Independent review of the *Return to Work Act 2014* (SA)

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Introduction

Thank you for the opportunity to make a submission to the independent review of the administration and operation of the *Return to Work Act 2014* (SA) (**the Review**). We have set out below our views on each of the Review's Terms of Reference.

Response to Terms of Reference

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decrease in the time taken to resolve disputes (especially when compared to the scheme and processes applying under the repealed Act)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 defer to the records kept by the South Australian Employment Tribunal (SAET) as to total dispute numbers since July 2015 and how they have compared to previous numbers under the scheme and processes applying under the repealed Act. As a law firm representing both self-insurers and the Corporation in this jurisdiction, Sparke Helmore has noticed a significant drop in dispute matters since 1 July 2015 compared with periods before this date.

We would suggest that simply comparing the total number of disputes since 1 July 2015 to relevant periods before that date, however, does not allow one to draw any sound conclusions as to the likely pattern and number of disputes that will exist in the future. The uncertain law surrounding the transitional provisions of the Act and Regulations has resulted in significant disputation involving former Act injuries, and the entitlements that flow from them under the new Scheme. Rather than the dispute numbers since 1 July 2015 reflecting only new Act injuries and entitlements under the new Scheme, these numbers are skewed by a significant number of transitional injuries and claims such that an assessment of the true performance of the new Act and new Scheme operation (including the Tribunal) is not possible. Even isolating dispute numbers to those relating to injuries sustained following 1 July 2015 does not fairly allow for any meaningful measure of performance of the SAET or time taken to resolve disputes, given that so much of the Tribunal's resources are currently tied up with the transitional claims. With around a dozen pending Supreme Court appeals and applications for leave concerning transitional claims, the uncertainty around the law is likely to persist a little longer.

Our view is that whilst there are a number of improvements that can, and should, be immediately made to the Scheme (as set out later in this submission), the dispute resolution processes under the Act (save for some minor suggested changes) and the *South Australian Employment Tribunal Act 2014* need to be given more time before one can fairly say whether they will achieve a reduction in dispute numbers and the time taken to resolve disputes.

Having said that, the data provided by RTWSA in its initial submission shows that disputes have decreased markedly for injuries sustained since 1 July 2015. Eventually, most disputes will only

involve new Act injuries as more of the transitional claims are finalised. Once this happens, a more informed analysis of the measures around disputes can be undertaken.

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

We see no compelling argument for the jurisdiction of the SAET to be transferred to the SACAT. Given the specialised and technical nature of workers' compensation, the SAET is the most appropriate forum to deal with disputes given the skills and experience required, and we are not aware of any compelling reason that the SACAT could achieve either a reduction in dispute numbers or shorten the time taken to resolve disputes.

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)

The term 'medical question' is referred to in s117 of the Act in the context of the obtaining of Independent medical advice under Part 8. However, a 'medical question' was more extensively defined in the previous Act at s98E in the context of the Medical Panel regime that existed at the time, and included matters which were really legal questions rather than medical questions. We have assumed for the purposes of this Term of Reference that a 'medical question' is simply a question which requires evidence from a medical practitioner in order to be answered. The majority of these questions which are presently the subject of disputes involve permanent impairment matters and recommended treatment, including surgery.

We agree with the RTWSA initial submission regarding this Term of Reference, especially concern about the small number of assessors being used from what is a much larger pool of resources. We also agree with the comments concerning the *Mitchell* decision and the ramifications for the Scheme if it is ultimately found that this decision reflects the correct and intended interpretation of the Act.

Whilst the Full Court has not yet dealt with the *Mitchell* appeal, our view is that there has not been an improvement in the determination or resolution of medical questions under the Act and that amendments to sections 22, 33 and 58 of the Act will be required, as well as to the Impairment Assessment Guidelines, as set out later in this submission. We are certainly not advocating a return to the Medical Panel regime. That regime did not work on any measure. A small number of changes to the current Act, however, can, in our view, achieve a significant improvement in the determination and resolution of medical questions in the context of the various objects of the Act set out in Section 3.

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

We agree with, and have nothing further to add to, the RTWSA initial submission regarding this Term of Reference.

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

We don't see any material difference between the 'performance' of our self-insured clients under the new Act, as opposed to the old Act. Our self-insured clients continue to have excellent return to work rates, risk management strategies, reporting, education and intervention processes. Having said that, the anticipated financial ramifications of the unsettled law regarding whole person impairment, surgery and the gateway provisions of the Act—which are likely to impact on the registered employer scheme—are just as important and concerning for our self-insurer clients.

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

We agree with, and have nothing further to add to, the RTWSA initial submission regarding this Term of Reference.

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

We agree with the observations of RTWSA in its initial submission regarding this Term of Reference. Our experience with injured workers is primarily in the context of those who have a dispute. These workers obviously make up a very small portion of the total number of injured workers across the scheme. For those workers in dispute, however, we make two observations which we believe significantly impact on the failure to return to work within two years.

The first factor is the level of entitlement to weekly payments for the first designated period under s39(1) of the Act of up to 100% of notional weekly earnings. For any worker who does not actually like their job, their incentive to return to work during the first 52 weeks, when they have the alternative to stay at home and receive 100% of their pre-injury earnings, is virtually non-existent. Our perception is that a significant number of applicants in the Tribunal appear less focussed on a return to work during the first 52 weeks and more focussed on what compensation they might be able to maximise out of the Tribunal process. This is not the case with all applicants, but it is for a significant number of them. By the time the worker reaches the end of the first designated period and the weekly payment entitlement falls to a maximum of 80% of notional weekly earnings, the relationship with the pre-injury employer has deteriorated and impacts on the cooperativeness of both parties and their willingness to achieve a sustainable return to work.

The second factor, again in the context of our experience with applicants in dispute, and in many respects linked with the first factor above, is the fact that while in dispute for decisions involving a reduction or cessation of weekly payments, a worker automatically becomes entitled to weekly

payments again under s48(9), just by lodging a dispute and making the appropriate application for a suspension of the compensating authority's decision at the same time. Whilst a conciliator can review the suspension of the decision, in reality the suspension is rarely rescinded and the suspension remains in place until the resolution of proceedings. Not only does this result in more disputes, it again reduces any incentive for the worker to return to work, or settle the dispute early, because there is no financial impact on the worker in the interim.

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

We agree with, and have nothing further to add to, the RTWSA initial submission regarding this Term of Reference.

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

We agree with, and have nothing further to add to, the RTWSA initial submission regarding this Term of Reference.

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

A review of the definition of 'therapeutic appliance' in section 4 needs to be had in the context of section 33(21)(b)(i) to ensure that the intention of a 12 month limitation on all but the most vital of medical expenses is maintained.

Working directors should be excluded from entitlements under the Act, just as self-employed persons are under section 4. The return to work provisions and weekly payment entitlement provisions are unworkable given that when the worker is also the employer, it is very much up to a worker how much they decide to pay themselves and what suitable employment they will offer themselves. Entitlement should be only where the corporation extends the protection of the Act to a working director, just as that option exists for a self-employed person.

Where workers are engaged on a short term contract, their AWE should be determined by reference to what they actually earned during that period, not by reference to longer term comparators. The Act should make specific provision for the assessment of average weekly earnings where work is seasonal.

Definitions of the phrases "employment was a significant contributing cause" and "employment was the significant contributing cause" should be added to either section 7 or section 4 of the Act to clarify what parliament really intended by the addition of those phrases to the gateway provisions. The interpretation to date by the Tribunal to the meaning of "and employment was a significant contributing cause" would suggest no practical difference at all from the test that applied under the former Act. We would recommend that if parliament intended for 'employment' in that context to mean the actual duties or exigencies of employment, rather than the fact of

being employed at the relevant time, that this be made clear. Also, we recommend that it be made clear that 'significant cause' means the real, proximate or effective cause, rather than, for example, anything that is not *in*significant. The employment should be the real or effective cause of the injury, not merely the setting in which it occurred. An example of another jurisdiction that has clarified its gateway definitions is the Comcare Scheme. "to a significant degree" is defined in section 5B of the *Safety Rehabilitation and Compensation Act 1988* (Cth) as meaning "a degree that is substantially more than material".

Section 18 requires amendment to clarify whether the obligation to provide suitable employment is indefinite, or for a defined period such as, for example, the period during which a worker has an entitlement to weekly payments. It further needs amendment to clarify whether a worker who was only ever employed on a fixed-term contract can rely on section 18 to demand suitable employment from an employer beyond that term. In addition, the wording of section 18, specifically the reference to a worker 'who *has been* incapacitated' needs to be amended so that it is clear that a worker must *be* incapacitated.

Section 21 needs to be amended to include a provision that gives the Corporation the power to review whether a seriously injured worker is still a seriously injured worker at a later time, and to compel a worker to proceed with a further permanent impairment assessment as part of such a review or else payments will be discontinued. This would extend to mandatory reviews for workers who have had an interim serious injury decision under section 21(3), perhaps at least every six months, to confirm the worker's injuries are still likely to be assessed at or above 30% as required by section 21(3)(b)

Section 21 should also be amended so that not only must a worker have a 30% whole person impairment (WPI) in order to be a seriously injured worker, they must also be assessed as having no current work capacity and likely indefinitely to have no current work capacity. This will ensure that there is an incentive for workers who can work, to return to work, rather than stay at home on weekly payments until retirement age. After all, the Act is all about returning workers to work. This should apply to workers with a 30% WPI too.

The breach of mutuality provisions should be clarified so that they apply to a seriously injured worker, i.e. there should be a mechanism by which income support can be discontinued when a seriously injured worker is not complying with rehabilitation requirements or other obligations under the Act.

Section 22 needs to be amended to the extent necessary to avoid future assessments of WPI along the lines of the *Mitchell* decision (70% WPI) being made, and so that only truly seriously injured workers are found to be seriously injured workers under the Act. The injuries the subject of an assessment should only be those that have arisen from the same trauma, not subsequent trauma or consequential injuries or an argument that they are part of the one causal chain (i.e. impairments arising from injuries attributable to medical treatment including medication use or injuries attributable to overuse should not be combined with impairments from the original injuries). A specified list of injuries and impairments should be created and inserted as a schedule to section 22, and the impairments from those specified injuries should be specifically excluded from being taken into account in assessing whether or not a worker is a seriously injured worker, just as impairment from consequential mental harm is already excluded. For example,

impairments arising from digestive or dental complaints associated with medication usage and sexual dysfunction, which have no impact on a worker's work capacity, should be excluded. Further, such consequential claims should be specifically capped at a particular WPI percentage for all consequential injuries combined.

The Act should be amended so that no permanent impairment assessment can take place after the expiration of three years following the date of injury. The only exceptions would be in respect of the review of the status of a seriously injured worker or workers who have been taken as being seriously injured on an interim basis. This will promote greater certainty around a worker's entitlement and allow the Scheme to more accurately manage funding and actuarial projections. Further, it will prevent the significant levels of disputation around injuries that allegedly arise from long-term medication usage or overuse that are far removed from the original workplace trauma. This is also more consistent with a capped scheme.

The withdrawal of a medical authority should be added to the list of matters taken to constitute a breach of mutuality and the refusal to provide a medical authority should be a bar to entitlements under the Act.

The appropriate cases for a re-determination of a claim in section 31(10) should be expanded to include any other circumstance where the redetermination is necessary to prevent payments being made to workers to which they are not entitled. The criteria should be loosened further so that the compensating authorities have greater flexibility to make redeterminations, as this will assist in reducing disputation.

Section 48(9) should be removed in its entirety.

Section 33 needs to be amended, and section 7(3) clarified, so that in respect of aggravation injuries, the test is not simply whether an expense is incurred 'in consequence' of having suffered a work injury. In an ageing population where joint replacements in the general community are continuing to increase, it is not appropriate for the employers of this State to become liable for what are essentially underlying and non-work related conditions. It is not reasonable that employers become liable for the knee or hip replacement a worker was inevitably going to have, just because there has been an aggravation to that condition by work. It should be clearly defined that to be compensable, employment was the significant contributing cause of the need for the joint replacement and, in respect of aggravations, the compensating authority is only liable for a portion of the cost that represents the employment contribution to the need for the joint replacement.

Section 40 should be amended to make it clear that it applies only where a worker is in paid employment and can demonstrate an economic loss.

For noise-induced hearing loss claims, where a worker's last employment is in fact self-employment (and is noisy), or with a Commonwealth Licensee under the *Safety Rehabilitation and Compensation Act 1988* (Cth), the claim against any earlier employer should fail. A stricter time limit within which to lodge a claim for noise-induced hearing loss should be imposed with no exceptions.

The Return to Work Scheme Impairment Assessment Guidelines ("IAGs") need a significant overhaul. Suggested amendments include, but are not limited to the following:

- The combining/assessing chronologically by date of injury clauses from 1.18 to 1.20 do not sit comfortably with the Act and will need to be amended along with section 22 so that there is no inconsistency.
- 1.21-1.29 of the IAGs relating to previous injuries should be amended to ensure the principles in *Department of Health and Ageing v Neilson* [2017] SAET 136 are complied with.
- Deductions for prior spine injuries should specifically refer to injuries at other levels within the same spinal region – for example, where a worker had a previous injury at L4/5, and then a subsequent injury at L5/S1, it should be made clear that the deduction should occur. Likewise for left/right nerve impairments at the same level – to avoid the issue that arose in *Mangano v RTWSA [2017]* SAET 40.. These types of requirements could also be expanded to other body parts such as hips to avoid the issue that arose in *Anderson v RTWSA* [2017] SAET 37.
- Chapter 16 – psychiatric injury assessments in general appear to be too generous.
- At 16.17 – reference to "should" obtain neuropsychological assessment should be changed to "must" in order to achieve a rating above Class 1. Alternatively, completely remove the ability to achieve a rating higher than Class 1 for Intelligence.
- Mandatory investigations to confirm objective evidence of impairments – for instance endoscopy, colonoscopy and Doppler ultrasounds. The compensating authority should have the ability to insist a worker undergo these tests if the worker wants the relevant assessment. If they refuse – no assessment.
- Maximum WPI rating should be given for Carpal Tunnel Syndrome – 5% or 10% maximum.
- 2.22 in relation to CRPS assessment should be modified to include that the diagnosis is made by two or more examining **pain** physicians.
- Table 17-35 in relation to total knee replacements, and Table 17-34 (in the AMA) for total hip replacements, should both be modified to reduce the impact of the pain points rating.
- In the lower extremity chapter – the gait derangement method of assessment should be removed entirely as it is far too subjective.
- Spine chapter 4 – amend 4.8 to firm up the requirements regarding cortico spinal tract injuries – objective evidence of a corticospinal tract injury must be obtained (e.g. MRI within the last 12 months), and then also objective evidence of each impairment (e.g. objective evidence of sexual impairment). This is relevant to impairment assessments under Table 15-6 of the AMA 5.
- Amend the ADL descriptors so that it is not as easy to obtain an additional 3% rating.