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

9.34 AM, THURSDAY, 10 NOVEMBER 2016

Continued from 8/11/2016

PN1866

VICE PRESIDENT HATCHER: Yes, Mr Shariff, first of all there was the – I think we neglected it on the last occasion, but there was the revised Centennial Mining list.

PN1867

MR SHARIFF: Yes.

PN1868

VICE PRESIDENT HATCHER: Done on the basis of seniority, so unless there's any objection we'll mark that as exhibit 41.

EXHIBIT #41 REVISED CENTENNIAL MINING LIST

PN1869

MR SHARIFF: May it please.

PN1870

VICE PRESIDENT HATCHER: Mr Taylor looks perplexed.

PN1871

MR TAYLOR: I'm just not sure. I did see an email, if it please, from your Associate. I did mean to check with those instructing me what that document was. It might be that Mr Shariff can identify it for me so I - - -

PN1872

VICE PRESIDENT HATCHER: It was the annexure to Mr Edwards's statement which had a list of redundant employees listed by reference to their age. And we had requested him if he could reformat it by reference to their length of service. That was provided to us so that's what it is.

PN1873

MR TAYLOR: Thank you. Thank you, your Honour.

PN1874

MR SHARIFF: I did provide copies of those when your Honour's Associate came back out later on Tuesday afternoon and I provided copies to my friends.

PN1875

Your Honours, there was just one other set of evidence - - -

PN1876

VICE PRESIDENT HATCHER: Although it doesn't have an average at the end, but anyway.

PN1877

MR SHARIFF: We might be able to attend to that.

PN1878

VICE PRESIDENT HATCHER: All right.

PN1879

MR SHARIFF: Although I think Mr Taylor says that averages are misleading. But we might come to that. There was another item of evidence that was, if your Honour's will recall - - -

PN1880

DEPUTY PRESIDENT GOSTENCNIK: Sorry, Mr Shariff, can I just make a suggestion in relation to that document which is exhibit 41?

PN1881

MR SHARIFF: Yes.

PN1882

DEPUTY PRESIDENT GOSTENCNIK: I understand it was sent through a PDF form; is that right?

PN1883

MR SHARIFF: Yes.

PN1884

DEPUTY PRESIDENT GOSTENCNIK: If it's simply sent through in Word form we can manipulate it to suit whatever question the presiding Member might think he might need answered.

PN1885

MR SHARIFF: Yes.

PN1886

DEPUTY PRESIDENT GOSTENCNIK: And in the course of his deliberations which he can't work out with a calculator.

PN1887

MR SHARIFF: Without incriminating anyone's Excel spreadsheet skills. Yes. Yes, we'll undertake to do that by close today.

PN1888

DEPUTY PRESIDENT GOSTENCNIK: Yes. Thank you.

PN1889

MR SHARIFF: The other item of evidence was, if your Honour's will recall in Mr Gunzburg's evidence, he had obtained data of 923, I think, approximately employees made redundant in the period from 2012 to 2014 from some of the CMIEG members. The raw data relating to that I should tender. We have notified our friends and there is a graphical representation of that which goes with it and I've got four copies of each.

PN1890

VICE PRESIDENT HATCHER: There's no objection?

PN1891

MR TAYLOR: No objection.

PN1892

VICE PRESIDENT HATCHER: So how do I describe these, Mr Shariff?

PN1893

MR SHARIFF: Perhaps just the short description would be the raw data of the 950.

PN1894

VICE PRESIDENT HATCHER: I didn't hear that.

PN1895

MR SHARIFF: The raw data of the 923 – 953 employees made redundant referred to in Mr Gunzburg's evidence.

PN1896

VICE PRESIDENT HATCHER: All right. So the raw data of 953 redundant employees referred to in Mr Gunzburg's evidence will be marked exhibit 42.

EXHIBIT #42 RAW DATA RELATING TO 953 REDUNDANT EMPLOYEES REFERRED TO IN MR GUNZBURG'S EVIDENCE

PN1897

VICE PRESIDENT HATCHER: And the graphical representation of that data will be marked exhibit 43.

EXHIBIT #43 GRAPHICAL REPRESENTATION OF 953 REDUNDANT EMPLOYEES REFERRED TO IN MR GUNZBURG'S EVIDENCE

PN1898

MR SHARIFF: And finally, your Honours, there was an addition to be made to exhibit 15. I mentioned when I tendered it, exhibit 15, the other day, they were the documents "relating to the preparation of Professor Peetz's report". When I used that short description I use it in the way I read out the other day. But there were some additional documents handed to us that day. They should just be added to exhibit 15.

PN1899

VICE PRESIDENT HATCHER: All right. Well, that document, unless there's an objection, will be added to exhibit 15. Yes, all right, Mr Shariff. So submissions; you've sent us a written submission which obviously we haven't had the chance to read.

PN1900

MR SHARIFF: It looks like all the parties were very busy yesterday.

PN1901

VICE PRESIDENT HATCHER: Yes.

PN1902

MR SHARIFF: Whilst the sky was full again. But we have reduced what we wanted to say to writing. What I don't want to do is read it out to you.

PN1903

VICE PRESIDENT HATCHER: Good.

PN1904

MR SHARIFF: But perhaps I can take you to the select parts and I appreciate that my friends to the right will probably do the same. We set out, just by way of introduction, how we've arrived at the current position which you'd be familiar with, which is that by reason of an application or submissions made essentially by my friends to the right in respect of clause 14.4(c) that it was age discriminatory, that part of 14.4(c) of the extant award has been varied.

PN1905

The result of that is that the entitlement, as it currently stands, as your Honours know, is we say uncapped. There seems to be a semantic issue between, at least my friends Mr Taylor and Mr Fagir and us as to whether there has ever been a cap. Perhaps I can revisit that later. But as it currently stands the entitlement is not limited, perhaps to use a more neutral term. What flows from that, we say, is that the entitlement as it currently stands doesn't resemble the entitlement as it has ever stood, certainly not from 1973 because the 1973 entitlement was only one week of the year of service, but if one survived a minimum period of service of five years. It certainly doesn't resemble the 1983 entitlement because the 1983 entitlement went hand in glove with the mandatory retirement age. So the position is that the current entitlement doesn't meet the description of the entitlement that existed prior to 2010 and certainly prior to the 2015 decision.

PN1906

The Commission, in its 2015 decision invited the parties to give some consideration to whether there should be some alternative limitation or cap, and indicated that some of the types of materials that would need to be put forward would include material such as the age, length of service, et cetera, of those employees who were made redundant.

PN1907

Since that time my clients have not only put forward a proposed variation but also subsequently a grandfathering provision and we have put forward some evidence of the types of matters that the Commission requested which was where redundancies have occurred, the age profile, the length of service profile of those made redundant as well as the age distribution of people retiring. And I'll take you to some of that evidence in a short while.

PN1908

It seems to us, and I've only had a cursory review of what my friends to the right say in writing in their closing submissions, but we seem to be at a fundamental impasse, at least between those at the Bar table, about what the test is in an application of this type; who bears the onus and what needs to be shown. We maintain the position that these applications in a four-yearly modern award review don't really raise questions of onus. But we accept that if someone wants to come along and present a case for change one has to present an argument, a case on the merits, but we say a case on the merits can be based on both principle and evidence. But ultimately it's a matter for the Commission to be satisfied as to whether the award as it stands meets the modern award objectives and as to

whether the proposed variation would meet the modern award objectives. And that's a matter for the satisfaction of the Commission on the material that's placed before it.

PN1909

In our submissions we have extracted the relevant principles that were set out by the Full Bench in the preliminary jurisdictional issues decision that commences at the bottom of page 4 and goes through to page 5. At point 3 of that decision, which is extracted on page 5, the Full Bench said:

PN1910

The Commission is obliged to ensure that modern awards together with the NES provide a fair and relevant minimum safety net taking into account among other things the need to ensure a stable modern award system.

PN1911

Our friends focus on the final sentence of that paragraph which is that the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made. And so just pausing there, our friends proceed from the premise that the award, as it stands, is meeting the modern award objectives and that's a point that we challenge for reasons I'll come to. And then at point 4 the Full Bench said the modern awards objective applies to the review. The objective is very broadly expressed and is directed to ensuring that the modern awards, together with the NES, provide, and we obviously emphasise the words, a fair and relevant minimum safety net of terms and conditions and so on.

PN1912

If your Honours then go to page 7 we seek to set out what are the rival positions between the parties on the question of onus and the statutory test. Trying to be as fair as possible, and not having seen our friends' closing submissions, we tried to anticipate what they say. I think what they say is first that a substantial merits case must be established to show a change in circumstances where the relevant entitlement prima facie meets the modern awards objective. Secondly, they say we bear the onus to establish a significant change so as to depart from an established industrial standard. And, thirdly, they say in light of there being an industry-specific redundancy scheme then the award must be established the scheme no longer meets the industry's specific needs. They seem to be – there might be nuances to these, but they seem to be the three contentions raised against us.

PN1913

Just dealing with each of those in turn, the first matter, that is, that a substantial merits case needs to be established to show a change in circumstances, that's a matter that my learned friend, Mr Taylor, said in his short opening; that we bear the onus to show substantial change, either since 2010 when the modern award was made or from when the standard was established in 1983. We don't accept that that's a proper characterisation of the test. And, as we point out, in paragraph 8, that was a matter, in the context of the two-yearly award reviews that Deputy President Gooley, at first instance in the Restaurant Industry case, had said needed to be established, that is, that there needed to be established a significant change

in circumstances post-2010 to warrant a variation to the award. A Full Bench, including the majority held that that's too narrow, and I'm picking up now from the bottom of page 7 citing from paragraph 90 of the Full Bench decision which is reported at [2014] 243 IR 132.

PN1914

The Full Bench in the modern awards review 2012 decision identified:

PN1915

a significant change in circumstances which warrants a different outcome as being an example of cogent reasons which might justify departure from a previous Full Bench decision. However it is clear that there might be other cogent reasons why a Full Bench might not be followed in the conduct of a modern award review.

PN1916

And so on. So the idea that one has to erect a statutory test of a significant change in circumstances to warrant a departure from a previous Full Bench decision it overstates the proposition. If you do show a significant change in circumstances you'd go some way to establishing a cogent reasons test. But that's not the only basis upon which a variation would be granted. So, as we point out at paragraph 10, it's wrong to say that the substantial change needs to be shown to establish a departure.

PN1917

And in picking up at the top of page 9 the second element of our friend's first contention carries an assumption that the retrenchment entitlement prima facie met the modern awards objective. As we pointed out before the true principles stated by the Full Bench in the preliminary jurisdictional issue decision is that the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objectives. But of course, as each of you on the Full Bench know, the modern awards were created as a result of a process that commenced in 2008 in respect of which many provisions in many awards were simply not the subject of debate, challenge, et cetera. Many provisions were simply retained in modern awards by reason of a consent position. So that in many cases, like the retrenchment entitlement in the Black Coal Mining Award, there was no turning of the mind specifically to the particular entitlement to be satisfied that it met the modern award objective or, as I come to it, that it satisfied the conditions of an industry redundancy scheme, and I'll come to that argument in a moment.

PN1918

VICE PRESIDENT HATCHER: Well, the industry was booming at the time so the parties' minds were not turning to redundancy.

PN1919

MR SHARIFF: That may or may not be right, your Honour. But in the 2015 decision this Full Bench noted that back in 1999 somewhat ironically it was the employers who wanted to remove the age discrimination cap in the retrenchment entitlement. And the unions, as I understand it, opposed that and Harrison C issued a decision in which the age discrimination cap was removed. It went on

appeal to the Full Bench, and then it was remitted to Wilks C and here we are. So the idea that this has always been a consent position is somewhat contestable but at the end of the day we don't need to go there because all I'm dealing with is, at the moment, the proposition that one has to necessarily proceed on the basis that prima facie this award meets the modern award objectives.

PN1920

Certainly in circumstances where the entitlement was simply included or retained by a reason of a consent position we say that that provides an appropriate occasion for this Full Bench on review to examine whether the entitlement does, in fact, meet the modern award objectives. And it was, as we point out at paragraph 12, the minority in the – when I say minority they were only the minority in relation to some of the variations in the restaurant industry decision observed that very fact at 199 of that decision that it was clearly not practical during the award modernisation process to conduct a comprehensive review of the industrial merit of the terms of the awards. Matters that were not put in issue by the parties were not the subject to a merit determination in the conventional sense. Rather terms were adopted from predecessor awards that minimised adverse changes to employees and employers and, of course, that's what happened here because it was essentially a consent position.

PN1921

So we say that one can't accept the premise that simply because the entitlement was contained in the award that it follows that the award met the modern awards objective. And we say the same point at the bottom of the page can be made about the inclusion of the industry-specific redundancy scheme. The unions in these proceedings point to no argument or consideration that was put before the AIRC, as it then was, as to the inclusion of that scheme. Rather that appears to have proceeded on the basis of the consent position. By none of these submissions am I intending to be critical of anyone involved in the process. We're just stating the historical fact that that's what happened.

PN1922

But we say, at 15, contemporary principles as to the exercise of jurisdiction established that there needs to be shown on the part of a decision maker or Tribunal that it has given consideration to the state of satisfaction that has to be reached, that is, that one needs to come to a positive state of satisfaction that in respect of the award and in respect of the terms of the award that they do meet the modern award objectives and where prima facie there isn't any evidence disclosed of an active consideration given to that, and understandably why, because there it was a consent position, then that is a weaker basis upon which to proceed on the contention our friends urge, which is that prima facie the award meets the modern awards objectives.

PN1923

Then we say to the extent that our friends say that we bear the burden there seems to be a premise in our friend's case that in order to make good a substantive merits case one needs to come along and bring a suite of experts and people within the industry to identify aspects of the industry. As Professor Peetz's report makes plain a number of things that can be said about the black coal mining industry are available from public sources. And the idea that one needs to make good a

substantive merits case only on evidence is, we say, wrong. One can make good a substantive merits case on the basis of principle or principle and evidence together. And that's what we're seeking to do here.

PN1924

In any event, this Full Bench in its 2015 decision, identified the types of materials that would need to be put before the Commission, and they included, as I said earlier, the age profile, length of service of coal mining employees, the circumstances they face on redundancy, and the cost impact on employees of the scheme. We say we've attempted to address those matters as best we can. And also we have taken steps to demonstrate how these matters ought to be weighed to propose a cap that is consistent with, and I emphasise the words, "common industrial practice". That was terminology from paragraph 44 of this Full Bench's 2015 decision.

PN1925

And that's why our primary submissions went to some effort in writing to identify what has been common industrial practice in the TCR standard, in the New South Wales cases that we cite, and in the 2004 redundancy test case, because what we're trying to do is identify what is common industrial practice by way of comparison.

PN1926

Now, it's been said against us that the evidentiary materials that we have presented and adduced before the Commission is weak or thin, ineffective, the various pejorative of descriptors. But it should be remembered that the evidence that we have presented has attempted to do that, which the Full Bench requested. We've adduced, for example, evidence of the age and length of service of the 953 employees made redundant from five of the employees within the CMIEG as a representative sample. Evidence has been presented of the age profile of Centennial Coal's redundant employees from the three mines at Mannering, Newstan and Angus Place. We've also presented evidence of the retirement ages and length of service and will attend to the other tasks that the Full Bench has asked us to attend to in relation to their age and length of service profile at the time of retirement.

PN1927

As to the balance of the materials relating to the circumstances affecting employees on redundancy well, one needs to be a bit realistic about that. My clients are not going to be in a positon to have access to the employees who have been made redundant. Our friends do, and quite properly they have adduced some evidence relating to that and I will have something to say about that including lay witness statements from some of their members. And they've conducted, in fairness to them, a survey seeking to elicit some of the views of the people that have been made redundant. And that would be naturally the case because they are in the position, that's their membership, to put that kind of material before the Commission and they have done that.

PN1928

As to the second matter that our friends raise, that is, that one has to show some kind of significant change to depart from the 1973 and 1983 CIT decisions, well,

we'd like to just unpack those propositions. At paragraph 20 on page 11, we'll just try and identify what the logical sequence is of that reasoning process. The first limb of it seems to be that the current scheme is an industrial entitlement enshrined by a specialist industrial Tribunal which took into account the fact it's peculiar to the coal mining industry.

PN1929

The second limb of that argument seems to be those factors peculiar to the coal mining industry continue to prevail. The third limb of their argument seems to be those elements of the coal mining industry scheme has not been challenged since by employers and employer groups including during the award modernisation process. And that, finally, that a cap on redundancy pay was not a true cap, and, in any event, only applied to the retrenchment component of the scheme. That, doing it as fairly as possible, seems to be the sequence of the reasoning process.

PN1930

We say the first of those contentions warrants close examination. The logic propounded seems to be that because the CIT decisions were made by a specialist industrial Tribunal their logic continues to prevail and we've set out what that is and, of course, you've been taken to this in opening and also in rival parties' submissions, but the elements seem to be; career industry; benefits accrue on an industry wide basis; conditions are in advance of industry; loss of seniority; inability to find comparable employment; having to move in search for a job; and change in community attitudes, et cetera.

PN1931

We'd like to deconstruct the sequence of this reasoning process. First, we say, over to page 12, our friends don't point to why it is that decisions of a single Member of a CIT are binding on a four Member Full Bench of this Commission. Just pausing here, this debate arises because it is said that one needs to show cogent reasons to depart from previous Full Bench authority. The logic of that arose because the 2010 modern awards were the result of the award modernisation process and so it was said if you want to come along and vary those decisions we're in the position where the Full Bench has examined these matters and issued reasons for them or issued awards.

PN1932

So because the principle of precedent, as all of you know, principles of precedent and stare decisis don't apply here. There's been the development of this cogent reasons test as a pseudo application of precedent of stare decisis. But that is a principle that applies by proxy or analogy where there's previously binding authority. But decisions, as we say, of the CIT being decisions of single Members of the CIT with no rights of appeal that then existed cannot be said to be binding on a four Member Bench of this Commission. Even if it is said that those decisions are somehow binding we say then on application of orthodox principles they can be departed from where there are cogent reasons for doings so including but not limited to circumstances where the context no longer prevails, or there have been other developments in industrial law, that is, subsequent development of principle from the time that the decisions were handed down, or they were founded on flawed premises or they're just plainly wrong. And we say that

present in this case where any one of those descriptors are apposite. And we'll come to develop the reasons for that.

PN1933

But secondly and primarily the fact is that since the CIT decisions the Commission's predecessors have examined community standards referrable to the redundancy pay on at least two occasions as have State Industrial Tribunals. The Commission's predecessors examined this in 1983 and again in the 2004 redundancy test case. Neither this Commission nor its predecessors have sought to examine whether the principles underlying the CIT decisions of 1973 and 1983 are consistent with the principles in the TRC case or the 2004 case. Those two decisions are in fact binding on this Commission.

PN1934

Third, we say the criteria relied on in the CIT decisions either no longer have any relevance or are inconsistent with the authorities. Take the first, loss of seniority. Whatever the position was in 1973 and 1983 we know by reason of the High Court's decision in Australian Iron and Steel that the last on first off principle is not available as the exclusive basis for selection of redundancy. So that circumstance has changed.

PN1935

Secondly, this assertion that greater protection is warranted, and pausing there, this is picking up the language of Tribunal Member Duncan in 1983 that conditions are in advance of industry. That criterion we say has got to be plainly wrong. It's logically absurd. It wrecks the false basis that a safety net is to be a gold standard because the employees in the black coal mining industry earn remuneration and obtained conditions that are so far in advance of the rest of the industry that they deserve, so there's some economic justification to them having a retrenchment entitlement which is tenfold or fivefold, or whatever it is that the multiplier is, to the standard for the rest of industry, we say that that type of principle in the context of wage setting or entitlement setting seems to be inconsistent with the process that's required by the Act which is about the setting of fair and relevant minimum standards.

PN1936

As we further say the industrial context has also changed since 1973 and 1983. We say there has been, by the union's own evidence, Mr Vicker's statement, who charts the history of CIT decisions and then the promulgation of enterprise bargaining in the industry and the enterprise bargains that now exist with all the various employers, that a significant change that has occurred since 1983 is that these entitlements are now found as part of the industrial bargains that the parties have struck at the enterprise level, so that if one is examining the statutory scheme now as opposed to what it was when the Tribunal, constituted as the CIT, was examining the setting of minimum conditions it is different. Now, one is looking at the setting of minimum conditions as a basis for collective bargaining.

PN1937

Next we say whereas the TCR case and the redundancy case focused on the loss of non-transferrable credits to be taken into account, that is, the loss of them as a basis for justifying redundancy, the CIT decisions take these into account in the

opposite direction. That is the fact that people have access to a portable long service scheme seems to have become a basis as to why even more enhanced entitlements are justified.

PN1938

So one can see from what we're saying that there isn't a sound basis upon which to say that the CIT decisions are binding as a matter of law on this Full Bench and in any event on application of orthodox principles there are good reasons to depart from them or at least scrutinise them to examine whether the context continues to prevail.

PN1939

As to the third matter that our friends raise, which relates to specifically the scheme of the Act in relation to section 141, what our friends do in relation to that is rely upon the explanatory memoranda. And what the explanatory memorandum, our friends say, in relation to section 141, is that – and we've extracted it at the top of page 15 of their submission, that is, the explanatory memorandum suggests that the industry-specific redundancy scheme should continue to operate until they no longer meet industry-specific needs. And then they say there's unmistakable legislative intent to permit divergence from the NES standard for redundancy pay.

PN1940

So what our friends are doing is going to the explanatory memoranda to say that in order to establish a case for a variation to the industry-specific scheme one has to establish this false, we say, statutory criteria of that the scheme no longer meets industry-specific needs. One finds nowhere in the text of the provisions in section 141 subsection (3) that test at all. The text does not permit that test to be inserted.

PN1941

Now, our friends have it every which way, because when it suits them they rely upon the explanatory memoranda to support the erection of a test but at other times the explanatory memoranda they say must give way to the statutory test. As we point out on page 14, we've addressed this earlier at paragraph 23, in Centennial and CFMEU the Full Court said:

PN1942

The legislative intention is the intention manifested by the legislation.

PN1943

Statements as to – and then it's picking up what the High Court said in Saeed.

PN1944

Statements as to legislative intention made in explanatory memoranda or by Ministers however clear or emphatic cannot overcome the need to carefully consider the words of the statute to ascertain its meaning. Further through oversight or inadvertence the intention of the Parliament might not be reflected in the legislation. If that happens the Court must give effect to the will of the Parliament as expressed in the law.

PN1945

And as we say there is nothing within the variation provisions in section 141 subsection (3) that says that the test that my clients need to satisfy is that we have to show that the scheme no longer meets industry-specific needs and we say, with respect, they're leading this Commission into jurisdictional error if they say that that is the test that has to be satisfied.

PN1946

Up until that point is all I wanted to say about the parties' respective submissions on onus and what are the tests. We accept we have to show that the proposed variation that we've put forward meets the modern award objectives. We accept that we have to do that by reference to some of the peculiarities of this industry, and that's what we tried to do through our evidence which I'd now like to turn to, unless there's any questions about those questions.

PN1947

VICE PRESIDENT HATCHER: Well, before we turn to the evidence I just wanted to hear your submission about section 141(4)(b) and what's involved in satisfying that requirement.

PN1948

MR SHARIFF: Yes. I think that's the one that requires that any variation to the scheme must nevertheless ensure that it retains the industry-specific character to it.

PN1949

VICE PRESIDENT HATCHER: And while I ask the question can I just disclose something that's on my mind in that connection? I think you said in opening, and let's assume it's correct for the purpose of argument that, the scheme here must have some element of income maintenance in it to justify the – or if I've misstated what you've said you can correct me, but I thought you're indicating that there was at least a strong suspicion in the decisions that it must have some element of income maintenance then. It was a - - -

PN1950

MR SHARIFF: What I was saying, your Honour, was this; that the TCR standard, as restated in 2004, repudiates the idea of income maintenance.

PN1951

VICE PRESIDENT HATCHER: Yes.

PN1952

MR SHARIFF: My friends, I said, embrace that proposition as being consistent with the 1983 CIT decision. They actually say, and Tribunal Member Duncan says this is not about income protection. But all I was pointing out is that in the very decision though that idea of income protection is repudiated there are elements of the criteria that Tribunal Member Duncan used that smack of income maintenance. There's an inconsistency in the decision and might I just add it would be a good reason to closely scrutinise that decision and there might be cogent reasons for departing from it, but yes.

PN1953

VICE PRESIDENT HATCHER: Well, let's assume that some elements of income protection are taken into account when the scheme was set.

PN1954

MR SHARIFF: Yes.

PN1955

VICE PRESIDENT HATCHER: Does that then become part of the industry-specific character of the scheme that must be protected in the variation?

PN1956

MR SHARIFF: Well, one has to look at what they are. So the one seems to be that I think that comes most closely to - there might be two, the first being the conditions are in advance of industry, and the second is the length of time taken to find comparable employment. Both those two criteria might have about them an element of income maintenance because it suggests that the Tribunal is saying because these people have been earning a lot of money the fall is greater and it's going to take them a longer time to find a comparable job. The thesis underlying that seems to be they need more benefits to tide them over until that occurs. If one accepts that kind of logic then there's an element of income maintenance in it. I'm trying to be fair about this.

PN1957

So I accept, if one looks at it through that complexion, there's a degree of income maintenance in those two criteria.

PN1958

VICE PRESIDENT HATCHER: Well, I'm trying to explore with you, and that's just an example, what 141(4)(b) requires us to do, that is, it seems to me we have to identify what the industry-specific character of the scheme is, and then retain that. So I'm just asking you, from your client's perspective, what is the industry-specific character of the scheme which that provision applies?

PN1959

MR SHARIFF: Well, the way we had approached that to persuade the Commission that the industry-specific character of the scheme would be retained is by the formula, that is, the three weeks. That seems to have been, at least by 1983, 1973 it was one week per year of service. By 1983 it was an additional component of two. So if one retained the idea of the three week formula one would be retaining the industry-specific character of the scheme because that was something peculiar; that formula peculiar to the industry at least the way it was established. That would be one way of looking at it.

PN1960

But I can't say here that it's the only way of looking at it because we're dealing with a statute that's reasonably open-ended in that sense. One would then have to look at other characteristics of the industry which we have addressed. But, as we point out, one needs to be careful about that because some of the things that are said to be characteristics of the black coal mining industry are actually matters that could be said about other industries. But the way we put our case - and your Honour looks perplexed.

PN1961

VICE PRESIDENT HATCHER: Well, I mean, some of what you say might be persuasive in an application to abolish the scheme altogether but we're not dealing with an application of that nature. We're dealing with this variation.

PN1962

MR SHARIFF: Yes.

PN1963

VICE PRESIDENT HATCHER: 141(b) mandates the industry-specific character of the scheme must be retained. So it's dealing with the character of the scheme itself not the industry.

PN1964

MR SHARIFF: Yes. So our answer to that is the character of the scheme is retained by the retention of the formula.

PN1965

VICE PRESIDENT HATCHER: All right.

PN1966

SENIOR DEPUTY PRESIDENT HAMBERGER: But why should we - why shouldn't we just get rid of the – why are you arguing that we shouldn't just get rid of the scheme?

PN1967

MR SHARIFF: The legal response or the industrial response?

PN1968

SENIOR DEPUTY PRESIDENT HAMBERGER: Well, your response. In a sense that suggests by implication that you still think there's some – I mean, most of your arguments are about saying well, the black coal industry is no different than any other industry and should be treated – but in fact that's not what you're actually asking us to do.

PN1969

MR SHARIFF: No.

PN1970

SENIOR DEPUTY PRESIDENT HAMBERGER: You're saying we should still have an industry scheme with modification, but still have a separate scheme for the black coal industry.

PN1971

MR SHARIFF: Yes, that is our position.

PN1972

VICE PRESIDENT HATCHER: So why should we?

PN1973

MR SHARIFF: Because – well, the first answer to that is those are my instructions.

PN1974

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes, okay. That's not really an answer.

PN1975

MR SHARIFF: Okay. So let me move past that. Let me move past that one. The second is because we accept that to the extent that there are some differences between this industry and other industries, then there might be a case for having a differential entitlement. And the way we've - - -

PN1976

SENIOR DEPUTY PRESIDENT HAMBERGER: What sort of differences – sorry.

PN1977

MR SHARIFF: - - -sought to address that is that by retention of the three week formula.

PN1978

SENIOR DEPUTY PRESIDENT HAMBERGER: What sort of differences are you referring to?

PN1979

MR SHARIFF: Well, I think one of the differences is that the mining industry is concentrated in particular regions.

PN1980

DEPUTY PRESIDENT GOSTENCNIK: If you say a feature or a character of the industry-specific scheme is the three-week payment, how do you reconcile that with the capacity of the Commission to vary any amount of redundancy of this scheme? On that analysis it couldn't if the three-week payment is a feature or a character of the scheme because that would not be retaining the industry-specific character of the scheme.

PN1981

MR SHARIFF: Well, one of the difficulties is that 141(3) permits us only to vary the scheme. So that by necessity any variation to the scheme is going to have a change to what existed. But the variation that's limited to in 141(3)(a) is in relation to the amount of any redundancy payment, so it's further limited. So that's what we tried to do. We have tried to propose a variation that would vary the amount but keep other aspects of the scheme with the character that they had.

PN1982

DEPUTY PRESIDENT GOSTENCNIK: But then why isn't the unlimited or uncapped entitlement also a character of the scheme? If three weeks is a character why isn't the unlimited nature of it also a character.

PN1983

MR SHARIFF: Because that wasn't a character of the scheme.

PN1984

DEPUTY PRESIDENT GOSTENCNIK: Well, it was.

PN1985

MR SHARIFF: Well, we say it wasn't because - - -

PN1986

VICE PRESIDENT HATCHER: There might be a debate about the, what was it called, the retrenchment payment, but the severance payment was always uncapped, wasn't it?

PN1987

MR SHARIFF: That's so.

PN1988

VICE PRESIDENT HATCHER: So why does that even come into play?

PN1989

MR SHARIFF: Because this is as good a time as any to examine all of those. Because if one is going to examine a variation to the amount then by reference to common industrial practice, as your Honours invited us to do, then that's what we've tried to do. We've said looking at industrial practice entitlements generally are capped, and they're capped by a reference to length of service.

PN1990

VICE PRESIDENT HATCHER: But, I mean, that's exactly right, but that's the point, that is, that it's part of the character of the scheme that is uncapped unlike most schemes that one finds elsewhere. That's the conundrum, that is, that the section seems to say look, once you put this thing into an award, in terms of varying it, your hands are tied.

PN1991

SENIOR DEPUTY PRESIDENT HAMBERGER: Isn't there another way of reading it that it's the industry-specific nature of the scheme, in other words, it's really about probably the coverage. I mean, that it's really more getting to the idea that that's – it's a limitation on what we can do and it's saying what you can't do is – well, in the first bit of that clause it's saying you can't extend the coverage but maybe it's also you can't then limit the coverage, for example, to a subset of the industry.

PN1992

MR SHARIFF: That is a point that we had in fact debated. If one comes back to section 141(2) which deals with coverage there's a mandate in essence that whilst the Commission can include the scheme it must not extend the coverage of the scheme to classes of employees that it did not previously cover. So if, one way of reading the provisions in sequence is that retention of the industry-specific character of the scheme means that one doesn't extend the scheme to a new class of employees or to new coverage. Yes, that's right.

PN1993

COMMISSIONER JOHNS: Mr Shariff, whilst appreciating that the proposed variation from 19 June last year is varied by the grand-parenting clause, on your instructions you don't say that we're bound by that?

PN1994

MR SHARIFF: In the course of argument as I go through the evidence as it's fallen about what might be said to be average lengths of service and age profile in the industry I was going to draw attention to some other ways that the Full Bench uninhibited by any variation my clients put forward might come to a different view about where a different limitation or cap might lie.

PN1995

COMMISSIONER JOHNS: Are we equally uninhibited - - -

PN1996

MR SHARIFF: On grandfathering, yes.

PN1997

COMMISSIONER JOHNS: - - -and could contemplate 141(5)?

PN1998

MR SHARIFF: You are. You are.

PN1999

VICE PRESIDENT HATCHER: But as a matter of procedural fairness we'd have to start the case again, wouldn't we?

PN2000

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN2001

MR SHARIFF: Yes. I think I've said all I can about that. I'm not inviting - - -

PN2002

VICE PRESIDENT HATCHER: Did you want to get some instructions about it?

PN2003

MR SHARIFF: No, no, I think the world has already fallen down around me once this week. I wouldn't want to invite it again. But just coming back to the point, one might retain the industry character of the scheme by ensuring that it is limited to the pool of people, but varying the amount. Yes, that's another way of looking at it. I accept these aren't easy things because the legislation is not as clear as it could be, and we know that in other respects as well.

PN2004

But we devised a proposal that would retain some element of the character offered by the formula. That's what we tried to do. We proposed a cap based on length of service because, having examined the various principles and authorities, that seemed to be the consistent trend across other industries and although our friends say there are some exceptions as well in other modern awards, and we accept that, but that seemed to be the general trend.

PN2005

VICE PRESIDENT HATCHER: Can I just test the way your application works by reference to exhibit 41?

PN2006

MR SHARIFF: That's the Centennial - - -

PN2007

VICE PRESIDENT HATCHER: Yes.

PN2008

MR SHARIFF: But bear in mind these are all employees who worked through the retirement. So these aren't employees who – they weren't necessarily made redundant. These are the retirement ages of those people.

PN2009

VICE PRESIDENT HATCHER: All right.

PN2010

MR SHARIFF: If your Honour just might give me a moment.

PN2011

VICE PRESIDENT HATCHER: So if you look at the list sorted by length of service.

PN2012

MR SHARIFF: Yes.

PN2013

VICE PRESIDENT HATCHER: If you got to the second person, Mr Gearey.

PN2014

MR SHARIFF: The second person, Mr Gearey, yes.

PN2015

VICE PRESIDENT HATCHER: Yes. So let's assume, for the sake of argument, that he was made redundant and didn't retire.

PN2016

MR SHARIFF: In when?

PN2017

VICE PRESIDENT HATCHER: Let's assume for the sake of argument Mr Gearey was made redundant, that is, he didn't retire of his own volition.

PN2018

MR SHARIFF: Yes.

PN2019

VICE PRESIDENT HATCHER: So before we lifted the old cap he would have got, is this right, 41 weeks of severance payment and no retrenchment payment; is that right?

PN2020

MR SHARIFF: Yes. That's right.

PN2021

VICE PRESIDENT HATCHER: Now, under your proposal, just leaving aside the grandfathering clause for a minute, if a person in that scenario was made redundant many years down the track, he would simply get 26 weeks; is that right?

PN2022

MR SHARIFF: Twenty-seven.

PN2023

VICE PRESIDENT HATCHER: Twenty-seven weeks.

PN2024

MR SHARIFF: Yes.

PN2025

VICE PRESIDENT HATCHER: So I'm struggling with how moving an age discriminatory cap and replacing it with something else then leads to an outcome where somebody in that scenario down the track gets much less than they would have even with the discriminatory cap in place.

PN2026

MR SHARIFF: No. And we've proposed a grandfathering provision such that, and I know you've asked me to exclude that from the response I gave, but if one introduces now back the grandfathering provision that we put forward Mr Gearey's entitlement, if he was to be made redundant on the commencement of the variation we propose with the grandfathering would be 41 plus his full entitlement.

PN2027

VICE PRESIDENT HATCHER: Just make it clear, so say we made your variation, at the date of making the variation let's say you had that 41 years' service at the date of the variation, he would then crystalise an entitlement of 41 times 3 would he?

PN2028

MR SHARIFF: He would get 123. He wouldn't - - -

PN2029

VICE PRESIDENT HATCHER: And then that would stay the same no matter how longer he served?

PN2030

MR SHARIFF: Correct. Correct.

PN2031

VICE PRESIDENT HATCHER: All right.

PN2032

MR SHARIFF: That's right.

PN2033

VICE PRESIDENT HATCHER: But the further in time as you go the greater the bite of the new provision as it were.

PN2034

MR SHARIFF: Correct. That's so.

PN2035

VICE PRESIDENT HATCHER: Thank you.

PN2036

MR SHARIFF: All right. I was then next going to move on to address the evidence. And one of the first things we in fact address in the evidence is that we say let's have a look at some of the other data. Now, those retirement age profiles were from Centennial. Mr Gunzburg had identified the 953 employees made redundant from 2012 to 2014, and we had structured the graph which is now exhibit 33 in our submissions, but the colour copy of that your Honours now have is exhibit 43. If one looks at that, can I take that as an example, of the 953 who were retrenched across five CMIEG employees, 70 per cent of them had nine years or less service.

PN2037

Now, just pausing there, the Commission will recall that the evidence from the Essential Media survey is that roughly 70 per cent of the population or two-thirds of the population would also have less than nine years' service, and you'll recall that Professor Peetz's evidence on this analysis is that two-thirds of employees who got made redundant would be unaffected by the cap, and so we're dealing with a third of employees who have got service of greater than nine years.

PN2038

Now, if one said, look, nine years is too harsh, and one went to 12 years then what the percentages are is of the balance of the people. So if one went to 12 years – let me just make sure I'm reading this right. Yes, only 21 per cent would be affected. If one set the cap at 15 years 13 per cent would be affected. If one was looking at it that way.

PN2039

If one looked at it a different way again and said, picking up some of the comments your Honours have been putting to me, and said well, all right, the one year severance pay entitlement was never capped but that should not be capped. I'm just postulating this is the argument. But the two years was capped and you cap it at nine years, on our proposal, then the entitlement maximum on the second component would be, mathematically, 18 weeks. But the first limb of the entitlement would be uncapped.

PN2040

But if one extended it to, for argument's sake, 15 years, and we went back to Mr Gearey, his entitlement would be 30 weeks for the second component but he'd get his 41 weeks for the first component. That's another way of doing it. I don't have

instructions to put any alternates, but what I'm submitting is that if one looks at the average length of service in the industry and take into account what Professor Peetz says about this industry having the highest degree of labour turnover, then that all seems to be consistent with the various bits of evidence from the survey, from Mr Gunzburg that roughly 70 per cent of people have got up to nine years' service in the industry. So we're dealing with a third of people who might be affected at a point above nine years, and if the Commission was to impose a cap at a different point in time to nine years the amount of people affected would be lower. And then, of course, if your Honours accept a grandfathering provision at that rate then whatever their entitlement is gets crystallised at that point in time.

PN2041

But all I'm doing at the moment is saying, look, what kind of data has emerged from the evidence, that's one set of data. At page 16 we point out that in Ms Martin's evidence she obtained data from the Queensland Department of Natural Resources and Mines, the key data census to the age of employees on retirement, and, as we say, based on her evidence there's 4.3 per cent of people who were 60 years or over.

PN2042

Mr Edwards has also provided some age profiles of redundant employees that were made redundant at the various mines; Newstan, Angus Place, and Mannering, and we set that out at paragraph 30, and you'll see, for example, at Mannering the average age of employees who were affected was 43.8. The average age of employees affected at Newstan was 45.60, and the average age of employees affected at, I think that last one is, Angus Place, is 50.09.

PN2043

Insofar as experience of redundant employees is concerned, or as I said before, my clients have limited ability to adduce evidence before the Commission about that, but we did our best to do that based on the experiences of Mr Edwards, who'd been a general manager of human resources with over 30 years' experience in the industry. And he, of course, gave evidence about the three types of employees he's come across who are facing retrenchment; the ones who are ready to leave or ready to retire; the ones who probably don't want to go but have another job lined up but are happy to go; and the third set who don't want to go and have got nothing to go to. And we accept that that's broadly reflective of what happens in the community generally. Professor Peetz's evidence is consistent with that when one examines that middle part of his report from pages 59 and following where he describes the effects of retrenchment and redundancy on people in the community right across the economy not just focused on black coal mining.

PN2044

Ms Merritt gave some evidence about her experiences in dealing with the provision of outsourcing services to employees who had been made redundant. We accept her evidence is limited to her experiences. We weren't putting her forward as an expert in that sense but it was just her evidence of similar types of reactions to Mr Edwards which is that you are going to get this cross-section of people, some of whom go to have initiative, some of them not. Whether they have success in re-employment might depend on that. It will depend upon their

suite of skills. It will depend upon their initiative. None of that is really surprising we would have thought.

PN2045

VICE PRESIDENT HATCHER: I mean, it is true, isn't it, given that employees in the black coal mining industry are so well paid on average typically that if you then have to end up getting a job in another industry the likely effect on you is going to be more negative than if you were made redundant from another industry and had to move from that industry? I mean, it's a bit similar to the argument that because they're so well paid then the consequences for them are greater. But it's actually true though, isn't it?

PN2046

MR SHARIFF: It is the same. It is, I think, a flip side of the same coin, but one has to examine the validity of that kind of reasoning process in the context of minimum setting or an award arbitral process because the counterpoint to that is well, the evidence shows that, on average, the annualised earnings for black coal mining industry workers is $135,000 per year as compared to the national average of $78,000. So one might say right, there's going to be a degree of difficulty in you getting another job at that rate. All right. But on average you have nine years of service in this industry. If you accept what our friends say this is a career industry apparently so you have, up to 20 years of service in the industry altogether. So the counterpoint to that is that these are employees who, on average over a period of nine years looking forward, are going to earn something in the order of a million dollars before tax, 130 x 9. So one would say well, these are going to be the employees who are in a better position financially if it is about income maintenance to deal with the hardships, at least the financial hardships, associated with redundancy.

PN2047

That's going to be the counter argument and surely that's got to be right because there are people who are less well off in the community and what do you do for them? Do you say well, not only are you going to get a job – if one accepts Professor Peetz's evidence that it's harder generally in the economy in the trends that you're moving towards, towards casualisation and part-time employment. If you get made redundant in another industry, not only are you going to find it slightly less likely to get a job than those in the black coal mining industry, that's apparently the parameters, but you're also about as likely to go into part-time or casualised employment. And although your wages and conditions might be 44 per cent less on average than others, but you're starting from a lower point. So other employees in the economy in the community are worse off. And they don't have the benefit of earning the higher remuneration, and, we would say, they don't have the benefit of the collective bargaining regimes that are clearly in place in the black coal mining industry. You're talking about other industries - - -

PN2048

SENIOR DEPUTY PRESIDENT HAMBERGER: I suppose I'm thinking of people who end up leaving the industry.

PN2049

MR SHARIFF: Yes. But then our friends have got an inconsistent case. Which is it? If it's we're tracking trends from 1973 forward. Which is it? Is it an industry with high labour turnover but nevertheless an industry where it's a career, and because it's been a career since 1983 we deserve more, but we do leave and we find it harder to get back, but we get back into the same industry? So we might be out of employment for a year, but we're going back into employment after a year at a very high paying job. None of that seems to me to make sense when one is looking at compensating for the loss of job via retrenchment.

PN2050

And so what we're saying is over here you've got the CIT decisions that looked at particular criteria. For the rest of the community and the rest of the economy to whom modern awards apply you have the 1983 TCR and 2004 case and they say this is not about income maintenance. And this is about loss of non-transferrable credits. Why is the disparity between the two industries so wide? That is, as between black coal mining and all other industries so wide that it warrants such a substantial departure in minimum entitlements to retrenchment pay? That case just isn't there. And so if one was looking at this afresh, if one looked at this in 2010, and said, "Right, let's have a full-blown arbitrated case on whether this retrenchment entitlement should in fact be retained in the scheme or should be omitted", we'd have a very different argument.

PN2051

VICE PRESIDENT HATCHER: That might be persuasive but that's not what we're doing.

PN2052

MR SHARIFF: I know.

PN2053

VICE PRESIDENT HATCHER: The thing having gone in the award we now seem to have our hands tied by the Act, don't we?

PN2054

MR SHARIFF: No. Well, I'm not sure – well, I don't accept your hands are tied by the Act. I'm not accepting that, and it just seems to me that it is a wrong approach or a wrong basis of principle to approach the exercise by saying what was in in 2010 prima facie meets the modern award objectives and so we should just proceed on that basis. That would be wrong. If we move away from proceedings in the Tribunal into the general law, any statement of principle that is derived by a consent position is never as valid as a statement of principle that's derived by reason of a contested hearing. The one that immediately leaps out is a position in relation to the implied duty of trust and confidence. The High Court and Jessup J in his dissenting judgment in Barker and the Commonwealth went back through the authorities and traced that the implied duty, as it was in Mallick, was only found to exist because there was no contest about its existence.

PN2055

So it's not a sound basis of principle to proceed on the basis that, well, we're bound by this because of some consent position. One has to examine it.

PN2056

VICE PRESIDENT HATCHER: Sorry, Mr Shariff, I didn't make myself clear. I was really referring to 141 in that context not any notion of precedent.

PN2057

MR SHARIFF: All right. Yes. But you still have the power under 141(3) to vary. And the variation, so long as it continues to meet the character of the scheme, is a variation that is within power.

PN2058

VICE PRESIDENT HATCHER: Well, Mr Shariff, just to be clear, you are making the submission by reference to exhibit 43?

PN2059

MR SHARIFF: Yes.

PN2060

VICE PRESIDENT HATCHER: In terms of procedural fairness where at one end your proposal in the variation application, and at the other end the unions say no cap at all. If say, using exhibit 43 as a tool, we came up with an intermediate outcome, does that require any further hearing in order to afford procedural fairness?

PN2061

MR SHARIFF: I think as a matter of procedural fairness my friends to the right would need notice of what the proposed variation is and be invited to make comment on it, and my recollection is - - -

PN2062

VICE PRESIDENT HATCHER: I'll ask them, but, from your client's perspective, do you need another hearing to deal with any - - -

PN2063

MR SHARIFF: I don't think we need another hearing. We might just be prepared to be heard on the papers as it were.

PN2064

VICE PRESIDENT HATCHER: Right.

PN2065

MR SHARIFF: But I think something similar, from recollection, was done in the restaurant industry case in which your Honour presided, because on appeal the five Member Full Bench conducted the re-hearing and came to a conclusion that the award should be varied but on a different basis and gave the parties notice, and invited them to put forward submissions and ultimately the parties didn't. And that was the matter that went on judicial review, and it was said that there was no error in that approach, notice had been given.

PN2066

I was up to addressing the best available data as to periods of unemployment in the black coal mining industry. So page 18.

PN2067

VICE PRESIDENT HATCHER: What page are we on?

PN2068

MR SHARIFF: Page 18. Now, Mr Gunzburg, as the Commission is aware, obtained the data sets from the ABS in relation to unemployment. Mr Taylor's cross-examination of him criticised him on the basis that he's not a statistician. Well, we didn't present him as a statistician; criticised him on the basis that while unemployment data is only looking at the relevant data set through the ABS definition of unemployment, but the fact is look, Professor Peetz relies upon ABS data. Most of the experts who come along to this Commission and give evidence in these types of cases are relying upon ABS data. When it comes to unemployment data the ABS data is what it is. That's the recognised definition of unemployment and it captures those people, and unfortunately, whether we like it or not, insofar as data relates to the mining industry it's done for the mining industries as an aggregate. We can't break it down into black coal mining data. So doing the best we can Mr Gunzburg obtained data relating to unemployment rates or periods of unemployment in the mining industry and draws a comparison between that and other industries.

PN2069

Professor Peetz criticises him on that and says well, the unemployment rate doesn't take into account that people voluntarily leave employment because there's high labour turnover, and some of those people will suffer periods of unemployment. So the unemployment figures are skewed.

PN2070

But nevertheless, as we point out in the final sentence, of paragraph 34 in his supplementary report Professor Peetz in fact said that the ABS labour force data nevertheless had some merit for the imperfect measure of unemployment duration. Our point about that, and I suppose it goes to the issues that Hamberger SDP was raising with me that people in this industry might find it harder, or it might take them longer to find a comparable job. There's a second element in that, whether they find a comparable job at the same rate of pay, but put that to one side. But here is the best available data we can find about what are the relative periods of unemployment.

PN2071

Now, Mr Gunzburg does that by reference to the labour force data, but he also, in his supplementary statement, does it by reference to the subsequent data set based on lost last job and left last job, and you'll recall there's a schedule of that together with the graphical representation of it and, yes, it shows that in the mining industry lost last job figures go up and down in response to the cycles. But I invite the Commission to examine also the figures for the construction industry or the retail industry. They equally go up and down depending upon the different economic cycles that they operate on, and you will recall that Professor Peetz readily accepted that the black coal mining industry is not the only industry that's exposed to economic cycles and of course that's so.

PN2072

SENIOR DEPUTY PRESIDENT HAMBERGER: Of course the construction industry has an industry redundant scheme.

PN2073

MR SHARIFF: Yes. But - - -

PN2074

SENIOR DEPUTY PRESIDENT HAMBERGER: And it's got a different history so there's - - -

PN2075

MR SHARIFF: It's got a different history. But insofar as retail is concerned we know that that's subject to economic cycles based on consumer confidence and the like, but we're not here met with a case that says that there should be some kind of contribution redundant scheme. We're dealing with a more standard weeks per year of service entitlement and insofar as periods of unemployment or duration of periods of unemployment our point simply is, yes, there are swings and roundabouts, there are times when unemployment rates will go up, unemployment rates will go down, but that's so of every industry.

PN2076

VICE PRESIDENT HATCHER: But that's one view of the future of the industry. Another view which is referred to in Mr Colley's statement is every industry may face terminal decline, that is, it's not – there won't be ups and downs. It's - - -

PN2077

MR SHARIFF: But based on what? Based upon partly the introduction of omissions trading schemes. Well, I think the circumstances of the last 24 hours might suggest that that's all pie in the sky. I mean, predicting the future is inherently unpredictable. Who wants to engage in that exercise? I don't see that Mr Colley's opinion about that, and we've taken objection to it, is any more valid than your opinion.

PN2078

VICE PRESIDENT HATCHER: Well, to be fair to Mr Colley, I don't think it was his opinion. He referred to that as one school of thought about the industry's future.

PN2079

MR SHARIFF: One school of thought. But that school of thought relies upon propositions about coal price, about demand from china, productivity in Australia, and what it doesn't take into account, for example, his evidence doesn't address the spike in coal price over the last six months. A resurgence in demand from China for coal in the last six months. And if everything of the last 24 hours, and what's been promised bears true, trade between China and the US is likely to diminish providing greater opportunities for the Australian economy.

PN2080

SENIOR DEPUTY PRESIDENT HAMBERGER: Or reducing the competitors.

PN2081

VICE PRESIDENT HATCHER: It might reduce the demand for resources but anyway.

PN2082

MR SHARIFF: Maybe. But that's just one school of thought and Professor Peetz, in his report says, well, it's variable. And in fairness my friend, Mr Bukarica's submission just says, look, it's uncertain. It's not predictable. But if one looks at the trend, and we did this with Professor Peetz, since 1973 the volume of production has increased. There's no sign of the volume of production going down at the moment. The coal price has increased. Employment, according to his report, levels out at around 25,000, and that accounts for declines in the industry in the early eighties, declines in the late eighties and late nineties, the peak through the two thousands and the current decline. Even with the current decline, current employment numbers are at 44,000 which is above what he says the base line since post-World War II has been around 25,000 in terms of numbers in the black coal mining industry.

PN2083

But, our point about the ABS data coming back - - -

PN2084

VICE PRESIDENT HATCHER: Sorry, Mr Shariff.

PN2085

MR SHARIFF: Right.

PN2086

VICE PRESIDENT HATCHER: No, it's all right, Mr Shariff. We're just trying to recall a case recently where an enterprise agreement at a coal mine was terminated and that was - - -

PN2087

MR SHARIFF: Griffin Coal.

PN2088

VICE PRESIDENT HATCHER: I just maybe recollect that the evidence in that case had some fairly gloomy statements about the coal industry.

PN2089

MR SHARIFF: Yes, I'm being told that that's because the associated power station to which Griffin Coal was providing/supplying was closing down.

PN2090

VICE PRESIDENT HATCHER: I don't think it was Griffin.

PN2091

SENIOR DEPUTY PRESIDENT HAMBERGER: No.

PN2092

VICE PRESIDENT HATCHER: No, I don't think it was Griffin Coal. It was something else.

PN2093

MR SHARIFF: I might just put Mr Sevvens in the witness box, but he tells me Peabody might have been the other one, but - - -

PN2094

VICE PRESIDENT HATCHER: Yes. Yes.

PN2095

MR SHARIFF: And there are some peculiar circumstances relating to that. But anyway, the next point that we make at page 19 relates to the availability of other benefits. And we've addressed this in our earlier submissions and I've touched upon this. There are advanced benefits provided to these employees. Our friends say that because of the reason of the advanced benefits they need to cushion from the enhanced retrenchment entitlements and we say that that just points in all the other direction to the prevailing principles of this Commission and its predecessors relating to the redundant test cases.

PN2096

Can I then deal with the union's evidence commencing at page 20? The first thing to address is the Essential Survey. Can I just say something about the Essential Survey? Putting to one side the questions and how they were posed and how they were put and what information they elicited, putting all that to one side, if weight is to be given to the survey then what should be given weight is the actual survey results that we put into evidence as exhibit 14. Not Professor Peetz's interpretation of the results, not Mr White's interpretation of the results, but the actual raw survey data.

PN2097

And my friends, I think, say in their submissions that the cross-examination of Professor Peetz didn't address him on the data that he used. Forget whatever the data he used. I took him to the data results that the Essential Media obtained from the responses. If there was some other data then it was my friends, if they wanted to qualify the witness properly, and put before the Commission the evidence upon which the opinions were expressed, it was their duty to do that. If they haven't put before the Commission the evidence or the underlying factual basis upon which Professor Peetz expressed his opinions that's a matter for them. I was perfectly entitled to cross-examine Professor Peetz on what we received as the Essential Media data from the questions that were put.

PN2098

The conclusions we draw from that are the ones we've summarised at page 20. Two thousand six hundred and eighteen people responded to the survey. Do my friends dispute that? Of the 2618 people, 1940 people remained in exactly the same job. Do my friends dispute that? Five hundred and thirteen people responded on the basis that they had been made redundant, their contract had expired, or that they were terminated for other reasons. I don't think there's any dispute about that. Forty-two of them had had their contracts expired. Seventy-three had been terminated for other reasons and that left the 423 who had been made redundant.

PN2099

MR BUKARICA: 421.

PN2100

MR SHARIFF: Okay, 421. Of the five hundred - - -

PN2101

VICE PRESIDENT HATCHER: So can you just remind me, over what period was that?

PN2102

MR SHARIFF: That was from June 2013 to four weeks before the date of the survey which was, I think, June 2016.

PN2103

VICE PRESIDENT HATCHER: So three years.

PN2104

MR SHARIFF: Three years. So in the next subparagraph we say, and I don't think this is disputed, that 380 people said that they had received redundancy payments. Do my friend's dispute that? Of that 380 people if we just look at that pool they're the ones who actually received redundancy payments. If you average that over a three-year period that is on average 126.7 people who received a redundancy payment during the survey period. That's 4.3 per cent of the entire sample size of 2618. And Professor Peetz tells us that this sample size is an appropriate sample size and one can draw conclusions from it. The four - - -

PN2105

VICE PRESIDENT HATCHER: That's per year, the 4.3?

PN2106

MR SHARIFF: Yes, that's per year.

PN2107

COMMISSIONER JOHNS: So what conclusion do you say we draw from that?

PN2108

MR SHARIFF: 4.3. That the conclusion you draw from that is that the incidents of redundancy in the black coal mining industry is no different to the others, and I took Professor Peetz to the OECD report about that, and, of course, the conclusion in the OECD report, bearing in mind they use a different data set of displaced workers, is that the incidents of redundancy is higher in manufacturing and construction and the rate of redundancy for mining is hard to discern because it's a subset of agricultural, fishing mining, that category. But the rate of 4.3 per cent redundancy is not dissimilar I should add, I will come to this later, from Professor Peetz's own derivation of the numbers of redundancy based upon newspaper articles and media reports since 2007. And he comes to a figure of around 1300 redundancies per year, on his estimation of it, which over a sample size of 44,000 – sorry, not a sample size, across an industry of some 44,000 people, I don't have my calculator here, but it roughly gets you to about six to seven per cent.

PN2109

He says, of whatever data set he relied upon, in the body of his report he says there was 16 per cent of the sample size that were made redundant over the three year period of the survey. So that on average is slightly over five per cent on whatever data he used. So whichever data set you're looking at the bookends are something from 4.3 per cent to something like six to seven per cent, which, on the OECD report, seems to be largely in line with other industries. It's certainly lesser than manufacturing.

PN2110

VICE PRESIDENT HATCHER: So what's the economy wide figure?

PN2111

MR SHARIFF: I'll need to go to that. Does your Honour have the supplementary report? That's at exhibit 12.

PN2112

VICE PRESIDENT HATCHER: Yes.

PN2113

MR SHARIFF: At page 34. This is, of course, as Professor Peetz explained, a percentage of the contribution to overall displaced workers. But the point we were making is that - - -

PN2114

VICE PRESIDENT HATCHER: So does this have an economy wide figure of the percentage of workers who are made redundant per year?

PN2115

MR SHARIFF: I don't think it does, but our point is that the incidents of redundancy, as a proportion to overall displaced workers, is lesser than the contribution of other industries to the overall displaced workers.

PN2116

VICE PRESIDENT HATCHER: Well, that depends on the size of the industry, doesn't it?

PN2117

MR SHARIFF: No. But I'll just see what we can turn up.

PN2118

VICE PRESIDENT HATCHER: These are just percentages of the number isn't it compared to the - - -

PN2119

MR SHARIFF: That's right. That's right. So I'll see if we can turn up whether Professor Peetz actually identifies a general industry figure. But one of the troubles with looking at redundancy numbers over the last two or three years, and Professor Peetz in his report accepted this, is that one's concentrating in the last three years during a period of decline in the mining industry which commenced in 2012. And he says in that part of his report, and we've provided the reference, that these numbers are higher than expected because of the current decline. But

one has to bear in mind, as Professor Peetz also accepted that redundancies occurred during peaks. And that that occurs because of various reasons which he readily conceded, including outsourcing, the entry of labour hire, the entry of contractors, and the natural depletion of mines.

PN2120

But just coming back to what we've drawn from the data coming now to page 21, subparagraph (n), 320 – forget the "of the 513 people", but the 320 of the surveyed participants were employed by mine operators by the time their employment was terminated. Now, Mr Taylor jumped up and said something about demarcation issues. Our point about mine operators is that when one is looking at the survey data results one shouldn't proceed on the assumption that all of these people are going to be covered by the black coal mining industry award, or have it applied to them.

PN2121

VICE PRESIDENT HATCHER: When you say mine operators, as distinct from contractors, you mean or - - -

PN2122

MR SHARIFF: Yes. One hundred forty-three people had not worked since their employment was terminated, and that included people who had voluntarily retired and those who had looked for work but then decided to retire. Of those who had been made redundant 129 found paid work within four weeks. Two hundred and forty-five found paid work within six months. Two hundred and seventy-seven found paid work within a year. Fifty-one people already said that they were in jobs without paid annual or sick leave. Two hundred and fifteen people found work but where they could work 38 hours or more a week. One hundred and twenty-four people were not actively looking for work. Three hundred and twenty-six people said that they remained at the same address. A further 36 people moved but to the same town and the same area. Of the 62 people who moved to another address that was more than 50 kilometres from their pre-termination address, 26 people did so for personal reasons, 16 did so to take up another job, and you'll recall only one said that they moved because they were unable to pay their mortgage commitments. One thousand three hundred and fifty-five of the overall 2618 had an average weekly pay of 2000 or more.

PN2123

And then the age profiles are as we've set out. But consistently with the other evidence few people are in the bracket of over 65 and there are people in the bracket of 60 to 64, which Professor Peetz said was entirely consistent with the trend in the rest of the industry albeit with the limitation that people in blue collar and labour intensive industries tend to exit at an earlier age.

PN2124

So we then draw some conclusions from that which we state at paragraph 39. I accept in relation to subparagraph (a) that's our derivation of the 4.3 per cent from the 380 that had received redundancy payments. Our friends might have a different view on that, but we say, in any event, if one looks at Professor Peetz's reports he says that there was 1300 redundancies which roughly relates to the general rate of redundancies in the broader economy. Now, I'm a bit concerned

about that statement, so can I invite your Honours just to qualify that. We'll just check whether there was, in fact, any evidence in his report about what the general rate was in the broader economy.

PN2125

VICE PRESIDENT HATCHER: That number of redundancies, does that include involuntary redundancies, does it? It would appear to be the case, wouldn't it?

PN2126

MR SHARIFF: Yes. But your Honour raised that on a couple of occasions during the course of some of the cross-examination of witnesses from both camps. Voluntary redundancy, I think, Mr Taylor clarified this with one of the witnesses, I forget now who, that we're still talking about where a retrenchment occurs. A retrenchment is occurring and people nominate themselves to say "Look, I'll go". That is still, as I understand it, taken as a redundancy, but it's given a label of a voluntary redundancy because those people are happy to go on a voluntary basis.

PN2127

VICE PRESIDENT HATCHER: Well, I mean, I - - -

PN2128

MR SHARIFF: Is there any difference? I think - - -

PN2129

VICE PRESIDENT HATCHER: Well, I was somewhat perplexed as to whether redundancy of that nature is actually covered by clause 14.2 which refers to a termination at the employer's initiative.

PN2130

DEPUTY PRESIDENT GOSTENCNIK: I think I expressed this when the issue was raised but it's my understanding that a volunteer for redundancy really puts in an expression of interest.

PN2131

MR SHARIFF: Correct.

PN2132

DEPUTY PRESIDENT GOSTENCNIK: And that employer can either accept or reject that.

PN2133

MR SHARIFF: Correct.

PN2134

DEPUTY PRESIDENT GOSTENCNIK: If it accepts the expression of interest it then terminates the person's employment for redundancy in order to be caught by the clause.

PN2135

MR SHARIFF: Correct. Yes. And we would say caught by the clause. And I think that's a position that's accepted at least by Mr Bukarica.

PN2136

VICE PRESIDENT HATCHER: So does that mean there's no capacity for an employer to attract volunteers with a lesser payment than is provided for in clause 14?

PN2137

MR SHARIFF: I don't think, and I think the ATO would have something to say about this, that it's open to an employer simply to voluntarily retrench someone who wants to voluntarily be retrenched. It still has to conform to the process.

PN2138

VICE PRESIDENT HATCHER: But a lot of redundancy packages which I've seen have a different scale, a lower scale for voluntary redundancy.

PN2139

MR SHARIFF: This scheme doesn't. And as far as my instructions go – I will just check those. Yes, I'm told that in order to get it approved as a voluntarily redundancy of that type one has to get approval from the ATO, and then it's treated as a voluntary retirement payment. But I think your Honour is asking a different question which is some industrial instruments, agreements and the like have a different scale for people who – I'm thinking of one in particular involving the public sector.

PN2140

VICE PRESIDENT HATCHER: Yes.

PN2141

MR SHARIFF: Where there's a – I think it might be the ATO where there's – if you take a voluntary redundancy there's an inducement – you get something but you get a slightly lower pay whereas if you stick around you get a higher pay. There's nothing of that type in this award.

PN2142

We then turn to Professor Peetz's evidence. Professor Peetz's evidence in relation to the background and characteristics of the black coal mining industry largely based upon publicly available data. Other parts of this report rely upon general academic literature. We say his analysis of the survey results should be given no weight. One should actually look at the survey results and draw your own conclusions about that. And then insofar as his evidence is relevant, the critical parts of it, we've set out at paragraph 43. The black coal mining industry is concentrated in particular regions in New South Wales. It is an industry that has had substantial growth since 1973. It's also an industry that is subject to economic cycles of peaks and troughs. But he conceded that there are several other industries that are also subject to economic cycles. The rate of employment and the number of employees tend to follow the economic cycles. There's nothing novel in that. And then at subparagraph (e) although retrenchments do occur Professor Peetz fairly conceded that retrenchments occurred during peaks. This is because of factors such as the ones I mentioned before.

PN2143

And then we deal with the 1300 redundancies per year point. That we also note that he conceded that the period selected by him related to a downturn. He had not had regard to any of the CMIEG evidence about their redeployment options which showed job growth as well occurring at the same time. He agreed that there's been consolidation in the industry amongst the major operators. He accepted that there'd been greater development of the regions in which black coal mining has been undertaken and at least in relation to regions of which he had some knowledge, the Bowen Basin and the Hunter Valley, there had been development. He also accepted the Hunter Valley and Illawarra region already had population centres in other industries. None of this is really novel.

PN2144

Professor Peetz also accepted that types of employees engaged in the industry are trade qualified and degree qualified, and you'll remember that in the survey results over 70 per cent had trade qualifications or higher. He accepted that mining workers are the highest paid in relation to average weekly earnings. There is a strong relationship between age and tenure, but that's not unique to the black coal mining industry. He accepted that there was a small trend towards people retiring at an older age, but that's not unique. But he accepted that people in labour intensive and blue collar work tend to exit earlier than in other industries.

PN2145

We've set out some of the other concessions he made at subparagraphs (o). At (p) the general casualisation was occurring in the workforce. And then at subparagraph (q) we already addressed on. At subparagraph (r) Professor Peetz accepted that the evidence contained in his report as to the experience of redundant was not unique to the black coal mining industry. It applied equally across all industries. Just pausing there Professor Peetz had given expert evidence in the 2004 redundancy test case. And if one looks at the type of evidence he gave in those proceedings it is of a very similar nature as to the experience of redundant workers.

PN2146

He was then cross-examined about the survey results. I won't go into that again. He then conceded that, on his analysis, two-thirds of the employees would be unaffected by the variation proposed by the CMIEG. He further accepted that of the remaining third of the employees he'd not accounted for employees that were being covered by enterprise agreements and in fairness he'd not accounted for the grandfathering provisions.

PN2147

Now, in his supplementary report he addressed matters that should have really been addressed in-chief. Putting that to one side, he pointed to three points of distinction, which was the alleged rate of re-employment of retrenched workers was less likely, the rate of employment in non-permanent casualised and part-time work was greater, so he said on re-entry, and the terms and conditions of employment were lesser than in all other industries aggregated. Now, we say no weight can be placed upon those opinions and we set that out. There are different data sets. I won't go through the detail of this right now noting the time.

PN2148

In relation to the rates of re-employment we note that he used the figure of 420 but we say that the more reliable figure is 380. In terms of return to the workforce in non-permanent work, again, he hasn't adjusted for the differential in the data sets between displaced workers in the OECD and the data set he's looking at.

PN2149

Just going back to his conclusion about the rates of re-employment, his initial conclusion about that was that the rates of re-employment of black coal mining industry workers compared to the rest of the industry was a little less likely, and then of course he changed that to some extent less likely in his final report based upon some commentary he got from our friends.

PN2150

Now, in relation to conclusions about whether employees were in lower paying jobs, of course, he was looking at two different data sets. He's looking at a quantitative analysis based upon a longitudinal study being the HILDA which is the basis of the OECD report as compared to qualitative and subjective questions put to workers about whether they feel they're a little less worse off or a little bit better off and the like.

PN2151

Critically we say he seems to have focused his attention exclusively in identifying points of distinction, that is, in ways of drawing out adverse effects to black coal mining industry workers but he didn't dwell on any of the other upsides such as the fact that black coal mining industry workers earn more than the rest of the industry. He didn't examine any of the things that you would expect someone in that position who is doing an independent job trying to assess the real relative differences between black coal mining workers and the rest of the industry would do. In any event, we just say he was highly defensive about some of these aspects of his evidence and we question his independence, but ultimately I'm not inviting your Honours to make any conclusion about that. It is what it is.

PN2152

There were aspects of his report, and aspects of his evidence where he was clearly trying to defend his position and give evidence in support of the union's submissions, but there are aspects of his report that do have some value. But those parts of his report where he's analysing the Essential Media survey should be given very little weight because he's drawn all kinds of conclusions from that which we say are unsafe to rely upon. Rather we urge the Commission to actually look at the responses given to each of the survey questions in exhibit 14.

PN2153

In terms of Gavin White's evidence we make much the same point. I don't know if the Commission has actually looked at Mr White's report. It just quotes percentages from the survey results. It's just useless. It just recites some of the things, and, in parts it does so very unfairly and we say not accurately when you actually look at what percentages he's quoting, the questions that were put, and the end number that he identifies on each of the pages of the report. So we invite your Honours to treat that report with great caution and rather rely upon the Essential Media results themselves.

PN2154

Dealing next with the lay witnesses we tried to break this down into category. Evidence is still award and agreement coverage. Well, you've got some of that evidence from Mr Vickers:

PN2155

In large measure the employees are covered by enterprise agreements that are going to be unaffected by the proposed variation.

PN2156

To the extent that some of the enterprise agreements refer back to the award, there will be a question of construction as to whether that's a reference back to the award as it stood at the time or is varied from time to time. That raises some questions of construction. I'm not in a position really to deal with that without having each of the enterprise agreements before me, but there'll be a question of construction in those cases and that's really all I can say in those limited cases of the enterprise agreements that refer back to the award entitlement.

PN2157

But in large measure the employees are covered by enterprise agreements that identify the retrenchment entitlement. Evidence is that the staff is slightly different. They are, we accept, less likely to be covered by enterprise agreements. It's only, I think, approximately 12 per cent reliant upon something cited in Ms Bolger's evidence. But in large measure the staff, and Mr Taylor has tendered some of the sample contracts from each of the various companies, either have a contractual entitlement bound into their contracts to a retrenchment entitlement or there's an entitlement in a policy. And the Commission was taken to, for example, some correspondence with BMA about the policy. And, of course, BMA has made it clear to the staff, who are covered by relevant unwritten policy, that they will remain unaffected by the award provisions.

PN2158

Then we deal with the evidence of lay opinions where Ms Bolger gives evidence as to what she anticipates will occur, and Mr Vickers and Mr Colley do the same. All of that has got to be taken with a grain of salt. The real politic of this is that we're dealing with a high union density industry. There is collective bargaining that occurs certainly amongst Mr Bukarica's members, and to a lesser extent, amongst Mr Taylor's members. But the idea that this is a variation to the award is going to result in people sitting down at the next bargaining meeting and saying, Well, it's the NES entitlement or the highway, there's just no basis for those types of opinions to be expressed, and it's just unrealistic with respect.

PN2159

VICE PRESIDENT HATCHER: I assume your clients must see some benefit in this otherwise they wouldn't be putting their resources into the case? That is, it must be affecting somebody otherwise we wouldn't all be here.

PN2160

MR SHARIFF: Well, the benefit is ensuring that the modern award that applies to this industry has what it's meant to have which is a minimum safety net.

PN2161

VICE PRESIDENT HATCHER: Well, I mean, I'm sure your clients have an honourable interest in ensuring we discharge our duties in accordance with the Act, but I suspect there's a real life pecuniary interest, I'm not being critical, in there as well. That is, they're advancing this case because they intend for it to apply to some real life redundancies.

PN2162

MR SHARIFF: But just - - -

PN2163

VICE PRESIDENT HATCHER: That's not a criticism. It's just - - -

PN2164

MR SHARIFF: But what flows from that? Let's assume there's some intent unstated based on speculation that they want to, as it were, lower the standard so that there's some kind of race to the bottom. There are, according to Mr Bukarica's clients and Mr Vicker's evidence, virtually all of the CMIEG participants with enterprise agreements currently in place. There's no applications to terminate them, at least that I'm aware of, or I've been instructed about. So they are extant entitlements. When those agreements expire and there's a process of negotiation that occurs, well, why should one assume that the CFMEU or Professionals Australia are passive participants in collective bargaining? That idea in this industry is a remarkable one. There's an extant entitlement in enterprise agreements. They'll bargain; they'll bargain on terms and conditions as they see fit. I don't expect Mr Bukarica's client or Mr Taylor's client to just fold, but they'll bargain in the way that they usually do. And that is ultimately what the award is there for. It's to provide the minimum safety net from which bargaining can occur. Not the ceiling for it.

PN2165

This is just all the wrong way around. And so the interest is to ensure that the award has and operates as a minimum safety net. And nor have we put forward, at least in the proposed variation, a proposal that strips away the scheme altogether or takes it back to the NES. We've put forward a proposal that seeks to retain elements of the scheme but with variations to the amounts.

PN2166

There's then evidence from particular employees. We make the point that the CFMEU and APESMA have called evidence from various employees. Some of that evidence is objectionable; bare assertions; speculation; unsubstantiated facts. And it's not right. Our friends say, well, all this evidence is unchallenged. Well, we're not going to spend hours and days challenging people about the basis for their unsubstantiated assertions or speculations. We haven't taken that kind of technical and cumbersome approach to the management of the evidence. But we have taken objections, and we've taken objections where appropriate, and the Commission will give weight to those witness's evidence subject to those objections obviously.

PN2167

But it's also obvious that the unions have selected, for the purposes of that exercise, particular employees tending to be with long periods of service or particular employees who might have found it difficult in terms of re-employment outcomes. We've provided a table of the experience of each of those. And I'm told that we've identified a few errors in the schedule and the summary of the CFMEU and APESMA of witness evidence which we can amend. And can I undertake to the Commission to amend that as soon as possible, and we'll provide an updated copy hopefully tomorrow. But we've set out our summary of that evidence and you will see that with some of these employees they've in fact been made redundant from various collieries and found re-employment in the past. Some of them are finding it difficult to get re-employment. Some of them have got re-employment. Some of them got re-employment but in different industries. The experiences are varied.

PN2168

But what CFMEU and APESMA have done is present the good stories. They haven't presented the evidence of the employees, based on the Essential Media survey, we know that something in the order of 26 to 28 per cent, according to their own survey, found work within four weeks. Something in the order of 40 per cent find work within 26 weeks. Something in the order of 48 per cent find work in the next period, and I think it's something in the order of 58 per cent of people find work within 12 months.

PN2169

Now, we accept that some of the work is going to be not full time. But what neither the CFMEU and APESMA do is to focus on the 120-odd people who say that they got a 38 hour job in full-time employment. Where are those 120 people? They've selected peculiar examples. And, of course, some of the examples that they've presented in terms of the evidence are people who took the redundancy and retired. So what weight is to be given to that evidence? It's there. Yes, people have had varied experiences, as one would expect across an industry of 44,000 people.

PN2170

Now, the final points we make at pages 30 and following are matters that we have, I think, earlier addressed in either our written submissions and I've otherwise addressed orally relating to why we say circumstances have changed since 1970 and 1983; why we say on application of principle the proposed variation should be made. And then at the very final pages 34 and following we deal with why our proposed variation is consistent with principle and the modern awards objectives and we point out that it has a limited impact upon people. As I say, there's a third on Professor Peetz's measure; we've proposed a grandfathering; we've also indicated that that's our proposal. The Commission is uninhibited by our proposal. The Commission can come to its own conclusion on these things. We have put forward, as best we can, some of the data to assist the Commission as to what other limit it could come to. I've raised some ways that the Commission could approach that task, but otherwise I'd be repeating myself, and I wouldn't want to do that. And unless there's any specific questions that's all I wish to say.

PN2171

VICE PRESIDENT HATCHER: Thank you, Mr Shariff. Are you next or Mr Taylor next, Mr Bukarica?

PN2172

MR TAYLOR: Yes, I'll be going next.

PN2173

VICE PRESIDENT HATCHER: All right. We might take a morning tea adjournment of approximately 10 to 15 minutes and then we'll resume with Mr Taylor.

SHORT ADJOURNMENT **[11.25 AM]**

RESUMED **[11.47 AM]**

PN2174

VICE PRESIDENT HATCHER: Mr Taylor.

PN2175

MR TAYLOR: Thank you, your Honour. Can I just start as I think my friend does, certainly in his written submissions, by just reminding the bench as to why we are where we are today? We had a longstanding scheme, untouched for over 30 years, and the union's made an application as part of the four-yearly review, to alter one aspect of that scheme to simply remove a discriminatory age limitation in respect of one of the two entitlements on redundancy. The response of the employer was to say there should be no change to the scheme; that for various reasons there was no need to remove that limitation.

PN2176

There is now, as a result of the decision to remove that limitation, the outcome of that decision left open one question posed at the end of the decision and that is the bench in effect asked the question - or maybe more accurately granted leave for the employer to ask this question: is there a need to make a balancing change? That, we say, with respect, was all that the full bench was inviting consideration of. A balancing change, we say, is unnecessary for reasons I'll come to. But in essence, there was no cap and the extent to which an age limitation perhaps had the potential to limit the amount that might have to be paid was one that the bench wanted to see evidence of, to see whether in fact, as a result of the removal, there would in fact be a likelihood that employers would ultimately overall end up paying more than was originally contemplated at a time when everyone retired at 60.

PN2177

There is no evidence about that. But even if the bench were against us and of the view that there does need to be some balancing change, it was never - we say - or should never have been interpreted as an invitation for a wholesale review of the entire basis of the industry scheme or an invitation to fundamentally alter that scheme in the way that the employers have invited. At the very highest it was an invitation to do no more than place into the provision something which in effect replicated the net economic effect on employers, which would be no more than something in the order of - as the full bench noted in those final paragraphs of the

decision - something that replicated a cap on one of the two entitlements based on something in the order of about 40 years' service. That's where we are. Nevertheless, we meet the case that the employer seek to make and our written submissions which you have to extract, as my friend did, some of the relevant principles by way of introduction and the first extract is from the four-yearly review of modern awards preliminary jurisdictional issues decision, which wherein the full bench noted that one ramification of the need to insure a stable modern award system is that a party seeking to vary a modern award does need to advance an argument in support of the proposed variation.

PN2178

My friend has said that we are at odds on the question of onus. We are not suggesting that there is - that the Act itself imposes an evidentiary onus but we do submit that the nature of the exercise where a party is seeking to vary is that that party has the onus, if one wants to use that word, to convince the Commission that it's appropriate to do so. It is for the moving party to satisfy the Commission of the appropriateness of the change. So much has been said in those decisions and that isn't to be done simply by making assertions but is to be done on the basis of probative evidence and reference to appropriate material.

PN2179

It is to be done on the implied starting point, that the award in its current form meets the modern award objective. The second extract is from the more recent full bench decision in the stevedoring - I'm sorry, from the security services industry award decision, which was in turn cited by Deputy President Kovavic and Commissioner Rowe in the stevedoring industry award case wherein the full bench identified that the more significant the change in terms of impact or lengthy history, the more detailed the case must be and noted the need to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes.

PN2180

Just touching on that - I'll come back to this - one of the notable absences in the employer case is evidence on the impact of the current provision and its change on employers. One of the features of this industry identified from the outset, when these provisions were introduced, was a recognition by the then coal industry tribunal that you were dealing with employers who could reasonably foresee circumstances in which changes in market forces or simply the end of the life of a mine would lead to redundancies and these were employers who had the capacity to build the cost of redundancies into their operations, which given that these things could be reasonably contemplated.

PN2181

We heard evidence from Mr Edwards, who was the only witness who actually came forward on the employer's side who actually works for an employer, who certainly said in respect of his company provision was made for these things and there is no evidence to suggest that there is some economic incapacity or difficulty in employers doing that which in the absence of evidence the Commission can readily infer they do do, and that is to plan for the inevitable, cyclical changes that occur in this industry and make provision to do so out of the very substantial

profits that are made in the uptake periods, which Professor Peetz gave evidence about and which appears to be uncontested.

PN2182

To that end, can I turn back to where my friend I think quite appropriately started on Monday, and that is the basis for these decisions, the nature of the benefits themselves and the reasons why they were introduced. We do submit that there is a need to retain the industry-specific character of the scheme and that that goes beyond simply the coverage. The industry-specific character of the scheme is - does emerge from the decisions and I just want to deal with those things now by reference to the decisions. I hope the Commission still has copies of the decisions that my friend provided on Monday - the 1973 and 1983 decision?

PN2183

The first - the 1973 decision - was of course a contested hearing; an arbitrated hearing. The upshot of that was the introduction of one week per year uncapped without an age limitation. Mr Shariff quite rightly adds at that time it was without - in circumstances where there was an initial five-year qualification period, something that was removed in the 1983 decision in circumstances where the first-on, last-off practice then in place was said to mean that the five-year qualification period had a particularly adverse effect on employees who were most likely to be affected by redundancy.

PN2184

With respect, one aspect of the employer case which does fundamentally affect the character of this aspect of the scheme is to introduce a cap on something that was never capped, even in the sense of an age limitation, such that, as the Vice President pointed out to Mr Shariff, the net effect is someone on Mr Shariff's revised clause will actually get less than one week for every year of service if they have 28 years or more service, something that was never contemplated from the very beginning. The reasons for the one week per year of service are things which are echoed again in 1983 and which, as I'll take you to in a moment by reference to the evidence in this case, continue to characterise the industry.

PN2185

Collieries close down in whole or in part. They're placed into care and maintenance or parts of them are and you'll recall Professor Peetz's evidence at page 12 and 13 of his first report that this is not an industry where one finds labour hoarding. That is, this is an industry where at whatever point it becomes uneconomic through coal prices or otherwise, there is an immediate reaction: people are made redundant rather than, as one might find in other industries, staff are kept on at least to some degree with a view that the industry will pick up again.

PN2186

VICE PRESIDENT HATCHER: What if it's a temporary shutdown - for example, when they had those cyclones in Queensland?

PN2187

MR TAYLOR: I think I may have to ask - - -

PN2188

VICE PRESIDENT HATCHER: I'm just looking at - the retrenchment payment has more confined criteria than the severance payments.

PN2189

MR TAYLOR: Yes.

PN2190

VICE PRESIDENT HATCHER: It just occurs to me - I'm just trying to think what categories of redundancies might occur which might not be covered by 14.4.

PN2191

MR TAYLOR: Is your Honour's question - just so I understand it - whether 14.4 is in effect a subset of people who might be made redundant due to redundancy of 14.3 and who might be in that wider category?

PN2192

VICE PRESIDENT HATCHER: On its face that appears to be the case. I'm just trying to work out realistically whether there is any other category of redundancy. But that - I think it was referred to in one of the decisions - case where the mines were shut down because of flooding was the only scenario that immediately came to mind.

PN2193

MR TAYLOR: Yes, I can't immediately answer that question. I'm not sure if Mr Bukarica, whose knowledge of the industry is certainly better than mine, might be in a position to identify any situation in practice where it's ever been the case that someone has fallen - that an employer has fallen within 14.3 but not 14.4. But what we say is clear from both the 1973 and 1983 decision is that there was a recognition that not only do collieries close down in whole or in part but they do so as part of a cyclical nature of the industry, where it is the case that one sees substantial changes in total employment over not just months: we're not talking about cycles which turn in the course of a few months or even a year but over years, whereby in a downturn cycle one sees substantial reductions in total employee numbers such that there is a real likelihood that employees made redundant during that period are going to find it very difficult to find employment again in the industry in which they are skilled and trained and in the location in which they work. I'll come to Professor Peetz's evidence just to - as to that feature being a feature that appears from the material to have been a feature - is a feature of this industry and which does distinguish it, we say, from others.

PN2194

The 1973 decision identifies, of course, the fact that those who are in middle-age - this can be a major upheaval in their life and affect their family. That - when one is talking about whether there should be a cap or not one of the characters of the scheme that is uncapped is to recognise that the older workers - those who've worked continuously in the same career whose skills are specific to an industry are going to find it harder to find work. The idea that Mr Shariff perhaps implicitly puts forward by way of exhibit 43, that there is only 30 per cent that have more than nine years or only 13 per cent that have more than 25 years' service when they are retrenched doesn't, we say, take into account that the

character of the scheme has always been to recognise that it is those people who are most likely to suffer the effects of redundancy.

PN2195

The second decision is the 1983 decision: two weeks for every year of service, uncapped but subject to the age limitation which of course was not there - I say of course because the full bench has heard these arguments and has already made a decision about this - of course it was not there and was not stated to be there to actually place a practical cap on the potential amount that employers would have to pay out but rather said to prevent a windfall to someone who was about to retire in circumstances where there was a compulsory retirement age. As I already indicated what we don't have in this case is any evidence. We do have evidence that workers are working past 60.

PN2196

What we don't have is any evidence that as a totality from the time as an average they tend to start to the time they tend to finish, will be more likely to have more than 40 - substantially more or even in any way significantly more than 40 years' service and therefore have a greater economic impact than would have been the case back when this was placed into the award. But if the bench could bear with me and open up the decision at page 32 - this is the 1983 decision - and Mr Shariff in his opening identified correctly that here the bench records a series of findings relevant to the ultimate conclusion. He did, in fairness to him, identify some of these. Can I just identify a few more? He did start appropriately with the fact that the bench then considered coal-mining to be a career industry and there doesn't appear to be any reason to come to a different view on the evidence in this case. Certainly the evidence that has been denigrated as pure opinion of the many, many employees, they all demonstrate the specialised nature of their qualifications and experience that is peculiar to the coal industry. At paragraph 3 there is a reference to this cycle of growth and decline which we say is a characteristic of this industry. As I said, I want to come to that part of Professor Peetz's report where he deals with this.

PN2197

In paragraph 5 there is reference to technological improvements which charaterise the industry then and as I understand my friend's case, that continues to characterise the industry today. In paragraph 7, there is then a reference to some specific matters which were taken into account and that is benefits that were then available and which, therefore, to the extent to which my friend wishes to call in aid these benefits to suggest that because of their existence there needs to be a different approach taken now, this needs to be borne in mind, these were taken into account then, one of which is of course notice on termination. The next is accrued sick leave - pay it out.

PN2198

I think Mr Bukarica's evidence identifies why that was included: it was actually included because employers were concerned that employees were otherwise taking sick leave and would be less likely to do so if they could be paid out if they were made redundant. Annual leave is identified and could I just identify the last one: preference in re-employment at Roman numeral (vi). So at this point the bench took into account something which is not a feature of the industry anymore

but at that time was. Those who were retrenched would be preferred when things came up again. The removal of that now, if anything points to a likelihood of greater impact than was the position then and at the very least offsets anything that might be said to be the effect of the loss of a first-on, last-off principle.

PN2199

If I can digress for a moment on a related topic: something has been made by the employers of the potential for redeployment and the suggestion that the industry has changed in one respect and that is that there has been some consolidation which might make it more likely for employees who are not needed in one place to be able to be redeployed. One must bear in mind when considering that submission that clause 14.5 contains an exemption from an obligation to make redundancy payments for those who are offered a job in the same - at this point it was district, I think the word now is locale - who are given a classification rate of pay which is no different to the classification rate of pay that they previously had. So the greater redeployment capacity doesn't affect the question of retrenchment payments. If anything it points the other way because surely as a matter of principle the higher retrenchment payments are for those who can redeploy but don't wish to, the more likely that it is that they have an incentive to redeploy. If it's lowered they might be less likely to attempt to do so.

PN2200

In paragraph 8 there is like in the 1973 decision reference to the hardship that retrenchments will cause and in paragraph 9 there is a reference to cost to the employers. The fact that employers led little useful evidence of what was then said to be an unexpected cost, now of course we're dealing with costs which are expected and there is no evidence to suggest that these aren't costs which are budgeted for. In that regard can I ask the bench just to move forward to page 36 at about point eight of the page, a paragraph that starts, "However:"

PN2201

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. Such circumstances are technological change, market forces and the working out of reserves.

PN2202

VICE PRESIDENT HATCHER: Sorry, Mr Taylor; where are you now?

PN2203

MR TAYLOR: I'm on page 36 at about point eight of the page. There is a paragraph there that starts, "However" - - -

PN2204

VICE PRESIDENT HATCHER: Yes.

PN2205

MR TAYLOR: The key words there is that at this point - and we say it's no different now - the tribunal member was identifying that there was no reason why an adequate provision couldn't be made for circumstances which are reasonably

foreseeable, those circumstances being technological change, market forces and the working out of reserves.

PN2206

VICE PRESIDENT HATCHER: The previous paragraph identifies some of the other circumstances which may apply.

PN2207

MR TAYLOR: Yes. I'm sorry, your Honour?

PN2208

VICE PRESIDENT HATCHER: The last sentence of that preceding paragraph refers to flood, fire explosion and creep. What is creep?

PN2209

MR TAYLOR: Mr Bukarica needs to double-check that. I certainly can't tell you. I could hazard a guess but I might be wrong about the nature of movement of soil that might occur in certain conditions. So at the bottom of page 36.9 one finds - sorry, at the bottom of page 36 one finds sentences which I think my friend has extracted in his submission, third-last line:

PN2210

The matters therefore taken into account are - - -

PN2211

Then there is a series of matters taken into account and we say they are factors which - with the exception of loss of seniority which we say goes both ways given what was then preference of employment - factors which continue to be factors that characterise the industry today.

PN2212

SENIOR DEPUTY PRESIDENT HAMBERGER: You might want to address this later on but it's interesting the Essential survey suggested actually very few people do move after having been made - I mean, move as in move house.

PN2213

MR TAYLOR: Yes.

PN2214

SENIOR DEPUTY PRESIDENT HAMBERGER: There seems to be a suggestion here that in fact that was something that was typical; that you would actually have to move to find another job, whereas actually the survey evidence suggests at least these days that's actually not common at all.

PN2215

MR TAYLOR: I'm not sure they're mutually exclusive. I think what may have been the evidence before the tribunal which is certainly the evidence of a number of the individual witnesses - and I'll come to that - is that a number of them certainly in a downturn of the industry or unable to find work in their location. However, particularly once they get older and they have families and children they also find it difficult to move, which means they do actually find it difficult to

work in their location. It is true that amongst some they find work and we have Mr Shariff's annexure which identifies that a number of the individual witnesses give evidence that they did find work and so one of our witnesses at one point lived in the South Coast but could only find work around the Lithgow area.

PN2216

When he was younger that was okay, he moved to Lithgow. When it happened again a second time and he had a family he then commuted for a period of time before he could find a job in his location. Others unable to move from their location have had to find work outside of the industry and one of the other employees said to be employed - Mr Davey - has been able to pick up some casual part-time work as an exam supervisor for Newcastle University; for a couple of months a year he works part-time. That's the work he's been able to find in the locale. So obviously different people have different circumstances but one of the things that we say was true then and is true now is that those with longer service are more likely to be older.

PN2217

Those who are older are more likely to have difficulty, certainly in periods of industry downturn, finding alternative work and being able to move location if there happens to be work at another location. Yes, and Mr Fagir reminds me of a matter that I think the Vice President asked the Professor to clarify which might have affected the essential results, and that is that those who did move may have been less likely to be contacted and so there might have been some effect on the statistics - I don't think Professor Peetz could quantify it - as a result of that.

PN2218

VICE PRESIDENT HATCHER: So there was an associated question whether the survey was of financial members or anybody on the books: do you know the answer to that - which might affect the same issue - - -

PN2219

MR TAYLOR: I'll get some instructions. Before I turn to the evidence, can I just identify one more point that we say emerges from the legislation and which we've set out in our written submissions but the essence of it is this: that the Act when enacted permitted industry-specific schemes to deal with redundancy those schemes must have been contemplated by the legislature. There was just four of them. We've identified the industries in which they are to be found. They were adopted. There is nothing inconsistent, we say - there is no reason for the Commission to come to a view that there is something inconsistent with the notion of a fair, minimum safety net that reflects an industry-standard scheme in the form it was adopted. That was clearly intended.

PN2220

VICE PRESIDENT HATCHER: Mr Taylor, am I right in saying that apart from industry schemes redundancies are not a permitted matter in awards?

PN2221

MR TAYLOR: Yes, that is correct. So one finds in section 123 that the NES in respect of redundancy doesn't apply to those who have an industry-standard scheme. The effect of it is that the legislature is in effect saying the standard for

these people is their scheme; that is the appropriate standard. If the Commission so includes that long-standing standard, then that is the fair minimum safety net condition in respect of redundancy. We do say that there is no reason why the Commission shouldn't retain the nature of the scheme as it has been in place for 30 years and that is a nature of the scheme that has a character that emerges from those decisions of an industry where people are highly skilled in a very specific industry, making it very hard for them to work elsewhere and an industry with peaks and troughs, no labour hoarding, where one finds in the trough periods the real likelihood of a much more significant impact than one might find in industries that don't bear that characteristic.

PN2222

VICE PRESIDENT HATCHER: What provision was the NES provision which excluded industry-specific schemes?

PN2223

MR TAYLOR: Sorry, I think I might have given the wrong number. It's 123 - I got that right, I think - subsection (4)(b), which applies to subdivision (b), which is of division 11, which is the subdivision which deals with redundancy pay. We deal of course in greater detail than I'm going to deal on my feet with the nature of our evidence. But can I highlight some aspects of the evidence particularly those that weren't the subject of cross-examination, and can I start by asking the Commission to look at Professor Peetz's first report, wherein he identifies aspects of the industry which appear to reflect the character of the industry relied upon at the time that the standards were created? Can I firstly start with pages - I referred already to the lack of labour-hoarding, pages 12 and 13, but can I ask the Commission to go to pages 21 and following, dealing with the number of employees here. Going over to page 22, Professor Peetz refers to statistics of number of employees which is then summarised on page 23 by reference to figure 14. What that shows is that there is - employment indeed has peaks and troughs.

PN2224

The troughs are significant in quantum. So if you take approximately the period from 1952 to 1964, one sees employment dropped in the order of 50 per cent and it appears on a reasonably linear basis, such that those retrenched during that period of what appears to be continual contraction, would be likely to find difficulty obtaining employment. Then there is a period of growth which does end at around or a little after 1983, and then again a period of contraction, where if you take the ABS figure the number of employees again is contracting in the order of 50 per cent. The JCB figure, the contraction is less: it looks something closer to a third but nevertheless a substantial reduction.

PN2225

VICE PRESIDENT HATCHER: What caused the contraction over that period?

PN2226

MR TAYLOR: I'm sorry?

PN2227

VICE PRESIDENT HATCHER: What caused the contraction over that period? (Indistinct) the professor is unable to answer but the graph on page 4 shows

continual growth in production over that period in a fairly straight line. But you have this collapse in employment.

PN2228

MR TAYLOR: Yes, I don't recall anyone giving evidence about that. If the two are to be read together one must assume some substantial productivity improvements during that period allowing for increase in production to occur at the same time as substantial contraction in employment. The next figure, figure 15, which is ABS data between November '84 and February 2014, if one takes a peak at about January 1987 and a bottom point at about February 2001, again, you are looking at something over 50 per cent change; 50 per cent reduction in employment over that period, albeit the line here is less linear.

PN2229

Similarly, figure 16, the peak if one is taking the total figure, combining both open-cut and underground, compared to the figure at about September '15, you're looking at that period in the order of a 30 per cent reduction and there is no suggestion that it had bottomed out at that particular point. So the evidence does appear to show that this is an industry of peaks and troughs and not peaks and troughs that occur in a very short period but over years. The second aspect of Professor Peetz's evidence that I don't ask you to turn to but I remind the Commission of is the evidence of the nature of the industry, characterised as it is by large companies that earn very significant profits in the uptake periods. There is no reason to think and there is certainly no evidence led by those who could have led it that they are not in a position to both plan for what they reasonably expect to occur and budget for that which is the current entitlement. That doesn't appear to have changed.

PN2230

The last aspect relevant to my client that I wanted to emphasize is that part of Professor Peetz's material from page 52 onwards of his first report, which specifically deals with professionals. We have summarised in our written submission some of this material but from page 55 under the heading, "Effects on Professionals", Professor Peetz identifies from data that is published of the significant effect that redundancy in the minerals industry can have on professionals and in the middle of page 56 of those who are unemployed 55 per cent have been unemployed for six or more months, including 30 per cent who have been unemployed for more than 12 months.

PN2231

At the bottom of the page and one twentieth of all workers had experienced a forced redundancy within the previous 12 months or are unemployed at the time of the survey. At page 57, the third paragraph:

PN2232

The largest increases in unemployment were in older age groups.

PN2233

Then the next paragraph starts with the sentence:

PN2234

The increases in unemployment amongst older workers were even greater if compared with 2013 or 2012.

PN2235

The next paragraph starts with the sentence:

PN2236

Consistent with the other material that he presented to the Commission that older professional workers in the sector were either more likely to be made redundant or had greater difficulty in finding jobs again or more likely both.

PN2237

VICE PRESIDENT HATCHER: So is this all from that AusIMM survey, is it?

PN2238

MR TAYLOR: Yes, it's all from that survey which is footnoted at paragraph 33 and I think first appears in the statement at footnote 27 at the top of page 52. So in respect of my members - sorry, my client's members - we say that there is material - not forgetting that these are people who are much more likely to be impacted by any change, given the evidence that Mr Shariff has accepted, that something in the order of 80 or 90 per cent are not - in respect of 80 or 90 per cent the award applies to them. It doesn't just cover them. To the extent to which they're covered it applies to them. The impact on them is clearly potentially significant.

PN2239

I read what he says about the need to alter contracts or policies through applying contractual principles but the truth of the matter is employers have a significant bargaining power when it comes to matters such as this and certainly when it comes to policies, whether written or unwritten. There seems to be no - with great respect to Mr Edwards - contractual reason why they can't be altered with a stroke of a pen. So there is particular potential for changes here to impact on the members of my client. We have summarised in our submissions some of the conclusions from the Essential survey. We - Mr Shariff has criticised them as being bald statistical statements. I don't think he says they're wrong. We say that they are - and we've summarised them in our written submission - they are useful in demonstrating that the character of this industry has remained unchanged; that these things have particular impacts on workers in this industry of the nature identified in those earlier decisions.

PN2240

We do also rely on the evidence of the seven individual members who present evidence and were not required for cross-examination. The vast bulk of their evidence is neither speculation or opinion. It is simply describing to the Commission their qualifications and their personal experiences. So what one learns from that - albeit we accept it's anecdotal material but it is material which is consistent with the evidence as otherwise presented - firstly, that it is and has proven for them hard to get work when they're older and they've worked continuously in a particular industry. So Geoff Wright, Mr Greg Davey, tell you that - Mr Wright has, having been retrenched after working in the industry his

whole life, been unable to find other employment despite applying for such jobs as a triple-O operator and a bus driver.

PN2241

Mr Davey is the person who I indicated earlier who has picked up a part-time casual job as an exam supervisor. He did identify in his statement that he was a fitter by qualification and one aspect of the employer's case appeared to be some notion that those who have a trade qualification can readily move to other industries. What Mr Davey tells you - and there are other witnesses who say this too - is that being off the tools for many years and doing a job specific to the coal industry led them to find it not possible to find work, notwithstanding their qualification. That is true also for those with specialised skills.

PN2242

So Ms Farrey - exhibit 33 - is a geologist. She applied for multiple jobs without success. Her speciality was coal-mining geology and not readily able to find work outside of the coal-mining industry, ultimately finding casual employment with a contractor and if she could find work in another commodity industry but it would require her to both move and go back to an entry-level position. The same is true of Mr Wright who is a surveyor by training. He is someone who gives evidence that his surveying qualification is specific to coal mining. If he wanted to move to become a land surveyor he would have to obtain a fresh qualification and do another two years of work experience under a qualified surveyor. A number of the witnesses give evidence that they were employed for many years as deputies or under-manager and describe in detail the highly-specialised nature of that employment which means that they are very qualified to be a deputy or under-manager in coal mining and not otherwise, hence the difficulty they have had in finding other work.

PN2243

A number of them have given evidence consistent with what we say is the overall character of this industry that it is hard when the industry is in a downturn to find a job that allows you to stay in the same location that you've lived and where your family live and that it is much harder when you're older and have a family to be able to relocate. We have summarised a number of aspects in our written submission. Can I turn to the employer evidence now? The bench in the April 15 decision which removed the age cap invited in effect Mr Shariff's client, if it wished to make such an application, to provide evidence as to a number of different matters, one of which was the changing age profile and we accept that evidence to that effect has come before the Commission.

PN2244

But also invited was to provide the Commission as to the typical circumstances faced by those made redundant; perhaps a reference to the potential economic impact on employees. Mr Shariff has said that's really in our camp. We know about that and he doesn't. Certainly there is no evidence from them on that and there is our evidence which points only one way. Secondly, the bench invited the employers to provide evidence as to cost; that is the economic impact on employers. I've already made the point that whilst that was clearly in their capacity they have chosen not to lead that evidence, leading to the inference that this is a cost which is both bearable and for which they plan.

PN2245

There is no suggestion that these very large companies that operate in circumstances of substantial profits in certain periods are not able to do so. Ultimately the case led by the employers was an attempt to prove a fact which was not proven: that is that this industry is no different to any other industry. That evidence really just relied on two witnesses: Mr Gunzburg, and even then only as to one matter, that is, his assertion that his ABS data demonstrated that people retrenched from this industry were not unemployed for any greater length of time than any other industries and secondly, the evidence of Ms Merritt, to the effect that people retrenched from the coal-mining industry in her opinion wouldn't remain unemployed any longer than employees in other industries because of the industry. Ultimately, the evidence that they gave on those two things would be given no weight in light of what emerged from the cross-examination. With respect to Mr Gunzburg's first statement, paragraphs 17 to 27, wherein he summarised ABS data, with great respect to Mr Shariff the criticism is not that he used ABS data; it is what he did with it and what conclusion he sought to draw from it.

PN2246

He asserted that the five snapshots recorded, an average length of time of those who were retrenched from the mining industry and then asserted that in his view it would be no different for coal mining when in fact it did no such thing. It was not a record of how long people were unemployed after they were retrenched. It wasn't counting how long they were unemployed after they were retrenched. It wasn't even looking at those who were retrenched. It was looking at those who were unemployed for whatever reason. It didn't count those who had picked up casual work or contract work, of course. It didn't count those who due to age were not looking for work.

PN2247

It said nothing about coal mining as against mining generally and specifically the approach of taking - in circumstances where he had quarterly reports giving him 20 pieces of data - taking five of them said nothing about changes, particularly changes during downturn periods, which is really what we're talking about at this industry. Professor Peetz gave evidence that was uncontested, that the coal-mining industry makes up 0.4 per cent of the total workforce. Mining makes up 2 per cent. Inevitably that meant sample sizes were going to be small and the approach that was taken in trying to present the material ultimately did not allow the Commission to come to a view that that evidence actually demonstrates anything about the length of time people are unemployed after being retrenched from the coal-mining industry.

PN2248

We've set out some further criticisms in the written submissions to the same effect. The second statement of Mr Gunzburg sought to rely on the same statistics and so again had this difficulty of a 1-in-20 snapshot likely to conceal as much as it revealed. But what that demonstrated, you might recall, is that the percentage of those who left their last job as against lost their last job did vary very significantly for the mining industry. Indeed, it was higher certainly then retail or construction. The difference was 90 per cent at a certain point and 30 per cent at

other points. So you did have very high variability, which is again consistent with the cyclical nature of the industry. So that material doesn't demonstrate - contrary to Mr Gunzburg - that there was some consistency between the mining industry and other industries. It tends to confirm, rather, that what we have is an industry which has a very cyclical nature where you get a very high number who are made redundant at certain points in time.

PN2249

IN our written material we have identified that Professor Peetz does indeed present evidence in response to the suggestion that one can draw some conclusions from Mr Gunzburg's material to the effect that the mining industry generally experiences no different effects than others and he does so by way of reference to OECD data in his second statement by reference to the Essential data and he says in circumstances which we say there's no reason not to accept that there are lower re-employment rates in the coal-mining industry than one would generally find. For those who get work it's of a lower job quality, including a loss of permanent employment compared to the overall population and that employees who do find employment are worse off overall - that is for those in the coal-mining industry who have been retrenched - than the comparable group in the OECD data.

PN2250

So there is - to the extent to which there is probative expert evidence it is expert evidence going to the question of whether the coal industry is in some way different. It is to the effect that it is, with great respect to Mr Gunzburg. That is the conclusion that the Commission would draw if it needs to identify some uniqueness in order to come to its ultimate conclusion. We've also dealt with Ms Merritt's evidence: the opinion she gave that those who work in the coal-mining industry don't remain unemployed any longer than employees in other industries because of the industry. There are a number of reasons why no weight would be given to that opinion.

PN2251

She had dealt with, on her evidence - her company had dealt with 83 employees in the coal-mining industry over a two-year period. She dealt with somewhere between six and some greater number of those. She had spoken to them on one to five occasions, taught them how to get a job. She hadn't maintained contact with them until they got a job. That wasn't her role. She had no data upon which she was making any reference. To the extent to which she does give evidence that might fall more happily into her area of experience, she confirmed that there are features which affect how long people are unemployed after being retrenched, which are features of this industry. Those, you might recall, were firstly location: the more remote the location the more likely that there will be a longer period before one finds other employment. Secondly, specialisation of skills: she indicated that was - the more specialised you are the harder it is to find other employment and that she accepted that that is all the more so when we're talking about a skill that's unique to an industry in circumstances when that industry is in a downturn.

PN2252

Indeed, she identified or accepted that in addition to her four categories a general downturn in an industry is one which also will affect the length of time people are employed - before people are employed after being retrenched. Mr Edwards gave some opinion evidence about three categories of employees - Mr Shariff referred to that earlier this morning - which he said were roughly equal but his evidence in that regard had little weight when one understands that he accepted that that was over the course of both the ups and down periods and such that there was - he also accepted that he had no statistical material which would allow one to draw any conclusions about those categories.

PN2253

To the extent to which his evidence really added anything of substantive effect to this case it was the one point that I've mentioned already, the capacity of his employer to make provision for such payments and secondly, the statement that at least he - and he is the only one who gave evidence on behalf of the employer - his company doesn't pay out sick leave on redundancy for staff. Now, I just wanted to do a couple of things before I sit down: one of them is to deal with this criticism of Professor Peetz's evidence on the question of the subset of data that he was looking at.

PN2254

We say in our submission that there appears to have been some cross-purposes between the cross-examiner and Professor Peetz. The cross-examination appeared to proceed upon an assumption that Professor Peetz's report - without actually taking him to it - was drawing conclusions based on a subset of employees which the cross-examiner identified as 513 employees which included those who lost their job that they had in June 2013 as a result of their contract ending or as a result of dismissal for other reasons. But if the Commission could bear with me by going back to Professor Peetz's first report, he wasn't - at no point was it suggested to him that anything here stated in his report was wrong or that he had used an incorrect reference group. Professor Peetz made clear that whilst he was able to answer questions about exhibit 14, which was not a document that he had prepared - it was a document from Essential Media which summarised results of various questions - in his report he makes clear that the subset of employees in respect of whom he gives conclusions which are perhaps best identified at page 79 - you'll see the table 15 - is not the 513 employees which it was variously said to him therefore included people who weren't redundant and so forth.

PN2255

He makes clear at page 76, the second-to-last paragraph, that the analysis, at least from that point on, is of those for whom redundancy was reluctant: that is, they would have preferred to stay employed in their earlier job and includes those who are made compulsorily redundant and those who took packages but would have preferred to remain in their job. In other words, what then follows by reference to the expression, "reluctantly redundant", is a series of conclusions ultimately consolidated into table 15 of employees identified, as he said in cross-examination - it was suggested to him he hadn't identified who these are - which he identifies in the table answered a question that they were made redundant and then answered a question which was question five to the effect that they either were made

forcibly redundant or alternatively they were offered redundancy and it was an offer too good to refuse.

PN2256

He excluded from the category of those who were made redundant a category of those who said they were happy to go. That was the subset of C in question 5. It wasn't put to him that the data there recorded in table 15 was in any way an inaccurate representation of the group in respect of whom he was talking about, nor was it put to him that that was an inappropriate group to consider: that is, those who are made redundant who were either made redundant despite their preference or made reluctantly redundant in the sense that they were made an offer too good to refuse. It wasn't suggested to him that that group inappropriate contained others who shouldn't have been included or should have included others.

PN2257

So there is no reason, ultimately, to come to a view that his conclusions, as they represented in his report, where anything other than conclusions that this Commission can rely upon. It may well be, as my friend has identified, there are other conclusions that one can find from the data. My friend has identified in his written submission a series of matters that one can draw from that data. We can have a look at them but I'm not suggesting that there is anything necessarily wrong with them or you haven't had a chance to check but I'm sure that Mr Shariff would have done his homework and have got them right. But that doesn't mean that what Professor Peetz has done here is not equally right and that is that one identifies from table 15 that those with longer periods of service - 10 years or more - who are most directly affected by this application are substantially more likely to be out of work and - or alternatively in effect drop out of the workforce all together and be more likely to be unemployed.

PN2258

That is, we're talking about the group who are most likely to be affected by this application are going to have the greatest negative effect. That does take me to this matter that Mr Shariff did deal with, which we might need to reduce to a note, I think, and that is the suggestion that the Essential data reveals that 4.3 per cent of employees per annum are made redundant in this industry and that is essentially no different to the OEC data in this respect. Mr Shariff deals with that at pages 21 and 22 of his written submission. I think we should provide a note but can I just foreshadow where we're going with this? The first thing to say is that that 4.3 per cent is derived by Mr Shariff from the 380 that received a redundancy payment, not the 423 who said they'd been made redundant.

PN2259

The difference, it would appear, is likely to be those who are made redundant but are redeployed. When one is comparing against the OECD data, one should be comparing those who have actually been retrenched.

PN2260

VICE PRESIDENT HATCHER: I thought the cross-examination revealed that there were casuals included in the redundancy numbers who would, of course, not be entitled to redundancy payment?

PN2261

MR TAYLOR: I think that is true as well and so I think there would be two groups. But when one is comparing against the OECD data one has to be careful because there one is talking about displaced workers. That includes - as Professor Peetz was careful to confirm - not just those who are dismissed for economic reasons. That expression itself can extend beyond those who are permanently employed and retrenched and include casuals. So it doesn't just include people who are not counted in the 380 but also includes those who've lost their job for cause, which is similarly not in the 380. So if you're comparing like with like, knowing as we do from the survey that approximately 20 per cent were casual and you reduce OEC figures accordingly and you add on the other side of the equation from Essential those who were terminated for other reasons - you're actually looking at a difference in the order of double. That is something - those who are made redundant and those terminated for other reasons, in the Essential survey, would add up to something close to 500 or about 6.3 per cent a year. That is excluding - but when one compares that against the OECD numbers it's looking at a figure of about double.

PN2262

But ultimately, what the survey was doing wasn't looking at how many people are retrenched in any given year, because we know this is an industry where that varies. The focus of the survey - the relevance of the survey - is the impact that that has on people, particularly people with longer periods of service. So it's the - it's not the incidence in a particular time period but the impact of redundancy, which the evidence demonstrates that the character of this industry hasn't changed from that which led to the redundancy provisions which are the subject of this application.

PN2263

Can I finish by dealing with the factors in section 134; so section 134, the modern award objective requires the Commission to have regard to a series of matters. The employer's submissions in their opening written submissions of paragraph 63 identify one only of relevance, they say, which would lead this Commission to alter the current provision, and that is sub (b): "To encourage enterprise bargaining." It is said that if one reduces the current standard it will encourage enterprise bargaining: no other factor is relied upon. Now, the evidence in this industry, as Mr Shariff correctly identified, is in respect of CFMEU and its members is that bargaining is something which usually results in enterprise agreements: so the bulk of them are covered by enterprise agreements.

PN2264

There is no suggestion in the evidence that this condition is something which has affected what few agreements haven't been able to be reached. That is, there is no reason to think that altering this is going to make any difference to bargaining in respect of CFMEU and employers. In fact, we say it will actually have a negative effect. Mr Shariff was asked, "Why would you make this application if your clients weren't intending to take advantage of it in bargaining?" Whenever you have an industry which has a longstanding condition and someone alters it or seeks to alter it it inevitably will lead to disputation, because people have expected it: that's what they've come to expect as a standard entitlement. If the award is

altered and employers then seek to take advantage of that in bargaining, as would be their right, the inevitable response will be from the unions a view that it shouldn't change and to the extent to which that becomes an issue - which it hasn't been - it's a potential issue which will discourage bargaining being achieved.

PN2265

VICE PRESIDENT HATCHER: But doesn't the grandfathering provision ameliorate that in part?

PN2266

MR TAYLOR: It ameliorates but it doesn't remove it. SO it might postpone - maybe employers take a view that given the grandfathering there's not a lot in it for them in the first year or second year but over time it will have that effect. On the other side, in respect of my client's members, the evidence is that employers don't wish to have enterprise agreements covering those covered APESMA and there is no reason to think that is because of this current condition or that altering it would in some way encourage them to start making enterprise agreements with APESMA which they don't currently want to make.

PN2267

So the only factor which is relied upon by the employers to suggest there is a need to make this change is one which we say only actually points the other way.

PN2268

VICE PRESIDENT HATCHER: How is section 134(1) to be read with 141(4)(b)?

PN2269

MR TAYLOR: Was the second section number your Honour indicated 141(1)(b)?

PN2270

VICE PRESIDENT HATCHER: 141(4)(b).

PN2271

MR TAYLOR: (4)(b) - sorry, I misheard. Can I start by answering that question by accepting a submission that Mr Shariff has made in his written submissions, that subsection 134(2)(a) would mean that the Commission is required to apply the modern award objective whenever doing something in accordance with the part, and the part includes section 141. But we have made the submission which may assist to answer that question, that the legislature's intention by allowing industry-specific schemes to be included, must be read as intending that there is nothing inconsistent - indeed, to the contrary one can assume an industry-specific scheme reflects a fair and minimum, relevant safety net of terms and conditions, given that the two in effect go together and there is nothing inconsistent with it.

PN2272

It's clear that when one is considering an industry-specific scheme there are additional matters that must be taken into account in addition to the modern award objective, and they are the ones set out in section 141.

PN2273

VICE PRESIDENT HATCHER: So the exclusion of industry-specific schemes from the NES provision and their specific authorisation to be included in modern awards you say means that by definition they're to provide a fair and relevant minimum safety net?

PN2274

MR TAYLOR: Yes, so section 134(1) says:

PN2275

The Fair Work Commission must insure that modern awards together with the national employment standards provide a fair and minimum safety net.

PN2276

In this case those who are covered by the industry-specific scheme don't have an NES redundancy provision. What they have instead is the industry-specific scheme provision. The legislature has intended that that industry-specific scheme, which must retain its character, is one which can be read as being consistent with the modern award objective.

PN2277

VICE PRESIDENT HATCHER: Will you be much longer, Mr Taylor?

PN2278

MR TAYLOR: No, no longer at all; that was it - other than to say this: we - Mr Shariff I think was slightly more diligent than us, or maybe he just got our submissions a little bit before we got his: we haven't had a chance to critique them and what we would appreciate is an opportunity to provide a short note as to anything that we haven't been able to deal with or anticipate after today. We don't anticipate that it would be an extensive note and it certainly wouldn't be an attempt to respond to it all but only some specific matters that we identify.

PN2279

VICE PRESIDENT HATCHER: Right, and I ask this of Mr Shariff: the current positions are CMIG application 27 weeks cap; the union's position of no cap.

PN2280

MR TAYLOR: Yes.

PN2281

VICE PRESIDENT HATCHER: In the event that we were minded to do something between those extremes will you seek to be heard further about that?

PN2282

MR TAYLOR: We don't say that there would be a necessity to do so as a matter of procedural fairness. But to the extent to which the Commission is proposing any particular form of words which necessarily would include something we would appreciate the opportunity to be able to put something short in response.

PN2283

VICE PRESIDENT HATCHER: Okay. Is that a convenient time to take a luncheon adjournment? All right, we'll adjourn now and resume at 2 pm.

LUNCHEON ADJOURNMENT [1.05 PM]

RESUMED [2.02 PM]

PN2284

MR TAYLOR: Your Honour asked me two or three questions which I wasn't able to answer at the time.

PN2285

VICE PRESIDENT HATCHER: First Mr Creep?

PN2286

MR TAYLOR: Mr Bukarica is going to deal with Creep. He's also going to - - -

PN2287

VICE PRESIDENT HATCHER: I thought he was talking about the President elect.

PN2288

MR TAYLOR: Yes, I think he's also going to deal with something related; the forces of nature and the difference between retrenchments and severance pay. The one question, though, that I wasn't able to answer that I just thought I'd address: I was asked about whether individuals names that were given to Essential Media by the unions were financial members. The instructions I have are consistent with the witness statement of Gavin White of Essential Media, exhibit 16, that my client provided to Essential Media a database which took a random sample of its membership as at 1 July 2013. It gave them names and phone numbers of those it had on its system as at 1 July 2013.

PN2289

The expectation of my client is that most if not all of them would have remained members as at 1 July 2016 including those who weren't working in the industry because they're unemployed because the nature of its rules would allow them to remain financial members even if they weren't paying membership dues because of their being unemployed. But the true position is it was members as at 1 July 2013.

PN2290

VICE PRESIDENT HATCHER: Mr Bukarica.

PN2291

MR BUKARICA: If the Commission pleases, I might deal with those two or three matters raised by way of questions. Firstly I'm instructed that a creep is a form of geological occurrence which as a result of pillars of coal being insufficient to support the roof in an underground mining context and therefore there's a sagging in the roof which makes it either unsafe or impractical to mine coal. Apparently there also is a similar variant of that in an open-cut environment but I can't really assist in relation to that matter. Which leads us to the question of

what categories under 14.3 might - well, perhaps I'll start the other way - what would be excluded from payment in 14.4 of the clause that's referred to in the 1983 CIT decision and the word in clause 14.3. It appears that there is a category of what might be termed, "acts of god", or natural disaster in which the operation of the two clauses were read together is that in certain circumstances an employee might be entitled only to the severance payment upon the basis of these rare and exceptional occurrences.

PN2292

SENIOR DEPUTY PRESIDENT HAMBERGER: Are you aware of any of it actually happening?

PN2293

MR BUKARICA: In the short time I had, your Honour, I wasn't able to ascertain whether there has been. Certainly not in my - - -

PN2294

SENIOR DEPUTY PRESIDENT HAMBERGER: You've never come across it - - -

PN2295

MR BUKARICA: I've never come across it, no. I know there has been flooding of certain mines in Queensland in recent times: Ensham, I think, comes to mind. In those cases the employment situation was dealt with by way of forms of stand down or voluntary leave being taken. I'm not aware of any situation where a mine is completely closed and the employees have been terminated and there has only been one week's severance pay paid out.

PN2296

SENIOR DEPUTY PRESIDENT HAMBERGER: Yes.

PN2297

MR BUKARICA: So I can't assist beyond that. There was also a question in relation to figure 14 in Professor Peetz's first report. It may have been your Honour Vice President Hatcher who asked that question. I'm not 100 per cent certain. But there was a question as to what happened in or about 1982 in terms of the decline in employment in figure 14.

PN2298

VICE PRESIDENT HATCHER: When you compare it to the production figures in - on page 2 - - -

PN2299

MR BUKARICA: Yes.

PN2300

VICE PRESIDENT HATCHER: - - not page 2, it was page 4: so you had an almost linear increase in production.

PN2301

MR BUKARICA: In production, yes - - -

PN2302

VICE PRESIDENT HATCHER: But then - now you had a major downturn in employment during the '80s, I think it was.

PN2303

MR BUKARICA: Yes - as to the correlation or the inconsistency between production - - -

PN2304

VICE PRESIDENT HATCHER: '80s and '90s.

PN2305

MR BUKARICA: I beg your pardon?

PN2306

VICE PRESIDENT HATCHER: The '80s and '90s, really.

PN2307

MR BUKARICA: Yes. As to the inconsistency between production and employment, I won't go beyond what's put by the professor. I'm not qualified to analyse that. But what I can say, your Honour, is that there is in our material - in our submissions, in fact - reference to the original - or the process leading to the 1983 decision of the CIT and at page 13 of our written submissions there is a footnote which refers to the High Court case in the Queen v Duncan: ex parte Australian Iron and Steel, which was the result ultimately of an application by employers to restrain the jurisdiction of the CIT, particularly in making the original retrenchment provision in these - that are the subject of these proceedings.

PN2308

But I only raise that because in the decision itself, which is cited, his Honour Justice Harry Gibbs refers to the economic context then prevailing, which included mass redundancies, particularly in the Illawarra district in New South Wales. That caused some political upheaval and industrial protests and the like.

PN2309

VICE PRESIDENT HATCHER: I remember they banged on the doors of Parliament House.

PN2310

MR BUKARICA: I was going to get to that, your Honour. So there is some context and I think the High Court took some judicial notice of the economic situation in relation to that particular period and it appears that there was a general - among - if my memory serves me correctly as well there was a general recessionary environment around about then - '82, '83, I think. So that might explain in part the rapid decline in employment at that time.

PN2311

VICE PRESIDENT HATCHER: It seems to have gone on all the way till past 2000 then it just goes straight up again.

PN2312

MR BUKARICA: Yes, and I think Mr Vickers gives evidence about his own personal experience about having two - as he saw it - large downturns that he dealt with as an official: one at about this time and one again in the late 1990s and I think his evidence is - and I accept he's a lay person but he's speaking from his own personal experience - the downturn which occurred in the late 1990s and the current one, which we seem to be - depending on which position you take - either still in the trough of or coming out of - were the two largest in his experience. So take that for what it's worth. Your Honours, I obviously want to avoid repetition in dealing with the matters that have been dealt with comprehensively both in the written submissions and in Mr Taylor's closing. I do though want to touch on some of the matters that we consider to be of particular significance here today.

PN2313

So firstly I'll deal with the question of relevant principles and how we see the bench exercising its discretion in the current matter, having regard to relevant precedent. Then I want to just very briefly deal with the question of evidence. I have a summary which I'll hand up dealing with what we consider to be the most pertinent aspects of evidence. I also want to adopt Mr Taylor's analysis of that evidence, in particular his characterisation of the evidence led by the employers. Finally I want to also address the matter raised by his Honour the presiding member immediately before the luncheon adjournment as to the position of a redundancy cap and what position the Commission might adopt were it inclined to head in that direction.

PN2314

Also in doing so obviously I'll address the question of the grandfathering proposal put forward by Mr Shariff's clients. Your Honours, to the extent its necessary I rely upon our submissions filed on 23 June. They're relatively comprehensive. I haven't sought to again have a further set of written submissions. I think there is enough paperwork already before the full bench so I rely on those submissions. Both Mr Shariff and Mr Taylor have correctly and all the parties indeed in their submissions have correctly referred to the general context in which these proceedings occur, which is obviously the four-yearly award review, and in respect of this matter this is a second tranche of proceedings as we're all aware and accordingly the matter proceeds under the general procedures and statutory framework which apply to a four-yearly award review.

PN2315

It's uncontroversial that the preliminary jurisdictional matters decision is important in terms of informing the Commission or providing some guidelines as to how the bench as currently constituted will acquit its obligations and functions. But perhaps there's a difference in emphasis as to what flows from that decision and how in particular that relates to the current matter being a question which involves an industry-specific redundancy scheme, so I'll try to deal with those matters briefly. Now, one important aspect that we say arises from the preliminary jurisdictional matters decision is the importance placed on maintaining a stable awards system and from that we conclude that any changes proposed to modern awards should be measured, should be moderate and should be properly founded as a general principle. So there is an implied or an explicit, in some ways, expectation that the modern award system, to be stable, needs to be

subject to, I suppose, relatively few or relatively small fluctuations in terms of the prevailing framework which exists, lest the system become unstable and subject to doubt.

PN2316

Second - and again, this is a matter of emphasis to a large extent between the parties - it's clear that although in a four-yearly award review it's technically the Commission that is the moving party, it's clearly the case that a party seeking to mount a substantive change - a significant change - to a longstanding award condition will carry the burden of making its case or making the case to a requisite, probative standard. We say that the requisite standard is to not only convince the Commission that the change sought is desirable in a normative sense but that it's necessary to achieve or maintain the modern awards objective.

PN2317

Third and in some respects more important in the current context is having regard to relevant historical context and prior authority in considering the merits of any application. This is related both to the desirable public policy objective of insuring comity amongst the decisions of the Commission but it's also about furthering the objective of promoting a stable, modern awards system. I digress very slightly here to say in response to certain submissions concerning the binding nature of what's been put against us that we're contending that the CIT decisions that are foundation of the industry-specific redundancy scheme, that they may be binding. We don't say that in a strict legal sense: clearly any decision of a prior industry tribunal is not binding in that sense.

PN2318

However, there is a significant persuasive value that can attach and should attach to those earlier decisions and indeed, for the reasons that are set out in the preliminary matters jurisdictional decision, the Commission would be reluctant to depart from the reasoning of those earlier decisions unless there are cogent and good reasons for doing so. We'll return to that in a little more detail shortly. So beyond the general four-yearly award context there is of course a specific context of this matter and the fact that it's the second tranche of hearings. The context has been set out by Mr Taylor earlier but it's important to remember how exactly the relevant passage in paragraph 44 of the April 2015 decision emerged and it emerged in the context of Mr Shariff's clients putting the proposition that were the Commission inclined to grant the application of the unions in respect to the age discriminatory clause, that their alternative position would be either that the clause 14 of the award should be excised in its entirety or alternatively that there ought to be some form of cap put into the industry-specific redundancy scheme.

PN2319

Now, the full bench expressed a tentative view based on those submissions and from my recollection of the submissions that were put and the tenor at least of the alternative propositions, what was being put was that the removal of the age 60 limitation upset an industrial equilibrium. It changed the nature of the industry redundancy scheme and that accordingly, the Commission ought to put in place something which restored equilibrium. That's the way I read if you like the invitation or the leave proposed in paragraph 44 of the April 2015 decision. You were with respect or the prior full bench was in respect inviting consideration of

an alternative redundancy cap that would have or would relocate to the extent possible in a non-discriminatory way the industrial equilibrium which existed prior to the April 2015 decision.

PN2320

Now, again, I say that that was a very preliminary position in my reading of the relevant passage and I'm not suggesting in any way that the full bench or the Commission as currently constituted is constrained in respect to that proposition. Of course, it is open for the full bench, subject to the restrictions identified by the Vice President in terms of the relevant statute - section 141 - to move beyond or below those parameters that were foreshadowed in general terms. But of course the application we have here today is not about restoring that industrial equilibrium. The application goes far beyond the effect in terms of negative impact that the age 60 limitation would have had.

PN2321

That is the case even with the proposed grandfathering proposition. It's clear that, for example, an employee who has 10 years' service, who might be in his or her late 30s, were the employer proposition to be put in place and their existing 10-year entitlement to be grandfathered, they could work for another 30 years in the industry and not accrue any retrenchment component in their pay. So relative to where they would have stood in March of 2015, that same notional employee, they're clearly far worse off. There's all sorts of permutations one can develop in relation to that sort of scenario. But I think it's unarguably the case that if one accepts that that proposition that I put forward, that there was an industrial disequilibrium as a result of the April 2015 decision, then the solution proposed does not restore that equilibrium. It goes way, way the other way.

PN2322

DEPUTY PRESIDENT GOSTENCNIK: But in your scenario, putting aside the discriminatory nature of it prior to the variation that same employee would have only received 40 weeks' first component but not the second - - -

PN2323

MR BUKARICA: Yes.

PN2324

DEPUTY PRESIDENT GOSTENCNIK: - - because that person, by your criteria, being mid-30s in 30 years' time would be 65 and therefore the old cap would have applied.

PN2325

MR BUKARICA: Well, that's right and that's a qualifier I was going to get to, your Honour. You're quite correct. So I accept - I obviously accept that qualification. But I suppose a point, inelegantly made, is that if this was about restoring the relative position of employers to what it was back in March 2015 then it's nothing of the sort. It goes way beyond where we were and Professor Peetz does in his study quantify to some extent the notion or transfer between employees and employers that will be represented by the implementation of this cap and even if one were to assume the grandfathering provision would take

effect, there would still be a net transfer back into the employer's side of the equation.

PN2326

Now, which brings me to the question of the industry-specific scheme and what that itself means in terms of the current application. It's put against us by Mr Shariff that we make too much of the separateness or the distinctiveness of the provisions dealing with industry-specific redundancy schemes and there is some criticism about the use of the explanatory memoranda or reference to it. The issue, really, is this: that there is a reason, there is a clear statutory intent for the existence of industry-specific redundancy schemes. As a minimum what we can derive from that is that subject to certain conditions being complied with the industry-specific redundancy schemes which the black coal version is one, were intended to have a continuing existence.

PN2327

VICE PRESIDENT HATCHER: Mr Bukarica, do we have somewhere the entire text of the relevant part of the explanatory memorandum?

PN2328

MR BUKARICA: I could hand a copy up, if the Commission pleases. This of course is an extract of the relevant part: it's a very large document. I think, your Honour, while you're going through reading the extract, the part that we rely upon or extract in our submissions is paragraph 554 at the bottom of the page, commencing at the second sentence, for what it's worth. So I suppose our broader submission about this matter is regardless of what role the EM has to play in terms of informing oneself about the meaning of industry-specific redundancy schemes, clearly there is something intended by the preservation of such schemes within the context of the modern award system and the interaction of the NES.

PN2329

Your Honour has already - the presiding member has already referred to or made comments to the fact that it may be the case that your hands are tied in relation to this scheme. We wouldn't quite characterise it that way but we'd say that there is clearly a statutory context which means that your room for movement in respect to the industry-specific scheme is rather more limited than - - -

PN2330

COMMISSIONER JOHNS: Perhaps one arm behind the back is a better - - -

PN2331

MR BUKARICA: That's probably a better analogy. But more broadly, your Honour, what we say is - what we derive as being important from the existence of industry-specific schemes - and this goes to I think the primary position put forward by Mr Shariff on behalf of his client - that somehow the appropriate yardstick or comparison is between the industry-specific schemes and the broader world; the NES and NES-derived redundancy provisions.

PN2332

With respect, we don't see that that flows in any way from the relevant statutory provisions and in fact, what we consider to be an appropriate course is to consider

whether an industry-specific scheme meets the modern award objectives by reference to the conditions which prevailed in the industry at the time of the making of the scheme and which currently prevail. In other words, the proposition that Mr Taylor has put that in agitating for a change to a provision you have to show what is substantively different from when the industry-specific scheme was put in place at first instance.

PN2333

So we say as a matter of approaching this in a statutory context, one has to have regard to the very existence of the industry-specific scheme and with it is implied a reference point which is peculiar or particular to the industry which it covers. That's not to say you can't consider issues more broadly but your primary terms of reference must be the industry under consideration. Now, just moving very briefly to the question of the arbitral history of the - - -

PN2334

DEPUTY PRESIDENT GOSTENCNIK: Before you go on - - -

PN2335

MR BUKARICA: Sorry.

PN2336

DEPUTY PRESIDENT GOSTENCNIK: - - Mr Bukarica, the reference in the explanatory memorandum to the award modernisation request from the minister at paragraph 552, in particular the first dot point: is there anything in - - -

PN2337

MR BUKARICA: Sorry, your Honour - - -

PN2338

DEPUTY PRESIDENT GOSTENCNIK: Sorry - the first dot point - - -

PN2339

MR BUKARICA: Under - - -

PN2340

DEPUTY PRESIDENT GOSTENCNIK: - - under 552: "Whether the scheme is no less beneficial to employees in the industry", et cetera.

PN2341

MR BUKARICA: Yes.

PN2342

DEPUTY PRESIDENT GOSTENCNIK: Yes, when considered in totality - was there any consideration at the time about the differential operation of the scheme on different classes of redundancy; whether some employees would actually have been better off with the NES?

PN2343

MR BUKARICA: Sorry: are you asking in respect of this particular award?

PN2344

DEPUTY PRESIDENT GOSTENCNIK: When the provision was inserted into the award - - -

PN2345

MR BUKARICA: In the modern award?

PN2346

DEPUTY PRESIDENT GOSTENCNIK: Yes, in the modern award.

PN2347

MR BUKARICA: I can't assist - I'd have to get instructions, your Honour.

PN2348

DEPUTY PRESIDENT GOSTENCNIK: One of the things is that in certain respects the scheme is inferior to the NES.

PN2349

MR BUKARICA: Yes.

PN2350

DEPUTY PRESIDENT GOSTENCNIK: So if you get both payments it's inferior for the first year.

PN2351

MR BUKARICA: Yes.

PN2352

DEPUTY PRESIDENT GOSTENCNIK: And if you fell into that rare scenario where you only got the first payment (indistinct) of those 12 years. So was that considered?

PN2353

MR BUKARICA: Again, I can't assist your Honour specifically on that point. I think, though, it speaks to the issue that I've raised about considering the totality of the industry-specific scheme and its reference point being the industry itself, and that (indistinct) developed over time. I am aware that - and I think it was in the original table provided by the CMIEG - there were some industry-specific redundancy arrangements which were inferior in a general sense. As I understand it they may have been of a transitional nature. So clearly, that position was accommodated.

PN2354

As to whether the black coal award was ever explicitly evaluated in this respect to determine whether it was better off or worse off than the NES or other schemes. I just can't help the bench at present. I'd have to get instructions. So if I might very quickly deal with the issue of the arbitral history: the submissions on this are dealt with at paragraphs 35 to 58 of our submissions filed in June. They're also dealt with in the witness statement of Andrew Vickers, who it ought to be noted has been in an official of this union since 1981 and has an intimate knowledge of the history of the coal industry tribunal, our submissions do analyse at some length the 1973 severance pay decision and also the 1983 decision. I don't want to

repeat what's put there but can I deal with just a couple of points raised by Mr Shariff on behalf of his clients?

PN2355

Firstly, it's said that notwithstanding that the tribunal member Duncan stated explicitly that income maintenance did not form part of the rationale behind the introduction of the retrenchment provision standard in 1983 that somehow if one reads between the lines and reads very carefully that that's what was in fact intended or was an underlying rationale: we reject that. A proper, contextual reading of the decision shows that the primary concern was associated with hardship characteristics faced by coal industry employees and income maintenance was not a direct consideration nor an intended indirect consideration and his Honour or the tribunal had the benefit of the existing NSW scheme at that time to draw upon in terms of establishing his reasoning.

PN2356

VICE PRESIDENT HATCHER: When you say, "hardship", does that mean non-pecuniary hardship?

PN2357

MR BUKARICA: It means a range of factors, your Honour, including dislocation - some of the language is a bit archaic, I'd concede that - but it was a range of both pecuniary and non-pecuniary hardships but primarily pecuniary, I would say.

PN2358

VICE PRESIDENT HATCHER: When you say dislocation you mean the cost of moving house or something?

PN2359

MR BUKARICA: Yes, and I think it was more - I can't immediately remember the passage but there are passages about the effect on the status of the employee and in a sense psychological impact and so on. But that was in the context of dealing with submissions. I'm not sure whether that's one of the primary grounds upon which the claim was granted. IN fact, I'm certain it's not. Also, can I say that there is some attack on the reasoning in the 1973 and 1983 decisions to the effect that there is no - well, effectively the position is put that there should have been some sort of near-mathematical equation produced as to why three weeks as opposed to some other figure or two weeks as opposed to some other figure in respect to retrenchment pay. Clearly, if that's a claim - if that's a basis for criticism the same criticism could be made in respect of the - both the original TCR case in 1984 and the 2004 redundancy case. Clearly, these sorts of matters proceed. They have historically proceeded and I don't need to tell a bench as experienced as this. On the basis of contending claims there is nothing wrong or improper or disreputable with an arbitral tribunal attempting to navigate a position between contending claims and essentially coming to a well-informed value judgement as to what will be the appropriate outcome given the circumstances of the case.

PN2360

To somehow elevate that process, that arbitral process, to some form of actuarial exercise or an accounting exercise is really unreal in terms of the process which

pertained then, which continues to this day. Your Honour, I'm conscious of time. I won't go over the issue of the evidence other than to hand up a summary table of matters that we would point to in particular and deal with a couple of points that my friend has raised. One matter that's caused a degree of controversy has been the issue of Mr Peetz - I beg your pardon - Professor Peetz and the Essential survey and his relationship to the data generated by that survey or his use, I should say, of that data.

PN2361

What's clear is if you turn to page 2, in fact, of the original Peetz expert report you'll see there is some explanation there of the survey and his use of the survey in at least his first expert report and I'll start, if the Commission pleases, by drawing your attention to the middle of the second page where it says at the sentence beginning:

PN2362

Some of the tables and text near the back of this report refer to that survey - - -

PN2363

- - referring to the Essential survey:

PN2364

- - a more extensive report on the survey is, I believe, to be separately provided to the Commission and further details on the survey will be contained in that report.

PN2365

Again, the significance of this being that he's talking in the future tense in terms of the Essential report:

PN2366

I was consulted on the design of the questionnaire and have received an advance copy of a CSV format data file that has formed the basis for the analysis in the latter sections of this report - - -

PN2367

- - which is of course where Mr Taylor and others have taken you to in submissions. Now, I'm sure that at least one member of the bench would know that CSV stands for Comma-Separated Values. It's a software program for tabular data in text format. As the name implies, each value is separated by a comma. When opened in Excel each value is transferred to an individual cell in the Excel table. This can be then manipulated in the usual way that an Excel file can. So the significance of - I had to read that out because I don't truly understand it myself. I'll make that admission.

PN2368

But the reason that's significant, of course is that - and this goes to the issue of cross-purposes that Mr Taylor was referring to - Mr Peetz makes it clear in his report from the outset, "I wasn't operating on what is now exhibit 14 in these proceedings: I was provided with CSV files in advance of the Essential survey report being produced and that's what I worked off." So it's absolutely clear and

there is no subterfuge that that's what he did. Essentially - whether intentionally or not - there's been a conflation of this parallel process that's being conducted by the professor based on this raw data obtained in advance of the final report and what became exhibit - what is it now - exhibit 14 in these proceedings, which is Essential Media's own manipulation, if you like - and I use that in a neutral sense - of the data that was provided to Professor Peetz.

PN2369

I don't want to say anything more about the question of the evidence other than to adopt Mr Taylor's characterisation of the CMIEG case, or the evidentiary case - - -

PN2370

VICE PRESIDENT HATCHER: Before you move on from Professor Peetz, in your summary on the first page - I think it's the seventh bullet point - it talks about a strong relationship between age and tenure within the organisations. Can you see? It's about halfway down the first page.

PN2371

MR BUKARICA: Many (indistinct) or - - -?

PN2372

DEPUTY PRESIDENT GOSTENCNIK: The dot's line starts with: "That industry has a low."

PN2373

MR BUKARICA: "Has a low instance of workers aged under 25?"

PN2374

VICE PRESIDENT HATCHER: Yes, and it goes: "There's a strong relationship between age and tenure within the organisations."

PN2375

MR BUKARICA: Yes.

PN2376

VICE PRESIDENT HATCHER: Was there any evidence that that relationship was stronger in the coal mining industry than anywhere else, or mining than anywhere else?

PN2377

MR BUKARICA: I'll have to refer to the - we might get back to you about that, your Honour; it's just a matter of correlating against the relevant table of reference.

PN2378

VICE PRESIDENT HATCHER: Yes.

PN2379

MR BUKARICA: I think I was going to simply adopt Mr Taylor's submissions about the weight to be attributed to the CMIEG witnesses. I don't need to go over that as well. I might conclude, your Honour, by addressing those issues you raised before the luncheon adjournment as to what the Full Bench may or may not

be inclined to do in respect to a cap. I suppose our approach is and remains that no cap is warranted in the present circumstances and for the reasons that have been well and truly ventilated thus far. But what I would say is that were the Full Bench inclined towards granting a cap, then a significant consideration should be the position that pertained in April 2015 and that question of industrial equilibrium that I raised by way of shorthand to describe the nature of the submissions of the employers in that matter.

PN2380

That means that were the Commission inclined to grant a cap, it should firstly consider that the one-week severance component has never had a cap and it was never argued that it should have a cap, at least in the April 2015 proceedings, and whatever one does in respect to a cap should exclude the severance pay component. That's the first issue. The second point is one would have regard to the notional employee; that was referred to or muted in the April 2015 decision, in terms of fixing an appropriate level of that cutting position for the cap. So we would say there would be some logic in adopting a cap which reflected the outcome that would have pertained had an employee entered the industry at approximately the age of 18 and left at approximately the age of 60, in terms of the question of industrial equilibrium and restoring the position as it may have been.

PN2381

DEPUTY PRESIDENT GOSTENCNIK: Mr Bukarica, that sounds very much like a long service leave entitlement, rather than a redundancy entitlement which is aimed at something different.

PN2382

MR BUKARICA: Well, I don't think it's a long service leave entitlement, your Honour, with respect.

PN2383

DEPUTY PRESIDENT GOSTENCNIK: It continues to increase based on years of service.

PN2384

MR BUKARICA: That's been the very basis of the industry's specific scheme from the outset, your Honour, and bearing in mind - - -

PN2385

DEPUTY PRESIDENT GOSTENCNIK: If that's a characteristic or the character of the scheme, then it seems that can't change.

PN2386

MR BUKARICA: Yes, and that is our primary position.

PN2387

VICE PRESIDENT HATCHER: Just for the sake of argument, speaking hypothetically and only for myself, if the Full Bench, for example, was to give the parameters of a decision which might say the CMIEG application not granted in the term that it is sought, but we think a cap of some description should apply and

give some broad characteristics, is it beyond hope that the parties might be able to determine the precise form of the cap between themselves without us having to do it, or would we just be wasting time?

PN2388

MR BUKARICA: No, and it wouldn't be beyond contemplation, your Honour, provided there was some very clear hints from the Full Bench as to what was acceptable or not, if I could put it in that way.

PN2389

COMMISSIONER JOHNS: I think we might have tried that.

PN2390

VICE PRESIDENT HATCHER: Mediated by Commissioner Johns.

PN2391

COMMISSIONER JOHNS: I failed on the last case.

PN2392

VICE PRESIDENT HATCHER: And Commissioner Johns is still available as soon as we adjourn.

PN2393

MR BUKARICA: I've missed all of that, but I agree with it whatever it was.

PN2394

VICE PRESIDENT HATCHER: Be careful about that.

PN2395

MR BUKARICA: Your Honour, I think this is a matter which obviously has some great significance for the employees that we represent. There would have to be a very clear indication from the Bench as to what you consider to be a proper outcome in this, so I can't put it beyond that. In relation to grandfathering, if I could just conclude on that point, clearly our principal position is that there ought not be grandfathering, or it doesn't arise, firstly, if there's no cap inserted, but if it does, if there is a cap, then it's clearly important that the existing notional entitlement and expectations of employees who are currently employed and have accruals is properly protected, and that means not only freezing those entitlements at a point in time but allowing them to continue as per the existing scheme until they're extinguished for one reason or another, either got through redundancy or retirement or leaving the industry of their own accord. That means therefore that a proper grandfathering arrangement would, in our submission, involve the new cap only applying on a prospective basis to new employees. That's, in our respectful submission, the proper meaning or proper approach to a grandfathering arrangement in the current case.

PN2396

VICE PRESIDENT HATCHER: So any existing employee would continue to accrue under the scheme without a cap?

PN2397

MR BUKARICA: Yes. And I don't need to go again over the reasons why we say the employer's proposal is unacceptable, but clearly there will be situations where an employee, even with that grandfathering arrangement applied to them, will be worse off, relatively speaking, to what the prior award provision contained, prior to April 2015. Your Honour, unless there are any questions, I'll leave my submissions there. Thank you.

PN2398

VICE PRESIDENT HATCHER: Right. Mr Basiacik?

PN2399

MR O BASIACIK: Thank you, your Honour. May it please the Commission, my name is Basiacik, initial O, and I appear on behalf of the Australian Manufacturers Workers' Union, with our members having a substantial interest in these proceedings. The AMWU primarily relies on its written submissions, which were filed on 7 July 2016, and also we support the oral submissions as well as the written submissions of the CFMEU and APESMA. Thus without repeating those submissions, and obviously after hearing the witness evidence from both parties, the AMWU would like to just emphasise that any proposed variation to the redundancy provisions in the Black Coal Mining Industry Award would have a substantial impact on our members, many of whom are longstanding, specialised workers in the industry. Their expert evidence provided by Professor Peetz show that the post-redundancy outcomes for workers in the black coal mining industry are relatively worse off in comparison to other industries, particular in terms of redeployment options and future earnings.

PN2400

Among other things, this is due to - and our colleagues have already outlined this - the industry being a career industry, the industry being one that experiences cycles of growth and contraction such that retrenched employees must contend with the difficulty of finding comparable employment and a need to move in search for another job, and obviously the loss of seniority. In conclusion, we submit that these aspects of the industry have not changed since the persuasive decisions in 1973 and 1983 of the Coal Industry Tribunal which established the current redundancy provisions and survived the award modernisation process as an industry-specific redundancy scheme under section 41 of the Fair Work Act. With respect, we submit that the employers have not established a merits-based case to vary the industry-specific scheme that meets the modern award objective. Also, the proposed grandfathering clause does not mitigate its impact given the particular features of the industry. This concludes the AMWU's closing submissions.

PN2401

VICE PRESIDENT HATCHER: Thank you. Mr Shariff?

PN2402

MR SHARIFF: I'll try and respond very quickly to all sets of submissions. Mr Taylor started his submissions with contentions around the industry-specific character of the scheme. As we pointed out in our original written submissions, whatever was the industry-specific character of the scheme, it had two essential components of it. One was the existence of a mandatory retirement age, the kind

that was enacted, and secondly, and necessarily as a result of that, a concern about employees not receiving a windfall gain as a result of them nearing retirement at the point of time retrenchment occurred. That was, whether we like it or not, a character of the scheme. It no longer exists, and that's why we're here.

PN2403

Allied with that point, Mr Taylor on a number of occasions said the employers haven't adduced any evidence of the financial impact. We haven't adduced evidence of an incapacity to pay, I accept that; but there is evidence of the financial impact, and it's self-evidently the case, because even if one looks at the centennial list of aged retirees as was pointed out by your Honour, Deputy President Gostencnik, anyone over the age of essentially 59 or 59-and-a-half is now in a position and has been since the 2015 decision to receive a financial benefit that they did not previously stand to receive. So there is a financial impact. It's not right to say that there's no evidence of that. There is. But we accept we haven't run evidence on the basis of an incapacity to pay.

PN2404

VICE PRESIDENT HATCHER: Would it be possible to construct a variation which deals specifically with the windfall problem, that is, that that doesn't suggest any particular retirement age?

PN2405

MR SHARIFF: It is very difficult. We tried to manufacture various ideas around that. One of the difficulties is that, as all members of the Full Bench know, redundancy standards - - -

PN2406

DEPUTY PRESIDENT GOSTENCNIK: Sorry, a windfall was relative to the compulsory retirement requirement which is no longer there.

PN2407

MR SHARIFF: Exactly. It's not there.

PN2408

DEPUTY PRESIDENT GOSTENCNIK: So it's - - -?

PN2409

MR SHARIFF: It's just impossible to construct. But one can conceive of - - -

PN2410

VICE PRESIDENT HATCHER: I thought there was a TCR formulation, at least at one stage, about anticipated retirement date?

PN2411

MR SHARIFF: There was. And I recall that arose during the course of argument at the last occasion, and Deputy President Gostencnik raised an idea about giving notice of an intention to retire and then perhaps that might have a mechanism by which one can try and identify where a windfall gain would arise. And we canvassed those ideas internally here. But the difficulties one then moves into is issues dealing with age discrimination one way or the other, and the standards

haven't been based upon aged-based entitlements, perhaps for good reason, perhaps not. They are length of service-based entitlements. But one can conceive of an alternate grandfathering provision that has in mind for those employees who have an extant entitlement, what my friend Mr Bukarica says is that well everyone should be able to accrue at the same rate, and so not only should their entitlements be crystallised in time, they should continue to accrue. But those people, if they continue to accrue on that basis, they would get the windfall benefit. So one can conceive of an appropriate grandfathering provision for those people that might say well your maximum entitlement cuts out at a point in time, but that still leaves us with the other problem: we still have a scheme that no longer meets the description, and we still need a limitation for other accruals.

PN2412

The position is, as has been pointed out, that at the point in time that the employees arrive at the age close to 59 as it currently stands, they are in a position of windfall gain, compared to previously, and that's what we're trying to deal with. Yes, we've put forward a proposal that has a length of service-based cap at nine years, but as we've tried to show through some of the evidence, the average length of service, if one draws a line somewhere, there are going to be some people who will not be protected by that in terms of an accruing entitlement, but they can be addressed by appropriate grandfathering. But the whole idea of protection of the entitlement also proceeds on the flawed premise that this is an entitlement, that retrenchment is an entitlement that's accrued; it's not. It's not an accruing entitlement, it's not annual leave, it's not long service leave. This is on the hypothetical scenario that the eventuality of retrenchment will arise, and that should not be forgotten, as we've said in our written submissions.

PN2413

So that was the first point I wanted to raise in response to what Mr Taylor had said. Moving then to some of his submissions about reliance upon Professor Peetz's evidence, there was a part of Professor Peetz's evidence which relied upon AusIMM surveys. We took objection to that in our list of objections. Quite aside from the Essential Media survey, what Professor Peetz does is relies upon other surveys which are not in evidence. They're not in evidence, no factual foundation has been established for them, and nothing has been identified as to what questions were posed to those professionals, what sample size was, or anything of that type, and we did take objection for it for that reason, and we didn't cross-examine on it because simply the factual foundation for that evidence had not been established.

PN2414

That brings me to the criticisms that are made of our criticism of the Essential Media survey. Mr Taylor and Mr Bukarica want us to ask questions of Professor Peetz on the basis of the data that he looked at. If there was some other data that he looked at, they bore the onus to establish the factual foundation as the basis for his opinions. We based our questioning of Professor Peetz on the actual survey results from Essential Media, as we were right to do. If Professor Peetz has got some other data set, it can only be a subset of the data that emerged from the Essential Media survey; it can only be a subset of that. If it's some other data, then they haven't established the factual foundation for it.

PN2415

VICE PRESIDENT HATCHER: Mr Shariff, I'm sure you covered this earlier and I probably missed it, but what do you say about the conclusions about the Essential Media survey actually contained in GW3, that is, the Essential report that Essential Media prepared?

PN2416

MR SHARIFF: Yes, I addressed that earlier this morning and I said that no weight should be placed on that, because they're an interpretation of the actual percentages from the survey results, and I really do urge the Full Bench to just rely upon exhibit 14 because that's where you'll find the questions - the premises of each question, and then the proportionate answers and the raw numbers for the answers. The difficulty with looking at percentages is that you need to know what the sample size was, and as you'll recall, for each question there's a different sample, and to arrive at that sample size of the subsample, the person had to have answered either yes or no to an earlier question, so you're looking at an ever-decreasing subset of sample sizes. So I really do encourage the Full Bench to actually rely upon exhibit 14, not Mr White's report and not Professor Peetz's interpretation of the results.

PN2417

Mr Taylor relied upon the parts of Professor Peetz's report from page 76 and following, and where he says:

PN2418

We focused in the rest of this analysis on those for whom redundancy was reluctant.

PN2419

Whatever that means - and he says, so what we're looking at is those who said they would have preferred to stay employed in their earlier job, and it includes those who were compulsorily redundant and those who took packages but would have remained in their job, so what it excludes is the people who said we were happy to go. So that means all the rest of the analysis - the percentages - excludes the people who might have said I'm happy to go, I'm happy to take the amount and get a job, or don't have any difficulty in getting a job, don't move, and all the rest of the subquestions that arise, and there was a proportion of them. Then, if one actually goes to page 79, to the table upon which Professor Peetz extracts and Mr Taylor relies, the total end with data down the bottom - the 46, the 178, and the 88 equals 304 - nowhere does Professor Peetz actually set out the basis of reasoning that allows him to come to that conclusion that they are the relevant numbers and they are the relevant percentages. It's not my task as the cross-examiner to lay that foundation. That task fell to my friends, and if they haven't established the factual foundation for the basis for the professor's opinion, that's a matter for them. The same comments apply to Mr Bukarica's rejoinder to our criticism of Professor Peetz.

PN2420

In relation to the seven lay witnesses called by APESMA, it is of course the case that some of those employees, as I readily conceded in our primary submissions orally, have found some difficulty in finding alternative employment. That is the

case with retrenched workers. As I've pointed out earlier today, Professor Peetz deals with the experience of redundant workers at pages 59 and following of his report. That is all accepted. But that evidence of Professor Peetz applies to the economy generally: it is the experience of some redundant workers generally that some of them are going to find it more difficult to find re-employment, some of them are going to have to re-locate, and some of them are going to go back into casual or part-time work. What neither Mr Taylor or Mr Bukarica have answered is the proposition that they haven't called evidence from the people who did well, who have been able to get back into employment, who have been able to get other jobs in the coal industry, and as I said, the evidence that's been led was very selective in that regard.

PN2421

I'll pass over the criticisms of Mr Gunzburg and reliance upon the ABS data. I'd already addressed that earlier today. As I said, it is the only available data. Mr Taylor says well our criticism also extends to the fact it's the way he selected and presented the data. Well, what he did was to select data at points in time. In relation to the first set of data it was November each year, going back for the last five years; in relation to the second set of data it was at select points in time indiscriminately to try and show that the pattern is across the board and across the industries, that they're variable. Mr Taylor submitted that in substance the only modern award objective that the CMIG can attend would be advanced by the proposed variation is that in relation to collective bargaining. That's not correct, and can I just invite the Full Bench to read our written submissions - our primary written submissions - at paragraph 63 and 70 where we set out what our submissions are in relation to that matter.

PN2422

Mr Taylor at one point of his submissions, when he was being asked questions about the OECD data, accepted that the OECD data is different because they used a different cohort, yet had no response to the proposition that in Professor Peetz's supplementary report that is the very data that Professor Peetz relies upon to draw comparative conclusions. There is a degree of inconsistency in Mr Taylor's position as put to the Commission.

PN2423

Can I just also clarify a matter I said earlier during the course of the day that on my assessment of 4.3 per cent, assuming my mathematics to be right, I think I made a submission to the effect of that was still within the range of experience across industry generally, we've gone through Professor Peetz's report; he doesn't actually put a percentage or identify the experience of redundancy generally across the industry. The only reference is in the OECD report, and as I identified earlier today there they're comparing industries' contribution to the amount of displaced workers. So I overstated that proposition, and I accept that, but will the Full Bench take my submissions as being a reference to that matter.

PN2424

The final point I wanted to raise was that in relation to the industry-specific character of the scheme and its interaction with the modern awards objectives. Mr Taylor rightly pointed out that at section 134(2) of the Fair Work Act, the legislation provides the modern awards objective apply to the performance or

exercise of the modern award powers which are the Fair Work Commission's functions or powers under this part. Section 141 falls within the relevant part, and so we say when the Commission comes to exercise any powers under section 141, the modern award objectives must be taken into account. At one point I thought my friend, Mr Bukarica, was seemingly suggesting - I might be wrong - that because there is an industry-specific redundancy scheme, it is taken to (indistinct) the modern awards objectives.

PN2425

We say that that required the Commission - as I said earlier today, that required the Commission to be satisfied in the first instance back in 2010, and as I said earlier today given that there was a consent position on what we've been able to look at, there was no consideration given at all by the Commission to the inclusion of this scheme as an industry-specific scheme or whether it met the modern awards objectives at that time. But we are in a position where the Commission has varied the award as it currently stands, so - that occurred in 2015 - and in this further variation we say the effect of section 134(2) is that the Commission must have regard to the modern awards objectives in both considering our variation and any alternative.

PN2426

VICE PRESIDENT HATCHER: Theoretically, what if there's a conflict between retaining the industry-specific character of the scheme and the modern award objectives? Does 141(4)(b) trump 134(1) or what do we do?

PN2427

MR SHARIFF: You just have to find a way of reconciling it. That's why you're the Vice President and we're on this side, and each of you are members of the Full Bench. That partly I think brings us to the crossroads of this application, because we do say if left uncapped or unlimited, this scheme, one, doesn't have the industry-specific character to it that it had when it was originally made, and secondly, it is not a scheme that meets the description of something that's a fair and relevant minimum standard. So we have proposed a variation that we say seeks to marry both of those. Our friends have proposed nothing, although I accept Mr Bukarica has in oral submissions raised a proposal which in effect is no capital, and alters the scheme, because it actually means that people now obtain the windfall benefit that they would not have done in the past.

PN2428

We, on instructions, would be prepared to consider any parameters that the Full Bench were to identify as part of any decision and have discussions with our friends about that to come up with a potential solution, and we appreciate the task might be a difficult one, but we'd undertake it, and perhaps Commissioner Harrison is more prescient than all of us, because that's in fact what he directed back in 1999, and the parties then took their courses on appeal and never got there. But we would embrace that approach and we would undertake the task in earnest to see if any agreement could be reached. We accept that the parameters of that would have to include consideration to grandfathering provisions as well as the line to be drawn and how one can draw the line.

PN2429

VICE PRESIDENT HATCHER: Ask Mr Bukarica about whether the comment in Professor Peetz's report about a strong correlation between age and services industry, whether there was a comparative figure for industry generally.

PN2430

MR SHARIFF: Yes. Can I address that issue by taking your Honour to the report at page 36? This is where - - -

PN2431

VICE PRESIDENT HATCHER: Go to where?

PN2432

MR SHARIFF: To Professor Peetz's report, exhibit 11, I think, on page 35. He commences that analysis on the relationship between age and tenure, and relies upon what was an Australian coal and energy survey that he was involved in conducting some years beforehand, and can I take you then to page 38 where he says this, after the table:

PN2433

The close relationship between age and tenure is also seen in other data relating specifically to retrenched black coal mining workers.

PN2434

And he of course relies upon Mr Gunzburg's data there, and then he says in the next paragraph:

PN2435

This close relationship between age and tenure is also not unique to mining and indeed makes sense. Older workers are more likely to have been in long-duration jobs. It is also evident amongst retrenched workers in other industries.

PN2436

Pausing there, he then deals with the 2001 ABS data, indicated that 71 per cent of retrenched workers aged 55 to 64 had a prior job tenure of five years and over, as did 63 per cent of retrenched workers aged 45 to 54, compared to just 45 per cent of those 35 to 44, et cetera. So that's the evidence. Can I just say, part of the difficulties that I think all parties have had in these proceedings is that there is actually very little data from the ABS about retrenched workers. The last, as I understand it, comprehensive study done of retrenched workers was in 1997 and 2001, and that's the data that Professor Peetz relies upon in the middle parts of his report, which I've made mention of before. It's actually the same data that Professor Peetz reported on in the 2004 redundancy test case, and some of his evidence in that regard was accepted in relation to the economy broadly, and I think an earlier study of Professor Woden was also relied upon by the Full Bench in the 2004 test case. But one will find very, very little economy-wide data on retrenched workers since that time. Unless there's anything further, those are our oral submissions.

PN2437

VICE PRESIDENT HATCHER: Thank you. Mr Taylor, you wanted to file a short written reply submission?

PN2438

MR TAYLOR: Yes, if we could.

PN2439

VICE PRESIDENT HATCHER: How long will that take?

PN2440

MR TAYLOR: Could we have until the end of next week?

PN2441

VICE PRESIDENT HATCHER: This week?

PN2442

MR TAYLOR: Sorry, could we have until the end of next week?

PN2443

VICE PRESIDENT HATCHER: Next week, all right. Mr Bukarica, you wanted to put in a note about something?

PN2444

MR BUKARICA: I'll have to check - I think there was a question that was asked that I couldn't answer immediately.

PN2445

VICE PRESIDENT HATCHER: That question, all right. If you don't need to, you don't have to.

PN2446

MR SHARIFF: I'm sorry, your Honour?

PN2447

VICE PRESIDENT HATCHER: No, that was another matter, so Mr Shariff, if something arises out of that, you can apply for the right to have a further response.

PN2448

MR SHARIFF: Yes, and we will undertake to provide the electronic copy of the schedules. We'll also see if we can manipulate the data to produce an average, and we will also provide an updated schedule of the summary of lay witnesses that went with our submissions.

PN2449

VICE PRESIDENT HATCHER: All right. I thank the parties for their submissions. Subject to the receipt of the further submissions, we'll reserve our decision. We will now adjourn.

ADJOURNED INDEFINITELY **[3.17 PM]**

LIST OF WITNESSES, EXHIBITS AND MFIs