

COAL MINING INDUSTRY EMPLOYER GROUP

SUBMISSION

VARIATION OF MODERN AWARDS TO INCLUDE A DELEGATES' RIGHTS TERM

(AM2024/6)

1. Introduction

1.1 The Coal Mining Industry Employer Group (**CMIEG**) represents major employers in the black coal mining industry in Australia. The Group has consistently represented employers in proceedings in the Fair Work Commission concerning the *Black Coal Mine Industry Award 2020* (**BCMIA**) and its predecessor, the *Black Coal Mining Industry Award 2010*.

1.2 This submission in reply is made in accordance with the Commission's process set out in the Statement of Justice Hatcher, President on 30 January 2024.

2. Process

2.1 For the reasons set out in the submission of the Australian Industry Group (**Ai Group**) dated 4 March 2024 in paragraphs 29 – 48, the CMIEG submits that the Commission should:

- (a) adopt a cautious and conservative approach in drafting a delegates' rights clause to be included in all modern awards;
- (b) in the present process required to enable all modern awards to include a delegates' rights clause to come into operation from 1 July 2024, confine itself to a standard or model clause; and
- (c) not endeavour in the present process to determine clauses tailored to what may be contended by some interests as appropriate to the circumstances of particular awards.

2.2 As persuasively explained in the Ai Group's submission, there is simply insufficient time available in the present proceedings for the Commission to adequately consider the evidence and submissions that will need to be taken into account in formulating a variety of potential provisions that one or more parties interested in an award may contend are appropriate.

2.3 The submissions of the Mining and Energy Union (**MEU**) in respect of the BCMIA fall far short of justifying particular terms of the delegates' rights clause in that award. More evidence would be required. The MEU is only one of the unions interested in the BCMIA. The CMIEG and other employer representatives should of course be given an adequate opportunity to respond to any evidence and the submissions supporting particular terms for the BCMIA.

2.4 Furthermore, importantly, until a model or standard clause is determined and available for consideration by both employer and employee interests, it is logically impossible to assess and determine what, if any, variations from the standard clause are appropriate for the BCMIA (or any other award).

2.5 If the Commission is of the view that it should determine a delegates' rights clause in the BCMIA that is different from a standard or model clause, the CMIEG would press that the MEU and other

parties interested in the BCMIA first provide proper evidence and submissions to support a different clause and that the CMIEG and other interested parties be given a proper opportunity to respond to such evidence and submissions.

3. **The Delegates' Rights Clause – Approach, Principles and Content**

3.1 The CMIEG has considered and generally supports the submissions already filed by:

- Australian Chamber of Commerce and Industry (**ACCI**) (dated 1 March 2024);
- Australian Industry Group (**AI Group**) (dated 4 March 2024); and
- Australian Business Industrial (**ABI**) (dated 29 February 2024).

3.2 Those submissions contain extensive submissions about the approach and principles which the Commission is urged to adopt and as to the content of the clause which the Commission should determine.

3.3 The CMIEG does not wish unnecessarily to repeat those submissions. The CMIEG does however make the following submissions by way of additional particular emphasis:

- (a) The modern award objective set out in section 134 of the *Fair Work Act 2009* (Cth) (**FWA**) plainly applies in the present task of the Commission. Of particular relevance are the need to encourage collective bargaining (section 134(1)(b)) and the need to ensure a simple, easy to understand modern award (section 134(1)(g)). As a general proposition, enterprise agreements provide an adequate opportunity for the circumstances of particular employers and their workforces to frame suitable delegates' rights provisions through collective bargaining. Furthermore, as the Commission's present task is, for the first time, codifying delegates' rights provisions, the clause needs to be in terms that are genuinely simple and easy to understand.
- (b) The standard or model clause determined by the Commission should go no further than is truly necessary in a clause that provides for the exercise of the rights of workplace delegates (FWA section 149E), those rights being set out in section 350C.
- (c) Much of clause 350C can and should be repeated in the delegates' rights clause without expansion or elaboration.
- (d) It would be valuable for the clause to provide some appropriate definition of what is intended by the important expression "industrial interests" that is used in subsections (2) and (3) of section 350C. This could include illustrative but not exhaustive examples of what is meant by "industrial interests". In essence, the "industrial interests" of the persons represented by a delegate will pertain to and arise from the relationship between an employee and the employer of that employee.
- (e) There is no justification for the delegates' rights clause to prescribe the rights of workplace delegates beyond their role as employee representatives. For example, the clause should not prescribe rights that an employee, whether or not a workplace delegate, should have as an office holder in an employee organisation.

- (f) The delegates' rights clause should fully recognise the importance of the consistent use in section 350C of the word "reasonable". It qualifies the entitlement of the workplace delegate to communication, access to the workplace and workplace facilities and paid time for training. Section 350C(5) requires that regard must be had to the matters and circumstances set out in the subsection – namely, the size and nature of the enterprise, the resources of the employer and the facilities available at the enterprise. Whilst regard must be had to those matters and circumstances, what is reasonable will frequently require consideration of a variety of other circumstances present at a particular time and particular workplace that are relevant to the exercise of a delegate's right. Therefore the clause should not unnecessarily pre-empt or limit consideration of such other circumstances.
- (g) A workplace delegate always remains an employee and is subject to the employee's ordinary contractual obligations as an employee. The clause should not nullify or limit the rights of the employer except to the extent genuinely necessary to give effect to the intention of section 350C.

4. The Number of Workplace Delegates

- 4.1 A matter left at large in section 350C and the FWA, is the number of workplace delegates that an employer is required to recognise and afford the rights set out in this section. The maximum number of workplace delegates should be the subject of some appropriate prescription. The ACCI submission provides one approach, namely, prescribing a maximum number by reference to the number of full and part time employees at a given workplace (submission paragraph 41). An alternative would be to set a limit of one delegate per geographically or operationally distinct workplace. Such a provision would prevent abuse and avoid imposing oppressive obligations on an employer. Recognising more workplace delegates would remain a matter able to be agreed between an employer and an interested employer organisation whether in an enterprise agreement or otherwise.

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