

# Special Report

WORKERS COMPENSATION & SELF INSURANCE

## Mad March in Adelaide The Review and the Election

By John Walsh

The State Election in March is shaping up to be the most interesting and unusual election in decades.

We can expect the election to be fought and the news cycle to be dominated by the big ticket items:

- power prices;
- the economy;
- unemployment; and
- health system.

And just to add spice to the mix we have the intriguing prospect of a current or former minister(s) being named and criticised by Independent Commissioner against Crime and Corruption Bruce Lander when he delivers his report into the Oakden Nursing Home on or before 28 February.

### Workers compensation

Few people will consider what the election result will mean to workers compensation, but for those of us in the industry the result could have far-reaching consequences because the timing of the election coincides with the mandated review of the *Return to Work Act 2014* ("RTW Act") which ushered in a complete overhaul of the system which Deputy Premier, and Minister for Industrial Relations John Rau famously described as "*buggered*".

### Labor win

If the Labor Government is returned, expect a renewed effort to relinquish self-insurance for the Public Service and the transfer of Public Service workers compensation claims administration to Return to Work SA (RTWSA) and probably loosening the limits on the benefit structure to address Union concerns.

Although last year attempting to justify the (ultimately unsuccessful) movement of the public sector claims to RTWSA on the basis of "*greater consistency and transparency*", there can be little doubt that the case for relinquishing self-insurance and RTWSA taking over the management of the public sector claims does not stack up. I have previously asserted (reference [2/12/16](#) and [19/1/17](#) articles) that the only possible justification for the move can be to increase the size of the scheme sufficiently to make it attractive for privatisation. There would, of course, also be the side benefit for the Government of reducing the size of the public sector by the approximately 150 people employed to manage claims in the Public Service.

The real reason for privatisation is because there is money in it!

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Witness the following privatisations under Labor and their value:

- Forestry SA privatised in 2012 for \$670 million;
- SA Lotteries privatised in 2012 for \$427 million;
- MAC privatised in 2014 for \$2 billion plus;
- Lands Titles Office privatised in 2017 for \$1.6 billion.

The trend of selling off highly profitable public assets has been well-established under this Labor Government.

The Return to Work Scheme is arguably no more “*core business*” for the Government than the MAC and could provide a similar windfall if the scheme were to be privatised. A windfall that would provide the funds for a big spending Labor Government.

#### Liberal win

If the Liberals win Government in their own right, expect a steady as she goes approach as I suspect they will have other priorities and will adopt the pragmatic approach of waiting to see how the Scheme progresses. It is still early days in the Scheme and there remain “known unknowns” that could seriously impact the viability of the Scheme.

One Decision in particular, *Mitchell*, has the potential to return the scheme to unfunded liability territory! More about that later in this article.

#### SA-Best win or balance of power

If SA Best achieves the stated aim of having the balance of power, it is difficult to know what will happen because SA Best has so far been a “*policy-free zone*” and its charter is reminiscent of Don Chipps, Australian Democrats, who sought to “*keep the bastards honest*”.

#### What are the issues faced by the industry?

The number 1 critical issue is the viability of the scheme. In making a statement to the House of Assembly on 14 November 2017, Deputy Premier Rau introduced the review of the administration and operation of the RTW Act. In doing so he proudly asserted that it had “*already delivered significant benefits for South Australians*”. *It is a scheme that is 120% funded and supports workers to recover and return to work in a safe, durable and timely manner. Return to work outcomes have improved significantly.*”

While a “significant” improvement in return to work outcomes may, on the published figures, be justifiable, the big issue is whether the scheme will continue to be fully funded. There are matters of interpretation of the RTW Act to be determined by the Supreme Court that have the potential to plunge the scheme back into unfunded territory with the necessary consequence of a significant jump in the average premium rate.

#### Mitchell

*“This case relates to combining side effects from medication with the permanent consequences of the initial work injury for the purposes of calculating whole person impairment (WPI). The Full Bench of the SAET found that an initial back injury attracting a WPI of 26% could be combined with impairments associated with side effects of certain medications – resulting in a combined WPI of 70%”.*

RTWSA reports that, “*At RTWSA’s request, Finity assessed the claims liability impact if the Mitchell decision were to be maintained on appeal to the Supreme Court. The impact on claims liability ranges between \$166 million and \$570 million, and the potential impact on the average premium rate ranges from an increase of 0.16% to an increase of 0.58%. To be clear, the latter would result in an average premium rate of 2.35% for South Australia (compared to the current 1.80%)*”.

It can be reasonably argued that the whole WPI assessment process is flawed because under the Guidelines, the injured worker can choose their assessor and “*the bulk of assessments are done by a small group of assessors (1,524 out of a total of 3,443 assessments have been completed by 6 assessors since 1 July 2015)*”.

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RTWSA says that “there is significant involvement from lawyers in the WPI process, including advising workers which assessor to select.” The latter comment is a bit rich when you consider that the Impairment Assessment Guidelines under the RTW Act mandate (albeit in a qualified way) that the worker can choose the assessor. The representative of the worker would be remiss in not advising the worker to choose an assessor who appears to be generous. The problem does not lie with the lawyers who act in the best interests of their clients but with the Legislation!

Li

This matter deals with an appeal from the rejection of a claim for compensation for an injury found to consist of an illness or disorder of the mind. At first instance SAET found the employment was a substantial cause of the injury, but that the claim was defeated by the existence of the disqualifying circumstances described in Section 30A(b)(1) of the *Workers Rehabilitation & Compensation Act 1986*. The Full Bench of SAET allowed the appeal and found that the injury was compensable on the basis that, “*Even if the workplace causal factors predominantly comprised of potentially disqualifying actions of the employer, the claim is to be accepted if the worker establishes that the injury did not arise wholly or predominantly from those potentially disqualifying workplace causal factors*”.

Although this decision dealt with a determination made under the *Workers Rehabilitation & Compensation Act 1986*, it would impact upon the manner in which psychological injury claims are determined under the RTW Act and likely, if the appeal fails, undermine the intention of the RTW Act to limit compensability for psychological injury claims to those where employment is **the** significant contributing cause. RTWSA’s actuary has assessed that the *Li* decision, if upheld:

*“Will have a very significant financial impact on the scheme, in relation to both current claims liabilities and future premium rates”.*

There are other cases on appeal to the Supreme Court which have the potential to impact adversely on the scheme although, to a lesser extent. The decision of *Robinson* on its face would only have a modest detrimental effect if the appeal by RTWSA was unsuccessful. The decision provides that in circumstances where an injured worker has redeemed the future entitlement to weekly payments the amount of the weekly payment the injured worker is taken to be receiving cannot be so high as to disentitle the injured worker to continue to receive weekly payments of compensation at or above the Federal minimum wage. The hidden danger, however, is if the Supreme Court in determining the appeal revisits the whole basis of a redemption payment which has

been well settled since the decision of *Tsimpinos* in 2001.

Similarly, the result of the appeals in *Brealy* and *Rullo* have the potential to widen the “gateway” to compensability to make it clear that a significant contribution from employment only applies to the original injury and does not apply to any subsequent consequential injury for instance where an aggravation of the original injury occurs outside of employment and while the injured worker is conducting some sort of non-work related activity.

Parliamentary Committee on Occupational Safety, Rehabilitation & Compensation

The Parliamentary Committee has released its report into the Return to Work Act and Scheme and it too will no doubt find its way into the deliberations of the Honourable John Mansfield (AM QC) who is to conduct the independent review of the administration and operation of the RTW Act.

Many of the recommendations made by the Committee seem to be uncontentious, however, there are some which, if adopted, would seriously impact upon the viability of the scheme:

- **Recommendation 2**

The Committee recommends the Minister for Industrial Relations amend Section 7(1)(2)(b)(i) of the *Return to Work Act 2014*, replacing “**the significant cause**” with “**a significant cause**”.

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If this recommendation were to be accepted, there would be an increase in the number of compensable psychiatric injury claims and, combined with Recommendation 16 which recommends that the Minister, “consider amending the Return to Work Act 2014 to allow workers with a psychiatric injury to receive payments for economic loss and non-economic loss similar to those who suffer physical injuries” would substantially increase costs in the scheme and negatively impact the viability of the scheme.

• **Recommendation 4**

The Committee recommends the Minister for Industrial Relations consider the inclusion of a narrative test to supplement the already prescribed whole person impairment assessment processes.

Adoption of this recommendation would undoubtedly increase costs in the scheme by inflating whole person impairment assessments because the narrative test is inherently subjective. The inflation of whole person impairment assessments would flow through to the numbers of people who are categorised as seriously injured workers under the RTW Act. The number of people so categorised is already of concern and any increase will affect the viability of the Scheme.

• **Recommendation 5**

The Committee recommends broadening the coverage of medical expenses, “so there will be no time limit for the coverage of:

- reasonable costs associated with medication; or
- treatment for which there is evidence that the treatment is required to maintain a worker to remain at work.”

Adoption of this recommendation would encourage the already over-prescription of opioid-based drugs which has reached epidemic proportions in the United States where opioids are the leading killer of Americans under the age of 50 years. Over prescription is rapidly assuming the same significance in Australia with disastrous effects for those for whom it has been prescribed in very many cases.

The Sydney Morning Herald reported on [24/7/17](#) that “more Australians are dying from accidental opioid overdoses each year with prescription painkillers rather than heroin now accounting for two thirds of the fatalities. The death, rate has more than doubled among addicts between 35 and 44 since 2007 and is expected to keep climbing”.

Statistics reveal that there has been a fourfold increase in the prescribing of these drugs between 1990 and

2014, particularly for OxyContin, Tramadol and Fentanyl.

Similarly, the recommendations, if accepted, would encourage ongoing physiotherapy and other treatment modalities which have little or no therapeutic benefit but are expensive. Nationally there is a worrying increase in arthroscopic and joint replacement surgery which is said to be growing “at an unsustainable rate and 25 percent of (joint replacement) operations are inappropriate”. ([Financial Review 7/02/18](#))

**Lump sum for economic loss**

There is a sleeping issue which will also adversely affect the viability of the Scheme as time goes on. The RTW Act introduced an additional income entitlement for workers injured at work over and above weekly payments, medical expenses and a lump sum to compensate for the permanent impact of a physical injury. The RTW Act allows for a further lump sum to be paid for the economic impact of the injury and is available for those workers who have been assessed as having a whole person impairment within the range of 5-29% (excluding psychiatric and noise-induced hearing loss claims). It is still early days in the scheme and there have been, in my experience, only a comparatively few payments of the economic lump sum but, as time goes by and those workers injured since the inception of the RTW Act reach stability they will claim their entitlement to the economic loss lump sum.

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## The politics

With all of these factors in play, the politics becomes really interesting because recent events suggest that Labor is moving to the left both federally and now in South Australia. Bill Shorten is busily trying to shore up the Labor vote in Batman following the resignation of David Feeney and is seeking to undermine the vote for the Greens by opposing (at this stage) the Adani mine in Queensland because of the potential impact upon the Great Barrier Reef.

In South Australia we have quietly seen a further shift to the left, which could be interpreted as an encouragement to the CFMEU to move away from the Greens and back to supporting Labor.

The Advertiser on 3 February 2018 reported that CFMEU SA State Secretary Aaron Cartledge described the workers compensation system as being “*worse than when (Labor) got in*” and a lack of prosecution over worker deaths on major projects had left members “disillusioned” with the ALP and looking at the Greens and SA Best ahead of the State election.

On 6 May 2015 the Honourable Tammy Franks MLC (Greens) moved to introduce the Work Health & Safety (Industrial Manslaughter) Amendment Bill to provide stronger penalties for employers and corporations whose work practices result in the death of a worker.

There had been a previous private members’ bill that sought to

introduce the offense of industrial manslaughter to the statute book. The first was in 2004 when it was introduced by Nick Xenophon.

The second amendment bill introduced in May 2015 by Tammy Franks was referred to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation on 11 November 2016 and, after receiving a number of submissions, the Committee determined that there were already adequate legal safeguards in place to address the consequences of workplace deaths and the new offence of industrial manslaughter was unnecessary. The Government publicly agreed with this conclusion and did not support the passage of the bill. Relatively quietly in the last couple of weeks, the Government has indicated that, if returned to power it will introduce a bill to create the offense of industrial manslaughter. We can expect that such a bill would attract the support of the Greens and SA Best and be applauded by the CFMEU!

Similarly, it was recently reported that the Premier has held open the possibility of a High Court action to stop a national nuclear waste dump in South Australia. The Government’s opposition to any further involvement in the nuclear fuel cycle including waste repositories is a considerable back flip, having championed a proposal for South Australia to build a permanent facility to house the world’s high level nuclear waste!

We should not doubt the capacity of the Government to do whatever deal is required to remain in power. Going back to the days of Peter Lewis through to Geoff Brock, Labor has shown a remarkable ability to accommodate politicians of other persuasions who are prepared to work with them. If SA Best has the balance of power, their influence will be paramount and although Nick Xenophon has a strong background and interest in personal injury and workers compensation, who knows whether he will be a moderating influence or encourage amendments that lead to greater benefits flowing to injured workers through easing restrictions on compensability and introducing lump sum payments for psychiatric injury. I suspect that he will support such amendments.

We do indeed live in interesting times!

Watch this space as we move into mad March!



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