BEFORE THE FAIR WORK COMMISSION

Matter no. **AM2014/67**

Applicant: **Coal Mining Industry Employer Group**

Respondent: **APESMA**

CLOSING SUBMISSIONS FOR APESMA

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A. Introduction

1. This is an application, brought by a sub-set of coal industry employers, to amend the *Black Coal Industry Award 2010* (**the Award**) by significantly reducing the benefits available under the industry specific redundancy scheme contained in clause 14 of the Award.

2. The principles applicable to an award review of this kind are well established:

> [23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

> [24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review 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.[1]

3. The nature of the case required to be made out will reflect the nature of the change sought:

> [8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary 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. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[2]

4. Some general observations about the application may be made:

   (a) in order to succeed, it is necessary for the applicant CMIEG to demonstrate that the variation is necessary to meet the modern awards objective of ensuring that modern awards provide a fair and relevant minimum safety net;

   (b) the existing provisions of modern awards as made in 2010 (including relevantly the industry specific redundancy scheme) are to be regarded as *prima facie* compliant with the modern award objective;

   (c) this application is made pursuant to leave granted by the Full Bench in the decision removing the discriminatory cap previously contained in clause 14.4(c) of the Award.[3] The grant of leave was directed to the question of whether there should be "*a new cap upon what is a fairly generous scheme*". The Full Bench did not invite a root-and-branch review of the industry scheme; and

[1] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788; 241 IR 189.
[2] *Security Services Industry Award 2010* [2015] FWCFB 620.
[3] *Black Coal Mining Industry Award* [2015] FWCFB 2192; 249 IR 26 at [44].

(d) the industry-specific scheme has never contained a cap. To justify introducing one CMIEG needs to demonstrate a substantial change in circumstances that justify such a significant change. CMIEG's case however relies on matters which have been a feature of the industry from the inception of the scheme and throughout its history.

5. The application should be rejected because the variation sought is not necessary to achieve the modern awards objective of the establishment of a fair and relevant minimum safety net. To the contrary, the proposed variation detracts from that objective, because:

(a) the features of the industry which lead to the establishment of the scheme continue to obtain, and if anything the distinct character of the industry is more pronounced;

(b) the industry scheme is a long standing feature of employment in the coal mining industry and has been accepted as the appropriate standard by employers and employees including in employment contracts, enterprise agreements and company policies;

(c) s141 of the *Fair Work Act 2009* (Cth) (**FW Act**) acknowledges that industry-specific schemes such as this one are not inconsistent with the modern award objective;

(d) there is no evidence of any change that justifies departing from the current provision; and

(e) the variation would tend to reduce living standards and reduce the workforce participation of older workers.

B. The history of the industry scheme

6. The genesis of the industry redundancy scheme was in decisions of the Coal Industry Tribunal (**CIT**) in 1973 in respect of the "severance payment" of one week per year of service (CR 2183) and in 1983 in respect of the "retrenchment payment" of two weeks per year (CR 3132).

7. In its 1973 decision[4] the Tribunal considered a claim for, *inter alia*, severance payment of four weeks per year of service. The claim was contested by the relevant employers. Having rejected the unions' contention that there was an extant industry standard, the Tribunal determined:

> Nevertheless, I consider the claim is sound in principle, particularly in an industry in which from time to time collieries close down either in whole or in part and unemployment thereby results. The coal mining industry is one in which employees tend to attach themselves to a particular colliery, in some instances for the whole of their working lives. Loss of a job which a man has come to regard as permanent is a serious matter and when an employee has reached

[4] *Australian Coal and Shale Employees Federation and others* [1973] ACIndT 2183 (16 February 1973).

> middle age it is capable of causing an upheaval in his life which can affect his family as well as himself.
>
> I have decided to make provision for severance pay. It will take the form of an order requiring an employer who has decided to close down a colliery in whole in part either permanently or for an indefinite period to pay each employee who has completed at least five years of continuous employment at the colliery, and whose services have been terminated by reason of the closure, severance pay of one week at ordinary rates for each completed year of service.
>
> The intention of the decision is to provide a measure of relief for an employee who has given an appreciable portion of his working life to a colliery and who through its closure has been deprived of his livelihood…

8. In its 1983 decision the Tribunal considered a claim for a retrenchment payment. The claim was contested and the hearing "*occupied many days*". The Tribunal, after discussing the 1973 standard including the threshold requirement of five years' service, said:[5]

> However when I consider the factors the submissions lead me to take into account, I do not consider the existing provisions are adequate where the circumstances are such as to be reasonably foreseeable. Such circumstances are technological change, market forces and the working out of reserves. No distinction is made between them.
>
> Cases of assessment have been outlined in a number of decisions of the Conciliation and Arbitration Commission and other industrial tribunals. However the position in the coal mining industry is distinct. It has had a code since 1973 which is more comprehensive than the general arbitrated schemes to which I have referred. While other decisions are useful guides the actual assessment must be done on an industry basis. The matters therefore taken into account are-the industry is a career industry, some benefits accrue on an industry wide basis, many conditions are in advance of those in industry generally, loss of seniority, an inability to find comparable employment, difficulties and financial pressures occasioned by what will frequently be a need to move in the search for a job, changing community attitudes to retrenchment evidenced by legislation and the fact the retrenchment agreements exist whatever their terms, severance and retrenchment are industrial, not social, matters in a tribunal such as this and income maintenance is not a proper consideration, the costs of any measure and, so far the evidence permits, an assessment the effect of any change on marginal operations. Conscious of problems confronting the industry on costs I nevertheless bear in mind that capital has poured into the industry and created demands for jobs which were beyond what are now seen as probable requirements at this time. In the light of these factors my assessment of the appropriate amount is three ordinary weeks' pay for every completed year of service.
>
> The decision will be implemented in the following manner. The existing severance pay provisions are to be retained, subject to removal of the barrier. There will be a further provision for retrenchment on the specified grounds of technological change, market forces and working out of reserves. This further provision which will provide for two weeks' pay for every completed year of service with a minimum of two weeks' pay for every employee will be in addition to the adjusted provision for severance pay…

[5] *Australian Coal and Shale Employees Federation and others* [1983] ACIndT 3132 (19 Jan 1983) at 36–37.

9. In short, the industry scheme was established following contested arbitrations. It was established by reference to the special features of the industry, including that:

   (a) the industry is a career industry;

   (b) conditions in the industry are in advance of other industries;

   (c) the industry is one that experiences cycles of growth and contraction such that retrenched employees must contend with inability to find comparable employment;

   (d) the need to move in search for a job;

   (e) loss of seniority; and

   (f) the industry has the capacity to make provision to make such payments given the "reasonably foreseeable" circumstances that give rise to redundancy.

Developments since the introduction of the scheme

10. The industry scheme thereby established has continued to operate, without challenge, for the following 33 years. Neither the original *Termination, Change and Redundancy Decision* (1984) 8 IR 34 nor its successors[6] precipitated a challenge to the industry scheme. There was, for example, no contention by employers in the industry similar to that made in the current proceeding that redundancy entitlements in the industry should not exceed TCR standards. The various rounds of award simplification came and went without any challenge to the scheme.

11. The industry scheme was included in the modern award in 2010 with the consent of all parties. The consent of the CMIEG to its inclusion could only reflect its acceptance at that time that the industry standards set a fair and relevant minimum safety net.

12. CMIEG does not identify any change in circumstances since 2010—or even since 1983—which warrants the drastic reduction in the benefits under the industry scheme for which it contends. The award scale is reproduced in enterprise agreements, employment contracts and redundancy policies established by employers in the industry.[7] There is no evidence of any attempts to avoid the scale by enterprise bargaining.

13. In other words, the scheme is entrenched in the coal mining industry and has long been accepted by employers and employees as a condition of employment in the industry.

14. All conditions in an industry are set against the background of other existing conditions. That is particularly the case in respect of long-standing conditions. Any reduction in one area would

[6] Including *Redundancy Test Case Decision* [2004] AIRC 287; (2004) 129 IR 155.
[7] Exhibit 38.

ordinarily be met by a corresponding adjustment in another area. Conditions have been set by the tribunals and the parties over the decades against a background of the current redundancy entitlements. Employees enter an industry, and remain in it, on the basis of an understanding of the key industry conditions.[8] That is particularly so in this industry where decisions are made at the outset of a career to obtain industry specific skills that may make it very difficult to readily work elsewhere. Those decisions are made against a background of the well-known cyclical nature of the industry, where redundancies are a common and long-standing historical feature. Workers enter the industry aware of the 'generous' redundancy scheme that provides a degree of comfort in those circumstances.

15. Against that historical background a party seeking to demonstrate that a substantial change to this long standing condition is necessary to ensure a fair and relevant minimum safety net faces a high hurdle. The CMIEG evidence and submissions fall well short.

C. The findings for which the parties contend

16. The respondents contend that the following findings should be made on the evidence:

(a) The special features of the industry which formed the basis for the decisions to establish the industry-specific scheme continue to obtain. Specifically:

i. the industry remains a career industry;

ii. the industry remains one which is affected by peaks and troughs;

iii. the effects of retrenchment on employees in the industry are particularly harsh; and

iv. the industry has ample capacity to make provision for the "reasonably foreseeable" circumstances that give rise to redundancies caused by working out of reserves or market forces.

(b) To those long standing features may be added further features which have emerged since the establishment of the scheme:

i. those workers who do regain employment in the industry are likely to obtain employment on substantially worse conditions;

ii. union density and collective bargaining coverage has diminished;

iii. the workforce is aging;

iv. there is no longer preference of employment for those retrenched; and

[8] See for example the statement of Stephen Took (Exhibit 36) at [31].

v. the threat of retrenchment is used to reduce employment conditions.[9]

17. The applicant in effect contends for a single factual finding: that the circumstances of retrenched employees in the black coal mining industry do not differ substantially from those of retrenched employees in any other industry. It has not established that proposition and the finding should not be made.

D. General observations about the evidence

18. Before considering the content of the parties' evidence, two general matters may be commented upon: first, the quality of the parties' evidence; second, the limited ambit of the CMIEG challenge to the unions' case.

The quality of the parties' respective evidentiary cases

19. The CMIEG—being a conglomeration of large and very large corporations—chose to prosecute its case on the strength of evidence adduced from witnesses who were neither independent nor expert. The form of the evidence was broad and conclusory assertion together with a small amount of facile statistical analysis. The CMIEG did not explain its failure to engage an expert and objected to cross-examination questions directed to that topic. In effect, the CMIEG asks the Commission to accept on faith the bare assertions of its non-expert and partisan witnesses in circumstances where it could have but chose not to assist the Commission with the view of an independent expert.

20. The unions, by contrast, engaged a reputable survey company and an eminently qualified expert. The expert, who was required to consider and declared himself bound by the Expert Witness Code of Conduct, provided a comprehensive and considered report dealing with matters within his area of knowledge. His evidence did not take the form of assertion but transparently exposed his assumptions and reasoning.

21. Given the total contrast in quality of the respective evidentiary cases, there is an air of unreality to the CMIEG criticism of the unions' survey and expert evidence. It is incongruous that a party which relies on impressionistic lay evidence would criticise the minutiae of an expert's approach. In deciding not to bring expert evidence of its own, the CMIEG has effectively vacated the field of matters addressed by the unions' expert.

22. It should be borne in mind that the methodological criticisms made of the design and logic of the unions' expert and survey evidence cannot be made of the CMIEG evidence because it does

[9] As to which see paragraph [73] below.

not reveal any underlying logic or method; nor was there any point testing the independence of the CMIEG witnesses because they did not pretend to be independent. Those are not matters which should lead to a forensic benefit to the CMIEG.

23. A party which eschews the opportunity to lead independent expert evidence which exposes to scrutiny its underlying assumptions and logic, and instead chooses to lead evidence in form of assertion from non-independent non-experts, should not be rewarded for doing so.

24. The applicant's decision to proceed on the basis of intrinsically defective material leaves the Commission with little choice but to prefer the unions' evidence. To the extent there is any divergence between the parties' evidence, the unions' evidence should be accepted.

The limited nature of the CMIEG attack on the unions' evidence

25. In addition to its expert evidence the unions lead evidence from a number of union officials and witnesses. That evidence outlines the history of the development of the industry scheme, the nature of work in the industry, the types of industry-specific skills developed and qualifications obtained. Importantly, the evidence describes the lived experience of workers in the industry and the harsh effects of retrenchment upon them. That evidence was not challenged to any degree. It should be wholly accepted.

26. There was a challenge to the unions' expert evidence, but a limited one. Professor Peetz's reports addressed a range of relevant issues, including the economic characteristics of the industry; productivity of workers in the industry; the characteristics of employers; patterns of employment in the industry; revenue and wages per employee; employment outlook; the demographics of the industry; characteristics of employment in the industry; the incidence of redundancy; national level data on the experiences of redundant workers; the ages of retrenched workers; the value of notional transfer of contingent redundancy entitlements; and the effects of redundancy in the black coal mining industry.

27. Only the last of those areas of analysis was tested, and then only to the limited extent that the CMIEG cavilled with aspects of the design of certain survey questions. The cross-examination of the Professor was ineffective to materially detract from the force of the Professor's conclusions, as discussed next; but in any case, the vast bulk of the Professor's evidence was unchallenged and should be accepted wholly.

E. The Peetz evidence

28. The limited ambit of the challenge to the Professor's evidence has been mentioned. The cross-examiner put a series of questions that proceeded, without foundation, on the unstated premise that the Professor had conducted his analysis by reference to Essential subsets of the data (exhibit 14), including a cohort of 513 respondents which included employees who had had their contract come to an end or had been terminated for reason other than redundancy. Exhibit 14 contained tables of subsets of the data prepared by Essential Media which Professor Peetz had not seen until immediately before the hearing. Professor Peetz's report made clear that his conclusions (such as table 15), drawn from the same raw data, were based on a different subset, namely those who he defined in his report as "reluctantly redundant". These he defined as employees who had been made redundant and who did not want to leave or would have preferred to keep working but were offered a package too good to refuse (put differently, from those who were redundant (answer 3Aa) those who answered yes to survey questions 5(a) or (b) but not 5(c)).[10]

29. The cross-examiner did not take the Professor to any part of his report in this regard. It was not put to that his classification was inappropriate, or that his conclusions about the cohort were incorrect. His evidence remains almost entirely unchallenged and wholly undisturbed. The following conclusions can be drawn from it.

30. **Employment in the black coal mining industry is characterised by peaks and troughs.** Employment in the industry as a whole is very sensitive to coal prices.[11] Employment at particular mines can drop precipitously even while mine employment as a whole is rising.[12] Troughs can affect the whole industry and last for years, during which time total employment reduces by 30–50%.[13] There is no evidence of labour hoarding (i.e. retention of surplus employees in order to retain skilled labour) in the industry.[14]

31. **Profits per employees are very high during boom periods.[15]** In the period 2006–2007 to 2011–2012 profit per employee in the sector was 14 times the all-industries average and peaked at 31 times in 20008–2009. Although profit per employee subsequently fell, the very high level of profit obtained in boom years probably provide a major buffer against downturns.

[10] Peetz First Report(Exhibit 11), page 76.
[11] Peetz First Report (Exhibit 11), page 32.
[12] Peetz First Report (Exhibit 11), page 27, Table 2; page 84.
[13] Peetz First Report (Exhibit 11), pages 22–27
[14] Peetz First Report (Exhibit 11), page 13.
[15] Peetiz First Report (Exhibit 11), page 19–21.

32. **Coal mining employers have a capacity to make provision for existing redundancy costs.** There is a high concentration of large firms in black coal mining. There is a high level of firm resilience to loss making, and high levels of profit during boom times probably provide a major buffer against downturns.[16]

33. **Retrenched employees, if re-employed at all, are likely to be re-employed on inferior conditions.** The Essential survey indicates a substantial transfer of employment to contractors, with associated diminution in work conditions. The Professor explained in cross-examination that the striking aspect of the data was that the employment conditions of retrenched workers were significantly worse than those who had not been retrenched, including in loss permanency.[17]

34. **The experiences of retrenched employees in the coal mining industry are worse than employees in other industries.** In his second report the Professor examined the proposition that the coal industry is no different to other industries. By comparing the best data available, that is the Essential Survey data, with OECD data as to impact generally he pointed out that the industry has much lower re-employment rates than the workforce generally[18] and that workers who do regain employment suffer a larger diminution in job conditions than the workforce generally.[19]

35. As Professor Peetz explained in cross-examination, the relatively low rates of casualisation in the industry would mean, all things being equal, that that the industry would be expected to have *better* redundancy outcomes than industry generally. Put differently, given the lower level of casualisation, comparison between mining and the workforce generally will tend to understate the relative impacts of redundancy on coal mining employees.

36. **Employees in the industry are older and longer tenured than average.[20]** Employees in the mining sector are older than workers in other industries overall. One-third of employees are above 45 although there is a relatively low incidence of employees aged above 55. Tenure and age are closely correlated. The Professor's evidence is broadly consistent with the evidence of Gunzberg and Martin in this respect.

[16] Peetz First Report (Exhibit 11), page 84.
[17] Peetz Second Report (Exhibit 12) [13]–[14].
[18] Peetz Second Report (Exhibit 12) [12].
[19] Peetz Second Report (Exhibit 12) [13]–[14].
[20] Peetz First Report (Exhibit 11) pages 33 and following.

37. **Older retrenched employees suffer particular disadvantage.**[21] Older employees and employees with long tenure who are retrenched are significantly disadvantaged. They are more likely to be made redundant and less likely to find new employment.

38. The relationship between age and the probability of displacement of re-employment is well established. The OECD Report points out that older workers have both a higher probability of displacement and a lower prospect of re-employment.[22] The report also observes that workers with long tenure (more than 20 years) have a lower probability of re-employment than those with intermediate tenure (5–19 years). Similarly data produced by Gunzburg suggests that more than half of those retrenched are older than 55 in circumstances where 14.3% of the industry falls into that category.

39. In short, it is the employees whose redundancy entitlements CMIEG proposes to reduce who are worst affected by redundancy.

40. **Professionals are particularly severely affected.** 9% of mineral professionals who responded to one survey had been retrenched in the previous year. A number pre-empted redundancy by leaving. Between 2013 and 2015 the number of long term unemployed minerals professionals rose from 8% of those unemployed to 30%. Unemployment rates were particularly high among older workers and are rising. Older professional workers were more likely to be made redundant and to have greater difficulty in finding jobs.[23]

41. This data takes on particular significance in circumstances where there is limited enterprise agreement coverage of professionals[24] and more that 70% rely on the Award to set their minimum legal entitlement.[25]

F. The Essential Survey

42. Essential is a well-known and well respected professional survey firm. It conducted a survey of members of the union. Quotas and random selection were used to ensure participants were equally likely to be contacted regardless of region.[26]

43. Some salient aspects of the Essential survey are as follows:

    (a) Less than half of those retrenched are currently working the coal mining industry.

[21] Peetiz First Report pages 62 and following.
[22] OECD Report, page 36.
[23] Peetz First Report (Exhibit 11), pages 56–57.
[24] See Bolger statement (Exhibit 37) at [10]–[14].
[25] See Bolger statement (Exhibit 37) at [14].
[26] Statement of Gavin White, Exhibit 16, paragraph [7].

(b) 28% of respondents had not worked at all since being retrenched.

(c) Only 21% of those who had been retrenched are in full time work.

(d) Of those who are in paid work, 72% are worse off than they were before retrenchment.

(e) 57% of those who have found work have worked wholly on casual or fixed term bases.

(f) A majority of those retrenched had worked for their employer for longer than six years and 30% for longer than ten years.

(g) 60% of those retrenched had been in the industry for longer than ten years, and 41% longer than 20 years.

(h) 62% of respondents were working for contractors, compared to 27% working for contractors before retrenchment.

(i) A majority of those retrenched received no transition support at all. 20% received outplacement services and 3% relocation assistance. 6% received new training and 12% were offered redeployment.

44. There was some question as to the extent to which the respondents were covered by the Award. Two points may be made in this respect. **First**, even if correct, that fact would not matter very much. The purpose of the survey was to investigate the circumstances of employees in the industry. The fact that some fraction of respondents might fall just within or without the coverage of the Award is not particularly significant.

45. **Second**, the respondents to the survey were the members of APESMA and CFMEU. The relevant extracts of APESMA's coverage rules and the relevant coverage provisions of the Award are annexed at Annexure A. In short, APESMA coverage coincides perfectly or almost perfectly with the coverage of the Award. The same position obtains in respect of CFMEU coverage. It is therefore very likely that all, or the overwhelming majority of, respondents were covered by the Award.

G. APESMA's lay evidence

46. As mentioned, APESMA lead a substantial amount of lay evidence which has gone completely unchallenged. The evidence outlined the history of the development of the industry scheme, the nature of work in the industry, the types of skills developed and qualifications obtained. Importantly, the evidence described the lived experience of workers in the industry and the harsh effects of retrenchment upon them.

Justin Smith (Exhibit 34)

47. Mr Justin Smith is a coal mining surveyor. He qualified as a surveyor after four years' TAFE study which lead to a coal mining specific qualification, that is, Coal Mine Surveyors Certificate of Competency.

48. He began work in 1980 at Valley 3 Colliery and Nattai North in the Burragorang Valley near Picton. At the end of his cadetship, and as a result of a general downturn, he was not offered a position at Valley 3. He moved to the Hunter in 1985. Two years later he was retrenched when his colliery was placed in care and maintenance.

49. He looked for work in the coal mining industry but could not find it. He eventually moved to Western Australia to a gold mine in Telfer. He was not employed in a statutory role and earned half his previous salary. His qualifications were coal-specific and were not recognised. He was required to make an application and undertake another assessment. He eventually obtained certification but never worked in a statutory role.

50. He returned to work in 1991. He obtained some contract work, but it took ten years' of continuous searching before he secured another full time position in 2001. His contract work averaged about six months per year. It required him to travel from Central Queensland to Lithgow to the South Coast.

51. In 2014 he was, again, retrenched. He was unable to relocate because he had two dependent children. His retrenchment pay allowed him to re-train (ironically in industrial relations) but he has not yet found work. There is no coal mining work in his area.

52. He explains that his qualifications in surveying are not readily transferable. Land surveying would require further qualifications. Surveying in metalliferous mining requires further experience because "*the techniques, work routines, mining environment and equipment used are very different*".

Jayne Farrey (Exhibit 33)

53. Ms Farrey is an exploration geologist. She joined the industry in March 2006. She was initially based at Millenium Mine 160km south west of Mackay in Queensland and over the following six years moved to Oaky Creek mine in the Bowen Basin, Curragh open cut mine near Blackwater in Queensland, Angus Place near Lithgow and Bulga Underground in the Hunter Valley and, from September 2012, Wambo west of Singleton. Ms Farrey was retrenched from Wambo in June 2015.

54. Ms Farrey searched for work every day but was out of work for four months. In November 2015 she obtained casual work with a geotechnical consultancy company. She suffered a large wage cut together with the loss of leave entitlements and the other benefits of permanency. Her employment is precarious and she has long periods without work, including eight weeks without work at the time of signing her statement.

55. Ms Farrey explains that although her qualifications are theoretically transferrable, any work she obtained in other commodities would be entry level and require a move to Central NSW.

Geoff Wright (Exhibit 31)

56. Mr Wright was a Mine Surveyor and Deputy. He joined Newcom Colliery near Lake Macquarie in 1968 and was retrenched in 2015. He was retrenched during a downturn. As a result, a number of younger and better qualified employees were laid off at the same time as him.

57. The retrenchment payments made to him allowed him to pay off his mortgage and place an amount into superannuation. He uses his superannuation to support his daughter.

58. Mr Wright applied for various jobs, including truck driving, bus driving and call centre work. He remains unemployed.

Greg Davey (Exhibit 32)

59. Mr Davey joined Burwood Colliery in Newcastle as a fitter in 1979. He left Burwood in 1982 because production was winding down and moved to Myuna Colliery. He was progressed through the ranks and qualified as a deputy and then undermanager after substantial coal specific training. He was retrenched from Myuna in 2013.

60. At the time of his retrenchment he planned to continue to work to support himself and his wife. He has been unable to find work since. He thinks that is because his qualifications as Deputy and Undermanager are not transferrable. He has qualifications as a fitter, but not having worked on the tools for many years he does not believe he could obtain work as a fitter.

61. He now has some casual work as an exam supervisor working part-time hours during exam periods in June and November.

Steve Bartlett (Exhibit 35)

62. Mr Bartlett joined Old Bulli Colliery in 1974 as a trainee surveyor. He qualified as a deputy in 1982 and was promptly retrenched in April 1983. He was re-engaged at Old Bulli in late 1983

following the sudden death of a Deputy. In 1985 he was transferred to Appin as Old Bulli wound down.

63. When he was retrenched Mr Bartlett was out of work for four months. He was unable to move out of the region and in any case he understood there was little work in other coal mining areas. If not for the unfortunate death of an incumbent deputy, he thinks he would have been out of work for a long period. He says that after he was re-engaged at Old Bulli new employees were only hired to replace retirees.

64. Mr Bartlett relies on his income from work, has four stepchildren ages between 17 and 23 and a family settled in the Illawarra. He intends to keep working for a few more years.

Stephen Took (Exhibit 36)

65. Mr Took joined the industry as an operator in 1979 at Kemira Colliery near Wollongong. He moved to Avondale Colliery in early 1981. In December 1982 he was retrenched when his employer closed Kemira Colliery as well as Avondale, Old Bulli, Corrimal and Cordeaux simultaneously. He was unemployed for seven months. He visited the South Coast pits routinely but found no work. He looked further afield in Lithgow and the Hunter.

66. In August 1983 he found work at Fernbrook Colliery in Lithgow. He continued to look for work in the Wollongong area and found it over four years after his retrenchment, in late 1986, when he moved to Coalcliff.

67. He was retrenched from Coalcliff in late 1990 because the coal ran out. He was then out of work for five or six months.

68. In 1991 he found work at the Ivanhoe Colliery at Portland near Lithgow. He was unable to move his family on this occasion and had to commute from Albion Park to Portland.

69. Mr Took was retrenched the first time before the 1983 decision establishing the retrenchment pay entitlement. He explained that he suffered financially. In 1990 he received severance pay but still suffered hardship.

70. He needs to keep working and does not want to retire. He cannot now move because his family is established in Wollongong.

71. Mr Took has been offered other jobs for more pay over the years. He explains that has not taken the offers partly because of loyalty, but also because of the benefits of long service, including redundancy.

Catherine Bolger (Exhibit 37)

72. Ms Bolger deals with a number of relevant matters. She was not cross-examined. Her evidence establishes the following propositions:

(a) The qualifications of professional employees in coal mining (**Staff**) are coal mining industry specific and are tied to industry specific legislation.

(b) The conditions of professional employees are in advance of industry generally.

(c) Loss of seniority can cause a loss of income as a result of loss of access to desirable shifts.

(d) Coal mining employers are highly resistant to bargaining. The outcome of the present application is unlikely to alter the position.

(e) Collective agreement coverage of Staff is *circa* 12%.

73. Importantly, Ms Bolger explains that the threat of retrenchment is used to reduce pay and conditions for Staff.[27] She provides two specific examples in February and April this year. That evidence was not answered and not challenged in any degree. It is consistent with Professor's Peetz's view that data suggests redundancies have been used to reduce pay and conditions.[28]

Conclusions from APESMA lay evidence

74. The following conclusions can be drawn from the APESMA lay evidence.

(a) Professional staff in the black coal mining industry have specialised skills which are not readily transferrable to other industries or sectors. That is true even for those staff whose qualifications are theoretically transferrable, such as surveyors and geological engineers.

(b) Employees who have been retrenched historically have spent significant periods out of work and have had to move to find work.

(c) Employees who have been retrenched in recent years either remain unemployed or find employment which is vastly inferior to their previous conditions.

(d) Employees join and remain in the industry and with particular employers on the basis of a particular understanding of their redundancy entitlements.

[27] Bolger statement (Exhibit 37) [40]–[46].
[28] Peetz First Report (Exhibit 11) page 56.

(e) The threat of retrenchment and/or actual retrenchment is used to reduce employment conditions.

H. The employer evidence

The evidence CMIEG did not lead

75. In its earlier decision the Commission indicated that any relevant variation would require consideration of a range of factors, including the age profile and length of service of coal mine employees who have been made redundant, the typical circumstances they face on redundancy, and the cost impact on employers of the scheme.

76. CMIEG evidence as to the second and third matters specifically identified by the Full Bench is notable by its absence. The matter of costs impact of employers and employers' capacity to pay them in particular is a matter largely within the knowledge of the employers. Apart from offering an a-contextual sum payable in respect of redundancies by one particular employer (for which it appears provision had been made), no such evidence was produced.

77. There was no evidence to suggests that reducing employers' redundancy liabilities would lead to anything other than an improvement in their profitability. The Commission would on that basis draw two important inferences:

(a) Coal industry employers have ample capacity to absorb redundancy costs.

(b) The proposed variation would have no impact on productivity or efficiency.

78. Nor did CMIEG make any serious attempt to lead evidence as to the circumstances of retrenched employees. Apart from a sophomoric analysis of one ABS dataset, no evidence relevant to the mater was advanced.

79. There are a number of other notable omissions from the CMIEG evidence. For example, it lead no evidence about:

(a) the actual effect of the "removal" of the age 60 cap, that is, the extent to which removal of the cap actually increased employers' liabilities (bearing in mind that employees subject to the cap could nonetheless accrue more than 40 years' service);

(b) the actual effect of the imposition of the 27 week cap for award purposes, that is, the extent to which the imposition of the cap will in fact reduce employers' liabilities (given that employees' redundancy entitlements may be set by agreements unaffected by award variations);

(c) the intentions of CMIEG members if a cap is introduced, that is, whether the employers will in fact move to reduce employees' entitlements by amending company policies;

(d) the effect of the introduction of a cap on enterprise bargaining, and whether a change to the award would increase the prospects that they would collectively bargain.

80. Knowledge of each of those matters was within the province of the employers. It should be inferred in each case that any evidence CMIEG could have lead would not have assisted it.

David Gunzburg

81. Mr Gunzburg is an industrial officer engaged by CMIEG. He is neither an economist nor statistician. He is not independent and in fact seems to have been intimately involved in the preparation and conduct of this application.

82. The salient part of Mr Gunzberg's statement is his purported analysis of ABS statistics regarding time out of work. That analysis is said to support a conclusion that employees in the coal mining industry spend no more time out of work than employees in any other industry. The analysis is wholly discreditable for the following reasons.

83. **First**, it is doubtful whether ABS data provides a sound foundation for any conclusions relative to the coal mining industry. Although Mr Gunzberg himself was not aware of the relevant figures, Professor Peetz explained that coal mining workers are roughly 20% of the mining workforce and mining workers roughly 2% of the workforce overall. Coal mining employees surveyed by the ABS are likely to be in the order of 0.4% of the Labour Force survey sample. Gunzberg does not explain the effects of that sample size on the viability of his mooted conclusions, probably because he has no understanding of the significance of sample sizes in statistical analysis.

84. Professor Peetz, on the other hand, was conscious of the shortcomings of ABS data for these purposes. It is for that reason that the unions invested a not insubstantial amount in the Essential survey.

85. **Second**, although Gunzberg's statement asserts that graph DG-6 identifies the length of time spent unemployed by individuals retrenched from various industries, it does no such thing. Rather it identifies the period of time the respondents to a ABS survey have been out of work at particular moments in time.

86. The graph does not disaggregate employees who have been retrenched from those who have resigned or been dismissed, or from those who have never worked or have not worked for many

years.[29] Nor does it disaggregate coal mining employees from mining employees generally. Employees who have been dismissed are a minority of unemployed persons. Persons who have been retrenched are a subset of those who have been dismissed. Coal mining employees are a minority—roughly 20%—of mining employees overall.

87. Accepting Gunzburg's thesis requires the Commission to assume that the period of time out of work for unemployed workers who most recently worked in the mining industry coincides with the experiences of coal mining workers who have been retrenched. There is no basis for that assumption.

88. **Third**, Mr Gunzburg has opted to take 'representative' samples of unemployment at 5 year intervals for the sake of his analysis. These samples have been taken from a series with a quarterly release schedule. That is, he has considered 1 in every 20 data points. That is a decision with major implications for the force of the data. There is no indication that Mr Gunzburg has considered, or is even aware of, the implications of that choice.

89. It is manifest that there are potential implications. Whatever variations occur within the five year periods are overlooked. Mr Gunzburg's own data demonstrates that large variations which can occur within five year periods—between October 2011 and September 2016 the price of thermal coal varied between 125.96c and 70c in a series of peaks and troughs in the interregnum.[30] The consequence of Gunzberg's decision to use five yearly points in time is to conceal the effects of those medium-term fluctuations.

90. The use of trends or averages might have ameliorated the difficulties with small sample sizes; the decision to use disparate points in time exacerbates the difficulty. Mr Gunzberg's explanation for his approach – that the alternative was to produce a graph which was difficult to see – demonstrates his ignorance of the basic requirements of sound statistical analysis.

91. One of the results of this faulty approach is extreme variability in the data. Rather than taking that as a fairly obvious indication of a methodological flaw, Mr Gunzburg suggests that as a conclusion to be drawn from his analysis.[31]

92. **Fourth**, the sampling methodology employed by ABS in the Labour Force Survey sees the same dwellings surveyed repeatedly for a period of time up to eight months.[32] If retrenchment

[29] The latter two categories—"Never worked" and "Worked more than 2 years ago" actually represent a majority of respondents to the survey.
[30] Annexure DG-9 to the statement of David Gunzburg (Exhibit 1).
[31] Statement of David Gunzburg (Exhibit 1)
[32] http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/6269.0main+features50May%202013

within a specific industry directly led to individuals changing locale, the length of time individuals from that industry spent unemployed could be substantially underestimated.

93. Finally, it wold be noted that Mr Gunzberg's second statement confirms that a high percentage of employees in the mining industry lose their jobs in downturns.

Ms Merritt

94. Mr Lorraine Merritt is an employee of a "career management organisation" known as Audrey Page & Associates. Ms Merritt has no relevant qualifications other than her experience at the agency. The agency advertises Ms Merritt as a kind of executive coach, as the extract from the firm website shows.[33] Her experience in relation to Australian mining apparently involves provision of career transition services to a group of workers at one coal mine and one zinc mine.

95. The relevance of Mr Merritt's statement is not immediately apparent. She offers some evidence under a hearing "Factors leading to redundancy".[34] She explains that there are a variety of reasons on a variety of scales. She also says that various industries go through periods of downturns. The basis of her understanding of these matters is not identified, but the propositions that various industries go through downturns is not exactly controversial.

96. Ms Merritt offers an opinion that employees in the coal mining industry are not out of work any longer than employees in other industries. That opinion is entitled to no weight because:

(a) the sum total of her identified experience in the coal mining industry is one set of dealings with employees retrenched by one employer (83 employees in total, of whom she had dealt with more than 6);

(b) her contact with those employees was limited to a small number of meetings;

(c) the contact she had did not continue until the employees regained work, with the result that she has no way of knowing how long it is before employees gain employment;

(d) her knowledge, such as it is, is wholly anecdotal and unsupported by data.

97. Ms Merritt also advances some general propositions about employees' post-termination experiences. She offers views about the length of time it takes a person to find a new job, undeterred by the fact that her knowledge of how long it takes her clients to find work is impressionistic and not "*based on hard data*".

[33] Exhibit 8.
[34] [13] and following.

98. Moving to an area which has some relevance to her knowledge and experience, Ms Merritt identifies some factors relevant to prospects of re-employment.[35] Apart from personal characteristics, she identifies regional location and specialist skills as factors which tend to make it harder to find work. She accepted the obvious proposition that employees in the black coal industry tend to be concentrated in regional areas and tend to have specialist skills.

99. She accepted that a general downturn in industry is one which might reasonably increase the likelihood of unemployment.

100. The personal characteristics she identified are personal motivation and preparedness to change. Presumably preparedness to change is, as a general proposition, reduced for employees who are older and who have spent decades in the same profession.

101. It appears that Ms Merritt evidence was lead to demonstrate the similarity between the experiences of retrenched employees in the black coal industry and those in industries generally. It is doubtful whether she has any proper basis to undertake such a comparison. In any case, her evidence does not give any real support to that proposition. In respect of the areas where she might be taken to have some insight—that is in relation to factors bearing on re-employment—her evidence demonstrates that black coal industry workers face twin barriers of regional location and specialised skills.

Edwards

102. The significance of Mr Edwards' evidence was similarly unclear. Perhaps the most relevant part of his evidence was his indication that Centennial does not—contrary to the submissions for CMIEG—pay out personal leave on termination.

103. Cross-examination of Professor Peetz seemed to emphasise the significance of Mr Edwards' evidence that a mine workforce was wholly redeployed on one occasion. It is hard to see why that is important. It might be accepted that some employees whose positions are redundant are redeployed. An anecdote to that effect does not advance the debate one way or another.

104. It would be observed, incidentally, that the exemption in clause 14.5 of the Award means that employees who are offered redeployment are not paid redundancy pay. That there is an increased capacity in large employers to redeploy is not a reason to reduce redundancy payments. If anything a diminution of redundancy entitlements will reduce the economic incentive to redeploy workers.

[35] [25] and following.

I. Scheme is inconsistent with the modern awards objective

105. The fundamental submission of CMIEG is that the industry scheme contained in clause 14 of the Award is inconsistent with the modern awards objective, because it is:

(a) inconsistent with the legislated minimum standard;

(b) inconsistent with principle;

(c) inconsistent with other modern awards despite no material distinguishing features of the black coal mining industry; and

(d) not justifiable by reference to industry based and other benefits.

106. The first, second and third propositions are variations on a theme that an industry scheme which provides entitlements superior to the s119/TCR scale is "*inconsistent*"—*qua* different—and objectionable on that basis. They are incorrect as a matter of principle. The fourth proposition—which might be better expressed as a contention that the higher standard is not justifiable by reference to the features of the industry—is also wrong both at the level of principle and of fact.

107. Each of the four contentions is addressed in turn below.

Scheme inconsistent with the legislated minimum standard

108. At paragraphs 34–36 of its submissions CMIEG contends that clause 14 of the Award does not meet the modern awards objective because it is "*inconsistent with the legislated minimum standard*". This "*inconsistency*" is said to arise because "*the NES already prescribes the legislated safety net which the Parliament, and thus the community, regards as the minimum safety net standard*".

109. This submission proceeds on a misunderstanding of the nature of the NES. The NES is a minimum standard, not a code: *CFMEU v Spotless Facility Services Pty Ltd* [2015] FWCFB 1162; 248 IR 34. The design of the safety net assumes that the NES will be supplemented by awards and enterprise agreements as appropriate. That an award entitlement would exceed the NES minimum is not only unobjectionable but unremarkable.

110. That proposition applies *a fortiori* in respect of industry specific redundancy schemes having regard to section 141 of the FW Act. Section 141 specifically contemplates that a modern award may contain an industry-specific redundancy scheme if the scheme was included in the award during the award modernisation process. That the FW Act contemplates that industry specific schemes providing for different conditions to the NES provision shall exist is further confirmed by s123(4)(b).

111. Four industry specific schemes were contained in modern awards at the time of the passage of the FW Act: those applying to the construction, black coal mining, higher education and dredging industries. It follows that Parliament in enacting s141 specifically contemplated that the four extant industry schemes would be retained, and that their retention was not inconsistent with the modern awards objective.

112. It would of course have been a simple matter for the legislature to have ensured that industry schemes did not differ from the NES, either generally, or in respect of a cap on entitlements. To the contrary the legislature specifically contemplated that industry schemes would continue to contain industry-specific schemes in their existing form, including this scheme which contained no cap.

113. In that context, the CMIEG submission that the industry scheme is objectionable on the basis that it departs from the NES minimum standard would not be accepted.

114. CMIEG's submissions at [35]–[36] are based on an incorrect premise:

(a) At [35] the CMIEG submits that the "*express text of s134(1) requires that statutory duty to be exercised **by reference to** the National Employment Standards*". It is on that basis that CMIEG goes on to submit that the Commission is required to "evaluate" clause 14 by reference to the standard for redundancy set by Subdivision B of Division 11 of Part 2-2;

(b) What subsection 134(1) actually states is that the Commission "*must ensure that modern awards, **together with the National Employment Standards**, provide a fair and relevant minimum safety net of terms and conditions*", taking into account a series of matters. The words "together with the National Employment Standards" must be read as a reference to the Standards as far as they apply. Division 11 of Part 2-2, which provides the National Employment Standard for redundancy pay, does <u>not</u> apply where there is an industry specific scheme: s123(4)(b). Accordingly s134(1) does not require the Commission to consider whether the Award meets the modern award objective by reference to Subdivision B of Division 11 of Part 2-2.

115. In short, the FW Act permits a modern award to contain redundancy entitlements that are greater than the NES if they are an industry-specific scheme. The Commission is not required to determine why an industry-specific scheme contains an entitlement that is greater than the NES, either at all, or in respect of any particular quantum, in order to ensure that the Award meets the modern award objective.

Scheme inconsistent with principle

116. At paragraphs 37–53 CMIEG argues that the scheme is "*inconsistent with principle*" in the sense they are "*inconsistent with the well-established principles as to the purpose of severance pay and its appropriate limits*". That contention is followed by a close examination of the development of the general severance pay standards through decisions of the NSW and federal commissions and the conclusion (at [53]) that the industry scheme is "*inconsistent with these lead test cases*" because it provides for more favourable entitlements than the s119/TCR standard.

117. This submission is a slight variation on the previous contention of inconsistency with the NES. For the same reasons, it is misconceived. Neither the FW Act nor the authorities referred to contain any prohibition on an industry scheme which is more beneficial than the s119/TCR standard. To the contrary, the statute specifically contemplates and authorises such schemes. The submission that a redundancy entitlement more beneficial than the minimum standard is *per se* objectionable should be rejected.

118. The Commission is considering a long-standing industry-specific scheme that the parties have accepted as appropriate for more than 30 years, a period during which the various authorities that CMIEG submit established 'contrary' principles were determined. Those authorities did not lead the parties or the Commission to consider the scheme ought to be altered, including in 2008-09 when the Award was made. That is not surprising since the reasons that were given by the tribunal for creating the entitlements were consistent with the principles later determined by those authorities. The only difference was the quantum of the payments, which clearly arose from factors associated with the nature of the industry.

119. In any event, the Commission is not now engaged in a process of determining an appropriate provision from scratch. It is considering only the question of whether a cap ought to be introduced into a scheme that has never had one. As such the appropriate focus is on what has *changed*. None of the 'principles' that are relied upon by the CMIEG constitute such a change.

Scheme inconsistent with other modern awards despite no distinguishing features

120. At paragraphs 56–62 of its submissions CMIEG argues that the industry scheme differs from other modern awards in circumstances where there are no distinguishing features of the industry. Three things may be said about this submission.

121. **First**, and for the reasons already discussed, the fact that the scheme is different from other modern awards is not a proper basis for complaint.

122. **Second**, the contention is factually incorrect. The circumstances of the industry today are substantially the same as those obtaining at time of the establishment of the scheme, including:

(a) the industry is a career industry, with employees typically possessing skills and experience specific to coal mining;

(b) it is an industry where employees are geographically located in areas a considerable distance from major areas of employment;

(c) conditions in the industry are in advance of other industries;

(d) it is an industry with a well-documented history of boom and bust, and one where employers are quick in downturns to reduce production and shed labour;

(e) retrenched employees must contend with inability to find comparable employment, the need to move in search of a job, and loss of seniority; and

(f) the industry is one with a proven capacity to bear the costs of the scheme, constituted as it is by major companies who make very substantial profits in boom times and have the capacity to plan to meet the costs that arise at times of down-turn, including redundancy costs.

123. The CMIEG points to no other industry that shares all of those characteristics.

124. **Third**, and assuming contrary to the foregoing that the coal mining industry is not substantially different from the mining industry generally, it does not follow that any superior entitlements must be reduced. There is no provision of the FW Act which requires that employment conditions in comparable industries must all be equalised at the bottom.

Scheme not justified by reference to industry based and other benefits

125. At paragraphs 55–56 of its submissions CMIEG identifies various benefits available to coal mining industry employees, including:

(a) portable long service leave entitlements;

(b) entitlement to payment for unused personal leave in some circumstances;

(c) an additional week's annual leave compared to the NES standard;

(d) a capacity to access superannuation benefits from age 55; and

(e) unemployment benefits.

126. These benefits, it is said, ameliorate the hardship associated with retrenchments. The submissions do not in terms identify the consequence said to follow from that alleged fact. It

may however be inferred that CMIEG contends that the entitlements conferred by the industry scheme are unduly beneficial having regard to the listed matters.

127. None of the matters relied upon are identified as constituting a change in circumstance that justifies the Commission taking a different course from that considered appropriate when the modern award was made.

128. Dealing with the matters in turn:

(a) It is correct to say that employees in the coal mining industry have, since 1949, had the benefit of a portable long service leave scheme. It does not follow that there should now be reduction in redundancy pay, departing from the standard set in the knowledge of such a scheme.

(b) The entitlement to unused personal leave was introduced in 1976 in response to a heavy rate of absenteeism complained of by employers, and to recognise the special value of an employee who had managed to keep themselves fit for work over the years.[36] It is a provision introduced to benefit employers as much as employees. It too provides no basis to depart from a standard set in the knowledge of such an entitlement. It might be noted that the one witness called by CMIEG who works for an employer gave evidence that his company does not pay out sick leave on redundancy of Staff.

(c) The entitlement to an additional week's annual leave, which recognises the particular nature of shift work in the industry, has no bearing on termination payments.

(d) The capacity to access superannuation benefits from age 55 is similarly irrelevant. Superannuation that is accessed at an earlier age will be exhausted at an earlier age; it is in any case properly regarded as earnings foregone.

(e) Unemployment benefits are, if anything, a factor that tells against the change the CMIEG seek. That an employee may be able to access welfare payments of $238.20 per week (if partnered) provides no justification to introduce a cap. Since unemployment benefits are not payable for a period equivalent to the period of the redundancy payment (referred to as an 'income maintenance period')[37] any reduction in termination payments will increase the likelihood that unemployment benefits be paid. There is no public interest in increasing the likelihood that the public purse will be called upon.

[36] *Australian Coal and Shale Employees' Federation and others v New South Wales Combined Colliery Proprietors Association and another* [1976] ACIndT 2514 (14 September 1976) at page 9.
[37] https://www.humanservices.gov.au/customer/enablers/income-maintenance-period

Conclusions as to inconsistency with the modern awards objective

129. For the foregoing reasons, the CMIEG contentions regarding inconsistency with the modern awards objective would be rejected.

J. Section 134 factors

130. At paragraph 63 of its submissions CMIEG addresses the mandatory factors set out in section 134. Only one factor is identified as relevant, namely the alleged stultifying effect of the industry scheme on enterprise bargaining. Three points may be made about this.

131. **First**, the fact that only one of the eight mandatory considerations is engaged by this application suggests that the application does not, in truth, involve any variation necessary to achieve the modern awards objective.

132. **Second**, it is difficult to understand as a matter of industrial common sense how the reduction of employment conditions might be said to promote enterprise bargaining. Bargaining is not promoted by gifting employers reduced working conditions. The fact that there is no evidence of employers attempting to reduce redundancy entitlements through bargaining suggests it is not a first order issue. There is no reason to assume that higher conditions, which may be thought to give employers an incentive to bargain, are less likely to encourage enterprise bargaining, than low conditions that might encourage employees to bargain.

133. As matters stand, there is a high level of bargaining in respect of production workers and low levels of bargaining in respect of staff. That sharp divergence between the bargaining coverage of two groups covered by the same Award indicates that there is no relationship between Award conditions and the probability of bargaining in this industry.

134. The reduction of redundancy entitlements is, if anything, likely to inhibit bargaining by promoting disputation in relation to a previously well-settled area. Bargaining after the proposed variation would probably be characterised by major, perhaps intractable, disagreement about the redundancy standard to be incorporated in enterprise agreements.

135. **Third**, the industrial character of the coal mining industry generally suggests that a change in the industry redundancy scheme is highly unlikely to affect the attitude of employers to bargaining. As Ms Bolger explains, employers in the industry are stubbornly resistant to efforts to engage them in bargaining. Cases demonstrate that employers do not want an enterprise agreement because they wish to "retain maximum flexibility" and see no "benefit" in an enterprise agreement that can provide no "productivity improvements" or "cost savings" over

the existing situation of an Award containing minimum conditions overlayed by a contract of employment: see *APESMA v Endeavour Coal Pty Ltd* [2012] FWA 13 at [7]; *APESMA v Peabody Energy Australia Coal Pty Ltd* [2014] FWC 6061 at [37]. The notion that the reduction of award entitlements will lead to an increase in bargaining the coal mining industry is industrially-speaking risible.

136. **Fourth**, the s134 considerations most obviously affected by the application are the need to promote social inclusion via participation. The cap proposed by the CMIEG would eliminate an existing incentive to retain older workers and thereby exacerbate the clearly observed phenomenon of high rates of retrenchment of older workers. That is a result inconsistent with an objective of increasing workforce participation of older workers.

Cost impact

137. As mentioned, a remarkable feature of the CMIEG submissions is the absence of any reference to the costs of the scheme for employers in the industry, notwithstanding that the costs of the scheme is a mandatory consideration pursuant to section 134(f) and notwithstanding that in granting leave to consider whether a cap should be introduced the Bench identified the "*cost impact on employers of the scheme*" as a matter about which the Commission would need greater evidence before it would introduce such a cap.

138. That absence reflects the reality that employers in the industry are large corporations that make substantial profits, and can readily build into the cost of production the likely costs associated with reductions in production when the price of coal drops.

139. More particularly CMIEG has provided no evidence demonstrating any increase in costs flowing from the removal of the discriminatory age limitation. There is no evidence to suggest that overall employers today are more likely to be required to pay greater sums as a result of the discriminatory age-based limitation being removed than historically has been the case. When the scheme was introduced the theoretical maximum that could have expected to have been paid was an amount based on about 40-43 years service (16yrs-18yrs to 59yrs of age). While workers in the industry now work beyond 60yrs, they do so in relatively small numbers. As a generalisation people tend to start work at an older age than they did in the late 70's and early 80's, and there is no reason to think they are today more likely to remain with the one employer for the whole of their career. As such there is no reason to conclude, in the absence of evidence, that the removal of the discriminatory age gap will increase costs over that which were contemplated when the industry scheme was created.

K. Conclusions

140. The true foundation of the CMIEG application is the unstated proposition that an award entitlement above the NES is *prima facie* objectionable and, unless capable of being justified in some quasi-mathematical fashion, liable to be reduced to the NES minimum standard.

141. That premise has no support in the legislative scheme for the reasons outlined at paragraphs [108]–[115] above. It also betrays a misunderstanding of the manner in which award entitlements are established and maintained. Award conditions do not develop in a vacuum. A long standing entitlement of the kind in view here reflects a diversity of factors operating over time—the productivity of labour, the profitability of industry, the preferences of employees and employers as expressed in bargaining and arbitrations, trade-offs and compromises of conditions, and the range of other industrial vicissitudes which influence the development of awards. An approach which requires each award condition to be analysed in isolation from that context, and justified afresh to a degree of mathematical precision, will steadily erode the base of award conditions. Over time its effect will be to reduce all conditions to a common floor. That result would be both industrially unfair and inconsistent with the legislative scheme which contemplates that awards will build of the legislated minima rather than mimic it.

142. The unstated premise of the application should be rejected together with the stated contentions in support of it. The application should be dismissed.

Ingmar Taylor SC
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10 November 2016

Annexure A—Coverage of APESMA, the CFMEU and the Award

143. The Award applies, inter alia, to "Coal mining employees" that is:

> Coal mining employees are:
>
> (i) employees who are employed in the black coal mining industry by an employer engaged in the black coal mining industry, whose duties are directly connected with the day to day operation of a black coal mine and who are employed in a classification or class of work in Schedule A—Production and Engineering Employees or Schedule B—Staff Employees of this award;
>
> (ii) employees who are employed in the black coal mining industry, whose duties are carried out at or about a place where black coal is mined and are directly connected with the day to day operation of a black coal mine and who are employed in a classification or class of work in Schedule A—Production and Engineering Employees or Schedule B—Staff Employees of this award.

144. The relevant industry is:

> 4.2 For the purposes of this award, black coal mining industry has the meaning applied by the courts and industrial tribunals, including the Coal Industry Tribunal. Subject to the foregoing, the black coal mining industry includes:
>
> (a) the extraction or mining of black coal on a coal mining lease by means of underground or surface mining methods;
>
> (b) the processing of black coal at a coal handling or coal processing plant on or adjacent to a coal mining lease;
>
> (c) the transportation of black coal on a coal mining lease; and

145. The Award includes classifications for production workers together with a range of supervisory, professional, administrative, technical and clerical positions up to and including Undermanager in Charge: Schedules A—Production and Engineering Employees and B—Staff Employees.

146. The relevant part of the APESMA eligibility rule is:

> **3.12 - COLLIERIES INDUSTRY**
>
> Without in any way limiting or being limited by Rule 3.1 to 3.11 or Rule 3.13 and 3.14, the following persons shall be eligible to be members of the Organisation:
>
> 3.12.1 Persons who are employed in the coal or shale mining industry at or about a coal or shale mine in a supervisory, professional, administrative, clerical or technical capacity up to and including the level of responsibility of under manager in charge.
>
> 3.12.2 Persons who are employed in the coal or shale mining industry in a supervisory, professional, administrative, clerical or technical capacity up to and including the level of responsibility of under manager in charge in a mine office or mine laboratory where that person's work is directly connected with the day to day operation of a coal or shale mine and the production of coal or shale whether or not such mine office or mine laboratory is situated on a coal mining lease.

3.12.3 Persons who are employed by a firm or company whose principal business is both the production and marketing of coal as accountants – chief clerks, senior clerks, office clerks or junior clerks.

3.12.4 A person who is an independent contractor, being a natural person who, if the person were an employee performing work of the kind which the person usually performs as an independent contractor other than as an employer in respect of the qualifying work, would be an employee eligible for membership of the Association.

147. The CFMEU is, relevantly, eligible to enrol "*employees engaged in or in connection with the coal and shale industries*" (Rule 2(D)) and "*persons employed or usually employed as workers engaged in or in connection with the Coal Mining Industry*" (Rule 3(E)).