

BEFORE THE FAIR WORK COMMISSION

Matter no. AM2014/190

Applicant: Coal Mining Industry Employer Group

Respondent: APESMA, CFMEU, AMWU

RESPONDENTS' SUPPLEMENTARY NOTE

A. Summary

1. This note deals with the effect of the data produced by Coal Mines Insurance (CMI) immediately before the most recent hearing of this matter on 24 November 2017.
2. This note demonstrates that:
 - (a) The data summarised by Gunzberg in his second statement (exhibit 2) at figures 1 and 2 understated the percentage of injured workers who would be affected by the CMIEG proposal;
 - (b) About 67% of all those who are injured at work and whose entitlement to accident pay is derived from the Award would have their income reduced by the CMIEG Preferred Outcome, and about 44% of those in NSW would have their income reduced by the Alternative (those expressions are defined in the next paragraph).
3. It is to be noted that:
 - (a) CMIEG seeks to reduce the overall length of accident pay from 78 weeks to 52 weeks (see CMIEG primary written submissions at [2] which set out that intention but without stating how that might affect each of the periods of time dealt with in clause 18(2));
 - (b) CMIEG's preferred outcome is that such a reduction from 78 weeks to 52 weeks would be achieved by reducing each of the two periods of accident pay currently set out in clause 18(2) of the Award at (a) and (b) from 39 weeks to 26 weeks ('**the CMIEG Preferred Outcome**');
 - (c) In oral submissions on 24 November 2017 in reply counsel for CMIEG noted that it would be open to the Commission to reduce the overall length of accident pay from 78 weeks to 52 weeks by reducing only the second period of accident pay set out in clause 18(2)(b) from 39 weeks to 13 weeks ('**the Alternative**'). It was submitted that the Alternative would alleviate some of the impact on employees.

- (d) The impact on employees in dollar terms of each alternative can be seen in the Union written submissions at [48]-[51] and, using different assumptions, by CMIEG in its reply submissions at [49]-[51]). As each of the tables there demonstrate, the CMIEG Preferred Outcome would significantly affect all employees on accident pay for more than 26 weeks, and the Alternative would significantly affect those in NSW who are on accident pay for more than 52 weeks.
4. This note is to be considered as part of the Union's wider submission that no change to clause 18 of the Award would be made for reasons that include the significant impact such a change would have on employees. The Full Bench in *Re 4 Yearly Review – Transitional Provisions* [2015] FWCFB 3523 determined accident pay clauses for various modern awards. The Bench identified at [212] that a different approach can be taken when considering whether to maintain provisions in operation in an award compared to the position that faced the Bench in that case, of inserting such provisions into an award. That must be right, for reasons that include the impact of altering an existing entitlement.

B. The pie-chart in exhibit 12

5. The pie chart appearing at Figure 1 of the Gunzburg second statement of 18 August 2017 (exhibit 2) sought to summarise visually the effect of the data contained in Annexure DG-9 of Gunzburg's statement dated 24 February 2017. That data, produced by CMI, recorded the number of claims made each year from 1995 to 2016, along with the duration of each claim as at 30 November 2016.
6. The pie chart sought to record the proportions of claims which required accident payments for 0–26, 27–39, 40–52 weeks, 53–78 and 78+ weeks respectively. The chart suggested some 39% of claims involved accident payments for longer than 26 weeks and 31% for longer than 39 weeks. It followed, on Mr Gunzburg's analysis, that the conditions of some 39% of injured workers would be reduced as a result of the CMIEG Preferred Outcome (or 31% if the Commission took up the Alternative Change).
7. The Unions made two submissions about the graph. First, the data underlying the graph is problematic insofar as it showed a dramatic and wholly unexplained drop in the number of claims between 2004 and 2005. This change can be seen in Figure 2 of exhibit 12: there is a substantial reduction in total the number of claims and in particular the number of claims for less than 26 weeks for every year from 2005 compared to all the years before then. Mr

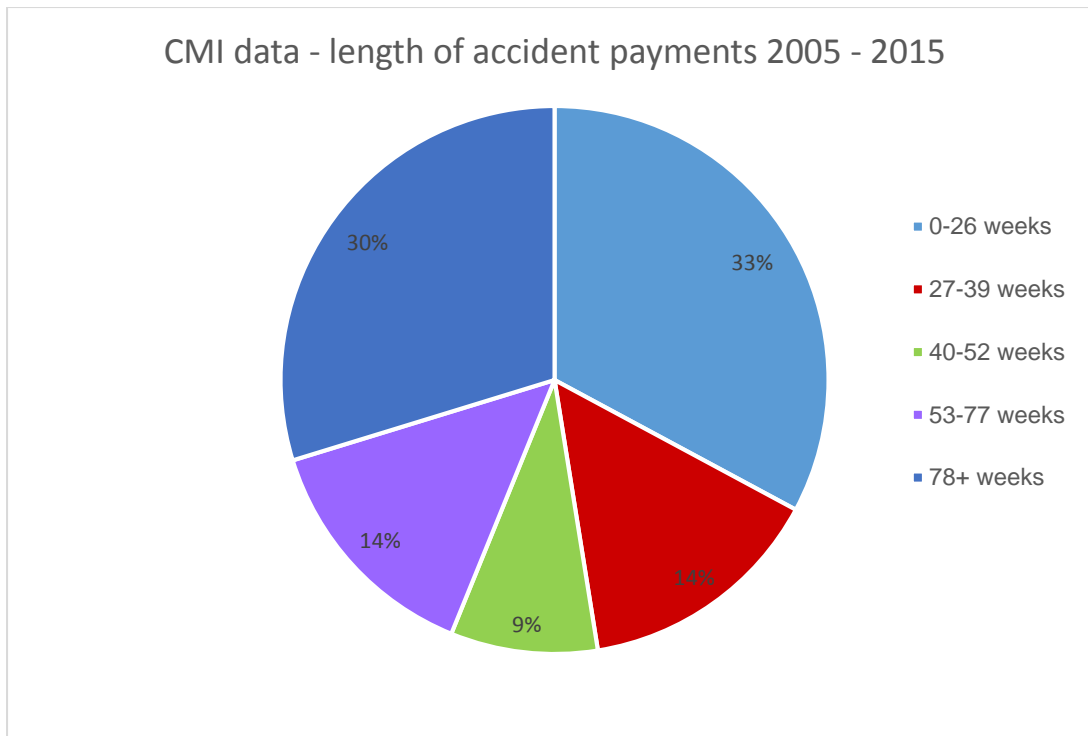
Gunzburg had no explanation for the discontinuity in the data and, it appeared, had not turned his mind to the issue.¹

8. Second, the pie-chart was apt to mislead by understating the length of claims, in particular in suggesting some reduction in the length of claims in more recent years. That was so because the data produced as at 30 November 2016 could not by definition indicate the ultimate length of claims which were ongoing as at that date. Thus for example any claim made in the second half of 2016 would be indicated as having a duration of less than 26 weeks, notwithstanding that it might ultimately continue well beyond November 2016.
9. In response to that criticism the CMIEG sought and obtained updated data from the CMI. The update provided the same category of data, that is the number of claims made in each year and the duration of each claim, but updated to 31 October 2017.
10. That updated data was produced again by CMIEG in pie-chart form in Figures 1 and 2 in Exhibit 12. That updated data confirmed that there had been underreporting of the length of more recent claims, as set out in part D of this note.
11. The updated data recorded that over the 21 years from 1995 to 2016 some 40% of claims were for more than 26 weeks. In other words if the Commission were to proceed on the basis that CMIEG's record of the updated data is indicative of the average length of accident pay claims then it would be conclude that at least 40% of those injured at work and who claim accident pay will claim accident pay for more than 26 weeks, and so 40% of such injured workers would have their income while on accident pay cut by the CMIEG Preferred Outcome.
12. The true position however is that the percentage of those affected would be substantially higher for the reasons set out in the next section of this note.

C. Duration of accident pay claims

13. As noted, the pie-chart prepared by CMIEG ignores the discontinuity in the data between the years up to 2004 and then from 2005.
14. In light of the unexplained change in data that is so clearly demonstrated by Figure 2 of Exhibit 12 the better course is to examine the data from 2005 to date using the most recent CMI data, while excluding the years 2016–2017 which remain affected by the fact that longer claims would still not be resolved (for the reasons set out in Part D of this note).
15. On that basis the pie-chart is as follows:

¹ Transcript of 5 October 2017 hearing, PN 490–PN 495.



16. As may be seen, the CMI data indicates that for the years 2005–2015, 33% of accident pay claims had a duration of 26 weeks or less while 67% had a longer duration.
17. CMIEG puts the CMI data forward as the best data available to understand the average length of time an injured worker claims accident pay. Taking the period 2005-2015 the data shows that **two-thirds of injured employees whose entitlement is derived from the Award would have their entitlements cut** as a result of the CMIEG Preferred Outcome. On the Alternative outcome 44% of those in NSW would be affected.

D. Data for the most recent years

18. A comparison of the CMI data produced in November 2016 and summarised by Gunzberg in his second statement to the data produced in October 2017 and summarised in exhibit 12, demonstrates that the Unions' criticism of Gunzberg's second statement was well-founded. The updated data shows how the figures used by Gunzberg in his second statement understated the length of claims in the most recent years.
19. The tables set out in **Annexure A** compare the durations of accidents payments in respect of claims made in the 2013 – 2016 calendar years as indicated in the 2016 data by comparison with the updated 2017 data.
20. The effect of the analysis may be summarised as follows:

Percentage of claims leading to accident payments for longer than 26 weeks:

	Original data	Revised data
2016	18%	42%
2015	51%	62%
2014	46%	47%
2013	53%	54%

21. As the analysis makes plain, the original data dramatically understated the durations of claims in the 2015 and 2016 years and understated somewhat the duration of the claims in the 2013 and 2014 years. That understatement is likely to persist even in the revised data, with a further check in 2018 and 2019 likely to demonstrate that further claims have moved from the lower to higher range. Hence the data summarised in Part C of this note does not include data for 2016 or 2017.

For the Unions

8 December 2017

ANNEXURE A

2016 claims

	Original	Revised	Change
0-26	50	85	+35
	82%	58%	-24%
27-39	10	24	+14
	16%	16%	0%
40-52	1	11	+10
	2%	7%	+6%
53-77	0	23	+23
	0%	16%	+16%
78+	0	4	+4
	0%	3%	+3%

2015 claims

	Original	Revised	Change
0-26	52	48	-4
	49%	38%	-11%
27-39	17	25	+7
	16%	20%	+6%
40-52	17	15	-2
	16%	12%	+4%
53-77	15	15	-
	14%	12%	-2%
78+	5	22	+17
	5%	18%	+16%

2014 claims

	Original	Revised	Change
0-26	91	90	-1
	54%	53%	-1%
27-39	19	17	-2
	11%	10%	-1%
40-52	11	13	+2
	6%	8%	+2%
53-77	15	12	-3
	9%	7%	-2%
78+	34	39	+5
	20%	23%	+3%

2013 claims

	Original	Revised	Change
0-26	71	70	-1
	47%	46%	-1%
27-39	19	17	-2
	13%	11%	-2%
40-52	11	13	-2
	7%	9%	+2%
53-77	15	12	+3
	10%	8%	-2%
78+	35	39	+4
	23%	26%	+3%