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

28th Report

OF THE

PARLIAMENTARY COMMITTEE ON OCCUPATIONAL SAFETY, REHABILITATION AND COMPENSATION

Tabled in the House of Assembly and ordered to be published on 30 May 2017

Fifty Third Parliament Second Session

Presiding Member's Foreword

The workers' compensation scheme in South Australia has come under much scrutiny in recent years. The previous scheme, known as *WorkCover*, was often cited as one of the poorest performing in the country. It 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.

Having a well-functioning workers' compensation scheme is a complex, yet important part of modern society. It must be both socially and financially sustainable. The Scheme needs to provide timely assistance through the provision of income support, cover the costs of medical and allied health services to assist workers to recover and return to work, and provide enough support to those who are unable. However, the Scheme must balance these needs against remaining affordable for employers and government.

On 1 July 2015, the *Return to Work Act* (*RTW Act)* commenced. This was part of reforming the state's workers' compensation system. The Scheme, now known as the *Return to Work Scheme*, has a stronger focus on remaining at or returning to work and early intervention than its predecessor did. In addition, it has a greater focus on setting more affordable employer premiums to remain competitive with jurisdictions across the nation, as well as being a scheme that is fully funded.

Along with the change in legislation, the Scheme reform saw the rebranding of *WorkCover Corporation* to *ReturnToWorkSA*, the introduction of mobile case managers, and greater customer focused systems such as telephone reporting.

The Hon Tammy Franks MLC moved for an inquiry into the Return to Work Act and Scheme, with the Legislative Council referring the inquiry to the Committee. The Committee received 25 submissions from workers and unions; 10 submissions from employers and their associations / groups; 9 from medical and legal professional organisations, and 3 from other groups.

Many submissions stated these changes promoted return to work, and provided a system, which encourages independence. This is in comparison to the former WorkCover Scheme where there were reports of workers becoming too reliant on its pension style payments and not returning to work.

Many workers and their unions made submissions about the negative impacts of the Return to Work Scheme.

Changes to the compensability / eligibility tests potentially add complexity. For physical injuries, there has been limited change; however, for psychiatric injuries the hurdle to access support is more substantial. Workers must now prove employment is 'the significant contributing cause' of their injury. The full impact remains untested in the South Australian Employment Tribunal (the SAET), however it could mean workers who suffer from psychiatric injuries may have difficulty accessing the services they need from the Scheme.

The *RTW Act* also introduced the concept of the *seriously injured worker*. While each injured worker's circumstance and experience is different, many are seriously affected by their injury. The *RTW Act* defines a seriously injured worker as one who has been assessed as having a whole person impairment (WPI) of 30 per cent or more. The *RTW Act*'s definition does not take into account the impact an injury has on an individual worker's life, the realistic prospects of a permanently injured worker remaining in or returning to employment (by considering their education level, skillset and economic climate), nor does it consider a worker's current or future capacity for work.

Workers assessed as having a WPI of 30 per cent or more receive ongoing weekly income support (until retirement), ongoing reasonable medical costs and have no obligation to return to work. Many submissions stated this threshold is arbitrary, does not take into account individual circumstances, and is too difficult to attain, leaving some workers without the support they need.

The Committee received examples of workers unable to work but who have had, or will have, their income and medical support ceased, as they do not meet the 30 per cent threshold. Conversely, the Committee received examples of workers who have been assessed as having a WPI of 30 per cent or more, but have been able to return to part time or full time employment, even though they may access ongoing income and medical support.

The Scheme allows workers with a WPI of 30 per cent or more to access common law. This allows them to sue their employer in cases of employer negligence. While threat of common law action may encourage employers to provide safer workplaces, as well as give workers their 'day in court', the Law Society stated that the process is too adversarial and gives rise to fractured worker and employer relationships. Other submissions stated the re-introduction of common law in South Australia was a 'token' gesture as the ability to access common law is too limited.

All workers may receive weekly income support at 100 per cent of their pre-injury wage for the first 52 weeks, followed by 80 per cent for the following 52 weeks. Income support now ceases at 104 weeks for workers who do not meet the *RTW Act*'s definition of seriously injured. SISA said that of the workers who claim income support, historically 80 per cent were no longer in receipt of payments by 104 weeks. According to SISA, these workers would therefore be better off under the Return to Work Scheme as it provides a greater percentage of pre-injury earnings as income support for the first 52 weeks compared to the WorkCover Scheme.

Unless assessed with a WPI of 30 per cent or more, a worker's ability to claim medical expenses now ceases 12 months after lodgement of their claim; or 12 months after the cessation of income support – whichever is later. This is in stark contrast to the WorkCover Scheme, where medical support was be ongoing. While there is a need to promote independence, many submissions stated these timeframes were too short to allow maximum recovery from some severe or complex injuries, and could mean workers may be left without the support they need to recover and return to work.

Workers who were on the WorkCover Scheme on 1 July 2015, moved to the Return to Work Scheme in accordance with the transition provisions contained in the *RTW Act*. As a result of these provisions, some workers have been left without income or medical support. The Full Bench of the SAET found this provision caused a 'seemingly unfair outcome' for one worker. Submissions expressed concern as to how these provisions may also impact workers with permanent impairment assessments predating the Return to Work Scheme.

ReturnToWorkSA reported that disputation rates and employer premiums have reduced, and there has been a slight improvement of return to work rates.

As found during the Committee's 2012 *Inquiry into Vocational Rehabilitation and Return to Work Practices for Injured Workers in South Australia*, there continues to be no consistent definition of *return to work* in jurisdictions across the country. The *RTW Act* does not define *return to work.*

The Committee has identified that the Scheme is evolving with the full effects of the reform yet to be realised. As such, it has produced this interim report. This report allows for groups or individuals to consider the evidence, submissions and research **presented up to and including 2 March 2017**, as a basis for further discussion.

The Committee would like to thank all of those who have contributed to the inquiry by making submissions, assisting in its understanding of this important, yet evolving area.

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

Date: 19th May 2017

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1. PARLIAMENTARY COMMITTEE ON OCCUPATIONAL SAFETY, REHABILITATION AND COMPENSATION

1.1 Preamble

This is the 28th report of the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation (the Committee).

On 25 May 2016, the Hon Tammy Franks MLC moved for an inquiry into the Return to Work Act and Scheme. The original motion was to refer the matter to a Select Committee of the Legislative Council but following a resolution, the inquiry was referred to the Committee.

The *Return to Work Scheme* commenced on 1 July 2015, and is South Australia's new workers' compensation system. It introduced a raft of changes, including changes to support for workers, the reintroduction of common law, and a stronger focus on return to work delivered through greater face-to-face support. It replaced the WorkCover Scheme after many years of it producing below average return to work rates, expensive employer premiums and it was heavily underfunded.

Making an early safe return to work is important. Studies show the longer a worker is away from work, the less likely they will ever return. Being unemployed has been linked with poorer general physical and mental health in individuals. Further, being away from work has impacts on the community by affecting social welfare systems, loss of productivity, as well as affecting an individual's family and social networks. It is therefore important to have a workers' compensation system that balances the needs of workers, employers and other stakeholders, but promotes and supports the early recovery and return to work of injured workers.

As the Scheme has been operating for less than two years, it is still evolving. The South Australian Employment Tribunal and courts are still adding to case law, affecting future interpretation of the *Return to Work Act*. Also due to the relatively short length of time passed, the full impact of the new scheme is yet to be realised.

Given the importance of this topic, along with the evolving nature of the Scheme, the Committee resolved to produce an interim report. It provides a summary of the submissions, and research presented to the Committee **up to and including 2 March 2017**, and serves as an opportunity for further discussion.

1.2 Use of the term 'Seriously Injured'

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 and unfortunate 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 their life. 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 affects may not be captured by the *RTW Act*'s definition of a *seriously injured worker*.

The Committee would like to note that where the term *seriously injured* is used within this report, 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 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.*

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)

Ms Nat Cook MP (appointed on 10 February 2015)

Hon Justin Hanson MLC (appointed on 28 February 2017)

Hon John Darley MLC

Mr Stephan Knoll MP

Hon John Dawkins MLC

Hon Gerry Kandelaars MLC (17 October 2012 — 21 February 2017)

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

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

Hon Hanson MLC was appointed to the Committee on 28 February 2017, in place of Hon Gerry Kandelaars MLC who resigned.

2.2 Committee Staffing

The Committee is supported by the following staff:

Executive Officer : Ms Sue Sedivy (5 November 2012 —)

Research Officer : Mr Peter Knapp (12 December 2016 —)

2.3 Functions of the Committee

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

> *(a) 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*
>
> *(b) 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*

(c) 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,* 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,* 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. MOTION AND TERMS OF REFERENCE

Pursuant to section 16(1)(a) of the *Parliamentary Committees Act* 1991 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.

4. GLOSSARY

AEU	Australian Education Union (SA Branch)
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
GEPIC	Guide to the Evaluation of Psychiatric Impairment by Clinicians
Guidelines	The Impairment Assessment Guidelines
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

5. BACKGROUND

5.1 History of Workers' Compensation in South Australia

Managing a workers' compensation scheme is a complex process given the significant number of interacting parts working together - all with the aim of producing a scheme that is both financially and socially sustainable.[1] To be socially sustainable, key drivers include fairness to all stakeholders; a culture that supports returning to work as a good thing; and a balance between the needs of different stakeholders. A financially stable scheme requires stable premiums that are paid by employers, whereby these premiums fully fund the cost of providing insurance and is affordable.[2]

Commencing in 1987 the then South Australian workers' compensation scheme - known as the *WorkCover Scheme* - had become arguably one of the poorest performing schemes in Australia.

For some years, there had been concerns raised in relation to the performance of the WorkCover Scheme. Not only was it a highly underfunded scheme, it also produced poorer than expected return to work outcomes and higher than average employer premiums.

The Government, with the support of the then WorkCover Board, commissioned an independent review and report of the Scheme. The reviewers made comment on a number of proposals from the Board, while consulting with the Scheme's stakeholders. Tabled in Parliament in early 2008, the report supported a large proportion of the Board's proposals, as well as additional legislative, non-legislative and policy recommendations.[3]

In 2008, a number of amendments were made to the Scheme's governing legislation – the *Workers Rehabilitation and Compensation Act 1986* - with the aim of increasing return to work rates, reducing premiums and reducing the unfunded liability.[4] These amendments saw the introduction of reduced weekly income maintenance at 13 and 26 weeks, the introduction of both the Medical Panel, and Work Capacity Review at 130 weeks, as well as obligations for employers to train rehabilitation and return to work coordinators.

A further review was undertaken in 2011 when it was found minimal improvement on return to work rates. It also found that there was no discernible impact on premiums, and while there was some short-term improvement on financial viability, long term effects remained unknown.[5]

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1 Geoff Atkins and Gae Robinson, 'A Best Practice Workers Compensation Scheme' (Proposal Report, Finity, 21 May 2015) 3.

2 Ibid 10.

3 Wayne Potter, Ian Rhodes and Emma Siami, 'Implementing Legislative Reform: The South Australian Story' (Paper presented at the Institute of Actuaries of Australia 12th Accident Compensation Seminar, Melbourne, 22-24 November 2009), 6.

4 South Australia, *Parliamentary Debates,* House of Assembly, 28 February 2008, 2312-2314 (Michael Wright, Minister for Industrial Relations).

5 Bill Cossey and Chris Latham, *Review of the Impact of the Workers Rehabilitation and Compensation (Scheme Review) Amendment Act* 2008, 9-10.

In 2011, PricewaterhouseCoopers found a continued 'compensation culture' (instead of one focussed on returning to work), and significant deficiency in the performance of vocational rehabilitation services.[6] This in turn led to reform of the use of rehabilitation services.

In 2011, amendments were made to the levy collection system[7], moving away from a uniform levy across industries, to one that factored in an employer's claims costs – an employer with more claims or more expensive claims, would pay a greater premium than employers with lower claims costs. This move was designed to encourage employers to proactively work at preventing injuries, and in the event that an injury did occur, to actively assist workers to return to work (therefore minimising costs to the Scheme).[8]

In 2012, the Committee completed an *Inquiry into Vocational Rehabilitation and Return to Work Practices for Injured Workers in South Australia*. Its findings included that claims agents were putting too much weight on medical information to cease income support without considering a worker's realistic prospects of obtaining employment.[9] It also found there was no reliable vocational rehabilitation performance framework, with case management activities being carried out by rehabilitation providers.[10] The Committee expressed concern that there was no agreed upon measure of *return to work*, citing that the lack of consistency in the definition made it hard measuring and comparing performance of the Scheme.[11]

On 2 April 2014, the Premier announced a 'complete rewrite of WorkCover laws'[12] with a new Bill to replace the *Workers Rehabilitation and Compensation Act*.

> We have acknowledged that the scheme in its current form does not sufficiently support injured workers to return to work, leading to increased unfunded liability and higher premiums for business.[13]

When introducing the *Return to Work Bill 2014* to Parliament, the Minister for Industrial Relations, the Hon John Rau MP stated:

> [T]he current Workers Rehabilitation and Compensation scheme does not best serve workers, employers or the state. Workers experience worse return-to-work outcomes than in other jurisdictions and, for many, the services provided to them do not support early and effective recovery and return to work.[14]

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6 PricewaterhouseCoopers, *Vocational Rehabilitation Framework – Model Options Final Report* (March 2011) 3.

7 The Return To Work Scheme uses the term *premium* instead of *levy*.

8 WorkCover Corporation, 'Annual Report 2011-2012' (Annual Report, 2012) 15.

9 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) 33-35.

10 Ibid 43-52.

11 Ibid 9.

12 Jay Weatherill, 'WorkCover Overhaul Given Top Priority' (News Release, 2 April 2014).

13 Ibid.

14 South Australia, *Parliamentary Debates,* House of Assembly, 6 August 2014, 1436 (John Rau, Minister for Industrial Relations).

The *Return to Work Bill 2014* was introduced to Parliament on 6 August 2014 and received Royal Assent on 6 November 2014. The *Return to Work Act 2014* (SA) came into full operation on 1 July 2015.

5.1.1 Drivers for Change

Numerous indicators are available to provide information on a workers' compensation scheme's overall health. Three of the most commonly used indicators cited for being the driving force behind changes to the WorkCover Scheme are:

1. **Durable Return to Work Rate**: This is a measure of how many claimants successfully return to work within a certain period. A higher return to work rate is indicative of a scheme that successfully supports those injured to recover and return to work. Socially, this is beneficial as it means there is less potential reliance from injured workers on social benefits such as social security, disability pension or unemployment. Further, being away from work generally has a negative impact on a person, returning to work will in most cases leave returned workers healthier than those who do not return to work.[15] In South Australia, the WorkCover Scheme consistently had lower return to work outcomes than other jurisdictions as seen in Figure 1.

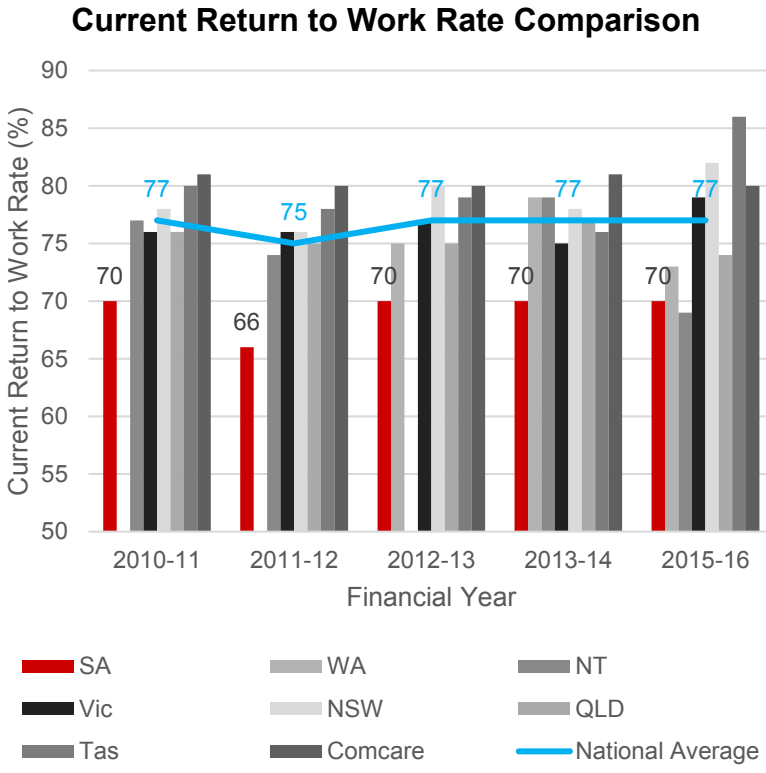

Figure 1: Current return to work rate across Australia

Source: Safe Work Australia, *Return to Work Survey: 2016 Summary Research Report (Australia and New Zealand)*, (2016) 20

[15] There is no set definition for Return to Work Rate for the Scheme or a uniform definition across Australia. For example, some jurisdictions define this as a worker not being in receipt of income maintenance, regardless of whether they returned to work (for example, non-compliance)See section 6.2 for further information.

2. **Average Premium**: The average premium rate is the average of what employers must pay to the regulating body to fund the scheme (this is discussed further in section 7.5). Lower premium rates are indicative of a lower costing scheme. As premiums are an additional cost to employers, when premiums are too high, it makes conducting business in the state less attractive. Businesses operating in a jurisdiction with a high premium will most likely reduce staffing or pay lower salaries to ensure operations remain affordable. Figure 10 (page 100) shows that South Australia consistently had one of the highest premiums in Australia, and in more recent years, the set premium was not enough to cover the costs of the scheme.

3. **Funding Ratio**: This is the ratio of assets to outstanding claims. Where this figure is greater than 100%, it indicates that the scheme has more assets than the estimated cost it would be to pay out liabilities on all claims. Where it is less than 100%, it would indicate that the scheme does not have enough assets to pay out all of its outstanding liability. This ratio is used to indicate the financial viability of the scheme.[16]

   In the period prior to the 2014-15 financial year, the Scheme was underfunded for some years, with a ratio generally in the low 60s. In the lead up to the commencement of the new Scheme, reforms in claims management and service delivery had already commenced. It was announced that as of December 2014 the Scheme was fully funded at 100.7%.[17]

   Figure 2 shows the Scheme's funding ratio in comparison with jurisdictions over a seven year period.

[16] Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* (2016) 218.

[17] John Rau, 'Unfunded Liability – Wiped Out' (News Release, 13 March 2015).

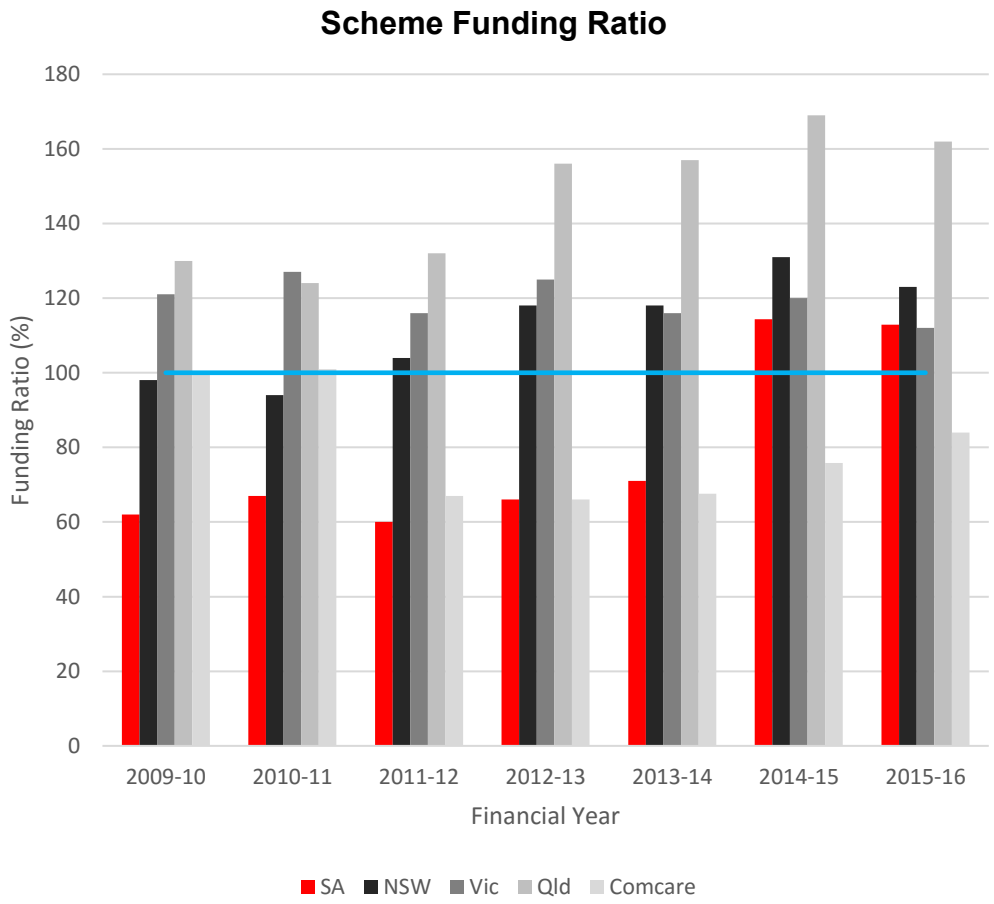

Figure 2: Comparison of funding ratio for other non-privately underwritten jurisdictions across Australia

Source: Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* (2016) 218

5.2 Return to Work Act and Scheme Background

5.2.1 Legislation

The new Return to Work Scheme is governed by the following pieces of legislation:

- ***Return to Work Act 2014*** **(SA)**: Referred to in this report as 'the *RTW Act*', it sets out the requirement for the workers' compensation scheme in South Australia, as well as outlines worker / employer support and obligations, service standards, along with framework for dispute resolutions, compensability of injuries and premium collection. The *RTW Act* also outlines the support for workers who were on the Scheme prior to the commencement of this Act under the transitional provisions in schedule 9.
- ***Return to Work Regulations 2015*** **(SA)**: Referred to in this report as 'the RTW Regulations', it provides more detail on specific parts of the *RTW Act* (where the Act allows). The regulations are made and amended by the Governor, with authority delegated by Parliament for this purpose.[18]
- ***Return to Work Corporation of South Australia Act 1994*** **(SA)**: This Act establishes the Return to Work Corporation of South Australia, which trades as ReturnToWorkSA. It is the governing body that provides work injury insurance and regulates the Scheme.
- ***South Australian Employment Tribunal 2014*** **(SA)**: This Act establishes the South Australian Employment Tribunal (the SAET) which hears matters in relation to disputes, the provision of suitable employment, as well as applications for expedited decisions.

[18] *Return to Work Act 2014* (SA) s 202.

5.2.2 Stakeholders

As shown in Figure 3, the Scheme's stakeholders are broad. They can be grouped into three categories – primary, secondary and tertiary – depending on the level of influence and interaction they have with the Scheme.

Return to Work Scheme Stakeholders

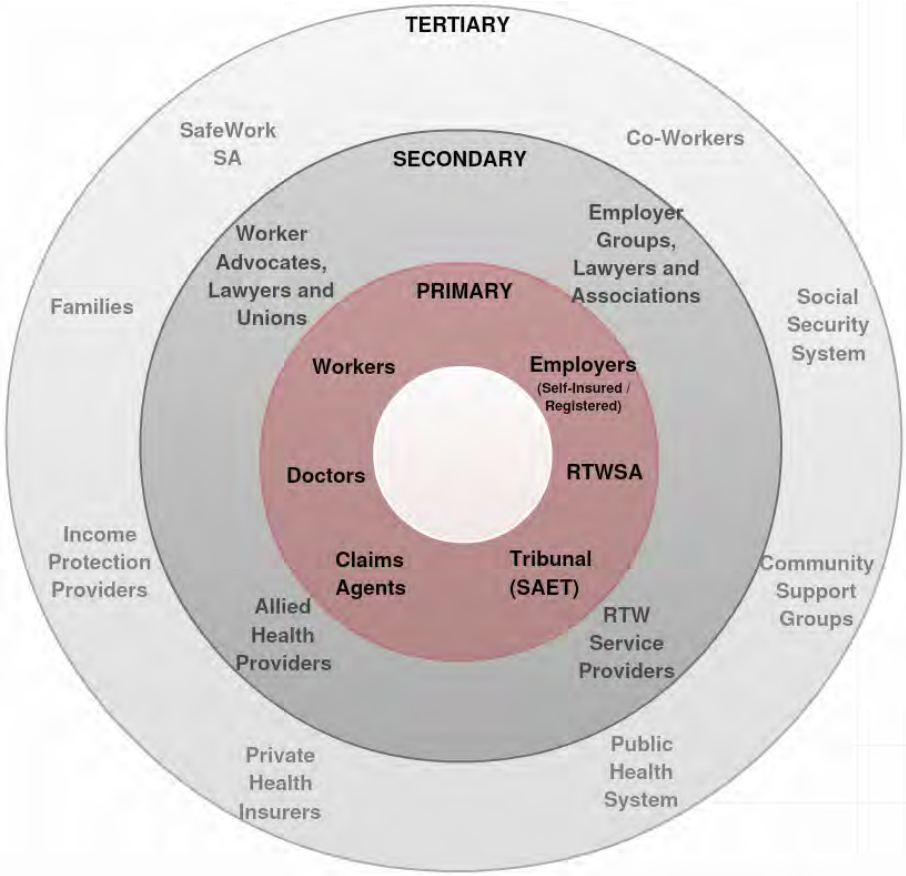

Figure 3:Stakeholders involved in the Return to Work Scheme

Primary Stakeholders

Primary stakeholders have the greatest interaction and influence with the Scheme.

ReturnToWorkSA

ReturnToWorkSA (RTWSA) is the regulatory body that is responsible for the Return to Work Scheme in South Australia and is established by the *Return to Work Corporation of South Australia Act 1994* (SA). RTWSA has two main functions:

1. **Provide Insurance**: RTWSA provides work injury insurance to more than 50,000 businesses, and nearly 500,000 employees across the state. It directly provides all insurance underwriting functions for non-self insured employers, and manages premiums (sets price and collections).

2. **Regulation**: It manages employer (both registered and self-insured) compliance, registration, sets fees and conditions for medical, allied health and other service providers, provides education to service providers, investigates offences such as dishonesty and fraud and ensures permanent impairment assessments comply with the Impairment Assessment Guidelines.[19]

Claims Agents

RTWSA outsources management of its registered employer claims to two privately run claims agents – EML and Gallagher Bassett Services (GB). EML and GB act in a similar way to an insurance company in managing claims, however the money which they control for making payments on claims is that of RTWSA and not their own[20].

Self-insured employers

Self-insured employers are those employers who not only manage their own claims (or contract management out to a third party), but also accept the financial responsibility to pay for all costs associated with their claims. In South Australia, there are 76 self-insured private employers.

On the whole, the self-insured scheme generally achieves better return to work outcomes – potentially because of better internal management, a more thorough understanding of the individual workplace (as those managing claims generally work closely with the employer), and a greater scope for workers to return to work on alternate duties when compared to smaller registered employers.

Registered Employers

Registered employers are those employers who are not self-insured, and instead are insured directly by the RTWSA Scheme. Their claims are managed by a claims manager at either EML or GB.

In the 2016 financial year, there were approximately 52 300 registered employers. Of this, around 43 300 were small employers, 8 200 medium and 800 large.[21]

South Australian Employment Tribunal (the SAET)

The South Australian Employment Tribunal handles disputes arising from the *RTW Act* – see section 7.3 on disputation.

Doctors

Only doctors can certify a worker's capacity by way of RTWSA's *Work Capacity Certificate* (previously called a *WorkCover Medical Certificate*). Without a current Work Capacity Certificate certifying an incapacity a worker is not able to access income support payments. Doctors can encourage workers to return to work by certifying them with capacity to do so.

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[19] ReturnToWorkSA, '2015-16 Annual Report' (Annual Report, 2016) 15.

[20] The majority of funds come out of RTWSA's compensation fund account.

[21] ReturnToWorkSA, 'ReturnToWorkSA – Scheme Statistics FY2016' (Tableau Report, 14 December 2016).

Secondary

Secondary stakeholders are involved in longer or more complex claims where additional support is required.

Allied Health Providers

These practitioners include physiotherapists, occupational therapists, psychologists, podiatrists, and exercise physiologists and provide specialised treatment.

Return to Work Service Providers

Return to Work Service providers support workers with their return to work through targeted services. See section 7.1.5 for further detail.

Employer Groups, Lawyers and Associations

This group of stakeholders take interest in issues impacting employers' interests. Self Insurers of South Australia (SISA) and Business SA are two of South Australia's largest employer advocacy and support bodies in the area of workers' compensation. They provide advice, lobby on behalf of and represent employers in workers' compensation matters.

Worker Advocates, Lawyers and Unions

Workers may seek support from an advocate, lawyer or their union during all or certain parts of a claim. This support may be in the form of advice on their claim or representation during a dispute.

Tertiary

Tertiary stakeholders have the least influence on the Scheme. They are generally impacted by the most complex or long-term claims.

For example, Workers who do not fully recover, or do not achieve a full return to work within the period of support coverage offered by the Scheme may then need to rely on the social security or public health systems, or utilise any private insurance they may hold for further support. In addition, Workers may require additional support from family (such as financial or emotional support), putting extra strain on these family members.

SafeWork SA is responsible for providing work health and safety, public safety and state-based industrial relations services. Depending on the severity of an injury, SafeWork SA investigates workplace incidents to prevent further similar injuries arising, and to determine if there have been breaches of the *Work Health and Safety Act 2012* (SA).[22]

[22] SafeWork SA, *About Us*, < https://www.safework.sa.gov.au/functionpages/about_us.jsp>.

5.2.3 Shift to Service Culture

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.'[23]

This move is evident in the *RTW Act*, with a 'Statement of Service Standards' now being included in Schedule 5. RTWSA has adapted this legislative requirement to create 10 service commitments which outline what people can expect when they deal with RTWSA, agents, self-insured employers and providers. RTWSA and these bodies are expected to comply with the following commitments:

1. View a worker's recovery and return to work as the primary goal if a worker is injured while at work.
2. Ensure that early and timely intervention occurs to improve recovery and return to work outcomes including retraining (if required).
3. With the active assistance and participation of the worker and the employer, consistent with their obligations under the Return to Work Act 2014, ensure that recovery and return to work processes focus on maintaining the relationship between the worker and the employer.
4. Ensure that a worker's employer is made aware of, and fulfils the employer's recovery and return to work obligations because early and effective workplace based coordination of a timely and safe return to work benefits an injured worker's recovery.
5. Treat a worker and an employer fairly and with integrity, respect and courtesy, and comply with stated timeframes.
6. Be clear about how we can assist a worker and an employer to resolve any issues by providing accurate and complete information that is consistent and easy to understand (including options about any claim, entitlements, obligations and responsibilities).
7. 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.
8. Take all reasonable steps to provide services and information in a worker's or employer's preferred language and format, including through the use of interpreters if required, and to demonstrate respect and sensitivity to a person's cultural beliefs and values.
9. Respect and maintain confidentiality and privacy in accordance with any legislative requirements.
10. Provide avenues for feedback or for making complaints and be clear about what can be expected as a response. [24]

RTWSA stated:

> These standards encourage positive relationships between us, our claims agents, workers and employers. They acknowledge that we all need to work together to achieve the best outcomes, especially by adopting early intervention and return to work support.[25]

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[23] ReturnToWorkSA, above n 19, 11.

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

[25] Ibid.

5.3 Importance of Return to Work

There is ample evidence available 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 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.[26]

The consensus statement also highlighted the importance of supporting an early safe return to work as

> work absence tends to perpetuate itself: that is, the longer someone is off work, the less likely they become ever to return.
>
> If the person is off work for:
>
> - 20 days the chance of ever getting back to work is 70%;
> - 45 days the chance of ever getting back to work is 50%; and
> - 70 days the chance of ever getting back to work is 35%.[27]

The consensus statement identified research that found that unemployment was associated with:

- Increased rates of overall mortality and, specifically, increased mortality from cardiovascular disease and suicide;
- Poorer general health;
- Poorer physical health including increased rates of cardiovascular disease and lung cancer;
- Poorer mental health and psychological well-being;
- Somatic complaints;
- Long-standing illness;
- Disability; and
- Higher rates of medical consultations, medication consumption and hospital admission.[28]

Work injuries have a broader impact than on the injured worker. It also imposes both direct costs (such as workers' compensation premiums, and income support payments) and indirect

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

[27] David Johnson and Tim Fry, 'Factors Affecting Return to Work After Injury' (Working Paper No 28/02, Melbourne Institute of Applied Economic and Social Research, December 2002).

[28] The Royal Australasian College of Physicians, above n 26, 12-13.

costs (such as loss of productivity and cost of providing social welfare) on employers and the community.[29]

Also, the consensus statement identified that after a period of unemployment or work absence, re-employment of unemployed adults generally found the improvement of general health and well-being, as well as reduced psychological distress and led to lower morbidity rates.

It is clear that not only are there negative impacts on injured workers, and their families as a result of prolonged work absence, but that there is an improvement to their physical and mental well-being when employment is re-established. As such, it is important to encourage and support injured workers to remain or return to work at the earliest and safest possible time.

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

5.4 Cause for this Inquiry

Section 203 of the *RTW Act* states that the Minister for Industrial Relations must cause a review of the 'Act and its administration and operation' on the 'expiry of 3 years from its commencement.'[30]

The resolution for the Committee to inquire into and report on the *Return to Work Act* and Scheme has occurred nearly 2 years prior to this legislated Ministerial review date.

The Hon Tammy Franks MLC originally moved that this inquiry occur by way of Select Committee on 25 May 2016. When providing reason for her motion, she stated that the *RTW Act* made it now 'effectively the case for many injured workers in this state that it is indeed harder to return to work without the support that they need.'[31] She, along with the Hon John Darley MLC who co-sponsored the motion, provided examples of injured workers who had been adversely affected by the new Scheme.[32]

Injured workers who made submissions, along with a number of unions echoed some of the concerns that the two Honourable Members raised and helped highlight the importance of a fair workers compensation scheme.

Injured workers submitted:

> I am very worried what will happen to me and many others that have no way of earning or getting employment in the future after weekly payments finish…[33]
>
> Having an injury changes your whole life. If you recover that is good, but what If things go wrong or get worse, then your life is not the same and never will be. This is what has happened for me. During this time I have not been able to return to work, and this has been a hard thing for me as I have always been a worker and enjoyed work. I now feel useless and worthless. As stated above, this has also impacted on my relationships and affected my home life.[34]
>
> In my opinion the intention of the introduction of Return to Work legislation was to reduce costs to the SA Government, unfortunately at the expense of the injured worker.[35]
>
> It seems the new return to work rules main aim is to reduce liability at any cost when I and many others are least equipped to cope. I feel devalued as do my doctors and specialist as we are not believed. It is the injured workers that are going to pay the price for the reduction in employers work cover costs and the governments inability to balance their books.[36]

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

31 South Australia, *Parliamentary Debates,* Legislative Council, 25 May 2016, 4049-4054 (Tammy Franks).

32 South Australia, *Parliamentary Debates,* Legislative Council, 25 May 2016, 4054-4055 (John Darley).

33 Carol P (Injured Worker, Surname Withheld), Submission No 4, *Inquiry into the RTW Act and Scheme,* 8 September 2016, 2.

34 Terri T (Injured Worker, Surname Withheld), Submission No 5, *Inquiry into the RTW Act and Scheme,* 12 September 2016, 1.

35 Brian M (Injured Worker, Surname Withheld), Submission No 7, *Inquiry into the RTW Act and Scheme,* 14 September 2016, 2.

36 Mary-Ann L (Injured Worker, Surname Withheld), Submission No 9, *Inquiry into the RTW Act and Scheme,* 26 September 2016, 3.

Worker unions made similar statements regarding the Scheme in which they stated:

> It is our strongly held view that the Return to Work Act 2014 is without a doubt the nastiest workers compensation act that the author has observed in the past 50 years…[37]
>
> … the governments concern about the financial bottom line of the scheme, and pre-determination to reduce employer levies, resulted in reduction to other entitlements that went too far and cuts that went too deep.[38]

5.4.1 Timing of the Inquiry

Whilst in response to the call for submissions, workers and their advocates generally provided opinions around the harshness of the Return to Work Scheme, many employer groups and other bodies stated that this inquiry is being conducted too early.

> [SISA] submit that it is far too soon for any review of the RTW Act. With only 1 year of its operation so far and very little case law, there is no way to know what the ultimate effects will be on any stakeholders. It is inadvisable to consider changes when it is not known what, if any, changes are needed.
>
> It is generally acknowledged at the actuarial level that it takes a new scheme between 5 and 10 years to mature *if it remains unchanged.*

Along with concerns relating to the inquiry, were concerns about changes being made to the new Scheme. The Motor Trader's Association submitted that:

> Premature alteration of the scheme risks misinterpreting transitional misalignments with systemic failures, and could result in unwinding of the improvements of the scheme unintentionally.[39]

The Committee notes the ill timing of the inquiry bit hopes that it may assist the mandated inquiry which will occurring in 2018. The Committee is required to inquiry into the *Return to Work Act* and Scheme in line with section 15F of the *Parliamentary Committees Act 1991* (SA).

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[37] Construction, Forestry, Mining, and Energy Union, Submission No 22, *Inquiry into the RTW Act and Scheme*, 30 September 2016, 1.

[38] SA Unions, Submission No 36, *Inquiry into the RTW Act and Scheme*, 30 October 2016, 2.

[39] Motor Trade Association of South Australia, Submission No 33, *Inquiry into the RTW Act and Scheme,* 31 October 2016, 5.

6. ADDRESSING THE TERMS OF REFERENCE

6.1 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;

6.1.2 Summary

The *RTW Act* has introduced changes to the wording of the compensability sections as a means to ensure that only those with legitimate employment related injuries are compensated. This allows better focus and support for these workers, while also controlling Scheme costs.

The criteria to be met for psychiatric injury claims is higher than for physical injury claims. The legislation requires that for psychiatric injury claims, employment be 'the significant contributing cause' and for physical injury claims employment be 'a significant contributing cause.'

While submissions varied on how this legislative change would impact on physical injuries, recent decisions in the South Australian Employment Tribunal (the SAET) held for physical injuries, compensability would still be judged on a case by case basis with there being fundamentally minimal change.

However, while the SAET has not decided any claims relating to the compensability for psychiatric injury, submissions overwhelmingly supported the opinion that the entry test for pure mental harm claims has increased, with some stating the test is now too harsh.

6.1.2 Background and Legislative Reference

In any workers' compensation scheme, a set of criteria must be met in order for an injured worker's claim for compensation to be *compensable* – that is, for the worker to be able to access support from the Scheme. In South Australia, section 7 of the *RTW Act* sets out these requirements. Broadly, the criteria that must be met are:

- The person must meet the definition of a 'worker' as defined in the *RTW Act*;[40]
- The worker must have suffered from an injury;[41]
- The injury must have arisen from employment.[42]

[40] *Return to Work Act 2014* (SA) s 4.

[41] Ibid s 7(1).

[42] Ibid.

As an injury must arise from employment for a claim to be compensable, section 7(2) defines that this has occurred if:

> *(a) in the case of an injury other than a psychiatric injury – the injury arises out of or in the course of employment and the employment was **a significant** contributing cause of the injury; and*
>
> *(b) in the case of a psychiatric injury —*
>
> *(i) the psychiatric injury arises out of or in the course of employment and the employment was **the significant** contributing cause of the injury; and*
>
> *(ii) the injury did not arise wholly or predominantly from any action of decision designated under subsection (4)*[43]

The most prominent legislative change in relation to compensability has been the current requirement that employment must now either be 'a' or 'the' significant contributing cause of the injury, depending on whether the injury is psychiatric or not. The repealed Act remained silent on the significance of contribution for physical injuries, however required employment to be 'a substantial cause' for psychiatric injuries (whereas the *RTW Act* requires employment to be 'the significant' cause).

6.1.3 Reasons for Change

The reason for the change of wording for the compensability test can be summarised during the Committee Stage of the *Return to Work Bill*, where the Minister for Industrial Relations, the Hon John Rau MP explained:

> **The Hon. J.R. Rau:** … At a conceptual level, there are a number of critical points in the scheme. The first critical point is the gateway provision, which is the provision that gives a person the right to participate in the scheme beyond that point. Compared with all the other schemes in Australia, the current gateway provision for the South Australian scheme is wide open…
>
> The reason for that is that the present rules basically say this: you can have a problem which is one to which your age, lifestyle, recreational activities or whatever has been the overwhelming contributor. Then you go to work, and at work something happens which in and of itself is not a significant thing, but it is the tipping-point event, no matter how trivial.
>
> **Mr Williams:** The straw.
>
> **The Hon. J.R. RAU:** The straw, indeed. It is very difficult for any doctor to say that that little incident is incapable of being that tipping point. The prevailing view around Australia is that the test should be that something that happens at work is a significant issue. It does not mean the only issue, it does not necessarily even mean the main issue, but it has to be significant. It cannot be insignificant, it cannot be almost happenstantial: it has to be something of significance. [44]

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[43] Emphasis added.

[44] South Australia, *Parliamentary Debates,* House of Assembly, 23 September 2014, 1913 (John Rau, Minister for Industrial Relations).

Such sentiments were echoed by some employer and worker advocacy groups, with Hardware Australia stating that

> The tightening of the criteria around the Return to Work Scheme provides additional encouragement, motivation, and incentive for injured workers to return to work as soon as possible. Our members are supportive of the tightening of the criteria… Our members past experiences have often seen claims where external elements and activities are significant contributing factors to the alleged injury but are not appropriately factored into causation.[45]

Specifically in relation to psychiatric injury, United Voice submitted that

> we understand the purpose of [the change where employment must be "the significant contributing cause"] was to remove from compensability those claims which are essentially caused by non-work factors with only a minor work contribution.[46]

6.1.4 Does this change entry requirements for physical injuries?

Submissions to the Committee presented 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. The impact of the changes to psychiatric injuries are covered in further detail in 5.1.5 of this report.

A number of submissions, especially those from worker advocacy groups, expressed the opinion that the *RTW Act* has made it harder for workers to access compensation because of physical injury. The Financial Sector Union of Australia (FSU) expressed their opinion that 'the new criteria that now applies makes it much more difficult for workers who have been injured to have their claims accepted' as a result of the 'a significant' and 'the significant' tests.[47]

The Australian Education Union (AEU) submission stated that:

> The introduction of the additional criteria that employment must be "a significant contributing cause" of an injury of employment restricts eligibility, adds complexity and leads to increased disputation."[48]

Conversely, a number of submissions held the view that while there has been a change in the wording of the *RTW Act*, it is too early to determine the impact this change will have on the scheme.[49]

To date, there have been two decisions handed down by the SAET, where 'significant' has been a consideration – *Ward v State of South Australia* [2016] SAET 28 and *Roberts v State of South Australia* [2016] SAET 58. In the *Ward* decision (see Appendix C), Gilchrist J stated that

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[45] Hardware Australia, Submission No 21*, Inquiry into the RTW Act and* Scheme, September 2016 2.

[46] United Voice SA, Submission No 24, *Inquiry into the RTW Act and Scheme,* September 2016.

[47] Finance Sector Union of Australia, Submission No 17, *Inquiry into the RTW Act and Scheme,* September 2016 6.

[48] Australian Education Union (SA Branch), Submission No 26, *Inquiry into the RTW Act and Scheme*, September 2016 2.

[49] Business SA, Submission no 25, *Inquiry into the RTW Act and Scheme,* September 2016 3.

> [t]he 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. [50]

In the *Roberts* decision, Calligeros DP stated that 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.'

While Gilchrist J found that an 'evaluative judgement'[51] was still required when determining 'significant' and compensability, the Australian Education Union submitted this case demonstrates 'an injury that would clearly have been compensable under the repealed Act becomes a complex and disputed case under the RTW Act.'[52]

The Self Insurers of South Australia (SISA) submitted that based on interstate case law, the inclusion of 'significant' may represent no major change when the SAET has had limited cases to determine. Business SA echoed this sentiment in their submission and stated:

> Based on the [judgement of Ward v State of SA], 'a significant' has a broad interpretation, however, as only one matter (at the time of writing) has sought to interpret 'a significant' it is Business SA's view that it is too early to determine the effect of this section.

Mr Toni Rossi, President of the Law Society of South Australia in evidence at a Committee hearing said:

> There have been two decisions of single judges of the tribunal on what that provision means. Our view is that the effect of those decisions is that there is no real difference. So, there has been a change in language but that won't have an adverse impact on injured workers.

Whilst there are opinions expressed in relation to a tightening of entry onto the Scheme, a review of the latest RTWSA Scheme statistics for non-exempt employers is outlined in Table 1.

It can be seen that there has been a decrease in the percentage of rejected claims coupled with an increase in the percentage of accepted claims since the commencement of the *RTW Act*. However, acceptance percentages are down from FY2014.

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

51 Ibid.

52 Australian Education Union (SA Branch), above n 48, 2.

Table 1: Determination Status for non-exempt RTWSA claims

	Financial Year		
Determination Status	**FY 2014**	**FY 2015**	**FY 2016**
Accepted	13,799 89.4%	12,249 86.0%	12,645 88.5%
Pending	5 0.0%	3 0.0%	30 0.2%
Rejected	799 5.2%	948 6.7%	693 4.8%
Withdrawn	840 5.4%	1,041 7.3%	924 6.5%
Grand Total	**15,443** **100.0%**	**14,241** **100.0%**	**14,292** **100.0%**

Source: Adapted from, ReturnToWorkSA, 'ReturnToWorkSA – Scheme Statistics FY2016' (Tableau Report, 14 December 2016)

In evidence to the Committee, CEO of RTWSA, Mr Rob Cordiner stated in relation to the Scheme's acceptance rates, that they are relatively high' given that it is a no-fault Scheme. Acceptance rates in South Australia are 'pretty much the same as every other workers comp jurisdiction in Australia at the moment. That doesn't mean that it's good or it's bad; it just means that it's fairly typical.'[53]

6.1.5 Psychiatric Injuries

Whilst there appears to be differing opinions as to whether 'a significant' will greatly impact compensability for physical injury claims, opinions appear more cohesive in relation to psychiatric injury in that the legislative change of the requirements for compensability may have more of an impact on those claims.

Both the RTW and repealed Acts outlined 'tougher' tests for those who claimed psychiatric injury when compared to physical injury. The repealed Act stated that employment must be '*a* substantial cause of the injury,'[54] while the *RTW Act* states that it must be '*the* significant contributing cause of the injury.'[55]

In evidence, Mr Tony Rossi stated:

> The test of compensability has changed. Previously, in terms of causation (physical or psychiatric) there was no real difference, other than showing that employment was a substantial cause. What we saw in practice was, under the WorkCover scheme, that establishing employment was a substantial cause was not a terribly burdensome test, and

[53] Evidence to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Parliament of South Australia, Adelaide, 16 February 207, 4 (Rob Cordiner).

[54] *Workers Compensation and Rehabilitation Act 1986* (SA) s 30A(a).

[55] *Return to Work Act 2014* (SA) s 7(2)(a)(i).

> that was because, even if there were other substantial contributing causes, provided employment was one of them, you could succeed and obtain compensation.
>
> What has changed is that, under the return-to-work scheme, the worker has to prove that employment is the significant contributing cause. It is the use of the word 'the' rather than 'a' which makes all the difference. What it means is that, if there is any other significant contributing cause, then the worker can't succeed.[56]

Psychiatrist Professor McFarlane stated in relation to psychiatric injuries that

> [t]he majority of this morbidity does not arise as a consequence of the circumstances of the workplace. However, frequently people with disorders such as depression struggle to function and will look for proximate explanations for their distress and may inappropriately attribute the causes to workplace stresses rather than acknowledges their inability to cope. Hence, it is important that there are objective measures of workplace adversity as contributing to an individual's disorder.[57]

The Police Association of South Australia (PASA) submitted that this change in wording means that the 'tightening of the eligibility criteria, particularly a psychological injury, is unjustly harsh.'[58]

Andersons Solicitors and the Australian Manufacturing Workers' Union (AMWU), jointly submitted that many workers naturally experience stressors during the course of their life, and may seek medical intervention. While this would not normally be an issue, they stated that should the worker then experience an injury resulting from employment and lodge a workers' compensation claim, the Compensating Authority would now have greater ability to deny the claim for compensation as it could be argued that employment was not 'the significant' cause given the prior history of psychiatric treatment.[59]

They provided the following '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 injury:

1. A woman who was sexually harassed at work and submitted a claim, but a year ago she sought counselling after miscarrying her unborn child. The Compensating Authority relied on the miscarriage to assert that employment was not 'the' significant contributing cause;

2. A recent immigrant to Australia from the Middle-East developed anxiety because of alleged racial discrimination in the workplace was denied workers compensation because of their previous experiences in their war-torn country. The Compensating Authority asserted that the traumatic experiences overseas must have contributed to his psychological injury;

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[56] Evidence to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Parliament of South Australia, Adelaide, 2 March 2017, 17 (Tony Rossi).

[57] Professor Alexander McFarlane, Submission No 10, *Inquiry into the RTW Act and Scheme, 26 September 2016,* 1.

[58] Police Association of South Australia, Submission No 27, *Inquiry into the RTW Act and Scheme*, 30 September 2016, 2.

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

3. A man was denied workers compensation for his psychological injury because at the time of submitting his claim, he was also going through divorce proceedings. The Compensating Authority asserted that the stressful divorce meant that employment was not 'the' significant contributing cause.[60]

Andersons Solicitors and the AMWU's opinion about the potential increase in rejected psychiatric injury claims due to personal circumstances was echoed by the Police Association:

> Rarely does there exist just one cause for a psychological condition; and an affected worker suffers in all aspects of his or her life.
>
> Trying to identify "the", as opposed to "a", substantial cause leaves many workers with rejected claims.[61]

The Rail, Bus and Tram Union also expressed concerns regarding the restriction in place by 'the significant', and suggested it be replaced with 'a significant' to make the test similar for non-psychiatric injuries.[62] The Law Society of South Australia held a similar view stating that the wording should be revisited as it may be too restrictive.[63]

Many of the concerns regarding the 'tightening' of eligibility for psychiatric injury claims appear to be isolated to the lodgement of claims relating to psychiatric injury which are a result of the primary event. Calligeros DP in the case of *Roberts*, opined that the 'test for compensability of a psychiatric injury found in s7(2)(b) of the *RTW Act* is confined to cases of pure mental harm and does not apply to consequential mental harm.'[64]

This would suggest a worker suffering from consequential mental harm (for example developing depression because of their change in circumstances after a physical injury), the compensability of the injury would need to meet the criteria of being 'a significant cause' rather than 'the significant cause' as it does not need to meet the requirements of section 7(2)(b).

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60 Ibid.

61 Police Association of South Australia, above n 58, 2.

62 Rail, Tram and Bus Industry Union, Submission No 23, *Inquiry into the RTW Act and Scheme,* 30 September 2016, 3

63 The Law Society of South Australia, Submission No 37, *Inquiry into the RTW Act and Scheme,* November 2016, 4.

64 *Roberts v State of South Australia* [2016] SAET 58 [95].

6.2 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;

6.2.1 Summary

See also section 1.2 – "Use of the term 'seriously injured'".

The Return to Work Scheme saw the introduction of the category of *seriously injured workers* - workers who suffer a permanent impairment of 30 per cent or above. They are able to access greater support from the Scheme (including ongoing medical expenses and income support as well as access to common law).

The *RTW Act* and Impairment Assessment Guidelines dictate how permanent impairment assessments are to occur, including if and how different injuries are combined or excluded.

Submissions raised significant concerns about some of these methods, including that the guidelines for psychiatric injury impairment assessments are too harsh, and that the rules around combining injuries could mean that significantly impaired workers will not meet the seriously injured worker threshold.

Some raised concern about having an arbitrary threshold as the criteria for ongoing support. It has resulted in some workers with WPI scores of 30 per cent or above to be classified as seriously injured even though they have the ability to work. Workers who do not meet the threshold will not receive ongoing assistance even if they are unable to work.

The criteria to be determined as a seriously injured worker does not take into account the realistic opportunities a worker may have to work.

Submissions suggested a number of alternative methods, including the use of a narrative test similar to that used in Victoria.

6.2.2 Background and Legislative Reference

The commencement of the *RTW Act 2014* saw the introduction of the s*eriously injured worker* classification (see also section 1.2 *Use of the term 'Seriously Injured')*. The Hon John Rau MP

in his second reading speech said that 'having a distinct boundary here is essential for the scheme to be able to support those workers who need it most.'[65]

Section 21(2) of the *RTW Act* defines a seriously injured worker as:

> *A worker whose work injury has resulted in permanent impairment and the degree of whole person impairment has been assessed under Division 5 for the purposes of this Act to be 30% or more.*

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

- Income support until retirement age;[66]
- Medical expenses relating to the compensable injury covered for life;[67]
- Access to common law in cases of employer negligence; and[68]
- No obligation to return to work or to comply / participate in a recovery / return to work plan.[69]

As at 16 February 2017, 301 workers had been determined as seriously injured.[70]

Interim Decision

In the event that it appears an injured worker will be classified as seriously injured but a formal assessment has yet to occur (such as the injury is yet to stabilise), section 21(3) allows an interim decision to be made. This decision allows the worker to be treated as a seriously injured until a formal determination occurs.

Clause 13 of the RTW Regulations state that this application must be made in writing to the Corporation, and that

> *(2) For the purposes of section 21(4) of the Act, an interim decision must be—*
>
> *(a) Based on evidence from a medical practitioner; and*
>
> *(b) Made following consultation with the worker.*[71]

However, in oral evidence to the Committee Mr Rossi stated that

> there is just no guideline. It says that you can apply, but there are no guidelines as to what ReturnToWorkSA or a self-insured employer should take into account in making that decision.[72]

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65 Parliament of South Australia, *Parliamentary Debates,* House of Assembly, 6 August 2014, 1439 (John Rau, Minister for Industrial Relations).

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

67 Ibid s 33(21)(a).

68 Ibid s 72.

69 Ibid ss 15(4), 25(11).

70 Rob Cordiner, above n 53, 7.

71 *Return to Work Regulations 2014* (SA) cl 13(2).

72 Tony Rossi, above n 56, 19.

6.2.3 Assessment Guidelines and Determination of Seriously Injured Workers

For a worker to be determined as seriously injured, a permanent impairment assessment must take place in accordance to division 5. While the division is of some length, of particular note division 5, section 22(2) states:

> *(2) An assessment under this section –*
>
> *(a) must be made in accordance with the Impairment Assessment Guidelines; and*
>
> *(b) must be made by a medical practitioner who holds a current accreditation under this section*[73]

Further, the assessment must not be made until there is evidence that the injury has stabilised[74], and the assessment must take into account a number of principles outlined in section 22(8) (in addition to following the Guidelines). Some of these principles include:

- Impairments from unrelated injuries or causes are to be disregarded in making an assessment;
- Impairments from the same injury or cause are to be assessed together or combined to determine the degree of impairment of the worker;
- Impairment resulting from physical injury is to be assessed separately from impairment resulting from psychiatric injury;
- No regard is to be had to impairment that results from consequential mental harm; and
- Any portion of an impairment that is due to a previous injury is to be deducted for the purposes of an assessment[75].

With the exception of some circumstances, the *RTW Act* is clear that only one permanent assessment is to occur, with section 22(10) stating:

> *(10) Subject to subsections (11) to (15) inclusive, only 1 assessment may be made in respect of the degree of permanent impairment of a worker from 1 or more injuries (including consequential injuries) arising from the same trauma (and any injury that may subsequently develop or manifest itself or develop after the assessment of impairment is made will not be assessed)*

Impairment Assessment Guidelines

The Impairment Assessment Guidelines (the Guidelines) are published by the Minister[76] and are used when there is a need to 'establish the degree of whole person impairment that results from a work injury.'[77] In line with section 22(2)(a), accredited assessors must use the

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[73] *Return to Work Act 2014* (SA) s 22.

[74] Ibid s 22(7).

[75] Ibid s 22(8).

[76] Ibid s 22(3).

[77] Government of South Australia, *Impairment Assessment Guidelines,* 2015, 2.

Guidelines when making a permanent impairment assessment. They are intended to provide an 'objective, fair and consistent method for assessing permanent impairment arising from a work injury.'

> The Guidelines are based mainly on the *American Medical Association Guides to the evaluation of permanent impairment, 5th edition* (AMA5). AMA5 is the most authoritative and widely used source for the purpose of evaluating permanent impairment. However, extensive work by eminent medical specialists, representing medical colleges, has gone into reviewing AMA5 to ensure alignment with Australian clinical practice. [78]

It should be noted however that 'the chapter on Psychiatric Disorders is based on the 'Guide to the Evaluation of Psychiatric Impairment by Clinicians' (GEPIC).[79]

Psychiatric Injuries and the Guide to the Evaluation of Psychiatric Impairment by Clinicians

As per the Guidelines, psychiatric injuries are assessed for WPI in accordance with the GEPIC.[80]

Originally developed by psychiatrists in 1997, the GEPIC emerged out of recognition of need for a better psychiatric impairment tool than the psychiatric chapter in the AMA Guides.[81]

The Police Association of South Australia (PASA) expressed concern that the method of assessment is too harsh, resulting in WPI scores that are too low when taking into account the impact the injury has had on the worker. They submitted that even though police officers are exposed to some horrific events, to their knowledge, no member has reached the 30 per cent WPI for a psychiatric injury.[82]

Mr Harbord, in evidence to the Committee in relation to the Inquiry into Work Related Mental Disorders and Suicide Prevention, said a worker needs to be very injured to have a 30 per cent or more WPI.

> The views that I've heard from psychiatrists is that a person will need to be very severely impaired. For instance, they will have to maybe have difficulty leaving the home; need support such as in activities of daily living such as perhaps in self-cleaning; be very anxious and depressed; and may be quite socially isolated. So the opinion of various psychiatrists that I've spoken to is that it would be at a very debilitating level before a person with a psychiatric injury reached that 30 per cent threshold.[83]

Mr Rossi stated he experienced a similar encounter with a psychiatrist when discussing the GEPIC. He reported he asked a psychiatrist

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78 Ibid 3.

79 Ibid 3.

80 Ibid 97.

81 Gregor Schutz, 'GEPIC Overview' (Slideshow Presentation, MLCOA, 2015) 10.

82 Police Association of South Australia, above n 58, 2.

83 Evidence to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Inquiry into Work Related Mental Disorders and Suicide Prevention, Parliament of South Australia, Adelaide, 25 February 2016, 97 (Graham Harbord)

> if a worker has the degree of cognitive functioning that he or she is able to work out, by using a street directory, how to get to your surgery from his or her home, can that person reach 30 per cent whole person impairment? The answer was no.[84]

This view was confirmed by Dr Clarke during the Inquiry into Work Related Mental Disorders and Suicide Prevention that the GEPIC is very complicated to explain but he advised that

> [f]or someone to reach 30 per cent of psychiatric incapacity they have to actually be very, very ill, and there will be a lot of people who really will not consider themselves able to work but would fall under the 30 per cent because over 30 per cent people have to have a major disability in many facets of their life that is sometimes very destructive to themselves or other people, sometimes transgressing the law.

Selection of a Whole Person Impairment Assessor

Chapter 17 of the Guidelines sets out how an assessor is to be selected for the purpose of an impairment assessment. As per the Guidelines, when selecting an assessor, consideration needs to be given to the following:

- The body system to which the injury relates - the assessor selected must be accredited for the relevant body section;
- Nature and complexity of the injury;
- Possible conflicts of interest;
- Availability of assessors; and
- Whether multiple assessors are required.[85]

Assessors completing WPI assessments must undergo an accreditation process as outlined by the Minister of Industrial Relations.[86]

Concern has been raised in relation to the freedom of choice that workers have when choosing assessors.

According to Mr Cordiner, WPI assessments continue to be completed; however, there may be a backlog of assessments to occur in the Scheme.

> The worker chooses who the assessor is and because… they tend to be choosing one assessor and that assessor is booked up. One of the difficulties with that is that there are other assessors who haven't got work. We don't have the authority to say, 'You have to go and see someone else.'

As part of the Inquiry into Work Related Mental Disorders and Suicide Prevention, Mr Harbord stated that his legal firm has recently

> been having a dispute with ReturnToWorkSA because they have been saying that a treating specialist is not permitted to do such [a permanent impairment assessment]. Our view is that there is nothing in the Act that says that, or indeed in the Guidelines. We say in fact that a treating specialist is in the best position to be able to properly assess whole person impairment because they know more than any others, in the case of a mental injury,

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84 Tony Rossi, above n 56.

85 Government of South Australia, above n 77, 113.

86 *Return to Work Act 2014* (SA) s 22(16)-(17).

> the history of a person, the causation, they have spent some time, and they have been able to assess and examine symptoms as they have developed over time.
>
> Obviously in relation to a physical injury the treating specialist might be someone who is actually a surgeon, has actually gone inside the knee, for instance, and seen what is there. So it appears that ReturnToWorkSA has a view that a treating specialist would be biased. We strongly dispute this and, in fact, in my experience particularly working for injured workers, many so-called independent medical experts ,I would say, are biased from time to time in acting for insurers, but that's just my personal prejudice.[87]

6.2.4 Concerns Regarding the Current Assessment Process

While the Local Government Association (LGA) sees no reason to depart from the 30 per cent threshold at this stage, they expressed concern in relation to the methodology determined by the *RTW Act* when conducting the assessments.

> In our view, the AMA Guides (as modified by the Impairment Assessment Guidelines) are an imperfect blueprint on which to assess impairment and in our experience do not factor any relativity between other impairment assessments and are largely impersonal to a particular worker's circumstances.[88]

United Voice in their submission stated that the use of the 30 per cent impairment threshold is a mechanism to determine whether a worker is likely to have a capacity for meaningful work. Further, they, along with SA Unions expressed concern that this threshold is arbitrary and that the measurement of impairment does not necessarily indicate the level of current or future capacity a worker may have. They believe this may result in unfairness as there may be those who are either totally or significantly incapacitated but are not classed as seriously injured as they do not have a WPI of 30 per cent or above. Conversely, they both expressed a potential unfairness whereby workers who are classified as over 30 per cent and have the ability to work will be able to access lifelong support.[89]

To illustrate this point, SISA submitted as an example under the Guidelines, somebody who has two successful knee replacements is likely to have significant capacity for work, however would be assessed as having a WPI of over 30%.[90]

Further, SISA advised about a number of injured workers currently working for self-insured employers who have been assessed as having impairments of over 30% but were able to return to work (at either their pre-injury or reduced hours). They stated that given the health benefits of returning to work, the availability of ongoing income support for workers who have the capacity to work, even if there is no obligation to do so, may be counter-intuitive in

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87 Graham Harbord, above n 83, 96-97.

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

89 United Voice above n 46; SA Unions, above n 38, 5.

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

motivating them to actually return to work.[91] These examples from SISA can be found in Appendix B.

A number of submissions received held that consideration must be broader than to rely purely on the Guidelines as they are currently written, with Mr Ian Hutchinson summarising

> …to suggest that WPI is an accurate measure of employability is to completely disregard the individual capacity of human beings to over-come adversity and conquer challenges. Fully employed, worthwhile and contributing members of society exist with far greater impairment levels than 30% WPI but to identify injured workers as having no responsibility to participate in work or rehabilitation is to deny societal and personal obligations and is misguided[92].

Whist many employer groups expressed that the current 30 per cent threshold should remain the same, or that it was too early to provide an opinion as to whether it should be changed, many worker advocacy groups stated the threshold was too high and needed to be lowered.

One injured worker's wife expressed concern for her husband who has suffered an injury at work, has undergone multiple surgeries, and will have a lifelong physical restriction but may not be assessed at 30 per cent WPI.

> So we have to live with the fact he will not get an income after 2 years. The way we feel is horrible he has to live with the pain for the rest of his life it will not stop when the 2 years are up. We have a family to worry about he is getting punished for something he didn't ask for.[93]

Another injured worker who has not been assessed to determine her WPI stated in her submission:

> [E]ven if I were not impaired at 30% it doesn't mean that I am not impaired, or that I can do the thing I previously did, because I can't. However, unless someone meets the 30% or more, the system considers that they are okay, they can work, they can function as they did pre-injury, and again this is so unfair, because I feel that I am so impaired that I cannot function at all most times, yet because of not meeting the 30% I am not eligible to receive ongoing income maintenance for the rest of my life or until my injuries improve.

Another injured worker who reported that she has suffered from multiple injuries from more than one work related incident submitted;

> [R]eaching 30% whole person impairment for one injury makes it nearly impossible to reach. I have had back surgery, and surgery on both knees from two separate injuries and will require two knee replacements in the future. My doctor would love me to be permanently off work but I don't reach 30% with one injury but would with combined injuries, therefore I find it difficult in walking, moving after sitting and standing for long periods but still remain at work.[94]

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91 Ibid, 9.

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

93 John and Nicole O (Injured Worker and Wife, Surname Withheld), Submission No 3, *Inquiry into the RTW Act and Scheme,* 4 September 2016, 1.

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

The AEU stated the 30 per cent threshold will have a significant impact on workers. They provided examples of members who were incapacitated for work at 104 weeks, but whose income support will cease as they were not over 30 per cent WPI. The AEU are concerned by this and stated:

> WPI has no direct relationship with capacity for work. Indeed impairment ratings are not intended for that purpose.
>
> [The] one size fits all model may provide levels of certainty regarding the extent of financial liability but will lead to significant disadvantage for Workers whose work injury requires a withdrawal from the workforce.[95]

Explored further in sections 6.6.4 and 6.6.5 of this report, some submissions stated their concerns with how the *RTW Act* and Guidelines stipulate the combination of both physical and psychiatric injuries and the impact that this may have on calculating a WPI score.

6.2.5 Threshold in Other Jurisdictions

When discussing access to lifetime support, Mr Cordiner stated that 'no other scheme in Australia has such a low threshold.'[96]

> [T]he equivalence in the CTP scheme in South Australia is—they use a different method, but the equivalent is about 50 percent whole person impairment. The Victorian transport accident workers comp scheme equivalent is about 50 per cent whole person impairment …. Queensland doesn't have one; they will follow the NDIS rules, which is again not measured the same way, but as an equivalent or proxy measure is about 50 per cent whole person impairment.

However, a review of income support and weekly payments across the country found that jurisdictions have varying requirements for injured workers to access ongoing income support payments.

It should be noted however, that jurisdictions have different requirements in relation to assessing permanent impairment. Further, in some cases, depending on the degree of WPI, some schemes require workers to undergo regular assessments as to whether their circumstances have changed and are able to work.

A comparison of the minimum WPI required for ongoing income support payments is shown in Table 2.

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[95] Australian Education Union, above n 48, 2.

[96] Rob Cordiner, above n 53, 12.

Table 2: Comparison of minimum WPI required before lifetime benefits apply across different jurisdictions

Workers Compensation Jurisdiction	Minimum WPI required for ongoing or continuing weekly payments *
SA	30%
ACT	No WPI requirement
Comcare	No WPI requirement
NSW	20%
NT	15%
Qld	15% (to 5 years)
Tas	30%
Vic	No WPI requirement
WA	No WPI requirement
*While some jurisdictions may have a minimum WPI required for ongoing weekly payments as one method of test, 'No WPI requirement' means that in those jurisdictions there may also exist an alternate method for accessing these ongoing payments regardless of WPI. For example in Victoria payments will cease at 130 weeks, however if a worker is unfit for work, and will continue to be so indefinitely, then payments may continue.	

Source: Compiled from, Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* (2016) 24; *Workers Rehabilitation and Compensation Act* (Tas) s 69B(1).

6.2.6 Suggestions for Alternatives

A number of submissions suggested alternative methods in relation to the classification of seriously injured workers.

Alternative 1: Narrative or Qualitative Test

A common alternative that was proposed was the introduction of a 'narrative test' for those who do not meet the 30% WPI threshold.[97]

Ms Nikolovski, Vice President of the Law Society, in evidence stated that the narrative test

> is for both physical and psychiatric injury. In [Victorian] legislation, they have this test, if it is harsh and unjust, that someone should be cut off. So, they also have a threshold of 30

[97] Australian Lawyers Alliance, Submission No 14, *Inquiry into the RTW Act and Scheme,* 29 September 2016, 8; The Law Society of South Australia, above n 63.

> per cent whole person impairment, but they have this narrative test available so that someone can seek compensation ongoing [if they do not meet the 30% WPI threshold].[98]

The Victorian *Workplace Injury Rehabilitation and Compensation Act 2012* states that *seriously injured* means

> *(a) permanent serious impairment or loss of body function; or*
>
> *(b) permanent serious disfigurement; or*
>
> *(c) permanent severe mental or permanent severe behavioural disturbance or disorder; or*
>
> *(d) loss of foetus*[99]

Ms Nikolovski provided an example where

> a person has multiple impairments and if you add them altogether it might be 48 per cent whole person impairment but, because of the combination of factors and how you can't combine injuries under the scheme, they wouldn't qualify for a whole person impairment [of greater than 30 per cent], whereas a person who has, say, a total knee replacement … that has a moderate to not great result automatically meets the 30 per cent whole person impairment.
>
> To think that somebody with a three-level spinal fusion will get to 29 but wouldn't hit the whole body impairment of 30, but a person with a knee replacement who could clearly return to work would hit the 30 per cent and has no obligation to mitigate their loss, is clearly harsh and unjust. That is the type of narrative test that we are saying should be applied where people can make an application, and it should be able to be a reviewable decision in our opinion.[100]

A narrative test could take into account more than just an arbitrary impairment threshold, by factoring in the worker's age, pre-injury occupation, skills, education, training, and suitable vocation options.

Alternative 2: Reduction in threshold

A number of worker advocacy groups expressed support for the reduction of the threshold[101] to help ensure that there was a greater chance for those with permanent injuries be given appropriate levels of support.

The South Australian Police Association (SAPA) as well as the Australian Lawyers Alliance (ALA) both submitted that in their opinion the threshold should be reduced, with consideration to a 15 per cent WPI threshold. While the ALA concede that it has no objective evidence to determine whether this is a more reasonable threshold[102], the Police Association suggest that if the threshold were reduced, then a 'work capacity-type' review for injured workers could be

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[98] Evidence to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Parliament of South Australia, Adelaide, 2 March 2017, 18 (Amy Nikolovski).

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

[100] Amy Nikolovski, above n 98, 18.

[101] See, eg, SA Unions, Submission No 36, *Inquiry into the RTW Act and Scheme*, 30 October 2016, 5.

[102] Australian Lawyers Alliance, above n 97, 7.

introduced. This would see workers' payments maintained as long as they worked to their maximum capacity.[103]

The Shop, Distributive and Allied Employees' Association (SDA) believe that while 'the threshold of 30% is too blunt an instrument to achieve fair and equitable outcomes for workers' they believe that the simple reduction of the threshold would create another arbitrary threshold, and support the introduction of a qualitative assessment.[104]

Alternative 3: Tiered Support Structure

The Australian Rehabilitation Providers Association (ARPA) suggested that the New South Wales scheme offered a reasonable alternative with weekly payments being made for varying lengths of time depending on a workers' particular circumstance. In NSW, weekly payments cease at the end of 130 weeks, with the exception for workers:

- who are assessed as having no current work capacity and likely to continue indefinitely to have no current work capacity;[105] or
- who are assessed as having high needs – that is, have a WPI of 20% or more; or
- who are assessed as having work capacity, have returned to work for no less than 15 hours per week, are in receipt of income maintenance, and are assessed as likely to continue indefinitely to be incapable of undertaking additional employment to increase their weekly earnings.[106]

In NSW, a worker is not able to access weekly income payments after 260 weeks (approximately five years) unless they have a WPI of 20% or more.[107]

In Tasmania, a similar tiered system exists, dependent on a worker's level of WPI. Workers 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 per cent,
- 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.

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[103] Police Association of South Australia, above n 58, 2.

[104] Shop, Distributive & Allied Employees' Association, Submission No 30, *Inquiry into RTW Act and Scheme,* 28 October 2016, 2.

[105] *Workers Compensation Act 1987* (NSW) s 38(2).

[106] Ibid s 38(3).

[107] Ibid s 39.

Alternative 4: Amend the Guidelines

SA Unions suggested that another alternative is to amend the Guidelines or the AMA Guides.

> Some of the outcomes produced by the Guidelines and Guides appear to be indefensible when set alongside each other. An example provided by one affiliates union says "*For instance a worker with a spinal fusion and substantial sciatic pain and significant impact upon activities or* [sic] *daily living is not entitled to a 30% assessment; a worker whose leg is amputated just below the knee will not be entitled to a 30% assessment. Yet in an age when knee replacement surgery is becoming increasingly common, a worker who has a total knee replacement in each knee, even with a good outcome, will be entitled to a 30% assessment…"*[108]

Also, SA Unions provided another example that could be addressed if the Guidelines were modified.

> The Guidelines severely limit the assessment available from impairment arising from pain in most cases. So a worker sustaining damage to a sensory nerve, which produces completely disabling pain, will not be entitled to a 30% assessment notwithstanding that they will never work again.[109]

Psychiatrist Professor McFarlane said that there are much more objective ways to measure impairment than the GEPIC.

> [T]here are now much more objective ways of measuring impairment 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.[110]

[108] SA Unions, above n 38, 5.

[109] Ibid.

[110] Alexander McFarlane, above n 57, 99.

6.3 Medical Expenses

Term of Reference

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

6.3.1 Summary

The Return to Work Scheme limits payment for medical expenses to a period of:

- 12 months after the cessation of entitlement to income support payments
- 12 months if there was no entitlement to income support payments.

The costs related to therapeutic appliances do not fall under the above time limitations.

Workers can have costs covered for surgery outside of this window as long as the worker applies for (and has approved) the surgery prior to the expiration of medical expense support. There is conflicting case law as to how probable future surgery should be before it is pre-approved.

There is no clear definition of *surgery*, with reports that certain procedures are not considered *surgery* by the Compensating Authority.

There is no time limit for reasonably incurred medical expenses for workers who have been assessed as having a WPI of 30 per cent or more.

The WorkCover Scheme did not impose a time limit for medical expenses to be covered, as long as they were reasonably incurred.

Submissions varied, with some bodies supporting the new timeframe, stating that it was important for workers and treating providers to work towards a level of independence from the Scheme. Other submissions suggested that some workers can only remain at work because of the 'maintenance' treatment they receive, and suggested that those workers should receive ongoing treatment (if it will keep them at work).

6.3.2 Background and Legislative Reference

Prior to the commencement of the *RTW Act*, injured workers had the costs of medical expenses paid as long as they were reasonably incurred because of a compensable injury.[111] 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. Section 33(20) states:

> *(20) Subject to subsection (21), an entitlement to compensation under this section (including an entitlement to make an application under*

[111] *Workers Rehabilitation and Compensation Act 1986* (SA), s 32.

> *subsection (17)) comes to an end if the worker has not had an entitlement to receive weekly payments in relation to the work injury under Division 4 for a continuous period of 12 months (or has not had an entitlement to receive weekly payments under Division 4 and a period of 12 months has expired) (insofar as costs are incurred after the end of that period).*

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

- A seriously injured worker (as defined by the *RTW Act)*;
- 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
- Injuries prescribed by the regulations.

Clause 23 of the *Return to Work Regulations 2014* prescribe 12 types of cancer classes of injury for the purpose of above.

6.3.3 Historical medical support expenditure

Payments of unchecked medical expenses were a significant contributor to individual claims costs. There was concern that ongoing treatment was provided for injuries where it was not needed, or the treatment did not result in an improved outcome for workers.[112]

The Australian Medical Association (AMA) stated there was a general feeling that insurers may regard the medical profession as wanting to keep injured workers ill for longer to generate income from further attendance fees:

> Aside from the fact that this is obviously completely contrary to the codes of ethics and conduct that all doctors must abide by, it is also not borne out by the facts, including the undersupply and high demand for doctors, additionally notable in the workers' compensation field, and the motivations and job satisfaction of doctors.[113]

Psychiatrist Dr Nick Ford expressed a similar sentiment in his submission, and felt it 'ludicrous' given the significant undersupply of doctors, and his own personal waiting list of new patients.[114]

6.3.4 Impact of the Changes

Workers who were not entitled to income maintenance at 1 July 2015 when the *RTW Act* commenced, could have covered a further 12 months of medical expenses ceasing on 30

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[112] Hutchinson, above n 92, 2-3.

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

[114] Dr Nick Ford, Submission No 16, *Inquiry into the RTW Act and Scheme,* 29 September 2016, 2.

June 2016. For those workers who were entitled to income support at the commencement of the *RTW Act*, and continued to be entitled to income support for the maximum 104 weeks, their medical expense support will cease on 28 June 2018 (12 months after the cessation of income support).

As outlined in 6.3.2 of this report, medical expenses for workers with a WPI of less than 30 per cent cease 12 months after their period of income support ends.

The full impact of this cessation has not been fully realised yet, however a number of submissions put forward what they anticipate would occur over the coming years.

One worker submitted that her ongoing physiotherapy and other medical costs were needed to 'keep all injuries under control' and she wondered 'how will [she] pay for [her] medical benefits and other bills that come in.'[115]

Another injured worker stated:

> This will impact severely on my family medically and financially with my injury and medicines ongoing for life because there has been little improvement with no surgery to get my life back to where it was before this all happened.
>
> My medication costs me over $120 a month and this will be for the duration of my life.[116]

An injured worker's mother described how her son was working as a security guard when he was badly assaulted. Her son now has permanent injuries including damage to the occipital nerve, bilateral damage to both hands and wrists, balance problems as well as severe anxiety. She stated he was assessed as having a WPI of 29% and therefore did not have access to lifetime medical support. She reported that currently the cost for medication is around $2000 a month with most of it not being covered by the Pharmaceutical Benefit Scheme (PBS). She said that her son and family were unable to afford the cost of the medications without support, and that her son was not able to survive without them.[117]

Workers with active claims on the WorkCover Scheme at 1 July 2015, can receive payment for medical expenses for a period of 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. The transitional provisions for workers on the WorkCover Scheme are covered in section 6.8 of this report.

Psychiatrist Professor McFarlane raised a similar point in relation to medication availability on the PBS – he noted that much of the psychiatric medicine which is paid for under the Scheme for clients with psychiatric injuries is not covered by the PBS. Dr McFarlane said the removal of access to these medications could lead to significant relapse or worsening of an individual's impairments, potentially leading to increased risk of suicide.[118]

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[115] United Voice, above n 46, 1.

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

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

[118] Alexander McFarlane, Submission No 10, *Inquiry into RTW Act and Scheme*, 26 September 2016, 5.

Workers whose medical expense support cease under the *RTW Act* may be able to access further treatment through Medicare or through their private health insurance. There may however be limitations.

Mr Harbord stated

> unless those people can access Medicare—and obviously there will be some entitlement under Medicare, but that's limited—they will not be treated, unless of course they pay it out of their own pocket.
>
> The situation with private health schemes is a little unclear about this. One would expect private health schemes to pick up those expenses, but in the past private health schemes have said, 'Well, if you've got a workers compensation claim then we don't pay for that.' When a person is actually off the scheme, it may depend from private scheme to private scheme as to whether they will pick up some of those expense.[119]

Some submissions suggested that re-consideration should be given to the timeframe for medical expenses. SISA suggested that in cases where workers have resumed work and require treatment to remain at work, medical expenses should continue to be covered long as there is evidence to support this.[120] Such an amendment would bring this part of the legislation in line with Victoria which has such an exemption.[121]

6.3.5 Surgery

The costs of surgery, and related hospital, rehabilitation and nursing services, are covered by the *RTW Act*. For workers who have been assessed as having a WPI of less than 30 per cent, these costs are subject to the limits imposed as previously described.

In some instances, injured workers may require surgery to occur at a point well past the date of injury. For example, a person may suffer from an injury to their shoulder, while conservative treatment will initially be suggested by specialists, surgery may be required if this fails. This may be needed after the cessation of income support.

The *RTW Act* allows for future surgery to be paid for as long as a worker applies for this surgery prior to the cessation of their medical expense coverage.

Principal Solicitor of Wearing Law, Mr Joseph Wearing, expressed concern in relation to payment for a worker's surgery costs if they had not sought prior approval for future surgery:

> … [I]t would appear that they have no entitlement to recover the cost of such surgery.
>
> It would seem unfair that workers who are well-advised will have their entitlement to recover the cost of future surgery preserved, whereas an employee who is not represented may lose their entitlement to future surgery. [122]

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[119] Graham Harbord, above n 83, 98.

[120] Self Insurers of South Australia, above n 90, 11.

[121] *Work Injury Rehabilitation and Compensation Act 2013* (Vic) s 232(5)(a).

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

United Voice, the Police Association of South Australia (PASA), and the AEU similarly submitted difficulties and concerns around this requirement. The stated that the application process for future surgery is confusing, and is open to the Compensating Authority making questionable decisions, with a number of future surgery requests being rejected.[123]

The AEU submitted that the Compensating Authority has made a number of decisions to reject surgery pre-approval applications for reasons including:

- The application was not in the right form;
- The information was inadequate;
- The application was for more than one surgery; and
- The surgery could have been performed within the period where medical expenses were covered.[124]

The AEU noted that none of the rejections they had seen was argued based on the fact that the application was not a consequence of a compensable work injury.[125]

Mr Rossi, President of the Law Society stated:

> There is considerable difficulty at the moment about what a worker actually has to do by way of an application to have [the entitlement to future surgery] preserved. It's far too complex.
>
> There are differing approaches in the tribunal. I would urge the committee to look at that. It should be a very simple procedure for a worker to just send the letter and say, 'This is the type of operation that I want to have in the future.' That should suffice to preserve the right, subject to a compensating authority having the ability to ask for more information if it wants to.
>
> At the moment, we are having cases before the tribunal where ReturnToWorkSA is arguing that the amount of detail in the letter was insufficient and the worker has not preserved that right. An awful lot of money is being spent on these cases over matters of form rather than substance.[126]

The Public Service Association (PSA) provided a further example demonstrating some of the confusion in relation to this part of the *RTW Act* and its administration. The PSA advised that they had one member who suffered from an annular tear, and consequentially assessed having 27 per cent WPI. They reported that the worker's specialists held a medical opinion that in relation to future surgery it was 'likely or probable,' however the worker's application was denied. The claims manager interpreted the *RTW Act* to mean that there could not be any speculation over the need for surgery and instead believed that for pre-approval to occur the reason must be that the surgery should have happened within the designated period where medical expenses are covered if it were not for the delay.[127]

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[123] United Voice, above n 46, 7; Police Association of South Australia, above n 58, 3; Australian Education Union, above n 48, 3-4.

[124] Australian Education Union (SA Branch), above n 48, 3-4.

[125] Ibid, 4.

[126] Tony Rossi, above n 56, 21.

[127] Public Service Association of SA, Submission No 34, *Inquiry into the RTW Act and* Scheme, 31 October 2016, 3.

There have been two decisions by the SAET in relation to pre-approval for surgery and the probability of the surgery, however they appear to provide conflicting outcomes – *Tinti v Return to Work SA* [2016] SAET 72 and *Ledo v Return to Work SA* [2017] SAET 21. In the Tinti decision, Calligeros DP decided that surgery should only be approved when 'on the balance of probabilities the surgery sought is likely to be needed in the future…'[128] This decision appears to be in direct contrast to the decision handed down by Lieschke DP in the matter of *Ledo*. In *Ledo*, the worker was advised that there was a 5 to 10 per cent chance that he would require surgery in the future, the Deputy President found that surgery did not need to be at least probable for prior approval to occur.[129]

Suggestion Relating To Surgery

To help alleviate some of these issues, Mr Wearing, the SDA, SA Unions and others have suggested section 33(20) should not apply to surgery where it is reasonable and relates to the compensable injury.

The SDA also added, that given not many workers require surgery in the first place, by allowing blanket coverage of surgery relating to the compensable injury, the impact to the scheme would be minimal.[130]

Mr Rossi stated a similar view:

> 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.[131]

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.

Mr Rossi stated that

> [t]he other major problem with [the provision of pre-approval for surgery] is that it doesn't define what surgery is. There is an enormous amount of disputation at the moment before the tribunal. Money that should be going to workers to treat them is going on disputed proceedings in the tribunal over arguments in relation to what is surgery: 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 anaesthetic 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

[128] *Tinti v Return to Work SA* [2016] SAET 72.

[129] *Ledo v Return to Work SA* [2017] SAET 21.

[130] Shop, Distributive & Allied Employees' Association, above n 104, 3.

[131] Tony Rossi, above n 56, 22.

> 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. At the moment there are unnecessary arguments about it.[132]

Ms Nikolovski advised that 'there are a lot of disputes before the tribunal about these [surgery] pre-approvals, because they are saying that an arthroscopy is not surgery.'[133]

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, and therefore fits within the definition of therapeutic appliance. Gilchrist DPJ found that:

> Provided it is required to maintain Mr Ashfield's capacity, the costs associated with it will be recoverable. More to the point, where subsection 33(21)(b)(ii) and reg 23(2a) speak of surgery, any associated medical, nursing or medical rehabilitation services (including the cost of hospitilisation) they must be referring to surgery, other than surgery in connection with the insertion of a therapeutic appliance. [134]

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 appliances).

[132] Tony Rossi, above n 56, 22.

[133] Amy Nikolovski, above n 98, 22.

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

6.4 Income Support

Term of Reference

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

6.4.1 Summary

The Return to Work Scheme introduced a strict capped time limit for workers to receive income support payments. Workers can receive a maximum of 104 weeks income support. Payments are now paid at 100 per cent for the first 52 weeks, then reduce to 80 per cent of notional weekly earnings for the second 52 week period.

Workers who have been assessed as having a WPI of 30 per cent or more receive weekly payments at 80 per cent (after the first 52 weeks) until retirement age.

Submissions either supported the newly capped system, or were against it. Those in support cited the importance of not making workers dependent by offering ongoing support, and warned against removing / broadening this cap for fear of repeating the financial difficulties of the WorkCover Scheme when its unfunded liability ballooned.

Some argued that 104 weeks is harsh and unfair, with submissions stating some injuries take more time to heal. Without the possibility of having payments extended (unless they meet the *RTW Act*'s of seriously injured), workers may be left without payments even though they are unable to return to work.

6.4.2 Background and Legislative Reference

Income support is the most significant cost on any workers' compensation scheme.

The WorkCover Scheme allowed for income support payments to be ongoing (subject to a work capacity review), and was often blamed for contributing to the Scheme's significant unfunded liability and poor return to work rates.

Notional Weekly Earnings (NWE) are the average of weekly earnings prior to injury, adjusted when required by the legislation (for example to include economic adjustments for seriously injured workers). The NWE is calculated in accordance with section 5 of the *RTW Act*, and includes all gross earnings (including overtime and allowances, but excluding superannuation) which the worker was paid for the 12 months prior to the date of injury.

Under the repealed Act, workers who were not at work could receive weekly payments (known as income maintenance) at a rate of:

- **First entitlement period**: 100 per cent for 13 weeks of NWE;
- **Second entitlement period**: 90 per cent for 13 weeks of NWE; and

- **Third entitlement period and beyond**: 80 per cent for the remaining time on the Scheme.[135]

When a worker had made a partial return to work - but was earning less than their NWE - they would receive a percentage of the difference between their NWE and the earnings from paid employment.

Under the WorkCover Scheme, a worker could receive income maintenance until retirement age. There was a mechanism in the repealed Act under sections 35B and 35C which allowed for workers to continue to be in receipt of income maintenance at a rate of 80 per cent of their NWE in the following circumstances:

- Had no current work capacity and was likely to continue indefinitely to have no current work capacity; or
- Had work capacity, was in paid employment, and was determined to be incapable of undertaking further or additional paid employment which would increase their earnings from paid employment (ie they were maximising their earning capacity).

After 130 weeks of income maintenance, if a worker was found to have capacity for work and was not maximising their earning capacity, their weekly payments could be ceased or further reduced.

Under the repealed Act, a week only counted towards the entitlement period if the worker was actually entitled to income maintenance during that week. For example, if a worker made a brief full return to work, the weeks where they were working and earning at or above their NWE, would effectively 'pause' the clock before they moved to the next entitlement period (should they require further time off of work).

Under the *RTW Act*, workers with a WPI score of less than 30 per cent may receive to weekly payments (known as income support) at the following rates in relation to their NWE:

- **First entitlement period**: 100% for 52 weeks post first incapacity.
- **Second entitlement period:** 80% for a further 52 weeks post the end of the first entitlement period.[136]

Unlike the repealed Act, workers' income support will cease at 104 weeks post the initial incapacity (the first day in which the worker required time off work and income support) regardless of whether the worker achieved a return to work (and was not in receipt of income support payments) during that time.[137]

A brief comparison of income support accessible by workers can be found in Table 3.

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[135] *Workers Rehabilitation and Compensation Act 1986* (SA), s 35A.

[136] *Return to Work Act 2014* (SA), s 39(1).

[137] Ibid s 39(3).

Table 3: Income support comparison of 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 at 130 weeks

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

Should a worker have pre-approved surgery after the end of the second entitlement period, the worker may receive *supplementary income support payments* in accordance with section 40 of the *RTW Act*. These supplementary payments are payable for a period of up to 13 weeks after surgery.[138]

Provisional Payments and Interim Benefits

Income support is afforded to those workers who have accepted workers' compensation claims. However, some claims may take longer to investigate prior to a determination on their compensability being made. This may be due to the nature of the injury, complexity or lack of available information. This delay could cause financial hardship to some injured workers.

As part of the 2008 reforms, a mechanism to allow prompt payment of income support was introduced, called *provisional payments*.[139] Unless a *reasonable excuse* existed, the Corporation or self-insured employer was required to commence provisional payments within seven calendar days of receiving the minimum information required for initial notification of a claim.[140]

Provisional payments were paid for a period of up to 13 weeks, and included an additional amount for medical expenses to be paid (up to around $5000 – indexed annually). Should the claim not be accepted, payments already made would be considered costs of the Scheme. Only in the instance of the worker acting dishonestly when making the claim or providing false information would the Corporation to seek recovery of any monies paid.

Reasonable excuses outlined in the Provisional Payment Guidelines are:

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[138] *Return to Work Act 2014* (SA) s 40.

[139] *Workers Rehabilitation and Compensation Act 1986* (SA) div 7A.

[140] Ibid s 50B.

- Claim for compensation already determined;
- The injured person is unlikely to be a worker under the Act;
- The injury is not work related; or
- The injury is notified after 13 weeks of incapacity.[141]

Should a reasonable excuse be applied, the repealed Act allowed *interim payments* to occur. Similar to provisional payments, interim payments did not mean that liability was accepted, but did allow a worker to receive weekly payments while the claim was determined. Unlike provisional payments however, if the claim were ultimately not accepted, the Corporation would be able to recover any monies that were paid to the worker.[142]

As part of the most recent reforms and new Scheme, provisional payments were removed from the *RTW Act*.

Instead of provisional payments being offered, the *RTW Act* now requires that the Corporation make an offer of interim payments if the claim cannot be determined within 10 business days after claim receipt.[143]

However, as per section 32(3):

> *If on final determination of a claim it appears that an amount to which the claimant was not entitled has been paid under this section, the Corporation may recover that amount as a debt in a court of competent jurisdiction.*

Federal Minimum Wage Safety Net

A new component of the reformed Scheme was the introduction of the federal minimum wage safety net. Section 42 now prevents a worker from being paid under the Federal minimum wage at any point, in particular after the first 52 weeks when the 80 per cent step down applies. Section 42 states:

> *(1) Despite the preceding sections in this Subdivision, if the combined amount that a worker would receive in respect of any incapacity for work in any week applying under any such section would result in the worker receiving less than the Federal minimum wage (adjusted in the case of a worker who was working at the relevant date on a part-time basis so as to provide a pro-rata payment), the amount of compensation payable under this Subdivision will be increased so that the combined amount equals the Federal minimum wage (or, if relevant, the Federal minimum wage as so adjusted).*[144]

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[141] Minister for Workers' Rehabilitation, 'Provisional Payment Guidelines' in South Australia, *The South Australian Government Gazette,* No 83, 20 December 2012, 5735, 5736.

[142] *Workers Rehabilitation and Compensation Act 1986* (SA) s 106

[143] *Return to Work Act 2014* (SA) s 32.

[144] Ibid s 42(1).

6.4.3 104 Week Timeframe Feedback

Submissions were numerous and arguments strong in relation to calls for either the current income support structure of capping weekly payments to two years to remain, or complaints that the time limit is too harsh.

Many employer industry groups and associations called for the current time limit to remain at 104 weeks. SISA put forward that to consider extending the current 104 week income support period was dangerous, given the adverse effects longer payment periods had on the WorkCover Scheme. SISA also submitted that given income support now lasts for 52 weeks at 100% (as opposed to stepdowns at 13 and 26 weeks in the WorkCover Scheme), the 80% of claimants who return to work or have their payments ceased prior to the 104th week are financially better off under the Return to Work Scheme than the former scheme.[145]

According to Mr Ian Hutchinson, giving workers a longer period of compensation makes them dependent on the system and does little to support independence.[146] The Motor Traders Association (MTA) held a similar view and felt that returning to the previous open ended scheme would put South Australia out of step with other jurisdictions. Any increase in support and payment duration could lead to people staying on the system and discourage them from returning to work as early as possible.[147]

Business SA's view is that changes from a long term compensation scheme brings with it both positive psychological and physical impacts which far outweigh the negative impacts. A study of its members found that 69% of respondents believed restricting income to a maximum of 2 years was suitable. They also reported that many of their members had a strong focus on incentives to return workers to the workplace.[148]

Supporters of the current income support payments time limit highlighted other aspects of the Scheme - such as lump sums for economic loss, greater ability to enforce employer obligations and the fact that payments were made at 100% for 52 weeks - helped to lessen any impact by the shorter time limit imposed.[149]

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.

One worker in their submission wrote:

> I feel that this Return To Work SA [Scheme] has no benefit to the long term injured worker and concentrates on the short term injured worker. None of us wish to be like this.[150]

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[145] Self Insurers of South Australia, above n 90. 12.

[146] Ian Hutchinson, above n 92, 3.

[147] Motor Trade Association of South Australia, above n 39, 9.

[148] Business SA, above n 49, 5.

[149] SA Unions, above n 38, 3.

[150] Carol P (Injured Worker, Surname Withheld), above n 33, 2.

The Financial Services Union (FSU) stated that the two year cut off was the most adverse change to the Scheme, as now someone who has a partial or even total incapacity can have their payments ceased.[151]

The Australian Lawyers Alliance (ALA) raised concern about people who had a WPI score of less than 30 per cent but who were unable to return to work after two years because they would be in 'injury-related unemployment and a reliance on government welfare.'[152]

Psychiatrist Dr Nick Ford submitted that while he agrees with a cap on income maintenance, he did not believe the 104 week window was going to be sufficient. He was of the belief that the legislation fails to compensate appropriately for psychiatric impairment, submitting that any person with a psychiatric illness of greater than 20% WPI was most likely not going to recover in just two years. He stated that there appeared to be the thought that psychiatric illness could be overcome using 'will power' and could be easily feigned. He stated that this has driven the decision to implement a time frame, and is 'not keeping with academic literature'.[153]

The idea of longer recovery time frames for some injuries is echoed by the Australian Medical Association (AMA) who expressed concerns that capping income support at two years may 'prove insufficient' and that the timeframe should be considered in light of evidence.[154]

Calculation of Entitlement Weeks

A number of submissions expressed concern in relation to the method of calculating the number of weeks a worker could receive income support.

As previously mentioned in this report, the repealed Act only counted weeks of entitlement a worker was actually eligible for income support payment in that week (ie they were either not at work, or earned less than their notional weekly earnings from paid employment).

With the *RTW Act* however, the 104 weeks of income support available commences from the first day of the incapacity.[155] The counter does not pause during the weeks a worker may return to work.

Submissions from a number of union and lawyer groups provided a hypothetical example of someone requiring minimal time off work due to injury before returning to full hours. The concern expressed was that as soon as the person injures themselves, the 'clock starts ticking' and does not pause, even if they return to work. After returning to work, if that person aggravates, or their condition deteriorates later, and they require more time off work, they have already 'used' a portion of their entitlement on the Scheme, although they were determined enough to make an early return to work and had not received income support.[156] This may discourage people from making an effort to make an early return to work.

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[151] Financial Services Union, Submission No 17, *Inquiry into the RTW Act and Scheme*, 29 September 2016, 2.

[152] Australian Lawyers Alliance, above n 97, 9.

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

[154] Australian Medical Association (South Australia), above n 113, 3.

[155] *Return to Work Act 2014* (SA) s 39(3).

[156] Construction, Forestry, Mining, and Energy Union, above n 37, 4; Australian Meat Workers Union and Andersons Solicitors, above n 59, 6; Australian Lawyers Alliance, above n 97, 9.

6.5 Common Law

Term of Reference

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

6.5.1 Summary

The Return to Work Scheme saw the re-introduction of common law. This gives workers meet the *RTW Act*'s definition of seriously injured the ability to sue their employers where their employer's negligence had resulted in the injury.

Some submissions argued that common law is an important mechanism to both give workers a chance to access a greater amount than what is payable through income support or lump sum payments, as well as a mechanism to encourage employers to provide safer workplaces. Those who support common law also generally support it being made accessible to a wider range of injured workers, and not only those seriously injured.

Other submissions did not support common law as they felt that the monitoring and punishment for unsafe work practices is the role of Safework SA, and not for RTWSA. Also, some submissions stated that proceeding down the path of common law is highly adversarial, damages the relationship between worker and employer, and may encourage a worker to magnify their disability to secure the best outcome from the court.

6.5.2 Background and Legislative Reference

A significant feature of the *RTW Act* was the re-introduction of common law rights for workers.

Common law was a feature in the *Workers Compensation Act 1971* (SA) (the predecessor of the repealed Act), and remained a feature of the repealed Act until its removal in 1992.

In the event an employer is negligent, part 5 of the Act allows workers to sue their employer for economic loss. This right is restricted to those with a WPI of at least 30 per cent and the family / legal representatives in the event of the death of a worker.

Should a common law claim be successful, the worker will forgo access to their weekly income support payments with any payments already made being deducted from the damages amount[157]. The worker will have access to ongoing treatment, care and medical support for the injury, paid by RTWSA.

[157] *Return to Work Act 2014* (SA) s 75(1)(a)-(b).

6.5.3 Submissions Supporting Common Law

Some submissions supported the reintroduction of common law, however they expressed concern that the threshold of 30% WPI was too exclusive as it provided very few people access. The PSA highlighted there would be no additional benefit for the workers who could sue. They would be 'almost certainly better off to remain covered by the RTW Act' rather than pursuing damages.[158]

The ALA submitted the high WPI threshold for access, coupled with disincentives such as being able to pursue costs for economic loss only (and not treatment / medical expenses) is 'only a token acknowledgement' of common law rights. The ALA concurred with the PSA and said it 'is of such little utility that very few, if any, injured workers will ever take it up nor will they ever be so advised.'[159]

In evidence, Ms Nikolovski of the Law Society supported these views:

> [Injured workers] can only claim in limited circumstances... for pain and suffering and future economic loss. [Injured workers] can't claim for home help, care and support and future medical expenses. Those are quite often the biggest damages that are available to seriously injured people.[160]

Ms Nikolovski also stated these workers will continue to receive support for treatment and care through RTWSA even if they are successful with a common law claim:

> There's no point in pursuing it if you are going to get paid your weekly payments until retirement age in any event, and you do not have to mitigate your loss under this scheme. Why would you then pursue a claim if you are not going to get off the scheme, in that your medical expenses and your home help services are going to be monitored by the corporation.[161]

The AEU further echoed these arguments in their submission and called for a broadening of access to common law. They suggested that in circumstances where a worker's access to income support is exhausted, they should have access to common law. They proposed that if it were the employer's client or customer, and the employer's negligence caused harm, then that person would have the right to pursue damages.

> Not restricting access to common law remedies for Workers who have exhausted entitlements under the RTW Act where their injuries have occurred as a result of an employer's negligence is only just.
>
> An injured Worker's ability to access common law remedies should be no less than any other South Australian.[162]

One injured worker stated:

> The injury was caused by unsafe work practices. If I don't reach 30% whole person impairment I can not pursue common law for unsafe work practices. It shouldn't matter

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[158] Public Service Association of SA, above n 127, 5.

[159] Australian Lawyers Alliance, above n 97, 10.

[160] Amy Nikolovski, above n 98, 23.

[161] Ibid 24.

[162] Australian Education Union (SA Branch), above n 48, 4.

> what percentage a person reaches if the company has used unsafe work practices that have caused or contributed to an injury, then there should be an avenue to persue [sic] this if needed.[163]

Another injured worker felt that the threshold was too restrictive given what she has 'had to endure'.[164]

The PSA and Rail, Bus, Tram Industry Union (RBTIU) suggested that the government alleviate the unfairness of the common law threshold to 15% WPI.

In relation to the ability to bring on a common law suit, Mr Rossi stated that there was an 'anomaly' in the legislation.

> For example, if you are an employee of a labour hire firm and you are allocated to a host employer and the host employer is negligent, you don't have to reach the threshold of 30 per cent to bring a common law damages claim because you bring the claim against the host employer. But if you are employed by the employer and you have an injury in exactly the same circumstances, you can't pursue a claim for damages at common law for exactly the same injury unless you are a seriously injured worker.[165]

Ms Nikolovski stated that in the 1990s when common law was removed,

> the unions agreed with it on the condition that a worker would pretty much get a pension. [Injured workers] would get payments until retirement age. Now we are down to two years, with no further ability to claim, even if your employer was extremely negligent.[166]

A solution Ms Nikolovski suggested was to model South Australia's common law access to the hybrid scheme which exists in Queensland. She said in Queensland,

> they don't have a threshold that you have to meet to pursue a common law damages claim. If [an injured worker] can prove negligence, [they] can access the scheme. If we are to have some sort of threshold or hybrid scheme, that would be the preferred approach, rather than have a threshold to meet, as you do in most other states.[167]

According to Ms Nikolovski, another benefit of the Queensland scheme was that common law damages payments include costs relating to medical, hospital, home care and other treatment expenses.

> With respect to the Queensland scheme, you are off [the scheme]…. It gives an ability to people to actually self-manage themselves and their future rather than being stuck on the scheme really forever.

Another reason for the reintroduction of common law put forward in submissions is that some believe it may serve to deter employers from not maintaining a safe workplace out of fear of a potential suit of negligence.

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[163] Marie W (Injured Worker, Surname Withheld), above n 94, 3.

[164] Mary-Ann L (Injured Worker, Surname Withheld), above n 116, 3.

[165] Tony Rossi, above n 56, 22.

[166] Amy Nikolovski, above n 98, 23.

[167] Ibid

> Fundamentally, one of the reasons why we have a concept of common law damages is to recognise the duty of care that ought to be owed in particular circumstances. … Allowing claims for damages at common law encourages safe systems of work.[168]

Professor McFarlane, in his evidence to the Committee during the Inquiry into Work Related Mental Disorders and Suicide Prevention, supported common law. Referring to the limited ability to access common law, he stated that

> there are many practices in the workplace in South Australia that elsewhere lead to significant negligence claims, which then leads to changed practice within those organisations. I think the courts form a very important role in scrutinising the quality of health care provided within the workplace.[169]

6.5.4 Concerns Raised About Common Law

The Registered Employers Group (REG) and SISA both submitted it is the role of SafeWorkSA to monitor and reprimand employers who fail to adhere to occupational safety requirements, and not that of RTWSA.[170]

Mr Ian Hutchinson believed that the nature of the common law process is adversarial, and in a scheme that focuses on returning injured workers to work, can be quite damaging to the delicate relationship between workers and their employers. He also expressed fear that common law could entrench the view that workers are a financial liability rather than a valued asset of a business.[171]

The ARPA held a similar view. They submitted common law could give rise to additional conflict and increase the likelihood of delays to return to work. They submitted that there is limited evidence to support the view common law claims encourage return to work, and instead just lead to early claim closure. Also, they it encourages the 'worker's magnification of apparent disability, and often employer and insurers' minimisation of apparent disability.[172]

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[168] Tony Rossi, above n 56, 22.

[169] Profession McFarlane, above n 57, 99.

[170] Self Insurers of South Australia, above n 90, 13; Registered Employers Group, Submission No 18*, Inquiry into RTW Act and Scheme,* 29 September 2016, 3.

[171] Ian Hutchinson, above n 92, 1.

[172] Australian Rehabilitation Providers Association, Submission No 32, *Inquiry into RTW Act and* Scheme, 31 October 2016, 5.

6.6 Accumulative Injuries

Term of Reference:

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

6.6.1 Summary

Of the submissions that addressed this term of reference, six stated they were not sure what 'accumulative injuries' referred to as it was not a term used in the *RTW Act*. These submissions generally declined to comment on this without clarification from the Committee.

Other submissions that addressed 'accumulative injuries' have generally taken it to mean injuries which either:

- develop over time, but are still a result of the initial incident (also known as consequential injuries) – for example, an initial knee injury develops into a hip injury as a result of altered gait; or
- occur as a result of two or more separate workplace incidents, and then the impact this has on any permanent impairment assessment which may occur; or
- consist of both physical and psychiatric components, with impairments from physical injuries and psychological injuries not being combined in WPI assessments.

6.6.3 Development of Injuries Over Time

Submissions that understood *accumulative injuries* being those that develop over time but are still related to the one employment related incident highlighted how these injuries are dealt. These are now referred to as *consequential injuries,* but were previously referred to as *sequale* or *continuation injuries.* Section 7 and the compensability criteria remain the same for these types of injuries, as long as the injury arises from employment.

In addition, section 188(1) of the *RTW Act* states that injuries which develop over time are to be 'taken to have occurred when the worker first becomes totally or partially incapacitated for work by the injury.'[173]

Submissions that held this understanding did not see the need for changes in relation to accumulative injuries.

[173] *Return to Work Act 2014* (SA) s188(1).

6.6.4 Assessment of Injuries from Different Events

Some submissions understood that this term of reference referred to injuries sustained from different employment related events and then considered the impact it would have on WPI assessments. A worker's WPI assessment score only relates to the injury (or injuries in the event of the development of injuries as a consequent of the original injury) of a specific workplace event.[174] That is, if a worker suffers from two permanent injuries from two separate work-related events, the resulting WPI scores are not combined.

This is consistent with the legislation with section 22 stating:

> *(8) An assessment must take into account the following principles:*
>
> *…*
>
> *(g) any portion of an impairment that is due to a previous injury (whether or not a work injury or whether because of a pre-existing condition) that caused the worker to suffer an impairment before the relevant work injury is to be deducted for the purposes of an assessment, subject to any provision to the contrary made by the Impairment Assessment Guidelines;*

This would mean that, while a worker may have substantial limitations to working because of multiple permanent injuries, their WPI for each injury (or set of injuries) resulting from each incident will be considered individually and not combined. This would result in a decreased likelihood of a worker scoring above 30 per cent WPI.

United Voice stated that the

> rationale for the identification of a seriously injured worker… is essentially to ensure that workers with no or limited likelihood of returning to work receive ongoing support.
>
> Given that that is the rationale… it cannot matter whether a seriously injured worker is seriously injured because of one injury, or because of multiple injuries.[175]

6.6.5 Combining Physical and Psychiatric Injury WPI Assessments

Other submissions understood this term of reference to be in relation to psychiatric injury and its relation to a physical injury when it comes to a permanent impairment assessment. Part 2, division 5 of the *RTW Act* states that 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. The ALA provided an example of a hypothetical worker who may be assessed as having a 25% WPI for a physical injury, and a 20% WPI for a psychiatric injury, but the worker will not be determined as *seriously injured* as their injuries cannot be combined.[176]

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[174] Ibid s 22(8).

[175] United Voice, above n 46, 8.

[176] Australian Lawyers Alliance, above n 97, 6.

> The requirement that permanent impairments can only be combined in the event that they arise from a single trauma and impairment that arises from physical and psychiatric injuries must be assessed separately ignores the cumulative impact of such conditions on injured Workers, particularly on their capacity for work.[177]

Dr Michael Clarke said that it is quite common for someone with a physical injury that impacts on their life in a significant way, to then suffer a psychiatric injury. He said that workers with physical injuries could also

> … suffer a psychiatric injury because their injury upsets their entire life sometimes, not being able to work then what happens at home, their leisure pursuits, and people's identity is very much wrapped up in their physical prowess and abilities and they do not have much else in their life and they have a manual job, so it is very understandable that they will become unwell, but with the new legislation there will be this separation that that part is not combined with the other. So, someone could be quite disabled as a result of a depression anxiety, as well as their physical injury, but is seen as a separate issue.[178]

Some submitted that the inability to combine assessments from multiple injuries could mean that people who have no capacity and significant impairment will not be given the status of seriously injured worker.[179]

In evidence to the Inquiry into Work Related Mental Disorders and Suicide Prevention, Mr Graham Harbord provided an example of a scenario where there are

> two police officers who attend a bank robbery. The first officer gets shot and suffers significant physical injury. He then suffers consequential mental harm, depression and anxiety, in particular, from what happened in the attack. None of that consequential mental harm is assessable for the 30 per cent threshold. The second officer, again, however, suffers severe anxiety as a result of what happened and considering it could happen to him in the future. That's pure mental harm and can be assessed under the 30 per cent criteria. In our view, that is illogical.[180]

[177] Australian Education Union (SA Branch), above n 48, 5.

[178] Evidence to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Inquiry into Work Related Mental Disorders and Suicide Prevention, Parliament of South Australia, Adelaide, 14 April 2016, 122 (Dr Michael Clarke).

[179] See, eg, Australian Education Union (SA Branch), above n 48, 5.

[180] Graham Harbord, above n 83, 97.

6.7 Employer Obligations

Term of Reference

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

6.7.1 Summary

Overall, an employer's obligations to support their injured workers back to work, including through the provision of suitable paid employment, has remained largely unchanged in the Return to Work Scheme.

However, one change, is the ability for a worker to apply for the provision of suitable employment when they believe that they are ready, willing, and able and they believe that their pre-injury employer has suitable paid duties. Should the employer not provide the employment, the worker has the right to apply to the SAET for orders compelling the employer to provide the identified duties.

While many submissions see this as a positive step in strengthening the support employers must provide their injured workers, others do not see this as a realistic and workable solution due to the damage that the process of seeking an order will have on the worker and employer relationship.

6.7.2 Background and Legislative Reference

Strong employer involvement and support to return injured workers back to the pre-injury workplace is paramount for a modern workers' compensation scheme to be successful.

Both the repealed and RTW Acts placed an obligation on employers to provide suitable duties for their injured workers. Sections 18(1) and 18(2) of the current Act are the equivalent of section 58B of the repealed Act. A number of submissions stated that these two sections of the *RTW Act* place the same obligations on employers as the repealed Act. Section 18(1) states:

> *(1) If a worker who has been incapacitated for work in consequence of a work injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the employer from whose employment the injury arose (the **pre-injury employer**) must provide suitable employment for the worker (the employment being employment for which the worker is fit and, subject to that qualification and this section, so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was working immediately before the incapacity).*[181]

[181] *Return to Work Act 2014* (2014) s 18(1).

Like the repealed Act, employers did not have to comply with this obligation as detailed in section 18(2):

> *(2) Subsection (1) does not apply if –*
>
> *(a) it is not reasonably practicable to provide employment in accordance with that subsection (and the onus of establishing that lies on the employer); or*
>
> *(b) the worker left the employment of that employer before the commencement of the incapacity for work; or*
>
> *(c) the worker terminated the employment after the commencement of the incapacity for work; or*
>
> *(d) new or other employment options have been agreed between the worker, the employer and the Corporation under section 25(10); or*
>
> *(e) the worker has otherwise returned to work with the pre-injury employer or another employer.*[182]

One notable change of the exemption criteria is section 18(2)(d) which references section 25(10). If a worker has been incapacitated for work for a period of 6 months, or is not working at their full capacity, then new or other employment options need to be taken into account in order to assist the worker return to work in suitable employment.

This difference now allows workers and employers to 'detach' a worker from the pre-injury employer, allowing a focus on new employment to occur sooner. Under the repealed Act, this mechanism of putting the decision in the hands of the employer and worker did not clearly exist, and would often require the Compensating Authority to travel down a lengthy path to gather the information they required to support a change of goal decision.

6.7.3 Ability to Seek Order for the Provision of Duties

The major difference in relation to employer obligations in the *RTW Act* compared to the repealed Act is the ability for a worker to apply to the South Australian Employment Tribunal (the SAET) for the pre-injury employer to provide suitable employment. Section 18(3) of the *RTW Act*, prescribes that a worker can serve written notice to their employer advising that they are ready, willing and able to return to work, and that they have identified work with the employer that they are able to complete.

If an employer fails to provide suitable employment within one month of the worker making the request, the worker may then make an application to the SAET for an order to compel the employer to provide employment to the worker.[183]

Should the employer fail to comply with the order, upon application by the worker, the Corporation must make financial payments to the worker equivalent to what the worker would have earned if the employer had provided suitable employment. This obligation on the

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[182] Ibid s 18(2).

[183] Ibid s 18(5).

Corporation lasts for the first 104 weeks post the worker's first date of incapacity (that is the same length of time which income support would have been paid to a non-seriously injured worker). In this event, the Corporation may then seek to recover any amount paid to the worker (along with interest) from the employer.[184]

Some worker advocacy groups raised concerns that if an employer is identified to be in breach of orders from the SAET to provide suitable duties, there is limited remedy available should the employer not comply outside of the 104 week window.

The AEU submitted that in the event an employer fails to provide suitable employment against orders, the Corporation should continue to pay the worker the lost wages, and then recovery\ those monies from the employer.[185]

The inclusion of section 18(3) and a worker's ability to apply to the SAET has been seen as a positive step by many groups.

In relation to this section, SISA feels the provision will be ultimately unworkable, however concede that there has only been one significant case decided by the Tribunal at the time of their submission relating to this provision.[186]

Mr Rossi expressed concern that the pathway of seeking Orders to provide duties, while well intended by Parliament, are not working due to the breakdown in the worker and employer relationship as a result of the process. He stated that around four years ago there were

> some 15 000 applications Australia-wide to the Fair Work Commission.
>
> Of those 15 000 applications, there were only 22 orders for reinstatement. The reason is that, for an employment relationship to work, there has to be an important degree of cooperation between employer and employee to get to a point, as is contemplated by these provisions, where the worker says to an employer, 'You should provide me with this suitable employment.'
>
> The employer says, 'No, that's not suitable employment for you.' You then go to the tribunal. The tribunal tries very hard to conciliate the dispute, but it fails. You then go to a hearing and you have a trial in an adversarial contest. If you get to that point and an order is made for the provision of suitable employment, it's very difficult for that relationship to actually work afterwards.[187]

One concern that many employer groups raised was that there was an 'openendedness' to the obligations on employers to provide suitable employment, and there appeared to be a never ending ability for the worker to lodge an application. The Australian Industry Group expressed concern that by not having an end date to which applications can be made 'injured workers may initiate an action with the SAET, purely to obtain a financial settlement from the employer, in lieu of the provision of suitable duties.'[188] The *RTW Act* however does deter workers from acting 'unreasonably, fivolously or vexatiously' in bringing the matter before the

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[184] Ibid ss 18(12)-(15).

[185] Australian Education Union (SA Branch), above n 48, 5.

[186] Self Insurers of South Australia, above n 90, 15.

[187] Tony Rossi, above n 56, 24.

[188] Australian Industry Group, Submission No 29, *Inquiry into the RTW Act and Scheme*, 28 October 2016, 18.

SAET by declining or awarding costs against the worker, or by reducing the amount of the award of costs which the worker would otherwise be paid. [189]

The Australian Hotels Association submitted concern that the SAET now has the power to issue a decision that may not fully take into account the employer, and therefore it may not be reasonable to provide suitable employment in the normal conduct of its business.[190]

6.7.4 Return to Work Co-ordinators and Employer Engagement

Introduced as part of the 2008 reforms of the WorkCover Scheme, employers with 30 or more employees were required to appoint a Rehabilitation and Return to Work Co-ordinator (Co-ordinator). The Co-ordinator was required to undergo training prescribed by the Corporation from time to time.

The original intention for having Co-ordinators was to ensure a high level of engagement between the injured worker and the employer, which in turn enabled the injured worker to return to the workplace as quickly and expeditiously as possible. At the time, it was believed to have been modelled on reported successful practices amongst self insured employers.[191]

Re-titled 'Return to Work Co-ordinators' in the *RTW Act*, the same requirements exist for employers who have 30 or more staff.[192]

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[189] *Return to Work Act 2014* (SA), s 18(9).

[190] Australian Hotels Association (SA), Submission No 31, *Inquiry into the RTW Act and Scheme,* 28 October 2016, 4.

[191] Bill Cossey and Chris Latham, above n 5, 16.

[192] *Return To Work Act 2014* (SA) s 26.

6.8 Transitional Provisions

Term of Reference

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

6.8.1 Summary

Provisions on how to transition workers with claims originally under the WorkCover Scheme to the Return to Work Scheme are covered in schedule 9 of the *Return to Work Act 2014*. Workers entitled to income support as at 1 July 2015 can access up to 104 weeks of further income support from that date. Workers not entitled to income support, are unable to be paid further income support, but would have medical expenses covered for 12 months.

Submissions highlighted that the legislative requirement for workers to have an entitlement at 1 July 2015 has resulted in some workers left without weekly financial support from the new Scheme. Submissions claim this has produced unfair outcomes for some workers.

Some submissions have also stated that the transitional provisions have caused confusion and situations that may be perceived as unfair when it comes to assessing permanent impairment under the new legislation.

6.8.2 Background and Legislative Reference

Two broad options were available when considering compensation available for injured workers with claims lodged prior to 1 July 2015 (ie those who were on the WorkCover Scheme) when the ReturnToWork Scheme commenced:

- For those on the WorkCover Scheme to continue to receive compensation in accordance to the *Workers Rehabilitation and Compensation Act 1986*; or
- For those on the WorkCover Scheme to 'transition' to the new Scheme, and to receive compensation in accordance to the *Return to Work Act 2014*.

It was decided for the *Workers Rehabilitation and Compensation Act 1986* to be repealed and for workers with active claims to be governed by the new Scheme.

SISA believe that the transitional provisions put in place have allowed equity between those who were on the WorkCover scheme, and those whose injuries occur post 1 July 2015 (the designated date).[193]

Schedule 9 of the *RTW Act* outlines the repeal of the old Act, makes mainly administrative amendments to associated Acts (for example changing the terms WorkCover to

[193] Self Insurers of South Australia, above n 90, 15.

ReturnToWorkSA); and provides provisions for the transition of injured workers from the WorkCover Scheme to the Return to Work Scheme.

Part 10 of Schedule 9 states that workers with active claims at the commencement of the *RTW Act* have access to:

- Income support payments for 104 weeks post 1 July 2015 in the amount as outlined below (see Table 4); and
- Medical expenses paid in accordance with section 33 of the *RTW Act* as outlined below (see Table 4).

Table 4: Income support summary for workers with claims prior to 1 July 2015

Income Support at 1 July 2015	Maximum Support as % of NWE		
	First 52 Weeks	Second 52 Weeks	Medical Expenses*
100% of NWE	100%	80%	Up to 27 June 2018
90% of NWE	90%	80%	Up to 27 June 2018
80% of NWE	80%	80%	Up to 27 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

Source: *Return to Work Act* (SA) sch 37.

Workers who have a WPI of 30 per cent or more as assessed under the repealed Act, are deemed seriously injured for the purposes of the *RTW Act*.[194] The transitional arrangements also allow the Corporation to determine workers who do not meet the criteria of 'seriously injured' to be deemed seriously injured.[195]

Submissions were overall supportive and understanding of the requirement for transitional provisions (this being separate from opinion about the transitional provisions themselves). Operating two separate schemes would be difficult, plus would create an inequality for workers depending on when their date of injury was. SISA stated that if the old scheme were allowed to continue to operate with the 'tail' in place, it would have continued to put a strain and significant costs on the Scheme and economy.[196]

> In our submission, the transitional provisions are as well balanced as they can be. No transition between Acts like this can be made without some dislocations. To this extent, the transitional provisions are a compromise of interests – 'swings and roundabouts' to

[194] *Return to Work Act 2014* (SA) sch 9 cl 34(1).

[195] Ibid sch 9 cl 34(3)(a).

[196] Ibid.

> express it colloquially. To alter them would be to upset the balance. We submit that the transitional provisions should not be changed.[197]

This sentiment was echoed by some other employer groups, with the Registered Employers Group believing that it would be 'unfair' to some if the transitional arrangements were changed as, when taken as a whole, achieve the objectives of the *RTW Act*.[198]

However, some submissions were critical of the transitional arrangements, preferring to continue to be governed by the repealed Act, considering the new Scheme unfair. One injured worker wrote:

> Injured workers with WorkCover accepted claims should not be financially disadvantaged due to changes with retrospective effect.
>
> In my situation I made a decision relative to the "rules" at the time. Subsequently the rules were changed. This would have a serious financial impact on my life.[199]

United Voice raised a similar point, stating that long term injured workers were expecting income and medical support to be ongoing, and were reliant on those payments. They expressed concern that there may be devastating consequences for when support is withdrawn. They stated that in particular, these workers should be afforded access to support activities such as retraining, job-search assistance, and psychological counselling.[200]

RTWSA have developed a service which is designed to provide such assistance, called ReCONNECT, which is available for up to 12 months post income support cessation. This is covered in section 6.1.4 of this report.

6.8.3 Transition and Income Support

Whilst, most submissions supported the need for transitional provisions in order to ensure a smooth running of the new Scheme, there is evidence to indicate that 'gaps' in the legislation have resulted in unfair outcomes for some injured workers.

One of the most prominent 'gaps' identified, are for those workers who were not in receipt of income support payments on 1 July 2015 due to reasons such as:

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

In these circumstances, a worker would have had their income support ceased under section 36 of the repealed Act. As per clause 37 of Schedule 9 of the *RTW Act*:

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[197] Ibid 16.

[198] Registered Employers Group, above n 170, 3.

[199] Brian M (Injured Worker, Surname Withheld), above n 35, 2.

[200] United Voice, above n 46, 11.

(6) To avoid doubt, a person who, before the designated day, has ceased to have an entitlement to weekly payments on account of a discontinuance under section 36 of the repealed Act is not entitled to weekly payments under this clause (or under the repealed Act).[201]

During a Committee hearing, the Hon Step Key MP advised Mr Cordiner that she had received complaints by workers who had 'soldiered on' at work despite suffering an employment related injury. She provided an example where she was aware of year 12 teachers who continued to work to ensure that their students could finish the year. [202]

As these workers did not have an entitlement on 1 July 2015, they could not access further income support under the *RTW Act*. This has resulted in workers who assumed that they could resume support should their circumstances change – such as returning from leave, or if they suffered an aggravation during their return to work and required additional time off – not being able to claim income support payments.

Pennington v Return to Work SA [2016] SAET 21

Ms Pennington, a non-seriously injured worker injured her lower back while working with her employer in 2013. She was unable to return to her pre-injury employer, and obtained new employment through the RISE scheme. She continued however to have a partial incapacity for work. Her income support was ceased under section 36(1)(d) of the now repealed Act in September 2014 as she was earning above her average weekly earnings.

On 23 July 2015, three weeks after the commencement of the new Act, Ms Pennington's employment was terminated as her new employer had gone into liquidation and ceased trading.

Ms Pennington applied for her income support payments to be reinstated given her ongoing incapacity, however this claim was rejected on the basis that she was not entitled to income support on 1 July 2015.

The Full Bench found for ReturnToWorkSA, because 'weekly payments to Ms Pennington had been discontinued pursuant to s 36 of the WR&C Act prior to the designated day, RTW SA was correct to have rejected her claim dated 6 August 2015.'

However, while the findings upheld the rejection, the Full Bench did state in their findings:

> 20 It has to be said that the construction urged upon us by Return to Work SA **produces a seemingly unfair outcome** in this case. If Ms Pennington's employment had been terminated a month earlier, she would have had a potential entitlement to weekly payments for up to a further two years, if there was a continuing incapacity for work. If she had resisted attempts to be rehabilitated and was in receipt of weekly payments throughout her incapacity for work she also would have had a potential entitlement to weekly payments for up to another two years.
>
> 21 **It seems odd that her successful rehabilitation and the timing of her employer's demise have bought [sic] about such an unfortunate outcome**.

[201] *Return to Work Act 2014* (SA) sch 9 cl 37(6).

[202] Evidence to the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, Parliament of South Australia, Adelaide, 16 February 2017, 6 (Stephanie Key, Presiding Member).

Such a circumstance has been found to be an 'unfair outcome' as in the case *of Pennington v Return to Work SA* where the declination to have payments reinstated was held to be correct.[203]

The AEU provided an example where one worker became pregnant after having returned to work part time following a compensable injury under the repealed Act. She signed a voluntary discontinuance and accessed maternity leave, with the expectation, that upon the end of her maternity leave, she would recommence income support payments. Whilst she remained partially incapacitated during her leave, upon return, she was denied the resumption of income support payments as the Compensating Authority stated she was not entitled to income support at the designated date.

> But for the fact that this AEU Member became pregnant, had a child and was on maternity leave at the time of the commencement of the RTW Act, she would have continued to have an entitlement to weekly payments.[204]

The AEU provided a further example where one of their members who suffered an injury in early 2015, was off for a short period, before returning to work prior to the commencement of the *RTW Act*. As a result, her income support payments were ceased. After the designated date, she suffered an aggravation and required time off work. Her claim for further income support payments was denied, with the Compensating Authority citing clause 37(6) of schedule 9 of the *RTW Act*. The AEU stated that in this type of situation, workers are angered as they perceive they are at a disadvantage for successfully achieving an early return to work.

Some submissions highlighted that some workers who were incapacitated for work on the WorkCover Scheme, made financial arrangements and plans on the basis that support would continue (prior to the introduction of the *RTW Act*). One worker stated:

> In my situation I made a decision relative to the "rules" at the time. Subsequently the rules were changed. This would have a serious financial impact on my life.[205]

6.8.4 Medical Expenses and Transitional Arrangements

As outlined in Table 4, 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 (see 6.8.2).

6.8.5 Permanent Impairment and Transitional Arrangements

The Police Association of South Australia (PASA) stated that they have some members who have had a permanent impairment assessment completed prior to the commencement of the *RTW Act*, however, not all injuries were assessed as some of them were yet to stabilise. They expressed concern as per clause 44 of the transitional provisions, if a worker was assessed

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[203] *Pennington v Return to Work SA* [2016] SAET 21.

[204] Australian Education Union (SA Branch), above n 48, 6.

[205] Brian M (Injured Worker, Surname Withheld), above 35, 2.

under the repealed Act for the purpose of non-economic loss, they cannot undergo a further assessment under the *RTW Act*.[206]

The Law Society of South Australia stated similar concerns as the PASA, and believe that the transitional arrangements 'need further work'. They propose that workers who have permanent impairment assessments predating the *RTW Act*, should be able to undergo an updated assessment to ensure they obtain accurate compensation, including the potential to be deemed a seriously injured worker.[207]

A worker with a whole permanent impairment of 30 per cent or more as assessed under the repealed Act, is to be taken as seriously injured.[208] The transitional provisions allow the Corporation to determine a worker with an injury that was compensable under the repealed Act as being seriously injured, even if the worker would not normally qualify under the *RTW Act* (that is be assessed as having a WPI of less than 30 per cent.)[209]

[206] Police Association of South Australia, above n 58, 5.

[207] Law Society of South Australia, above n 63, 20.

[208] *Return to Work Act 2014* (SA) sch 9 cl 34(1).

[209] Ibid sch 9 cl 34(2)-(3).

6.9 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;

6.9.1 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*, 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.[210]

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. This section of the report compares some of the broad differences between schemes.

6.9.2 Weekly Payment and Medical Support

Medical Expenses

Jurisdictions differ in the length of time they offer workers payment for medical expenses. However, most jurisdictions either have no time limit, or impose a limit after the expiration of the cessation of income support payments.

Those jurisdictions that do impose a time limit generally have provisions where further medical expenses may be covered. For example, in Victoria, medical expenses may continue to be covered if a worker has returned to work, but would not be able to remain at work if medical services were not provided.[211]

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[210] Business SA, above n 49, 8.

[211] *Work Injury Rehabilitation and Compensation Act 2013* (Vic) s 232(5)(a).

Table 5: Comparison of medical expense coverage across workers' compensation jurisdictions

Jurisdiction	Time Limit
South Australia	12 months after the cessation of weekly payments for non seriously injured workers No limit for seriously injured workers Surgery may be approved outside of this window as long as it is pre approved.
ACT	No limit
Comcare	No limit
NSW	Two years after the cessation of weekly payments. Five year extension available for those with 11-20 per cent WPI No limit for those with greater than 20 per cent WPI
NT	No limit
Tas	52 weeks after the cessation of income support, or 52 weeks after claim lodgement if no income support is payable. An extension may be possible via Order from the Tribunal
Victoria	52 weeks after the cessation of weekly payments. Medical expenses may continue to be covered if: • A worker has returned to work, but could not remain at work if the service was not provided • Requires surgery • Requires modification of a prosthesis Requires modification of a prosthesis
Western Australia	No time limit, however expenses are capped at 30% of the prescribed amount (for the 2016-17 financial year, 30% of the prescribed amount is $66 657). Where a worker's social and financial circumstances justify, and arbitrator may grant a further $50 000. For workers with a WPI of no less than 15 per cent, and who meet an exceptional medical circumstances test, additional medical expenses may be granted.

Source: Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* (2016) 100-106.

Weekly Income Support Payments

Table 6 on the following page provides a comparison of the amount of weekly payments that are made in different jurisdictions across Australia for workers with a total incapacity for work. Schemes provide weekly income support at varying rates, for a minimum of two years.

Depending on the jurisdiction, and with the exception of South Australia, schemes have the ability to continue to provide income maintenance past the two year mark for workers regardless of whether they suffer a permanent impairment. This ability however is subject to either a worker's incapacity (or capacity) to work, and these may not be ongoing.

For jurisdictions where there is a capped timeframe on income support payments, there is generally an ability for ongoing support should the worker meet a minimum permanent impairment threshold.

The figures detailed in the table are the percentages of a worker's pre-injury earnings paid as income support for each week that they are totally incapacitated. The criteria in each jurisdiction varies as to how pre-injury earnings are calculated.

Table 6: Percentage of pre-injury earnings paid in different jurisdictions across Australia over different durations from first date of incapacity for workers who are totally incapacitated and do not suffer from a permanent impairment.

	0-13 Weeks	14-26 Weeks	27-44 Weeks	45-52 Weeks	53-104 Weeks	105-130 Weeks	131-260 Weeks	260+ Weeks	Minimum degree of impairment required for ongoing payments
South Australia	100%	100%	100%	100%	80%	-	-	-	30%
Australian Capital Territory	100%	100%	65%	65%	65%	65%	65%	65%	Not applicable
Comcare	100%	100%	100%	75%	75%	75%	75%	75%	Not applicable
New South Wales	95%	80%	80%	80%	80%	80%	80%	-	20%
Northern Territory	100%	100%	75%	75%	75%	75%^	75%^	-	15%
Queensland	85%	85%	75%	75%	75%	Single pension rate		-	15%
Tasmania	100%	100%	90%	90%	90%-80%	80%	80%	80%	30%~
Victoria	95%	80%	80%	80%	80%	80%	80%*	80%*	Not applicable
Western Australia	Claimants may receive 100% of earnings each week for the life of the claim with total weekly payments being capped at the 'Prescribed Amount'. For the 2016-17 financial year, this is $221 891.								

Note: Where shown above, some jurisdictions in which weekly income support is not ongoing have mechanisms in their legislations to allow for further weekly payments for workers where they suffer a minimum level of permanent impairment. The level of permanent impairment which must be reached, varies between jurisdictions and is shown in the last column of the table.

^Payments may cease if the worker is deemed to have an earning capacity

*The worker must be unfit or be working at least 15 hours per week and is working at their maximum capacity

~WPI less than 15% or not assessed, payments may continue up to 9 years; 15% or more but less than 20% payments for up to 12 years; 20% or more, but less than 30%, payments for up to 20 years.

Source: Adapted from Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* (2016) 23-24.

Permanent Impairment Payments

Workers' compensation jurisdictions make additional payments (in the form of a lump sum/s) to injured workers where they suffer a permanent impairment.

Appendix D contains a table which shows the example payments which may be made in South Australia for various degrees of impairment.

Many jurisdictions require workers to reach a higher benchmark before they can receive lump sum payments for psychiatric injuries. In South Australia, psychiatric injury is not considered when calculating WPI scores.

Table 7: Comparison of permanent impairment payments across jurisdictions

Jurisdiction	Lump Sum Type, Criteria and Limit		
South Australia	**Economic Loss** WPI between five and 29 per cent. Access does not arise because of psychiatric injury, mental harm or noise induced hearing loss. **Maximum amount** $365 864	**Non-Economic Loss** WPI of five per cent or more. Does not arise in relation to psychiatric injury or mental harm **Maximum amount** $493 393	
Australian Capital Territory[212]	**Compensation for Permanent Injury** Payable if a worker suffers from one or more permanent injuries mentioned in schedule one of the *Workers Compensation Act 1951* (ACT). **Maximum amount** $140 239 for a single injury or $210 359 for multiple injuries (amounts as of Sep 2015, CPI indexed quarterly)		
Queensland[213]	**Permanent Impairment (Standard)** Payable to any worker with a degree of permanent impairment.	**Additional Lump Sum** Payable to workers with a degree of permanent impairment of 30 per cent or more. This is in addition to the standard permanent impairment payment.	**Additional Lump sum for Gratuitous Care** Payable to workers with a degree of permanent impairment of 15 per cent or more, and have a moderate to total level of dependency of care for fundamental activities of daily living. No entitlement exists where impairment arises from psychological injury.

[212] *Workers Compensation Act 1951* (ACT) s 51.

[213] *Workers' Compensation and Rehabilitation Act 2003* (Qld) div 4.

Jurisdiction	Lump Sum Type, Criteria and Limit		
	Maximum amount $314 920	**Maximum amount** $314 920	**Maximum amount** $356 745
New South Wales[214]	**Permanent Impairment** Permanent impairment of 10 per cent or more, however for psychological injury must be 15 per cent or more. Except for psychological injuries, exempt workers (including police officers, paramedics and firefighters), are not required to meet a minimum level of permanent impairment. **Maximum amount** $577 050	**Pain and Suffering** Available only to exempt workers (including police officerse, paramedics and firefighters) with a permanent impairment of 10 per cent or more (or 15 per cent or more for psychological injury. **Maximum amount** $50 000	
Northern Territory[215]	**Compensation for Permanent Impairment** WPI of five per cent or more **Maximum amount** $326 497.60		
Tasmania[216]	**Compensation for permanent impairment** WPI of five per cent or more, however for psychiatric impairment WPI must be 10 per cent or more **Maximum amount** $355 169.45		
Victoria[217]	**Non-economic loss** WPI of 10 per cent or more, however for psychiatric impairment WPI must be 30 per cent or more **Maximum amount** $578 760		
Western Australia[218]	**Lump Sum Payment for Specified Injuries** Payable for single or multiple impairments which are listed in schedule 2 of the *Workers' Compensation and Injury Management Act 1981*(WA). A worker who receives a lump sum forfeits payment for income support. **Maximum amount** $221 891		

[214] *Workers Compensation Act 1987* (NSW) pt 3 div 4, pt 19H div 3 s 25.

[215] *Return to Work Act 2016* (NT) sub-div C.

[216] *Workers Rehabilitation and Compensation Act 1988* (Tas) s 71.

[217] *Work Injury Rehabilitation and Compensation Act 2013* (Vic) ss 211-217.

[218] *Workers' Compensation and Injury Management Act 1981* (WA) pt III div 2A.

Jurisdiction	Lump Sum Type, Criteria and Limit	
Comcare[219]	**Economic Loss** Permanent impairment of 10 per cent or more (five percent or more if impairment is hearing loss). **Maximum amount** $183 034.84	**Non-Economic Loss** Permanent impairment of 10 per cent or more (five percent or more if impairment is hearing loss). **Maximum amount** $68 638.10
Note: With the exception of the *Pain and Suffering* payment in NSW, *maximum amounts* are generally indexed taking into account CPI or wage changes. Depending on the jurisdiction, this either occurs annually on 1 January or 1 July, or quarterly.		

Source: Compiled from various sources - Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* (2016) 107-110; and specific parts of legislation as indicated by the corresponding footnote for each jurisdiction.

[219] *Safety, Rehabilitation and Compensation Act 1988* (Cth) div 4.

6.9.3 Access to Common Law

The ability to access common law in workers' compensation has varied from jurisdiction to jurisdiction over time. It is available when employers are negligent and fail to meet their duty of care to employees.

Most jurisdictions require workers to reach a minimum permanent impairment threshold before they can sue their employer. Of the Schemes which have access to common law, South Australia has the highest common law access threshold when compared to the other jurisdictions.

Table 8: Comparison of ability to access common law across workers' compensation jurisdictions in Australia[220]

Jurisdiction	Threshold for access	Type of Damages	Cap
South Australia	Worker must have a WPI of 30 per cent or more.	Economic Loss only	Unlimited
Australian Capital Territory	No threshold	Unlimited	Unlimited
Queensland	Worker must have a degree of permanent impairment of five per cent or more. If the worker has a degree of permanent impairment of less than 20 per cent, the worker must either choose a lump sum or to seek damages. Otherwise, the worker may elect to do both.	Economic and non-economic loss	General damages capped at $349 400. Loss of earnings capped at $4370.70 per week for each week of the period of loss of earnings.
New South Wales	Worker must have a WPI of 15 per cent or more. Claims for permanent impairment lump sum must be settled prior to common law claim.	Economic Loss	Unlimited The common law claim must not be started before six months of the employer being notified of the injury, and not more than three years after the date of injury.
Northern Territory	No access to common law		

[220] Safe Work Australia, above n 16, 120-123.

Jurisdiction	Threshold for access	Type of Damages	Cap
Tasmania	Worker must have WPI of 20 per cent or more	Economic and non-economic loss	Unlimited
Victoria	Worker must be granted a *serious injury* certificate, either by being assessed as having a WPI of 30 per cent or more, or by way of the *narrative test.*	Pain and suffering; and economic loss	Pain and suffering: Not to be awarded if the amount is less than $57 030. Maximum amount payable is $578 760. Economic Loss: Not to be awarded if the amount is less than $59 040. Maximum amount payable is $1 329 350.
Western Australia	Worker must have a WPI of 15 per cent or more. Secondary psychological, psychiatric and sexual conditions are excluded.	Economic and non-economic loss	Where WPI is less than 25 per cent, maximum amount is $447 260. Where WPI is 25 per cent or greater, there is no limit to damages amount.
Comcare	Worker must have a permanent impairment of 10 per cent or more (five per cent for hearing loss)	Non-economic loss	Damages shall not exceed $110 000

Source: Compiled from various sources - Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* (2016) 120-123.

6.10 Injury Scale Value

Term of Reference

(j) The adverse impacts of the injury scale value

6.10.1 Submission Responses

Of the submissions that provided a response in relation to this term of reference, 11 of them advised that they were of the belief that the Injury Scale Value did not have any relevance to the Return to Work Act or Scheme with some stating that the matter instead relate to motor vehicle accidents.[221]

[221] See, eg, Law Society of South Australia, above n 63, 9.

7.0 OTHER RELEVANT MATTERS

Term of Reference

(k) Any other relevant matters.

7.1 Service Delivery and Return to Work Support

Besides the change in legislation, one of the most significant parts of the Scheme reform was the change in service delivery model from an adversarial medico-legal model to a recovery and return to work one that involves a stronger focus on customer service.[222]

7.1.1 Complaints about the Scheme

RTWSA attribute moving to a scheme with a stronger service focus as the reason for a reduction in complaints they have received since the Scheme's implementation. In Figure 4, it can be seen that since the introduction of the Return to Work Scheme (FY 2015), there has been a significant reduction in complaints received from workers.

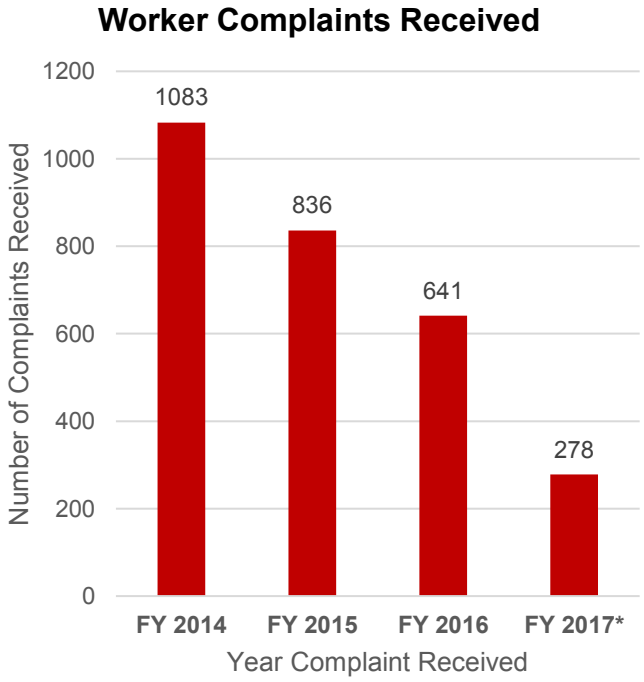

*figure is as of January 2017

Figure 4: Number of complaints received by RTWSA and Agents from workers[223]

Source: ReturnToWorkSA, Submission No 41, *Inquiry into the Return to Work Act and Scheme*, 31 January 2017, 3.

[222] ReturnToWorkSA, above n 19, 22.

[223] ReturnToWorkSA, Submission No 41, *Inquiry into the Return to Work Act and Scheme*, 31 January 2017, 3.

Mr Cordiner, CEO of RTWSA, stated that while not denying any issues which they may have, 'over 50 per cent, of the complaints [RTWSA is receiving are] from people who are from the old scheme.' Mr Cordiner opined that 'by the time we move on another year or two, [the complaint level] is likely to be even lower than this simply because the new scheme is generating hardly any.'

> The majority of the complaints are still about access to benefits for people in the old scheme. I thought the Committee would probably want to know that that's the significant issue. Albeit the complaint numbers are significantly down, that's a live issue…[224]

Ombudsman

The Ombudsman plays an important role as an independent body of review. For example, the Victorian Ombudsman conducted a review of complex cases in the Victorian workers' compensation scheme after concerns were raised that WorkSafe agents were making 'unreasonable decisions to reject or terminate claims.'[225] The Ombudsman found some workers were experiencing 'genuine hardship and distress' while all five of the Scheme's agents were 'gaming' the system by making poor decisions to terminate workers from the Scheme. It also found that as agents received financial reward for terminating claims,

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

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,* complaints about employers failing to comply with their obligations, as well as matters relating to the provision of effective rehabilitation and their return to work.[227]

The *RTW Act* saw the WorkCover Ombudsman abolished[228], 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 services standards of the *RTW Act*, as well as complaints relating to acts of the RTWSA and Crown agencies.

Should an investigation occur, the Ombudsman has the power to recommend that RTWSA, the claims agent of self-insured employer complete one or more of the remedy actions as per schedule 5, part 7 of the *RTW Act*. These remedies include the provision of an apology, or

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[224] Rob Cordiner, above n 53, 5.

[225] Victorian Ombudsman, 'Investigation into the Management of Complex Workers Compensation Claims and Worksafe Oversight' (Report, 12 September 2016) 4.

[226] Ibid 9.

[227] *Workers Rehabilitation and Compensation Act 1986* (SA) s 99D

[228] *Return to Work Act 2014* (SA) sch 9 cl 57.

written explanation, a meeting with the worker or employer to consider their views in order to achieve a resolution, or any other reasonable steps to remedy the matter.

While such a culture of poor decision making has not been found in South Australia, it demonstrates the important role of the Ombudsman.

In the first financial year of operation, Ombudsman SA received 424 complaints[229], with the greatest number of complaints being about breaches of the service standards which state 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.[230]

7.1.2 Early Intervention

Providing early and meaningful intervention after a worker suffers a workplace injury is crucial to supporting early return to work. Such a premise is ingrained in the *RTW Act* evident in a variety of ways including:

- The primary objective of the Scheme is to provide early intervention in respect to claims to support the realisation of the health benefits of work, in recovering from injury, in returning to work, and in being restored to the community.[231]
- Obligations on the Corporation to adopt a service orientated approach that is focused on early intervention.[232]
- For injured workers to expect the provision of early intervention by the Corporation in providing recovery and return to work services.[233]
- The need for Recovery and Return to Work Plans to be implemented if a worker is or is likely to be incapacitated for 4 weeks or more, compared to 13 weeks in the repealed Act.[234]
- The inclusion that the Corporation will ensure that there is an early and timely intervention occurs to improve recovery and return to work outcomes.[235]

The *RTW Act* is clear now that an injured worker is to expect early intervention by the Corporation in providing recovery and return to work services.[236]

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[229] Ombudsman SA, 'Annual Report 2015/2016' (Annual Report, 2016) 57.

[230] Ibid 58.

[231] *Return to Work Act 2014* (SA) s 3(1).

[232] Ibid s 13.

[233] Ibid s 15.

[234] Ibid s 25.

[235] Ibid sch 5 cl 4.

[236] Ibid s 15(1).

As mentioned, with the new Scheme came improvement to service delivery as well as improved early intervention support. In his evidence to the Committee, Mr Cordiner stated that

> it is now possible for an employer when they receive notification of an injury … to simply ring the claims agent and notify the claim over the phone. The triage process starts on the phone to determine whether this is an employer and a worker who need significant help. If they do need significant help … we mobilise someone, ideally within two days, to get out to that workplace with that worker and with that employer to help sort out what it is we need to do to assist that person to recovery, stay at work or return to work.[237]

7.1.3 Mobile Claims Managers

A new feature of the Scheme is the utilisation of *mobile claims managers* by the two claims agents. Mobile claims managers are tasked with providing personalised, face-to-face services for employers and workers.[238] This assists the Corporation to meet its legislative requirement to provide face-to-face service wherever possible and there is a need for significant assistance[239], which is another new feature of the *RTW Act*.

In their latest annual report, RTWSA reported that there are 107 trained mobile claims managers, who have completed, at the time of the report, 16 698 face-to-face visits on 6 224 claims. According to the report, RTWSA try to ensure a lower average case load[240] as a way to promote the delivery of prompt and proactive services on claims.[241]

Mr Cordiner gave evidence that mobile claims management is being well received by employers and injured workers. Through RTWSA's net promotor score surveys of customers who had received face to face service, 80 per cent of returned responses rated the service a score of seven or more, with 50 per cent rating the service either a nine or 10 out of 10 (see Figure 5). He stated that a zero means that the service was rated as 'hopeless,' while a ten means that the service 'was so good people would recommend us to someone else if [it] were a competitive market.'[242]

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[237] Rob Cordiner, above n 53, 1.

[238] ReturnToWorkSA, above n 19, 15.

[239] *Return to Work Act 2014* (SA) s 13.

[240] When compared to the case load of an in-office case manager.

[241] ReturnToWorkSA, above n 19.

[242] Rob Cordiner, above n 53, 2.

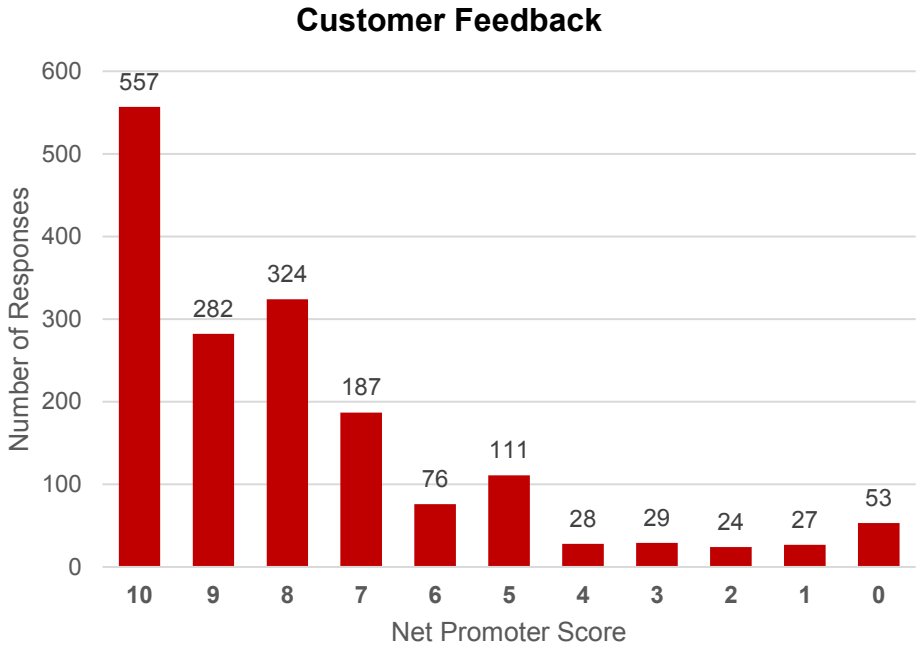

Figure 5: Customer feedback in relation to face to face services

Source: ReturnToWorkSA, Submission No 41, *Inquiry into the Return to Work Act and Scheme*, 31 January 2017, 2.

In relation to the instances where poorer scores were received, Mr Cordiner stated that

> zero means that people think we are absolutely hopeless, so we look carefully at all the [scores] in that four to zero [range]. There's a fairly high correlation because we haven't got names and things like that all the time[243], but actually some of the people who are really angry do tell you. There is a fairly high correlation between us accepting a claim that the employer doesn't want accepted and getting a zero, or us denying a claim that the worker expected to have accepted. I guess that's entirely understandable where the service experience has been overridden by the disappointment with the outcome.

Mr Cordiner further explained that in instances where poor scores are received, and where respondents have provided sufficient contact details, RTWSA makes contact with them to find out what went wrong, to fix what went wrong and to improve the service. Mr Cordiner stated that RTWSA have found

> that's actually the beginning of getting people re-engaged who have been unhappy. For us, it's following up on the poor service experience because it's done live and not after the event. This is while people are still receiving services, not when it's over.

Employers were positive about mobile claims managers, with the Australian Hotels Association who stated that the intention of the mobile claims management system has improved the working approach of triage to the acceptance and management of claims:

[243] The Net Reporter feedback survey is confidential, and respondents are not required to provide their name or claim details.

> The ongoing application of this approach, based on continuing liaison / communication between all the triage parties will continue to improve the management of the claims and returning injured workers back to work.[244]

While generally well received by employers and injured workers of the Scheme, the Australian Rehabilitation Providers Association (ARPA) raised concerns about a lack of consistency across agents regarding mobile claims managers, with one agent calling them 'Return to Work Specialists.' ARPA state that this may create a misconception about the individual, and 'connotes a level of independence that they do not have,' in addition to creating

> confusion about the role of Rehabilitation Consultants, who are appropriately trained and resourced to deal with complex worker issues but who may seem less qualified simply because of their job title[245]

7.1.4 Other Scheme Supported Services

ReSkilling

RTWSA has developed a new programme called ReSkilling – and it is intended to 'provide effective skill maintenance or training to support an injured person in the following scenarios':[246]

- Where the worker is unable to return to their pre-injury employer until fully recovered (due to the nature of the injury and the duties available at the employer), but during the recovery the worker is able to complete alternate duties in a different environment. In this instance, the programme can assist with skill maintenance and provide a motivating work environment.
- Where the worker is not able to return to work with their pre-injury employer, ReSkilling will help the person identify existing skills, develop new skills and employment prospects suited to their circumstance.[247]

There are five suppliers of the service to RTWSA and all have direct links with key industries.[248] Suitable workers are identified by their claims manager, and a referral can then be made to the programme.

Re-employment Incentive Scheme for Employers (RISE)

The Re-employment Incentive Scheme for Employers (RISE) programme incentivises employers to help people who have been injured at work to return to meaningful employment should they be unable to return to their pre-injury employer.

Businesses which utilise RISE are able to access the following benefits:

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[244] Australian Hotels Association (SA), above n 190, 5.

[245] Australian Rehabilitation Providers Association, above n 172, 2.

[246] Return to Work SA, above n 19, 23.

[247] Ibid.

[248] Ibid.

- Reimbursement of up to 100% of gross wages for the first 4 weeks of employment followed by 50% of gross wages for the following 22 weeks.
- Support from the case manager to ensure there is a smooth transition into the new role.
- Payments to cover minor workplace modifications and equipment to assist the worker.[249]

ReCONNECT

Mr Cordiner stated in evidence that RTWSA has listened to injured workers who have expressed concerns about their finances after their income support ends. He advised that RTWSA are supporting injured workers in a number of ways. He provided an example of how RTWSA organised 'people from social security' to meet with some workers in efforts to try and 'ease the journey' and 'make certain that people are well-informed.'[250]

Mr Cordiner advised that it is important that people understand that it is not the 'WorkCover Scheme or nothing,' and there is a community safety net funded by the taxpayer to support people after they exit the Scheme.[251]

Run by RTWSA, ReCONNECT is a free and voluntary service which is 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.'[252]

The service is available for 12 months, and during this time an advisor can assist injured workers to access support services on:

- Finances
- Housing
- Volunteering
- Looking for a job (eg resume writing, and job seeking techniques)
- Preparing for a job interview (eg interview techniques, referees)
- Training and development
- Family support
- Support at home
- Transport.[253]

In 2015-16, 107 clients were supported by ReCONNECT.[254]

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[249] 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>.

[250] Rob Cordiner, above n 53, 8.

[251] Ibid.

[252] ReturnToWork SA, 19, 25.

[253] ReturnToWorkSA, 'ReCONNECT' (Information Sheet, December 2015).

[254] ReturnToWork SA, 19, 25.

7.1.5 Return to Work Service Providers

Return to Work Services are provided by approved and registered providers of the Scheme. A case manager may refer a worker to a return to work service provider for specialist support, including:

- Assistance at the pre-injury workplace
- Fit for work
- Job placement and support
- Assessments
- Mediation
- Other services that might assist return to work[255]

In 2011, an independent review of vocational rehabilitation[256] in South Australia found that

> The [WorkCover] scheme shows little evidence of improved return to work performance, in spite of very heavy referrals to and cost of vocational rehabilitation compared to comparable schemes. [257]

It also stated that

> return to work outcomes remain poor, while the cost of vocational rehabilitation is high… Moreover, the nature of the rehabilitation services seems more frequent and prolonged than in other jurisdictions.[258]

In 2012, the Committee completed its *Inquiry into Vocational Rehabilitation and Return to Work Practices for Injured Workers in South Australia.* The Committee made a number of findings including the lack of a clear and reliable method for monitoring rehabilitation provider performance. They also heard evidence where referrals were being preferred to providers based on pre-existing relationships instead of outcomes achieved and in some instances, providers were completing claims management activities.[259]

The Australian Rehabilitation Providers' Association (ARPA) which represents the rehabilitation industry, in their submission stated that in recent years there has been a reduction in the use of the specialised services of return to work services providers, while there has been an increase in claims management fees. ARPA stated that

> South Australian injured workers and their employers may be left with the poorest quality rehabilitation services in Australia with a workers' compensation scheme that is effectively limited to two years for all but the most severely injured.[260]

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[255] ReturnToWorkSA, *Return to Work Services*, (4 April 2017) < https://www.rtwsa.com/service-providers/supporting-return-to-work/return-to-work-services>

[256] The term 'vocational rehabilitation' has been replaced with 'return to work service' as part of the Scheme reform.

[257] PricewaterhouseCoopers, above n 6, 4.

[258] Ibid.

[259] Parliamentary Committee of Occupational Safety, Rehabilitation and Compensation, above n 9, [3.6].

[260] Australian Rehabilitation Providers' Association, above n 172, 3.

In their submission, ARPA acknowledged the period of increasing return to work service expenditure even though return to work rates were decreasing. However, they stated during a number of reviews they

> discussed this issue and expressed concern that rehabilitation costs, like many aspects of the scheme, appeared to have been inadequately managed. Rehabilitation expenses were often used for claims management purposes in South Australia. This has been a practice on occasion in other schemes but lasted for a number of years in the South Australian environment. More sound management under the National Framework Principles of the RTWSA scheme would have resolved that issue.[261]

7.1.6 Support Outside of the Metropolitan Area

In the 2015-16 financial year there were 12 580 accepted claims from registered employers where the registered employer location was within South Australia. Of these, 24.7 per cent (3101 claims) were located outside of the Adelaide Hills and metropolitan area.

One worker who lives in Roxby Downs submitted that he was assigned a Return to Work Consultant to support him with his retraining and return to work. He stated his Consultant worked out of Wallaroo which is around a 4.5 hour drive from where he lives and due to the distance had only met her once since she was assigned. He stated:

> As I live in Roxby, and sometimes I feel that the system discriminates against people who live far from the city.
>
> I have a young family with a new born baby – I am determined to return to work, but I need the support.[262]

[261] Australian Rehabilitation Providers' Association, above n 172, 8.

[262] Joe T (Injured Worker, Surname Withheld), Submission No 43, *Inquiry into the Return to Work Act and Scheme,* 14 February 2017, 3.

7.2 Return to Work Rate

A review of the return to work rate as an indicator of the success of the new Scheme is important. Besides it being one of the driving forces for the reform of the WorkCover Scheme, it is also a measure of how well the Return to Work Scheme is performing to meet one of its most core objectives.

The definition of what is classed as a *return to work* differs depending on the authority 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 payments; or
- Returned to work, completing any hours; or
- Are no longer in receipt of weekly payments, regardless of whether they have not returned to work (for example, payments are ceased due to reasons such as non-compliance).

When questioned during the Committee stage of the Return to Work Bill in relation to the inclusion of a definition for *return to work* in the *RTW Act*, the Hon John Rau MP, Minister for Industrial Relations stated that

> there is no definition of 'return to work' here. The second thing is that that is basically in common with the existing legislation. The courts have over many years expressed opinions about what is meant by 'return to work'. In effect, we are not wishing to disturb that case law by going into some definitional attempt here. Return to work is a complex thing; it sounds simple, but its not. By not attempting to define what in many respects is almost undefinable, strangely enough, we are looking back on the existing case law and saying, 'If you want guidance as to what "return to work" is, look to that.

In Australia each year, Safe Work Australia produces the *Return to Work Survey,* in which return to work rates are compared between workers' compensation jurisdictions. The survey replaces the Return to Work Monitor previously published by the Heads of Workers' Compensation Authorities.

Safe Work Australia produces two sets of *return to work* statistics:

- **Returned to Work Rate:** The percentage of workers who had:
    - Submitted claims for compensation 7-9 months prior to the survey
    - Were employees from non-self insured employers
    - Who had 10 or more days off of work (in South Australia, the measure is based on those who had more than 10 days off); and
    - Returned to work at any time since the injury (they do not need to be at work at the time of the survey).
- **Current Return to Work Rate:** This measure has the same criteria as the Returned to Work Rate, however workers must be at work at the time of the survey.[263]

[263] Safe Work Australia, 'Return to Work Survey: 2016 Summary Research Report *Australia and New Zealand), 18 October 2016), 15-18.

The latest survey was conducted via telephone interview for those workers with a claim date between 1 March 2014 and 31 January 2016. Data collected shows for the past five financial years, South Australia has continued to experience return to work rates lower than other jurisdictions, and consistently falls below the national average (see Figure 6
Figure 7).

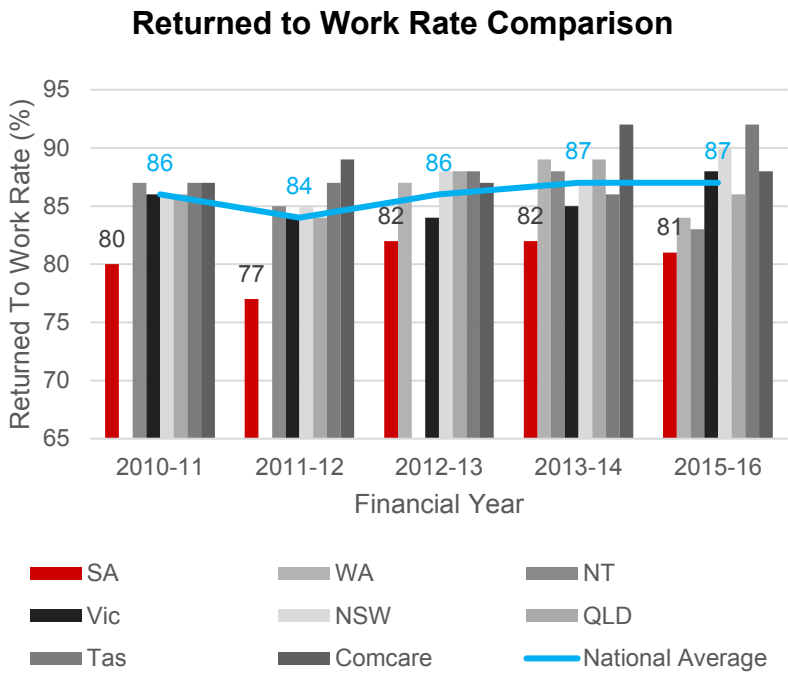


Figure 6: Returned to Work Rate between 2010-11 and 2015-16 across Australia

Source: Safe Work Australia, *Return to Work Survey: 2016 Summary Research Report (Australia and New Zealand)*, (2016) 17.

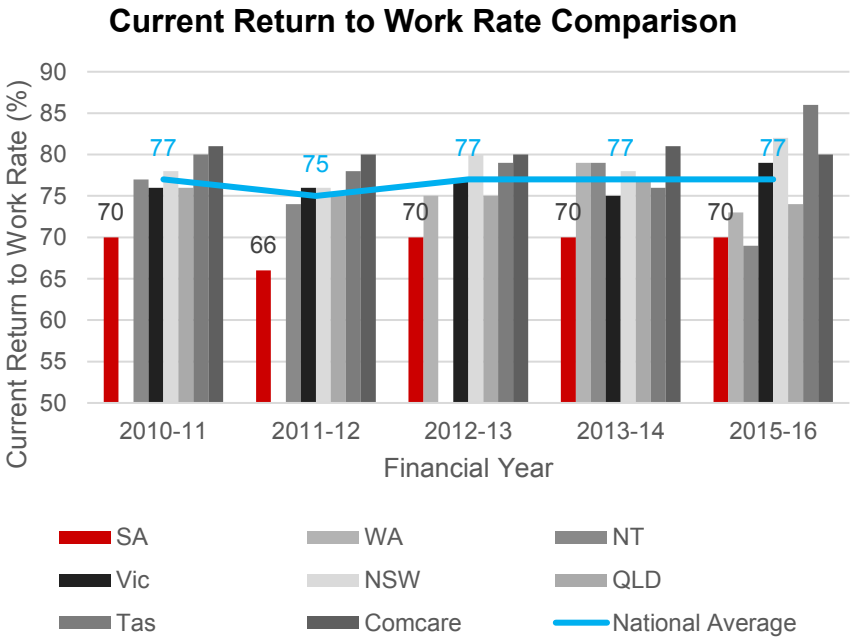
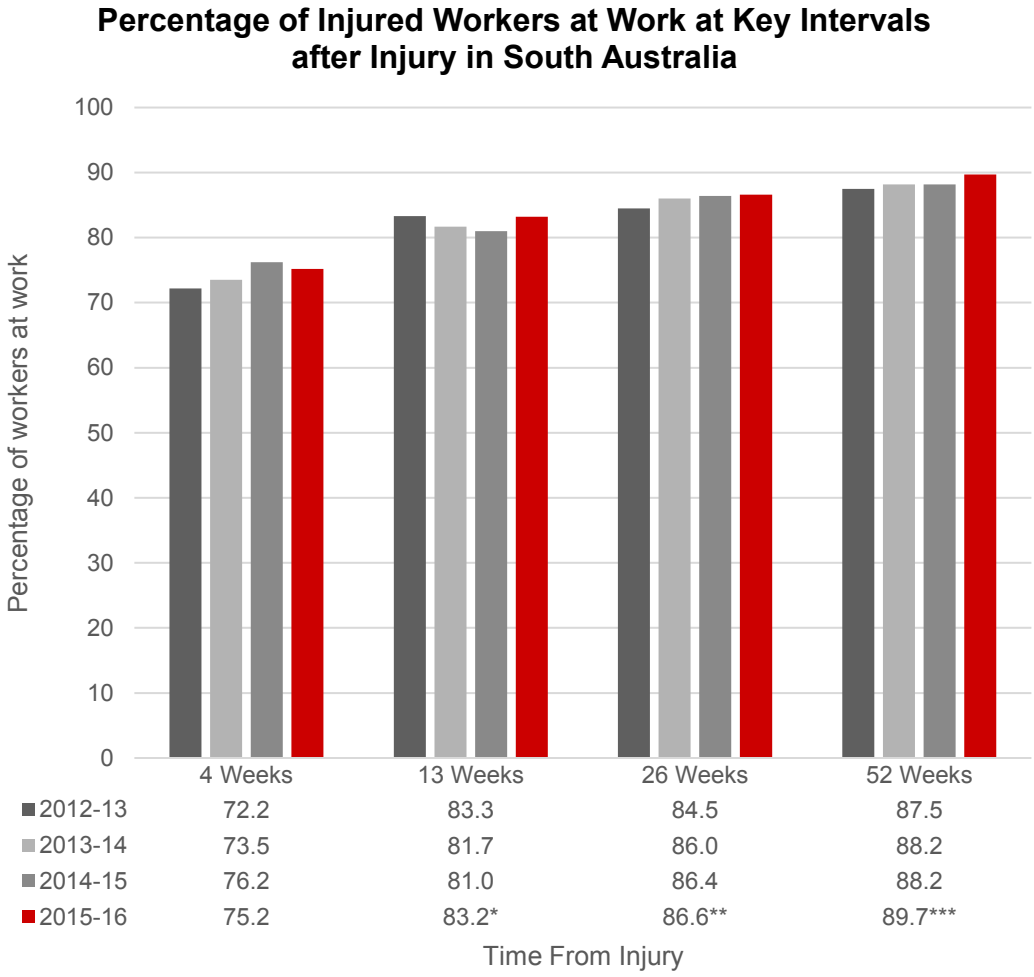


Figure 7: Current Return to Work Rate between 2010-11 and 2015-16 across Australia

Source: Safe Work Australia, *Return to Work Survey: 2016 Summary Research Report (Australia and New Zealand)*, (2016) 20.

Given the different definitions of return to work, it is understandable that return to work data produced by RTWSA is different from that released by Safe Work Australia.

Figure 8 shows the percentage of injured workers who were at work at key intervals after their injury as provided by RTWSA.



*9 months to March 2016 **6months to December 2015
***This figure was provided by Mr Rob Cordiner in evidence

Figure 8: Percentage of Workers at Work at Key Intervals after Injury as provided by RTWSA[264]

Source: ReturnToWorkSA, '2015-16 Annual Report' (Annual Report, 2016) 9

In relation to the above return to work rates, Mr Cordiner stated that the rate at four weeks is the most volatile measure as 'what happens in the first four weeks is so variable depending on treatment. It's not always that high it's sometimes higher. Add five per cent either way and you have that measure.'[265]

[264] ReturnToWorkSA, above n 19, 9.

[265] Rob Cordiner, above n 53, 5.

Mr Cordiner also stated that in relation to the 13 week measure of 83.2 per cent, RTWSA is 'now consistently hitting what is probably as good as it will get – unless there is a huge improvement in the economy.'[266] In relation to the return to work rate at 52 weeks, it is

> a little better than the old scheme. It's consistent with the rest of the country. I think, if we extrapolate that out to the end of two years, we would expect that to 94 per cent of people, maybe.[267]

While this figure is better than the 2013-14 and 2014-15 rates, it is slightly poorer than the 2012-13 rate.

Mr Cordiner confirmed that the return to work rate remains 'probably the biggest focus in our contract with our claims agents. It's the thing they get reward for. They get rewarded for return to work and paying people on time.'[268]

[266] Ibid.

[267] Ibid.

[268] Ibid.

7.3 Disputation

The South Australian Employment Tribunal (SAET) was established by the *South Australian Employment Tribunal Act 2014* and came into operation on 1 July 2015. It replaced the Workers Compensation Tribunal (WCT). There are three types of applications which can be made to the SAET under the *RTW Act*:

- A decision to be reviewed (a list of reviewable decisions are outlined in section 97 of the *RTW Act*);[269]
- A decision to be expedited;[270] or
- For the provision of suitable employment.[271]

Any disputes which were handled by the WCT prior to the commencement of the SAET were either finalised by the WCT or resolved to a point where they could be transferred to the SAET.[272]

The SAET is focussed on providing just and timely dispute resolution.

> This was opened with the objective of providing resolution of disputes through high quality processes, the avoidance of formality and technicality as far as possible and the use of mediation and alternate dispute resolution procedures wherever appropriate.
>
> Consistent with its objectives, the South Australian Employment Tribunal is processing applications and resolving disputes as quickly as it possibly can whist achieving just outcomes for the parties involved.[273]

Efforts to provide more timely resolution to disputes is evident in data according to the Hon John Rau MP who stated in a news release that

> [m]atters resolved at conciliation are taking an average of nine weeks, compared to 28 weeks in the previous Workers Compensation Tribunal. Matters that do not resolve at conciliation, take an average of 25 weeks from lodgement to decision, compared to 48 weeks in the Workers Compensation Tribunal.[274]

The SAET has also made efforts to update and modernise its service delivery, now processing applications within 24 hours of receipt, seeing matters referred to conciliation within two days of lodgement, and direction hearings within three weeks of lodgement.[275]

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[269] *Return to Work Act 2014* (SA) s 97.

[270] Ibid s 113.

[271] Ibid s 18.

[272] South Australian Employment Tribunal, 'Dissolution of the Workers Compensation Tribunal' (News Release, 4 March 2016).

[273] South Australia, *Parliamentary Debates,* House of Assembly, 24 March 2016, 4936-4937 (John Rau, Minister for Industrial Relations).

[274] John Rau, 'SA Employment Tribunal Kicking Goals' (News Release, 11 April 2016).

[275] South Australian Employment Tribunal, 'Annual Report 2015-16' (Annual Report, 2016) 8.

Along with speedier dispute resolution in the SAET, the new Scheme's focus on better service has also helped to reduce the number of new disputes lodged in relation to claims by 52.3 per cent to 2 308 received in the 2015/16 financial year.[276]

When providing further information on the number of disputes lodged (as shown Figure 9), Mr Cordiner confirmed that the number of disputes received, on average, are reducing over time. He noted a spike in applications the SAET received in August 2016 and advised that this was because approximately 1 300 workers applied for preapproval of medical expenses (as there was a cut off date at the end of June 2016), with a significant portion of those applying for expedited decisions in July and August. Mr Cordiner stated this was a 'once off' had to do with a transitional clause and timing.[277]

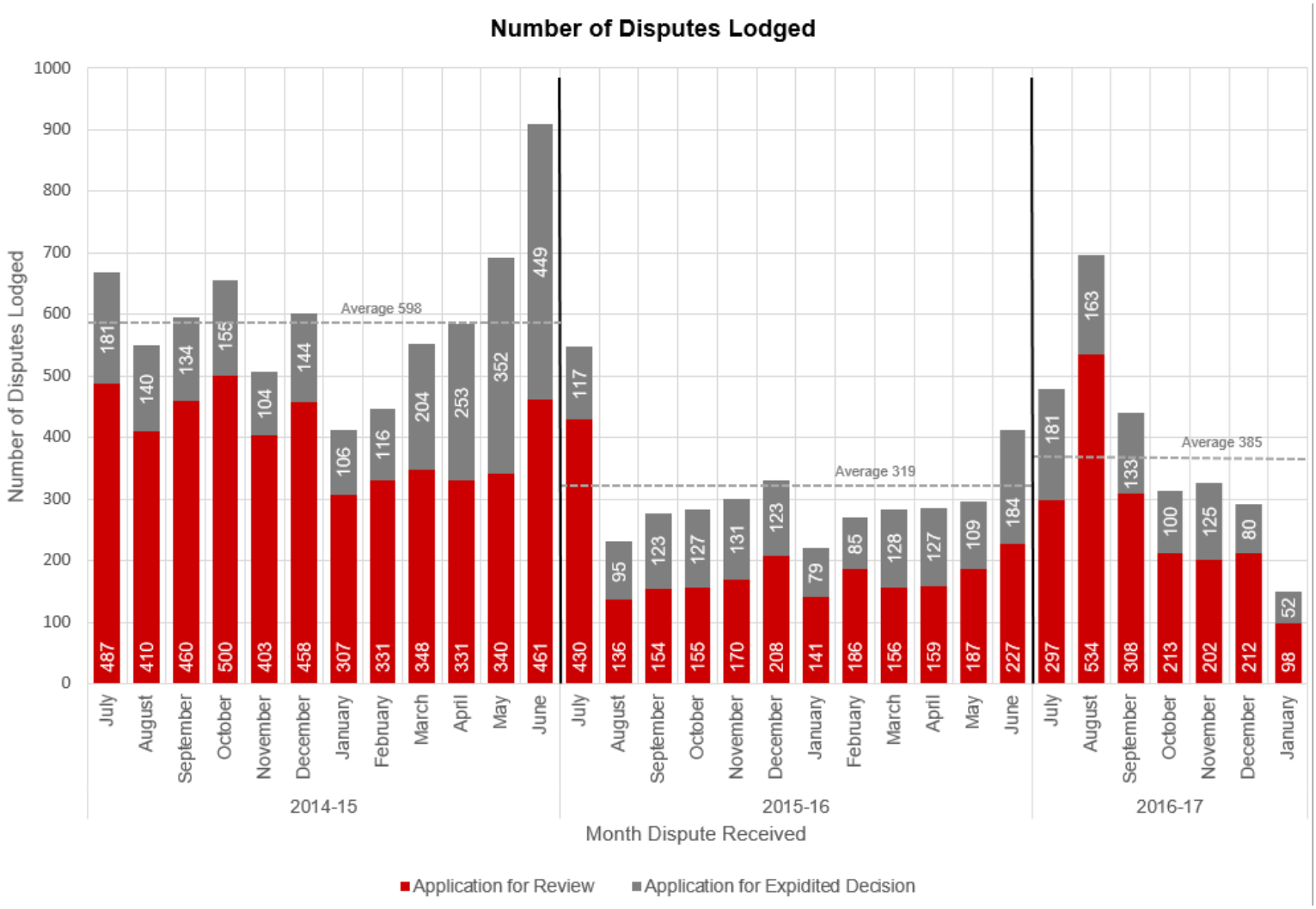

Figure 9: Disputes lodged per month

Source: ReturnToWorkSA, Submission No 41, *Inquiry into the Return to Work Act and Scheme*, 31 January 2017, 5.

[276] ReturnToWorkSA, above n 19, 22.

[277] Rob Cordiner, above n 53, 6.

Mr Cordiner stated once the disputes relating to the transition period have been finalised, it is expected the SAET will see disputes at one-third the level of what was occurring under the WorkCover Scheme.[278]

While the SAET initially commenced hearing workers' compensation matters, the South Australian Parliament passed legislation in late 2016 to expand the range of disputes to be heard by the SAET.[279] With the aim to commence from 1 July 2017, besides workers compensation matters, the SAET will start to hear issues which previously went to the Industrial Relations Court and Commission, Equal Opportunity Tribunal matters relating to employment, and common law employment contract disputes. The amendment Act will also see the establishment of the South Australian Employment Court which will hear matters criminal proceedings for industrial offences amongst other matters.[280]

[278] Ibid.

[279] *Statutes Amendment (South Australian Employment Tribunal) Act 2016* (SA).

[280] South Australian Employment Tribunal , *SAET Expansion,* (10 February 2017), < http://www.saet.sa.gov.au/about-saet/saet-expansion/>.

7.4 Lump Sum Payments

In evidence during a Committee hearing, Mr Cordiner stated:

> In the scheme, if you have a whole person impairment that is between 5 per cent and 29 per cent, then there is an automatic lump sum: you don't go to court and fight about; it's automatic. There are, in fact, two automatic lump sums under the new benefit package that was introduced by Parliament. One of those is for non-economic loss issues, like pain and suffering, in the old language, and the other one is for future economic loss, in the current language.[281]

There are three types of lump sum payments which exist (however, only the last two are actively utilised by the Scheme, with redemptions mainly reserved for self-insured employers):

- Redemptions;
- Economic Loss; and
- Non-economic Loss.

Depending on any WPI assessments, payment amounts for economic and non-economic loss are regulated in the Regulations. The table in Appendix D shows the lump sum payment amounts available to injured workers, depending on their age, WPI, and whether they were working full-time or not at date of injury.

Mr Cordiner stated in evidence that the new Scheme now provides injured workers with permanent impairments to generally receive a larger lump sum amount than in the WorkCover Scheme.[282]

7.3.1 Redemptions

Redemptions are lump sum payments made to workers in exchange for the worker to release RTWSA of any further liability on the claim. This means that a worker will not be receive further support from the Scheme (in respect to that particular claim) once the payment occurs.

Redemptions are currently not utilised by RTWSA and its agents.

Ms Nikolovski raised a concern in relation to the removal of redemption payments:

> They have also taken away, except for exempt employers, the ability to redeem a claim. ReturnToWorkSA currently has a policy that there are no redemptions to be allowed, so that means that usually in a psychiatric injury you are able to redeem, and because it is obviously an industrial stressor, their return to work at that place of employment is probably not the best for them in any event.[283]

SISA submitted in their second submission that they

> observed in [their] September 2016 submission that one factor that might affect the future management of the scheme is the income tax status of income redemption lump sums.

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[281] Rob Cordiner, above n 53, 11.

[282] Ibid.

[283] Amy Nikolovski, above n 98, 21.

> Since then, the Australian Taxation Office has ruled[284] that such payments are taxable as income. Some of our members are now reporting that this has made the negotiation of income redemptions payments much more difficult and will inevitably increase costs to our members and the rest of the scheme.[285]

7.3.2 Economic Loss

The *RTW Act* introduces payments for economic loss as per section 56. Restricted to workers who suffer a WPI of between five and 29 per cent for physical injuries.

> [I]t's for those who get over that 5 per cent threshold but who would not be entitled to ongoing weekly payments after the two-year cut-off date. As I understand it, this was inserted into the legislation to part compensate those who would suffer from having their payments cut after two years.[286]

Economic loss payments do not arise in relation to psychiatric injury, consequential mental harm or noise induced hearing loss.[287]

Mr Harbord stated that

> 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 provision. Again, in my view, that is illogical.[288]

Some submissions stated that while there would potentially be adverse impacts on the new time cap for income support payments, the 'enhanced entitlement to lump sum payments' adequately covers the reduction in weekly payments.[289]

The economic loss payment takes into account a worker's WPI, age at the time of injury as well as the percentage of full-time hours they were working.

7.3.3 Non-Economic Loss

A second lump sum payment for non-economic loss is available under section 57 of the *RTW Act*. This payment, commonly known to cover injury consequences of 'pain and suffering', is available to workers with a WPI of five per cent or more for physical injury. Like the economic loss payment, access to a non-economic loss lump sum payment does not arise in relation to psychiatric injury or consequential harm.[290]The non-economic loss payment takes into account a worker's WPI.

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[284] See, Commissioner of Taxation, *Income Tax: Is a Redemption Payment Received by a Worker under the* Return to Work Act 2014 *(SA) assessable income of the worker?*, TD 2016/18, 23 November 2016.

[285] Self Insurers of South Australia, Submission No 42, *Inquiry into the Return to Work Act and Scheme,* 2 February 2017 2.

[286] Graham Harbord, above n 83, 98.

[287] *Return to Work Act 2014* (SA) s 56(3).

[288] Graham Harbord, above n 83, 98.

[289] Local Government Association, above n 88, 6.

[290] *Return to Work Act 2014* (SA) s 58.

7.5 Premiums and Scheme Costs

The Return to Work Scheme is mostly funded by collecting premiums from registered employers along with the self-insurance fees from self insured employers. RTWSA sets and collects premiums from employers, and has the additional responsibility of underwriting the scheme and managing funds.[291]

The premium rate is set as a percentage of the total remuneration paid to employees during a financial year by an employer. Given this, premium costs need to carefully balance covering the Scheme's costs, while also not imposing a premium that is a burden on employers. As workers' compensation is an additional cost to employers, it is said that if the cost is too high, it makes conducting business in South Australia less attractive to businesses, and those business that do, a high premium is most likely going to impact staffing levels and salaries to make business operations affordable.

As mentioned previously, South Australia's average premium rate had become one of the highest in the country, and there this was causing some concern in the state.

During a Private Member's Motion in relation to the troubled WorkCover Scheme, the Member for Morphett stated that he was aware of a number of businesses whose WorkCover premiums were increasing. In relation to one business and the impact the premiums were having, the Member stated the employer

> is considering closing because of the increases in WorkCover. We certainly know that business costs in South Australia, besides WorkCover, are very high. WorkCover, in this case, the straw that is going to break the camel's back.[292]

As part of the Scheme reform, RTWSA consulted with employer associations and employers about the WorkCover insurance premium, and it was agreed that a simpler premium system was needed. A new system was proposed, and agreed upon, and it commenced on 1 July 2015. This new premium system, along with the changes in the Scheme, saw the average premium rate drop from 2.75% to 1.95% which represented in $180 million savings for employers in 2015-16.[293]

An employer's RTWSA premium calculation is now based on:

- A percentage of the annual remuneration rate which is paid to employees (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 employers in higher risk industries (such as manufacturing or aged care); and
- Income support costs paid to worker's with claims in the previous year.[294]

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[291] Safe Work Australia, above n 16, 218.

[292] Parliament of South Australia, *Parliamentary Debates,* House of Assembly, 12 September 2013, 6899 (Dr Duncan McFetridge).

[293] ReturnToWorkSA, '2014-15 Annual Report' (Annual Report, 2015) 24.

[294] Jane Yuile, 'RTWSA Premium Order (Return to Work Premium System) 2016-2017' in South Australia, *The South Australian Government Gazette*, No 27, 12 May 2016, 1424.

By including an employer's income support costs, this premium system encourages employers to be proactive and supportive of their injured workers in achieving an early return to work. If workers are supported to return to work sooner, they are less reliant on income support from the Scheme, which then reduces the impact on the employer's premium.[295]

Mr Cordiner stated as at the end of December 2016, the Scheme was running within the 1.95 per cent average premium rate – meaning the Scheme was collecting enough from premiums to fund the future costs of the Scheme for claims incurred this year. He did note however, as funds are heavily invested to ensure value on return, if something were to go wrong with the investment market, 'then that would be a problem.'[296]

Mr Cordiner also stated the premium is probably 'stable and, if [the Scheme continues] the same types of recovery and return to work rates, then in the longer term there's probably an opportunity for a lower premium for the state.[297]

Since the introduction of the simplified premium system, employer premium disputes are down by 61.5 per cent.[298]

A comparison of average premium rates can be seen in Figure 10. The figure shows the average premium rate across jurisdictions. It should be noted that for years 2010-11 to 2014-15 inclusive, these are standardised figures as calculated by Safe Work Australia to allow for more accurate jurisdictional comparisons. The principal adjustments which have been made take into account: the exclusion of the provision for coverage of journey claims; inclusion of self-insurers; inclusion of superannuation as part of remuneration; and the standardisation of non-compensable excesses imposed by each scheme.[299]

The rate shown in the 2015-16 is not standardised as this figure has not been calculated in the latest comparison report form Safe Work Australia. These amounts have been sourced from individual jurisdiction's annual reports.

Finity provided data on the *break-even premium* for each past accident year (see Figure 11). This premium rate is the rate that would have been sufficient to cover claims costs, expenses and recoveries for that particular accident year. Figure 11 shows the latest valuation (which includes the actuaries' calculations taking into account the *RTW Act).*

Prior to the valuation in December 2014 (that is, the valuation prior to the passing of the *RTW Act*), it can be seen in that the break-even premiums were calculated at around 3 per cent each year to cover costs (shown with the red diamonds). [300] That is, for claims incurred in those years would have required a premium of around 3 per cent to cover their costs. Since the introduction of the *RTW Act*, the latest valuation has brought the break-even premium down to around 2 per cent.

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[295] ReturnToWorkSA, above n 19, 25-26.

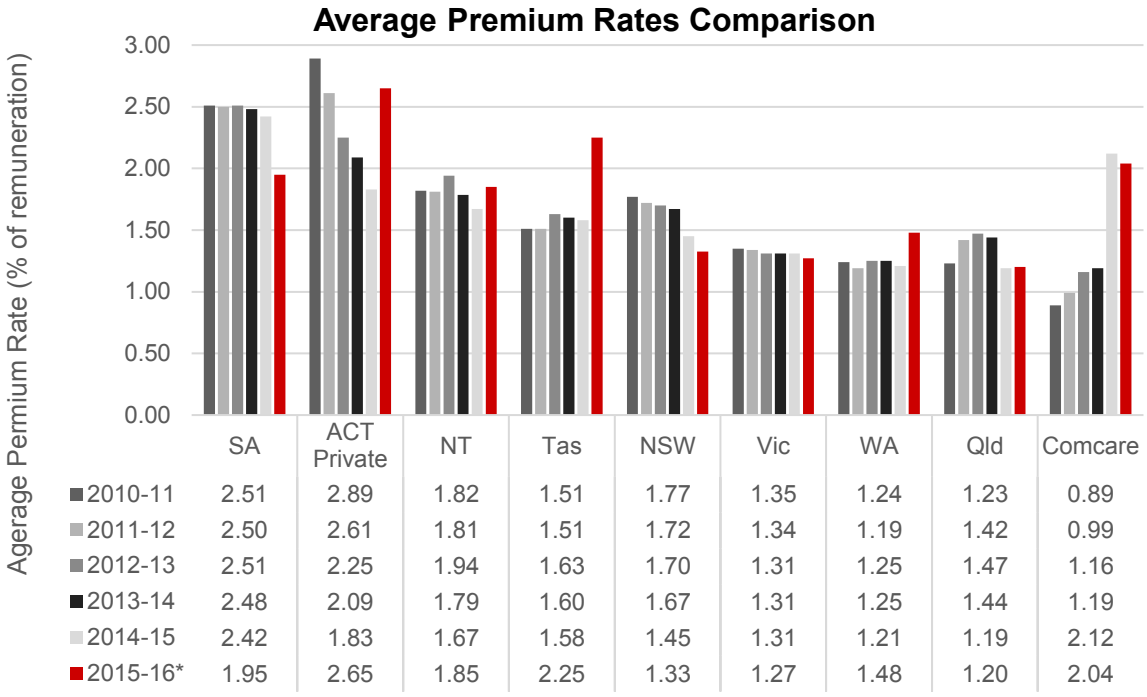
[296] Rob Cordiner, above n 53, 13.

[297] Ibid.

[298] ReturnToWork SA, above n 19, 22.

[299] Safe Work Australia, *Comparative Performance Monitoring Report,* (18th ed, 2017) 218.

[300] Finity Consulting, 'Scheme Actuarial Valuation as at 31 December 2014: ReturnToWorkSA' (Report, 3 March 2015) 11.



	SA	ACT Private	NT	Tas	NSW	Vic	WA	Qld	Comcare
2010-11	2.51	2.89	1.82	1.51	1.77	1.35	1.24	1.23	0.89
2011-12	2.50	2.61	1.81	1.51	1.72	1.34	1.19	1.42	0.99
2012-13	2.51	2.25	1.94	1.63	1.70	1.31	1.25	1.47	1.16
2013-14	2.48	2.09	1.79	1.60	1.67	1.31	1.25	1.44	1.19
2014-15	2.42	1.83	1.67	1.58	1.45	1.31	1.21	1.19	2.12
2015-16*	1.95	2.65	1.85	2.25	1.33	1.27	1.48	1.20	2.04

Figure 10: Standardised average premium rates (for 2010-11 to 2014-15) and average premium rate for 2015-16 shown as a % of employee remuneration.

Source: Adapted from Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* (2016) 218 for periods 2010-11 to 2014-15. Average Premium Rates for 2015-16 sourced from ReturnToWorkSA, Submission No 41*, Inquiry into the Return to Work Act and Scheme*, 31 January 2017, 9.

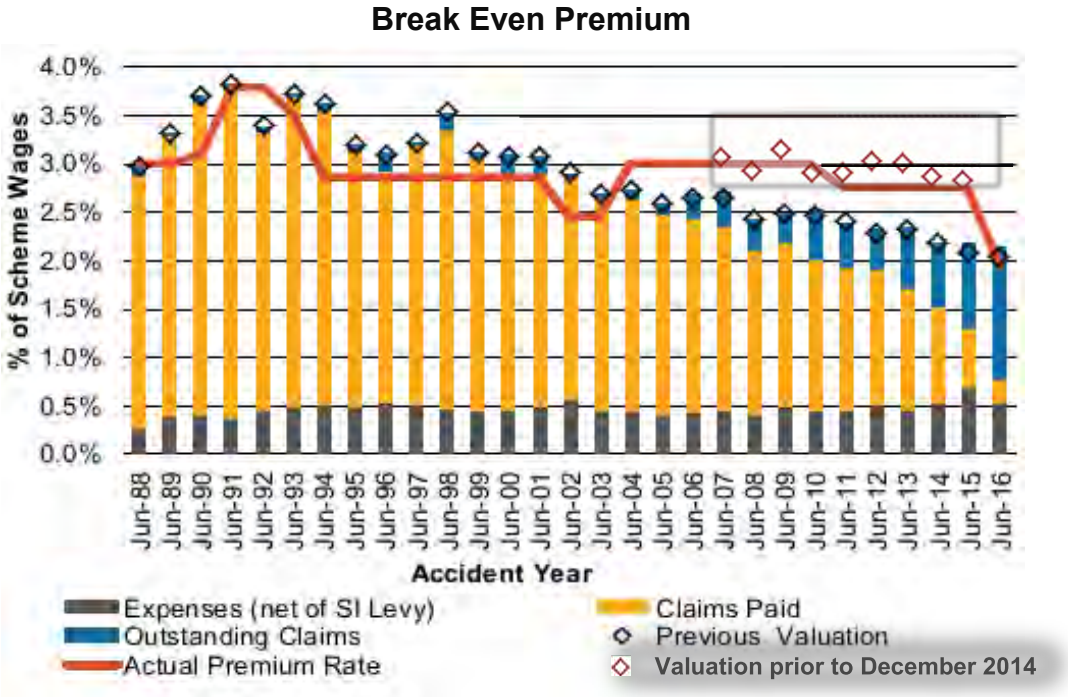


Figure 11: Break even premium rate and actual premium rate charged, with valuation prior to introduction of the Return to Work Act for years 2007 and beyond.

Source: Adapted from various sources - Finity Consulting, 'Scheme Actuarial Valuation as at 30 June 2016: ReturnToWorkSA' (Report, 30 August 2016) 9; Finity Consulting, 'Scheme Actuarial Valuation as at 31 December 2014: ReturnToWorkSA' (Report, 3 March 2015) 11; The 'Valuation prior to December 2014' markers were taken from the 2015 report and imposed onto the figure from the 2016 report to show the impact that the Act had on the costs of the Scheme.

7.6 Independent Medical Advisors

As part of the 2008 WorkCover reforms, Medical Panels SA was established in Part 6C of the repealed Act.

> It has not been uncommon for the advice of an injured worker's treating doctor and that of the independent doctor to differ substantially.
>
> The intention of the legislation establishing medical panels was to provide an impartial and conclusive medical opinion as a way of resolving these differences as well as resolving them more quickly.[301]

However, in 2011 a decision was handed down by the Full Supreme Court of South Australia that addressed a number of matters relating to questions of law surrounding the medical panel. The Court found that 'any body or person' did not include the Workers Compensation Tribunal and that an opinion was therefore not binding on it.[302] As a result, the Tribunal can reach its own decision on a medical question, and can either adopt the opinion of a medical panel or reach a different opinion[303], therefore nullifying one of the original intentions of establishing the panel to avoid lengthy disputes relating to medical opinions.

Professor McFarlane stated in evidence to the Committee during the Inquiry into Work Related Mental Disorders and Suicide Prevention that

> [h]aving sat on those medical panels, what I thought was extremely good about them was that you would have four medical peoples sitting in a room at the same time, generally two specialists of the expertise of that particular case. I think that was an excellent peer review, that people didn't take extreme views. I think that they were generally very measured. At times, I saw those panels identify diagnoses and issues which had been missed, where patients had been wrongly treated.[304]

With the introduction of the *RTW Act*, the use of medical panels was removed. In its place, the position of Independent Medical Advisors was established with their purpose of providing the Court or Tribunal an avenue to seek an independent medical opinion.

The Australian Medical Association (AMA) stated that they had concern that the

> removal of medical practitioners from the initial phases of dispute resolutions by closure of Medial Panels SA was not helpful, and that criticism of Medical Panels SA failed to consider the effects of the legal process[305].

The Independent Medical Adviser has the power to consult with any medical practitioner or other health practitioner who is either treating or has treated the worker, as well as other persons who the Adviser think is fit, call for the production of information such as medical reports and imaging as well as have the worker submit themselves for examination. However, unlike the original intentions of the medical panel, their medical findings are not binding on the SAET.

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[301] Bill Cossey, above n 5, 52.

[302] *Campbell v M & I Samaras P/L &2 P/L & 3 P/L & Employers Mutual Ltd; Yaghoubi v BDS People P/L & Employers Mutual Ltd* [2011] SASCF 58 (27 June 2011)

[303] WorkCover Corporation, 'Annual Report 2010-11' (Annual Report, 2011) 9.

[304] Ibid.

[305] Australian Medical Association, above n 113, 3.

7.7 Outsourcing of Crown Claims Management and Privatisation

While outside of the scope of the review of the Return to Work Scheme, a number of submissions expressed concern in relation to claims management for Crown agencies being handled by RTWSA (and most likely outsourced to claims agents).[306]

Since the receipt of submissions, the following announcement was made by the Office for the Public Sector:

> The Government has made a decision that from 1 July 2017 all new workers compensation claims (with a date of injury on or after 1 July 2017), made by South Australian public sector employees will be administered by ReturnToWorkSA.[307]

The *Return to Work Corporation of South Australia (Crown Claims Management) Amendment Bill 2017* was introduced into Parliament on 12 April 2017 to allow facilitation of the new administration arrangements.

Further, the Rail, Tram and Bus Industry Union stated that they were 'increasingly concerned at the growing number of rumours'[308] associated with the privatisation of the workers' compensation scheme in the state. They, along with SA Unions[309] and the Australian Education Union[310] stated their opposition to privatisation of the scheme.

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[306] See, eg, Australian Education Union (SA Branch), above n 48, 7.

[307] Office for the Public Sector, *Transition of Public Sector Injury Management Services to ReturnToWorkSA*, (4 April 2017), < http://publicsector.sa.gov.au/rtw>.

[308] Rail, Tram, and Bus Industry Union, above n 62, 7.

[309] SA Unions, above n 38, 12.

[310] Australian Education Union (SA Branch), above n 48, 7.

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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
28	21 October 2016		Mr Mark S	Injured Worker

Item	Date	Organisation	Contact	Role
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	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
This interim report considers the issues raised by the first 43 submissions (those received by 2 March 2017). The following submissions will be considered in the Committee's future report on the Inquiry.				
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

Hearings

The following witnesses provided evidence to the Committee.

Date	Witness/es
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
This interim report discusses the evidence presented at the above hearings (those which occurred on or before 2 March 2017). The following evidence will be considered in the Committee's future report on the Inquiry.	
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

APPENDIX B – EXAMPLES OF SERIOUSLY INJURED WORKERS

Example of seriously injured workers who have achieved a return to work

The following table is an extract from the Self Insurers of South Australia submission to the Committee. The table shows examples of workers who are with self insured employers, who have impairments of over 30% (therefore they have the ability to be classified as seriously injured), but have achieved a return to work.

Age	Pre-injury Job	PI Hours	Injury	WPI	Post-injury job & Hours
42	Teacher	4 days/week	Knee replacement	31%	Teacher, 2 days / week
45	Service deli operator	Full time	2 cervical fusions	41%	Checkout operator, full time[a]
a.	It is noteworthy that since the seriously injured provisions were introduced in the RTW Act, this worker appears to be in the process of ceasing work in favour of obtaining further benefits.				
47	Registered nurse	Full time	Chronic Regional Pain Syndrome	35%	Business Continuity & Telecommunicatons Project Officer, full time
58	Firefighter	Full time	40% burns to whole body	73%	000 operator and admin, full time
50+	Forklift driver	Full time	Amputated left leg above knee	36%	Youth worker, fitness trainer, boxing teacher, full time
50+	Production line worker	Full time	Bilateral arthritis of wrists	Over 50%[b]	Plant operator, full time
b.	In cases where the WPI is obviously over 30%, it can be deemed appropriate to not subject the worker to an assessment and determine them to be seriously injured. In these cases the exact level of WPI is not known.				
40	Teacher	Full time	Spinal cord injury in 2001, incomplete paraplegia with severe spasticity	Over 30%[2]	Classroom support, 10 hours per week with possible future increase
64	Teacher	Full time	MVA resulting in paraplegia in 1987	Over 30%	Curriculum development, full time
55+	Teacher	Full time	Knee replacement with poor outcome in 2011	Over 30%	Teacher, full time
55	FIFO mine worker	Full time	Septic arthritis – amputated left leg below knee in 2007, physical & mental sequelae	52%	Store manager / tyre retailer, 25 hours / week
54	Storeman	Full time	Spinal, right knee, plantar fasciitis,	34%	Stock controller, full time

			neuroma right foot and hips		
61	Grader operator	Full time	Knee replacement	30%	Office and deliveries, full time
66	Finance clerk	Full time	Cervical fusion	31%	Finance clerk, full time
62	Registered nurse	Full time	Writing and keyboard overuse injury to the arms – WPI of cervical, left arm & right arm combined	40%	Registered nurse with permanent modifications, full time
47	Registered nurse	28 hours / week	Gradual onset, manual handling of heavy patients – cervical fusion 2009	31%	Registered nurse, 26.5 hours per week with restrictions to driving – different role to pre-injury
60	Administrative officer	Full time	Undertaking repetitive computer and clerical work – repetitive strain injury to right and left hands – multiple surgeries	41%	Administrative officer, 37.5 hours per week – different position and location to pre-injury
47	Registered nurse	Full time	Struck right knee on bed rail – requires knee brace and walking stick / scooter	35%	Registered nurse, 37.5 hours per week – different position & location to pre-injury
33	Trainee medical specialist	38	Worker riding motorcycle to work lost control and crashed resulting in severed spinal cord	86%	In first year of four years in rehabilitation medicine – working full time since 7/2016 – current contract to 2/2017

APPENDIX C – WARD DECISION

Ward v State of SA (Department of Primary Industries and Regions (PIRSA)) [2016] SAET 28

In the case of Ward, Mr Ward was employed as a Senior Research Technician with the Department of Primary Industries and Regions, and part of his role was to count and classify fish.

In 1989, Mr Ward was involved in an unrelated motor vehicle accident, from which he suffered a closed head injury. As a result of this injury, he began to experience seizures.

In August 2015, Mr Ward, along with two colleagues, were on a small boat on the River Murray as part of a field trip to sample fish populations. Mr Ward was wearing thick waterproof boots while standing against the edge at the front of the boat. At around midday, he was completing his work, and then the next thing he could remember was waking up from a laying position on the deck of the boat with a sore ankle.

Mr Ward's colleagues reported that they noted his body suddenly slump over onto the rails of the boat, so they helped Mr Ward by placing him in the recovery position on the deck of the boat. They reported he was unconscious for about 5 minutes, after which when he attempted to stand reported severe pain in his left ankle. He was later found to have fractured his fibular and dislocated his left ankle.

The Department rejected Mr Ward's claim for compensation as they contended that employment was not a significant contributing cause of the injury. They believed that the waders Mr Ward was wearing at the time it was unlikely Mr Ward would have caught his food on the boat, that the medication Mr Ward was taking had compromised his bone density (a known side effect), and that there was the possibility that his seizure had been the cause of the broken bones.

Through the appeal process, medical evidence was gathered – an independent specialist opined that while the ankle was supported with the waders, there was no evidence to suggest that Mr Ward's medication had compromised the strength of his bones, and the severity of the break had indicated that it was not caused by the seizure. The doctor believed that it was somewhere between the position of initially slumping over and being laid onto the boat's surface that the ankle was broken.

Upon consideration of the evidence, Judge Gilchrist found that while the exact cause of the break was unable to be found, it was on the balance of probabilities that he suffered the break while being helped onto the deck (as opposed to it being a result of the seizure, or medication).

Judge Gilchrist states at points 35 and 36 of his determination:

> 35. 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.
>
> 36. The use of the indefinite article "a" is important. It means that there can be multiple contributing causes to an injury, and that one or some can be very important, yet some other cause that is less important can nonetheless still be a significant contributing cause.

APPENDIX D – LUMP SUM COMPENSATION

Some examples that compare the lump sum payments in WRCA scheme and RTWA schemes

Note: the date of injury in the WRCA scheme is assumed to be 30 June 2015. The date of injury in the RTWA scheme is assumed to be 1 July 2015.

WPI% for work injury	Age at time of work injury (factor that is applied)	Hours worked at time of work injury (factor that is applied)	Lump sum payment under Workers Rehabilitation and Compensation Scheme at 30 June 2015	Lump sum payment under Return to work Scheme at 1 July 2015 Note: the economic loss lump sum is adjusted by age and hours worked factors			Difference between lump sum payments in the WRCA and RTWA schemes	
			Non-economic loss payment	Non-economic loss	Economic loss	Total	$	%
5%	25 yrs (100%)	Full time (100%)	$ 12,045	$ 12,051	$ 5,107	$ 17,158	$ 5,113	42%
5%	25 yrs (100%)	1/2 time (50%)	$ 12,045	$ 12,051	$ 2,554	$ 14,605	$ 2,560	21%
5%	40 yrs (85%)	Full time (100%)	$ 12,045	$ 12,051	$ 4,341	$ 16,392	$ 4,347	36%
20%	25 yrs (100%)	Full time (100%)	$ 46,764	$ 46,895	$ 156,549	$ 203,444	$ 156,680	335%
20%	25 yrs (100%)	3/4 time (75%)	$ 46,764	$ 46,895	$ 117,412	$ 164,307	$ 117,543	251%
20%	40 yrs (85%)	Full time (100%)	$ 46,764	$ 46,895	$ 133,067	$ 179,962	$ 133,198	285%
20%	50 yrs (70%)	Full time (100%)	$ 46,764	$ 46,895	$ 109,584	$ 156,479	$ 109,715	235%
29%	25 yrs (100%)	Full time (100%)	$ 84,948	$ 109,729	$ 357,426	$ 467,155	$ 382,207	450%
29%	40 yrs (85%)	Full time (100%)	$ 84,948	$ 109,729	$ 303,812	$ 413,541	$ 328,593	387%
29%	50 yrs (70%)	Full time (100%)	$ 84,948	$ 109,729	$ 250,198	$ 359,927	$ 274,979	324%
29%	60 yrs (40%)	Full time (100%)	$ 84,948	$ 109,729	$ 142,970	$ 252,699	$ 167,751	197%
30%	25 yrs (100%)	Full time (100%)	$ 90,331	$ 120,165	No economic loss lump sum is payable to people with a permanent impairment of 30% or more a they will receive income support to retirement when required	$ 120,165	$ 29,834	33%
30%	40 yrs (85%)	Full time (100%)	$ 90,331	$ 120,165		$ 120,165	$ 29,834	33%
30%	50 yrs (70%)	Full time (100%)	$ 90,331	$ 120,165		$ 120,165	$ 29,834	33%
30%	60 yrs (40%)	Full time (100%)	$ 90,331	$ 120,165		$ 120,165	$ 29,834	33%
50%	25 yrs (100%)	Full time (100%)	$ 247,411	$ 482,014		$ 482,014	$ 234,603	95%
50%	40 yrs (85%)	Full time (100%)	$ 247,411	$ 482,014		$ 482,014	$ 234,603	95%
50%	50 yrs (70%)	Full time (100%)	$ 247,411	$ 482,014		$ 482,014	$ 234,603	95%
50%	60 yrs (40%)	Full time (100%)	$ 247,411	$ 482,014		$ 482,014	$ 234,603	95%