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Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation

Inquiry into

The Return to Work Act and Scheme

Submission of the

Finance Sector Union of Australia

September 2016

FINANCE SECTOR UNION

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The Executive Officer
Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation
House of Assembly
Parliament House, North Tce Adelaide 5000

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Dear Executive Officer,

Please find enclosed a submission by the FSU to this inquiry.

For further information, please contact Jason Hall on 1300 366 378 or by email fsunioninfo@fsunion.org.au

Yours faithfully,

Geoff Derrick
National Assistant Secretary
Finance Sector Union of Australia

The *Return to Work Act 2014* (RTW Act) and Scheme, which commenced on 1 July 2015, contains what are arguably some of the most detrimental changes to impact injured workers in South Australia in many years.

The Finance Sector Union of Australia (FSU) welcomes the opportunity to make a submission to this inquiry prior to the prescribed three-yearly review in the hope that the most harmful aspects of the RTW Act and Scheme will be amended following this inquiry.

The FSU is a union that represents over 32,000 members across the country who work in banking, insurance, credit unions, superannuation, financial planning and finance companies. The Union has thousands of members who live and work in South Australia and who are directly affected by the new RTW Act and Scheme.

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

Of the several changes to the workers compensation scheme introduced by the RTW Act, the FSU believes the most adverse to be the automatic, arbitrary cut off date to benefits after 104 weeks for injured workers who do not fall into the category of "seriously injured". (A seriously injured worker is someone who is deemed to have a whole person impairment of 30% or greater).

Previously, under the now repealed Act (*Workers Rehabilitation and Compensation Act 1986*) and scheme, an injured worker could apply for weekly payments to continue beyond 130 weeks if they could demonstrate that they were totally incapacitated or were likely to remain incapacitated and unable to return to pre-injury duties. This meant that injured workers in effect could receive workers compensation benefits indefinitely or until the age of retirement.

Currently, under the RTW Act and Scheme, regardless of whether or not an injured worker (except those seriously injured) has any capacity to return to work an injured worker will cease receiving weekly payments 104 weeks from the date of the injury.

This means that an injured worker who may only have a partial capacity to work and who is only earning some of their pre-injury income is not entitled to receive any income maintenance after 104 weeks at all.

Another significant feature of this change is that the 104 week period commences from the date of injury and is calculated by calendar weeks from that date rather than by reference to the number of weeks that weekly payments have actually been made.

This means that the 104 weeks can include any time an injured worker returned to work on full duties. For example, if an injured worker returned to work for a period of four weeks between the date of injury and the expiration of 104 weeks, the four week period is included when calculating the 104 weeks from the date of injury and results in the injured worker only receiving 100 weeks of benefits instead of the full 104 weeks.

In contrast, under the repealed Act and scheme any weeks in which an injured worker returned to work on full duties would not count towards the 130 week entitlement threshold, this meant that an injured worker would be entitled to receive up to a total of 130 weeks of benefits and payments regardless of any work they may have performed in between.

Similarly, the 30% threshold at which an injured worker will be assessed as being "seriously injured" is harsh as it is an excessively high threshold that many injured workers cannot attain.

The effect of these changes are that the majority of injured workers who are not deemed to be seriously injured due to the high 30% threshold, will have their access to benefits and payments arbitrarily ceased after 104 weeks even though they remain unable to return to work on full duties.

This will result in countless injured workers suffering severe financial and other hardship and distress.

By way of comparison, in other workers compensation jurisdictions, such as New South Wales, which has in recent years similarly been overhauled, injured workers (except those seriously injured) are entitled to weekly payments for a period of up to *five years*.

The FSU believes that injured workers who are not deemed to be seriously injured should be eligible to apply for weekly payments beyond 104 weeks:

- If they are totally incapacitated and are unlikely to return to work; or
- They are fit for some suitable, alternative duties but alternative duties can not be provided;
- The previous calculation method be reinstated so that any periods during which an injured worker returns to work are not taken into consideration for the purposes of calculating the 104 week period.

The current restrictions on medical entitlements for injured workers

In relation to the current restrictions on payments for medical and other expenses, other than for those deemed seriously injured, the FSU believes that the current scheme is unreasonably harsh and having a harmful impact on injured workers.

Under the repealed Act and scheme, injured workers were eligible to receive payments and reimbursements for medical and related expenses, as long as they were reasonable and related to their injury, which could be indefinite and regardless of whether the injured worker had returned to work or not.

Currently, under the RTW Act and Scheme, injured workers who have not been in receipt of weekly payments for a continuous period of twelve months are no longer eligible to receive any reimbursement for medical and other expenses related to their injury.

For those injured workers transitioning from the old scheme to the new scheme, their entitlement to medical and other expenses suddenly ceased on 30 June 2016 if they had not been in receipt of weekly benefits in the 12 months prior to that date despite being eligible to receive ongoing payments for medical expenses for the duration of their injury under the former scheme.

For injured workers under the RTW Act and Scheme this means that an entitlement to ongoing medical and other expenses is linked to their incapacity for work but the Scheme does not taken into account the need for injured workers to continue to access medical and other treatments despite having capacity to return to work.

In the banking and finance sector, for example, there is a high incidence of workers suffering psychological injuries due to bullying related to targets and performance. Even though those injured workers have been able to return to work after a period of incapacity, often those injured workers will still require ongoing therapy or medication to help with the treatment of their injury.

To illustrate the point, a bank worker, who has suffered a psychological injury but who has returned to full duties with the assistance of ongoing counselling and medication, will have their entitlement to medical expenses stopped after 12 months if they have not received income maintenance for the previous 12 months despite that worker needing ongoing treatment and medication.

The effect of this change is that injured workers who are unable to afford medical and other expenses will stop seeking the necessary medical attention and treatment needed for their injury. Injured workers will therefore unnecessarily suffer the pain of their injury, or worse, suffer a

deterioration of their injury. This will in turn affect an injured worker's ability and capacity for employment.

The FSU therefore believes injured workers should be entitled to receive reimbursement and payment for medical and other expenses for as long as an injury exists.

The impact of transitional provisions under the Return to Work Act 2014

In relation to the transitional provisions under the RTW Act, these provisions are too having a harmful impact on injured workers, which is highlighted by the decision in *Pennington v Return to Work SA* [2016] SAET 2.

Briefly, the facts in Pennington involve Ms Pennington, who had suffered an injury before 1 July 2015. As a result of the injury Ms Pennington was totally incapacitated and unable to work for a short period of time and then gained a partial capacity to return to work.

Although Ms Pennington remained partially incapacitated, she was able to find another job that paid her more than she was previously earning, and as a result of her earning capacity Ms Pennington was issued a section 36 Notice under the former scheme which discontinued her weekly payments.

Ms Pennington was still working and earning more than her previous income after the RTW Act and Scheme commenced but unfortunately she became unemployed towards the end of 2015 when her employer went into liquidation.

Ms Pennington then applied for weekly payments to be recommenced on the basis that she remained partially incapacitated and unable to earn her full income.

The Tribunal decided that the transitional provisions made it clear that only workers who were receiving weekly payments immediately prior to 1 July 2015, or who had not received a section 36 Notice to discontinue weekly payments, could continue to receive benefits after 1 July 2015.

The implication after the decision in Pennington is that if an injured worker prior to 1 July 2015 was not in receipt of weekly payments that injured worker had no entitlement to weekly payments after 1 July 2015 under either the repealed Act or the RTW Act.

It needs to be highlighted that had Ms Pennington, on her own initiative, not returned to work at all and therefore not received a section 36 notice discontinuing her weekly payments, she would have remained eligible to receive weekly payments for a period of up to 2 years from 1 July 2015.

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

The tightening of the eligibility criteria for entry into the Return to Work Scheme is of great concern to the Union as the new criteria that now applies makes it much more difficult for workers who have been injured to have their claims accepted.

Under the repealed Act the test for liability included that the injury "must arise out of or in the course of employment" in the case of a physical injury.

In the case of psychological injuries, employment needed to be "a substantial cause" of the injury under the repealed Act in order for liability to be accepted.

Under the RTW Act new wording and criteria apply so that employment must now be, in the case of a physical injury, "a significant contributing cause of the injury" and in the case of a psychological injury employment must be "*the* significant contributing cause of the injury".

The FSU believes workers suffering psychological injuries already have a high degree of difficulty accessing and entering the workers compensation scheme but with the narrowing and tightening of access brought about by the RTW Act access has been made even more difficult for injured workers to enter the Scheme.

The negative and detrimental impact on injured workers and their families, particularly in the banking and finance sector, is that those workers who experience psychological injuries caused by bullying and harassment in the workplace will not be able to receive the necessary compensation and benefits, which will then impact their ability to work and earn an income to support themselves and their families.

The Union believes the wording of the RTW Act should be amended to remove employment being "the" significant contributing cause and replaced with employment being "a" contributing cause in respect to psychological injuries.

The restriction on accessing common law remedies for injured workers with a less than 30% WPI

In relation to the reintroduction of the ability for injured workers to pursue common law claims in negligence, the FSU believes the threshold to be overly restrictive as only those workers who have been assessed at 30% whole person impairment or greater are eligible to bring common law claims.

In addition to the already high and difficult to reach threshold is the fact that injuries are assessed separately so that, for example, if a worker was suffering from two separate injuries, one being physical and the other psychological, the two injuries could not be combined to get an injured worker over the 30% threshold which would render that worker ineligible to sue in negligence.

Injured workers also have to decide whether to pursue common law damages or compensation through the workers compensation scheme, but are unable to do both.

The Union believes that in most cases seriously injured workers will not pursue common law claims as those workers are entitled to receive weekly payments at the rate of 80% to retirement age. Therefore the time, cost and uncertainty that comes with litigation under the common law would likely be an unattractive prospect for a seriously injured worker.

The broadening of the criteria to allow injured workers with less than 30% whole person impairment to claim damages in common law would potentially provide the most benefit to more injured workers, as common law damages could arguably provide greater compensation to those injured workers given that under the RTW Act two years after the date of injury those injured workers will have their compensation payments ceased.

In addition, the FSU believes the calculation of the 30% assessment should allow a combination of any physical and psychological injury to be taken into consideration in order to reach the threshold.

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

In relation to the new obligation placed on employers to provide suitable, alternative employment for injured workers, this is an amendment that is welcomed by the FSU.

This addition to the RTW Act strengthens an employer's obligation to provide work to an injured worker if requested, with the support of the Tribunal if necessary, and should remain as it has too often been the case that employers have unreasonably and disingenuously refused to provide suitable alternative work to injured employees when there has been more than enough work available.

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