

In the Fair Work Commission

B2023/1339

**Application for Single Interest Employer Authorisation**

The Association of Professional Engineers, Scientists and Managers, Australia

**Applicant**

and

Great Southern Energy Pty Ltd (t/as Delta Coal)

Whitehaven Coal Mining Ltd

Peabody Energy Australia Coal Pty Ltd

Ulan Coal Mines Pty Ltd

**Respondents**

**Applicant's Outline of Submissions in Reply**

**INTRODUCTION**

1. The applicant replies to the following submissions filed by the SIEA Employers:
  - (a) Peabody's Outline of Submissions dated 26 February 2024 (**Peabody Outline**);
  - (b) Peabody's Outline of Submissions in Reply dated 15 March 2024 (**Peabody Reply**);

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Filed on behalf of	Association of Professional Engineers, Scientists, and Managers Australia – Applicant
Law firm	AEN Legal
Tel	0415991191
Email	<a href="mailto:aron.neilson@aenlegal.com.au">aron.neilson@aenlegal.com.au</a>
Address	Level 17, 9 Castlereagh Street, Sydney NSW 2000

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- (c) Outline of Submissions of Ulan Coal Mines Pty Ltd (undated) (**Ulan Outline**);
- (d) Outline of Submissions of Ulan Coal Mines Pty Ltd in Response to Material Filed by the Other Respondents (undated) (**Ulan Response**);
- (e) Outline of Submissions of Whitehaven Coal Mining Ltd dated 26 February 2024 (**Whitehaven Outline**);
- (f) Outline of Supplementary Submissions of Whitehaven Coal Mining Ltd dated 15 March 2024 (**Whitehaven Supplementary**);
- (g) Outline of Submissions of Delta Coal dated 26 February 2024 (**Delta Outline**);
- (h) Supplementary Outline of Submissions of Delta Coal dated 15 March 2024 (**Delta Supplementary**).

## **APPLICANT EVIDENCE**

- 2. The applicant relies upon the following evidence in reply:
  - (a) Reply Statement of Catherine Bolger, CSD Director, dated April 2024 (**Bolger Reply**).

## **MATTERS NOT IN ISSUE**

### **Standing/Representation s248(1)(b), s249(1)(b)(i)**

- 3. None of the SIEA Employers contests APESMA's submission at [5] and [8] – [10] of the Applicant's Outline of Submissions dated 29 January 2024 (**APESMA Outline**) that:
  - (a) it has standing to bring the application as a bargaining representative in respect of the proposed enterprise agreement (s248(1)(b));
  - (b) at least some of the employees that will be covered by the agreement are represented by an employee organisation, namely that some of the employees are represented by APESMA (s249(1)(b)(i)).

## Section 249(1B)

4. It is also not in issue that each Employer:
  - (a) employed at least 20 employees at the time that the application for the authorisation was made: s249(1B)(a);
  - (b) had not made an application for a single interest employer authorisation that had not yet been decided in relation to the employees that will be covered by the agreement: s249(1B)(b);
  - (c) had not been named in a single interest employer authorisation in relation to the SIEA Employees: s249(1B)(c).
5. There is no contention that subsection 249(1D) applies to Peabody, Ulan or Whitehaven, as none of them contend that:
  - (a) as at 15 December 2023, they were covered by any enterprise agreement in respect of the SIEA Employees that had not passed its nominal expiry date;
  - (b) they had agreed in writing with any employee organisation entitled to represent the industrial interests of one or more of the SIEA Employees to bargain for a proposed single-enterprise agreement.
6. Only Delta contends that s249(1D) has application to it, by reason of the existence of the *Delta Coal Enterprise Agreement 2022*. Delta's argument in that respect is dealt with below.

## MATTERS IN ISSUE

7. There are five matters in issue:
  - (a) Whether the operations and business activities of the employers are reasonably comparable with the other employers: s249(1)(b)(vi) (**reasonably comparable question**);
  - (b) Whether the employers have clearly identifiable common interests: s249(1)(b)(v), s249(3)(a) (**common interest question**);

- (c) Whether it is not contrary to the public interest to make the authorisation: s249(1)(b)(v), s249(3)(a) (**public interest question**);
- (d) Whether a majority of the employees who are employed by the employer at a time determined by the FWC and who will be covered by the agreement want to bargain for the agreement: s249(1B)(d) (**majority support question**);
- (e) Whether s249(1D)(a) applies in respect of Delta.

#### **APPROACH TO CONSTRUCTION OF DIVISION 10 OF PART 2-4**

- 8. The approaches the SIEA employers contend should be taken to construing the legislative criteria are addressed first.

#### **Good Faith Bargaining Obligations**

- 9. At [3], Peabody observes that the SIEA is a process that authorises a process of bargaining with more than one employer and brings into play good faith bargaining obligations. That is self-evident. Such obligations arise whenever parties are bargaining for an enterprise agreement, whether on a multiple or single employer basis. The former requires a majority of employees at each employer to want to so bargain, the latter will occur upon a majority of employees at an employer want to so bargain and a majority determination is made.
- 10. The obvious conclusion that is reached from the absence of the Commission having a residual discretion to not grant an SIEA, is that Parliament intends that upon the statutory criteria being met, including a majority of employees at each employer wishing to so bargain, there should then be good faith bargaining, in the same manner as applies at a single employer level where a majority of employees wish to bargain with their employer.

11. The making of an SIEA does not of course require any employer to make an agreement – s228(2) applies in the same way as it does in single employer enterprise bargaining.
12. These matters tell against the notion that Parliament intended that multi-employer bargaining ought to be substantially more difficult to achieve than single-employer bargaining, upon it being established that a majority of employees want to so bargain.

### **Preclusion from Single Enterprise Bargaining (Peabody Outline Part B)**

13. At [4], Peabody observes that the SIEA is a mechanism that has the effect of precluding the employer from bargaining as a single employer at the enterprise level for at least twelve months.
14. The policy behind this provision is obvious – good faith bargaining on a multi-employer basis would be impeded if it were open to one or more of the employers to seek to make a single employer enterprise agreement while the bargaining is proceeding.
15. It is not clear, however, that that consideration informs the construction of the criteria which apply to the present application. Certainly, it cannot bear upon whether the SIEA employers have “clearly identifiable common interests” or have “operations and business activities” which are reasonably comparable.
16. To the extent that such a consideration may be relevant to the public interest question (noting APESMA’s primary submission that it is important to distinguish between the public interest and the interests of the parties<sup>1</sup>), it is one the force of which must depend on the circumstances. In the present matter, those circumstances include the absence of evidence that any of the SIEA Employers:

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<sup>1</sup> APESMA Outline at [58].

- (a) had sought, prior to the application, to engage in single enterprise bargaining with the SIEA employees; or
  - (b) had any plan to engage in single enterprise bargaining with the SIEA employees in the coming months or years; or
  - (c) has ever been party to a single enterprise agreement with the relevant cohort of employees.
17. In those circumstances it cannot be said that any established practice, or expectation of single enterprise bargaining will be disturbed by the making of the SIEA.

### **Objects of the Legislation**

18. Peabody (at [5]) contends that the criteria in s249 of the FW Act must be construed in a manner that best promotes the legislative objects and purposes. The Revised Explanatory Memorandum at [1044] supports that proposition, but by reference to different objects than those that Peabody focusses on. It states:

[1044] In performing its functions or exercising its powers generally under the FW Act, the FWC is required to have regard to the objects of the FW Act and the objects of any relevant Part of the FW Act (in existing section 578(a)). For example, when considering whether it would be contrary to the public interest to approve the variation, the FWC would have regard to the objects of the FW Act (contained in section 3), such as whether making the variation will promote productivity and economic growth while being fair to working Australians, and the objects of Part 2-4 (contained in section 171), such as whether approving the variation promotes collective bargaining in good faith, particularly at the enterprise level.

19. As noted, Peabody's submission focusses instead on the objects at s3(f) and s171(a) of the FW Act. Those objects record the *emphasis on enterprise-level collective bargaining*, and *collective bargaining in good faith, particularly at the enterprise level*.
20. It is not clear how Peabody suggests those objects inform the application of criteria in s249, and in particular the questions of whether the SIEA employers

have “clearly identifiable common interests” or have “operations and business activities”.

21. The Act contains provisions designed to facilitate bargaining across multiple enterprises, and which incorporate presumptions of satisfaction of the criteria in the present circumstances. Upon the criteria being met, there is no remaining discretion to not make an SIEA. That is, the operative provisions of the Act contain no preference for single employer bargaining over multi employer bargaining, since both are available, and the latter is to occur upon the criteria being met.
22. Lest it be suggested the public interest criteria is relevant in that regard, it is worth noting again that the criteria in question (s249(3)(b)) is that making an SIEA is not *contrary* to the public interest. That does not call for the exercise of a discretion, involving a weighing of the potential benefits or efficiencies<sup>2</sup> of single-employer bargaining versus multi-employer bargaining. It requires evidence that making an SIEA would be *contrary* to the *public* interest. Notably, none of the employer submissions identify why that is so, beyond the broad assertion that the Act has a preference for single-employer bargaining (despite Part 2-4, Division 10 that expressly permit multi-employer bargaining) or assertions that, in effect, submit that an SIEA would have a negative effect on them (confusing the public interest with their own interests).
23. Peabody’s contention as to the import of the objects it identifies is, in any event, misconceived. The reference in s3(f) of the FW Act is to be understood in light of both s3(b), which refers to the statutory safety net of the NES, Modern Awards and minimum wages, and s3(c), which records a rejection of statutory individual agreements:
  - (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment

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<sup>2</sup> Cf Peabody submissions at [57].

agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

24. The object in s3(c) is significant for its embrace of collective, rather than individual bargaining as the preferred means of achieving productivity and fairness. Subsection 3(f) of the FW Act existed in its current form before the introduction of multi-employer bargaining. It places importance on reaching collective bargaining outcomes at the enterprise-level, as against conditions being set at an individual employee level or across an industry or occupation by award. Properly understood, given the subsequent presence of Division 10 of Part 2-4, and the fact that bargaining under that Division is directed towards the making of an enterprise agreement under Part 2-4 which is enforceable like any other, the reference to “enterprise level” in each of those paragraphs would not be read as being solely concerned with bargaining at the level of a single enterprise. Rather, consistent with the subsequent addition of Division 10 of Part 2-4, the object would be understood to be directed to achieving productivity and fairness through collective bargaining that achieves an enterprise agreement that would apply at the level of the relevant enterprises.<sup>3</sup>
25. While that purpose is evidenced from the legislation itself, it is confirmed by reference to the Revised Explanatory Memorandum at [1006]<sup>4</sup> :

Division 10 of Part 2-4 of the FW Act [is proposed to be amended] to remove unnecessary limits on access to single interest employer authorisations and simplify the process for obtaining them, and facilitating bargaining by: ...

26. In any event the submission made by Peabody at [6] that the SIEA mechanism “*defer[s] to existing single enterprise agreements and bargaining processes for those agreements...*” is an arid one, in the absence of evidence that if an SIEA were not made there would be any likelihood of single enterprise agreements being made instead.

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<sup>3</sup> As the Revised Explanatory Memorandum quoted earlier states at [1044].

<sup>4</sup> cf Peabody at [8].

## Common Interests

27. At Peabody Outline [7], Peabody contends that the “*clearly identifiable common interests*” of which s249(3)(a) speaks are interests *relevant to the facilitation of enterprise bargaining*. That limited construction is not compelled by the language of the sub-section. Indeed it calls for words to be read into the section that do not exist. Rather, the examples in subsection 249(3A) provide a better guide to understanding the nature of the interests contemplated by subsection 249(3)(a). The application of the common interest criteria in accordance with the plain meaning of the words operates to ensure that bargaining may be facilitated, as employers with common interests will bargain together, if a majority of relevant employees at each employer wish to bargain. No further gloss need be applied to limit words that are of broad import.
28. In *Application by the AMWU*<sup>5</sup> (the air conditioning industry case), Wright DP at [33] cited with approval the Full Bench decision in *Application by UWU, AEU and IEU*<sup>6</sup> at [33], where it was held that ‘common interests’ “*extends to any joint, shared, related or like characteristics, qualities, undertakings or concerns as between the relevant employers*”, and at [34] identified in that case four factors which are similarly uncontested in this case:
- (a) geographical location “*in that they principally operate in the State of New South Wales*”;
  - (b) regulatory regime;
  - (c) the nature of the enterprises, namely that they all operate in the same industry, are members of the same employer association, employ workers from the same labour pool, and are often subject to the same processes for tendering for work;

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<sup>5</sup> [2024] FWC 395

<sup>6</sup> [2023] FWCFB 177

- (d) the terms and conditions of employment, *“in that the employees are covered by the [Award] and fall within the same or very similar classification structures”*.
29. At Peabody Outline [7], Peabody contends that *“high level commonality, such as being located in state of New South Wales and being covered by industry wide legislation is of little or no relevance”*.
30. Whilst that submission is convenient for Peabody it is inconsistent with authority, as noted in the previous paragraph, and does not derive from the language of s249(3) and (3A) or any relevant principle. Section 249(3A) expressly contemplates that geographical location and regulatory regimes are matters that may be relevant to determining whether the employers have a common interest. Peabody’s own submission at [9] recognises the necessity of construing the legislation having regard to its text.
31. At [11] and [12], Ulan appears to submit that the meaning given to the expression *“common interests”* in *Re Application by United Workers Union & Ors*<sup>7</sup> (**Re UWU**) – *“joint, shared related or like characteristics, qualities, undertakings of concerns as between the relevant employers”*, is inapt because the Commission there was considering a supported bargaining authorisation, and the present application seeks a single interest employer authorisation, in respect of which the additional requirement as to operations and business activities applies. The Commission would not accept that submission. In *IEU v Catholic Education Western Australia Ltd*<sup>8</sup> the Full Bench considered<sup>9</sup> that given the commonality of language in the relevant parts of s243 and s249 the approach in that passage in *Re UWU* may equally be applied in considering the common interest question in an application under s249.

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<sup>7</sup> [2023] FWCFB 176.

<sup>8</sup> [2023] FWCFB 177.

<sup>9</sup> At [32].

32. The Commission would not accept submissions put by the respondents that they do not have common interests merely because, inter alia, the different sizes of their operations, including the different amounts of coal they produce. The Senate Supplementary EM said that “employers of very different sizes” and “employers of very different size, scope and scale” may have “common interests”.<sup>10</sup>
33. Ulan further submits that any inquiry about operations and activities occurs *after* establishing a common interest. Of course, each of the criteria must be satisfied (including by way of operation of one of the presumptions where applicable) for the authorisation to be made.
34. Ulan erroneously suggests (at [13]) that the Applicant seeks to rely only on the factors in s249(3A) in satisfaction of the common interest test. That submission is incorrect. At [50] of its submissions, APESMA characterised s249(3A) as providing *guidance* as to *potentially relevant matters*, and listed nine matters at [53] of its submissions. Ms Bolger’s Reply statement also identifies:
- (a) The common application of the *Energy and Utilities Administration Act 1987 (NSW) (EUA Act)*, under which New South Wales coal producers have been required to reserve a portion of their product for domestic consumption;<sup>11</sup>
  - (b) The common application of the *Protection of the Environment Operations Act 1997 (NSW) (PEOA Act)*, which subjects the SIEA employers to oversight by the Environmental Protection Authority;<sup>12</sup>
  - (c) Common membership of the SIEA Employers in the Minerals Council of New South Wales;<sup>13</sup>

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<sup>10</sup> See Senate Supplementary EM at [53], [55] and [71].

<sup>11</sup> Bolger Reply [40].

<sup>12</sup> Bolger Reply [43-45].

<sup>13</sup> Bolger Reply [51-52]

- (d) Common involvement of Peabody, Whitehaven and the Ulan parent Glencore in the Coal Mining Industry Employers Group, which engaged in the 4-yearly review of the Black Coal Mining Industry Award concerning industry terms and conditions.<sup>14</sup>

### **Presumption in 249(3AB)**

35. Peabody contends<sup>15</sup> that the presumption, ‘unless the contrary is proved’, (as to satisfaction of the clearly identifiable common interest and public interest tests in s249(3)) is displaced where there is *any* evidence to the contrary of the presumption.
36. That submission is advanced in reliance on the judgment in *McGrath; in the matter of Pan Pharmaceuticals Ltd (in liq) v Australian Naturalcare Products Pty Ltd*,<sup>16</sup> the relevant passage in which discussed the construction of the former s51A of the *Trade Practices Act 1974*. That section then provided as follows:
- (1) For the purposes of [Div 1 of Pt V of the Act], where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be misleading.
  - (2) For the purposes of the application of subsection (1) in relation to a proceeding concerning a representation made by a corporation with respect to any future matter, the corporation **shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.**”
- (emphasis added)
37. That the Court there found, consistent with the terms of the statutory test in question, that the deeming provision (as to the existence of reasonable grounds) *ceased to operate upon evidence being adduced to the contrary* is unsurprising but of

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<sup>14</sup> Bolger Reply [53-56]

<sup>15</sup> At [13].

<sup>16</sup> (2008) 165 FCR 230; Although there appears to be a typographical error in the case name in footnote 6 in the Peabody Outline where the respondent is referred to as “Aviation Naturalcare Products”.

no utility to understanding legislation that uses a different test, namely ‘unless the contrary is proved’.

38. The presumption means the employers have to do more than merely adduce evidence to the contrary – they must prove the contrary to the civil standard.

### **Operations and Business Activities are Reasonably Comparable**

39. Peabody’s submissions at [14]-[16] wrongly summarise the submissions put by APESMA as to the meaning of ‘reasonably comparable’.<sup>17</sup> APESMA has not submitted that the expression in context merely means “capable of being compared”, but also that it conveys that two or more things are of a similar type or genus, while not needing to be identical or the same. That is, that having considered their ‘operations’ and ‘business activities’ the employers are *sufficiently similar*.
40. It may be accepted that the requirement as to reasonable comparability of operations and business activities invites a focus upon matters that are broadly relevant to enterprise bargaining. For example, two agricultural employers in the same region with the same number of employees, or same turnover would not have ‘reasonably comparable’ operations and business activities if one is a winery and the other a dairy farm. However, conversely, two wineries in the same region of a broadly similar size may be ‘reasonably comparable’, even though one employs more employees than the other, or makes more profit, or uses different technology, if they employ the same types of employees, doing the same types of work, subject to the same regulatory requirements, including safety requirements.
41. What follows from the fact that the reasonable comparability as to operations and business activities are as to matters broadly relevant to enterprise

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<sup>17</sup> APESMA Outline at [18]-[24].

bargaining is that questions as to who buys the products produced are highly unlikely to have any relevance.

42. At [17] Peabody cites with mild approval a submission of the ACTU that the purpose of the “reasonable comparable” threshold is, in the context of multi-employer bargaining, to ensure sufficient commonality such that joint negotiation is both rational and practicable, but then contends that the purpose of the “reasonable comparable” threshold is not only that *“the multi employer bargaining be rational and practical, but that it would facilitate bargaining at least as equally as the alternative of single employer bargaining.”* That purpose is not explicit in the language of the subsection, nor is that purpose articulated elsewhere in the language of the Division, which is otherwise detailed and specific. Had Parliament intended such a purpose it would have said so.

**EMPLOYER SUBMISSIONS RE OPERATIONS AND BUSINESS ACTIVITIES:  
S249(1)(B)(Vi)**

43. Each of the SIEA employers invites the Commission to descend to a minute level of detail about their operations and business activities, in an attempt to identify points of difference to support the conclusion that they are not reasonably comparable.
44. Those submissions are an invitation to error because:
- (a) for reasons set out above, on a proper application of s249(1)(b)(vi) it is not necessary for the Commission to be satisfied that the SIEA employers’ operations and business activities are identical in every respect for them to be reasonably comparable; and
  - (b) in any event, an analysis of the evidence demonstrates that the differences between the operations and business activities, insofar as they could be relevant to anything relevant to bargaining, are more imaginary than real.

45. The submissions of the SIEA Employers identify the following major points of difference:
- (a) Location;
  - (b) Method of mining, with each of Peabody, Whitehaven and Ulan engaged in longwall mining and Delta engaged in bord and pillar mining;
  - (c) Expected life of mine; with Wambo identifying its [REDACTED] [REDACTED] as a matter distinguishing it from the other mines;
  - (d) Production costs and Profitability; and
  - (e) Market for product; with each of the SIEA employers identifying the fact that Delta provides its product direct to a related company for use in electricity generation with the other employers selling their coal on the export market.
46. Those matters are dealt with in turn below.

*Location*

47. Nothing about the locations of the employers gives rise to a difference which renders their operations and business activities not reasonably comparable. They all operate mines located in regional areas in NSW.
48. Although their different locations mean their products take different times to get to port (in the case of Peabody, Ulan and Whitehaven) or to the end customer (in the case of Delta) there is no evidence demonstrating how those different locations or the time it takes for a round trip to port sound in any difference in the work or responsibilities of the SIEA employees, or how they might affect the capacity of any of the employers to bargain in respect of those employee.

*Method of Mining*

49. Each of Peabody, Ulan and Whitehaven utilise the longwall method while Delta employs the bord and pillar method of mining.

50. That makes Delta’s mining method different, but the distinction is neither absolute nor significant.
51. Both bord and pillar mining and longwall mining, utilise continuous miners, in the “development” phase. <sup>18</sup> That development work often takes many months or years, and constitutes a substantial portion of the overall work in a mine, whether measured in time or metres, and is usually ongoing in a different section of the mine whilst any longwall block is being mined. In addition, mines using a longwall may also have bord and pillar sections in them<sup>19</sup>.
52. There is nothing in the evidence which demonstrates that the work of the SIEA employees is fundamentally different by reason of the fact that a longwall is employed in the extraction of the coal. To the contrary, the competencies required of a person appointed to exercise one of the statutory functions pursuant to the *Work Health and Safety (Mines and Petroleum Sites) Regulation 2022*, which include the functions of deputy and undermanager, are the same regardless of the method of mining employed.
53. Delta was operating a longwall until 2021<sup>20</sup>. At the time it ceased to do so and only used Bord and Pillar, it did not require different SIEA employees.<sup>21</sup>
54. Whether a mine is utilising a longwall at a given time or not, it is still required to have:
- (a) an undermanager on duty to supervise mining operations on any shift where there are more than 15 persons underground, secondary extraction is occurring or there are major changes being made to the ventilation system<sup>22</sup>;

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<sup>18</sup> Bolger [24].

<sup>19</sup> Bolger Reply [28]

<sup>20</sup> [10] of the First Delta Submissions, [65] of the First Cornford Statement and [8] of the Second Cornford Statement

<sup>21</sup> Bolger Reply [110]

<sup>22</sup> *Work Health and Safety (Mines and Petroleum Sites) Regulation 2022* (WHS Reg), Reg 87; see also Sch 10, cl 6.

- (b) a mining supervisor (including a nominated deputy) present in any production area when any coal extraction is occurring;<sup>23</sup>
- (c) at least one person at the surface:
  - i. readily available to be contacted by persons underground;
  - ii. with the authority and competence to activate the emergency plan required by the Regulations;
  - iii. readily available with the competence to answer alarms; and
  - iv. readily available with the competence to switch off and switch on the supply of power to the underground parts of the mine as necessary.<sup>24</sup>

55. The latter functions are those commonly filled by Control Room Operators.<sup>25</sup>

### *Life of Mine*

56. The Commission would take a cautious approach to placing any weight on the the claims of Peabody that Wambo mine only has an anticipated life until the dated nominated by Mr Roberts.<sup>26</sup>

57. First, Peabody has approval to continue operations until 2042.<sup>27</sup>

58. Second, as Ms Bolger narrates in her Reply at [15]–[23], the coal industry has a long, and notorious, history of mines being planned or expected to close, and those plans being reversed, or those expectations not being realised. That history includes the Russell Vale mine, which was originally the subject of the present application, which closed unexpectedly in January.

59. Third, and consistent with the previous point, the Wambo mine was previously partially closed in June 2020, which decision was reversed three months later.

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<sup>23</sup> WHS Reg, Reg 87.

<sup>24</sup> WHS Reg, Reg 105.

<sup>25</sup> Bolger 38(j).

<sup>26</sup> Roberts [44].

<sup>27</sup> Bolger Reply [11], CBR-2.

Further, it was projected to close in 2021, but continued operations beyond that time.<sup>28</sup>

60. Fourth, in December 2023, Peabody sent employees at the Wambo mine a letter referring to the [REDACTED]  
[REDACTED]  
[REDACTED] is not shown or referred to in any of the evidential material upon which Peabody relies in the present proceeding, and the letter to employees raises the prospect of [REDACTED]  
[REDACTED]
61. Even if Wambo in fact had [REDACTED] the evidence is too imprecise for the Commission to give it significant weight. If the mine were to continue to operate until the end of [REDACTED] for example, that period would be equal to the life of most enterprise agreements approved by the Commission. [REDACTED] in that time-frame does not render the Wambo mine's operations and activities not comparable to those of the other respondents in any way meaningfully relevant to enterprise bargaining.
62. That is particularly so where, given the cyclical nature of the coal industry, and likely impact upon the industry of the transition to renewable energy, the prospect of displacement is a central concern for all coal mining employees.

#### *Production Costs and Profitability*

63. The Commission would give little weight to the claims about the employer's productions costs, or the relative profitability of the mines.
64. Mr Roberts (from Peabody) refers<sup>30</sup> to Wood Mackenzie data as to those operating costs and margins. That is, he seeks to rely upon the estimate of

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<sup>28</sup> Bolger Reply [16].

<sup>29</sup> Bolger Reply [14], CBR-3.

<sup>30</sup> At [45] and following.

another person as to the operating costs of the entity of which he is an officer. He does so without averring that the estimate being correct, or adopting it.

65. The Wood Mackenzie data is hearsay. The author of the report is not produced for cross-examination, and neither the data upon which Wood Mackenzie has relied, nor their calculation methodology has been exposed. Indeed, Mr Roberts acknowledges his obligation to Wood Mackenzie to make a disclaimer on their behalf; that they do not accept responsibility of liability for use of the information.
66. Indeed, Mr Case says that the Wood Mackenzie data relied upon by Mr Carter is inaccurate.<sup>31</sup> Mr Case goes on to provide his own contradictory data, although even that comes with a disclaimer that the figures are referable only to *“WHC’s managed interest in the Narrabri Mine, which is a 77.5% beneficial interest..the relevant figures for Narrabri Mine on a 100% basis may differ, although I understand that any differences would be only very minor”*.<sup>32</sup>
67. Given the above, the evidence as to production costs and profitability does not provide a satisfactory basis for the Commission to make useful findings.
68. In any event, the fact that production costs differ is not itself a matter of significance. Different production costs, which may arise due to different environmental factors or different decisions made as to the scale of the operation, do not change factors relevant to bargaining. For example, that one mine has chosen to have a particularly wide longwall, which presumably increases its production costs, (but presumably also its efficiency or returns), has little or no affect on the nature of the work or the conditions of employment of the SIEA employees.

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<sup>31</sup> Case [55(a)]

<sup>32</sup> Case [55].

### *Market*

69. Although the SIEA Employers point to different customers for their product, those differences are not significant given:
- (a) all of them extract thermal coal for sale for use in the generation of electricity;
  - (b) although Delta produces coal solely for domestic consumption, each of the employers is currently required, pursuant to a direction given by the Minister under the *Energy and Utilities Administration Act 1987* (NSW) to reserve a portion of the coal they produce for sale for domestic consumption.
  - (c) so far as each of Peabody, Whitehaven and Ulan are concerned, their markets are principally in the East and South-East Asian region:
    - i. Wambo coal is sold to customers in Japan, Taiwan and Korea;<sup>33</sup>
    - ii. Ulan coal is sold to customers in China, South Korea and South-East Asia;<sup>34</sup>
    - iii. Narrabi mine coal is sold to customers in Japan, Korea and Taiwan.<sup>35</sup>
70. In any event, the fact that the mines sell thermal coal with different calorific values or quality, to different customers does not alter the nature of the work of the SIEA employees.

### **EMPLOYER SUBMISSIONS AS TO COMMON INTERESTS: s249(3)(a)**

71. The evidence of the employers confirms the submissions of APESMA that the employers have clearly identifiable common interests.

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<sup>33</sup> Roberts [51] – [53].

<sup>34</sup> Roberts Supplementary [11].

<sup>35</sup> Case [20].

72. So far as those interests are comprised of the employment of employees to perform similar functions in their operations, the following observations from the SIEA Employers' evidence is pertinent:
- (a) each of the employers has an enterprise agreement that applies to its production and engineering workforce (although Peabody makes no mention of the *Wambo Underground Enterprise Agreement 2021*<sup>36</sup> in its evidence);
  - (b) each of the mines operates 24 hours across 7 days of the week (albeit in Wambo's case, its Sunday operations are comprised of overtime shifts, workers performing maintenance and Control Room Officers);<sup>37</sup>
  - (c) each of the employers pays a bonus or incentive payment calculated by reference to a number of factors;<sup>38</sup>
  - (d) each of the employers operates strikingly similar roster arrangements, with a mix of 4on/3off and 3on/4off rosters across the mines,<sup>39</sup> albeit there is a single deputy on a 7 day on, 7 day off roster at Whitehaven.<sup>40</sup>

**EMPLOYERS SUBMISSIONS RE NOT CONTRARY TO PUBLIC INTEREST:  
s249(3)(b)**

73. Nothing in the Submissions of the SIEA Employers has identified any genuine public interest consideration that tells against the making of the authorisation.
74. The Commission would readily dismiss Ulan's claims that the volatility of the coal industry and its need for flexibility give rise to such a consideration. As set out in APESMA's Outline, the self-interest of employers do not amount to public interest concerns.

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<sup>36</sup> Bolger Reply [103].

<sup>37</sup> Carter [92], [93].

<sup>38</sup> Carter [101], Ostermann [59], Case [26(d)]; Cornford (Confidential Schedule).

<sup>39</sup> Carter [86], [94]; Ostermann [67], Case [27ff]; Cornford [86], [88].

<sup>40</sup> Case [27].

75. The Commission would also reject the submissions of Peabody and Ulan that bargaining would not be facilitated in an efficient manner<sup>41</sup>. Ms Bolger has addressed in her Reply:
- (a) the history of industry wide negotiations in the black coal mining industry<sup>42</sup>;
  - (b) the history of both Peabody and Delta negotiating enterprise agreements with several union bargaining representatives<sup>43</sup>; and
  - (c) the logistical arrangements APESMA would adopt for the bargaining<sup>44</sup>.
76. The history, and future of this industry, highlights the important public interest which will be served in making the SIEA to compel the SIEA Employers to participate in a bargaining framework in circumstances where the issues that are being faced are common.
77. The historical context is that the market for coal is highly variable and volatile, and this leads to decisions being taken at short notice about cessation of mining operations with consequent impact on SIEA Employees. The First Carter Statement [84]-[85] highlights this, where Mr Carter talks of the decision taken by Peabody in June 2020 to partially cease operations of the mine owing to its deemed economic viability, with that decision being reversed shortly thereafter because of improved economic conditions. The First Ulan Submissions at [3] also discuss what it refers to the volatility and unpredictability of the market for thermal coal.
78. Environmental factors and safety issues can also interrupt production and lead to sudden decisions about ongoing viability of mines, such as the recent

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<sup>41</sup> Peabody Submission at [57]; Ulan Submission at 31(d); Delta Submission at [49]; Whitehaven Submission at [20].

<sup>42</sup> Bolger Reply [97, 99]

<sup>43</sup> Bolger Reply [96(c)]

<sup>44</sup> Bolger Reply 96

decision of Wollongong Coal to exit following decisions by the regulator about safety matters.

79. The submission that the making of an SIEA that would allow for multi-employer bargaining with a view to common collective conditions is contrary to the public interest is inconsistent with the industrial context and the particular circumstances of the SIEA Employees, which include:
- (a) they operate in work environments which present serious risks to their health and safety;
  - (b) deputies and undermanagers perform roles in which they must ensure the safety of the workers under their control at the same time as having expectations about meeting employer production targets;
  - (c) their employers operate in a coal market which is historically volatile and cyclical, and in which coal mine workers are particularly vulnerable to retrenchment;
  - (d) the national environment in which a transition away from reliance on coal is imminent, as evidenced by the recent introduction into the Commonwealth Parliament by the Government of the *Net Zero Economy Authority Bill 2024* and the *Net Zero Economy Authority (Transitional Provisions) Bill 2024*, one of the aims of which is to support workers in emissions intensive industries (such as the SIEA Employees) to access new employment, or acquire new skills to transition away from those industries.
80. Each of those factors mean that the establishment of secure consistent working conditions for the SIEA Employees is both in the public interest and consistent with the Objects of the FW Act.

#### **EMPLOYER SUBMISSIONS RE MAJORITY SUPPORT**

81. Peabody contends at [48] to [55] that the Commission would not find this criterion satisfied. It concedes a “facial majority” but queries the genuineness

of the support. It is a submission that relies on no evidence, and is entirely speculative and for that reason would be rejected.

82. It appears that it is put because APESMA “unilaterally” conducted a survey of its membership. That, like most registered organisations, APESMA communicated with its members to determine their direction without first clearing that with the employer is not evidence that could possibly support a conclusion that the support is not genuine.
83. Peabody “disputes” the notion that a facial majority is sufficient to satisfy the Commission of majority approval, and speculates that the employees may not have had an “adequate understanding of what they were being asked to approve”.<sup>45</sup> In particular, Peabody speculates that employees may not have been told that upon an SIEA being made, employees will not be able to bargain for a single employer enterprise agreement for 12 months.
84. Peabody advances the astonishing contention that an inference can be drawn that the facial majority was not genuine because employees were referred to the information pages of the Fair Work Commission and Fair Work Ombudsman.<sup>46</sup>
85. Nothing in Peabody’s submission provides a proper basis to question as to the legitimacy of the survey.
86. First, (at the risk of repetition) the submission relies on speculation.
87. Second, as a matter of fact, the assertion that being ‘shut out’ from bargaining for a single enterprise agreement for twelve months would be critical in the present matter is entirely fanciful.
88. Peabody has not filed any evidence to establish the employees’ beliefs about the present likelihood of such an event. It has not filed any evidence that it:

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<sup>45</sup> At [50].

<sup>46</sup> Peabody Submissions at [53].

- (a) has offered to engage in single enterprise bargaining with the SIEA employees;
  - (b) had any desire to engage in single enterprise bargaining with the SIEA employees in the coming months or years; or
  - (c) has ever sought to bargain for a single enterprise agreement with the SIEA employees; or
  - (d) has ever been party to a single enterprise agreement with the relevant cohort of employees.
89. Peabody did not contest either of the following jurisdictional facts in its Response:
- (a) that the SIEA employees are not covered by an enterprise agreement that had not passed its nominal expiry date; nor
  - (b) that it has not agreed in writing with any employee organisation entitled to represent the industrial interests of one or more of the SIEA employees to bargain for the proposed single enterprise agreement that would cover the employer and the SIEA employees.
90. Given those facts, there is no basis to think that the SIEA employees would have regarded the SIEA application as having changed their existing prospects of obtaining an enterprise agreement for the worse, let alone that failure to emphasise that consequence of the SIEA application could be so significant as to be capable of vitiating the survey responses.
91. Third, even if Peabody's suspicions were established as fact, that would not provide a basis for questioning the majority. In attempting to challenge the genuineness of the majority on the basis that there has been a misrepresentation, Peabody has a high hurdle. It must show something of such import that it calls into question the authenticity and moral authority of the survey responses.<sup>47</sup> The mere fact that APESMA's communications did not

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<sup>47</sup> *CFMEU v Australian Industrial Relations Commission* (1999) 93 FCR 317 at [126], [155].

provide employees with Peabody's present, highly selective analysis of the provisions, would not be sufficient to clear that hurdle. In an enterprise bargaining context, employers may emphasize the negative economic environment without fear that arguing their corner will call the genuineness of a ballot for an enterprise agreement into question<sup>48</sup>. *A fortiori*, employee bargaining representatives may advocate a position which is at odds with the employer's view, without that advocacy undermining the genuineness of the responses.

92. The Commission has previously observed that if an employer wishes to advance a case that employees were misled or deceived by officials of a Union, evidence to support such assertion should be adduced by the employer.<sup>49</sup> Peabody has not filed any such evidence.
93. Whitehaven faintly echoes the Peabody submission on this issue at [29] to [34] and the Commission would reject that submission for the reasons set out above.
94. Ulan also addresses this question at [35] to [43] of its Submission. Although Ulan refers to authority concerning the impact of misrepresentation, it identifies no such misrepresentation and appears to invite the Commission to engage in speculation. The Commission would reject that invitation.

#### **DELTA'S ARGUMENT REGARDING SECTION 249(1D)**

95. Delta contends that s249(1D) has application to it, by reason of the existence of the *Delta Coal Enterprise Agreement 2022*. That is incorrect.
96. The subsection provides (relevantly):
  - (1D) This subsection applies to an employer if:
    - (a) the employer and the employees of the employer that will be covered by the agreement are covered by an enterprise agreement that has not passed its nominal

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<sup>48</sup> *Application by Central Queensland Services Pty Ltd* [2015] FWC 1554 at [83], per Asbury DP.

<sup>49</sup> *CFMEU v McKellar Mining* [2022] FWC 690 [166].

expiry date at the time that the FWC will make the authorisation; ...

97. That Agreement provides, at clause 1.2, Incidence and Application that:

The parties to the agreement shall be:

- Great Southern Energy Pty Ltd t/as Delta Coal ("Delta Coal"); and  
its employees engaged at Chain Valley and Mannering Collieries in classifications to which this Agreement applies; and
- those unions that have given notice to s183 of the *Fair Work Act 2009* (Cth) (the Act).

(underlining added)

98. The classifications and rates of pay are set out in Part 2.1 of the Agreement.

99. They are limited to:

- (a) Trainee Tradesperson and Trainee Operator;
- (b) Experienced Tradesperson and Experienced Operator; and
- (c) Coal Handling Plant Operator.

100. It is Mr Cornford's evidence that there are no Shift Engineers employed by Delta.<sup>50</sup>

101. Although the Agreement provides, at clause 2.3, for the payment of a "Step-Up allowance" to "employees appointed to undertake the duties of a Maintenance Leading Hand", that does not mean that the Agreement *covers* the role or position of Shift Engineer or Leading Hand. Rather, a plain reading of the coverage clause of the Agreement reveals that it covers persons in the identified classifications only (and not Leading Hands), but provides for an additional payment when they perform the duties of a role which are different to their existing classification.

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<sup>50</sup> Cornford [18].



**INGMAR TAYLOR SC**  
Greenway Chambers

**LISA DOUST**  
6 St James Hall Chambers

11 April 2024