

4 YEARLY REVIEW OF MODERN AWARDS

Fair Work Act 2009

COMMON ISSUES – PAYMENT OF WAGES

(AM2016/8)

SUBMISSION BY THE CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION, MINING AND ENERGY DIVISION (CFMEU)

SUBMISSION IN REPLY TO RESPONSE BY THE AI GROUP AND THE COAL MINING INDUSTRY EMPLOYERS GROUP TO SUBMISSION BY THE CFMEU ON A PROVISION FOR PAYMENT UPON TERMINATION OF EMPLOYMENT IN THE BLACK COAL MINING INDUSTRY AWARD 2010

1. On 20 September 2016, the CFMEU filed a submission that proposed an alternate clause to the clause that had been prepared by the Fair Work Commission (FWC) as a means of facilitating the consideration of a payment upon termination of employment clause in a number of Awards, including the Black Coal Mining Industry Award 2010 (BCMIA).
2. The provision prepared by the FWC was modeled on a provision prepared by the Ai Group and Australian Business Industrial (ABI) and the subject of a variation sought to 10 Awards, none of which was the BCMIA.
3. On 13 October 2016, the Coal Mining Industry Employers Group (CMIEG) and the Ai Group filed submissions in response to the clause sought by the CFMEU in its submission of 20 September 2016.
4. This submission is a reply to those submissions.
5. With respect to the CMIEG submission we reply as follows:

5.1. The CMIEG submits that there is no reason to distinguish the circumstances of the BCMIA or the coal mining industry from other Awards or industries.¹ The problem with that submission is that the relevant provision in the BCMIA is already distinct from other Awards.² As the CFMEU observed in our initial submission it is a provision of some longevity. It was also inserted in the BCMIA with the concurrence of the CMIEG. In that context the issue, more appropriately is why it should be the same as other Awards - more so when it has never been a consideration in the past. In that regard, the CFMEU proposal does not change the relationship

¹ CMIEG Submission, 13 October 2016, paragraph 6

² A review of Attachment A in [2016] FWCFB 7455, dated 14 October 2016, results in the conclusion that, with respect to extant payment upon termination of employment clauses in modern awards, the provision in the BCMIA is unique.

between the BCMIA and other Awards. It follows that this reason has no probative value in this exercise.

- 5.2. The CMIEG criticizes the CFMEU submission as one where the CFMEU “has provided no factual material, or reasoned examples, supporting its submission”.³ There are two responses to that position:
 - 5.2.1. The CMIEG is, itself, guilty of the same failing as it ascribes to the CFMEU. The CMIEG supports a variation as set out in the draft determination. In doing so it does not provide “any factual material, or reasoned examples supporting its submission.” To the extent it relies on the Ai Group and the ABI submissions, those submission do not fill the gap.⁴
 - 5.2.2. The CMIEG submission either overlooks or ignores paragraph 12.9 of the CFMEU submission where we address the issue of the probative evidence necessary to demonstrate any facts we may rely upon.
 - 5.2.3. The combination of these two responses is to negate any force in this argument by the CMIEG.
- 5.3. The CMIEG contends that none of the reasons raised by the CFMEU are particular to the coal mining industry and hence undermine any argument for a separate provision in the BCMIA.⁵ As noted above, what the CFMEU is seeking is largely what is already in the Award. The change is simply to bring the payment on termination by EFT in line with the payment by other means in the BCMIA. As such, whatever is the situation in other industries – and the CMIEG on this point want for “any factual material, or reasoned examples supporting its submission” – is essentially beside the point.
- 5.4. The CMIEG relies on the notion that obliging an employer to do a “pay run” outside of the usual run of things requires additional resources and amounts to a regulatory burden. Again, the CMIEG falls foul of its own demand for “any factual material, or reasoned examples supporting its submission.” As mentioned in our submission the use of modern computer based information technology systems has facilitated the speed of transactions exponentially and reduced the transactions cost. In an industry characterized by large multinational corporations who, in many respects are in the vanguard of technological change, that notion that a pay run out of order would be costly and burdensome is

³ CMIEG Submission, 13 October 2016, paragraph 6

⁴ Whilst the ABI submission included a Statement from the Payroll Manager from CSR, it is a company that is not involved in the coal mining industry and in any event, the ABI has withdrawn the statement.

⁵ CMIEG Submission, 13 October 2016, paragraph 6

implausible. It is also ironic that at a time when computers have sped up process times, the CMIEG, in fact, wants more time. It is not a position, we submit, that its members would accept with the application of modern technology to the mining of coal. And it is not a position that the FWC should accept in this case.

6. In a letter to the President, the Ai Group states that the CFMEU submission "does not address the central issue to which Ai Group's claim is directed: alleviating the additional costs and regulatory burden associated with administering a separate payment by EFT."⁶ We beg to differ. In our submission, dated 20 September 2016, we note the mitigating effect of notice periods and the positive impact of "sophisticated information technology in payroll systems."⁷ Further, in our submission in response to the Ai Group submission in support of a similar variation to that in the draft variation for the BCMIA, the CFMEU goes to some lengths to address those issues.⁸ The CFMEU relies on those submissions.
7. For the reasons outlined in our submission of 20 September 2016, our response to the Ai Group and ABI submissions as well as the draft determination on 13 October and this submission, the CFMEU submits that the FWC should vary the Award in the manner sought by the CFMEU.

Construction, Forestry, Mining and Energy Union
Mining and Energy Division
18 October 2016

⁶ Letter to the Hon. Justice Ross, President from Mr. Stephen Smith, Head of National Workplace Relations Policy, Ai Group, 13 August *(sic)* 2016

⁷ CFMEU Submission, 20 September 2016, paragraphs, 12.3 and 12.4

⁸ CFMEU Submission, 13 October 2016, paragraphs 9 - 10