



Stephen Smith
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BY EMAIL: stephen.smith@aigroup.com.au
CC: Chambers – Hatcher VP, CEPU, AMWU, APESMA, AMWU, CMIEG

Dear Stephen,

RE: AM2019/8 – Application by the Australian Industry Group to vary the Black Coal Mining Industry Award 2010

I refer to the above application which is listed for directions, this coming Friday 10 May 2019. I note that the application is purportedly advanced under the 4 Yearly Review of Modern Awards in respect of the Black Coal Mining Industry Award 2010. In the alternative, the application pleads either sections 157 or 160 of the *Fair Work Act 2009 (FW Act)* as providing a jurisdictional basis for the application to proceed.

As you would be aware, the relevant statutory tests applying to each of the three provisions relied upon in your application are substantively different and therefore require different cases to be made out.

In our view, your application cannot proceed under the 4 Yearly Review process as it does not amount to a review of the kind contemplated by the application and transitional provisions of the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)*. Accordingly, there is no jurisdictional basis for the application to proceed under the statutory tests and relevant principles applicable to the 4 Yearly Review process.

However, we are prepared to concede that your application could proceed under either or both of ss.157 or 160 of the FW Act. This concession is made without accepting that your application has any merit in terms of the statutory tests applying under those sections.

Accordingly, it is our view that the directions you propose would provide an acceptable basis to proceed if the application only proceeded under the ambit of ss.157 and/or 160. Accordingly, we request that you confirm your willingness to amend the application consistent with the position outlined above.

If that proposal is unacceptable to your organisation, it would be our submission at the directions hearing this Friday that instead of issuing your proposed directions, the Vice President should instead issue directions for a preliminary hearing on the question of whether your application is capable of proceeding as part of the 4 Yearly Review process.

In our view, it would be inappropriate to issue directions in respect of the substantive hearing until this preliminary question is determined. This is because the nature of the submissions and evidence to be brought by the parties will be significantly different, depending on the statutory provision being addressed. Therefore, it would be inefficient and unnecessarily burdensome to require the parties to answer a case being led on the basis of multiple statutory provisions, particularly as the basis for proceeding under the 4 Yearly process is clearly unsustainable.

Please feel free to contact me prior to the hearing if anything in this letter requires clarification.

Yours faithfully,



Alex Bukarica
National Legal Director