* (Cth) (**FW Act**).
4. The company groups that form the CMIEG each support the use of family friendly work arrangements and policies that reflect and take account of the practical issues associated with working in the black coal mining industry. A number of such policies and arrangements are already in place in the black coal mining industry. Those policies supplement the operation of section 65 of the FW Act as amended. Together, those policies and the operation of section 65 adequately deal with family friendly working arrangements.
5. The CMIEG submits that in the black coal mining industry family friendly work arrangements are best dealt with, as occurs now, by discussion between the employee and their supervisor or manager as circumstances arises. The CMIEG is unaware of any evidence filed in the present proceedings demonstrating that employers in the black coal mining industry are not already taking a practical and supportive approach to the use of family friendly work arrangements, whether under the operation of policies, section 65 or otherwise. Indeed, there is nothing in the evidence filed by the ACTU that specifically deals with the black coal mining industry.³

¹ It is noted that the matter is being heard together with AM2015/1 concerning domestic violence leave. These submissions do not address that matter

² ACTU proposed variation (email of 18 May 2017); Statement [2017] FWC 3692 (14 July 2017), Attachment A

³ The lay evidence is from persons in the education, banking, retail and local government industries; the expert evidence does not deal with the black coal mining industry (or the mining industry more generally)

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6. In the absence of evidence suggesting that the approach taken in the black coal mining industry is not operating satisfactorily, it is submitted that there is no demonstrated need to introduce the provision sought by the ACTU into the BCMI Award.
7. The CMIEG, accordingly, does not support the introduction of a more general or broad-brush approach to this issue as is contended for by the ACTU to insert its proposed provision in each modern award, including the BCMI Award. The circumstances of industries covered by modern awards and the need for such a provision vary considerably.
8. In the black coal mining industry, there are practical difficulties that may be associated with the use of family friendly work arrangements that must generally be, and are, considered on a case-by-case basis.
9. Examples of the types of practical issues that are likely to arise in the black coal mining industry and perhaps not in other workplaces include the following.
 - (a) Many roles at coal mining operations are essential to continued operation of the mine. Changing the hours in which an employee working in one of those roles attends for duty may not be possible because of the impact it will have on the ability of the rest of the mine (or a section of the mine) to continue operating safely while the employee is not present. This can be contrasted to a situation where an individual employee works largely independently of others and can vary work times without much affecting their work (for example, an accountant working in a large accounting practice).
 - (b) Coal mining operations normally utilise shift work arrangements and these require a pattern of work where an employee's shift relief must match their shift times with the employee they are relieving. Varying hours of one employee will therefore often affect the work hours of their relief and require their agreement. Changes to work hours may also affect breaks between shifts and impose additional overtime costs or penalties for short break times between shifts.
 - (c) Some coal mining operations take place in remote areas. Where these operations utilise a fly-in fly-out staffing system, this would tend to exclude any possibility of flexible work hours on a daily basis, and depending on flight schedules, it may also not be possible to vary which days are spent on site. It is also possible that for some operations bus transport at the start and finish of shift is provided between the mine site and nearby towns. Bus schedules may affect the ability to provide flexible work hours on a daily basis.
10. While these practical issues may not be a barrier to a range of family friendly work arrangements, and indeed such arrangements are supported by the industry and put in place where possible these, they do present a barrier to the establishment of the arrangements as sought by the ACTU.

11. There is nothing in the evidence of submissions filed in support of the application by the ACTU that demonstrates that the provision sought is "necessary" in the black coal mining industry and accordingly the BCMI Award, within the meaning of section 138 of the FW Act. To the extent that, at a particular workplace in the black coal mining industry, there is a need to supplement section 65 of the FW Act, this may be dealt with by either policy or through enterprise bargaining. That tells against the clause proposed by the ACTU being "necessary".⁴
12. Finally, it is noted that the proposed clause would operate in a way to exclude the operation of section 65(5) and accordingly would contravene section 55(1) of the FW Act.⁵ It is beside the point that section 65 applies to a wider range of employee circumstances and a wider range of flexible working arrangements than the provision sought by the ACTU.⁶ The flexible arrangements contemplated in the proposed clause clearly come within the scope of section 65, yet operate to exclude section 65(5). The term is not incidental, ancillary or supplementary to section 65 and accordingly does not come within section 55(4) of the FW Act. Pursuant to section 136(2), such a term must not be included in a modern award.

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⁴ See, by parity of reasoning, *Annual leave - Black Coal Mining Industry Award* [2017] FWCFB 5394 at [38], [60]

⁵ See *Re Canavan Building Pty Ltd* [2014] FWCFB 3202 at [36]; *NES Inconsistencies Decision* [2015] FWCFB 3023 at [37]

⁶ ACTU submissions dated 9 May 2017 at [194]