

IN THE FAIR WORK COMMISSION

MATTER NO: AM2014/190

TITLE OF MATTER: FOUR YEARLY REVIEW OF MODERN AWARDS – TRANSITIONAL PROVISIONS – ACCIDENT PAY PROVISIONS

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

RESPONSE TO NOTE FILED ON BEHALF OF THE CFMEU, APESMA AND AMWU

1. These further submissions in reply of the CMIEG respond to matters set out in the Respondents' Supplementary Note filed on behalf of the Association of Professional Managers, Engineers and Managers Australia (**APESMA**), the Construction, Forestry, Energy and Mining Union (**CFMEU**) and the Australian Manufacturing Workers' Union (**AMWU**) (**Union Parties**) on 8 December 2017 (**Note**).
2. The Note deals with the data produced by Coal Mines Insurance Pty Ltd (**CMI**) prior to the hearing on 24 November 2017. This data was produced in response to an Order for Production issued by the Fair Work Commission on 21 November 2017 (Exhibit 14). The CMIEG notes that the Order was made with the consent of the Union Parties and was sought in response to a request by the Commission at the hearing on 5 October 2017 to obtain updated data from CMI from that produced under an Order issued on 8 December 2016 (Exhibit 13).¹
3. The CMIEG responds to certain matters in respect of the Note as follows.
4. *First*, to the extent that the Note seeks to imply that the CMI data was presented by the CMIEG (through Mr Gunzburg) in an inaccurate way or that it was somehow misleading, any such implication should be rejected. The charts set out in the second statement of David Gunzburg dated 18 August 2017 (Exhibit 2) and the "Updated graphs" prepared by Mr Gunzburg (Exhibit 12) quite simply presented, in graphical form, the data produced by CMI.

¹ See the [Transcript of hearing 5 October 2017](#), PN 592ff.

5. Further, the Union Parties had the same data available to them and did not take any steps to present the data in any other way for themselves. Other than in cross-examination of Mr Gunzburg, the Union Parties did not seek to deal with the data themselves. Any criticism of the way in which the data was presented as amounting to it being presented inaccurately or in a way that misrepresents the data is unfounded.
6. *Second*, the Union Parties make submissions as to the impact that a variation to clause 18 of the Award will have on employees. In making those submissions as to the extent of the loss, however, the Union Parties do not take into account the differences between Queensland and New South Wales. Employees in Queensland will not have a reduction of entitlement in the future and will not be affected because as the analysis prepared by both sides demonstrates there is no negative impact on them post-26 weeks.²
7. In New South Wales, the effect of the loss in the future in respect of the CMIEG Preferred Outcome³ when referring to the average worker⁴ will be moderate to slight.
8. The data, as presented by the CMIEG,⁵ shows that in New South Wales 40% of injured workers would be affected by the variation that would reflect the CMIEG preferred outcome. To the extent that the experience in Queensland is similar to that in NSW,⁶ then 26% of injured workers would be affected.
9. *Third*, the Union Parties have sought to exclude from the data produced by CMI, data for the period from 1994 to 2004, without any proper basis for this exclusion being established. While the Union Parties might assert the data shows a "dramatic and wholly unexplained drop in the number of claims between 2004 and 2005",⁷ that is no proper basis to doubt or exclude the data as produced by CMI and no basis to do so has been proffered by the Union Parties. There is, accordingly, no proper basis to do so. This is more so the case when CMI have been asked and have not provided any reason to explain the change in data so as to doubt its integrity.
10. *Fourth*, the change in the data in recent years of 2015 and 2016,⁸ as shown from a comparison of the response provided by CMI to the first Order to Produce (issued on 9 December 2016),

² See [CMIEG Submissions in Reply](#) at [50].

³ As it is described by the Unions Parties (see Note at [3(b)]).

⁴ See [CMIEG Submissions in Reply](#) at [48]-[50].

⁵ Updated Graphs (Exhibit 12) – Figure 1.

⁶ Noting the data is only in respect of NSW.

⁷ See Note at [7].

⁸ See Note at [20].

and the data produced in response to the second Order to Produce (issued on 21 November 2017), simply illustrates that the most recent figures at any time will be subject to change as claims progress. Any suggestion this amounts to a misrepresentation of the data ought to be rejected. The change in the data sets indicates that the length of claims in most recent years is trending towards the levels in previous years.

11. *Fifth*, the submission of the Union Parties concerning the "impact of altering an existing entitlement"⁹ do not have proper regard to:
- a) accident pay being a contingent entitlement;
 - b) the proposal of the CMIEG that any variation ought to only be prospective.¹⁰

It is self-evident that a variation will result in some impact to an "entitlement"; however, the proper tests are those contained in section 134 and 138 of the *Fair Work Act 2009* (Cth).

Yaseen Shariff
Counsel for the CMIEG

Ashurst Australia
Solicitors for the CMIEG

20 December 2017

⁹ See Note at [4].

¹⁰ See the [Transcript of hearing on 24 November 2017](#), at PN553.