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Sent: Tuesday, 14 February 2017 3:55 PM
To: Chambers - Hatcher VP
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Subject: AM2014/67 – Black Coal Mining Industry Award – redundancy pay

Dear Associate

AM2014/67 – 4 yearly review of modern awards – Black Coal Mining Industry Award – redundancy pay

We **attach**, by way of filing, written submissions of the Coal Mining Industry Employer Group. These submissions are made in accordance with the invitation of the Commission by email dated 13 February 2017.

We have copied this email to each of the representatives for the CFMEU, APESMA, AMWU and AiGroup.

Yours faithfully

Adrian Morris
Senior Consultant

Trent Sebbens
Counsel

IN THE FAIR WORK COMMISSION

MATTER NO: **AM2014/67**

TITLE OF MATTER: **FOUR YEARLY REVIEW OF MODERN AWARDS – BLACK COAL MINING INDUSTRY AWARD 2010 – CLAUSE 14 – REDUNDANCY**

SUBMISSIONS OF THE COAL MINING INDUSTRY EMPLOYER GROUP (CMIEG)

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1. These submissions are made in accordance with the invitation of the Full Bench of the Fair Work Commission (**Commission**) by email dated 13 February 2017, in respect to the effective date of variation to clause 14 of the *Black Coal Mining Industry Award* 2010 (**Award**).

2. The Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) and the Construction, Forestry, Mining and Energy Union (**CFMEU**) (the **union parties**) have sought an indulgence from the Commission that the determination in this matter be deferred for 30 days so that the union parties may make an application to the Federal Court of Australia for judicial review of the Commission's decision dated 27 January 2017 (PR589761).

3. The request is made by the union parties in the absence of any formal application for such relief having been made to the Commission or the Federal Court.

4. The CMIEG respectfully submits that the Commission ought not grant the indulgence having regard to the following:

   (a) No formal application has been made in either the Commission or Federal Court. The union parties have had since 27 January 2017 (over 14 days) to make such an application, if they wished to do so.

   (b) The Commission is clearly satisfied of and has exercised its jurisdiction, having determined the matter save for issuing a formal determination. It has published a decision in which it has clearly formed such a view that it has such jurisdiction.

   (c) No order has been made by a court exercising supervisory jurisdiction which would prevent the Commission from discharging its statutory functions to determine a matter regularly brought before it: *Abdalla v Viewdaze Pty Ltd*

[2003] AIRC 504; (2003) 123 IR 215 at 235 [51] per Lawler VP, Hamilton DP and Bacon C.

(d) The request of the union parties amounts to an application for a temporary stay, however described or styled. The Commission ought to be satisfied of the usual tests before granting such a stay. The power to grant a stay is discretionary and such intervention should not take place lightly: see, by parity of reasoning, *Newcrest Mining v IRC of New South Wales and CFMEU* [2005] NSWCA 85; (2005) 139 IR 72 at 74–75 [5] per Bryson JA. In such circumstances, the usual test is not merely one of considering the balance of convenience, but that exceptional circumstances must exist for a stay to be granted. The union parties have not made out such grounds.

(e) It is difficult to see how the making of an application to the Federal Court would, in any event, necessarily lead to a stay of proceedings in the Commission. The making of such an application would not, of course, automatically result in such a stay: see *Collins v Edelman Publication Relations Worldwide Pty Ltd* [2015] NSWIRComm 205 at [6] per Schmidt J.

(f) Critically, the union parties have not demonstrated, and are unable to demonstrate, that there would be any prejudice if the Commission continued to exercise its jurisdiction in this matter, prior to an application being made by the union parties to the Federal Court, or such an application being determined. Any subsequent conclusion by the Court that the Commission had exceeded its jurisdiction in varying the award, if such a conclusion were reached, would permit the Court to grant prerogative relief which would constitute a fully effective remedy.

5. The CMIEG respectfully submits that the indulgence sought by the union parties ought not be granted, and the Commission should proceed to issue a determination in accordance with its 27 January 2017 decision to vary the award effective from that date.

Ashurst Australia

Solicitors for the CMIEG

14 February 2017