Our Ref: JWW:DB:18030

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The Hon John Mansfield AM QC
GPO Box 464
ADELAIDE SA 5001

Also by email: RTWreview@sa.gov.au

Dear Sir,

RE: Review of the Return to Work Act 2014

Introduction

1. WearingLaw is a boutique law firm specialising in advising and representing workers in employment and workers compensation matters. This submission is prepared on the basis of our experience with the workers compensation system both before and after the commencement of the *Return to Work Act, 2014*.
2. These submissions respond firstly to the terms of reference, and in part to the Corporation's submissions in its "Key messages" document and its Initial Submission.
3. We will provide further submissions in response to the Corporation's Initial Submissions via separate correspondence.

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decrease in the time taken to resolve disputes (especially when compared to the scheme and processes applying under the repealed Act)

4. We are not a position to comment on the number of disputes lodged in the Tribunal. The statistics will speak for themselves. No doubt transitional issues from the WRCA to the Return to Work Act, 2014 and lack of clarity

around new definitions and criteria in the new legislation have contributed significantly to the number of disputes.

5. It has been our experience that the length of time to resolve disputes has increased, not decreased.
6. The increase in the time for resolution of disputes is partly due to the number of matters currently under appeal to the full bench of the Tribunal and to the Supreme Court. This is likely to resolve over time once these scheme-critical issues are finally determined by the courts.
7. In our experience, the statutory requirement in section 43(7) of the SAET Act that the conciliation process be concluded within 6 weeks has resulted in some attitudinal shift by litigant's representatives and Commissioners, and has resulted in the parties identifying issues in dispute and obtaining necessary evidence at an earlier stage than previously. Furthermore, this legislative change has led to Commissioners generally being willing to refer matters on at an early stage when it becomes clear that a negotiated resolution will not be possible.
8. Nevertheless, we have experienced numerous matters where the compensating authority and/or its lawyers, have been slow to obtain and provide relevant documents or information, or instructions in relation to settlement proposals. It seems that the compensating authority's lawyers are often under-resourced and deal with disputes in a reactive, rather than proactive fashion. Often, books of documents do not contain all relevant documents, and it takes several weeks for the compensating authority's lawyers to obtain and provide relevant documents when requested.

Whether the jurisdiction of the South Australian Employment Tribunal under this Act should be transferred to the South Australian Civil and Administrative Tribunal.

9. Workers compensation is a highly technical and specialised jurisdiction. The jurisdiction of the SAET has only recently been expanded to incorporate discrimination complaints, common law employment claims and other employment-related litigation.
10. Many workers compensation claims involve or overlap with other employment issues including award interpretation, discrimination, wages

claims and unfair dismissal. We understand that the reason for the recent expansion of the jurisdiction of the SAET was to provide a one-stop shop for employment related matters to reduce the need for litigants to commence and pursue litigation in different jurisdictions in respect of different facets of the employment relationship. This is an important development, which will improve access to justice for working people.

11. In these circumstances, we strongly contend that it would be inappropriate to roll the important work performed by the SAET into the SACAT.

The extent to which there has been an improvement in the determination or resolution of medical questions arising under the Act

Whole Person Impairment

12. The linchpin for many entitlements under the *Return to Work Act, 2014* is the assessment of the injured worker's level of permanent impairment. This assessment is critical to determining the worker's entitlement to:

- lump-sum compensation for economic loss, pursuant to section 56;
- lump-sum compensation for non-comic loss pursuant to section 58;
- income support payments beyond two years;
- lifetime medical expenses;
- access to pursue common law claims against a negligent employers.

13. The critical importance of the permanent impairment assessments naturally focuses attention on the manner in which the assessment is conducted and the outcome.

14. We do not accept that permanent impairment is a rational or fair method of determining a worker's entitlement to compensation. We expand on this later in this submission.

15. The *Return to Work Act, 2014* introduced a new process for obtaining assessments of permanent impairment, with a view to reducing the number of assessments undertaken and the scope for disputes about the assessment. This process allows the worker to choose the permanent impairment assessor (or assessors) and to have any input into the information that is provided to the assessor and the questions asked of the assessor. This process has had the desired effect of reducing the phenomenon of "duelling experts", and the extent of disputation.

16. However, the process for assessing permanent impairment under the *Return to Work Act, 2014* severely disadvantages workers who are not legally represented. We have seen a number of matters where unrepresented, or poorly represented, workers have gone through the permanent impairment assessment process, before all of the compensable injuries have been identified, investigated and treated. Grossly inadequate permanent impairment assessments have resulted.

Response to RTWSA's Initial Submission

17. We note that there has been a significant number of decisions relating to Whole Person Impairment (**WPI**) assessments including the decision in *Mitchell* which is heavily criticised in Return to Work SA's initial submission. We do not support this criticism. Nor do we believe that this criticism is relevant to the term of reference to which it is addressed.

18. In *Mitchell* the SAET found that ALL of an employee's injuries arising from the same incident should be considered when determining an employee's level of whole person impairment. In our view, this is the only logical way for whole person impairment to operate. The alternative, for which the Corporation contends, is to use the permanent impairment assessment guidelines to determine the various components of an injured worker's presentation in a piecemeal fashion, but never combine them. This would seem an artificial and unfair interpretation, which deliberately seeks to disregard the combined impact of the effects of injuries, all resulting from the same compensable event, on a worker's capacity.

19. For example, as a result of an accident at work, an employee suffers an injury to their knee which in turn leads to altered gait and a permanent impairment to the employee's hip and lower back. At the time of the assessment an employee has an injury to his knee, hip and lower back. There would appear to be no logic to assessing these three components as separate injuries - to do so would be to fail to determine the employee's level of whole person impairment.

20. The *Return to Work Act, 2014* apparently assumes that the assessment of a worker's whole person impairment assessment is a measure of the worker's capacity for work, and need for income support. (In fact, there is no logical correlation between a worker's whole person impairment and the worker's

capacity for work. The same injury is likely to have vastly different effects on a lawyer and a bricklayer). To the extent that there is a relationship between whole person impairment and incapacity, the effect of assessing the various components of an injury separately is to completely undermine it.

21. In fact, we would go further to state that the legislation should be clarified to make it clear that an assessment of permanent impairment should take into consideration ALL of an employee's work-related injuries, regardless of when they occurred. Even allowing for the *Mitchell* decision, an employee who injures themselves in a series of injuries is at a disadvantage when compared to an employee who injures themselves in one single incident. For example, an employee who injures both knees in a single incident requiring bilateral knee replacement surgery is likely to be considered a seriously injured worker, whereas a worker who injures each knee in separate incidents is unlikely to be deemed a "seriously injured worker" because the two injuries cannot be combined. The two workers have identical injuries and levels of incapacity but their entitlement are vastly different. This is illogical and grossly unfair.
22. If permanent impairment is to be used to determine an employee's entitlement, it should genuinely consider the employee's level of whole person impairment, regardless of when the incidents leading to the impairment occurred.

Medical Expenses – Future Surgery

23. The changes to the Act meant that for most workers, the entitlement to medical expenses ends 12 months after the expiration of their entitlement to income maintenance. This limit does not apply to therapeutic appliances (including joint replacements). Furthermore, this limit does not apply to surgery if the worker applies to the Corporation for approval of such surgery prior to the expiry of the worker's entitlement to medical expenses.
24. There is still some confusion regarding the threshold for approval of such applications. The position of the Corporation in *Ruddock* and *Karpathakis* is that the level of detail required in an application under s33(17) must be provided. This has been rejected by the SAET and is currently before the Supreme Court.
25. That decision aside, a number of further issues arise.

26. Firstly, doctors have different views about the likelihood of future surgery. One doctor may describe future surgery as a possibility, whilst another may describe it as a probability. The worker's right to recover the cost of such surgery should not depend on the predictions of doctors regarding the future likelihood of such surgery.
27. If the surgery is ultimately not required, there is no cost to the Corporation. If the surgery is required, the parties can consider whether the need for surgery is related to the original compensable injury at that time. The need to argue over the likelihood of such surgery before the end of a worker's entitlement to medical expenses is, in our view, completely unnecessary.
28. The above is likely to lead to the perverse outcome whereby a worker who ultimately needs a surgery which was thought to be unlikely will not be entitled to compensation for the surgery, despite the need arising directly from work. By contrast, there will be many workers who have had their application for future surgery approved, but who never actually undergo the surgery.
29. Furthermore, workers are discouraged by the Corporation from making applications for surgery that relate to "therapeutic appliances" such as knee or shoulder replacement surgery. Where such applications are made, the Corporation rejects these applications on the basis that they relate to therapeutic appliances and are otiose. There is a real risk that, with medical advances, surgical options will become available that avoid joint-replacement. Employees will discover that they are not covered for such surgery.
30. Finally, employees who are in disputation regarding various aspects of their claim and are assisted by either the union or a lawyer are likely to make an application for future surgery within the nominated time frame, whereas, employees who have done the "right thing" and returned to work successfully, are unlikely to be in regular contact with people who can advise them to make such applications. These people are not likely to make applications for future surgery within the prescribed period and will miss out on future surgery because they did not make an application within the nominated time frame.

31. All of the above can be avoided by simply allowing for future surgery related to compensable injuries outside of the three year window without the need for prior approval.

Factors contributing to non-seriously injured workers failing to achieve a return to work within 2 years

32. As discussed above, the relationship between a worker meeting the threshold to be considered a seriously injured worker (ie 30% WPI) and their ability to return to work within two years is a tenuous at best. In our experience, many blue collar workers who sustain physical injuries compromising their ability to return to unrestricted manual labour, such as back, knee, or shoulder injuries, struggle to return to work within two years, whilst their whole person impairment does not reach 30%.

Any additional recommendations regarding re-skilling services to assist return to work outcomes

Whether the scheme has yet achieved financial stability and, if not, when the scheme is likely to be mature and stable

33. In our experience, the Corporation continues to be unwilling to consider retraining as a way of allowing injured workers to overcome barriers to return to work resulting from an injury, and compounded by lack of education and poor language skills. The two year period of income support is so short that claims managers rarely take a long – term view. By the time a worker has recovered from the initial injury and subsequent surgery, the remaining period of income support rarely allows meaningful retraining or rehabilitation.

Any other recommendations consistent with the objects of the Act

34. We will write separately responding to the Corporation's Initial Submission

We trust these submissions have been helpful and would be happy to appear in person to answer any questions.

Joseph Wearing **Donald Blairs**