MINING & ENERGY UNION

29 November 2024

Review Secretariat
Department of Employment and
Workplace Relations

By Email: SJBPReview@dewr.gov.au

Dear Sir/Madam,

Re: Secure Jobs, Better Pay Review

Please find attached the Submissions of the Mining and Energy Union in relation to the Secure Jobs, Better Pay Review.

Please contact us if you require further information.

Kind regards,

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Mining and Energy Union

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Submission: Secure Jobs, Better Pay Review

Introduction

1. The Mining and Energy Union (**MEU**) is the principal trade union representing workers in the coal mining industry. We also have significant membership working in power stations, coal ports, amongst locomotive drivers in the Pilbara, and in metalliferous mining. In total, we have approximately 24,693 members who work in the mining and energy industries across Australia.

2. Our members work in regional Australia – including in the coal mines in the Hunter Valley, Central Queensland, the Illawarra, Lithgow & Mudgee in Western New South Wales, Collie in the South West of Western Australia, and Tasmania; the metalliferous mines in the Pilbara and in the Far West of New South Wales; and the power stations in the Latrobe Valley, Hunter Valley and around Lake Macquarie in New South Wales, and in Central Queensland.

3. Our members make an invaluable contribution to our national economic prosperity. The mining industry in Australia contributes around 13.4% of our total GDP, and accounts for around two-thirds of Australia's total exports.[1] Our members working in the energy industries continue to power the nation.

4. That contribution and hard work by MEU members in the incredibly profitable industries in which our members work warrants fairly paid, secure and safe jobs.

5. The MEU welcomes the opportunity to make a submission to the Secure Jobs, Better Pay Review (**SJBP Review**), which is tasked with reviewing the operation of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**) and of the amendments made by Part 16A of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023.*

[1] Department of Industry, Science and Resources, Commonwealth of Australia Resources and Energy Quarterly September 2024, page 5.

6. Our submission is focused on four significant amendments made to the *Fair Work Act 2009* (**FW Act**) by the SJBP Act which have clearly benefitted MEU members. These amendments concern the bargaining system and flexible work arrangements.

7. The amendments made to what was a broken bargaining system have restored authenticity and abolished a series of 'work-arounds' deployed by employers to avoid engaging in genuine enterprise bargaining with their workforce. The bargaining related amendments have been instrumental in MEU members achieving fair wage increases. Those fair wage increases have been especially important given the cost-of-living challenges experienced over the past few years.

8. The amendments made concerning flexible work arrangements have been incredibly important for those MEU members that need some flexibility at work, such as those with school aged children or younger, or with a disability. The MEU has assisted members implementing a flexible work arrangement including a reduction to their hours of work or a change to their roster. These flexible work arrangements have allowed these MEU members to remain in the workforce and meet their family responsibilities or work within the limits of their capacity. None of those flexible work arrangements would have been achieved without the flexible work amendments made by the SJBP Act. Such amendments have clearly promoted gender equity and inclusion.

9. It is evident that the amendments made to the bargaining system and flexible work, which will be discussed in greater detail below, are appropriate and effective.

A. Small cohort agreements

10. Up until the operation of the SJBP Act, a routine 'work-around' deployed by employers in the coal mining industry was to seek approval of an enterprise agreement made with a small number of carefully selected employees without any real bargaining. The entire process from the initiation of bargaining until the employees voting on the agreement was typically conducted in or around the minimum 21-day statutory time period. The terms of such an enterprise

agreement were typically the Award plus a wage rate barely above the Award rate.[2] This was for the sole purpose of satisfying the BOOT. The fact that the enterprise agreement was effectively the Award terms plus a miniscule above Award wage rate was irrelevant to the small number of carefully selected employees that voted on such an enterprise agreement. Those employees typically had 'no stake' in the enterprise agreement - they were provided with guaranteed wages and conditions in excess of the wages and conditions in the enterprise agreement that they had purportedly bargained.

11. An illustration of the usual features of a small cohort agreement is found in the October 2016 decision of a Full Bench of the Fair Work Commission (**FWC**), which concerned an appeal arising from the approval of the Sparta Mining Services Pty Ltd Enterprise Agreement 2016.[3] The Full Bench's summary of the evidence before it is reproduced below:

> [**28**] In this case the evidence before the Commission demonstrated that:
>
> - *the very similarly-named Spartan Mining Services Pty Ltd (Spartan) was a pre-existing labour hire company which had operated in the coal mining industry for many years and had a number of employees;*
>
> - *Sparta and Spartan were associated corporate entities, with common management team, common premises and common addresses;*
>
> - *Mr Jansen was Human Resource Manager for both Spartan and Sparta, and from his perspective apart from the fact they were different legal entities there was 'not a lot' of difference between them;*

[2] See, for example, *Construction, Forestry, Mining and Energy Union* v *SESLS Industrial Pty Ltd* [2017] FWCFB 3659 at [48].
[3] [2016] FWCFB 7057.

- *the three employees of Sparta who voted upon the Agreement were previously employed by Spartan, and were employed by Sparta for the sole purpose of negotiating the enterprise agreement;*

- *the three employees were selected (in about November/December 2015) on the basis that they had the 'intellectual ability' to go through the enterprise agreement process;*

- *two of the three employees were supervisors of persons employed by Spartan;*

- *Sparta intended to 'ramp up the manning', once the Agreement was approved;*

- *the Agreement was voted upon by a show of hands in Mr Jansen's office;*

- *the three employees were not paid in accordance with the provisions of the Agreement, but at all times were paid above-award rates, and entitlements which were superior to the Agreement, which Sparta committed to continue for them only;*

- *Sparta had not developed any policies or procedures of its own dealing with workplace health and safety notwithstanding that it operated in the coal mining industry*.

12. Immediately prior to the operation of the SJBP Act, the coal mining industry – and other industries – were flooded with such small cohort agreements. As explained, those agreements were made without any genuine bargaining, and voted upon by a small group of carefully selected employees that had 'no stake' in the agreement.

13. The small cohort agreements were an employer tactic to avoid bargaining with the hundreds or thousands of workers that would then become employed and work under these agreements – **after** the agreement was approved by the FWC.

14. By locking workers out of genuine bargaining, the employers were able to lock-in below industry wages and conditions. Anaemic wage growth was the result.

15. Within the limits of the then FW Act, the MEU actively opposed the FWC approving inauthentic small cohort agreements that were devoid of any genuine bargaining. Notwithstanding that activity and the occasions where MEU intervention resulted in the FWC dismissing the application for approval of an inauthentic small cohort agreement, the flood of such small cohort agreements continued.

16. The operation of the SJBP Act bought this employer 'work-around' to an end. In particular, the repeal of what was section 188 and its substitution with what is now s.188(2) of the FW Act. Following the operation of s.188(2) of the FW Act, there has been very few, if any, inauthentic small cohort agreements made. As explained, this is a very different from the MEU's direct experience just a few years ago.

17. The success of the SJBP Act in stopping inauthentic small cohort agreements has resulted in a marked increase in genuine bargaining between employers and employees. The MEU also believes it to be a factor in driving real wage increases across the mining and energy industries.

18. That inauthentic small cohort agreements have been stopped and genuine bargaining has increased is a clear demonstration that the amendments made in the SJBP Act concerning small cohort agreements are appropriate and effective.

B. Unilateral termination of enterprise agreements

19. Another a routine 'work-around' deployed by employers to avoid genuine bargaining and / or reduce wages and conditions was seeking to unilaterally terminate the enterprise agreement.

20. The FW Act did and continues to allow for the termination of an enterprise agreement after its nominal expiry date. This is on application to the FWC by a person described in s.225 of the FW Act.

21. The problem with the FW Act prior to the SJBP Act was the legislative bar by which an unilateral application for termination was assessed against was far too low. An employer seeking to terminate an enterprise agreement during bargaining to gain significant leverage, and / or reduce wages and conditions, was assessed by the FWC as not being contrary to the public interest and appropriate in all of the circumstances. This was the experience of MEU members at worksites, including Peabody's coal plants in Central Queensland,[4] Port Kembla Coal Terminal,[5] AGL's Loy Yang mine and power station in the Latrobe Valley.[6]

22. Termination of an enterprise agreement results in the employees falling back onto Award wages and conditions, plus whatever undertakings (usually limited to three months duration) offered by the employer during the proceedings before the FWC.

23. The threat of going back to the Award was a powerful tool in the employer's arsenal during bargaining. It was a threat that employers in the mining and energy industries routinely made at the bargaining table to moderate employee claims.

24. Laws that enabled unilateral termination to unwind decades of bargaining for better wage and conditions above the Award safety net was plainly unfair and inappropriate. Anaemic wage growth was again the result.

25. The amendments to s.226 made by the SJBP Act have lifted the legislative bar to an appropriate level. The current legislative bar means that employers cannot terminate an enterprise agreement during bargaining to gain leverage and / or reduce wages and conditions.

26. These amendments in the SJBP Act have clearly been effective and appropriate. Since their operation, employers have stopped threatening to terminate enterprise agreements during bargaining to gain leverage and / or reduce wages

[4] *Sedgman Employment Services Pty Ltd Bowen Basin Front Line Employee Enterprise Agreement 2011 – 2014* [2016] FWC 1595,
[5] *Port Kembla Coal Terminal Limited Enterprise Agreement 2012 – 2015* [2018] FWCA 2391.
[6] *Loy Yang Power Enterprise Agreement 2012* [2017] FWCA 226.

and conditions. The MEU is also unaware of any such application being made to the FWC.

27. That employees can no longer be sent back to the Award safety net simply because they won't agree to the employer's claims to cut their wages and conditions is a very powerful illustration that these amendments in the SJBP Act have been appropriate and effective.

C. Initiation of bargaining

28. The SJBP Act included a very modest amendment to the definition of 'notification time' in s.173(2) of the FW Act. In summary terms, the concept of 'notification time' triggers the commencement of bargaining or, when faced with an employer that even then refuses to commence bargaining, enables an application to be made to FWC to start bargaining.[7]

29. The modest amendment was in the form of what is now s.173((2)(aa) and (2A) of the FW Act. The effect of the amendment is that bargaining can start for a replacement single-enterprise agreement where no more than five years has passed since the nominal expiry date of that agreement. In those very confined circumstances, bargaining is deemed to have started by way of a bargaining representative sending the employer a written request to bargain.

30. This is a straightforward and practical process to start bargaining in those very confined circumstances. It is a process that is only used where the employer refuses to bargain, and is a sensible alternate to the lengthy and complex processes associated with making an application for a majority support determination (**MSD**).

31. The Western Mine Workers Alliance (**WMWA**), which is a partnership between the MEU and the Australian Workers Union (**AWU**), was able to commence bargaining with BHP for a single-enterprise agreement to replace the Mining Area C Operations Agreement 2015 (**2015 Agreement**) using this amendment. The 2015 Agreement reached its nominal expiry date on 12 August 2019. The replacement single-enterprise agreement that is being negotiated between the

[7] For example, a bargaining order under s.229 of the FW Act. See, s.230(2) of the FW Act.

union bargaining representatives and BHP will cover BHP's mining operations at Area C and South Flank in the Pilbara.

32. It is no exaggeration to say that the major mining companies are hostile to collective bargaining. Without the amendments made to the initiation of bargaining, the unions would have been required to make an application for a MSD to the FWC to bring BHP to the bargaining table. That was likely to be a lengthy and complex process involving argument as to matters such as:

    a) whether the group of employees to be covered by the proposed agreement is fairly chosen, taking into account whether the group is geographically, operationally or organisationally distinct; and

    b) whether it is reasonable in all the circumstances to make the MSD.

33. Considering the likelihood of an appeal, the FWC process to obtain the MSD may have taken at least 12 months. BHP would not have been required to bargain or pay any wage rise in that 12 month or so period where the parties were locked in a legal argument as to whether bargaining should start. Real wage cuts are the result from spending so much time and effort on going through a complex and lengthy legal process to commence bargaining.

34. This demonstrates that the amendments in the SJBP Act concerning the initiation of bargaining are clearly appropriate and effective. The amendments remove the complexity and delays associated with commencing bargaining. A more efficient bargaining process, and a greater number of employees covered by enterprise agreements, is likely to result in fairer real wages that keep up with the cost-of-living.

D. **Flexible work**

35. The FW Act prior to the amendments made by the SJBP Act with respect to a request for a flexible work arrangement was a 'toothless tiger'.

36. With one exception, the class of persons that can make a request for a flexible work arrangement under the amendments made by the SJBP Act could make a

request for a flexible work arrangement under the FW Act as it was prior to the SJBP Act.[8]

37. The significance of the amendments in the SJBP Act is that if the request is refused, there is now a forum to examine whether the refusal was made on reasonable business grounds. Prior to those amendments, there was no such forum. The employee could make the request, there were some procedural steps that the employer was required to take, and then the employer could refuse the request without any realistic possibility as to an examination of the reasons for the refusal. On completion of those procedural steps, the amendments in the SJBP Act permit the employee to now commence a dispute in the FWC, which is empowered to conciliate and, most critically, arbitrate as to whether any refusal is on reasonable business grounds.

38. Empowering the FWC to examine whether a refusal is on reasonable business grounds has been of significant benefit to several MEU members. These MEU members have been returning to work after a period of parental leave, or with caring responsibilities for school aged children, or members with a disability. The amendments made by the SJBP Act has enabled the MEU to assist these members implement flexible work arrangements. The flexible work arrangements requested by these MEU members has typically been a reduction in working hours or change of shift. The flexible work arrangements have been sought to enable such MEU members to balance their work and family commitments, or work within the limits of their capacity.

39. To date, the MEU has not been required to access arbitration to resolve any of these requests. Rather, through conciliation and / or negotiation with the employer outside of the formal FWC processes, the MEU has been able to assist these MEU members with negotiating a flexible work arrangement.

40. This did not happen and would not have been possible with the amendments made by the SJBP Act. MEU members were far less likely to make a request for a flexible work arrangement – because they knew that the employer could just

[8] The SJBP Act expanded the class of persons that could make the request to include 'an employee is pregnant': s.65(1A)(aa) of the FW Act.

say no (with reasons and after going through a tokenistic process). The prospect of the FWC examining the reasonable business grounds that prevent a major mining company from making an adjustment, for example, to the hours of work of a mine worker returning to work from a period of parental leave, has been enough to negotiate fair and flexible working arrangements.

41. It is evident from the above that the amendments in the SJBP Act concerning flexible working arrangements are appropriate and effective. They have clearly promoted gender equity and inclusion.

Summary

42. The above submission is focused only upon the four amendments that have been of most significance to the MEU and its members. The strong view of the MEU is that those amendments are appropriate and effective.

43. The MEU has also had the benefit of reading the ACTU Submission to the SJBP Review. In addition to the comments made below, the MEU agrees with and supports the ACTU Submission, including the recommendations made in the ACTU Submission.

Mining and Energy Union
29 November 2024