

Special Report

WORKERS COMPENSATION & SELF INSURANCE

Return to Work SA 'Consultation Paper' in Relation to Proposed Changes to the Policy on Self Insurance

By John Walsh

Deceitful

Dishonest

Disingenuous

Return to Work SA ("RTWSA") is proposing that there be dramatic changes for those employers who are currently self-insured in the Scheme and those wanting to become self-insured.

Make no mistake any changes will result in a number of current self-insurers being forced back into the Scheme and additional financial impost for those that are able to maintain self-insurance.

There are increased costs associated with the proposed changes and balance sheet implications associated with the increased minimum level of a bank guarantee.

Some who have commenced the journey will have invested hundreds of thousands of dollars in preparation for self-insurance. All wasted!

The position paper acknowledges, 'the cost and balance sheet impacts for a number of the employers that chose to self-insure, (but) Return to Work SA is of the view that these changes are **essential** to provide for an affordable and sustainable Scheme which is able to deliver its objectives for all employers and workers in South Australia'.

'**Essential**' suggests that the proposed changes will be introduced and consultation is going to be very limited indeed.

Fact:

The Board of WorkCover has commissioned and received two separate reports from its consulting actuaries in relation to "the financial effects of granting exempt (self-insurance) status to additional employers". In each case the conclusion was the same:

it is clear, at least anecdotally, that the overall performance of the self-insureds in respect of exactly the same statutory framework, as you quite rightly say, is more impressive.



South Australia - "open for business" ?

"the practices surrounding the transfer of liabilities to successful applicants under Section 10 of the Code of Conduct do not adversely affect the Compensation Fund"

If there was no adverse effect upon the Compensation Fund in the context of a long tail scheme as it was at the time how can it be "essential" that the proposed changes be implemented now that we have a short term Scheme?

Fact:

Trowbridge Deloitte in their report in February 2004 concluded:

"Considering the current scale of the non-exempt Scheme relative to other insurance entities, the number of small to medium employers who

could never become exempt, the demonstrated preference of significant numbers of larger employers to remain in the non-exempt Scheme and the responsibilities which the Corporation continues to have for exempt employers, we conclude that concern over the viability of the Scheme and the Corporation through granting greater numbers of exemptions is unwarranted"

Have you seen the above advertisement which features prominently in our local newspaper?

The proposed policy changes make a mockery out of the claim that "we're creating the lowest taxing State in Australia for business"

Why the Changes

Why are they doing it? Is it empire building on the part of RTWSA or are they carrying out Government policy?

After many years of being critical of the management of the WorkCover Corporation I have expressed in recent articles my respect for the management team at RTWSA. They collectively have made a number of decisions which have contributed to an improved performance by the Scheme even before the enactment of the *Return to Work Act 2014*. ("RTW Act") If the changes represent an initiative of the Board of RTWSA the Board should be called to account.

What are the proposed changes?

- The current minimum level of bank guarantee will go from \$840,000 to \$4.5million.

'There is no doubt that we have got a lot to learn from self-insurers

- The current indicative minimum number of employees will increase to a minimum of 500 employees but at the discretion of the Board it could be any number between 500 and 1,000 employees.
- There will be a greater discretionary element with the RTWSA Board having sole discretion in determining if a business is 'fit and proper'.

Reasons for the Proposed Changes to the Policy

- 'The Scheme has changed and the obligations bestowed on compensating authorities are more significant than ever before'.

It is said that:

'Areas of increased responsibility on compensating authorities include:

- *The serious injury claim provisions including service and liability implications as well as not being able to commute future care and support needs;*

- *The requirement to comply with the service standards set out in Schedule 5 and the requirements placed on insurers in Section 13 of the Act'.*

Fact:

The compensating authority had the responsibility to provide medical and like services to an injured worker for life under the *Worker's Rehabilitation & Compensation Act* ("WR&C Act")

Nothing has changed in that regard for those workers categorised as "seriously injured" save that they cannot redeem their entitlement.

Fact:

Self-insurers had to comply with service standards under the WR&C Act and as a cohort are acknowledged by the Deputy Premier and CEO of RTWSA to perform well and in fact is "more impressive"

In an appearance before the House of Assembly Estimates Committee the Deputy Premier, John Rau had this to say:

'One of the things that I found very interesting in this exercise is – bearing in mind that we are

not necessarily comparing exactly apples with apples, because the cohort of employers that are the self-insured cohorts tend to be the larger, more sophisticated employers than the employers that are in the Scheme. However, even if you take that into account, it is clear, at least anecdotally, that the overall performance of the self-insureds in respect of exactly the same statutory framework, as you quite rightly say, is more impressive.

More of a point, the single most significant difference I have been able to ascertain from my looking at the problem is the effective personal attention they give to individual claimants

I do not think that there is much doubt that the self-insureds as a cohort – I'm not talking about every single one of them, but as a cohort – have had a pretty significant focus on that early intervention model, and many of them have dedicated return to work programs and staff on their payroll, whose job it is to quickly identify and assist an individual employee who becomes injured in the course of their employment'.

At the same hearing in June 2013 Mr McCarthy, CEO of RTWSA had this to say on the subject:

'There is no doubt that we have got a lot to learn from self-insurers and, whilst we do have a role as a regulator to oversee that the self-insurers comply with the legislation, there is also a lot of learning that we gather from those self-insurers.

There is no doubt that the learning that comes from self-insurers is essentially that good or best practice outcomes for worker's compensation management get driven from the workplace. There is some great learning that comes from that; the challenge is how do you model that and drive that into workplaces in this State that do not have the internal capacity to do that? That is a challenge that we are endeavouring to meet and it is a challenge that we will take on over the next period of endeavouring to bring this Scheme under control. So, I agree with you – there is a lot to be learnt from self-insurers and we are endeavouring to do that'.

The published reasons for the changes don't stack up!

The 'obligations bestowed on compensating authorities' are not more significant than ever before. The only change that could be said to be more onerous is the removal of the ability of the compensating authority to redeem the entitlement to future medical expenses of a "seriously injured worker". It is important to recognise that under the WR&C Act an agreement to redeem future medical expenses was just that – an agreement. An injured worker could never be forced to redeem that entitlement.

This initiative by Return to Work SA, will further reduce business confidence, increase unemployment and detract from the attractiveness of doing business in the State.

The requirement to comply with service standards has, similarly, always been there and as the Deputy Premier Rau and Mr McCarthy publicly acknowledged before the Estimates Committee, the plain fact is that self-insurers as a cohort have consistently outperformed the Scheme. It should also be pointed out that self-insured employers are consistently subject to

audit by RTWSA and if found to breach service standards in a material way can be subject to restrictions on renewal period with the ultimate sanction being the revocation of the self-insured licence.

South Australia has a long and proud history of self-insurers in the various Schemes. It has the highest proportion of selfinsurers of any jurisdiction in Australia but that is partially explained because it includes the South Australian Government which represents about half of the self-insured community but for which RTWSA is **not** the insurer of last resort. It is a rare occurrence for a self-insured employer to become insolvent. The existent safeguards for the Scheme are as good as, or better than, any other Scheme in Australia.

In attempting to achieve the dramatic increase in employee numbers required to achieve self-insurance RTWSA assert that:

'Smaller self-insured businesses often find themselves maintaining system based approaches to meet self-insurance obligations alone and at times find it difficult to justify employment of people with the expertise to continuously manage WHS and injury



management systems at the standard required. This becomes apparent during evaluations and in instances where standards have dropped in and around departure of key people. This demonstrates an exposure that smaller businesses may have in being a single point sensitive to maintain their systems’.

This is a broad statement unaccompanied by fact. Numbers alone are irrelevant. Some of the smallest self-insured businesses in fact have the highest standards.

Trust and confidence in the business environment is essential for a business to thrive. Premier Jay Weatherill recently told 5AA radio listeners that:

‘People are addicted to pessimism in South Australia’.

‘I think we’ve got to stop making excuses about why we’re not actually generating jobs and activity in this State one of it is about confidence. We need to actually have a far more positive view’.

Kicking the very cohort of self-insurers which are the backbone of the economy in South Australia and which outperforms the Scheme on every measure is a strange way of inspiring confidence!

It is said by RTWSA that:

‘There are no known or expected adverse impacts on workers associated with the proposed change in policy’.

If injured workers moving from a best performance environment to one which receives constant criticism when it comes to case management is not an adverse impact then I don’t know what is.

Why the Changes?

The supposed rationale for the changes does not stack up and I suggest that the real reason is to make the Scheme more attractive for privatisation. The recently privatised CTP Scheme delivered a massive \$355,000,000 surplus in the midyear budget review handed down by Treasurer Koutsantonis in December last year. I expect Treasurer Koutsantonis to be banking on a similar windfall with the privatisation of the Scheme.

In giving evidence to the House of Assembly Estimates Committee last year Mr McCarthy was asked:

'Do you envisage that, for example, there could be a flurry of self-insured employers returning to your Scheme, and is that something you are actively seeking?'

In answer Mr McCarthy had this to say:

'It is interesting that you say that. We have got a number, and I mean a number, of what I would call the smaller self-insureds. There are some people who, in size, would just naturally be self-insureds. The Scheme is quite unique in that it has a very, very high number of self-insureds compared to other jurisdictions around Australia.

There are many selfinsureds in this Scheme who, if it were not for the way in which the Scheme has performed in the past, you would wonder why they would be self-insured.

I can say to you that a good number, and I mean a good number, of self-insured employers have approached us to help them understand what coming back

to the Scheme might mean for them. They are not the large ones, they are certainly not the ones who employ a couple of thousand people, but the ones who employ one to 300 people certainly are looking'.

In answer to the same question the Deputy Premier said:

'Can I just mention there, too, that there are a couple of factors that might lead some of those employers to consider doing that? One of the factors of course is that the Scheme is performing better and the cost of the Scheme to the employer is better. I think some people are looking at that and saying may be that is competitive from a business point of view.

The second thing is that, if you are outside the Scheme, you are still responsible for the long term care of people who are severely injured. With people who are severely injured and are over 30% WPI assessed, if you are outside the Scheme, they remain your responsibility indefinitely, whereas if you are in the Scheme then they are the Scheme's responsibility. If you are very large like Coles and Woolworths

or somebody, that is possibly not a big issue but, at some point in time, depending on the nature of the industry I suppose, people may consider whether or not it is better not to have that risk potentially on their books'.

It is no secret that Mr McCarthy has been actively promoting a return to the Scheme with a number of self-insureds and being quite open about negotiating on premium. The carrot hasn't worked and so the baseball bat is to be employed.

The fact is there has not been, 'a flurry of self-insured employers' returning to the Scheme. Not one has returned to the Scheme whilst more than a handful are currently working towards attaining a grant of self-insurance. This fact speaks more eloquently of the advantages in an holistic sense of managing your own workforce and not being subject to the capricious changes in policy and direction by the Worker's Compensation Regulator in this State.

A Sensis study released in late January reported business confidence in South Australia as the lowest in the nation. This initiative by Return to Work SA, will further reduce business confidence, increase unemployment and detract from the attractiveness of doing business in the State.

The additional financial cost of paying premium beyond the actual cost of claims will mean that money is not reinvested to achieve growth and stimulate employment.

Similarly, I expect some of the self-insured employers in the manufacturing industry will seek to move their operations offshore or accelerate that process with consequential job losses.

The Government should make it abundantly clear to the Board that the proposed changes should not be made and, on the contrary, self-insurance should be encouraged as a way of improving the performance of those companies capable of fulfilling the current criteria. The state as a whole benefits from business' being encouraged to continuously improve performance.

South Australia - "open for business" ?

For further information in relation to the proposed changes to the policy on Self Insurance please contact John Walsh at DW Fox Tucker Lawyers.

Contact details can be found on the DW Fox Tucker website at

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