APPENDIX 4 TO ACTU SUBMISSION

Case study: "start up" labour enterprise agreements in the coal mining industry – a back-door version of employer greenfield agreements?

Over the last 12 months, the CFMEU Mining and Energy Division has observed an increasing incidence of applications by labour hire companies seeking their first enterprise agreement in the coal mining industry.

The CFMEU has been concerned with both the process and content of the agreements that have been the subject of the applications. The CFMEU subsequently took steps to be heard by the Fair Work Commission in relation to the approval process for these agreements.

The companies involved in the applications are:

Civil, Energy and Mining Services Pty Ltd (CEM Services)(currently under administration): The Agreement in this matter was approved by the Fair Work Commission[1]and subsequently successfully appealed by the CFMEU with an order for costs being awarded to the union.[2]

SubZero Labour Services Pty Ltd: This matter (AG2014/7178) was the subject of proceedings before the Fair Work Commission and was subsequently withdrawn by the applicant. The CFMEU was granted permission to be heard in the proceedings and opposed the approval of the agreement

BCM Labour Solutions Pty Ltd: The Agreement (AG2014/8783) in this matter was approved by the Fair Work Commission[3] with the giving of 7 undertakings and the insertion of the model consultation provision. The CFMEU was granted permission to be heard and opposed the approval of the agreement.

AWX Labour Pty Ltd: This matter (AG2014/10280) was the subject of proceedings before the Fair Work Commission and was subsequently withdrawn by the applicant. The CFMEU was granted permission to be heard in the proceedings and opposed the approval of the agreement.

SRSW Pty Ltd: This matter (AG2014/10717) was the subject of proceedings before the Fair Work Commission and at the time of writing, the decision was reserved. The CFMEU was granted permission to be heard in the proceedings and opposed the approval of the agreement.

One WORKFORCE Pty Ltd: This is a multi-employer application by One WORKFORCE together with the four companies listed immediately below. There have been two applications for approval made by One WORKFORCE. The first application (AG2014/8377) was subsequently withdrawn following a number of issues being raised by the Fair Work Commission. A further application (AG2015/144) was filed in January 2015. The CFMEU made written submissions

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1 [2014] FWCA 3145

2 [2014] FWCFB 5708

3 ([2014 FWCA 7413)

in the first application and has sought permission to be heard in the second application. The second application is listed for hearing on 31 March 2015.

Milray Contracting Pty Ltd: See One WORKFORCE Pty Ltd application

SJDL Pty Ltd: See One WORKFORCE Pty Ltd application

Milray Employment Services Pty Ltd: See One WORKFORCE Pty Ltd application

Hornet Mining Pty Ltd: See One WORKFORCE Pty Ltd Application

CoreStaff Qld Pty Ltd: This application (2015/1754) is currently before Fair Work Commission and has been the subject of correspondence between the Fair Work Commission, the applicant and the CFMEU. The CFMEU has filed submission as to why the Fair Work Commission should give permission for it to be heard and its objections to the approval of the agreement.

The involvement of the CFMEU in these matters has been brought about by a number of concerns with the applications, namely;

1. There appears to be increasing number of small and new labour hire companies seeking to become involved in the coal mining industry. Each of the abovementioned labour hire companies are seeking their first enterprise agreement in the coal mining industry.

2. With the exception of SubZero, which employs 122 employees and possibly BCM Labour Solutions, for which we are unaware of the total number of employees covered by its agreement, the companies each employee a small number of employees. From the material filed as part of their application, we see that AWX Labour Pty Ltd employed 3 employees, SRSW Pty Ltd employed 7 employees, One WORKFORCE Pty Ltd and the other 4 companies employed 11 employees in total, CoreStaff Qld Pty Ltd employed 4 and CEM employed 7 employees. This is clearly an insufficient number of workers to operate a coal mine.

3. The employees are overwhelmingly employed on a casual basis. All 122 employees of SubZero were employed on a casual basis. All 4 employees of CoreStaff Qld were employed on a casual basis, as were all employees of SRSW PTY LTD, One WORKFORCE and the other 4 companies in its application. At CEM Services 1 of the 4 employees was employed on a casual basis and at AWX, 1 of the 3 employees was employed on a casual basis. The number of casual employees employed by BCM Labour Solutions is unknown.

4. Together with the small number of employees covered by the agreements at the time they were made, the information shows that they were based in the one state, either NSW or Queensland. However, the agreements have application and coverage Australia wide. The only exception is the CoreStaff Qld Agreement whose application and coverage is confined to Queensland.

5. Collectively, what points 2 and 4 show are that a small number of people from a confined geographic area in one state are approving an agreement that can

ultimately cover many employees and on a nationwide basis (only restricted by the presence of a coal mine).

6. With respect to bargaining representatives, none of the material filed by the applicants in the Fair Work Commission that was made available to the CFMEU identified an independent bargaining representative for the employees. They either identified some/all of the employees or no bargaining representative. In all of the proceedings that the CFMEU has been represented in to date regarding these applications, the employees have not been represented.

7. In each of the applications, the CFMEU has raised what we saw as failures to meet the various procedural issues and/or a failure to meet the better off overall test.

8. In a number of the agreements the wage rates are the same or only marginally better than the *Black Coal Mining Industry Award 2010*. For example the agreements filed for approval by AWX and SRSW provide the award wage rate as the agreement wage rate. The One WORKFORCE agreement may suffer from the same problem but one cannot tell from the illegible nature of the copy of the agreement filed by the applicant. The Corestaff Qld. Agreement provides wage rates that are some $3-$5 in excess of the Award. They are then combined with other changes to award conditions that, in our submission, when taken together, do no pass the better off overall test.

9. The SRSW Agreement as filed in the Fair Work Commission incorporates 5 modern awards covering industries as diverse as coal mining, building and construction, hydrocarbons and manufacturing. They are to be read in conjunction with the agreement. It is, at the least, unfair to expect that employees should be aware of the contents of each award, let alone understand where the coverage of one award begins and another award ends.

10. Of each of the applications set out above, only one – BCM Labour Solutions - has been approved by the Fair Work Commission and that approval was conditional upon 7 undertakings and the insertion of the model consultation clause.

11. The CEM Agreement was initially approved but was overturned on appeal and in that case it was observed by the Full Bench that the Commission at first instance "*had been misled in a number of critical respects by the Respondent when it made its application for approval of the enterprise agreement*"[4]

12. Together with the dismissal on appeal and the qualified approval, two of the applications were withdrawn before any decision could be made. Further, one application is awaiting a decision and another two applications are in currently under consideration.

In these matters it is extremely doubtful that any genuine bargaining occurred. It appears that the employees simply agreed with a document presented to them by the employer.

The agreements would appear to be the result of a power imbalance between casual (and/or probationary) employees and unscrupulous employers intent on obtaining the lowest possible wage outcome in a statutory instrument for tender purposes.

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4 [2014] FWCFB 5708 at PN [2].

The CFMEU was not a formal party to any of these applications. The CFMEU was not a bargaining representative and in that regard had no automatic right to be heard in the proceedings before a single member of the Fair Work Commission. The CFMEU could only be an "aggrieved party" on appeal.

Under the current provisions, objecting unions are dependent upon the discretion of the Fair Work Commission in order to be heard in any application for approval of an enterprise agreement - to the extent that the Fair Work Commission wishes to hear from the CFMEU. The CFMEU is also subject to the discretion of the Fair Work Commission as to whether it will be provided with the application for approval and the accompanying statutory declaration of the applicant.

The foregoing case study demonstrates that the current enterprise agreement approval process is open to abuse. The cases identified are probably multiplied many times over across the different sectors and industries. The case study also demonstrates the important role played by unions – even in circumstances where they have limited rights – in attempting uphold decent minimum standards for employees.

However, the most disturbing aspect of the phenomena described in the case study is that it appears to be a back-door approach to reinstituting the much derided "employer greenfield agreement" that was a feature of *WorkChoices*. That is, the "agreements" that are being put forward to the Fair Work Commission are in reality, unilaterally determined by the employer and are then presented to a vulnerable, contingent workforce for approval. None of the agreements described indicate any genuine bargaining – for example, why would any employee genuinely agree to receive only the award rate of pay? What advantage is there for an employee to agree to such a proposal, particularly if the agreement also provides for the employer to "roll up" minimum award conditions into a flat rate of pay, not specified or described anywhere in the agreement?

This is the reality of "bargaining" when employees have no bargaining power and no independent representation. The FW Act should not facilitate conditions being "locked down" in an industry based on the apparent "consent" of small number of unrepresented contingent or probationary workers.