Article

Workers Compensation & Self Insurance

Workers Compensation in South Australia: Has Malinauskas Kicked an Own Goal?

By John Walsh

We all know how much Peter Malinauskas loves sport as he has succeeded in bringing back the Adelaide 500, winning the Gather Round for the next couple of years and LIV Golf, but has he kicked an own goal, to take the sporting metaphor further, with his proposed amendments to the *Return to Work 2014 Act* (SA) **[the RTW Act]** and in particular Section 18 of the RTW Act.

Broadly speaking, the Section 18 Amendment Bill proposed by the Government will make a range of significant changes to the manner in which the RTW Act operates. It includes:

1. provisions that facilitate claims for workers suffering certain conditions;
2. grounds to reject a request for suitable employment;
3. the requirement to consider certain factors in determining whether it is reasonably practicable for an employer to provide suitable employment;
4. labour-hire requirements;
5. right to request suitable employment after recovering from an injury;
6. new Tribunal powers;
7. costs;
8. new jurisdiction for monetary claims; and
9. impairment assessments for terminally ill workers.

Some of the proposed amendments are sensible and should be passed, namely those relating to costs and impairment assessments for terminally ill workers. Others, however, have the potential to do significant damage by unnecessarily increasing litigation in the South Australian Employment Tribunal and adding a financial burden to businesses generally in the State.

Why do the proposed amendments matter?

The suggested amendments, apart from those relating to costs and impairment assessments for terminally ill workers, will create more disputes and have unintended consequences which will add costs to the scheme and individual employers. They will adversely affect self-insureds, particularly those with multiple sites, and there will be a negative impact on the labour-hire industry.

The South Australian scheme as it currently exists has been operating relatively well in recent times with good guidance from the management of Return to Work SA, unlike the schemes in Victoria and New South Wales in particular.

The Advertiser, on Thursday, 7 September 2023, reported that:

> *"South Australia's economy has recorded the highest growth in the country, according to Australian Bureau of Statistics figures released on Wednesday.*

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SA's State Final Demand grew by 1.3% to 1.7% in the June quarter, putting SA at the top of the list in line with Queensland and above the national growth rate of 0.7%....

State Final Demand reflects consumption on goods and services, including imports, and capital investment.

Last week, South Australia recorded the strongest retail turnover of all the states, as well as the strongest growth in new home sales of any state."

In the same paper, the Advertiser reported that:

"*The Malinauskas Government has launched an advertising blitz highlighting Victoria's exorbitant business taxes in a bid to lure firms here.*"

The daring campaign to poach Victorian businesses was recently launched by SA Labor, with ads running in major Melbourne media.

Using the tag "Business is Better in SA", the ad spruiks South Australia's lower fees, payroll tax reprieves and premium office space that is "37% cheaper than Melbourne".

In the same article, it was reported that:

"Premier Daniel Andrews' move to hike taxes in May, including raising payroll tax, land tax and WorkCover premiums, has previously been panned."

Tim Piper, the Victorian Head of the National Association of Employers, AI Group, warned the 'sting in costs' in the budget could drive investors interstate.

"The Government has made a considered decision to saddle businesses with significant extra costs that can only make the cost of doing business in the state much higher," he had said.

The Australian Financial Review in July 2023 reported that:

"The State of Victoria has come out of the pandemic – and public spending habits that long predated COVID-19 – with the deepest debts, the highest taxes, and the weakest credit rating of any State;"

It was further reported that "the new business levies will hit companies with as few as 100 staff, including aspiring start-ups."

This commentary in relation to the parlous state of the Victorian economy is not unexpected. In June last year, the Australian reported that:

"A sharp rise in public sector costs is helping drive the dysfunction in Victoria's workers compensation scheme, with a confidential report also warning that premiums have been too low for many years. Victoria's WorkSafe Board received a paper on the financial sustainability of the scheme at the start of last year which outlined how public sector annual costs had doubled over five years."

The report has never been made public, but the Andrews Government had rejected higher premiums as it prepared to fight the election in November last year.

We now know that Victoria's premium rate will rise from 1.27% to 1.8%.

The Auditor General's Report for the 2019-20 financial year found outstanding insurance claims liability increased by $4.6 billion, or 11.7%, over the year to $44.1 billion as of 30 June 2020.

Nearly 12 months later, the Auditor General's Report was referred to by a Victorian State Government spokeswoman who said that Victoria's WorkCover scheme is "fundamentally broken", and it was revealed that WorkCover's claims liability had tripled since 2010 and was mainly driven by the increased cost of weekly income support. It was revealed that the gap between the annual cost of claims and premiums collected had resulted in an annual premium deficit of $1.1 billion and growing!

The spokeswoman went on to say that, "*The WorkCover scheme is fundamentally broken. The scheme is no longer fit for purpose and does not meet the modern needs of those it was originally designed*

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to assist more than 30 years ago...the Victorian Government is working with business and worker stakeholder groups to look at all options and take urgent action to continue the ongoing sustainability of the Work Safe Program.

…Our priority is helping people get back to work after an injury – and ensuring the sustainability of the scheme so every Victorian has the opportunity to return to the workforce after an injury.…Payouts for mental injury claims were one of the most significant factors leading to the scheme's adverse performance".

Contrast the Victorian WorkCover Scheme, which is fundamentally broken with the operation of the Scheme in South Australia.

It appears that mental injury claims in the Victorian Scheme accounted for more than 15% of claims in 2021-22, which was about 13% more than the previous year, according to Work Safe's annual report.

The annual report forecast that in 2022-23, 50% of all weekly income support paid by the WorkCover Scheme to injured workers was expected to be for mental injury claims. This is in stark contrast to the performance of the Return to Work Scheme in South Australia, where mental injury claims have minimal impact in the State. In fact, the only cohort of claims to have increased in South Australia are those related to noise-induced hearing loss.

Again, the Return to Work figures in South Australia are exceptionally good and much better than those achieved in Victoria. 80% of South Australian workers who are injured in the workplace return to work within 13 weeks, and 96.7% return to work within 26 weeks.

The situation is so dire in Victoria that the Government is considering blocking some mental health claims. Earlier this year, it was reported that workers compensation for mental health injuries could be restricted to post-traumatic stress disorder and exclude bullying and harassment. In contrast to the situation in South Australia, the increase in mental injury claims is such that they make up 16% of all WorkCover claims in Victoria and are rising by about 3.5% each year.

The Victorian Government, in delivering their budget in May 2023 revealed that, amongst other things, a "*COVID debt levy*" will come into operation and will remain in place until 2033. The Government expects the tax will raise $8.6 billion over the next four years.

Businesses with a national payroll of more than $10 million will pay an additional payroll tax of 0.5%, or 1%, if their national payroll exceeds $100 million. It is expected that the payroll increase would affect about 5% of Victorian businesses. In introducing the budget, the Treasurer had this to say:

> "*We think big business has the capacity to make a modest additional contribution over the next 10 years to assist in repaying the COVID debt.*"

Amongst those who were commenting adversely about the budget (but more particularly the WorkCover hike) were Victorian labour-hire firms who warned that Victoria could lose more **teachers** and **nurses** after WorkCover fees more than doubled on 1 July, exacerbating cost pressures in some industries with the possible knock-on effects for household budgets.

Australia's peak body for the labour-hire industry sounded the alarm and called on the Andrews Government to justify the increase, which it said would "*take away employment opportunities for Victorians*".

Apparently, Recruitment Consulting and Staffing Associate Chief Executive Charles Cameron, in a letter to Work Safe Minister Danny Pearson, claimed that the sector suspected workers compensation claims were being incorrectly attributed to labour hire services instead of the industries in which the accidents or injuries occurred.

As a result, Cameron said the industry rate for labour-hire firms – the figure used to calculate WorkCover premiums – had grown from 3.1% of a company's payroll to 7.5% year on year.

"*In the middle of a crisis around staffing, it seems crazy that we're going to increase premium costs for those who are actually trying to solve the talent shortage,*" he said.

Bayside Group and Acclaimed WorkForce Director Robert Blanche, is reported as saying that the hiked charges would set his two labour-hire companies back a combined $200,000 given he had about 60

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employees, and that is in the context of them not having had a claim in the last 3 years. He said, "*It doesn't make it easy working in Victoria, that's for sure. I've spoken to two other recruitment agencies, and they're now having to think about where they go*".

I understand that various business groups and unions have united to oppose changes to Victoria's workplace compensation scheme after the State Government announced premiums paid by businesses would rise from 1.27% to 1.8%, and when you add WorkCover premium increases to a new hike in payroll tax for medium and large businesses in Victoria, the question is whether Victoria is actually open for business.

Advantage South Australia?

We have some significant advantages if we want to entice much-needed teachers, nurses and other trades and businesses. Those advantages are:

- in South Australia, the economy is reasonably stable;
- housing is still low cost by comparison with that in Victoria;
- lifestyle and climate are attractive;
- the general economic outlook in South Australia is more positive by far than Victoria, due in part to the likely increase in employment numbers due to an expectation of increased defence-related work; and
- our Return to Work scheme is stable, with little prospect of an increase in premium and, importantly, good return to work rates.

The environment, coupled with a supportive approach to self-insurance under the management of Michael Francis, CEO of Return to Work SA, is one which must be attractive to large organisations now based in Victoria. The outstanding performance of self-insurers in the scheme is another considerable advantage that we have not taken enough benefit from.

As the outgoing manager of Self Insurers of South Australia Inc, Robin Shaw, in the annual report for 2021-22, has said:

> "*We can say with some degree of confidence that serious injury numbers among our private sector members have not been as great a concern as is the case for the rest of the scheme….Large employers are in a better position to offer suitable work as early as possible for those with potentially higher levels of impairment, thus preserving the connection with the workplace; (self-insurers) provide a different model for managing claims from day 1.*"

Why do the proposed amendments for Section 18 matter?

A detailed analysis of the Bill is contained in our Alert published on 17 July 2023[1]. Particular reference should be made to the following:

> *"**The requirement to consider certain factors in determining whether it is reasonably practicable for an employer to provide suitable employment.***
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> *In assessing whether it is reasonably practicable for an employer to provide suitable employment, the Tribunal will, in addition to anything else of relevance, be required to have regard to five factors:*
>
> - *the size of the employer;*
> - *the extent of any adjustments required to the role to accommodate the worker;*
> - *the risk of re-injury and potential for further harm;*
> - *whether the parties can maintain trust and confidence in the employment relationship; and*
> - *the impact on other employees."*

This proposed amendment, on the face of it, is unlikely to result in a substantial change to the manner in

1 https://www.dwfoxtucker.com.au/2023/07/section-18-a-solution-looking-for-a-problem

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which the Tribunal approaches the issue of reasonably practicable. It will require, however, Tribunal members in their written reasons to address each of these issues if the employer relies on subsection 18(2)(a) as a defence to an application for suitable employment.

Right to request suitable employment after recovering from an injury

Workers who have returned to their pre-injury capacity will have a period of 6 months within which to bring an application for suitable employment. This amendment is clearly directed at the decisions of *Roberts v Department for Education* [2021] SAET 56 and *Coleman-Sleep v Return to Work Corporation of South Australia (Ceduna Koonibba Aboriginal Adelaide Health Service*) [2021] SAET 144, in which the Tribunal has stated that Section 18 can only have application if the relevant worker has an incapacity for employment at the time the relevant order is made.

On the face of it, any power to order an employer to provide an employee who is no longer incapacitated for work with their pre-injury role is liable to be invalid if the employer has lawfully terminated the employment relationship.

It is also worth noting His Honour Deputy President Judge Rossi's comments in *Coleman-Sleep* at [222]:

> "*I respectfully agree that it is unlikely that the legislature intended that the expanded obligation upon an employer to provide suitable employment as contemplated by s18, would extend to circumstances where the injured worker had recovered to a point where there was no ongoing incapacity for work. Otherwise s18 would have the effect of providing security of tenure following an incapacity from work injury, no matter how brief the period of incapacity. That would not be consistent with Object 3(2)(c) of the RTW Act to provide a reasonable balance between the interests of workers and the interests of employers.*"

New Tribunal powers

The Section 18 Amendment Bill would confer powers on the Tribunal to:

1. ***Make orders as to the nature of the suitable employment being provided, which will include, amongst other things, the power to order a graduated increase in duties or hours of work.***

Pursuant to Section 97(c), the Tribunal already has the power to review any decision relating to a recovery/return to work plan. In this regard, the proposed power simply extends this to determining an application for suitable employment and provides the Tribunal with greater scope to determine the provision of suitable employment in circumstances where a work injury is not yet stable.

2. ***Order any member of a group of self-insured employers (even if it is not the pre-injury employer) to provide suitable employment.***

With respect to the Crown, the Tribunal would be able to make an order for the provision of suitable employment with any agency or instrumentality of the Crown.

On the face of it, treating the public service as one entity has the potential to create significant issues if there is an expectation that an injured worker can expect suitable employment to be provided in the agency or instrumentality of their choice. Section 18 will still operate on the basis that suitable employment is employment that is the same as or equivalent to the pre-injury employment. As such, it seems likely that the power to treat all agencies and instrumentalities as one employer will only apply if an injured worker's role is replicated within another agency or instrumentality.

On a practical level, the Government will have to carefully consider how the costs associated with rehabilitating an injured worker will be budgeted. Given each department operates under its own budget, there may be some understandable resistance to incurring the cost of rehabilitating an injured worker in circumstances where the worker was injured while employed by an entirely different department. It's unclear whether the Government has consulted with the various agencies and instrumentalities about how this approach might work in practice.

3. ***Take into account any change in capacity for work and any other evidence before the***

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Tribunal in determining suitable employment and is not limited to the type of employment nominated by the worker.

Deputy President Judge Hannon in *Walmsley* at [136] stated, "*…the question is whether an order should be made for specified employment* ***nominated*** *by the applicant*". His Honour's reasons in this regard were adopted by President Justice Dolphin in *Oldman v Department for Education and Child Development* [2018] SAET 225 at [49].

It is important that section 18(3) only requires a worker to nominate the type of employment that they consider they are capable of performing, not the precise role. For example, a worker could seek an administrative role and provide their qualifications and experience.

Such an approach allows the employer to review their available roles and determine whether there is suitable employment of the type nominated by the worker that can be made available to the worker.

In exercising this power, it is unclear whether the Tribunal would also need to take an inquisitorial approach to determine what constitutes suitable employment.

Such a power has the potential to cause delays in litigation if there is a significant change in the injured worker's capacity or position as to what employment is sought. Given that the Tribunal would require evidence to support an order for the provision of employment other than what is set out in the application. Cost and procedural fairness issues will likely arise if there is any significant change in the position as to what constitutes suitable employment after the employer has obtained all of its evidence in preparation for trial.

4. Make an order for back pay in respect of the suitable employment ordered by the Tribunal from the date of the application.

This power appears to be directed at ameliorating the impact of prolonged proceedings on a worker who is not in receipt of weekly payments.

While such an order might seem straightforward in some instances, it seems likely that the order will often be speculative in nature. If, for example, a worker has sought an order for the provision of suitable employment with a graduated increase in hours – is it to be presumed, for the purpose of ordering back pay, that the graduated return to work commenced on the same date as the application? In that case, a further assumption will be required that the worker proceeds through the graduated return to work as expected. Finally, does the worker, having presumed to have successfully progressed through the graduated return to work, then experience a drop in their salary when they actually commence a return to work?

Certainly, this is likely to make an application pursuant to Section 18 of the RTW Act a far more attractive proposition than any of the other avenues open to a worker to seek reinstatement. Bearing in mind that – subject to the operation of Section 106 of the RTW Act – the worker will likely have most, if not all, of the costs paid by the Compensating Authority, the ability to seek an order for back pay in addition to the seeking of an order for suitable employment; it seems likely that Section 18 will become the preferred vehicle to litigate against an employer (as opposed to the Fair Work Act as an example).

5. Determine whether the worker has suffered a work injury within the meaning of the Act, even if that injury has not been the subject of a previous claim for a species of compensation.

In dealing with an application regarding section 25 of the RTW Act, his Honour Deputy President Judge Gilchrist in *Department for Education v Long* [2020] SAET 29 found that it is a pre-condition of the invocation of Section 25 of the RTW Act that there is a 'work injury' within the meaning of the RTW Act.

Presumably, the intention of this proposed amendment is to avoid an application for suitable employment being struck out on the basis that the relevant worker has not previously had a claim accepted by the relevant Compensating Authority or obtained an order from the Tribunal to that effect.

This is likely intended to allow a worker to pursue a claim for suitable employment while also contesting a decision to reject a claim for weekly payments and/or medical and like expenses. The mischief this creates is that should a member of the Tribunal determine that a worker has sustained a work injury, it is hard to see how

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this cannot prejudice any other proceedings on foot in which that is a live issue. Furthermore, should the other proceedings result in a finding that the worker has not suffered a 'work injury', this proposed amendment does not address how such a conflict will be resolved.

There is no doubt that the delay in resolving a disputed claim can (and often does) make rehabilitation from an injury much harder. Determining an application for suitable employment before resolving a disputed claim for weekly payments and/or medical expenses will only create more mischief as an applicant may elect to try and fast-track an application for suitable employment after a claim has been rejected.

Costs

The proposed amendments would clarify the entitlement to costs and make it clear that both the worker and employer are entitled to costs from the Compensating Authority, subject to the ability of the Tribunal to reduce or decline costs contained in subsection 18(9) of the RTW Act.

Labour-hire requirements

Labour-hire workers will be able to request the "host" employer's cooperation in the provision of suitable employment, but it is unclear exactly how the Government proposes to enforce these provisions. Quite understandably, host employers will be concerned about providing suitable employment to injured workers, particularly if those workers are vulnerable to further injury. In this regard, it is important to remember that host employers do not enjoy the protection afforded by Section 66 of the RTW Act and may be the subject of a claim brought at common law for damages.

While the intent of the provisions is clearly to try and ensure a labour-hire worker's right to be provided with suitable employment is not unduly hindered by their employer's inability to control the relevant workplace and who works there, it is difficult to see how these proposed amendments could work in practice. There are a range of reasons why a business will elect to utilise labour-hire, but generally, it is because the business does not require those roles to be performed on a permanent basis. As such, it is hard to see the utility in an order for suitable employment to be provided at a host employer in circumstances where the application has been resisted through to trial.

The alternative would be that the worker makes the application against **both** the employer and the host employer such that the host employer is a party to the proceeding from the beginning. I anticipate, however, that this may be difficult to accommodate from a practical perspective.

The problems associated with the proposed amendments for labour-hire companies will disproportionately affect labour-hire firms. The other amendments, with two exceptions, will increase the cost of doing business in South Australia.

These amendments are being put forward at a time when South Australia's advantages for the business community are becoming apparent. The proposed amendments by the Malinauskas Government will weaken the State's attractiveness to large businesses currently in Victoria looking for a new home because of the increased cost of doing business in Victoria. In that regard, we will have, as a State, kicked an own goal if they pass.

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