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Business SA submission:

Review of the Return to Work Act 2014

2 March 2018

Business SA
Chamber of Commerce
and Industry South Australia

Executive Summary

Business SA strongly supported and advocated for the introduction of the *Return to Work Act 2014*. The previous Act was unsustainable and did not provide an incentive for workers to return to work. Business SA welcomes the opportunity to discuss matters, which could affect our members as well as South Australian businesses more broadly.

While the number of disputed matters, and the time taken to resolve those disputed matters, has decreased under the new Act, improvements can be made. More thorough investigations and 'administrative first review' of claims could reduce these disputes further. SAET should retain jurisdiction for matters under the *Return to Work Act*.

Medical questions under the Act require significant consideration. Whole person impairment should not be expanded, or the threshold decreased, and it should not be possible to 'doctor shop' for generous assessors.

Lack of review for interim decisions and unpredictable policy announcements hamper ReturnToWorkSA's management of claims. By comparison, self-insured employers appear to be achieving promising outcomes.

Employer premiums in South Australia are more competitive than in the past but still need to be improved further. South Australia still has the second highest premiums in Australia, second only to Tasmania. Lessons can be learned from other jurisdictions, Queensland's "Recover at Work" initiative is a prime example of such. While members have not indicated reskilling services are an issue for their businesses, we welcome initiatives to improve training for injured workers.

The financial position of the scheme has improved under the new Act; however, it faces significant threats. Critically, changes to calculation of whole person impairment threaten the financial viability of the scheme; a cost which would be borne by all scheme participants.

A number of opportunities exist to improve the Act and the operation of South Australia's Return to Work scheme: medical assessment panels will provide expertise and certainty when determining a worker's whole person impairment; increased choice and contestability of claims agents will result in better service; and amendment to the definition of 'domestic partner' will ensure spouses are not inappropriately excluded from payment under Division 8.

Introduction

Business SA, South Australia's Chamber of Commerce and Industry, was formed in 1839 and has approximately 3,500 members across every industry sector, from micro businesses right through to listed companies. Our members employ some 140,000 South Australians. Business SA is a not-for-profit business membership organisation which advocates on behalf of members and the broader business community for sustainable economic growth in South Australia and the nation.

Business SA is interested in this matter as it has the potential to affect a great many of our members and the wider business community in South Australia. Every workplace injury is disheartening, and we support efforts to make workplaces as safe as possible. However, it will never be possible to prevent all accidents. Those workers injured at work should be confident that they will be taken care of, their injuries treated and their return to work facilitated properly. There is little argument regarding the benefit of returning to employment and this outcome should be strived for wherever possible.

It is for these reasons Business SA is pleased to provide feedback for the *Return to Work Act 2014* Review (the Review). In providing these comments Business SA has separately addressed the terms of reference.

It is important to stress at this early stage that the Review must consider the Act as a whole, rather than in relation to a series of cases relating to individual employees or employers. The Act is still in its infancy and further improvements can be made. South Australia requires a robust, efficient and low-cost scheme. This will ensure South Australian workers injured at work are properly rehabilitated and returned to work in the future.

1. The extent to which the scheme established by the Act and the dispute resolution processes under the Act and the *South Australian Employment Tribunal Act 2014* have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve disputes (especially when compared to the scheme and processes applying under the repealed Act)

1. In responding to this term of reference Business SA refers to the initial submission of Return to Work SA (RTWSA) regarding the number of disputed matters. It appears reductions have been achieved, however we submit further decreases could be achieved. Business SA submits a system of administrative first review within RTWSA will further decrease the number of disputed matters and will ensure Scheme resources are applied to achieving the best outcome for injured workers.

Analysis - RTWSA's initial submission

2. We note RTWSA's initial submission illustrates significant reductions in the number of disputed matters on average. Their submission states, for the period of July 2010 to December 2012, there were a total of 9530 disputes; an average of 318 disputes per month.[1] This compares to a total of 2662 disputes, an average of 89 per month, for the period of July 2015 to December 2017.[2] Business SA does not disagree with the factors cited by RTWSA as contributors to this significant decrease in disputed matters.[3]

3. Business SA welcomes this 72% decrease in disputed matters. This decrease indicates a greater proportion of injured workers are achieving satisfactory outcomes following their involvement with the Scheme. We submit however, the average of 89 disputed matters per month could be further reduced; decreasing resource demand on both RTWSA in litigating matters and SAET in adjudication. Such a step would strongly accord with the Act's object to reduce disputation when workers are injured at work by improving the quality of decision-making and by reducing adversarial contests to the greatest possible extent.[4]

Recommendation: More comprehensive investigations and administrative first review for disputed cases

4. Business SA submits the administration and operation of the Act could be improved by requiring ReturnToWorkSA to thoroughly and comprehensively investigate disputed matters. Business SA has received feedback from members involved in Return to Work (RTW) claims of an increase in 'rubber stamping' of decisions by claims agents without proper investigation of disputed claims.

5. A robust investigation is beneficial to all parties as it provides the parties with detailed information; ensures medical practitioners are provided with all relevant information to make decisions; and, if the dispute goes to conciliation, lawyers do not need to undertake lengthy, expensive investigations. Ultimately, this will lead to fewer decisions being appealed and better outcomes for matters that are appealed to SAET.

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[1] ReturnToWorkSA, 'Review of the *Return to Work Act* (2014) – Initial Submission', 11 January 2018, 3.
[2] Ibid.
[3] Ibid 4.
[4] *Return to Work Act 2014* (SA)s 3(2)(f) ('the Act').

6. Use of SAET for reviewing disputes increases the adversarial nature of the system and creates a significant backlog in the Tribunal. Since the commencement of the Act there have been an average of 89 disputes per month (1068 per annum).[5] Business SA does not presume to comment on the administration of SAET and its capacity to manage the demands placed on it. We make this point purely on the basis that the fewer matters requiring adjudication the better; resources can be devoted to contentious or significant matters where they are most required.

7. Introduction of an independent administrative review process would allow a worker, claimant or employer to apply for a free review of ReturnToWorkSA's initial decision based on the facts. Such a system has been successfully implemented in Queensland with administrative appeals providing a prompt and non-adversarial review of some decisions and resulting in few claims being appealed to the Queensland Industrial Relations Commission. Of the approximately 100,000 claims lodged in Queensland, some 300 (0.3%) are appealed past the administrative review stage.[6]

8. It should be a simple process for a participant in the matter to call for a review. Though a person may choose to engage a lawyer to assist with the preparation of materials for the review, there would be no costs available to lawyers. As this is not a court matter, assistance could be provided by the representative union or other support person.

9. The review process would not involve an investigation or process of inquiry as a robust investigation should be undertaken for any disputed matter. Rather, the review would be administrative in nature, it would be conducted on the papers. An independent review officer would be given the same information as the original decision-maker, and the review would see if this independent review officer comes to the same conclusion as the original decision-maker. This administrative review would produce a binding decision which is then appealable to SAET.

10. The typical type of decision that the independent review panel should assess is the acceptance or rejection of a claim and decisions regarding compensation payments. We note RTWSA's comment that most disputes now relate to 'the core issue of compensability'.[7] The introduction of an independent review panel would directly address this major topic of dispute.

11. Introduction of this style of independent review would allow issues to be resolved before they escalate to SAET and impose lengthy and costly legal representation on the worker. The worker, if eligible, would receive compensation and rehabilitation sooner and potentially, could return to work sooner. As noted above, this recommendation comfortably accords with the objects of the Act, particularly regarding sections 3(1) and 3(2)(f).

[5] ReturnToWorkSA, 'Review of the *Return to Work Act* (2014) – Initial Submission', 11 January 2018, 3.
[6] Office of Industrial Relations, 'Queensland workers' compensation scheme statistics 2016-17' Queensland Government 2017, 6.
[7] ReturnToWorkSA, 'Review of the *Return to Work Act* (2014) – Initial Submission', 11 January 2018, 3.

2. Whether the jurisdiction of SAET under the Act should be transferred to the South Australian Civil and Administrative Tribunal;

1. Business SA does not support jurisdiction conferred under the Act to the South Australian Employment Tribunal (SAET) being transferred to the South Australian Civil and Administrative Tribunal (SACAT). We do not support this proposal for three reasons: the need for such change has not been established; SAET is the appropriate forum for employment related tribunal matters in general; and pressing concerns with the Act will remain regardless of which tribunal processes matters.

Need for such change has not been established

2. The evidence does not suggest SAET's handling of RTW matters warrants transfer of jurisdiction to SACAT. Business SA has long supported SAET's role as a 'one stop shop' for employment related matters. In 2016 we supported legislative changes which conferred jurisdiction on SAET for employment-related matters in other pieces of legislation.[8] While we have expressed concern in the past regarding increasingly legalistic approaches to employment disputes we submit the principles behind SAET remain sound.

SAET is appropriate forum to handle employment related matters

3. Business SA also opposes the suggested transfer given the difference in legislation dealt with by the respective tribunals. Transferring jurisdiction of RTW matters from SAET to SACAT will not only encumber SACAT with an additional responsibility, this will also introduce jurisdiction for a suite of matters quite distinct from SACAT's other jurisdictions. The below table contrasts the legislation conferring jurisdiction on the two bodies.

South Australian Employment Tribunal	South Australian Civil and Administrative Tribunal
Construction Industry Long Service Leave Act 1987	*Advanced Care Directives Act 2013*
Dust Diseases Act 2005	*Aquaculture Act 2001*
Education Act 1972	*Community Housing Providers (National Law) (SA) Act 2013*
Equal Opportunity Act 1984	*Consent to Medical Treatment and Palliative Care Act 1995*
Fair Work Act 1994	*Controlled Substances Act 1984*
Fire and Emergency Services Act 2005	*Emergency Services Funding Act 1998*
Industrial Referral Agreements Act 1986	*Firearms Act 2015*
Long Service Leave Act 1987	*First Home and Housing Construction Grants Act 2000*
Police Act 1998	*Fisheries Management Act 2007*
Public Sector Act 2009	*Food Act 2001*
Return to Work Act 2014	*Freedom of Information Act 1991*
Technical and Further Education Act 1975	*Guardianship and Administration Act 1993*
Training and Skills Development Act 2008	*Historic Shipwrecks Act 1981*

[8] Business SA, '*Statutes Amendment (South Australian Employment Tribunal) Bill 2016* – submission', June 2016, 2.

Work Health and Safety Act 2012	*Housing Improvement Act 2016*
	Lobbyists Act 2015
	Local Government Act 1999
	Mental Health Act 2009
	Plant Health Act 2009
	Primary produce (Food Safety Schemes) Act 2004
	Real Property Act 1886
	Residential Parks Act 2007
	Residential Tenancies Act 1995
	Retirement Villages Act 1987
	Safe Drinking Water Act 2011
	South Australian Housing Trust Act 1995
	Tobacco Products Regulation Act 1997
	Valuation of Land Act 1971
Source: http://www.saet.sa.gov.au/resources/legal/ (January 2018).	Source: http://www.sacat.sa.gov.au/information/legislation/our-jurisdictions (January 2018).

4. The above comparison clearly demonstrates the legislative workload imposed on the respective tribunals. Business SA makes clear that we are not commenting on the relative number of matters brought under the *Return to Work Act 2014* as opposed to, for example, the *Historic Shipwrecks Act 1981*. Instead, the above table illustrates the quantity of jurisdictions currently conferred on SACAT as opposed to SAET. Addition of RTW jurisdiction will only burden SACAT further.

5. The above comparison also illustrates the nature of matters dealt with by the respective tribunals. It is clear that SAET, the South Australian Employment Tribunal, currently has jurisdiction over matters related to work and employment. This is particularly demonstrated by its jurisdiction over matters under the *Equal Opportunity Act 1984*, *the Fair Work Act 1994*, the *Return to Work Act 2014*, and the *Work Health and Safety Act 2012*. By contrast, SACAT has a varied field of jurisdiction, ranging from controlled substances, to historic shipwrecks, mental health, and valuation of land matters. Business SA clarifies here that we are not passing comment on the expertise or ability of SACAT members. It is preferable however, that matters related to employment and the workplace be dealt with by the specialised tribunal which already deals with other employment and workplace matters. This tribunal will have a more complete appreciation of complex businesses pressures which affect employment and the workplace. This factor tends strongly against transferring RTW jurisdiction from SAET to SACAT.

Issues with the Act will persist

6. Finally, transferring RTW jurisdiction from SAET to SACAT should be opposed simply because it is a superficial response to a symptom of RTW issues rather than a response to the source of perceived RTW system problems. Conferring RTW jurisdiction on SACAT will not address business concerns with the Act and its deficiencies. These deficiencies, discussed in further detail later, include too much ability for an injured employee to 'shop around' for assessors; a lack of statutory requirement for independent medical opinions where a person may reach the 30% whole person impairment threshold; and weak powers to investigate disputed claims.

7. Given the above, nothing suggests to Business SA that transferring jurisdiction of RTW matters from SAET to SACAT is a justified suggestion. As SAET is now reaching maturity it is important that it not lose a major element of its jurisdiction. This is particularly so where the employment tribunal would lose jurisdiction for this work-related field of matters to another tribunal. Instead, any perceived issues arising from SAET's handling of RTW matters should be dealt with through appropriate resource allocation and oversight. The best outcome for all RTW actors will be for matters to be heard and determined in the most efficient manner possible by those with requisite expertise and understanding.

3. The extent to which there has been an improvement in the determination or resolution of medical questions arising under the Act (especially when compared to the system applying under the repealed Act);

1. At this early stage in the Act's operation it is difficult to comprehensively assess whether the determination or resolution of medical questions has improved compared to the repealed Act. This being said however, Business SA has significant concerns regarding some aspects of medical questions, including their determination and resolution, under the Act. Specifically, Business SA is concerned by: SAET's apparent disinclination to utilise the expertise of independent medical advisers (IMAs); uncertainty regarding future surgery entitlements; insufficient medical consideration where a person may meet or exceed the 30% whole person impairment threshold; and increasing scope when considering whole person impairment.

Insufficient use of independent medical advisers

2. Medical questions are a critical factor when considering an injured worker's rehabilitation and return to work. Given medical questions go to the heart of many return to work disputes, such as degrees of permanent impairment, potential surgery, and other treatment needs, the answers to these questions will significantly affect outcomes for employees, employers and the scheme itself. Business SA is significantly concerned that SAET is not engaging independent medical advice and expertise when considering these significant medical questions.

3. Section 121 of the Act allows for medical questions or questions arising in proceedings to be referred to 1 or more independent medical advisers for inquiry and report. This provision is an appropriate part of the Act. While members of SAET are highly capable members of the legal profession, they do not have medical training. This provision allows members to refer important medical questions to those with appropriate expertise and knowledge. Unfortunately for employees, employers and the scheme in general this ability is underutilised by SAET members and is decreasing. In the 2015-16 reporting period SAET made 23 referrals to IMAs,[9] while in the 2016-17 reporting period SAET made only 11 referrals.[10] This 52% reduction in IMA referrals occurred at a time where SAET had a 20.8% increase in applications received.[11]

4. We take this opportunity to highlight SAET's description of independent medical advisers: 'IMAs are medical professionals. Their independence and professionalism is central to the integrity and overall success of the Return to Work scheme.'[12] Business SA seconds this statement. Minimal use of the 55 IMAs available to provide their expert opinion of medical uncertainty or disagreement, as evidenced above, is disheartening. While this response does not directly address whether there has been an improvement in the determination and resolution of medical questions arising under the Act compared to the repealed Act, this is an area of concern for members. Mandatory referral to IMAs in certain circumstances should be an area of potential reform for the Act. This suggestion will be discussed in further detail later in this submission.

[9] South Australian Employment Tribunal, 'Annual Report 2015-16', 15.
[10] South Australian Employment Tribunal, 'Annual Report 2016-17', 9.
[11] Ibid 7.
[12] South Australian Employment Tribunal, 'Annual Report 2015-16', 15.

Future surgery

5. Business SA is also concerned with elements of the Act, and their inconsistent interpretation by SAET, which allow injured employees to request future surgery without first having a claim approved. In these instances, the determination or resolution of medical questions under the Act is not operating appropriately. As stated earlier, we regret any instance where a person is injured while at work, these people should be, and are, cared for through the scheme. However, we are concerned that claims for future surgery approval in circumstances where the medical need for such surgery does not surpass the balance of probabilities will put further pressure on the scheme's operations. This pressure will likely impact premiums paid by South Australian employers.

6. Wording in section 33 of the Act and regulation 22 has been interpreted differently in two SAET decisions; *Tinti*[13] and *Ledo*.[14] At issue in *Tinti* was whether the applicant's claim for future shoulder surgery should be pre-approved by the scheme. In this decision DP Calligeros found that under s 33(21)(b)(ii) or reg 23(2a)(b), a worker needs to show, on the balance of probabilities, it is reasonable to undertake the surgery sought in the future; and that the future surgery be reasonable with regard to the worker's circumstances or likely future circumstances.[15] He further stated that:

> *If it is not established that it is both reasonable and appropriate to have surgery in the future on the balance of probabilities, the application for pre-approval should be refused. In my view an application seeking preapproval of an unspecified number or unspecified type of procedures over time should be refused. To be reasonable and appropriate, the nature of the surgery sought to be undertaken in the future must be identified.*[16]

7. The approach applied in *Tinti* was explicitly rejected in *Ledo*. Early in DP Lieschke's judgment he states: 'For the reasons that follow I respectfully have reached the conclusion that the earlier decision on this point [*Tinti*] is incorrect and should not be followed.'[17] Instead, when considering pre-approval for future surgery, DP Lieschke found:

> *The decision maker is required to consider the impact or likely impact of the existing injury on the worker's future health and capacity, and in this context, whether it is reasonable and appropriate for surgery to be undertaken at a later time. The injury's future likely impact is a relevant consideration, but it is not determinative. The current or future impact may be such that the chances of specific remedial surgery can be identified by a surgeon, subject to various contingencies.*

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[13] *Tinti* [2016] SAET 72 (*Tinti*).
[14] *Ledo* [2017] SAET 21 (*Ledo*).
[15] *Tinti* [71], [73].
[16] Ibid [74].
[17] *Ledo* [7]-[8].

> *Thus, the chances and significance of likely future impact of the compensable injury on the worker's health and capacity (unrestricted to just capacity for employment), must be considered, even if there is no presently identified probable need for surgery. If these considerations lead to a conclusion it is reasonable and appropriate for potential specific remedial surgery to be undertaken at a later time, it should be approved.*[18]

8. An express inconsistency exists between these decisions. In *Tinti* a future surgery application must be identifiable in nature, whereas in *Ledo* there need not be any presently identified probable need for future surgery. We recognise *Ledo* is subject to appellate proceedings,[19] which at time of writing does not appear to have settled the 'future surgery' threshold question. Business SA does not suppose to predict the decisions of the South Australian judiciary. We simply raise this point to highlight that the Act, as written, is not clear. Until appellate decisions are handed down this inconsistency casts the proper approach to this issue into confusion.

9. We note ReturnToWorkSA's submission on this topic, where they stated 'RTWSA's view is that it was never intended that the Scheme fund surgery in the absence of an accepted work injury claim and/or medical evidence to support the surgery'.[20] RTWSA goes on to suggest legislative reform in this area[21] – a submission Business SA supports.

Whole person impairment

10. A critical medical question arising in every proceeding under the Act is whether the injured worker is a 'seriously injured worker'. Designation as a seriously injured worker affects multiple aspects of the Return to Work Scheme, significantly including exemption from the 104-week cut-off for weekly payments.[22] An injured worker will be a seriously injured worker if their work injury has resulted in permanent impairment and the degree of whole person impairment (WPI) has been assessed to be 30% of more.[23] Expanding WPI assessments, 'doctor shopping' for lenient assessors, and a lack of independent medical expertise in WPI determinations are all significant issues which should be addressed by this Review.

Concerns regarding expanded WPI assessments

11. Business SA is concerned there may be some parties wishing to use this review to expand WPI assessments, either by decreasing the WPI threshold or by broadening principles taken into account when making an assessment. The Act is clear on what matters may be considered jointly when assessing permanent impairment and what must be considered separately.[24] This has been reiterated in issued decisions.[25]

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[18] Ibid [35]-[36].
[19] *Return to Work SA v Ledo* [2017] SAET 180.
[20] ReturnToWorkSA, 'Review of the *Return to Work Act* (2014) – Initial Submission', 11 January 2018, 10.
[21] Ibid.
[22] The Act ss 39(1), (3).
[23] Ibid s 21(2).
[24] Ibid ss 21(8), 22(8).
[25] See for example, *Preedy v Return to Work SA* [2017] SAET 71.

12. Business SA strongly submits WPI should not be expanded. Expansion of WPI assessments will significantly impact the financial stability of the scheme and, perversely, result in fewer injured workers returning to work.

13. We cannot pre-empt the exact nature of claims by those wishing to expand WPI assessments, however, in reiterating our submission above we make the following policy comment. Business SA strongly opposes any attempt to make WPI assessments more generous in relation to psychiatric injury and mental harm. This includes any attempt to vary section 21(8)(a)-(d). Such changes would not better enable workers to make an appropriate and effective return to work, rather they would brand that worker 'seriously injured' – discouraging further workforce participation and potentially causing emotional harm to the injured person.

Choice of assessor

14. A significant factor contributing to WPI inefficiency is the ease at which an injured worker can select the assessor who will assess the worker's WPI. This entitlement arises once the work injury has stabilised/reached maximum medical improvement.[26] It goes without saying that the circumstances of each injury will be unique, as will be the personal and health characteristics of the injured worker. Consequently, it is unreasonable to expect that all permanent impairment assessments for a type of injury (eg, a broken ulna bone) will result in the same WPI. However, Business SA is aware of patterns in the return to work process in which workers will be encouraged (often by their legal representatives) to have their permanent impairment assessed by certain assessors who are considered more 'generous' with their assessments. We note similar comments made in ReturnToWorkSA's submission on this point, where they note significant variation in WPI percentages by different assessors for similar injuries.[27] This practice is an inappropriate approach to determining and/or resolving the WPI medical question arising under the Act.

15. Business SA strongly submits amendment be made to section 22 of the Act to limit the ability of an injured worker to select or change their assessor. An appropriate procedure would be for the claims agent to nominate an assessor based on factors the same as, or similar to, those currently set out in the Impairment Assessment Guidelines. The injured worker should then have the ability to apply via internal review at first instance to change that assessor in specified circumstances, for example where there is a conflict of interest.

16. Business SA submits a significant change in the determination of WPI assessments is required to effectively improve the determination or resolution of medical questions arising under the Act. The core of this change is that any assessments which purportedly exceed 30% WPI would be reviewed/confirmed by a Medical Assessment Panel (MAP). This recommendation will be discussed further in response to Term of Reference 10.

[26] Government of South Australia, 'Return to Work Scheme – Impairment Assessment Guidelines', March 2015, cl 17.3.
[27] ReturnToWorkSA, 'Review of the *Return to Work Act* (2014) – Initial Submission', 11 January 2018, 9.

4. The performance of RTWSA in managing claims including RTWSA's outcomes in reducing instances of work injury;

1. Business SA submits RTWSA's management of claims could be improved. Lack of review for interim decisions issued under the Act are a significant issue impacting proper management of claims within the objects of the Act. Further, development of policies applicable to claims agents could be improved – inconsistency and uncertainty hinder efficient claim management. Regarding reducing instances of work injury, this should remain the purview of SafeWork SA.

Interim decisions

2. Interim decisions serve a legitimate purpose, however they are easily undermined by unscrupulous actors within the Scheme. Interim decisions allow RTWSA to ensure the support available to seriously injured workers are available to those who may reach or exceed the threshold when later assessed. Business SA stresses that we do not oppose the use of interim decisions to ensure injured workers receive the support they require. We provide the following submissions to spur change which allows this process to remain available to address legitimate needs, whilst eliminating dubious or potentially fraudulent claims.

3. As discussed previously, designation as a 'seriously injured worker' has a significant impact on the depth and duration of the injured worker's involvement with the Scheme. Designation as a seriously injured worker normally occurs after the worker's injury has stabilised and the assessor considers the worker's WPI to be fully ascertainable.[28] Prior to this assessment taking place, RTWSA may make an interim decision (on its own initiative or upon application by the worker) to the effect that the worker will be considered a seriously injured worker for the purposes of the Act.[29] RTWSA's interim decision has effect until a WPI assessment is made under Division 5.[30] These interim decisions are not subject to regular review; significantly hindering RTWSA's proper management of claims.

4. Under the current legislation, the interim decision system can be exploited with ease. An injured employee can seek an interim decision from RTWSA classifying them as a significantly injured worker. Once this assessment has been made, there is no incentive for the worker to undertake further assessment. Undertaking further assessment carries the possibility the injured worker will receive a below-30% WPI. As long as the worker avoids assessment, their seriously injured worker status continues indefinitely.

5. Business SA strongly submits the Act must be amended to introduce mandatory reviews of issued interim decisions. Where RTWSA issues an interim decision the status of the worker, particularly whether they are able to undertake assessment, should be reviewed every 6 months. This could be introduced as a new paragraph in section 21(4) or as a new subsection within section 21. Two primary objectives of the Act are to support workers in recovering from injury and in returning to work.[31] The ability for people to avoid WPI assessment and remain classified as a seriously injured worker based on an interim decision means no progress will be made to achieve the objects of the Act. Amendments to the Act to require regular review of interim decisions, as suggested above, will resolve this.

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[28] Government of South Australia, 'Return to Work Scheme – Impairment Assessment Guidelines', March 2015, cl 1.13.
[29] The Act s 21(3).
[30] Ibid s 21(4)(b).
[31] Ibid s 3(1).

Policy development

6. RTWSA should not be seen as the only actor within the Scheme, claims agents EML and Gallagher Basset are integral in the management of claims. These claims agents are appointed by RTWSA and are tasked with managing claims for injured employees and their employers. The activity of claims agents is guided heavily by RTWSA policies and procedures ('service standards'[32]). Notwithstanding contestability concerns within the Scheme (discussed at term of reference 10), RTWSA's current approach to claims agent policy guidance is a significant issue.

7. The basis of this issue is that, as Business SA understands, service standards are drafted by RTWSA with little or no input from the claims agents tasked with carrying out these directives or employers who may ultimately be affected. It is our understanding that policies are change or are updated frequently and with limited consultation. Such outcomes detract from efficient claims management, particularly to the disadvantage of the injured worker caught in the middle.

8. Business SA is not advocating against service standards; these set clear expectations for the Corporation (including claims agents) when interacting with employers and injured workers. Rather, Business SA submits that RTWSA adopt a more inclusive approach to policy drafting. Consultation with claims agents at the earliest stage of policy formulation will ensure those policies are reasonable in scope and are practicable for the agents. In addition, Business SA believes policies on how claims are managed should be pubic, open and transparent.

Reducing instances of work injury

9. Business SA supports efforts by all stakeholders to make workplaces safer. However, we note and agree with comments made by RTWSA regarding their role in this process. In their initial submission, RTWSA state: "…since the separation of SafeWorkSA and the then WorkCover over ten years ago, prevention of injuries has been the primary responsibility of SafeWorkSA."[33]

10. It is beyond the scope of this submission for Business SA to comment on the activities of SafeWork SA. For the purposes of this submission, we simply submit this review should not alter the role of RTWSA to achieve outcomes which would be better managed by SafeWork SA.

[32] Ibid sch 5 cl 4.

[33] ReturnToWorkSA, 'Review of the *Return to Work Act* (2014) – Initial Submission', 11 January 2018, 11.

5. The performance of self-insured employers including outcomes in reducing instances of work injury;

1. Self-insured employers represent a significant proportion of Scheme participants, their performance is an appropriate consideration within this review. We note ReturnToWorkSA's comments that self-insured employers make up 31% of total claims within the Scheme (16% private and 15% public) and that 69 private self-insurers currently operate.[34] While Business SA's membership does include some self-insured employers, we are not in a position to comprehensively critique the performance of these self-insured employers. Other bodies and industry groups may be better placed to undertake this analysis. Instead, Business SA provides the following general comments and observations.

2. Business SA understands the outcomes reported from self-insured employers and monitored by RTWSA are meeting or exceeding expectations. We note promising analysis by ReturnToWorkSA of self-insured employers which stated: 'RTWSA's evaluation of private self-insured employers' management systems indicate they are generally well resourced, risk focused, and work cooperatively with RTWSA on performance monitoring and improvement activities' and that '[t]he performance of self-insured employers against the requirements of registration has been both positive and stable.'[35]

3. Strong performance by self-insured employers benefits not only that employer and their employees, but also the wider South Australian business population. The localised benefit of strong self-insured performance is identified in the RTWSA submission where it notes that self-insured employers, often larger and well-established employers, are incentivised to significantly invest in injury prevention.[36] The employer therefore does not pay premiums and the resultant safety benefit for that employer's employees is obvious. Self-management of workplace injuries, as opposed to RTWSA paying the actual costs of an injury, decreases the financial and resource burden on the Scheme; a benefit shared by all those with an interest in the Scheme operating efficiently and effectively.

4. Business SA submits the review should be wary of suggesting changes to self-insurance requirements. While other parties may identify issues within the Act relating to the performance of self-insured employers, changes to registration or compliance requirements must be well-justified. The journey an employer undertakes to become a self-insured employer requires, appropriately, the prospective self-insured employer to meet a number of eligibility and compliance criteria; a process which can take many years to complete.

5. Given the promising outcomes of self-insured employers as reported by RTWSA, and the benefits flowing from effective self-insurance systems to the specific workplace(s) and to the broader economy, this approach should be encouraged rather than discouraged. The Act should not be altered to increase the bureaucratic burden on current and prospective self-insured employers.

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[34] ReturnToWorkSA, 'Review of the *Return to Work Act* (2014) – Initial Submission', 11 January 2018, 15.
[35] Ibid.
[36] Ibid.

6. Changes in return to work rates at key milestones outlining factors influencing any improvement or deterioration;

1. The ReturntoWork SA submission shows an increase in the number of workers who are return to work at key milestones. These improvements are not only at the 2-year stage of claims where employee's entitlement to wages are concluded, but at all stages of the claims with 92% of workers returning to work by 52 weeks.

2. As previously mentioned in this submission, the object of the Act is to return workers to the workplace. It is Business SA view that the 30% WPI and ability for workers to remain on payments until retirement after they have met the 30% WPI threshold is contrary to this objective and that an improvement in return to work rates of workers with WPI should also be considered by ReturntoWork SA.

3. Business SA is not suggesting that workers who meet the 30% WPI should be made to work. However, 30% WPI does not indicate work incapacity. This is demonstrated by the fact a number of workers who have been assessed with greater than 30% WPI have returned to work. If the RTW Act is going to meet its prime object of returning workers to the workplace, incentives must be provided to allow workers who have greater than 30% WPI to re-enter the workplace, even if for a small number of hours per week.

4. The following is an excerpt from a position paper of The Royal Australian College of Physicians, that demonstrates the importance of returning to work after an injury.

> *"Even health problems that are frequently attributed to work—for example, musculoskeletal and mental health conditions—have been shown to benefit from activity-based rehabilitation and an early return to suitable work. However, despite encouraging shifts in policy, in Australia and New Zealand the available evidence suggests that the message that 'work is generally good for health' has not yet achieved widespread acceptance*
>
> *The case for increased action becomes even more compelling when the negative health consequences of remaining away from, or out of, work are considered. Research shows that long-term work absence, work disability and unemployment are harmful to physical and mental health and wellbeing. Moreover, the negative impacts of remaining away from work do not only affect the absent worker; families, including the children of parents out of work, suffer consequences including poorer physical and mental health, decreased educational opportunities and reduced long term employment prospects."*[37]

Recommendation

5. Business SA recommends the inquiry consider reskilling and return to work incentives of other jurisdictions to improve the skilling. For example, Queensland has implemented the "Recover at Work" initiative, which places injured workers in short term (3–6 weeks) host employment with employers who have an established track record of successful return to work outcomes with their own workers. WorkCover pays the worker's wages when they participate in a suitable duties program and the host employer benefits from the

[37] The Royal Australia College of Physicians, "Realising the Health Benefits of Work" (2011) www.racp.edu.au/docs/default-source/advocacy-library/realising-the-health-benefits-of-work.pdf?sfvrsn=10 (Last accessed 28 February 2018).

services of an additional skilled worker. At the end of the placement, there is no obligation to employ.[38] While South Australia has implemented similar schemes in the past, such as RISE, these schemes are not widely advertised, and host employers need to be provided increased incentives to participate in such schemes.

6. It is Business SA's view that the improvements in the return to work numbers are a positive step for employees and employers, however we believe more work can be done to improve the lives of seriously injured workers. These improvements can be made by providing financial incentives for employees with greater than 30% WPI and a capacity to work, to return to the workplace. These incentives should not be penalties for those workers who are not in a position to return to work and based on work capacity.

[38] WorkCover Queensland, <www.worksafe.qld.gov.au/recoveratwork> (accessed 1 March 2018).

7. Factors contributing to non-seriously injured workers failing to achieve a return to work within two years;

1. This term of reference is difficult to provide a definitive answer to, particularly given the unique characteristics of every worker, every employer, every workplace and every injury. Each of these factors will affect whether a non-seriously injured worker achieves a return to work within two years; at times these factors will combine and affect the return to work outcome. We further note RTWSA's initial submission which identified that 79% of people who suffer a work injury are able to return to work within 4 weeks, and that 92% of those people have returned to work within 52 weeks.[39] This suggests the number of non-seriously injured workers failing to achieve a return to work within two years is low.

2. There is an array of elements which contribute to non-seriously injured workers failing to achieve a return to work within two years. The following are factors Business SA considers could impact this outcome:

    - **Individual characteristics**: Individual characteristics of the injured worker could influence this outcome. These characteristics could include: the worker's mental state and desire to return to work; the level of transferable skills the worker has; and the ability of the worker to engage in further training.

    - **Employer characteristics and behaviour**: The employer also may influence this outcome, such as by failing to offer sustainable work or appropriate modified duties.

    - **Ongoing claims**: Disputes and improper claims management may delay a person's return to work, such as where the dispute relates to the person's degree of WPI.

    - **Business and employment conditions generally**: The South Australian economy has seen some small and promising improvements over the last 12 months, however some businesses have difficulty finding viable, sustainable work for injured workers to return to. This is particularly true for small businesses, where it is much harder to modify a role to suit any ongoing incapacity.

3. As noted above, the proportion of non-seriously injured workers failing to return to work appears to be quite small – however this does not mean no attention should be given. The issues identified above could be addressed by better administration and management of claims by RTWSA, EML and GB. Individual and employer characteristics could be improved by earlier identification of re-skilling needs and workplace consultations.

[39] ReturnToWorkSA, 'Review of the *Return to Work Act* (2014) – Initial Submission', 11 January 2018, 17.

8. Any additional recommendations regarding reskilling services to assist return to work outcomes;

1. According to the Return to Work SA submission, each year, a small percentage of injured workers (approximately 1,000 of the 12,600 accepted claims each year) have more than three months off work after having a workplace injury. About half of those workers need to find employment with a different employer due to the nature of their injury. The ReSkilling program is designed to assist those workers. It includes skill maintenance, skills assessment, training /retraining and outplacement services.

2. The reskilling of workers is a very individual process based on many factors including the type of work and injury. Business SA members have not indicated an issue with the time period for the reskilling of workers however, although we would welcome any incentives to improve the reskilling of workers.

3. Business SA and its members welcome any involvement in the process to reskill workers where necessary. We note RTWSA's comments on the need to focus on workers in regional areas. Potentially, regional employees who have been injured at work, face greater isolation due to distances, fewer alternative job opportunities and less transport options. As such, we encourage the focus on the regional areas to develop suitable reskilling options.

9. Whether the scheme has yet achieved financial stability and if not when the scheme will be likely to be mature and stable;

1. Business SA recognises the importance of the Scheme achieving and maintaining financial stability. Stability will ensure the Scheme can continue to support injured workers, both in the immediate term and in their subsequent return to work. While progress has been made, it is clear the Scheme has not yet achieved financial stability; particularly given significant uncertainty related to pending Supreme Court decisions.

2. When the *Return to Work Act 2014* and RTWSA came into operation in 2015, the scheme was facing $1.1 billion worth of unfunded liability.[40] The unfunded liability was a result of a scheme that was seen as social security system and provided little incentive for workers to return to work. There is no doubt this scheme was untenable and had to be changed, which was demonstrated by a bipartisan vote in parliament to pass the Return to Work Act.

3. The 2017 Actuarial Report provides the most comprehensive financial evaluation of the scheme. This report found a net outstanding claims liability for registered employers of $2.017 billion; the majority of which resulted from serious injuries ($1.325 billion).[41] The Actuarial Report noted both the number of new serious injury claims in the previous 6 months, and the number of psychological claims reaching serious injury, were higher than expected.[42]

4. The number of open disputes has risen and there are more claims being appealed. While it is expected that new legislation will be legally tested, following changed in the RTW Act that mean legal costs are no longer at risk, there is a greater incentive by employees and their legal representatives to make claims that have limited legal merit.

5. The Actuarial Report notes a number of key uncertainties which could impact the Scheme's estimated liabilities. The identified risks are:
    - Legal precedent risk;
    - WPI assessments;
    - Serious injury (including life expectancy, cost escalation and ultimate number of claims);
    - Return To Work;
    - Compensability and claim acceptance;
    - Outcomes for claims with current disputes; and
    - Labour market pressures.[43]

[40] ReturnToWorkSA, '2014-15 Annual Report – Transforming South Australia's work injury insurance scheme' Government of South Australia, 31.
[41] Andrew McInerny, Tim Jeffrey and Geoff Atkins, 'Scheme Actuarial Valuation as at 30 June 2017 – ReturnToWorkSA' August 2017, 7.
[42] Ibid 6.
[43] Ibid 11-12.

6. Business SA does not propose to discuss or analyse the above risk factors in detail, they are ably discussed in the Actuarial Report. Instead, Business SA highlights the following factors as particularly critical issues to be considered as part of this review.

Legal precedent risk

7. Legal precedent risk represents one of the most pressing challenges to the Scheme. The Actuarial Report describes this risk as 'the possibility of decisions which are unfavourable to the Scheme or the cultures and behaviours of its participants.'[44] This risk has also been identified by RTWSA itself, with their initial submission stating '[RTWSA's] financial position does not account for the uncertainty relating to significant SAET decisions, such as the *Mitchell* or *Li* decisions, and their potential financial impacts on the Scheme'[45] (emphasis in original). This factor is clearly identified as a risk to the financial stability of the Scheme, it should be a key consideration for this review.

8. This risk has arisen from ambiguous or unintentionally broad drafting in the Act. Such drafting has given creative advocates the opportunity to argue for increased scope within the Act, such as when considering WPI or compensability of psychological injury. These considerations have been discussed in response to term of reference 3.

9. This review must result in a clear statutory regime for the Scheme's operation. While ambiguous provisions remain in the Act the financial stability of the Scheme cannot be held with any certainty.

WPI assessments

10. As discussed throughout this submission, WPI assessments are a critical element which impact many aspects of the Scheme's operation; the Scheme's financial viability being no exception. Changes must not be made to WPI assessments which would make it easier for persons to meet the threshold. This includes: not decreasing the threshold, not making it easier for persons with psychological injury to reach the threshold, and not altering how multiple or consequent injuries are considered.

11. The Actuarial Report identifies the uncertainty surrounding the Scheme's continued operation due to WPI assessments. As correctly identified in that report, there are significant differences between the compensation awarded where a claim is above 30% WPI compared to claims below 30% WPI.[46] The Actuarial Report goes on to state: 'The Scheme will face significant financial consequences if this leads to either extra claims getting over the 30% WPI threshold and/or WPI creep.'[47]

12. As recommended above, this review must result in the Act providing a clear regime for assessing WPI. This should include clear statements as to the scope of WPI assessments (including which matters are outside this scope) and mandatory review of interim WPI assessments. The financial stability of the Scheme depends on clear WPI assessment parameters being set.

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[44] Ibid 11.
[45] ReturnToWorkSA, 'Review of the *Return To Work Act* (2014) – Initial Submission', 11 January 2018, 23.
[46] Andrew McInerny, Tim Jeffrey and Geoff Atkins, 'Scheme Actuarial Valuation as at 30 June 2017 – ReturnToWorkSA' August 2017, 11.
[47] Ibid.

10. Any other recommendations based on your review of the administration and operation of the Act which you consider appropriate and consistent with the objects of the Act.

1. It is important to reiterate at this stage that the Act and the Scheme are still maturing. It is too early to provide comprehensive critique for many aspects of the Act given their interpretation is subject to as yet undecided proceedings. With this in mind, Business SA provides the following recommendations to improve the administration and operation of the Act. These recommendations provide greater certainty for participants in the Scheme and will lead to outcomes better aligned with the objects of the Act.

Medical assessment panels

2. As mentioned in [3.16], Business SA submits a significant change in the determination of WPI assessments is required to effectively improve the determination or resolution of medical questions arising under the Act. The core of this change is that any assessments which purportedly exceed 30% WPI would be reviewed/confirmed by a Medical Assessment Panel (MAP).

3. We note comments made in the Return to Work SA August 2017 Actuarial Review. This document identified WPI assessments as a key area of uncertainty, stating:

> *[U]nder the RTW Act, there are significant difference between the compensation available to claims above the 30% WPI threshold and those below. This factor, combined with the new lump sum for future economic loss payable to Short Term Claims, means there will be increasing pressure on WPI assessments. The Scheme will face significant financial consequences if this leads to either extra claims getting over the WPI threshold and/or 'WPI creep'. Robustness of the 'once and for all' WPI assessment rules under the RTW Act is an important area of risk.*[48]

4. Business SA recommends the introduction of a MAP, as an arm of SAET, to assess claims that have been referred on the basis they may reach the 30% WPI threshold. Currently, members of SAET decide whether the threshold has been reached, with varying results and inconsistent outcomes. The introduction of a MAP to determine whether the threshold has been reached will reduce uncertainty and disputes arising from 30% WPI assessment consideration.

5. We note medical assessment panels currently operate successfully in Queensland, Victoria and New South Wales to objectively assess the worker's whole person impairment.

6. The MAP should be set up to provide independent, expert medical decisions about injury and impairment. Medical specialists would be appointed to the MAP based on their expertise in their particular field. The MAP could operate as a three-person panel, where each expert independently considers the worker's degree of WPI. The worker's WPI would be the average of these three individual expert assessments.

[48] Scheme Actuarial Valuation as at 30 June 2017, ReturntoWorkSA, August 2017, p 105.

7. This recommendation accords with the objects of the Act. Particularly, introduction of MAPs will ensure the scheme which supports workers who suffer injuries at work is carried out with reduced disputation, and with reduced overall social and economic work injury cost to the State and community.

Claims agents

8. Business SA members have expressed concern that there is no readily accessible ability to change their claims agents. Members may wish to change their claims agent for a number of reasons, not least of which could include poor claim management. On this topic RTWSA's website states: 'change of employers between claims agents can only be facilitated when … there has been a significant service failure, in which case ReturnToWorkSA expects employers to work with their existing claims agent to remedy the services before considering a request to change claims agent.'[49]

9. While Business SA understands that typically, members would like to see increased competition between the claims agents to drive efficiency and drive down prices, it is Business SA view that it is a misconceptions that claims management in South Australia is an "open market".

10. In South Australia, current claims have dropped to approximately 13,000 and are managed by two claims agents, EML and Gallagher Bassett. On a national basis, this is a low number of claims, even for two claims agents. The RTW scheme is struggling with an issue of scale. There is no ability for the current claims agents to drive competition and prices down as RTWSA, a monopoly insurer and the regulator, sets the prices and standards for both agents. RTWSA must be encouraged to increase efficiency through driving performance and benchmarking between the claims agents.

11. The scheme historically had a greater number of claims agents and in that period the scheme performed poorly. Duplication of the services through multiple claims agents did not support an efficient scheme and in fact, the opposite was true. Therefore, unless there is an appetite to go to market and have full competition from private insurers, which Business SA is not advocating in this submission, the current system is best positioned to keep the premiums low.

12. Instead of providing choice between two providers that have identical KPIs and fees, employer concerns can be addressed by ReturntoWorkSA holding claims agents accountable when there is a service failure. Employer confidence can be built on a system of administrative reviews, prior to judicial appeals, as this will quickly and efficiently address employer dissatisfaction over the "rubber stamping" of claims and provide a means for address when issues occur.

The *Relationships Register Act 2016* (SA)

13. The *Relationships Register Act 2016* (SA), which came into operation on 1 August 2017, makes it possible for a couple (irrespective of their sex or gender identity) to register their relationship with the office of Births Deaths and Marriages in South Australia. A number of Acts containing the definition of domestic partner were varied to include the registered relationships. The *Return to Work Act* was not varied.

14. Business SA recommends updating the definition of "Domestic Partner" in s4 – Interpretation, to read the following (addition emphasised):

[49] RTWSA, 'Your claims agent' ReturnToWorkSA <https://www.rtwsa.com/insurance/insurance-with-us/your-claims-agent>.

domestic partner—a person is the domestic partner of a worker if the person lives with the worker in a close personal relationship and—

(a) the person—

(i) has been so living with the worker continuously for the preceding period of 3 years; or

(ii) has during the preceding period of 4 years so lived with the worker for periods aggregating not less than 3 years; or

(iii) has been living with the worker for a substantial part of a period referred to in subparagraph (i) or (ii) and the Corporation considers that it is fair and reasonable that the person be regarded as the domestic partner of the worker for the purposes of this Act; or

(b) a child, of whom the worker and the person are the parents, has been born (whether or not the child is still living); or

(c) the person in a registered relationship with the worker, and includes—

(i) a person who is about to enter into a registered relationship; or

(ii) a person who has been in a registered relationship;

15. This variation will ensure the registered partner of a worker who dies through a workplace incident, is not discriminated against and receives payment according to Division 8 – Payment on Death.

Conclusion

The *Return to Work Act 2014* is still in its infancy and while the number of disputed matters, and the time taken to resolve those disputed matters, has decreased under the new Act, further improvements can be made. The greatest risk to the scheme is the expanding of whole person impairment to include medical conditions that previously would not have met the threshold. Business SA strongly recommends tightening up the wording of the legislation to ensure the threshold is not eroded through judicial appeals. Business SA strongly opposes any reduction in the 30% WPI limit and encourages the inquiry to consider the capacity of a worker as an indicator of their ability to return to work, rather than solely looking at WPI.

The viability of the scheme is essential for the future of South Australia's injured workers. Business SA encourages the inquiry, when assessing the legislative improvements, to consider the scheme as a whole rather than the cases of an individual workers or employers. South Australia requires a robust, efficient and low-cost scheme into the future.

Should you require any further information or have questions, please contact Estha van der Linden, Senior Policy Adviser, on (08) 8300 0073 or esthav@business-sa.com.

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* For the purposes of full disclosure, Business SA has entered a sponsorship relationship with EML for a program that supports smaller business in regional South Australia. This has been appropriately disclosed for all matters dealing with commentary on the *Return to Work Act.*