

## FAIR WORK COMMISSION

### **Four yearly review of modern awards – Transitional provisions – Accident pay provisions AM2014/190**

#### **Submission on behalf of the Coal Mining Industry Employer Group**

1. This submission is made on behalf of the Coal Mining Industry Employer Group (**CMIEG**) in accordance with the directions issued on 13 July 2016.
2. The CMIEG confirms that it requests an opportunity to be heard on the question whether or not the 52 week limitation period to accident pay entitlements should apply to the Black Coal Mining Industry Award 2010 (**BCMI Award**), consistent with the decision of the Full Bench of the Commission delivered on 18 August 2015 ([\[2015\] FWCFB 3523](#)).
3. This submissions deals only with the "threshold" question, as described, as to whether the CMIEG should be permitted by the Commission to be heard on this question.

#### **Decision of the Full Bench delivered on 18 August 2015**

4. The decision of the Full Bench of the Commission, for the purposes of its decision delivered on 18 August 2015, deals with applications made by the ACTU and several unions to vary modern awards to include provisions for accident pay. Those applications related to 37 specific awards.<sup>1</sup> Critically, the Full Bench did not have before it any application concerning the BCMI Award.
5. In its decision of 18 August 2015, the Full Bench stated:

[211] In general we consider that the safety net accident pay entitlement should only apply for a period of 26 weeks from the time of incapacity for work due to injury or illness. This is the period of accident pay entitlement under many of the pre-reform instruments to which we have been referred. We consider that this is the appropriate period to be included as part of the minimum safety net in the awards unless there are special circumstances relating to particular awards which warrant a departure from this standard. Such an entitlement will provide support for low paid and award reliant employees at least in the initial period of absence from work due to injury. It will also limit the cost impact of providing a generally

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<sup>1</sup> See [\[2015\] FWCFB 3523](#) at [1]-[7].

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applicable accident pay entitlement under the relevant awards and provide scope for collective bargaining to improve upon the minimum entitlement.

[212] We recognise that there are special circumstances relating to the awards in the first category listed earlier in this decision. The pre-reform instruments in these industries provided a generally applicable accident pay entitlement of 39, 52 or 104 weeks. The accident pay provisions in those awards provided what might be considered to be a clear national standard for the particular industries as described in the *Award Modernisation Decision 2008*. For similar reasons as were given in relation to the *Black Coal Mining Industry Award 2010* we have decided that the previous accident pay entitlements in these award areas should be maintained as part of the minimum safety net. However, having regard to the evidence and submissions in the present proceedings, and given the purpose of modern awards in setting minimum terms and conditions for employees in particular industries or occupations consistent with the statutory objectives, we do not consider that the accident pay entitlement in any of the awards should exceed 52 weeks. We consider that there is a difference in inserting such provisions in awards by arbitral determination at this time and in the context of the present proceedings and a decision to maintain provisions which were still in operation in an award. We do not consider that it is necessary for the minimum award safety net to provide for a period beyond 52 weeks. In so deciding, we note that the evidence presented suggests that there is considerable scope in some of the industries for the safety net entitlement to be supplemented through collective bargaining.

(emphasis added)

6. The CMIEG and other parties interested in the BCMI Award have not had an opportunity to be heard by the Full Bench as to:
  - (a) whether or not the 52 week limitation period should apply to the BCMI Award; and
  - (b) whether there is a proper distinction to be drawn, in the particular circumstances of the cases before the Full Bench, between inserting accident pay provisions in awards by arbitral determination and the Full Bench's decision to "maintain" the (then) transitional accident pay clause in the BCMI Award by the deletion of the sunset provision.
7. The circumstance of the CMIEG not having had an opportunity to be heard by the Full Bench on these matters arises simply because the Full Bench determined the CFMEU's application for the removal of the sunset provision in the accident pay clause (clause 18.8) of the BCMI Award in its decision of 31 October 2014 ([\[2014\] FWCFB 7767](#)), in advance of, and therefore separately from, its consideration of the applications by the ACTU and several unions in respect of accident pay provisions in other modern awards which led to the 18 August 2015 decision of the Full Bench.

#### **Scope of the proceedings leading to the decision of 31 October 2014**

8. The proceedings leading to the decision of 31 October 2014 of the Full Bench, were in respect of the ACTU's application to delete the sunset provisions in the transitional

accident pay clauses of 105 modern awards (including the BCMI Award),<sup>2</sup> and the particular application of the CFMEU (as supported by APESMA) to delete the sunset provision from the accident pay clause in the BCMI Award.

9. This focus of the proceedings is clear from the applications of the ACTU and CFMEU, the submissions filed by the ACTU, CFMEU, APESMA, AiGroup and CMIEG, and from the decisions of the Commission dealing with the applications.
10. In those proceedings, the CFMEU made submissions in support of the removal of the sunset provisions in accident pay clauses of modern awards using the BCMI Award as a case study.<sup>3</sup> While it is accepted that the submissions and evidence filed by the CFMEU provided a comprehensive chronological history of the accident pay provisions in predecessors awards to the BCMI Award, and also in relation to the award modernisation process, the submissions were necessarily focussed upon the removal of the sunset provision from the accident pay clause in the BCMI Award.
11. The submissions were not focussed upon other aspects of accident pay including matters such as quantum, time limits and the relationship with leave entitlements in the BCMI Award.<sup>4</sup> Rather, the submissions were appropriately focussed upon the removal of the sunset provision. This focus was confirmed in the oral submissions made for the CFMEU at the hearing of the matter.<sup>5</sup>
12. This scope of the proceedings reflected how the CFMEU had proceeded, from the outset, to deal with the review of transitional provisions in modern awards. In submissions filed by the CFMEU on 1 July 2014<sup>6</sup> it submitted:
  5. The proposal to delete the sunset provision is the only issue to be considered with respect to accident pay as part of the common issues process in the 2014 modern award review.
  6. 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.
13. This submission of the CFMEU properly reflected the Statement of President Ross delivered on 4 June 2014,<sup>7</sup> the earlier Statement of his Honour delivered on 17 March 2014<sup>8</sup> and the Background Paper published by the Commission on 2 June 2014,<sup>9</sup> each of

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<sup>2</sup> See [ACTU submissions](#), 1 July 2014, ACTU Attachment A and ACTU Attachment B (p 6); and [ACTU submissions](#), 1 August 2014 at [5].

<sup>3</sup> [CFMEU submissions](#), 1 August 2014 (at [3]. [6])

<sup>4</sup> Cf [\[2015\] FWCFB 3523](#) at [152]; see also [ACTU Submissions](#), 1 August 2015 at [79]-[81]; compare also [CFMEU/APESMA submissions](#), 17 July 2016 at [7].

<sup>5</sup> [Transcript of AM2014/190 on 29 October 2014](#) (Boulton J, Kovacic DP and Bull C) at PN782-786ff, PN893-895 (Mr Bukarica for the CFMEU).

<sup>6</sup> [CFMEU submissions](#), 1 July 2014.

<sup>7</sup> [\[2014\] FWC 3704](#).

<sup>8</sup> [\[2014\] FWC 170](#).

which provided that the relevant "common issue" to be dealt with by the Full Bench was the *"transitional/sunset provisions relating to accident pay, redundancy and district allowances."*<sup>10</sup>

14. The Background Paper published on 2 June 2014 noted that the CFMEU had earlier made submissions about the approach that the Commission should adopt to the common issue of sunset provisions in accident pay clauses of modern awards.<sup>11</sup> Those submissions were made in response to an Issues Paper published by the Commission on 24 January 2014.<sup>12</sup> In those submissions, the CFMEU stated (at [13]):

13. In proposing this course, the CFMEU notes that no party is precluded from addressing the substance of accident pay provisions in modern awards (including the Black Coal Industry Award 2010) in the normal way during the 4 yearly review. However, given the common nature of the sunset provision and the specific time constraint that attaches to it, a special approach to the matter is justified and necessary.

These submissions were supported by APESMA,<sup>13</sup> which submissions were similarly limited to dealing with the sunset provisions of the accident pay clause of the BCMI Award.

15. Both the Background Paper and the CFMEU submissions also referred to an earlier application made by the CFMEU to vary the BCMI Award to delete the sunset provision (clause 18.8) filed in or about October 2013.<sup>14</sup> That application dealt alone with the deletion of the sunset provision.
16. Further, it is noted that it had been earlier stated in an Issues Paper issued by President Ross on 24 February 2014 that *"the Commission should deal with the issue of the appropriate accident pay provisions to replace the present transitional provisions as a 'common issue' in the review."*<sup>15</sup> In a conference conducted by Senior Deputy President Hamberger on 10 February 2014 concerning the CFMEU's application of October 2013, the CFMEU submitted that the common issue had been too broadly described in the Issues Paper, and that the CFMEU considered the deletion of the sunset provision alone was the common issue.<sup>16</sup> The later Statement and Directions issued by President Ross on 17 March

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<sup>9</sup> [Background Paper: 4 Yearly Review of modern awards—Transitional/sunset provisions relating to accident pay, redundancy and district allowances.](#)

<sup>10</sup> [\[2014\] FWC 1790](#) at [8].

<sup>11</sup> [CFMEU submissions](#), 31 January 2014 (but dated 3 February 2014).

<sup>12</sup> [Issues Paper: 4 Yearly Review of Modern Award, 24 January 2014.](#)

<sup>13</sup> [APESMA submissions](#), 4 February 2014 (but dated 3 February 2014).

<sup>14</sup> [Application to Vary a Modern Award](#), filed by the CFMEU on 2 October 2013 (but dated 26 September 2013) (AM2013/20).

<sup>15</sup> [Issues Paper: 4 Yearly Review of Modern Awards – Common Issues](#), 24 February 2014 at [14]-[15]; see also [CMIEG submissions](#), 30 January 2014 at [7]; and the Statement [\[2014\] FWCFB 916](#), 6 February 2014 at [6(iv)].

<sup>16</sup> [Transcript of conference on 10 February 2014](#) before Senior Deputy President Hamberger, AM2013/20 see PN20-26, 48 (Mr Bukarica for the CFMEU).

2014 correspondingly, then, more narrowly described the "common issue" of sunset provisions in the accident pay clauses being dealt with.<sup>17</sup>

17. In the proceedings leading to the decision of the Full Bench on 31 October 2014, the submissions of the CFMEU were supported by APESMA.<sup>18</sup> The submissions of APESMA were correspondingly focussed upon the removal of the sunset provision in the accident pay clause of the BCMI Award.
18. In the proceedings, the AiGroup made detailed and substantive submissions as to why the transitional accident pay provisions should be deleted, in their entirety, from relevant modern awards.<sup>19</sup> Those submissions were supported by the CMIEG<sup>20</sup> in particular that the entirety of the accident pay clause (clause 18) should be deleted from the BCMI Award.
19. In accordance with the scope of the ACTU and CFMEU's applications, the Full Bench proceeded to consider whether the sunset provisions in accident pay clauses should be removed from relevant modern awards. The Full Bench rejected the ACTU's application. However, the Full Bench held in respect of the BCMI Award:

[7] In relation to the CFMEU application regarding the Black Coal Mining Industry Award 2010, we have decided to delete clause 18.8 of that Award with the effect from 31 December 2014. In this regard, we consider that the accident pay provision in the Award provides a clear national standard for the particular industry as described in the Award Modernisation Decision 2008.

The decision was clearly limited to dealing with the deletion of the sunset provision in clause 18.8.

20. The Full Bench went on to publish separate reasons for its 31 October 2014 decision on 11 February 2015 ([\[2015\] FWCFB 644](#)). The relevant part of the decision in respect of the BCMI Award is set out at [65] to [72]. The scope of the application being dealt with was clearly stated by the Full Bench as an application for "*the deletion of the sunset provision (clause 18.8) from the accident pay clause of the Black Coal Award*" (at [65]). The Full Bench went on to confirm its decision to "*remove the sunset provision in clause 18 of the Black Coal Award*" (at [72]). The Full Bench subsequently issued a determination giving effect to its decision in relation to the BCMI Award by deleting clause 18.8.<sup>21</sup>
21. There is nothing in these decisions of the Full Bench indicating that it had considered the quantum of accident pay in the BCMI Award.<sup>22</sup> This is unsurprising given the particular

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<sup>17</sup> [\[2014\] FWC 1790](#) at [8].

<sup>18</sup> [APESMA submissions](#), 5 September 2014 (but dated 29 August 2014); see also the substantially similar [APESMA submissions](#), 19 September 2014.

<sup>19</sup> [Ai Group submissions](#), 5 September 2014.

<sup>20</sup> [CMIEG submissions](#), 5 September 2014.

<sup>21</sup> [PR559442](#), 19 December 2014.

<sup>22</sup> Cf [\[2015\] FWCFB 3523](#) at [152]; see also [ACTU Submissions](#), 1 August 2015 at [79]-[81].

focus of the application of the CFMEU, and the submissions of each of the interested parties, on the question of whether the sunset provision should be deleted from the accident pay clause, and not upon the other aspects of the accident pay.

### **Scope of the proceedings leading to the decision of 18 August 2015**

22. The scope of the proceedings leading to the decision of the Full Bench on 31 October 2014, is to be contrasted with the scope of the proceedings leading to the decision of the same Full Bench delivered on 18 August 2015 ([\[2015\] FWCFB 3523](#)). In the latter proceedings, the Full Bench gave its decision in relation to applications by several unions and the ACTU to vary 37 modern awards<sup>23</sup> to include provisions for accident pay.
23. As is apparent from the decision of the Full Bench of 18 August 2015 (at [8]-[13]), the applications arose from the decision of the Full Bench on 31 October 2014, and the subsequent decision delivered on 11 February 2015,<sup>24</sup> not to grant the ACTU's application to delete sunset provisions in accident pay clauses in various modern awards and, correspondingly, to grant the AiGroup's applications to delete the transitional accident pay clauses in those particular modern awards.
24. As previously noted, none of the applications before the Full Bench leading to its decision of 18 August 2015, dealt with the BCMI Award. The CMIEG, accordingly, did not participate in those proceedings, as it had no relevant interest in respect of any awards being considered in the proceedings.<sup>25</sup>
25. For the purposes of the decision of the Full Bench on 18 August 2015, the Full Bench determined a maximum period for the operation of accident pay provisions, including in awards which, like the BCMI Award, already had well established industry standard accident pay provisions applying for in excess of 52 weeks.
26. It is in light of that determination that the CMIEG has made its present request.

### **The request by the CMIEG should be permitted**

27. The CFMEU and APESMA has submitted that the CMIEG ought not be heard by the Full Bench on the relevant question which is now put. This is because:
  - (a) the Full Bench has dealt with the CFMEU's application concerning the accident pay clause in the BCMI Award, the Commission is therefore effectively *functus officio*, and there is no proper basis to "re-open" the matter already determined; or
  - (b) if the Commission is not *functus officio*, the CMIEG's request should be refused on discretionary grounds.

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<sup>23</sup> See [\[2015\] FWCFB 3523](#) at [3]-[4].

<sup>24</sup> [\[2015\] FWCFB 644](#) (see [73]-[76]).

<sup>25</sup> Cf [CFMEU/APESMA submissions](#), 17 July 2016 at [27].

The two limbs of the submission may be dealt with together.

28. *First*, it may be accepted that the CFMEU's application to delete the sunset provision of the accident pay clause in the BCMI Award has been determined by the Full Bench.<sup>26</sup> That does not, however, mean the Commission is *functus officio* in respect of the CMIEG's present request. The CFMEU's application was one limited to the particular matter of deleting the sunset provision.
29. The submissions of the CFMEU/APESMA conflate the Full Bench having dealt with the "merits" of deleting the sunset provision of the accident pay clause in the BCMI Award, with the question, which is now pressed, concerning the quantum and time limits of accident pay.<sup>27</sup> There was nothing in the application of the CFMEU, the submissions of the interested parties, or the decisions of the Full Bench on 31 October 2014 and 11 February 2015, indicating that the quantum and time limits of accident pay in the BCMI Award were considered.
30. The AiGroup<sup>28</sup> made submissions, supported by the CMIEG,<sup>29</sup> dealing with the "merits" of the CFMEU's application to delete the sunset provision in the accident pay clause of the BCMI Award. That is the matter that was dealt with by the Full Bench. The submissions of the AiGroup and CMIEG, and the decision of the Full Bench, do not deal with the merits of the quantum and time limits of accident pay in the BCMI Award because that was not the CFMEU's application.<sup>30</sup>
31. *Second*, the principle of *functus officio* is not to be strictly applied to the Commission,<sup>31</sup> and must be considered in the particular statutory context. It is clear that the Commission has power to correct, vary or revoke an earlier decision (sections 602 and 603, *Fair Work Act 2009* (Cth) (**FW Act**)). To the extent that the Commission considers that it will be necessary, in dealing with the CMIEG request, to "re-open" its decisions of 31 October 2014 and 11 February 2015, it has a power to do so. The CMIEG does not consider, however, that its request will involve any "re-opening" of those decisions, for the first (above) and third (below) reasons set out.
32. *Third*, even if it were accepted that the Commission was *functus officio* in respect of the CFMEU's application to remove the sunset provision, the CMIEG's request does not seek to re-open the decisions of the Full Bench of 31 October 2014 and 11 February 2015 dealing

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<sup>26</sup> [CFMEU/APESMA submissions](#), 17 July 2016 at [22].

<sup>27</sup> [CFMEU/APESMA submissions](#), 17 July 2016 at [7], [8], [9], [25]

<sup>28</sup> [Ai Group submissions](#), 5 September 2014.

<sup>29</sup> [CMIEG submissions](#), 5 September 2014.

<sup>30</sup> Cf [CFMEU/APESMA submissions](#), 17 July 2016 at [9]-[12].

<sup>31</sup> *Spotless Services Australia Ltd v M Wookey and T V Topham* (unreported, PR929400, AIRC, 7 April 2003, Marsh SDP, Blain DP and Deegan C), [2003] AIRC 364; *Victoria Radio Network Pty Ltd v Bruce Eva* (unreported, PR980376, AIRC, 31 January 2008, Watson VP, Cartwright SDP and Foggo C), [2008] AIRCFB 26.

with that application. Those decisions do not deal with the quantum and time limits of accident pay in the BCMI Award. There is no need to "re-open" them.

33. *Fourth*, the Commission may, in any event, depart from earlier decisions where there are cogent reasons to do so.<sup>32</sup> To the extent that the Commission considers, contrary to the submission of the CMIEG, that it is *has* considered the quantum of accident pay in the BCMI Award in its decisions of 31 October 2014 and 11 February 2015, it is clearly open to the Commission, and reasonable, if not necessary, for it to revisit that matter having regard to its later decision of 18 August 2015 setting a general standard limiting period for accident pay.
34. *Fifth*, the four yearly review of awards is, of course, ongoing. The Full Bench has also made clear in the *Preliminary Jurisdictional Issues* decision<sup>33</sup> that the four early review of modern awards may result in variations to modern awards. The Commission is empowered to make any variations under section 156(2) of the FW Act. As has transpired in proceedings AM2014/190, and as appears to be the practice across other parts of the four yearly review process, variations may be sought by interested parties and dealt with by the Commission. That was the step taken by the ACTU and several unions in the part of the proceedings leading to the decision of 18 August 2015. Further, the apparent practice that has been adopted is that a variation may be sought by an interested party by way of submissions or correspondence, and not necessarily by formal application.<sup>34</sup> The CMIEG's correspondence to President Ross dated 22 September 2015<sup>35</sup> amounts to an extant application.<sup>36</sup> If, however, the Commission prefers for the CMIEG's application to be regularised, that can be addressed.
35. *Sixth*, the CFMEU and APESMA's submissions in respect of discretionary grounds for refusal of the CMIEG's request, reflect similar submissions put against the ACTU and the applications of several unions resulting in the decision of 18 August 2015.<sup>37</sup> That argument was rejected by the Full Bench in its decision of 18 August 2015, and by parity of reasoning, should be rejected here.
36. *Lastly*, the primary difference between the BCMI Award and other modern awards in respect of which accident pay provisions have been considered by the Full Bench, is in the timing of that consideration. That is, with respect, not a sufficient reason by itself to have different outcomes. Nor is it a sufficient reason to deny the opportunity to the CMIEG, and

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<sup>32</sup> *Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [25]-[27]; *Cetin v Ripon Pty Ltd t/as Parkview Hotel* (2003) 127 IR 205 at[48]; *Construction, Forestry, Mining and Energy Union v Queensland Bulk Handling Pty Ltd* [2012] FWA 7551.

<sup>33</sup> [2014] FWCFB 1788 at [60]

<sup>34</sup> The Commission has, in any event, powers to waive any formal requirements in respect of applications and how they may be dealt with: section 586(b), 589, 591.

<sup>35</sup> [Letter from CMIEG to President Ross](#), 22 September 2015.

<sup>36</sup> Cf [CFMEU/APESMA submissions](#), 17 July 2016 at [22].

<sup>37</sup> See [\[2015\] FWCFB 3523](#) at [148]-[154].



any other interested parties, to now be heard on the matter. There is a proper question to be considered, namely, as a matter of merit, whether or not the 52 week limitation period on accident pay should apply to the BCMI Award.

37. Had the application in respect of the BCMI Award been heard at the same time as other awards, the issue of the maximum period of operation of accident pay provisions would have been able to be duly considered by the parties and the Commission. It was the submission of the CMIEG that the BCMI Award accident pay provisions should be dealt with as a common issue.<sup>38</sup>
38. It is both permissible and appropriate that there should now be a review of the maximum period of operation of the accident pay provision in the BCMI Award.
39. The CMIEG respectfully presses its request for an opportunity to be heard on that matter.

**Ashurst Australia  
Solicitors for the CMIEG**

4 August 2016

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<sup>38</sup> [CMIEG submissions](#), 30 January 2014 at [7].