



**FINAL REPORT INTO THE REFERRAL FOR AN INQUIRY INTO
THE RETURN TO WORK ACT AND SCHEME**

30th Report

OF THE

**PARLIAMENTARY COMMITTEE ON OCCUPATIONAL SAFETY,
REHABILITATION AND COMPENSATION**

Tabled in the House of Assembly and ordered to be published on 14 November 2017

Second Session, Fifty Third Parliament

Presiding Member's Foreword

The State's previous workers' compensation scheme, known as *WorkCover*, attracted considerable scrutiny throughout its operation because it was one of the poorest performing schemes in Australia. This is because *WorkCover* consistently produced return to work rates well below the national average, required one of the country's highest employer premiums to operate, and was extremely underfunded.

The Committee acknowledges that a well-functioning workers' compensation scheme is arguably difficult to achieve; however, it is a goal that remains integral to society today. Accordingly, a 'successful' scheme must be both socially and financially sustainable; and must cater to a range of competing objectives. For example, the scheme should provide timely assistance to injured workers by:

- providing appropriate income support;
- cover the costs of medical and allied health services to assist workers recover and return to work, and
- provide enough support to workers who are unable to return to work.

With that said, these aims must be weighed against the requirement that the scheme remains affordable for both employers and government.

To address the systemic issues associated with *WorkCover* and to try and strike the appropriate balance between these competing interests, the South Australian Parliament enacted the *Return to Work Act (RTW Act)*, which commenced full operation on 1 July 2015. This legislative instrument played a seminal role in reforming the State's workers' compensation system, which is now known as the *Return to Work Scheme* (the Scheme), by having a stronger focus on workers remaining at or returning to work. In addition, the new Scheme now has a greater focus on early intervention strategies to ensure that injured workers have the best prospects of returning to or remaining in the workforce. Moreover, the Scheme also strives to maintain affordable employer premiums to ensure that South Australia remains competitive with other Australian jurisdictions, and highlights the importance of the Scheme being fully funded. Along with these legislative changes, the reforms saw the rebranding of *WorkCover Corporation* to *ReturnToWorkSA*; the introduction of mobile case managers; and greater customer focused systems such as telephone reporting.

In considering the significance that these changes posed, the Hon Tammy Franks MLC moved for an inquiry into the *RTW Act* and Scheme, with the Legislative Council referring the inquiry to this Committee. Due to the interest of this inquiry, the Committee produced an Interim Report summarising the evidence, submission and research presented up to an including 2 March 2017. This Final Report should be read and considered along with the information contained in the Interim Report for a fuller understanding of the issues presented before the Committee.

There has been some difficulty in properly assessing the operation of the *RTW Act* as many of the consequences of the new scheme are still taking effect and their full impact won't be

known until at least July 2018. Section 203 of *RTW Act* prescribes the Minister for Industrial Relations must cause of a review of the Act, along with its administration and operation, three years after the Act first commenced (an extract of this section is found in Appendix B). As parts of the *RTW Act* came into operation on 4 December 2014, it is expected the Minister's review will commence on 4 December 2017 and will be completed within 6 months of this date. The Committee's inquiry is expected to provide this review with a background on matters of importance within the Scheme. Further, the Committee has made recommendations in specific areas which the Minister's review should further explore and inquire into.

As part of this inquiry, the Committee received a total of 52 submissions from interested parties, including 25 from workers and unions; 10 from employers and their associations/groups and nine from medical and legal professional organisations. In addition to this, the Committee received additional evidence across 11 public hearings. Many submissions and evidence adduced through these hearings indicated that the changes implemented by the *RTW Act* promoted return to work and provided a system which encourages independence.

The scheme has also had much success in helping to reduce costs to businesses, reduce litigation and reduce the number of complaints about the scheme. The average premium rate since the operation of the new act has reduced from 2.75 per cent to 1.8 per cent and this is to be applauded, but it still places South Australia as one of the more expensive schemes in the country. The consequences of many changes in the legislation are still being worked through the courts system, especially in relation to interpreting some of the new clauses.

With regard to these potential shortcomings, stakeholders noted particular concerns about the strict timeframes on income support and medical expenses, and the apparent difficulty in meeting the criteria to access ongoing support. In expanding upon this latter concern, the Committee received evidence which highlighted the view that the compensability and eligibility test for psychiatric injury claims could be increasing the complexity for these injured workers to access the services they require from the Scheme in order to recover and remain/return to work.

In reflecting upon the evidence the Committee gathered throughout this inquiry, the Committee made a total of 18 recommendations. In making these recommendations, the Committee notes that workers' injuries and the workers' compensation process itself can be distressing—not only for the injured worker, but also for their employer and those around them. As such, the Committee highlights the view that these recommendations should be considered with the following in mind:

- each injury and claim is unique;
- each injury and claim can accordingly affect people in different ways; and
- some may require individualised support to achieve positive return to work outcomes.

Furthermore, the Committee acknowledges that South Australia is predominately comprised of small or medium sized employers/businesses. Therefore, consideration of these recommendations should consider that some employers may need additional support in ensuring recovery and return to work opportunities are maximised. This is because employers have varied levels of experience when dealing with injury management and workers' compensation. In addition, many businesses, in particular smaller ones, may have limited

experience, knowledge and/or resources when it comes to supporting an injured employee to return to work.

These 18 recommendations comprise a mixture of suggestions to the Minister for Industrial Relations about how the Scheme could be strengthened, as well as topics or initiatives that should be explored further through the mandated review into the Scheme.

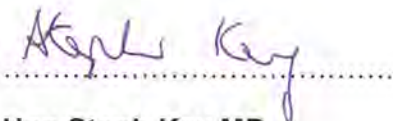
It is noted that many of the recommendations in the report propose significant changes to the Scheme which will result in increased cost to the Scheme. In order to assess the impacts that these recommendations will have, it is imperative that the financial implications are understood and taken into consideration. It is only after these impacts are fully explored that the recommendations can be considered.

There are also a number of legal interpretations that are still working through the industrial legal system to settle on what they mean in a practical sense for businesses, injured workers and the overall performance of the *RTW Act* in its current form.

Whilst the recommendations are worthy of consideration we must ensure the Scheme remains competitive and in line with other states so that we can continue to encourage new job creation and business growth and at the same time not do anything that jeopardises the positive outcomes that have been achieved under the new Act.

Although this inquiry sought to review the Scheme while the legislative changes were in their infancy, it afforded a valuable opportunity for stakeholders to highlight their issues and concerns about the significant changes to the structure and operation of our State's workers' compensation scheme. It, therefore, facilitated an important dialogue amongst stakeholders, aggrieved workers and the Committee, which provides an invaluable foundation for the mandated review into the Scheme.

On behalf of the Committee, I express my appreciation to those interested parties who provided submissions and/or oral evidence. I particularly thank those injured workers who provided evidence to the Committee.



Hon Steph Key MP
Presiding Member
Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation

Date: 14th November 2017

Terms of Reference

Pursuant to section 16(1)(a) of the *Parliamentary Committees Act 1991* (SA) the Legislative Council adopted the following resolution on 6 July 2016:

That the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation inquire into and report on—

- (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;*
- (b) *Alternatives to the overly restrictive 30% WPI threshold for ongoing entitlements to weekly payments;*
- (c) *The current restrictions on medical entitlements for injured workers;*
- (d) *Potentially adverse impacts of the current two year entitlements to weekly payments;*
- (e) *The restriction on accessing common law remedies for injured workers with a less than 30% WPI;*
- (f) *Matters relating to and the impacts of assessing accumulative injuries;*
- (g) *The obligations on employers to provide suitable alternative employment for injured workers;*
- (h) *The impact of transitional provisions under the Return to Work Act 2014;*
- (i) *Workers compensation in other Australian jurisdictions which may be relevant to the inquiry, including examination of the thresholds imposed in other states;*
- (j) *The adverse impacts of the injury scale value; and*
- (k) *Any other relevant matters.*

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RECOMMENDATIONS

Recommendation 1 See Page 21

The Committee received evidence highlighting the importance of early intervention and it notes that the provision of such strategies is an object of the *Return to Work Act*. The Committee also received evidence that due to the complexity of some claims, there may be a delay between claim lodgement and compensability being determined.

Considering the importance of early intervention, and noting that on average, only around 5 per cent of claims end up being rejected, the Committee recommends early intervention strategies be implemented as soon as practically possible for all claims, and where appropriate, even prior to determination. To ensure that workers whose claims are ultimately rejected are not faced with the need to cover the costs of these services, the Committee also recommends the re-introduction of provisional liability in the Scheme, limited to only cover payment of early intervention services.

Recommendation 2 See Page 22

While acceptance rates for claims of psychiatric injury fluctuate from year to year, the Committee notes that in 2016/17 this rate was the lowest it has been in five years. The Committee is concerned that the changes in the compensability tests, in particular for psychiatric injuries, is more limiting than what was intended. Therefore, the Committee recommends the Minister for Industrial Relations amend section 7(1)(2)(b)(i) of the *Return to Work Act*, replacing 'the significant cause' with 'a significant cause'.

Recommendation 3 See Page 24

The Committee notes that every workers' compensation jurisdiction differs in the terminology used to describe those workers who can access ongoing support. For example, the Committee notes that in New South Wales, a reform of their Scheme saw the term *seriously injured worker* removed. It was replaced with the term *worker with high needs* for those with a permanent impairment greater than 20 per cent, and the term *worker with highest needs* for those with assessed as being greater than 30 per cent.

The Committee recommends the Minister for Industrial Relations considers New South Wales' approach and replaces the term *seriously injured worker*.

Recommendation 4 See Page 31

The Committee recommends the Minister for Industrial Relations consider the inclusion of a narrative test to supplement the already prescribed whole person impairment assessment processes. The Committee also recommends that should a narrative test be included in the Scheme, accredited doctors be trained in its use and application.

Recommendation 5 See Page 37

The Committee received evidence stating that some medication, including medication used to treat psychiatric injury, can be expensive and may not be covered by the Pharmaceutical Benefits Scheme. Further, the Committee recognises that for those workers who have returned to work, some require ongoing treatment to maintain their capacity, and without such treatment the worker may be unable to continue working.

Considering the above, the Committee recommends the Minister for Industrial Relations amends the *Return to Work Act* to broaden the coverage of medical expenses so there will be no time limit for coverage of:

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

Recommendation 6 See Page 38

ReturnToWorkSA have provided the Committee with examples where it has paid for return to work services beyond the cessation of a worker's income support. Given the importance of such services in supporting injured workers with their recovery and return to work, the Committee recommends the Minister for Industrial Relations ensures that all injured workers have access to return to work services for the full duration allowed in the *Return to Work Act*, including for the 12 month period after income support ceases.

Recommendation 7 See Page 41

The Committee recognises it is important for ReturnToWorkSA to be aware of claims where there is the potential for future surgery. However, the Committee does not find it reasonable for a worker to be denied payment for their work-related surgery because the surgery occurred outside of their medical support period and they had not sought pre-approval for surgery.

The Committee recommends the Minister for Industrial Relations amends the *Return to Work Act* so that the reasonable costs of future surgery associated with a compensable work-injury are payable by the Scheme without the precondition the surgery was pre-approved.

Recommendation 8 See Page 47

The current method of calculating the 104 week entitlement to income support is calendar based. As a result, a worker may only receive 104 weeks of income support if their incapacity is 104 consecutive weeks. Evidence presented to the Committee suggests that an initial return to work is not always successful, despite the best efforts of the worker and their employer. Sometimes, a second and third attempt may be required.

To address this anomaly, the Committee recommends that the *Return to Work Act* be amended so that the method of the 104 week income entitlement is based on the aggregate period of the incapacity for worker, whether consecutive or not.

Recommendation 9 See Page 53

The Committee received evidence both for and against the inclusion of common law in the Return to Work Scheme. Considering this evidence, in addition to the lack of common law cases to date, the Committee recommends common law and its inclusion in the Scheme be reviewed as part of the mandated review.

Recommendation 10 See Page 60

The Committee notes the disparity between small, medium and large sized employers and the resources available to them in order to offer injured workers suitable employment. This disparity, along with the provision of additional resources should be considered with this recommendation.

The Committee recommends the Minister for Industrial Relations ensure ReturnToWorkSA holds all employers accountable in providing suitable employment for their injured workers, as soon as the worker is certified fit to return to work.

The Committee also recommends RTWSA develop a key performance measure for agent compliance with section 18; and with the outcomes to be provided to the Committee every 12 months.

Recommendation 11 See Page 70

The Committee recommends the Minister for Industrial Relations review the compliance of the Corporation to meeting the Statement of Service Standards prescribed in Schedule 5 of the Return to Work Act, and report the findings to the Committee within 12 months.

Recommendation 12 See Page 73

The Committee recommends the Minister for Industrial Relations direct ReturnToWorkSA to review the information available on its website and the methods in which it disseminates information about the Scheme to injured workers to ensure it is easily accessible for all workers. Further, the Committee notes the digital divide that exists in the community. As such, it is important ReturnToWorkSA also makes information freely available to workers and other stakeholders through print, telephone and other mediums to suit the varied ways people may wish to access information about the Scheme.

Recommendation 13 See Page 83

The Committee recommends the Minister for Industrial Relations review and advise the Committee of the impact that the reduction of rehabilitation / return to work service provider spend has had on the outcomes of the Scheme.

Recommendation 14 See Page 86

The Committee notes in 2015/16, 25 per cent of the accepted claims were with employers based outside of the Adelaide hills and metropolitan area. Evidence received by the Committee, in particular from individual injured workers, did not reflect well on ReturnToWorkSA's regional engagement strategy. The Committee recommends the Minister for Industrial Relations require ReturnToWorkSA to review and advise on improvements of their services for regional and remote injured workers to ensure high quality services are afforded to all South Australians, regardless of location.

Recommendation 15 See Page 91

The Committee notes ReturnToWorkSA's ReCONNECT service helps people transition to community based and job search support services after income support has ceased. However, the Committee holds it important that workers who are most likely to require this support are provided with access to this information earlier to provide them sufficient time to plan.

The Committee recommends the Minister of Industrial Relation cause RTWSA to hold regular forums / information sessions where they can connect workers who are most likely going to exit the Scheme at 104 weeks with agencies (such as Centrelink) who can explain the support mechanisms which may be available for them prior to their income support ceasing.

Recommendation 16 See Page 96

The Committee recommends that the Minister for Industrial Relations consider amending the *Return to Work Act* to provide allow workers with a psychiatric injury to receive payments for economic loss and non-economic loss similar to those who suffer physical injuries.

Recommendation 17 See Page 97

The Committee recommends the Minister for Industrial Relations amend the *Return to Work Act* to require that workers receive financial advice for any lump sum payments of over \$50,000.

Recommendation 18 See Page 100

The Committee notes some employers reported it was unclear as to why they had experienced premium increases when the Scheme's average premium rate had gone down. The Committee therefore recommends the Minister for Industrial Relations require ReturnToWorkSA to communicate to an employer the reason for any change to their premium.

1. PARLIAMENTARY COMMITTEE ON OCCUPATIONAL SAFETY, REHABILITATION AND COMPENSATION

1.1 Preamble

This is the 30th report of the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation (the Committee). This inquiry was referred to the Committee from the Legislative Council.

This is the final report in relation to the inquiry, and should be read together with the Interim Report (the 28th report of the Committee, which was tabled on 30 May 2017). The Interim Report provides a summary of all submissions received as well as evidence heard from the Law Society of South Australia and ReturnToWorkSA (RTWSA).

This inquiry has been of considerable interest to many in the community. The Committee noted that whilst many workers and their advocates provided opinion around the harshness of the Return to Work Scheme, many employer groups and other bodies considered the inquiry premature given the relatively short length of time the Scheme has been in operation, and with there being a prescribed Ministerial review set to commence from 4 December 2017.

However, the findings of this Inquiry should inform the mandated review.

2. COMMITTEE MEMBERSHIP AND FUNCTIONS

2.1 Members of the Committee

Following the March 2014 State election, the Sixth Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation was constituted with the following Membership:

Hon Steph Key MP (Presiding Member);

Hon Justin Hanson MLC* (appointed on 28 February 2017)

Hon Jennifer Rankine MP** (appointed on 26 September 2017)

Hon John Darley MLC

Hon John Dawkins MLC

Mr Stephan Knoll MP

Ms Nat Cook MP*** (10 February 2015— 6 September 2017)

Ms Katrine Hildyard, MP (May 2014—February 2015).

Hon Gerry Kandelaars, MLC (May 2014—28 February 2017)

* the Hon Justin Hanson MLC was appointed on 28 February 2017 in place of the Hon Gerry Kandelaars who resigned.

** the Hon Jennifer Rankine MP was appointed on 26 September 2017 in place of Ms Nat Cook MP who resigned.

*** Ms Cook was appointed to the Committee on 10 February 2015, in place of Ms Katrine Hildyard who resigned.

2.2 Committee Staffing

The Committee is supported by the following staff:

Ms Sue Sedivy	Executive Officer	(5 November 2012—)
Mr Peter Knapp	Acting Executive Officer	(29 August 2017—)
	Research Officer	(12 December 2016—)
Ms Peta Spyrou	Research Officer	(14 September 2017—)

2.3 Functions of the Committee

Section 15F of the *Parliamentary Committees Act 1991* (SA) defines the functions of the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation as:

- (l) *to keep the administration and operation of the Occupational Health, Safety and Welfare Act 1986, the Workers Rehabilitation and Compensation Act 1986, and other legislation affecting occupational health, safety or welfare, or occupational rehabilitation or compensation under continuous review; and*
- (m) *to examine and make recommendations to the Executive and Parliament about proposed regulations under any of the legislation mentioned in paragraph (a), and in particular regulations that may allow for the performance of statutory functions by private bodies or persons; and*
- (n) *to perform other functions assigned to the Committee by this or any other Act or by resolution of either House of Parliament.*

2.4 Referral Process

Pursuant to section 16(1) of the *Parliamentary Committees Act 1991* (SA), any matter that is relevant to the functions of the Committee may be referred to the Committee:

- (a) *by resolution of the Committee's appointing House or Houses, or either of the Committee's appointing Houses*
- (b) *by the Governor, by notice published in the Gazette;*
- (c) *of the Committee's own motion.*

2.5 Ministerial Responses

Pursuant to section 19 of the *Parliamentary Committees Act 1991* (SA), any recommendations directed to a Minister of the Crown require a response from that Minister within four months. This response must include statements as to:

- which (if any) recommendations of the Committee will be carried out and the manner in which they will be carried out; and
- which (if any) recommendations will not be carried out and the reasons for not carrying them out.

The Minister must cause a copy of the response to the Committee's report to be laid before the Committee's appointing House within six sitting days after it is made.

3. GLOSSARY

AEU	Australian Education Union (SA Branch)
ASORC	Australian Society of Rehabilitation Counsellors
AMA	Australian Medical Association
AMWU	Australian Manufacturing Workers' Union
ARPA	Australian Rehabilitation Providers Association
ALA	Australian Lawyers Alliance
Committee	Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation
FSU	Finance Sector Union
GEPIIC	Guide to the Evaluation of Psychiatric Impairment by Clinicians
Guidelines	The Impairment Assessment Guidelines
Interim Report	The 28 th Report of the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation – Interim Report into the Referral for an Inquiry into the Return to Work Act and Scheme
LGA	Local Government Association
NWE	Notional Weekly Earnings
PASA	Police Association of South Australia
PSA	Public Service Association of SA
RISE	Re-employment Incentive Scheme for Employers
RTW Act	Return to Work Act 2014 (SA)
RTW Regulations	Return to Work Regulations 2014 (SA)
RTWSA	ReturnToWorkSA
SAET	South Australian Employment Tribunal
SDA	Shop, Distributive and Allied Employees' Association
SISA	Self Insurers of South Australia
WCT	Workers Compensation Tribunal
WPI	Whole Person Impairment

4. BACKGROUND

The Return to Work Scheme (the Scheme) is South Australia's workers' compensation system, which replaced the State's previously troubled WorkCover scheme.

For years, the WorkCover Scheme consistently had one of the worst return to work rates in the country, had one of the highest employer premiums and was severely underfunded. Numerous inquiries and reviews into the old Scheme sought to rectify these issues through various amendments, however, there was minimal overall improvement. The Minister commissioned a review of WorkCover and the legislation which ultimately led to the creation of the new Scheme in 2014.

The *Return to Work Act 2014 (SA) (RTW Act)* now sets the foundation for the Return to Work Scheme. This new Scheme came into full operation on 1 July 2015, along with three other pieces of legislation which play a key role. These legislative instruments are the:

- *Return to Work Regulations 2015 (SA)*;
- *Return to Work Corporation of South Australia Act 1994 (SA)*; and
- *South Australian Employment Tribunal 2014 (SA)*.

This new Scheme addresses the issues the old WorkCover system faced by having a stronger focus on early intervention and emphasising the importance of returning to work. Moreover, the Scheme now runs on lower premiums to remain competitive when compared to other jurisdictions and to be fully funded. However, in order to achieve this, the support afforded to workers underwent significant change, including the introduction of hard time limits for income support and medical expense coverage.

Submissions and evidence received were mixed in relation to this inquiry. Mr Bradley Cagney, a lawyer with the Shop, Distributive and Allied Employee's Association (the SDA) summarised the mixed views and stated that,

whilst percentage of workers are better off under the Return to Work scheme, given the reduction in step downs, protections for employees that might fall below the minimum wage, the introduction of lump-sum economic loss payments and a right under section 18 to enforce the provision of suitable employment, there are cohorts of workers who fall through the cracks in this scheme.¹

The changes to the Return to Work Scheme have affected many in the community.

As the Scheme is still in its early days, many parts of the *RTW Act* remain untested in the South Australian Employment Tribunal (the SAET) and superior courts. This has resulted in the Committee receiving some submissions claiming that this inquiry is too early to understand that full effect of the change in legislation.²

On this point, Mr John Walsh, Director of DW Fox Tucker Lawyers, stated,

¹ Bradley Cagney, Committee Hansard, 10 August 2017, 93-94

² See, eg, Registered Employers Group, Submission No 18, *Inquiry into the RTW Act and Scheme*, 29 September 2016,

in large measure it is far too early to contemplate changes to the Return to Work Act, far too early because we are still uncertain in relation to the interpretation of the act that is going to be applied in many areas by the full bench of the South Australian Employment Tribunal and, in many cases I suspect, by the Supreme Court.³

With that said, Dr Kevin Purse, Adjunct Research Fellow at Central Queensland University, took a different view and stated:

We often hear the argument that the scheme is only in its early phase and it needs to settle down. I think we know enough to be able to see the serious problems which have emerged and I think most of the reforms we would be looking at would be 'affordable'. We do not need to wait for another three, five or 10 years. Even in New South Wales, they have taken action to ameliorate the genuine hardships which have been occasioned by their legislation—the legislation on which we have based our Act.⁴

The *RTW Act* stipulates the Minister for Industrial Relations must cause a review of the *RTW Act* as well as its administration and operation. This is to be conducted on the 'expiry of 3 years from its commencement.'⁵ Given parts of the Act came into operation on 4 December 2014, the mandated inquiry is to be completed within six months of this date.⁶

The Committee's report will assist with the mandated inquiry.

4.1 Importance of Return to Work

There is ample evidence that prolonged absence from work has major debilitating effects on injured workers and their families. The Australian and New Zealand Consensus Statement on the Health Benefits of Work summarises the latest evidence on return to work and found,

the negative impacts of remaining away from work do not only affect the absent worker; families, including the children of parents out of work, suffer consequences including poorer physical and mental health, decreased educational opportunities and reduced long term employment prospects.⁷

Work injuries have a broader impact than just on the injured worker. It also imposes both direct costs (such as workers' compensation premiums, and income support payments) and indirect costs (such as loss of productivity and cost of providing social welfare) on employers and the community.⁸

After a period of unemployment or work absence, reemployment generally results in an improvement of health and well-being, as well as reduced psychological distress. This also leads to lower morbidity rates.

³ John Walsh, Committee Hansard, 30 March 2017, 25.

⁴ Kevin Purse, Committee Hansard, 18 May 2017, 58.

⁵ *Return to Work Act 2014* (SA) s 203(1)

⁶ *Ibid* s 203(3).

⁷ The Royal Australasian College of Physicians, 'Realising the Health Benefits of Work' (Position Statement, 2011) 7.

⁸ Safe Work Australia, 'The Cost of Work-Related Injury and Illness for Australian Employers, Workers and the Community: 2012-13' (Report, November 2015) 9.

Governments, employers, unions, insurance companies, legal practitioners, advocacy groups, as well as the medical, nursing and allied health professions across both Australia and New Zealand agree that:

- Work is generally good for health and wellbeing;
- Long-term work absence, work disability and unemployment have a negative impact on health and wellbeing;
- Work is an effective means of reducing poverty and social exclusion;
- Individuals seeking to enter the workforce for the first time, seeking reemployment or attempting to return to work after injury or illness, face a complex situation with many variables; and
- Health professionals exert a significant influence on work absence and work disability. This influence provides health professionals with opportunity for patient advocacy, which includes but is not limited to, recognition of the health benefits of work.⁹

⁹ The Royal Australasian College of Physicians, above n 7, 7.

5. ADDRESSING THE TERMS OF REFERENCE

5.1 Eligibility Criteria

Term of Reference

- (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;*

5.1.1 Changes

Section 6.1.2 of the Interim Report detailed the background and legislation relating to changes of the criteria for injury compensability. Broadly these changes include the fact that,

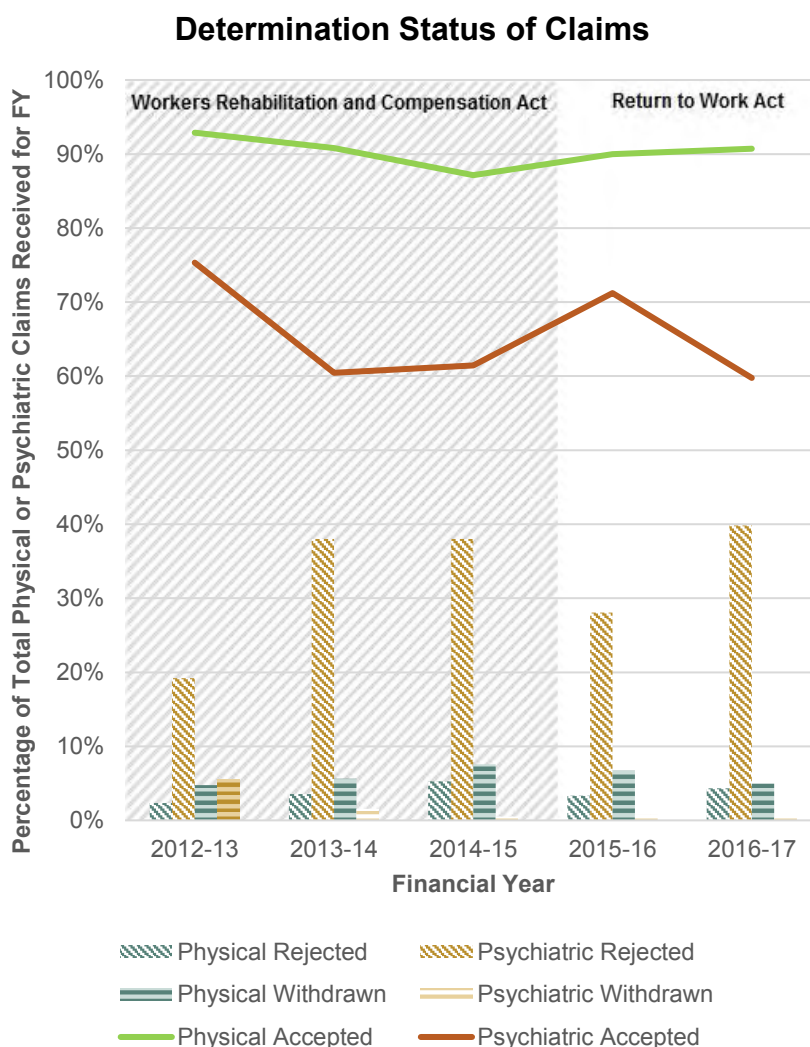
- **physical injuries** are compensable if the injury arises out of or in the course of employment and employment was **a significant** contributing cause of the injury;¹⁰ and
- **psychological injuries** are compensable if the injury arises out of or in the course of employment and employment was **the significant** contributing cause and did not arise as a result of an exclusion event.¹¹

Figure 1 shows the determination status of claims received over the past five financial years, broken down into physical injury claims and pure psychiatric injury claims. On average, around 5 per cent of the total number of claims received each year are rejected.¹²

¹⁰ *Return to Work Act 2014* (SA) s 7(2)(a) and (b).

¹¹ *Ibid* s 7(2)(b). Exclusion criteria are listed in *Return to Work Act 2014* (SA) s 7(4).

¹² ReturnToWorkSA, 'Data Request for Occupational Safety, Rehabilitation and Compensation Committee' (Response to Committee Request, September 2017) 1.



Source: ReturnToWorkSA, 'Data Request for Occupational Safety, Rehabilitation and Compensation Committee' (Response to Committee Request, September 2017) 1.

Figure 1: The determination status of non-self insured claims received. Physical injury and primary psychiatric injury claims have been separated. Claim numbers are expressed as a percentage of the total number of claims received for that injury type.

5.1.2 What has been the Impact for Workers with Physical Injuries?

There is a polarising view as to whether or not the change in legislation would indeed make it more difficult for entry into the Return to Work Scheme for those with physical injuries. To date, two decisions handed down by the SAET where *significant* has been a consideration — *Ward v State of South Australia (Department for Primary Industries and Regions SA (PIRSA))* [2016] 28 (*Ward*) and *Roberts v State of South Australia* [2016] SAET 58.

Deputy President Gilchrist held in *Ward*:

The word 'significant' as it appears in s7 of the Act is not a term of art. It is an ordinary word that requires the trier of fact to make an evaluative judgement as to whether or not there is sufficiency of a connection between the worker's employment and the injury to

permit the conclusion that the worker's employment was a significant contributing cause of the injury.¹³

Deputy President Calligeros in *Roberts* confirmed the,

use of the indefinite article before the word significant importantly qualifies its effect and means there can be more than one significant contributing cause of an injury.¹⁴

In evidence to the Committee, Mr John Walsh, Director of DW Fox Tucker Lawyers, stated that he does not,

expect there to be any significant change in relation to the tightening of that eligibility criteria. The Supreme Court, and other jurisdictions as well, has made it very clear that when dealing with the word 'significant', it means anything that is not insignificant.¹⁵

Mr Graham Harbord, Managing Director of Johnston Withers Lawyers, stated from the cases that have been disputed and decided, there,

has not [been] any real impact, but I caution that it is probably too early to come to a final conclusion in this respect until we have more cases decided.¹⁶

The experiences of both Mr Walsh and Mr Harbord were echoed by lawyer of the SDA, Mr Cagney:

[I]t is our experience that there has been little to no change in how physical injuries are assessed for compensability. When the scheme was initially introduced, we did see some attempts to interpret the words 'significant contributing cause', to apply that to certain situations and come up with a different result than what otherwise might have been, but our experience is, in the end, it hasn't actually changed a whole lot.¹⁷

These views appear to be substantiated by the most recent data provided by RTWSA. As seen in Figure 1, there appears to be little change in acceptance rates of claims for physical injury. While there appears to be a slight increase in the acceptance rates post the introduction of the *RTW Act*, this appears to be within normal yearly variation.

5.1.3 What has been the Impact for Psychiatric Injuries?

While initial SAET decisions indicate the legislative changes may have limited impact on the compensability for physical injury claims, to date there have been no decisions handed down for claims relating to the compensability of psychiatric injuries.

¹³ *Ward v State of SA (Department for Primary Industries and Regions SA (PIRSA))* [2016] SAET 28 [35].

¹⁴ *Roberts v State of South Australia (TAFE SA)* [2016] SAET 58.

¹⁵ John Walsh, Committee Hansard, 30 March 2017, 27.

¹⁶ Graham Harbord, Committee Hansard, 13 April 2017, 30.

¹⁷ Bradley Cagney, Committee Hansard, 10 August 2017, 94.

Throughout this inquiry, the Committee received submissions and evidence highlighting the view that the changes to the legislation have possibly made it more difficult for workers with a psychiatric injury to access the Scheme.¹⁸ On this point, Mr Cagney from the SDA said:

There is no doubt that the change is meant to further tighten the criteria for accessing the scheme for those who have suffered a psychiatric injury. Now, only the most obvious of work-induced mental injuries resulting in incapacity for work will be accepted.¹⁹

The Australian Meat Workers Union and Andersons Solicitors, in their joint submission to the Committee, provided real-life examples of workers who were denied access to the Scheme because of their inability to show that employment was **‘the’** significant contributing cause of the injury.²⁰

Mr Harbord stated as of 13 April 2017, there has been no final concluded case in relation to a psychiatric injury where employment was **a** significant cause but it was **not** the significant cause (and therefore not compensable). However, he said he was,

aware ... of a number of cases, from personal experience and talking to other lawyers, where ReturnToWorkSA is certainly testing this. Our experience has been that the usual course is to reject a psychiatric injury, unless there are no other possible causes apart from work.²¹

However, Mr Walsh stated that in his,

personal experience and anecdotal experience ... the ‘tightening of the eligibility criteria for entry into the Return to Work Scheme’ has had and will continue to have minimal impact.²²

Figure 1 shows the determination rates for psychiatric injuries appear to be more volatile than those for physical injuries. Immediately after the commencement of the *RTW Act*, acceptance rates increased to over 70 per cent, however, in the 2016-17 financial year dropped down to the level seen in the two years prior to the current Scheme.

Mr Cordiner said when comparing the Return to Work Scheme to other jurisdictions:

In most states, about 55 per cent of [psychiatric injury claims] fairly consistently will be rejected and have very high dispute rates. In our case, we are not up to 55 per cent. It’s not that we are trying to get to 55 per cent, we just deal with whatever the merits are of the situation.²³

¹⁸ See, eg, Tony Rossi, Committee Hansard, 2 March 2017, 17; Police Association of South Australia, Submission No 27, *Inquiry into the RTW Act and Scheme*, 30 September 2016, 2; Bradley Cagney, Committee Hansard, 10 August 2017, 94.

¹⁹ Bradley Cagney, Committee Hansard, 10 August 2017, 94.

²⁰ Australian Meat Workers Union and Andersons Solicitors, Submission No 19, *Inquiry into the RTW Act and Scheme*, September 2016, 2.

²¹ Graham Harbord, Committee Hansard, 13 April 2017, 33.

²² DW FoxTucker Lawyers, Submission No 44, *Inquiry into RTW Act and Scheme*, 21 March 2017, 5.

²³ Rob Cordiner, Committee Hansard, 28 September 2017, 111.

Although Mr Harbord and Mr Walsh's experiences differed as to whether eligibility criteria had in fact been tightened, both shared the common view that the change in wording may cause more thorough investigations and disputation.

Mr Walsh said,

the time taken to investigate these issues often militates against early intervention efforts and if the claim is rejected the disputation often creates an unhealthy atmosphere of distrust which further compounds the problem. Ultimately, I expect that the 'tightening of the criteria' will cause more disputation but will achieve little of practical benefit.²⁴

Mr Harbord stated that because of the change of wording, there,

is certainly a lot more dredging up of the past by ReturnToWorkSA to trawl through the medical history of every worker who lodges a claim for psychiatric injury, to see if they can uncover anything that might give rise to a previous visit to a doctor for depression—perhaps their partner died many years ago. That triggers that sort of search and that sort of argument, that that has been a lingering condition ever since—even though they are back at work—and that employment wasn't the significant contributing cause.²⁵

However, the length of time it takes to determine a claim may impact on the worker's return to work outcome. The Australian Society of Rehabilitation Counsellors (ASORC) recognised in their submission that,

while claim determination may take an extended period of time to finalise, especially with psychological injuries, early intervention should not depend on claim determination status,

and

the emphasis needs to be about promoting return to work regardless of the claim formalities.²⁶

Schedule 5 of the *RTW Act* stipulates service standards the Corporation must meet. This includes that the Corporation (which includes self-insured employers, claims agents, and service providers where engaged by the Corporation) must,

- (b) *ensure that early and timely intervention occurs to improve recovery and return to work outcomes including after retraining (if required);*²⁷

The *RTW Act* does not stipulate these service standards must be only met for determined accepted claims.

The Committee heard evidence that because of the change in wording, some psychiatrists were going to significant detail when attributing the cause of the psychiatric injury. Mr Walsh provided an example of one case where an assessing psychiatrist found the contributing factors for one worker's injury were:

- 'Past history of depression'—40% contribution;

²⁴ Ibid.

²⁵ Graham Harbord, Committee Hansard, 13 April 2017, 31.

²⁶ DW FoxTucker Lawyers, above n 22, 4.

²⁷ *Return to Work Act 2014* (SA) sch 5 pt 2 cl 4(a)(b).

- 'Being post-menopausal—5% contribution;
- 'Gender (female)'—5% contribution;
- 'Social factors (e.g. being a divorcee and not being in a current relationship)'—10% contribution; and
- 'Personality factors' (e.g. suffering a degree of anxiety or having obsessional, narcissistic or neurotic tendencies)—10% contribution.

In this case, the individual worker developed psychiatric symptoms after an altercation in the workplace which came from an abusive interaction with a co-worker which in turn was exacerbated by an increased workload, all of which caused the individual to decompensate. The psychiatrist considered the workplace factor to make a 30% contribution and 'therefore her employment would not be seen as the significant contributing cause of her adjustment disorder'.

I believe that even if there is some medical validity for this sort of mathematical approach to the assessment of significant contribution, it will not find favour with the Courts who will continue to make the assessment based upon well-established principles of causation.²⁸

Findings

Given the objects of the *RTW Act*, service standards as well as evidence supporting early intervention, the Committee found it important to continue to focus on recovery and return to work during the determination phase of a claim. However, the Committee was cognisant that those few workers who have their claim rejected should not have to bear the cost of such early intervention.

Recommendation 1

The Committee received evidence highlighting the importance of early intervention and it notes that the provision of such strategies is an object of the *Return to Work Act*. The Committee also received evidence that due to the complexity of some claims, there may be a delay between claim lodgement and compensability being determined.

Considering the importance of early intervention, and noting that on average, only around 5 per cent of claims end up being rejected, the Committee recommends early intervention strategies be implemented as soon as practically possible for all claims, and where appropriate, even prior to determination. To ensure that workers whose claims are ultimately rejected are not faced with the need to cover the costs of these services, the Committee also recommends the re-introduction of provisional liability in the Scheme, limited to only cover payment of early intervention services.

The Committee recognised there have been concerns raised that the change in wording around compensability will make it more difficult for some workers to access the Scheme. For physical injuries, from the cases decided to date, data provided by RTWSA in addition to evidence received, it appears there may be limited impact.

²⁸ DW Fox Tucker Lawyers, above n 22, 4-5.

For psychiatric injuries, the change in wording is yet to be tested fully in the SAET. Determination data shows that while there was an increase in acceptance rate post commencement of the *RTW Act*, this has dropped in the most recent financial year to its lowest point in five years. Further, from the evidence received, it appears to the Committee the change in wording may have led to more thorough investigations in order to determine the compensability of psychiatric injury claims. This may negatively impact the length of time it takes to make a determination.

Recommendation 2

While acceptance rates for claims of psychiatric injury fluctuate from year to year, the Committee notes that in 2016/17 this rate was the lowest it has been in five years. The Committee is concerned that the changes in the compensability tests, in particular for psychiatric injuries, is more limiting than what was intended. Therefore, the Committee recommends the Minister for Industrial Relations amend section 7(1)(2)(b)(i) of *the Return to Work Act*, replacing 'the significant cause' with 'a significant cause'.

5.2 Whole Person Impairment (WPI) and ‘Seriously Injured Workers’

Term of Reference

(b) *Alternatives to the overly restrictive 30% WPI threshold for ongoing entitlements to weekly payments;*

5.2.1 Use of the term ‘Seriously Injured Worker’

Each work injury is unique. For doctors, medical providers, claims agents and some larger employers, being involved with a work injury claim is a regular occurrence.

For workers and their families, a work injury is often a rare or even once-in-a-lifetime experience. At one end of the spectrum, it may involve just getting the *all clear* from a doctor or minimal treatment. On the other end, it could significantly change lives. In the worst cases, it may result in permanent restrictions on capacity, loss of career, breakdown of relationships, and years of attending medical appointments for diagnoses and treatment. The extent of these effects could fall outside the *RTW Act’s* definition of a *seriously injured worker*.

As part of an innovative policy approach, the New South Wales government used *behavioural insights* to help people make better decisions for themselves and society. As a result of this approach, it found that the ‘blanket use of legislative terms—such as *significant injuries*’ caused negative priming and has consequently been removed.²⁹

Dr Purse also did not agree with the use of the term *seriously injured*:

It is also an insult to people ... [A] lot of people with serious injuries are somehow told that they don’t have a serious injury. That is something they don’t really need, but it is a distortion of our language and it distorts the system... It is bad policy and is bad use of language.³⁰

Safe Work Australia, the Australian government statutory body established to develop a national policy relating to work, health and safety as well as workers’ compensation defines a *serious claim* as:

An accepted workers’ compensation claim for an incapacity that results in a total absence from work for one working week or more.³¹

Safe Work Australia’s definition does not rely on the need for workers to meet a level of permanent impairment.

Where this report refers to a *seriously injured worker*, it is with reference to those workers who have been assessed as having a WPI of 30 per cent or more—that is workers who meet the criteria of being a *seriously injured worker* as stipulated in section 21 of the *RTW Act*. By using

²⁹ New South Wales Government, Premier & Cabinet Behavioural Insights Unit, ‘Understanding People, Better Outcomes’ (2010) 8.

³⁰ Kevin Purse, Committee Hansard, 18 May 2017, 55.

³¹ Safework Australia, *Glossary* <www.safeworkaustralia.gov.au/glossary>.

the term, the Committee does not ignore the significant impact that a work injury may have, even if the worker does not meet the arbitrary threshold imposed by the *RTW Act*.

Findings

Recommendation 3

The Committee notes that every workers' compensation jurisdiction differs in the terminology used to describe those workers who can access ongoing support. For example, the Committee notes that in New South Wales, a reform of their Scheme saw the term *seriously injured worker* removed. It was replaced with the term *worker with high needs* for those with a permanent impairment greater than 20 per cent, and the term *worker with highest needs* for those with assessed as being greater than 30 per cent.

The Committee recommends the Minister for Industrial Relations considers New South Wales' approach and replaces the term *seriously injured worker*.

5.2.2 Support Available

A greater level of support is provided to seriously injured workers including:

- income support until retirement age;³²
- medical expenses relating to the compensable injury covered for life;³³
- access to common law in cases of employer negligence;³⁴ and
- no obligation to return to work or to comply/participate in a recovery/return to work plan.³⁵

For the purpose of the *RTW Act*, a worker is considered *seriously injured* by one of three following ways:

1. a worker is assessed as having a WPI of 30 per cent or more;³⁶
2. an interim decision is made by RTWSA;³⁷ or
3. a determination is made by RTWSA that a worker with an existing injury is to be taken to be seriously injured for the purposes of the Act (this applies to transitional claims only).³⁸

³² *Return to Work Act 2014* (SA) s 41.

³³ *Ibid* s 33(21)(a).

³⁴ *Ibid* s 72.

³⁵ *Ibid* ss 15(4), 25(11).

³⁶ *Ibid* s 21.

³⁷ *Ibid* s 21(3).

³⁸ *Ibid* sch 9 cl 34(2).

As at 27 April 2017, there were 353 seriously injured workers with active claims. Of these claims:

- 250 have been assessed as having a 30 per cent or more WPI;
- 31 have been the subject of an interim decision; and
- 72 have been transitional claims determined under schedule 9, clause 34(2).³⁹

Mr Peter Wilson, an injured worker who appeared before the Committee said he was assessed as having a WPI of 47 per cent. He described, that for him, *seriously injured worker* status was introduced at a particularly difficult time in his life. On this point, the witness stated:

I didn't see becoming a seriously injured worker as a golden ticket or winning the lottery, at all. I saw it as an opportunity at the right time, that I was ready to move on with my life and that I could do something else.⁴⁰

5.2.3 Assessment Guidelines

Most workers will be required to undergo a formal whole person impairment assessment to assess whether they have a WPI of 30 per cent or more.

The assessment must be completed in accordance with division 5 of the *RTW Act*, together with the Impairment Assessment Guidelines (the Guidelines).⁴¹

The Guidelines are intended to provide an 'objective, fair and consistent method for assessing permanent impairment arising from a work injury'.⁴² They are based on the *American Medical Association Guides to the evaluation of permanent impairment, 5th edition* (AMA5), with the chapter on psychiatric disorders being based on the *Guide to the Evaluation of Psychiatric Impairment by Clinicians* (GEPIC).⁴³

5.2.4 Psychiatric Injuries

The Committee notes that '[t]he quantitative assessment of the impact of a psychiatric disorder in individuals is a long-standing problem'.⁴⁴ This issue does not appear to be solved by use of the GEPIC, as both worker and employer associations put forward views on the appropriateness of this assessment tool for determining WPI, and ultimately ongoing support for injured workers.

³⁹ Letter from Rob Cordiner, Chief Executive Officer of RTWSA, to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, 27 April 2017, 3.

⁴⁰ Peter Wilson, Committee Hansard, 3 August 2017, 87.

⁴¹ *Return to Work Act 2014* (SA) s22(2)(a).

⁴² Government of South Australia, *Impairment Assessment Guidelines*, 2015, 3.

⁴³ *Ibid.*

⁴⁴ Gordon Davies, 'The Psychiatric Impairment Rating Scale: Is it a Valid Measure?' (2008) 43(3) *Australian Psychologist* 205.

Discussed in the Interim Report (see section 6.2.3), a number of worker groups expressed concern that the GEPIC is too harsh and resulted in scores that were too low when considering the impact the injury had on the worker.⁴⁵

The Police Association of South Australia (PASA) submitted even though police officers are exposed to some horrific events, to their knowledge, no member had reached the 30 per cent WPI for a psychiatric injury.⁴⁶ Mr Harbord broadened this and stated in his experience and from talking to other lawyers, he was,

not aware of anyone who has got over the 30 per cent threshold for psychiatric injury at present.⁴⁷

Mr Joe Szakacs, State Secretary of SA Unions, said the use of the GEPIC 'means a worker need essentially be catatonic to be assessed seriously injured under' the *RTW Act*.⁴⁸

Contrary to this opinion, Dr Julia Oakley of RTWSA stated that in 2016-17 there were 19 permanent impairment assessments for primary psychiatric injury and five workers were assessed as having a WPI of 30 per cent or more.⁴⁹

Mr Walsh stated,

psychiatry is an imperfect science and views will differ amongst individual psychiatrists when they examine an individual. Some sort of structure, as GEPIC provides, is of benefit in that it should minimise the difference between individual psychiatrists, who may well come to it from two different points of view.⁵⁰

Having consistency when assessing any injury is important and Professor McFarlane told the Committee that,

there are now much more objective ways of measuring impairment [than the GEPIC] by active measures of behaviour and brain function, and the science behind that impairment scale is really not well established, and there are some significant issues that could I think be done to improve that method of assessment.⁵¹

Similar issues were raised in the Committee's 2016 Inquiry into Work Related Mental Disorders and Suicide Prevention. As a result of this inquiry, the Committee recommended the Minister for Industrial Relations commission an independent review of the GEPIC to ensure it is a valid and reliable measure of psychiatric impairment.⁵²

The Minister responded in July 2017 and stated that:

⁴⁵ See, eg, Police Association of South Australia, Submission No 27, *Inquiry into the RTW Act and Scheme*, 30 September 2016, 2.

⁴⁶ Ibid.

⁴⁷ Graham Harbord, Committee Hansard, 13 April 2017, 31.

⁴⁸ Joe Szakacs, Committee Hansard, 1 June 2017, 66.

⁴⁹ Julia Oakley, Committee Hansard, 28 September 2017, 116.

⁵⁰ John Walsh, Committee Hansard, 30 March 2017, 28.

⁵¹ Alexander McFarlane, Committee Hansard, 18 July 2018, 99.

⁵² Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Parliament of South Australia, *Inquiry into Work Related Mental Disorders and Suicide Prevention* (2016) 12.

The Government will investigate commissioning a review of GEPIC ... To inform [the section 203 review], it would be beneficial if a review of the GEPIC were to be completed prior to the legislated review commencing.⁵³

5.2.5 Opinion regarding the 30 per cent Threshold

There was a general consensus from organisations who made submissions and provided evidence that changes needed to be made to the 30 per cent threshold, albeit for differing reasons.

Ms Belinda Loh, Executive Committee Member of SISA, stated in evidence:

[T]here has been a worrying trend of workers and their representatives who are more concerned at reaching that 30 per cent whole person impairment benchmark and less concerned about returning workers to safe and sustainable employment. That benchmark seems to be negatively impacting both the injured worker and their worker environments concerned with what they can do and more concerned with what they can't do.⁵⁴

This concern was shared by Ms Jeanette Hullick, Authorised Officer of the Local Government Association's (LGA) workers' compensation scheme, who stated the,

LGA Workers Comp Scheme didn't have any long-term incapacity claims exceeding two years under the old act, so we never really had a major influence in regard to ongoing liability beyond that 104 weeks under the old act. The concerning trend that's unfolding, which we are seeing under the new act at this early stage, relates to the 30 per cent WPI benchmark ... [T]here is a surge at the moment ... to strive for this 30 per cent WPI, to remain on weekly benefits as opposed to returning to work.⁵⁵

The Committee notes that the WPI assessment is not necessarily indicative of an individual's ability to work. The Australian Education Union and others argued by solely using this threshold it would result in workers who are unable to work, but still have their payments ceased at 104 weeks as they do not meet the criteria for ongoing support.⁵⁶ Conversely, SISA said some workers have been assessed as having a WPI of 30 per cent or more, but are able to work and yet will be automatically granted access to ongoing support for life.⁵⁷ An example was provided by some submissions that a double knee replacement would attract a 30 per cent WPI but would leave most people capable of continuing in employment, while a serious spinal injury may not attract this level of WPI assessment but leave people unable to continue in employment.⁵⁸

The SDA echoed this position and submitted:

⁵³ Minister for Industrial Relations, 'Response to the Recommendations of the Committee' (Ministerial Response, July 2017) 2.

⁵⁴ Belinda Loh, Committee Hansard, 11 May 2017, 43.

⁵⁵ Jeanette Hullick, Committee Hansard, 11 May 2017, 42.

⁵⁶ See, eg, Australian Education Union (SA Branch), Submission No 26, *Inquiry into the RTW Act and Scheme*, September 2016, 2.

⁵⁷ Self Insurers of South Australia, Submission No 6, *Inquiry into the RTW Act and Scheme*, 12 September 2016, 10.

⁵⁸ Local Government Association, Submission No 15, *Inquiry into the RTW Act and Scheme*, 29 September 2016, 5.

We are assisting workers who have undergone serious surgery such as spinal fusions that fall just short of the 30% threshold.

These workers face difficulties in returning to their pre-injury hours and duties, and cannot realistically achieve a return to work ...

The corollary of this is that some workers with a 30% WPI go on to have meaningful working lives, especially where their pre-injury employment is in an environment that can accommodate sedentary or 'lighter' work.⁵⁹

SISA provided a list of injured workers currently working for self-insured employers who have been assessed as having impairments of over 30 per cent but were still able to achieve a return to work (see Appendix A in the Interim Report).⁶⁰

Ms Hullick, provided an example where this threshold may have an unintended consequence. She stated that,

under the old act... [we had] a worker who has exceeded the 30 per cent incapacity threshold. He had successfully returned to work and has been in a successful role for many years. However, he is now considering the option to remain at home to receive weekly benefits as opposed to remaining in useful employment.⁶¹

While Ms Hullick provided an example where the threshold may encourage a worker with capacity to cease work, Mr Joe Szakacs, State Secretary of SA Unions referred to this threshold as 'blunt',⁶² with the threshold potentially causing the denial of workers who cannot work the opportunity for ongoing support. In explaining this position, Mr Szakacs maintained that the threshold,

fails to take into account a worker's previous job, qualifications, age, prospects of retraining or in fact the market that we live. Can anyone reasonably argue that a worker from the Whyalla steelworks and a worker from a call centre both suffering serious lower limb injuries, have the same prospects for returning to meaningful work?⁶³

Dr Purse described the threshold as an 'actuarially devised contrivance'⁶⁴ with most people having 'a totally different concept of what a serious injury is.'⁶⁵ Both he and Mr Harbord shared a similar view of the threshold having no relationship to earning capacity of a worker, that it is too high with very few people being able to reach the threshold for ongoing support.⁶⁶

One injured worker submitted the,

30% WPI is set over the moon to [sic] high and will place thousands of South Australian injured workers and their families on government welfare as their permanent injuries

⁵⁹ Shop, Distributive & Allied Employee's Association, Submission No 30, *Inquiry into the RTW Act and Scheme*, 28 October 2016, 3.

⁶⁰ Self Insurers of South Australia, above n 57, 9-10.

⁶¹ Jeanette Hullick, Committee Hansard, 11 May 2017, 42.

⁶² Joe Szakacs, Committee Hansard, 1 June 2017, 64.

⁶³ Ibid.

⁶⁴ Kevin Purse, Committee Hansard, 18 May 2017, 55.

⁶⁵ Ibid.

⁶⁶ Graham Harbord, Committee Hansard, 13 April 2017, 31.

[though] below 30 % WPI will stop the majority of them from gaining meaningful re-employment.⁶⁷

The transfer of costs to others was echoed by Dr Purse who found a consequence of the current threshold being,

a lot of the costs associated with the approach is borne by workers, their families and... the federal social security system. What we are doing here is shifting the cost for work injury onto the individuals and the taxpayers.⁶⁸

Findings

The Committee notes that while there have been some workers with psychiatric injury who have been assessed as having a WPI of 30 per cent or more, it received other evidence which indicates the current 30 per cent threshold is too black-and-white, and does not take into account workers' individual circumstances. Its use as the method for determining who has access to ongoing support means some workers unable to work but below the threshold will be left without support, while others who are or have the ability to work provided access. However, the Committee notes the alternative two year review process which formed part of the now repealed *Workers Rehabilitation and Compensation Act 1986* (SA) was fraught with problems. It did not achieve the outcomes intended, which was to limit ongoing weekly payments to those with the most serious injuries and incapacity for any form of employment.

5.2.6 Suggestions for Alternatives

The Committee received suggestions for alternative methods of determining which workers should receive ongoing income and medical support.

Alternative 1: Narrative or Qualitative Test

Introducing a narrative or qualitative test was the most commonly suggested alternative / addition to the 30 per cent threshold.

Mr Harbord stated,

there should be a test in the legislation, which would allow the tribunal to consider whether an assessment that a person is not a seriously injured worker is harsh or unjust in the circumstances, having regard to the nature and degree of the injury, the personal circumstances of the worker, the level of incapacity and whether that is likely to be permanent and the effect on the future earning capacity of the worker. At present, it is either you get over that threshold or you don't, and it is a very arbitrary and harsh criterion.

This was also supported by Dr Purse (albeit without reference to any decision being that of the SAET), who said:

A narrative is not a bad approach in the sense that it addresses the individual circumstances of an injured worker. WPIs are sort of like a bureaucratic approach. Being

⁶⁷ Andrew C (Injured Worker, Surname Withheld), Submission No 46, *Inquiry into the RTW Act and Scheme*, 30 March 2017, 2.

⁶⁸ Kevin Purse, Committee Hansard, 18 May 2017, 55.

pragmatic, it would probably be better to have a combination of both, but this is an area which merits further discussion in the broader community about what is the best approach.

Mr Walsh held a mixed view, but agreed with a combination of the WPI threshold and narrative tests. He stated that:

Perhaps introduction of some form of narrative [test] into GEPIC might be useful, not one of the other. I suspect that the narrative would result in significant divergences of opinion amongst psychiatrists, so I'm more attracted to the structure that GEPIC provides.⁶⁹

Like South Australia, workers in Victoria are classed as having a serious injury if their WPI is assessed as being 30 per cent or more. However, the narrative test exists in Victoria as an alternative method to determine whether a worker should be determined as seriously injured. In the Victorian jurisdiction, being classified as having a serious injury opens up access to common law (opposed to ongoing support and common law like in South Australia).⁷⁰ In relation to this, Mr Shaw warned that if the narrative test were brought into South Australia it would be 'more problematic'⁷¹ than the current criteria. According to Mr Shaw, in the Victorian workers' compensation system,

over 90 per cent of all their common law claims go through the narrative test and not the whole person impairment barriers, as a result of which common law is now exploding in Victoria and it's a big problem for the scheme.⁷²

Alternative 2: Reduction in Threshold

Workers and their advocacy groups expressed support for the reduction of the 30 per cent threshold.⁷³ Australian Lawyers Alliance and the South Australian Police Association (SAPA) suggested it be brought down to 15 or 20 per cent.⁷⁴

The SDA submitted a simple reduction of the threshold would create another 'arbitrary threshold'.⁷⁵ Mr Shaw stated when a,

hard boundary like a whole person impairment level that provides access to enhanced benefits [is set], you will create a new field of litigation. If somebody comes in with a 25 or 28 per cent whole person impairment, they are going to litigate, they are going to try to get pushed over the line.⁷⁶

To overcome creating another arbitrary threshold, the SDA and the SAPA both submitted if the threshold was reduced, some form of qualitative assessment would still be required.⁷⁷ This

⁶⁹ John Walsh, Committee Hansard, 30 March 2017, 28.

⁷⁰ *Workplace Injury, Rehabilitation and Compensation Act 2012* (Vic) s 325(2).

⁷¹ Robin Shaw, Committee Hansard, 11 May 2017, 46.

⁷² Ibid.

⁷³ See, eg, SA Unions, Submission no 36, *Inquiry into the RTW Act and Scheme*, 30 October 2016, 5

⁷⁴ Australian Lawyers Alliance, Submission No 14, *Inquiry into the RTW Act and Scheme*, 29 September 2016, 7; Police Association of South Australia, above n 45, 2.

⁷⁵ Shop, Distributive & Allied Employees' Association, above n 59, 2.

⁷⁶ Robin Shaw, Committee Hansard, 11 May 2017, 46.

⁷⁷ Ibid; Police Association of South Australia, above n 45, 2.

may be in the form of a work capacity assessment that would see workers' payments maintained as long as they worked to their maximum capacity.⁷⁸

Alternative 3: Tiered Support Structure

Dr Purse stated Tasmania 'use WPIs as well but they have a tapered approach, so your duration on the scheme is longer the higher your rating' and suggested that it would be worth in particularly looking at this approach.⁷⁹

Workers in Tasmania have access to income support for a period of up to:

- nine years if WPI is less than 15 per cent;
- 12 years if WPI is 15 per cent or above, but less than 20 percent;
- 20 years if WPI is 20 per cent or above, but less than 30 per cent; or
- Until retirement age if the WPI is 30 per cent or greater.

Such tiered systems may help to ensure that those who have a greater level of need are offered a greater level of support from the Scheme.

Findings

The Committee agrees that the 30 per cent WPI is a blunt instrument. It does not take into account nuances of individual circumstances such as type of work, age, retraining capabilities etc, and results in some workers who are unable to work after 104 weeks being left without income support and only a further 12 months of medical expenses covered.

The Committee received a number of suggestions as to how this section of the *RTW Act* may be changed, with suggestions to have a *narrative test* being the most suggested.

Recommendation 4

The Committee recommends the Minister for Industrial Relations consider the inclusion of a narrative test to supplement the already prescribed whole person impairment assessment processes. The Committee also recommends that should a narrative test be included in the Scheme, accredited doctors be trained in its use and application.

⁷⁸ Police Association of South Australia, above n 45, 2.

⁷⁹ Kevin Purse, Committee Hansard, 18 May 2017, 56.

5.3 Medical Expenses

Term of Reference

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

5.3.1 Impact of the Changes

Under the old WorkCover Scheme, injured workers had the costs of medical expenses paid as long as they were reasonably incurred because of a compensable injury.⁸⁰ No time limit was imposed by the legislation.

With the introduction of the *RTW Act*, the types of medical expenses covered did not change, but a time limit was imposed for workers who did not meet the *RTW Act's* definition of seriously injured. Section 33(20) states medical expense coverage ceases after a period of:

- 12 months from when the worker's access to income support expires; or
- 12 months if the worker was never entitled to income support.⁸¹

According to section 33(21), payments for medical expenses does not expire in the following circumstances:

- The worker meets the *RTW Act's* definition of being a *seriously injured worker*;
- Any therapeutic appliance required to maintain a worker's capacity;
- Surgery (and associated medical, nursing or rehabilitation costs), which have been pre-approved by the Corporation. Any application for pre-approval must occur prior to the end of the medical expense coverage period; or
- Injury prescribed by the regulations.

Some submissions stated there should be no changes to the medical expenses time limit. On this point, Mr Walsh stated the,

current restrictions on medical entitlements affect only a small percentage of workers who sustain compensable injuries. The majority either have no time off work or relatively short periods before returning to work and those categorised as seriously injured workers receive lifetime support. The cap will likely deter long term treatment which provides no benefit other than to increase dependence upon medication and/or the treaters.⁸²

Mr Ian Hutchinson submitted that access to ongoing medical expenses increased the risk of dependence by the worker. He provided one example where a worker received ongoing physiotherapy treatment for over 10 years, with 'no level of improvement for so long'.⁸³

Rather than assisting the worker to cope with injury, the perceptual nature of ineffective treatment has ensured she remains, at least in her own mind, incapable of recovering.

⁸⁰ *Workers Rehabilitation and Compensation Act 1986* (SA) s 32.

⁸¹ *Return to Work Act 2014* (SA) s 33(20).

⁸² DW FoxTucker Lawyers, above n 22, 1.

⁸³ Ian Hutchinson, Submission No 11, *Inquiry into the RTW Act and Scheme*, 28 September 2016, 2.

...

The old legislation [which provided access to ongoing medical expenses] ensured many individuals were trapped into a cycle of disconnect between themselves and their injury and totally outsourced the responsibility to medical providers willing to continue to treat a long since resolved condition and replace it with psychological dependence.⁸⁴

However, to overcome inappropriate treatment and avoid dependency issues raised, Finity Consulting recommended it is best practice to have ‘treatment guidelines which establish expectations for how some common injuries should be treated, and which provide information on expected recovery times.’⁸⁵ This is coupled with Finity’s recommendations for statistical data, and peer reviews to be used to ensure quality services are provided.⁸⁶

In comparison, patients requiring treatment through Medicare for chronic disease can have their General Practitioner complete a GP Management Plan. This plan outlines the patient’s health needs/conditions, recommended treatment, goals, as well as what the patient should do to remain as healthy as possible. Subject to eligibility, completion of the plan also allows access to specific allied health services such as physiotherapy.⁸⁷

Submissions received and evidence heard before the Committee mostly called for changes to the current medical expenses support cap. The time limit imposed by the *RTW Act* was described as ‘unduly restrictive and arbitrary,’⁸⁸ ‘contrary to the objects of the Act,’⁸⁹ and ‘discriminatory.’⁹⁰

The Committee heard that in some instances, treatment and medication being covered through the Scheme was assisting workers to remain at work (in circumstances where the worker had achieved a return to work). For this reason, SISA suggested that where treatment was needed to keep someone at work, these medical expenses should continue to be covered as long as there is evidence to support this.⁹¹

Ms van der Linden, Senior Policy Adviser of Business SA, shared a similar view and stated some workers should be entitled to ongoing medical expenses, but this needed ‘to be assessed on a case-by-case basis.’⁹²

We would hate to see a worker who has come back to work, has done the right thing but has got an ongoing injury beyond the two years. The year after that they have gone back to work, they have their income back, but they still have expenses themselves around injuries. I am not necessarily talking about going to a physio once a week for 10 years ...

⁸⁴ Ibid 2-3.

⁸⁵ Geoff Atkins and Gae Robinson, ‘A Best Practice Workers Compensation Scheme’ (Proposal Report, Finity, 21 May 2015) 20.

⁸⁶ Ibid.

⁸⁷ Department of Human Services, ‘Chronic Medical Condition Assistance’ (27 August 2017) <<https://www.humanservices.gov.au/individuals/subjects/chronic-medical-condition-assistance>>.

⁸⁸ DW FoxTucker Lawyers, above n 22, 1.

⁸⁹ Graham Harbord, Committee Hansard, 13 April 2017, 32.

⁹⁰ Kevin Purse, Committee Hansard, 18 May 2017, 56.

⁹¹ Self Insurers of South Australia, above n 57, 11.

⁹² Estha van der Linden, Committee Hansard, 6 July 2017, 75.

I am talking about people who need ongoing painkillers or some sort of medical help to actually function in their jobs as well.⁹³

Some employers who have the means assist their workers to remain at work by funding their treatment when the supports under the Scheme ceases. Both Ms van der Linden and Mr Shaw shared that some of their members choose to go over and above the minimum set out in the *RTW Act*. These members would use their discretion to continue to pay for the medical expenses for some of their injured workers where these expenses are not covered by the Scheme.⁹⁴

Mr Cordiner provided the opinion that the costs of ongoing medical expenses for someone who was back at work were not one of the biggest drivers of the WorkCover Scheme and that the question of providing ongoing medical support to keep someone at work was one for parliament.

Amending the *RTW Act* to continue to provide workers with medical support where it assists with keeping them at work would bring the Scheme in line with the Victorian workers' compensation system.⁹⁵

A further argument for broadening medical expenses support is that some injuries do not resolve within the maximum three year time frame allowed.⁹⁶ This may be especially true for workers who require ongoing medication. One injured worker submitted that her medication costs are over \$120 a month, and will be the case for the duration of her life.⁹⁷ Another submission received from an injured workers' mother expressed concern her son—having been assessed with a 29 per cent WPI—currently has medication costs of around \$2000 per month, most of which is not covered by the Pharmaceutical Benefit Scheme (PBS).⁹⁸

Psychiatrist, Professor McFarlane submitted that as much of the psychiatric medicine paid for under the Scheme is not covered by the PBS⁹⁹, it potentially leaves injured workers with psychiatric injuries out in the cold.

The removal of access to these medications could lead to a significant relapse or worsening of an individual's impairments. When on a disability support pension, the individual will no longer be able to afford these medications or have them provided under the PBS safety net. Such circumstances have the potential to create a wave of subsequently disputed claims or reapplications for workers' compensation. A system needs to be put in place to provide sustained treatment that does not put patients at such risk, which could include outcomes such as suicides.¹⁰⁰

⁹³ Ibid.

⁹⁴ Ibid; Robin Shaw, Committee Hansard, 11 May 2017, 43.

⁹⁵ *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 232(5)(a).

⁹⁶ See, eg Graham Harbord, Committee Hansard, 13 April 2017, 32.

⁹⁷ Mary-Ann L (Injured Worker, Surname Withheld), Submission No 9, 26 September 2016, 2.

⁹⁸ Heather C (Injured Worker's Mother, Surname Withheld), Submission No 38, 29 November 2016, 1-5.

⁹⁹ Alexander McFarlane, Submission No 10, *Inquiry into the RTW Act and Scheme*, 26 September 2016, 5.

¹⁰⁰ Ibid.

Mr Graeme Kirkham, Director/Lawyer of LawCall summarised the potential difficulties a worker may face when their medical expense support ceases in the following terms:

In my experience, as a compensation lawyer, there are many injured workers who rely on treatment for extended periods of time. Prescription medication is one of these. So, a worker with a psychiatric injury, relying on antidepressant medication or a worker with a physical injury relying on pain relief medication, may not have the benefit of these being paid by the scheme. Visits to doctors, allied health professionals like physiotherapists may also be caught ... [T]hese workers will have to rely on any benefits under the Commonwealth Scheme or otherwise face further financial hardship, or worsening symptoms, which understandably, can adversely affect quality of their day-to-day activities.¹⁰¹

CASE STUDY 2: Chad Eaton

Chad Eaton was a 17-year-old working at KFC. On 15 May 2015, Chad was severely burned when he fell into a tank of hot oil. Chad suffered burns to 9 per cent of his body, was left with permanent scarring, extreme sensitivity to ultraviolet light, and lower back pain due to damage to his nerve endings.

Despite the permanent injuries, Chad returned to work within 6 weeks of the incident.

KFC was prosecuted by SafeWorkSA, convicted, with a fine of \$105,000 imposed. Whilst they responded positively after the incident, KFC were found to have an unsafe work environment, unsafe system of work, with inadequate information, training and supervision.

As result of the changes to the Scheme (including the transitional provisions), Chad's entitlement to medical expenses ceased on 30 June 2016.

Source: *Boland v Kentucky Fried Chicken Pty Ltd* [2017] SAIRC 16

Other submissions supported the removal of the time limit altogether as proper claims management practices should be able to ensure only reasonably necessary medical expenses are covered by the Scheme.

Mr Shaw stated,

[W]e didn't see a lot of point in putting cap [on medical expenses] ... in the first place, simply because, for the most part, medical costs have never been a huge driver of the scheme itself ... [T]he general experience was that we didn't see a lot of what you would call inappropriate use of the medical and hospital side of things, so we were not entirely convinced that it was necessary to do it in the first place.¹⁰²

Mr Cagney¹⁰³ and Mr Szakacs both shared a similar view to Mr Shaw. Mr Szakacs said,

the restriction on medical entitlements is arbitrary and not clinically evidenced. This should be amended. Under the previous act, there was adequate provisions for the rejection or refusal to pay for medical expenses that were no longer medically necessary or

¹⁰¹ LawCall, Submission No 48, *Inquiry into the RTW Act and Scheme*, 3 May 2017, 1.

¹⁰² Robin Shaw, Committee Hansard, 11 May 2017, 44.

¹⁰³ Bradley Cagney, Committee Hansard, 10 August 2017, 95.

reasonable. ... [T]his provision produced unfairness and is likely to be counter-productive to return-to-work outcomes in many cases.¹⁰⁴

Dr Purse shared a similar view and stated there is,

really only the one option I can think of which adds up and that is that for people who need medical expenses, provided that they are reasonably incurred and the rates are reasonable, then we should be doing that, otherwise a lot of people will be burnt.¹⁰⁵

RTWSA advised the Committee that should the entitlement to medical expenses be extended by a further 12 months (that is for a total of 24 months post cessation of income support), it would cost the Scheme approximately \$10 million per annum for new claims, and increase the break even premium by 0.04 per cent.¹⁰⁶

Recovery / Return to Work Services

While the majority of submissions for this inquiry referred to the cessation of medical expenses to mean medical services, medicines and other treatment, section 33 of the *RTW Act* also covers 'approved recovery/return to work services'.¹⁰⁷ These services are subject to the same cap as other medical expenses.

The Australian Society of Rehabilitation Counsellors (ASORC) submitted the importance of return to work services:

Access to [recovery/return to work] services be treated the same as access to medical entitlements and be available to scheme participants for the full three years, with the view of assisting those in the scheme more towards independence even if this support exceeds income support periods.¹⁰⁸

This view is consistent with other submissions received and evidence heard in relation to workers who may not be working at the time of cessation of income support, but who still require additional support to either gain suitable employment or support to re-engage with the community.

During the September 2017 Committee hearing, RTWSA were asked about the provision of return to work services post cessation of income support. Mr Cordiner stated for workers who were on the WorkCover Scheme, the provision of such services would occur 'hardly ever'¹⁰⁹ as the group often did not have 'a great deal of trust with the then WorkCover or its agents, and mainly dealt with us via lawyers.'¹¹⁰ However, Mr Cordiner went on to state that for workers

¹⁰⁴ Joe Szakacs, Committee Hansard, 1 June 2017, 64.

¹⁰⁵ Kevin Purse, Committee Hansard, 18 May 2017, 58.

¹⁰⁶ ReturnToWorkSA (Response to Questions on Notice, 12 October 2017) 3.

¹⁰⁷ *Return to Work Act 2014* (SA) s 33(2)(c).

¹⁰⁸ Australian Society of Rehabilitation Counsellors, Submission No 50, *Inquiry into RTW Act and Scheme*, 26 June 2017, 7.

¹⁰⁹ Rob Cordiner, Committee Hansard, 28 September 2017, 113.

¹¹⁰ *Ibid.*

on the Return to Work Scheme, they were often 'already engaged earlier'¹¹¹ and services could generally 'just simply continue.'¹¹²

In response to a question asked on notice, RTWSA provided the Committee with three examples where the Scheme continued to assist workers with specialised services after the cessation of income support. These examples can be found in Appendix B.

Findings

The Committee found the time limits imposed by the *RTW Act* to be 'too blunt'. Ceasing payment of medical expenses, in some circumstances, may cause workers to:

- stop working if they had achieved a return to work but had not fully recovered; or
- be unable to afford necessary treatment and medication if they cannot have it funded through avenues such as Medicare, the PBS or their private health insurance.

The Committee supports the management of ongoing reasonable treatment and associated costs through the use of proactive claims management, rather than a black and white time limit.

Recommendation 5

The Committee received evidence stating that some medication, including medication used to treat psychiatric injury, can be expensive and may not be covered by the Pharmaceutical Benefits Scheme. Further, the Committee recognises that for those workers who have returned to work, some require ongoing treatment to maintain their capacity, and without such treatment the worker may be unable to continue working.

Considering the above, the Committee recommends the Minister for Industrial Relations amends the *Return to Work Act* to broaden the coverage of medical expenses so there will be no time limit for coverage of:

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

The Committee also found return to work services beyond the cessation of income support to be of benefit to some workers and notes under section 33, workers may continue to receive this support for the same period it receives other medical support (including after cessation of income support).

¹¹¹ Ibid.

¹¹² Ibid.

Recommendation 6

ReturnToWorkSA have provided the Committee with examples where it has paid for return to work services beyond the cessation of a worker's income support. Given the importance of such services in supporting injured workers with their recovery and return to work, the Committee recommends the Minister for Industrial Relations ensures that all injured workers have access to return to work services for the full duration allowed in the *Return to Work Act*, including for the 12 month period after income support ceases.

5.3.2 Surgery

The time limit imposed by section 33(20) does not apply to surgery and associated medical, nursing or rehabilitation costs where they have been pre-approved by the Corporation. Any application for pre-approval must occur prior to the end of the medical expense coverage period.¹¹³

As outlined in section 6.3.5 of the Interim Report, concerns were raised through submissions regarding the need for pre-approval for future surgery. Broadly, these were:

- some workers may not be aware of the requirement to seek pre-approval for surgery if they have either not been well-advised (either by the Compensating Authority or their representative);¹¹⁴
- the process for seeking pre-approval is confusing, and is open to the Compensating Authority making questionable decisions;¹¹⁵ and
- the Compensating Authority rejecting pre-approval applications for administrative reasons (for example the application was not submitted in the correct manner or form).

The Committee has heard in evidence since the Interim Report that many workers continue to not be aware of the need for them to seek pre-approval for surgery prior to their medical expense support ending. This is evident in the following Hansard extract:

The PRESIDING MEMBER: Mr Cagney, do you think that the average worker who is maybe not represented and, sadly, not in a union, for example, would have any idea that they could do that?

Mr CAGNEY: No. Most of these applications, as far as I know, if they are a member of the union and represented by them, might be made by the union or it might be made by a worker's solicitor. I understand it has fallen to representatives of workers to reach out to people and to put out information, 'Hey, look, if you don't do this, you're going to miss out.'¹¹⁶

¹¹³ *Return to Work Act 2014* (SA) s 33(21)(ii).

¹¹⁴ Wearing Law, Submission No 20, *Inquiry into RTW Act and Scheme*, 29 September 2016, 2.

¹¹⁵ See, eg United Voice SA, Submission No 24, *Inquiry into the RTW Act and Scheme*, September 2016, 7; Police Association of South Australia, above n 45, 3.

¹¹⁶ Bradley Cagney, Committee Hansard, 10 August 2017, 95.

There continues to be confusion regarding the criteria for having surgery pre-approved. Mr Cagney advised that there have been two cases decided at the SAET in relation to pre-approval for surgery:

There have been two cases by single members of the SAET that have come up with different tests. One is that [the future surgery] needs to be probable and the other is that it needs to be quite possible.¹¹⁷

To alleviate some of the issues which the pre-approval process creates, Mr Wearing, the SDA, and SA Unions suggested that section 33(20) should not apply to surgery where it is reasonable and relates to the compensable injury. On this point, Mr Cagney said:

Often if you have to make an application for surgery that you might need in 10 or 20 years, it is always speculative at best. You may not be able to get the evidence that you need at the time to be able to support an application.¹¹⁸

The President of the Law Society, Mr Rossi further supported this view and stated:

We don't actually see why surgery isn't just allowed indefinitely. Workers don't go having operations unless they are really needed. If a worker is able to demonstrate, whether it be five years or ten years after a work-related injury, that the worker needs that operation as a result of a work injury, why shouldn't that be allowed? It's one thing to restrict the period of time for physiotherapy or chiropractic treatment; it's quite another to restrict surgery.¹¹⁹

Surgery Definition

The *RTW Act* does not define *surgery*. A review of relevant legislation in other Australian workers' compensation jurisdictions found they also did not define surgery.

Black's Medical Dictionary defines surgery to be,

[t]hat branch of medicine involved in the treatment of injuries, deformities or individual diseases by operation or manipulation.¹²⁰

Mr Rossi supported defining *surgery* in the *RTW Act*, and that the definition should take into account changing technology and advances in treatment. In relation to a definition, he asked,

do you need to penetrate the body, for example with surgery?

The answer to that is no; it is accepted that a manipulation of a shoulder, for example, under a general anesthetic as an inpatient is clearly surgery. Where you do penetrate the body, what is the degree of penetration? It can't be restricted to the use of a scalpel. We now have arthroscopic surgery, which is much more refined than that, and one would expect that as the years go by there will be further refining. There's no reason why the act can't define surgery, have a schedule, have a regulation that resolves this issue.¹²¹

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Tony Rossi, Committee Hansard, 2 March 2017, 22.

¹²⁰ A & C Black Publishers Ltd, *Black's Medical Dictionary* (42nd ed, 2010) 639.

¹²¹ Tony Rossi, Committee Hansard, 2 March 2017, 22.

Ms Nikolovski advised that 'there are a lot of disputes before the tribunal about these [surgery] pre-approvals, because they are saying than an arthroscopy is not surgery.'¹²²

While Mr Cagney said that he had not come across any issues with there being no definition for *surgery*, he acknowledged an issue which may arise in the future.

For instance, in 10 or 20 years there may be advances in medical research that enable certain procedures to be undertaken that you or I might not consider as surgery now, but relate to the worker's injury and would go some way to assisting them in either maintaining their capacity or their quality of life.¹²³

The Committee notes that due to the number of disputes relating to surgery it is likely that the Courts will define surgery or clarify these matters. However, the delays and disputes are likely to be costly for all concerned and may inhibit early return to work.

Therapeutic Appliances

Therapeutic appliances (including but not limited to spectacles, hearing aids, and prostheses)¹²⁴ are not subject to the time limits imposed by section 33(20).¹²⁵

The decision of *Ashfield v Return to Work SA (Valspar (WPC) Pty Ltd)* [2017] SAET 11 clarified the definition of *therapeutic appliance* to include that a hip replacement is a prosthesis.¹²⁶

Based on the *Ashfield* decision, where surgery relates to a therapeutic appliance, it does not fall under the same time limits as other surgery (as there is no time limit for coverage of therapeutic appliance). Also, workers are not required to apply for pre-approval for future surgery where it relates to the installation or replacement of these items.

Findings

Uncertainty in relation to circumstances where surgery should be pre-approved may produce inconsistent results for injured workers needing future surgery. The Committee supports the view that workers will only seek surgery when it is needed, and if it can be shown the need for surgery relates to the compensable work-injury, then it should be paid for by the Scheme regardless of whether pre-approval has been sought.

For this reason, the Committee supports the removal of pre-approval for surgery. By doing so, the Committee also expects there will no longer be the confusion or stress experienced by some workers around the need to apply for pre-approval.

¹²² Amy Nikolovski, Committee Hansard, 2 March 2017, 22.

¹²³ Bradley Cagney, Committee Hansard, 10 August 2017, 95.

¹²⁴ *Return to Work Act 2014* (SA) s 4.

¹²⁵ *Ibid* s 33(21)(b)(i).

¹²⁶ *Ashfield v Return to Work SA (Valspar (WPC) Pty Ltd)* [2017] SAET 11

Recommendation 7

The Committee recognises it is important for ReturnToWorkSA to be aware of claims where there is the potential for future surgery. However, the Committee does not find it reasonable for a worker to be denied payment for their work-related surgery because the surgery occurred outside of their medical support period and they had not sought pre-approval for surgery.

The Committee recommends the Minister for Industrial Relations amends the *Return to Work Act* so that the reasonable costs of future surgery associated with a compensable work-injury are payable by the Scheme without the precondition the surgery was pre-approved.

The Committee is concerned it heard there is a lack of consistency with workers being informed of their rights around medical expenses. The Committee's findings on communication within the Scheme are covered in section 6.1.1.

The Committee considered the benefits of defining *surgery*. Having a definition would provide a more consistent approach for the Compensating Authority when determining surgery pre-approval applications, and allow workers and their treating medical team some assurances as to what treatment is accessible in the future. However, given the advances in technology and treatment, the Committee feels that defining surgery may be too restrictive. The Committee is also aware as decisions are made by the SAET, the boundaries for what constitute surgery will emerge through case law.

5.4 Income Support

Term of Reference

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

5.4.1 Changes

The *RTW Act* introduced a significantly different weekly income replacement structure known as *income support*. A comparison between Schemes is shown in Table 1.

Table 1: Comparison between income support paid for both the Return to Work and WorkCover Schemes.

	Entitlement Weeks					
	0-13	14-26	27-52	53-104	105-130	131+
Workers Rehabilitation and Compensation Act	100%	90%	80%	80%	80%	80%*
Return to Work Act (WPI below 30%)	100%	100%	100%	80%	-	-
Return to Work Act (WPI 30% and above)	100%	100%	100%	80%	80%	80%

*subject to Work Capacity Review after 130 weeks

Source: Compiled from *Return to Work Act 2014 (SA) s 39(1)*; *Workers Rehabilitation and Compensation Act 1986 (SA) s 35A*.

5.4.2 104 Week Timeframe Feedback

No change required to the timeframe

A number of submissions stated the majority of injured workers were better off financially under the Return to Work Scheme. On this point, SISA said that given income support now lasts for 52 weeks at 100 per cent (as opposed to being reduced at 13 and 26 weeks in the WorkCover Scheme), the 80 per cent of claimants who return to work or have their payments ceased prior to the 104th week are financially better off.¹²⁷

Submissions received from Mr Hutchinson, and the Motor Traders Association expressed the view that giving workers a longer period of compensation makes them dependent on the system and does little to support independence.¹²⁸ Mr Walsh shared this view and submitted the,

restriction on entitlement to weekly payments should, in fact, encourage that small percentage with a less than optimum commitment to return to work to fully embrace return to work opportunities and realise the health benefits associated with meaningful employment.¹²⁹

¹²⁷ Self Insurers of South Australia, above n 57, 12.

¹²⁸ Ian Hutchinson, above n 84 3; Motor Traders Association of South Australia, Submission No 33, *Inquiry into the RTW Act and Scheme*, 31 October 2016, 9.

¹²⁹ DW FoxTucker Lawyers, above n 22, 1.

Ms Hullick advised the LGA Workers' Compensation Scheme did not have any long-term incapacity claims exceeding 104 weeks under the repealed Act.¹³⁰

Supporters of the current income support payments structure said other changes to the Scheme have helped to lessen the impact felt by workers as a result of the income support time limit. These include economic lump sum payment, greater ability enforce employer obligations and the fact that payments were made at 100 per cent for 52 weeks.¹³¹ However, there are restrictions on which workers may receive these lump sums. This is discussed further in section 7.4.

Changes Recommended

While some argued the 104 week income support limit should remain unchanged, other submissions stated the income support window is too limiting due to the length of time some injuries take to heal, along with difficulties in finding suitable paid employment and the consequential financial hardship faced by workers after payments cease.

While psychiatrist Dr Nick Ford agrees with a cap on income support, he submitted that the legislation failed to appropriately compensate for psychiatric impairment. He stated any worker with a psychiatric illness of greater than 20 per cent WPI was most likely not going to recover in two years.¹³² The Australian Medical Association echoed these concerns, and expressed in their submission that there is evidence supporting some injuries have extended recovery times, and that capping income support at two years may 'prove insufficient'.¹³³

ASORC submitted that given the time it takes to secure new employment for workers unable to return to their pre-injury employer, the period in which income support is available may be insufficient because:

In today's competitive job market, it takes considerably more time and energy to find employment than it did a decade ago. In fact, 75% of Australians who are currently searching for a new job have been looking for up to six months.¹³⁴

Mr Harbord, along with other submissions raised concerns about the impact this change has had on workers. He stated:

Many families ... are concerned about the impact that the cut-off date will have on them being able to maintain their mortgages. I know of partners of injured workers who are working a lot more hours and lot more overtime to simply try to supplement and build up some funds that will carry them through for a little while, at least, when the cut-off date comes into effect.¹³⁵

One worker submitted that while she has achieved a partial return to work, she has been left with permanent restrictions meaning she has been unable to return to her pre-injury duties or

¹³⁰ Jeanette Hullick, Committee Hansard, 11 May 2017, 42.

¹³¹ SA Unions, above n 73, 3.

¹³² Dr Nick Ford, Submission No 14, *Inquiry into RTW Act and Scheme*, 29 September 2016, 1.

¹³³ Australian Medical Association (South Australia), Submission No 39, *Inquiry into the RTW Act and Scheme*, 8 December 2016, 3.

¹³⁴ Australian Society of Rehabilitation Counsellors, above n 108, 8.

¹³⁵ Graham Harbord, Committee Hansard, 13 April 2017, 32.

hours. In her submission, she details the difficulties she faces because of her income support ceasing at 104 weeks in the following terms:

I am single and do not have a spouse to fall back on financially.

I have had to adjust to the limitations from my injuries and now expected to 'just adjust' to financial ruin.¹³⁶

Mr Harbord also stated that a,

number of public sector unions are negotiating ... to attach provisions to their enterprise agreements, which will take some of the harshness off the two-year cut-off date ... [I]t is a very narrow criterion and at least it is an admission by the state government that the two-year cut-off date is unfair for certain injured workers and such workers should continue to receive some form of compensation.¹³⁷

The State Government and Police Association of South Australia (PASA) have reached an agreement that provides ongoing medical and income support for police officers who are injured in the line of duty after their relevant support from the Scheme is exhausted. This support is now enshrined in their new Enterprise Agreement.¹³⁸

During this year's Estimates Committee, the then Minister for Police, the Hon Peter Malinauskas MLC, when asked what was being done for firefighters at the end of their support period, responded:

The state government...was very conscious of the fact that, if the government was going to provide an additional entitlement to police officers, then it would be reasonable that that entitlement also be provided to other emergency first responders.¹³⁹

Mr Phil Palmer, Ambulance Employees' Association general secretary has stated the union is negotiating directly with the Attorney-General for a similar clause, with an agreement getting close. The Australian Nursing and Midwifery Federation has already gained its own exemption to the workers' compensation provisions as part of the enterprise bargaining agreement the government agreed to last December.¹⁴⁰

The Committee is keen to hear how additional workers' compensation support will be secured for emergency workers.

Accessing Support

Mr Harbord raised concerns about difficulties workers may encounter when seeking support from other schemes and programmes after their workers' compensation support ends.

¹³⁶ Bernadette C (Injured Worker, Surname Withheld), Submission No 47, *Inquiry into the RTW Act and Scheme*, 13 April 2017, 3.

¹³⁷ Ibid 36.

¹³⁸ John Rau, 'State Government and PASA Reach Agreement', (News Release, 14 February 2016).

¹³⁹ South Australia, *Parliamentary Debates*, Estimates Committee B, 28 July 2017, 184 (Peter Malinauskas, Minister for Police).

¹⁴⁰ Tom Richardson, 'Gov Poised for Widespread Exemptions on Workers' Comp', *InDaily* (online), 5 September 2017 <<https://indaily.com.au/news/local/2017/09/05/govt-poised-for-widespread-exemptions-on-workers-comp/>>.

The intent... does seem to be to push as many workers as possible onto Commonwealth-funded social security, however, of course, the commonwealth government is applying even stricter criteria for access to the disability pension. We are concerned, as lawyers acting for those injured workers, that people who have injuries arising from their employment and who then have to go on Centrelink will continued to be hounded to seek employment, where there is no support for them to do that.¹⁴¹

Services and support available to injured workers is covered in detail in section 6.2.

An example of the difficulties being experience by some workers was expressed by Mark S in the below case study below.

CASE STUDY 3: Mark S

Mark was injured in April 2009 fracturing his right leg, dislocating his right, tore tendons and ligaments to his ankle as well as damaged nerves in his right leg.

Mark reported that he underwent multiple surgeries on his leg, surgeries to repair the tendons, and then 3 years after the incident required to have his ankle fused. He said that he also had to have a spinal stimulation implant installed to reduce the nerve pain in his right leg.

Mark advised that due to the ongoing pain, he developed severe depression which required a 5 week admission to Glenside Health Services. As a result of the initial injury, Mark reported having to lodge claims for lower back pain and herniated disk, as well as a left knee injury. He now needs the knee totally replaced.

Mark stated that he will most likely need further ankle surgery to provide him further pain relief, with amputation of the ankle being a real possibility.

Mark reported that as a result of the injury combination rules, his WPI has been assessed at 19 per cent. He stated he does not have the capacity to work (and has not had the capacity since October 2011), and will not be able to claim government support as his wife works.

Mark stated: 'I would be totally reliant on my wife for financial support which is unfair when I was injured at work at no fault of my own. I already suffer from depression and with the worry of this financial stress and the realisation that I will struggle to afford daily living costs is making me worse.

Source: Mark S (Injured Worker, Surname Withheld), Submission No 28, *Inquiry into the RTW Act and Scheme*, 21 October 2016.

Findings

The majority of workers receive a greater level of financial support through the Return to Work Scheme's income support structure because they now receive 100 per cent of their pre-injury earnings for the first 52 weeks, when compared to the WorkCover Scheme where payments would drop to 90 per cent after 13 weeks, then further to 80 per cent after 26 weeks.

¹⁴¹ Graham Harbord, Committee Hansard, 13 April 2017. 33.

While some employers and their associations said the capped time limit of 104 weeks encouraged workers to return to work, there was strong opinion from workers, their advocates, medical professionals, along with others who stated the capped time limit of 104 weeks was too limiting, harsh and unfair.

The Committee has made recommendations under section 5.2.5 relating to workers having access to further support from the Scheme and the criteria to be met.

5.4.3 Calculation of Entitlement Weeks

A number of submissions expressed concern in relation to the method of calculating the number of weeks a worker may receive income support. Under the repealed Act, a worker may receive up to 130 weeks of income support before a work capacity review may be required, and their payments ceased. A week would only count towards the 130 weeks if the worker was eligible to receive income support during that week—that is, they earned below their pre-injury earnings (including when they were not at work at all). For example, if a worker achieved a return to work and was earning at or above their pre-injury earnings (and therefore not entitled to income support from the Scheme), the weeks in which this occurred would not be counted towards the 130 weeks before a work capacity assessment was required. Under the *RTW Act*, however, a worker may receive up to 104 weeks of income support, but counted as consecutive weeks, and the accumulation of weeks is not paused even if a worker achieves a full or partial return to work.

Dr Purse provided the following hypothetical example of how a worker may be disadvantaged by this method of calculation:

Consider a senior firefighter who gets about \$1,185 a week ... That person gets diagnosed with multiple myeloma. That is quite a serious cancer... Because we now have good medical services, that firefighter might only have, say 16 weeks off work ...

He or she has a good employer, so they are back at work. The combination of efficient medical treatment and an accommodating employer enables that person to go back to work. Let's assume that they are back at work for the next 88 weeks. That takes us up to 104 weeks. A week later, they find that the cancer has come back ... They have no [income support] entitlements because the two years has lapsed ... [The myeloma] is not a serious injury [under the *RTW Act*].

On top of that, there is no access to medical expenses because ... medical expenses cut out 12 months after you no longer received weekly payments. After that 16-week period where the worker did get an entitlement, one year later, it is all gone.¹⁴²

Figure 1 on the following page is a visual representation of Dr Purse's above example, and shows how the worker may have been supported under the WorkCover Scheme.

The Committee notes that it is common for people who suffer cancer to heal and then at some later stage, perhaps years later, to be diagnosed with secondary cancers relating to the initial cancer. Secondary cancers may appear elsewhere in the body.

¹⁴² Kevin Purse, Committee Hansard, 18 May 2017, 54.

Another example of the difference between income support available between the Return to Work and WorkCover Schemes is shown in Figure 2. In this scenario, a worker has periods of being unfit and returning to work on reduced hours (so will be topped up with income support), as well as periods where they are working their pre-injury hours. The new method of calculating the number of weeks of support affects this worker negatively. Mr Szakacz expressed the same concern and stated ‘this is a deeply inequitable application of the law, particularly in a capped two-year scheme, and should be amended to reflect 104 weeks of weekly income.’¹⁴³

Findings

The *RTW Act* has changed the method of calculating the number of weeks a worker may receive income support. The Committee found the current method does not allow the 104 week ‘clock to pause’ when workers return to work, and this may discourage workers from doing so during their recovery phase. The Committee also found it might leave some workers who do return to work but need to take time off later at a disadvantage, as they can no longer receive income support.

Recommendation 8

The current method of calculating the 104 week entitlement to income support is calendar based. As a result, a worker may only receive 104 weeks of income support if their incapacity is 104 consecutive weeks. Evidence presented to the Committee suggests that an initial return to work is not always successful, despite the best efforts of the worker and their employer. Sometimes, a second and third attempt may be required.

To address this anomaly, the Committee recommends that the *Return to Work Act* be amended so that the method of the 104 week income entitlement is based on the aggregate period of the incapacity for worker, whether consecutive or not.

¹⁴³ Joe Szakacs, Committee Hansard, 1 June 2017, 64.

Scenario 1				Scenario 2		
RTW Act	WRC Act (Repealed Act)	Worker's Capacity	Weeks Since First Incapacity	Worker's Capacity	RTW Act	WRC Act (Repealed Act)
IS Paid (13 weeks)	IS Paid (13 weeks)	Unfit	13	Unfit	IS Paid (13 weeks)	IS Paid (13 weeks)
			26	Reduced Hours		
		Full Hours	39	Full hours		
			52			
			65	Reduced Hours	IS Paid (4 weeks)	IS Paid (4 weeks)
			78	Full Hours		
			91	Reduced Hours	IS Paid (30 Weeks)	IS Paid (65 weeks)
			104	Unfit	Income support paid for period ending 104 from first incapacity.	Income support paid for a total of 82 weeks.
			117	At Work		The worker may be eligible for at least a further 48 weeks of income support should they aggravate / reduce their hours. This would bring there is paid to 130 weeks before a work capacity review may take place.
Not eligible for IS even though only 13 weeks has been paid.	IS Paid IS may continue to be paid for 117 weeks before work capacity review may take place (130 weeks minus 13 weeks paid at the commencement of claim)	Unfit / Reduced Hours	130	Reduced Hours	No longer eligible for IS even though only 47 weeks have been paid.	
			143	At Work		

Figure 2: Two scenarios comparing the income support paid through both the RTW and WorkCover Schemes. **Scenario 1** is Dr Purse's example of a firefighter with multiple myeloma who requires some initial time off work, and then returns and remains at work until the 104th week when the myeloma returns. **Scenario 2** shows a worker who injures themselves and resumes work. The worker then experiences a number of aggravations, a further stage of being unfit, before gradually returning to work.

5.5 Common Law

Term of Reference

- (e) *The restriction on accessing common law remedies for injured workers with a less than 30% WPI;*

5.5.1 Changes

The *RTW Act* reintroduced common law rights for injured workers. Workers can now sue their employer in cases of negligence but access is restricted to workers with a WPI of 30 per cent or more. This also applies to the family/legal representatives of a deceased worker.¹⁴⁴ The Submissions received by the Committee were mixed as to whether common law was a positive for the Scheme or whether it should be removed.

Actuaries, Finity Consulting, in their report describing a best practice workers compensation scheme found there to be an argument for both, however it should have:

- no access to common law, alongside a relatively generous permanent impairment benefit scale, or
- a limited common law regime, confined to serious injuries and with a threshold defined using WPI—typically 10-20%.

Both of these models keep the main focus of the workers compensation scheme on compensating all injured workers appropriately and consistently, without the distraction of considering negligence. In addition, restricting access to common law keeps the scheme's legal costs under better control.¹⁴⁵

5.5.2 Submissions Supporting Common Law

As discussed in section 6.5.3 of the Interim Report, a number of submissions supported common law, with many expressing the current 30 per cent WPI threshold made access 'too exclusive' and the criteria for access should be relaxed.¹⁴⁶

The positive effects of common law were stated:

- it would serve to deter employer from not maintaining a safe workplace out of fear of a potential suit of negligence;¹⁴⁷
- it would give workers their 'day in court';¹⁴⁸ and
- damages provided through common law may be greater than those paid otherwise through the Scheme.¹⁴⁹

¹⁴⁴ *Return to Work Act 2014* (SA) pt 5.

¹⁴⁵ Geoff Atkins and Gae Robinson, above n 85, 37.

¹⁴⁶ Australian Education Union (SA Branch), above n 56, 4.

¹⁴⁷ Tony Rossi, Committee Hansard, 2 March 2017, 22; Alexander McFarlane, above n 51, 99.

¹⁴⁸ Elizabeth Kilgour et al, 'Interactions Between Injured Workers and Insurers in Workers' Compensation Systems: A Systematic Review of Qualitative Research Literature' (2015) 25 *Journal of Occupational Rehabilitation* 178.

¹⁴⁹ Kevin Purse, Committee Hansard, 18 May 2017, 57.

SA Unions support common law and they stated the current threshold is too high.¹⁵⁰ However, Mr Szakacs of SA Unions expressed concern and said

the largest motivation for those advocates of common law has been for a persuasive legislative barrier to persuade employer behaviour... [However,] an employer can insure their common law liability in the same way that they pay a levy for workplace compensation ...

It is the position of trade unions that should there be a change to common law, employers should not be able to insure against their own negligence, insure to mitigate their own negligence, which would be contemplated by common law.¹⁵¹

The case of *Hillman v Ferro Con (SA) Pty Ltd (in Liquidation) and Anor* [2013] SAIRC 22 is a case in point. After the death of an employee in 2010, the Industrial Court convicted Ferro Con and director Paulo Maione and ordered fines of \$200,000 each. Mr Maione, however, had sought indemnity insurance prior to the accident resulting in the majority of the fine being paid by the insurer.¹⁵²

Managing Partner of Clyde & Co lawyers, Mr John Edmond rhetorically asked at a seminar where this case was examined:

How can you be contrite, how can you be remorseful, if the big ASX-listed [insurance] company is paying the fine?¹⁵³

The ability for employers to insure against negligence claims reduces any deterrent effect common law access had. The Committee, however, has not received submissions as to the number of employers that have taken out such an insurance policy.

5.5.3 Concerns Raised About Common Law

A number of submissions, especially those from employer groups and associations, did not support the reintroduction of common law.

The reasons for concern put before the Committee were covered in section 6.5.4 of the Interim Report and include:

- it is the role of SafeWorkSA to monitor and reprimand employers who fail to adhere to WHS requirements and not the role of RTWSA;¹⁵⁴
- the common law process is adversarial, can damage worker and employer relationships, and is not conducive to fostering healthy environments to return to work; and¹⁵⁵

¹⁵⁰ SA Unions, above n 73 2.

¹⁵¹ Joe Szakacs, Committee Hansard, 1 June 2017, 67.

¹⁵² OHS Alert, 'Insurance and WHS Management: Part 1' (Article, 10 May 2016) 1.

¹⁵³ Ibid.

¹⁵⁴ Self Insurers of South Australia, above n 5791, 13; Registered Employers Group, above n 23.

¹⁵⁵ Ian Hutchinson, above n 83, 1; Australian Rehabilitation Providers Association, Submission No 32, *Inquiry into RTW Act and Scheme*, 31 October 2016, 5.

- it may create incentives for some workers to focus on their impairment to maximise benefits rather than recovery and return to work.¹⁵⁶

Mr Walsh in DW Fox Tucker Lawyer's submission stated,

[n]ot only does common law act as a barrier ... to recovery and return to work, but it demonstrably impacts adversely upon physical and social functioning and increases the likely hood of the injured worker developing depressive symptoms.¹⁵⁷

Ms Lipel, Professor of Law at the University of Quebec completed an academic paper on the therapeutic and anti-therapeutic effects of a workers' compensation scheme on individuals. She found a common law trial provides 'opportunity for the injured to be heard,' and where the worker is victorious, 'sends a message to the defendant that he or she has done wrong', and to the worker that 'he or she is believed.'¹⁵⁸

However, Ms Lipel supports Mr Walsh's view when she found:

The very nature of the process is that of casting blame on others and rejecting plaintiff's own responsibility. Successful litigation often relies on the victim dwelling on every detail of the injurious incident, questioning ... post-accident abilities, keeping a diary of every ache and pain felt since the accident, in order to better document the damages resulting from the tortious act.¹⁵⁹

The adequacy of payments were also questioned in a study looking at the adequacy of common law payments for South Australian motor accident victims. It found 54.4 per cent believed 'their compensation did not cover their financial loss.'¹⁶⁰ The study also found a relatively high proportion of claimants were 'now poor'¹⁶¹, reliant on social security, or financially insecure due to the accident. It found this could be for a variety of reasons, including inadequate compensation, mismanagement of funds, or wrong predictions about the future severity of the injury.

Similar to these findings, Mr Peter Wilson shared his experience of being an injured worker on the WorkCover Scheme. His experience of receiving a lump sum payment was in line with the above study's findings.

Mr Wilson received approximately \$155,000 through a permanent impairment lump sum. A deal was struck between him and his then employer whereby Mr Wilson loaned the company almost all of his payment. When Mr Wilson asked for some of his money back, he was told

¹⁵⁶ Geoff Atkins and Gae Robinson, above n 85, 37; Australian Rehabilitation Providers Association, Submission No 32, *Inquiry into RTW Act and Scheme*, 31 October 2016, 5.

¹⁵⁷ DW FoxTucker Lawyers, above n 22 7.

¹⁵⁸ Katherine Lippel, 'Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation' (1999) 22(5-6) *International Journal of Law and Psychiatry* 524.

¹⁵⁹ *Ibid.*

¹⁶⁰ Marcia Ann Neave and Louise Howell, 'The Adequacy of Common Law Damages' (1992) 5 *Adelaide Law Review Research Papers* 51-52.

¹⁶¹ *Ibid.*

there was not any. Mr Wilson then realised it was an ‘inexperienced poor judgement call’¹⁶² made ‘on a handshake’¹⁶³ with nothing in writing.

Mr Wilson recalled prior to making the loan he asked his claims agent whether he could loan money to the business employing him. He reported being told the money was his and therefore the choice was his to make. He said it was never suggested that he see a financial adviser for assistance with handling his payment.¹⁶⁴

As a result of losing most of his money, Mr Wilson said his life deteriorated:

Probably the worst part of my injured worker life, you might say—and I would perhaps say life in general—was around 2013-14. By this stage, I had pretty much realised that I had stuffed up.¹⁶⁵

Inexperience of handling such large payments by workers may contribute to them losing some or all of it. This may mean they will not be able to afford future treatment or not have the financial security to compensate for potentially earning less in future employment because of their permanent injury.

While no worker has accessed the common law provisions to date, there is concern that increasing the scope of workers who may access common law could lead to higher premiums.

DWFoxTucker Lawyers submitted concern if changes were made to allow greater access to common law, in particular it would:

- introduce further complexity and cost into the scheme;
- delay compensation, and physical and emotional recovery in many cases;
- necessarily result in further restrictions in statutory benefits for the majority of injured workers as a trade off, and carry with it a genuine risk of funding problems. Most schemes have had to introduce and/or increase thresholds which restrict access to common law because of funding blow-outs; [and]
- prevent the maintenance of the average premium rate at a level which will make it competitive with other States and Territory Schemes.¹⁶⁶

Dr Purse provided the example when claims management was brought back in to the then-WorkCover, it led to a blow out of costs because:

In 1992 this culminated in the abolition of the remaining right of workers to seek common law damages from their employer for worker related injury and contributed to a fall in the average levy rate of 3.0%¹⁶⁷

¹⁶² Peter Wilson, Committee Hansard, 3 August 2017, 83.

¹⁶³ Ibid 84.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ DW FoxTucker Lawyers, above n 22, 7.

¹⁶⁷ Kevin Purse, ‘Outsourcing Myths and Workers’ Compensations Administration’ (2009) 68(4) *The Australian Journal of Public Administration* 449.

The Committee noted that the *Worker's Compensation Act 1971* (SA), which included common law, did nothing to improve injury prevention in workplaces.

Findings

Recommendation 9

The Committee received evidence both for and against the inclusion of common law in the Return to Work Scheme. Considering this evidence, in addition to the lack of common law cases to date, the Committee recommends common law and its inclusion in the Scheme be reviewed as part of the mandated review.

5.6 Accumulative Injuries

Term of Reference

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

Of the submissions that addressed this term of reference, six stated they were unsure what *accumulative injuries* referred to, as it was not a term used in the *RTW Act*.

Johnston Withers Lawyers in their submission stated they understood the term of reference related to ‘issues concerning “consequential injuries” as referred to in section 58(9) of the *RTW Act*.¹⁶⁸ *Consequential mental harm* is defined as ‘mental harm that is a consequence of bodily injury to the person suffering mental harm.’¹⁶⁹

The term *consequential injuries* is not defined in the *RTW Act*, however, is understood to refer to those injuries which develop because of an initial injury. For example, a hip injury may develop because of an existing knee injury.

There are numerous scenarios which dictate whether injuries will have their contributory WPI combined or not combined, including the combination of consequential injuries. Mr Shaw stated in evidence that:

There are so many different scenarios. You might have an old act assessment and a current act assessment. You might have two assessments under the current act or two assessments under the old act ... So, anybody seeking to combine is probably going to wind up having to make the case in the tribunal because the law is very complex.¹⁷⁰

Mr Harbord shared a similar view and said:

There are a number of disputes as to what is or what is not consequential injury, and it is a complex area and we are still awaiting definitive decisions from the full tribunal and possibly the Supreme Court in that respect.¹⁷¹

However, Mr Szakacs stated despite the current complexities,

the act should be amended to better reflect the physical reality that a worker’s capacity or qualification of ‘seriously injured’ matters, not that the worker is seriously injured because of one injury or because of multiple injuries.¹⁷²

Supporting Mr Szackacs statement, one injured worker submitted her experience as a result of the Scheme’s method for WPI combination:

I have had back surgery, and surgery on both knees from two separate injuries and will require two knee replacements in the future ... I don’t reach 30% with one injury but would

¹⁶⁸ Johnston Withers Lawyers, Submission No 45, *Inquiry into the RTW Act and Scheme*, 28 March 2017, 6.

¹⁶⁹ *Return to Work Act 2014* (SA) s 4 (definition of ‘consequential mental harm’).

¹⁷⁰ Robin Shaw, Committee Hansard, 11 May 2017, 46.

¹⁷¹ Graham Harbord, Committee Hansard, 13 April 2017, 34.

¹⁷² Joe Szakacs, Committee Hansard, 1 June 2017, 65.

with combined injuries, therefore I find it difficult in walking, moving after sitting and standing for long periods but still remain at work.¹⁷³

While there remains uncertainty about the combination of some injuries, division 5 of part 2 of the *RTW Act* clearly states physical injuries and psychiatric injuries (whether they be pure or consequential mental harm) must be assessed separately, and results from one assessment will have no regard to the other.¹⁷⁴

In relation to the impacts of combining assessments of injuries, Mr Szakacs, on behalf of SA Unions stated,

we submit the act unfairly ignores or falsely constructs that only certain categories of work injures may render someone seriously injured,

and

psychiatric injuries should not be assessed separately from physical injuries and that in assessing physical injuries there should be regard for consequential mental harm.¹⁷⁵

The complexities and uncertainty around the combination of WPI assessments is shown through the number of disputes which are presently in the SAET. The Committee is interested to see the outcome of these discussions and learn how they affect the Scheme.

Findings

The Committee found confusion over the term *accumulative injuries* as the term is not defined within the Act. Several witnesses have made assumptions about what the term may mean but they may be incorrect. Some have assumed the term refers to a combination of injuries for the purpose of assessing whole person impairment, a complex and evolving aspect of the legislation. With the number of cases in the process of being decided in the SAET, the Committee is interested to see how the impacts future decisions in this area.

Others thought the term may refer to multiple work related injuries (whether physical injuries arising from different events, physical injuries which develop over time, or a combination of physical or mental injuries). The Committee heard that workers may be left without adequate support even if they are too incapacitated to work as the Scheme does not take a whole-of-body approach to their injuries.

However, given the confusion over this term of reference, the Committee is reluctant to make any recommendations.

¹⁷³ Marie W (Injured Worker, Surname Withheld), Submission No 12, *Inquiry into the RTW Act and Scheme*, 30 September 2016, 1.

¹⁷⁴ *Return to Work Act 2014* (SA) pt 2 div 5.

¹⁷⁵ Joe Szakacs, Committee Hansard, 1 June 2017, 65.

5.7 Employer Obligations

Term of Reference

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

5.7.1 Changes

Ms van der Linden of Business SA stated ‘the wording is pretty much the same between section 18 and [section 58B of the repealed Act], so there hasn’t been a huge difference.’¹⁷⁶

Employers continue to be obliged to support their injured workers back to work, through the provision of paid employment as well as having trained Return to Work Coordinators.

Ms van der Linden highlighted the importance of employers supporting their injured workers with returning to work—see Case Study 4.

CASE STUDY 4: Successful Return to Work

A worker who was suffering from a longer term, degenerative, non-work-related illness developed mental health issues in the workplace. A workers’ compensation claim was lodged, however initially rejected before being overturned. It was a complex case.

The employee was a manager of production and as a result of his workplace injury the organisation underwent a restructure and tasks were reallocated to ensure the worker would not be affected by the cause of the workplace stress. The production management role was also modified and the employee provided extra training to assist with bringing him up to a level where he could do the change in the role.

Due to the work by the employer and collaboration with the worker, he is still at the workplace and continues to perform his duties.

Source: Business SA, ‘Questions on Notice: Return to Work Act 2014 Review’ (Response to Questions on Notice, 15 September 2016).

5.7.2 Ability to Seek Order for the Provision of Duties

As discussed in section 5.7.3 of the Interim Report, the *RTW Act* now prescribes that a worker can serve written notice to their employer advising they are ready, willing and able to return to work. They must also advise they have identified work with the employer they are capable of performing. If an employer fails to provide suitable employment within one month of the worker

¹⁷⁶ Estha van der Linden, Committee Hansard, 6 July 2017, 77.

making the request, the worker may then make an application to the SAET for an order to compel the employer to provide employment. This process is shown in Appendix D.

Overall, submissions were not only understanding but also supportive of placing obligations on employers to provide suitable employment to their injured workers,¹⁷⁷ there were differing opinions in relation to the ability for workers to seek orders from the SAET.

SISA felt the provision would be ‘ultimately unworkable’.¹⁷⁸ The President of the Law Society, held a similar view, and expressed concern the pathway of seeking orders to provide duties – through application to the SAET—would not work due to the breakdown in the worker and employer relationship as a result of the process.¹⁷⁹

Ms van der Linden expressed Business SA’s concern that the appeal process goes straight to the SAET because:

There is no conciliation around it, there is no sitting around a table and having a discussion to say, ‘How can we do this? Is there something the employer hasn’t thought about? Is there something the employee hasn’t thought about? How can we work through this together?’ to get them back into the workplace. Going straight to the South Australian Employment Tribunal means that there are additional costs. There are additional costs for lawyers and ... if there is an appeal ... for a few [workers, then it may] clog up the Employment Tribunal over time with too many cases which could be conciliated. We don’t think there is a reason why there shouldn’t be a conciliation provision with that clause.¹⁸⁰

Mr Cagney said the SDA has had ‘to launch several applications [under section 18], especially for workers at the end of their entitlement period.’¹⁸¹ These matters have ‘not progressed as quickly’ as Mr Cagney thought they might because:

These matters first come before a deputy president, as opposed to what were called conciliation officers but are now called commissioners.

The idea ...to get [the application] before a deputy president was to fast track it ... What I have seen the practice of the tribunal to be is to simply refer the matter back to conciliation. So it hasn’t moved as quickly as I would have thought and often time is of the essence in these matters, especially for workers at the end of their entitlement period.¹⁸²

Dr Purse supported the introduction of workers being able to apply through the SAET, however stressed this was an additional avenue for enforcement of suitable employment, and not a replacement. He held that it was still important RTWSA continue to pursue potential cases of employer non-compliance, and not rely just on workers to lodge applications with the SAET.¹⁸³

Dr Purse also called for greater claims agent accountability with the provision of suitable employment being made more transparent.¹⁸⁴ He stated there were benefits of keeping

¹⁷⁷ See, eg, Australian Education Union, above n 56, 5.

¹⁷⁸ Self Insurers of South Australia, above n 57, 15.

¹⁷⁹ Tony Rossi, Committee Hansard, 2 March 2017, 24.

¹⁸⁰ Estha van der Linden, Committee Hansard, 6 July 2017, 77.

¹⁸¹ Bradley Cagney, Committee Hansard, 10 August 2017, 96.

¹⁸² Ibid.

¹⁸³ Kevin Purse, Committee Hansard, 18 May 2017, 57.

¹⁸⁴ Ibid.

employers accountable to provide suitable employment, however, as seen in case study 4 this may not always be happening. Pursuing suitable employment is,

also a good way of restricting liability for claims because, as I mentioned earlier, costs associated with workers comp schemes are largely a function of claims duration, so if we can legitimately reduce claims duration, that's a win-win. It's a win for the worker, it's a win for the employers who do the right thing and it's a win for the scheme management.¹⁸⁵

Mr Cordiner informed the committee while it was part of 'normal expectations' that agents report employers who are doing the wrong thing with regard to the Scheme. Mr Cordiner stated:

If you are a claims agent under the current rules of the game and you are having difficulty getting return to work, then there is a very strong incentive for you to let us know—to let the regulatory part of the business know—if there is any employer who is actually doing the wrong thing, is the easiest way ...

On the other hand, we have a requirement for the agent to do their best work with that employer. Inform and educate is their first requirement, not to simply send it to use so that we go out with a big stick or something. They need to get people working together first.¹⁸⁶

While Mr Cagney supported section 18 applications, he said the statutory cap on the amount of costs that can be claimed for representation is too low.

My understanding is that law firms are reluctant to [make section 18 applications] because there is a cap on costs and often the actual costs of running those matters can far outweigh that cap.¹⁸⁷

Further, Dr Purse noted this avenue of pursuing suitable employment was reliant on the worker knowing of the ability to do so. He expressed it is 'questionable whether [workers] will know about their rights.'¹⁸⁸

On the same topic, Mr Szakacz stated:

SA Unions strongly supports the new provisions of section 18. However ... there are still significant gaps in employer understanding and acceptance of their obligations to provide suitable employment.

5.7.3 Return to Work Co-ordinators and Employer Engagement

Discussed in section 6.7.4 of the Interim Report, employers are required to appoint *Return to Work Co-Ordinators* whose functions include:

- to assist injured workers to remain at or return to work;
- to assist the Corporation in the preparation and implementation of any recovery / return to work plan for an injured worker;
- to monitor the progress of an injured worker's capacity to return to work; and

¹⁸⁵ Ibid.

¹⁸⁶ Rob Cordiner, Committee Hansard, 28 September 2017, 111.

¹⁸⁷ Bradley Cagney, Committee Hansard, 10 August 2017, 96.

¹⁸⁸ Kevin Purse, Committee Hansard, 18 May 2017, 57.

- as far as reasonably practicable, to take steps to prevent the occurrences of an aggravation, acceleration, exacerbation, deterioration or recurrence of an injury when a worker returns to work.¹⁸⁹

CASE STUDY 5: Bernadette C

Bernadette reported suffering injuries to her left shoulder, neck, head, back and left hip, on 17 June 2017 while performing in home support and personal care work.

Bernadette stated she has been advised by her pre-injury employer that they cannot guarantee her pre-injury hours after her income support entitlement ceases, resulting in a significant drop in income for her.

Bernadette reported her pre-injury employer has not worked with her to find ongoing suitable employment to match her restrictions.

She stated the changes in the legislation, which have meant her income support to cease in June 2017, have caused her major anxiety – as she will have to face losing everything she has worked for.

Source: Bernadette C (Injured Worker, Surname Withheld), Submission No 47, *Inquiry into the RTW Act and Scheme*, 13 April 2017

Findings

The Committee found the obligation for employers to provide suitable employment to their injured workers remains an important part of the Scheme. The legislation has strengthened this obligation by giving workers their own avenue to pursue suitable employment with their pre-injury employer. However, the Committee heard this might not be conducive to delivering suitable employment to workers, due to the adversarial nature of potentially taking the matter before the SAET. Workers who are represented by unions are in a far better position to be assisted, but there are many workers who do not have access to this support, and therefore, may not be aware of their rights.

Given this, the Committee still firmly holds that RTWSA remain not only accountable, but actively ensures employers comply with their obligations to support workers to return to work, through the provision of suitable employment. The Committee is of the view that the responsibility for ensuring suitable employment for work injured employees rests with the employer and with Return to Work SA, rather than with the worker.

¹⁸⁹ *Return to Work Act 2014* (SA) s26.

Recommendation 10

The Committee notes the disparity between small, medium and large sized employers and the resources available to them in order to offer injured workers suitable employment. This disparity, along with the provision of additional resources should be considered with this recommendation.

The Committee recommends the Minister for Industrial Relations ensure ReturnToWorkSA holds all employers accountable in providing suitable employment for their injured workers, as soon as the worker is certified fit to return to work.

The Committee also recommends RTWSA develop a key performance measure for agent compliance with section 18; and with the outcomes to be provided to the Committee every 12 months.

5.8 Transitional Provisions

Term of Reference

(g) *The impact of transitional provisions under the Return to Work Act 2014;*

5.8.1 Changes

Schedule 9 of the *RTW Act* repeals the *Workers Rehabilitation and Compensation Act 1986* (SA), makes administrative amendments to associated Acts, and provides provisions for the transition of injured workers from the WorkCover Scheme to the Return to Work Scheme.

The Hon John Rau MP, Minister for Industrial Relations stated during question time:

There were a number of people who were long-term claimants on the old scheme before the new scheme came into operation on 1 July 2015. In respect of that old cohort of people—in other words, people who may have been on the scheme for many, many years prior to that—they were treated as if their first day of injury was 1 July 2015. So that it is clear, that means that there were a number of people who might have been on the scheme for a very long time but, because the new scheme came in, they were given an additional two years' notice that they would be coming off the scheme.

[For these workers, their income support] will end therefore on 28 June this year [2017] ... Those people may have access to financial support for medical expenses up to 12 months after income support ceases or for life if they are seriously injured people ... [I]ndividuals whose injuries are so serious that they have in excess of a 30 per cent WPI assessment, those people have lifetime support, even if the injury occurred prior to 1 July 2015.¹⁹⁰

The Minister also advised that RTWSA had been working very hard to communicate with injured workers to transition from the WorkCover Scheme to the Return to Work Scheme. He advised that since January 2015, from a total of nearly 7000 workers on the WorkCover Scheme, a total of 5874 had accepted and been paid redemptions. Further, as at 15 June 2017, 397 workers were considered as *seriously injured* and therefore eligible for income support to retirement age and lifetime medical support. This has meant that approximately '700-odd' people transitioned from the old Scheme to the new.¹⁹¹

For workers on the WorkCover Scheme at 1 July 2015 who were assessed as having a WPI of below 30 per cent, their entitlement to come support is outlined in Table 2.

¹⁹⁰ South Australia, *Parliamentary Debates*, House of Assembly, 22 June 2017, 10245 (John Rau, Minister for Industrial Relations).

¹⁹¹ *Ibid.*

Table 2: Comparison of income and medical expense support available to workers between the RTW and WRC Acts

Support Available for Workers Transitioning from the WorkCover Scheme

Income Support at 30 June 2015 on WorkCover Scheme	Maximum Support as % of NWE on RTW Scheme		Medical Expenses*
	First 52 Weeks	Second 52 Weeks	
100% of NWE	100%	80%	Up to 28 June 2018
90% of NWE	90%	80%	Up to 28 June 2018
80% of NWE	80%	80%	Up to 28 June 2018
No Income Support	Income Support Not Available	Income Support Not Available	Up to 30 June 2016

*Compensation for medical expenses ceases 12 months after the cessation of income support

The submissions received by the Committee were generally understanding of the need for transitional provisions (this being separate from the opinion about the transitional provisions themselves). It was generally held operating two separate schemes would be difficult, and would create an inequality for workers depending on when their date of injury.¹⁹² However, detractors of the transitional arrangements submitted workers who had been on the WorkCover Scheme for some years were not only expecting income and medical support to be ongoing, but were reliant on such payments.¹⁹³

The Australian Society of Rehabilitation Counsellors (ASORC) stated there,

is little doubt that those affected by the transition from the prior arrangements has been challenging. This arrangement has seen people who have been in the scheme for a long time, with entrenched behaviours and limitations, need to move to a position where they can re-enter the workforce within a two year period. Some of these people have continued through the two year period believing that they will be deemed as seriously injured, which has meant that for those people who did not have this established early enough, that they will find it difficult to locate suitable employment before their income entitlements cease.¹⁹⁴

Mr Harbord described the transitional provisions 'a mess' and further noted:

[W]e are facing conflicting decisions in the tribunal, and until such time as we have definitive decisions from the full tribunal, and probably from the Supreme Court, we really don't know how the transitional provisions will play out. That is causing a lot of concern and worry amongst injured workers.¹⁹⁵

¹⁹² See, eg, *Self Insurers of South Australia*, above n 57, 15.

¹⁹³ United Voice SA, *Submission No 24, Inquiry into the RTW Act and Scheme*, September 2016, 11.

¹⁹⁴ Australian Society of Rehabilitation Counsellors, above n 108, 12.

¹⁹⁵ Graham Harbord, *Committee Hansard*, 13 April 2017, 31.

5.8.2 Transition and Income Support

Discussed in section 6.8.3 of the Interim Report, a number of submissions identified ‘gaps’ in the transitional provisions which resulted in unfair outcomes for some injured workers.

One of the most prominent ‘gaps’ identified, has been for those workers not in receipt of income support payments on 1 July 2015. This may have been due to the worker:

- performing alternate duties at full time hours as part of a return to work programme;
- voluntary temporary discontinuance due to personal circumstances (for example to take leave); or
- maternity leave.

In these circumstances, a worker would have had their income support suspended under section 36 of the repealed Act. As they were not in receipt of income support on 1 July 2015, they therefore would not be entitled to income support under the *RTW Act*.¹⁹⁶ This has resulted in workers who assumed they could resume income support should their circumstances change—such as upon returning from maternity leave, or if they suffered an aggravation of their injury and require additional time off work—not being able to claim income support payments.

5.8.3 Medical Expenses and Transitional Arrangements

As indicated in Table 2, those with injuries pre-dating 1 July 2015 are able to have medical expenses paid for 12 months post cessation of income support, or 12 months post 1 July 2015 if they were not in receipt of income support on that date.

5.8.4 Lump Sum Payments and Transition Arrangements

Covered in section 7.4 on Lump Sumso, the LGA opined the introduction of the 104 week time limit on income support is offset by the increased lump sum payments, and introduction of payment for economic loss.¹⁹⁷

Mr Cagney did not fully agree with this view, as the economic lump sum is available only to some workers. Also, workers with injuries sustained prior to 1 July 2015 cannot access the section 56 lump sum payment for economic loss.

I am representing a worker at the moment. His injuries actually occurred a week before [the start of the Return to Work Scheme]. He had substantial injuries to his shoulders and cervical spine. He had three separate shoulder surgeries and ongoing complications with his spine. He was assessed for whole person impairment and it was significant – not 30 per cent but it was still significant. His weekly payments have run out. He had the benefit of an additional week of income [paid between his injury and the commencement of the new Scheme], but he missed out on a \$85,000 economic loss, which would have gone some way to mitigating his loss.¹⁹⁸

¹⁹⁶ *Return to Work Act 2014* (SA) sch 9 cl 37(6).

¹⁹⁷ Local Government Association, above n 58, 5.

¹⁹⁸ Bradley Cagney, Committee Hansard, 10 August 2017, 97.

Mr Cagney suggested a way to remedy this. While striking a balance between it being fair for workers and not imposing undue cost on the Scheme, he suggested to allow workers who had suffered injury prior to 1 July 2015 access to the economic lump sum payment—however for the lump sum to be reduced by the amount of income support the worker had received on the WorkCover Scheme.

For workers who had been on WorkCover for years, their economic lump sum payment may be reduced to zero. For others who received minimal support from the Scheme because their injury was sustained close to the commencement of the new Scheme, their economic lump sum would therefore be larger.¹⁹⁹

Findings

The wording of the transitional provisions have resulted in some workers who, although injured but were either working in alternate duties, on a rehabilitation and return to work plan whereby they were not in receipt of income support or not at work due to maternity leave provisions when the new Scheme commenced, have been left without benefits.

The Committee acknowledged even if these workers had access to the Scheme on 1 July 2015, their income support payments would have already ceased (at 104 weeks), and their medical expense support would be nearing an end.

¹⁹⁹ Ibid.

5.9 Other Jurisdictions

Term of Reference

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

5.9.1 Summary

A number of submissions stated that considering the features of other jurisdictions would not add any further value to the Scheme as elements of workers' compensation systems are integrated and that 'cherry-picking' the positives of one scheme ignores the potential impact that it will have on the Return to Work Scheme.

Business SA stated in their submission that considerable research was conducted in the drafting of the *Return to Work Act 2014* (SA), and that identifying individual elements of other jurisdictions, and 'cherry picking' their best elements would not create an ideal system given the delicate balance between assisting workers, Scheme financial viability and employer needs.²⁰⁰ With this in mind, Safe Work Australia regularly produces a comprehensive report that compares aspects of workers' compensation jurisdictions across Australia and New Zealand. A comparison of various aspects of other jurisdictions, weekly income and medical support available to workers, show that jurisdictions vary vastly across Australia. Section 6.9.1 of the Interim Report contains a number of jurisdictional comparisons in various aspects of the Scheme, including:

- weekly payment and medical support;
- permanent impairment payments; and
- access to common law.

A comparison of income replacement support available for every jurisdiction in Australia, as produced by Safe Work Australia, can be found in Appendix E.

²⁰⁰ Business SA, Submission no 25, *Inquiry into the RTW Act and Scheme*, September 2016, 8.

5.10 Injury Scale Value

Term of Reference

(j) *The adverse impacts of the injury scale value*

5.10.1 Submission Responses

Of the submissions providing a response to this term of reference, the majority stated the Injury Scale Value did not have any relevance to the *RTW Act* or Scheme, with some stating the matter instead related to motor vehicle accidents.²⁰¹

²⁰¹ See, eg, The Law Society of South Australia, Submission No 37, *Inquiry into the RTW Act and Scheme*, November 2016, 9.

6.0 OTHER RELEVANT MATTERS

Term of Reference

(k) *Any other relevant matters*

6.1 Service Delivery and Return to Work Support

6.1.1 Service Standards

Along with the new Scheme came an active move by RTWSA to shift the culture from ‘administering a medico-legal scheme to delivering a Scheme that embraces the health benefits of work with a strong service ethic.’²⁰²

Discussed in section 5.2.3 of the Interim Report, the *Statement of Service Standards* is found in Schedule 5 of the *RTW Act*. RTWSA has adapted this legislative requirement to create 10 service commitments outlining what people can expect when they deal with RTWSA, agents, self-insured employers and providers.²⁰³

Mr Wilson appeared before the Committee. The Committee heard he has had direct experience with both the WorkCover and Return to Work Schemes as an injured worker, and since starting up his business, Determined2.²⁰⁴ has provided services to between 40 and 50 injured workers.²⁰⁵ Mr Wilson said he is able to identify two general cohorts of workers—‘old world’ and ‘new world’.²⁰⁶

Mr Wilson described people who have been on the WorkCover Scheme, such as himself, as ‘old world’ because:

[R]egardless of the significance of their actual disability or injury, ... we carry baggage ... It’s clear, and I have become much more clear about what really does hold me back day-to-day, and it is my mental state. That damage that was done to me by the way things were managed [when I was on WorkCover], I think that’s just being institutionalised by the system. I am a victim of what was. I don’t think it could have been avoided, but I can clearly see in the future that it doesn’t have to be repeated.²⁰⁷

He explained there is a stark contrast to those who had been injured since the introduction of the Return to Work Scheme. On this point, Mr Wilson stated:

[T]hey have a way different attitude and a way different outlook on how things are going to be for them because they are not having to prove constantly that they are injured. It’s accepted that they are injured. Someone is going to them and saying, ‘You are injured; what do you want to do?’ The person says, ‘I want to do X’ and the [case manager] says,

²⁰² ReturnToWorkSA, ‘2015-16 Annual Report’ (Annual Report, 2016) 11.

²⁰³ ReturnToWorkSA, *Our Service Commitments*, <<https://www.rtwsa.com/about-us/returntoworksa/our-service-commitments>>.

²⁰⁴ Determined2 is the first service provider to offer Immersion Therapy. This type of therapy offers freedom of movement within a water environment.

²⁰⁵ Peter Wilson, Committee Hansard, 18 May 2017, 90.

²⁰⁶ Ibid.

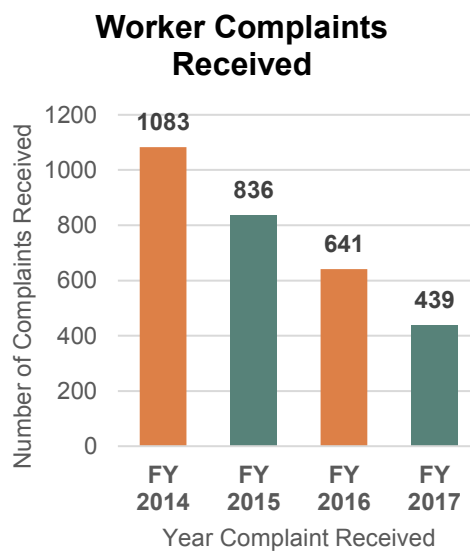
²⁰⁷ Ibid.

‘Okay, let’s support you to do X.’ ... You are removing entitlement and you are removing compensation from the picture because the focus is on, ‘What do you need?’²⁰⁸

Regarding the future administration of the Scheme, Mr Wilson stated from his view of being an injured worker on the Scheme,

there is still some work to do on how workers are viewed. I don’t think we are people who need to be helped, we are people who need to be supported. We are people who need to be listened to and have our needs understood, and then supported to reach them and be made accountable for the outcomes.²⁰⁹

The move to a strong service focused Scheme has been one of the reasons RTWSA has attributed the reduction in complaints the Scheme has received from workers, as seen in Figure 3.



Source: ReturnToWorkSA, Submission No 42, *Inquiry into the Return to Work Act and Scheme*, September 2017, 3

Figure 3 Complaints received by RTWSA from injured workers.

6.1.2 Ombudsman

As part of the 2008 WorkCover Scheme reforms, the WorkCover Ombudsman was established to investigate administrative acts under the *Workers Rehabilitation and Compensation Act 1986* (SA), complaints about employers failing to comply with their obligations, as well as matters relating to the provision of effective rehabilitation and return to work.²¹⁰

²⁰⁸ Peter Wilson, Committee Hansard, 3 August 2017, 90.

²⁰⁹ Ibid 88.

²¹⁰ *Workers Rehabilitation and Compensation Act 1986* (SA) s 99D.

The *RTW Act* abolished the WorkCover Ombudsman,²¹¹ with powers to oversee aspects of the Act being transferred to Ombudsman SA.

Ombudsman SA is able to receive and investigate complaints about breaches of the service standards of the *RTW Act* (see section 6.1.1), as well as complaints relating to acts of the RTWSA and Crown agencies.

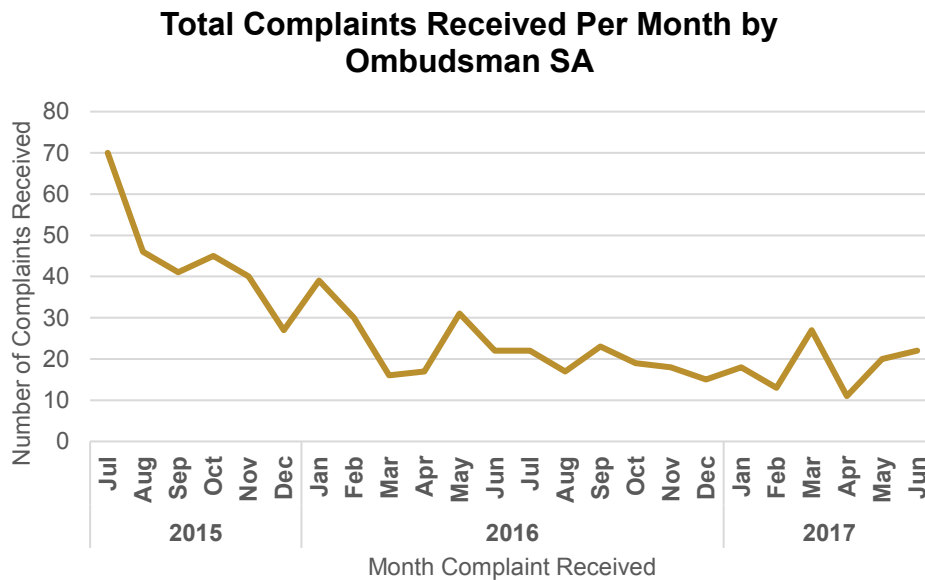
Similar to RTWSA, OmbudsmanSA has also experienced a reduction of complaints since the Scheme commenced, see .

In the first year of operation, Ombudsman SA received 424 complaints, with the greatest number of complains being about breaches of the services standards, stating the Corporation, will:

- treat the worker and employer fairly and with integrity, respect and courtesy and comply with stated timeframes—29.5 per cent; and
- be clear about how the Corporation can assist to resolve issues by providing accurate and complete information that is consistent and easy to understand—26.7 per cent.

The number of complaints further decreased in the second year of operation with the Ombudsman only receiving 225 complaints for the year. However, the two service standards with the greatest complains remained unchanged from the previous year.

Appendix E contains further summary information about the complaints received by Ombudsman SA during 2016/17.



Source: Ombudsman SA, 'Annual Report 2016/2017' (Annual Report, 2017) 57 and Ombudsman SA, 'Annual Report 2015/16' (Annual Report, 2016) 57.

²¹¹ *Return to Work Act 2014* (SA) sch 9 cl 57.

CASE STUDY 6: Ombudsman Complaint

A worker's advocate lodged a complaint related to the agent and its decision to only communicate with the worker's legal representative on all claim related matters which resulted in the worker incurring additional legal costs.

The Ombudsman investigated this complaint and found that RTWSA had relied upon information the agent had provided that the worker agreed to the arrangement to direct all communications to his legal representative and that it did not undertake any independent assessment of the information that the agent had provided. Further, the Ombudsman found the way in which RTWSA investigated complaints demonstrated that its investigation process failed to identify whether the agent had provided it with accurate and reliable information.

The Ombudsman was of the view RTWSA had breached clause 4(f) of the Service Standards which states the Corporation should be clear about how the Corporation can assist a worker and an employer to resolve any issues by providing accurate and completing information that is consistent and easy to understand.

The Ombudsman acknowledges that RTWSA has implemented a new complaints investigation process that addresses this type of deficiency, and has taken corrective action to prevent this type of complaint from occurring again.

The Ombudsman recommended RTWSA provide a written apology to the worker and provide a response that was accurate and supported by evidence.

Source: Ombudsman SA, 'Annual Report 2016/2017' (Annual Report, 2017) 60.

Figure 4: Total number of complaints received per month by Ombudsman SA in relation to the Return to Work Act

Findings

Ombudsman SA can receive and investigate complaints relating to potential breaches of the service standards prescribed in the *RTW Act*. As the Ombudsman received 225 complaints in 2016-17 with the majority relating to potential breaches of service standards. In addition to the complaints received by RTWSA, the Committee is keen to find out compliance with these service standards.

Recommendation 11

The Committee recommends the Minister for Industrial Relations review the compliance of the Corporation to meeting the Statement of Service Standards prescribed in Schedule 5 of the *Return to Work Act*, and report the findings to the Committee within 12 months.

6.1.3 Communication

The Committee notes that the two service standards with the greatest number of complaints received by Ombudsman SA related to the treatment of workers and stakeholders, as well as the level and completeness of communication with them.

As mentioned in section 5.3 of this report, the Committee heard evidence workers might not be aware of all of their rights when it comes to medical support. Unions have often been a source of information about workers' compensation for workers; however, with union memberships have falling in recent years,²¹² there is greater importance that the Compensating Authority is making workers aware of their rights and obligations.

The Statement of Service Standards in the *RTW Act* (covered in further detail in section 5.2.3 of the Interim Report) prescribes the Corporation must,

(g) assist a worker in making a claim and, if necessary, provide a worker with information about where the worker can access advice, advocacy services and support;

and

(k) recognise a right of a worker or an employer to be supported by another person and to be represented by a union, advocate or lawyer.²¹³

However, a review of the RTWSA website found limited information on where a worker may be able to locate advocacy services.²¹⁴ The website states:

We will provide information on other agencies that may be able to assist when we cannot. This information is available by calling 13 18 55, on our website and in written communication.²¹⁵

Under 'Useful Contacts', the website has listed SafeWorkSA, Ombudsman SA, the SAET and the Legal Services Commission SA (LSCSA). The website states that while the LSCSA can provide free independent legal information, advice and guidance on matters relating to claims, they do not provide advocacy or representation services.²¹⁶

A review of the publications available on the RTWSA website found there to be limited information in a single source for workers which had information about:

- their rights and responsibilities;
- employer rights and responsibilities;

²¹² Ewin Hannan, 'Union Membership Hits Record Low', *The Australian* (online), 4 May 2017, <<http://www.theaustralian.com.au/national-affairs/industrial-relations/union-membership-hits-record-low/>>.

²¹³ *Return to Work Act 2014* (SA) sch 5 pt 2.

²¹⁴ A search using the ReturnToWorkSA's website search function for the terms 'advocacy' and 'advocate' was completed on 25 August 2017.

²¹⁵ ReturnToWorkSA, *Help Making A Claim*, 25 August 2017, ReturnToWorkSA, <<https://www.rtsa.com/about-us/returntoworksa/our-service-commitments/help-to-make-a-claim>>.

²¹⁶ ReturnToWorkSA, *Useful Contacts*, 25 August 2017, ReturnToWorkSA, <<https://www.rtsa.com/about-us/how-can-we-help-you/useful-contacts>>.

- who was involved in their claim;
- support available to them;
- requirements relating to surgery pre-approval;
- Scheme supports include RISE and NewAccess;
- useful contacts; and
- the service standards.

The website did contain RTWSA's publication titled *Your Work Injury Insurance*—a publication designed for employers. This 23 page booklet contained information pertinent to employers, including details on the insurance premium system, services available, useful contacts, mechanisms for complaints, the service standards and how to have a decision reviewed.²¹⁷

Having access to this information in a single document allows workers/employers greater ease of access as they are not required to navigate through multiple web pages. Ease of access of information available online about the Scheme is of particular importance. In the 2015-16 financial year, 28 per cent of claims received were from workers aged 50 and above.²¹⁸ Overwhelmingly, claims were from workers in blue-collar occupations. Traditionally, older people or those from blue-collar occupations may have less-advanced skills in the use of computer technology and fall into the digital divide. It is therefore important information is easily accessible to them.

Having information available in a single document makes it easy for workers to request a friend or family member to print off the information for them should they require it.

Findings

Many complaints about the Scheme relate to the level of information and the method of communication between workers and the Corporation (including its agents and self-insured employers). A review of the RTWSA website found information for workers spread over multiple webpages. This may make it difficult for some workers to locate information about the Scheme. RTWSA could make improvements with accessibility of information relevant to injured workers.

The Committee would like to see a greater amount of information available for injured workers on the RTWSA website. This information should be easily accessible.

The Committee also notes that some workers may find accessing technology difficult, and therefore support that information should be available by a variety of means, including online and hard copy by post.

²¹⁷ ReturnToWorkSA, 'Your Work Injury Insurance' (Publication, July 2017).

²¹⁸ ReturnToWorkSA, 'ReturnToWorkSA – Scheme Statistics FY2016' (Tableau Report, 14 December 2016).

Recommendation 12

The Committee recommends the Minister of Industrial Relations direct ReturnToWorkSA to review the information available on its website and the methods in which it disseminates information about the Scheme to injured workers to ensure it is easily accessible for all workers. Further, the Committee notes the digital divide that exists in the community. As such, it is important ReturnToWorkSA also makes information freely available to workers and other stakeholders through print, telephone and other mediums to suit the varied ways people may wish to access information about the Scheme.

6.1.4 Decisions made by Claims Agents

Some submissions, including those from SA Unions and Dr Purse, were critical of the manner in which agents were making some decisions. Mr Szakacz stated:

Inappropriate decision-making and claims agent behaviour is not something new to this scheme ... It leads to the wrongful denial of entitlements to workers, to increased disputation and to the loss of confidence of injured workers in the scheme and the concept of return to work. It should have no place in our scheme.²¹⁹

Dr Purse described the impact of,

[a]dversarial claims management techniques used by claims agents, in which workers are subjected to insensitive or uncaring treatment, can lead to loss of self worth, anger and depression.²²⁰

A review of research into the interactions between insurers and injured workers found the impact in which insurers can have on a worker to be significant because:

Insurers can be a major influence affecting the injured worker's well-being, as they control the acceptance of claims, the provision of financial support and medical and rehabilitation services, as well as negotiation of any compensation for serious injuries. All interactions between the injured worker and the insurer have the potential to influence the injured worker's recovery, and so the interactions between these parties that are unrelated to return to work arrangements are also important to investigate.²²¹

The impact of interactions between the Corporation and worker is evident in a recent matter before the SAET. The Committee was shocked to hear of the case of the factory manager who was not informed about the success of his workers compensation claim for almost a decade after it had been submitted. The worker spiralled into alcoholism and resultant brain damage. The case exposed the failure of communication by WorkCover that the Tribunal had overturned his appeal to the originally rejected claim. According to *InDaily*, RTWSA did not apologise for the oversight.²²²

²¹⁹ Joe Szakacs, Committee Hansard, 1 June 2017, 65.

²²⁰ Kevin Purse, above n 167, 453.

²²¹ Elizabeth Kilgour et al, above n 148, 161.

²²² Bension Siebert, 'WorkCover 'Must Be Held Accountable'', *InDaily* (online), 20 June 2017 <<https://indaily.com.au/news/local/2017/06/20/workcover-must-held-accountable-compo-failure/>>.

During the September Committee hearing, this case was raised before RTWSA. When asked whether RTWSA had implemented something to ensure this scenario did not occur again, they stated:

Mr CORDINER: I will give two answers to that. The gentleman concerned was represented by a lawyer. The lawyer was in the court. The lawyer was a party to the decision.

Dr OAKLEY: And received copies of the orders.

Mr CORDINER: And received copies of the orders. We can't put ourselves in the shoes of the client and their lawyers. Many years later, when none of the people who were there, someone comes back and says, 'I wasn't told'. It's very difficult. The trust is that the systems from nine years ago or something are just so different to what the systems are now. We use face-to-face communication as well as emails and letters. It is just a different ballgame.²²³

While this inquiry did not delve specifically into the behaviour of claims agents, an investigation was completed in the Victorian WorkSafe Scheme by the Victorian Ombudsman. It was found some workers in Victoria were experiencing 'genuine hardship and distress'²²⁴ while all five of the Scheme's agents were 'gaming'²²⁵ the system by making poor decisions to terminate workers from the Scheme. It also found as agents received financial reward for terminating claims,

evidence of unreasonable decision-making strongly [suggested] that in disputed and complex matters the financial measures [were] encouraging a focus on terminating and rejecting claims to achieve the financial rewards.²²⁶

In South Australia, RTWSA advised the KPIs which the agents are measured against at the time of the Committee hearing related to:

- timeliness of decision-making;
- quality of decision-making;
- service scores (RTWSA are in the process of transitioning from this to measure the quality of particular referral types to service providers); and
- accuracy of payments made.²²⁷

Mr Francis said that it is important these KPIs are put in context of the remuneration model for the claims agents. On this point, he advised:

Our claims agents have a base fee, which is received, and then the KPIs effectively take away from that base fee. So they lose amounts if they don't meet the required KPIs from that particular base fee.

²²³ Rob Cordiner and Julia Oakley, Committee Hansard, 28 September 2017, 109.

²²⁴ Victoria Ombudsman, 'Investigation in the Management of Complex Workers Compensation Claims and Worksafe Oversight' (Report, 12 September 2016) 13.

²²⁵ Ibid.

²²⁶ Ibid 4.

²²⁷ Michael Francis, Committee Hansard, 28 September 2017, 110.

The incentive, which sits on top of the base fee, is all around return-to-work performance. So it is not a KPI as such, but it's an opportunity to make a profit, which goes on the back of actually achieving better return to work...

The Auditor-General in his 2016/17 annual report found:

In 2017, claim management fees decreased by \$7 million to \$66 million. The decision to align the fees between the two agents resulted in an overall reduction in the base fees and a consequential reduction in effect on performance fees and business reform costs, which are calculated based on 20% of the base fee.²²⁸

Mr Wilson shared his experience of interacting with the claims agents. He said his claim was handled by a number of case managers over the years with there being limited communication between each one:

The Hon. J.E. HANSON: How many claims managers do you think you went through?

Mr WILSON: At least 12.

The Hon. J.E. HANSON: During what period of time?

Mr WILSON: Eight years, but predominantly... [after the first] year and a half. There was maybe one through that first period, but it was once I established that they didn't know much about me and that, if they were going to help me to get to where I needed to go, they needed to know who I was, that it was my job to make sure they knew who I was because I couldn't rely on their paperwork being accurate.

The Hon. J.E. HANSON: In your words, did you have to explain who you were to each case manager every single time?

Mr Wilson: Every single time. I had to tell that story every single time.

...

The Hon. J.E. HANSON: Did you feel like the case managers were talking to each other?

Mr WILSON: Not at all. Not once. There was never an understanding of who I was, where I had been or where I was going—ever.²²⁹

Given the impact decisions made by insurers have on the recovery and return to work of workers, Mr Szakacs proposed that consideration should be made to amend,

the Act to make it an offence for persons exercising power under the Act to make a decision relating to a claim for compensation capriciously or without reasonable foundation.

In our view, such a provision would ensure that decision-makers take seriously their responsibilities to make decisions in accordance with the scheme.²³⁰

United Voice also supported this in their position submission.²³¹

²²⁸ Auditor-General, 'Report of the Auditor-General: Annual Report for the Year Ended 30 June 2017. Part B: Agency Audit Reports' (Annual Report, 2017) 352.

²²⁹ Peter Wilson, Committee Hansard, 3 August 2017, 82-83.

²³⁰ Joe Szakacs, Committee Hansard, 1 June 2017, 65.

²³¹ United Voice SA, above n 193, 11.

Such a concept is not unheard of in workers' compensation schemes overseas. In the United States of America the *duty to act in good faith* in the assessment of insurance claims is well established in both their common law and legislation.

Such a duty requires an insurer to assess any claim in a timely manner and to come to a decision based upon evidence which the insurer has made its best efforts to substantiate. The existence of this duty to act in good faith acts as a bulwark against excessive vigour by insurers in denying claims which have merit; ignoring evidence in favour of the workers claim; and acceptance evidence against the workers claim without properly testing the veracity of that evidence.²³²

The *RTW Act* does state in Section 3—Objects of Act:

*(3) A person exercising judicial, quasi-judicial or administrative powers must interpret this Act in the light of its objects and these objectives without bias towards the interest of employers on the one hand, or workers on the other.*²³³

However, the Committee notes there are no direct penalties should a decision or action be made to favour one stakeholder group over another.

Findings

Changes to the service delivery model have positively impacted the Scheme. The Scheme now receives fewer complaints than the WorkCover Scheme, and the Committee heard that workers on the Return to Work Scheme are being treated with a stronger focus on what they need to support them with recovery and return to work.

The decisions made by the Compensating Authority have great effect on workers' and recovery and return to work outcomes.

The Committee received submissions and heard evidence relating to decisions being made by claims agents which were not adequately supported in fact. Whilst no investigation has been undertaken to such depth in South Australia, the Committee found the Victorian Ombudsman's reporting into poor decision making by agents in the Victorian Scheme to be disturbing.

The Committee is interested to see how the Scheme's new service model affects outcomes for injured workers and employers.

6.1.5 Early Intervention

Discussed in the Interim Report, changes in the *RTW Act* now make it clear an injured worker should expect the Corporation to provide early intervention through recovery and return to work services.²³⁴

²³² Robert Guthrie and Stephen Monterosso, 'Legislating to Prevent Further Harm to the Harmed' (Paper presented at Non-Adversarial Justice: Implications for the Legal System and Society Conference, Melbourne, Australia, 4 to 7 May 2010) 14-15.

²³³ *Return to Work Act 2014* (SA) s 3(3).

²³⁴ *Ibid* s 15(1).

Dr Purse commented RTWSA 'have done well' at implementing early intervention and the mobile claims managers.²³⁵

ASORC submitted:

Due to the capped entitlement to injury management payment, it is even more important that the early intervention occurs and that the decisions are made around change of employment goal.

Mentioned in section 5.1.4, ASORC also highlighted the view that some complex claims (in particular those involving psychiatric injury) may involve a more lengthy and detailed investigation process before a determination on compensability can be made. As such, the Committee made Recommendation 1 to ensure the provision of early intervention support regardless of claim determination.

Further, the provision of early intervention services is a requirement under the Statement of Service Standards of the *RTW Act*. To assess compliance with all service standards, including the one requiring early intervention, the Committee has made Recommendation 10.

6.1.6 Mobile Claims Managers

The Interim Report discussed the introduction of *mobile claims managers* who have been tasked with providing personalised, face-to-face services for employers and workers.²³⁶ As at September 2017, there were 97 mobile claims staff.²³⁷ ARPA had raised concerns about inconsistent practices between claims agents and confusion about their role versus the role of return to work service providers/rehabilitation counsellors.

Mr Cordiner informed the Committee it is part of the claims agents' contracts that they are to deliver a business model that includes mobile claims management. He further stated that:

They are measured on a number of things, both the service results and return-to-work rates, level of complaint ... and on all of those, things have continued to basically be better ... They are only one part of the claims process, but they are an important part ...²³⁸

Mr Wilson, who has experienced both the WorkCover and Return to Work Schemes as an injured worker, recalled his experience when he found out of the introduction of mobile claims managers.

When I learned about what [a mobile case manager] does and their job was to, when someone became injured, go out and meet with them and try to understand where they were and what they wanted and where they were going and how did they need help to get there, I think I burst into tears. I went, 'Wow.' First of all, I was a bit jealous. I was like, 'Why didn't I ever get that?' I reflected on what I didn't get. When I got my first phone call it was, 'Why are you being lazy?' and 'Why aren't you back at work?' I thought to myself [about

²³⁵ Kevin Purse, Committee Hansard, 18 May 2017, 61.

²³⁶ ReturnToWorkSA, '2015-16 Annual Report' (Annual Report, 2016) 15.

²³⁷ ReturnToWorkSA, Submission No 52, *Inquiry into the Return to Work Act and Scheme*, September 2017, 2.

²³⁸ Rob Cordiner, Committee Hansard, 28 September 2017, 110.

mobile case managers], 'Well, that's a wonderful, lovely thing.' The great thing about that means that no-one should ever have to experience what I experienced ever again...²³⁹

Mr Cordiner and others submitted that mobile claims management had been well received by employers and stakeholders.²⁴⁰ This has also been supported by the 2016 survey of Recovery and Return to Work Coordinators in which 86.6 per cent of those surveyed found worksite visits from mobile claims managers either useful (33.5 per cent) or very useful (53.1 per cent).²⁴¹

However, Mr Harbord stated otherwise as indicated in the below Hansard extract:

The PRESIDING MEMBER: Have you seen any improvement with the addition of mobile case managers?

Mr HARBORD: Not particularly. Injured workers do get a phone call fairly soon after a claim is lodged and then it all just disappears. That is my experience, so it's almost tokenistic.

The PRESIDING MEMBER: We have received evidence and I have had some constituents tell me about mobile claims manger, once they appreciate that they are not out to spy on them as opposed to help them... I have had some positive feedback [claims agents] being more involved with the injured worker than the phone calls that may or may not happen.

Mr HARBORD: I have had the reverse where someone has rolled up at a person's house and they have been quite upset by what has happened.²⁴²

Findings

The Committee found RTWSA has a stronger focus on applying intervention strategies as they are now expressed in the *RTW Act*. Given the current time limited scheme, providing early intervention services as soon as possible is more crucial than ever in ensuring that workers are given all opportunities to recover and return to work before their income support ceases.

Mixed views were expressed about the role of mobile case managers from the few that made submissions or provided evidence to the Committee. The Committee is pleased to hear that RTWSA is taking a proactive approach to early intervention and time will tell if this processes helps or hinders early return to work.

6.1.7 Other Scheme Supported Services

The Scheme funds some additional services and programmes which are designed to support workers.

²³⁹ Peter Wilson, Committee Hansard, 3 August 2017, 84.

²⁴⁰ See, eg, Business SA, above n 200, 9.

²⁴¹ Ann-Louise Hordacre, 'Revisiting Return to Work Coordinators. Building Bridges 2010-2016' (2017) *Australian Industrial Transformation Institute, Flinders University* 23.

²⁴² Graham Harbord, Committee Hansard, 13 April 2017, 38.

ReSkilling

RTWSA's ReSkilling program is a trial,²⁴³ which is designed to,

help people with a workplace injury to maintain their existing skills or develop new skills while they recover from their injury. The program can also help people identify employment prospects if they need to seek different work.²⁴⁴

Mr Francis expanded on this and stated the programme has been in operation for a little over 12 months and has seen in excess of 500 people going through the programme.

It certainly was designed to fill what we believe to be a gap in the services available to facilitate return-to-work opportunities for workers, and certainly from the perspective of giving people opportunities to engage in what are bona fide industrial environments that are more akin to that where we are trying to keep people in both a physical condition to remain in, but also a psychological condition to remain in to help make the transition back into work more smooth and effective. It is achieving that end for us.²⁴⁵

Mr Francis advised there are 'numerous examples of people obtaining direct employment' as a result of the programme, as well as other positive outcomes including where trust has been re-established between the worker and the Scheme. Mr Francis provided one particular example of an outcome of the programme:

One particular example springs to mind of a young man who was a plumber and got to a point where the relationship had broken down to the extent that he would only engage via his lawyer. Through one of the reskilling programs, ... being engaged in a more trusting environment as far as he was concerned, and something that was closer to what he was accustomed to, we were able to re-establish a much more effective and constructive rapport to the point where the main, if he is not employed now, the last I heard he was that close to being readily employable again.²⁴⁶

Re-employment Incentive Scheme for Employers (RISE)

The Re-employment Incentive Scheme for Employers (RISE) programme incentivises employers to assist workers to return to meaningful employment should they be unable to return to their pre-injury employer. The programme offers employers reimbursement of 100 per cent of gross wages for the first four weeks, and 50 per cent of gross wages for the following 22 weeks of employment.²⁴⁷

Employers are not eligible for RISE if they are the pre-injury employer.

Ms van der Linden in response to questions on notice said:

²⁴³ Rob Cordiner, Committee Hansard, 28 September 2017, 112.

²⁴⁴ ReturnToWorkSA, ReSkilling People Back to Work, (14 July 2017) < <https://www.rtwsa.com/about-us/newsroom/articles/reskilling-people-back-to-work>>.

²⁴⁵ Michael Francis, Committee Hansard, 28 September 2017, 112.

²⁴⁶ Ibid.

²⁴⁷ ReturnToWorkSA, Re-employment Incentive Scheme for Employers (RISE), (10 February 2017) <<https://www.rtwsa.com/claims/returning-to-work/re-employment-incentive-scheme-for-employers-rise>>. See also Business SA, 'Questions on Notice: Return to Work Act 2014 Review' (Response to Questions on Notice, 15 September 2016), 1.

Anecdotally, these changes have been met with positive feedback and Business SA continues to support and advocate the RISE Scheme. The RISE Scheme provides many of the arrangements discussed by the Standing Committee including support from a case manager to ensure transition into the new job is smooth for both the worker and employer; and payments to cover costs such as minor workplace modifications and equipment to assist the worker if needed.²⁴⁸

Under the WorkCover Scheme, if a worker aggravates, accelerates, exacerbates, deteriorates or experiences of a prior injury, the new employer would not have their employer premiums effected, as it would be considered a secondary injury.²⁴⁹ However, this benefit to new employers does not exist under the new Scheme. See section 6.5.2 for further information.

Submissions such as those from ASORC²⁵⁰ and Mr Walsh²⁵¹ stated employers are often worried about employing a previously injured worker as they fear there is a likelihood of the worker's injury reoccurring. Under WorkCover, as secondary injuries did not impact employer premium, claims agents could better sell the benefits of employing an injured worker as there was a reduced risk to the new employer. Secondary injuries are not a concern for self-insured employers because they take responsibility regardless of the status of injury.

In some workers' compensation schemes, a similar incentive to RISE exists, whereby a new employer may be reimbursed for wages if they employ an injured worker.

ReCONNECT

See section 6.2.

NewAccess

The NewAccess programme has been developed by *beyondblue* and is a free and confidential support service for people who may experience depression or anxiety as a result of day-to-day life. In South Australia, it is supported by RTWSA.

Despite there being an initial peak in referrals when the service was first Launched in March 2017, Mr Francis advised that as the attention was taken off of the programme, referrals have dropped. He also stated:

[T]here is some positive news in terms of [NewAccess] actually continuing to deliver some good outcomes for people who are access it. The challenge for us is to maintain the awareness of the service so that it is being accessed in a way so that we can maximise the opportunities that it provides us.

Legal Services Commission

RTWSA provides funds to the Legal Services Commission to provide a free information and advisory services to workers about work injury insurance matters and processes. According

²⁴⁸ Ibid.

²⁴⁹ See, eg, SA Government Gazette no 31, 23 May 2013 1973 – WorkCover Premium Order (experience Rating System) 2013-14.

²⁵⁰ Australian Society of Rehabilitation Counsellors, above n 108, 11.

²⁵¹ DW FoxTucker Lawyers, above n 22, 4.

to RTWSA, the service 'commenced in August 2013, and during 2016-17, the LSC received 313 phone enquiries and arranged 62 advice appointments.²⁵²

Findings

RTWSA operates Scheme support programmes such as ReSkilling and ReCONNECT. RTWSA continues to operate the Re-employment Incentive Scheme for Employers (RISE) which the Committee found to be an incentive for employers to employ injured workers who have been unable to return to their pre-injury employer.

The Committee received evidence that some potential new employers shy away from employing the Scheme's workers due to fear that workers may be more susceptible to re-injury and should this occur, are worried it will affect their premium.

The Committee notes that a worker should not be placed in a new role unless the worker's treating professionals, in conjunction with the new employer, worker and case manager, have completed a thorough risk assessment. This, in addition to an employer having an effective work health and safety system in place, should minimise the risk of injury to the worker. In fact, the worker should be at no greater risk of injury than other workers in the workplace. If the workplace is unsafe for the injured worker, it is likely to be unsafe for all other workers.

While the Committee acknowledges suggestions to reintroduce the removal of costs relating to secondary injuries from claims calculations, the Committee feels greater level of risk assessment and support to reassure potential employers of a worker's suitability for the role is more appropriate.

6.1.8 Return to Work Service Providers

As discussed in the Interim Report, Return to Work Service providers (previously known as *Rehabilitation Providers*) were found historically to be in receipt of a greater number of a referrals and were of higher cost when compared to other schemes.²⁵³

As a result of the PricewaterhouseCoopers review, the Committee's *Inquiry into Vocational Rehabilitation and Return to Work Practices for Injured Workers in South Australia*, and poor performance in the scheme, a number of changes occurred in the use of return to work services. Services have become more outcome focussed and specialised. This contributed to the decrease in return to work service referrals when compared to historical data.

According to Finity:

Over the last couple of years rehabilitation payments reduced, particularly as [work capacity assessments] ended. Since June 2016 there has been an increase in rehabilitation spending by agents as part of new strategies to achieve better return to work outcomes.²⁵⁴

²⁵² ReturnToWorkSA, '2016-17 Annual Report' (Annual Report, 2017) 24.

²⁵³ PricewaterhouseCoopers, *Vocational Rehabilitation Framework—Model Options Final Report* (March 2011) 3.

²⁵⁴ Finity Consulting, 'Scheme Actuarial Valuation as at 31 December 2016: ReturnToWorkSA' (Report, 17 March 2017) 52.

Rehabilitation/return to work service spending is shown in Figure 5.

ASORC recommended the increased use of Rehabilitation Counsellors as they

differ from other allied health professionals on the basis of their specific expertise in disability, recovery processes, and rehabilitation counselling, as their work is informed by the processes of adaption to the physiological and psychological changes, social identity, work, family and broader social functioning ... [They] bring critical skills to the community of illness and injury as their expertise centres around a case management framework, thereby ensuring guidelines and objectives are met.²⁵⁵

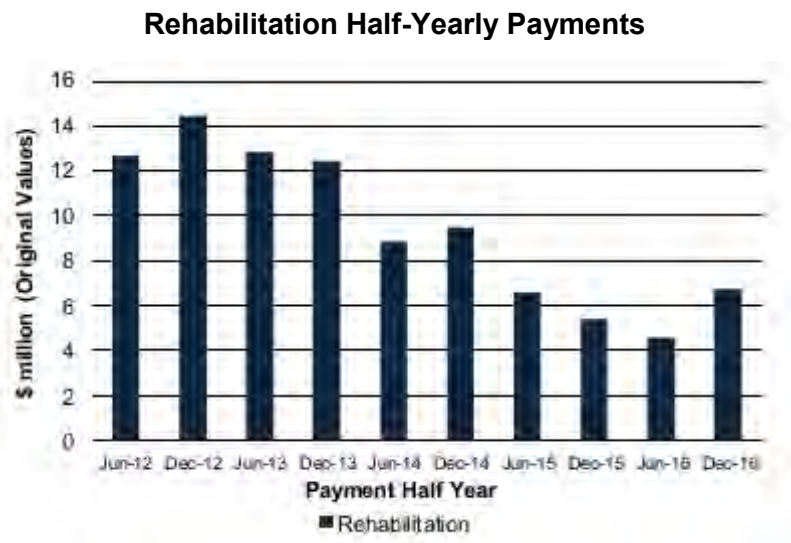


Figure 5: Payments made for rehabilitation/ return to work services per half-year

ASORC also stated that at times the claims determination process holds up or distracts from the focus of supporting a worker with their recovery and return to work. They have found if,

engaged early, Rehabilitation Consultants are able to work through the barriers and ensure that the outcomes are achieved regardless of the claim determination process.²⁵⁶

Ms van der Linden stated that:

Business SA would absolutely encourage any further assistance which is provided through the Return to Work scheme to encourage workers back to place, because ultimately that is the objective of the act and any good worker wants to go back to work, any worker should want to go back to work, and any employer wants their good workers back as well. You have to have good workers to run a business.²⁵⁷

²⁵⁵ Australian Society of Rehabilitation Counsellors, above n 108, 6.

²⁵⁶ Australian Society of Rehabilitation Counsellors, Submission No 50, *Inquiry into the RTW Act and Scheme*, 26 June 2017, 3.

²⁵⁷ Evidence to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Parliament of South Australia, Adelaide, 6 July 2017, 74 (Estha van der Linden).

The Committee notes in its 2012 Inquiry into Vocational Rehabilitation and Return to Work Practices for Injured Workers in South Australia, the important role return to work providers (previously known as rehabilitation providers) have in the Scheme. This report noted:

Rehabilitation providers have an intrinsic role in the return to work process of many injured workers, particularly those with more severe or complex injuries. Providers are responsible for identifying workers' rehabilitation needs, developing rehabilitation programs, administering various rehabilitative treatments, monitoring workers' progress, and consulting with the claims agent and employer.²⁵⁸

The Committee would be interested to hear if the reduction in use of rehabilitation providers has created a gap in the system adversely affecting injured workers. If so, the Committee would like to know how this gap could be addressed.

Findings

The use of return to work service/rehabilitation providers has historically not produced favourable results for the Scheme. As a result, the use of these providers was overhauled, and coupled with other changes in the Scheme, caused a dramatic reduction in spending.

However, with appropriate management, return to work service providers may be able to offer additional skills, experience and services that are not offered by agents. Schedule 5 of the *RTW Act* (as covered in section 5.2.3 of the Interim Report), outlines service standards the Corporation is to meet for workers and employers—this includes the Corporation's obligation to,

- (b) *ensure that early and timely intervention occurs to improve recovery and return to work outcomes including after retraining (if required);*

Recommendation 13

The Committee recommends the Minister for Industrial Relations review and advise the Committee of the impact that the reduction of rehabilitation/return to work service provider spend has had on the outcomes of the Scheme.

6.1.9 Support Outside of the Metropolitan Area

During 2015-16, nearly 25 per cent of accepted claims were with employers who lived outside of the Adelaide Hills and metropolitan area.²⁵⁹

²⁵⁸ Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Parliament of South Australia, *Inquiry into Vocational Rehabilitation and Return to Work Practices for Injured Workers in South Australia* (2012) 22.

²⁵⁹ ReturnToWorkSA, above n 218.

The Committee received a submission from one regionally based injured worker who was assigned a Return to Work Consultant who was based a 4.5 hour drive from his home, and that due to the distance had only met her once since she was assigned (see Case Study 7).²⁶⁰

CASE STUDY 7: Joseph T

Joseph reported he lived in Roxby Downs and worked for an underground mine. He sustained a back injury on 11 December 2014, hospitalised the following day, and verbally reported the incident to his supervisor on 13 December 2014.

Joseph said he was asked not to lodge a WorkCover claim by his employer's RTW Coordinator, and suggested he instead access income protection.

Joseph reported his income replacement was capped at approximately \$1000 a week, which was less than half of what he was earning pre-injury. He ended up lodging a claim, however was advised it was rejected.

After around 15 months of no support from the Scheme, and a lengthy dispute process, Joseph was advised his claim was accepted. He said during this time he had to fund his own medical expenses, with the pain being so severe and persistent, he wanted to die.

Joseph stated he was determined to find a job as soon as possible; he self-funded a Cert IV in Work, Health and Safety and planned to complete a Cert IV in Training and Assessment.

Towards the end of 2016 – nearly 2 years after his initial injury – Joseph was put in touch with a return to work service provider. The consultant assigned lived 4.5 hours away, and he reported very little contact from her. He said this was on top of feeling like very little support was afforded to him from the Scheme.

Joseph reported at times communication was poor, with goals and job options being changed either at the last minute, or in areas not reasonable.

Joseph reported he fears he will have to exit the Scheme without a job.

Source: Joe T (Injured Worker, Surname Withheld), Submission No 43, *Inquiry into the Return to Work Act and Scheme*, 14 February 2017, 3.

A similar concern in relation to the service difference between metropolitan and regional areas was raised by employers. In 2016 the Australian Industrial Transformation Institute repeated a 2010 survey of Recovery and Return to Work Coordinators. The survey found:

[Recovery and Return to Work] Coordinators in rural regions, particularly in the farthest reaches of the state, were more likely to experience service gaps for injured workers

²⁶⁰ Joe T (Injured Worker, Surname Withheld), Submission No 43, *Inquiry into the Return to Work Act and Scheme*, 14 February 2017, 3.

thereby limiting their ability to function in the role when compared with Coordinators in metropolitan regions:

- **Health and medical services** were readily available in the metropolitan area, but more difficult to access in rural areas – particularly specialist services.
- **Return to work services** were also more difficult to access in rural areas, with Yorke Mid North and Eyre Western least able to provide these services.²⁶¹

It is common for people who live in regional or remote areas to receive poor service delivery. A large study by Monash University found that people who live in rural and remote areas had some of the worst access to psychological health services.²⁶²

RTWSA has a regional engagement strategy:

The strategy includes a number of initiatives designed to support employers and health practitioners to assist people injured at work to achieve the best possible recovery and return to work outcomes.²⁶³

The 2016 RTWSA annual report outlines the view that claims agents have mobile claims managers in Mount Gambier and the Iron Triangle with 'drive-in support available to other regional areas.'²⁶⁴ RTWSA's workplace advisory team has also delivered face-to-face training to employers in regional locations, as well as information sessions and workshops to self-insured employers and medical practitioners.²⁶⁵

Similarly, in RTWSA's 2017 annual report, RTWSA provided information and training sessions to a range medical practitioners and employers.

Neither annual report does not refer to support RTWSA providers to workers in regional areas.

Findings

The Committee found that while RTWSA has a regional engagement strategy, it appeared focussed on providing education and training to employers and health practitioners. The Committee is aware that for some workers who are in regional locations, the services they are afforded may need improvement.

²⁶¹ Ann-Louise Hordacre, above n 241, viii.

²⁶² Sophie Scott, 'Mental Health: Poor and Remote Areas Don't Have Equal Access to Services, Monash university Study Finds', ABC (Online), 2 March 2015 <<http://www.abc.net.au/news/2015-03-02/study-highlights-divide-in-access-to-mental-health-services/6269920>>.

²⁶³ ReturnToWorkSA, above n 202, 25.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

Recommendation 14

The Committee notes in 2015/16, 25 per cent of the accepted claims were with employers based outside of the Adelaide hills and metropolitan area. Evidence received by the Committee, in particular from individual injured workers, did not reflect well on ReturnToWorkSA's regional engagement strategy. The Committee recommends the Minister for Industrial Relations require ReturnToWorkSA to review and advise on improvements of their services for regional and remote injured workers to ensure high quality services are afforded to all South Australians, regardless of location.

6.2 Services After Income Support Ceases

With many workers having their payments ceased at 104 weeks, some submissions including Johnston Withers Lawyers,²⁶⁶ and the Australian Lawyers Alliance,²⁶⁷ submitted workers will need to turn elsewhere for support.

Workers' compensation schemes interact with other support schemes in society, such as social security, superannuation, private disability income insurance and the motor accident compensation commission. According to Finity Consulting, best practice scheme design will consider the interactions between the Scheme and social security, so once workers' compensation support ceases, workers who are still unable to work will not find themselves in limbo between the two systems.²⁶⁸

To assist with bridging this divide, RTWSA runs ReCONNECT—a free and voluntary service designed,

to deliver practical assistance to the small number of people who require some ongoing support to transition from Scheme funded services to community based support services at the end of their claim.²⁶⁹

It is available for people whose income support has ceased, including those who:

- are disputing the cessation of their income support,
- are still receiving return to work services,
- are entitled to medical expenses,
- are employed by self-insured employers, or
- have reached retirement age.²⁷⁰

The service runs for up to 12 months and is accessible to all injured workers in the scheme, including Crown and self-insured employers, not just those of premium-paying employers.²⁷¹ Referral to the programme can be made by anybody. In explaining this program, representatives from RTWSA stated:

We will take a referral to ReCONNECT from anywhere. We will take it from claims agents or from our own staff. The worker can self refer. We will take it from the employer. We will take it from a lawyer. We will take it from a family friend. We will happily take it from a member of parliament. We will accept a referral and we are not in any way prescriptive about that.²⁷²

²⁶⁶ Johnston Withers Lawyers, above n 168, 5.

²⁶⁷ Australian Lawyers Alliance, Submission No 14, *Inquiry into the RTW Act and Scheme*, 29 September 2016, 7.

²⁶⁸ Geoff Atkins and Gae Robinson, above n 85, 38.

²⁶⁹ ReturnToWorkSA, above n 202, 25.

²⁷⁰ ReturnToWorkSA, *ReCONNECT*, 30 September 2017, ReturnToWorkSA, <<https://www.rtwsa.com/claims/returning-to-work/reconnect>>.

²⁷¹ ReturnToWorkSA, Committee Hansard, 28 September 2017, 103.

²⁷² ReturnToWorkSA, Committee Hansard, 28 September 2017, 104.

As at the end of September 2017, there were four members in the ReCONNECT team at RTWSA, and they have backgrounds in nursing, social work, former Centrelink employees as well as career counselling.²⁷³

Dr Julia Oakley, General Manager of Regulation at RTWSA, advised the Committee that the ReCONNECT service gets categorised in three ways:

- **Information only** (approximately 14 per cent): for people who just need information on something and then are ‘happy to go away and do their own thing.’
- **Active support** (approximately 80 per cent): for people who want help with job seeking, negotiating the Centrelink process, or assistance accessing financial counselling or housing services.
- **Complex clients** (approximately six per cent): for people who might be having issues with homelessness, mental health, or be in an out of hospital. The service will often help them with finding accommodation, accessing emergency services or Centrelink entitlements.²⁷⁴

When workers accept to enter the programme, they set goals they want to achieve through working with the service. Participants inform the ReCONNECT team when they have achieved a goal, and with the success of the programme measured based on goals achieved versus active participants.

Dr Oakley provided the Committee with ReCONNECT participant information. This is shown in Table 3.

Table 3: Participant numbers and goals completed for the ReCONNECT service delivered by RTWSA.

	2015-16	2016-17	2017-18*
Referrals	261	569	104
Accepted Service	136	441	71
Completed Goals	134	334	3**

*For period 1 July 2017 to 27 September 2017

**Low completion rate is due to the recency of referrals.

Source: ReturnToWorkSA, Committee Hansard, 28 September 2017, 104.

²⁷³ ReturnToWorkSA, Committee Hansard, 28 September 2017, 104.

²⁷⁴ Ibid.

During question time, the Hon John Rau MP, Minister for Industrial Relations advised the House:

Since January [2017], ReturnToWork has partnered closely with Centrelink in order to make the transition from the Return to Work scheme to Centrelink-based payments, where appropriate, as seamless as possible.

Specifically relating to the group of workers who were on the WorkCover Scheme and had their income support ceased on 28 June 2017, the Minister for Industrial Relations reported:

I can indicate that there has been ongoing interaction between ReturnToWorkSA and those individuals, both in a face-to-face sense and also through correspondence. There has been an attempt to reach out to those people so that where they would have the opportunity of transitioning from payments under the Return to Work scheme to a Centrelink entitlement, the Return to Work scheme is actually assisting them to make the appropriate connections with the federal agency concerned and assisting them with making applications.²⁷⁵

Once workers exhaust any support available to them from the Return to Work Scheme, further income replacement may be sought from the regimes identified in Appendix F. These include New Start Allowance, Disability Support Pension and Income Protection. It should be noted that many regimes have maximum payments which may be substantially below a worker's pre-injury earnings. An example of the difference between the average weekly earnings in Australia and what can be received from two schemes is shown in Table 4.

Table 4: The difference between the Average Weekly Earnings from Employment in Australia and those who receive the maximum benefit payable on the Disability Support Pension and Newstart Allowance.

Support Regime	Weekly Pension/Allowance	Average Weekly Earnings from Employment	Difference Per Week
Disability Support Pension ^a	\$444.15	\$1,179.00 ^c	-\$734.85
Newstart Allowance ^b	\$267.80		-\$911.20

^a payment rate for single person

^b payment rate for single person

^c seasonally adjusted figure

Sources: Centrelink, *How Much You Can Get* (26 April 2017); Centrelink, *Disability Support Pension*, (12 July 2017) and Australian Bureau of Statistics, *6302.0 Average Weekly Earnings, Australia, May 2017*, (17 August 2017).

Further, options such as the Disability Support Pension and Newstart Allowance are subject to the worker undergoing income and asset tests. While the worker's principal residence is not asset tested, assets owned by the worker or the worker's partner may be included—these

²⁷⁵ South Australia, *Parliamentary Debates*, House of Assembly, 22 June 2017, 10246 (John Rau, Minister for Industrial Relations).

include investment properties, financial investments, motor vehicles, hobby collections, and household contents.²⁷⁶

Some injured workers have explored replacing their income support with government support but foresee problems. One worker stated:

I can't get job search [Newstart] allowance, disability allowance or pension as my Husband works.²⁷⁷

Another worker stated similar difficulties with accessing support:

I am currently unable to work in any capacity and would not be entitled to any government support as my wife works.²⁷⁸

Mr Cagney reported some of SDA's members who have had their payments ceased are,

having to access social security payments or income protection payments, either through a policy in their super fund or through a private policy. Most of our members don't have a private policy, but a lot of our members do have income protection policies through their super fund.

Often those types of payments don't replace the loss of entitlements and there is often a different test for accessing them. So it is not as if you can make a seamless transition from one to the other. There is often a different way of assessing entitlements under those particular schemes as well.²⁷⁹

As discussed in section 5.3.1 of this report, the Committee received evidence that medicine which some workers rely on (especially those with psychiatric conditions) may not be paid for by the PBS. Workers will need to seek their own method of funding this medication in the future.

This has been confirmed in the CFMEU's submission where they stated:

Some [medical and return to work services] that [workers] are entitled to under the Return to Work Act 2014 are some services that they cannot claim under Medicare or for that matter under their private health coverage.²⁸⁰

With reference to the prescribed payment rate, Mr Szakacs stated:

For workers who reach two years and cease to receive weekly payments, the disability support pension will be a likely safety net. Under this pension, it is highly unlikely in the circumstances of some injuries that a worker could afford to continue with the clinically advised treatments and medications.²⁸¹

²⁷⁶ Department of Human Services, *Assets*, (13 July 2017)

<<https://www.humanservices.gov.au/individuals/enablers/assets>>

²⁷⁷ Carol P (Injured Worker, Surname Withheld), Submission No 4, *Inquiry into the RTW Act and Scheme*, 8 September 2016, 2.

²⁷⁸ Mark S (Injured Worker, Surname Withheld), Submission No 28, *Inquiry into the RTW Act and Scheme*, 21 October 2016, 2.

²⁷⁹ Bradley Cagney, Committee Hansard, 10 August 2017, 95.

²⁸⁰ Construction, Forestry, Mining and Energy Union, Submission No 22, *Inquiry into the RTW Act and Scheme*, 30 September 2016, 3.

²⁸¹ Joe Szakacs, Committee Hansard, 1 June 2017, 64.

Mr Graeme Kirkham, Director/Lawyer of LawCall expressed concern in his submission about the broader pressure being put on the community:

I am seeing the start of the ‘ripple effect’ now. There are community organisations that offer financial counselling, which will be vitally important for these workers facing a substantial reduction in income, and I suspect these resources will be stretched.²⁸²

As well as unions, many not for profit organisations provide free financial counselling, education and support to the public. Such organisations are listed on the Australian Securities and Investments Commission’s ‘Money Smart’ website.²⁸³ The website lists organisations such as the Magdalene Centre, Lutheran Community Care, Uniting Care Wesley, Anglicare and Aboriginal Legal Rights Movement. With that said, these organisations may know little about the State’s *RTW Act* and Scheme.

Findings

Services available to workers post being on the Scheme are broad and are not centralised. Access to these services are not guaranteed and workers will be required to meet a set of criteria, depending on the service to which they are seeking access.

The Committee, however, found programmes that may be commonly sought—the Disability Support Pension or New Start Allowance—will most likely pay substantially less than the worker was receiving prior to their injury.

To help demystify the complex web of support which exists outside of the Scheme, RTWSA runs the ReCONNECT programme, designed to connect injured workers to these services.

Recommendation 15

The Committee notes ReturnToWorkSA’s ReCONNECT service helps people transition to community based and job search support services after income support has ceased. However, the Committee holds it important that workers who are most likely to require this support are provided with access to this information earlier to provide them sufficient time to plan.

The Committee recommends the Minister of Industrial Relation cause RTWSA to hold regular forums/information sessions where they can connect workers who are most likely going to exit the Scheme at 104 weeks with agencies (such as Centrelink) who can explain the support mechanisms which may be available for them prior to their income support ceasing.

²⁸² LawCall, Submission No 48, *Inquiry into the RTW Act and Scheme*, 3 May 2017, 1.

²⁸³ Australian Securities & Investments Commission, *Find a Financial Counsellor*, 12 May 2017, Money Smart <<https://www.moneysmart.gov.au/managing-your-money/managing-debts/financial-counselling/find-a-financial-counsellor>>.

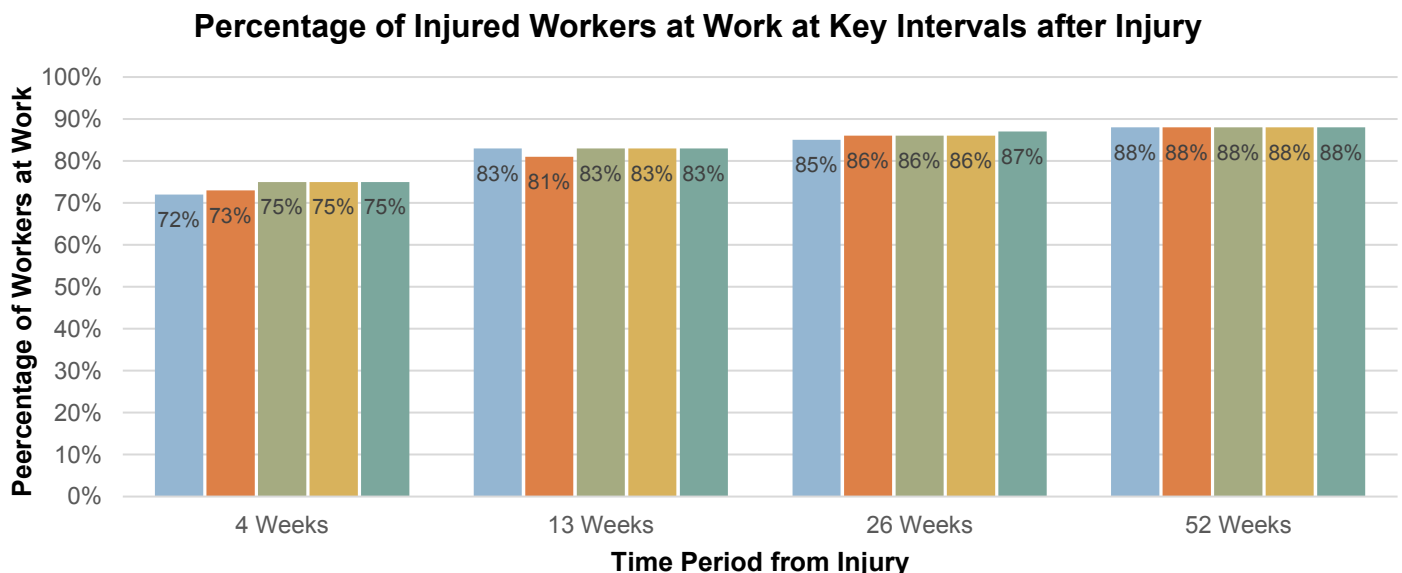
6.2 Return to Work Rate

As discussed in the Interim Report, the definition of *return to work* differs depending on the jurisdiction or context. For example, different definitions mean a worker may have achieved a return to work if, after having time off of work, they:

- returned to work at their pre-injury hours and were no longer in receipt of income support; or
- returned to work completing any hours; or
- are no longer in receipt of weekly payments, regardless of whether they have returned to work or not.

Safe Work Australia collects return to work data nationally. From their latest survey (which covered workers with a claim date between 1 March 2014 and 31 January 2016), it was shown South Australia continued to experience return to work rates lower than other jurisdictions and consistently fell below the national average (see section 7.2 of the Interim Report).²⁸⁴ The Committee notes, however, while this is the latest data from Safe Work Australia, its collection period incorporates claims which were made during both the WorkCover and current Scheme. This may mean the full impact of the new Scheme on return to work rates is not accurately reflected in this data.

RTWSA's latest return to work rates are shown in Figure 6.



Source: ReturnToWorkSA, '2016-17 Annual Report' (Annual Report, 2017).

Figure 6: The number of injured workers who have remained or returned to work at specific intervals after injury in South Australia.

²⁸⁴ Safe Work Australia, *Return to Work Survey: 2016 Summary Research Report (Australia and New Zealand)*, (2016) 20.

6.3 South Australian Employment Tribunal and Disputes

Discussed in the Interim Report, the South Australian Employment Tribunal (SAET) replaced the Workers Compensation Tribunal when the Return to Work Scheme commenced.

Mr Cordiner stated during the 2017 Estimates Committee the Scheme was now dealing with around 78 per cent fewer disputes than the WorkCover Scheme.²⁸⁵

In March 2017, Mr Walsh stated there were approximately 64 appeals listed before the Full Bench of the SAET, which was at least double what would normally be expected. He stated that prior to the *RTW Act*,

if a matter proceeded beyond the initial judicial determination [in the South Australian Employment Tribunal] to an appeal, the cost associated with the appeal, generally speaking, depended upon the result.

In other words, if the compensating authority won on the appeal, there was an entitlement to an order for costs. If the worker won on the appeal, there was an entitlement to an order for costs. That changed with the Return to Work Act ... [as] the worker is [now] entitled to his or her costs of the appeal no matter what the result.²⁸⁶

Mr Walsh stated that this automatic indemnity for workers has been at

significant cost to the scheme and I don't think it's a cost that is warranted because what it does is encourage appeals that are not meritorious.²⁸⁷

However, during the September Committee hearing, Mr Cordiner said that one of the 'hidden incentives' of the Return to Work Scheme and that the Scheme covers the costs for people to run disputes, with \$30 million being spent in lawyers' fees last year.²⁸⁸

²⁸⁵ South Australia, *Parliamentary Debates*, Estimates Committee B, 26 July 2017, 61 (Rob Cordiner).

²⁸⁶ John Walsh, Committee Hansard, 30 March 2017, 25.

²⁸⁷ Ibid 26.

²⁸⁸ Rob Cordiner, Committee Hansard, 28 September 2017, 108.

6.4 Lump Sum Payments

Three types of lump sum payment exist:

1. redemption;²⁸⁹
2. economic loss;²⁹⁰ and
3. non-economic loss.²⁹¹

6.4.1 Redemptions

Redemptions are currently not utilised by RTWSA and its agents.²⁹²

Ms Nikolovski said redemptions are a tool to release a worker from the Scheme—saving on claims management costs, and also allowing the worker to be free of the stress of dealing with the system.²⁹³

However, without the ability to negotiate redemptions, Mr Harbord stated as a result ‘there has been much less scope to settle a workers compensation claim.’²⁹⁴

Self-insured employers may still choose to utilise redemption payments, however,

the Australian Taxation Office has ruled that [redemption payments] are taxable income [when previously they were not]. Some of our members are now reporting that this has made the negotiation of income redemption payments much more difficult and will inevitably increase costs to our members and the rest of the scheme.²⁹⁵

6.4.2 Economic and Non-Economic Loss payments

Economic loss payments are available to workers who suffer a WPI of between five and 29 per cent for physical injuries,²⁹⁶ while non-economic loss payments are available for workers with a five per cent WPI or more.²⁹⁷ The amount payable is affected by the age of the worker at the relevant date in accordance with the Schedule and the number of hours worked.

The Local Government Association stated the ‘enhanced entitlement to lump sum payments adequately covers the reduction in weekly payments.’²⁹⁸

However, an entitlement does not arise for psychiatric injury or consequential mental harm.

²⁸⁹ *Return to Work Act 2014* (SA) ss 53-54.

²⁹⁰ *Ibid* ss 55-56.

²⁹¹ *Ibid* ss 57-58.

²⁹² Amy Nikolovski, Committee Hansard, 2 March 2017, 21.

²⁹³ *Ibid*.

²⁹⁴ Graham Harbord, Committee Hansard, 13 April 2017, 36.

²⁹⁵ Self Insurers of South Australia (supplementary submission), Submission No. 42, *Inquiry into the RTW Act and Scheme*, 2 February 2017, 2.

²⁹⁶ *Return to Work Act 2014* (SA) s 53.

²⁹⁷ *Ibid* s 58.

²⁹⁸ Local Government Association, above n 197, 5.

Mr Szakacz raised concern during a Committee hearing as these payments are not available to all permanently injured workers and questioned whether these payments do indeed adequately cover the reduction in weekly payments.²⁹⁹

Mr Harbord shared a similar view and stated,

despite the fact that workers suffering a mental injury are just as likely to have their payments cut off after that two years, they do not at least get some part compensation through the economic loss provisions.³⁰⁰

In section 6.9 of the Interim Report, Table 7 summarised permanent impairment lump sum payments available in different jurisdictions in Australia. South Australia differs from many other jurisdictions as its lump sum payments do not arise from psychiatric injury, that is, a worker who is permanently impaired as a result of only psychiatric injury cannot receive an economic or non-economic loss lump sum payment.³⁰¹

In most jurisdictions, lump sum payments do arise for workers with psychiatric injury, however, a higher minimum WPI is often required for access when compared to workers with physical injuries in those same jurisdictions. For example, in New South Wales, payment is made where there is a permanent impairment of at least 10 per cent for physical injuries, or at least 15 per cent for a psychiatric injury.

While the changes in lump sum payments have been said to compensate the reduction in weekly payments, the ability for workers' to manage large payments has been questioned. Discussed earlier in this report (see section 5.5.3 on the concerns raised about common law), studies have found some workers who received lump sum payments through common law were 'now poor' or financially insecure, due to a variety of reasons including the mismanagement of funds.³⁰²

Mr Wilson received approximately \$155,000 through a section 43 non-economic loss permanent impairment payment under the repealed Act. He said as a result of the investment—which he said was done 'on a handshake'³⁰³—he lost almost all of his money. In discussion with his case manager prior to the investment, he said there was never a suggestion by the claims agent for him to see a financial advisor.³⁰⁴ Mr Wilson's case highlights the view that it is easy for poorly informed injured workers to be separated from money that is meant to benefit them.

Lump sum payment amounts are prescribed, and are dependent on the worker's assessed WPI, and for the calculation of economic loss lump sum, the worker's age and their pre-injury

²⁹⁹ Joe Szakacs, Committee Hansard, 1 June 2017, 66.

³⁰⁰ Graham Harbord, Committee Hansard for the Inquiry into Work Related Mental Disorders and Suicide Prevention, 26 February 2016, 97.

³⁰¹ *Return to Work Act 2014* (SA) ss 56(3)(a), 58(3).

³⁰² Marcia Ann Neave and Louise Howell, 'The Adequacy of Common Law Damages' (1992) 5 *Adelaide Law Review Research Papers* 51-52.

³⁰³ Peter Wilson, Committee Hansard, 3 August 2017, 84.

³⁰⁴ *Ibid.*

hours. Depending on the worker's WPI and age, these payments can be quite significant, sometimes in the hundreds of thousands of dollars.

Examples of some current prescribed lump sum amounts for workers who were working full time pre-injury are found in Table 5.

Table 5: Examples of prescribed lump sum payment amounts, taking into account WPI and age. Age only impacts the Economic Loss payment. In this table, all examples assume the worker was working full-time at the time of their injury.

		Lump Sum Payment Amount		
WPI	Age (age factor)	Economic Loss	Non-Economic Loss	Total
5%	25 (100%)	\$5,227	\$12,336	\$17,563
	40 (85%)	\$4,443	\$12,336	\$16,779
	55 (60%)	\$3,136	\$12,336	\$15,472
10%	25 (100%)	\$43,216	\$21,710	\$64,926
	40 (85%)	\$36,734	\$21,710	\$58,444
	55 (60%)	\$25,930	\$21,710	\$47,640
25%	25 (100%)	\$253,658	\$78,616	\$332,274
	40 (85%)	\$215,609	\$78,616	\$294,225
	55 (60%)	\$152,195	\$78,616	\$230,811
35%	25 (100%)	No access to economic loss as income support is available to retirement age.	\$183,675	\$183,675
	40 (85%)		\$183,675	\$183,675
	55 (60%)		\$183,675	\$183,675

Findings

The Scheme now offers lump sum payments for both economic and non-economic loss for some permanently injured workers whereas the WorkCover Scheme only offered non-economic loss payments. Workers are automatically entitled to these payments depending on their WPI assessment.

Nonetheless, the Committee found that although these payments help to lessen the impact of the 104 week time limit for income support, psychiatric injuries do not provide workers with access to these payments. The Committee is concerned at the discrimination of workers with psychiatric injury as many are severely incapacitated for work due to their work related mental illness but do not receive the same compensation as their physically injured counterparts.

Recommendation 16

The Committee recommends that the Attorney General consider amending the *Return to Work Act* to provide allow workers with a psychiatric injury to receive payments for economic loss and non-economic loss similar to those who suffer physical injuries.

Lump sum payments support injured workers with funding further treatment or lost income, and provide compensation for pain and suffering long after their income support ceases. However, there has been a study to suggest workers may become easily separated from their money through poor choices of investment or purchases. There is no requirement for workers to seek competent financial advice about the use of the money received from the lump sum. The Committee believes that financial advice should be made available to anyone receiving a lump sum payment above \$50,000.

Recommendation 17

The Committee recommends the Attorney General amend the *Return to Work Act* to require that workers receive financial advice for any lump sum payments of over \$50,000.

6.5 Premiums and Scheme Costs

The Return to Work Scheme is funded by:

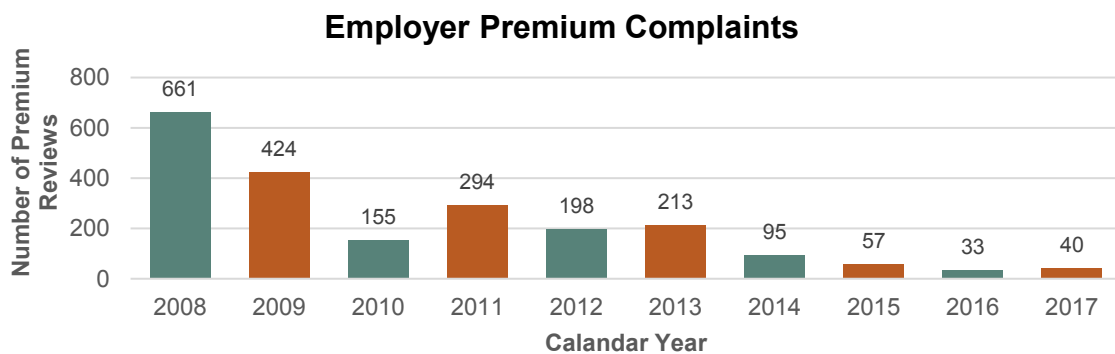
- premiums collected from registered employers;
- self-insurance fees from self insured employers; and
- returns on investments made with funds received.

Under the WorkCover Scheme, South Australia’s average premium rate had become one of the highest in the country. Some submissions stated that worker’s compensation is an additional cost to employers, which may drive business out of the State. If the cost is too high it makes conducting business in South Australia less attractive to employers, and a high premium is most likely going to impact staffing levels and salaries to make business operations unaffordable.³⁰⁵ In response to this notion, Dr Purse stated in evidence that this scenario ‘is pretty much non-existent.’³⁰⁶

I’ve been looking at this for about 20 years ... How many firms have moved out of South Australia because of WorkCover’s premium rate of 3 per cent or 2.75 per cent? I’m not aware of any. I don’t think anybody I’ve come across has come up with any evidence in that area, but what we find is that the competitive premiums argument insists that, if a scheme has higher premiums, then somehow it is ‘unsustainable.’³⁰⁷

As part of the Scheme reform, a new and simpler premium system was introduced, commencing 1 July 2015.³⁰⁸ This has contributed to the reduction in employer premium complaints received, as shown in

Figure 7.



Source: ReturnToWorkSA, Submission No 51, *Inquiry into the Return to Work Act and Scheme*, September 2017, 10

Figure 7: Employer premium reviews received

³⁰⁵ See, eg, Motor Traders Association, Submission No 33, *Inquiry into the RTW Act and Scheme*, 31 October 2016, 2.

³⁰⁶ Kevin Purse, Committee Hansard, 18 May 2017, 53.

³⁰⁷ Ibid.

³⁰⁸ ReturnToWorkSA, ‘2014-15 Annual Report’ (Annual Report, 2015) 24.

As covered in section 7.5 of the Interim Report, the premium rate for registered employers is broadly based on:

- a percentage of the annual remuneration which is paid to employees for each financial year (including wages, superannuation and allowances);
- industry premium rates—employers in lower risk industries (such as medicine or education) will have a lower industry rate (and consequently lower premium) than those employer in high risk industries (such as manufacturing or aged care); and
- income support costs paid to worker’s with claims in the previous financial year.³⁰⁹

An initial premium is calculated at the start of each financial year using an employer’s estimated remuneration, and all employers will a discount based on their base premium. If no income support costs are made during the year, they keep their full discount. At the end of the financial year, a premium is calculated using the actual remuneration paid for the same period.³¹⁰

The Scheme reform saw the average premium rate drop from 2.75 per cent in 2014-15 to 1.95 per cent in 2015-16 which represented a \$180 million saving for employers.³¹¹

Of the 52,600 registered premium paying employers during 2016-17, 80.8 per cent retained their full discount, 1.5 per cent retained a partial discount and 3.7 per cent lost their discount and paid a penalty.³¹²

The average premium rate for 2017-18 dropped further to 1.8 per cent. This is reported to provide a further \$40 million per annum benefit to employers through the reduction in premium.³¹³ Although there has been a drop in average premium, the Scheme premium remains one of the highest in the country.



Source: ReturnToWorkSA, Submission No 42, *Inquiry into the Return to Work Act and Scheme*, September 2017, 3
Figure 8: Average premium rates across Australia for 2017-18.

³⁰⁹ Jane Yuille, ‘RTWSA Premium Provisions 2017-18’ in South Australia, *The South Australian Government Gazette*, No 37, 14 June 2017, 2124.

³¹⁰ ReturnToWorkSA, *Premium Calculations*, (30 September 2017) <<https://www.rtwsa.com/insurance/insurance-with-us/premium-calculations>>

³¹¹ ReturnToWorkSA, above n 202, 24.

³¹² ReturnToWorkSA, Submission No 52, *Inquiry into the Return to Work Act and Scheme*, September 2017, 9.

³¹³ Government of South Australia, ‘Budget Statement: Budget Paper 3’ (State Budget 2017-18, 2016) 85.

Ms van der Linden said Business SA conducted a survey of its members and asked, 'From when the new act was introduced, have you seen a premium increase?' of which 58.5 per cent of respondents answered they had. Ms van der Linden acknowledged that those who responded to the survey were most likely those 'people who have an issue with the system generally.'³¹⁴

However, Ms van der Linden expressed concern as of those businesses who responded, most did not know why their premium had increased,

despite giving [the businesses] prompts and choices, a significant number of them said, 'We actually aren't sure why our premiums have increased.' It might be a legitimate reason, but it might be just that it's not being communicated.'³¹⁵

Besides Scheme premiums, Ms van der Linden also expressed on behalf of Business SA members, that employers felt they would often incur expenses not covered by RTWSA when supporting a worker's return to work. These included:

- the management of the claim
- lost time whilst managing the claim
- lost productivity
- impact on other workers
- cost of restructure around reporting lines
- not just managing the injured worker but managing the team in which the work is placed.³¹⁶

Findings

There have been two premium reductions delivering an ongoing saving of \$220 million per annum as a result of the reform. While this is positive, for those businesses where their premiums have increased, a large proportion did not appear to have a clear understanding why this occurred.

Recommendation 18

The Committee notes some employers reported it was unclear as to why they had experienced premium increases when the Scheme's average premium rate had gone down. The Committee therefore recommends the Minister for Industrial Relations require ReturnToWorkSA to communicate to an employer the reason for any change to their premium.

³¹⁴ Estha van der Linden, Committee Hansard, 6 July 2017, 75.

³¹⁵ Ibid 76.

³¹⁶ Business SA, above n 200, 2.

6.5.1 Scheme Valuation

For many years the WorkCover Scheme was underfunded—that is, there were not enough funds available to pay out all of the Scheme’s outstanding liabilities.³¹⁷ With the introduction of the *RTW Act* as well as other changes, it was announced that as of December 2014, the Scheme was fully funded at 100.7 per cent.³¹⁸

This has since further strengthened with RTWSA’s 2016/17 annual report stating the funding position of the Scheme now at 119.5%, with the Scheme now having \$501 million in net assets (assets which exceed liabilities).³¹⁹ While this is the case, the Scheme’s actuaries have stated there is still uncertainty which may affect future funding. This has been considered in four broad categories:

- Economic: employment, inflation, investment markets
- Legal: disputes, tribunal decisions, transition to SAET, appeal court decisions
- Behavioural: the way scheme participants such as injured workers, employers and service providers behave in future (sometimes referred to as ‘scheme culture’)
- Scheme management: what ReturnToWorkSA does, including how it manages its agents and how they perform.³²⁰

Specifically, Finity advised that some of its main areas of uncertainty for its current estimates include:

- **Serious injury:** with support payable for life, the life expectancy of individuals with a WPI of 30 per cent or more, the future costs of medical expenses, as well as the ultimate number of claims that reach this threshold will impact current liability estimates. Finity is also concerned about how the ageing population who currently provide informal care for seriously injured workers but may not be able to do so in the future - this may result in payment of unforeseen formal care costs.
- **WPI Assessment:** as claims at or above 30 per cent WPI make available ongoing support, and even those under 30 per cent there is the possibility of significant lump sum payments, there is increasing pressure on WPI assessment. ‘The Scheme will face significant financial consequences if this leads to either extra claims getting over the 30 per cent WPI threshold and/or ‘WPI creep’.
- **Legal precedent risk:** possibility of SAET decisions which are unfavourable to the Scheme and behaviours of its participants—this risk is likely to remain for at least another one to two years.
- **Management actions:** this will determine the extent to which redemptions and other types of exit strategies act to reduce the number of claims that remain on ongoing benefits.

³¹⁷ Safe Work Australia, *Comparison of Workers’ Compensation Arrangements in Australia and New Zealand*, (2016) 218.

³¹⁸ John Rau, ‘Unfunded Liability – Wiped Out’ (News Release, 13 March 2015).

³¹⁹ ReturnToWorkSA, ‘2016-17 Annual Report’ (Annual Report, 2017) 9.

³²⁰ Finity Consulting, above n 254, 11.

- **Labour market:** high unemployment and low wages growth could place additional pressures on achieving RTW outcomes.³²¹

The Auditor-General noted similar in the annual report:

There is significant uncertainty surrounding the financial impact of the legislative reforms which will only become clearer as outstanding claims experience emerges in future financial periods. If in future years the actual costs of claims... are greater than the balances recorded in the financial statements, this will adversely impact the funding ratio.³²²

6.5.2 Secondary Injuries

Under the *Workers Rehabilitation and Compensation Act 1986 (SA)*, injuries that resulted from the aggravation, acceleration, exacerbation, deterioration or recurrence of a prior were taken to be a *secondary injury*.³²³

Under the WorkCover Scheme, when calculating employer premiums (in particular the employer's experience premium component), any costs associated with claims for secondary injuries are excluded.³²⁴

In evidence, Mr Walsh stated:

Under the *Return to Work Act*, the concept of a secondary injury, so far as impact on premium is concerned, doesn't exist. I think that is a great disincentive to employers to employ not only persons who have sustained a compensable injury in the past but in fact anybody who is suffering from some form of injury or illness. We have an ageing workforce. As we age all of us are subject to the degenerative process, and it is a great disincentive for employers to employ particularly older workers.

I think the reintroduction of quarantining of weekly payments costs from the premium calculations would be very advantageous: it would encourage the employment of older workers, those who had previous sustained injuries that had given rise to some degree of impairment.³²⁵

ASORC supported this idea. Since the removal of secondary injuries, ASORC submitted it,

has made employers more weary of employing those people returning to the workforce from an injury. A suggestion would be to allow [secondary injuries] as per the previous scheme, but limit it to RISE placement. This would add to Rehabilitation Counsellors ability to convince an employer to consider a worker who is eligible for RISE.³²⁶

In Victoria and New South Wales, should the workers re-injure themselves within the first two years of employment and it is found it relates to the original compensable, the costs associated with the claim will not affect the employers' premiums. Also, in New South Wales, the new

³²¹ Ibid 10-11.

³²² ReturnToWorkSA, above n 202, 89.

³²³ *Workers Compensation and Rehabilitation Act 1986 (SA)* s 3.

³²⁴ See, eg, SA Government Gazette no 31, 23 May 2013 1973 – WorkCover Premium Order (experience Rating System) 2013-14.

³²⁵ John Walsh, Committee Hansard, 30 March 2017, 26.

³²⁶ Australian Society of Rehabilitation Counsellors, above n 108, 14.

employee's wages are exempt from the employer's workers compensation premium calculation for up to two years.³²⁷

When asked for comment as to whether excluding costs related to secondary injuries for the purposes of calculating employer premiums, Mr Michael Francis, General Manager of Insurance at RTWSA, stated:

Philosophically, I can understand a position which might suggest that an employer is less inclined to put on someone with a previous injury if they are not protected ... from having to incur further liabilities if that person aggravates that particular loss.³²⁸

However, from RTWSA's experience, the average cost for closed claims for secondary injuries cost three to five times as much as those claims that do not have that classification. Mr Francis advised that rather than the individual employer paying for those incurred claims costs (for secondary injury claims) the costs would need to be 'picked up by the rest of the industry and everybody ends up paying more.'³²⁹

So whilst on the surface of it, there might be an argument which suggests that it is a good thing to have secondaries able to be excluded, experience has showed us over a long period of time that it actually lead to increased costs for all of the employers in the space and potentially a lack of appropriate levels of opportunity being given for people who were suffering aggravations.³³⁰

Findings

The Committee found since the commencement of the Return to Work Scheme, the average employer premium dropped from 2.15 per cent in 2014-15 to 1.8 per cent in the current financial year.

The Committee also found while it is fully funded, given the relatively early stages of the Scheme, there remains a heightened level of risk and uncertainty to the Scheme's future funding ratio. The Committee has taken a keen interest in how certain aspects of the Scheme may affect future valuations.

The Committee found the removal of the secondary injury definition and exclusion from premium calculations has resulted in employers being less open to employing people with pre-existing injuries.

The Committee notes Finity's caution about potential future impacts on the Scheme. As it is one of the Committee's functions to keep the operation and administration of the *RTW Act* under continuous review, the Committee will monitor the progress of the Scheme in the future.

³²⁷ WorkSafe Victoria, 'WorkSafe Incentive Scheme for Employers' (Information Sheet, September 2016) 2; State Insurance Regulatory Authority, 'JobCover Placement Program' (Information Sheet, 2017).

³²⁸ ReturnToWorkSA, Committee Hansard, 28 September 2017, 107.

³²⁹ Ibid.

³³⁰ Ibid.

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APPENDIX A—SUBMISSIONS AND HEARINGS

Submissions

The following submissions were received by the Committee:

Item	Date	Organisation	Contact	Role
1	10 August 2016	Plenty Catering Company	Mr Elbert Hoebee	Managing Director
2	24 August 2016		Ms Tracy R	Injured Worker
3	4 September 2016		Mr Josh and Ms Nicole O	Injured Worker and Wife
4	8 September 2016		Ms Carol P	Injured Worker
5	12 September 2016		Ms Terri T	Injured Worker
6	12 September 2016	Self Insurers of SA	Mr Robin Shaw	Manager
7	14 September 2016		Mr Brian M	Injured Worker
8	16 September 2016		Mr Gary P	Injured Worker
9	26 September 2016		Ms Mary-Ann L	Injured Worker
10	26 September 2016	University of Adelaide	Prof A McFarlane	Psychiatrist
11	28 September 2016		Mr Ian Hutchison	
12	29 September 2016		Mr and Mrs W	Injured Worker
13	29 September 2016		Mr Stephen W	Injured Worker
14	29 September 2016	Australian Lawyers Alliance	Mr Patrick Boylen	SA President
15	29 September 2016	Local Government Association	Mr Tony Gray	Executive Manager
16	29 September 2016		Dr Nick Ford	Psychiatrist
17	29 September 2016	Finance Sector Union	Lien Sutherland	National Industrial Officer
18	29 September 2016	Registered Employers Group	Ms Hedi Babi	Chairperson
19	29 September 2016	AMWU	Mr John Camillo	Secretary
20	29 September 2016	Wearing Law	Mr Joseph Wearing	Lawyer
21	30 September 2016	Hardware Australia	Mr Scott Wiseman	Executive Officer
22	30 September 2016	CFMEU	Mr Les Birch	Advocate
23	30 September 2016	Rail Tram & Bus Industry Union	Mr Darren Phillips	Branch Secretary
24	30 September 2016	United Voice	Mr David Di Troia	Branch Secretary
25	30 September 2016	Business SA	Mr Anthony Penney	Exec Director
26	30 September 2016	Adelaide Education Union	Mr Jack Major	Branch Secretary
27	30 September 2016	Police Association of SA	Mr Mark Carroll	President

Item	Date	Organisation	Contact	Role
28	21 October 2016		Mr Mark S	Injured Worker
29	28 October 2016	Ai Group	Ms Tracey Browne	Manager
30	28 October 2016	SDA Union	Ms Sonia Romeo	Branch Secretary
31	28 October 2016	AHA	Mr Ian Horne	CEO
32	31 October 2016	Aust Rehab Providers Assoc	Ms Briony Freda	SA Council President
33	31 October 2016	Motor Traders Association	Mr Nathan Robinson	Policy & Advocacy Manager
34	31 October 2016	Public Service Association	Mr Nev Kitchen	General Secretary
35	30 October 2016	Australian Lawyers Alliance	Mr Patrick Boylen	SA President
36	30 October 2016	SA Unions	Mr Joe Szakacs	Secretary
37	7 November 2016	The Law Society of SA	Mr David Caruso	President
38	29 November 2016		Ms Heather C	Injured Worker's Mother
39	8 December 2016	Australian Medical Association	Mr Joe Hooper	Chief Executive Officer
40	10 December 2016	Determined2	Mr Peter Wilson	Injured Worker
41	31 January 2017	ReturnToWorkSA	Mr Rob Cordiner	Chief Executive Officer
42	2 February 2017	Self Insurers of SA (Supplementary)	Mr Robin Shaw	Manager
43	14 February 2017		Mr Joseph T	Injured Worker
44	21 March 2017	DW Fox Tucker	Mr John Walsh	Director
45	28 March 2017	Johnston Withers Lawyers	Mr Graham Harbord	Director
46	30 March 2017		Mr Andrew C	Injured Worker
47	13 April 2017		Ms Bernadette C	Injured Worker
48	3 May 2017	LawCall	Mr Graeme Kirkham	Director
49	18 May 2017	Central Queensland University	Dr Kevin Purse	Adjunct Research Fellow
50	26 June 2017	Australian Society of Rehabilitation Counsellors	Ms Cristina Schwenke	Chief Executive Officer
51	1 August 2017		Mr Mark O	Injured Worker
52	21 September 2017	ReturnToWorkSA (updated submission)	Mr Rob Cordiner	Chief Executive Officer

Hearings

The following witnesses provided evidence to the Committee.

Date	Witnesses
16 February 2017	Mr Rob Cordiner, Chief Executive, ReturnToWorkSA Mr Michael Francis, General Manager of Insurance, ReturnToWorkSA Dr Julia Oakley, General Manager of Regulation, ReturnToWorkSA
2 March 2017	Ms Amy Nikolovski, Vice President, Law Society of South Australia Mr Tony Rossi, President, Law Society of South Australia
30 March 2017	Mr John Walsh, Director, DW Fox Tucker Lawyers
13 April 2017	Mr Graham Harbord, Managing Director, Johnston Withers Lawyers
11 May 2017	Mr Robin Shaw, Manager, Self Insurers of South Australia Ms Belinda Loh, Executive Committee Member, Self Insurers of South Australia Mr Tony Gray, General Manager, Local Government Risk Services Ms Jeanette Hullick, Authorised Officer, Local Government Association Workers Compensation Scheme
18 May 2017	Dr Kevin Purse, Adjunct Research Fellow, Appleton Institute, Central Queensland University
1 June 2017	Mr Joe Szakacs, State Secretary, SA Unions
6 July 2017	Ms Estha van der Linden, Senior Policy Adviser, Business SA
3 August 2017	Mr Peter Wilson, Managing Director, Determined2
10 August 2017	Mr Bradley Cagney, Lawyer, SDA
28 September 2017	Mr Rob Cordiner, Chief Executive, ReturnToWorkSA Mr Michael Francis, General Manager of Insurance, ReturnToWorkSA Dr Julia Oakley, General Manager of Regulation, ReturnToWorkSA

APPENDIX B—RETURN TO WORK ACT, SECTION 203

203—Review of Act

- (1) The Minister must cause a review of this Act and its administration and operation to be conducted on the expiry of 3 years from its commencement.
- (2) The review must include an assessment of—
 - (a) the extent to which the scheme established by this Act and the dispute resolution processes under this Act and the *South Australian Employment Tribunal Act 2014* have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve disputes (especially when compared to the scheme and processes applying under the repealed Act); and
 - (b) without limiting paragraph (a), whether the jurisdiction of the South Australian Employment Tribunal under this Act should be transferred to the South Australian Civil and Administrative Tribunal; and
 - (c) the extent to which there has been an improvement in the determination or resolution of medical questions arising under this Act (especially when compared to the system applying under the repealed Act),and may include any other matter that the Minister considers to be relevant to a review of this Act.
- (3) The review must be completed within 6 months and the results of the review embodied in a written report.
- (4) The Minister must cause a copy of the report to be laid before both Houses of Parliament within 12 sitting days after receiving the report.

APPENDIX C—EXAMPLES OF RTW SERVICES AFTER INCOME SUPPORT CEASES

Rehabilitation services for workers post cessation of income support

Where needed and appropriate, the Return to Work Scheme will continue to fund services that are relevant to a worker's recovery and return to work, which includes (but it is not limited to); training, job placement, caring/home support, therapeutic appliances, transport and travel costs. Workers are also entitled to medical support for another 12 months post the cessation of their income support.

Below are some de-identified examples where the Scheme has continued to assist workers with personalised services after their income support cessation:

Example 1

Person with shoulder, cervical spine, and thoracic spine injuries sustained in January 2014; income support ceased on 28 June 2017. Return to Work services have continued past this date in the form of Job Placement Services (JPS) with a focus on the individual making a safe return to work with a new employer. In addition the person has also received Vocational Counselling services during July and August 2017 to assist with career transition, identification of transferrable skills, interests, identified training opportunities, and current labour market trends.

Example 2

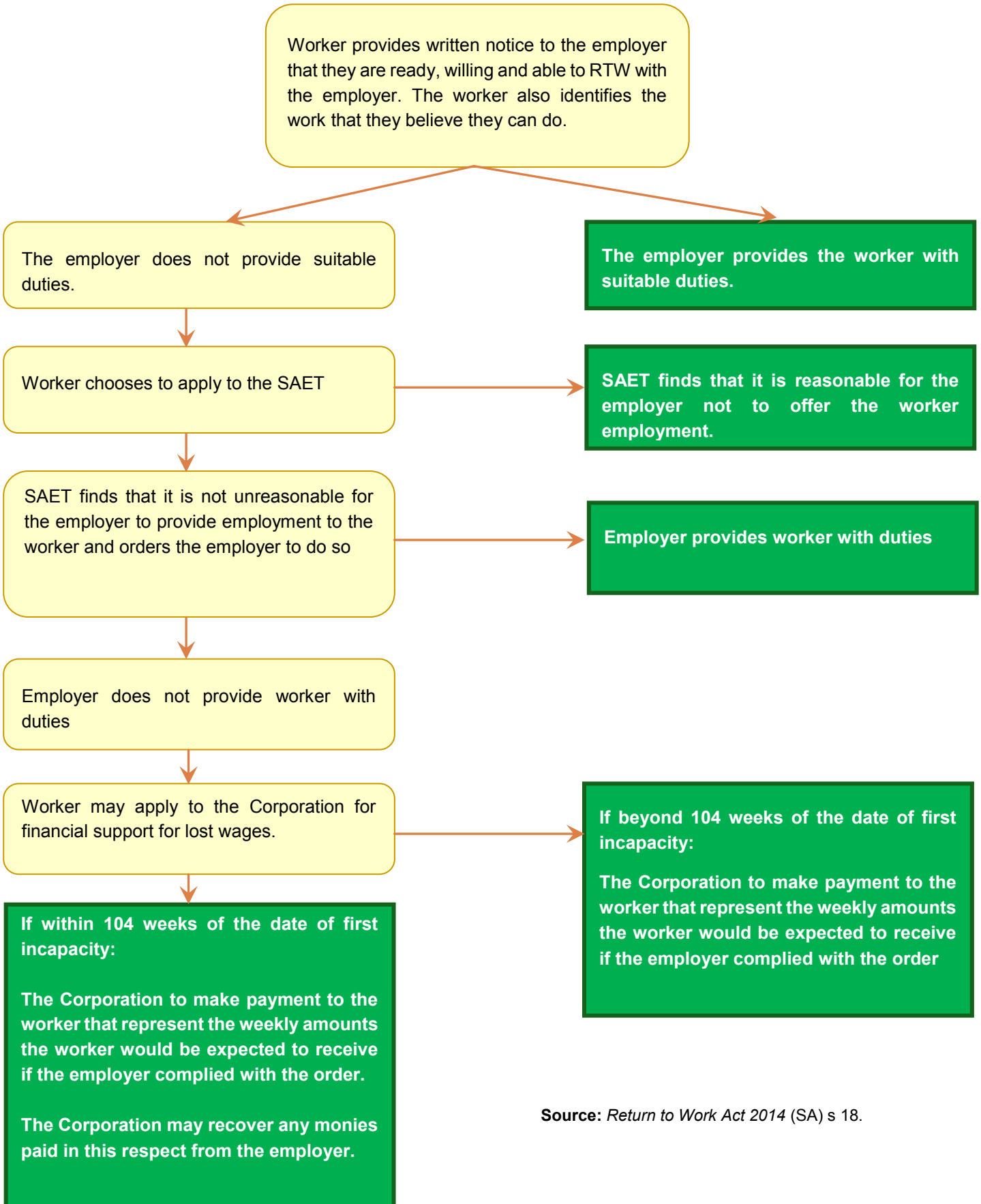
Person with bilateral knee injuries sustained in August 2015; with income support ceasing in August 2017. Return to Work services have continued past income support cessation in the form JPS. Specifically this has incorporated employment pathways services with a focus on new employment opportunities. Additionally, the person has been supported with retraining opportunities.

Example 3

Person with a lumbar spine injury sustained in March 2015; income support ceased on 28 June 2017. Return to Work services have continued past this date in the form of Pre-injury Employer Services with a focus on the person making a safe and sustainable return to their pre-injury employer. Following a restructure in the pre-injury employer's business around the time of income support cessation it appeared that this goal was no longer viable, as such, the person has also received Vocational Counselling between July and September 2017 aiming to prepare to transition into new employment.

Source: ReturnToWorkSA (Response to Questions on Notice, 12 October 2017) 2.

APPENDIX D—SECTION 18 PROCESS FOR WORKERS



Source: Return to Work Act 2014 (SA) s 18.

APPENDIX E—SUMMARY OF COMPLAINTS RECEIVED BY OMBUDSMAN SA

The following three tables are sourced from the Ombudsman SA’s 2016/17 annual report. The figures stated relate only to the complaints received within the Return to Work jurisdiction of the Ombudsman’s office.

Complaints received per respondent per month

	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Total
RTWSA	4	2	3	0	0	2	1	1	2	0	1	3	19
EML	5	6	10	4	7	4	3	1	8	1	5	2	56
Gallagher Bassett	11	4	7	11	7	5	12	6	12	4	4	9	92
Crown Self Insured	1	4	1	2	2	3	2	3	1	4	8	7	38
Other Self Insured	1	1	2	2	2	1	0	2	4	2	2	1	20
Total	22	17	23	19	18	15	18	13	27	11	20	22	225

Outcomes

	Total	Percentage
Advice Given	6	2.7
Alternate remedy available with another body	34	15.2
Breach of service standards	7	3.1
Breach of service standards not substantiated	2	0.9
Complainant cannot be contacted	6	2.7
Declined / Investigation unnecessary or unjustifiable	41	18.3
Out of jurisdiction	3	1.3
Referred back to compensating authority	66	29.5
Resolved with compensating authority’s cooperation	49	21.9
S180 review decision varied	1	0.4
Withdrawn by complainant	9	4.0
Total	224	100%

Issues

	Total	Percentage
Access to claims file	2	0.8
Service standards sch 5 s4(a)	24	9.3
Service standards sch 5 s4(b)	16	6.2
Service standards sch 5 s4(c)	10	3.9
Service standards sch 5 s4(d)	12	4.7
Service standards sch 5 s4(e)	95	36.9
Service standards sch 5 s4(f)	53	20.6
Service standards sch 5 s4(g)	11	4.3
Service standards sch 5 s4(h)	1	0.4
Service standards sch 5 s4(i)	3	1.2
Service standards sch 5 s4(j)	3	1.2
Service standards sch 5 s4(k)	3	1.2
Other	24	9.3
Total	257	100%

Source: Ombudsman SA, 'Annual Report 2016/2017' (Annual Report, 2017) 57.

APPENDIX F—SUPPORTS AND SERVICES AVAILABLE AFTER THE SCHEME

INCOME REPLACEMENT		
Support Regime	Benefits	How is it Accessed
Annual and Sick Leave	Generally 10 days sick leave and 4 weeks annual leave at normal rate of pay (applicable for permanent employees)	As per employment agreement
Income Protection	Approximately 75% of normal wage, subject to duration caps	Must be previously purchased, will need to go through any waiting periods, and will need to apply to private insurer.
Total and Permanent Disability	Lump sum payment if no longer able to work.	Will need to apply through private insurer.
Superannuation	A lump sum or periodic payments may be able to be drawn. Benefits stop when the individual's account runs out.	Funds not normally available until preservation ages (55 to 60 years old depending on date of birth), although these restrictions may be waived in the case of permanent disability.
Disability Support Pension	Maximum rate of \$444.15 per week (for a single person).	Permanently blind or have been assessed as having a physical, intellectual, or psychiatric impairment, and unable to work, or to be retrained for work, for 15+ hours per week at or above the relevant minimum wage within the next two years. Also, income and asset tested.
Newstart Allowance	Maximum rate of \$267.80 per week (for a single person)	Must be looking for paid work and be able to demonstrate this. Income and asset tested.

Source: Adapted from Finity Consulting, 'Stress and Mental Injuries – How to Compensate?' (Paper presented at the Injury Schemes Seminar: Balancing Outcomes, Gold Coast, 10-12 November 2013) 23 and Centrelink website.

MEDICAL AND OTHER SUPPORT

Support Regime	Benefits	How is it Accessed
Health Insurance	Depending on policy, a limited amount of medical costs may be covered	Must be previously purchased. The Committee has heard anecdotal evidence that some workers have had difficulties accessing private health insurance support for injuries relating to workers compensation.
Medicare	Free or subsidised some medical treatment and public hospital costs.	As per the Medicare benefit schedule.
Pharmaceutical Benefits Scheme	Available to Medicare cardholders, the PBS offers free and subsidised medicines.	As per the Schedule of Pharmaceutical Benefits.
Better Access	Allied mental health services (including psychological assessment and therapy) up to 10 sessions per calendar year.	Diagnosed mental disorder who is being managed by a GP or referred by psychiatrist or paediatrician.
National Disability Insurance Scheme	Lifetime care and support (for example mobility cane, and hearing aids)	Must have an impairment or condition that is likely to be permanent, that substantially reduced the ability to participate in activities as well as affects capacity for social and economic participation.
Lifetime Support Scheme	Medical treatment, allied health, respite and attendant care, aids and appliances including wheelchairs, mobility aids, and adjustable beds, prostheses, education / training, as well as home, vehicle and workplace modifications.	The Scheme is accessible for those with very serious, lifelong injuries sustained in a motor vehicle accident.

Source: Adapted from Finity Consulting, 'Stress and Mental Injuries – How to Compensate?' (Paper presented at the Injury Schemes Seminar: Balancing Outcomes, Gold Coast, 10-12 November 2013) 23 and Centrelink website.

APPENDIX G

—SUMMARY OF WORKER ENTITLEMENTS ACROSS AUSTRALIA AS AT 30 SEPTEMBER 2015

	New South Wales	Victoria	Queensland	Western Australia	South Australia	Tasmania	Northern Territory	Australian Capital Territory	C'wealth Comcare	C'wealth Seacare	C'wealth DVA	New Zealand
	What pre-injury weekly earning includes											
Overtime	Yes, for the first 52 weeks of weekly payments.	Yes, for first 52 weeks of weekly payments.	Yes (NWE).	Yes, for the first 13 weeks. No from week 14 onward.	Yes	No, with some exceptions (see note). ^a	Yes, if regular and established.	Yes, if regular and required	Yes	Yes, if regular and required	Yes	Yes
Bonuses	No	No	Yes	Yes, for the first 13 weeks. No from week 14 onward	Yes	No (s70(2)(ac))	No	No	No (some allowances are payable)	No (some allowances are payable)	No (some allowances are payable)	No
	Entitlements expressed as a percentage of pre-injury earnings for award wage earners^b											
0–13 weeks (total incapacity)	95% less any deductibles (subject to max cap). *	95% up to max.	85% of NWE ^c (or 100% under industrial agreement).	100%	100%	100% s69B(a)	100%	100%	100%	100%	100%	80%
14–26 weeks (total incapacity)	80% less any deductibles (subject to max cap).*	80% up to max.	85% of NWE ^c (or 100% under industrial agreement).	100%	100%	100% s69B(a)	100%	100%	100%	100%	100%	80%
27–52 weeks (total incapacity)	80% less any deductibles (subject to max cap).*	80% up to max.	75% NWE or 70% QOTE. ^c	100%	100%	90% (95% in some circumstances) s69B(b)	75–90%	65% or Stat Floor.	27–45 wks 100%. 46–52 wks 75%.	27–45 wks 100%. 46–52 wks 75%.	27–45 wks 100%. 46–52 wks 75%.	80%

	New South Wales	Victoria	Queensland	Western Australia	South Australia	Tasmania	Northern Territory	Australian Capital Territory	C'wealth Comcare	C'wealth Seacare	C'wealth DVA	New Zealand
53–104 weeks (total incapacity)	80% less any deductibles (subject to max cap and excludes overtime and shift allowance).*	80% up to max.	75% NWE or 70% QOTE. ^c	100%	80%	53–78 weeks 90% (or 95%), s69B(b) 79–104 weeks 80% (85% in some circumstances. s69B(c)	75–90%	65% or Stat Floor.	75% If an employee retires or is retired - 70% less any employer funded superannuation benefit (weekly equivalent if lump sum is involved) received.	75% If an employee retires or is retired - 70% less any employer funded superannuation benefit (weekly equivalent if lump sum is involved) received.	75%	80%
104+ weeks (total incapacity)	80% less any deductibles (subject to max cap, excludes overtime and shift allowance) Payments cease at five years unless permanent impairment of >20% (subject to meeting requirements of s38 of the Workers Compensation Act 1987). These provisions apply after week 130.	80% (up to max, subject to work capacity test after 130 weeks).	If >15% degree of permanent impairment, 75% NWE or 70% QOTE, otherwise single pension rate. ^d	100%	80% for seriously injured workers (WPI of 30% or more) s41(1) Nil for non-seriously injured workers s39(3)	80% (or 85%) The maximum payment period varies according to the assessed percentage of whole person impairment. s69B(c)	75–90% Compensation ceases after 260 weeks unless 15% or greater WPI	65% or Stat Floor.	75% If an employee retires or is retired, 70% less any employer funded superannuation benefit (weekly equivalent if lump sum is involved) received.	75% If an employee retires or is retired 70% less any employer funded superannuation benefit (weekly equivalent if lump sum is involved) received.	75%	80%

	New South Wales	Victoria	Queensland	Western Australia	South Australia	Tasmania	Northern Territory	Australian Capital Territory	C'wealth Comcare	C'wealth Seacare	C'wealth DVA	New Zealand
					Other entitlements							
Permanent impairment	<p>Date of injury on or from 5th August 2015 - maximum amount payable for permanent impairment is \$577 050 (plus additional 5% for back impairment).</p> <p>Date of injury prior to 5th August 2015 maximum amount payable for permanent impairment is \$220 000 (plus additional 5% for back impairment).</p>	\$578 760	\$314 920 permanent impairment plus \$356 745 gratuitous care.	\$217 970 + up to \$163 478 in special circumstances	<p>Lump sum of up to</p> <p>\$357 426 – economic loss s56</p> <p>Lump sum of up to</p> <p>\$482 014 – non economic loss s58(4)</p>	\$343 009.95	\$314 808	\$210 359	<p>\$179 975.26 (Economic).</p> <p>\$67 490.76 (non-economic loss).</p>	<p>\$179 975.26 (Economic).</p> <p>\$67 490.76 (non-economic loss).</p>	Up to \$441 469.48 (or up to \$330.12 pw) + \$84 985 for each dependent child if on 80 or more impairment points + \$2 506.70 financial and legal advice if on 50 or more impairment points	Up to \$133 802.28 lump sum payment.

	New South Wales	Victoria	Queensland	Western Australia	South Australia	Tasmania	Northern Territory	Australian Capital Territory	C'wealth Comcare	C'wealth Seacare	C'wealth DVA	New Zealand
Death entitlements (all jurisdictions pay funeral expenses to differing amounts)^e	\$750 000 + \$134.30 pw for each dependant child Funeral expenses: maximum \$15 000.	\$578 760 (shared) + pre-injury earnings-related pensions to a maximum of \$2130 pw for dependant partner/s and children.	\$589 875 + \$15 770 to dependant spouse + \$31 520 for each dependant family member under 16 or student + \$116.60 pw per child to spouse while children are under 6 yrs + \$145.70 pw per dependant child/family member while children/family members under 16 yrs	\$298 810 + \$57.10 pw for each dependant child + max of \$65 391 for medical expenses. ^f	\$482 014 + Up to: 50% worker's NWE for spouse 25% worker's NWE for orphaned child 12.5% worker's NWE for non-orphaned child Funeral benefit: up to \$10 172	\$343 009.95 + 100% weekly payment - 0–26 weeks, 90% weekly payment - 27–78 weeks, 80% weekly payment - 79–104 weeks + \$123.98 pw for each dependant child. s67A	\$550 914 + \$151.85pw for each dependant child to max of 10 children	\$210 359 (lump sum) cpi indexed + \$70.12 (cpi indexed) pw for each dependant child.	Comcare — \$517 564.84 lump sum + \$11 459.25 funeral + \$142.33 pw for each dependant child.	\$517 564.84 lump sum + \$6231.80 funeral + \$142.33 for each dependant child.	Up to \$744 404.54 (or \$440.45pw) + up to \$141 641.69 for 'service death' + \$2506.70 financial and legal advice + (\$84 985 + \$141.35pw) for each dependant child + up to \$84 985 for 'other dependant'	Up to \$133 802.28 lump sum + Survivors grant of \$6455.40 + Funeral grant of \$6 021.11. Child care payments of \$137.27 p/w for one child, \$82.35 p/w each for two children, or \$192.18 pw in total for three or more children.

Entitlements benefits in Western Australia, Victoria, Tasmania, Queensland, Northern Territory, Australian Capital Territory and New Zealand do not include superannuation contributions. Compensation in the form of superannuation contribution is payable in Victoria after 52 weeks of weekly payments

- No, unless overtime was a requirement of the worker's contract of employment, the overtime was worked in accordance with a regular and established pattern and in accordance with a roster, the pattern was substantially uniform as to the number of overtime hours worked and the worker would have continued to work overtime in accordance with the established pattern if the worker had not been incapacitated [s70\(2\)\(ab\)](#).
- Payment thresholds and specific benefit arrangements may also apply. The relevant jurisdiction should be contacted directly if further information is required.
- NWE — normal weekly earnings (except South Australia where NWE denotes notional weekly earnings), QOTE—seasonally adjusted amount of Queensland Full-time adult person's ordinary time earnings.
- Except for workers who receive a settlement or award of pecuniary loss damages or a statutory voluntary settlement or whose work or activities of daily living would be adversely affected or surgery is required.
- Lump sums maximum and Death entitlements are updated on annual basis and may since have been changed
- Lump sum shared under statutory formulae between spouse and children. Pension payable to partner for 3 years and to children until age of 16 (or 21 in full-time study).

* NSW Exemptions:

- police officers, paramedics and fire fighters;
- workers injured while working in or around a coal mine;
- bush fire fighter and emergency service volunteers (Rural Fire Service, Surf Life Savers, SES volunteers); and
- people with a dust disease claim under the Workers' Compensation (Dust Diseases) Act 1942.

Claims by these exempt workers continue to be managed and administered as though the June 2012 changes never occurred. 2) Workers who made a claim before 1 October 2012 are able to access medical benefit until retirement age where they have a WPI 21%-30% or for certain medical benefits or secondary surgery. 3) Workers with WPI >30% are entitled to lifetime medical.

Source: Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, (2016) 23-26.