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

A. The actual impact of the "removal" of the cap

1. Counsel for CMIEG submitted orally that the "removal" of the cap fundamentally altered the nature of the industry redundancy scheme. That submission should not be accepted. It was never a 'fundamental' aspect of the scheme that it have an age-based limitation. What was fundamental to the scheme was that it was based on years of service, and was uncapped, subject only to a provision that was intended to avoid 'windfall' to those about to retire.

2. As previously pointed out, the CMIEG did not lead evidence of any financial impact resulting from the removal of the cap and an inference should be drawn on that basis.

3. Such limited evidence as was adduced suggests that the removal of the cap had little practical effect.

4. As the Commission noted in its earlier decision, clause 14.4(c) established an effective cap of approximately 40 years' service.[1] Material produced in answer to a notice to produce shows that of 339 employees retrenched by Centennial between 1 January 2013 and 31 December 2015, only 6 had service of 40 years or more. Of the six, three were younger than 60 years old (57, 58 and 59 respectively). On the other hand, 192 of the 339 had more than 9 years' service. A copy of the relevant table is **attached** to this submission.

5. Other material produced by Centennial similarly shows that the length of service of retirees is in an overwhelming majority of cases less than forty years. Of the approximately 200 workers listed in Exhibit 41, 5 had a length of service above 40 years at the time they retired and another 7 had a length of service above 35 years.

6. There is no evidence to suggest the overall cost of the scheme has increased from that which existed 30 years ago (taking into account that employees today may well start work on average at a later age). That is, CMIEG led no evidence to suggest that the average length of service of those being made redundant has increased as a result of the removal of the discriminatory cap.

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[1] *Black Coal Mining Industry Award 2010* [2015] FWCFB 2192; 249 IR 26 at [44].

7. In short, the removal of the discriminatory cap affected a small minority of retrenched employees. Bearing in mind that the severance payment was never limited by reference to length of service, it is likely that removal of the cap has extended employers' maximum liability only marginally. That change did not fundamentally alter the nature of the scheme.

8. Imposition of a cap of nine years' service, on the other hand, would reduce the entitlements of more than half the workforce. That development *would* fundamentally alter the scheme.

9. Allowing the present application would not re-introduce a balance destroyed by the removal of the cap but would drastically reduce protections for workers in the industry. The application is in truth an opportunistic attempt to use the removal of a discriminatory clause as cover for a major attack on employee entitlements.

B. Redundancy vs OECD figures

10. In its final written submissions CMIEG suggested that a comparison of the Essential data with the OECD Report suggests that the incidence of redundancy in the black coal industry is similar to that in the economy overall. Consideration of three aspects of the OECD Report demonstrate the fallacy of that proposition.

11. **First**, the OECD Report suggests that between 2002–2013 only a fifth of workers who separated from their jobs were dismissed for economic reasons or for cause:[2] that is, 20% of those leaving their jobs were "*job losers*" as opposed to "*job leavers*". Gunzburg's second statement suggests that the percentage of "*job losers*" in mining varies between 35% and 90% and average 60%.[3]

12. **Second**, the OECD Report indicates that 3.7% of employees are dismissed for economic reasons or for cause each year.[4] That figure includes casuals; conservatively estimating casuals at 20% of that group, the figure for permanent employees is 2.96% dismissed for economic reasons or for cause each year.

13. The Essential Survey suggests that 423 employees were retrenched in the three years before the survey and a further 73 employees were dismissed for cause.[5] 18.9% of the Essential cohort

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[2] OECD Report page 30. The OECD Report was appended to the second Peetz Report (Exhibit 12).
[3] Annexure DG-8 to the Gunzburg statement of 4 November 2016. DG-8 is imprecise and does not offer an average, but as best as many discerned the percentages of "*job losers*" vis-à-vis "*job leavers*" in the mining industry are 35%, 50%, 55%, 60%, 75% and 85%. The average of those figures is 60%.
[4] OECD Report page 30.
[5] 73 employees answered yes to the question "*I was terminated for other reasons*": Table 6 of Ex 14.

were therefore retrenched or dismissed for cause in the three years prior to the survey, or an average of 6.3% per year—more than double the OECD Report equivalent.

14. The matter may be approached slightly differently. The OECD Report provides that 2.3% of employees who have at least a year's service are dismissed for economic reasons or for cause each year.[6] That group includes those dismissed for cause and casuals; the figure of permanent employees with a year's service dismissed for economic reasons is therefore likely be well below 2% per year.

15. The Essential report suggests that 380 employees, that is 14.5% of the surveyed group, had been retrenched and paid redundancy pay in the three years before the survey. That group is necessarily confined to permanent employees with at least one year's service. The Essential Survey therefore indicates that roughly 4.8% of permanent black coal industry employees with at least one year's service are retrenched each year—again, more than double (probably 2.5–3 times) the OECD Report equivalent.

16. It may be accepted that the correspondence between the OECD and Essential cohorts is imperfect. It is however reasonably clear that black coal industry employees are more than twice as likely to be retrenched in any given year.

17. **Third**, the OECD Report suggests that wage gains after job displacement are somewhat more likely than wage losses.[7] 31% of displaced workers in the OECD Report suffered a wage drop of more than 10%. The Essential survey by contrast suggested that 72% of respondents were worse off than before. (It will be recalled Professor Peetz regarded this as the most striking result of the Essential survey.)

18. Counsel for CMIEG criticised the Essential survey results as "qualitative". Professor Peetz—being the expert in the field—disagreed and suggested that employees are quite capable of saying whether they were better off or worse off after retrenchment, albeit there was an element of subjectivity in the further categorisation of "*a little worse off*" compared to "*a lot worse off*". Even if the figure of 72% is affected in some degree by subjectivity, the unavoidable conclusion remains that black coal industry employees are twice as likely to suffer loss of conditions following retrenchment as employees generally.

19. In summary, a comparison of the Essential Survey and OECD Report suggests that black coal industry employees:

[6] OECD Report page 31.
[7] OECD Report page 40.

(a) are more than twice as likely to be retrenched than employees generally; and

(b) if retrenched, twice as likely to suffer a drop in conditions.

C. Peaks and troughs in the mining industry

20. In its written submissions CMIEG suggests that "*Further, when one looks at the ABS data there is variability from year to year from industry to industry in proportion of people who are unemployed who have "lost their jobs"... Counsel for APESMA suggested that there is a wider gap between the peaks and troughs, but as Mr Gunzburg pointed out that is not dissimilar to the gas or construction industry.*"

21. Two matters should be noted. **First**, Gunzburg's analysis on this point (DG-8 of Exhibit 2) suffered from the same flaws as his earlier analysis contained in DG-6 of Exhibit 1: among other things, the fact that he took snapshots in time using 1 of each 20 data points means that his graph concealed as much as it revealed.

22. **Second** and in any case, DG-8 does not support the notion that the peaks and troughs in the black coal industry are not dissimilar to gas and construction. The graph actually shows that the variation in black coal is very significantly wider than for every other industry save "*Electricity, Gas Water and Waste*".[8] In particular it would be noted that the variation is significantly higher than both the construction and retail industries, being the two industries said to suffer from peaks and troughs comparable to black coal.

D. Reliability of the CMIEG summary of union evidence

23. On the morning of the final submission in the matter the CMIEG handed up a summary of the union witnesses' evidence. For that summary to be useful, it would need to accurately represent the effect of the unions' evidence. It does not. Two examples make the point.

24. **First**, in respect of Ms Farrey and under the heading "*Details of redundancy*" appears an entry "*She was made redundant in 2015. Her redundancy pay is not set out. She likely received 27 weeks' pay for 9 years' service.*". It is impossible to see how that conclusion was reached. Ms Farrey's evidence is that her *total* experience in the industry is nine years, during which she worked at six different mines.[9] It is plain from her evidence that Ms Farrey's length of service on retrenchment was less than three years[10] such that her redundancy

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[8] Although the matter was not explored, it is likely the variation in the figures relative to the Electricity etc industry is a function of the flaws in Gunzburg's statistical analysis.

[9] Peabody, Glencore, Wesfarmers, Centennial, Glencore again and Peabody again: Exhibit 33 at [4]–[9], [13].

[10] Ms Farrey was employed at Wambo mine in September 2012 and retrenched in June 2015: Ex 33 at [9], [13].

entitlement was six weeks' pay. She was then without a job for 4 months, despite attempting to find work as diverse as a sheriff, retail worker and a taxation officer, before picking up casual consultancy work earning $30,000pa less than her last job, with no leave conditions, and did not give her a certain income (she had not been given work in the 8 weeks leading up to the date her statement had been made).

25. **Second**, in respect of Mr Greg Davey and under the heading "*Did they find a new job (and in what industry)*" the entry reads "*Yes. He now works at the University of Newcastle as an exam supervisor.*" Mr Davey's actual evidence is that he has unsuccessfully searched for work since his retrenchment in 2013. He was out of work until February 2016, when he found some work as a casual exam supervisor working part-time hours in June and November.[11] The summary entry might be strictly speaking accurate, but is apt to mislead. The entries in respect of *inter alia* Ms Farrey and Mr Smith are in the same category.

26. The CMIEG summary is not a useful substitute for consideration of the union's evidence.

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[11] Exhibit 32 at [13]–[20].