IN THE FAIR WORK COMMISSION

Matter No.: AM2014/67 – Black Coal Mining Industry Award 2010
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

Black Coal Mining Industry Award – Redundancy Provisions

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents around 100,000 members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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1. Background

1.1 The Australian Manufacturing Workers' Union (AMWU) makes the following submissions in accordance with Directions issued on 8 December 2015.

1.2 The AMWU is opposed to CMIEG's application on 29 March 2016 to vary the redundancy provisions in the *Black Coal Mining Industry Award 2010* (the Award).

1.3 The AMWU also supports and relies on the submissions of the Construction, Forestry, Mining and Energy Union (the CFMEU) and the Association of Professional Engineers, Scientists and Managers Australia (APESMA).

1.4 The 2015 decision[1] deleting cl. 14.4(c) of the Award noted at [44] that "a very substantial merits case" would be needed prior to removing the entitlements found in cl. 14 in their entirety. The Full Bench said that there "may potentially be some merit in…a new limitation on retrenchment payments to replace cl. 14.4(c)", before noting that the previous entitlement allowed for potentially 80 weeks of retrenchment payments. It is worth noting from the outset that the decision did not contemplate reducing the entitlement itself – rather, it considered introducing a "new limitation on retrenchment payments". Therefore, the appropriate starting position in assessing CMIEG's application is that a cap on retrenchment payments was only suggested as one potential outcome by the Full Bench, and such a cap does not necessarily involve the reduction in retrenchment entitlements. Indeed, there is nothing in the 2015 decision which recommends or even proposes the reduction in retrenchment entitlements.

1.5 CMIEG's proposal involves the "capping" of the redundancy entitlement at 27 weeks for both severance and retrenchment pay, or at 9 years of service.[2] Not only does this proposal substantially diminish the existing entitlement, it also

[1] [2015] FWCFB 2192.
[2] Para [64] – CMIEG Submission.

applies equally to both severance and retrenchment pay despite historically capped entitlements existing only for retrenchment pay. This is a substantial change to the Award entitlement, and therefore "a very substantial merits case" would need to be mounted to justify "taking the axe" to the redundancy scheme.[3]

1.6 Further, the onus of proof also involves an assessment of whether the variation pursued by CMIEG is 'necessary' in order to achieve the modern award objectives.[4]It is presumed that a modern award already meets the modern awards objective, and therefore contained only terms and entitlements "to the extent necessary to meet the modern awards objective".[5]

1.7 In this context, the AMWU submits that CMIEG has not mounted such a case for variation.

2. CMIEG's draft variation

2.1 CMIEG's draft variation seeks to impose "a cap on the entitlement to severance and redundancy pay at 9 years service".[6] CMIEG argues that the "service based cap" is "consistent with the long line of redundancy test cases decided by Federal and State industrial tribunals".[7]No evidence is offered suggesting that the modern award objective necessitates a cap on redundancy payments. Indeed, the *Dredging Industry Award 2010* provides for redundancy to be paid uncapped at the rate of three weeks pay for each year of continuous service.[8] It is therefore a fiction to maintain that industry specific redundancy entitlements require the payment to be "capped" at a particular amount or for a specified time.

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[3] [2015] FWCFB 2192 at [44].
[4] *Fair Work Act 2009*, s. 138.
[5] *Fair Work Act 2009*, s. 138.
[6] Para [64] - CMIEG Submission.
[7] Para [66] – CMIEG Submission.
[8] *Dredging Industry Award 2010*, cl. 12.5.

2.2 It is also argued that "the Draft Variation does not seek to alter the components of the benefit of the underlying formula" (emphasis added).[9] However, this is precisely what the draft variation attempts to do, by effectively removing any meaningful distinction between retrenchment and severance pay. The draft variation has the effect of applying the 9 year cap to *both* severance and retrenchment pay. This is inconsistent with the current and historical position of the Award, as the previous cap[10] applied only to retrenchment payments under cl. 14.4.[11] This would fundamentally alter the "underlying position" of the current Award.

3. Clause history and the Modern Awards Objective

3.1 It is further argued that the redundancy provisions were the result of agreement between "industry participants", rather than the product of comprehensive industrial disputation through the Coal Industry Tribunal (the CIT). The arbitral history of the CIT shows clearly that the redundancy provisions now found in the Award developed separately and has largely survived to the present day.

3.2 Assessment of redundancy provisions against the modern awards objective is the appropriate measurement. The AMWU makes the following comments in relation to s. 134 matters identified by CMIEG:

- 134(1)(b) the need to encourage collective bargaining – CMIEG argues that the current redundancy entitlements "are not a minimum safety net standard and do not thereby encourage bargaining as to their terms", and that "overly generous, high threshold terms" discourage bargaining. Indeed, the corollary position is that more generous redundancy provisions would *encourage* employers to bargain in

[9] CMIEG Submission
[10] As removed in [2015] FWCFB 2192.
[11] In Black Coal Mining Industry Award 2010 [2015] FWCFB 2192, it was said at [29] that "the severance payment entitlement has its origins in decisions of the Coal Industry Tribunal in 1973…the payment of that entitlement has never been limited by reason of the age of the redundancy employee" (emphasis added).

order to reduce their liability to redundancy payment. However, it is worth noting that this is an industry with an already high enterprise agreement coverage, when compared with award coverage, so it is clear that in practice, the redundancy provision does not hinder enterprise bargaining.

- 134(1)(d) the need to promote flexible modern work practices and the efficient and productive performance of work – It is argued that due to the clause not encouraging collective bargaining, the clause does not promote efficiency or workplace productivity. CMIEG have not provided evidence, or compelling rationale for this assertion.

3.3 It is worth noting that the only issues the CMIEG raised in terms of the modern award objective were ss. 134(1)(b)(c). Indeed, CMIEG have failed to sufficiently identify how the current redundancy provision does not accord with the modern awards objective, as there are major areas in the objective which have been addressed as factors which "do not arise".

4. Industry-specific redundancy schemes and the Fair Work Act

4.1 Section 141 of the *Fair Work Act 2009* provides for the inclusion and variation of industry-specific redundancy schemes into a modern award. The *Fair Work Bill 2008 – Explanatory Memorandum* refers to the award modernisation request specifying whether a scheme is to be included into a modern award, being

- Whether the scheme is "no less beneficial to employees in the industry than the redundancy provisions of the NES" and
- Whether the scheme is an established feature of the industry.

4.2 There is no doubt that the scheme is an established feature of the industry and has been so since the initiating arbitral decisions by the CIT. The Explanatory Memorandum also states that "industry specific schemes, developed with the needs of employees and employers in the particular

industry in mind, operate to the exclusion of the general redundancy entitlements in the NES. If a scheme no longer meets industry specific needs, the NES should apply" (emphasis added).

4.3 This is telling, as it recognises that industry-specific redundancy schemes have developed by reference to "the needs of employees and employers in the particular industry in mind", rather to provisions of the NES. In this respect, comparisons to the NES by CMIEG are not encompassed by the explanatory memorandum. This also indicates that the redundancy provisions in the Award should not be judged by reference to the standards and conditions in other modern awards. Rather, industry-specific redundancy schemes should be assessed on the basis of its relevance, and it's capacity to meet the modern awards objective.

4.4 Furthermore, the current redundancy provision is clearly still relevant in it's operation, and indeed no evidence has been provided indicating that it is no longer relevant for the industry.

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