

IN THE FAIR WORK COMMISSION

MATTER NO: AM2014/190

TITLE OF MATTER: FOUR YEARLY REVIEW OF MODERN AWARDS – TRANSITIONAL PROVISIONS – ACCIDENT PAY PROVISIONS

1. These submissions are filed for the Coal Mining Industry Employer Group (CMIEG) in accordance with the Statement issued by President Ross on 18 April 2017 ([2017] FWC 2189) (**Statement**) in matter AM2015/1 and others. These submissions are made in respect of matter AM2014/190 and the application of the CMIEG concerning the accident pay clause in the Black Coal Mining Industry Award 2010 (**BCMI Award**). That matter is listed at Item 3 of Attachment A to the Statement.
2. The CMIEG confirms that it continues to pursue its claim in matter AM2014/190.
3. The CMIEG submits that in the circumstances of the resignation of the presiding member of the Full Bench, Vice President Watson, that the President should either:
 - (a) direct that another member of the Commission form part of the Full Bench dealing with matter AM2014/190, pursuant to section 622(3) of the *Fair Work Act 2009* (Cth) (**FW Act**); or
 - (b) alternatively, constitute a new Full Bench and allocate the matter to it pursuant to sections 568 and 618 of the FW Act.
4. The CMIEG submits that whichever, in the President's view, is the most appropriate and efficient course, then that course should be adopted by the President.
5. In this respect, it is noted that the President issued a Statement on 28 April 2017 ([2017] FWC 2347) in matter AM2015/1, providing a provisional view that he should refer questions of law to the Federal Court pursuant to section 608 concerning that matter. The CMIEG submits that in the present proceedings, the President should not await developments in respect of matter AM2015/1 in either the Commission or the Federal Court, concerning the constitution of the Full Bench dealing with that matter. In this regard, it is noted that a question may arise whether the Vice President has become "unavailable" under section 622. Accordingly, to the extent that the President considers that there may be any doubt about the application to, or operation of, section 622 in

respect of matter AM2014/190, the CMIEG submits that it is unnecessary for that question to be determined in the present proceedings, and the President ought to proceed to constitute a new Full Bench and allocate the matter to it pursuant to sections 582 and 618 of the FW Act.

Status of the application of the CMIEG in matter AM2014/190

6. In matter AM2014/190, a decision was issued by the Full Bench on 17 October 2016 ([2016] FWCFB 6841) determining that the Commission has jurisdiction to deal with the application of the CMIEG (at [25]).
7. Subsequent to that decision, the Full Bench listed the application for hearing on 24 to 28 July 2017, and issued a Notice of Listing on 31 October 2016 for those hearing dates. Directions were issued by Vice President Watson on 31 October 2016 for the filing of submissions and evidence, which were amended by the Vice President on 30 January 2017. The parties have complied with the amended directions to date.
8. Neither Vice President Watson, nor the other members of the Full Bench (Deputy Presidents Kovacic and Bull) have otherwise dealt with the substantive application of the CMIEG in matter AM2014/190. The circumstances in the present proceedings may be distinguished from those in matter AM2015/1.

Conclusion

9. In all the circumstances, the CMIEG submits that it is appropriate for the President to, either, direct another member of the Commission to form part of the Full Bench pursuant to section 622, or to constitute a new Full Bench pursuant to sections 582 and 618, as the President considers is appropriate and most efficient in all the circumstances.
10. If the latter course is adopted, the CMIEG submits that it would be most efficient for Deputy Presidents Kovacic and Bull to be members of the Full Bench constituted, given their availability on the listed hearing dates, their involvement so far in matter AM2014/190 and to satisfy the requirements of section 618(1) concerning the constitution of the Full Bench.
11. The CMIEG respectfully requests that the President make appropriate directions as soon as practicable, in order to provide certainty to the parties and having regard to the directions already issued for filing evidence and submissions, and the dates for hearing having been reserved.

12. The CMIEG submits that, to the extent possible, the hearing dates listed for 24 to 28 July 2017 be preserved, or if that becomes not possible, that the matter be called on for a directions hearing to deal with the programming of the matter having regard to the availabilities of the parties.

Yaseen Shariff
Counsel for the CMIEG

Ashurst Australia
Solicitors for the CMIEG

5 May 2017