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**

FINAL SUBMISSIONS OF THE COAL MINING INDUSTRY EMPLOYER GROUP (CMIEG)

A. INTRODUCTION AND PRINCIPLES

INTRODUCTION

1. It is important to recognise the genesis of the current hearing, as recorded in the decision of the Full Bench of the Fair Work Commission (**Commission**) in *Black Coal Mining Industry Award 2010* [2015] FWCFB 2192 (**2015 Decision**) at [2]. On 9 May 2014, as part of the four yearly review being conducted, the Construction, Forestry, Mining and Energy Union (**CFMEU**) identified clause 14.4(c) as a potential item of review. On 20 October 2014, after the Commission had issued an exposure draft of what is now the *Black Coal Mining Industry Award 2010* (the **Award**) retaining the then existing clause 14.4(c), the CFMEU and Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) (collectively, the **Unions**) filed a joint submission seeking the deletion of the provision. In the 2015 Decision, the Commission determined that cl 14.4(c) should be varied. In that decision, at [42] and [44] the Full Bench stated:

> [42] We consider that the appropriate course, in the light of the conclusions we have reached, is to make a determination varying the Award to delete clause 14.4(c). Such a provision should never have been placed in the Award because at all times since the Award became effective on 1 January 2010 it was inconsistent with the modern awards objective in s.134(1) and offended s.153(1). The immediate removal of the provision will not have any adverse consequence for any employer bound by the Award, since the provision has in our opinion never had legal effect by virtue of s.137.
>
> …
>
> [44] …may potentially be some merit in the proposition that a new limitation on retrenchment payments should be introduced to replace clause 14.4(c)… Arguably, in circumstances where the original consensual industry-specific redundancy scheme

will now be altered to remove one of its starting-point features, a new cap upon what is a fairly generous scheme should be imposed in line with common industrial practice.

2. In line with the 2015 Decision, and consistent with the directions made by Commissioner Johns issued on 19 June 2015, the CMIEG put forward a proposed variation to clause 14 of the Award in the form set out in its letter of 7 July 2015 (see Exhibit 1, Annexure DG-1), which stated:

> The CMIEG proposes a variation to clause 14 of the Award as follows:
>
> (a) A cap be included, providing for a maximum entitlement of no greater than nine years' accumulation of redundancy benefits.
>
> (b) The cap apply to both severance pay, under clause 14.3, and retrenchment pay, under clause 14.4. Accordingly, a total cap of 27 weeks' pay would apply, being 9 weeks of severance pay and 18 weeks retrenchment pay.
>
> (c) The cap would apply to all employees covered by the Award. There would be no "grandfathering" arrangement.

3. Since that time and on 31 October 2016 by letter to the Associate to the presiding member, Vice President Hatcher, the CMIEG has also proposed a grandfathering provision.

4. The position that presently prevails is that the redundancy entitlement of employees covered by the Award is entirely uncapped. The entitlement as it currently stands does not accord with the entitlement in any form as it has existed since 1983.

RELEVANT STATUTORY PROVISIONS

5. These issues were summarised in paragraphs [10]-[19] of the original submissions filed by the CMIEG dated 29 March 2016 (and are included here for convenience):

> [10] The present application arises as part of the 4 yearly reviews being conducted by the Commission pursuant to s 156 of the FW Act: **2015 Decision at [2]**.
>
> [11] As part of the 4 yearly review process, the Commission has express power pursuant to s 156(2)(b)(i) to make *"one or more determinations varying modern awards"*. The power to vary a modern award involves the exercise of *"modern award powers"* as described in s 134(2)(a) of the FW Act: see *4 Yearly Review of Modern Awards:*

Preliminary Jurisdictional Issues [2014] FWCFB 1788; (2014) 241 IR 189 (***Preliminary Jurisdictional Issues Decision***) at [17].

[12] A variation must satisfy the modern awards objective enshrined in s 134 (1) of the FW Act: see also ***Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*** **(*SDA v NRA (No 2)*** [2012] FCA 480; (2012) 205 FCR 227. Relevantly, s 134(1) provides that the Commission must ensure that modern awards, together with the National Employment Standards, provide a *"fair and relevant minimum safety net"* taking into account the following criteria:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[13] Importantly, as noted above, s 134(2)(a) provides that the modern awards objectives apply to the performance or exercise of the Commission's functions or powers under Part 2-3 of the FW Act, which are described as the *"modern award powers"*.

[14] Section 139 of the FW Act identifies the terms which may be included in modern awards. Redundancy pay is not one of the matters included in s 139.

[15] Section 141(1) prescribes the circumstances in which a modern award may include an industry-specific redundancy scheme. Relevantly, s 141(1)(a) provides that an industry-specific redundancy scheme may be included in a modern award if it was included in that award in the *"award modernisation process"*.

[16] Sections 141(3) to (5) provide for the circumstances in which the Commission may vary or omit industry-specific redundancy schemes from modern awards, as follows:

> *Varying industry-specific redundancy schemes*
>
> (3) The FWC may only vary an industry-specific redundancy scheme in a modern award under Division 4 or 5:
>
> (a) by varying the amount of any redundancy payment in the scheme; or
>
> (b) in accordance with a provision of Subdivision B of Division 5 (which deals with varying modern awards in some limited situations).
>
> (4) In varying an industry-specific redundancy scheme as referred to in subsection (3), FWC:
>
> (a) must not extend the coverage of the scheme to classes of employees that it did not previously cover; and
>
> (b) must retain the industry-specific character of the scheme.
>
> *Omitting industry-specific redundancy schemes*
>
> (5) FWC may vary a modern award under Division 4 or 5 by omitting an industry-specific redundancy scheme from the award.

[17] By reason of s 134(2)(a), the exercise of power by the Commission under ss 141(3) to (5) involves the exercise of *"modern award powers"* and, as a result, in varying an industry-specific redundancy scheme the Commission must ensure that the modern award provides for a *"fair and relevant minimum safety net"* taking into account the criteria enumerated in s 134(1)(a)-(h) of the FW Act.

[18] Further, in the *Preliminary Jurisdiction Issues Decision* at [60] (209-211), a Full Bench of the Commission conveniently set out the parameters as to the scope of a 4 yearly review, as follows (emphasis added):

> 1. Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews. The discretion in s.156(2) to make determinations varying modern awards and to make or revoke modern awards in a Review, is expressed in general terms. The scope of the discretion in s.156(2) is limited by other provisions of the FW Act. In exercising its powers in a Review the

Commission is exercising 'modern award powers' (s.134(2)(a)) and this has important implications for the matters which the Commission must take into account and for any determination arising from a Review. In particular, the modern awards objective in s.134 applies to the Review.

2. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review. Section 582 provides that the President may give directions about the conduct of a Review. The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).

3. The Review is broader in scope than the Transitional Review of modern awards completed in 2013. **The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g))**. The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

4. **The modern awards objective applies to the Review. The objective is very broadly expressed and is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'**.

5. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.

6. There may be *no one set* of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern award, each of which may be said to achieve the modern awards objective.

7. The characteristics of the employees and employers covered by modern awards varies between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.

8. Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards. Depending on the terms of a variation arising from the Review, certain other provisions of the FW Act may be relevant. For example, Division 3 of Part 2-1 of the FW Act deals with, among other things, the interaction between the National Employment Standards (NES) and modern awards. These provisions will be relevant to any Review application which seeks to alter the relationship between a modern award and the NES. The Review will also consider whether any existing term of a modern award is detrimental to an employee in any respect, when compared to the NES (see s.55(4)).

9. Division 5 of Part 2-3 (ss.157-161) of the FW Act deals with the exercise of powers outside 4 yearly reviews and annual wage reviews. These provisions are not relevant to the conduct of the Review but the Review process is not of itself a barrier to an application or determination being made under Division 5, provided the Commission is satisfied that the requirements of Division 5 have been met. In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Interested parties will be provided with an opportunity to comment on any such proposed variation.

10. Division 6 of Part 2-3 contains specific provisions relevant to the exercise of modern award powers. These provisions apply to the Review. If the Commission were to make a modern award or change the coverage of an existing modern award in the Review, then the requirements set out in s.163 must be satisfied.

    Determinations varying modern awards arising from the Review will generally operate prospectively and in relation to a particular employee the determination will take effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. A variation can only operate retrospectively if the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) *and* there are exceptional circumstances that justify retrospectivity.

> Section 166 deals with the operative date of variation and determinations which vary modern award minimum wages and it also applies to the Review.

[19] These principles are relevant to the discharge of the Commission's powers in the present matter [emphasis added].

RIVAL POSITIONS ON ONUS AND STATUTORY TEST

6. The Unions submit that:

   (a) a substantial merits case must be established by the CMIEG to show a change in circumstances where the relevant entitlement, *prima facie*, meets the modern awards objectives;

   (b) CMIEG bears the onus to establish a significant change so as to depart from an established industrial standard; and

   (c) in light of there being an industry-specific redundancy scheme in the Award it must be established that the scheme no longer meets the industry specific needs.

7. The CMIEG submits that these contentions should be rejected.

8. As to the first matter (set out in paragraph 6(a) above), in his short opening address, Senior Counsel for APESMA stated that it was necessary to establish a change in circumstances in order to succeed in relation to the proposed variation. This is not correct. Although a change in circumstances would certainly provide a basis on which the Commission could be satisfied that a variation ought be made to a modern award, it is not the only basis. In *Baking Industry Association of Queensland - Union of Employers Restaurant and Catering Australia and Others Victorian Employers' Chamber of Commerce and Industry* [2013] FWC 7840, Deputy President Gooley in the context of the two yearly modern awards review had rejected various proposed variations to the *Restaurant Industry Award 2010* on the basis that the relevant employer groups had not established substantial change in circumstances. On appeal, in *Restaurant and Catering Association of Victoria* (2014) 243 IR 132; [2014] FWCFB 1996, a Full Bench of the Commission (both the majority and minority) found that Deputy President Gooley had engaged in error. The majority (Vice President Hatcher, Justice Boulton, Commissioner McKenna) held as follows:

> [90] **The Full Bench in the *Modern Awards Review 2012* decision identified a "significant change in circumstances which warrants a different outcome" as**

being an example of "cogent reasons" which might justify a departure from a previous Full Bench decision [*Modern Awards Review 2012* [2012] FWAFB 5600 at [99]]. However, it is clear that there might be other cogent reasons why a Full Bench decision might not be followed in the conduct of a modern award review. These might include that the evidence demonstrates that the modern award has not operated in practice in the way intended by the Full Bench in its earlier decision, or that a matter critical to the proper operation of the modern award was not raised before the Full Bench and consequently not considered, or that the Full Bench made a patently demonstrable error. For the purpose of the two-yearly review, if a party cogently demonstrates that for any reason an award is not achieving the modern awards objective and/or is not operating effectively, without anomalies or technical problems arising from the award modernisation process, then that must be taken into account in the conduct of the review under item 6(2) regardless of whether circumstances have changed since the Full Bench decision which resulted in the making of the modern award.

[91] In paragraph [247] of the Decision (which we have earlier set out), the Deputy President concluded that cogent reasons had not been established because the "grounds on which they [the 18 applicants] seek the variations do not identify a significant change in circumstance; rather they are largely merits considerations which existed at the time the Award was made". That conclusion, with respect, appears to have established a criterion for the determination of the penalty rates case, namely "a significant change in circumstance", which was not derived from item 6 of Schedule 5 of the Transitional Act. Although in the following paragraph of the Decision the Deputy President stated a general conclusion that the variations to the penalty rate provisions sought by the 18 applicants were not warranted on the basis that the Restaurant Award was not achieving the modern awards objective or operating other than effectively without anomalies or technical problems arising from the award modernisation process, we consider that it appears to emerge from the Deputy President's chain of reasoning that this conclusion was a consequence of the earlier finding that no significant change in circumstance had occurred.

[emphasis added]

9. Although the above reasoning applied to the two yearly modern awards review, there is no reason why as a matter of principle it would not equally apply to the four yearly modern awards review.

10. Thus, it is wrong to say that substantial change needs to be shown to establish a departure from an earlier provision in a modern award.

11. Further, the second element of the first contention of the Unions carries an assumption that the retrenchment entitlement *prima facie* meets the modern awards objective. The true principle, noted above in relation to the *Preliminary Jurisdictional Issues decision* ([2014] FWCFB 1788; 241 IR 189), is that:

> [60(3)] … The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.

12. It does not follow from that statement that every term of every modern award is taken to have satisfied the modern awards objective. That is particularly the case where a term was simply not considered on its merits as it was agreed to on a consent basis, or where there was no contest between the parties in respect of the provision. In addition to the above, it should be remembered that the modern awards were made in the context where a number of matters were simply incorporated by consent and without any argument on the merits as to the inclusion of the provisions into the relevant award. In the same Full Bench decision, the minority (Vice President Watson and Commissioner Roberts) held:

> [199] As a result of the award modernisation process, approximately 1560 federal and state awards were reviewed over a period of about 18 months and replaced by 122 modern awards. A further 199 applications to vary modern awards were made during this period. It is clear from any review of the process that the objects of rationalising the number of awards and attempting to balance the inconsistent objects of not disadvantaging employees and not leading to increased costs for employers attracted the vast majority of attention from the parties and the AIRC. **It was clearly not practical during the award modernisation process to conduct a comprehensive review of the industrial merit of the terms of the awards. Matters that were not put in issue by the parties were not subject to a merit determination in the conventional sense. Rather, terms were adopted from predecessor awards that minimised adverse changes to employees and employers** [emphasis added].

13. The assumption that all entitlements, including the redundancy entitlement, in the Award meets the modern awards objectives would lead the Commission into jurisdictional error as it supposes without any active consideration on the part of the Tribunal, that the matter on its face satisfies that statutory condition.

14. The same point can be made as to the inclusion of the industry specific industry redundancy scheme. The Unions in these proceedings point to no argument or consideration given to the inclusion of such an industry scheme in the current Award. Rather, their submissions proceed on the basis that because the clause was included in the Award, that matter had been

specifically considered by the Commission and that the Commission was thereby satisfied as to its inclusion.

15. However, contemporary principles as to the exercise of jurisdiction establish that more needs to be shown on the part of a decision maker or a tribunal to establish that it has given consideration to the state of satisfaction that it has reached. It must be a state of satisfaction reached which is not irrational, illogical or unreasonable (*R v Connell; Ex parte Hetton Bellbird Collieries Ltd* [1944] HCA 42; 69 CLR 407 at 432; *Minister for Immigration v Li* [2013] HCA 18; 249 CLR 332) and must be properly formed according to law (*Buck v Bavone* [1976] HCA 24; 135 CLR 110 at 118-119; *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 90 ALJR 213 at 33; *D'Amore v ICAC* [2013] NSWCA 187; 303 ALR 242 at [220]; *QBE Insurance (Australia) Ltd v Miller* [2013] NSWCA 442 at [36]).

16. Further, insofar as the Unions contend that the CMIEG bears a burden to present a substantive merits case, the provisions relied upon are ones that do not impose an onus but rather require the Commission to reach a state of satisfaction.

17. In any event, a substantive merits case can be made out on the basis of evidence or principle, or both. In the present case, the CMIEG attended to the task that the Full Bench identified in the 2015 Decision, which was to put before the Commission evidence of the age profile and length of service of coal mining employees; the circumstances they face on redundancy and the cost impact on employees of the scheme. Further, steps have been taken to demonstrate how these matters ought be weighed so as to propose a cap that is consistent with "common industrial practice" (2015 Decision at [44]).

18. The Unions have contended that the evidentiary case presented by the CMIEG is "weak" and "thin". It should be remembered that the evidence that might be able to be presented by the CMIEG would relate to the circumstances of redundancy, and the age and length of service of redundant employees. Insofar as that evidence was available, it has been adduced. For example, the CMIEG evidence includes the age and length of service of some 953 employees made redundant between 2012 and 2014 from members of the CMIEG (see Exhibit 1 at [11], DG-1 and DG-2). Evidence has also been presented of particular circumstances of closures of mines, using the Centennial Group as an example (Exhibit 3). Evidence of retirement ages has also been presented (Exhibits 3 and 41). As to the balance of the materials relating to the circumstances of the industry and trends, that is largely available from public data. By contrast, the Unions are in and were in a position to call evidence from employees and were

in a better position to conduct surveys of the type they did conduct of employees who were made redundant.

19. As to the second matter (set out in paragraph 6(b) above) in any event, the Unions argument proceeds on the basis that the decisions of the Coal Industry Tribunal (**CIT**) are binding upon the Full Bench of the Commission and cannot be departed from.

20. The Unions' case relies upon the following sequential process of reasoning:

    (a) the current scheme is an industrial entitlement enshrined by a specialist industrial tribunal (the CIT) which took into account the factors peculiar to the coal mining industry;

    (b) those factors peculiar to the coal mining industry continue to prevail;

    (c) the elements of the coal mining industry scheme have not been challenged since by employers and employer groups, including in the award modernisation process; and

    (d) the cap on redundancy pay was not a true cap and in any event only applied to the retrenchment component of the scheme.

21. The first of these contentions warrants close examination. The logic propounded by the Unions is that the criteria upon which the CIT determined severance entitlements is sacrosanct and not open to challenge. The criteria relied upon by the CIT included in the 1973 decision ([1973] ACIndT 2183 (16 February 1973)):

> relief for an employee who has given an appreciable portion of his working life to a colliery and who through its closure has been deprived of his livelihood.

and from the 1983 decision ([1983] ACIndT 3132 (19 January 1983)) a list of factor including:

> … the industry is a career industry, some benefits accrue on an industry wide basis, many conditions are in advance of those in industry generally, loss of seniority, an inability to find comparable employment, difficulties and financial pressures occasioned by what will frequently be a move in the search for a job, changing community attitudes to retrenchment by legislation and the fact the retrenchment agreements exist whatever terms, severance and retrenchment are industrial, not social, matters in a tribunal such as this and income maintenance is not a proper consideration, the costs of any measure and, so far the evidence permits, an assessment the effect of any change operations.

22. First, it is not established that the decisions of the CIT are binding on the Commission as presently constituted. The idea or principle that cogent reasons need to be established to depart from earlier binding authority is a principle that has been developed by industrial tribunals to work as a pseudo application of precedent or *stare decisis* (see *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (2003) 127 IR 205 at [48]; *Preliminary Jurisdictional Issues* decision at [25]-[27]). That is a principle applying to previously binding authority. The decisions of the CIT, being decisions of single members of the CIT with no rights of appeal that then existed, cannot be said to be binding on a four member Bench of the Commission. Even if somehow it is said that those decisions are binding, then on the application of orthodox principles they can be departed from where there are cogent reasons for doing so, including but not limited to circumstances where the context no longer prevails, there have been other developments in industrial law, or they were founded on flawed premises, or where they are plainly wrong. The present is the case where each of these descriptors are apposite.

23. Second, since the CIT decisions, the Commission's predecessors have examined community standards referrable to redundancy pay on at least two occasions, as have State industrial tribunals. This includes the *Termination Change and Redundancy Case* (1984) 8 IR 34 (**TCR Case**) and the *Redundancy Case* (2004) 129 IR 155. Neither this Commission, nor its predecessors, have sought to examine whether the principles underlying the CIT decisions of 1973 and 1983 are consistent with the principles from the TCR Case and Redundancy Case that **are** binding upon this Commission as presently constituted.

24. Third, the criteria relied upon in the CIT decisions either no longer have any relevance or are inconsistent with the authorities binding on the Commission, and further some of the criteria are plainly wrong. For example:

    (a) The issue of loss of seniority can no longer be sustained as a relevant criterion. Since the decision in *Australian Iron & Steel Pty Ltd v Banovic* [1989] HCA 56; 168 CLR 165, the "last on first off" principle is not an available basis for selection of redundancy.

    (b) The assertion that greater protection is warranted to be provided to employees covered by the Award because their conditions are in general advance of industry is a logically absurd contention in the context of setting minimum wages and conditions. This erects the false criterion that the safety net is to be a gold standard. It also fails to account for the fact that the substantially higher wages. It is in fact employees that are in less vulnerable positions than others in the community and society at large that

might warrant enhanced retrenchment payments. Whatever might have been the industrial considerations in play in 1973 and 1983, given the substantial change in legislation and the movement towards minimum safety nets the criteria based upon conditions being in advance of industry has no relevance and are plainly wrong.

(c) As developed in more detail below, the CIT decisions were made in a particular industrial context where there was no collective bargaining at an enterprise level and the award and determinations made by the CIT were "actual rates" awards. An examination of the CIT decisions discloses that the enterprise bargaining at a site based level appears to have emerged post-1983. These are matters about which a certain degree of judicial notice can be taken. Professor Peetz's assertion that enterprise bargaining was prevalent in the 1970 has no foundation. The subsequent development of enterprise bargaining and its prevalence is a substantial change in circumstance.

(d) To the extent that in 1973 and in 1983 the CIT was concerned about protection of conditions that were in advance of industry generally, to the extent that that is a relevant consideration in the present statutory context, such matters are protected by the industrial bargains that parties are able to strike at each enterprise. The place for the modern award is to provide a foundation for enterprise bargaining, not as its ceiling.

(e) Whereas the TCR Case and the Redundancy Case require loss of non-transferrable credits to be taken into account, the CIT decisions take into these into account in the opposite direction.

For these reasons, the CIT decisions should be seen in their historical context. There are ample reasons why this Commission is not bound by them, can depart from them, distinguish them and/or give them appropriate but limited weight.

25. As to the third matter (set out in paragraph 6(c) above), the issues were summarised in paragraphs [19]-[24] in the reply submissions filed by the CMIEG dated 26 August 2016 (and are included here for convenience):

> [19] The respondent unions claim that the CMIEG's reliance and reference to the NES redundancy entitlement under the FW Act is inappropriate or misguided as the FW Act expressly provides that industry-specific redundancy entitlements (if any) are to apply in substitution of the NES redundancy entitlement. In support of this contention, the CFMEU in its submissions at [21]-[22] asserts that *"industry-specific*

redundancy schemes were intended to have a continuing existence in the modern award system, subject to the satisfaction of certain conditions. Indeed, the Explanatory Memorandum suggests that industry-specific redundancy schemes should continue to operate until they no longer meet "industry specific needs" and then submit that there was *"an unmistakable legislative intent to permit divergence from the NES standard of redundancy pay"*.

[20] It may be accepted that s.141(1)(a) of the FW Act permits the inclusion in a modern award of an industry-specific redundancy scheme *"if the scheme was included in the award… in the award modernisation process…"*. However, two points must be noted.

[21] ***First***, s.141(1)(a) only reflects a legislative intent that a discretion be conferred on the Commission to include an industry-specific redundancy scheme, **if** such a scheme was included as part of an award modernisation process. That says nothing about what is to be the guiding criteria or standard that must be satisfied for the inclusion of such a scheme as part of the award modernisation process. The guiding criteria were the Commission's award modernisation functions set out in s576B of the *Workplace Relations Act 2006* (Cth) and the various Ministerial requests that were issued: e.g., see *Modern Awards Review 2012* [2012] FWAFB 5600 at [85]. However, as noted above, the fundamental difficulty with accepting that this industry-specific redundancy scheme is one that met the modern awards objective is that it merely reflected an unchallenged consent position. It does not follow that there was any consideration given as to whether the terms of the so-called industry-specific scheme met the modern awards objective.

[22] Further, any such industry scheme is not sacrosanct. The industry scheme may be varied subject to ss.141(2) and (3) of the FW Act. The industry scheme is not immutable. Such a varied scheme may continue to meet the needs of employees and employers in the particular industry, and retain its industry specific nature, and further, such a varied scheme may meet the modern awards objective.

[23] ***Second,*** there is no warrant for reading into ss.141(3) or (5) that the Commission's jurisdiction to vary industry-specific schemes contained in modern awards is limited to cases where such a scheme *"no longer meets industry specific needs"*. Notwithstanding the text of the Explanatory Memorandum, nothing within the text of s.141 supports the unions' contention drawn from that Explanatory Memorandum. As the Full Court stated in *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* (2015) 231 FCR 298 at [47]-[48]:

> [47] The legislative intention is "the *'intention manifested'* by the legislation": *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at

[31] (original emphasis), referring to *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-9 per Gummow J. As French CJ, Gummow, Hayne, Crennan and Kiefel JJ went on to observe in *Saeed*:

Statements as to legislative intention made in explanatory memoranda or by Ministers, however, clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

[48] Furthermore, "through oversight or inadvertence", the intention of the Parliament might not be reflected in the legislation. If that happens, the court must "give effect to the will of the Parliament as expressed in the law". See *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 (Mason CJ, Wilson and Dawson JJ) cited in *Saeed* at [32].

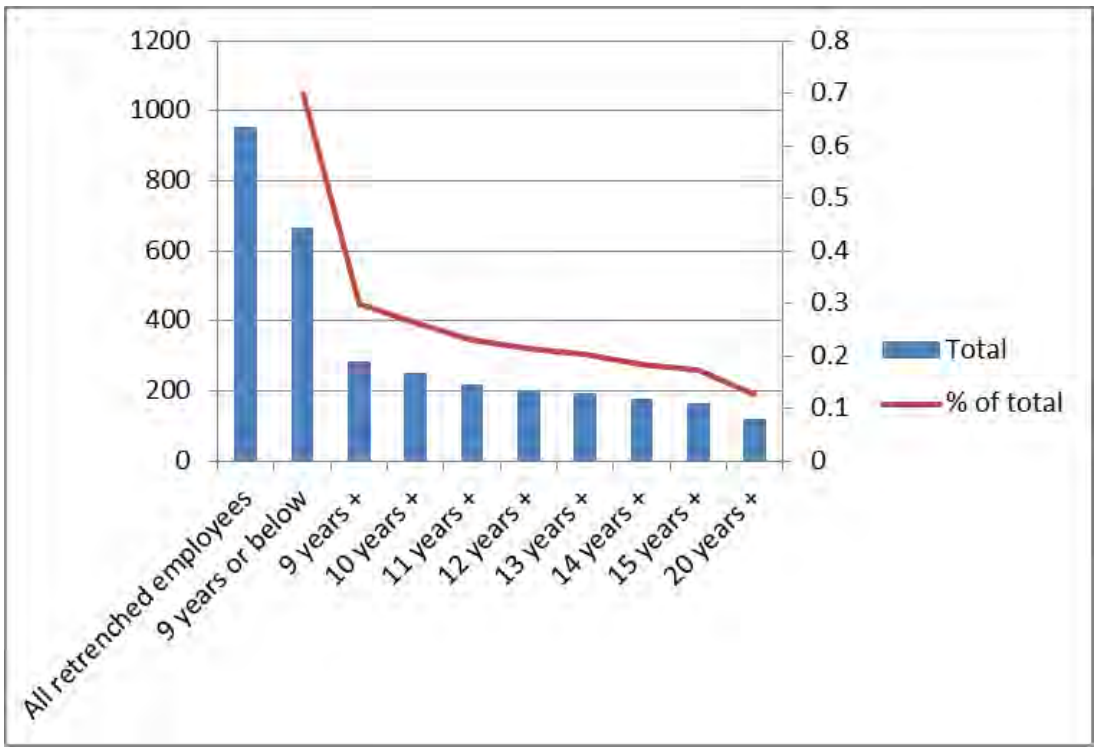
[24] In the present case, it is evident that the Commission's discretion to vary modern awards as part of the 4 yearly review process is at all times to be conducted to ensure that the modern awards objective are satisfied. No other test can be superimposed. The true question is whether it remains appropriate for the Award to have an industry-specific redundancy scheme and, if so, whether the amount of redundancy payment provided by that scheme beyond the NES entitlement is warranted, justified and, most importantly, ensures that the modern awards objective is satisfied. This is particularly so in light of the Commission's duty to ensure that the modern award provides for a *"fair and relevant <u>minimum safety net</u>"* taking into account the criteria enumerated in ss.134(1)(a)-(h) of the FW Act [emphasis added].

B. THE EVIDENCE

CMIEG EVIDENCE

Age and length of service profile

26. The evidence of Mr Gunzburg (Exhibit 1) sets out data obtained from five members of the CMIEG, who had in total retrenched 953 employees from 2012 to 2014, including as to their age brackets and their length of service. This data has been graphically represented as follows:



27. The data shows that the 70% of 953 employees have less than nine years' service and less than 10% are over the age of 60 years of age. It is noted below that these statistics are roughly consistent with those deduced from the Essential Media Survey results (Exhibits 14 and 16). Mr Gunzburg also obtained data from Coal Services Pty Ltd in relation to employees engaged in the coal mining industry, as to the age distribution of all employees in the industry in New South Wales (Exhibit 1, DG-4). That data shows that only a very small percentage of employees (4.4%) were aged over 60 years of age in 2010.

28. Ms Hannah Martin also obtained data from the Queensland Department of Natural Resources and mines in relation to employees engaged in the coal mining industry in Queensland (Exhibit 9, HM-1). That data shows, similarly, that only a very small percentage of employees (of approximately 4.3%) were aged 60 years of age or over in 2014.

29. Mr John Edwards has provided evidence, not as to the age and length profile of redundant employees, but as to the age and length of service of those employees that retired from Centennial Coal (Exhibit 3). His data has been converted into a table format and provided to the Commission and comprises the table in Exhibit 41. Some of this data has been graphically represented by Professor Peetz in his original report (Exhibit 11, Figure 21). The data shows that the age profile of those that retire is approximate to 60 years of age, but there is some variation in the length of service of the people who retired, but more often than not, as one would, expect the length of service of those employees who retired is longer.

Mine closures and redeployments

30. The black coal mining industry experiences economic cycles with peaks and troughs and during troughs there tend to be retrenchments (Exhibit 3, witness statement of Mr John Edwards at [12]). In the period since 2013, Centennial has implemented redundancies at three mines. The Mannering mine was placed into care and maintenance in January 2013, but all 113 employees (other than six) were transferred to other mines. The average age of the affected employees was 43.8 years of age. The Newstan mine was placed into care and maintenance on 1 August 2014. 147 employees were affected and who were covered by the Award. But 83 of these 147 employees were transferred to other mines and 64 employees were forcibly retrenched. The average of affected employees was 45.16 years of age. The Angus Place Mine was placed into care and maintenance on 12 November 2014, with 267 employees covered by the Award being affected. Nineteen of these employees took voluntary redundancies, 22 employees undertook voluntary redundancy swaps (with workers from other mines), 139 employees were transferred to other mines, 77 employees remained to complete work and then took voluntary redundancies and 32 employees were forcibly retrenched. The average age of the affected 32 employees was 50.09 years of age.

Experience of redundant employees

31. Both Mr Edwards and Ms Merritt give some evidence of the experience of employees who have been made redundant. Mr Edwards' experience in a period of over three decades in human resources management in the black coal mining industry is that employees facing retrenchment fall into three broad categories. The first being those employees who are ready for retirement and who take up voluntary redundancies. The second being those who find work outside of the black coal mining industry or at another mine shortly after being advised of their redundancies. The third being those being who would not wish to leave and have no alternative employment to go to (see Exhibit 3). It is unsurprising that in general terms the Essential Media Survey (see Exhibit 14) elicits similar types of responses of the participants as to what they do following retrenchment: some get full time employment in the industry, some get employment outside of the industry, and some get part-time or casual employment either inside or outside the industry, some retire, some stop looking for work for various reasons. There is no reason to suggest that the experience to those retrenched in the black coal mining industry is any different from the experiences of employees made redundant in other industries.

32. Ms Merritt gives evidence about her experiences in dealing with employees following retrenchments including in the black coal mining industry (Exhibit 5). In general terms, her

evidence is that the success of retrenched employees in obtaining re-employment depends upon issues such as regional factors, specialist skills and their transferability and preparedness to change of the individual and initiative and motivation of the individual. That too is largely unsurprising.

Best available data as to periods of unemployment of black coal mining industry employees

33. As became apparent in the cross-examination of Mr Gunzburg and Professor Peetz, much of the data on unemployment is based on surveys conducted by the Australian Bureau of Statistics (**ABS**) and the resulting data made available by it. In relation to unemployment data, the ABS groups the mining industry together without separating out black coal mining. Further, the unemployment data is necessarily dependent on the ABS definition of unemployment.

34. Allowing for the above limitations, Mr Gunzburg's first witness statement (Exhibit 1) produced evidence of unemployment data comparing the mining industry to all other industries at certain points in time (Exhibit 1, DG-5 and DG-6). That data shows that the periods of the period of time that a relevant survey participant had said they were unemployed was generally in line with other industries. Although Professor Peetz criticised reliance on this data alone in his supplementary report he accepted that the ABS labour force data nevertheless had "some merit as an, albeit imperfect, measure of unemployment duration of people whose previous job was in the mining industry, compared to other industries" (Exhibit 12 at [36]).

35. In his second witness statement, Mr Gunzburg obtained ABS data relating to periods of unemployment for workers in the mining industry and other industries by reference to whether they had "lost last job" or "left last job" (Exhibit 2). Although the "lost last job" categories includes employees that had been terminated due to ill health or injury, season or temporary employment, closing down their own business due to financial difficulties, and being "dismissed" (see Exhibit 2 at [8]), it is again the best available objective data from the ABS on which to draw comparisons. In examination of that data, while there is variability for each industry over time and between industries at the same time, the "Mining Industry" shows a greater variability over time than most, but not all, other industries. At various times the Mining Industry has had a greater and lesser proportion of unemployment being for reason of "lost last job" than most other industries at that same time. When viewed in conjunction with the ABS data contained in Mr Gunzburg's first report (Exhibit 1), it would appear that over time the Mining Industry experience in relation to the reason for people leaving their last job

and the amount of time taken to find a new job is similar to the experience of other industries contained in the ABS data set (Exhibit 2 at [11]-[13]).

Availability of other benefits

36. The evidence from the CMIEG discloses that the black coal mining industry workers receive benefits additional to those available in other industries. This includes the following:

    (a) the un-contradicted objective evidence is that the average weekly earnings is $2,597.30 as compared to the average weekly ordinary time earnings for all industries as being $1069.80 (Exhibit 13);

    (b) employees in the black coal mining industry generally are eligible for portable long service leave entitlements under the regime enacted under the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth), *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992* (Cth) and *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* (Cth) (Exhibit 3, at [43]);

    (c) clause 13.5(b) of the Award provides that employees whose employment is terminated due to "retrenchment", and have 70 or more hours of untaken personal leave, are entitled to be paid that entitlement (Exhibit 3 at [46])**,** with the entitlement to personal leave under clause 25 of the Award of 105 hours (equivalent to 15 days) being more generous than the National Employment Standards of the *Fair Work Act (2009)* (**FW Act**).

    (d) under clause 25 of the Award, employees are entitled to five weeks (175 hours) of annual leave, with seven day roster employees being entitled to six weeks (210 hours), and when taken is are paid the ordinary rate of pay plus a 20% loading, or the employee's rostered earnings for the period of the annual leave (which includes rostered overtime and roster public holidays), whichever is the greater, which entitlements are all in excess of the National Employment Standards;

    (e) clause 14 of the Award takes no account of the benefits that employees may receive under their relevant occupational superannuation fund (whether the Mine Wealth and Wellbeing Superannuation Fund (Exhibit 3 at [37]) or another fund, which generally from the age of 55 permit employees to access superannuation benefits; and

    (f) persons who are unemployed may be entitled to access unemployment benefits provided by the Government, by way of both monetary allowances and job search assistance.

Predictability of the future

37. The Unions' witnesses accepted that it is difficult to predict the future of the black coal mining industry and it is uncertain. There has been an increase in coal price in the last six months and predictions as to the future growth of the industry remain, like all other industries, variable (see Exhibit 2 at [14]-[18], DG-9, DG-10 and DG-11).

UNION EVIDENCE

Critical Conclusions To Be Drawn From Essential Survey

38. The key conclusions that can be drawn from the Essential Media Survey data (see Exhibit 14) are as follows:

    (g) 2,618 people responded to the survey. The sample size was drawn from approximately 12,000 union members.

    (h) Of the 2,618 people who responded, 1,940 people remained in the exact same job and were not asked further questions (other than the level of their weekly earnings and their age).

    (i) 513 people had responded on the basis that they had been made redundant, their contract had been expired, or they were terminated for other reasons. Some respondents stated that they had been terminated in accordance with more than one of those categories. These 513 people were asked most of the questions in the survey.

    (j) 42 people had claimed that their contracts had expired.

    (k) 73 people had claimed that they had been terminated for other reasons.

    (l) 423 people had claimed that they had been made redundant.

    (m) Of the 513 people who had responded on the basis that they had been made redundant, their contract had been expired, or they were terminated for other reasons, 380 people had received redundancy payments (which the question qualified as a payment in addition to any unused leave entitlements) over the period of three years from July 2013. That figure of 380 people is, on average, 126.7 people who were received a redundancy payment per year of the survey period. This is approximately 4.3% of the entire sample size of 2618 survey participants.

(n) 320 of the 513 people were employed by mine operators by the time their employment was terminated.

(o) 143 people (or 32.7% of people, adjusting for those who did not respond to the question) had not worked since their employment was terminated. This figure includes those who had voluntarily retired and those that had looked for work but then decided to retire.

(p) Of those who had been made redundant, 129 people (or 27.8% of people, adjusting for those who did not respond to the question) found paid work within four weeks. 245 people (or 56.1% of people, adjusting for those who did not respond to the question) had found paid work within 6 months. 277 people (or 63.5% of people, adjusting for those who did not respond to the question) found paid work within a year.

(q) 51 people were previously in jobs that did not pay annual leave or sick leave.

(r) 215 people had found work whereby they could work 38 hours or more a week.

(s) 124 people were not actively looking for work (in the four weeks preceding the survey). This included people who did not want to take up new work and included those who had retired.

(t) 326 people either remained in the same residential address as they lived at before having their employment terminated. A further 36 people remained in the same town or area. Of the 62 people who moved to another address more than 50km from their pre-termination address, 26 people did so for personal reasons, 16 did so to enable them to take up another job.

(u) 1,355 of the 2618 people had an average weekly pay of $2,000 or more. Adjusting for those who declined to answer the question and those who did not answer, those 1,355 people formed 65.3% of respondents to that question.

(v) The age profiles are as follows:

(i) 140 people were in the 18-29 age bracket;

(ii) 276 people were in the 30-34 age bracket;

(iii) 313 people were in the 35-39 age bracket;

(iv) 351 people were in the 40-44 age bracket;

(v) 335 people were in the 45-49 age bracket;

(vi) 375 people were in the 50-54 age bracket;

(vii) 346 people were in the 55-59 age bracket;

(viii) 275 people were in the 60-64 age bracket; and

(ix) 88 people were in the 65 and over age bracket.

(w) This means that 2,136 people who responded to the survey were under the age of 60 years of age (or 85.4% of people, accounting for those who did not answer the question).

(x) Only 153 of the 513 people (or 33.1% of people, accounting for those who did not answer the question) had greater than nine years' service. This means that for two thirds of people they will not be affected by the cap, until they reach greater than nine years' service, as there entitlement will not continue to accrue and will freeze in time.

39. Assuming that the Unions have established that Professor Peetz as to the validity sample size (despite it being small) can be accepted, the following conclusions might be drawn from the survey:

(a) only 4.3% of the workforce is made redundant annually, which roughly accords with Professor Peetz's evidence relating to 1300 redundancies and also roughly relates to the general rate of redundancies in the broader economy (see Exhibit 12 DP-7).

(b) 66.9% of those terminated had less than nine years' service.

(c) 63.5% found paid work within a year.

(d) The vast majority remain in same area after being made redundant/losing their job.

Professor Peetz's Evidence

40. Professor Peetz's evidence in relation to the background and characteristics to the black coal mining industry is largely based upon publically available ABS data and other publically available information.

41. Other parts of his report which rely upon general academic literature about the impact on redundancy and unemployment largely rehearses the types of matters that are considered by the AIRC in the Redundancy Case.

42. Those parts of his report (Exhibit 11) that rely upon on the Essential Media Survey (Exhibit 14) and draw conclusions on them are entirely unsafe and should not be relied upon. That is

because they reflect Professor Peetz's extraction and interpretation of the survey results based upon his rationale about what amounts to a "redundancy" and other matters.. He has not disclosed the basis for his reasoning as to how he selected particular figures or percentages from the raw survey result data. It is that raw survey result data that should be considered if any conclusions can be drawn from it.

43. Insofar as it is relevant, critical parts of Professor Peetz's evidence is as follows:

(a) The black coal mining industry is concentrated in particular regions in New South Wales and Queensland.

(b) It is an industry that has substantial growth since 1973 and Figures 1, 2 and 3 set this out.

(c) It is also an industry that is subject to economic cycles of peaks and troughs. However, Professor Peetz conceded that there are several other industries that are also subject to economic cycles, in particular construction, manufacturing and retail being examples.

(d) The rate of employment and the number of employees engaged in the industry tend to follow the economic cycles, there have been previous declines in employment followed by upswings in employment. Generally speaking the number of employees in the black coal mining industry has fluctuated to a level of 25,000 people and presently is approximately 44,000 people.

(e) Although retrenchments do occur during periods of decline or troughs, Professor Peetz fairly conceded that retrenchments also occurred during peaks. This is because of factors such as: outsourcing, contracting, growth of labour hire, natural depletion and closures of mines.

(f) According to Professor Peetz own analysis of newspaper articles and media releases, there have been approximately 1,300 redundancies per year since 2008 (Exhibit 11 at 51). However, he conceded that the period selected by him predominantly related to a downturn in the industry, and he agreed that the higher incidence of redundancy was because of those reasons.

(g) Professor Peetz admitted that he had not had regard to any of the CMIEG evidence that suggested that there was also job growth in the industry, for example, in relation to redeployment. He also accepted that some of the retrenched employees had obtained full-time employment back in the industry. He referred to the fact that there

are 1,300 redundancies (per year) in overall in the industry, but did not take into account job creation in the industry.

(h) Professor Peetz also agreed that there is greater consolidation in the industry amongst the major operators and accepted that that gave rise more so now than in the past for opportunities for redeployment.

(i) Professor Peetz had accepted that there had been greater development of the regions in which black coal mining has been undertaken, at least in relation to the regions that he had some knowledge of, including Bowen Basin, Hunter Valley and (to some extent) the Illawarra.

(j) Professor Peetz also accepted that the Hunter Valley and the Illawarra already had population centres and other industries.

(k) Professor Peetz also accepted that the types of employees engaged in the industry are those that are trade qualified, degree qualified and otherwise skilled. He accepted that the types of employees include electricians, fitters, drivers, engineers, scientists and managers.

(l) Professor Peetz accepted that mining workers are the highest paid in relation to average weekly earnings.

(m) Professor Peetz accepted that there is a strong relationship between age and tenure, but that that was not unique to the black coal mining industry.

(n) Professor Peetz accepted that there is a smaller trend towards people retiring at an older age, but again that this is not unique to the black coal mining industry. Professor Peetz also accepted that people in labour intensive and blue collar work tend to exit earlier than in other industries due to health and labour intensification issues.

(o) Professor Peetz accepted that the OECD report indicated that the incidence of redundancy falls disproportionately amongst workers in manufacturing and construction industries.

(p) Professor Peetz also agreed that there has been a general casualization in the workforce, trend towards part-time arrangements and contract labour and that none of this is unique to the black coal mining industry. In fact he accepted that contract labour accounted for, in excess of 30% of employment in the black coal mining industry in NSW.

(q) Professor Peetz claimed that based on the Essential Media Survey (Exhibit 14), approximately 14 or 15% had been made redundant, but also accepted that this figure was an aggregate figure over three years and therefore was an average figure of between 4% and 5% per year.

(r) Professor Peetz accepted that the evidence contained in his report as to the experiences of redundant workers based on ABS from 1997 and 2001 was not unique to the black coal mining industry and applied equally across all industries.

(s) Professor Peetz was then closely cross-examined on the results of the survey conducted by Essential Media (Exhibit 14). The relevant parts of those survey results are summarised above.

(t) Professor Peetz conceded that on his analysis, two thirds of the employees would be unaffected by the variation proposed by the CMIEG. He further accepted that of the remaining third of employees, he had not accounted for employees that would be covered by enterprise agreements. And, in fairness, he had not accounted for the grandfathering provisions which would diffuse the extent of the impact on those employees that could be potentially affected.

(u) Professor Peetz had not turned his mind to whether or not the Award covered or applied to the survey participants.

44. In Professor Peetz's Supplementary Report (Exhibit 12), Professor Peetz belatedly addressed matters that should have been addressed in his primary evidence, but was asked to respond to submissions made by the CMIEG as to there was any distinction between the black coal mining industry and other industries. Instead of comparing the black coal mining industry to other comparable industries, Professor Peetz relied upon on one OECD report to draw comparison between the black coal mining industry and all other industries in aggregate. He posited three points of distinction between the experience of "retrenched workers" in the black coal mining industry (based upon his own conclusions of the survey results) and "displaced workers" (as defined in the OECD). Those three points of distinction were as follows that

(a) the alleged rate of re-employment of retrenched workers in the black coal mining industry was "less likely" than that of all other industries aggregated;

(b) the rate of employment in non-permanent, casualised and part-time was greater; and

(c) the terms and conditions of employment were lesser than in all other industries aggregated.

45. No weight can be placed upon these opinions and it would be unsafe to do so for the following reasons:

(a) Different data sets were being looked at:

(i) The Essential Media Survey data set (Exhibit 14) was a sample of 421 who claimed to have been made redundant when in fact only 380 people had received redundancy payments, of which some are not even likely to have been covered by the Award. That immediately means that the comparison reflects an overstatement of redundancies reflecting black coal mining industry or those actually affected by the current proceedings.

(ii) The OECD data set includes retrenched workers, workers terminated for cause, and casual temporary and seasonal workers, but excludes those on fixed term contracts.

(iii) Thus it follows that the data sets are not like for like.

(b) In relation to the conclusions relating to rates of re-employment, Professor Peetz uses the data sample of 421 people alleged to have been made redundant when in fact the true number is closer is 380 (or lower when taking into account those who are actually covered by the Award). It is not known how many of the 380 obtained re-employment as the figure of 58% draws from the survey result of all 513 people who had lost employment. Professor Peetz does not otherwise disclose the basis on which he uses particular results or not. To the extent that he relied on a subset of the survey results, which he manipulated, he did not disclose his reasoning process nor did the Unions establish the data that Professor Peetz already used. Further, Professor Peetz's initial conclusions was that the variation was a "little less likely" which he adjusted to "less likely" at the suggestion of Mr Bukarica representing the CFMEU. Therefore these opinions should be treated with great caution.

(c) In relation to the conclusions about return to the workforce in non-permanent work, his determining factor appears to be the number of people who have claimed that they were in jobs not receiving annual or sick leave, but does not account that some 50 people claimed they were already in jobs that did not pay annual or sick leave.

(d) In relation to conclusions about whether employees were in lower paying jobs or not, his comparison is between quantitative results based on a longitudinal survey as opposed to a qualitative survey conducted. These conclusions are also without substance.

46. Critically, whilst Professor Peetz appears to have focussed his attention exclusively on identifying points of distinction in such a way to draw out the three areas in which the experience of black coal mining industry workers was alleged to have been adverse to all other industries, he failed to focus on any points of distinction where black coal mining industry workers are better off. One such instance is that black coal mining industry workers earn substantially more than all other workers. Others include that they receive cashed out personal leave or long service leave upon termination. His failure to account for these more beneficial aspects of the experience of retrenched black coal mining industry workers discloses that Professor Peetz took it upon himself to provide evidence which he knew would be "centrally relevant" to the Unions' case in these proceedings, as he was instructed by Mr Bukarica (see bundle tendered – Exhibit 15).

47. Some of Professor Peetz's evidence disclosed that he was highly defensive and not being entirely independent. In his report, he gave evidence about the number of employees in the industry said to be covered by awards as opposed to enterprise agreements. Yet, when he was being cross-examined on the basis that the questions did not discriminate between people who were made redundant pursuant to the award because they were covered by it or under an agreement, he conceded that point but claimed that it would be difficult to formulate a question to put to survey participants in relation to that matter. Likewise, when Professor Peetz was asked about why the survey participants were not asked their rate of income at the point of termination, as opposed to the point of remuneration presently, he claimed that they would be difficult questions to ask and that the answers would not be reliable. He suggested that memory would not be reliable in relation to pay. This is a remarkable response given that survey participants were being asked far more detailed questions about matters in the past, such as, whether they received annual leave or sick leave entitlements, whether they worked for a mine operator or a contractor, the reasons for redundancies.

48. There are also whole parts of Professor Peetz's report and the survey questions that are entirely irrelevant, invite speculation and can have no probative value placed on them. These relate to survey participants speculating in relation to the reasons for their termination, whether they were targeted because they were union members, whether they were discriminated on the basis of age, whether their jobs were truly no longer needed. Those survey questions would not be admissible if they were asked as questions of witnesses in

court. Any responses to those survey questions have no probative value and it follows that any conclusions based on those questions have no basis in established fact and that evidence should not admitted or relied upon.

49. In the final analysis, it is obvious that Professor Peetz is seeking to provide evidence to support the Unions' position. The CMIEG submits that his report should be treated with a great degree of caution and other than in relation to the matters set out above, it should not be relied upon.

GAVIN WHITE'S EVIDENCE

50. Mr Gavin White's statement (Exhibit 16) annexes a report that seeks to summarise the data and the survey results. However, as the CMIEG objections outline, when the summary of that data is examined it is obvious that there is a very selective and unfair recording and reporting of the data. The CMIEG submits that no weight should be placed on the report and instead invites the Commission to examine the actual survey results (Exhibit 14). In this regard, the key survey results have been summarised above.

51. If one is to place any value on the Essential Media Survey, the true figure of the number of redundancies is 380 (being the people who answered that they had received redundancy payments). That is approximately 4.3% of the total sample group of 2618 which Professor Peetz considers to be a statistically valid sample on which to base his conclusions relating to the industry.

52. That figure of 4.3% does not account for the fact that the 380 people are not all employed by mine operators (that figure was 320 people) and it should be accepted that the number of 380 people will include people to whom the Award will not apply (and therefore will not be affected by any variation). On a close examination of the actual data, the widely varied predictions made by the union parties are not established.

53. 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", although that data needs to be considered to be considered with a degree of circumspection having regard to definitional issues, and the survey participants selected by the ABS, it is another useful indicia that the experience of the BCMI is not unusual. 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.

Evidence as to award and agreement coverage

54. The evidence of Mr Vickers (Exhibit 17) in part establishes that the vast majority of CFMEU employees are covered by enterprise agreements that apply to their employment. Further, these enterprise agreements all contain a variant form of the redundancy entitlement. Some enterprise agreements refer to the application of the Award.

55. In large measure, employees that are covered by enterprise agreements are unaffected by the proposed variation. To the extent that enterprise agreements seek to refer back to the award there will be questions of construction as to whether or not those entitlements relate to the entitlement as fixed by the award at that point in time or as varied from time to time (see for example, *Teys Australia Beenleigh Pty Ltd v Australasian Meat Industry Employees Union (No 2)* [2016] FCA 2).

Evidence as to staff arrangements

56. The evidence of Ms Bolger (Exhibit 37) is that only 12% of "Staff" are covered by enterprise agreements. However, the evidence of Mr Edwards (Exhibit 3), which was reinforced by the documents as tendered at exhibits 38, 39 and 40,established in large measure that retrenchment entitlements are contained in contracts and/or in policies. If that is the case, any variation to those entitlements would need to comply with contractual principles as Mr Edwards pointed out in cross-examination.

Evidence as to lay opinions

57. Ms Bolger gives further evidence about her opinions as to what she anticipates will occur and suggests that there have been examples where employees have been offered the revised contracts of employment, with the alternative to accepting those contracts being redundancy (Exhibit 37 at [40]-[46])

58. Mr Vickers similarly gives evidence that if the award variation is granted employers will seek to bargain for similar entitlements during enterprise bargaining (Exhibit 17 at [68]). The underlying assumption is that somehow that the CFMEU and its members will agree to that and that they will consent to (and the Commission will approve) such amendments to (or termination of) extant enterprise agreements. This is sheer speculation.

59. Mr Colley's evidence (Exhibit 18) about the future of the black coal mining industry are simply his predictions based on various publically available reports (at [38]-[72]). As noted above, Professor Peetz accepts that the future is variable.

Evidence as to the experience of particular employees

60. Both the CFMEU and APESMA has called evidence from workers in the industry (Exhibits 20 to 36). Some of the evidence is objectionable as it is based upon bear assertions, speculation, unsubstantiated facts and is otherwise not probative or admissible. The balance of the evidence simply explains the experiences of particular employees and their post-redundancy experience. It is obvious the Unions have selected, for the purpose of this exercise, very senior employees with long periods of service and of older age. It is not a fair representation of the experience of all retrenched employees. For example, on the unions own case, based on the Essential Media Survey, 27.8% of people attained jobs within four weeks (Exhibit 14). Very few examples of this occurred in the evidence presented by the Unions in relation to these witnesses. Likewise, the Essential Media Survey also disclosed that over 120 employees obtained paid work of 38 hours or more, but that again very little of that evidence has been presented in these examples.

61. Attached to these submissions is a table that sets out the effect of the CMIEG proposal upon the employee witnesses of the Unions. It is evident from an examination of the attachment concerning the lay witnesses, that the vast majority of them would not be impacted by the proposed variation of the CMIEG as the grandfathering provision would apply.

C. CONTENTIONS IN SUPPORT OF THE VARIATION TO THE AWARD

CIRCUMSTANCES HAVE CHANGED

62. First, since the retrenchment entitlements were established in 1973 and 1983, circumstances relating to the industry have changed. These factors include the following:

    (a) The production levels have increased, technology has developed, skills training and development has increased

    (b) The regions in which coal mining occurs has developed. The regions are also more accessible now and other industries exist in these areas.

    (c) The consolidation in the industry has led to greater redeployment opportunities

(d) There is a prevalence of enterprise bargaining. Although in 1973 and 1983 there were local agreements, these were not common. Bargaining was done on the basis of an industry collective and the determinations of the CIT applied to set "actual rates". The counter parties in making the awards before the CIT were the employers and the unions and they established industry terms of employment or the terms and conditions were arbitrated.

(e) There are now community standards existed for in the National Employment Standards (which are based upon the Redundancy Case and the TCR Case before it). While in 1973 and 1983 there were legislative standards (at the State level) they were not community standards.

(f) Seniority now longer is applied, or is only applied amongst a range of other factors in considering matters such as selection for redundancy. In 1973 and 1983, seniority and the principle of "last on, first off" was prevalent.

(g) The locations of mining operations is now concentrated centres which are located near major population centres (eg. the Hunter Valley and Illawarra), major regional hubs or towns from which employees "drive in and drive out" (**DIDO**) or "fly in and fly out" (**FIFO**) meaning "remote location" is less significant.

(h) There has been a significant increase in the use of outsourcing and labour hire.

(i) There has been significant legislative reform, including the regulation of employment and industrial relation moving from a specialist tribunal (the CIT) with no appeals to the mainstream tribunal to the primary industrial forum (the FWC), the removal of the mandatory retirement age (by the *Age Discrimination Act 2004* (Cth)); and the introduction of safety net employee entitlements (including in relation to redundancy pay under the National Employment Standards of the FW Act).

(j) There has been a dramatic growth in export market of coal (see Exhibit 11, Figures 3 and 4).

(k) Contrary to the notions of "career jobs" the evidence is that the mining industry has the highest labour turnover (Exhibit 12 at [33]).

63. Not only have there been change of circumstances since 1973 and 1983, the Commission has developed principles in relation to severance and retrenchment entitlements (in the TCR Case and the Redundancy Case). The two key criteria are: loss of non-transferrable credits and inconvenience and hardship. Inconvenience and hardship is defined to mean loss of seniority and loss of security of employment.

64. These principles repudiated the notion that severance and retrenchment pay is about income maintenance (TCR Case at 78; Redundancy Case at [149]). The object and purpose of severance and retrenchment pay is not to compensate employees for periods of unemployment. The 1983 CIT decision rejected the notion of income maintenance as being relevant in relation to severance and retrenchment pay (at 37).

65. As noted above the CIT decisions rationalised the inclusion of a highly generous redundancy scheme based on career industry, some benefits accruing on an industry wide basis, many conditions being in advance of those in industry generally, loss of seniority, an inability to find comparable employment, difficulties and financial pressures occasioned by what will frequently be a move in the search for a job, changing community attitudes to retrenchment by legislation.

66. These factors are inconsistent with the TCR Case and Redundancy Case and are in any event irrelevant or plainly wrong for the reasons stated above. As to career industry, the evidence is that there is a high labour turnover, which is said to be the highest of any industry (Exhibit 12 at [33]). Further, whilst the evidence suggests that at Centennial Coal, retiring employees had long periods of service, there is also evidence of employees who retired with short periods of service. Further, the fact that the industry is cyclical indicated that employment numbers fluctuate (Exhibit 41). During a peak, for obvious reasons, employment numbers will go up, and also understandably during a trough, employment numbers will go down. Looked at over time, it is the obvious that a proportion of the workforce will leave the workforce, but it is equally obvious that a portion of the workforce will return to the industry (or make way for new entrants). The alleged growth of FIFO and DIDO arrangements indicate that taking up employment opportunities and leaving them can be down with greater ease than in the past. There is little evidence to suggest that the circumstances of 1973 and 1983 where employees were tied to a particular colliery continue to pertain.

67. As to the regional location of the mines, the evidence discloses that these areas have been developed since 1973 and 1983. The regions in which the mines are located have become

less remote over time and have become more accessible due to the increase in the number of FIFO and DIDO workers. Further, the evidence discloses that, to the extent that employees do not move following redundancy, it is largely by their own choosing.

68. As to the assertion that the highly generous scheme is justified by reference to the specialist skills of workers in the industry, there is no evidence before the Commission that the skills are more specialised than in any other industry or that by reason of those specialised skills that workers find difficulty in finding other jobs. To the extent that the Unions have put on evidence relating to the fact that specialised mining skills, the evidence is that certain trade skills, for example, are transferrable however, as might be expected, employees have to undertake some further training to learn more particular application of those skills to other industries.

69. The evidence is that the types of employees engaged in the industry include trade-skilled employees, university educated employees, drivers, production managers, scientists and engineers. Further, from the Essential Media Survey, of those whose employment had been terminated (n=513) 81.8% had a trade qualification or higher (Exhibit 14) (accounting for those who did not answer the question). The Commission should not assume that in the absence of probative evidence to the contrary that trade skill and tertiary educated employees would find it more difficult to obtain employment. There is no evidence that this industry has a higher degree of specialisation than other industries.

70. The fact that benefits accrue on an industry wide basis is not a reason that logically supports the highly generous redundancy scheme but in fact supports the contrary position. The only entitlement that accrues on an industry wide basis is long service leave. If employees leave the industry, they are able to cash out this entitlement.

71. The next contention relates to the conditions generally being in advance of industry. Again that is not an argument in support of a highly generous scheme but one that suggests that it should be limited. These matters have been addressed above.

72. Similarly, the same logic applies to the criterion in relation to the inability to find comparable employment.

73. To the extent that any of these criteria warrant a departure or variation from the NES or community standards the CMIEG position acknowledges that by retention of the three week per year rate of accrual and the grandfathering proposal.

THE CMIEG'S PROPOSED VARIATION CONSISTENT WITH PRINCIPLE AND MODERN AWARDS OBJECTIVES

74. The CMIEG's proposed variation is consistent with the prevailing community standards that impose a length of service based cap on redundancy entitlements. In addition to that, consistent with principle, the CMIEG are proposing a grandfathering provision. The reality of this variation is that:

    (a) a small pool of non-enterprise agreement covered production employees might be affected, or those with enterprise agreements where questions of construction might arise;

    (b) for "Staff", impact on them will depend on their contractual entitlements.

    (c) on the Unions' own evidence by Professor Peetz, two third of employees will remain unaffected, and this does not take into account award coverage or grandfathering;

    (d) Professor Peetz's conclusion is supported not only by the Essential Media Survey but also Mr Gunzburg's analysis of the 953 employees that show that 70% have nine years of service or less.

75. As has previously been submitted, CMIEG's variation seeks to establish a fair and relevant safety net. It acknowledges the empirical fact that higher retrenchment benefits are and should be the subject of collective bargaining.

76. The Commission should not assume that there is any disproportionate effect on employees who are older. As with other redundancy entitlements in the NES and other awards, it is length of service that determines the entitlement not age.

77. The Unions' position is that the entitlement should be unlimited. There is no justification for that. Indeed, the Commission would be lead into jurisdictional error if it accepted the Unions' position. The reason for this is that absent the 60 years old based redundancy cap, the current entitlement is not the industry based scheme that previously existed. The Unions have propounded no submission or called no evidence to justify how they say the unlimited entitlement continues to meet the pre-existing industry scheme. As a result, the Commission is in a position where some variation is necessary and making such a variation, the Commission is required to ensure that there is a relevant minimum safety net and that it meets the modern awards objectives.

78. The Unions have contended that the 2015 Decision invited consideration only of a cap to replace clause 14.4(c) of the Award, and did not invite a reconsideration of the entire entitlement contained in clause 14 of the Award. It is submitted by the respondent unions that this does not provide an invitation to "take an axe" to the redundancy entitlement as a whole.

79. This submission should be rejected.

80. First, the Full Bench (at [44] of the 2015 Decision) clearly identified that there may be merit in the proposition that a "new limitation" on retrenchments payments should be introduced. That statement neither limited nor conditioned the nature of the application to be made.

81. Second, the application for the Draft Variation made by the CMIEG is not reliant on any comment, recommendation or suggestion of the Full Bench. It is perfectly within the ambit of the 4 yearly review of the modern awards for the present application to be made and considered by the Full Bench.

82. Third, the reference to the words "take the axe" at [55] of Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2) (2015) 247 IR 350 has been taken out of context. The comment made by Buchanan J was in the context of a judicial determination that the invalidity of a redundancy clause in an enterprise agreement (that was in similar terms to clause 14.4(c) of the Award) did not provide the Federal Court a basis upon which to declare invalid the entire clause, as opposed to severing that portion of it that was invalid. His Honour's comments were made in a non-arbitral determination as to the validity of a particular clause. By contrast, in the present case, the Commission has been directly charged with the statutory duty to review the Award to ensure that it, in its totality, including the totality of the redundancy clause, meets the modern awards objective. It is a different matter altogether.

83. Further, it is no part of the CMIEG's case to extinguish altogether the retrenchment entitlement or to equalise it to the NES entitlement. The CMIEG's Draft Variation retains the same rate of benefit per year of service (i.e. effectively, 3 weeks per year of service), but seeks to impose an effective cap of 27 weeks.

84. The CMIEG has previously made submissions in writing in respect of the modern awards objective (see submissions filed on 29 March at [34] to [70] and submissions filed on 26 August 2016 at [42]) . Those submissions are relied upon.

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