October 2015

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Special Report

WORKERS COMPENSATION & SELF INSURANCE

Return to Work SA Update
(The upside and the downside)

By John Walsh

In mid-September Return to Work SA released the 2014-15 figures which show an improved scheme financial and return to work performance

Finance

The funding ratio has improved to 114.3% with $370,000,000 in net assets which is a dramatic improvement from the $1.132 billion liability in June 2014.

The improvement is largely a result of the 'one off impact' of the Government's legislative reforms ($992,000,000) but there is continuing improvement in return to work outcomes and claims management performance ($426,000,000) all of which has been underpinned by strong investment return ($228,000,000).

The Return to Work SA management team under Greg McCarthy, aided by the Government's legislative reforms, have brought about an outstanding turnaround in a previously troubled scheme which has allowed the average premium rate for South Australian business to reduce to 1.95%, the lowest in the history of the scheme.

The Government trumpets that, 'this represents a saving of $180,000,000 for South Australian businesses'.

The question remains whether the improvement can be sustained.

Industrial Relations Minister John Rau in a media release which accompanied the release of the 2014-15 figures by the Board was rightly understated in his response:

> *'While this is a pleasing result and I am cautiously optimistic this trend will continue, it would be prudent to wait for further data before determining what this will mean for the scheme long term'.*

The Corporation has consistently delivered good investment results but the Chairman Ms Jane Yuile correctly points out that:

> *'The volatile investment market remains a significant risk to our financial performance'.*

Performance

There has been a pleasing consistent reduction in people requiring income support at two weeks, 13 weeks, 26 weeks and 52 weeks over the last three financial years and there is no obvious reason why that trend should not continue or at least stabilise.

Similarly, there has been a reduction in the number of disputes being lodged in the new South Australian Employment Tribunal ("SAET") but that is normally the case after a major change and disputation can be expected to increase as parties become aware of new rights and responsibilities.

It should be remembered that disputation is not necessarily a bad thing as a degree of tension is desirable in any no fault Scheme to minimise potential for parties to take advantage of the Scheme.

The ATO – Out Of The Blue

There is, one significant factor which has recently emerged and probably taken everybody by surprise that has the potential to increase claims costs to a significant degree when parties are negotiating a redemption of all future entitlements.

Redemptions over the years have been the lever of choice for the Corporation to achieve actuarial release by removing long term claimants from the scheme with a one off lump sum payment. Those payments have been characterised as lump sum payments for loss of earning capacity rather than lump sum payments as replacement of weekly income maintenance. As such they have not been taxable in the hands of the recipient, the injured worker, and the settlement amount has been negotiated on that basis.

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The ATO has recently released a position paper on the assessability of lump sum redemption amounts paid under the *Return to Work Act 2014 (SA) ("RTW Act")*. It is proposed that a lump sum received by a worker under Section 53 of the *RTW Act* on redemption of the worker's right to receive weekly payments be regarded as ordinary income and included in the worker's assessable income unless characterised as an 'employment termination payment'.

The wording of the relevant provisions in the *RTW Act* mirrors that of the equivalent provision in the *Worker's Rehabilitation & Compensation Act 1986* in that the liability to make weekly payments and/or payments for medical services can, by agreement, 'be redeemed by a capital payment to the worker'.

On its face then it is reasonable to pose the question of why the character of such payments is now considered by the ATO to represent a replacement of the income that would otherwise be derived in the form of weekly payments rather than, as has previously been the case, characterised as a capital payment for a loss of earning capacity.

Those employers who are diligent about improving work health and safety and claims performance will be advantaged.

In fact it is more difficult to argue that the capital payment is a payment reflective of a loss of earning capacity rather than a replacement of the income that would otherwise be derived in the form of weekly payments when:

(a) the liability to pay weekly payments is now known and capped at 104 weeks; and

(b) unlike the *Worker's Rehabilitation & Compensation Act 1986* there is now specific provision in the *RTW Act* for lump sum compensation for economic loss. Section 56 of the *RTW Act* provides that:

> '(i) Subject to this Act, if a worker, other than a seriously injured worker, suffers a work injury resulting in permanent impairment as assessed under Part 2 Division 5, the worker is entitled (in addition to any entitlement apart from this Section) **to compensation for loss of future earning capacity by way of a lump sum'** (my emphasis); and

(c) the *RTW Act* separately provides for redemption of liabilities associated with weekly payments (Section 53) and redemptions of liabilities associated with medical services (Section 54).

The ATO position paper is just that, a position paper, and it is not a ruling but I do not think there is any doubt that the principles outlined in the position paper are correct and as would normally be the case this position paper will precede a ruling to that effect.

The effect of the ruling will be simply to increase the amount that would otherwise be paid as a redemption by the amount of tax payable on the lump sum.

Employment For Life?

One of the 'known unknowns' in the RTW Act is the employer's duty to provide work pursuant to Section 18 of the Act which goes much further than its predecessor, Section 58B, of the *Worker's Rehabilitation & Compensation Act*.

Firstly, there is no exemption from its provisions where a worker has been dismissed for serious and wilful misconduct and, secondly, and importantly, it provides

an avenue for an injured worker to make application to the South Australian Employment Tribunal (**'SAET'**) for an order that an employer provide suitable employment if the Tribunal is satisfied that it is not unreasonable for the employer to provide employment to the worker.

It could be argued that the provision is not at all unreasonable if the application of the provision is restricted to the period of 104 weeks during which the injured worker has an entitlement to weekly payments. The problem is, however, the right to make the application is open ended and we will not know with any certainty for quite some time whether the right to apply is indeed open ended or restricted to the period of 104 weeks. In the meantime the prospect of Section 18 giving rise to the concept of 'employment for life' and employer obligations extending beyond 104 weeks is causing considerable consternation amongst the employer community.

Federal Minimum Wage Safety Net – Watering Down Of The Step Down Provisions?

Section 42 of the *RTW Act* introduces a concept that has the potential to ameliorate the effect of the step down provisions of the Act. The concept also has the potential to cause considerable difficulty in calculating the entitlement to income maintenance on a weekly basis where the injured worker has returned to work but the level of income support fluctuates because of the nature of the condition or the consistent availability of hours and suitable duties.

For the first 52 weeks it is not a problem because the worker is entitled to weekly payments equal to the worker's notional weekly earnings but after the end of that period the worker is entitled to weekly payments equal to 80% of the worker's notional weekly earnings.

Section 42 relevantly provides that:

> *'(i) Despite the preceding sections in this sub division, if the combined amount that a worker would receive in respect of any incapacity for work in any week applying under any such section would result in the worker receiving less than the federal minimum wage (adjusted in the case of a worker who was working at the relevant date on a part time basis so as to provide a pro rata payment), the amount of compensation payable under this sub division will be increased so that the combined amount equals the federal minimum wage (or, if relevant, the federal minimum wage as so adjusted).*

What that appears to mean is that if the combined amount of the worker's earnings in suitable employment and the 'top up' payment at 80% is less than the federal minimum wage the amount of the 'top up' payment must be adjusted and increased so that the worker receives the equivalent of the federal minimum wage. In those cases (for instance in retail) where modest earnings mean that notional weekly earnings are set at a little above the federal minimum wage the impact of the step down to 80% after 52 weeks will be ameliorated or virtually eliminated.

The provision will make it difficult to calculate the entitlement on a weekly basis as hours fluctuate for whatever reason.

Summary

It is early days yet and the scheme is heading in the right direction but there will be interesting times as we grapple with the uncertainties associated with some of the known unknowns and as further unknown unknowns reveal themselves.

Employers in high risk industry sectors should not become complacent because of the capping of premiums at 7.5% because the cap is only in place for the 2015-16 year and over the subsequent four years will be raised in equal instalments. The industry sectors at risk include meat processing, manufacturing and building and construction. Those employers who are diligent about improving work health and safety and claims performance will be advantaged but those that are complacent and have a poor claims history can expect to pay for their complacency.

For further information or for assistance with Employment/S18 issues and the provision of suitable duties please contact Ben Duggan, John Walsh and Patrick Walsh and in relation to the RTW Act generally please contact John Walsh, Caroline Knight and Patrick Walsh. Contact details can be found on the DW Fox Tucker website at www.dwfoxtucker.com.au

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