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Submission to the Review
pursuant to section 203 of the *Return to Work Act 2014*

Submission by Registered Employers Group SA Inc

Introduction

The Registered Employers Group SA Inc (REG) provides a networking forum for ReturnToWorkSA (RTWSA) registered employers in the areas of workers compensation and rehabilitation. REG is recognised by RTWSA as an employer stakeholder and takes an active interest in workers compensation issues and developments.

REG has had the opportunity to review the Terms of Reference and the submission received from RTWSA, and also discuss the current operation of the Return to Work Act 2014 (the Act) and Scheme with other employer organisations and stakeholders.

It is REG's position that no substantial changes should be made to the Scheme at this time. REG is aware of a number of appeals to the Supreme Court of South Australia (the Supreme Court), the outcome of which will have a significant impact on the administration and viability of the Scheme. REG suggests that any substantial changes to the Act should wait until the Supreme Court has had the opportunity to deliver judgements in the currently pending appeals.

Many of the issues that are arising are being created by workers and their advisors seeking to test the boundaries of the Scheme, which in some cases has created concern about the Scheme's viability. In our view, access to long term benefits, especially income support, should be restricted to those who have a genuine loss of work capacity. REG does not support any amendments to the Scheme that would increase the proportion of workers obtaining ongoing benefits on the basis that this would lead to an unaffordable Scheme for employers.

We do note that the capped Scheme introduced by the Act on its face appears to work well for the vast majority of workers as in excess of 90% have returned to work within the 104 week period without further need for weekly payments. In our submission below we have addressed areas where we consider minor changes could be made to how the Scheme is operating which REG believes would lead to better outcomes for injured workers, and better service to registered employers.

We hereby submit our comments on the Terms of Reference for consideration. REG has also taken the opportunity in this submission to address the recommendations made Parliamentary Committee in its interim review of the Act (the Parliamentary Review).

We would be happy to appear before the Review to discuss our comments further.

Submission

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)**

    - We note that the RTWSA submission excludes transitional claims from their data and response. This has the effect of making the dispute numbers since 1 July 2015 appear significantly less that they actually are. In our view, dispute levels as a whole need to be looked at.
    - The anecdotal experience from stakeholders, including REG members, is that there has been no reduction in dispute numbers and there is no suggestion this will change.
    - We note that the ReturnToWork SA 2017 Actuarial reports states that "*after significant reductions in the count of open disputes up to June 2016, the number of open disputes has again been rising. We also understand that more claims are appealing dispute decisions, following changes in the RTW Act that mean legal costs are no longer at risk on appeal*".
    - Our members are reporting that claims are being accepted on the basis that the view of the claims agent is that the claim will have little financial impact, often in circumstances where the claim has not been, or insufficiently been, investigated. There are two issues with this, being that a claim should only be accepted if it is compensable and accepting unmeritorious claims has an impact on employers beyond their premium. Feedback from members suggests that employers feel that they have no option but to file an Application for Review if they do not agree with the decision made as they are not being consulted properly. Members also report that they are often told there is no premium impact if there is no income payable as justification for accepting a claim and/ or expenses.
    - There is a lack of certainty / inconsistency regarding interpretation of certain aspects of the Act as a result of discord in the SAET on interpretation. This is leading to an increase in disputes.
    - The lack of consultation with employers, has had the effect that they have very little information until they are involved in a dispute before the Tribunal. Of particular concern to REG is a report by a member that they were told that the employer was not an equal party to the proceeding by a Commissioner. This was in the context of the employer requesting an order allowing them to issue a summons for medical records. REG feels that there is a culture in the Scheme that employers are not accorded an equal status in the return to work process and suggests that more could be done to assist employers understand their rights and responsibilities under the Act.

2. **Without limiting paragraph (1), whether the jurisdiction of the SAET under the Act should be transferred to the South Australian Civil and Administrative Tribunal**

    - We believe there is a need to retain the current specialist Tribunal and would not support a move to the SACAT.
    - We however are concerned at the inconsistent judicial decisions coming out of the SAET on key aspects of the Act.

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)**

    - We do not think the determination of medical questions is working well under the Act and would refer to Whole Person Impairment (WPI) assessments and pre-approval of surgery as two areas to support our view.
    - The current process by which impairment assessments are performed was implemented on the basis that it would lead to a reduction in the number of disputes. REG does not consider that this has occurred. The fact that only one assessment can be performed (and the choice of the assessor lies

with the worker) means that there is no ability for parties to negotiate and agree a position – this leads to more disputes, which are more difficult to resolve.

- We also note that, since the commencement of the Act, 1,524 out of a total of 3,443 assessments (44.3%) have been completed by 6 assessors. In its submission RTWSA states that it has observed a significant variation in WPI percentages depending on which assessor is chosen.
- We suggest that following changes to the whole person impairment assessment process:-
  - Changes be made to the Impairment Assessment Guidelines and the Act to provide for the ability to reach a compromise assessment for whole person impairment.
  - That once it is determined that a worker has reached maximum medical improvement then the compensating authority can proceed with an assessment of whole person impairment. The clear intention should be to allow the Compensating Authority to progress the assessment and to avoid workers unreasonably delaying the process of assessment. The benefit in this would be to allow for finalisation of claims where injuries have stabilised and provision of certainty in relation to the assessment of impairment. Workers would still have review rights and be able to challenge whether maximum medical improvement had been achieved.
  - The Impairment Assessment Guidelines be modified such that preference in assessment of impairment should be given to those medical assessors with specialist experience. For example, if a worker has suffered nerve damage on account of a work injury then assessment of whole person impairment should be undertaken by an Accredited Neurologist or neurosurgeon.
  - Worker choice of assessor without qualification should be removed. It is recommended that the parties be entitled to nominate assessors but if agreement cannot be reached then , under the supervision of the Tribunal, the identification of an appropriate assessor or assessors can be determined. This based upon the interlocutory process in the Tribunal would assist in the efficient progress and determination of whole person impairment. This may require changes to the definition of "permanent impairment matter" in relation to the jurisdiction given to the Tribunal under section 97 of the Act.
- With respect to the issue of pre-approval of surgery, REG considers that a significant number of applications have been made with insufficient supporting evidence as workers seek to "reserve their rights" to surgery; without genuine consideration as to whether it would be reasonable or appropriate. There are currently conflicting authorities on the application of section 33(17) and (21) of the Act and REG considers that this issue will need to be resolved by the Supreme Court.
- REG has observed that there are conflicting decisions being published by the SAET, which has a flow on effect of increasing the number of disputes as a consequence of the uncertainty this creates.

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

- From our experience, it would appear that the Claims Agents' major focus is on compliance with RTWSA policies and processes rather than on individual claims management.
- We understand RTWSA is directing the Claims Agents to make decisions based on RTWSA's interpretation of the Act, which in some instances is not consistent with the actual wording in the Act. An example of this is the suspension of weekly payments when a worker is on annual leave. RTWSA's interpretation is that a suspension cannot be issued retrospectively or when the worker takes leave due to a business shutdown. There is nothing in the Act to state that a suspension cannot be issued retrospectively, or when a business shuts down over the Christmas period. Another example is the calculation of Average Weekly Earnings with Agents required to use a RTWSA calculator and work on complete pay periods rather than the period of actual earnings. This can result in a calculation that does not provide a fair average.
- The level of contact by the Claims Agents with employers is variable with no single point of contact.
- The experience of case managers is found to be variable and limited.
- The level of service provided by mobile case managers is variable. In addition to this, the lack of consistency with respect to points of contact mean that employers (and workers) have a difficult time obtaining a consistent level of service.

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

- We have no ability to comment on this.

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

- We note that RTWSA talks of improvement but the data they have provided to stakeholders suggests fairly static rates with no marked improvement.
- We would note that measuring return to work rates is not easy and query the validity of this measure.

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

- One factor contributing is the length of time taken to resolve disputes at the Tribunal. It is not unusual currently for a worker to have to wait until after the expiration of their entitlement to weekly payments before a decision can be made by the Tribunal in respect of their claim for compensation. REG considers that this is a consequence of not only the number of disputes currently before the Tribunal, but also the removal of mechanisms by which parties can resolve disputes, such as redemptions (as a result of RTWSA policy) and secondary injuries (not included in the Act).

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

- The general rule should be that as soon as there is any evidence to suggest that a worker cannot return to work without some sort of re-training or up-skilling, then steps should be taken without undue delay to facilitate it. It is very important to take the following into consideration:
  - The training must be within the scope of the worker's abilities;
  - It must have a realistic prospect of leading to work that the worker can safely and sustainably carry out; and
  - It should not be of excessive duration (a period of years for example).

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

- It is not appropriate for REG to comment on this.
- We note RTWSA's position on this and consider they are in the best positon to comment.

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

Annual leave

- Section 50 of the Act makes it clear that income support is to be suspended when an injured worker takes annual leave. RTWSA have interpreted this to mean that suspensions can only be for applications for leave which are prospective and not retrospective (the Act makes no such distinction and it is not RTWSA's role to interpret legislation or interpolate words into it) and further, they have also suggested that suspensions much be for "significant periods" of time and not just for one day or a few days. Section 50 is quite simple; when an injured worker takes approved annual leave, income support is suspended so no consent to discontinue is required. It does not need to be more complicated than that and RTWSA's interpretation has made the process needlessly unwieldy. Income support directly affects the premium calculation of registered employers and should be discontinued promptly in accordance with the Act.

Rehabilitation referrals

- REG has been made aware that RTWSA has directed the agents to stop rehabilitation referrals except in exceptional circumstances (e.g. psychiatric claims). This has had a direct impact on service delivery. Early intervention rehabilitation is a cornerstone of good claims management and REG is concerned that RTWSA has made this a policy directive rather than delegating the authority to claims managers so that this can be decided on an "as needs" basis. Furthermore, REG considers that failing to initiate rehabilitation has the potential to increase the length of time that worker requires weekly payments which directly impacts the premiums of employers.

Seriously injured workers

- We would like to also make comment on the seriously injured status and impact of not being able to impose any return to work obligation. There is no correlation between WPI% and capacity for work, but deeming a worker to be seriously injured has the effect of creating a belief that anyone who exceeds 30% WPI is unable to work. REG notes that the number of worker's being deemed *seriously injured* is well in excess of the predicted number prior to the commencement of the Act, this has put pressure on the Scheme's viability and premium rates.
- REG understands that workers who are deemed to be "*seriously injured*" are not being encouraged to return to work by the claims agents. The legislation does not prevent a seriously injured worker from being assisted to return to work. This policy position is at odds with the current research around the health benefits of work and does not align with the Act's objectives.
- We suggest that changes be made to Part 4 Division 4 to require all workers whether seriously injured or not to exercise reasonable work capacity. To that end, changes also be made to Section 36 to make it clear that it includes a seriously injured worker. Further section 43 of the Act be amended to add that a worker who has a current work capacity includes a seriously injured worker.

We have provided our comments (below) on the Parliamentary Committee recommendations as these have the potential to adversely impact the Scheme.

Recommendation 1

The Committee recommends early intervention strategies be implemented as soon as practically possible for all claims, and where appropriate, even prior to determination. To ensure that workers whose claims are ultimately rejected are not faced with the need to cover the costs of these services, the Committee also recommends the re-introduction of provisional liability in the Scheme, limited to only cover payment of early intervention services.

- We do not support the re-introduction of provisional liability and do not see any need for it. There is already provision in the Act for mandatory interim benefits to be offered if the claim cannot be determined within 10 days which would enable the cost of services to be covered.
- The Scheme should not and cannot afford to be liable for costs associated with claims that are ultimately determined to be not compensable.

Recommendation 2

The Committee recommends the Minister for Industrial Relations amend section 7(1)(2)(b)(i) of the Return to Work Act, replacing 'the significant cause' with 'a significant cause'.

- We do not support this recommendation.
- The intention of the wording was to ensure that compensability for psychological claims was limited to those claims where employment was "the" significant contributing factor.
- "As Mr Tilmouth QC said whatever meaning is given by use of a dictionary to 'significant', **the test in the subsection that is not very demanding. It is there to oust from compensation very trivial complaints of very minor aches and pains**"
- The revised causation provision in relation to psychiatric injuries (section 7(2)(b)) is unique in Australian legislation and the SAET has to date not commented on this. It is our submission that

in the absence of any jurisprudence no assessment can be made of the impact of the new causation provision in relation to psychiatric injuries.

Recommendation 3
The Committee recommends the Minister for Industrial Relations considers New South Wales' approach and replaces the term seriously injured worker.

- We do not consider that the terminology "seriously injured worker" itself needs to be changed and do not support the proposed alternative.
- The issue is with the legislation which does not allow a return to work obligation to be imposed on a seriously injured worker. This has created a culture whereby workers seek to reach the 30% threshold as a way to an early retirement.

Recommendation 4
The Committee recommends the Minister for Industrial Relations consider the inclusion of a narrative test to supplement the already prescribed whole person impairment assessment processes. The Committee also recommends that should a narrative test be included in the Scheme, accredited doctors be trained in its use and application.

- We do not support a narrative test. REG considers that the use of a narrative test will lead to an increase in disputation.

Recommendation 5
The Committee recommends the Minister for Industrial Relations amends the Return to Work Act to 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.

- We do not support this recommendation.
- The aim of the Act was to create a capped Scheme with clear and defined end points.
- Furthermore the Act already provides that a worker may continue to receive certain classes of medical benefits indefinitely. REG considers that this is sufficient to meet the objectives of the Scheme.

Recommendation 6
The Committee recommends the Minister for Industrial Relations ensures 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.

- We have no issue with return to work services being provide to injured workers for the additional 12 months.

Recommendation 7
The Committee recommends the Minister for Industrial Relations amends the Return to Work Act so that the reasonable costs of future surgery associated with a compensable work-injury are payable by the Scheme without the precondition the surgery was pre-approved.

- We do not support this recommendation and note that the criteria for determining pre-approval are subject to SAET appeals.
- As detailed above, the aim of the Act was to create a capped Scheme with clear and defined end points.

Recommendation 8
The Committee recommends that the Return to Work Act be amended so that the method of the 104 week income entitlement is based on the aggregate period of the incapacity for worker, whether consecutive or not.

- We would not support this recommendation without actuarial assessment of its potential impact as it could extend the duration over which medical costs are paid and potentially significantly increase claims costs. The aim of the Act was to create a capped Scheme with clear and defined end points which the current time frame of 104 consecutive weeks provides.

Recommendation 9
The Committee recommends common law and its inclusion in the Scheme be reviewed as part of the mandated review.

- We did not support the inclusion of common law in the Act and do not believe that common law has a place in a no fault Scheme. We would note that there have been no common law actions commenced as yet under the Act.
- It is our submission that access to common law does not benefit any of the stakeholders in the Scheme.
- Currently the *Work Health and Safety Act 2012* (SA) provides a statutory scheme for the investigation and enforcement of work health and safety requirements in the workplace. We consider that a properly funded regulatory body (in this case SafeWork SA) provides a significantly better mechanism for holding employers accountable for the health and safety of workers, than relying on access to a common law scheme.
- Furthermore, we submit that common law has a deleterious effect on employment relationships and return to work outcomes.
- It is generally accepted that common law litigation is more time consuming, costly, and provides worse outcomes than a properly managed statutory scheme. We consider that, if anything, all access to common law should be removed.

Recommendation 10
The Committee recommends the Minister for Industrial Relations 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.

- The provision of suitable employment is already monitored and managed by the claims agents on behalf of RTWSA.
- The Act itself limits provision of suitable employment to "where reasonably practicable" and provides an option for a worker to make application to the SAET.
- We do not see any further role for RTWSA in this area.
- We would argue that creating an ongoing obligation for employers to provide suitable employment provides a disincentive to focus on the best return to work outcome for each individual worker. A time limited obligation as exists in other jurisdictions would be a better option.

The Committee also recommends 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.

- REG does not consider that this is reasonably practicable. Determining compliance with section 18 is a complex issue and would be a significant additional burden on Claims Agents. In light of issues that REG members have raised about service levels, REG would be concerned that this would lead to a further deterioration in the levels of service being offered to registered employers.

Recommendation 11
The Committee recommends the Minister for Industrial Relations review the compliance of the Corporation to meeting the Statement of Service Standards prescribed in Schedule 5 of the Return to Work Act, and report the findings to the Committee within 12 months.

- We would support review and reporting of RTWSA's compliance.

Recommendation 12
The Committee recommends the Minister for Industrial Relations direct ReturnToWorkSA to review the information available on its website and the methods in which it disseminates information about the Scheme to injured workers to ensure it is easily accessible for all workers.

- We would support the provision of information to injured workers.

Recommendation 13
The Committee recommends the Minister for Industrial Relations review and advise the Committee of the impact that the reduction of rehabilitation / return to work service provider spend has had on the outcomes of the Scheme.

- We refer to our earlier comments regarding the provision of rehabilitation services to injured workers.

Recommendation 14
The Committee recommends the Minister for Industrial Relations require ReturnToWorkSA to review and advise on improvements of their services for regional and remote injured workers to ensure high quality services are afforded to all South Australians, regardless of location.

- We would support this and believe it should extend to support for employers as well.

Recommendation 15
The Committee recommends the Minister of 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 Centrelink) who can explain the support mechanisms which may be available for them prior to their income support ceasing.

- RTWSA is already undertaking this on an individual basis through ReConnect. REG queries whether there is there any evidence to suggest that more needs to be done or that forums would assist better than individual contact.

Recommendation 16
The Committee recommends that the Minister for Industrial Relations consider amending the Return to Work Act to provide allow workers with a psychiatric injury to receive payments for economic loss and non-economic loss similar to those who suffer physical injuries.

- REG opposes this recommendation on the basis that it would greatly increase the costs to the Scheme and that the nature of psychiatric injuries makes any attempt to assess whole person impairment much more subjective. It is REG's view that:
    - In general terms, the causal nexus between a psychiatric injury and employment is much more difficult to determine as a psychiatric injury will generally have a wide range of significant contributing factors. This is reflected in the decision to amend the causation test in the Act.

- The GEPIC assessment requires a worker to be placed into brackets for WPI purposes and is therefore not an appropriate tool for determining entitlements to lump sum compensation. REG is not aware of any psychiatric assessment tool that would have sufficient precision to be able to perform this task adequately.
- The long term effects of a psychiatric injury are much more difficult to determine, which makes it difficult to determine an appropriate level of compensation for economic and non-economic loss.

Recommendation 17
The Committee recommends the Minister for Industrial Relations amend the Return to Work Act to require that workers receive financial advice for any lump sum payments of over $50,000.

- We would support this recommendation.

Recommendation 18
The Committee therefore recommends the Minister for Industrial Relations require ReturnToWorkSA to communicate to an employer the reason for any change to their premium.

- We would support this recommendation.

Summary

One of the principle factors behind the implementation of the Act was that the previous Scheme was too expensive and unsustainable.

Put simply, worker's best interests are not best served by a Scheme that is too costly and adversely impacts on the South Australian economy at a time when it is one of the worst performing economies in the country.

REG considers that it is important that in a "**no fault**" system the rights and benefits of all stakeholders are carefully balanced. Accordingly, any increase in certain benefits would necessitate changes to other benefits in order to maintain the balance of the Scheme and make sure that it remains sustainable and affordable.

It is our submission that it is premature to make any significant changes to the Scheme and that more time is needed to consider new case law and obtain information on the impact of the Scheme on stakeholders before any significant changes to the Scheme are contemplated.

Whilst we consider more time is required before consideration is given to major change we see merit in changes now to the assessment of permanent impairment, the entitlement to medical/surgical services and reinforcing the obligations on workers to exercise within reason retained work capacity. As to the latter point we also acknowledge the role of employers in facilitating that.

Thank you for your consideration.

Yours sincerely,

Submitted via email

REG Executive Committee