Submission to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation inquiry into the Return to Work Act and Scheme

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Contact:
Robin Shaw, Manager
Ph: 8232 0100
Fax: 8232 0113
Mobile: 0411 778 251
robin@sisa.net.au

SISA
Self Insurers of South Australia

Contents

Glossary

CLA - *Civil Liability Act 1936* (SA)

CTP – Compulsory third party

MVA – Motor vehicle accident

Repealed Act or 1986 Act – *Workers Rehabilitation & Compensation Act 1986* as amended (SA)

RTW – Return to work

RTW Act or current Act – *Return to Work Act 2014* (SA)

WHS – Work health and safety

WPI – Whole person impairment

Executive Summary

With regard to the Terms of Reference, our submissions can be summarised as follows:

(a) The potential impacts on injured workers and their families as a result of changes to the Return to Work Act including tightening of the eligibility criteria for entry into the Return to Work Scheme

We submit that at the very least, it is far too early to make any judgements as to the impact, potential or otherwise, of the revised causation provisions. Interstate case law suggests that they may represent no major change when the SA judicial system has had cases to determine.

(b) Alternatives to the overly restrictive 30 per cent WPI threshold for ongoing entitlements to weekly payments

We submit that the impact of the 30% whole person impairment threshold for ongoing weekly payments will eventually be positive by ensuring that people with a capacity for work are not encouraged to stop working and face the risks to health, family and life set out in the research cited in this submission.

We do not agree with the sentiment that this Term of Reference seems to imply through the inclusion of the phrase 'overly restrictive' – that open-ended benefits should be more easily available to those with a capacity for work. We believe that the best interests of workers, employers and the State are best served by moving away from that obsolete and risky viewpoint.

Our submission includes some examples of how workers with relatively high levels of impairment have retained and utilised sound levels of work capacity.

We observe that there is a poor fit between section 176 of the RTW Act (which allows for funding agreements with the Lifetime Support Scheme for seriously injured workers) and the LSS entry criteria for motor accident victims, which are injury and prognosis-based. An alternative might be to align seriously injured status under the RTW Act with the injury/prognosis-based entry criteria for the LSS and retain 30% whole person impairment as the threshold for common law while tying access to ongoing weekly benefits to a more fact-driven test that objectively weighs a person's true capacity for work.

(c) The current restrictions on medical entitlements for injured workers

SISA submits that this is a vexed issue. The across-the-board cessation of medical benefits under section 33(20) has to us been questionable. Some of our members have workers who have made a solid return to work but have clear medical evidence of a need for ongoing medical treatment or medication that is essential to maintaining the worker's ability to remain at work. In these cases, our members tend to opt to continue paying these costs on an *ex gratia* basis. However, not all cases are of this sort. There are others where extended treatment or medication can have negative health effects.

An option may be to amend section 33 to say that if a worker has achieved a return to work to a set standard within the existing medical entitlement period, (at say 50% or 75% or more of pre-injury hours), and provides medical evidence that ongoing medication and/or treatment is essential to

maintaining the RTW, then it can continue to be covered. To maintain the integrity of this, there should be a right for the compensating authority to have the worker and the evidence independently assessed and, in the event that the compensating authority declines the request for ongoing medical benefits, a right of review for the worker.

(d) Potentially adverse impacts of the current two year entitlements to weekly payments

We submit that this goes to the same issues discussed under Term of Reference (b). We refer the Standing Committee to our submissions under that Term of Reference. We do wish to reinforce the submission that rather than consider the impacts of the 2-year limit as potentially adverse, the Committee should focus on the potentially adverse impacts of returning to a benefit structure that places workers at grave risk of deteriorating health, employment, life and family outcomes in the longer term.

We further observe that the difference in weekly benefit structures between the repealed and current Acts have actually left a large proportion of workers better off.

(e) The restriction on accessing common law remedies for injured workers with a less than 30 per cent WPI

The reason for having common law that we hear most often is that it allows for the legal pursuit of negligent employers. We submit that in 1986, as a State we chose to remove this function from the workers compensation jurisdiction and allocate it to a WHS regulatory arm. Where a worker's tort action drives their claim into an adversarial situation, it acts as a major barrier to the collaboration between worker and employer that is essential to rapid recovery and return to work.

Furthermore, there is no evidence that the theory of deterrence is valid – common law in workers compensation has no known links to workplace safety trends as far as we are aware.

Allied to this point is the notion of 'giving the worker their day in court'. This too is invalid in a vast majority of common law cases in other jurisdictions. Only a very small proportion of cases proceed through trial to judgement – all the rest settle well short of that point.

It is therefore our submission that common law should be deleted from the Act rather than made more widely available.

If the Standing Committee were to contemplate a recommendation that common law be made more widely available under the Act, we submit that it should note the following:

1. When the Bill was drafted and negotiated, the 30% level was achieved by balancing it out with statutory benefits – particularly through the introduction of s.56 economic loss lump sums.
2. If there were any contemplation of reducing the 30% level it must be with the understanding that the funding must come from reducing the economic loss lump sums accordingly.
3. Broadening common law access without such a counter-balancing reduction of statutory lump sums would threaten scheme funding and ultimately the State economy.

(f) Matters relating to and the impacts of assessing accumulative injuries

SISA is not clear on what this Term refers to, so it is difficult for us to make submissions. 'Accumulative injuries' are not defined or addressed in either the current or repealed Acts. Injuries that develop gradually are addressed by section 188 of the Act, which is the equivalent of section 113 of the repealed Act. However there is little material difference between the two.

If the term is intended to address the assessment of whole person impairment resulting from injuries that develop gradually, then it is unclear what aspect of that is being questioned. The Impairment Assessment Guidelines address in detail how all injuries are to be assessed, including those that develop gradually. However without more guidance on what aspect of the assessment process is under discussion, we are unable to make comment. To the best of our knowledge there have been no serious questions raised about the Guidelines generally.

With further clarification we may be able to make further submissions as needed.

(g) The obligations on employers to provide suitable alternative employment for injured workers

The Committee will have noted that the wording of the obligation to provide work is identical to the repealed Act. The obligation to pay an appropriate wage for such work is likewise identical. It is difficult to see how the RTW Act has brought any changes, nor are we aware of any concerns raised by other stakeholders. So we see no scope for any submissions in this regard.

The major divergence is the introduction in the RTW Act of a worker's right to apply for suitable employment and appeal to the SA Employment Tribunal where such an application is refused. This provides significant additional opportunities for workers to enforce the obligation.

While SISA has doubts that subsections 18(3) to (5) will ultimately prove to be workable, there has at the time of writing been only one case decided by the Tribunal, so it is far too early to make any submissions in this regard.

(h) The impact of transitional provisions under the Return to Work Act 2014

This is a very complex area. The purpose of the transitional provisions is to ensure that all claims, existing and new, are consistently dealt with.

In our submission, the transitional provisions are as well balanced as they can be. No transition between Acts like this can be made without some dislocations. To this extent, the transitional provisions are a compromise of interests – 'swings and roundabouts' to express it colloquially. To alter them would be to upset that delicate balance.

We submit that the transitional provisions should not be changed.

(i) Workers compensation in other Australian jurisdictions which may be relevant to the inquiry, including examination of the thresholds imposed in other states

SISA observes that this was done in detail at the time the RTW Act was drafted and negotiated. We doubt that anything will be gained from repeating the exercise.

We further observe that benefit levels and thresholds are part of the balanced structure of benefits and premiums in any scheme – if any are altered, other benefits and the premiums that fund them must be altered accordingly to keep the funding balance of the scheme.

We further submit that there is no 'ideal'. SA made the grave mistake in 2008 of importing elements of other schemes and grafting them into the now-repealed Act. The end result as we now know was a highly predictable failure that made a whole new Act necessary in SA.

We submit that an item-by-item review of other schemes will yield no insights unless the workings of each entire scheme are considered in detail.

(j) The adverse impacts of the injury scale value

The Injury Scale Values (ISVs) are set out in section 52(2) of the SA *Civil Liability Act 1936* (CLA). They apply exclusively to non-economic loss damages claimed in common law actions undertaken under that Act (for example compulsory third party and public liability claims). Since the common law provisions under the RTW Act are restricted to future economic loss, the ISVs can have no relevance to the RTW Act and scheme.

We conclude that the inclusion of the ISVs in the Terms of Reference is in error and we make no submissions.

(k) Any other relevant matters

4. We submit that it is far too soon for any review of the RTW Act. With only 1 year of its operation so far and very little case law, there is no way to know what the ultimate effects of its terms will be on any stakeholders.
5. It is generally acknowledged at the actuarial level that it takes a new scheme between 5 and 10 years to mature *if it remains unchanged*.
6. SISA observes that the Terms of Reference deal exclusively with the impact of the RTW Act on injured workers. We submit that the scheme established by that Act impacts equally on workers and employers and ultimately on the State economy. Any discussion of impact has to contemplate what collateral effects would arise from the alteration of any aspect of the RTW Act benefit structure on scheme cost, funding and jobs.
7. One external factor that may affect the running of the scheme in the near term is the income tax status of income redemption lump sums.

Submission

We will address the Terms of Reference in the order that they appear:

(a) The potential impacts on injured workers and their families as a result of changes to the Return to Work Act including tightening of the eligibility criteria for entry into the Return to Work Scheme

We take the phrase 'eligibility criteria' to be a reference to the revised causation provisions of the RTW Act as set out in section 7.

These provisions are divided into two classes:

(a) in the case of an injury other than a psychiatric injury—the injury arises out of or in the course of employment and the employment was a significant contributing cause of the injury; and

(b) in the case of a psychiatric injury—

> *(i) the psychiatric injury arises out of or in the course of employment and the employment was the significant contributing cause of the injury; and*
>
> *(ii) the injury did not arise wholly or predominantly from any action or decision designated under subsection (4).*

Subsection 7(4) goes on to bar a psychiatric claim if the injury was caused by reasonable action taken by the employer in a reasonable manner.

These differ from the repealed Act in that for physical injuries, the repealed Act required only that the injury arise out of or in the course of employment (section 30(2)(a)). For psychiatric injuries, the requirement was for the employment to be 'a substantial cause of the injury' (section 30A(a)) and there were almost identical 'reasonable action' exceptions (section 30A(b)).

So from a standpoint of language, the primary difference between the repealed Act and the current Act are the words 'a significant' and 'the significant'. The question therefore is whether or not these words amount to a different threshold than the repealed Act set.

As at the time of writing (August 2016), no case law has been set out in SA to tell one way or another what the effect of the altered causation language has been or is likely to be. It is however instructive to observe the interpretation of very similar language that has been in place in Victoria and Queensland for some time. We submit that the following strongly indicate that the revised wording may not in fact represent a higher barrier:

"It can be said that only infrequently in the case of physical injury caused by external trauma arising in the course of a worker's employment will the necessary causal element not be established".

> Ashley J of the Vic Supreme Court in *Hegedis v Carlton & United Breweries [2000] VSC 380 (27 September 2000)*

"Nothing in workers compensation law suggests that an objective standard should be set up when considering the compensability of injury or that a factor need be the sole or dominant factor causing injury in order that it qualify as a significant contributing factor even while not the sole or even dominant contributing factor".

> Nettle J of the Vic Supreme Court in *Day v Electronik Fabric Makers (Vic) Pty Ltd [2004] VSC 24 (16 February 2004)*

'Significant', according to the Macquarie Dictionary, means "important; of consequence". There is no reason why the word should be given other than its ordinary dictionary meaning. Whether any particular matter is a contributing factor depends on the circumstances of each individual case; and different minds might legitimately reach different conclusions…

> Frank Lippett, Barrister-at-Law, More Chambers Q-COMP Statutory Law Cases Seminar - *A Significant Contributing Factor* 29 May & 18 July 2006

In view of this, we submit that at the very least, it is far too early to make any judgements as to the impact, potential or otherwise, of the revised causation provisions. The quotes above suggest that they may in fact represent no major change when the SA judicial system has had the cases to examine and determine.

(b) Alternatives to the overly restrictive 30 per cent WPI threshold for ongoing entitlements to weekly payments

The phrase 'overly restrictive' carries a clear pre-judgement that is of concern to SISA. Setting that to one side, we submit that focusing the discussion on access to ongoing entitlements to weekly payments is to actually pose a long term risk to the health and wellbeing of injured workers.

There is ample evidence readily available[1] that prolonged absence from work has major debilitating effects on workers and their families. The following is a summary of one such body of evidence:

Work absence tends to perpetuate itself: that is, the longer someone is off work, the less likely they become ever to return.

If the person is off work for:

- *20 days the chance of ever getting back to work is 70%;*
- *45 days the chance of ever getting back to work is 50%; and*
- *70 days the chance of ever getting back to work is 35%.*

…

Unemployment has a significant negative impact on physical health and mental health and results in increased mortality rates. And…the problem is not merely one of association: on the balance of the evidence…unemployment causes, contributes to or accentuates these negative health impacts.

Their review found unemployment to be associated with:

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[1] See for example *Working for a Healthier Tomorrow*, Dame Carol Black, March 2008 and the work of Prof Sir Mansel Aylward in the UK, who most recently wrote 'Overcoming Barriers to Return to Work: Towards Behavioural and Cultural Change', chapter 7 of *The Handbook of Return to Work: From Research to Practice*, Izabela Z. Schultz, Robert J. Gatchel (eds) ISBN 978-1-4899-7627-7. Sir Mansel was in Adelaide in September 2016 to provide an update on his work.

- *Increased rates of overall mortality, and specifically increased:*
    - *mortality from cardiovascular disease; and*
    - *suicide;*
- *Poorer general health;*
- *Poorer physical health, including increased rates of:*
    - *cardiovascular disease;*
    - *lung cancer; and*
    - *susceptibility to respiratory infections;*
- *Poorer mental health and psychological well-being;*
- *Somatic complaints;*
- *Long-standing illness;*
- *Disability; and*
- *Higher rates of medical consultation, medication consumption and hospital admission.*[2]

J.F. Ross wrote in 1995 that "The health risk of being out of work for long periods of time is equivalent to smoking 10 packets of cigarettes a day and research has shown that young men out of work for more than six months have a 40 times increased risk of suicide"[3].

We submit that the impact of the 30% whole person impairment threshold for ongoing weekly payments will eventually be positive by ensuring that people with a capacity for work, (which those under 30% and most over 30% will have), are not encouraged by the availability of ongoing entitlements to simply stop working and unwittingly face the very real risks to health, family and life set out above and elsewhere in the cited research.

Instead, we submit, the focus should be on ensuring that compensating authorities are focused on what the RTW Act already emphasises – early intervention and the earliest possible safe return to work as a first priority. We do not agree with the sentiment that this Term of Reference seems to imply through the inclusion of the phrase 'overly restrictive' – that open-ended benefits should be more easily available.

We believe that the best interests of workers, employers and the State are best served by moving away from that obsolete and risky viewpoint.

We believe that levels of whole person impairment cannot viably be equated to total incapacity for work or the need for ongoing benefits. We cite the following examples of workers with high-range impairments who have remained at work. These are drawn from among our members:

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[2] *Australian and New Zealand Consensus Statement on the Health Benefits of Work*, Royal Australasian College of Physicians and the Australasian Faculty of Occupational & Environmental Medicine, 30 March 2011 pp 12-13

[3] J.F. Ross, 'Where do the real dangers lie?', *Smithsonian* Issue 8 Vol 26 1995

Age	Pre-injury job	PI hours	Injury	WPI	Post-injury job & hours
42	Teacher	4 days/wk	Knee replacement	31%	Teacher, 2 days/week
45	Service deli operator	Full time	2 cervical fusions	31%	Checkout operator, full time[1]
1. It is noteworthy that since the seriously injured provisions were introduced in the RTW Act, this worker appears to be in the process of ceasing work in favour of obtaining further benefits.					
47	Registered Nurse	Full time	Chronic Regional Pain Syndrome	35%	Business Continuity & Telecommunications Project Officer, full time
42	Office worker	Full time	Spinal fracture	21%	Office worker, full time
58	Firefighter	Full time	40% burns to whole body	73%	000 operator and admin, full time
50+	Forklift driver	Full time	Amputated left leg above knee	36%	Youth worker, fitness trainer, boxing teacher, full time
50+	Production line worker	Full time	Bilateral arthritis of wrists	Over 50%[2]	Plant operator, full time
2. In cases where the WPI is obviously over 30%, it can be deemed appropriate to not subject the worker to an assessment and determine them to be seriously injured. In these cases the exact level of WPI is not known.					
40	Teacher	Full time	Spinal cord injury in 2001, incomplete paraplegia with severe spasticity	Over 30%[2]	Classroom support 10 hours per week with possible future increase
64	Teacher	Full time	MVA resulting in paraplegia in 1987	Over 30%[2]	Curriculum development, full time
55+	Teacher	Full time	Knee replacement with poor outcome in 2011	Over 30%[2]	Teacher, full time
55	FIFO mine worker	Full time	Septic arthritis - amputated left leg below knee in 2007 physical & mental sequelae	52%	Store manager/tyre retailer, 25 hrs/week
54	Storeman	Full time	Spinal, right knee, plantar fasciitis, neuroma right foot and hips	34%	Stock controller, full time

Age	Pre-injury job	PI hours	Injury	WPI	Post-injury job & hours
61	Grader operator	Full time	Knee replacement	30%	Office and deliveries, full time
66	Finance clerk	Full time	Cervical fusion	31%	Finance clerk, full time

We submit that it could not be rationally argued that these people and the many like them are better off not working. Making ongoing benefits automatically available on the basis of any level of WPI where suitable employment opportunities that are within the worker's capacity are on offer is to us counter-intuitive and dangerous to the workers in the long run. By the same token, labelling these workers as 'seriously injured' does nothing to enhance resilience and the will to remain at work.

With all that said, we note that the 30% whole person impairment threshold serves multiple purposes that could, should the need arise, be varied. It is, as stated by the Terms of Reference, the threshold for ongoing weekly benefits. It is also the threshold for:

- Seriously injured status, which apart from ongoing weekly benefits, also confers ongoing medical and allied health costs and no RTW obligations; and
- The right to sue at common law for future economic loss.

SISA has considered this convergence of thresholds around the 30% WPI level since before the Act commenced. Seriously injured status under the Act includes the ability to reach service and funding agreements with the Lifetime Support Scheme (LSS, which is the SA version of the acquired injury segment of the National Disability Insurance Scheme (NDIS)) under section 176 of the RTW Act. However, this is well out of step with the entry criteria for the LSS that applies to others not covered by the RTW Act (for example motor accident victims). These are injury-based and prognostic in nature rather than based on an assessment of whole person impairment[4].

While we do not minimise the impact of 30% whole person impairment on anybody, a 30% assessment will probably arise where, for example, a person has two successful knee replacements. In such a case, there is likely to still be a significant capacity for work. Compare that with the types of injury set out in the LSS Rules and the poor fit between section 176 of the Act and the LSS entry criteria is clear.

Types of injury required by the LSS Rules include major amputations, total blindness, severe burns, major spinal and brain damage. In effect, the LSS is designed for people who are catastrophically injured. 30% whole person impairment falls well short of that.

This incompatibility is created by the nexus between serious injury status, the ability to make agreements with the LSS, ongoing benefits and access to common law. However the integrity of the benefit structure is not greatly dependent on this nexus.

An alternative might be to align seriously injured status under the Act with the injury/prognosis-based entry criteria for the LSS and retain 30% whole person impairment as the threshold for common law (if it is to be retained) while tying access to ongoing weekly benefits to a more fact-

[4] See the *Lifetime Support Scheme Rules* Part 3 – Injury Criteria, page 14

driven test that objectively weighs a person's true capacity for work without the negative connotations that come with the automatic application of the label 'seriously injured'.

(c) The current restrictions on medical entitlements for injured workers

SISA submits that this is a vexed issue. The across-the-board cessation of medical benefits under section 33(20) has to us been questionable.

Some of our members have workers who have made a solid return to work but have clear medical evidence of a need for ongoing medical treatment or medication that is essential to maintaining the worker's ability to remain at work. In these cases, our members tend to opt to continue paying these costs on an *ex gratia* basis once the entitlement period has expired.

The obverse case is where workers are given fully-funded, open-ended access to services and medication that are, on the face of the available evidence, actually harmful to the worker's ability to return to and remain at work. Some examples of this are:

- Physiotherapy, hydrotherapy, chiropractic, massage and other forms of manipulative therapy over a period of years that make no improvement to the worker's condition and can make the worker mentally dependent on the treatment and unnecessarily fearful of a recurrence of the injury in its absence.
- Long-term prescription of pain control or anti-depression medication including opiates and benzodiazepines, leading to addictive behaviours, personality disorders and sometimes fatal overdoses[5].
- Use of psychiatric and/or psychological services over a period of years that can lead to emotional dependence on the services and an active fear of showing improvement[6].

In cases like this, it may actually do the worker long-term good to cease funding these things where it is clear that their conditions are actually being reinforced rather than improved.

An option may be to amend section 33 to say that if a worker has achieved a return to work to a set standard within the existing medical entitlement period, (at say 50% or 75% or more of pre-injury hours), and provides medical evidence that ongoing medication and/or treatment is essential to maintaining the RTW, then it can continue to be covered. To maintain the integrity of this, there could be a right for the compensating authority to have the worker and the evidence independently assessed and, in the event that the compensating authority declines the request for ongoing medical benefits, a right of review for the worker.

(d) Potentially adverse impacts of the current two year entitlements to weekly payments

We submit that this goes to the same issues discussed under Term of Reference (b). We refer the Standing Committee to our submissions under that Term of Reference. We do wish to reinforce the submission that rather than consider the impacts of the 2-year limit as potentially adverse, the

[5] See for example 'Prescription medicines killing hundreds a year'[sic], *The Advertiser* 29/8/16 pages 10-11

[6] See for example 'Why anxiety has become so alarming', Australian Financial Review, 3/11/15

Committee should focus on the potentially adverse impacts of returning to a benefit structure that places workers at grave risk of deteriorating health, employment and life as well as poor family outcomes in the longer term.

We would also add that the difference in weekly benefit structures between the repealed and current Acts have actually left a large proportion of workers better off:

	% of weekly earnings	
	Repealed Act	**Current Act**
To 26 weeks	100%	100%
27-52 weeks	90%	100%
53-104 weeks	80%	80%

It is well understood that a relatively small proportion of workers remain on weekly benefits at 104 weeks. Taking some figures from the RTWSA December 2015 actuarial valuation and the 2015 RTWSA annual report:

	New claims in 2013	**Still on benefits at 104 weeks (2015)**	**%**
All claims	16,000	985	6%
Income claims	5,000		20%

So the transition to the current Act left 80% of workers with income claims better off.

(e) The restriction on accessing common law remedies for injured workers with a less than 30 per cent WPI

The most fundamental point to understand about common law in the workers compensation setting is that the workers compensation scheme indemnifies the employer against common law damages (though this is not a consideration for self-insurers). We often see and hear suggestions that employers would have to find a separate means to fund or be indemnified against common law liabilities under the RTW Act. This is not correct[7].

There is also an incorrect impression that common law equates to judges doling out significant amounts in damages. The reality is that common law under the RTW Act is limited to future economic loss, is subject to a cap imposed by the *SA Civil Liability Act* and is also subject to reductions for statutory benefits already paid and contributory negligence on the worker's part.

The reason for having common law that we hear most often is that it allows for the legal pursuit of negligent employers that have caused injury, and imposes penalties that act as a deterrent to such

[7] With the exception of less frequent third party actions that are subject to recovery under s.66 of the RTW Act. Those actions usually fall under CTP and public liability insurance.

negligence in the future. (It is worth noting in passing that this rationale did not appear in the Government policy paper in January 2014 that was the forerunner of the RTW Act). SISA considers this rationale entirely invalid. The fact that employers are indemnified by the scheme against common law costs means that there is no deterrent effect at all.

In our submission, in 1986, as a State we chose to allocate this prosecution and sanction function to a separate workplace health and safety law and regulatory arm. The task of punishing and deterring negligent employers was deliberately removed from the workers compensation jurisdiction. It was thought, correctly in our view, that where the worker's tort action was driving the claim into an adversarial situation, it acted as a major barrier to the collaboration between worker and employer that was essential to rapid recovery from injury or disease and return to work. With an independent health and safety regulator carrying out the enforcement process, the worker was out of the firing line and could focus on returning to work with the employer's cooperation.

We see no reason why this arrangement should be disturbed. The rationale for separate workers compensation and health and safety jurisdictions is as valid today as it was in 1986, especially since the commencement of the *Work Health and Safety Act 2012* with its significantly increased sanctions and the imposition of officers' duties.

If elements of the community feel that employers are not pursued zealously enough for alleged negligent conduct, this must surely be levelled at the health and safety regulatory system, not re-assigned to the workers compensation scheme to make up for this perceived lack. This includes questions about the disposition of monetary penalties. The fact that WHS fines go to Government consolidated revenue and not to workers in the form of compensation or to fund safety initiatives is a different debate, and is not a justification for common law in the workers compensation scheme.

Furthermore, there is no evidence that the theoretical link between common law and workplace safety is valid – the existence of common law in workers compensation has no known links to workplace safety trends as far as we are aware.

Allied to this point is the notion of 'giving the worker their day in court'. This too is invalid in a vast majority of common law cases in other jurisdictions including the SA CTP scheme. Only a very small proportion of such cases proceed to trial and through to judgement – all the rest settle well short of that point.

From a worker benefit standpoint, a properly articulated statutory entitlement structure can provide lump sum settlements with exactly the same effect as common law without the time-consuming and costly adversarial process of finding fault and the destructive effect that that has on the employment relationship. Moreover, if these sorts of settlements were limited to a common law setting, workers whose employers are not found to have been negligent would not receive a lump sum and may be on risk for costs of the action. In this context, a common law approach can pose real risks for workers. The no fault setting has none of those risks, although we acknowledge that disputes over statutory entitlements can assume major proportions as well.

It is therefore our submission that common law should be deleted from the RTW Act rather than made more widely available because it delivers none of the things claimed for it by its advocates and can actively damage the very employment relationships that the RTW Act demands for a successful return to work.

If the Standing Committee were to contemplate a recommendation that common law be made more widely available under the Act, we submit that it should note the following:

8. When the RTW Bill was drafted and negotiated, the 30% level was achieved by balancing it out with statutory benefits – particularly through the introduction of s.56 economic loss lump sums (which themselves are arguably excessive in our view).
9. If there were any contemplation of reducing the 30% level it must be with the understanding that the funding must come from reducing the economic loss lump sums accordingly.
10. Broadening common law access without such a counter-balancing reduction of statutory lump sums would threaten scheme funding and ultimately the State economy.

(f) Matters relating to and the impacts of assessing accumulative injuries

SISA is not clear on what this Term refers to, so it is difficult for us to make submissions. 'Accumulative injuries' are not defined or addressed in either the current or repealed Acts. If this is a reference to injuries that develop gradually, then these are addressed by section 188 of the Act, (the equivalent of section 113 of the repealed Act). The only difference between the two is the removal of the Corporation's powers to direct an employer to carry out tests at the employer's expense (the repealed subsections 113(2b) and (2c)).

If the Term is intended to address the assessment of whole person impairment resulting from injuries that develop gradually, then it is unclear what aspect of that is being questioned. The Impairment Assessment Guidelines address in detail how all injuries are to be assessed, including those that develop gradually. However without more guidance on what aspect of the assessment process is under discussion, we are unable to make comment. To the best of our knowledge there have been no serious questions raised about the Guidelines generally.

With further clarification we may be able to make further submissions as needed.

(g) The obligations on employers to provide suitable alternative employment for injured workers

These obligations are set out in section 18 of the RTW Act, which is the equivalent of the repealed section 58B. The Committee will have noted that the wording of the obligation to provide work is identical – see subsections 18(1) and (2) and the repealed subsections 58B(1) and (2).

The obligation to pay an appropriate wage for such work is likewise identical – see section 19 of the RTW Act and the repealed Act subsection 58B(3).

With identical wording of the obligation itself, it is difficult to see how the RTW Act has brought any changes to it. To the best of our knowledge, ReturnToWorkSA, which has administrative oversight of these matters, has not raised any difficulties with it, nor have we had any representations from associations representing workers in regard to the obligation itself. So we see no scope for any submissions on this Term of Reference.

The major divergence is the introduction in the RTW Act of a worker's right to apply for suitable employment and to appeal to the SA Employment Tribunal where such an application is refused – see subsections 18(3) to (5). In addition, workers have subsection 15(2) to call on. These provide significant additional opportunities for workers to seek enforcement of the obligation.

While SISA has doubts that subsections 18(3) to (5) will ultimately prove to be workable, there has at the time of writing been only one significant case decided by the Tribunal[8], so it is far too early to make any submissions in this regard.

(h) The impact of transitional provisions under the Return to Work Act 2014

This is a very complex area. The purpose of the transitional provisions is to ensure that all claims, existing and new, are consistently dealt with. The overall effect was to transfer all claims under the repealed Act to the jurisdiction of the RTW Act and make them subject to the provisions of the RTW Act. The transitional provisions then specified how this transition was to be made. Without them, existing claimants would have been in a legal limbo, with no repealed Act rights and no rights under the RTW Act.

In effect, the transitional provisions exist to draw a bright line between the repealed and RTW Acts. The only alternative would have been to include saving provisions that would have seen existing claimants continuing to receive benefits under the repealed Act while workers in the same workplaces who were injured after 1/7/15 would have been subject to the capped provisions of the RTW Act. This would not have been even remotely equitable.

Aside from questions of equity, there are sound reasons for the transitional provisions to be as they are:

- Had the 'tail' of claims remained in place through the inclusion of saving provisions as noted above:
    - The premium-paying scheme would have remained in its precarious funding position with unaffordable premium rates and the risk that that posed to jobs and the State economy;
    - It would have robbed the RTW Act of a large proportion of its new and far more appropriate focus on returning people to work rather than simply paying compensation;
    - It would have left two schemes operating simultaneously. One need only to look at the situation in NSW and the Northern Territory, where there are multiple Acts and sets of amendments operating side by side. It is a chaotic and almost unworkable situation where both employers and workers suffer great confusion over what their entitlements and obligations are.
- They have to balance interests. While the focus is no doubt on workers who were on extended benefits now being subject to benefit caps, what is probably not mentioned is that it also delivered a windfall for some workers:
    - A worker who was, at 1/7/15, 1 day away from dropping from 100% to 90% of weekly earnings under the repealed Act got the 100% for a further 1 year.
    - Similarly, those on the cusp of dropping from 90% to 80% received 90% for a further 1 year.

  Clause 37 of Schedule 9 of the RTW Act sets these matters out.

[8] *Walmsley v Crown Equipment Pty Ltd* [2016] SAET 4

In our submission, the transitional provisions are as well balanced as they can be. No transition between Acts like this can be made without some dislocations. To this extent, the transitional provisions are a compromise of interests – 'swings and roundabouts' to express it colloquially. To alter them would be to upset that balance.

We submit that the transitional provisions should not be changed.

(i) Workers compensation in other Australian jurisdictions which may be relevant to the inquiry, including examination of the thresholds imposed in other states

SISA observes that this was done in detail prior to the 2008 amendments to the repealed Act and probably again at the time the RTW Act was drafted and negotiated. We doubt that anything will be gained from repeating the exercise.

We further observe that benefit levels and thresholds are part of the balanced structure of benefits in any scheme – if any are altered, other benefits and/or premiums must be altered accordingly to keep the funding balance of the scheme. For a review of the various aspects of Australian and New Zealand schemes, we direct the Committee's attention to the Safe Work Australia *Comparison of workers' compensation arrangements in Australia and New Zealand (2015)*, though this was published before the SA RTW Act and some amendments to the Queensland and NSW schemes took effect, so caution should be exercised in the use of that publication.

In reviewing the comparison document, the Committee will see that some schemes have a heavier emphasis on lump sums and common law while others limit those things and place more emphasis on periodic compensation. Each scheme has a different premium and experience rating system as well, which must not be forgotten when considering scheme structures. Some schemes (such as Queensland and WA) are low benefit-low premium while others such as Comcare are the reverse. What is not possible is a high benefit-low premium regime or the reverse. Both would have major distorting influences on State job markets and economies.

We submit that it is easy for some to contemplate the 'best' benefits of each scheme, subjectively speaking. But to assemble all of those 'bests' would produce a scheme so expensive that its economic damage would be significant. The reverse is also true – to assemble all of the lowest benefits would produce a scheme so miserly as to be socially unacceptable. This goes for the best and worst of both the levels of the benefits and the thresholds that apply to them.

We further submit that there is no 'ideal'. Each scheme is a structured package. SA made the grave mistake in 2008 of importing its choice of elements of other schemes and trying to graft them into the now-repealed Act. The end result as we now know was a highly predictable failure, something that SISA warned of at the time but was ignored and at times treated with hostility and contempt[9]. As SISA foreshadowed at the time, it was the failure of the 2008 amendments that made a whole new Act necessary in SA.

We submit that an item-by-item review of other schemes will yield no insights unless the workings of each entire scheme are considered in detail.

[9] *Legislative Change – Gimmick or Panacea? A brief review of the 2008 amendments and issues beyond*, Self Insurers of South Australia Inc., presented at Both Sides of the Fence XI, 23 October 2009

(j) The adverse impacts of the injury scale value

The Injury Scale Values (ISVs) are set out in section 52(2) of the SA *Civil Liability Act 1936* (CLA). They apply exclusively to non-economic loss damages claimed in common law actions undertaken under that Act (for example compulsory third party and public liability claims). Since the common law provisions under the RTW Act are restricted to future economic loss, the ISVs can have no relevance to the RTW Act and scheme.

We note in passing that while section 66 of the RTW Act addresses the common law right of tort action against negligent third parties, the section does not create those rights but rather allows compensating authorities to recover their past and future RTW Act claim costs from any damages awarded to the worker. Such 3rd party actions take place under the CLA and therefore lie outside the RTW Act and beyond the scope of these Terms of Reference.

We conclude that the inclusion of the ISVs in the Terms of Reference is in error and we make no submissions.

(k) Any other relevant matters

To summarise these:

1. We submit that it is far too soon for any review of the RTW Act. With only 1 year of its operation so far and very little case law, there is no way to know what the ultimate effects will be on any stakeholders. It is inadvisable to consider changes when it is not known what, if any, changes are needed.
2. It is generally acknowledged at the actuarial level that it takes a new scheme between 5 and 10 years to mature *if it remains unchanged*. We take the view that no changes of any sort should be contemplated until at least the 3-year review mandated by section 203 of the Act.
3. SISA observes that the Terms of Reference deal exclusively with the impact of the RTW Act on injured workers. We submit that the scheme established by that Act impacts equally on workers and employers and ultimately on the State economy. Any discussion of impact has to contemplate what collateral effects would arise from the alteration of any aspect of the RTW Act benefit structure on scheme cost, funding and jobs.
4. One external factor that may affect the running of the scheme in the near term is the income tax status of income redemption lump sums. At the time of writing, the Australian Taxation Office is in the process of ruling them to be taxable. Workers wishing to accept redemption lump sums will lose some of them in tax, possibly necessitating a change to the way redemption is used relative to other lump sums.

Summary

We conclude our submissions under the Terms of Reference with the observation that the 1986 Act, in its multitude of amended versions, was always roundly criticised for two things:

1. Its propensity to generate a cohort of workers on long-term benefits who were so unwell and de-conditioned that the likelihood of their ever returning to work was very low; and
2. The unacceptable economic cost to premium-paying employers and the State economy.

We do not contend that the legislation was the sole cause of these problems, (as the performance of the self-insurers under the 1986 Act attests), but it played a leading role in allowing such a situation to persist for so long in the premium-paying segment of the scheme to the great detriment of many workers.

The RTW Act aspires to reverse the adverse effects of the 1986 Act on the health and well-being of workers and the State economy. We submit that it should be allowed to go undisturbed in order to see if it meets those aspirations. To focus only on handing out money - to pay people to not work - without grasping the health risks that that entails is, as we noted earlier, both risky and obsolete.

About SISA

The Self-insurers of South Australia (SISA) is an incorporated association that represents most of South Australia's largest private and public sector employers that are self-insured under the *Return to Work Act 2014.* Our membership represents about 38% of the State's employment by remuneration.

SISA was first incorporated on 3rd August 1984 as the Employer Managed Workers Compensation Association (EMWCA). Although it was known as SISA for many years beforehand, the name was officially changed from EMWCA to SISA in November 2005.

SISA is recognised as the sole representative organisation for self-insured employers in South Australia. It provides its member organisations with assistance and support in their interactions with the workers compensation scheme and promotes best practice in the prevention and management of workplace injuries.

SISA's objectives are to promote, develop and support the interests of its members by communication and liaison with regulators, Government, unions and other organisations in regard to self-insurance.

SISA services include:

- Providing a single voice for self-insurers and associate members, and to promote, foster, develop and support the interests of members.
- Contributing to sustainable and efficient return to work and WHS regimes on behalf of self-insurers.
- Providing resources, information and a support network to members.
- Promoting work health & safety and return to work best practice.
- To provide education and training to members in regard to work health & safety and return to work.
- To advocate improvements to legislation and work health & safety and return to work practices.

About workers compensation self-insurance

Self-insurance in workers compensation terms describes larger employers that fund and manage their own claims under a licence or grant provided by the relevant workers compensation regulator. Self-insurance has been a part of most Australian schemes since their early genesis. The exception is Queensland, where it is a relatively recent addition.

Exceeding the benchmark – the history of self-insurance

Before the implementation of statutory workers' compensation arrangements in the late 1800s, injured workers seldom succeeded in actions against their employer for negligence. The *Employment Liability Act 1880* enacted in England and replicated in the Australian colonies fell short of its intent and new 'no fault' laws began to appear in the early 20th century to improve

conditions for injured workers. However, early no-fault coverage for workers' compensation was limited.

Some larger employers that sought to improve coverage for their employees were given statutory exemptions from this early legislation on condition that they would put in place workers compensation arrangements that were no less favourable than those mandated by the legislation. Section 9 of the South Australian *Workmen's Compensation Act 1900* is one example of such legislation, and called the process 'contracting out'. These employers were later called 'exempt employers' because they were, in those times, exempted from the operation of the relevant Acts.

As the various Acts were changed and replaced over the 20th century, self-insurance evolved from this notion of exemption from legislation to the self-insurance we know today, where it is a self-funding arrangement within the legislation, rather than outside it.

Interestingly, the term 'exempt employer' was only excised from the South Australian Act in 2008 and is still in the Western Australian Act. This is despite the fact that self-insurance has for a long time been an employer status *within* the legislation, and to which the relevant Act generally applies. It is equally bizarre that in South Australia, employers that are insured by ReturnToWorkSA are colloquially known as 'registered employers', as if self-insurers are not registered, which of course is not true. They are registered, but under different sections of the Act.

Given this history, it can be said that self-insurance has its genesis in a group of employers that wanted to look after their workers to a greater extent than the law of the time required. Exceeding the benchmark has been in the genes of Australian self-insurance ever since.

Self-insurance generally

Self-insurance is not easy to get, with significant financial criterion to be complied with, financial guarantees, excess of loss insurance, reserve accounts and strict compliance with WHS and return to work standards and other statutory requirements. This is because in all jurisdictions, the workers compensation scheme is the 'insurer of last resort' in the event that a private sector self insurer ceases operating without being able to cover its workers compensation liabilities.

In South Australia, it is commonly stated that we have the highest proportion of self-insurance in Australia at 38% of the workforce by remuneration. However, that is not the entire story. About half of the self-insurance in South Australia is the State public sector (generally referred to as the Crown). The Crown itself is its own insurer of last resort, meaning that the Compensation Fund only has this responsibility for the private sector self-insurers, at around 19% of the workforce by remuneration. So in terms of contingent risk to the Return to Work Scheme, the citing of the 38% level of self-insurance is misleading. In this context, the actual number of self-insurers in South Australia is not that far out of proportion with some other schemes.