VOID SUBMISSION

INDEPENDENT REVIEW OF THE RETURN TO WORK ACT 2014 (SA)

Summary

This submission aims to address the ….

AndreaMadeley
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VOID SUBMISSION

KEY CONCERNS

INTRODUCTION

My name is Andrea Madeley and I would like to raise some concerns that have been presented to me in my role as an advocate for families of the support group VOID (voice of industrial death). I founded the group in 2006 after the loss of my own son in a work incident in 2004.

Our families represent some 60 people that whose own experiences span from very recent events to those of more than 20 years. We operate informally and unfunded but collectively have something important to contribute in relation to the many and varied problems families face after confronting the death of a loved one.

The group meets regularly to keep abreast of these issues and communicate on a daily basis via private pages on social media.

An all too common complaint is the way they are treated by the worker's compensation regime. This is not new. We have been dealing with these same concerns for a decade. I

In 2007 we began in earnest knocking on the doors of the many key stakeholders; being the then standing ministers and their many and varied advisors, as well as the department heads of the corporation at that time. We then also collaborated with Alan Clayton in his review of the repealed legislation. His response was positive and encouraging in so far as we understood that it was unusual to receive much feedback from those dealing with death claims. We left reassured that the scheme might work with fatal issues more inclusively, rather this tacked on afterthought.

In truth, we realise today those early efforts to rectify the course of worker's compensation in death benefit claims were wasted – they were efforts made in vain. The nod in the office as we left did not equate to how the corporation would interpret the law.

I will now concede that I have been inactive in the ongoing petitioning of government ministers and bureaucrats in relation to the compensation scheme because the realty was that much of that effort amounted to very little in long term resolve for families. It is unfair and unacceptable to waste the time and energy of people who already have experienced so much pain and loss.

After the coronial inquest into my own son's death was finalised in 2011, I made the decision to study law in order to improve my understanding of the legal system that drives both work health and safety and compensation regimes. I am at the end of that road (literally having submitted my final assignments this month). I also completed an incredibly valuable placement recently under Deputy President Lieschke at the SAET. That experience cemented my resolve.

I now wish to highlight the concerns raised by families impacted by workplace death and also some of the nagging disparities that correlate the working environment and the consequences of unsafe work.

DEAD PEOPLE CANNOT RETURN TO WORK

DEATH BENEFITS ARE A TACKED-ON AFTERTHOUGHT

The first point I would like to raise in arguing that policy makers have little interest in dealing with the many fairness issues in death benefits is as noteworthy as the name itself.

The death benefits under this legislation is not considered or measured. It is copy- pasted as an after-thought and sets the scene for what is essentially a poorly considered model when dealing with fatal outcomes in the workplace – a complete lack of consideration given to the families of the most seriously injured workers on the scheme.

THESE MATTERS FALL OUTSIDE THE TERMS OF REFERENCE

I sincerely apologise for failing to follow the terms but I feel strongly that these issues need to be raised and I respectfully ask that you to consider the following points in relation to how families of deceased workers are dealt with by the scheme.

ACCESS TO COMMON LAW RIGHTS

DECEASED WORKER'S FAMILIES ARE STILL BEING UNDULY RESTRAINED BY THIS SCHEME

The RTW continues to withhold common law rights to justice and therefore penalises most family members impacted by a workplace death. This goes much further than grief and loss. Families dealing with a workplace death are often forced to deal with highly traumatic and very public tragedies. Resent research conducted by Sydney University provides powerful support for the psychiatric harm done to family members as a consequence of a workplace event.[1]

There is almost no avenue for non-financially dependent family members of deceased workers to remedy the harm they suffer due to the denial of common law right to damages. VOID was reassured that this limitation would be lifted under the RTW statute by the Minister's office. A request for a meeting was deemed unnecessary because our concerns were not in issue. It was a blatant and misleading falsehood.

It conceded that a no-fault scheme should provide sureties to employers that they will not be tied up in endless litigation. Limiting access to common law to only those seriously injured provided a fair balance to prevent over litigation. Our position was that if negligent conduct was evident and could be established on the balance of probabilities, a common law right to action should be provided to families as a means to serve as general deterrent, as any civil law should.

What was ultimately provided by the 2014 regime is so restrictive it is considered window dressing. The figures suggest it is rarely utilised. That is hardly surprising given the rules governing negligent

[1] Lynda Matthews et al, *Death at Work: Improving Support for Families,* (Consultation Report) University of Sydney, NSW, Australia, (2016); L. R. Matthews et al, 'Bereaved Families and the Coronial Response to Traumatic Workplace Fatalities: Organizational Perspectives' (2016) 40(3) *Death Studies*, 191; Lynda R. Matthews et al, 'The Adequacy of Institutional Responses to Death at Work: Experiences of Surviving Families' (2012) 6(01) *International Journal of Disability Management*, 37.

actions are an equally perplexing instrument that appears to be stuck in a continued state of out-dated redundancy.

If a family member can establish a case for negligence by act or omission, the courts should be given the power to decide what those damages should be based on the level of negligence and the level of harm done. We would argue that the only way to do this is to grant full access to non-economic and economic losses. This is important because the court acts as an independent umpire to determine the right balance based on the many and varied factors that come into play in these workplace tragedies.

SECTION 84

I have already mentioned the assurances provided to VOID by the Minister's office while the Bill was being debated. In reality, what we ended up with is a disingenuous poor cousin with overly burdened limitations.

Even if we can argue the door was opened by way of s 72(1)(b), it was promptly slammed closed by the operation of s 84.

Section 84 articulates that no damages can exist for nervous shock claims for non-workers. This will apply to family members. RTWSA confirmed this, albeit with some vague ambiguity as to its application. The best guess we were provided is that it would 'probably' apply to all non-workers. This then effectively rules out common law claims for family members who have suffered a psychiatric injury caused by the employer's negligence.

The s 84 exclusion is important because it expressly abrogates the principle developed by the High Court in 2002. That is to say, if the conduct of a negligent employer causes a person of 'normal fortitude' to suffer a psychiatric injury, they may be liable to pay compensation. In that, the High Court recognised that an employer owed a duty of care to the parents of a worker killed on a cattle station. The pure mental harm caused by the trauma of the news of their son's death was determined to be an injury that was in law, 'reasonably foreseeable' by the employer's negligent conduct.[2]

DETERRENCE AND PREVENTION ARE PIVOTAL

Any laws, civil or criminal, play a constructive role in deterrence. In this case, they play a vital role in combating unsafe work practices and the serious harm these tragic events have.

The state has control of deterring wrongdoing by prosecuting unsafe work through legislative instruments.[3] However, actions against companies are rare and utterly disproportionate to the more than 12,000 injury claims every year. With only a dozen or so prosecutions mounted each year in South Australia, there is clearly a heavy distortion in opposition to taking action against negligent employers. We are not implying the majority of employers are causing injuries to workers through failing in their obligations to create a safe workplace, but one could easily postulate that more than a dozen injuries are likely to be caused by practices that do not follow basic work, health and safety laws.

The point is, any decision relevant to taking action against negligent conduct is held by Crown law and the Crown alone. The problem, as we see it, is that in the hands of the Attorney-General's department,

[2] *Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.
[3] *Work Health and Safety Act 2012* (SA).

party politics can tarnish (and we would argue, absolutely do) those decisions. Even when successful prosecutions are undertaken, it is the government's coffer that becomes the sole beneficiary to any penalties handed down.

This places all legal opportunities to action a breach of safety with government while the consequential burden of harm is carried wholly by the family.

HOW THE CORPORATION INTERPRETS THE ACT

TOO MUCH DISCRETION AT THE EXPENSE OF FAIRNESS

Non-dependent claims were an important part of VOID's discussions in 2007 and through to this legislation. The legislation has included provisions that appear to provide an entitlement to lump sum compensation for non-dependent family members like parents.

If there was any doubt as to whether the corporation is limited by its discretionary rule, that can now be clarified.

> *Division 8 – Payments on death*
>
> **Section 61 – Lump sums**
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> (8) If the worker does not leave any partner or child but leaves a person who is to any extent dependent on the worker's earnings, the Corporation may, if it considers that it is justified in the circumstances, pay compensation not exceeding the prescribed sum that the Corporation considers is reasonable and appropriate to the loss to that person (and if the Corporation decides to make a payment of compensation to more than 1 person under this subsection then the sums paid must not in total exceed the prescribed sum).
>
> (9) If the worker, being under the age of 21 years at the time of the work injury, leaves no partner and no child but, immediately before the injury, was contributing to the maintenance of the home of the members of his or her family, the members of his or her family are taken to be dependent on the worker's earnings for the purposes of subsection (8).
>
> (10) If a person who is entitled to a payment under this section is under the age of 18 years, the payment may, if the Corporation so determines, be made wholly or in part to a guardian or trustee for the benefit of that person.

The corporation has clearly been provided a great deal of discretion in deciding whether or not such entitlements might be granted, however, at face value, it is not unreasonable to conclude that non-dependent claims should not be an impossible hurdle.

In May 2017 I was in the process of providing some commentary to a draft booklet being developed by SafeWork SA for people dealing with a workplace death. The purpose of the booklet was designed to assist families.

A statement included on page 11 was written as follows:

> *Non-dependent family members may also receive financial support in certain cases of financial hardship*

There was a comment on the draft copy made by an employee of RTWSA that made the following recommendation as to that statement:

Please remove this, the circumstances are rare and exceptional, we have not previously extended this to anyone.

The first point I would like to make is that nowhere under s 61 is there any mention of financial hardship as a limitation to a claim. The concept behind such a provision was always supposed to support family member who have suffered a traumatic loss.

It is evident that RTWSA is writing its own law while inventing limitations that are not established by the legislation. They certainly were not established by the consultation process. The word 'hardship' is not cited and therefore should not be 'read in' to the relevant provisions.

Our question would then be, how many of non-dependent claims have been rejected on this basis?

I can certainly appreciate how very difficult it is for families to seek compensation after such a great loss because it is generally at odds with how we should behave given seeking compensation after a death can be socially frowned upon. If these families were advised in accordance with these directives, then we argue they have been denied natural justice.

It appears that in 10 years, we have come full circle to where the deceased worker without financial dependents becomes an economic win for the scheme while the people hurt are ignored.

A PECULIARITY OF ENTITLEMENTS: SERIOUS INJURY vs FATAL INJURY

I will attempt to outline our next concerns by drawing on the language used in the legislation to highlight how poorly the RTW Act has considered fatalities in the legislative framework.

VOID argued in 2007 that a deceased worker's family should be provided the same legal rights to compensation as a worker that is injured.

The scheme's death benefits consist of a sum that is undefinable. There is no guide as to how it is made up. The 'prescribed sum' aligns with that provided to the maximum benefit payable to seriously injured workers but we note this non-economic loss component does not apply where a worker dies.[4]

This matters because without clarity, it is unclear if this lump sum component should be made more accessible to family members who are not financially dependent, in the event the worker had no financial dependents. We already know today the corporation is denying claims on the basis of hardship which is not a requirement under the Act.

Wrongful death or 'dependency claims' were never designed to limit compensation to financially dependent family members. Moreover, while it is structured on economic loss, it is not limited to a loss of income and can include services of a domestic nature.[5] These could be relevant where a worker lives at home and helps with the upkeep of the family home.

Death is a fatal injury with a 100 percent impairment and should be given at least the same consideration as a worker with a greater than 30 percent impairment.

[4] *Return to Work Act 2014* (SA) s 58(11).
[5] *Nguyen v Nguyen* (1990) 169 CLR 245.

Non-dependent and immediate family members should not be obstructed to claim pain and suffering and any loss or detriment of a non-economic nature if they have suffered a traumatic psychological injury because it is inequitable to deny them an opportunity to address their injury.

A PENSION SCHEME IS NOT A COMPENSATION SCHEME

The economic loss component of the death benefit is the weekly payment regime. We still maintain that a dependent who is financially reliant on the income of the deceased worker creates a regime that forces that party to languish at home rather than provide an opportunity to rebuild a shattered life.

SOCIAL WELFARE RECIPIENTS

The scheme adopts a controlling arm over the dependent and effectively puts her under financial pressure at the outset.

If a worker's widow was fully dependent on her partner for financial support, she will immediately lose half of his income after his death.[6] If a worker's widow is partially dependent on her partner's income, the corporation has complete discretion as to how much she may be entitled to.[7]

Section 60 discussed the corporations right of review in the discretion to consider income from employment, earning capacity or any other circumstances that may change the rate of payment.

Curiously, in this respect, the scheme now elects to place the same limitations on her as it would an injured worker. The term 'earning capacity' is especially curious because it reads like something copied from a provision dealing with an injured worker's return to work plan.

The scheme provides no incentive to rebuild or plan for the future. VOID has been dealing with these complaints for years. There are clear repercussions should a widowed partner seek part-time work outside the home to supplement the reduced income or perhaps take steps to invest the lump sum benefit to provide some financial security moving forward (property investments / rent). The practical effect of these measures is that she will have her benefits reduced or removed completely.

These traumatic losses are difficult to navigate on one's own and yet it is patently evident the scheme is constructed in a way that forces a people to stagnate at home or risk losing an important income stream, albeit a portion of what the family had prior to the death.

There is no value in denying a family the right to heal from its trauma. This is not achieved by de-incentivising topping up the depleted family income by finding work outside the home.

There should be a fair alternative that allows a dependent spouse and children to invest the economic component into their own future. The amount should be based on a fair calculation according to age. It is then the spouse's decision which is preferred.

DEAD PEOPLE CANNOT RETURN TO WORK

[6] *RTWA 2014* s 61(1)(a)(i).
[7] Ibid s 59(1)(a)(ii).

It really needs to be said again. If a law designed to compensate people for their loss ends up being a damaging factor, then it stands to reason changes should be made. We continue to highlight where improvement is needed, there is agreeance that something should be done, and the path continues to be littered with road blocks.

Dead people cannot return to work. Again. Dead people cannot return to work.

IN CLOSING

There are some alarming comments coming from the actuary reports that warn of the schemes shifting direction toward uncertainty in terms of being properly funded.

The relevant government bureaucrats will no doubt point the finger at the South Australian Employment Tribunal in its interpretation of just what constitutes an injured worker. The more reasonable view is that the figures presented to parliament were always imaginary.

Perhaps the key here is to provide an incentive to those entitled to make their way off the scheme and fund their own recovery. It is certainly an issue pertinent to fatal workplace incidences.

I thank you for the opportunity to put some thoughts forward in this submission. I do appreciate that my discussion points fall well outside the terms of reference, but having made many attempts over the years to address these same issues many times over, it was worth addressing them one more time.

Kindest Regards,

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Founder - VOID

REFERENCES

Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317

L. R. Matthews et al, 'Bereaved Families and the Coronial Response to Traumatic Workplace Fatalities: Organizational Perspectives' (2016) 40(3) *Death Studies,* 191

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