



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT HATCHER
SENIOR DEPUTY PRESIDENT HAMBERGER
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER JOHNS**

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2014/67)
Black Coal Mining Industry Award 2010**

Sydney

10.04 AM, MONDAY, 7 NOVEMBER 2016

PN1

VICE PRESIDENT HATCHER: Yes, can I take the appearances? Mr Shariff?

PN2

MR Y SHARIFF: Yes, I seek permission to appear for the Coal Mining Industry Employers Group.

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VICE PRESIDENT HATCHER: Thank you.

PN4

MR A BUKARICA: May it please the Commission, I appear for the Construction, Forestry, Mining and Energy Union, Bukarica, initial A.

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VICE PRESIDENT HATCHER: Yes. Mr Taylor.

PN6

MR I TAYLOR: If it please the Commission, I seek permission to appear with Mr Fagir who is currently running a little late. He is in another court, but will be here shortly. While I'm on my feet, can I just apologise in advance for some loud coughing that I'm inevitably going to do as some point during the course of the day.

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VICE PRESIDENT HATCHER: You are appearing for who?

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MR TAYLOR: We are appearing for the Association of Professional Engineers, Scientists and Managers Australia who represent staff or white collar employees in the coal industry.

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VICE PRESIDENT HATCHER: Is there any opposition to permission being granted to parties to be represented by lawyers?

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MR BUKARICA: No.

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VICE PRESIDENT HATCHER: We will grant that permission. Mr Shariff?

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MR SHARIFF: Yes, thank you, Vice President. The Full Bench have had the benefit of receiving some reasonably comprehensive written submissions from all of the parties. I intended to take a brief moment to just by way of summary state what the position is. But before I come to that, can I just raise some matters of housekeeping. There are three witnesses in my client's case that my friends require for cross-examine. That's Mr Gunzburg, Mr Edwards and Ms Merritt. Each of those three people are available today and with the estimates I have been

given, I think we should complete the cross-examination of those three witnesses today.

PN13

In the union's case, there is only one witness that my side has required to attend for cross-examination and that's Professor Peetz. We have some objections to the balance of the evidence and subject to those objections, those statements can go in. We can deal with that tomorrow in my friend's case. I was told by Mr Taylor this morning that unfortunately Professor Peetz has come down with chicken pox, but - - -

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VICE PRESIDENT HATCHER: I have had that, so that's okay.

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MR SHARIFF: I'm sorry. I might be overstating. It might be that he is in the process of being - I will let Mr Taylor perhaps - - -

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MR BUKARICA: Perhaps, Your Honour, if I could address that issue. Mr Peetz advised yesterday that he has had his second round of chicken pox or has been diagnosed as such. But the current diagnosis is that he is able to attend and feels well enough to attend. But there may be some issues with coming into contact with pregnant women.

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VICE PRESIDENT HATCHER: Maybe he should attend by video somewhere.

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MR BUKARICA: The alternative that we were going to propose is that that occur. However, he is having a further medical appointment this morning which may give him a clearance to attend in person. So we should know by the luncheon adjournment as to whether that's the case.

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VICE PRESIDENT HATCHER: You will keep us advised about that.

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MR BUKARICA: I will.

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MR SHARIFF: I should indicate that we hope to complete Professor Peetz's cross-examination within a day. If not, we will only go slightly into the following day which happily for the Full Bench would mean that we should complete the evidence at least by Tuesday afternoon if not early Wednesday morning.

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VICE PRESIDENT HATCHER: Does that mean we can complete the whole case by Wednesday?

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MR SHARIFF: If Your Honour wanted us to move straight into submissions, I think that could be the case. There has been some discussion between my friends and me about the appropriate way to proceed to closing submissions. It may be if the Commission still has Thursday available that we take a day off to gather our thoughts together, we do closing submissions and come back on Thursday or reduce some of our points to writing. I appreciate there is at least one interstate member, so we are quite keen to do whatever is convenient to the Commission, but if we need to - - -

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DEPUTY PRESIDENT GOSTENCNIK: For my part, I have listed a matter here in Sydney on Friday, so I'll be here for the week for my sins.

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MR SHARIFF: I see. Well, that assists. Thankfully, we might take up the opportunity to have a day break, but that might be something we can revisit at the close of evidence once we know what's happened. They were the only housekeeping matters I wanted to raise at the moment. I don't know if my friends wants to raise any further housekeeping matters.

PN26

VICE PRESIDENT HATCHER: There was an issue about an order for production. Has that now resolved itself?

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MR TAYLOR: No, but I spoke to Mr Shariff only shortly before we started with a view to having a proper conversation with him about that during the course of the day and if we can't resolve it then we will bring that to the Full Bench's attention either late today or first thing tomorrow.

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VICE PRESIDENT HATCHER: Thank you.

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MR SHARIFF: Yes, thank you. We have proceeded on the basis that this application still arises in the course of the four yearly review of modern awards and the position, as your Honours know, is that there has been a variation brought about by the excision of subparagraph (c) of clause 14.4 to the extent that it include the age discrimination cap. The position as it currently stands is that the severance entitlement contained in the modern award is entirely uncapped. Our proposed variation, as the Full Bench would know, seeks to impose a length of service based cap based on nine years' service to the entitlement, but otherwise keeping the formula of essentially or in substance three weeks of the year of service in play.

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VICE PRESIDENT HATCHER: That would involve capping the element that was previously and still currently uncapped.

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MR SHARIFF: Correct. As we understand at least the CFMEU's position is that there is a complete opposition to that. I anticipate that Professionals Australia's submission is to the same effect, although there was a reference in one of their written submissions or their written submissions to the effect that if there is to be a length of service based cap, that notionally would be 42 years' service, I think the way they reason to that conclusion is that if one took the notional employee from age 18 and they had worked to 60 when the earlier cap applied, that would give rise to a 42-week based service.

PN32

The position is that if a 42-week - sorry, 42 years - was applied as the length of service cap, an employee with 42 years' service would stand to obtain, on our estimation, 126 weeks. That's combined severance and retrenchment. If that didn't apply, and we're not suggesting by that that Professionals Australia is advocating that position, but that seems to be one at least fall-back one can discern from it. But the idea of 126-week cap in a modern award that is intended to apply as a fair and relevant minimum safety net, we say is absurd. We say it doesn't accord with the objects of the Act, nor the objects of the relevant provisions dealing with the promulgation of modern awards.

PN33

We have in the last week, if the Commission has received it, proposed a grandfathering arrangement. Did the Commission receive that?

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VICE PRESIDENT HATCHER: I'm sure we have, but where do we find that?

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MR SHARIFF: I can provide copies.

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VICE PRESIDENT HATCHER: If at the date of any variation, you have more than nine years' service, you will continue, you will have a totally uncapped entitlement, will you?

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MR SHARIFF: Your entitlement will be capped to the amount that it stood at that time. So that if one had 15 years' service at that point in time, then your entitlement as at the date of the variation's commencement would be crystallised to that amount.

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COMMISSIONER JOHNS: But if you worked for a further five years, it would be 20 years.

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MR SHARIFF: Correct.

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COMMISSIONER JOHNS: I understand, thank you.

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MR SHARIFF: Perhaps I can return to that matter both briefly in what I am about to say and in closing. Our position in relation to a length of service based cap of nine years, we seek to support that and justify it by reference to a series of arbitrated cases which have generally capped severance entitlements based on length of service.

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Next, we also find support for that type of cap in the National Employment Standard which itself, of course, has a cap at 10 years, but the differential between nine and 10 is that the entitlement goes down. We also have proposed what we do, having regard to the underlying rationale for severance entitlements, and in that regard could I briefly take your Honours to a decision which is a 2004 redundancy test case. I've got copies. That's the redundancy case which is reported in 2004, 129 IR. It commences at page 155 as a five-member Full Bench. I was going to take your Honours to page 193.

PN43

If I take your Honours to that at paragraph 132, what their Honours said in that case was that a number of those opposing the inclusion of income maintenance as a consideration in fixing the level of severance pay, submitted that the social security safety net is far more effective now than it was in 1984. They also submitted that post-retrenchment unemployment experiences vary considerably from worker to worker, thus making it difficult to measure the loss of a general basis, et cetera.

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At paragraph 133, they said:

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While in the passage which we have set out from the TCR No.1 decision the Commission took the view that the "primary" reason for the payment of severance pay did not relate to the requirement to search for another job and/or to tide over an employee during a period of unemployment, it is clear that those requirements played very little if any part in the level of severance pay which was then decided upon. We have not been persuaded that in these respects the Commission's approach was wrong. Nor have we been persuaded that we should depart from that approach because circumstances have materially altered since 1984.

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- et cetera. Picking up a few sentences down:

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The Commonwealth is able, through a range of integrated social security programs, to target income maintenance transfers more effectively than could the Commission.

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Then at paragraph 134:

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We think it is important, however, to identify what we intend in using the term "income maintenance". We use that term to refer specifically to compensation for periods of unemployment.

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Just pausing there, there is a repudiation both in the TCR No.1 case and then again in the 2004 case about income maintenance being the guiding principle for the setting of severance entitlements.

PN51

In excluding income maintenance from our consideration of the appropriate level of severance pay, we do not intend to exclude all income related loss experienced by redundant employees. We think that the Commission's reference in the TCR No.1 decision to "the inconvenience and hardship imposed on employees" by redundancy should not be given an artificially narrow reading. The term "hardship" should be given its ordinary and natural meaning. That meaning is broad enough to cover areas such as loss of seniority, loss of security of employment and other kinds of losses which were identified in the evidence.

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Then they go on:

PN53

The question remains whether an increase in severance pay is justified having regard to the basis upon which the Commission introduced severance pay in 1984.

PN54

Picking up the final sentence:

PN55

Leaving aside income maintenance issues, those areas include trauma associated with the termination itself, loss of non-transferable credits such as sick leave, and the potential costs associated with loss of employment security, inferior conditions, loss of seniority, lower job satisfaction or diminished social status.

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Then if I can go to paragraph 137:

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We turn now to the issue of loss of non-transferable credits. By non-transferable credits we mean primarily accrued untaken personal leave and contingent long service leave accruals.

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And so on, and then they set out what the legislative minimums were at the time relating to long service leave. Then the Commission will see at paragraph 139 on

page 195, they deal with loss of seniority, at 140, loss of employment security, and then at 142, they say this:

PN59

It is also legitimate to take into account that the hardship associated with retrenchment is likely to vary relative to length of service with a particular employer. This is likely to be so in relation to the emotional trauma -

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- et cetera. Then the final sentence:

PN61

Even taking into account that part of those adjustment costs arise through unemployment, this finding reinforces the conclusion that length of service should be a significant factor in the assessment of the hardship resulting from redundancy.

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The existing severance pay scale reaches a maximum of eight weeks' pay after four years of service. There is no disclosed reason why that should be so.

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And so on. Then if your Honours move forward to page 198, what their Honours then do over the next two pages is assess the relative merits of why eight weeks' service back at that time resulted in five weeks or so of severance pay and why five weeks of service resulted in lower entitlement. Then at paragraph 153, they set out what the standard should be. Then at 154, they say:

PN64

Our decision to increase severance payments for employees whose employment is terminated by reason of redundancy after five or more years of service is based, to a significant extent, on the loss of non-transferable credits. The largest non-transferable credit is long service leave -

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- et cetera. Then they say in the final sentence:

PN66

It would be double counting not to make an allowance for that fact in fixing the amount of severance pay to apply after 10 years of service.

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As we understand it, that is the last statement of principle on the setting of severance pay for Federal industrial awards. We accept that that system has changed under the 2010 award modernisation process which, in fact, commenced in 2008. But we say a number of things can be discerned from that decision. The first is that the setting of severance entitlements in an award setting context is not about income maintenance, though income maintenance issues may impact upon hardship factors.

PN68

VICE PRESIDENT HATCHER: Is there any suggestion that in this industry specific scheme that income maintenance was a factor behind its construction, given its very early genesis in terms of redundancy provisions?

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MR SHARIFF: I didn't hear the first part of your Honour's question, I'm sorry.

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VICE PRESIDENT HATCHER: Is there any material by way of decisions or anything else which guides as to whether income maintenance was a factor taken into account in the construction of this industry specific scheme?

PN71

MR SHARIFF: There are two decisions which I'll come to of the Coal Industry Tribunal. Can I answer your Honour's question just in a moment? The first issue is of income maintenance. The second issue is that one can see in the 2004 test case a focus of setting minimum standards relating to severance pay was the loss of non-transferrable credits, the two primary ones being sick leave and long service leave. The third was hardship is defined which is hardship in the broad sense that the Full Bench was talking about: loss of seniority, status, the trauma, et cetera, associated with redundancy.

PN72

We say that the proposed variation that my clients put forward meet those objectives because they take into substance that in this industry on redundancy there is no loss of transferrable credits - non-transferrable credits. The reasons for that, and we will come to this in more detail in closing, but we have touched upon it in our opening written submissions, is that on retrenchment, employees covered by this award are entitled to cash out of their sick leave entitlements. Secondly, employees covered by this award have the benefit of the portability long service leave scheme. The loss of non-transferrable credits in this industry is far more mitigated than it is in any other industry.

PN73

The second point we would raise is this, that our proposal, to the extent that there is any difference in this industry compared to other industries relating to hardship, our proposal seeks to retain the three-week formula, in substance, so that we are not seeking in this application a proposed variation that would have this industry treated in the same way as every other industry necessarily. So, there is an accounting for difference.

PN74

Our opponents say a number of things. First, they say we bear the onus to bring forward a substantial merits case and we have said in our written opening submissions that the question of onus is a flawed analysis of the statutory scheme and that's perhaps a matter we can return to in closing submissions. The second point they raise is that they say because this was an industry based redundancy scheme at the time of making in 2010, there is a legislative intention that there shouldn't be a variation to the industry based scheme unless there has been some significant change in industry. We also reject that and we have dealt with that in the written opening submissions and we will come back to it.

PN75

Third, they say we have misstated the position in relation to the history and genesis of this and this is where I wanted to come to answer your Honour's question in relation to the Coal Industry Tribunal decisions. In our first set of written submissions, I think I had suggested that there was a consent position that had led to the decisions in 1973 and in 1982. I accept that that's an overstatement and really what we were trying to say, and I think we have corrected this in our reply submissions, is that no rationale is exposed in those decisions as to why the quantum of the entitlement was set the way it was and perhaps the way to deal with that is take your Honours to those decisions.

PN76

Can I provide first the decision, I think it was of tribunal member Gallagher in 1973. And I will also provide to your Honours the second decision of 1981. Can I first take the Commission to the 1973 decision and in that decision the question of severance pay is dealt with at the top of page 7. Does the Commission have that? Just under the heading "Severance Pay":

PN77

The union's claim severance pay at the rate of four weeks' pay for each year of service. They relied upon evidence given at the hearing, et cetera. Having examined the documents, I have concluded that unlike the position of accident pay, jury service and compassionate leave, there is insufficient evidence to warrant a finding of a general industry standard in respect of severance pay. Nevertheless, I consider the claim is sound in principle, particularly -

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And this is, I think, picking up the objects:

PN79

- industry in which from time to time collieries close down either in whole or in part and unemployment thereby results. The coal mining industry is one in which employees tend to attach themselves to a particular colliery, in some instances for the whole of their working lives. Loss of a job which a man has come to regard as permanent is a serious matter and when an employee has reached middle age it is capable of causing an upheaval in his life which can affect his

PN80

family as well as himself.

PN81

I have decided to make provision for severance pay. It will take the form of an order requiring an employer who has decided to -

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- and then we emphasise these words:

PN83

close down a colliery in whole or in part either permanently or for an indefinite period to pay to each employee -

PN84

- and then the second limb is this:

PN85

- who has completed at least five years of continuous employment at the colliery, and whose services have been terminated by reason of the closure, severance pay of one week at ordinary rates.

PN86

The standard that was arbitrated in 1973, was to apply where a colliery closed down in whole or in part and the employee had an minimum of five years of continuous employment and in that case they were entitled to one week's severance pay. They go on:

PN87

The intention of the decision is to provide a measure of 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. It is not my intention that the benefit should be available to an employee who immediately upon the closure or within seven days thereafter is placed at another colliery -

PN88

- et cetera. And that's it. That's the entire reasoning from the 1973 decision and at least in 1973, it seems that there is an element of income maintenance being taken into account in the decision. And one of our propositions is although I think the CFMEU submissions say by reference to the next decision that the Coal Industry Tribunal, in fact, repudiated the income maintenance principle, we say that very thing has not really been examined for 40 or 30 years, at least in light of other contemporary severance pay cases.

PN89

Can I then go to the next decision, that's the 1983 decision. I think this was tribunal member Duncan, and if we start at page 32, the first part of this decision sets out all the various parties' evidence and intentions. At page 32, tribunal member Duncan sets out, through to page 35, 17 propositions, the first being that coal mining is a career industry and so on.

PN90

Then can I also draw attention to proposition 13, on page 34, there is no community standard on redundancy provisions. Then reference is made to what had happened in New South Wales by way of the Employment Protection Act. Then 14, the prospects for those retrenched at this time, suggesting there is a historical context at play at that point in time, and that's also picked up at point 17 where at that time there were bans on employment of new labour at various mines.

PN91

In relation to the quantum of severance entitlements or dealing with a case on the merits, that part of the decision commences at page 36. The first thing that tribunal member Duncan does is to say that there is no further justification for the five-year barrier, as it was called. You can see that midway through the first paragraph there:

PN92

The evidence shows me conclusively that the five year service 'barrier' as it was called, created considerable hardship on those affected by the almost universal award provision of 'the last to come the first to go'.

PN93

Just pausing there, of course, that principle of 'last on, first to go,' has now basically abated. But that was a consideration that was being taken into account at that point in time. Then the next paragraph:

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The manner in which the application was presented and opposed does not permit me to pay much attention to the concept of severance pay based on age which features in many ad hoc schemes.

PN95

They are saying age is not an issue here or that shouldn't be the basis upon which one determines the severance entitlement. He goes on to say:

PN96

I do find however that the existing provision is inadequate if the effect of retrenchment is loss of membership of the industry, i.e. if no place within it is available. The existing provision, particularly with the 'barrier' removed adequately recognises those factors capable of recognition by an industrial tribunal if further employment within the industry can be found within a reasonable period.

PN97

Just pausing there, that dose suggest income maintenance because that suggests that it's the period of unemployment.

PN98

Further, the existing provisions strike what I consider to be the best balance between the claims of employer and employee where the circumstances leading to retrenchment could not reasonably have been foreseen. Such circumstances are covered by the general description 'natural disasters'.

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Then the next paragraph:

PN100

However when I consider the factors the submissions lead me to take into account I do not consider the existing provision adequate where the circumstances are such as to be reasonably foreseeable.

PN101

Then in the next paragraph, picking up from the third last line on the page:

PN102

The matters therefore taken into account are: 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 need to move in the search for a job, changing community attitudes to retrenchment evidenced by legislation and the fact the retrenchment agreements exist whatever their terms, severance and retrenchment are industrial, not social, matters in a tribunal such as this and income maintenance is not a proper consideration.

PN103

You will have, we say, respectfully, by the time we close, an inconsistency here. They go on. Sorry, the tribunal member goes on to say:

PN104

The costs of any measure and, so far the evidence permits, an assessment the effect of any change on marginal operations. Conscious of problems confronting the industry on costs I nevertheless bear in mind that capital has poured into the industry and created demands for jobs which were beyond what are now seen as probable requirements -

PN105

- et cetera.

PN106

In the light of these factors my assessment of the appropriate amount is three ordinary weeks' pay for every completed year of service.

PN107

Just pausing there, our point is that one just arrives at that conclusion saying, "These are the factors one takes into account", but there is no real rational explanation, no logic behind why it is said that the three weeks per year of service is the adequate measure of the compensation for the relevant dislocation associated with retrenchment in the industry. There is just rational explanation. Rather, this has the hallmarks of, if one goes back to the start, I think the union had an ambit claim of some 12 weeks' pay and one can see that in the very first page, the terms of the application were (a) three months' notification at the cessation of service (b) 12 weeks' pay at the rate which would have been paid and/or long service leave entitlements.

PN108

This has the hallmarks of picking a figure that is within the range of ambit and that's it. There are a list of factors stated, but no actual examination in coming to the conclusion as to why. Our point about this is that in response to what our friends say is that some of the factors when they're pared back and looked at and scrutinised, don't actually have a degree of logic to them that might otherwise be said.

PN109

Take the first point that it is a career industry, the idea of that would suggest that at that time, 1973 or early 1980s, mine workers attach themselves to the one industry. But the entitlement was based upon loss of employment from a colliery. The idea that an employee is to compensate people for retrenchment

from their job, though the industry is a career one, it contemplates that people are going to remain in the industry and if they are, then it would seem to have a windfall benefit to it.

PN110

The idea of career industry as being a criterion upon which one determines severance pay has not actually been scrutinised in the 40 or so years since this standard has been established.

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VICE PRESIDENT HATCHER: Isn't the import of that that a loss of job may mean loss of career? That is, you can't find another job in the industry and you have lost your career? Isn't that what the import of that consideration was?

PN112

MR SHARIFF: That retrenchment pay isn't triggered by a loss of job from the industry. It's payable on loss of job from particular employment.

PN113

VICE PRESIDENT HATCHER: I understand that. I'm just wondering whether the emphasis on it being a career industry was on the notion that loss of a job at a particular colliery might have the outcome that you can't find another job in the industry. That is, you lose your career.

PN114

MR SHARIFF: I can accept that as a proposition, but if one is then measuring a quantification of compensation to allow for that, how does one do it? In the evidence that is going to be presented in this case, there is - I might just leave those submissions for closing. We will say something about the nature of the evidence in due course. We further say that the argument essentially that has been presented by my learned friends in their written submissions, allowing for the fact that there is a cash-out of sick leave entitlements and portable long service leave scheme, they go on to say but also people in this industry work a 35-hour week under the award. They have an entitlement to five weeks of annual leave and, therefore, there is a basis upon which the retrenchment entitlements of employees in this industry should be greater because, in essence, the fall is greater.

PN115

We say that that's not a principle that should be appropriately taken into account in the setting of minimum wages and conditions. The logic of that seems to be that what we are doing here is not dealing with a safety net, but a cushion and we address that our in written submissions in reply and will further address that in closing as an appropriate basis upon which to enshrine minimum standards in an industry.

PN116

We will have something to say specifically about the evidence that the statistical and other expert evidence that the unions call. There is to be some degree of cross-examination on that. There is also other statistical information that we have put before the Commission to indicate that, amongst other things, the relevant

impact of retrenchment on black coal miners is, in a substantive sense, no different to people in other industries.

PN117

Professor Peetz has filed a supplementary report in reply seeking to address some of those matters and they are based upon data sets which he has looked at and which the OECD reports, for example, look at, and we will test those matters and then we will have something to say about that in closing submissions.

PN118

That's all I wish to say by way of opening comment. Unless there's any further questions at this stage, I would propose to call the first witness, Mr Gunzburg.

PN119

VICE PRESIDENT HATCHER: All right.

PN120

MR TAYLOR: We are content, if the Commission thinks it's of assistance, to outline in a broad sense our position, but we are in the Commission's hands. We have obviously filed submissions. Mr Shariff has, to some extent, anticipated our case; with great respect to him, not its full import and impact, we would suggest. But we are in the Commission's hands, if it would assist.

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VICE PRESIDENT HATCHER: Mr Bukarica, do you want to say anything by way of opening as well?

PN122

MR BUKARICA: I'm happy to if it will assist the Commission.

PN123

VICE PRESIDENT HATCHER: I think so that the issues are fully exposed before we hear the evidence, it might be useful to hear briefly from the other union parties, Mr Shariff, so that we're alive to the issues as we go. Who would like to go first? Mr Bukarica?

PN124

MR BUKARICA: May it please the Commission, I will be as brief as I can in outlining our general position in relation to the application. It's correct to say that we do oppose the application. That's stated in our original outline and on various matters raised by Mr Shariff this morning, we would rely on what's put in writing before the Commission and I don't want to spend a great deal of time now talking about the original TCR case and the 2004 Redundancy Case and the CIT determinations that he took you to because there will be ample opportunity for that at the close of submissions.

PN125

What I do want to say, though, is that we have approached these proceedings, bearing in mind what the Full Bench said in the preliminary jurisdictional matters decision issued in respect of the Award Modernisation proceedings. In particular, we focussed on that part of the judgment and its decision and it's cited by both

parties, I don't need to go to it now, which talks about the nature of a case that a party would need to make to justify a significant or a substantial paraphrasing variation to a modern award.

PN126

There can't be any doubt, in our submission, that the proposed variation in this matter has a very significant impact. There is evidence being led in these proceedings, largely uncontested, as I understand it, going to the potential impact of the proposed variation on coal mining industry employees both what are termed production and engineering employees, CFMEU members and potential members, and those represented by the colliery staff and the AMWU.

PN127

COMMISSIONER JOHNS: But, sorry, most of that evidence relates to a time prior to the grandfathering that's now been proposed.

PN128

MR BUKARICA: Yes, it does, Commissioner, and that's an issue we will obviously address in submissions more fully. The grandfathering proposition as has been put by Mr Shariff was only given to us less than week ago. For one thing, it hasn't allowed for any proper consultation within the responsible bodies of the union, but I think it's safe to say that we don't regard that proposal as being sufficient and all it does - well, it does two things. One, it does ameliorate the effect, we accept, or potential effect, of the proposed variation. But it also highlights the drastic effect of the original proposal. It's an admission that the effect of that proposal is what the evidence that we have led shows it to be. And that is in the case of particular members or particular employees in the industry, impacts of over \$100,000 in potential redundancy payments per individual. But on a global basis, it represents - this is in Professor Peetz's original report - represents a notional transfer of contingent liability from employees to employers in the 100s of millions of dollars. It is probably best if I address that in conclusion given the late nature of the proposal.

PN129

SENIOR DEPUTY PRESIDENT HAMBERGER: Mr Bukarica, apart from the issue of grandfathering, as the scheme works now, it's actually quite a new arrangement. There was a cap and now there isn't one.

PN130

MR BUKARICA: Yes, yes.

PN131

SENIOR DEPUTY PRESIDENT HAMBERGER: That's actually a very recent phenomenon. I suppose, at least part of (indistinct) proceedings. I appreciate the application goes beyond just merely trying to, as it were, compensate for the abolition of the cap, the age-based cap. Nevertheless, it's not the case that the scheme as it now exists is something that's been there for 30 or 40 years. Elements are, but then there's been a recent change and I suppose that's something I hope both parties take us to - all parties will take us to.

PN132

MR BUKARICA: I think we address that in our written submissions, if Your Honour pleases. But also of course on a strictly legal assessment, it's not a recent change. The clause had no effect really as of 2010 with the making of the modern award.

PN133

SENIOR DEPUTY PRESIDENT HAMBERGER: In a real world sense, which is what I'm more interested in.

PN134

MR BUKARICA: Yes, maybe the real world and the legal world intersect on this particular issue, as I understand, Mr Sevvens' clients will be able to tell you, anyway. In terms of the approach that we have adopted, if the Commission pleases, we have taken at face value the notion that a substantial merits case needs to be mounted in this matter. Accordingly, whether there is a clear question of or the notion of legal onus applies in this matter or not, I suspect if Mr Shariff's right that strictly speaking that that notion is probably at best an analogous concept.

PN135

But regardless of that, it's clear that a substantial merits case needs to be made by those who would seek a change of this significance. Particularly when we see the member companies who comprise the CMIEG. Very large corporations have significant resources. One could expect that in approaching that of this sort that those applicants would attempt to put the Commission in the best possible position in respect of the evidence upon which any decision will be founded.

PN136

But instead, in our respectful submission, the evidentiary case of the applicants in this matter is very weak. We hope to show that the evidence is fundamentally undermined or of less value because of the amount of opinion evidence that's led by persons which, frankly, are not qualified to offer those opinions. In addition, there's a complete dearth of relevant and specific evidence relating to the coal mining industry as opposed to more broad categories of industry upon which we say any sensible conclusion in this matter can be reached.

PN137

There is a very serious problem, we say, in terms of the applicants in this matter or the moving parties in this matter meeting the type of case that we say the preliminary jurisdictions matter or decision emphasised would be necessary.

PN138

Similarly, we say the submissions by our friends are littered with errors and misconstruction of both antecedent decisions of the CIT, Coal Industry Tribunal, and indeed of our position and one of the issues Mr Shariff properly raised this morning which is the notion advanced quite stridently in the original submissions by the CMIEG that the original redundancy scheme in this industry was the result of some form of industry agreement. That's clearly not true and regardless of the criticisms Mr Shariff would now raise as to the reasoning of the CIT at first instance in those two decisions, the fact of the matter is that there was a hotly contested arbitral process. There was evidence led heard by a specialist industry tribunal that resulted in those two decisions.

PN139

Indeed, the 1983 decision, it should be remembered, or the process leading to the 1983 decision resulted in an attempt by employee interests to prevent the CIT from proceeding to hear the matter and it became the High Court case known as Duncan which no doubt this Full Bench is well aware of.

PN140

We have a flawed evidentiary case. We have basic errors in the submissions which are put forward which we submit doesn't meet the requisite standard required to meet or to justify an application of the significance proposed in this matter. Ultimately, we say that all points to an assumption on the part of the moving party or the applicant in this matter that really they don't need to do much to justify the proposed application. That essentially, as is put in paragraph 18 of the reply submissions, it's really self-evident in their view that the existing redundancy provision in the Black Coal Mining Industry Award is out of sync and unjustifiable having regard to the modern award system. We don't accept that assertion or that submission and we don't believe the Commission ought to either.

PN141

The provision that applies in the Black Coal Mining Industry Award is, we say, a properly set minimum standard having regard to the particular characteristics of the coal mining industry. It's been judged to be so in those antecedent CIT proceedings. It was not contested. It was approved and formed part of the modern award when it was made and there was no issue taken with the provision at that stage.

PN142

Similarly, the relevant statute provides for the continuing existence of industry specific redundancy schemes and when one considers that provision which we do in some length in our submissions, it is clear that the mere fact that there is divergence between an industry specific redundancy scheme and what is either the NES itself or NES based award provisions, that that in itself is no good reason to impugn the basis for the scheme.

PN143

Your Honours and Commissioner, we will bring significant or we have brought significant evidence to both justify the initial proposition that we put that the existing provision is properly set having regard to the industry specific characteristics of the coal mining industry. But we also have attempted to address the position put forward by the CMIEG that we need to justify the scheme by reference to industry as a whole and demonstrate how it is that the coal mining industry or the situation of coal mining industry employees is different and in some respects significantly worse than other employees in respect to the redundancy and retrenchment situation.

PN144

That's all I put by way of opening unless there are any questions.

PN145

VICE PRESIDENT HATCHER: Thank you, Mr Bukarica. Mr Taylor.

PN146

MR TAYLOR: The starting point is always going to be the fact that we are dealing with provisions which are and have been for decades an industry standard. In the case of redundancy pay, 33 years; in the case of severance pay, 43 years. It is against that background that the Full Bench summarised the history in the decision of April 2015 which has, in effect, led to where we are today. In that decision, the Full Bench - this Full Bench - identified that history and identified that there was not a cap. There has never been a cap. There was an age-based limitation, but if someone was 58 years old, there was no cap on the amount of redundancy pay. If someone was 60 years old, there was no cap as one understand it, they just got zero. That's not a cap.

PN147

It is true, as the Full Bench identified, that it meant from an employer point of view that their potential economic risks or amount they might have to pay out was in effect never going to be more than about 40 years' worth. And if one started at 18, then perhaps 42 years' worth. But at no point was there ever a cap. It was simply the fact that one at that time when it was instituted understood that people didn't work beyond 60.

PN148

One of the things that the Full Bench - the Full Bench in that decision - and we will be of course taking you to it in closing submissions - identified that it would need a very substantial case to be mounted by the employers to be able to convince this Commission to introduce any change into a very longstanding standard. That is, of course, entirely consistent with Full Bench authority such as the stevedoring industry case in which the Full Bench in that and other cases as repeatedly said that when one is dealing with an existing condition which prima face meets the modern award objective, an employer must lead a probative case or a party seeking a change, I should say, must lead a probative evidence case as to why that existing provision should change.

PN149

The more significant the change in terms of impact or length of award history, the more detailed that case must be. That, we say, or the import of that, is all the more so when we are dealing as we are here with an industry specific redundancy scheme. You will have seen from our submissions that we draw attention to the fact that the legislature at the time that the legislation was moving into the world of the Fair Work Act recognised that certain industries had industry specific schemes.

PN150

It was, of course, open to the legislature to simply mandate that all employees would be entitled to nothing more or less than the NES when it comes to redundancy. Rather, the legislature identified existing schemes which it must have understood what those schemes were, were able to be continued and that is in circumstances where at the same time the legislature was identifying the modern award objective. There is nothing we say inconsistent with the notion that an industry specific scheme containing a standard that had been in place for decades is inconsistent in any way with the notion of an award that meets the modern award objective.

PN151

In essence, the task that Mr Shariff's clients have, we say, is to identify that there has been some change since the standards were set which would justify a substantial change. And even with the late move to a grandfathering provision, this is a very substantial change. Perhaps not on day one, but in five or 10 or 20 years' time, the effect of the clause as proposed is very significant. Not on productivity. There is no suggestion this productivity, but simply on the amount of compensation, the amount of moneys that are paid to employees who are made redundant in this industry.

PN152

Our case, our evidentiary case, you will see, relying in contrast to the employer's case on expert evidence in the true sense, demonstrates that the factors in play 30 years ago have not changed. And the employers, with respect to them, do not attempt through their evidence to point to any change in the way the industry operates which would justify a view that the position now is different to what it was then. For that reason, based on authority, we say their case must fail.

PN153

Their case is nothing more or less than an attempt to invite this Commission to determine the question afresh. Their evidence to the extent to which it is there and, as Mr Bukarica quite rightly said, the value of that evidence is, with respect to them, very weak. To the extent to which it is there it appears to attempt to prove only one thing and that is an attempt to prove that the coal industry in some respects at least is not different to other industries. But the quality of that evidence is very thin and would not be sufficient but, in any event, is, we say, not relevant because the relevant question is not one of posing the question if we were to start afresh what would we do?

PN154

The four yearly review of awards, we say, is not an invitation for parties to come to the Commission and say that a particular condition, albeit one that has been in place for many years, is either greater than it should be or less than it should be. They must point to some probative case to demonstrate why something, particularly if it's a longstanding standard, should be changed. In a sense, you will see the evidentiary cases are quite different. The union's case, we say, consistent with the authority, is to demonstrate there has been no relevant change. The employer's case, limited as it is, is more going to try and establish that this industry is not significantly different to others; something that we strongly take objection to and say is wrong.

PN155

In conclusion, our position is that my client opposes the introduction for the first time of a cap. There is, of course, no need for grandfathering if, as we submit, no cap is introduced. As a matter of principle, we do not - my client does not embrace the notion that employees doing the same work are treated differently. So grandfathering, in any event, is always problematic. If, contrary to our case, the Commission saw a need to introduce some sort of reduction in current entitlements by way of introduction of some cap, then, of course, as the employer's case belatedly recognises, there would have to be some provision to ameliorate the effect of that. We say not one that freezes a current entitlement.

Employees have accepted employment in this industry, accepted employment on current terms and conditions. There is no reason why current employees should have entitlements frozen. Any grandfathering should not affect current employees at all. That was all I wanted to say.

PN156

VICE PRESIDENT HATCHER: Mr Shariff, your first witness? Do you want to reply, do you?

PN157

MR SHARIFF: Yes, just a couple of points arising. Obviously I am not going to get into a debate at the moment about the tests that apply in this case. The tribunal has got power under section 141 of the Act to vary an industry redundancy scheme. Can I just say something about the grandfathering? Mr Bukarica touched upon the issue about loss of entitlements to employees and the transfer, as it were, of those entitlements to the employer. The evidence of Professor Peetz which is sought to be relied upon says that on their analysis of the survey results and aggravating those into the industry broadly, they say for many employees made redundant, almost two-thirds, the effect is zero.

PN158

That's their evidence and the evidence is in relation to the balance, that is two-thirds, the loss of entitlement would equate to an average of between 57 to \$83,000. That's over the period, that's not per year. We will come to address this in due course. But for two-thirds of the employees made redundant, the effect is zero and that evidence was obtained from Professor Peetz before the grandfathering clause that we propose is put forward. But I will hold fire on everything else until the close of the case. If I could ask Mr Gunzburg?

<DAVID MAURICE GUNZBURG, AFFIRMED [11.06 AM]

EXAMINATION-IN-CHIEF BY MR SHARIFF [11.06 AM]

PN159

MR SHARIFF: Can you just state your full name for the record, please?---David Maurice Gunzburg.

PN160

Your business address?---Is 370 Highett Street, Richmond, Victoria.

PN161

Mr Gunzburg, you have prepared two statements for the purpose of these proceedings. The first is dated 23 March 2016; correct?---That's correct.

PN162

Has the Commission received the second statement?

PN163

VICE PRESIDENT HATCHER: Yes, yes, thank you.

*** DAVID MAURICE GUNZBURG

XN MR SHARIFF

PN164

MR SHARIFF: The second statement, Mr Gunzburg, is dated 4 November 2016?---That's correct.

PN165

Are there any changes you wish to make to either of those statements?---No.

PN166

Can you say that the contents of those statements are true and correct to the best of your knowledge, recollection and belief?---They are.

PN167

Could I tender the first statement? That's 23 March.

PN168

VICE PRESIDENT HATCHER: The statement of David Gunzburg dated 23 March 2016 will be marked exhibit 1.

**EXHIBIT #1 STATEMENT OF DAVID GUNZBURG DATED
23/03/2016**

PN169

MR SHARIFF: Can I tender the second statement dated 4 November 2016?

PN170

VICE PRESIDENT HATCHER: Yes, the statement of David Gunzburg dated 4 November 2016 will be marked exhibit 2.

**EXHIBIT #2 STATEMENT OF DAVID GUNZBURG DATED
04/11/2016**

PN171

MR SHARIFF: Sorry, before I tendered those, I should have indicated that my friend has provided me with some objections.

PN172

MR TAYLOR: Yes, we do. I was waiting for an appropriate time to indicate that we have some objections to both of those statements. For convenience, can I hand to the Commission a document which also contains objections to two other statements of witnesses who will be called later today. The objections to Mr Gunzburg's first and second statements can be broadly summarised as follows. Mr Gunzburg attempts to give expert opinion evidence of matters of statistics without in any way being qualified as someone who has any expertise in that area.

*** DAVID MAURICE GUNZBURG

XN MR SHARIFF

PN173

If I can take the Commission in respect of the paragraphs of the first statement, 17 through to 27. The Commission will have read or will read that what Mr Gunzburg sets out that he has done is taken raw ABS data from something that he describes in paragraph 18 as a data cube. In paragraph 20, he tells us that this data is only accessible using special software which in paragraph 21 he says the then

downloaded. He then annexes documents which are extracts from raw data that he has in some way published by way of snapshots in time. Then in paragraphs 25, 26, and 27, expresses what could only be described as an attempt at expert opinion evidence as to the nature of what the data, he says, reveals.

PN174

We say he is not qualified to - has not been qualified by the statements to demonstrate that he has any expertise in this area and certainly not qualified to give the opinions in 25 to 27 or the annexures DG5 and DG6 which are the two documents which are, he says, the results of his efforts at downloading software and taking ABS raw data.

PN175

VICE PRESIDENT HATCHER: Do you accept that to the extent he has expressed opinions they are testable by you? That, he has exposed the basis on which he has reached the conclusions and you are capable of testing those, aren't you, in cross-examination?

PN176

MR TAYLOR: Yes, but ultimately if someone is giving opinion evidence that is of so little weight it is of no utility why take the Commission's time in cross-examining a witness to ask them further questions about it? There is nothing here which would demonstrate that either in chief or in cross-examination this witness has a capacity to properly understand or give opinion evidence as to the merits of raw data that he has manipulated or in some way published using some software that he has downloaded.

PN177

SENIOR DEPUTY PRESIDENT HAMBERGER: But that's just a standard thing of how you look at ABS data. You can look at ABS data that way. I do it. You don't need to be a statistician to do it.

PN178

MR TAYLOR: It's quite different if you are taking an ABS report and providing that to the Commission. But here this witness is not doing that. He is taking raw data which is a survey report which is produced on a quarterly basis and he is attempting to give the Commission what he says are snapshots in time.

PN179

SENIOR DEPUTY PRESIDENT HAMBERGER: It would be very easy to check whether it was done correctly.

PN180

MR TAYLOR: Yes.

PN181

SENIOR DEPUTY PRESIDENT HAMBERGER: I mean, I would think that unless you can it's not done correctly that it's quite interesting data. I don't see why we shouldn't have access to it.

*** DAVID MAURICE GUNZBURG

XN MR SHARIFF

PN182

COMMISSIONER JOHNS: But is the point that you don't object to us having the data, you just don't want us to have access to his opinion about the data?

PN183

MR TAYLOR: Well, we do - we - - -

PN184

VICE PRESIDENT HATCHER: You're saying the graphical representation of the data is itself an opinion. Is that what you're saying?

PN185

MR TAYLOR: It is. It is. It's not the raw data. He is taking bits of data and suggesting that those graphs represent the true data position. But that's the opinion and then paragraphs 25 to 27, other than the first sentence of 27, then profess to give opinion evidence about what those stats say. We do take objection to this witness. With great respect to the coal industry, one can't imagine they had a difficulty in finding a witness who actually is qualified to give this sort of evidence. They haven't. Anyone, we will ultimately submit, who was qualified, would never have presented it in this manner.

PN186

COMMISSIONER JOHNS: Mr Taylor, I just want to clarify in my own mind, the list of objections that you have handed up just now says that you object to paragraphs 25 and 26 and 27.

PN187

MR TAYLOR: And 27 other than the first sentence and the two annexures, five and six.

PN188

COMMISSIONER JOHNS: Yes, all right. Now I understand, sorry. Thank you.

PN189

MR TAYLOR: Mr Fagir reminds me that the objection to paragraph 27 is put on an additional basis that the witness expresses a view or a conclusion that there is no reason why the black coal mining industry would not be similar to the mining industry generally without, in respect of time spent unemployed by individuals retrenched from the industry without providing a proper basis for that opinion.

PN190

VICE PRESIDENT HATCHER: The objections to the second statement are of the same nature?

*** DAVID MAURICE GUNZBURG

XN MR SHARIFF

PN191

MR TAYLOR: They are, the difficulty being slightly compounded in respect of the second statement and that is that we received it very late and I hear what Senior Deputy President Hamberger said about the capacity to, in effect, lead evidence to demonstrate that it's wrong. We, in the very short time we have had over the weekend, have received some raw information which could easily be led

into a statement which would demonstrate that it is wrong, but it is very hard to do anything other than if this goes in to cross-examine and put propositions, but difficult to lead evidence in the short time that we have here. Here, the witness is doing something similar in the second statement, taking snapshots in time from raw data and by way of annexures purporting to suggest that those graphs represent a true reflection of the ABS data.

PN192

SENIOR DEPUTY PRESIDENT HAMBERGER: How long have had these statements?

PN193

MR TAYLOR: The first one - - -

PN194

SENIOR DEPUTY PRESIDENT HAMBERGER: No, the second one.

PN195

MR TAYLOR: Sorry, the second one only over the weekend. The first one we had at the outset.

PN196

VICE PRESIDENT HATCHER: You're not objecting on the basis of the late receipt of the second statement?

PN197

MR TAYLOR: No, no, we are simply objecting on the basis that it is opinion evidence which this witness is not qualified to give and which will simply take unnecessary time in cross-examining a witness and putting propositions to them about it when this evidence has no useful weight that can be placed upon it.

PN198

VICE PRESIDENT HATCHER: Mr Shariff?

PN199

MR SHARIFF: Can I just deal with the issue of lateness first? The CFMEU served on my clients last Tuesday a supplementary report of Professor Peetz. That supplementary report was served on us unannounced after there had been communications with the tribunal about the length of the hearing and the likely duration of cross-examination and the like. So we received a late - - -

PN200

VICE PRESIDENT HATCHER: Mr Shariff, no one is objecting on the basis of late filing of statements.

*** DAVID MAURICE GUNZBURG

XN MR SHARIFF

PN201

MR SHARIFF: I understand that. What I'm - if I might be allowed - that report, that supplementary report from Professor Peetz responds to the data set that Mr Gunzburg addresses it the first statement, but now we're met with this objection. Frankly, it's an absurd objection to take. The fact that the data set from ABS data

is available, can be collated and reproduced as a graph, is not controversial. That is actually not opinion evidence. We haven't put this witness forward as an expert and we are not putting this witness forward as an expert. We are putting this witness forward as a person with experience in the coal mining industry who has gone and collated ABS data and is reproducing it. They have had the first statement since early this year and they have, in fact, responded to it. I don't see what the actual objection is. I am not putting it forward as an expert opinion.

PN202

In relation to the second part of it which is, I think, some particular assertions made by the statement as to what his experience is based on that data, that's just lay opinion based on the person's experience in the industry, much like the 20-odd statements we have been served by the other side where either Mr Colley or Mr Vickers will have us accept their views on what the outlook is in the coal mining industry, years of experience, age profiling and the like.

PN203

Witnesses commonly come to this tribunal and give that kind of evidence on their lay opinion, not expert opinion. I just don't see what's so objectionable at all.

PN204

VICE PRESIDENT HATCHER: All right. We reject the objections. We propose to admit the evidence. Insofar as it is opinion evidence, we consider that it is potentially probative and we consider that it's capable of being properly tested in cross-examination. Any further evidence-in-chief, Mr Shariff?

PN205

MR SHARIFF: No.

PN206

VICE PRESIDENT HATCHER: Mr Bukarica?

CROSS-EXAMINATION BY MR BUKARICA

[11.19 AM]

PN207

MR BUKARICA: Mr Gunzburg, I am going to ask you some questions regarding your experience. You have heard the debate that's just occurred, so I think there might be some forewarning of some of the questions I will be putting to you. At paragraphs 1 to 6 of your witness statement, you refer to your considerable experience as a human resources manager and consultant?---That's correct, yes.

PN208

Can I ask you whether you have any specialised - firstly, sorry, could I ask you what your post-secondary school educational qualifications consist of?---I am a Bachelor of Commerce from the University of Western Australia.

PN209

No other post-graduate degrees or diplomas?---I commenced an Honours year, but I didn't finish it. I'm not sure if that means if I have or not.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN210

In relation to your Bachelor degree, did you have any specialised training in the use or analysis of statistics?---Statistics was one of the core subjects that I was required to undertake I think the first and second years.

PN211

Did that constitute a major in your degree?---No.

PN212

Have you ever published any peer reviewed academic papers on the topics of economics, statistics or industrial relations?---No.

PN213

Can I ask you, who approached you to prepare this witness statement?---I approached myself to some extent. This was prepared on behalf of the industry. I was organising it, so there was no external body who approached me.

PN214

You're part of the organisation of the case in this matter?---That's correct.

PN215

Representing the CMIEG?---That's correct.

PN216

Were you ever given by anybody a document called or a document relating to the obligations of expert witnesses?---I can't recall. I may have, but I can't recall.

PN217

You don't recall turning your mind to the relevant requirements that, for example, the Federal Court expects of persons giving - - -

PN218

COMMISSIONER JOHNS: Mr Bukarica, sorry to interrupt, but I think we just heard Mr Shariff say moments ago that this witness is not being put forward as an expert.

PN219

MR BUKARICA: If the Commission pleases, I won't press the issue, but I thought it would be evidence that came from Mr Gunzburg himself.

PN220

COMMISSIONER JOHNS: I think we understand he is not being put forward as an expert.

PN221

MR BUKARICA: In both of your statements you offer opinions about the effect and meaning of certain data, in particular, in your first statement at paragraphs 26 and 27, you offer such opinions. Do you accept that's the case?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN222

Given you're not an expert witness, you're putting this forward as your opinion as a lay person with experience in the coal mining industry. Is that the nature of those opinions?---Yes.

PN223

You said earlier that you were involved in organising the case. Is that a fair description of your role?---Depending what you mean by 'organise', yes.

PN224

You were involved in marshalling other witnesses or deciding who the other witnesses in the matter would be?---Yes.

PN225

You were involved in trying to establish what the line of submission might be in this matter?---Yes.

PN226

What I want to put to you, Mr Gunzburg, is that the opinions you put forward in paragraph 26 and 27 are actually your submissions, aren't they?---Our submissions flow from the same point, but I'm sure Mr Shariff will be making the submissions in this matter, not me.

PN227

I'm putting to you, Mr Gunzburg, that your opinions are really just reflecting the line of argument that your client in this matter wishes to put?---They represent a view of the data which will be used in our submissions.

PN228

The CMIEG could have commissioned an independent expert witness to give the evidence that you attempted to put forward in your witness statement, did they not?---I presume so, yes.

PN229

Were you part of the decision about whether to use an expert witness in this matter?

PN230

MR SHARIFF: I object on the grounds of relevance.

PN231

VICE PRESIDENT HATCHER: I will allow the question.

PN232

MR SHARIFF: If the Commission pleases.

PN233

MR BUKARICA: Did you hear the question or do you need it repeated?---Could you repeat the question?

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN234

Were you part of the decision to not use an expert witness in this matter?---Yes.

PN235

Can you explain the rationale for that, please?

PN236

MR SHARIFF: I object. That might require disclosure of privilege. I'm just not sure what the purpose of the questioning is.

PN237

VICE PRESIDENT HATCHER: I think we have got to the stage where he is not an expert witness. There was a decision not to use an expert witness. Do we need to take it much further than that?

PN238

MR BUKARICA: I can lead the next question if, the Commission pleases.

PN239

VICE PRESIDENT HATCHER: All right.

PN240

MR BUKARICA: Can I put this to you, Mr Gunzburg, that your client - no, I withdraw that. Can I clarify one point, Mr Gunzburg? You run your own consultancy business and you're an employee of any of the CMIEG companies; that's correct?---That's correct.

PN241

The CMIEG is not a corporation or a registered association or an industrial organisation under law, is it?---That's correct.

PN242

Would you agree with this, that it would best be described as a loose ad hoc association of major coal mining industry employers who get together from time to time on industrial issues? Would that be a fair summary?---No, I don't think so.

PN243

How would you describe it?---It's certainly an association of the major employers in the coal mining industry who get together regularly to discuss matters of mutual interest and to respond to industry matters.

PN244

VICE PRESIDENT HATCHER: Is it an association with rules and a constitution?---No.

PN245

MR BUKARICA: The composition changes from matter to matter; is that correct?---It's generally the same. In this particular matter it changed from what it usually is.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN246

Why is that?---You'd have to ask the people who decided not to be represented in this matter.

PN247

VICE PRESIDENT HATCHER: What is it usually?---It's usually all the major operating companies, if I call them that. that is the owners and operators of the coal mines. Because they come and go a little, it sometimes doesn't include everyone, but all the major employers.

PN248

What is it for the purposes of this case?---It's simply a convenient way for an opinion to be put or a view expressed on behalf of those companies rather than having eight or 10 of them stand up and say all the same thing.

PN249

COMMISSIONER JOHNS: How many are normally in it?---About eight or 10.

PN250

How many are in it for this purpose?---Two less than that.

PN251

VICE PRESIDENT HATCHER: Six or eight?---Yes.

PN252

COMMISSIONER JOHNS: Who?

PN253

MR BUKARICA: In simple terms, those who you represent on this occasion is a lesser number than you normally represent, is that the belief?---Yes.

PN254

COMMISSIONER JOHNS: Who are they?---The two who are not represented in this matter at South 32 and Rio Tinto.

PN255

Who is left in?---We did have a list.

PN256

Yes, sorry, take me to that.

PN257

MR SHARIFF: If I can assist, annexure DG1, on the second page at paragraph 3.

PN258

MR BUKARICA: Your Honour, I was actually going to go to those questions and flesh that out a bit more fully.

PN259

COMMISSIONER JOHNS: That's all right.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN260

MR BUKARICA: Mr Gunzburg, when the CMIEG expresses an opinion on a particular matter, obviously it doesn't do so in its own right. There is no corporate entity. There is no body corporate there. But you do say only as a mouthpiece for these specifically designated companies; that's correct?---I'm not sure 'mouthpiece' is a word I'd use. It's a convenience, one which has been accepted by the Commission and by the union parties in the past.

PN261

I am just trying to understand the ambit and parameters, if you like, of your organisation. For example, you don't purport to speak on behalf of the entire coal mining industry, do you, or employers in the industry?---No.

PN262

The companies that are represented here today in these proceedings, they're found in annexure DG1 to your first statement; yes?---Yes.

PN263

They are, just for the sake of the transcript, and correct me if I'm wrong, Anglo American, BHP Coal, Centennial Coal, Ensham, Glencore, Jellinbah, Peabody, Vale, Wesfarmers, Whitehaven and Yancoal; that's correct?---That's correct.

PN264

You have also mentioned that there is one or two who are not represented today - one or two companies who are not represented today. You said Rio Tinto and South 32, which I think is a spin-off of BHP or previously BHP associated?---Yes, correct.

PN265

Would you accept also that a number of other significant coal mining industry employers who are not represented beyond those two within CMIEG, I mean?---Could you define what you mean by 'coal mining' because, as you know, it can be a bit of a flexible term.

PN266

No, no, I'll be specific. New Hope Group is not represented?---There are some operating companies which are not included.

PN267

LakeCoal would be another?---That's correct.

PN268

And Idemitsu?---I believe Idemitsu are now the operating company for one - I'm sorry - one of these.

PN269

Ensham, I think might be the case?---Ensham, that's correct.

PN270

There is one mine operation?---So in that respect, via Ensham, yes, they are.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN271

Are you aware as to whether amongst those non-CMIEG companies I have mentioned whether any of those companies who specifically oppose the current application?---No, I'm not aware. If they are members of the AIG, though, AIG has certainly said it supports the application. So they may be bound up as a member of AIG.

PN272

You are not aware of whether South 32 has expressed to industrial employee organisations that it opposes the application?---I'm not aware.

PN273

You're not aware of that.

PN274

VICE PRESIDENT HATCHER: Are you about to move on from that topic, Mr Bukarica?

PN275

MR BUKARICA: Yes, I am.

PN276

VICE PRESIDENT HATCHER: We might take a morning tea adjournment of approximately 10 minutes.

<THE WITNESS WITHDREW [11.32 AM]

SHORT ADJOURNMENT [11.32 AM]

RESUMED [11.47 AM]

PN277

VICE PRESIDENT HATCHER: Yes, Mr Bukarica.

PN278

MR BUKARICA: If the Commission pleases.

<DAVID MAURICE GUNZBURG, RECALLED [11.48 AM]

CROSS-EXAMINATION BY MR BUKARICA, CONTINUING [11.48 AM]

PN279

MR BUKARICA: Mr Gunzburg, before the break, I was asking some questions about the composition of the CMIEG. I just have a couple more questions to deal with there and then we will move on. We went through DGI expresses who the CMIEG participants in this matter are and you would agree with me, would you not, that each of those companies by reference to their market capitalisation would be regarded as a large company?---I'm not sure where 'large' starts. Certainly some of them are large.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN280

Maybe if I am more specific. I think Whitehaven Resources would be valued at about \$750 million in terms of its current market capitalisation. Are you aware of that?---I don't know.

PN281

You don't know. Clearly, the big three, BHP Billiton, Glencore, Peabody - perhaps not Peabody recently, but the others that you mentioned are by reference to market capitalisation billions of dollars' worth, very large companies?---Some of them certainly, yes.

PN282

In addition to those mining employer companies that I mentioned earlier, Rio Tinto, South 32, New Hope Group, LakeCoal and Idemitsu except in relation to Ensham, CMIEG does not purport to speak on behalf of the numerous contractors that operate in the coal mining industry either, do you?---No.

PN283

Have you had the opportunity to read all of the witness statements filed by the CFMEU and APESMA in these proceedings?---Yes, but it was some time ago that I read them all.

PN284

You would have read the witness statement of Mr Andrew Vickers; is that correct?---Yes.

PN285

You know Mr Vickers obviously through your professional life?---Yes.

PN286

In his witness statement at paragraph 59, Mr Vickers makes a statement, I am going to ask you whether you agree with this statement, that the member companies of the CMIEG have in place enterprise agreements at each of their mines to which the CFMEU is party. Do you accept that proposition?---I think that's probably true, yes.

PN287

Similarly, Mr Vickers, at paragraph 64 of his witness statement - I will just ask you to assume that this is correct - attests that as a result of a search conducted by the CFMEU it appears that almost universally the redundancy provisions in those enterprise agreements don't contain a redundancy cap or the overall majority don't contain a redundancy cap?---I haven't done a similar study. I simply don't.

PN288

Again, I'll try to be more specific now. Obviously there was proceedings in 2015 relating to the removal of the redundancy cap in this tribunal and there were related proceedings or analogous proceedings in the Federal Court of Australia involving Centennial Coal. You're aware of those?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN289

I ask you that because I'm going to qualify in terms of timeline the question I'm putting. Prior to that, prior to those decisions, it would be true to say, wouldn't it, that there was only one major employer member of the CMIEG who had caps in terms of redundancy pay in their enterprise agreements prior to those decisions and that was Centennial Coal?---I don't know.

PN290

You have got no basis, though, to dispute that position?---I don't know.

PN291

You don't know. What about the proposition that even amongst the Centennial Coal companies or Centennial mine sites, there were enterprise agreements applying at particular Centennial Coal mine sites that did not have a redundancy cap? You can't comment on that either?---I simply don't know.

PN292

Assuming Mr Vickers is right about the general pattern in enterprise agreements in relation to whether there is a redundancy cap in place or not and the evidence he gives is that it's overwhelmingly the case that there were not caps or limits on redundancy payments. What do you believe or can you explain to the Commission what the interest of the CMIEG member companies is in respect to these proceedings? What is it? What legitimate interest does the CMIEG have in this process?---You mean the member companies?

PN293

Yes, assuming that they all currently don't have a cap on redundancy pay in enterprise agreements, what's the interest here?---I believe their interest is that the modern award should not contain - should not contain uncapped redundancy provisions.

PN294

But in terms of direct impact on them to the extent they employer persons under enterprise agreements, there is no direct financial impact, is there, on the current proceedings or arising from it?---There is such a broad range of possible circumstances, I think you could pick almost any outcome and find an example of it.

PN295

I don't quite understand that answer, Mr Gunzburg?---There is - I couldn't tell you what the impact was because there is no single impact. There is a huge range of impacts and possible impacts.

PN296

Let's just have a look at that. BHP or BMA have no redundancy cap in any of their enterprise agreements as far as you're aware, is that the case?---I don't know.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN297

You don't know. Assuming that's the case, for the purpose of this question that's the case, a redundancy cap is imposed as a result theoretically of your application. What financial impact will that have on the BMA company to the

extent they employ persons under the enterprise agreements?---Depending on how the clause in the enterprise agreement is framed, it may have no impact whatsoever.

PN298

But that would be, assuming that the enterprise agreement simply expresses a three week per year of service entitlement as many do, do you accept that?---Again, I don't know.

PN299

You don't know. But in that circumstance there would be no direct impact?---Probably not, though, I would have to look at the clause and see how it interacted with the modern award clause.

PN300

Similarly, given that there is presently no cap in the award, it follow logically, does it not, that there would be no - there is no additional cost impact on existing industry employers on the basis of that cap? I withdraw the question. Sorry, I've lost myself on that one?---I'm glad it's not just me.

PN301

But the position is at the moment there is no cap and, therefore, all employers in the industry have the same exposure to the contingent liability based on their employees' year of service. You would agree with that proposition?---I think so. I'm not sure I understand the - I understand the question properly, though.

PN302

All right, I'll move on. The proposed cap that you seek is to be set at a total of nine years accrual inclusive of both redundancy and severance pay; that's correct?---Yes.

PN303

You would agree, of course, that there are a substantial number of employees in the industry at present who have more than nine years' service?---Yes.

PN304

We understand there has been a grandfathering proposal put forward in recent days, but focussing on the original application proposed by CMIEG, you wouldn't dispute the fact, would you, that the effect of the proposed variation would be any accrued notional entitlement that any employee would have at present would be wiped. That would be the effect of the original application?---In excess of nine years?

PN305

Yes?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN306

There is witness evidence led by the CFMEU and APESMA or colliery staff in relation to individual employees. Have you had a chance to consider those witness statements?---I've read them.

PN307

You wouldn't dispute, for example, that Mr Trusty from North Goonyella or Mr Wallace from Metropolitan Mine are not being truthful when they say they have got considerably more service than nine years and they would be severely affected by a cap being imposed without a grandfathering arrangement.

PN308

MR SHARIFF: I object. I am not sure I completely understood the question, but if I have understood it, there is a premise in that question that is unfair because the force of the evidence from the employees who give it is that they have entitlements currently covered by enterprise agreements. So their assertion that they are going to be affected by a cap imposed on the modern award is a wrong premise and an unfair premise to put to this witness.

PN309

MR BUKARICA: I will try to rephrase the question if I could.

PN310

DEPUTY PRESIDENT GOSTENCNIK: Particularly given your earlier line of questioning suggesting that the companies aren't going to be affected at all.

PN311

MR BUKARICA: Your Honour, that was about financial impact, but I will try to qualify the question properly.

PN312

Mr Gunzburg, you're aware that - or could I put this proposition to you? There will be at least two classes of employee who would be affected by a cap being imposed on redundancy payments as a result of these proceedings, assuming for the purpose of the question there's no grandfathering arrangement - okay? The first category would be employees who are simply award-covered employees. You would accept that? By this I mean employees who are not subject to an enterprise agreement and fall within the classifications of the award?---I think the correct thing to say is they would no longer have an entitlement under the award.

PN313

Inasmuch as the cap would apply; is that what you mean?---That's correct.

PN314

So clearly there's one category who are award employees, for shorthand, and I also put to you there's another category of employee who may be covered by the enterprise agreement, but the enterprise agreement simply says words to the effect of, "Your redundancy entitlements will be as per the award"?---I think that would be the case, yes.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN315

Indeed, Mr Trusty from North Goonyella, which is a Peabody mine, and Mr Wallace from Metropolitan, which is also a Peabody mine, say in their witness statements, effectively, that their enterprise agreement has a term to that effect?---I don't recall that from the statements, but if you say so.

PN316

So the proposition would be that in respect of these individuals, what they are saying in their witness statement is, "Because my enterprise agreement simply references the award, were it to be varied in the terms originally sought by the employer, the CMIEG, I would receive a cut in my notional entitlement of X amount of dollars." Do you understand that proposition?---Yes.

PN317

You don't dispute, do you, that that is the effect at least of the original application put forward by your participant companies?---The only thing I would say in addition to that is, of course, even an enterprise agreement sets minimum terms and conditions, so I can't speak on behalf of Peabody in terms of what their intention would be.

PN318

No, I wasn't asking about Peabody's intention, I am simply saying the simple proposition they are putting is, "Our enterprise agreement says as per the award, the awards vary, a cap is imposed, I'm made redundant tomorrow or next week, my existing entitlement of however many weeks is going to be cut to nine weeks and it equates to a significant amount of money"?---For those people, that could be correct, yes.

PN319

You wouldn't have any basis to argue the position, would you, or you wouldn't have any knowledge to contradict the statement by Mr Trusty, for example, from North Goonyella where he says that the amount of loss he would sustain as a result of a cap being introduced in the terms originally sought by your participant companies would be in excess of \$100,000 were he to be made redundant in the near future?---It's hard to describe it as a loss if he's not actually retrenched.

PN320

Mr Gunzburg, we will go to this in due course, but redundancies aren't unknown in the coal-mining industry, are they?---That's correct.

PN321

And we have had quite a round of redundancies in the last few years?---That's correct.

PN322

So the concerns of Mr Trusty and Mr Wallace and other employees is no mere theoretical concern, is it?

PN323

MR SHARIFF: I object. I am not sure what the value is to put to this witness the concerns of other people. They say what they say. I am just not understanding the relevance of putting to this witness the concerns of other employees to the matters to be resolved in this application.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN324

MR BUKARICA: I was going to move on, but really it is exploring the effect of the employer application and Mr Gunzburg's understanding of it. Again, the views of other people doesn't come into it but the effect certainly is an issue.

PN325

If I could take you to paragraphs 11 and 12 of your witness statement, Mr Gunzburg. Here you are talking about the age profile of retrenched employees?---That's correct.

PN326

You talk about being provided with data from five CMIEG member companies; is that correct?---Yes.

PN327

It is about the age profile of retrenched employees or redundant workers; correct?---Yes.

PN328

Who are those companies?---I'm sorry, I don't recall. There were five companies responded from a request I sent out for data.

PN329

Is there any reason why you haven't named those companies in the statement?---Originally when I obtained the data, I said I was obtaining it from them confidentially. That was more my way of me saying I wasn't going to send it out to lots of places, but it was done in 2014, so I just can't recall exactly which ones responded.

PN330

You don't recall why, other than possible confidentiality concerns, you didn't put their names in your statement?---In this statement?

PN331

Yes?---No, I don't.

PN332

Can I ask, firstly, in what form was the data that you received?---It was mainly in Excel spreadsheets which had been taken out of their company payroll data and then sent to me as a spreadsheet with the names of individuals taken off there so I wasn't aware of any personal details.

PN333

Is there any reason why you haven't included that source data in your witness statement?---The source data?

PN334

Yes?---No.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN335

There were no privacy concerns, for example?---No, once the people's names had been taken off.

PN336

Yes?---Just a little sensitive to anyone's information about their employment being spread around.

PN337

But you haven't sought to include that so that, for example, the data you claim could be independently tested or verified?---It's a table of 800 or so dates and times. It would just be a long piece of paper.

PN338

You say that is the reason why the data wasn't included and why the companies weren't identified, it is just the bulk of the data; is that right?---The basic spreadsheet wasn't included simply because it's a very long list, yes.

PN339

At paragraph 12 of your statement, you say that based on your experience in the coal-mining industry, the age profile depicted in attachments DG2 and DG3 are a fair representation of the age distribution and length of service of employees who have been recently retrenched. I might just ask you a couple of questions about that. Firstly, have you ever personally worked on or about a coal mine?---No.

PN340

I take it from that answer you have not lived in coal-mining community?---No.

PN341

In fact, you are residing in Melbourne?---That's correct.

PN342

Have you had any direct contact with retrenched production and engineering employees in the coal-mining industry in the last five years?---No.

PN343

You have not, for example, worked as an HR manager in respect to redundancy processes with any of the CMIEG companies?---No.

PN344

In reality, you have had very little direct contact with retrenched coal-mining industry employees?---That's correct.

PN345

It follows then that the information that you base your opinions or conclusions on is - what - obtained from CMIEG members and the companies?---Yes, as I described, yes.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN346

Indirect?---Well, the request for data was sent to the HR managers of those companies. They, or their payroll people, then got the data out of the payroll records and sent it to me.

PN347

What I am trying to get to, Mr Gunzburg, is your statement says:

PN348

Based on my experience in the black coal-mining industry, I consider the data in annexures DG2 and DG3 to be a fair representation of the age distribution and associated length of service of employees in the coal-mining industry in Australia who have been recently retrenched.

PN349

I am just trying to establish the basis of your knowledge in that respect?---The knowledge is that it was obtained from the HR managers or payroll records of the major companies who had recently been through that redundancy experience. It was not selected in any particular way, so it was a fair sample of the experience over that time.

PN350

But you are saying here that based on your experience in the industry, the information they provided you is a fair representation and I am trying to understand what other independent source of information would you have to make such a conclusion?---None.

PN351

None? So, in reality, the statement you make there has no proper evidentiary basis, does it?---I don't believe that's the case. I don't think there is anyone who knows individually all the people who have been retrenched over a period of time in an industry as large as the coal-mining industry, so it requires somebody who is able to contact the HR managers of the various companies and get that data out of them and it is data simply about age and length of service, it doesn't require any intimate knowledge of the circumstances of the individuals.

PN352

Mr Gunzburg, that is not what you say here, you say that based on your experience in the black coal-mining industry, et cetera. Now, what you are really saying, and I am asking you to say whether you agree or not, is what you should have said is, "Look, I've been provided with this information from CMIEG member companies, here it is" and left it there because you have no proper basis to offer the opinion you do in that passage, which is that you consider the data to be a fair representation of the age distribution and associated length of service of employees based on your experience.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN353

MR SHARIFF: I object. I think the witness has answered that question now three or four times. It relies upon which way you read paragraph 12. Paragraph 12 is saying, read in context with paragraph 11, he has obtained the data, the data is a

fair representation of the data relating to the people who had been retrenched, and I think that is the way this witness is saying it should be read, whereas I think my friend is putting to him, "You are actually asserting an opinion greater than that, you are saying that this data extrapolated reflects the entire experience of everyone." I apprehend what this witness has now said based on the last response he gave is that he is saying that the data that he got from these HR managers reflects a fair representation of what has happened in the five member companies who responded.

PN354

VICE PRESIDENT HATCHER: But that is not what the paragraph says.

PN355

MR SHARIFF: I said that there are two ways of reading it and I think this witness - - -

PN356

VICE PRESIDENT HATCHER: I am not sure there is. I think there is one way of reading it and perhaps the witness has given an inconsistent answer.

PN357

MR SHARIFF: That might be the case, but that is what the witness has said.

PN358

VICE PRESIDENT HATCHER: Mr Gunzburg, in paragraph 12, are you saying that the data in DG2 is a fair representation of the age distribution of redundant employees in the five companies from which it was derived or for all companies in the coal-mining industry?---I'm saying that the data is accurate for the five companies and that I know of - I believe that those five companies' experience is the same or similar to that of all the companies in the industry, therefore you could extrapolate it to the entire industry.

PN359

How do you know that?---Simply - - -

PN360

In terms of the issue - we are dealing with age distribution - how do you know that those five companies are similar to every other company?---Simply by talking to the HR managers involved at the time I collected the data. They were all - - -

PN361

Of the five companies, but what about the other companies you are comparing it to?---At the time I asked them a similar question, I believe, but I can't recall exactly the conversation which took place.

PN362

Anyway, to the extent you express an opinion, it is based on conversations with HR managers of various coal companies?---That's correct.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN363

MR BUKARICA: I suppose then, Mr Gunzburg, if you look at paragraph 15 of your statement:

PN364

Based on my experience in the black coal-mining industry, I consider the data in annexure DG4 to be a fair representation of the age distribution of employees in the coal-mining industry currently -

PN365

that is based on the same foundation, is it not?---No. That data - I think you are referring to DG4 - is obtained from Coal Services, which is an industry body which, amongst other things, is charged with collecting that sort of data for the New South Wales coal industry, so it's certainly accurate for the New South Wales coal industry and what I've been told by people who have worked in both sectors of the industry is that there is no substantial difference between the Queensland and New South Wales regions in terms of that issue.

PN366

I guess what I'm focusing on, Mr Gunzburg, and I want you to focus on is the first few words in that paragraph where you say again: "Based on my experience in the black coal-mining industry, I consider", et cetera?---Yes.

PN367

What is the basis for that opinion or conclusion?---What I was referring to there is that the data collected by Coal Services is considered by the industry to be one of the best sets of statistical data that there is and it's through my experience in the industry that I've become aware of that data and the way it's regarded within the industry.

PN368

So this is - what - based on conversations you have had with other HR managers or - - -?---No, I was actually on the board of Coal Services for a couple of years.

PN369

I might just ask you some questions about voluntary redundancy in paragraph 16 of your statement?---Yes.

PN370

You talk about the data you have collected from 11 CMIEG members to advise the proportion of redundancies which were voluntary as opposed to forced redundancies in the preceding 12-month period that you refer to there. Can I ask you just some clarifying questions, if I might. First, in making a distinction between voluntary and forced redundancies, you are not seeking to imply, are you, that what you call voluntary redundancies are not, in fact, genuine redundancies?---No.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN371

In fact, what you are talking about is a situation where an employer has identified the need for a workforce reduction and instead of unilaterally selecting employees

for that workforce reduction, the employer calls for expressions of interest in voluntary selection?---Yes, correct.

PN372

So the term "voluntary redundancy" is a bit of a misnomer, isn't it? It is best described as "employees self-selecting for identified workplace reductions"?---I was simply using the terminology that gets used in the industry.

PN373

It is common terminology, yes. I just want to make sure that we are not at cross purposes there with what you mean by "voluntary redundancy". There is nothing inherently wrong with a VR or voluntary redundancy process, is there, in your view?---No.

PN374

Would it be your experience as a human resources manager that in terms of a voluntary redundancy process, the employer normally has a right of refusal? Do you understand what I mean by that?---Yes. There's again a wide range of practices there, so I couldn't be sure what the practice was at a particular place.

PN375

But if I put to you that the common situation in enterprise agreements and other instruments that provide for VRs as part of the normal process would be that the employer would offer VRs subject to retaining appropriately skilled employees? That might be one qualification?---Either that or, when the offer is made, it is made only in certain areas where they are prepared to accept that volunteering.

PN376

Moving on from that point, you would agree, though, wouldn't you, that the voluntary redundancy process as utilised in the coal-mining industry can serve some useful purposes? For example, it might allow an employee who is dissatisfied with their current position to move on and thereby generally improve workplace culture; would you accept that general proposition?---That's possible.

PN377

Similarly, it might also lead to some, if you like, socially equitable outcomes from the perspective of employees?---I'm not sure what that means.

PN378

I will put this scenario to you: there's a voluntary redundancy process occurring, there are some employees who are approaching the end of their working lives, they might be in their late 50s, for example, there are other employees who are younger who have got young children who want to stay in the workforce. The existence of a VR process might allow those employees who are in a better position financially to move on and for younger workers to be retained?---It allows people to volunteer for whatever reason and there's numbers of them.

PN379

Including that sort of proposition?---Including that.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN380

I want to put to you that, in that situation, you would agree, would you not, that a scenario where an older employee might volunteer to take redundancy could be influenced by the level of accrual that employee has?---It could be.

PN381

For example, we have evidence from Mr Bennett in these proceedings - do you recall reading his witness statement?---Not specifically, no.

PN382

He was approaching 60 years of age, he had an uncapped redundancy entitlement, he decided to take it and he says part of his motivation was that there were younger workers at that site who, had he not and other taken the VRs, might have been selected for redundancy. Would you accept that that is a real life situation?---If that's what he said, it's the case for him at that stage, yes.

PN383

You could accept as well the proposition that for a person in Mr Bennett's position, for example, for him to leave employment early, earlier than he normally might, there would normally need to be some sort of financial incentive for that to occur?---Not in every case, no.

PN384

But in some cases you would accept that would be the case?---I'm sure there's an example of virtually everything.

PN385

Specifically the proposition I want to put to you is that the insertion of a cap in the respective employees' entitlements, so that, for example, Mr Bennett's total accrual is equalised with a younger employee who has nine years' service, by doing that, you are removing some of the financial incentive for a worker in Mr Bennett's position to leave earlier or to leave employment and thereby that might have some deleterious impact on the younger employees?

PN386

VICE PRESIDENT HATCHER: Mr Bukarica, is the premise of that question that the award clause could ever apply to a voluntary redundancy?

PN387

MR BUKARICA: Yes, it is.

PN388

VICE PRESIDENT HATCHER: Speaking for myself, I am not sure how that could be the case.

PN389

MR BUKARICA: Well, the - - -

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN390

VICE PRESIDENT HATCHER: The award only applies to voluntary redundancies properly speaking, doesn't it, that is terminated at the employer at the employer's initiative?

PN391

MR BUKARICA: That is what we are talking about, your Honour, that was the initial exchange I had with Mr Gunzburg. The way that voluntary redundancies in industry often work is the process of selection of the employees by - - -

PN392

DEPUTY PRESIDENT GOSTENCNIK: But the voluntary nature of it is an expression of interest.

PN393

MR BUKARICA: Correct.

PN394

DEPUTY PRESIDENT GOSTENCNIK: Which is then accepted.

PN395

MR BUKARICA: Yes.

PN396

DEPUTY PRESIDENT GOSTENCNIK: Thereby triggering the termination.

PN397

MR BUKARICA: So there's a two-stage process. The redundancies are there, inasmuch as BHP might decide there's a hundred less haul truck drivers they want at a particular pit, but then the question as to who falls into that pool might be facilitated in part by this voluntary process.

PN398

VICE PRESIDENT HATCHER: So the premise is that the award clause, if the award applies at all, applies as much to voluntary as well as involuntary redundancies, is it?

PN399

MR BUKARICA: I think that is correct. Well, in terms of the scenario that I have put, which I think - I beg to be contradicted - appears to be a standard situation in the coal-mining industry, that would be the case.

PN400

VICE PRESIDENT HATCHER: All right.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN401

MR SHARIFF: I did have an objection, which is I think the question was premised on Mr Bennett, as I understood it, and, as I understood the question as it came out, Mr Bennett and employees of his type, but the previous questions that were put were on the basis that Mr Bennett is covered by an enterprise agreement. So this isn't actually - again, as with an earlier question, the questions

now being put to this witness are in respect of an employee and it is unclear whether this employee is going to be impacted by the insertion of the cap, as we have been calling it, for one. Secondly, this question, as it is, requires, or calls for, speculation on the part of this witness. Precisely why particular employees make choices that they do, these can all be the matter of submission, but putting that to this witness and asking him to postulate why one employee as opposed to another employee, whether those advantages or disadvantages are taken away, in my respectful submission, is not a matter for this witness.

PN402

VICE PRESIDENT HATCHER: What was the question again, Mr Bukarica? I lost track of it amid all that.

PN403

MR BUKARICA: Your Honour, I was really trying to, I suppose, erect a theoretical example for the purpose of the point but using Mr Bennett as an illustrative example. I have probably gone as far as I need to with that, so I will move on.

PN404

VICE PRESIDENT HATCHER: All right.

PN405

MR BUKARICA: Mr Gunzburg, I might take you now to paragraph 17 and onwards of your witness statement. Here you deal with certain data that you have obtained from the Australian Bureau of Statistics and, in particular - and correct me if I am wrong - you have relied primarily here, or exclusively, I should say, on the Australian Bureau of Statistics Labour Force Survey, which has got the catalogue number 6291.0.55.003; does that sound correct?---Yes.

PN406

Your Honour, I think my friend Mr Taylor would like to address or ask some questions of Mr Gunzburg as to this section of questions, if it pleases, or paragraphs, if it pleases.

PN407

VICE PRESIDENT HATCHER: Right now?

PN408

MR BUKARICA: I think that is the proposition, yes.

PN409

VICE PRESIDENT HATCHER: And then we come back to you again?

PN410

MR BUKARICA: Well, it depends on whether he cover it adequately.

PN411

VICE PRESIDENT HATCHER: Mr Taylor is under sufferance then.

*** DAVID MAURICE GUNZBURG

XXN MR BUKARICA

PN412

MR SHARIFF: I object to that course. I think the convention is that each party should really complete their cross-examination. I don't mind Mr Taylor being interposed, but it has to be an interposing when Mr Bukarica has completed.

PN413

VICE PRESIDENT HATCHER: Apparently, if Mr Taylor does a good job, Mr Bukarica might not have to come back.

PN414

MR SHARIFF: There are subjective views about that.

PN415

VICE PRESIDENT HATCHER: Mr Taylor?

PN416

MR TAYLOR: Our intention is to not cross-examine on the same subject and I have some cross-examination on this subject. It may be that Mr Bukarica had some questions on a different subject which he was still to get to, but there is no intention on our part, either with this witness or any other witness, to, in effect, have two people cross-examining on the same subject matter and asking the same questions.

CROSS-EXAMINATION BY MR TAYLOR

[12.29 PM]

PN417

MR TAYLOR: In this section - I am asking you questions now about paragraphs 17 to 27 of your statement. You had to download some special software to read this data?---Yes.

PN418

You hadn't done this exercise before until you did this particular exercise?---That's correct.

PN419

Did you familiarise yourself with the questions that were asked of the households that generated this data?---No.

PN420

You accept that the data is data of those who are unemployed?---Yes.

PN421

Do you know what the ABS definition of unemployed is, that is, who they are counting?---I have read it but I can't recall it.

PN422

Do you accept that the definition is in two parts: firstly, it doesn't count anyone who is employed as defined?---That makes sense.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN423

And that anyone who had at least one hour at work for pay or profit in the reference week is employed?---I can't recall, but I accept what you're saying.

PN424

You actually have no expertise in this area at all, do you?---I'm not an ABS statistician, if that's what you're asking.

PN425

Do you accept that unemployed people are those who are not employed, as I have indicated, who have looked for work at any time in the last four weeks and could start work in that reference week?---I don't know.

PN426

The data includes those who were made redundant from their last job?---As I've said, I read the description at some stage but I don't recall the content of it.

PN427

What I am suggesting to you is the data that has been counted by the ABS includes those who were retrenched from their last job but is not only those who were retrenched from their last job?---Yes, that's correct.

PN428

Have a look at paragraph 17. Do you see there that you have said that:

PN429

The ABS data shows the average time spent unemployed by individuals who have been retrenched.

PN430

?---Yes.

PN431

It is not data of those who have been retrenched only, it is data of people who are unemployed for whatever reason?---That's correct.

PN432

To that extent, paragraph 17 is wrong?---I have certainly used the wrong phrase there. It should have been "unemployed".

PN433

Can I take you to paragraph 26. Here you express an opinion, do you not, as to what the graph shows compared to other industries as to the length of time spent by unemployed individuals retrenched from the industry?---Yes.

PN434

Again, that graph does not show the length of time people have spent unemployed who are retrenched only, it simply counts people who are unemployed for whatever reason?---That's correct, it's the same error in both places.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN435

Again in paragraph 27, do we find the same error?---Yes.

PN436

It includes people who left their job for a reason such as ill health?---Yes.

PN437

Or family commitments requiring them to move to a new location?---Yes.

PN438

Or people who dislike their current job?---It includes all unemployed people.

PN439

It includes people whose last work was not as a permanent employee?---I'm not sure that I understand what that means.

PN440

People who are unemployed, when employed they might have been employed as a casual, not a permanent employee?---Sorry, yes.

PN441

They might have been a contractor immediately before they became unemployed?---I'm not sure if that's possible. Does the ABS count contractors as employees?

PN442

I think, in fairness to you, you don't know what the definition of "employed" is. I did try to put it to you as at least one hour of work for pay or profit or commission, some form of income for work. If you accept that - I am putting that to you - then you accept that people who are unemployed, that is people who are not employed, their immediate previous "employed" as defined might not have been as an employee but as a contractor?---That's possible.

PN443

Do you know how many households were surveyed in order to produce this data?---No.

PN444

Did you determine what percentage or did you make any attempt to consider what percentage of the total households surveyed were likely to have been from the mining industry or last worked in the mining industry?---Yes.

PN445

What percentage of those households that were surveyed by the labour force survey - - -?---Sorry, can I correct that? Not of the households, no.

PN446

As to what percentage of the total workforce in Australia would be working in the mining industry, would you say that would be approximately 2 per cent?---I don't know.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN447

Within the mining industry as a whole - I will just stop you there for a moment - the only figures you have accessed and produced in that to the extent to which they refer to coal-mining workers are those workers who fall into the broader group of mining industry workers; is that right?---That's correct.

PN448

You accept that the coal-mining industry employs about one-fifth or one-sixth of the total mining workers?---That's possible.

PN449

Can I suggest to you - and tell me if I am wrong - I think you are professing to give some knowledge of the mining industry and its similarity to coal-mining - do you accept that the mining industry as a whole employs about 2 per cent of the Australian workforce?---I don't know the percentage of the workforce.

PN450

What I want to suggest to you - and tell me if you have any reason to know this - there would be something in the order of 0.4 per cent of households that were surveyed that would have been likely to have last worked in the coal-mining industry?---I don't know.

PN451

What you do know, can I suggest to you, is that whatever number that the ABS surveyed of households, it would be a percentage of less than 1 per cent that would have last worked in the coal-mining industry?---I have never tried to find out what percentage of the survey relates to various industry or industry subsectors.

PN452

Do you accept this proposition from your first and second year bachelor studies that when looking at survey data, the smaller the sample size, the greater the chances of sampling error?---Yes.

PN453

You accept that notwithstanding that, you didn't try to determine whether the data in question in respect to the mining industry was of such a size that it might be subject to data issues?---As I understand it, all data is subject to error. What I relied upon was the ABS publishing it as being worthy of consideration.

PN454

But the reports that you annex to your statement are not published by ABA, are they?---No, they are my representation of their figures.

PN455

What they are is your representation of broad data collected by ABS through its labour force survey?---I think that's what I said.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN456

Do you accept this proposition, that once you get down to very small sample sizes, results that are at the top or the very bottom, the top 5 per cent and bottom 5 per cent, have a capacity to affect an average?---That's the definition of an average, yes.

PN457

No, what you gave in your annexure are averages of the whole workforce, are they not? They are not the mean - sorry, it is the mean - it's not the median, it's the average?---It's the arithmetic mean, yes.

PN458

Do you accept this proposition, that once you are talking about very small sample sizes, it is important to exclude outliers because of their impact on the average?---Yes.

PN459

You didn't do that, did you?---I was not required to do that in order to produce those tables that I have in front of you.

PN460

Did someone require you to produce those tables?---No.

PN461

Did someone instruct you on how to do so?---No.

PN462

So when you say you were not required, you mean when you were determining how to do it, you didn't require yourself to do it that way?---That's correct.

PN463

But you accept the proposition, do you not, that if you were actually trying to represent a true average, it is important to firstly understand the sample size and, secondly, adjust to ensure outliers do not affect and create a false impression of average?---Well, it's not false, it's simply an arithmetic mean. I'm not sure how it can be false.

PN464

The method you took was to take a snapshot of a particular month on five years. I am now talking about your first statement where you have, in DG5 and 6, taken a snapshot in time, a November month, and picked five years; is that right?---Yes.

PN465

Then, in respect of that, you gave us an average for that particular month as to how long those who answered the survey said they had been unemployed?---No, that data is not averaged by me, that is the data from the ABS survey.

PN466

As I understood the figure that you have represented - let's just make sure we are on the same page here?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN467

If you turn to DG5 and you look at mining and you look at November 2015, you have put there a figure of 26.4?---Yes.

PN468

Correct me if I am wrong, I understood your evidence to be that having looked at raw data, you understood that raw data was that in November 2015, those who had last worked in the mining industry and were unemployed as defined by the ABS on average had been unemployed for 26.4 weeks. Am I wrong about that?---That's the figure which derives directly from the ABS data. I have not manipulated that in any way.

PN469

I am not asking you whether you have manipulated it, I am saying that is an average of all those. It is not that every single person had 26.4 - - -?---No, sorry, I thought you were asking me if I had conducted some sort of averaging of these numbers. The ABS calculation is no doubt some sort of statistical average of every individual who responded to the survey.

PN470

VICE PRESIDENT HATCHER: Just to be clear, that figure is showing people who, on average, were unemployed and had been unemployed for 26.4 weeks?---What it shows is that within people who advised their last industry of employment was the mining industry, they had been unemployed for 26.4 weeks when that survey was taken.

PN471

And were still unemployed?---That's correct.

PN472

So it doesn't tell us anything about when they have got another job?---All you can do, I think, is look at how long - sorry, let me express this better. What it shows is that at that time, that was the average period of time that they had been unemployed for and - - -

PN473

Just to answer my question, it doesn't tell you on average how long it takes to get another job?---Unless you look over at the time series and see if it varies and goes up and down. So if that figure was continually increasing, then it would be taking longer for people to get jobs after they left the industry. I don't think there's any way of looking into the future with a piece of data and saying, "How long will it take that person to get a job?"

PN474

MR TAYLOR: Unless you do something like the unions did and actually survey employees directly?---I don't think any of that information told us how long it was before some of those people were going to get a job in the future.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN475

But that would be the way you would find out, would it not, to actually do some surveying?---I think that's what the ABS does.

PN476

Let's just look at these figures. Do you see that figure at the top of DG5 "Unemployed All Industries"?---Yes.

PN477

The average for November 2015 is 45.8?---Yes.

PN478

Have you got any capacity to explain why that figure for everyone is so much higher than any individual line entry?---I'm sorry, I did investigate that at the time and I've forgotten the reason. It is explained on the data but it's slipped my mind at the moment.

PN479

VICE PRESIDENT HATCHER: So the total number for that first row is obviously not a total of all the categories below?---No, it includes a segment which is not included in the industry.

PN480

SENIOR DEPUTY PRESIDENT HAMBERGER: Does it include people who weren't in any industry the previous - - -?---I think it does.

PN481

Because it is a bit odd?---It's strangely out of sync and there is a reason for it, but, sorry, I've forgotten what it was.

PN482

VICE PRESIDENT HATCHER: Are they persons who haven't held a previous job?---I think that's possibly it. I think you're correct actually. It's people who were unable to give an industry that they had gone from but were just generally unemployed, so they hadn't left an industry previously.

PN483

MR TAYLOR: It wouldn't count - do you accept this - it wouldn't count anyone who has been retrenched and hasn't looked for work in the last four weeks?---I think that's correct, yes.

PN484

You are familiar, are you not, either from your own experience or from reading material prepared for the purpose of this case, that those who are retrenched at older ages are often discouraged from looking for work?---They often don't. I'm not sure if "discouraged" is the right word.

PN485

Would you accept this proposition, that when an industry is in a downturn as a whole - let me just back up a sec. The coal industry is one, you accept, do you not, that has peaks and troughs?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN486

There are peaks that can last 10 or more years where the industry, as an overall, grows in the number of employees in effect as a steady trend?---Yes.

PN487

That growth can be, or has been as a matter of statistical fact, in the order of a hundred per cent or more increase in employment over a decade or so?---I haven't done the numbers but it's certainly been strong.

PN488

Then there are the downturns where, in a similar way, one sees a consistent trend over a decade or so, looking back, where the number of employees gradually reduces over time?---I think the pattern is actually that the downturns are usually fairly sharp and the upturns are generally slower.

PN489

Have you seen statistics to that effect?---No, I don't think I've seen any statistics to that effect.

PN490

You haven't read Professor Peetz' report which has data of the number of people who are employed in the coal industry and records decreases over about a decade in the order of 50 per cent and 33 per cent at various points?---I thought they were over a more rapid timeframe, to be honest.

PN491

Certainly the downturns, whilst they are occurring, occur across the industry such that employees who are retrenched will, during a downturn, quite reasonably have a view that it is going to be hard for them to maintain employment in the industry?---In the coal industry, yes, if the entire industry is declining, yes.

PN492

The data set that you were extracting from provided month by month data which included quarterly summaries, so you could track - if you wanted to graph, you could graph on a quarterly basis the changes in length of period of unemployment?---Yes.

PN493

You didn't do that, you chose instead to take five snapshots in time?---Yes.

PN494

Do you accept this, that by doing so, what you don't reveal is whether cyclical effects, the peaks and troughs, are being represented fairly and accurately?---I'm not sure what you mean by "fairly and accurately". Certainly if I had included every quarter, you would have been able to see the variation from quarter to quarter. It would have been quite hard to see, though, it would have been a complex set of data.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN495

Are you aware that the sampling methodology used by ABS in this survey visits the same dwellings repeatedly for a period of eight months?---No.

PN496

If that were the case, do you accept that those employees whose job loss has led them to have to change locale, their residence, will affect the data as to how long they have been unemployed?---Yes.

PN497

Can I just take you now, if you still have DG5 in front of you, to the "Total" column, that's the first of the columns, and as I understand your evidence, what you have done here - - -?---Is that DG6, the graph?

PN498

DG5, so the first heading - - -?---Sorry, yes.

PN499

Just so that we are all clear, the first heading is "Unemployed All Reasons", the next heading is "Total"?---Yes.

PN500

As I understand it - tell me if I am wrong - what the figure of 1719.2 is is a total of the number of average weeks that a person who last worked in the mining industry was unemployed over the period from November 1991 all the way through to November 2015?---Yes, it's simply a total of all the quarterly figures. It probably only makes sense when it's compared to the other total numbers, otherwise it is hard to see what the figure means.

PN501

It would be wrong to interpret that as saying that those who last worked in the mining industry were unemployed for 1719 weeks? That would be wrong, wouldn't it?---That would be wrong.

PN502

Because this data is not counting how long people are in fact unemployed, is it?---The total number?

PN503

Well, any of those numbers is not counting how long those employees in fact end up being unemployed?---That's correct, it's how long they have been unemployed at that time.

PN504

And by aggregating weeks over such a long period, do you accept that what that does is hide the true effect of how long people are unemployed given the cyclical nature of various industries?---No, I don't see how that follows.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN505

Let's assume at some point during November 1991 and November 2015, the mining industry, or at least some portion of it, was booming. Can you make that assumption for the purpose of this?---Yes.

PN506

Can you accept, therefore, that at some point during that long period, people who left their job for whatever reason would be likely to have not been unemployed for very long?---Yes, but that would show up in the quarterly figures which are then added together to make the total.

PN507

Yes, but what that tends to do then, if you have a period of some years where the averages are very low because the industry is doing very well, that will then mean that when you are looking at the total average over the whole period, you are not getting a very good idea of how long people are unemployed during the trough periods?---Certainly there will be times when the quarterly number is very low and there will be times when it's very high, but that's not hidden, it's just - that's the fact.

PN508

But you haven't attempted to graph on a quarterly basis, have you?---No, I've done it taking five or six spots at random rather than doing it quarter by quarter. I'm sure it could be done, it's just when I tried to do it, the graph was impossible to see.

PN509

Did you look at the quarterly data between February 2015 and November 2015?---Yes.

PN510

Did you notice that those in the mining industry were reporting length of time unemployed ranging from the 56th percentile to the 94th percentile of figures?---I don't recall, but I think I say in my statement that there are times when the mining industry has a significantly higher amount of time of unemployment and times when it has significantly lower, so I'm sure there are times you could pick showing both extremes.

PN511

That takes us to the mining industry. I think you have identified in your statement, have you not, that the mining industry, as examined here, including coal mining but it is not just coal mining, is it?---That's correct. Unfortunately, the industry subdivisions which, within the mining industry, goes down to things like coal mining or iron ore, are not - the data for the subdivisions is not available.

PN512

I'm sorry for this but I can't now recall whether you knew this or not, so I will ask it again. Do you accept that coal-mining industry employees make up about a fifth of the total mining workforce?---I don't know.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN513

In any event, that industry includes the mineral and hydrocarbon aspects of the total mining industry?---I think it does, yes.

PN514

You accept that the mineral and hydrocarbon aspects of the mining industry also have booms and busts?---Absolutely.

PN515

That don't coincide necessarily with the coal-mining industry's booms and busts?---Some of them would coincide. For instance, the iron ore industry and coking coal industries are both used primarily in iron production, so they would probably move together.

PN516

You haven't done any analysis of that, though?---I don't think there is any data about that, but that has certainly been my experience.

PN517

Putting aside the iron ore mining part of the industry, other minerals and hydrocarbons, their booms and busts don't necessarily coincide with coal mining?---Not necessarily.

PN518

So when one is looking at average data for the whole industry, necessarily you are talking about, can I suggest to you, something like four-fifths of the averages come from other aspects of the mining industry which might be working on a different boom/bust cycle?---Yes.

PN519

Do you accept this, too, that when you look at the definition of the mining industry as used by ABS, which used ANZSIC codes, that they include employees based not just on site at the coal face but those who provide mining services?---Yes.

PN520

Would you be in the mining industry, do you think?---I don't think so, I think I have to put myself under the "consulting" or "other" categories.

PN521

Is that another problem that when you are dealing with a labour force survey, it relies on the person answering the question, which industry they think they were last in?---That's the difficulty with all surveys.

PN522

I note the time, if it please, Commissioner, I was about to move to the supplementary statement.

PN523

VICE PRESIDENT HATCHER: Yes, is that a convenient time, Mr Taylor? All right, we will adjourn for lunch and we will resume at 2 pm.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

<THE WITNESS WITHDREW [1.00 PM]
LUNCHEON ADJOURNMENT [1.00 PM]
RESUMED [2.02 PM]
<DAVID MAURICE GUNZBURG, RECALLED [2.02 PM]
CROSS-EXAMINATION BY MR TAYLOR, CONTINUING [2.02 PM]

PN524

VICE PRESIDENT HATCHER: Yes, Mr Taylor.

PN525

MR TAYLOR: Mr Gunzburg, I now want to ask you some questions about exhibit 2, your supplementary statement, and I want to ask you about the annexures, which are referred to as DG7 and DG8, which you discuss in your statement as how you achieved them in paragraphs 4 to 13. What you have done - am I right - is gone to the same ABS data source?---A very similar one. There's a number of tables or data cubes but they all derive from the same source.

PN526

What you have done is again take some snapshots in time, and I am looking at DG7 now?---Yes.

PN527

You picked again a month, but this time February?---Yes, February happened to be the first month in the series when I examined them.

PN528

If we look for a moment, so we understand this data - can I take you to February 2012, the second to last column?---Yes.

PN529

And to the mining entry. There are three numbers there, 9.4, 4.7 and 4.7?---Yes.

PN530

What does the 9.4 represent?---That is the total number of people unemployed who gave mining as their last industry of employment.

PN531

How many zeros do we need to add to it?---I'm sorry, I can't remember.

PN532

You are not sure if it is 940 or 9400 or 94,000?---No, I'm sorry, I can't. This last set of numbers was put together in some haste, given the need to try and respond to Professor Peetz' rejoinder, which I only got a chance to see on the Tuesday of last week and, unfortunately, I was busy with another client on the Thursday and Friday, so it left me with Wednesday.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN533

The 9.4 multiplied by a factor of 10 is what the survey said was the number of people unemployed as defined in February 2012 who last worked in the mining industry?---Yes.

PN534

Of which 4.7 factored by 10 or a factor of 10 fell into a category of lost last job and an equal number fell into a category of left last job?---Yes.

PN535

You have told us in paragraph 8 how those two categories are defined?---Yes.

PN536

Those who lost their last job include those who were laid off or retrenched?---Yes.

PN537

But also includes others who, as you indicate from the definition, left their last job because of ill health or injury or whose job was seasonal or temporary or who were running a business which closed or were dismissed?---Yes.

PN538

The data you have here represented doesn't allow one, therefore, to conclude that those who lost their last job were all made redundant, does it?---That's correct.

PN539

It would include those who were made redundant?---Yes.

PN540

If you then look across to August 2016, do you see the total number who were unemployed as at that snapshot was approximately the same, 9.1 to a factor of 10?---Yes.

PN541

But at this point, those who lost their last job have become a much greater proportion of that number than those who left their last job?---Yes.

PN542

Is it your understanding that between February 2012 and August 2016, there has been a decline in the coal-mining industry - sorry, I withdraw that. There has been a decline in the mining industry generally in the numbers of people who are employed?---Yes.

PN543

Indeed, to your knowledge, have there been large scale retrenchments in that industry during that period?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN544

Do these figures help you to accept the proposition that the percentage at any point in time who lost their last job versus left their last job will be significantly

affected by a downturn in that particular industry?---Yes. In fact, I think I say that in my statement.

PN545

In this case, did you prepare this data yourself or did somebody else do this?---I prepared it in the same way as the other data.

PN546

You didn't go back to the data you summarised for your first statement and tell the Commission of those who lost their last job rather than left their last job, how long they were unemployed as at snapshots in time?---There didn't seem to be an ability to make that cross reference within the way in which the dataset is made available publicly.

PN547

You say that as someone who has checked with others or simply you weren't able to do that?---In the time available, all I was able to do was look at the data which was available. I was unable to make any inquiry of the ABS whether there is, behind the scenes, some way for them to manipulate the data in another way.

PN548

Again you took monthly snapshots when ABS, in the data you had, produces quarterly results. Do you accept that if you had represented quarterly results over a trend period, that would have given one a better idea of the true position than taking individual month snapshots in time?---I don't think that follows. What I've got here is quarterly results, I've just chosen ones at five-year intervals to try and cover a period of time without having an almost - a very difficult to see number of points that you have to represent.

PN549

I think one of the things that you indicate is that the data shows variability over time?---Yes.

PN550

Can I suggest to you that the variability is particularly high in respect of the mining industry, that is, the variability between the percentage who lost their last job and left their last job?---Yes, in fact, if you look at the chart at DG8, you can see that there, that the top to the bottom is greater on that chart than, not all, but most of the other industries.

PN551

Whilst I don't have a colour copy of that and you probably do?---Sorry.

PN552

No, no need to apologise. Just so the Commission can follow your last answer, is this the position for the mining industry, that in February 07, the percentage who were unemployed as at February 2007 because they had lost their last job rather than left their last job was in the order of about something a little over 30 per cent?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN553

And that can be contrasted to the position in August of 2016 where the figure is approaching 90 per cent?---Yes.

PN554

February 2007, did that correspond with a boom period in the mining industry?---Pretty well. It certainly corresponded to a time when the number of people unemployed from the mining industry as a total was historically low.

PN555

As I understood it - tell me if I am wrong - the purpose of submitting this evidence was to determine whether the experience of employees in the black coal industry who had been made unemployed differs from that of employees retrenched from other industries?---In association with my earlier statement, and you pointed out the error I had made in the earlier statement of calling all unemployed "retrenched".

PN556

Yes?---The best measure I could find to try and describe or to see if it was possible to do exactly the same thing I had done in my first statement, but looking at retrenched or not retrenched, was left last job or lost last job. I was unable to find any data which linked that directly to time unemployed, but I was able to, as you can see, at least get some indication of how that seems to change over time.

PN557

Was the purpose of submitting this evidence in DG7 and DG8 to demonstrate that the experience of employees in the mining industry who had been made unemployed differs from that of those employees who are unemployed who last worked in other industries?---No. What I think it demonstrates is that there are a range of circumstances which apply from time to time depending on the state of the industry that someone has come from and that, at various times, the mining industry is one in which it is very easy to get another job, at other times it's much harder, but the same could be said of every other industry, so really pick your time and get the result you want.

PN558

So if you pick the time when it's very easy to get a job, that is a time, is it, when employers are increasing their workforce?---Yes, usually.

PN559

And the periods of time when it is hard to get a job are the periods when employers in the industry as a whole are reducing their workforce?---Yes, as for every industry, that is the same.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN560

Can I suggest this to you, that if you had actually graphed the mining industry versus all other industries, what that would have demonstrated is that the variability for the mining industry is, in fact, much greater than it is for all other

industries combined?---I don't believe that is the case. The graph shows that the mining industry is one of the more variable of them, but not greater than all.

PN561

You haven't done this graphing exercise that I - - -

PN562

VICE PRESIDENT HATCHER: When you said "the graph shows", what is that?---I am sorry, your Honour, DG8. If you just look at the gap between the lowest percentage to the highest percentage, for the mining industry, it is quite a large gap, so it can go from between 30 to some 85 per cent. Some other industries, like public administration and safety, the gap is much smaller; it is still fairly high at 60 per cent to 70 per cent. So there is a greater variability in terms of reasons for leaving job in the mining industry than some other industries, but I wouldn't say that it was outside the range demonstrated by others.

PN563

But this is the range, isn't it? It is in the range by definition?---Yes.

PN564

But is it the most variable or not?---I don't believe so. I am only doing this by visual inspection of the data. If you look at the electricity, gas, water and I think that's waste industry, that would appear to be very similar. It is certainly one of the more variable, though.

PN565

MR TAYLOR: I asked you this question and just tell me whether you did this or not: take the mining industry and compare that to a combination of all the other industries combined?---No, I didn't do that.

PN566

What I want to suggest to you is that if you had done that, it would have shown that if you looked at those in the mining industry versus every employee together from the other industries, it would show that the other industries are almost around the same mark, around the 60 per cent mark all the way, whereas the mining industry is going up and down and up and down?---Well, I'm not a statistician, as you know, but if you do combine all the other industries as a single figure, then you take out all the variability between the industries, so it is not a fair comparison. If you do it properly, and I haven't done this, you would have to do some sort of statistical study of the variability of each industry and then see where the mining industry sits.

PN567

Were you able to, from your analysis of the data, identify that what stands out from about October 2009 onwards is that unemployed people previously employed in the mining industry are much more likely to have lost their job rather than left their job than other industries?---I didn't look at a particular segment of that time. I was trying to get the longest longitudinal study that I could.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN568

Yes, but by taking snapshots in time rather than actually demonstrating trends, what you are not doing is allowing the Commission to understand what is the trend versus other industries over the last - -?---I don't think that's correct. Each quarter is a snapshot of time.

PN569

Yes?---I've just shown on this spreadsheet six of them for ease of reference, so they are all snapshots.

PN570

VICE PRESIDENT HATCHER: Let me go to February 2012 for mining. That's about half and half. I am just struggling to understand why you would have half the unemployed in a particular industry having voluntarily left their job. What scenario is that?---Well, I presume that's a scenario where there are not many people leaving in total and the reasons they gave when surveyed fell within the definition of "left last job" as opposed to "lost last job", so that would presumably be a situation where people were changing jobs for the purpose of promotion or they were offered a better role somewhere else, any, for want of a better word, voluntary reason for leaving.

PN571

DEPUTY PRESIDENT GOSTENCNIK: But it wouldn't have those people, would it, because this records those who are unemployed. So somebody leaving for a promotion - - -?---That's true, yes.

PN572

VICE PRESIDENT HATCHER: I am struggling to understand a scenario where you voluntarily leave a job and you are unemployed. I mean, you could imagine a few individuals doing that because of stupidity, but why half the unemployed would leave their job voluntarily and then be unemployed is beyond me. I don't understand what that is describing?---All I can say is it is for one of the reasons listed: unsatisfactory work arrangements; pay hours; to obtain a better job or conditions; the job was a holiday job; I left the job to return to study. All I can say is that's what the data shows.

PN573

MR TAYLOR: Is the mining industry, even in boom times, one where there is high labour turnover, as a generality?---Yes, I think it is.

PN574

Those aspects of the mining industry which involve working in remote locations on shift patterns which might be thought to be unattractive are jobs where people do it for a period of time and then leave because of those society or personal reasons; do you accept that?---No, I don't think - there's been a lot of conjecture about that but the studies that have been done that I've read have not been able to identify any pattern which would go to that being the cause.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN575

DG9 is a chart which shows coal prices and shows a significant increase in recent times?---Yes.

PN576

Is this correct, at this stage, there is no evidence that that recent increase in coal prices has led to a similar rise in employment in the industry?---I think if you go to DG11, that talks about the proposed reopening of some mines and there is some conjecture in there by the journalist of other mines reopening, but it's very difficult to predict what's going to happen.

PN577

So there may be an increase in employment in the future, but, at this stage, that hasn't yet correlated?---No, there have been at least some reopenings. Whether there is any data of employment currently available which shows what's happening, I don't know.

PN578

And whether those openings are directly linked to the change in coal prices is also a level of conjecture, is it not?---No, I think we can be pretty certain about that.

PN579

Mr Bukarica, when he was asking you questions, asked you some questions about the nature of the industrial regulation of the industry and he suggested to you that many of the companies that you contract to and on whose behalf you are giving evidence have enterprise agreements in place which provide for an entitlement to redundancy pay that would not be affected by this case. Do you recall that?---Yes, I do.

PN580

You understand I am representing the staff union, APESMA, and I want to ask you some questions about the nature of the industry as it applies to my client's members?---Certainly.

PN581

In contrast - do you accept this position - in the industry, there are very few employers that have enterprise agreements that cover staff?---Certainly less than there are for Mr Bukarica's members, yes.

PN582

When you say "less" - you do have an understanding of the industry, do you not?---Yes.

PN583

There are very few that have an enterprise agreement that applies to staff?---Comparatively, yes.

PN584

Those employers employ on the basis of staff being employed on a contract of employment underpinned by the award?---Yes.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN585

The subject of redundancy, in some cases, is dealt with by the contract of employment and, in other cases, is a matter of company policy?---Yes.

PN586

If the award were to be changed such as to create a lesser entitlement to redundancy pay, then it would be open to those employers that deal with the subject matter by way of contract to seek to vary the contracts to reflect the new lower award entitlement?---Leaving aside the grandfathering issue, yes.

PN587

And for those who deal with it by way of policy, there would be nothing stopping them, if they were so inclined, altering their policy to reflect a lower entitlement consistent with a change in the award?---I think there are some restrictions on ability to change policy sometimes, but it would be open to them, yes.

PN588

Do you know what those restrictions are?---Only that, as a matter of law, and I am not qualified to give this view entirely, it is sometimes considered that particular policies form part of the contract of employment and are therefore not so easily varied.

PN589

Accept as a proposition that staff - I am using "staff" as in a capital S staff - those who are eligible to be members of my client are much more likely to be directly affected by any change that might be made to the award, seeing as, for most of their cases, they are dealing with the subject matter being dealt with by contract or policy underpinned by the award?---In the short term only, in that every enterprise agreement, of course, comes to its end at some stage.

PN590

Yes, but what I was suggesting to you is that the vast majority of them are not covered by an enterprise agreement as such and when it comes to an end or not is irrelevant to them?---But you are asking me to compare them with others.

PN591

I see. And what is the comparison with others? Those who are covered by an enterprise agreement, what do you think happens to them?---Well, an enterprise agreement can be renegotiated at some stage in the future.

PN592

Yes, and why would that then change your comparison?---Well, I thought you were saying to me earlier that the enterprise agreements contained provisions in respect to redundancy.

PN593

Yes?---So, in the same way, they're open for negotiation in the future.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN594

I just want to make sure I understand the position. Are you suggesting that your clients who are currently covered by an enterprise agreement that would not allow for a cap could negotiate in the future a new enterprise agreement that does reflect a cap, if it were to be introduced?---Well, obviously that's possible.

PN595

Yes. And is that something that, in your knowledge, is the current intention of any of your clients?---I've got no knowledge of their intentions.

PN596

I see. Notwithstanding that you represent them and have come here to give evidence in order to change the cap, you are suggesting that that has occurred against the background in which they have given you no indication of their future intentions if a cap were to be introduced?---I've got no knowledge of their intentions.

PN597

But you haven't sought any knowledge?---No.

PN598

Thank you, your Honours, Commissioner.

PN599

VICE PRESIDENT HATCHER: Thank you. Mr Bukarica?

PN600

MR BUKARICA: No.

PN601

VICE PRESIDENT HATCHER: So you did a good job, Mr Taylor. Any re-examination?

PN602

MR SHARIFF: No.

PN603

VICE PRESIDENT HATCHER: Thank you for your evidence, Mr Gunzburg, you are excused and you are free to leave.

<THE WITNESS WITHDREW

[2.31 PM]

PN604

MR SHARIFF: The next witness is Mr Edwards. He has one statement.

PN605

MR TAYLOR: Just while Mr Edwards is coming forward, can I just indicate that notwithstanding the schedule I handed up earlier, we don't take objection to Mr Edwards, sir.

*** DAVID MAURICE GUNZBURG

XXN MR TAYLOR

PN606

VICE PRESIDENT HATCHER: Thank you.

PN607

MR TAYLOR: Also while I am on my feet, just for the benefit of the Commission and our learned friend, Mr Peetz was given the all clear to travel by his doctor, so we are expecting him here tomorrow.

PN608

VICE PRESIDENT HATCHER: All right.

PN609

MR SHARIFF: Do we have the all clear to be in the same room?

PN610

MR TAYLOR: At your own risk. Apparently, those who are pregnant would want to be careful not to come in contact.

PN611

VICE PRESIDENT HATCHER: I will let you know if my status changes overnight.

PN612

THE ASSOCIATE: Please state your name and address.

PN613

MR EDWARDS: John Milton Edwards, (address supplied).

<JOHN MILTON EDWARDS, SWORN [2.32 PM]

EXAMINATION-IN-CHIEF BY MR SHARIFF [2.32 PM]

PN614

MR SHARIFF: Would you just state your full name for the record?---John Milton Edwards.

PN615

You have recently retired?---Yes, that's correct.

PN616

Your current address is that stated in your statement, is it?---Yes.

PN617

You have prepared a statement for the purpose of these proceedings dated 24 March 2016?---Yes.

PN618

Are there any corrections you wish to make to that statement?---Not that I'm aware of, it should be fine.

*** JOHN MILTON EDWARDS

XN MR SHARIFF

PN619

VICE PRESIDENT HATCHER: Maybe paragraph 1?---Yes.

PN620

MR SHARIFF: Yes. Paragraph 1, I think, says you are currently employed in the position?---Yes.

PN621

Subject to that change - - -?---Subject to that change, yes.

PN622

- - - do you say that, other than that change, the contents of this statement are true and correct to the best of your knowledge, recollection and belief?---Yes.

PN623

I tender that statement.

PN624

VICE PRESIDENT HATCHER: The statement of John Edwards dated 24 March 2016 will be marked exhibit 3.

EXHIBIT #3 STATEMENT OF JOHN EDWARDS DATED 24/03/2016

PN625

MR SHARIFF: May it please, I have no further questions.

PN626

VICE PRESIDENT HATCHER: Mr Taylor?

CROSS-EXAMINATION BY MR TAYLOR

[2.33 PM]

PN627

MR TAYLOR: Were you just made redundant, Mr Edwards?---I wasn't that lucky.

PN628

At paragraphs 12 and 13, you refer to peaks and troughs in the black coal-mining industry. Just so we understand what you mean by that, by a "trough", is this the position, that during a trough there is an industry-wide trend to retrenchments and a shrinking of the workforce?---Yes, yes.

PN629

And, in contrast, during peaks, there are very few retrenchments and the workforce is increasing?---Yes, correct.

PN630

Do you agree with me - sorry, I withdraw that. Have you sought to access any statistical material which would allow you to answer any questions about the size and lengths of peaks and troughs?---Not statistical, no.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN631

The nature of the peaks, can I suggest to you, is that employment can increase by something in the order of 50 to 150 per cent over something in excess of a decade?---I couldn't comment on that number but it definitely does increase.

PN632

Can you comment on the lengths of the peaks and troughs? This is the case, isn't it, that the peaks and troughs are not in the order of three months or six months, they tend to be years in duration?---From my experience, that's the case.

PN633

In paragraph 14, you introduce some evidence that then follows as to the most recent trough, which you date to 2013; do you see that?---Yes.

PN634

And you identify a personal involvement in retrenching employees and you identify three locations; do you see that?---Yes.

PN635

You are not, though, suggesting, are you, that they are the only retrenchments that you have been involved in during that period?---No, that's correct.

PN636

In 2013, do you recall there were retrenchments in about October of that year at the Myuna Colliery?---Yes, that's correct.

PN637

Four employees were made redundant at that time?---I couldn't tell you the number but I know there were retrenchments.

PN638

Four staff were made redundant at that time. Sorry, I withdraw that. Do you recall this, that seven days before those staff were informed, you held a meeting with all staff?---That would have been correct.

PN639

And you indicated that there would be some retrenchments?---That's correct.

PN640

But were unable to indicate how many or from what categories?---From memory, that's correct.

PN641

Then, on 25 October, four staff were called to a meeting, one by one, not together, and you had four meetings and made four employees redundant?---That would be correct.

PN642

One of them was Greg Davey, an under manager; do you recall that?---Yes.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN643

You told him he was redundant and he would be finishing that day?---That would be correct.

PN644

Do you recall how long he had been employed at that point?---I would say for a substantial period of time because I know Greg was at other mine sites prior to Myuna.

PN645

Do you accept it was about 31 and a half years?---That would probably be correct.

PN646

Do you recall how much redundancy pay he was paid?---No.

PN647

You are not serious, are you?---Well, I am serious because I can't remember.

PN648

Okay?---I can't remember - - -

PN649

Let me put the question more fairly. I'm sorry, I might have misled you by the previous question. Do you recall - you understand in the clause that there is an amount for severance pay, one week for every year of service, there's an amount for redundancy pay, two weeks for every year of service. Talking about that part, the two weeks for every year of service, can you recall what Mr Davey was paid?---No, I can't.

PN650

Do you recall how old he was on that day?---No, I can't.

PN651

You don't recall that he was over 60 years of age and received no redundancy pay?---At that time, that would have been correct, yes.

PN652

You do recall that?---Yes.

PN653

And that the amount that he would have been paid but for his age was 226,000, roughly?---I'm assuming that would be the case.

PN654

And that another employee who was in the same position, Jim Wright - - -

PN655

VICE PRESIDENT HATCHER: When did these occur, what year?

PN656

MR TAYLOR: October 2013. Is that correct?---I would think so, yes.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN657

VICE PRESIDENT HATCHER: This is after, long after the statutory age of retirement was abolished; is that right?

PN658

MR TAYLOR: Yes.

PN659

Do you recall that of the four employees, another employee, Mr Brett Henderson, a mechanical engineer, was 58 years old and you made him redundant that day as well?---Yes.

PN660

And he received his redundancy pay in full, the two weeks for every year of service?---I'm assuming that's correct.

PN661

There were no volunteers called for those redundancies, those four?---Not that I was aware of, no.

PN662

VICE PRESIDENT HATCHER: There may be a capacity to recover those payments now, mightn't there?

PN663

MR TAYLOR: Your Honour, since - - -

PN664

MR SHARIFF: You are giving free legal advice, your Honour?

PN665

MR TAYLOR: It's okay, your Honour, let me ask this question.

PN666

You know this, don't you, that following the decision to remove that subclause, Centennial has since paid those two employees an amount equal to the two weeks per year of service?---That is correct.

PN667

At that time in October 2013, this is the case, isn't it, that your company that employed you, Centennial, was the only company that applied the age 60 cap?---I couldn't comment on that.

PN668

You are not - - -?---What I am saying is I don't know. I know what our company did, I don't know what other companies did.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN669

What I am putting to you is you know as a matter of fact that you were the only company at that time that was applying the age 60 cap?---I can't comment on that, as I said.

PN670

There was, up until 2012, a staff enterprise agreement that applied to staff at the Centennial Mine, at at least two Centennial Mines?---Yes, that's correct.

PN671

If those enterprise agreements had remained in place, they would have provided for redundancy pay without an age cap?---What sites are you talking about?

PN672

Those sites that had an enterprise agreement, there were two sites that had enterprise agreements that were terminated in 2012; is that right?---Well, we had several sites. I don't know what - you're not giving me a site.

PN673

No, that's true. I might be able to do so in a moment but I can't do so immediately. In 2013, those employees, that is Mr Davey and Mr Wright, were employed pursuant to individual contracts which stated that they were entitled to redundancy payments in accordance with the award. I am paraphrasing, but that is - you accept that was the position?---I'm assuming that would be correct, yes.

PN674

I next want to take you to that part of your statement headed "Impacts of Redundancy", paragraphs 27, 28 and following. In paragraph 27, you say that, in your experience, employees who are facing retrenchment fall into three broad categories. Do you see that?---Yes.

PN675

Firstly, the words "in my experience", do I take it that you are not here giving evidence that you have referred to any statistical or objective data but rather are summarising your own anecdotal experiences and recollections?---That's correct.

PN676

These three categories of people who are "facing retrenchment", just so I can understand what those two words mean, are you talking about people who, at the point in question, are all still working?---Could you point me again to what clause you're talking about there, please?

PN677

Paragraph 27?---27, yes.

PN678

Do you see there, it starts:

PN679

In my experience, employees who are facing retrenchment fall into three broad categories.

PN680

I am just trying to understand these categories, firstly by understanding who we are talking about. Employees who are "facing retrenchment", these are employees who are working but could be retrenched?---It's using "employees" as a collective, it doesn't mean individuals or whatever, it's just a collective name of employees, our employees, regardless of whether they're CFMEU employees or they're AMWU or they're APESMA employees.

PN681

It is the expression "facing retrenchment" I am just trying to get an understanding of?---It's just the - - -

PN682

Are these people who are currently employed but may be liable to be retrenched at some point?---There's no specific names, it's just normally numbers at a particular point of time when you are going to have retrenchments.

PN683

You have divided employees, broadly, into three categories. The first are employees who are "ready for retirement". Do you see that?---Yes.

PN684

These are employees who haven't yet been retrenched?---That's correct.

PN685

So when you say they are "ready for retirement", but for the retrenchment, they would have kept working until some point in the future when they actually wanted to retire?---Potentially.

PN686

VICE PRESIDENT HATCHER: Do you mean people who might want to retire in the near future; is that what you're talking about?---My experience is again anecdotal but my experience of working at mine sites and dealing with guys, particularly when they're in that 55 to 65 age bracket, there's a lot of the guys will be looking at yes, I'm going to finish up at a particular time. As soon as 60 comes I'm going to go, and there's those guys that say well, I'm going to stick around for a while. You just get that feel from the guys when you're dealing with them. But in saying that, you know, all I'm saying is that potentially some guys will want to take it, if it happens to come up. Others won't because of their particular circumstances.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN687

MR TAYLOR: Well, that's true if they're being given a choice but when we looked at the words "facing retrenchment", you're not simply dealing with people who have a choice are you? Or are you only talking about - are these three categories only categories of people who have an option to volunteer for redundancy?---As a company, I think you'll find if you have a look through records and data you've probably got from ourselves, the vast majority of times is that there's always a voluntary redundancy opened up. There are times when

they're not but that's very, very minimal that that happens. It's just a use of words saying that there are what I think anecdotally, that there are employees who would want to go if there was a redundancy came up at that period of time.

PN688

If they weren't being made redundant, they would keep working for some months or years?---Yes.

PN689

People who were made redundant, and I guess I'm now talking about people who haven't volunteered who are made redundant 55 plus may well, you accept, have wanted to keep working but think that there is no likelihood, or at that age they won't be able to find ongoing employment?---That could be the case.

PN690

Particularly the case during a trough period?---That could be the case, depending upon their skills and so forth that the individuals have.

PN691

Now the second category you describe are employees who have decided that they will take up work either outside the black coal industry or at another operation shortly after being advised of the redundancy of their position. So are these people who you say there's one third of employees who upon being retrenched have actually decided that they want to work elsewhere?---Again from my experience there are guys who have decided that they've had enough of the industry and they've decided I want to get out. The reality of it is that most of those guys tend to be tradesmen; electricians and fitters, where they have got similar skillsets outside in other industries. Production employees it's a different story, where theirs is a very unique operation that they work in and for them to pick up work yes, it would be more difficult but tradesmen and so forth, I've seen tradesmen that have gone and become their own businesses and (indistinct) and so forth. That's where I've used those words where there are people that have decided they've had enough. They've had enough of the peaks and troughs and they want to take some big money and get out.

PN692

That group would include, can I suggest to you, people who in a trough see no capacity to maintain employment in the black coal industry and have no option but to try and find work outside if they want to keep working?---That's correct, and then obviously when the good times come you find, and we have done that, other guys come back into us when the times get better than what they have been.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN693

In paragraph 28 you suggest these three categories haven't changed over the years and can be approximately divided across these three categories. Is this the case that the question of the division of those categories very much depends upon whether we're in a peak or a trough period?---As I said, they're anecdotal observations. One point you can have a think about with this and it is - again, it is anecdotal, it's roughly a third, a third, a third, depending on the mine site itself.

For example, there might be a mine site where you have a lot of older guys and the mine might have been running for a long period of time, the guys might have stayed there for quite a while and it might be a backlog of guys who may leave or put their hand up to go because if they're at that age now close to or over or on the age 60. So you might get a site where more people may go of an older age. Then again, you might go to another site and it's more balanced, you might go to another site and it might be younger guys who actually are retrenched because they're - as part of the EA the seniority might put them out first.

PN694

Also I think your answers to depend, do you accept, on whether these employees are in a position where they can put their hand up or whether they are being selected for redundancy without any choice?---Yes, that's correct.

PN695

I think you've said in your experience voluntary redundancies is a feature of the industry. In respect of staff, that is those who are represented by my client APESMA, do you accept that it is not feature of the industry that they are selected on the basis of volunteers. That it's much more common that they are selected by the employer?---It's mixtures where the - yes, you are correct, there have been times where we've indicated staff to move out. There's also the consultation with the staff as to what's happening and what's going on, so people understand. Then there's also the voluntaries from that, asking people to put their hands up to go to save someone else's. So it's a mixture of the whole lot.

PN696

VICE PRESIDENT HATCHER: Does Centennial pay the same package for voluntary redundancy as it does for involuntary redundancy?---Yes.

PN697

Is there a reason for that?---No.

PN698

MR TAYLOR: I didn't hear the witness' last answer.

PN699

VICE PRESIDENT HATCHER: I thought the answer was no.

PN700

MR TAYLOR: I see. When we were looking at paragraph 28 and you're dividing these three groups equally, I just want to make sure I get the basis upon this correct. Firstly, your evidence in paragraph 28 is, I think, and I think this is correct, based on your anecdotal experience not on any attempt by you to analyse information on an objective, statistical basis?---That's correct.

PN701

This is your experience over both the boom and the trough years combined?---Correct.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN702

In paragraph 33, you identify a specific figure of an amount that's been paid in redundancies between 1 January 2013 and 31 December 2015. Firstly, is that including accrued leave entitlements or only severance and redundancy pay in accordance with clause 14?---It's severance and retrenchment.

PN703

Now in 2002, Powercoal was privatised and became Centennial?---That's correct.

PN704

When it was privatised allowance was made, was it, in the purchase price for accrued entitlements?---The severance pay was paid out to everybody, so at that point in time - - -

PN705

The one week?---The one week was paid out for their years of service up until 2002, and then obviously it commenced again from there, and the retrenchment remained as it was.

PN706

There was allowance made in the purchase price for employee accrued entitlements?---I assume so.

PN707

Was a bank guarantee put in place covering accrued entitlements including severance and redundancy pay?---That's correct.

PN708

Is that bank guarantee updated on an annual basis reflecting the current obligations to pay severance and redundancy pay?---As I understand it.

PN709

If there was to be a decision of this Commission which lowered the obligation of Centennial to make redundancy or severance payments to staff, that would then flow through to the amount that needs to be guaranteed?---I would assume so.

PN710

VICE PRESIDENT HATCHER: What's the practical cost of maintaining a bank guarantee?---Look, financially I can't really give you a number on that but there is a figure for whatever it is at that point of time each year, to make sure that there is enough to cover if the worst came to the worst. As I understand it, and I think there's a group of three which meet yearly to ensure that that payment is there and that it is available if required, if needed.

PN711

MR TAYLOR: Is this the case that there is - and tell me if I'm wrong, I'm not putting this on the basis of instructions but on what I understand to be the general position. Is there a fee that is pay to a bank on a regular basis which is directly reflecting or directly related to the quantum that's being guaranteed at any point in time?---I couldn't answer that question.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN712

The statement goes onto deal with the subject of entitlements upon termination of employment of employees in the black coal industry, and it starts with superannuation. You refer to a particular fund, the Mine Wealth and Wellbeing Superannuation Fund. Firstly, it's the case is it not that many employees in the industry are not members of that fund but members of an employer specific fund?---There'd be mixtures, yes.

PN713

This is not the only fund in respect of which mine workers and staff have their superannuation?---Yes, correct.

PN714

Centennial, for example, has most of its staff in a fund administered by Colonial First State that is not a Mine Wealth and Wellbeing Superannuation Fund?---Could you just repeat that again, please?

PN715

Yes. In respect of Centennial's staff, most are members of a fund, one I'm referring to as a Centennial fund, administered by Colonial First State?---There is actually - there's two options and I could give the example of myself. Up until a week or so ago I had an AUSCOAL Superannuation and I also had Colonial Superannuation. So the AUSCOAL goes back to the mineworkers pension, back into the 40s, which moved on to become AUSCOAL and the staff had their own superannuation fund. So when Centennial purchased Powercoal the option was given to the people to change the superannuation scheme away from the company and into use Colonial, and employees had the option of - they could have taken their AUSCOAL and put it into Colonial or leave it as it is, and my example was that I left my AUSCOAL in it and I had my Colonial.

PN716

VICE PRESIDENT HATCHER: Mr Taylor, in what sense are we using the word staff in this question? Just employees generally or your client's interest?

PN717

MR TAYLOR: That's a good point, your Honour. I was using staff firstly in the context of capital S staff, that is APESMA staff - - -?---Yes, I was answering as staff, yes.

PN718

Is it the position that those who are capital S staff, who have been employed more recently than you find their way or the vast majority of them are in the one administered by Colonial First State, not the AUSCOAL fund?---I couldn't answer that because it's up to the individual.

PN719

Notwithstanding your role, it's not something that you've had an opportunity to examine as to where employees fall within the organisation?---That's right.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN720

Can I suggest this to you that the money that is paid into the Mine Wealth and Wellbeing Superannuation Fund comes from two sources; firstly employee contributions and secondly employer contributions?---As I understand it.

PN721

The employee contributions are, you accept, part of their remuneration that they have determined to elect to pay into a superannuation fund?---Yes, that'd be right.

PN722

The employer contributions are compulsory contributions required by law?---That's correct.

PN723

Under the Centennial standard contract of employment, the superannuation contributions made by the employer are part of, and are described to be, part of the total remuneration?---That's correct.

PN724

So the amounts which sit within the fund and which gather, one hopes, increased value are entirely funded out of the employees' own remuneration?---The contracts have a total employment compensation, so that's the way we have it. The options normally - other companies, every company does it different ways or thereabouts. People will have a base and then there'll have plus super. We decided to go for the TEC, which was base plus super as one. The idea behind that was that there's additional benefit for the employee because their rate of pay now includes the super amount. So for payments such as, you know, annual leave entitlements, long service leave entitlements and so on increase higher rather than just on the base rate. Again, that was done deliberately, again with the point of sale for the employees, for the employees to see that we're trying to provide a decent benefit because of the sale process. Because the usual story, people were at that point in time in 2002 not sure what was going to happen. So Centennial went down that track to give people, you know, here's an opportunity for a bit more money, not to actually buy it but say for the future you'll actually accumulate more income.

PN725

I'm not sure that we're disagreeing with each other but let me just make sure that's the case. As Centennial describes it to its own employees, the employer contributions are said to be part of their total employment compensation?---That's correct.

PN726

That is, in return for the work they do they get salary and super rolled up into a single TEC figure?---Correct.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN727

At paragraph 41 you identify some benefits of the funds. Now, in your capacity or in your experience over the years, have you had any cause to understand what are the legal obligations under Australian tax and superannuation law, as to these

issues that you describe as being benefits of the fund?---From my - the amount of time that I spend in relation to these type of things is minimal. It's done by our accountants and commercial people, so that's basically they're the ones that work that out for us.

PN728

What I want to suggest to you is that all of the matters in 41(a) to (e) are matters which as a matter of law are ones that one finds as entitlements that can be accessed by employees of superannuation funds generally?---Yes, as I understand, yes.

PN729

There's nothing specific about this fund that means that they have a special or different entitlement than employees generally get?---That's correct.

PN730

Now I think you would accept this proposition that if employees are made redundant and as a result then retire but do so earlier than they had planned, that on the one hand they will get redundancy pay but on the other hand they will lose the salary and superannuation contributions that they would have otherwise earned through to their preferred final day?---Yes, that's correct.

PN731

You accept, do you not, that the amount in question once you take that into account the lost value of the superannuation contributions and the increased value over time will for many be greater than the amount of redundancy pay that they receive under the current provisions?---I assume so.

PN732

Can I turn to long service leave. You describe here the portable long service leave regime which applies in the coal mining industry do you not?---Yes.

PN733

Do you understand that this is something that has been in place since about 1949?---Yes.

PN734

At the time that it was determined to make changes to industrial regulations such as to introduce severance and redundancy pay, this long service leave regime was in place?---Correct.

PN735

The way that the regime works is that where an employee takes long service leave or is terminated and has received a long service leave payment, if they elect to do so, the employer, their last employer pays them the long service leave?---That's correct.

PN736

Then is reimbursed from the fund for the full amount?---Correct.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN737

The fund is funded by ongoing payments by the employees - sorry, by the employers?---Yes, and at times there has been top ups that the company has to put in as well.

PN738

The next subject to deal with is personal carer's sick leave. Now we've heard today, I'm not sure if you were here, from the counsel for the coal companies that the award contains an obligation on companies to pay out personal carer's leave in a redundancy situation. Is that the approach that Centennial takes in respect of staff employees?---Personal carer's leave for staff, no. The staff have income protection insurance for them.

PN739

Yes?---Which provides our - sorry, I'll start again. Our personal carer's leave for our employees is six months payment for people who have had an illness or an injury, and if after that six months - and we always give people more than the six months - if they get to the stage that we know they're not going to come back, then the income protection insurance kicks in and that provides two years at 75 per cent of their salary, yearly salary. So for staff that's the way we do our personal carer's leave. In other words for each illness or injury that occurs we just pay that. The general workforce, they receive the annual leave of 15 days per year and they don't receive any income protection insurance.

PN740

VICE PRESIDENT HATCHER: I don't understand this. So if you have a staff member who's made redundant, what happens?---They don't receive any personal carer's leave because it's in the income protection insurance and they've got six months leave as well, personal leave, carer's leave, that we provide for them as well. So if someone unfortunately became ill, so they could have six months off with an illness and as I said we always do cut people off a bit more, give them a bit more chance to see whether they can come back to work. Then if that doesn't happen then the income insurance protection kicks in for two years and it pays the individual 75 per cent of their salary at that period of time.

PN741

So again to be clear. If you've worked say 10 years, you've never had a day off sick, and you're a staff member you won't get paid out any personal carer's leave?---No, no, but you do get six months and you do get two years..

PN742

MR TAYLOR: Now under the award whether you're a staff member or not, you have an entitlement to a minimum amount of personal leave that you accrue every year?---Yes.

PN743

Sorry, I didn't hear you?---Yes, that's under the award, yes.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN744

So an employee who's been employed for 10 years, who's never had a sick day would have under the award accrued sick leave, would they not, regardless of the company's contract or policy? As a minimum award entitlement?---Yes.

PN745

Yet on termination, Centennial does not pay them any of that accrued sick leave if they're made redundant?---That's correct and that's because what we provide for the staff is more payments for them than it is getting the sick leave.

PN746

Just so I can understand your evidence. As you understand the position, at least as applied by your company, staff do not have an award entitlement to be paid personal carer's sick leave on redundancy?---That's correct.

PN747

You referred to or I've asked you some questions and in some of your answers you've referred to entitlements that arise under the contract. Can I show you a document and ask whether you agree that this is a copy of the current standard contract? If I could have this document shown to the witness and I also have some copies for the Bench. Now just before you look at it, can I just tell you there's been a photocopying error, and the first page has been copied back to front?---Okay.

PN748

So the first page in fact should be the memorandum and then the next page should be the - carry the words contract of employment. See that?---Yes.

PN749

I've drawn that to your attention for this purpose only, to help you confirm that the standard contract issued on 24 May 2012 is the document that I've handed to you?---Yes, I'm assuming it's correct.

PN750

I tender that document.

PN751

VICE PRESIDENT HATCHER: The document entitled Centennial Coal Memorandum dated 24 May 2012 will be marked exhibit 4.

**EXHIBIT #4 DOCUMENT ENTITLED CENTENNIAL COAL
MEMORANDUM, DATED 24/05/2012**

PN752

MR TAYLOR: Firstly, can I take you to - and I'm looking at the page numbering in the bottom right-hand corner?---Yes.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN753

Page 2, and on the left-hand side the heading "Superannuation". I already asked you some questions about this and I think paraphrased the contract. Can I just confirm by reference to those questions I asked you that the way in which

superannuation is dealt with, that is it's within your remuneration, is dealt with in written terms at that point of the contract at page 2?---Yes.

PN754

You referred a moment ago to the company's approach to personal carer's leave, is that something that is dealt with at the bottom of page 4 and over to page 5?---Yes.

PN755

The subject of retrenchment is dealt with at the bottom of page 5 and over to page 6. Tell me if I'm wrong, I may have misread it but am I right that neither in the personal carer's leave or the retrenchment is there a provision there which states that such accumulated leave is not to be paid out on retrenchment?---Yes, it's not accumulative, yes, for the carer's leave, yes.

PN756

You deal at the end with unemployment benefits from paragraphs 50 to 54. Is it your - did you include this because you had a view or an expectation that employees made redundant in this industry, from your experience, access unemployment benefits after they've been retrenched?---Sorry, could you say that again please?

PN757

Did you include this section on unemployment benefits because you say - is it in your experience that unemployment benefits are in any way relevant to employees who are made redundant in this industry?---Well, it's just giving - it's just giving some data - well when I say data, just making some comment as far as, you know, those government benefits that may be accessed.

PN758

Do you accept this proposition that the lower the payment on termination, the more likely that a person who is retrenched might have to access either unemployment or pension benefits?---That may be the case.

PN759

Except that if there was therefore an entitlement to an employer to reduce the amount paid out on termination, such that employees had to access unemployment benefits, that the effect of that decision would be to in effect transfer an obligation from the employer to the Australian people to have to make payments - - -

PN760

MR SHARIFF: I object. I object.

PN761

MR TAYLOR: I don't press the question. Now you are familiar, I think, with clause 14 as a whole, that is of the Black Coal Mining Award?---Refresh my memory.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN762

It's the retrenchment clause, I should have said that, I'm sorry?---Okay, right, yes.

PN763

In particular do you recall there's an exemption in that clause?---Yes.

PN764

Let me refresh your memory by handing you a copy of the clause?---That's within - like within seven days finding a job for someone.

PN765

Look, it's easier I think if we just have it in front of us and then there's no need for a memory test. I ask the witness to assume that what I'm handing to the witness is an extract of the current award, one page each. I might not have counted correctly. You might have more than you need. An extract of the award being clause 14. Do you have in front of you clause 14 of the Black Coal Mining Industry Award?---Yes.

PN766

Can I just draw your attention to the exemption at 14.5. Are you familiar with this exemption? Is this something that you've had cause to turn to in the course of your employment?---I couldn't comment on whether I have or haven't to be honest.

PN767

I see. You don't recall applying the exemption in any particular case where the company made someone redundant but offered them another position at the same or a higher classification rate of pay?---Yes, we have done that, yes.

PN768

Have you done so in circumstances where the actual pay is lower albeit it's the same position, it's the same classification rate of pay?---Were you saying that we've paid less? Are you saying or - - -

PN769

There's been a circumstance in which the company's made an employee redundant, I'm using it by way of an example but it could be any classification, and under manager redundant and offered them another under manager job at a lower rate of pay and applied the exemption, and avoided - - -?---I - - -

PN770

Pardon?---I couldn't comment.

PN771

You can't recall doing that?---No, I'm not saying I did or I didn't. I'm saying I can't remember.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN772

I think we can deal with that by way of - well let me just ask you this and otherwise I'll deal with it by way of submissions. Are you familiar with this exemption being different to the way an exemption would work for those employees who are not covered by this award but are covered by the NES?---All I'm aware of is that if we have moved people, and we have, to save jobs and

moved them into other positions, we have in the most - again because I can't - I can't remember at all. But we would have more than likely have put people into the same rate or into a rate that was equal to, and if it was less, if that did occur then there would have been a reason as to why. I can't answer because I haven't got any example of who or what or when or why that may or may not have happened.

PN773

But this is the position is it not, and tell me because I can sense that you are at the edges of your memory?---Yes, very much so.

PN774

This is the case is it not that if an employee was offered another role, the same classification and a lower rate of pay and rejected it, even though it was a lower rate of pay, they would not get redundancy pay?

PN775

MR SHARIFF: I object. Is this - is the question being put as to whether this witness knows of a particular example or is the witness being invited to provide evidence on the proper scope and operation of clause 14.5?

PN776

MR TAYLOR: Yes, I thank my friend. It's the former.

PN777

MR SHARIFF: But this witness I think, as my friend rightly has accepted, is at the edges of his memory and I think he's answered the question, that he doesn't recall.

PN778

VICE PRESIDENT HATCHER: Well, he can do his best, I'm sure he won't give an answer that's inconsistent with his memory?---Yes, like if I've got a name I might know - have an answer. I can't say whether it - - -

PN779

MR TAYLOR: You can't recall a situation?---I'm not saying I can or I can't.

PN780

I don't take it any further?---Okay.

PN781

There is some suggestion in this case, I want to ask you to assume, that any change in entitlements or reduction in entitlements that might arise as a result of this case, could be the subject of enterprise bargaining, such that an enterprise agreement could in effect remove any reduction that the award might have and maintain a higher position. I want to just ask you to assume that that's something that might be put?---Yes.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN782

When it comes to staff, that is those I represent, are there any enterprise agreements Centennial has that cover staff?---Not that I'm aware of, no.

PN783

Is this Centennial's position, and I want to understand if I'm putting this fairly, that Centennial as you understand it would see no benefit in enterprise agreement - entering into an enterprise agreement that would apply to staff?---That decision was made by the staff. The staff made that decision not to have the enterprise agreements.

PN784

I'm asking for Centennial's position. Is this the position Centennial would see no benefit for an enterprise agreement for staff?---If there is a - a bargaining is put on, then that's what it is and legislation is the legislation we'd abide by.

PN785

VICE PRESIDENT HATCHER: When you say the staff made the decision, what are you talking there?---Well, if the staff decided not to have - to have an enterprise agreement, then we would just have a normal negotiation as would happen, because that's their right to do that.

PN786

So the import of that is in your time there, there was never a request on behalf of staff for an enterprise agreement?---We again go back to the sale process which is back in 2002 and there were enterprise agreements put in place, and that was from the state government where that had to happen as part of the sale. So Centennial picked up enterprise agreements at all of its mine sites and for all of its staff. So they've remained in place. The general workforce ones have obviously remained in place and have continued on. The staff at a particular point in time the staff made a decision that they didn't want the enterprise agreements, they were happy to have common law contracts put together by the company and it's been like that, I'm guessing now, for about the last five or six years or more. So that's - - -

PN787

When you say they made a decision, was there a vote or something or what was the - - -?---Yes, yes, they all made a decision.

PN788

Thank you.

PN789

MR TAYLOR: When I was putting to you questions about there being any enterprise agreements for staff and I think you said no, I think in this industry sometimes some individuals who are eligible to be members of my client referred to as deputies, are sometimes included and sometimes not included in the definition of staff?---Okay, yes, deputies or - - -

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN790

It's been suggested to me that you do have enterprise agreements that apply to deputies but not to - sorry, let me stop there and make sure I've got that right

because I might have misled you earlier. Are there enterprise agreements currently in place that apply to deputies?---Yes.

PN791

When you were agreeing with me earlier that there are none that apply to staff, are we talking about those at higher - those other than deputies?---Yes.

PN792

Is this the position that in 2012 Centennial applied successfully to terminate enterprise agreements at the following collieries. Firstly, Angus Place?---Are you talking staff? Staff enterprise agreements?

PN793

The staff ones, yes. Yes, not the deputies' ones?---No, okay. Yes.

PN794

Do you agree with me?---Yes.

PN795

Also Clarence?---Yes, and again I'm assuming that the dates are correct, yes.

PN796

Mandalong, there was an enterprise agreement there which Centennial successfully terminated?---Correct.

PN797

Also Myuna?---Correct.

PN798

Also Mannering?---Correct.

PN799

Also Newstan?---Correct. At the request of the employees.

PN800

Do you recall that a majority support determination was successfully sought at all of those?---I think that's correct.

PN801

That the company sought - made an application to revoke those MSDs?---As I understand.

PN802

The position being, as I suggested earlier, that the company's position is that it doesn't see any benefit to the company by way of productivity or cost savings in having enterprise agreements?---No, I don't think the company has ever said that.

PN803

They're my questions. I'm not sure if Mr Bukarica has any.

*** JOHN MILTON EDWARDS

XXN MR TAYLOR

PN804

VICE PRESIDENT HATCHER: Mr Bukarica.

CROSS-EXAMINATION BY MR BUKARICA

[3.24 PM]

PN805

MR BUKARICA: Just a couple, if the Commission pleases. Mr Edwards, can I take you to paragraph 35 of your statement?---Yes.

PN806

Now in this paragraph you're referring to the exhibit you've annexed as JE1, you see that?---Yes, yes.

PN807

That annexure or exhibit is a list of employees who have retired and their age at date of retirement. Is that correct?---That's correct, yes.

PN808

Now the spreadsheet covers both the period during which there was compulsory retirement age for underground miners in New South Wales and up to the current period. Is that correct?---I'm not clear when it actually happened. The age 60 when it went.

PN809

If I put to you, Mr Edwards, that it was about 2008 the statutory provisions relating to a compulsory retirement in New South Wales were removed, would that sound right?---That's correct, yes.

PN810

If you turn to JE1, you'll see the first couple of pages at least seem to cover that period leading up or about the same time as the compulsory retirement age was abolished?---Mm-hm.

PN811

Is that right?---As I understand, yes.

PN812

Then the following pages deal with a period subsequent to that change in legislation. So the question I'll ask you Mr - or the questions I'll ask you Mr Edwards is have you examined yourself whether there's a change in the overall profile of the retirement age of your employees from the beginning of the period that you've noted here, which is 2004 through to the present day? Is there any trend that you observe?---I don't have any data like that at all. All I have is a spreadsheet.

PN813

I see. Because I was going to suggest to you, Mr Edwards, that it appears for your own records that there's aggression towards older retirement date ages amongst your employees, the closer you get to the current date. Is that not a feature that you've observed?---Anecdotally I'd say that would probably be correct.

*** JOHN MILTON EDWARDS

XXN MR BUKARICA

PN814

Yes. It makes sense in the sense that there's no longer a statute bar to longer service?---That's correct.

PN815

Is there a - in your experience is there generally within the - amongst the employees of Centennial Coal a correlation between length of service or company tenure and age?---Yes, that'd be right.

PN816

So as a general proposition, the older you are the longer you'd be with the company?---Yes, that's likely, yes.

PN817

Nothing further.

PN818

VICE PRESIDENT HATCHER: Mr Edwards, would it be possible to reformat that annexure so that it shows for each person their length of service and the average length of service?---Yes, that can be done.

PN819

Perhaps I might speak to Mr Shariff about getting that done.

PN820

MR SHARIFF: We'll do that, it might take us some time from the data, sir.

PN821

VICE PRESIDENT HATCHER: Yes.

PN822

MR SHARIFF: I should note that in one of Professor - I think Professor Peetz's first report he actually analyses the data and represents it in a graphical form, and he also gives some evidence that generally speaking there is a correlation between length of service and age, as you would expect. But that's not uncommon here as against other industries, he says that, but we'll undertake that exercise. I should say I have no further questions for Mr Edwards.

PN823

VICE PRESIDENT HATCHER: Thank you. Thank you very much, Mr Edwards, you're excused and free to leave?---Thank you.

<THE WITNESS WITHDREW

[3.29 PM]

PN824

MR SHARIFF: Your Honour, we have a further witness. I am - - -

PN825

DEPUTY PRESIDENT GOSTENCNIK: Unless you're mathematically challenged we can work that out from the information that's here.

*** JOHN MILTON EDWARDS

XXN MR BUKARICA

PN826

MR SHARIFF: We'll try and make it easier.

PN827

VICE PRESIDENT HATCHER: You can do it.

PN828

MR SHARIFF: I thought your Honour was mathematically astute.

PN829

VICE PRESIDENT HATCHER: Yes, just lazy that's all. So Mr Taylor, Mr Bukarica, can we finish the next witness today or - - -

PN830

MR TAYLOR: No.

PN831

VICE PRESIDENT HATCHER: Do you want to start today?

PN832

MR TAYLOR: I'd be quite happy not to. We can deal with the objections.

PN833

MR SHARIFF: The only reason I say - could I get an estimate because the remaining witness is from interstate and if she can return that would be her preference now. I think Mr Taylor said to me earlier he'd be about 40 minutes in cross-examination of Ms Merritt. I don't know how long Mr Bukarica will be.

PN834

VICE PRESIDENT HATCHER: Well, we're happy to keep on going until the witness is finished if that's the only - if that's the extent of it. If that's an accurate estimate.

PN835

MR TAYLOR: I think I actually indicated to my friend 45 minutes to an hour.

PN836

MR SHARIFF: Did you?

PN837

MR TAYLOR: I did.

PN838

MR SHARIFF: I heard 40 minutes, I'm sorry.

PN839

VICE PRESIDENT HATCHER: Yes, and?

PN840

MR TAYLOR: All I'm saying that's what I indicated, that's still - - -

PN841

VICE PRESIDENT HATCHER: I then we're prepared to accommodate that if the parties are ready to go.

PN842

MR SHARIFF: I'm sorry if I misheard you.

PN843

MR TAYLOR: We're content. We're ready.

PN844

VICE PRESIDENT HATCHER: Right. We'll get on with it then. We'll just take a short break first and then we'll get going with the next witness.

SHORT ADJOURNMENT [3.31 PM]

RESUMED [3.37 PM]

PN845

VICE PRESIDENT HATCHER: Yes, we'll administer the oath to the witness.

PN846

THE ASSOCIATE: Place your right hand on the Bible and look at the Vice President. Please state your full name and address.

PN847

MS MERRITT: Lorraine Margaret Merritt, (address supplied).

<LORRAINE MARGARET MERRITT, SWORN [3.38 PM]

EXAMINATION-IN-CHIEF BY MR SHARIFF [3.38 PM]

PN848

MR SHARIFF: Thank you. Can you just state your full name for the record?---Lorraine Margaret Merritt.

PN849

Your current business address?---Business address is Level 7, 145 Eagle Street, Brisbane.

PN850

You've prepared a statement for the purpose of these proceedings dated 24 March 2016?---That's correct.

PN851

Are there any corrections you wish to make to that statement?---No.

PN852

Do you say that the contents of that statement are true and correct to the best of your knowledge, recollection and belief?---Yes.

*** LORRAINE MARGARET MERRITT

XN MR SHARIFF

PN853

Yes, I tender that statement. I think there were some objections.

PN854

VICE PRESIDENT HATCHER: Was there any objections, Mr Taylor?

PN855

MR TAYLOR: Yes, if your Honours and Commissioner still have the objections we do object, essentially on the same basis that we objected to Mr Gunzburg's evidence. There isn't an attempt we say to qualify Ms Merritt to give the evidence which she gives. In effect, her statement is an attempt to lead evidence that the employees in the coal mining industry aren't any different to employees in other industries but there is no attempt to qualify that on the basis of any material which would allow that to be anything other than an opinion given on some anecdotal basis. We say that that's not a proper basis and it would be much quicker, given that this - ultimately this evidence is of so little weight that it's going to be of no assistance to the Commission if the evidence is simply not allowed in.

PN856

VICE PRESIDENT HATCHER: Is there any reason why we'd make a different ruling than we did with Mr Gunzburg?

PN857

MR TAYLOR: No.

PN858

VICE PRESIDENT HATCHER: Right, well we'll reject the objections and allow the evidence on the same basis as we articulated earlier with respect to Mr Gunzburg. The statement of Lorraine Margaret Merritt, dated 24 March 2016 will be marked exhibit 5.

PN859

MR SHARIFF: May it please.

**EXHIBIT #5 WITNESS STATEMENT OF LORRAINE MERRITT
DATED 24/03/2016**

PN860

VICE PRESIDENT HATCHER: Mr Taylor.

CROSS-EXAMINATION BY MR TAYLOR

[3.40 PM]

PN861

MR TAYLOR: Thank you. Ms Merritt, do you have a copy of your statement with you?---I do.

PN862

Now before you joined Audrey Page in 2003 you were an academic in Tasmania I think we read?---That's correct.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN863

You were part of the School of Visual and Performing Arts?---That's correct.

PN864

You lectured in performing arts in voice and directing?---Yes.

PN865

You had a particular interest in the application of theatre skills to the corporate sector?---That's exactly right.

PN866

Can we accept that that role gave you no insight into career transition in the black coal mining industry?---Not in the black coal mining industry but the basis of the work that I do is the exploration of stories, and so therefore my background in performing arts was what was - I was approach by the owner of the business that I work for because of those particular skills. But at the stage of entering the business I had no knowledge of any industry apart from having worked in the corporates - doing a night of performance - corporate performance course for 10 years prior to that.

PN867

Just so I pick up that last point. So you were an academic for 10 years up to 2003 and for the 10 years before that, you were employed or contracted, I'm not sure which, by NIDA to assist in their program by which NIDA would teach those in corporate life theatre skills?---No, I was doing the work at the University of Tasmania, at the same time as I was working for NIDA.

PN868

The same 10 year period leading up to 2003?---The same 10 year period. I used to return to Sydney every three weeks to work for NIDA.

PN869

Mr Bukarica's going to hand me a document in a moment and I think you'll recognise it. We have obtained from the - what we understand to be the current Audrey Page website, an entry that describes you. I just want to have you identify that and there are - - -?---Thank you.

PN870

Do you recognise that as a document or maybe more correctly a page on the Audrey Page website which describes you and your background?---That's correct.

PN871

To the extent to which the website emphasises that your skills and focus are as an executive coach. Does that accurately reflect the weight of your knowledge and experience?---That's part of what I do, not exclusively by any means and it would be best to qualify this. I work in the Brisbane office so we tend to do out of Queensland an enormous amount of work in the mining sector versus what would be done out of our New South Wales office. And hence this statement written by our Sydney has more of a flavour for our Sydney clients.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN872

I see. It is equally accessible in Queensland though is it not?---Yes, though the executive coaching that I do is largely for clients in Sydney.

PN873

Now you give some evidence in your statement that employers who are intending to make employees redundant approach Audrey Page and seek to get services from Audrey Page?---That's correct.

PN874

What Audrey Page does is make it part of such contracts, it provides various levels of service to employees who have been made redundant?---That's correct.

PN875

Paid for by the employers?---That's correct.

PN876

At paragraph 11, you identify the nature of the service that's generally provided to blue collar employees. Have I read that correctly? That generally what Audrey Page does for blue collar employees is assist them to learn how to do three things; write a resume, write a cover letter and how to perform in an interview?---The greater percentage of work that I have delivered for blue collar workers, that is what has been done for them and the reason I would say the greater percentage is because I was highly involved in the closure of Century Mine, which is a zinc mine owned by MMG, and that's where I worked with hundreds and hundreds and hundreds of employees so that's what expands those figures out to say that that's what we have done for the greater percentage of blue collar employees.

PN877

You refer in paragraph 21 to some career transition services to work as leaving new quests, I'm not sure if I'll get the pronunciation right, Lihir - L-i-h-i-r - Gold Mine in PNG and MMG Century Mine in the Gulf of Carpentaria?---Yes.

PN878

Is the second of those the one you were just talking about a moment ago?---That's right, that's right.

PN879

Yes, and so in respect of large numbers of blue collar employees you, as I understand it, you personally assisted them or did so as part of a team that you were managing. I just want to get that clear?---So with the Century Mine story, I have - of the 300 that took up the program offer I would have delivered 225 programs, however I went to site at least nine times from a few days to several weeks as these big waves and transitions were occurring. So during that time I individually assisted 300 men, or 300 people I should say.

PN880

Just so we can understand what that individual assistance involved. Was it a one on one meeting?---Yes.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN881

In that one on one meeting, how long did it take to cover these three issues?---So the one on one meeting at site occurs after the news has been given to the person whose role is being made redundant. So that's been - is given by the manager and HR person and then the person would be brought to me, and according to how they were receiving the news would depend on the length of time I would spend with them. So it could be anything from maybe 20 minutes to perhaps an hour and at that moment is really to see the level of shock that is entering a person's body and to settle them. As regards the assistance beyond that, that then - the program that MMG wanted for their employees was that they would be provided with between three to five sessions with us individually. So that's the difference between what you call on site support and the career transition program, they're two phases of the support.

PN882

The three to five sessions, was that at the - - -?---At the mine.

PN883

Whether the employee wished to have it or not have it?---No, no, it was totally - it's totally the employee's choice. There's no - it's totally up to them to take it up. So for example, in the Peabody figures where I say that 325 people were offered the program by Peabody in the last five years and about 83, I think, accepted it. Then it's just totally up to an individual whether they want it and that is often determined by if they have other employment to go to, they won't need to take up the program offer.

PN884

So these three to five sessions, if the employee elects to take them, are they - well let's just deal with MMG first. Were they dealt with by you in person by phone or by Skype?---So I actually - because of the length of time I was at site, if there was some people who needed assistance immediately we accommodate - that was accommodated and so I would work with those people at site, and maybe do follow ups when I was back in Brisbane. Because these people weren't largely in North Queensland because Century Mine is in the Gulf of Carpentaria on the Northern Territory border and so therefore all those sessions were done by phone, what we call remote based work unless of course they lived in Brisbane. There were a percentage of those people that worked right up there in the Gulf of Carpentaria who lived in Brisbane or they might have lived on the Sunshine Coast or on the Gold Coast, and then they would come to our office for face to face meetings. Otherwise it was all by phone.

PN885

So three to five, we're talking about the MMG - - -?---That's right.

PN886

- - - which I think I got you down as doing some 225 individuals you assisted. Did that include - did all of those 225 people access more than the initial meeting where they - you meet with them and there's some level of shock et cetera?---Yes, the 225 are those that we then worked with beyond that initial meeting. The 300 is the figure for the ones that I saw at site.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN887

With some of the 225, did you deal with the issues of how to write a resume, cover letter and perform an interview in that first meeting?---In the first meeting at site?

PN888

Yes?---Yes, for those that might have had something cooking. With the Century Mine story, these people knew - have known that the mine was closing for a long time, so the redundancies weren't a huge shock. What the issue was, they didn't know which tranche they were going to be in. So some of them were well primed to be actually looking around for other work and were encouraged by their superintendents and managers to do so. So if somebody had something in the wings, that's when I responded and gave the assistance while I was at site, because it made good sense to do so.

PN889

For those where there was follow up contact, in your case 225 if I follow it correctly, were they all by phone or Skype?---All by phone.

PN890

All by phone, and - - -?---Unless they lived in Brisbane, Sunshine Coast or Gold Coast, as I mentioned before.

PN891

Were they all still employed by MMG throughout the period that you spoke to them?---No, no.

PN892

Some of them finished during that period?---No, all. All were finished.

PN893

I see?---So normally, a person takes up a career transition program upon exiting an organisation. The only case when you start work with them before they've exited is if their company offers what is called redeployment. Which is very common within the banking industry.

PN894

Are you able to recall how - roughly how long and what period between the time that you met them for the first time, at the point where they've just been told that they're finishing, and the finish of the three - up to three to five meetings?---That's totally - that was totally dependent on what the individuals might want to do. So for example, with some of them - - -

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN895

Just with respect, I wasn't asking why it might take different times. I'm just asking whether you recall what periods of time it took?---Yes. So it might be immediate, as soon as they got back to Brisbane might be when I would start working with them. Or according to their personal circumstances it could be in two months' time if they chose to have a break, which is what some people decide to do.

PN896

The meetings that you have with the MMG Century Mine employees, did they - when you said three to five, was Audrey Page contracted to provide up to five meetings?---Up to five, that's correct.

PN897

The contract, correct me if I'm wrong, was not to have meetings until they obtained other employment?---Could you repeat that?

PN898

Your job as contracted was not to continue to provide assistance up until the point they found another job was it?---No.

PN899

So can we accept - is this the position, that once you had completed giving them the assistance that you identify in paragraph 11, they were in effect then with all the benefit you'd given them on their own to then find employment?---Yes, however I do need to qualify that because one of the key principles of our organisation is around a deep care of the individual. So while a program may be officially finished in the sense that you may have covered what was required or what was asked for, if I had any concerns or any of my colleagues would have any concerns about an individual, if they were struggling perhaps with confidence, then we would just continue with them and continue to check in with them as part of what we do.

PN900

At various points in your statement you express, can I suggest to you, an opinion based on your experience?---Yes.

PN901

That includes statements made about, for example, length of time to find other employment. When you refer to, "in my experience", is that a shorthand expression for you indicating that in expressing an opinion you've drawn on your recollection of your - what you broadly experienced anecdotally rather than referring to any specific statistical or objective data which has recorded how long people have been employed?---"In my experience" refers to having worked very intensely in this field the last 30 years unsupported by statistical data.

PN902

I think it follows from what you said earlier, is that you for at least some employees who you are providing up to three to five meetings wouldn't know how long it is before they get another job?---After a program is finished, as I mentioned before, if a person was struggling unbeknown to the client we would continue to support that person. So sometimes, for example, I might continue to work with somebody that's on what is called a short program for 12 months, and I do have a case of somebody for two years. Simply because I like to sleep at night. I like not to be worried about their mental health, the pain they might be experiencing in their family, so just as part of what we do you don't cut that thread if a person's in need.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN903

Is that a feature of the effect of redundancy on some employees, that there is some significant pain and effect on families in your experience?---Absolutely. In all industries, across the board.

PN904

VICE PRESIDENT HATCHER: So what was the answer to the question? I thought the question was do you know how long they take to get another job?---No, I don't know how long it takes people across all organisations, all industries to get another job. I can't quote that. In, for example, financial services it will take a banker at a certain level to get a job in two months. There are so many factors that play into that. A person's preparedness to go looking for work, where they live, the geography.

PN905

I wasn't really - I think the question was directed at in terms of the functions you carry out personally, does that lead to you knowing how long it may take to find another job?---Not in hard data.

PN906

MR TAYLOR: I want to return to that subject but let me just do so firstly by noting that in your statement you refer at paragraphs 19 and 20 to some experience you've had in respect of the coal industry. That is your company has done some work with Peabody, previously known as Macarthur Coal. Is that right?---That's correct.

PN907

Over a five year period you understand some 325 blue collar and white collar employees were offered Audrey Page services?---That's correct.

PN908

By offered, is this your understanding that those employees on being told they were redundant received a package of information, one page of which was information about Audrey Page which they could then of their own volition take up if they contacted you?---That's correct.

PN909

Unlike MMG, you're not present at the point they're being terminated in this case?---Not for Peabody, no.

PN910

Eighty-three people took up that opportunity and is this the position that of those 83, you had personal contact with six of them?---Six of them?

PN911

Yes?---I don't know where you got that figure from.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN912

I see. Are you aware that in preparation for this case a request was made for data which underpinned the material that you have in paragraph 20, which you yourself

say you referred to in order to come up with the figures of 325 and 83? Are you aware of that?---Yes, yes.

PN913

Are you aware that that data records against lines the officer or employee of Audrey Page who was the person providing service?---Okay, so what happens is when our programs get set up in our system, somebody's name gets placed against it as the likely person to do that work. So you just put anyone's name against it. It has to go into the system. In our Brisbane office I'm the person responsible for allocating the programs, so I have to do it on a fair basis for all consultants that work for me. As it turns out then, if they're not available because we work on what's called an associate model, which is they're not permanent full-time employees. It's on an as needs basis. So what that means then is that I would be the one delivering the program if they weren't there. So that's why those - I know the list that you've got is not - it's not reflecting accurately. I could show you that from any of the companies that we work for.

PN914

You don't have any difficulty with the notion that the document that's been provided to us records as the relevant consultant's name your name on six occasions?---No, that'd be correct. There's six - my name appears six times but there'd be other peoples' names, like if you're looking at that document now there'd be peoples' names like Cathy Forth, Steve Wheeler, et cetera, and I would have just put their names against the program as the possibility of delivering it. So for example today while I've been waiting outside in my emails I'm watching my name appear against a whole lot of programs. I won't deliver those. It will all go according to our calendars. So it's a little bit misleading.

PN915

VICE PRESIDENT HATCHER: So how many did you deliver out of the 83?---Out of the 83 I would have delivered about half of that number.

PN916

MR TAYLOR: Can I show you another document. I asked you some questions earlier about a flyer being made available to employees who were made redundant at Peabody telling them about your services. I want to show you a document and ask you whether you can identify this as a typical example of information which is provided to or was provided to employees at Peabody at the time as part of the package information they were given on the day that they were made redundant?---That's absolutely accurate.

PN917

I tender that document.

PN918

VICE PRESIDENT HATCHER: Yes, the document headed "Audrey Page & Associates Job Search Skills Program" will be marked exhibit 6.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

EXHIBIT #6 AUDREY PAGE & ASSOCIATES JOB SEARCH SKILLS PROGRAM

PN919

MR TAYLOR: The information - sorry, I'll withdraw that. The statement as to what employees would get if they decided to access Audrey Page services, the description of the services that they were entitled to if they wanted to access it are accurately described here in this document?---That's correct.

PN920

As you understand it some 83 individuals decided to contact Audrey Page and have one or two or three sessions by phone or Skype to speak about those three issues?---So yes, however Peabody introduced the three session program, maybe the start of last year, start of 2015. Prior to that, so it - 83 people didn't do the three session program. Prior to that they did what was called the fast track program which was a five meeting program and then on that spreadsheet that you have which talks about the different programs, you would see the words professional program, manager program and senior manager program. So of the 83 some would also have done the senior manager program, the manager program or the professional program and they are of different length; two months, four months and six months.

PN921

We keep referring to this document I now regret I didn't hand to you earlier because it would have perhaps been easier to follow as we went?---Yes. Thank you.

PN922

Firstly, I've handed you a document and we've just already discussed more than once a document which you understand was produced which recorded people who were offered a package and others who took it up, albeit in this case there's no name of employee. Is this the document you were referring to earlier?---Absolutely.

PN923

I tender that document.

PN924

VICE PRESIDENT HATCHER: How do you want to describe this, Mr Taylor?

PN925

MR TAYLOR: A document produced by Audrey Page in answer to a call for any document which was used or referred to by this witness in order to give the evidence in paragraph 20.

PN926

VICE PRESIDENT HATCHER: I thought you might have something more (indistinct).

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN927

MR TAYLOR: I think accommodation of my cold at the time, (indistinct) is not what I'm being at the moment, I'm sorry about that.

PN928

VICE PRESIDENT HATCHER: I'll just call it Audrey Page list, exhibit 7.

EXHIBIT #7 AUDREY PAGE LIST

PN929

MR TAYLOR: Ms Merritt, the fourth last column is headed "Package level", you were referring earlier to different packages and some of them have different lengths of time. The first - there's only one entry for executive, it appears that they've been - I'll withdraw that. There appears to be only one entry for executive. What length of time was that program?---12 months.

PN930

Then for senior manager, what's the length of that?---Is six months.

PN931

The next two are manager?---Manager is a four month program.

PN932

Then there are some professional?---That's two months.

PN933

Then further down we see - - -

PN934

VICE PRESIDENT HATCHER: When you say they're months, what do you mean by that? What's - - -?---So normally - what that refers to is the length of time a person has access to our services. So if they're given a two month program then that normally - programs also go on hold, if I can clarify it. So the person may want to start, they might want to get some basic things done, the tactical elements done. For example, resumes, assistance with a letter et cetera. They might then be going on holidays, want to take a break, want to renovate their house as some people do and then we just simply put their program on hold. So you could have a person on a two month program but you may have contact with them over six months.

PN935

So why do the more senior people get longer programs?---Because it normally takes them a longer period of time to get a role. So if you're dealing with an executive on a 12 month program, what that normally says is that it's going to take that length of time to get a role, and it does.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN936

MR TAYLOR: The vast majority here are either described as fast track or 5M. Are they two different programs or are they both five meeting programs?---That column where the 5M is I have no idea what that is. That's something - that must

be an accounting - an accounting code. Where it says package, something, I have no idea what that is.

PN937

VICE PRESIDENT HATCHER: Is that five meetings, is that what that is?---The fast track program is a five meeting program but it wouldn't equate with that column, that's a - I'm sure that's an accounting code.

PN938

MR TAYLOR: Are there some employees who don't take up their full entitlement to either five meetings or up to 12 months?---Absolutely. They may secure a role, you know, the next day.

PN939

Or they may find that their first meeting covers the issues of building a resume and a job application and preparing for phone interviews without the need for further meetings?---I don't know if that can be achieved in one meeting.

PN940

But they may - it's a matter for their choice, isn't it?---Absolutely. Nothing is imposed.

PN941

So what you don't do, can I suggest, in this program is have contact - in respect of the 83 you did not maintain, you or the organisation, did not remain in contact with these people through to the point they got another job, did you?---It depends, they may have got their jobs while we were doing the program.

PN942

Yes, but with respect to the totality - - -?---With the totality, no.

PN943

Obviously in respect of the balance, the balance of the 325 who you didn't have any contact with, you have no knowledge about how long they might have taken to get a job?---No, none whatsoever.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN944

VICE PRESIDENT HATCHER: When you say you help someone build a resume, do you actually prepare it for them or you just give them a guide as to how to do it?---No, you - well, if I'm working with the person face to face I sit with them, I have it on my - their draft on the screen. They sit beside me and we start to work through it very carefully building it, and it's a process that is not just about getting words on the page to build the resume but I often find that the way that a person is talking about what they do, what they've achieved, gives me a very good gauge about how they're feeling at the moment about what they're going to do next, where it's a litmus test in many ways as to where their confidence is. So it provides me with some very clear guidelines to be able to support or cradle them. It's also almost the very first part of interview training because you're getting them to find a language that they can talk about for themselves. For example, with some of the people at Century Mine, there was

illiteracy. You know, words were not their world, so that was very, very important to make sure that it was very, very carefully presented for them.

PN945

Thank you.

PN946

MR TAYLOR: In paragraph 25 onwards you identify experience you've had across all industries as - and you identify some factors that you say in your experience can affect the length of time it takes a person to find a new job, do you not?---Yes.

PN947

Again, just so we're clear, what you are not doing here is expressing an opinion that is based on any empirical research that you've done. Is that right?---This is based on my experience.

PN948

Yes. You didn't get a statistical material or other empirical data to determine whether in truth these factors operate equally regardless of industry, did you?---No, and they don't operate equally.

PN949

Let's deal with them. The first factor is location, is this the position that those who work in more remote locations, it is a factor which tends to increase the length of time as a generality that it might take a person to find a new job?---I honestly believe so.

PN950

Is it your experience from the mining industry that mine workers tend to not be found in major cities or towns?---They're much more in the regions.

PN951

The second matter you identify is specialist skills, and you may or may not be in a position to express an opinion about this, tell us if you don't know. But do you accept the proposition that coal miners and professionals employed by coal mines have specialist skills?---Yes.

PN952

You identify in paragraph 27 that there are others who have specialist skills and in particular you make the reference to IT professionals as having specialist skills, do you not?---Yes.

PN953

Do we understand it that what you're suggesting here is that those with specialist skills can find it harder to find other work?---Yes, if there is all of a sudden not a need for those specialist skills.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN954

IT professionals have specialist skills which you accept are skills that can be applied across a range of industries?---Yes.

PN955

So whereas a coal mining specialist skill is one that is special to one industry only?---That's correct.

PN956

The third issue you identify is a preparedness to change and you give, for example, a preparedness to change location. Is this your understanding that those, for example, who are in a remote location might be more likely to find a job quickly if they're prepared to move to a less remote location?---That's correct.

PN957

But for those who have a specialist skill in a particular industry, if that industry is in the midst of a general downturn, do you accept the proposition that changing location is unlikely to have a significant effect on their capacity to find another job?---Is that question for the coal mining industry or is that - or across industries?

PN958

Well at this stage, as I understand it, you're saying these things are true for all and I was dealing with it on that basis?---Yes. I come from Brisbane and so Brisbane is in some ways still a very big regional town when it comes to the world of work. So therefore when there is a downturn in some industries, you know, Sydney is where it might still be cooking. So unless people move, so I see that all the time. Every day of the week.

PN959

Yes, I see. But if we do turn to the mining industry, can I suggest to you that if there's a general downturn in the industry it's unlikely that the willingness to move to Sydney is going to significantly assist someone to find another job in the mining industry?---Certainly not to Sydney.

PN960

The last issue you identify is individual initiative and motivation, and do you accept this as a proposition from your general experience, that it is harder to be motivated if you reasonably believe that due to a downturn in the industry there simply aren't any jobs out there?---We could have a philosophical debate couldn't we?

PN961

I'd prefer not, I'd prefer you just to answer the question. Do you accept that proposition?---I think it's too complex. I think the way that human beings are wired is immensely complex and in the face of great adversity I have actually found blue collar workers in particular to be highly motivated and have great initiative. I don't think they go into their shells at all. They're an outstanding group.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN962

I hope I didn't suggest otherwise. What I was suggesting was that peoples' capacity to be - have initiative and be motivated is something which is much harder if there's a downturn in the industry and there simply aren't any jobs out there?---That is a very hard question to answer with a yes and no in all honesty.

PN963

Well if that's the case I'll move on. What I want to suggest to you, you've identified here four factors. These aren't the only factors are they?---No.

PN964

Would you accept that a further factor, a fifth factor that will affect the length of time someone might take to get another job in an industry is whether employers in that industry as a whole are increasing or decreasing staff?---That's correct.

PN965

Now at paragraph 30 you express an opinion. You say:

PN966

In my experience in dealing with employees in the coal mining industry these employees when retrenched do not remain unemployed any longer than employees in other industries simply because of the industry in which they currently work.

PN967

Now firstly, the experience you're talking there is, am I right, the experience you've gained from assisting employees at Peabody Mine?---That's correct, yes.

PN968

Your involvement in respect of those employees and do I understand the opinion you're putting here, you're not suggesting that they don't remain unemployed any longer than employees in other industries. You're just saying if they do it's not because of the industry. Is that how we - - -?---That's, yes.

PN969

You don't know whether they in fact remain unemployed longer than other industries?---Longer, that's correct.

PN970

At paragraph 10, just going back a little way, you say in the second sentence that:

PN971

As a company Audrey Page doesn't have different service offerings based on industries as the assistance people need when looking for new employment does not differ based on industry.

PN972

?---Mm-hm.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN973

By that you're not suggesting, are you, that the needs of a coal miner when retrenched from a coal mine in a regional centre are the same as the needs of a retrenched back teller who lived in Sydney?---No.

PN974

So when you're saying different services, what you're talking about is you would offer both the bank teller and the coal miner, for example, the five meeting or the three meeting service but they might have quite different needs when it comes to how they might go about finding a job?---Exactly.

PN975

I was just checking what I had and hadn't tendered. Apparently, if it please your Honour I didn't ask your Honour to formally accept into evidence the extract from the website describing Ms Merritt's role and I do tender that if it hasn't gone into evidence.

PN976

VICE PRESIDENT HATCHER: The Audrey Page website extract for Lorraine Merritt will be marked exhibit 8.

EXHIBIT #8 AUDREY PAGE WEBSITE EXTRACT FOR LORRAINE MERRITT

PN977

MR TAYLOR: Thank you, they are the questions.

PN978

VICE PRESIDENT HATCHER: Mr Bukarica, do you have any questions?

PN979

MR BUKARICA: No, thank you.

PN980

VICE PRESIDENT HATCHER: Any re-examination?

PN981

MR SHARIFF: No.

PN982

VICE PRESIDENT HATCHER: Thank you for your evidence, Ms Merritt, you're excused and you're free to go?---Thank you.

<THE WITNESS WITHDREW

[4.21 PM]

PN983

So the statement of Hannah Martin, was she required for cross-examination?

PN984

MR SHARIFF: No, she wasn't.

*** LORRAINE MARGARET MERRITT

XXN MR TAYLOR

PN985

VICE PRESIDENT HATCHER: So can I mark that now?

PN986

MR SHARIFF: Yes.

PN987

VICE PRESIDENT HATCHER: The statement of Hannah Martin dated 23 March 2016 will be marked exhibit 9.

**EXHIBIT #9 WITNESS STATEMENT OF HANNAH MARTIN
DATED 23/03/2016**

PN988

MR SHARIFF: Yes, I think that is the evidence in my client's case.

PN989

VICE PRESIDENT HATCHER: Thank you. We will now adjourn and resume at 10 am tomorrow.

ADJOURNED UNTIL TUESDAY, 8 NOVEMBER 2016

[4.22 PM]

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