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16 October 2013

Raymond Donnelly
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CHRISTCHURCH

Attention: Brent Stanaway

Ministry of Business, Innovation and Employment v Peter Whittall

1. As you know, Minter Ellison Rudd Watts and I act for Peter Whittall in his defence of the charges laid by the Ministry of Business, Innovation and Employment (the **Ministry**) under the Health and Safety in Employment Act 1992 (the **charges**).

2. It is understood that you have been reviewing the issues of evidential sufficiency and public interest as they apply to this case in the context of the Solicitor-General's 2013 Prosecution Guidelines. The proposal which follows is made on the basis that we consider that it should be taken into account in the course of your review as a relevant and appropriate public interest consideration.

3. In short, the proposal is that a voluntary payment of $3.41 million be made available to the families of the 29 men who tragically lost their lives in Pike River's coal mine and the two men who survived the 19 November 2010 explosion.

Proposed $3.41 million payment

4. While it is acknowledged that nothing can replace their loss, it is envisaged that a voluntary payment to the families could go some way towards alleviating the financial pressures on the families and serve as a meaningful recognition of such loss.

5. It is proposed that the voluntary payment:

   (a) Will be made on behalf of the directors and officers of Pike River Coal Limited (in receivership) (the **Company**) at the time of the explosion for the families of the 29 men who died and the two survivors, and

   (b) Will comprise allocations of $110,000 for each of those families and survivors in the amount calculated by Judge Farish when ordering that they be compensated for the significant loss and ongoing trauma that she found had been caused by the actions of the Company.

(c) Will be paid into Court for it to distribute to the families of the 29 men who died and the two survivors.

6. In advance of the $3.41 million being made available, it is proposed (with precise terms to be agreed) that:

(a) The Ministry will not proceed with the charges laid against Mr Whittall by advising the Court that no evidence will be offered in support of any of the charges.

(b) A private meeting will be arranged at which Mr Whittall will express sympathy on behalf of the Company to the families and survivors and will convey his personal empathy and condolences.

(c) Each of the Company directors at the time of the explosion will be asked by Mr Whittall to attend this meeting.

(d) Any public statement by the Ministry and/or the Crown about the charges against Mr Whittall being withdrawn will be made in terms agreed with me.

7. My instructions require me to emphasise that if the proposed resolution is to proceed, the sooner this happens the better for all concerned. I have been instructed that the proposed payments could be made available promptly insofar as we are concerned. I envisage that from our perspective the whole matter could be finalised possibly before the third anniversary of the first explosion but certainly pre-Christmas should these stipulations be acceptable to the Ministry.

Proposal benefits

8. Putting to one side our view that Mr Whittall has good defences to the charges, which would in part involve a considerable focus on the role of the Department of Labour's inspectorate in relation to the mine, there are obvious significant economic and preservation of resources benefits in concluding this matter as expeditiously as possible. Among other things, there are considerable on-going monthly costs being incurred by both sides as disclosure and other preparation continues on the basis that the case will proceed to trial.

9. Such costs will certainly further increase for the prosecution. There are a number of difficult problematic issues arising from the informant's investigation and disclosure processes which will be explored in detail prior to and during the trial. For example, during the disclosure process, the creation dates of documents have been changed by the Ministry's electronic procedures before providing them to us. Based on our analysis to date, by copying documents to its servers, opening such documents and then copying them to an external hard drive for disclosure to the defence, the Ministry has altered the underlying metadata of at least 23% of the full disclosure (on at least three occasions for each document). As a result, metadata information about the author of the document and the date the document was created, accessed and modified is no longer available and the authenticity of at least those documents cannot presently be established beyond a reasonable doubt.

10. Disclosure indices provided by the Ministry also list a significant number of files that have not been reviewed and in respect of which relevance has therefore not been determined, notwithstanding that they relate to matters such as ventilation (in relation to which at least one charge has been brought). Based on our review of the indices, it appears that more than 23,000 documents have not been opened by the Ministry. The Ministry itself has conceded the potential relevance of some of these documents that it has not opened or reviewed. For example, one of the spreadsheets contains the following notation next to one file: "*cannot open files - .mpp files (possibly relevant)*".

11. The above issues have and will continue to create severe difficulties in the preparation of the defence and will necessitate extensive re-disclosure by the Ministry at substantial further delay and cost before any trial can proceed.

12. In addition, there are serious inadequacies regarding the electronic data obtained by the Ministry for the purposes of its investigation and subsequent prosecution of Mr Whittall. In my view, these inadequacies are such that they may render the Ministry unable to establish any of the charges against Mr Whittall beyond a reasonable doubt. Such issues include the following:

    (a) The Ministry did not obtain any data stored to desktop local hard drives and, in fact, the Police did not clone any Company desktops or laptops.

    (b) The Ministry did not receive data from Mr Whittall's desktop when it was obtained by the Police during the Royal Commission process from the Company's receivers.

    (c) Notwithstanding that laptops were widely used by Company staff and contractors (including the Mine Manager, Technical Services Manager, Project Manager, Safety Manager, Technical Services Coordinator and Engineering Manager), the Ministry only obtained data from one laptop (which was issued to a contractor and was not used by Mr Whittall).

    (d) The Ministry did not obtain all of the Company's server data collected by the Police.

    (e) The Ministry did not collect data from any mobile devices (such as iPhones or Tablets).

    (f) The Ministry did not collect any data from portable storage devices (such as memory cards or CDs).

13. In terms of further expense, costly pre-trial applications pursuant to the Criminal Procedure Act 2011 will likely be required to determine issues such as the admissibility of evidence and the application of the statutory time bar in section 54B of the Health and Safety in Employment Act 1992.

14. By withdrawing the charges, not only will all these costs and burdens be avoided, but the extensive judicial and prosecution resources required for a defended hearing of up to 16 – 20 weeks in length could instead be utilised elsewhere.

Conclusion

15. The voluntary payment of $3.41 million is economically viable only if Mr Whittall's continuing preparation costs can be terminated promptly. If this cannot be achieved, the proposed payment will not represent any saving over the cost of proceeding to trial and in that event, whatever the outcome, I believe that the families will not receive anything like the amount offered.

16. Accordingly, for all the above reasons, I look forward to hearing from you about whether our proposal is acceptable to the Ministry. I would welcome the opportunity to discuss this further as soon as reasonably possible after your current prosecution commitment has been concluded.

Yours faithfully

Stuart Grieve QC