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Business SA submission:

Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation inquiry into the Return to Work Act and Scheme

30 September 2016

Business SA
Chamber of Commerce
and Industry South Australia

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Introduction

As the peak employer representative body in South Australia with 178 years behind us, Business SA welcomes the opportunity to provide a submission to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation inquiry into the Return to Work Act and Scheme. Business SA has a long history of advocating for changes to the South Australian Workers' Compensation System and in 2014 welcomed the positive changes introduced by the State Government.

Executive Summary

Business SA has serious concerns about the commencement of a review into the *Return to Work Act*[1] (*RTW Act*) prior to the completion of the legislated three-year period. The *RTW Act* states that a review should take place on the expiry of three years from commencement[2]. It is important to allow the three-year period to expire prior to the commencement of a review as certain provisions of the Act have not yet not been implemented or had the opportunity to run the course. Business SA believes this review is extremely premature.

Of further concern is the wording used in the terms of reference. It is Business SA's view that the wording is biased, subjective and written to gather evidence to roll back portions of the *RTW Act*. Rolling back any part of the Act impacts South Australian businesses. South Australia must become a world competitive place to do business, and to do this we must constantly strive to ensure a balance between workers' rights and regulatory imposts on business, particularly small business. It is Business SA's view that rolling back any of the *RTW Act* could inhibit growth in the South Australian economy.

As part of this submission Business SA undertook a survey of its members and asked specific questions relating to the terms of reference. Business SA received responses from 107 companies and these responses have guided the following submission.

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Yours sincerely,

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[1] *Return to Work Act 2014* (SA)
[2] *Ibid s203*

(a) The potential impacts on injured workers and their families as a result of changes to the *Return to Work Act* including tightening of the eligibility criteria for entry into the Return to Work Scheme

It is Business SA's view that it is too early to determine the impact the changes to the Return to Work (RTW) Scheme have had on injured workers and their families. The eligibility into the RTW Scheme has not been tightened significantly and the main change to the eligibility has been to the cause of the injury.

Section 7 of the *RTW Act* states:

> *(a) in the case of an injury other than a psychiatric injury—the injury arises out of or in the course of employment and the employment was* ***a significant*** *contributing cause of the injury; and*
> *(b) in the case of a psychiatric injury—*
>
> > *(i) the psychiatric injury arises out of or in the course of employment and the employment was* ***the significant*** *contributing cause of the injury; and*
> > *(ii) the injury did not arise wholly or predominantly from any action or decision designated under subsection (4).*

The primary difference between the repealed Act and the current *RTW Act* are the words 'a significant' and 'the significant'. Whether these words amount to a different threshold than the repealed Act is up to the Courts to determine.

There has only been one decision by the South Australian Employment Tribunal (SAET), *Ward v State of SA*[3], which provides insight into how the courts will interpret this section of the *RTW Act*. In this matter the incident was found to be a workplace injury as there was something *unique* about the workplace environment that contributed to the injury. Therefore, the work was 'a significant' contributor to the injury. According to the decision in *Ward, '*significant' 'is not a term of art'[4] it is an 'ordinary word that requires the trier of fact to make an evaluative judgment as to whether or not there is a sufficiency of a connection between the worker's employment and the injury to permit the conclusion that the worker's employment was a significant contributing cause of the injury.'[5]

Based on the judgement above, 'a significant' has a broad interpretation, however, as only one matter (at the time of writing) has sought to interpret 'a significant' it is Business SA's view that it is too early to determine the effect of this section.

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[3] *Ward v State of SA (Department for Primary Industries and Regions SA (PIRSA)) [2016] SAET 28*
[4] *Ibid at [35].*
[5] *Ibid.*

(b) Alternatives to the overly restrictive 30 per cent Whole Person Impairment (WPI) threshold for ongoing entitlements to weekly payments

Business SA has concerns with the wording "overly restrictive" in this term of reference. The wording in this term of reference prejudges that 30% is overly prescriptive and that alternatives are needed. Business SA submits that the 30% WPI threshold is set at the correct level and results in a greater number of employees returning to work. The objectives of the Act are to return workers to the workplace. It is widely acknowledged there is a significant mental and physical benefit to employees returning to the workplace after an injury. The 30% WPI threshold encourages workers, who have capacity, to return to work. The continued availability of near full entitlements does not offer some workers an incentive to return to work. Business SA considers it too early to assess whether changes to the system are required and does not believe an alternative to the 30% WPI is necessary.

(c) The current restrictions on medical entitlements for injured workers

In responding to this term of reference Business SA has assumed the 'current restrictions' are the cessation of medical entitlements. In the last few months, workers from the previous system have started dropping off the medical expenses scheme and workers on the new system will have their medical benefits cease from 1 July 2017.

Under the previous scheme there was evidence of medical expenses continuing past the point where there was a tangible benefit to the worker or without any significant improvement on the worker's well-being. This in turn has a detrimental effect on the worker. This situation led to the current provision of a 2-year cap for medical expenses for any worker with a WPI less than 30%. The two-year cap also reduces the incidence of health professionals taking advantage of the generosity of the scheme.

However, Business SA acknowledges some workers may require ongoing medical benefits in order to return to work. In such cases, a viable option is allowing medical benefits to continue when a worker can provide medical evidence that the medical entitlements are required for a return to work. Any such continuation of medical benefits would need to be regularly reviewed and have a positive effect on the worker's ability to continue working.

(d) Potentially adverse impacts of the current two year entitlements to weekly payments

This term of reference focuses solely on the negative impacts of the Act. With all systems of compensation there will be people who are less advantaged. It is Business SA's view that the positive impacts of the changes far outweigh the negative impacts. The benefit of workers returning to the workplace is significant for physical and psychological benefits and every effort should be made to ensure workers are returned to work.

Business SA's survey of members showed 69% of respondents believed restricting income to a maximum of 2 years was suitable. Of the 31% who did not believe the 2-year timeframe was suitable, only 20% (7 respondents) believed the system should be more generous to workers. Importantly, when answering this question, a majority of comments were focused not on the money paid over 2 years but on further incentives to return workers to the workplace.

(e) The restriction on accessing common law remedies for injured workers with a less than 30 per cent WPI

The ability to claim for common law negligence was re-introduced after being removed in 1986. If a worker wishes to pursue a common law claim, they must opt to do so under the *Civil Liability Act 1936,* and therefore forfeit their rights under the *RTW Act*.

While it is perceived the compensation awarded could be higher, this is not necessarily the case. Common law claims are limited to future economic losses and furthermore there are greater risks for any worker who wishes to pursue such a claim, such as contributory negligence. At the time of this submission, there had been no cases for common law remedies before the courts. It is Business SA's opinion that broadening this section of the *RTW Act* to include workers with less than 30% WPI would not result in additional claims being made and would detract from the objectives of the Act.

If an employer acts in a negligent way that results in a worker's injury, it is SafeWork SA and the *Work Health and Safety Act* that provides a means to prosecute and fine the employer. The *RTW Act's* objectives are to support workers who suffer injuries at work and have a priority on returning workers to work. The objective of the *RTW Act* recognises the significant health benefits of working and the objects are not to provide workers with additional compensation or punitive damages for an injury. An inclusion to allow for common law claims would be contrary to these objectives.

The lack of common law claims since the introduction of the *RTW Act* demonstrates that it is not considered a viable option for workers to claim compensation and these provisions do not need broadening and this indicates the provisions should be removed.

(f) Matters relating to and the impacts of assessing accumulative injuries

The term "accumulative injuries" is not defined in the *RTW Act*, nor is it a common industry term. Business SA presumes the reference is to injuries that either gradually develop over time or occurring on different dates.

The *RTW Act* requires that impairments arising from injuries which occurred on different dates are to be assessed chronologically by the date of the injury and are not to be combined.[6] Impairments resulting from more than one injury caused by the same trauma are to be assessed together and combined to arrive at the degree of impairment of the worker.[7]

Business SA submits that The Return to Work Scheme Impairment Assessment Guidelines provide a clear method of assessing all types of injuries and reiterates that the prematurity of this review does not allow for the review of injuries that accumulate over time. However, it should be noted that injuries that gradually develop overtime are addressed in s 188 of the *RTW Act* and these provisions have not been varied significantly from the previous Act.

(g) The obligations on employers to provide suitable alternative employment for injured workers

Employers are obligated to provide work under s18 of the *RTW Act*. The Committee should note that the wording of the obligation to provide work is identical to the repealed Act section 58B. The obligation to pay an appropriate wage for such work is likewise identical. With identical wording, it is difficult to see how the *RTW Act* has brought any changes, nor are we aware of any concerns raised by other stakeholders.

There is additional wording s18(3) which states:

> *(3) Furthermore, if—*
>
> > *(a) a worker who has been incapacitated for work in consequence of a work injury seeks employment with the pre-injury employer consistent with the requirements of subsection (1); and*

[6] s22(8)(a)
[7] S22(8)(c)

(b) the worker, in seeking the employment—

(i) by written notice to the employer—

(A) confirms that he or she is ready, willing and able to return to work with the employer; and

(B) provides information about the type of employment that the worker considers that he or she is capable of performing; and

(ii) complies with any other requirements prescribed by the regulations; and

(c) the employer fails, within a reasonable time, to provide suitable employment to the worker, the worker may apply to the Tribunal for an order under subsection (5).

This allows a worker to apply for suitable employment and to appeal the decision. Business SA has concerns that an appeal is automatically referred to the South Australian Employment Tribunal (SAET) without any ability to conciliate the matter beforehand. This direct referral to the SAET causes additional cost and stress on both the employer and the employee. Business SA believes a less formal approach to resolve the matter would reduce the impact on the court system and lead to a less adversarial approach. This is especially important when a worker is seeking to continue working at a specific location and a good working relationship is required.

(h) The impact of transitional provisions under the *Return to Work Act 2014*

The purpose of the transitional arrangements in the *RTW Act* is to ensure all claims from a particular period are dealt with in a consistent manner. The current transitional arrangements have allowed for a transition between the old and new legislation. With the implementation of any new legislation there will be difficulties. Business SA submits that the current transitional provisions allow for the best outcome possible for transition between the two pieces of legislation. Business SA submits that to change the transitional arrangements at this stage would cause considerably more issues.

The alternative to transitional provisions is a savings provision that allowed workers on the system prior to 1 July 2015 to continue to receive the same provisions. In Business SA's view this would be less equitable than the current provisions as it would create two distinct groups of workers. It would also create issues if the date of the injury was unclear or disputed and would not provide encouragement for workers to come off the system. As the transitional provisions have been operating for over 12 months, Business SA does not consider any changes a viable option.

(i) Workers compensation in other Australian jurisdictions which may be relevant to the inquiry, including examination of the thresholds imposed in other states

Business SA submits that considerable research was conducted into other jurisdictions at the time the Return to Work legislation was drafted. There is little benefit in identifying individual elements of different jurisdictions in order to compare with the South Australian Scheme. Picking and choosing the best and worst elements in different jurisdictions will not create an ideal system for either employers or employees. Any scheme must be balanced between assisting workers, financial viability and employer needs. Business SA does not see any value in revisiting the systems in place in other jurisdictions.

(j) The adverse impacts of the Injury Scale Value (ISV)

Business SA has concerns on the inclusion and wording of this term of reference. By wording the term of reference as "adverse" it creates a subjective judgement of the ISV as being unfair. Importantly, the injury scale value is not contained in the RTW Act, but is in section 52(2) of the *Civil Liability Act 1936 (SA)*. Therefore, the ISV is only relevant for workers who choose to make a common law claim.

A common law claim is only available to workers who have a 30% or more WPI and the action is restricted to future economic loss. As previously mentioned, there have been no common law claims to date. As there have been no claims and the *Return to Work Act* did not change the injury scale value, Business SA submits that this Term of Reference is not relevant to review of the *RTW Act*.

(k) Any other relevant matters

It is Business SA's view that legislation is only as good as the administrational management. Business SA has a number of concerns around departmental processes that undermine the legislation. Business SA surveyed members on the Return to Work Scheme with the results indicating a number of members have concerns on how claims are managed. Some of the specific issues raised by Business SA members are as follows:

- 58.5% of respondents had seen an increase in premiums. The increase in premiums varied from $50 a month to $100,000 per annum. Of the companies who saw increases, a significant majority saw increases due to claims with concern being expressed that workers did not have an incentive to return to work in the first 12 months. However, a surprising number of respondents were unsure of the reason for the increase;
- A significant number of respondents were concerned that RTW does not have enough power to get employees back to work. This theme was consistent across a number of the questions;

- There was a concern that doctors drive the outcomes and there are a particular doctors sought out by workers for favourable medical reports;
- Of the organisations who had received a claim, a significant number (28.6%) had disputed the claim.
- In difficult cases investigations and employer input has not occurred, despite concerns being voiced by employers. This has led to the rejection or acceptance of the claim without all the facts being obtained. It is then up to the aggrieved party to dispute the decision. This in turn leads to a waste of time, resources and money. Furthermore, workplace injuries can have a significant impact on workers, their families, employers and colleagues. Disputing claims leads to increased stress for all parties involved and is not beneficial to the system;
- A positive from the survey was that a significant number of respondents praised the mobile case management system as being a quick and effective method of managing claims.

Conclusion

Business SA has serious concerns about the commencement of a review into the *RTW Act* prior to the completion of the legislated three-year period. A three-year review would allow enough time to pass for all parts to the *RTW Act* to take effect and for some case law to provide guidance. As such, Business SA submits any changes to the *RTW Act* would be premature. Business SA thanks the Standing Committee for the opportunity to make this submission on the Return to Work Act Review and looks forward to the opportunity to discuss these submissions further.