SUBMISSION

Review of the Return to Work Act 2014

18 January

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2. About the Motor Trade Association of South Australia

The following submission is provided on behalf of the Motor Trade Association of South Australia (the MTA), the only employer organisation representing the interests of approximately 1,100 automotive retail, service and repair businesses, who employ over 15,000 South Australians.

Eighty per cent of these businesses employ less than twenty employees in South Australia. The automotive retail, service and repair sector adds more than $2.85 billion to the State economy annually and employs almost 29,000 people in South Australia – more than the ten largest South Australian companies combined.

The MTA Group Training Scheme is a Registered Training Organisation and Group Training Organisation, which delivers post trade and apprentice training to automotive tradespeople, employing approximately 450 apprentices and placing them in over 250 host businesses. We also train approximately 100 industry employed apprentices.

As a state based representative body, the MTA has twelve divisions representing the full range of trades in South Australia's modern automotive industry, including:

1. Australian Auto Dealers Association
2. Automotive Repairs
3. Automotive Dismantlers
4. Collision Repair
5. Commercial Vehicle Industry Association
6. Farm Machinery Dealers
7. Licensed Vehicle Dealers
8. Motorcycle Industry Association of South Australia
9. Rental Hire
10. Service Stations
11. Towing
12. Tyre Dealers

3. Glossary

MTA	The Motor Trade Association of South Australia
RTWSA	Return to WorkSA
RTW Act	Return to Work Act 2014
SAET	South Australian Employment Tribunal
The Act	Return to Work Act 2014
The Committee	Parliamentary Committee on Occupational Safety, Rehabilitation & Compensation
The Final Report	Final Report into the Referral for an Inquiry into the Return to Work Act & Scheme
The Scheme	The Return to Work scheme
WPI	Whole Person Impairment

4. Executive Summary

The reforms enacted by the *Return To Work Act 2014* were intended to transform an ineffective and unsustainable worker's compensations scheme into one that improved benefits for seriously injured workers, lowered premiums for employers whilst increasing the overall sustainability of the scheme.

Previously, WorkCover provided some of the highest benefit levels of any workers compensation scheme in Australia and yet consistently had the worst return to work outcomes. This was concurrent with some of the country's highest premium levels.

The implemented reforms to the scheme were designed to improve the scheme's financial sustainability, enhance claims management, reduce adversarial approaches, increase accountability for all parties associated with the scheme and improve the return to work rate of injured workers.

These objectives have obvious benefits to employees, employers and government in increasing workforce productivity. The MTA believes that, in large measure, progress is being made towards achieving these objectives.

We note that the current Return to Work scheme introduced on 1 July 2015 is still in its infancy. The MTA believes that this review, while mandated by the RTW Act, should be cognisant of this when making its recommendations.

Wholesale changes to the RTW Act would likely further delay the maturation and stabilisation of the scheme.

However, the MTA believes that this review does provide an opportunity to refine those elements of the scheme that:

- Are likely to pose significant funding threats to the scheme due to issues of interpretation by the courts

- Do not operate in a manner that best supports the scheme's primary objective of returning injured workers to meaningful and sustainable work as efficiently and safely as possible

- May impact scheme's ability to return injured workers to meaningful and sustainable work as efficiently and safely as possible

The MTA has also taken the opportunity to comment on the recommendations of the Parliamentary Committee on Occupational Safety, Rehabilitation &

Compensation's *Final Report into the Referral for an Inquiry into the Return to Work Act & Scheme,* as tabled in Parliament November 2017.

This has been done to both state our position in relation to what we believe to be adverse recommendations and to suggest ways in which to operationalise some of those recommendations that would positively support the operation of the scheme.

The comments made in this submission should be read in conjunction with those contained in the Self Insurers of South Australia submission.

5. Proposed Amendments to the Return to Work Act 2014

The MTA makes the following proposed amendments in response to issues that have emerged during the operation of the new Act both operationally and as a result of findings of the SAET.

The objective of the proposed amendments is to maximise an employee's ability to return to work safely without imposing unproductive costs on employers.

Item	Subject	Section	Problem	Proposed Amendment
1	Causation	7(3)(a)	Intent of the current wording was to raise the threshold of compensability for aggravations etc of prior compensable injuries. However the Full Bench decision in *RTWSA v Brealey & Rullo* [2017] SAET 133 nullified the phrase *'…employment must be a significant contributing cause…*', thus returning the effect to that of s.30 of the repealed Act	Replace ss.7(3)(a) with something along the lines of: *(a) in the case of an injury other than a psychiatric injury—the prescribed event must have occurred in the course of employment…* Leave has been granted to appeal SAET 133 2017 to the Full Court of the Supreme Court – with judgement unlikely before the Review is concluded, our recommendation is subject to the Court's decision
2	Causation	7(3)(b)	Intent of the current wording was to raise the threshold of compensability for psychiatric injuries, particularly around the reasonableness of management action. However the Full Bench decision in *Li v Department for Health and Ageing* [2017] SAET 75, while it is a case under the WRCA, has the same effect on the equivalent wording of the RTWA and significantly weakens the standard.	Leave has been granted to appeal SAET 75 2017 to the Full Court of the Supreme Court – with judgement unlikely before the Review is concluded, our views on the need for amendments will be subject to the Court's decision
3	Suitable employment	15(2)	The Corporation's power to investigate employers regarding the retention, employment or re-employment of workers cuts across the jurisdiction of the SAET under ss.18(5) and has potential to generate conflicting and/or unsustainable positions	Amend ss.15(2) by deleting all after '…under this Act' (subject to any changes made to s.18).
4	Suitable employment	18(2)	The current ss.18(2) does not include the employer size exception that was in ss.58B(2)(e) of the WRCA. In many cases it remains impractical for businesses as small as this to offer suitable	Reinstate the wording as ss.18(2)(f): *(f) the employer currently employs less than 15 employees, and the period that has elapsed since the worker became incapacitated for work is*

			employment on an open-ended basis	*more than 1 year.*
5	Suitable employment	18(3) – (16)	The scheme of worker applications and SAET review of rejections of applications: 1. Is unwieldy and will always remain of uncertain effect due to the fact that decisions will always turn on their own facts and little precedent can ever be gained; 2. Is unreasonably open-ended – it effectively lasts the worker's entire working life; 3. Has only resulted in a single SAET decision of note (*Walmsley* [2016] SAET 4) that proved to be of no lasting benefit to the worker or the employer and set no precedent.	Delete all after ss.18(2) and include the alleged failure to provide suitable employment as a reviewable decision under s.97
6	Seriously injured status	21(2)	Providing ongoing benefits at 30% WPI can be highly deleterious to the long-term health and welfare of some workers. It serves to encourage workers with plenty of work capacity to stop working and has created an entire new field of costly litigation around WPI assessment – see Part 4 for a more detailed submission on the impact of not working on workers with work capacity. There were cases where workers with 30+% WPI under the repealed Act who were working in safe and sustainable employment left their employment on being informed that under the RTW Act, they were no longer required to work. We submit that this was a perverse outcome that was diametrically opposed to the core objectives of the Act.	This is a very complex question and MTA does not claim to have a definitive answer. Some options to explore singly or in combination could be: • Raise the threshold for ongoing benefits; and • Reasonably require that residual work capacity be exercised up to a certain point by removing the blanket ban on requiring some sort of RTW in 30%+ WPI cases up to the level of the raised threshold • Introduce stepped benefits based on degree of WPI over 30% topping out at set percentage – say 50% • SA must avoid introducing a narrative test.

7	Seriously injured status, WPI & interim decisions	21 & 22	There are some cases where workers have sought to force the allocation of interim serious injury status with a view to then avoiding a WPI assessment to ensure that the status continues indefinitely without the risk of a sub-30% assessment at some later stage	Amend to allow the compensating authority to require a WPI assessment as soon as stability and maximum medical improvement have been certified. Failure to submit to the assessment should lead to loss of interim serious injury status
8	WPI – aggregation of assessments	22	The ability to aggregate impairments that have little or no impact on the ability to work, including matters such as sexual function, mastication/deglutition etc can take cases from sometimes quite low assessments to unrealistically high ones. The effect of the problem is that people with high levels of remaining capacity for work are classed as 'seriously injured' and no longer required to participate in RTW activities, with all the health and financial consequences for workers, employers and the scheme that are spelled out in Part 4 below. We submit that this ability to argue that a worker cannot, and should not be required to, work due to conditions that don't reduce the capacity to work is entirely out of step with the basic objectives of the RTW Act and scheme as expressed in section 3(1)(a) to (c).	The ability to aggregate impairments that are the result of the original injury (what we might call 'consequential impairments') should be limited by reference to the effects of those impairments on work capacity. For example, a loss of sexual function would not impact on a worker's ability to be a mechanic or a plant operator. Digestive problems would be at best highly unlikely to entirely prevent a worker from working in an office or sales environment.
9	Future surgery	33(21)(b)(ii)	The imprecision of the wording has resulted in conflicting SAET decisions in *Ledo* [2017] SAET 21 and *Tinti* [2016] SAET 72. Issues are around the amount and precision of information required for approval of future surgery. While higher courts may clarify, there is a clear need for improved wording SAET 21 2017 has gone on appeal, so our recommendation is subject	1. Insert wording to require applications to contain prescribed information 2. Make regulations to prescribe the information; for example: a. Worker and claim identification information b. A written opinion from an appropriately qualified medical expert: i. That the worker will require a surgical procedure after the end of the entitlement period

			to the Court's decision	ii. Identifying the procedure iii. That the procedure will be required within a specific period to be defined in months or years iv. Setting out the benefits of the procedure in terms of the worker's quality of life and/or ability to work and the consequences of not carrying out the procedure
10	Prescribed allowances	38	At present there are no allowances prescribed, which allows workers to continue to receive certain allowances as part of their weekly benefits while not actually working and thus not incurring the cost or risk that the benefits are intended to cover.	• Remove any entitlement to allowances which form part of a Modern Award with the intention to compensate employees for particular conditions or expenses associated with the workplace e.g. overtime, tool allowances, travel, hot/cold or dirty work etc.

6. Position on the Final Report of the Parliamentary Inquiry

The MTA made a number of recommendations to the parliamentary inquiry into the Return to Work Act and Scheme.

Principally, the MTA position was that the Committee's inquiry was premature given that the scheme had been operating for an even shorter period of operation than it has to date.

We also noted that the terms of reference of the inquiry articulated a value judgement regarding numerous aspects of the operation of the Return to Work Scheme before the Committee had even received evidence.

This judgement was based on the assumption, recorded in the Hansard debate establishing the inquiry, that there was an injustice being imposed upon workers who are injured at work by the operation of the Return to Work scheme, reinforced by the view that requiring an employee to return to work in an appropriate form would be somehow detrimental to the employee.

Given these presumptions, we feel it is necessary and appropriate to comment on those recommendations that in our assessment would materially impact on the effective and sustainable operation of the scheme.

The MTA makes the following comments in relation to the Committee's Final Report, consistent with our submission to that inquiry.

Recommendation		Affected Section	MTA Position
2	Amend section 7(1)(2)(b)(i) of the Return to Work Act, replacing 'the significant cause' with 'a significant cause'.	7(1)(2)(b)(i)	**Do not support**. The Committee appears to equate higher rejection rates of, and more thorough investigation of, psychological injury claims with there being something wrong with the causation wording. In the absence of evidence to support this conclusion, it is just as likely that these trends reflect more accurate investigation and determination of compensability that had not been occurring before – that is to say, claims were being accepted that should not have been and are not any longer. In the Committee's own words, *the change in wording is yet to be tested fully in the SAET* (Committee Report page 22). It is therefore premature to be suggesting change. It is unlikely to be necessary anyway if the experience of the SAET interpretation of the physical injury causation wording in *Brealey & Rullo* is repeated.

3	Replace the term *seriously injured worker* with the term *worker with high needs* for those with WPI greater than 20 per cent, and the term *worker with highest needs* for those with WPI greater than 30 per cent.	21 and consequential	**Do not oppose.** Agree in principle that 'seriously injured' is an inappropriate description for workers with substantial remaining work capacity. However the suggested replacement words are no better. Regardless, changing words in the Act rarely has anything more than symbolic value, since few workers read the Act. It is what is required of all parties in respect of the injury status that matters.
4	• Include a narrative test to supplement the already prescribed WPI assessment processes • Accredited doctors be trained in its use and application.	21, 22 & consequential	**Do not support**. Narrative tests are entirely subjective and cannot be made objective even by combination with WPI assessments and application by assessors or courts. The unvarnished truth is they are too easy to 'game'. When Victoria adopted a narrative test as an option to access common law and placed the test in the hands of the courts, common law claims exploded and put scheme funding under significant and ongoing pressure. Experience with WPI assessment in SA to date is also instructive. Some chapters of AMA 5 allow the assessor sometimes wide discretion to load the WPI% based on subjective assessment of impact on ADL and the like. This is a *de facto* narrative test and the many cases of major variations in WPI results show that any form of test based on subjective descriptions and discretions will lead at best to significant additional disputes and at worst major damage to the scheme. WPI assessment as it stands gives an imperfect picture of the total effects of injury on workers but a narrative test is not the answer.
5	Broaden the coverage of medical expenses so there will be no time limit for coverage of: • reasonable costs associated with medication; or • treatment for which there is evidence that the treatment is required to maintain a worker to remain at work [sic].	33	**Do not oppose.** Under current provisions, such extended payments are legally on an *ex gratia* basis but this is a minor accounting consideration. Such a legislative extension would rely on the adequate application of the test of what is reasonable, including by the SAET. We must be cautious about provisions that may, for example, encourage the extended over-use of opiate or steroid medication. It may require mandated protocols to define reasonableness in the ongoing approval of the use of these types of medication.

6	Ensure that all injured workers have access to return to work services for the full duration allowed in the Return to Work Act, including for the 12 month period after income support ceases.	Part 3	**Do not oppose**.
8	The 104 week income entitlement is based on the aggregate period of incapacity, whether consecutive or not.	39(1) & (3) & consequential	**Do not support**. Taken literally, such a change would not increase the weekly benefit liability since there are no economic reviews of weekly benefits if the worker is not seriously injured and the benefits are received over a longer period. It would however, act to: • Increase the duration over which the 104 weeks of income benefits are paid in some cases • Increase the duration over which medical benefits are paid in some cases An actuarial opinion on the impact of this recommendation would be needed before reaching further conclusions.
10	a. Ensure ReturnToWorkSA holds all employers accountable in providing suitable employment for their injured workers, as soon as the worker is certified fit to return to work. b. RTWSA develop a key performance measure for agent compliance with section 18; and with the outcomes to be provided to the Committee every 12 months.	15(2), 18	a**. Do not support**. All parties should be accountable in meeting their obligations under the Act b. **Do not oppose**.
15	Minister for Industrial Relation cause RTWSA to hold regular forums/information sessions where they can connect workers who are most likely going to exit the Scheme at 104 weeks with agencies (such as	N/A	**Support.** These forums could be facilitated through trade associations to ensure increased compliance.

	Centrelink) who can explain the support mechanisms which may be available for them prior to their income support ceasing.		
16	Allow workers with a psychiatric injury to receive payments for economic loss and non-economic loss similar to those who suffer physical injuries.	22, 55-58 & consequential	**Do not support**. Will cause major blow-outs in scheme funding. Aside from funding risks, history shows that psychiatric conditions, no matter how precisely diagnosed, usually have uncertain or very nebulous causal connections with the workplace except in the most clear-cut PTSD cases. The subjectivity of drawing causal connections is driven by the fact that it is based predominantly on the history as given by the worker and their presentation at examination. This is the same reasoning upon which pain is not accepted on its own as an impairment.

18	Minister for Industrial Relations require ReturnToWorkSA to communicate to an employer the reason for any change to their premium.	Part 9	**Support**. Such communication must include detailed specifics on why the premium adjustment has occurred.

7. Next Steps

The MTA is available to provide further information in relation to its proposed amendments and to clarify any aspect of this submission.

This includes meeting with agency representatives and facilitating further consultations with industry on proposed changes.

8. Submission Contact

For further information relating to this submission please contact:

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