**BEFORE THE FAIR WORK COMMISSION**

**Matter no.** AM2014/67

**Applicant:** Coal Mining Industry Employer Group

**Respondent:** APESMA

## APESMA'S NOTE IN RESPONSE TO CMIEG CLOSING SUBMISSIONS

1. Two aspects of the CMIEG supplementary submission dated 6 December 2016 warrant reply.

2. **First**, the CMIEG submission at [8] notes that APESMA's supplementary written submission dated 21 November 2016 did not respond to every aspect of the CMIEG written submissions, with the implication that those parts of the CMIEG written submissions not dealt with by that response can be accepted. APESMA's 21 November submission did not purport to be a full response to the CMIEG case. It was filed as a consequence of APESMA requesting leave to file a short note to address any matters of evidentiary detail that could not be dealt with orally at the hearing in circumstances where the CMIEG written submissions had been provided that morning (as to which no criticism is made).

3. As to the two specific matters mentioned by the CMIEG as matters not dealt with in the written note, being the reliability of the union's expert and survey evidence, they had been otherwise addressed *inter alia* at [19]–[29] of APESMA's final written submissions.

4. It will be recalled that APESMA noted the irony of CMIEG's criticism of the independence and quality of the unions' witnesses, given that its own evidentiary case was advanced by witnesses who did not pretend to be expert or independent. Importantly, APESMA submitted that CMIEG's decision to eschew independent expert evidence should not result in a forensic advantage to it:

> 22. It should be borne in mind that the methodological criticisms made of the design and logic of the unions' expert and survey evidence cannot be made of the CMIEG evidence because it does not reveal any underlying logic or method; nor was there any point testing the independence of the CMIEG witnesses because they did not pretend to be independent. Those are not matters which should lead to a forensic benefit to the CMIEG.
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> 23. A party which eschews the opportunity to lead independent expert evidence which exposes to scrutiny its underlying assumptions and logic, and instead chooses to lead evidence in form of assertion from non-independent non-experts, should not be rewarded for doing so.
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> 24. The applicant's decision to proceed on the basis of intrinsically defective material leaves the Commission with little choice but to prefer the unions' evidence. To the extent there is any divergence between the parties' evidence, the unions' evidence should be accepted.

5. The CMIEG is perhaps the best resourced industrial participant in the award review process. Its membership stands to benefit by many millions of dollars if its application is accepted. CMIEG could have called expert evidence. There is no reason why the Commission would accept CMIEG's contested assertions of fact for which the only evidence is that presented by CMIEG's industrial officer.

6. **Second**, the CMIEG submission suggests that the APESMA contentions regarding the actual impact of the removal of the cap are to be discounted because APESMA did not refer to exhibits 42 and 43.

7. The analysis of service at retirement in APESMA's 21 November supplementary submission was based on a document produced by a CMIEG member and created by a CMIEG witness.

8. It remains unclear how reference to Exhibits 42 and 43 would lead to any different result (and the supplementary submission of CMIEG does not say how it would).

9. Exhibit 42 records ages and lengths of service of employees made redundant provided to CMIEG by some employers in the past. Those records suggest that less than 2% of 954 retrenched employees were older than 60 and a very large fraction had more than nine years' service. The data confirms that the replacement of the age 60 cap by a 9 year cap would result in a dramatic windfall gain for employers in the industry and a dramatic diminution in conditions for employees.

10. Exhibit 42 was introduced into the proceedings late on the afternoon of the second to last day of hearing after the evidence was closed. It was described as data referred to by Gunzburg at paragraph 11 of his first statement but not annexed to his statement. The timing of its tender meant it went in after the witnesses had given evidence.

11. The provenance of the data (as with much of Gunzburg's evidence) is unexplained except insofar as Gunzburg asserts that he was provided with the data by some CMIEG members two years ago. The data itself is an a-contextual list of ages and lengths of service. There is no basis upon which the Full Bench could determine whether the data is reliable or representative.

12. Even a superficial review suggests that Exhibit 42 is unreliable and certainly less reliable than the Centennial data. Subtracting the specified age from the specified years of service suggests that one employee began work at 14 and several at 16. The document suggests that one employee recently retrenched at age 22 had 5.6 years' service. A number of employees are listed as having 0 years' service on retrenchment (lest it be thought that "0" represents between 0 and 1 years' service, a number of employees are listed at fractions of a year's service). The

employees listed as having 0 years' service on retrenchment include employees aged 58.5, 55.3, 52.1, 51.8, 51.6, 50.2 and 46.0.

13. There is nothing to suggest that Gunzburg made any attempt to understand the reasons for those anomalies, or even that he was aware of them.

14. Consideration of Exhibits 42 and 43 adds little to the substantive analysis of the matter. It does however illustrate how much of CMIEG's evidentiary case is reliant on opaque data adduced via a partisan and inexpert witness.

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**14 December 2016**