

9 February 2018

Hon. John Mansfield AM QC
Independent Review of the Return to Work Act 2014
GPO Box 464
ADELAIDE SA 5001
By email: RTWreview@sa.gov.au

Dear Justice Mansfield

1 Introduction

- 1.1 Thank you for the opportunity to provide this submission in relation to your inquiry into the *Return to Work Act 2014 (the Act)*.
- 1.2 REA Group Limited (**REA Group**) is a Melbourne-based, multinational digital advertising company specialising in property. REA Group operates Australia's leading residential and commercial property websites, realestate.com.au and realcommercial.com.au, spacely.com, Chinese property site myfun.com and a number of property portals in Asia via its ownership of iProperty Group. REA Group also owns Smartline Home Loans Pty Ltd, an Australian mortgage broking franchise group, and holds a significant shareholding in property websites Move, Inc in the US and PropTiger.com, Makaan.com and Housing.com in India. It is a small registered employer in South Australia, employing around 18 full time workers (most of its operations are located elsewhere).
- 1.3 In the past 5 months, REA has been engaged in a lengthy dialogue with RTWSA regarding the proper interpretation of provisions of the Act involving self-insurance and grouping.
- 1.4 RTWSA's approach to those discussions has, respectfully, been collaborative and conducted most appropriately.
- 1.5 However, REA is concerned that, if RTWSA's interpretation of the Act is correct, the relevant provisions operate in a way that is inconsistent with the efficient and cost effective management of the worker's compensation regime, to the detriment of both employers and their injured workers.
- 1.6 REA's submission responds to paragraphs 5 and 10 of your terms of reference.

2 Summary and recommendation

- 2.1 RTWSA interprets section 129 of the Act to operate such that a related body corporate of a self-insured employer must, regardless of its size, capacities or access to the resources of the related entity, also register as a self-insured employer.
- 2.2 The practical effect of this is that entirely unsuitable, small employers (who, alone, would not be permitted to self-insure and have not sought that status) are required to manage claims

and bear risks that they are ill-equipped to deal with. This is inimical to the safe and efficient management of claims from such employers' workers.

2.3 Accordingly, REA respectfully proposes the following recommendation:

REA's Proposed Recommendation

The Act should be amended to expressly provide that RTWSA may exclude an employer from a group where:

- the employer requests to exit (or not enter) a group;
- the employer operates in a manner that is substantially independent of all other member(s) of the group; and
- where RTWSA is satisfied that it would not be in the public interest and/or the objects of the Act for the employer to remain in the group.

RTWSA's decisions exercising this discretion should be reviewable pursuant to s 97 of the Act.

3 Factual Background

3.1 REA's largest shareholder is News Corp Australia (**News**) (which holds 61.7% of REA's issued capital). As set out above, REA is a very small employer in South Australia. In contrast, News is a very large employer, encompassing a range of print and television workplaces. As a consequence of News' shareholding, it is a related body corporate of REA.¹

3.2 Despite this, News and REA are financially, operationally and practically distinct. News exercises no day to day control over REA or involvement in its day to day decision making or workplace activities. REA does not use News' human resources systems. REA does not have ready access to the News' systems for the management of WorkCover claims and RTW services in South Australia.

3.3 News and REA are currently grouped by RTWSA. This circumstance arose when News applied for registration as a self-insured employer. Critically:

- (a) REA was not involved in News' application; and
- (b) News was required to demonstrate its compliance with the requirements of section 129(3) of the Act, but REA was not (as far as it knows) assessed against these requirements; and

3.4 News did not request that REA be grouped and would be content for it to be excluded from its group. REA provides, as an attachment to this submission confirmation from News that it would not object to REA being excluded from its group. News was simply required to list, and appropriately did list, REA as a related body corporate.

4 Grouping Provisions

4.1 Section 145(1) of the Act provides that:

2 or more employers will, if the Corporation so determines, constitute a group if—

¹ within the meaning of section 50 of the *Corporations Act 2010* (Cth)

- (a) *they are capable of being treated as a member of a group under the Payroll Tax Act 2009;² or*
- (b) *they are related in some other way.*

4.2 Section 129 of the Act sets out a range of matters in relation to self-insurance. Most relevantly:

- (a) Section 129(2)(b) provides, albeit with double negatives, that an application made by a group must include every related body corporate of every group member in the group.
- (b) Section 129(3) requires RTWSA to be satisfied that the group members have reached the appropriate standard to be self-insured. It is unclear how this provision can sensibly operate with section 129(2)(b).
- (c) Section 129(5)(d) requires a self-insured employer to comply with the Code of Conduct for self-insured employers determined by RTWSA³. This code imposes a number of onerous requirements, including financial guarantees and actuarial reporting. It requires the appointment of a person to exercise delegated powers pursuant s 134 of the Act. The Code states that a self-insured employer would ordinarily have a minimum of 200 employees.
- (d) Section 129(7) provides that RTWSA may add or remove a group member, but only on the grounds that the member is/has ceased to be a group member.
- (e) Section 129(14) of the Act makes all group members jointly and severally liable to satisfy the liabilities of the group under the Act – in the present case, making REA liable for News' claims.

4.3 REA considers it reasonably arguable the words "if [RTWSA] so determines" in s 145(1) of the Act provide RTWSA with a discretion as to the composition of a group.⁴ RTWSA disagrees. Its position is that, as a member of a group with News, REA must also be self-insured. REA acknowledges that this interpretation is also open on the terms of the relevant sections, particularly section 129(2)(b)(ii).

4.4 If RTWSA is right, the Act presently operates in a rigid and inflexible way with profoundly unfair and inefficient consequences for small employers. If REA is right, the Act is unclear and not achieving its purpose. In either case, there is a clear case for clarification and change.

5 Policy basis for self-insured

5.1 In addition to the requirements set out above, self-insured employers are also required to comply with injury management, work health and safety and other standards prescribed by RTWSA.⁵

² Part 5 of the *Payroll Tax Act 2009* provides for a number of bases for forming groups, most relevantly, where two entities are related bodies corporate.

³ https://www.rtwsa.com/_data/assets/pdf_file/0004/52996/Code-of-conduct-for-self-insured-employers.pdf

⁴ Section 145 must be of relevance to section 129, because it is the only section in the Act which defines groups.

⁵ Available at <https://www.rtwsa.com/insurance/self-insurance/regulating-self-insured>

5.2 RTWSA explains on its website that:

- (a) Self-insured status is available to large businesses that demonstrate effective management of work health and safety and work injuries and who meet the self-insurance requirements.
- (b) The costs associated with maintaining these resources is conservatively estimated at \$150,000 per annum for a small self-insured employer (i.e. base premium of \$500,000 to \$1,000,000).
- (c) A self-insured employer has many of the authorities, responsibilities and risks of a compensating authority. These include being responsible for claims liabilities and management of the life time care and support of seriously injured workers.
- (d) the Board of RTWSA considers that only fit and proper employers of significant size and the very highest levels of financial strength and resilience are positioned to deliver on the objects of the Act (as a self-insured employer); and
- (e) a business suitable for self-insurance should be able to:
 - (A) meet its liabilities in the most trying of economic circumstances,
 - (B) be able to fund lump sum payments (economic loss and non-economic loss) payable to non-seriously injured workers.
 - (C) be able to comfortably carry ongoing liabilities on its balance sheet associated with insuring short-term and potential long-term liabilities associated with serious and catastrophic injury claims
 - (D) have sufficient expertise to manage the responsible and compliant exercise of delegations under the Act
 - (E) maintain and justify the infrastructure required to support and manage Work Health and Safety and Injury Management systems to meet specified standards and quality assure service provision.

5.3 RTWSA has acknowledged to REA that, individually, it would never have been permitted to self-insure. It now finds itself obligated to do so. RTWSA has proposed two solutions to this circumstance:

- (a) change REA's corporate structure so that it is no longer a related body corporate of News; or
- (b) find some way to access News' claims management resources.

5.4 Neither option is presently feasible for REA. This situation is plainly not in the interests of REA, its workers or the proper operation of the scheme.

6 Proposed reforms

6.1 REA respectfully submits that, in appropriate cases, RTWSA ought to have a clear and express power to exclude a member from a group (whether a self-insurance group or otherwise). REA expects that RTWSA might well, if inquiries were made, support such an amendment to the current Act.

6.2 Such a discretion would allow RTWSA to determine whether it would be in the best interests of the parties involved, and promote the objectives of the Act, to do so. It would not,

however, allow inappropriate “gaming” of the system or premium avoidance. Where a business operates as part of an integrated or dependent group with access to group services, RTWSA could decline to exclude it from a group. However, in the case two technically related but practically independent businesses, RTWSA could make an appropriate determination if satisfied that it was appropriate to do so.

- 6.3 The present circumstances are avoided under the Victorian regime, where:⁶
- (a) a subsidiary of a body corporate is not eligible to register for self-insurance (a body corporate may only apply to include workers of its subsidiaries in its self-insurance policy if its subsidiaries are **wholly owned**);
 - (b) other than the wholly owned subsidiaries referred to above, WorkSafe has a discretion to exclude an otherwise deemed members from a group.
- 6.4 It is not consistent with RTWSA's statutory objectives or the interest of the scheme for RTWSA to be required to group entities who are tangentially, nominally or briefly related, or where there are other sound policy reasons for RTWSA to otherwise determine.
- 6.5 REA respectfully submits that regulatory discretion in this regard is desirable, efficient, practical and consistent with the statutory objectives of the regime.
- 6.6 For the above reasons, REA seeks the recommendation set out above. REA would be pleased to provide any further information that would assist you and awaits the results of your inquiry with interest.

Yours sincerely,



Sarah Turner
General Counsel & Company Secretary
REA Group Limited

⁶ Section 375(4), 376 and 431(10) of the *Workers Injury and Rehabilitation Act 2013* (Vic) (**WIRC Act**)