

**IN THE FAIR WORK COMMISSION**

**MATTER NO: AM2014/67**

**TITLE OF MATTER: FOUR YEARLY REVIEW OF MODERN AWARDS – BLACK COAL MINING  
INDUSTRY AWARD 2010 – CLAUSE 14 – REDUNDANCY**

**FURTHER SUBMISSIONS IN REPLY OF THE COAL MINING INDUSTRY EMPLOYER GROUP  
(CMIEG)**

**RESPONSE TO NOTES FILED BY CFMEU AND APESMA**

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1. These further submissions in reply of the CMIEG respond to matters set out in the Note filed by the Construction, Forestry, Mining and Energy Union (**CFMEU**) on 16 November 2016, and the Note filed by the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) on 22 November 2016.
  - A. The actual impact of the “removal” of the cap**
2. The CFMEU's Note responds to a question from the Full Bench. In respect of that question, it is not apparent on the face of the submissions of the parties in the award modernisation proceedings that there was any analysis of whether clause 14 of the Black Coal Mining Industry Award (**BCMI Award**) was more or less beneficial than the National Employment Standards. The particular issue was not dealt with in the submissions of the CFMEU on 10 October 2008,<sup>1</sup> or the submissions of the CMIEG filed on 31 July 2008<sup>2</sup> and 22 August 2008,<sup>3</sup> each of which dealt with particular aspects of the redundancy clause. The clause was not dealt with at all in the submissions of the CMIEG on 10 October 2008.<sup>4</sup>
3. Further, there is nothing on the face of the decisions of the Commission that the issue was considered by the Full Bench at the time that the BCMI Award was made.<sup>5</sup>

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<sup>1</sup> [http://www.airc.gov.au/awardmod/databases/coal/Submissions/CFMEU\\_submission\\_ed.pdf](http://www.airc.gov.au/awardmod/databases/coal/Submissions/CFMEU_submission_ed.pdf)

<sup>2</sup> [http://www.airc.gov.au/awardmod/databases/coal/Submissions/CMIEG\\_submission.doc](http://www.airc.gov.au/awardmod/databases/coal/Submissions/CMIEG_submission.doc)

<sup>3</sup> [http://www.airc.gov.au/awardmod/databases/coal/Submissions/CMIEG\\_submission\\_supplementary.pdf](http://www.airc.gov.au/awardmod/databases/coal/Submissions/CMIEG_submission_supplementary.pdf)

<sup>4</sup> [http://www.airc.gov.au/awardmod/databases/coal/Submissions/CMIEG\\_submissions\\_ed.pdf](http://www.airc.gov.au/awardmod/databases/coal/Submissions/CMIEG_submissions_ed.pdf)

<sup>5</sup> [2008] AIRCFB 717 at [36]-[42] (<http://www.airc.gov.au/awardmod/databases/coal/Decisions/2008aircfb717.htm>);

**B. The actual impact of the “removal” of the cap**

4. Both the CFMEU and APESMA appear to invoke a legal test that a variation to the BCMI Award can only be granted if the variation leads to restoring a "balance" or "equilibrium" that was removed by the excision of 14.4(c) (APESMA Note at [9]; Transcript, PN 2177, 2319-20, 2379-80). The Full Bench of the Commission in *Black Coal Mining Industry Award 2010* [2015] FWCFB 2192 (**2015 Decision**) did not find that this was the necessary test that must be met, in order to successfully apply to vary an award. Furthermore, there is no such requirement (relating to establishing any balance) referred to in the *Fair Work Act 2009* (Cth) (**FW Act**) stating that this is a relevant legal test. Furthermore, the CMIEG has not tied itself to restoring any "balance" to which the CFMEU and APESMA seek to refer to.
5. Further, and in regard to the relevant tests to be applied, three matters might be noted:
  - (a) **First**, a "significant change in circumstances" is only one example of the cogent reasons that might be advanced for a variation to be made to a modern award (*Restaurant and Catering Association of Victoria* (2014) 243 IR 132; [2014] FWCFB 1996 at [90]; CMIEG Final Submissions filed 10 November 2016 (**CMIEG Submissions**) at [8]-[10]). There was no demur from APESMA on this point.
  - (b) **Second**, it is common ground between the parties that any variation would need to be consistent with the modern awards objective contained in section 134(1) of the FW Act (Transcript, PN2424 (CMIEG), PN 2271-2 (APESMA); APESMA Submissions filed 10 November 2016 at [2]; CMIEG Submissions at [5(12)]).
  - (c) **Third**, the CMIEG put propositions orally in relation to the proper construction of section 141(3), specifically that the industry scheme could be altered so long as it retains its industry specific character (such as the retention of its specific coverage) (Transcript, PN1981, 1992; see also CMIEG Submissions at [25(22)]), which the CFMEU and APESMA have not grappled with.
6. APESMA has also misconstrued the submission of the CMIEG concerning the removal of the cap (APESMA Note at [1]-[2]). The CMIEG accepts that no case was put about the incapacity of employers in the black coal mining industry employers to pay. The Commission in the 2015 Decision asked for particular information (see 2015 Decision at [44]), and such information was put forward by the CMIEG. The financial impact on the employers is, in any event, self-evident in that those over the age of 60 years of age would be

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[2008] AIRCFB 1000 [154]-[166] (<http://www.airc.gov.au/awardmod/databases/coal/Decisions/2008aircfb1000.htm>)

paid more following the removal of the age based cap (Transcript, PN2403). These submissions put orally by the CMIEG we put fairly and without over-, or under-, statement.

7. The analysis contained in the APESMA Note at [6] to [9] makes no specific reference to the CMIEG data (Exhibits 42 and 43) drawn from across five employees and 953 employees. That data is to be preferred as a representation of the age profile of employees made redundant. Further, in the evidence of Professor Peetz, he contended that there is a greater propensity for those over the age of 60 years of age to be targeted as candidates for retrenchment. The data set relied on by Professor Peetz clearly represents the limitations imposed by the age cap. However, on APESMA's own evidentiary case, the age profile of the workforce and retiring employees will increase, and so will the age profile of those retrenched as they take voluntary redundancies. The age profile of retiring employees, is self-evidently, going to be older now that the cap has been excised and due to the fact that there is no longer a mandatory age of retirement in the industry.

**C. OECD and Essential Survey redundancy figures**

8. It is important to note that APESMA did not, in its Note, seek to challenge or deal with the matters raised by the CMIEG in its closing submissions, including (but not limited to) the following:
  - (a) any of the issues raised by the CMIEG in relation to the unreliability of the evidence and conclusions of Professor Peetz; and
  - (b) the unreliability of the Essential Media survey (CMIEG Submissions at [45]-[49]).
9. In addition to these matters, APESMA has not dealt with the important issue that the data sets presented in evidence are not like-with-like or comparable data sets. This is particularly the case when considering the OECD data and the Essential Media survey data and all attempts by Professor Peetz to compare the data sets and draw conclusions from them (CMIEG Submissions at [45(a)]).
10. In its Note, APESMA attempted to further make a comparison between un-like data sets. In relation to these attempts to compare un-like data sets, the CMIEG has the following responses:
  - (a) it is not possible to draw from the OECD report a level of redundancy across industries;

- (b) therefore any conclusions that APESMA do seek to draw from the OECD report about the generalised rates of redundancy are strictly speculation and surmised, and were certainly not matters about which Professor Peetz gave any evidence; and
  - (c) APESMA and the CFMEU both seek to rely on the evidence given by David Gunzburg in the proceedings but, on the one hand, but then otherwise challenge his evidence or seek to discredit it, on the other.
11. APESMA refers at paragraphs [13] to [16] to the number of employees surveyed by Essential Media as being retrenched as being 423. However, for the reasons included in the submissions of the CMIEG, the true figure is closer to 380, being those who responded "yes" to the question as to whether they received redundancy pay (CMIEG Submissions at [45(b)]).
  12. APESMA itself refers to the group of 380 individuals that received redundancy pay. APESMA uses this figure to state that the Essential Media Survey indicates that 4.8% of permanent black coal mining industry employees with at least one year's service, are retrenched each year, without considering the context of the survey. As was presented by the expert evidence in this matter, the time period in which the survey was conducted (and therefore the time period that is reflected in this figure relating to redundancy) captures one of the more substantial downturns in the industry (CMIEG Submissions at [43(f)]). It is not an accurate measure of the level of redundancy in the industry generally and it is misleading to refer to general rates of redundancy in the broader market without considering the context or timeframe relating to those redundancies.
  13. Furthermore, there is an inconsistency in the group sampled, and reported on, in the Essential Media survey and the OECD report (CMIEG Submissions at [45(a)]). Redundancies are not limited to terminations of employment caused by "economic reasons", but can also be as a result of outsourcing, exhausting reserves, technological change, and achieving efficiency or productivity improvements or other factors.
  14. The CMIEG also notes that in relation to the incidence of redundancy, there was a correction made to the transcript at the hearing by Counsel for the CMIEG in relation to the incidence of redundancy in the general economy (Transcript, PN2423). There is no evidence of this in the OECD report.
  15. In relation to paragraphs [17] and [18] of the APESMA Note, it is important to note that the general trend towards the casualisation of the general workforce and the trend towards part time work, and the significantly better conditions in the coal industry (see CMIEG Submissions at [43(p)]), make unsurprising the finding that employees made redundant in the

black coal mining industry tend to suffer a drop in earnings when finding new employment. In any event, income maintenance and protection has been eschewed by the Coal Industry Tribunal and the Australian Industrial Relations Commission as a principle underpinning redundancy pay (CMIEG Submissions at [21], [64]). The CFMEU concurred on this point.

**D. Peaks and troughs in the mining industry**

16. APESMA refer to Annexure DG-8 of Supplementary Statement of David Gunzburg, but only in relation to particular industries that were recorded in the Annexure. APESMA draws conclusions that are not available on the evidence as it was presented.
17. In relation to paragraphs [20] to [22] of the APESMA Note, the CMIEG notes that, to the extent the analysis of the data by Mr Gunzburg is said to "conceal more than it reveals", the Commission will not be aided by the submission in paragraph [22] of the APESMA Note.

**E. Reliability of the CMIEG summary of union evidence**

18. In relation to the table, the CMIEG notes that the table was provided as a summary and it is not intended to replace the evidence presented in the matter, but rather for it to be used as an aide. The CMIEG invites the Commission to read the evidence and come to its own conclusions. Being a summary, it does not examine the level of detail contained in the statements, nor does it intend to. The CMIEG accepts that a summary will, by its very nature, have glosses on detail.
19. APESMA in its criticisms specifically raised, at paragraph [25] of the APESMA Note, that the table was misleading but (other than the matter discussed below) was "strictly speaking accurate".
20. In relation to APESMA's only other criticism of the table, in relation to the issue raised at paragraph [24] of the APESMA Note, the CMIEG accepts that this is an error. The CMIEG accepts the summary provided by APESMA in its Note, and simply comments that the document was prepared within a short period and time and that this error was unintentional.
21. Other than these two matters in respect of the table, APESMA does not set out the basis for stating that the summary does not accurately represent the evidence.

22. Furthermore, what is not represented in the Note by APESMA is that what is presented in the evidence of the APESMA and CFMEU lay witnesses are a jaundiced view of experiences of employees in the coal mining industry and does not provide an accurate or objective cross-section of workers in the industry (see CMIEG Submissions at [60]).

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