Australian Education Union (SA Branch)

Submission to Parliamentary Inquiry into Return to Work Act and Scheme

Introduction

The Australian Education Union ("AEU") represents education staff employed by the Department of Education and Child Development ("DECD") in schools, and preschools and educational staff in TAFE SA.

The AEU has at all times opposed the majority of changes to workers compensation that have occurred as a result of the repeal of the *Workers Rehabilitation and Compensation Act* 1986 ("the repealed Act") and the introduction of the *Return to Work Act* 2014 ("RTW Act").

The effect of changed legislation has been to change the nature of workers compensation in South Australia. Rather than a pension type scheme that provides payments based on upon actual incapacity for work it is now a capped scheme. It is the AEU's position that South Australia's workers compensation legislation should provide for fair compensation and payments based on the actual loss an injured Worker has sustained. Unfortunately, the concept of fair compensation is no longer a major consideration[1].

The introduction of the RTW Act has stripped all workers in South Australia of the financial protection they could rely upon if they were unable to return to work following a work injury. The true cost of work injuries has been shifted from the Scheme to Workers and their families. This shift of costs has been to the benefit of employers (by way of reduced levy rates) and, in particular, the financial position of the scheme. Average premium rates paid by employers have been lowered from 2.75% to 1.95% saving employers approximately $180 million a year. At the same time as reducing average premium rates for employers the Scheme announced "a profit of $1.501 billion and a net surplus of assets over liabilities of $370 million"[2].

The AEU supports the continuation of self insured status of DECD and TAFE SA and opposes the privatisation or outsourcing of injury management services for public sector employees to private Claims Agents as a response to the Latham/Bentley Review of Work Injury Insurance Arrangements in the South Australian Public Sector[3].

The AEU is opposed to any sale of Return to Work SA.

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[1] S.2(1)(a)(iii) of the repealed Act included that its objects were to establish a workers compensation scheme "that provides fair compensation for employment-related injuries" whereas the RTW Act objects includes no reference to fair compensation but does include it is "to ensure that employers' costs are contained within reasonable limits so that the impact of work injuries on South Australian businesses is minimized".

[2] Return to Work SA 2014-15 Annual Report – pg 8

[3] The findings and recommendations of this Review have not been made public at this time.

(a) The potential impacts on injured Workers and their families as a result of changes to the Return to Work Act including tightening eligibility criteria for entry into the Return to Work Scheme

Workers and their families are already feeling the impact of the tightening of the eligibility criteria. The AEU has assisted a number of Members who have had claims for physical injuries rejected on the basis that, while the injury arose at work and in the course of employment, the Compensating Authority rejected the claim on the basis that employment was not "a significant contributing cause". The introduction of the additional criteria that employment must be "a significant contributing cause" of an injury of employment restricts eligibility, adds complexity and leads to increased disputation.

The effect of the introduction of this additional criteria is that a Compensating Authority will reject claims for injuries occurring at work unless the Worker can prove that there is a direct connection between the injury and the Worker's employment. For example, an injury arising from a simple fall at work will no longer be compensable unless the Worker can show that something particular about his or her employment caused the fall and/or subsequent injury. In the matter of *Ward*[4] the Tribunal had to choose between competing opinions as to the exact cause of an injury and found on balance that the necessary connection existed in this case. However, as *Ward* demonstrates, an injury that would clearly have been compensable under the repealed Act becomes a complex and disputed case under the RTW Act.

In the case of psychiatric injuries, which were already difficult to claim for under the repealed Act relative to physical injuries, the RTW Act requires employment be "the significant contributing cause" rather than "a substantial cause" as was the requirement of the repealed Act . The effect of this change is that where there are a number of substantial causes of a psychiatric injury, the injured Worker must now prove that employment was the predominant cause.

(b) Alternatives to the overly restrictive 30% WPI threshold for ongoing entitlement to weekly payments

There can be no doubt that the 30% WPI threshold for ongoing entitlement will significantly impact injured Workers. While the AEU is aware of dozens of Members who have a continuing incapacity for work as a result of compensable work injuries, we are only aware of one Member that has been assessed as having a greater than 30% WPI.

Alternatives need to consider the actual impact on the specific injured Worker. If the fact is that as a consequence of a work related injury a Worker has no capacity for work and will continue to have no capacity for work then ceasing weekly payments of income support after two years results in an incredibly harsh outcome irrespective of the actual WPI.

[4] *Ward v State of SA (Department for Primary Industries and Regions SA (PIRSA))* [2016] SAET 28

WPI has no direct relationship with capacity for work. Indeed impairment ratings are not intended for that purpose[5].

The RTW Act attempts to ameliorate this harshness by the inclusion of a lump sum payment for economic loss based upon WPI. For example, a full-time 40 year old Worker who suffers a work injury resulting in a 20% WPI is entitled to a payment of for economic loss of $134,574. This lump sum payment, which equates to an additional $5,382 per year (assuming retirement at 65 years of age), applies to all full-time 40 year old workers with a 20% WPI irrespective of the individual's actual likely economic loss as a consequence of the injury. In some instances, for example where an injured Worker is unable to return to any form of paid employment or is only fit for part-time work, the lump sum will be a tiny fraction of the overall economic loss. For some other Workers, for example, those who are able to continue in employment without any economic loss the payment is simply a windfall benefit. This one size fits all model may provide high levels of certainty regarding the extent of financial liability but will lead to significant disadvantage for Workers whose work injury requires a withdrawal from the workforce.

(c) The current restrictions on medical entitlements for injured Workers

The restriction on medical entitlements for injured Workers is clearly one of the harshest aspects of the changes introduced by the RTW Act. Under the repealed Act an injured Worker was entitled to all reasonable medical expenses associated with a work injury. The RTW Act limits the entitlement to reasonable medical expenses to a period of 12 months from the date of the cessation of income support.

Many injured Workers who suffered injuries prior to 1 July 2015 have already had their entitlement to medical expenses cease from 1 July 2016. The AEU understands that DECD alone wrote to approximately 900 employees advising that any entitlement to medical expenses would cease from 1 July 2016. The AEU has spoken to many of its Members who:

- were concerned that they were being disadvantaged by the fact they had returned to work;
- were concerned about their ability to remain at work without access to appropriate medical treatment and medication;
- were concerned about the financial impact on themselves and their families of trying to meet the reasonable medical costs associated with their injury;
- were angry at the unfairness of a situation where they were required to cover the cost of medical treatment and medication for work injuries for which they believed were caused by the employer's negligence;

Many injured Workers have made applications for the Approval of Future Surgery in accordance with s.33(21) of the RTW Act. Compensating Authorities have been routinely rejecting these applications for reasons including:

[5] Pg 5 AMA 5 - Guides to the Evaluation of Permanent Impairment – which also gives an example of an identical condition giving rise to a 30% WPI which has no impact upon work ability or a total incapacity for work depending on the nature of the work and Worker.

- the Application was not in the right form;
- the Application didn't provide required information;
- the information was inadequate;
- the Application was for more than one surgery;
- the surgery could have been performed within the period covered by the entitlement to medical expenses;

It is interesting to note that in the rejections seen by the AEU it does not appear to have been argued in a single case that the future surgery being applied for was not as a consequence of a compensable work injury.

(d) Potentially adverse impacts of the current two year entitlements to weekly payments

Potential adverse impacts relate to the loss of income for Workers with injuries that prevent their return to work in suitable employment. This means Workers and their families suffer financial loss and in some cases may be forced to survive on a Disability Support Pension from the Commonwealth Government.

The only exception to the cessation of weekly payments after two years for Workers not determined to be "seriously injured" is in circumstances where there is an entitlement to supplementary income support for up to 13 weeks for incapacity following approved surgery post the end of the entitlement to medical expenses. Unfortunately, the legislation appears to not provide for supplementary income support during the 12 month period after the end of weekly payments and before the end of medical expenses.

In relation to the two year limit, it appears that employees are being given the impression by employers that once the two years of weekly payments ceases there is a possibility that their continuing employment is at risk, even in circumstances where they have successfully made a partial return to work either part-time or performing different duties. Further, some employees are being told they must alter their contracts of employment and are not able to access accrued entitlements such as sick leave once weekly payments cease.

(e) The restriction on accessing common law remedies for injured Workers with a less than 30% WPI

The current provisions only allow for the ability to access common law remedies in the event a Worker is a seriously injured Worker as defined. This is essentially providing a Clayton's access to common law. Only those with an entitlement to continuing income support and medical expenses have access to common law remedies.

Not restricting access to common law remedies for Workers who have exhausted entitlements under the RTW Act where their injuries have occurred as a result of an employer's negligence is only just.

An injured Worker's ability to access common law remedies should be no less than any other South Australian. This is particularly so in the context where the RTW Act provides for a maximum of two years weekly payments and only 12 months of medical expenses following the cessation of weekly payments. In circumstances where a Worker's injury arose as a result of an employer's negligence but the Worker has exhausted their entitlements pursuant to the RTW Act the Worker should have the right to access common law. A Worker should not have a lesser right than an employer's client, customer or any other person injured by an employer's negligent act.

(f) Matters relating to and the impacts of assessing accumulative injuries

The requirement that permanent impairments can only be combined in the event that they arise from a single trauma and impairment that arises from physical and psychiatric injuries must be assessed separately ignores the cumulative impact of such conditions on injured Workers, particularly on their capacity for work. Multiple impairments, whether they arise from a single trauma or multiple traumas, have a cumulative impact on an injured Worker, including on their capacity for work. This is equally so when it comes to the impact of physical and psychiatric injury. It seems ironic that in assessing "whole person impairment" the legislation doesn't permit an assessment of all the actual impairments on the whole person, particularly when the degree of impairment is being used to determine a Worker's capacity to return to work.

(g) The obligations on employers to provide suitable alternative employment for injured Workers

Section 18 of the RTW Act is welcome insofar as it provides Workers with the ability to personally pursue an employer who refuses to provide suitable employment. It is an improvement on section 58B of the repealed Act because the Corporation was ineffectual in requiring employers to provide suitable employment.

However, in a similar way with the issue of access to common law, it is a Clayton's entitlement. Section 18 provides that if a Worker obtains an order from the Tribunal that the employer provide suitable employment but the employer fails to comply with the order, the Corporation will pay the Worker what they would have received if the employer had complied with the order and has the ability to recover these payments from the employer as a debt. However, the obligation on the Corporation to pay the injured Worker is limited for two years from the date of injury. An injured Worker with a partial incapacity would be entitled to weekly payments in circumstances where an employer failed to provide suitable employment for up to a maximum of two years so the critical period for which an injured Worker would be seeking suitable employment and payments in the event of failure to provide suitable employment would be after the two years had expired.

Section 18 of the RTW Act should be strengthened by requiring the Corporation to pay the Worker what they would have received if the employer had complied with the order and recover these payments from the employer as a debt for as long as the employer failed to comply with the Tribunal's order.

(h) The impact of transitional provisions under the Return to Work Act 2014

The Transitional Provisions in Schedule 9 of the RTW Act have led to a significant number of issues. In the SAET Full Bench matter of *Pennington*[6], the outcome of which was described as in the decision as "seemingly unfair", found that there was no entitlement to weekly payments for Workers with existing injuries in the event that weekly payments had been discontinued in accordance with s. 36 of the repealed Act prior to the "designated day", being 1 July 2015. In the *Pennington* case the Worker had been employed pursuant to the RISE scheme ("Re-employment Incentive Scheme") in suitable employment and just over three weeks after the "designated day" the employer went into liquidation.

The AEU is also aware of circumstances in which these Transition Provisions have had grossly unfair outcomes for its Members. For example, one AEU Member, happened to fall pregnant after having returned to work part-time following an accepted work injury. The Compensating Authority asked her to voluntarily discontinue her payments while she had her child and accessed maternity leave and, when she did so, issued a notice pursuant to s.36 of the repealed Act. As our Member was on maternity leave as at the designated date the Compensating Authority rejected any entitlement to weekly payments upon her return to work part-time (she was at all relevant times partially incapacitated for work as a consequence of the work injury). But for the fact that this AEU Member became pregnant, had a child and was on maternity leave at the time of the commencement of the RTW Act, she would have continued to have an entitlement to weekly payments.

In another case, an AEU Member who sustained a compensable disability in early 2015 but was only off work for a short period and had returned to work prior to the commencement of the RTW Act suffered a later aggravation or relapse only to have her claim rejected citing the Transitional Provisions. In this type of situation, Workers are angry that they perceive that they have been disadvantaged for successfully returning to work at the earliest opportunity.

(i) Workers compensation in other Australian jurisdictions which may be relevant to the inquiry, including examination of the thresholds imposed in other states

It is arguable that South Australia has the worst workers' compensation system in Australia in terms of the rights and entitlements for injured Workers.

Comparing different jurisdictions can be complex and the AEU notes that SafeWork Australia's July 2015 "Comparison of workers compensation arrangements in Australia and New Zealand" provided a snapshot of arrangements as at 30 September 2014 being prior to the commencement of the RTW Act.

(j) The adverse impacts of the injury scale value

It is unclear what is meant by "injury scale value". To the extent this is a reference to the use of the Permanent Impairment Guidelines to determine the degree of Whole Person Impairment ("WPI"), it is the AEU's position that using an assessment of WPI to determine economic loss as a result of a work injury is inappropriate for the reasons outlined in (b) above.

[6] *Pennington v Return to Work SA* [2016] SAET 21

(k) Any other relevant matters

The AEU opposes the privatisation or outsourcing of injury management services for public sector employees to private Claims Agents as a response to the Latham/Bentley Review of Work Injury Insurance Arrangements in the South Australian Public Sector.

The AEU opposes the sale of Return to Work SA.