

Proposed approach to managing Return to Work Act 2014 cases at hearing and determination



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INTRODUCTION

The enactment of the *Return to Work Act 2014* introduced new challenges to workers compensation litigation in South Australia. Those challenges have seen increasing year on year demand on the resources of the South Australian Employment Tribunal, particularly with regards to the hearing and determination of RTW cases.

In response to concerns relating to increases in the time taken for RTW cases to reach resolution, a growing backlog of such cases at hearing and determination and increasing judicial workloads, I established a working group to consider and design alternative approaches to SAET's management of RTW cases. The members of the working group were Deputy President Judge Brian Gilchrist, Deputy President Judge Mark Calligeros, Commissioner Jodie Carrel, Registrar Leah McLay and Deputy Registrar/Manager Conciliation Services Anne Lindsay.

Meeting on many occasions, the working group considered in detail how workers compensation cases have historically proceeded, what case management issues have arisen, where the pressure points are and how SAET's processes and procedures may be improved. The practices of other courts and tribunals were also analysed and considered. I regularly consulted with the working group as to its progress. After a period of internal consultation, I have approved the working group's proposal as contained in this document. I now intend to embark on a period of external consultation, which will conclude on 25 October 2019. In that period I would be pleased to receive constructive feedback on the proposal. Thereafter, decisions will be made as to the nature and extent of any changes that SAET may make to the way RTW litigation is case managed.



The Honourable Justice Steven Dolphin
President

20 September 2019

THE PROPOSED APPROACH

Key features

- The proposed approach relates to RTW cases only, not other litigation conducted in SAET.
- After conciliation, RTW cases will be allocated to one of two process pathways: docket or standard.
- A docket case will be a matter where the issue of ‘serious injury’ is at the heart of the dispute. These cases will be case managed by a Presidential member in chambers, who will prepare a Litigation Plan and who will go on to hear and determine the case.
- All other cases will be processed as a standard case and will be case managed by the Registry.
- In a standard case, a Litigation Plan will be issued by a Commissioner after the conclusion of the conciliation phase. Before a Pre-Hearing Conference is scheduled, a Certificate of Readiness with the Litigation Plan must be filed by the parties.
- In a standard case, no hearing date will be allocated until the case is ready to proceed to hearing i.e. the Litigation Plan has been completed, a Certificate of Readiness has been filed and any other orders have been complied with.
- A standard case Pre-Hearing Conference will be conducted by an assigned Presidential member in a courtroom.
- Standard cases will be listed in a callover for hearing and determination. Callover hearing dates will be allocated by the Registry taking into account any directions made at a Pre-Hearing Conference.
- Settlement Conferences will be conducted by a Commissioner, unless there is good reason for them to be conducted by a Presidential member.

It is expected that:

- There will be a reduction in the number of inconsequential appearances before Presidential members for all cases.
- Greater compliance with SAET orders will lead to better preparedness which in turn may lead to the earlier resolution of cases.

Allocation of cases to a process pathway

All RTW cases will be allocated to one of two process pathways.

Cases where serious injury worker status is at the heart of the dispute will be identified as **docket** cases. Objective criteria will be applied to ascertain the docket case process pathway. Such criteria will be revised from time to time.

All other RTW cases will be **standard** cases.

Allocation to either process pathway will be undertaken by a Commissioner at the conclusion of the conciliation phase. If a Commissioner requires assistance in allocating the process pathway, s/he will consult the Deputy Registrar, Co-ordinator of Conciliation Services.

The allocation of the process pathway will be an administrative process and it is intended that SAET will not entertain a review or dispute regarding the allocation.

Docket cases

It has been recognised that cases where the issue of 'serious injury' is at the heart of the dispute are more complex and are much more likely to proceed to a hearing and then judgment. These cases will be identified as docket cases and will be case managed in chambers by the Presidential member to whom the case has been allocated after conciliation. That Presidential member will hear and determine the case.

Docket cases will be listed for a Pre-Hearing Conference before the allocated Presidential member. In order to assist the Presidential member to assess the case, at least 5 business days before the Pre-Hearing Conference the parties will have filed a pre-hearing questionnaire. If, prior to the Pre-Hearing Conference, the parties jointly seek a Settlement Conference listing, or for other good reason that the Pre-Hearing Conference should be adjourned, then the listing may be vacated administratively by the filing of the required form.

At the Pre-Hearing Conference, the Presidential member will prepare a Litigation Plan containing orders to be complied with. A date upon which a Certificate of Readiness is to be filed will also be ordered. A case will not proceed to hearing unless a Certificate of Readiness has been filed.

The Presidential member will take a bespoke approach to the case and will make appropriate orders necessary for the management of that case towards a hearing. It may be that a hearing date is set down, and then orders are made by reference to that

date. Or, that orders are made for preliminary actions to occur before a hearing date is set down.

The Presidential member will deal with procedural and preliminary issues as they arise. For example, witness issues; who they will be, how long to allow for examination or cross-examination, or the order in which the witnesses will give their evidence may be ruled on by the Presidential member in advance of the hearing.

Standard cases

In standard cases, Commissioners will make orders in a Litigation Plan no earlier than 5 business days after the conclusion of conciliation. The Litigation Plan orders will be made prior to the referral to hearing and determination and will be made in order to assist with the business of the court. The Litigation Plan will contain standard orders, unless alternative orders are necessary. If so, the Commissioner may need to hear further from the parties before any alternative orders are accepted and made.

Compliance with the Litigation Plan will be managed by the Registry. The proposed Litigation Plan document will be similar to the current Trial Orders document, but the key changes are:

- No hearing date is allocated;
- Standard time-frames are calculated from the date of the order, rather than with reference to the hearing date;
- Settlement Conferences and Compliance Conferences are not included; and
- A Certificate of Readiness filing date, certifying that SAET's orders have been complied with.

The Litigation Plan will include a date by which a Certificate of Readiness is to be filed in the Registry. This document will be based on the District Court of South Australia's Certificate of Readiness document. It will be signed by the parties and will certify that the Litigation Plan has been complied with.

If the parties have attempted to, but are unable to comply with the Litigation Plan, they are to seek an extension of time to lodge the Certificate of Readiness from the Registry. Parties are encouraged to contact SAET if they anticipate not being able to comply with the Litigation Plan, rather than letting the date for compliance expire.

The case will proceed to the listing of a Pre-Hearing Conference when the Certificate of Readiness is filed.

Pre-Hearing Conferences for standard cases

In order to assist the Presidential member conducting the Pre-Hearing Conference assess the case, at least 5 business days before the conference the parties will have filed a pre-hearing questionnaire. If, prior to the Pre-Hearing Conference, the parties jointly seek a Settlement Conference listing, or for other good reason that the Pre-Hearing Conference should be adjourned, then the listing may be vacated administratively by the filing of the required form.

Pre-Hearing Conferences for a standard case will be listed as part of a Directions List before an assigned Presidential member. It is expected that counsel, the file principal, or a lawyer familiar with the substance of the case must attend the Pre-Hearing Conference.

At the Pre-hearing Conference the Presidential member will hear from the parties and will make an assessment of the matter in terms of the management and disposition of the case which could comprise of any number of things, including:

- Making directions and orders;
- Consolidating the proceedings with other cases involving the parties;
- Ordering the filing and serving of further affidavit or expert evidence;
- Resolving any outstanding issues of admissibility of evidence;
- Determining who the witnesses will be;
- Determining how the hearing will be conducted;
- Referring a question of law to the Full Bench;
- Listing a further Pre-Hearing Conference, if appropriate;
- Listing the case for a Settlement Conference.

At a Pre-Hearing Conference, if a case is ready to be listed for a hearing, the Presidential member will ascertain witness availability and other scheduling issues. Appropriate directions will then be made to the Registry regarding the listing of the case for hearing in a callover. The Registry will subsequently provide the callover date to the parties. The Registry will then manage the case until the callover date.

Only cases where a Certificate of Readiness has been filed and where the case is ready to proceed to a hearing will be provided with a callover date by the Registry. In the ordinary course, there will be no other procedural hearings listed once a callover date has been allocated by the Registry.

Directions Lists

Regular Directions Lists for standard cases will be scheduled before an assigned Presidential member. The following will be included in these lists:

- Pre-Hearing Conferences;
- RTW Act Applications for Directions;
- Non-compliance (the default list).

Directions Lists will be held in a courtroom where many cases will be heard in one sitting. It is hoped that the case management of standard RTW cases in the public arena will achieve better compliance with SAET's orders and with the consistency of practice. The assigned Presidential member will be assisted in the courtroom by a Legal Support Officer. The parties should attend with proposed orders having been discussed and agreed where possible. Orders will be prepared and issued on the day of attendance.

RTW Act Application for Directions

So far as possible, the parties are expected to make genuine attempts to resolve any procedural issues between themselves. In the ordinary course, no order will be made on any Applications for Directions unless a supporting affidavit states that the parties have conferred, to try and resolve the subject matter of the application, but that they genuinely remain at issue over the subject matter. The deponent of the supporting affidavit will be in attendance at the hearing of the Application for Directions, unless otherwise not required.

Non-compliance in standard cases

It is expected that SAET orders will be complied with. If eventualities arise that compromise a party's ability to comply with an order, either in substance or within time, it is expected the affected party will seek amendments to the Litigation Plan before any default.

If a Certificate of Readiness is not filed by the due date, the case will be placed in the default list. A case may be removed from the default list at any time by the lodging of a Certificate of Readiness confirming that all necessary actions have been undertaken.

On an application, a party may seek for a non-compliant case to be dismissed, or that summary orders be made. The defaulting party may apply to be heard as to how the non-compliance may be remedied. Once an application is made, the case will be scheduled in the Directions List before an assigned Presidential member.

SAET may schedule a non-compliant case in the Directions List of its own motion.

Upon hearing a case in the default list a Presidential member may make whatever orders are necessary to deal with the matter, including the dismissal of the case or other summary orders. For the purposes of costs, it will be considered unreasonable for a case to be in the default list.

Settlement Conferences

Settlement Conferences for docket and standard cases will be conducted by a Commissioner, unless good reasons can be demonstrated that the resolution of the case would be best served by the conducting of such a conference by a Presidential member.

A Settlement Conference will only be listed if the parties agree that there is potential for a negotiated resolution, or where a Presidential member is of the view that a Settlement Conference should be listed. The listing of a Settlement Conference will be accompanied with a direction stating that a person with authority to settle the case must attend the conference on behalf of each party. Further directions will also be made that require the parties in advance of the conference to exchange proposals for potential resolution of the case.

Hearing dates

Docket cases will be allocated hearing dates by the Presidential member managing the case.

Standard cases will be allocated to callovers. Unless the parties advise that only 1 day is required, standard cases will be allocated a 2 day hearing. Callovers will generally listed on the same days in similar weeks in each month, as follows:

- **Monday & Tuesday** – 2 day hearings.
- **Wednesday & Thursday** – 2 day hearings.
- **Friday** – 1 day hearings.

A Presidential member will conduct the callover on any given date, where the listed cases will be allocated for hearing. Presidential members will be available in each callover to hear and determine cases allocated to them.

Consultation

Feedback with regards to this proposal can be made in writing by **25 October 2019** to:

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or

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