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**

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

INTRODUCTION

1. These submissions respond to the submissions of the Construction, Forestry, Mining and Energy Union (**CFMEU**), the Association of Professional Engineers, Scientists and Managers Australia (**APESMA**) and the Australian Manufacturing Workers Union (**AMWU**).

2. The respondent unions raise the following primary arguments in response to the draft variation to the *Black Coal Mining Industry Award 2010* (**Award**) proposed by the CMIEG on 7 July 2015 (**the Draft Variation**):

   (a) ***First***, the CMIEG bears the onus in establishing that the variation is *"necessary"* because the *prima facie* position is that the Award is compliant with the modern awards objective (**the Burden Argument**);[1]

   (b) ***Second***, the *Fair Work Act 2009* (Cth) (**FW Act**) contemplates and provides for industry-specific redundancy schemes (**the Legislative Intent Argument**);[2]

   (c) ***Third***, the 2015 Determination[3] did not invite a wholesale revision, or a *"root-and-branch review"*, of clause 14 of the Award, and that the CMIEG's proposal takes *"an axe"* to the Award redundancy entitlement (**the Severance Argument**);[4]

   (d) ***Fourth***, there is an arbitral history which supports the redundancy entitlement in the Award (**the Arbitral History Argument**);[5]

   (e) ***Fifth***, the redundancy scheme is entrenched in the industry, and nothing has changed in the industry to warrant a change to the redundancy entitlement (**the Entrenched Entitlement Argument**);[6] and

[1] CFMEU submissions at [10] and [13], and APESMA submissions at [2(b)].
[2] CFMEU submissions at [15], APESMA submissions at [28] and AMWU submissions at [4.1].
[3] PR562586 (issued on 10 April 2015); [2015] FWCFB 2192.
[4] CFMEU submissions at [8] and [12], and APESMA submissions at [2(c)].
[5] CFMEU submissions at [35] and following, APESMA submissions at [6] and following, and AMWU submissions at [3.1].

(f) ***Sixth***, that the proposed variation would not meet the modern awards objective or that existing terms meet the modern awards objective (**the Modern Awards Objective Argument**).

3. The respondent unions' submissions also address various evidentiary issues arising from the evidence which they propose to lead at the hearing of this application. The evidence proposed to be led by the respondent unions does not deal with a central submission of the CMIEG, that it is not obvious that the black coal mining industry employees who are retrenched have markedly different, or worse, circumstances than those for employees in other industries who are retrenched, which would demand an uncapped redundancy scheme to be provided for.

4. Further, there are a number of problems with the evidence proposed to be led by the respondent unions, that will, in due course, be explored at the hearing and will need to be tested by cross-examination.

5. These submissions provide a brief and limited, but not complete, response to the evidence, at paragraphs 43 to 48 below.

PRELIMINARY OBSERVATIONS

6. The logic of the respondent unions' contentions appears to be as follows:

(a) because the legislature has prescribed a mechanism for the inclusion of industry-specific redundancy schemes, such schemes are, in effect, sacrosanct;

(b) in addition to (a) above, because the industry "parties" consented to the inclusion of the industry-specific redundancy scheme as part of the award modernisation process in 2008-2009,[7] a substantive merit based argument needs to be established to justify any variations;

(c) further, the elements of the industry-specific redundancy scheme in the Award are justified on their merits by reference to two decisions of the Coal Industry Tribunal (**CIT**) from 43 years ago in 1973 and from 33 years ago in 1983, and should be left untouched, without any examination, notwithstanding the passage of the near-half century and the subsequent examination of these standards in seminal test cases of peak industrial tribunals; and

---

[6] APESMA submissions at [16] and [18].

[7] See *Award Modernisation Decision* [2008] AIRCFB 1000 at [154]-[166], although note that no specific reference is made by the Full Bench to the industry specific scheme in the decision; see also *Black Coal Mining Industry Award 2010* [2015] FWCFB 2192 at [11], [37], [44].

(d) that the fact that employees in the coal mining industry earn more money and stand to obtain enhanced benefits provides them with a merit based entitlement to compensation for redundancy in an uncapped amount.

7. These contentions, both individually and cumulatively, do not withstand scrutiny. For the reasons advanced below, the respondent unions' case elevates considerations about the setting of a fair and minimum safety net to the establishment of a "gold standard".

THE BURDEN ARGUMENT

8. The CFMEU and APESMA claim that the CMIEG has not discharged its burden to prove to the Full Bench that the Draft Variation is *"necessary"*.

9. The respondent unions' submissions fail to examine the question of onus by reference to the statutory duties which the Commission must discharge, not the underlying principles which have been set to guide the discharge of those duties.

10. ***First***, the starting position is that s.156(2)(a) requires that *"In a 4 yearly review of modern awards,* ***the FWC… must review all modern awards****…"*. This task must be discharged having regard to the modern awards objective prescribed in s.134. The statutory task does not fall to be discharged in such a way so as to impose an onus on one or other of the parties, but requires the Commission to exercise a mandatory function.

11. ***Second,*** the above statutory task is reinforced in the decision cited as the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (***Preliminary Jurisdiction Issues Decision***) at [70], point 3, which provides that the *"The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, amongst other things, the need to ensure a 'stable' modern award system (s.134(1)(g))"*.

12. ***Third,*** the combination of the first and second points above is that the Commission "**must**" be satisfied that, having conducted a review of the Award, it **actually** meets the modern awards objective. In other words the mandatory duty must be discharged to ensure that the modern awards objective is met. This requires a positive examination of the relevant award provisions to ensure that the relevant safety net standard will be met.

13. ***Fourth,*** whilst the *Preliminary Jurisdictional Issues Decision* at [70], point 3, states that (a) changes to modern awards must be supported by a merit based argument, and (b) that the Commission will proceed on the basis that, *prima facie*, *"the modern award being reviewed achieved the modern awards objective at the time it was made"*, those statements must be

considered within their proper jurisprudential context. That statement of principle has, as its source, the underlying thesis that all modern awards *a fortiori* satisfied the modern awards objective. Although the principle of *stare decisis* does not apply to arbitral decisions of the Commission, the Commission may, in any event, depart from earlier decisions where there are cogent reasons for doing so, but it will not lightly do so: see *Modern Awards Review 2012* [2012] FWAFB 5600 at [86]-[89]; *Preliminary Jurisdictional Issues Decision* [2014] FWCFB 1788 at [25]-[27]. Thus, as part of the 2 yearly reviews, it was held that the Commission would not conduct a *"fresh assessment"* unencumbered by previous Tribunal authority: *Modern Awards Review 2012* [2012] FWAFB 5600 at [86]-[89].

14. It does not follow that the 4 yearly review may not involve a *"fresh assessment"*. The 4 yearly review of awards is, of course, ongoing. The Full Bench has made clear in the *Preliminary Jurisdictional Issues Decision*[8] that the four early review of modern awards may result in variations to modern awards. The Commission is empowered to make any variations under section 156(2)(b)(i) of the FW Act, and in respect of industry redundancy schemes subject to sections 141(3) and (4).[9]

15. The reasons of *"policy and sound administration",* consistency or comity (which are said to be the guiding principles to adhering to earlier Full Bench Decisions as set out in *Modern Awards Review 2012* [2012] FWAFB 5600 at [86]-[89]), have logically less weight when the earlier decisions expose that a provision relating to redundancy pay was adopted as a consent position, or at least that there is no evidence of it having been examined by reference to the modern awards objective. As noted in the *Preliminary Jurisdictional Issues Decision* (at [27]), *"[t]he particular context in which ... [previous] decisions [relevant to a contested issue] were made will also need to be considered"*. As previously submitted, an examination of the *Award Modernisation Decision* [2008] AIRCFB 1000 discloses that there was no specific examination of the "industry-specific" redundancy scheme. It is not the case that inclusion of the industry-specific redundancy scheme in the Award may be said to rest upon a definite stream of authority: see *Alqudsi v The Queen* [2016] HCA 24; 332 ALR 20 at [66] per French CJ; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

16. Further, the Commission as part of the 4 yearly review has a statutory duty to consider the modern awards objective as part of that review. This includes considering whether the modern awards objective would be satisfied in respect of any variation considered as part of that review: see *Preliminary Jurisdictional Issues* decision [2014] FWCFB 1788 at [29]. In

[8] [2014] FWCFB 1788 at [60].

[9] See, similarly, [2015] FWCFB 2192 at [43].

that regard, the Commission must satisfy itself of its jurisdiction as to the making, or variation, of the relevant clause providing for an industry-specific redundancy scheme. It is not sufficient for the Commission to accept that the jurisdictional prerequisites have been satisfied simply by the parties, in the earlier award modernisation process, having conferred that jurisdiction upon the Commission by consenting to the clause: see, by parity of reasoning, *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163; *Jeff Radisich v Michael Buchan and ors* [2008] AIRC 896 at [16].

17. ***Finally***, in *Black Coal Mining Industry Award 2010* [2015] FWCFB 2192 (**2015 Decision**) at [44], the Full Bench specifically stated that to give proper consideration to the imposition of an alternative cap, it would need to have *"...greater evidence as to a range of matters including the age profile and length of service of coal mine employees who have been made redundant, the typical circumstances they face on redundancy, and the cost impact on employers of the scheme."* The CMIEG has already filed evidence in relation to these matters. Redundancy costs are clearly significant to employers.[10] It is trite that a more generous redundancy scheme will have a more significant cost impact on employers than a less generous one.

18. There is, in any event, nothing within the text of s.141 of the FW Act or elsewhere that requires a party to make out a substantial merits case to make good the self-evident fact the existing uncapped redundancy entitlement is a minimum "safety net" and does not meet the modern awards objective.

THE LEGISLATIVE INTENT ARGUMENT

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"*.

[10] See Statement of John Edwards at [33].

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, **<u>if</u>** 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 minimum safety net"* taking into account the criteria enumerated in ss.134(1)(a)-(h) of the FW Act.

THE SEVERANCE ARGUMENT

25. The CFMEU and APESMA contend that the 2015 Determination 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.

26. This submission should be rejected.

27. ***First***, the Full Bench (at [44] of the 2015 Determination) 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.

28. ***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.

29. ***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.

30. 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.

THE ARBITRAL HISTORY ARGUMENT

31. The CFMEU takes issue with the CMIEG's submission that *"There are no arbitrated decision which expose the rational basis or underlying principles upon which the entitlements were determined to be an appropriate minimum standard in the past…"* (see CFMEU submissions at [33]-[34]) on the basis that the entitlement in clause 14 of the Award is based on two decisions.

32. The CMIEG accepts that there is one decision from 43 years ago in 1973 and one decision from 33 years ago in 1983 that set out some reasons for the inclusion of a retrenchment entitlement. However, the point made in the CMIEG's substantive submissions is that there is no exposition or rationale given for the actual entitlement which was then imposed – i.e., allowing for whatever was alleged to have been the differences in the coal mining industry, why is a total payment of 3 weeks per year of service the appropriate compensation for those differences? The two issues should not be conflated.

33. Although the 1973 and 1983 CIT decisions seek to identify the reasons why a retrenchment entitlement was to be included in the then applicable awards and those decisions indicate that these differences justified the quantum of entitlement then conferred, those decisions do not identify any cogent rationale for the conclusion that the quantum was to be effectively at the rate of three weeks per year of service, other than that it was then considered appropriate. There is no principled yardstick by which the quantum was measured – i.e, by reference to

periods of unemployment, availability of welfare benefits, or other benefits so as to justify the conclusion that an amount of 3 weeks per year of service should be the entitlement (as a reflection, for example, of loss of income and/or hardship, or loss of non-transferable benefits). For these reasons, the CMIEG maintains that the 1973 and 1983 CIT decisions do not reveal a cogent rationale or underlying principle upon which it was determined that severance payment should be paid out at the rate of one week per year of service, nor do they reveal the rational basis or the underlying principles upon which payment on redundancy should comprise three weeks per year of service for "severance" and "retrenchment" pay.

34. ***Third,*** the "specialist focus" of the CIT (see CFMEU submissions at [44]) is redundant in the modern industrial relations era and it is appropriate, and indeed necessary, for the Commission to compare the entitlements under the Award to the NES entitlements, and to the entitlements in different industries to ensure that the Award is meeting the modern awards objective.

35. ***Fourth***, as the respondent unions' submissions point out, the decisions of the CIT from almost half a century ago have not been examined in light of the several test cases of peak industrial tribunals since 1983, including, the most recent examination in 2004 as set out in the CMIEG's primary submissions.

THE ENTRENCHED ENTITLEMENT ARGUMENT

36. The respondent unions contend that the redundancy entitlement in the coal mining industry reflects apparently unique characteristics of that industry, is entrenched and has long been accepted as a condition of employment, and that the circumstances have not changed which would warrant the imposition of a cap on the entitlement. The CFMEU specifically relies on the passages from the 1973 and 1983 CIT decisions to contend that not only is the coal mining industry unique, but also that that precise uniqueness was considered by the CIT and was ultimately reflected in clause 14 of the Award (see, for example, the CFMEU submissions at [58]). These arguments are flawed and cannot be maintained in light of the contemporary evidence.

37. ***First***, a substantial number of the "unique" features of the coal mining industry are not unique to that industry at all. For example:

    (a) "boom and bust" cycles are common in the manufacturing, construction, mining (broadly) and a number of other industries;

(b) a number of other industries are prone to being "career industries" by virtue of the vocational qualifications required to work in such industries and non-transferable nature of such qualifications; and

(c) relocating to find alternative employment is equally common in industries such as manufacturing, agriculture, construction and timber.

38. There is nothing 'more unique' about the coal mining industry than the industries listed above. That fact can be most aptly demonstrated by an examination of the *Mining Industry Award 2010*, which operates in a similar industry. Uniqueness, *per se*, does not and cannot justify inflated and markedly different redundancy entitlements in the black coal mining industry when compared to other industries.

39. ***Second***, the respondent unions do not appropriately account for the fact (to which they apparently admit) that employees in the black coal mining industry stand to gain enhanced benefits during employment both as to salary, leave and other entitlements. These additional benefits only serve to reinforce the fact that employees in this industry are better placed by way of income and hardship considerations than other employees to deal with the dislocation associated with redundancy. Having earned greater income and received higher benefits, that places them at an advantage to deal with loss of employment than other workers in the economy. Further, these higher redundancy, leave and other entitlements are paid at the employee's wage rate, so that in net terms, the amount of money they hold in their hands following redundancy will be significantly greater than other employees in the economy (as apparently admitted by the respondent unions). Viewed in this context it is a remarkable proposition that an uncapped entitlement is the amount necessary to establish a fair and minimum safety net, or to compensate employees for loss of non-transferable benefits.

40. Nor do the respondent unions provide a satisfactory answer to the question that the employees in this industry get other benefits such as the portable long service leave entitlement and early-access to superannuation entitlements. These conditions in fact work **<u>against</u>** the preservation of an uncapped redundancy entitlement.

41. The unsatisfactory answer to the above points is that, because employees in the black coal mining industry generally receive higher benefits such as fewer hours of work per week, higher annual leave entitlement, higher personal leave entitlement, high penalty rates on public holidays, that they are 'harder hit' by redundancy and that these matters are to be taken into account when considering 'non-transferrable credits' (see CFMEU submissions at [74]). With respect, this argument is illogical. If accepted, it stands for some apparent industrial /

legal principle that those who get paid more and receive greater benefits should have even higher entitlements than others, and it therefore follows that those who receive lesser benefits (perhaps those in more vulnerable industries) should get a lower redundancy entitlement. The proposition is antithetical to a process of setting a safety net of **minimum** terms and conditions.

MODERN AWARDS OBJECTIVE ARGUMENT

42. The respondent unions make various assertions about whether the modern awards objective is being met and will be met by the Draft Variation. The CMIEG repeats its primary submissions in this respect but makes the following observation:

    (a) **Safety net:** The respondent unions contend that the safety net for redundancy pay is not set at a universal level. Whilst it is true that a limited number of other awards have redundancy provisions which differ from the NES, on the whole the NES entitlement does reflect the minimum entitlement for the majority of awards. The Draft Variation proposed by the CMIEG would still confer an entitlement that is greater than the NES, but by the imposition of a service based cap ensure that it creates a minimum standard.

    (b) **Encouragement of collective bargaining**: There is an apparent inconsistency between the CFMEU's submissions which seem to indicate at [157] that employers will bargain to their advantage and APESMA's submissions at [49]-[50] that there is no reason to assume that higher or lower conditions are more or less likely to encourage collective bargaining. Neither contention deals with the logical point that with a more appropriate safety net, there is more room for collective bargaining and trade-offs, as opposed to crowding out bargaining by the imposition of a standard at the highest end.

    (c) **Promotion of social inclusion**: The CFMEU's submission at [158]ff contend that a cap on redundancy might also create a disincentive to retain longer tenure employees in the coal mining industry because it would make it less expensive for employers to select older workers for redundancy. This assertion is premised on the entirely unsupported evidentiary foundation that employers intentionally "select" older workers for redundancy. It is also unsupported by the CFMEU's contention that on the present evidence, older workers are disproportionately selected for redundancy. The two propositions are inconsistent given that the older workers under the current clause would have a greater entitlement than younger workers. The Draft Variation proposed by the CMIEG achieves the purpose of ensuring that any financial

assessment is based on years of service capped at an appropriate level of 9 years, and operates indiscriminately to younger or older workers.

PRELIMINARY COMMENTS ON EVIDENCE

43. The evidence of the respondent unions does not deal with a central submission of the CMIEG, that it is not obvious that the black coal mining industry employees who are retrenched have markedly different, or worse, circumstances than those for employees in other industries who are retrenched, which would demand a "gold standard" redundancy scheme to be provided for.

44. The evidence of the CMIEG, in particular the ABS data,[11] demonstrates that there is considerable variability over time between various industries and at various times but no industry is better or worse than others, and that periods of unemployment in the mining industry generally fall within the lower range of periods in unemployment.

45. The CFMEU proposes to rely on the expert report of Professor David Peetz dated 23 June 2016. There are a number of problems with the report of Professor Peetz as to admissibility and/or the weight that can safely be placed on the findings or reasoning contained in the report. For example:

(a) The report heavily relies on the "Essential Survey", which Professor Peetz concedes he has not had the time to fully analyse;[12]

(b) The "Essential Survey" has a relatively small sample size of some 2,600 members of the CFMEU and Professionals Australia (APESMA), particularly when one considers that only 421 participants had experienced redundancy since July 2013;[13]

(c) The questions in the survey require speculation by the participants in the survey. For example, the answer to the questions *"do you think your job was genuinely no longer required, or was it described as a redundancy even though your job was still needed?"* (question 4) and *"which of the following criteria do you believe were used to choose who to put off?"* (question 5), calls for speculation by the participant. Further, the survey does not specifically deal with "voluntary redundancy" as an

[11] Statement of David Gunzburg at [17]-[27], Annexures "DG-5" and "DG-6".
[12] Report of Professor David Peetz, page 2.
[13] Report of Professor David Peetz, page 2.

option to the participants, notwithstanding the finding later in the report that a significant number of participants accepted redundancy offers;[14]

(d) The report draws conclusions regarding the likelihood of employees in the older age cohort (55 years or older) being made redundant compared to those in the younger age groups with seemingly no consideration of what portion of those in the older cohort accept voluntary redundancy – which Professor Peetz goes on to say later in the report was 32% of the over-55 cohort who said that *"they wanted to leave anyway"* and a further 19% who were *"offered a package that was too good to reject"*;[15]

(e) The report accepts that some of the results of the "Essential Survey" may be skewed because union members (being the entire sample size) tend to be older and have longer job tenure than the rest of the workforce;[16]

(f) The report makes statistical findings on increasingly small sample sizes. For example, the number of participants who were made redundant was 421, but that is further reduced to only account for those who were made "reluctantly redundant" (which oddly includes those who "took packages" voluntarily but would have preferred to stay[17]) and then findings are made, for example, *"28% [finding] work within 4 weeks"*.[18] It is not entirely clear what number of participants that 28% represents but it appears to only be 85 participants;[19] and

(g) The report fatally fails to compare the above findings to experiences in other industries or over a period of time.

46. The respondent unions also rely on the evidence of individuals as to their personal experiences. This lay evidence filed on behalf of the CFMEU and APESMA largely deals with irrelevant matters. The evidence of individuals who have not been made redundant, and in respect of whom have not been advised they are to be made redundant, is irrelevant. An entitlement to redundancy pay is not one that accrues progressively and accumulates as service of the employee increases. It is not even properly characterised as a contingent

[14] Report of Professor David Peetz, pages 73 and 76; Statement of Gavin White, Annexure "GW-2" (see Questions 5 and 16).
[15] Report of Professor David Peetz, pages 70 and 76.
[16] Report of Professor David Peetz, page 71.
[17] This appears to be explained by Professor Peetz as a step taken not to diminish the sample size to a number that is difficult to use – see Report of Professor David Peetz, page 78.
[18] Report of Professor David Peetz, page 76.
[19] Based on the numbers provided at page 78 of the report, namely sample size of 304 who were “reluctantly redundant”, including those who accepted redundancy packages but would have preferred to stay.

liability. Any suggestion that employees would "lose" an entitlement because of a variation to the redundancy pay clause fundamentally misunderstands the nature of the entitlement and when it crystallises.

47. APESMA has filed evidence concerning the peculiar skills in the industry (for those who occupy statutory positions eg. Deputies, Open Cut Examiners etc). That employees in the black coal mining industry are required to obtain specific qualifications or certificates of competence is not unique. Obtaining particular qualifications, licences or tickets is prevalent across various industries (eg. pilots of aircraft; drivers of vehicles, trains, mobile equipment; medical practitioners). It does not follow that employees in this particular industry ought enjoy a superior redundancy benefit to employees in other industries who have skills peculiar to that industry and might similarly be made redundant and need to find work in another industry.

OTHER MATTERS

48. The CFMEU and APESMA assert that there are other awards which have as generous redundancy schemes.

49. The CMIEG accepts that the Dredging Industry Award 2010 appears to be as generous in that it prescribes a period of 3 weeks per year of service for each completed year of service during the period of a dredging contract, but there is insufficient evidence available as to the average years of service of an employee in that industry. It might be expected that project work, and accordingly shorter periods of service, are more prevalent in this industry.

50. The Higher Education Industry – Academic Staff Award 2010, which is referred to by the respondent unions, may lead to a maximum entitlement of 78 weeks and not 104 weeks as alleged by the CFMEU. This benefit may or may not be a more generous entitlement than that provided in the Award, depending on length of service of the employee.

CONCLUSION

51. The CMIEG reiterates it position that the Draft Variation satisfies the modern awards objective and should be made.

Yaseen Shariff
Counsel for the CMIEG

Ashurst Australia
Solicitors for the CMIEG

26 August 2016