

IN THE FAIR WORK COMMISSION

FWC Matter No.: AM2014/190

Applicant: CMIEG

Respondent: APESMA and CFMEU

Re Black Coal Mining Industry Award 2010 – Accident pay provisions

SUBMISSIONS FOR THE UNIONS IN REPLY

1. The submissions of CMIEG (4 August 2016) are based on a false premise; namely that to date the CMIEG has not had an opportunity to put submissions as to the quantum of the limitation period for accident pay entitlements in the BCMI Award. It had that opportunity but elected not to take it.
2. In 2013 the CFMEU sought to delete the sunset provision applying to the accident pay provision of the BCMI Award. The effect of that application was to entrench in the award the existing accident pay provisions, including provisions as to quantum. The merits of the accident pay scheme were therefore centrally relevant to the application. For that reason, the unions' evidence and submissions addressed those merits at some length.¹
3. It is unsurprising that the CFMEU's oral submissions in that case focussed on the sunset provisions rather than merits. Neither CMIEG nor any other party took any point in relation to quantum and duration. The unions' evidence and written submissions as to merits were in effect unchallenged. The CMIEG chose not to adopt any fall-back position that the accident pay provisions, if retained, should be modified.
4. The review of the BCMI Award commenced in 2014 and included the following steps:
 - (a) On 9 May 2014 the CFMEU wrote to the Commission identifying a number of issues with the Award.
 - (b) Proceedings before Ross P and Hamberger SDP followed, with the Senior Deputy President reporting to the Full Bench in July 2014. The Senior Deputy President's report identified those matters which were agreed between the parties and those which were in dispute.² It did not mention accident pay.
 - (c) In September 2014 the Commission issued an exposure draft of the Award. The CFMEU and CMIEG put a joint response to the exposure draft.

¹ [2015] FWCFB 644 at [68]–[69].

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201467-report-231214.pdf>

5. At no point in that review process did CMIEG raise an issue as to quantum of accident pay.
6. In October 2014 the Full Bench determined to remove the sunset provision in the accident pay clause of the BCMI Award: [2014] FWCFB 7767.
7. During the proceedings that led to that decision it was foreshadowed that any disputes as to the specific terms of accident pay claims might be addressed on an award-by-award basis during the annual review.³
8. That was consistent with what the CFMEU had said in a submission to the Commission in July 2014 (which CMIEG have quoted):

In the event that any party has an issue with any other provision of an accident pay clause in any modern award, that issue can be raised and dealt with as part of the modern award review of the specific awards.
9. The Full Bench then proceeded to examine the merits of accident pay clauses in the context of specific awards. Those proceedings were heard over 7 days during March-May 2015, followed by written submissions in June 2015, resulting in the decision on 18 August 2015: [2015] FWCFB 3523..
10. CMIEG elected not to ask that the Full Bench consider the accident pay provisions of the BCMI Award as part of that proceeding.
11. In short, at no point during the various proceedings to consider accident pay provisions, whether specifically in respect of the BCMI Award, or generally, did the CMIEG take any of the several opportunities presented to:
 - (a) identify any concern regarding the substance of the accident pay provision;
 - (b) make *any* submission as to the substance of the accident pay provision;
 - (c) indicate any intention or desire to make any application or submission as to the substance of the accident pay provision in the future; or
 - (d) reserve its position as to the substance of the provision.
12. Throughout the process the CMIEG exhibited disinterest in the issue. The change in its attitude is precipitated by a Full Bench decision which, in its view, provides a foothold for variation of the relevant provisions. That is doubtful but in any case irrelevant for present purposes. The fact that the Full Bench decision provides it with an argument that was not previously available is unimportant. The need to preserve the finality of litigation generally, and the need to contain the scope of award review proceedings in particular, requires that CMIEG be held to its earlier

³ As noted by the Full Bench in its decision: [2015] FWCFB 644 at [18].

decision. To allow a party to remain silent until such time as the forensic calculus shifts in its favour seriously undermines that objective.

13. The Commission ought to reject the invitation made by CMIEG to now embark on a major exercise of examining the merits of the accident pay clause in the BCMI Award which has so recently been the subject of a decision of a Full Bench. That is particularly so given that the only basis for the current application is a decision of (the same) Full Bench in a later proceeding, notwithstanding that the Full Bench made clear it did not consider its later conclusions were inconsistent with its earlier decision as to the BCMI Award.⁴

⁴ See the unions primary submissions at [15]-[20].