

## FAIR WORK COMMISSION

### ***Four yearly review of modern awards – Timing of payment of wages*** **AM2016/8**

#### **Submissions - Coal Mining Industry Employer Group**

1. This submission is made for the Coal Mining Industry Employer Group (**CMIEG**) in respect of the Statement issued on 14 October 2016 ([2016] FWCFB 7455) setting out a proposed default term for payment of wages and other amounts due on termination (at [19]).
2. The CMIEG has made submissions on 13 October 2016 supporting the AiGroup and ABI claims for variation to payment on termination clauses, as those claims relate to the variation of clause 16.7 of the Black Coal Mining Industry Award 2010 (**BCMI Award**).
3. For the same reasons as set out in its submissions of 13 October 2016, the CMIEG generally supports the inclusion of the provisional default term into the BCMI Award, in place of the existing clause 16.7 of the BCMI Award.

#### **Questions from the Full Bench ([2016] FWCC 7455)**

4. In the Statement of 14 October 2016, the Full Bench has asked parties to address four questions (at [21]). The CMIEG deals with those questions as follows:

##### Question 1 – Provisional default term

5. In respect of question 1, the CMIEG submits that, for the purpose of consistency of language with the other terms used in the BCMI Award, the words "when the employee's employment ends" be replaced with "upon the termination of the employment".

##### Question 2 – Insertion of default term

6. In respect of question 2, the CMIEG supports the insertion of the provisional default term into the BCMI Award in place of the existing clause 16.7.
7. The CMIEG maintains its opposition to the term proposed by the CFMEU in its submissions of 20 September 2016 (and its further submissions of 13 and 18 October 2016). The CFMEU has not advanced a substantial merits argument, supported by submissions and probative evidence, for the variation sought by it (*Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 at [60(3)]). Further, in its submissions of 18 October 2016,

Lodged on behalf of:  
Address for Service:  
Ashurst Australia  
Level 11, 5 Martin Place  
Sydney NSW 2000

Coal Mining Industry Employer Group (CMIEG)  
Tel: (02) 9258 6025 / 6313  
Fax: (02) 9258 6666  
Email: adrian.morris@ashurst.com /  
trent.sebbens@ashurst.com  
Ref: AGM TZS 02 3000 0722

the CFMEU has not set out any reasons against the provisional view of the Full Bench that the provisional default term should be inserted into the BCMI Award.

Question 3 – Retaining existing clause

8. In respect of question 3, the CMIEG submits that there is (on this subject) no sound reason to distinguish the circumstances of the BCMI Award and the black coal mining industry, from other modern awards and the industries and occupations which are covered by them.
9. If the Commission determines to insert the provisional default model term into other modern awards, the clause should similarly be inserted into the BCMI Award.

Question 4 – Section 117(2)(b) of the *Fair Work Act 2009* (Cth)

10. If the Commission determines it appropriate to do so, the CMIEG is content for a reference to be made to section 117(2)(b) in the provisional default term. This could be done, for example, by use of a "Note" referring to section 117, inserted after the body of the provisional default term.
11. It may not be necessary for the Full Bench to come to a concluded view about the construction of section 117. It is noted, however, that in respect of the words "has paid" in section 117(2)(b) that:
  - (a) the provision ought to be given a purposive construction, with the evident purpose of section 117 being that an employee be given written notice of termination of employment and have the benefit of the prescribed notice period either by way of service or payment in lieu;
  - (b) a construction of the provision which provides a fairer and more convenient operation, so long as it conforms with the legislative intention, may be preferred even if it departs from a literal interpretation (see *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 (at 320-1 per Mason and Wilson JJ));
  - (c) a payment in lieu of notice is one consequential upon the termination of employment, and it would be an absurd operation of the provision that such payment be required to be paid prior in time to the event which creates the entitlement to the payment;
  - (d) accordingly, a preferable construction of section 117(2)(b) is that it requires that an employer must not terminate the employee's employment unless, when giving notice of termination of employment, it also gives notice that an amount in lieu of notice will be paid conformably with section 117(3);

- (e) the observations of Justice White in *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; (2014) 229 FCR 221 at [214], providing a literal construction of the words in section 117(2), are *obiter*.

**Ashurst Australia**  
**Solicitors for the CMIEG**

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