

# **INDEPENDENT REVIEW OF THE *RETURN TO WORK ACT 2014***

REPORT PREPARED PURSUANT TO SECTION 203 OF THE ACT BY

**THE HON. JOHN MANSFIELD AM QC**

4 JUNE 2018



Independent Review of the *Return to Work Act 2014*

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4 June 2018

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# 1. INTRODUCTION

## 1.1 Appointment

Under section 203(1) of the *Return to Work Act 2014* (“RTW Act”), the Minister for Industrial Relations is required to cause a review of the Act and its administration and operation to be conducted on the expiry of 3 years from its commencement (“the Review”).

The RTW Act was part-proclaimed on 4 December 2014 to allow preparatory work, such as the appointment of permanent impairment assessors and independent medical advisors (“IMAs”), to be carried out before the commencement of the new scheme on 1 July 2015. The new scheme has been in operation for almost 3 years as at the date of writing.

On 14 November 2017, I was appointed by the Hon. John Rau MP, then Deputy Premier, Attorney-General and, relevantly, Minister for Industrial Relations, to conduct the Review. I formally commenced the Review on 4 December 2017.

In accordance with section 203(3) of the Act, the Review must be completed within 6 months and the results of the Review embodied in a written report. Further, pursuant to section 203(4), the Minister must cause a copy of my report to be laid before both Houses of Parliament within 12 sitting days after receiving the report.

## 1.2 Acknowledgements

I have been greatly assisted in the conduct of this Review by counsel Mr Nino Marciano. Mr Marciano was seconded from the Crown Solicitor’s Office for the purpose of this Review. He has undertaken his role with enthusiasm and great competence. Whilst, of course, the views expressed and recommendations made are my own, Mr Marciano’s thoroughness and industry, and his professionalism, have ensured that, so far as I have been able to do so, those who are properly described as ‘stakeholders’ in the Review have been given a proper opportunity to have input into the formulation of my views and that my views have been formed on a proper appreciation of the matters raised by the ‘stakeholders’.

I am also grateful for the administrative assistance of Ms Amanda Giuliani-Solly. Ms Giuliani-Solly was seconded to the Review by the Office of the Chief Executive of the Attorney-General's Department. She has provided both administrative support and very helpful advice to my Review. She has done so entirely to my satisfaction, including in her dealings with the 'stakeholders' on my behalf from time to time. Her efforts, too, have contributed greatly to the quality of my Review.

During the course of conducting the Review, I received cooperation from all those who participated either by providing information or submissions, or both. Their material was provided as promptly as practicable, and so far as I have discerned, as fully and as accurately as possible. In the light of their contributions, I am able to provide this Review on the basis of information of which I am confident is reliable.

In particular, of course, the principal source of information was ReturnToWorkSA ("RTWSA"). It responded to my requests for information promptly and fully, where it had that information available. Where information it has provided has been the subject of particular submissions or comments from others who made submissions, I have endeavoured to identify as precisely as possible the competing factual foundations for those particular competing views and to explore their relative reliability. My Review discusses in some detail those issues where there are such competing views.

As I have said, the views and recommendations in this Review are my own.

### **1.3 Terms of Reference**

The Review's Terms of Reference include three matters specified in section 203(2) (items 1 – 3); and six other matters that the Minister considered relevant to the review of the Act (items 4 – 9). In addition, the scope of the Review includes making any other recommendations consistent with the objects of the Act (item 10).

My Terms of Reference are as follows:

*In undertaking the review for the purposes of section 203 of the Act, please consider, assess and advise upon, including by way of research and consultation with relevant Return to Work Corporation of South Australia ("RTWSA") members and staff, South*



*Australian Employment Tribunal (“SAET”) members and staff, other interested persons and the general public, the following matters in respect of the 3 year period commencing on 4 December 2014:*

- 1. the extent to which the scheme established by the Act and the dispute resolution processes under the Act and the South Australian Employment Tribunal Act 2014 (“SAET Act”) have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve disputes (especially when compared to the scheme and processes applying under the repealed Act);*
- 2. without limiting paragraph (1), whether the jurisdiction of the SAET under the Act should be transferred to the South Australian Civil and Administrative Tribunal (“SACAT”);*
- 3. the extent to which there has been an improvement in the determination or resolution of medical questions arising under the Act (especially when compared to the system applying under the repealed Act);*
- 4. the performance of RTWSA in managing claims including RTWSA’s outcomes in reducing instances of work injury;*
- 5. the performance of self-insured employers including outcomes in reducing instances of work injury;*
- 6. changes in return to work rates at key milestones outlining factors influencing any improvement or deterioration;*
- 7. factors contributing to non-seriously injured workers failing to achieve a return to work within two years;*
- 8. any additional recommendations regarding reskilling services to assist return to work outcomes;*
- 9. whether the scheme has yet achieved financial stability and if not when the scheme will be likely to be mature and stable;*

10. any other recommendations based on your review of the administration and operation of the Act which you consider appropriate and consistent with the objects of the Act.

## 1.4 Glossary

|                     |   |
|---------------------|---|
| AEA                 | Ambulance Employees Association SA  |
| AEU                 | Australian Education Union  |
| APR                 | Average premium rate  |
| ASOS                | Australian Society of Orthopaedic Surgeons, SA Branch                           |
| BEP                 | Breakeven premium rate  |
| CPSE                | Commissioner for Public Sector Employment                                       |
| EML                 | Employers Mutual SA Pty Ltd   |
| GEPIC               | Guide to the Evaluation for Psychiatric Impairment for Clinicians               |
| IAG                 | Impairment Assessment Guidelines  |
| IMA                 | Independent medical advisor   |
| LGA                 | Local Government Association of South Australia                                 |
| LGAWCS              | Local Government Association Workers Compensation Scheme                        |
| NWE                 | Notional weekly earnings  |
| OPS                 | Office for the Public Sector  |
| PCOSRC              | Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation |
| PASA                | Police Association of South Australia   |
| PIA                 | Permanent impairment assessment   |
| REG                 | Registered Employers' Group SA Inc  |
| RTW Act             | <i>Return to Work Act 2014</i>  |
| RTW Corporation Act | <i>Return to Work Corporation of South Australia Act 1994</i>                   |
| RTW Scheme          | Return to Work Scheme   |
| RTW Regulations     | <i>Return to Work Regulations 2015</i>  |
| RTWSA               | Return to Work Corporation of South Australia                                   |
| SACAT               | South Australian Civil and Administrative Tribunal                              |
| SAET                | South Australian Employment Tribunal  |
| SIICA               | Self-insurer Insolvency Contribution Aggregate                                  |
| SISA                | Self-Insurers of South Australia  |
| SAWIA               | South Australian Wine Industry Association                                      |
| WCT                 | Workers Compensation Tribunal   |

|            |   |
|------------|---|
| WPI        | Whole person impairment                                 |
| WRC Act    | <i>Workers Rehabilitation and Compensation Act 1986</i> |
| WRC Scheme | Workers Rehabilitation and Compensation Scheme          |

## 2. EXECUTIVE SUMMARY

My overall conclusion is that the experience in the RTW Scheme generally compares favourably to the WRC Scheme, notwithstanding that the RTW Scheme faces several challenges relating to the achievement of its primary object and the other objectives set out in section 3 of the RTW Act.

The statistical data and other information I reviewed indicates that the RTW Scheme is still in a transitional phase. There is no warrant for comprehensive change at this point in time. I have not recommended an overhaul of the dispute resolution process, the determination of medical questions or any great expansion or reduction in the benefit package available to workers. I have recommended that the jurisdiction under the RTW Act remain with SAET.

I have identified some areas of concern where the administration and operation of the RTW Act should be modified to better promote the primary object and other objectives of the RTW Act. I have recommended reforms aimed at ensuring the speedy resolution of disputes through more robust investigation, transparency in decision-making and more rigorous record-keeping. Incremental changes have been suggested to improve the experience for workers, employers and other stakeholders. I have aimed to promote fairness and efficiency, without substantially altering the well-defined boundaries that underpin the RTW Scheme. The RTW Scheme is being managed by RTWSA, as well as private self-insurers and Crown, in a way that is financially sustainable.

### 2.1 Table of Recommendations

| Term of Reference | Recommendation |  |
|-------------------|----------------|--|
| 1                 | 1              | That consideration be given to amending section 102 of the RTW Act to provide for a more robust and transparent initial reconsideration process. |
|                   | 2              | That the SAET collect statistical data of the number of decisions that are resolved at the initial reconsideration stage.                        |

| Term of Reference | Recommendation |   |
|-------------------|----------------|---|
|                   | 3              | That RTWSA keep records in respect of all disputed decisions, comparing the decision with the outcome of the dispute. That data should be published in RTWSA's annual report and must include the type of decision and whether the SAET confirmed the decision or, if the dispute is resolved at conciliation or via consent orders, whether the outcome was more favourable than the original decision or not.   |
| 2                 | 4              | That the SAET retain its jurisdiction under the RTW Act.  |
| 3                 | 5              | That consideration be given to amendments to the RTW Act and/or RTW Regulations to require compensating authorities to notify potential claimants of time limits well in advance of expiry of time limits and to provide potential applicants with relevant information about their rights (including the correct forms) to seek pre-approval of future surgery.  |
|                   | 6              | That consideration be given to amending the RTW Act and/or RTW Regulations to clarify that applications for pre-approval of surgery are required to be submitted with supporting evidence under regulation 22 and are not merely applications to preserve the right to make a substantive claim for the expense of surgery at a later date.   |
|                   | 7              | That consideration be given to amending the RTW Act and/or RTW Regulations to clarify that applications for pre-approval of future surgery need not be supported by evidence with the level of detail that would ordinarily be expected if the surgery was imminent and that requests for future surgery may be broadly framed to account for uncertainty about exactly what surgery is required.   |
| 4                 | 8              | That consideration be given to amending the RTW Act to provide, that, in the event of a decision on a claim for income support payments being made to RTWSA, and a decision to accept or not to accept the claim is not made within 10 days of the claim, and the worker is not otherwise being paid by the employer, the worker be entitled to income maintenance for the period from the commencement of the claim until a decision is made to accept or not to accept the claim. |

| Term of Reference | Recommendation |   |
|-------------------|----------------|---|
|                   | 9              | That RTWSA analyse records of the outcomes of the decisions which are referred to SAET as disputes by injured workers or employers (see Recommendation 3) to determine whether they indicate that there is some appropriate change in processes or procedures which should be made to improve initial decisions.  |
| 5                 | 10             | That the Government release all future versions of the Actuarial Report for the Liability for Crown Workers Compensation Claims for public consumption.   |
| 6                 | 11             | That RTWSA maintain records of the terms on which injured workers return to work, including whether the return to work is to the previous employment position or some other position, whether the return to work is to the same level of hours or some other hours, and whether the return to work is temporary or indefinite/apparently permanent.                 |
|                   | 12             | That RTWSA consider, in consultation with other major employer and employee organisations, whether there are other initiatives which might be taken to better or more effectively secure the return to work of injured workers, including consideration of strategies used to achieve return to work of injured workers under other schemes operating in Australia. |
|                   | 13             | That RTWSA maintain records of the return to work rates of the injured workers with a WPI of or greater than 30%, and consider the development of strategies to provide opportunities for such injured workers to return to work in some suitable employment.   |
| 7                 | 14             | The level of entitlements currently provided to workers in the two year income support period under the RTW Scheme should be maintained.  |
|                   | 15             | RTWSA should identify workers at risk of not returning to work within two years and commence providing ongoing support to those persons via the ReCONNECT program before the cessation of entitlements.   |
|                   | 16             | That consideration be given to amending section 18 of the RTW Act to clarify parties' rights and duties.  |

| Term of Reference | Recommendation |   |
|-------------------|----------------|---|
| 8                 | 17             | That RTWSA continue to conduct its ReSkilling pilot program, including the consideration of the introduction of financial incentives to support the re-employment of injured workers, and at an appropriate time including consideration of a meeting of all groups properly interested in reskilling injured workers to encourage their return to work.    |
|                   | 18             | That RTWSA ensure that its ReSkilling program extends to seriously injured workers, including those who continue to receive income maintenance after the expiry of two years from their injury.   |
| 9                 | 19             | That consideration be given to the amendments, proposed by RTWSA, to the RTW Act and the IAGs if the decision in <i>Mitchell</i> is upheld by the Full Court; and independently verified data collated after the Supreme Court's decision is delivered definitively indicates that that precedent threatens the financial sustainability of the RTW Scheme. |
| 10                | 20             | That consideration be given to amending the RTW Act and/or RTW Regulations to allow for persons who are working to receive compensation for medical treatment necessary for their continued employment beyond the three year limit.   |

### 3. METHODOLOGY

I commenced the Review by familiarising myself with the RTW Act; the *Return to Work Corporation of South Australia Act 1994* (“RTW Corporation Act”); the *Workers Rehabilitation and Compensation Act 1986* (“WRC Act”); the SAET Act; the regulations made under those Acts; and other relevant legislative material.

I also had regard to Second Reading Speeches, Parliamentary Debates and the Interim Report and Final Report into the Referral for an Inquiry into the RTW Act and Scheme (“Interim Report” and “Final Report”, respectively) published in 2017 by the Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation (“PCOSRC”).

I attended a stakeholder forum organised by RTWSA in late 2017, and shortly thereafter, invited RTWSA to provide an initial written submission to be disseminated to stakeholders and other interested persons, including those who had previously made submissions to the PCOSRC.

I issued a public notice inviting members of the public and interested persons to register their interest in making a submission to the Review. I then invited persons who had registered their interest in the Review and already-identified stakeholders to make a written submission to the Review.

Each person whom I invited to make a submission to the Review was provided with RTWSA’s initial submission. That submission was also made available on the Review’s website shortly after its receipt. All written submissions, except those that I identified as confidential, were made publicly available on the Review’s website.

I conferred with the then Minister for Industrial Relations, the Hon. John Rau MP, and also invited submissions from the Treasurer, the Hon. Rob Lucas MLC, (then Shadow Minister for Industrial Relations), as well as representatives of other political parties. After the State election, I met with the Treasurer in his capacity as the Minister to whom the RTW Act is now committed.



I conducted initial interviews in respect of Term of Reference No. 2 with Justice Steven Dolphin, President of the SAET; Ms Leah McLay, Registrar of the SAET; Justice Judy Hughes, President of the SACAT; and Ms Clare Byrt, Principal Registrar of the SACAT. I was subsequently provided with written submissions and relevant statistical data from the SAET and the SACAT.

I did not receive a formal submission from the State Government in respect of any of the Review's Terms of Reference. However, Ms Erma Ranieri, the Commissioner for Public Sector Employment ("CPSE"), and the Office for the Public Sector ("OPS") were able to provide information to assist me in my investigations.

I met with Mr Rob Cordiner, Chief Executive Officer of RTWSA; Ms Joanne Denley, Chairman of RTWSA's Board; Mr Andrew McInerney, Director, Finity Consulting Pty Ltd, the Scheme actuary; and managers of various units within RTWSA to further my inquiries. I also liaised with Ms Sally Burrige, Manager, Government Relations, RTWSA, throughout the course of the Review.

I requested, and was provided with, a supplementary written submission from RTWSA as well as stakeholders and interested parties. I requested additional information from the Scheme actuary. In addition, I wrote to selected stakeholders to seek further information about specific issues raised in submissions and actuarial data that I had received.

In preparing my report, I have carefully considered submissions from a diverse range of persons and organisations, including: injured workers and their families; employers; unions; industry groups; lawyers; insurers (including self-insurers); claims agents; doctors; medical groups; providers of rehabilitation services; judicial officers; politicians; and other persons and organisations interested in the administration and operation of the Scheme. A list of all written submissions that I have received appears as an appendix to this report.

I was able to review considerable material, both publicly available and supplied by interested parties, including several actuarial reports. A non-exhaustive list of that material appears as an appendix to this report.

This report is the product of the collation and distillation of the extensive information obtained. It is not a comprehensive commentary on each and every provision of the RTW Act. Nor does it attempt to provide solutions for each and every problem that may arise in

the jurisdiction. This report addresses the major issues arising in the first years of the RTW Act's operation, within the scope of my Terms of Reference.

## 4. THE RETURN TO WORK SCHEME

The Scheme comprises the Act and regulations made under the Act. The Act confers jurisdiction upon the SAET to review decisions and resolve disputes. The Act operates in conjunction with the relevant provisions of the SAET Act and the rules of the SAET made under that Act.

The administration and operation of the Scheme is best understood against the background of the old Scheme it replaced. The system under the WRC Act was acknowledged by the then Government as being “broken”.

The previous Scheme under the WRC Act was generally accepted as unsatisfactory. On 30 March 2017, the PCOSRC in its Interim Report noted at (i) that the WRC Scheme was “often cited as one of the poorest performing in the country”. It noted that return to work rates were well below the national average; that the WRC Scheme had one of the highest employer premiums in the country; and that the WRC Scheme was “extremely underfunded”.

The RTW Scheme sought to redress each of those concerns. Again, as the Interim Report noted at (i), the RTW Scheme:

*“... has a stronger focus on remaining at or returning to work and early intervention...In addition, it has a greater focus on settling more affordable employer premiums to remain competitive with jurisdictions across the nation, as well as being a scheme that is fully funded.”*

Those broad policy aims are readily seen in the RTW Act. They are seen in the Second Reading Speech of the *Return to Work Bill 2014* by the Hon. John Rau MP.<sup>1</sup> The Minister there said that the RTW Act involved “fundamental change” with “clear unambiguous boundaries and less moving parts”. It was intended to have a ‘break even’ premium rate of less than 2%. The prescription of so-called hard boundaries is obviously an important element of the changes designed, *inter alia*, to reduce employer premiums to the range stated. That range was identified by reference to the premium range applicable in the

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<sup>1</sup> The Hon. John Rau MP, Government Gazette, House of Assembly, 6 August 2014.

(relatively) comparable legislation in the other States and Territories of Australia. It was made clear that the employer premiums were intended to result in a fully funded scheme.

It is useful to identify the particular features of the RTW Act and Scheme by which the primary objectives were to be attained.

First, it refined the circumstances in which an injury was compensable. A physical injury is compensable if it arises out of or in the course of employment and the employment is “a significant contributing cause” of the injury. A psychiatric injury is compensable only if it arises out of or in the course of employment and the employment is *the* significant contributing cause of the injury, and it did not arise from any one or more of the specified exclusionary factors set out.

There was a line drawn between physical and psychiatric injuries, clearly intended by the different eligibility criteria to include psychiatric injuries in more limited circumstances than those for physical injuries. And, additionally, the “causation” eligibility test in any event was somewhat harder to meet than under the previous Scheme.

Some submissions to the Review on those aspects sought to have revisited the circumstances in which a psychiatric injury is compensable. They are referred to below in more detail. The somewhat firmer causation test in the case of physical injuries did not attract specific submissions suggesting any change to the RTW Act on that topic.

Second, the procedures and obligations imposed on employers, and the corresponding rights of workers who are injured in compensable circumstances, involve a much closer and prompter focus on early treatment, early payment of compensation if appropriate, and early return to work. That included an obligation on an employer to make work available to an injured worker of that employer, when suitable employment is available.

It introduced the concepts of a ‘seriously injured worker’ and ‘whole person impairment’ (“WPI”). A seriously injured worker is defined as a worker who has a WPI of 30% or more.

A seriously injured worker then is entitled to income support until retirement age (if not working) and lifetime care, support and medical services. That line between a seriously injured worker and a less seriously injured worker was identified in the Second Reading Speech as a distinct boundary to ensure those who need support most are able to receive it.

The benefits available to a worker who has less than a 30% WPI are more limited. Whilst all workers who are injured are entitled to prompt consideration, including if incapacitated for 4 weeks or more a return to work plan, and are entitled to income support and medical and like expenses, there is a time limit on those entitlements. The entitlement to income support for is no more than 2 years, initially at the rate of 'notional weekly earnings' ("NWE") and for the second 12 month period at 80% of NWE. The same reduction of the applicable rate for income support applies to seriously injured workers, except, as noted, it persists from the end of the first year to retirement. The entitlement to payment for medical services, subject to particular exceptions, ends 12 months after income support ceases. In addition, if a worker who is not a seriously injured worker is capable of doing certain work, the amount he or she could earn in suitable employment is deducted from the rate of income maintenance, provided a period of 6 months' notice has been given. If approval is given for anticipated surgery, there is an additional entitlement to income maintenance for the incapacity resulting from that surgery.

As is apparent, the assessment of WPI is a significant step. It may be made only once. The finality of that step was recognised in the Second Reading Speech as "important" and as one without which "the Scheme will not be sustainable in the long term". That is noted at this point because certain submissions addressed the desirability or otherwise of the finality of that step, as well as the basis upon which it is determined. Those matters are addressed in the body of the Review.

The WPI assessment in the case of physical injuries, provided it is equal to or greater than 5%, entitles the injured worker to a lump sum payment. In addition, for workers with a WPI of between 5% and 30% resulting from physical injuries (excluding hearing loss), there is an additional entitlement to a lump sum to, as the Second Reading Speech states, "...acknowledge the potential economic loss associated with a work injury". That entitlement is determined having regard to the injured worker's working life to retirement. There were no submissions to the Review concerning in particular the concepts underlying the entitlement to such lump sums or their quantification.

There is no entitlement to a lump sum payment for any WPI assessment made in respect of psychological injuries. Certain submissions to the Review were to the effect that it was neither logical nor fair to distinguish psychological injuries from physical injuries in the way it is done in the RTW Act. Those matters are also addressed below. It is appropriate to point out that, as a matter of policy, a distinction between those two types of injuries had been

made under the previous WRC Act, at least in respect of the entitlement to any lump sum payment.

A seriously injured worker may, in certain circumstances, also pursue a claim at common law for damages. The quantification of any such claim is limited, excluding damages for future treatment, care and support. There is no relevant history of such a claim being pursued after the commencement of the RTW Act on 1 July 2015. Nor was there any submission to the Review concerning limitations on that entitlement.<sup>2</sup>

The RTW Scheme is administered by RTWSA. It is the entity renamed from the previous WorkCover Corporation which administered the WRC Act and the former Scheme. It is, as it accepted, both an insurer and a regulator. It is directed to run the Scheme as a fully funded scheme. The Scheme allows for self-insurers, generally larger employers, and for the State itself, to be self-insured. The regulatory role of RTWSA encompasses the regulation of self-insured employers, and extends to determining whether to approve a particular employer to be self-insured and the terms upon which that is allowed. RTWSA thereby is able to track the performance of self-insured employers in relation to work injuries sustained by that employer's workers, including the management of their claims. In the course of the Review, information was obtained from self-insured employers, groups representing self-insured employees, as well as data provided by RTWSA.

There were no submissions which concerned discretely the performance of self-insured employers in their relations with their injured workers, or in relation to their relationship with RTWSA which call for separate consideration. Nor were there submissions which concerned the regulatory role of RTWSA in its dealings with self-insured employers or their Association. At least to the present time, there is no need to comment on those aspects of the administration of the Scheme.

The State administers its own claims by its employees. At one point legislation was introduced which proposed that the State's employees, and the State itself, would have the claims by injured employees administered by RTWSA.<sup>3</sup> That proposal was not passed. The State liaises with RTWSA, but it keeps its own records. Again, as between the State and its employees, there were no submissions which required particular attention for the purposes of the Review. The common issues are addressed below.

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<sup>2</sup> Cf. PCOSRC Final Report, p 49 – 53.

<sup>3</sup> *Return to Work Corporation of South Australia (Crown Claims Management) Amendment Bill 2017*.

There are two separate matters concerning the State which require comment in the Review, and are discussed below.

The first is about the extent to which the State presently centralises its claims administration, maintains centralised records, and makes provision for claims. The material available does not suggest that it is as comprehensive and co-ordinated as RTWSA, or that its estimated future liabilities are estimated in a way which would enable it to operate as a separate 'funded' scheme. Of course, that is a matter for the State.

The second is that the State has progressively entered into arrangements with its employees, effected by amendments to Enterprise Agreements and, more recently, Awards, by Schedule, now in relatively standardised terms, which extend the benefits to be provided to its injured employees in certain circumstances. The extension of those benefits is not confined to seriously injured workers, as defined in the RTW Act, that is – the extended benefits do not require that the injured employees have a WPI of 30% or more.

The relevant Schedule is usually titled "Additional Compensation for Certain Work Related Injuries or Illnesses". It operates where benefits under the RTW Act have ceased to be available. In short, in the circumstances defined, the benefits available to a seriously injured worker under the RTW Act are made available to any injured Public Sector worker in respect of an "eligible injury". An eligible injury, relevantly, is one resulting from conduct directed to a worker that is or appears to be a criminal offence; or occurred directly from conduct that is or appears to be a criminal offence; or occurred in circumstances where the worker "is placed in a dangerous situation" (with a further restriction in the case of psychiatric injuries). At first glance, it is fair to observe that, in the case of eligible injuries, the benefits granted are those more or less which applied under the WRC Act and the former Scheme. It is of course a matter for the State as to how it compensates its employees for work-related injuries. As discussed below, the extended entitlements broadly provide additional compensation entitlements to its employees who are placed in dangerous work-related situations. The Review remarks upon the breadth of the extended entitlement, at least on one view, particularly in the absence of definitions of the terms "criminal offence" and "dangerous situation".

There is no information presently available to identify whether there have been any adjudications granting such extended benefits, or of any actuarial assessment of the additional liability which the State might incur by reason of them.

Returning to the scheme as a whole, the consequence of the above is that the administering body for the particular work injury (RTWSA, the self-insured employer, or the State) is the initial entity responsible for making decisions whether to accept a claim, the day to day management of a claim (through claims agents in the case of RTWSA), and all matters related to it.

In each case, the SAET, established by the SAET Act, is the entity which has the jurisdiction to resolve disputes which arise under the RTW Act, and under the extended entitlements provisions available to State employees. Under the SAET Act, the SAET has power to refer certain disputes for determination by an IMA. That is a power which has not yet been much utilised.

The SAET may state a case to the Supreme Court on a matter of law, and any party affected by a decision of SAET may appeal to the Supreme Court limited to an appeal on a matter of law.

Finally, it is desirable to note the transitional provisions which applied in respect of injuries which occurred prior to 1 July 2015, and so to a point in time were being dealt with under the WRC Act and the former Scheme. The option of leaving the claims which had arisen under the WRC Act to run off under that Act, with the RTW Act applying only to work injuries which arose after 1 July 2015 was not adopted. That being said, compensability for an injury that is attributable to a trauma that occurred before that date is still determined under the WRC Act.

The WRC Act was repealed: Cl 2 of Schedule 9 to the RTW Act. Part 9 of Schedule 9 (clauses 26 – 66 of the Schedule) set out how the transition to the RTW Act was to operate. The RTW Act applied directly to injuries prior to 1 July 2015, including the obligations on employers to provide work under section 18(3) of the RTW Act. As the WRC Act also provided for WPI assessments, any such assessment made prior to the commencement of the RTW Act of a 30% WPI was to continue to have effect under the RTW Act, and if no assessment had been made, the assessment could be made under the RTW Act. An assessment of less than 30% WPI made under the WRC Act was to stand, and could not be revisited under the RTW Act. A 12 month period by which the entitlement to receive medical expenses in respect of a pre-RTW Act injury was set, to run from a “designated day”. The limit of 2 years for the receipt of income support in respect of workers with less than a 30% WPI was adopted, to run from 1 July 2015, so that the entitlement expired on 30 June 2017,



of course except in the case of seriously injured workers, and except in the prescribed circumstances.

The submissions to the Review pointed out that, in a number of respects, the way in which the transitional provisions would operate is complex and has yet to be finally determined by an authoritative Supreme Court or SAET decision.<sup>4</sup> Hence, it was submitted, that is one reason why there is yet no clear position of the financial position of RTWSA and the fund which it has in place to meet its current and future liabilities in respect of outstanding claims, both those which have arisen after 1 July 2015 and those which arose before that date. That matter is addressed below.

Other than that, however, the submissions to the Review did not take issue with any particular feature of the transitional provisions as requiring specific consideration for the purposes of the Review.<sup>5</sup>

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<sup>4</sup> Cf. *Return to Work Corporation of South Australia v Watkins* [2017] SASCFC 149 (10 November 2017).

<sup>5</sup> Cf. PCOSRC Final Report, p 61 – 64; PCOSRC Interim Report, p 64 – 69.

## 5. TERM OF REFERENCE 1: DISPUTE RESOLUTION

I have considered the extent to which the Scheme established by the RTW Act and the dispute resolution processes under the RTW Act and the SAET Act have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve disputes when compared to the Scheme and processes applying under the WRC Act.

### 5.1 The dispute resolution process

A broad range of decisions are reviewable under section 97 of the RTW Act.<sup>6</sup> The SAET has jurisdiction to deal with a reviewable decision in a hearing *de novo*. A person with a direct interest in a reviewable decision may commence proceedings for review within one month of the decision unless an extension of time is granted. The Registrar notifies parties to the application of the dispute and provides copies of the application to parties, together with supporting material.

The relevant compensating authority must reconsider the decision under section 102 and report back to the Registrar and other parties. If the decision is confirmed or another party expresses dissatisfaction with a varied decision, the matter is dealt with under Part 3 of the SAET Act. The parties are required to undertake compulsory conciliation before a Commissioner prior to the matter proceeding to hearing and determination. This usually involves the parties exchanging relevant evidentiary material in their possession. Parties are entitled to legal representation at conciliation conferences.

If the matter does not resolve at conciliation, the matter proceeds to a hearing before a single Presidential member of the SAET. Upon referral, a Presidential member will conduct a pre-hearing conference and make an assessment of the merits of the matter.<sup>7</sup> The Presidential member will then either make orders for the matter to proceed to a hearing of the issues as soon as possible (including ancillary orders) or schedule a settlement

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<sup>6</sup> The RTW Act also confers jurisdiction upon the SAET to determine an application to expedite decisions pursuant to section 113 and to determine an application for suitable employment under section 18.

<sup>7</sup> Submission of SAET, p 3.

conference to attempt to resolve the dispute first.<sup>8</sup> If the matter proceeds to hearing, it is conducted in a formal courtroom setting and results in a judgment from the Presidential member. That judgment is subject to appeal to the Full Bench of the SAET, comprised of three Presidential members. The decision of the Full Bench may be appealed, with permission, to the Full Court of the Supreme Court on a question of law only.

### **How can the dispute resolution process be improved?**

There is room to improve the dispute resolution process before matters proceed to conciliation by requiring compensating authorities to (re-)investigate disputed matters.<sup>9</sup> The current process under section 102 requires the relevant compensating authority to reconsider decisions and to give a written notice stating the result of the reconsideration. This process is susceptible to the “rubber stamping”<sup>10</sup> of decisions because there is no requirement on the compensating authority to reveal any details of the reconsideration process other than its decision and there is no requirement for an investigation to be undertaken. I note that a time limit of 10 business days from the date of receipt of the copy of the application for review is prescribed in section 102(5), subject to extension by the Registrar. The compensating authority should seek an extension of time from the Registrar to conduct further investigations if it those investigations are likely to result in the resolution of the dispute before the matter progresses any further.

The decision on reconsideration ought to provide a brief response to the matters set out in the application. This response is not intended to be exhaustive and may be in bullet-point format. The person who is assigned to reconsider the decision ought to have their work checked and confirmed by a more senior supervisor in each case. In summary, the notice stating the result of the reconsideration ought to state:

1. a brief (non-exhaustive) statement in response to the matters set out in the application;
2. confirmation that the work of the person who has been assigned to reconsider the decision has been checked and confirmed by a more senior supervisor;
3. the result of the reconsideration; and

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<sup>8</sup> Submission of SAET, p 3.

<sup>9</sup> Submission of Business SA, p 4.

<sup>10</sup> Submission of Business SA, p 4.

4. whether the compensating authority has confirmed or varied the decision as a result of the reconsideration and, if the decision has been varied, how the decision has been varied.

The latter two requirements are already prescribed in section 102 of the RTW Act. I do not consider that the above process is onerous or labour-intensive in consideration of the potential to save significant time and resources by avoiding the continuation of many disputes. The SAET should be open to listing matters for conciliation after the outcome of the reconsideration to enable the worker to reflect on the outcome of the reconsideration, but without any undue delay (section 103(2), RTW Act). It is important that the reconsideration process is, and is seen to be, a meaningful step in the dispute resolution process. Data should be collected by the SAET to measure whether this initial reconsideration step is having any impact on dispute resolution.

Further, I am concerned and somewhat surprised that RTWSA does not keep data, in respect of each disputed decision, that compares whether its decisions (and the decisions of its claims agents) were affirmed by the SAET or not. The fact that many matters are resolved by conciliation or via consent orders and are thus susceptible to resolving via a wide variety of potential outcomes is no excuse for not keeping a record of this information. In those cases, the data ought to record whether the negotiated outcome was more favourable than the original decision or not. If poor decisions are being made by RTWSA or their agents in the first place, then plainly that will cause unnecessary disputation. The collection of that data would provide a means by which the quality of decision-making in respect of disputed matters could be measured.

That data will, of course, be imperfect as a measure of quality decision-making because some matters will be resolved on a commercial basis. Nevertheless, I anticipate that the data will provide a useful perspective of the decision-making behaviours of RTWSA and its claims agents that is not currently available.

The data should be made publicly available in a de-identified form in RTWSA's annual report. This should include information about the type of decision that was reviewed and whether the SAET confirmed the decision or, if the dispute is resolved at conciliation or via consent orders, whether the outcome was more favourable than the original decision or not. Interested persons should be able to easily ascertain the proportion of disputed decisions

that withstand challenge as a percentage of all claims that are disputed in the registered scheme.

#### **Recommendation 1**

That consideration be given to amending section 102 of the RTW Act to provide for a more robust and transparent initial reconsideration process.

#### **Recommendation 2**

That the SAET collect statistical data of the number of decisions that are resolved at the initial reconsideration stage.

#### **Recommendation 3**

That RTWSA keep records in respect of all disputed claims, comparing the decision with the outcome of the dispute. That data should be published in RTWSA's annual report and must include the type of decision and whether the SAET confirmed the decision or, if the dispute is resolved at conciliation or via consent orders, whether the outcome was more favourable than the original decision or not.

## **5.2 Number of disputes**

I have had regard to data supplied by the SAET for the purpose of comparing the levels of disputation in the WCT and the SAET. I have also had regard to the two annual reports published by the SAET thus far.

The total number of disputes in the WCT was:

- 4898 in 2010-11;
- 4653 in 2011-12;
- 4916 in 2012-13;
- 7051 in 2013-14; and
- 9949 in 2014-15.

In its first year of operation (2015-16),<sup>11</sup> the SAET received a total of 4,904 applications, resolving 3,829 and leaving 1,022 in progress. Of the total number of applications made,

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<sup>11</sup> SAET Annual Report 2015-16.

3171 were either notices of dispute under the WRC Act or applications for reviewable decisions under section 97 of the RTW Act, 1695 were applications to expedite a decision under sections 113 and 38 were applications for suitable employment under section 18.

Of the applications for a reviewable decision, most applications were for the review rejection of a claim for physical injury under section 7(2)(a) / section 40 (802, 25.29%). There were also significant numbers of applications for the review of (uncategorised) decisions made under the WRC Act (781, 24.63%); applications for the review of the rejection of a claim for mental injury under section 7(2)(b) (337, 10.63%); and applications or the review of the reduction, discontinuance, variance, or review of weekly payments under section 48 (336, 10.60%).

In its second year of operation (2016-17),<sup>12</sup> the SAET received a total of 5924 applications, resolving 4945 and leaving 979 in progress. Of the total number of applications made, 4129 were either notices of dispute under the WRC Act or applications for reviewable decisions under section 97 of the RTW Act, 1755 were applications to expedite a decision under section 113 and 40 were applications for suitable employment under section 18. The total number of applications represented a 20.8% increase on the previous financial year.

Of the applications for a reviewable decision, most were for the review of a rejection of a claim for physical injury under section 7(2)(a) or section 40 (1132, 27.4%). There were also significant numbers of applications regarding the pre-approval of medical expenses (865, 20.9%); applications for the review of the rejection of a claim for mental injury under section 7(2)(b) (462, 11.2%); and applications or the review of the reduction, discontinuance, variance, or review of weekly payments under section 48 (386, 9.3%). The number of applications for the review of decisions made under the WRC Act reduced significantly (81, 2.0%). Disputes about medical expenses disputes spiked in August 2016 and disputes concerning compensability for serious injuries spiked in June – July 2017 due to mandated time limits coming into effect for transitional claims.<sup>13</sup>

In the 2017-18 financial year, as at the date of the relevant data being provided to me (20 February 2018), the SAET had received 3155 applications (in the workers' compensation jurisdiction only<sup>14</sup>), comprised of 2244 applications for a reviewable decision under section

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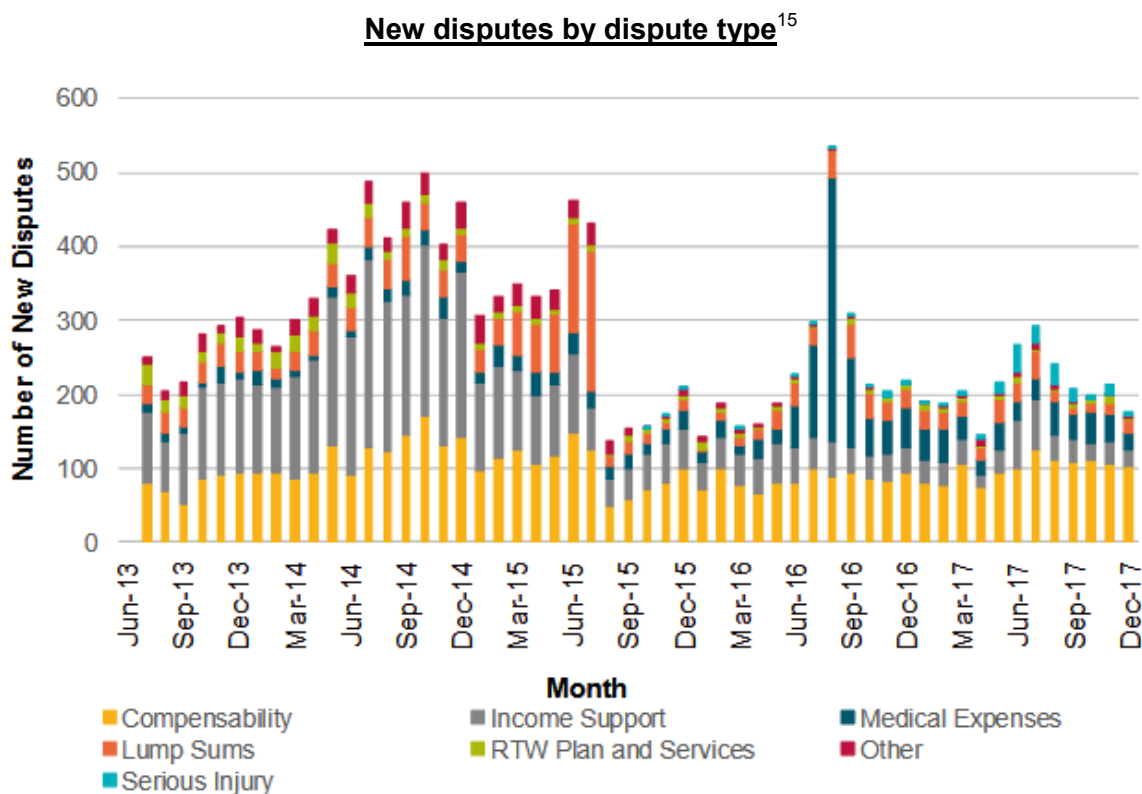
<sup>12</sup> SAET Annual Report 2016-17.

<sup>13</sup> 2016-17 SAET Annual Report, p 7; Scheme Actuarial Valuation (as at 31 December 2017), p 20 - 21.

<sup>14</sup> SAET's jurisdiction significantly expanded on 1 July 2017.

97, 882 applications to expedite a decision under section 113 and 26 applications for suitable employment under section 18. In the equivalent period of time in the previous financial year (July – February 2016-17), the SAET received 4123 applications and in the year before (July – February 2015-16) it received 3073 applications. On that basis, the increased number of applications in the 2016-17 financial year would appear to be a one-off occurrence.

The graph below summarises the types of new disputes by month for the period from June 2013 to December 2017.

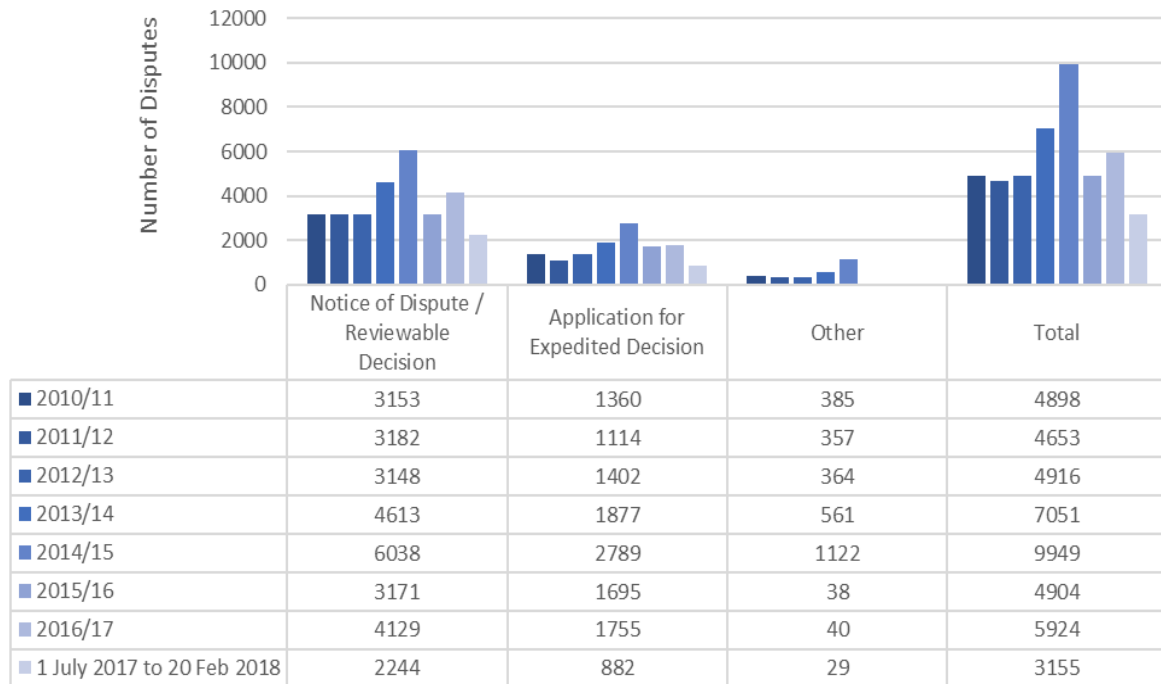


The data clearly shows the impact of the commencement of the new Scheme in July 2015. Also evident are the two surges in disputation in August 2016 and June – July 2017, referred to above. Disputes in relation to income support and lump sums have reduced substantially.

The next graph and table summarises the number of disputes on applications filed in the WCT and the SAET from 2010-11 to the current financial year.

<sup>15</sup> Source: Finity Consulting Pty Ltd, Scheme Actuarial Valuation (as at 31 December 2017), p 21.

## Disputes on applications filed in the WCT and the SAET



The statistical data indicates a marked reduction in the number of disputes in the SAET when compared with the last two years of the WCT's operation (2013-14 and 2014-15), but the data does not indicate a reduction in disputes in the SAET when compared to the number of disputes in the WCT from 2010-11 to 2012-13 (the number of disputes is approximately the same).

It is premature to make a definitive finding about whether a long-term reduction in dispute has been achieved or not because of the many transitional claims that remain to be resolved by the SAET. The transitional provisions are complex.<sup>16</sup> Proceedings that were commenced in the WCT continued in the SAET when the WCT was dissolved in March 2016.<sup>17</sup> Proceedings commenced before WCT under the WRC Act were continued and completed under the WRC Act.<sup>18</sup> Pursuant to Sch 9, cl 30(1) of the RTW Act, the question of whether

<sup>16</sup> See analysis of transitional provisions in *Return to Work Corporation of South Australia v Watkins* [2017] SASFC 149 at [26] - [34] (per Stanley J, with whom Kourakis CJ and Nicholson J agreed).

<sup>17</sup> *Return to Work (Dissolution of Workers Compensation Tribunal) Proclamation 2016*, 3 March 2016: the WCT was dissolved effective 5 March 2016. *Return to Work (Transitional Arrangements) (Dissolution of Workers Compensation Tribunal) Regulations 2016* r 4(e)(ii): any proceedings before the WCT under the WRC Act immediately before 5 March 2016 will be transferred to the SAET where they may proceed as if they had been commenced before SAET.

<sup>18</sup> *Return to Work Act 2014* Sch 9, cl 50.



an “existing injury”<sup>19</sup> is compensable or not will be determined pursuant to sections 30 and 30A of the WRC Act.

The statistics collated by the SAET are organised by the dates of applications rather than the dates of workers’ injuries. The SAET does not hold readily accessible statistical data that records the date of the injury for each claim. When disputes are compared by date of injury, a reduction in disputation is evident. The best data available to me to show this trend was provided by RTWSA in its initial submission. That data is, of course, limited in that does not include disputes outside of the registered scheme. RTWSA’s data reveals that the average number of disputes per month has reduced from 318 for injuries sustained between 1 July 2010 and 31 December 2012 (a total of 9530 disputes) to 89 disputes per month on average for injuries sustained in the period between 1 July 2015 and 31 December 2017 (a total of 2662 disputes).<sup>20</sup> This represents a 357% reduction in disputation. As the numbers of transitional disputes decline over time, I anticipate that the trend of reduced disputation will become apparent in the numbers of applications received by the SAET.

### **5.3 Length of disputes**

The duration of disputes has reduced substantially since the transfer of the workers’ compensation jurisdiction to the SAET.

Data provided by the SAET indicates that for disputes in the WCT that resolved at conciliation, the median time from lodgement to resolution was 188 days in the 2014-15 financial year. In the last five years of its operation, the WCT’s best median time from lodgement to resolution was 168 days in 2013-14. By contrast, the data indicates that for disputes in the SAET that resolved at conciliation, the average time from lodgement to resolution was 63 days in 2015-16 and 69 days in 2016-17 and 2017-18 (so far).<sup>21</sup>

The next graph and table summarise the duration of disputes that were resolved at conciliation in each financial year.

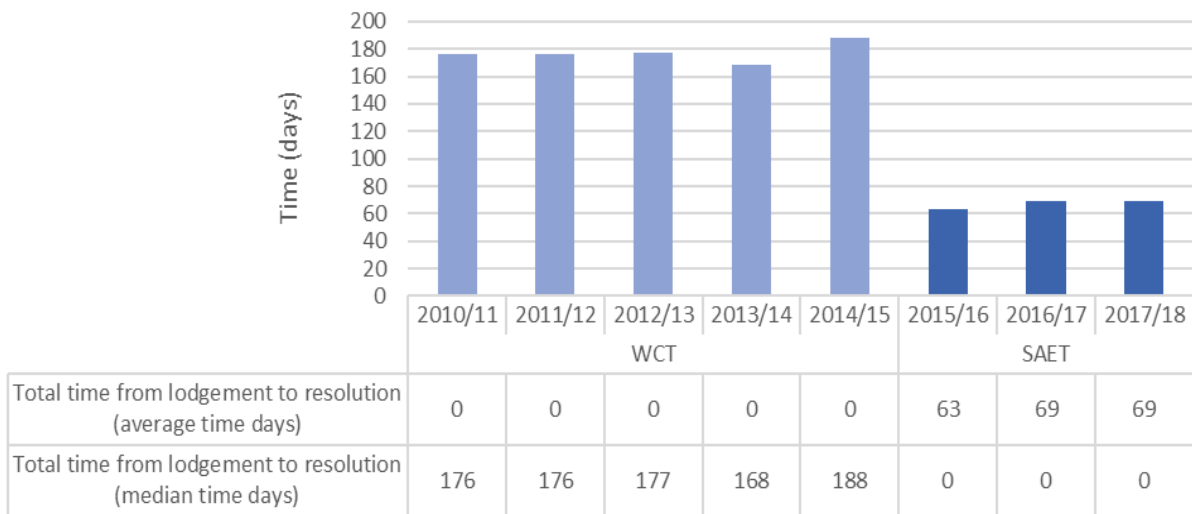
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<sup>19</sup> Attributable to a trauma that occurred before the commencement of the RTW Act.

<sup>20</sup> See Submission of RTWSA (No 1), p 3.

<sup>21</sup> The utility of this comparison is slightly limited by the fact that the WCT’s figures are expressed as a median (the middle value in a list of numbers), whilst the SAET’s figures are averages.

**Duration of disputes (if resolved at conciliation)**

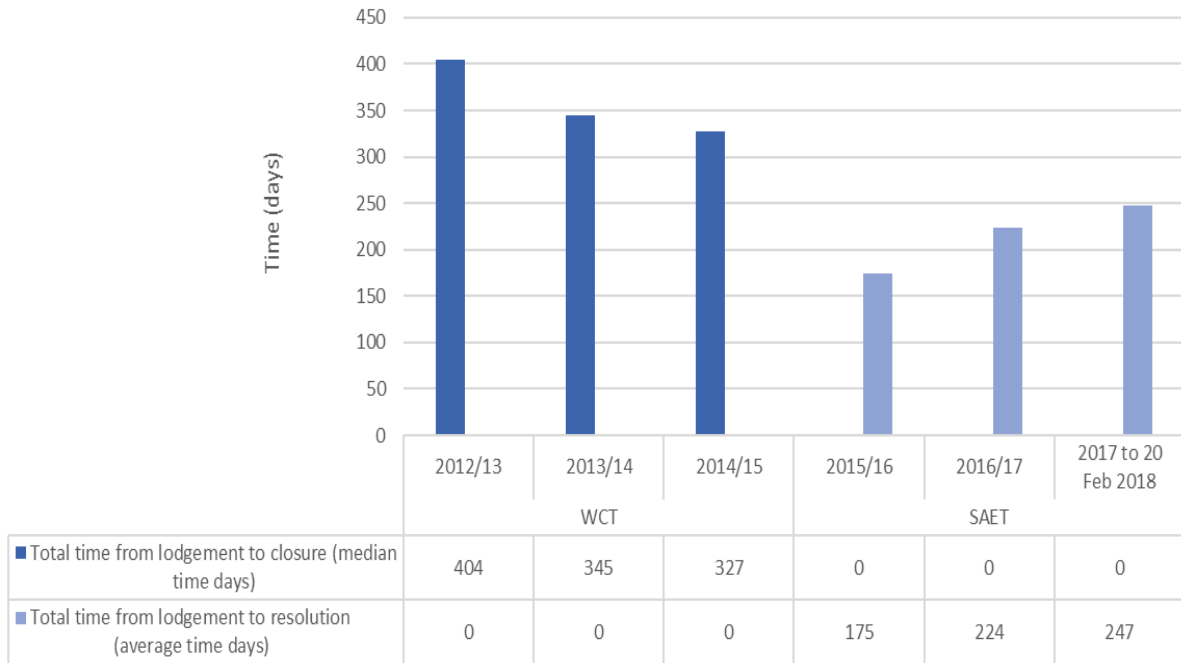


With regard to disputes that resolved at a hearing in the WCT, the median time from lodgement to closure of the matter was 327 days in 2014-15, 345 days in 2013-14 and 404 days in 2012-13. For disputes that resolved at a hearing in in the SAET, the average time from lodgement to resolution of the matter was 175 days in 2015-16, 224 days in 2016-17 and 247 days in 2017-18. The recent increases in the time taken by the SAET to resolve disputes is concerning, but the time taken is still less than in the WCT.<sup>22</sup> It is too early to tell whether this is a long-term trend or merely the result of the increased level of disputation relating to transitional claims in the 2016-17 financial year, in conjunction with uncertainty about the law pending the resolution of decisions under appeal.

The graph and table below summarise the duration of disputes that were resolved at hearing and determination in each financial year.

<sup>22</sup> The utility of this comparison is slightly limited by the fact that the WCT’s figures are expressed as a median (the middle value in a list of numbers), whilst the SAET’s figures are averages.

**Duration of disputes (if resolved at hearing)**

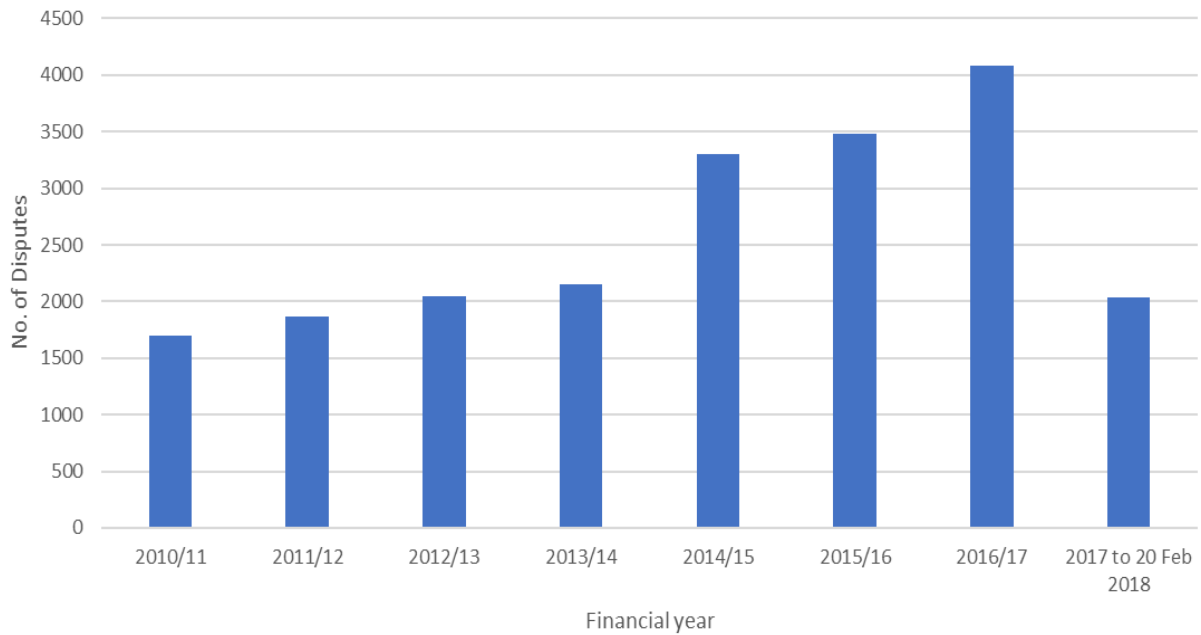


According to data provided by the SAET, the number of disputes resolved in conciliation has doubled since 2010/11 and this trend is expected to continue in the future. In the 2016-17 financial year, of the 4945 cases resolved, 4088 (83%) were resolved at conciliation (up from 71% in the previous financial year) and 857 (17%) were resolved at hearing and determination.<sup>23</sup>

The graph below shows the number of disputes resolved in conciliation by the WCT and the SAET in each financial year.

<sup>23</sup> SAET Annual Report 2016-17, p 7.

### Number of disputes resolved in conciliation

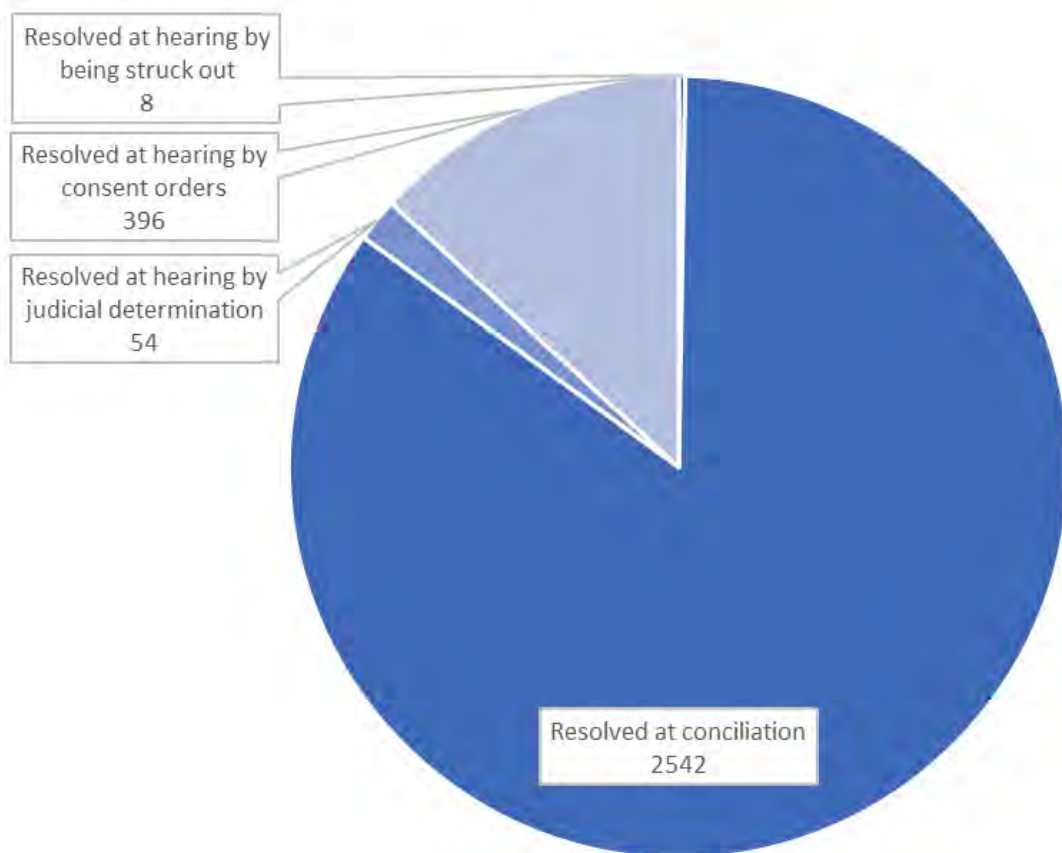


I sought further information from the SAET to better understand why such a high number of matters were resolved after conciliation, but relatively few decisions had been delivered by the SAET. A sample of 3000 random disputes revealed that:

- 2542 of the 3000 disputes were resolved at the conciliation stage (84.7%).
- The other 458 disputes (15.3%) proceeded to a hearing before a Presidential member. Of those disputes, only 54 resulted in a judgment (1.8% of all disputes).
- 396 of the 458 disputes (13.2% of all disputes) were resolved by a consent order.
- 8 of the 458 disputes that proceeded to judicial determination were struck out (0.2% of all disputes).

The above data is represented diagrammatically below.

**Sample of 3000 disputes resolved in the SAET, sorted by resolution**



The data reveals that a large number of matters are resolved after conciliation by consent orders. This is relevant to the submission of MinterEllison Lawyers that the inflexibility and inconsistency of Commissioners in exercising their discretion as to whether to extend the time for conciliation has led to a bottleneck of matters at hearing and determination before Presidential members, and an associated increase in the costs involved.<sup>24</sup> Equally, it may be said that the views of Presidential members carry much weight given their seniority and some parties would be assisted by a settlement conference before a Presidential member instead of an extension of time to continue conciliation.<sup>25</sup> The risk of incurring costs at hearing is also a factor that motivates parties to resolve matters expeditiously.

It is, of course, highly desirable for parties to have all of the relevant medical information before commencing conciliation as this enables the issues in dispute to be identified and narrowed down. Commissioners have the power to extend the time for conciliation and they may choose to exercise their discretion to do so in consideration of the particular

<sup>24</sup> Submission of MinterEllison, p 2.

<sup>25</sup> Submission of SAET, p 3.

circumstances of each matter. I am not convinced that the data supports a change in approach at this time. The SAET's alternative dispute resolution processes are a significant improvement on those of the WCT and it appears that the proportion of matters resolving via conciliation will continue to increase in the future.

## 5.4 Drivers of disputation

The most significant cause of disputes at present is the considerable uncertainty amongst lawyers, compensating authorities and injured workers as to the meaning of many critical aspects of the RTW Act.<sup>26</sup> The transitional provisions of the RTW Act are particularly complex and the SAET has had difficulty interpreting these provisions in a consistent manner.<sup>27</sup> There are several cases currently on appeal to the Full Bench of the SAET and the Full Court of the Supreme Court. Many matters that would ordinarily have settled in the past cannot be settled at present due to the uncertainty of the correct statutory interpretation of key provisions of the RTW Act,<sup>28</sup> or an equivalent provision in the WRC Act. As noted above, many of the matters presently being heard by the SAET and the Supreme Court relate to transitional claims where compensability and other issues were determined under the WRC Act. Once the transitional claims are resolved, I anticipate that the total number of disputes will reduce. The amount of disputation appears to bear no relationship to the total number of claims received by compensating authorities, which has steadily reduced since the 1990s.<sup>29</sup> The recent experience is that the number of applications received by the WCT / SAET has fluctuated over the last six years (see Ch 5.2), whereas the total number of claims received by compensating authorities has reduced each year from 32,833 in 2011-12 down to 20,098 in 2016-17.<sup>30</sup>

One of the themes underlying some of the submissions has been that the engagement of lawyers in this jurisdiction causes unnecessary disputation or unnecessarily prolongs disputation.<sup>31</sup> I have no evidence before me that militates toward such a conclusion. Although it would be desirable to see fewer claims that require the involvement of lawyers

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<sup>26</sup> Submission of Johnston Withers Lawyers (No 1), p 1; Submission of WK Lawyers (No 1), p 1; Submission of ASOS SA Branch, p 1.

<sup>27</sup> See *Pennington v Return to Work SA* [2016] SAET 21; *Andrzejczak v Department for Education and Child Development* [2017] SAET 183, 21 December 2017; *State of South Australia (Department for Education & Child Development) v Andrzejczak* [2018] SASC 30; *Return to Work Corporation of South Australia v Watkins* [2017] SASCF 149.

<sup>28</sup> Submission of Johnston Withers Lawyers (No 1), p 2.

<sup>29</sup> Finity Consulting Pty Ltd, Scheme Actuarial Valuation (as at 31 December 2017), p 23.

<sup>30</sup> Data supplied by RTWSA, inclusive of self-insured and Crown claims.

<sup>31</sup> See e.g. Submission of RTWSA (No 2), p 11.

because this would reduce costs to workers and employers, the complexity of the law means that when a claim is disputed, most parties, especially workers, will not fully understand their rights and entitlements without legal assistance.<sup>32</sup>

## 5.5 Costs and Appeals

Section 106 of the RTW Act requires the compensating authority to pay a party's reasonable costs of appeal to the Full Bench of the SAET and the Full Court of the Supreme Court, irrespective of the outcome of the dispute. This is a change from section 95 of the WRC Act, which entitled a party to an award for the party's reasonable costs against a compensating authority, but not in proceedings by way of an appeal or a reference of a question of law to a Full Bench of the WCT or the Supreme Court. I do not now seek to go behind the reason for this change in policy, other than to note that the Scheme, as a whole, was designed with a view to achieving financial stability and the financial impact of this change was factored into those calculations.

RTWSA submitted that it spent \$28.8 million on legal costs in the 2016-17 financial year and that this figure represents approximately 6% of total premium collected.<sup>33</sup> RTWSA further contended that the proportion of money spent on legal costs was too high and that review rights ought to be changed, including by limiting parties' rights to appeal certain types of decisions.<sup>34</sup>

The information provided by RTWSA is insufficient to support any finding that would support changes to costs provisions in the RTW Act. As stated in the supplementary submission of the Law Society of South Australia,<sup>35</sup> the data does not delineate different types of legal costs that have been incurred, or which party incurred those costs, or whether the costs incurred related to proceedings in courts of appellate jurisdiction or not. RTWSA submitted that such data was not readily available.

RTWSA's submission in respect of costs was supported by MinterEllison, who suggested that the risk of an adverse costs order acted as a disincentive for persons to pursue "minor and largely unnecessary claims".<sup>36</sup> I have no empirical data before me to suggest that

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<sup>32</sup> Submission of WK Lawyers (No 1), p 2; Submission of Law Society of South Australia (No 3), p 5.

<sup>33</sup> Submission of RTWSA (No 1), p 6.

<sup>34</sup> Submission of RTWSA (NO 2), p 14.

<sup>35</sup> Submission of Law Society of South Australia (No 2), p 2.

<sup>36</sup> Submission of MinterEllison, p 3.

persons have been pursuing such claims, although the statistical information available to me indicates that the SAET, thus far, has been characterised by a higher than usual number of appeals and Presidential referrals to the Full Bench, as well as an increased number of applications to the Supreme Court to appeal a decision of the Full Bench. The number of matters appealed or referred to the Full Bench of the SAET increased from eight in 2015-16 to 59 in 2016-17.<sup>37</sup> The number of applications to the Supreme Court to appeal a decision of the Full Bench increased from one in 2015-16 to five in 2016-17.<sup>38</sup>

It is important to acknowledge that, although the reduction of disputation is generally desirable for all parties, this aim must be balanced against parties' rights to have access to justice. There is no evidence of a systemic problem whereby claimants are lodging appeals to the Full Bench to pursue minor or unnecessary claims. The Full Bench has the power to make an adverse costs order against a party if that party acts unreasonably or the party's claim is frivolous, vexatious or an abuse of process, and it has done so.<sup>39</sup>

I am aware of over ten decisions of the Full Bench of the SAET in the workers' compensation jurisdiction that are currently on appeal to the Full Court of the Supreme Court as at the date of writing. The appeals concern questions of law regarding the interpretation of provisions of the RTW Act, or provisions of the WRC Act that are similar to provisions in the RTW Act. The appeals are at various stages.<sup>40</sup> Relatively few appeals to the Supreme Court have resulted in a judgment thus far. As parties are required to seek the permission of the Supreme Court in order to appeal a decision of the Full Bench of the SAET, I have no doubt that all appeals that are ultimately heard by the Full Court are arguable and of general importance.

The data available to me does not support a general restriction on the rights of appeal, either by amendment of sections 66 – 68 of the SAET Act or by the creation of a sub-jurisdiction in which decisions would be non-reviewable in the terms proposed by RTWSA or Business SA.<sup>41</sup>

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<sup>37</sup> SAET Annual Report 2016-17.

<sup>38</sup> SAET Annual Report 2016-17.

<sup>39</sup> Submission of PASA, p 6 - 7.

<sup>40</sup> For example, permission has been sought, or permission has been granted, or the appeal has been listed for hearing but not heard yet, or judgment has been reserved.

<sup>41</sup> Submission of RTWSA (No 2), p 14; Submission of Business SA, p 5.



## 6. TERM OF REFERENCE 2: TRANSFER OF JURISDICTION TO SACAT?

I have considered whether the jurisdiction of the SAET under the RTW Act should be transferred to the SACAT.

The SAET is best placed to deal with disputes arising under the RTW Act primarily due to the specialist expertise of its staff, including judicial officers; its functionality as both a court and a tribunal; and its conferral with other employment-related jurisdictions. None of the respondents to the Review advocated for the conferral of the jurisdiction under the RTW Act upon the SACAT. The SACAT is currently undergoing an expansion, which has thus far included both the conferral of new jurisdictions and the planned conferral of jurisdictions from other tribunals in stages. It is not appropriate for the SACAT to be conferred with jurisdiction under the RTW Act at this time.

### 6.1 Jurisdiction of the SAET

SAET commenced operation on 1 July 2015, contemporaneously with the commencement of the RTW Act. By sections 7 and 97 of the RTW Act, it was given jurisdiction to resolve disputes involving injuries under the RTW Act. The parallel jurisdiction under the WRC Act was exercised by the previous WCT. Under the RTW Act, it was contemplated that SAET's role would be to resolve disputes expeditious and fairly by quick and efficient decision-making: section 95.

SAET was, as at 1 July 2017, given jurisdiction to resolve other employment-related disputes. That jurisdiction was confirmed and extended by the *Statutes Amendment (South Australian Employment Tribunal) Act 2016*. By that enactment, the SAET Act was amended to create a part of the SAET sitting in court session, the South Australian Employment Court and a part that is an industrial relations commission. Further, the Industrial Relations Court, the Industrial Relations Tribunal of South Australia were abolished, and the jurisdictions of those two bodies was conferred upon the SAET. The SAET was also, at that time, given jurisdiction in respect all employment related matters previously held by a range of other tribunals, including dust diseases disputes, equal opportunity disputes, public sector grievances, and emergency services reviews.

At present, even with that very wide jurisdiction, its role under the RTW Act engages about 80% of its resources.

The RTW Act requires SAET to conduct a compulsory conciliation conference promptly after any dispute is notified to it (section 104, RTW Act). Then the SAET Act and Rules operate to prescribe specific and short time limits for that conference, with an initial hearing within 21 days and a formal conciliation conference within a further 28 days in the normal course. As noted in the previous chapter of this report, a significant majority of disputes are resolved at conciliation. If a dispute is not resolved in that way, it is referred to a Presidential member of SAET for active case management, again with a focus on speedy and fair resolution. The time span for such dispute resolution is dependent on the parties and the nature of the dispute. Again, a significant majority of disputes which do not resolve at conciliation resolve by consent.

For the purposes of this Term of Reference, it is not necessary to further detail the nature and extent of SAET's workload under the RTW Act or to compare its performance with that of the WCT under the WRC Act. As noted above, it is clearly more expeditious in bringing disputes to conciliation and in its extent to which disputes are effectively resolved by conciliation.

It is, however, appropriate to observe that the Presidential members of SAET are all well experienced, as are its Commissioners. Each of the Commissioners, who conduct the conciliation conferences, are accredited mediators under the National Mediator Accreditation Standards.

## **6.2 Jurisdiction of the SACAT**

SACAT commenced its operations on 29 March 2015. As its submission pointed out, The Government intended SACAT to have an extensive jurisdiction over time in a wide range of civil and administrative law disputes. That jurisdiction was to be granted in stages.

The first stage, conferred by the *Statutes Amendment (SACAT) Act 2014*, involved SACAT taking over the jurisdiction formerly exercised by the Guardianship Board, the Residential Tenancies Tribunal and the Housing Appeal Panel, together with a range of other minor work previously dealt with in the District Court of South Australia. There was also, by the

second stage, the grant of a further range of review of administrative decisions on matter previously not reviewable by a separate body. They are extensive in number but not involving the determination of any issues related to work related injuries.

The third stage was effected by the *Statutes Amendment (SACAT No 2) Act 2017*, conferring SACAT jurisdiction under a further 14 Acts of Parliament or Regulations. That jurisdiction will be granted progressively from 22 February 2018 and then later in 2018. It has not yet fully taken place.

SACAT has also been granted jurisdiction under the *Children and Young People (Safety) Act 2017* and the *Dog and Cat Management Act 1995*.

The planned fourth and fifth stages for the transfers of tranches of jurisdiction under existing legislation are yet to occur.

SACAT has pointed out that it is desirable that the evolution of its jurisdiction as planned, progressively, and allowing for its ordered development, is a desirable strategy, ensuring that it is able to best perform its functions as planned.

At the time of its establishment, it was not expressly intended that SACAT would take over the jurisdiction of the SAET or its predecessor as the entity reviewing decisions under the RTW Act or the now-repealed WRC Act.

### **6.3 Consideration of the transfer of jurisdiction to SACAT**

There were no submissions that, at this point, the jurisdiction of SAET under the RTW Act would better be exercised by SACAT.

There were some submissions about the SAET processes and systems, but none suggested that the concerns which gave rise to those submissions would be better resolved by transferring the jurisdiction to SACAT.

SACAT itself acknowledged that, if it were to be granted the jurisdiction presently exercised by SAET under the RTW Act, it would have to do so largely by importing the decision-making expertise and administrative and professional expertise of SACAT as well as having to find substantial physical premises presently remote from its existing premises. As the

President of SACAT acknowledged in her helpful submissions, if SACAT were to be given that jurisdiction, it would ideally be after it had the opportunity to ensure its existing and anticipated jurisdictions were completed and its own professional and administrative expertise in performing its functions to meet the expectations of its role in quality, timing and cost of its dispute resolution processes were fully in place. After that time, if SACAT were to be granted the jurisdiction of SAET under the RTW Act, it would have a more measured opportunity to develop the necessary expertise to best fulfil that role. Presently, such expertise is with SAET.

On the basis of the submissions, there is little doubt that the jurisdiction under the RTW Act presently exercised by SAET should continue to be exercised by SAET.

SAET has the appropriate expertise, both professional and administrative. It has an extensive workload, which is broadly speaking being fulfilled efficiently and in a timely manner. Particular submissions about the exercise of its jurisdiction are addressed elsewhere in the Review. There is no reason to think that they could not be addressed effectively by SAET.

There is an additional reason why the jurisdiction should presently be exercised by SAET. Consistency of decision making in respect of disputes arising from putative entitlements under the RTW Act is obviously desirable. To an extent, albeit presently not significant except at a potential level, such disputes might also arise in the case of some State employees (or the State) in relation the extended entitlements which may arise under the amendments to a number of industrial instruments noted elsewhere in this Review. The jurisdiction to resolve disputes under those instruments lies with SAET.

#### **Recommendation 4**

That the SAET retain its jurisdiction under the RTW Act.

## 7. TERM OF REFERENCE 3: DETERMINATION OF MEDICAL QUESTIONS

I have considered the extent to which there has been an improvement in the determination and resolution of medical questions arising under the RTW Act, including when compared to the system applying under the WRC Act.

### 7.1 Whole person impairment

#### The policy behind the test

In light of the submissions I have received in respect of this topic, it is appropriate to reiterate that this Review is concerned with the administration and operation of the RTW Act as it stands and is not an analysis of the merits of Government policy. This is a subtle, but important, distinction. The issue I have considered is whether the law is operating as intended, rather than whether the intention of the legislature ought to have been different.

One of the defining features of the RTW Scheme is that, in order for a worker to be classified as “seriously injured”,<sup>42</sup> and therefore eligible for income support beyond a period of two years and medical treatment for any longer than three years, his or her work injury must result in a permanent impairment and the degree of whole person impairment (“WPI”) must be assessed as at least 30% in a permanent impairment assessment (“PIA”).<sup>43</sup>

The new test replaces work capacity assessments under the WRC Act. Unlike PIAs, work capacity assessments were a type of “narrative” test that took into account the extent to which the worker’s injury affected his or her capacity to return to work. Some submissions contended for the re-introduction of a narrative test to either supplement or replace the already existing PIA process. The PCOSRC recommended that the Minister give consideration to the introduction of such a test.<sup>44</sup> Other submissions opposed the

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<sup>42</sup> *Return to Work Act 2014* s 21.

<sup>43</sup> A worker’s level of permanent impairment also affects their entitlement to lump sum compensation for economic and non-economic loss and their right to pursue common law claims against negligent employers.

<sup>44</sup> PCOSRC Final Report, p 31.

introduction of a narrative test on the grounds that it is inherently subjective<sup>45</sup> and will lead to an increase in disputation.<sup>46</sup> Those submissions cited the introduction of a narrative test as an option to access common law in Victoria as detrimental to the financial stability of the scheme in that State.<sup>47</sup> In any case, it is evident that the legislature has explicitly rejected the narrative test that was a feature of the WRC Act. That narrative test was seen to have contributed to the large unfunded liability of the old Scheme. With that in mind, the RTW Act was designed to have “clear, unambiguous boundaries and less moving parts.”<sup>48</sup>

The 30% WPI threshold is an example of what the Hon. John Rau MP, former Minister for Industrial Relations, described as a “hard boundary”.<sup>49</sup> The policy underlying PIAs and the 30% WPI threshold is that seriously injured workers ought to be treated differently to those workers who are less seriously injured because the former require significant support to maximise their recovery and ability to participate in the community.<sup>50</sup> The RTW Act effectively deems workers assessed with a whole person impairment of 30% or more to be seriously injured. It was thought that “[h]aving a distinct boundary here is essential for the scheme to be able to support those workers who need it most”.<sup>51</sup> In reality, the nature of injuries varies widely and the degree of a worker’s injury is difficult to definitively categorise as either ‘serious’ or ‘non-serious’.

### **Why is 30% WPI the threshold for deeming a worker to be seriously injured?**

The 30% threshold is a blunt instrument. It is bound to produce capricious outcomes in a small number of cases because a person’s degree of impairment will not necessarily be commensurate with their capacity to perform work.<sup>52</sup> For example, a clerical worker who has a double knee reconstruction could be classified as seriously injured, despite the injuries having minimal impact on his or her capacity to perform their work. The Scheme will provide ongoing financial support to that worker for the rest of their working life. Thus, the RTW Scheme operates to disincentivise a return to work in circumstances where it would be possible for the worker to return to work. Conversely, a labourer who has had spinal fusion surgery and is in constant pain might be classified as non-seriously injured, despite that

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<sup>45</sup> Submission of MTA, p 12; c.f. Submission of PASA, p 23.

<sup>46</sup> Submission of REG, p 6.

<sup>47</sup> Submission of MTA, p 12.

<sup>48</sup> The Hon. John Rau MP, Government Gazette, House of Assembly, 6 August 2014, 1437.

<sup>49</sup> Kevin Naughton, 2 April 2014, “Rau sets hard boundaries for WorkCover”, InDaily, <https://indaily.com.au/news/2014/04/02/rau-sets-hard-boundaries-workcover/>.

<sup>50</sup> Government of South Australia, 2014, “A new recovery and return to work system for South Australians: A workers’ compensation policy statement”, p 5.

<sup>51</sup> The Hon. John Rau MP, Government Gazette, House of Assembly, 6 August 2014, 1439.

<sup>52</sup> See e.g. Submission of PASA, p 22; Submission of SA Unions, p 13.

injury potentially meaning that the worker will never be able to perform manual labour again. The Scheme will provide that worker with no income support after two years and no money for medical treatment after three years, even though the worker may require financial support for an extended period of time.

That being said, the selection of the 30% threshold is not entirely arbitrary. Whether certain workers with specific types of injuries meet that threshold is a matter of well-defined policy. That policy intends that there are “[c]lear objective criteria for workers to be identified as being seriously injured. It is intended that serious injury cases will include injuries such as significant amputations, quadriplegia, blindness and significant burns.”<sup>53</sup> The question of whether workers with a lower WPI ought to be afforded greater benefits is a decision for the Government to make in consideration of all of the circumstances, including the financial stability of the Scheme. In this context, the policy objectives of achieving a financially sustainable scheme with an average premium rate of less than 2% are highly relevant.<sup>54</sup>

Each element of the RTW Act cannot be considered in isolation. The 30% WPI threshold for seriously injured workers is part of a wider package of benefits, some of which have increased, and others of which have decreased, when compared with the benefits available to workers under the WRC Act.<sup>55</sup> I accept that if there are changes to the WPI threshold, those changes would need to be offset by other changes.<sup>56</sup>

I have had regard to several submissions that contended for the 30% WPI threshold for seriously injured workers to be reduced.<sup>57</sup> However, I am not persuaded that a 20% WPI threshold, for example, would be any less arbitrary than the current threshold. Further, it is estimated that such a change would have an unsustainable impact on the RTW Scheme’s financial position and a significant adverse impact on the average premium rate.<sup>58</sup>

I have made recommendations elsewhere in this report with the aim of ameliorating, to some extent, harshness or unfairness that may result from the operation of the WPI threshold, without compromising the financial stability of the Scheme.

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<sup>53</sup> Government of South Australia, 2014, *A new recovery and return to work system for South Australians: A workers’ compensation policy statement*, p 5.

<sup>54</sup> The Hon. John Rau MP, Government Gazette, House of Assembly, 6 August 2014, 1437.

<sup>55</sup> Submission of AI Group, p 4.

<sup>56</sup> Submission of AI Group, p 5.

<sup>57</sup> Submission of SA Unions, p 14, Submission of PASA, p 27; Submission of Ambulance Employees Association of SA, p 2; Submission of RANZCP SA Branch, p 2; Submission of Johnston Withers Lawyers (No 1), p 8.

<sup>58</sup> Submission of RTWSA (No 2), Annexure prepared by Finity Consulting Pty Ltd entitled “*Costing Scenarios – Potential Changes to Scheme Boundaries*”, 20 February 2018, p 7.

## **The combination of injuries**

It is in the context of the Scheme's financial sustainability (see Chapter 13) that many parties have made submissions concerning the combination of injuries in PIAs. Those submissions are also relevant to the determination of medical questions. The matter of *Mitchell v ReturnToWorkSA* ("*Mitchell*")<sup>59</sup> was a focus for RTWSA in its submissions.

In *Mitchell*, the worker was assessed at 25% WPI caused by lumbar spine surgery and 1% WPI for surgical scarring associated with spinal fusion. The worker subsequently used numerous medications, mainly opioids, to relieve pain resultant from that surgery. The worker suffered further injuries to his upper digestive system (10% WPI); lower digestive system (14% WPI); urinary and reproductive system (20% WPI for erectile dysfunction and 28% for bladder disease); and mastication (difficulty chewing) / deglutition (difficulty swallowing) (10% WPI). I note that there was disagreement amongst persons who made submissions to the Review about the extent to which these additional injuries were resultant from the over-use of opioids. It was held by the SAET at first instance (Calligeros DPJ) that the worker could combine the WPI attributed to the original injury (26%) with the WPI attributed to the other injuries (44%), resulting in a total WPI of 70%. The decision was unanimously held on appeal (McCusker J, President, Dolphin DPJ, Lieschke DP).<sup>60</sup> The decision of the Full Bench of the SAET is presently the subject of an appeal to the Full Court of the Supreme Court. A decision is yet to be delivered by the Supreme Court as at the date of writing.

The *Mitchell* case concerns the interpretation of section 43(6)(a) of the WRC Act, which provides that if a worker suffers two or more compensable injuries arising from the same trauma, the injuries may together be treated as one injury to the extent set out in the WorkCover Guidelines (and assessed together using any combination or other principle set out in the WorkCover Guidelines). Section 7(6) of the RTW Act similarly provides that any injury which is attributable to surgery or other treatment is taken to constitute part of the original work injury.

It is not unreasonable that a worker who sustains multiple injuries arising from a single trauma is afforded the same benefits as a worker who only sustains one equally serious

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<sup>59</sup> [2017] SAET 16.

<sup>60</sup> [2017] SAET 81.



injury arising from a single trauma.<sup>61</sup> I cannot find a basis for RTWSA's submission that the decision in *Mitchell* "runs contrary to the objects of the legislation, in that it encourages a culture of litigiousness, perversely incentivises the taking of medications that have negative outcomes for the worker (such as opioids) and embeds a culture of dependence and sickness rather than focusing on a worker's capacity to return to work."<sup>62</sup> The facts of the case are, if anything, a warning against the use of opioids in large quantities for an extended period of time. I do not consider that persons are likely to inflict upon themselves the side-effects of excessive opioid use, which are evidently highly deleterious to one's health, in order to obtain additional compensation under the RTW Act. There is also now a greater awareness of the dangers of excessive opioid use amongst the community. It would appear from RTWSA's submission that it was not anticipated that iatrogenic (illness caused by medical treatment) impairments could result in significant WPI %, potentially well in excess of the WPI attributable to the original injury. RTWSA may have been caught off-guard by the extent to which iatrogenic injuries may cause a worker to be permanently impaired, but one cannot elevate this concern to a statutory purpose of the legislation.

The financial implications of the decision in *Mitchell* are discussed in Chapter 13.

## 7.2 Pre-approval of surgery

Section 33(17) of the RTW Act provides a novel basis by which a worker can apply for RTWSA's approval to meet the cost of services, appliances, medicines or materials set out in section 33(2) before they are incurred. This process is followed for the exceptions to the medical entitlement period in section 33(20) of the RTW Act, such as surgery. The majority of the Full Bench of the SAET in *Rudduck, Karpathakis and Ashfield v Return To Work SA*,<sup>63</sup> which is subject to appeal to the Full Court of the Supreme Court, found that requests for approval of surgery will fall to be considered under section 33(21), and not section 33(17). Therefore, an applicant need not comply with the requirement to provide medical evidence under r 22(2) of the RTW Regulations.

RTWSA's case for reform is that there has been a much larger number of claims seeking approval for future surgeries than was expected to occur. The scheme actuary had anticipated that approximately 50% of these claims would be successful. If substantially more claims are successful, RTWSA contends that there is a risk of tens of millions of dollars

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<sup>61</sup> Submission of ASOS, p 3; Submission of the Hon. Tammy Franks MLC, p 2.

<sup>62</sup> Submission of RTWSA (No 1), p 9.

<sup>63</sup> [2017] SAET 41.

to the outstanding claims liability and significant impact on the average premium rate. RTWSA has also raised concern that this cohort of claimants tends to dispute claims more often and require greater levels of management. RTWSA has proposed that r 22 of the RTW Regulations be amended to clarify that there is a requirement for detailed medical evidence to be submitted with an application in order for future surgery to be approved.

Several persons submitted that the requirement for surgery to be pre-approved is harsh. It may be argued that, if an injured worker is able to establish that surgery is necessary to treat a compensable injury at any time, then the cost of such surgery and associated medical care should be provided.<sup>64</sup> This reasoning is susceptible to the conclusion that the requirement for pre-approval of future surgery ought to be removed.<sup>65</sup> However, that would be contrary to the “hard boundary” set by the legislature. The clear intent behind the requirement that future surgery be pre-approved is to ensure a level of certainty in respect of outstanding claims liabilities after the end of the three year medical entitlement period. An inherent consequence of the requirement for pre-approval is that a worker, if he or she has legal representation and is made aware of their rights,<sup>66</sup> will lodge an application to preserve their right to access compensation for future surgery.<sup>67</sup> I am particularly concerned about instances where claims agents have allegedly failed to make workers aware of their rights or have provided incorrect advice to workers.<sup>68</sup>

#### **Recommendation 5**

That consideration be given to amendments to the RTW Act and/or RTW Regulations to require compensating authorities to notify potential claimants of time limits well in advance of expiry of time limits and to provide potential applicants with relevant information about their rights (including the correct forms) to seek pre-approval of future surgery.

The SAET appears to be hesitant to dismiss applications for pre-approval of future surgery that are made with barely any supporting evidence (the worker is at liberty to supplement their request during the judicial process if necessary).<sup>69</sup> There has been some inconsistency between the authorities on this issue, which is also presently the subject of appeal.<sup>70</sup> I

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<sup>64</sup> Submission of the Law Society of South Australia (No 1), p 2.

<sup>65</sup> PCOSRC Final Report, p 41.

<sup>66</sup> Submission of WK Lawyers (No 1), p 2.

<sup>67</sup> Submission of REG Group, p 3.

<sup>68</sup> Submission of Johnston Withers Lawyers (No 1), p 7.

<sup>69</sup> [2017] SAET 41, [84] (McCusker J, President), with whom Dolphin DPJ, as he then was, agreed at [188].

<sup>70</sup> See *Tinti v Return to Work SA* [2016] SAET 72 (Calligeros DPJ); *Return To Work SA v Ledo* [2017] SAET 180 (Dolphin J, President, Gilchrist, Farrell DPJJ).

consider that it is undesirable for all parties if the compensating authority has to make a decision on an application that contains inadequate supporting evidence and then it faces a substantially different case once the matter is listed for judicial determination. It causes substantial prejudice to the compensating authority,<sup>71</sup> as well as prolonged disputation that may not have been necessary if the applications had some substance when they were first formulated. The legislation has been interpreted such that it has resulted in a two-stage process in which claimants first make applications to seek permission for the time limit in section 33(20) not to apply, thereby preserving their right to have the issue of whether compensation should be paid for the surgical expenses at a later date.<sup>72</sup>

I do not propose to stray into the territory of statutory interpretation of the relevant provisions, particularly as that is the subject of appeal to the Supreme Court. I have considered, in light of all of the submissions and other extrinsic material available to me, whether the process is operating consistently with the legislation's objects as well as the relevant policy objectives. It would be preferable to have a one-stage process instead of a two-stage process to resolve these matters. This is consistent with the aim of the legislation, and the policy objective, to reduce disputation. An applicant ought to be able to have the issue of whether compensation should be paid for the surgical expenses determined in the one application, without having to make another application to first preserve their right to have that issue determined. That would be a waste of time and money for all parties concerned and is contrary to the intent of the pre-approval regime in that it provides no certainty for the compensating authority about the extent of outstanding claims liabilities.

The trade-off that comes with the certainty of the pre-approval regime for compensating authorities is that a claimant may make an application for pre-approval of surgery without having a detailed understanding of: (1) the nature of the surgery that may be required down the track; (2) the connection between that surgery and their injury; and (3) the anticipated benefits that they will obtain from the services.<sup>73</sup> This is unavoidable in a system that requires claimants to anticipate that surgery will be likely to be required well after the date of their application for pre-approval. When assessing applications for pre-approval of future surgery, compensating authorities ought to bear in mind that the level of supporting evidence may not be as detailed as it would have been if the surgery was imminent. In addition, requests for future surgery may be framed in broad terms to account for uncertainty in the exact type of surgery that may be required and/or the possibility that subsequent surgery

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<sup>71</sup> [2017] SAET 41, [137] (Calligeros DPJ).

<sup>72</sup> [2017] SAET 41, [210] (Dolphin DPJ).

<sup>73</sup> Submission of WK Lawyers (No 2), p 4.

may be required.<sup>74</sup> If a request for pre-approval of future surgery is framed broadly, the supporting medical evidence still needs to justify why that is the case.

#### **Recommendation 6**

That consideration be given to amending the RTW Act and/or RTW Regulations to clarify that applications for pre-approval of surgery are required to be submitted with supporting evidence under regulation 22 and are not merely applications to preserve the right to make a substantive claim for the expense of surgery at a later date.

#### **Recommendation 7**

That consideration be given to amending the RTW Act and/or RTW Regulations to clarify that applications for pre-approval of future surgery need not be supported by evidence with the level of detail that would ordinarily be expected if the surgery was imminent and that requests for future surgery may be broadly framed to account for uncertainty about exactly what surgery is required.

### **7.3 Medical questions and independent medical advisors**

Differences as to the interpretation of the IAGs, the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition (“AMA 5”) and the Guide to the Evaluation for Psychiatric Impairment for Clinicians (“GEPIC”) have given rise to more complex disputes about medical questions than under the old Scheme.<sup>75</sup> I note the submissions made by members of the medical community that these documents create a “legal fiction” and are not evidence-based. These are valid points. The translation of the seriousness of a person’s injuries into a percentage value is not a straightforward task, nor is it entirely objective, but it is a workable system for the purposes of the RTW Act. The “hard boundaries” of the RTW Act necessitate the quantification of impairment. The apparent increase in the complexity of disputes about medical questions is also likely to be a function of the emphasis placed on having one and only PIA to determine a worker’s WPI, which, in turn, determines the levels of compensation a worker will receive under the new Scheme. It is therefore to be expected that PIAs are generating a significant level of disputation and will continue to do so.

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<sup>74</sup> Submission of WK Lawyers (No 1), p 3.

<sup>75</sup> Submission of Johnston Withers Lawyers (No 1), p 3-5.

PIA's are complex, time-consuming and require a high level of expertise, potentially across many diverse areas of medical practice.<sup>76</sup> The bulk of PIAs are done by a small group of assessors (1524 out of a total of 3443 assessments have been completed by 6 assessors since 1 July 2015).<sup>77</sup> There is sometimes significant variation in WPI percentages allocated by different assessors for similar injuries depending upon which assessor is chosen by the worker.<sup>78</sup> It is important to remember that guidelines can only provide guidance about PIAs and that, where the guidelines provide for the exercise of discretion, reasonable minds may differ as to the answer to some medical questions.

Section 121 of the RTW Act provides for the appointment of one or more IMAs to consider medical questions or issues where there is a dispute. The SAET need not seek the agreement of parties before a matter is referred to an IMA. The SAET may refer a matter to an IMA at its own initiative or on the initiative of one party to proceedings. The SAET must satisfy itself that a medical question arises on the issues in dispute before ordering a referral to an IMA. The referral to an IMA should ideally be made as soon as a medical question is identified.<sup>79</sup>

Some submissions contended that the SAET is resolving medical questions itself instead of making use of IMAs.<sup>80</sup> Those submissions commonly pointed to the fact that only 11 referrals to IMAs were made in the 2016-17 financial year.<sup>81</sup> This is a disproportionately low number of referrals when compared with the number of disputes.

The use of IMAs was clearly intended to be much greater. Many IMAs have undertaken training, but have not been adequately utilised.<sup>82</sup> The underuse of IMAs is surprising given that IMAs are seen as the successor to medical panels,<sup>83</sup> which formerly played an important role in determining medical questions under the WRC Act. Furthermore, I would have expected that more PIAs would be subjected to scrutiny by IMAs, particularly in matters of greater complexity.<sup>84</sup> Although section 22(10) of the RTW Act provides that there can only be

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<sup>76</sup> Submission of IMEGSA and Dr John Meegan, p 6.

<sup>77</sup> Submission of RTWSA (No 1), p 9.

<sup>78</sup> Submission of RTWSA (No 1), p 9; Submission of PASA, p 23.

<sup>79</sup> Submission of MinterEllison, p 3.

<sup>80</sup> Submission of RTWSA (No 1), p 10; Submission of SISA p 6; Submission of MinterEllison, p 3; Submission of Minister's Advisory Committee, p 2; Submission of LGASA, p 5; see e.g. errors found on appeal by the Full Bench of the SAET in the matter of *Dallimore v Return To Work SA* [2017] SAET 72.

<sup>81</sup> 2016-17 SAET Annual Report, p 9.

<sup>82</sup> Submission of IMEGSA and Dr John Meegan, p 5.

<sup>83</sup> See e.g. McCarthy, Greg, *Insights for success in work injury insurance*, p 24.

<sup>84</sup> Submission of Dr Peter T. Jezukaitis, on behalf of ANZSOM SA Branch, p3.

one PIA to determine WPI, that PIA must be compliant and must still comply with rules concerning the admissibility of expert evidence.<sup>85</sup> Section 122 of the RTW Act clearly contemplates that an IMA may be used to answer questions relating to any matter that is relevant to the assessment of WPI. Thus, IMAs provide a potentially powerful tool for the resolution of medical questions. It remains to be seen whether the use of IMAs will increase as the RTW Scheme matures or whether IMAs represent an improvement on the determination of medical questions under the WRC Scheme.

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<sup>85</sup> *Abraham v Return to Work SA* [2016] SAET 76, [56] (Gilchrist DPJ); *White v RTWSA* [2018] SAET 91 (Lieschke DP).

## 8. TERM OF REFERENCE 4: PERFORMANCE OF RTWSA

This Term of Reference is limited to the consideration of RTWSA's performance in claims management and reducing instances of work injury. Other aspects of RTWSA's performance, such as return to work outcomes and financial stability, are discussed elsewhere in this report.

### 8.1 Quality of decision-making

In the very substantial majority of instances of work injuries since 1 July 2015, RTWSA has been the decision maker determining the entitlements of the injured worker. The other decision makers, of course, are the individual self-insured employers and the State.

RTWSA makes decisions directly in only a few instances of clearly severe injury. In the main, its decisions are made by its two agents Employers Mutual SA Pty Ltd ("EML") and Gallagher Bassett Pty Ltd ("Gallagher Bassett"). The worker's direct contact with RTWSA in most instances is therefore largely either EML or Gallagher Bassett. RTWSA accepts that it is responsible for their decision making. It also requires that the electronic records of its agents are routinely available to it. It conducts random, but not infrequent, checks of some of their files, and in the event of a complaint has immediate access to the relevant agent's file.

There is one matter which it is appropriate to address immediately. It was suggested in one submission that there may be in existence various incentive criteria for the two agents to minimise the benefits being paid to injured workers and to discontinue payments and the payment of medical expenses, and to otherwise reduce the costs to the Scheme. As that was suggested, that matter has been investigated. The relevant documents relating to the engagement of the two agents, and their obligations to RTWSA and any documents setting out key performance indicators have been examined. There are no such criteria in those documents. The senior officers of RTWSA have informed the Review that there are no formal or informal criteria of that character. In the material available to the Review, there is no other indication of any such criteria.

I am satisfied that there are no such criteria.

That is not to say that the decision making of RTWSA either directly or through its two agents is ideal. Clearly it is not. That picture emerges from the submissions to the Review from some, but not many, individual workers or members of their families, and from the submissions from a number of lawyers and unions who routinely deal with claims on behalf of individual workers.

It is not appropriate to set out the details of individual complaints. They have been carefully examined. Some relate to decision making under the former WRC Scheme. Those which relate to decision making under the present Scheme involve expressions of great disgust in part at the level of benefits available, but in part at the way in which the decisions which affect the injured worker or the worker's family are made and the correctness of the decisions made.

The submissions by lawyers and unions are also forceful.

Understandably, and correctly, often the starting point is to point out that there is an inherent conflict in RTWSA being responsible for the management of the RTW Act and Scheme, with an objective ensuring premiums are set so as to ensure that they do not exceed a certain level (2% of wage expenditure) and that the RTW Scheme is a fully funded scheme on the one hand, and on the other to make decisions about the eligibility of workers for benefits under the RTW Scheme and to fix the level of those benefits in each individual case. To state that is not to inevitably accept that the decision making of RTWSA directly or through its agents is consciously driven by keeping premiums as low as possible, or by making wrong decisions so as to achieve the required overall premium level and a funded scheme.

Obviously, decisions on individual claims could not be understood as directly impacting on those much broader issues. No particular decision on a claim or claims could do so. Moreover, the two claims agents do not have the basis for or any information which would enable any assessment to be made that its decision on any particular claim or claims could have a material impact on those wider matters and they are not accountable for them. Despite the conflict which has been pointed out, I have not seen evidence of any conscious decision making in relation to claims driven or potentially driven by those alternative considerations.

In my view, there is no basis for recommending that decision making in relation to claims should be made by any entity removed from RTWSA and its agents. I accept nevertheless



that each decision maker would be mindful of not allowing a claim unless satisfied that it is appropriate to do so. Indeed, in that sense, the decision making is similar to that made by any other insurer (or by the former WorkCover Corporation) — it involves a consciousness in a general sense that claims collectively, when allowed, may affect the bottom line.

Equally clearly, RTWSA has endeavoured to improve the quality of its decision making compared to that of the WorkCover Corporation under the former scheme since 1 July 2015. Its efforts to do so include accepting telephone reporting of claims, mobile claims management with what is an attempt at more personalised service (particularly in the metropolitan area), and more efficient processing of payments for claimants and providers. It regularly surveys employers and workers to assess the level of ‘client’ satisfaction. Overall, the surveys show that some 80% of those surveyed rate its service at 7/10 or higher and more than 50% give a score of 9 or 10.

Its efforts have not been entirely successful. The submissions of lawyers and unions (and the individual submissions) indicate that. One forcefully said that *“extremely poor decision-making by compensating authorities is by far the greatest cause of disputation”* and their *“decision-making should be greatly improved”*. Other submissions are less forceful, to the effect that there is little difference in the claims decision making compared to that under the previous regime.

Having regard to one submission which referred to a report of the Victorian Ombudsman on the scheme operating in Victoria, the Review received a report from the South Australian Ombudsman. As was pointed out, Schedule 5 of the RTW Act sets out service standards, but limits potential complainants to workers and employers (excluding their representatives and family members). In the 2016-17 financial year, the Ombudsman identified only 3 complaints concerning claims management. There were two about one claims agent and one about RTWSA through its other agent. They concerned: unreasonable management of time, i.e. delays beyond those contemplated (the agent was required to apologise and to implement systems to ensure the timeliness service standards were met); failure to treat the worker fairly, by failing to allow the worker a reasonable opportunity to resent material before rejecting the claim; and failure to properly investigate a claim. In the last mentioned case, as a result of the complaint, RTWSA implemented a refined complaints management / investigation process to endeavour not to have the same problem arise.

That material does not suggest a systemic failure to meet the service standards prescribed in Schedule 5, or any unwillingness on the part of RTWSA to endeavour to provide an appropriate claims management process.

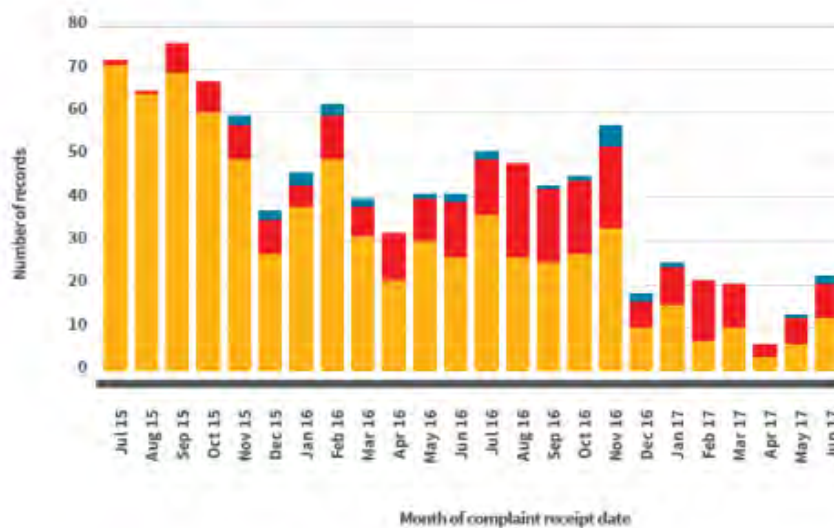
## 8.2 Statistics

RTWSA has provided the following records of the timeliness of its service measures in the 2016-17 year, and of the complaints it has received over the period from July 2015 to June 2017:

### Service measures - timeliness



### Complaints: old scheme vs new scheme



#### CLAIM TRANSITION INJURY CATEGORY DESCRIPTION

- Not claim related
- 1 July 2015 onwards
- Prior to 1 July 2015

There is no reason to doubt that data. It is apparent that there is scope for improvement in the timeliness of assessment of claims received. Some submissions suggested that it would be appropriate to provide a default entitlement to income maintenance if there was a delay in deciding to accept / not accept a claim within the time period of 10 days, and until the decision on the claim was made. There is merit in that submission. It is not addressed in the responsive submission of RTWSA.

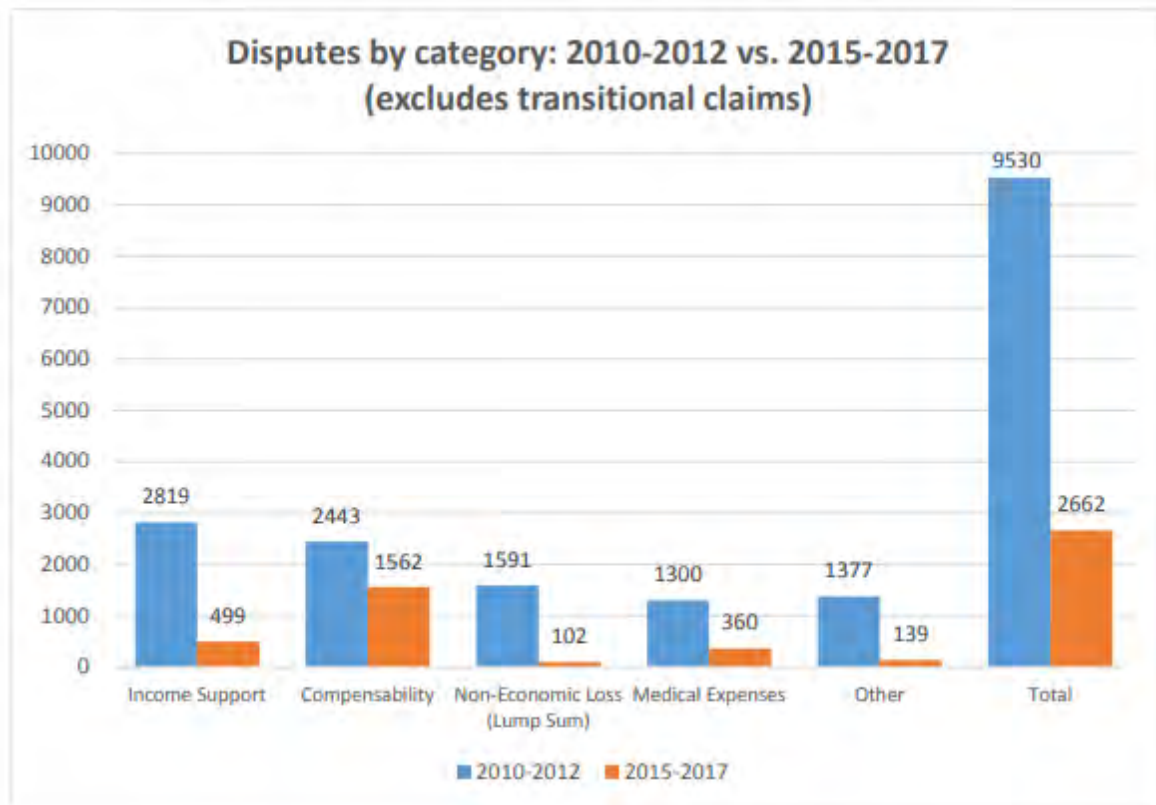
#### **Recommendation 8**

That consideration be given to amending the RTW Act to provide, that, in the event of a decision on a claim for income support payments being made to RTWSA, and a decision to accept or not to accept the claim is not made within 10 days of the claim, and the worker is not otherwise being paid by the employer, the worker be entitled to income maintenance for the period from the commencement of the claim until a decision is made to accept or not to accept the claim.

Although there are concerns expressed in the submissions about late payment of medical and like expenses in a timely manner, the statistics do not suggest any institutional problem with timely payment. There is no clear material indicating significant hardship with such payment delays as have occurred, although certain providers of medical and other support services have expressed concerns about delays. In my view that is a matter which should be monitored rather than requiring any particular change to the existing systems or obligations on the part of RTWSA and its agents.

In relation to the quality of decision making, it is also relevant to consider the extent to which disputes arising from decisions of RTWSA and its agents are referred to SAET. That is a matter which, in a different context, has already been addressed in the Review. Although criticised by some submissions, RTWSA suggest that it is relevant now that the period of income maintenance claims carried over from the previous Scheme has expired (30 June 2017) and the period for ongoing entitlement to medical and like expenses will expire on 30 June 2018, except of course in the case of seriously injured workers.

The statistics provided by RTWSA on that basis are set out below:



The graph shows that disputes arising from claims made in respect of injuries suffered after 1 July 2015 have significantly reduced. It is not surprising that, in addition, there should be significant numbers of disputes arising from transitional claims. Apart from addressing transitional claims in respect of seriously injured workers, that is those with a WPI of 30% or more, those disputes should largely reduce hereafter. There are apparently about 1000 workers who suffered serious injury prior to 1 July 2015 and who are still in receipt of income maintenance.

It is difficult to identify why there are still a significant number of disputes. RTWSA does not record statistically and in a meaningful way the outcome of disputes which are dealt with by applications to RTWSA. As elsewhere noted, the data from SAET shows that over 80% of the disputes are resolved at the conciliation stage. RTWSA does not record, apart from its file records, whether that resolution was more or less favourable than the RTWSA initial resolution of the claim. The same applies to the 20% or so of disputes which then go in to the SAET Presidential management and resolution process. The majority of those claims also resolve by agreement. Again, RTWSA does not record in a way that can readily be recovered whether those resolutions were more or less favourable than the initial decision of

RTWSA. The only record of such outcomes available is thought the published decisions of SAET, but they are so few in number relatively speaking as not to be statistically significant.

In my view, RTWSA should establish a record of the outcomes of those processes. That would indicate if there were any change to its decision making processes, or to its data collection processes, to make better decisions that it has done so to date.

#### **Recommendation 9**

That RTWSA analyse records of the outcomes of the decisions which are referred to SAET as disputes by injured workers or employers (see Recommendation 3) to determine whether they indicate that there is some appropriate change in processes or procedures which should be made to improve initial decisions.

It is not possible to know whether the outcome of that step will lead to that result. Equally, it is not possible to know whether there is some other action which would or might be warranted to reduce the number of disputed claims. RTWSA has suggested in its responsive submission, after it had the opportunity of seeing the submissions provided to the Review after its initial submission, a range of steps appropriate to be taken to reduce the level of disputed decisions.

In my view, in the absence of data of the character I have recommended, it would be premature to recommend any of those changes. As this Review, broadly speaking, accedes to the submissions (generally on behalf of all stakeholder groups) that it is a little premature to start taking wholesale steps to change the RTW Act, as not sufficient time has elapsed for the legislation to be clarified to the extent necessary by authoritative decisions of SAET and the Supreme Court, the assembly of that data will enable a more informed judgment to be made about whether there should be changes in the dispute resolution procedures or rights. I consider that section 97 of the RTW Act should not be changed at this point.

It would be remiss not to note, also, that it has established a specialised service for the most serious of the ongoing claims for workers with a WPI of 30% or greater. At present there are 521 ongoing serious injury claims within that category (ongoing since 1987), and 116 of them are in what RTWSA has identified as those with the most serious life altering injuries. Its special unit, ENABLE, is dedicated to their support and to meeting their needs.<sup>86</sup>

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<sup>86</sup> Submission of RTWSA (No 1), p 13.

It is also noted, pertaining to RTWSA's performance in managing claims, that there are a number of disputed interpretations of the RTW Act. Some are in the process of being litigated for an authoritative resolution. Obviously, with the passage time, most will be clarified.

Those issues include whether there can be a retrospective suspension of income maintenance when it is discovered, for example, where an injured worker has been on paid leave;<sup>87</sup> and whether the mobile claims management service effectively addresses claims quickly or simply collects selective information or inaccurate information and so results in the improper use of the claims management role.<sup>88</sup> There are other examples referred to in the submissions, particularly those where there is a concluding table suggesting legislative or regulatory amendment or clarification. There are a number of such suggestions in RTWSA's second submission.<sup>89</sup>

### **8.3 Reducing instances of work injury**

This Term of Reference also concerns the performance of RTWSA in reducing instances of work injury. As RTWSA say in its submission (supported by Business SA<sup>90</sup>), prior to the introduction of the current Scheme, the role of WorkCover Corporation was separated from that of SafeWork SA as a matter of Government policy. That separation was maintained when the RTW Act was introduced.

Nevertheless, RTWSA has introduced certain programs to support injury prevention in the workplace. There is a 'risk management team' which reacts in an instructive way to employers whose claims performance is trending away from the norm.<sup>91</sup> It has a mental health intervention program called New Access developed by Beyond Blue to instruct and respond to requested support, which at the time of RTWSA's first submission had received 761 referrals and had given 3928 coaching sessions to participants, as well as participating with other interested groups in delivering information sessions.<sup>92</sup> It also says that its registration processes for self-insurers includes consideration of claims incidence, and so an incentive to claims reduction for self-insured employers.<sup>93</sup> It is not clear how effective

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<sup>87</sup> Submission of REG, p 3.

<sup>88</sup> Submission of Andersons Solicitors, p 3.

<sup>89</sup> Submission of RTWSA (No 2), p 8 - 22.

<sup>90</sup> Submission of Business SA, at [8] – [9].

<sup>91</sup> Submission of RTWSA (No 1), p 14.

<sup>92</sup> Submission of RTWSA (No 1), p 14.

<sup>93</sup> Submission of RTWSA (No 1), p 14.

these steps are. They are part of the wider work injury prevention activities, where the primary actor is SafeWork SA. SA Unions, for example, was not aware of any such activities on the part of RTWSA.<sup>94</sup>

Despite those efforts, it has been pointed out that, based on publicly available data, there has been only a slight reduction in the number of work injury claims over the four year financial period from 2013-14. The small reduction might be explained by the harder eligibility requirement to establish an entitlement to benefits under the RTW Act in the case of psychiatric or psychological injury. In the submission of The Australian Society of Rehabilitation Counsellors Ltd (“ASORC”),<sup>95</sup> there is a table extracted from RTWSA’s public Tableau data website<sup>96</sup> showing, among other things, the active accepted claims by WorkCover Corporation and RTWSA since 2013-14. That table readily makes that point. The Annual Reports of RTWSA do not provide any data inconsistent with that conclusion.

In my view, there is no clear material evidencing that RTWSA, by its strategies referred to, has materially reduced instances of work injury. For the reasons referred to above, I do not consider that that conclusion indicates any adverse comment upon the performance of RTWSA. Nor do I have any recommendations in relation to the performance of RTWSA which would be likely to materially affect instances of work injury, beyond recognising the efforts it has made to do so.

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<sup>94</sup> Submission of SA Unions (No 1) at [20].

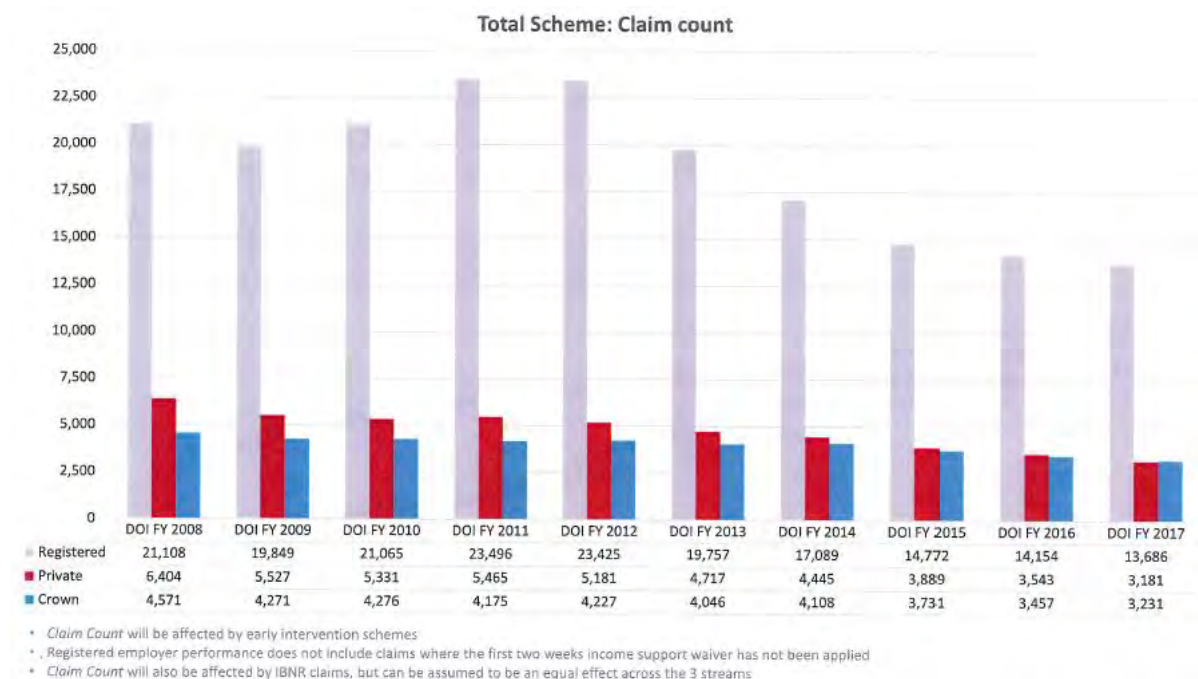
<sup>95</sup> Submission of ASORC, p 6.

<sup>96</sup> RTWSA Insurer Statistics, available at:  
<https://public.tableau.com/orofileirtwsa#/vizhomerneturbToWarkSA-InsurerStatisticsFY2017>.

## 9. TERM OF REFERENCE 5: PERFORMANCE OF SELF-INSURERS

I have considered the performance of self-insured employers. Almost all of my analysis below concerns the financial stability and claims management aspects of self-insurers under this Term of Reference. Private self-insurers and the Crown are considered. As with Term of Reference 4 (see Chapter 8), the effectiveness of self-insurers in reducing instances of injury was not a focus of submissions. Again, this is a reflection of the RTW Act, which lists “to support of activities that are aimed at reducing the incidence of work injuries” as an objective in section 3(2)(e), but does not regulate activities for the prevention of work injuries (or at least not in any way that is not incidental to achieving the primary objective of the RTW Act to provide early intervention in respect of claims so as to ensure that action is taken to support workers to return to work).

Self-insurers, including the Crown, represent approximately 38% of the State’s employment by remuneration (19% private self-insurers and 19% public self-insurers),<sup>97</sup> but make up only 31% of total claims (16% private self-insurers and 15% public self-insurers).<sup>98</sup>



<sup>97</sup> Submission of SISA, p 2.

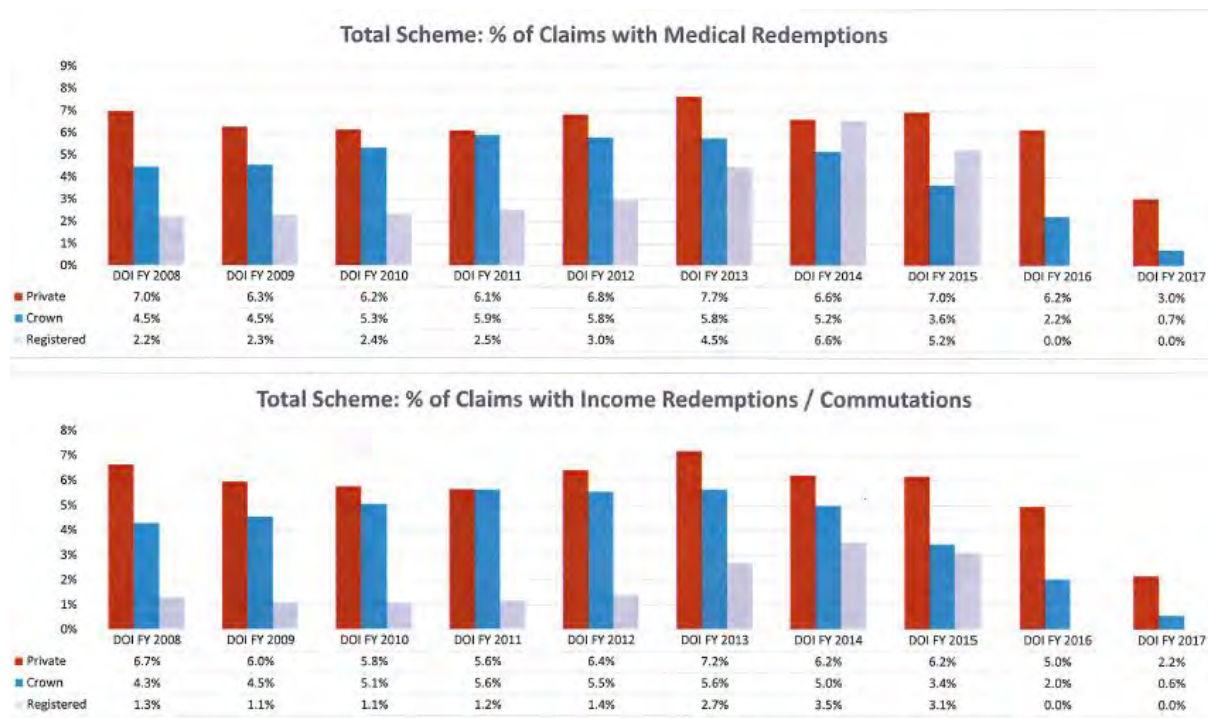
<sup>98</sup> Submission of RTWSA (No 1), p 15.



The data in the graph above, supplied by RTWSA, is consistent with the data regarding claims numbers that was supplied by SISA in respect of self-insurers. The trend of a reduction in the number of claims is readily apparent, especially since 2011-12. Private self-insurers and the Crown are no exception in that regard.

The majority of South Australian Public Sector agencies and public corporations are deemed to be self-insured by section 130 of the RTW Act. Private self-insured employers are regulated by RTWSA, but public self-insured employers are not. Private self-insurers manage their own claims, but RTWSA remains the insurer of last resort in the case of default. Various Public Sector agencies manage the Crown's claims and the Crown acts as its own insurer of last resort.

I have noted in respect of both private self-insurers and the Crown, more so than in the registered scheme, the use of redemptions under the former regime and the now greatly-reduced numbers of redemptions under the RTW Scheme, as may be seen in the graphs below.



Although it is premature to make any finding about the broader impacts of this trend, I agree with the submission of Mr Greg McCarthy, former Chief Executive Officer of RTWSA, that “lump sum culture” was not a positive aspect of the WRC Scheme and that the overuse of redemptions may have caused adverse return to work outcomes.<sup>99</sup>

## 9.1 Private self-insurers

Self-insurers are not part of the premium pool and there are no cross-subsidies to help mitigate the impact of the loss by spreading the cost among others in the pool.<sup>100</sup> That being said, self-insurers are subject to regulatory control by RTWSA (with the aim of ameliorating the effects of potential failure). Private self-insurers must:<sup>101</sup>

1. Provide a financial guarantee from an approved financial institution or an insurance bond from an approved insurer to RTWSA and pay into an insolvency fund held by RTWSA for a specified period to protect the Scheme in the event that a self-insurer is unable to meet its liabilities and its financial guarantee falls short (Sch 3, cl 8, RTW Regulations);
2. Pay an administrative fee to RTWSA calculated as a percentage of the premium it would have paid had it not been self-insured (these fees make up the Self-insurer Insolvency Contribution Aggregate or “SIICA”, along with \$2.5m initially contributed by RTWSA and investment earnings on that money) (section 146 RTW Act);
3. Carry excess of loss insurance (Sch 3, cl 9, RTW Regulations); and
4. Compliance with other obligations as set out in the “Code of conduct for self-insured employers” (section 129(5)(d) RTW Act).

It was not submitted to me that these pre-requisites for self-insurance are an undue barrier to the uptake of self-insurance, or alternatively, are not sufficiently robust.

The two tables below sourced from SISA’s most recent Annual Report show the value of the SIICA as at 30 June 2016 (\$51.2 million) and the total value of all self-insurer financial guarantees (\$384.8 million). These figures are relatively stable.

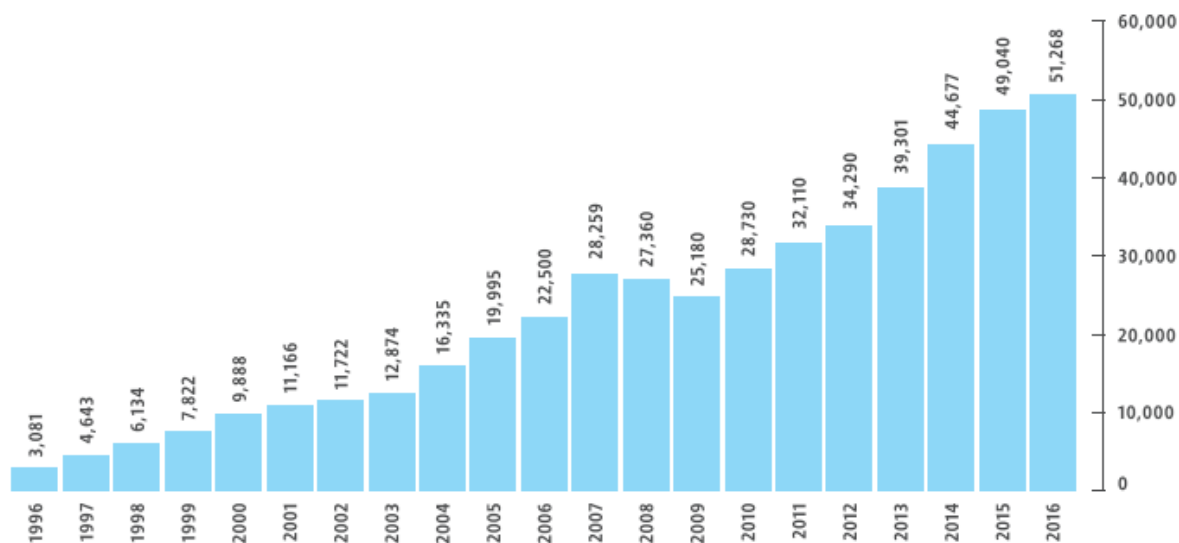
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<sup>99</sup> McCarthy, Greg, *Insights for success in work injury insurance*, p 12 – 14.

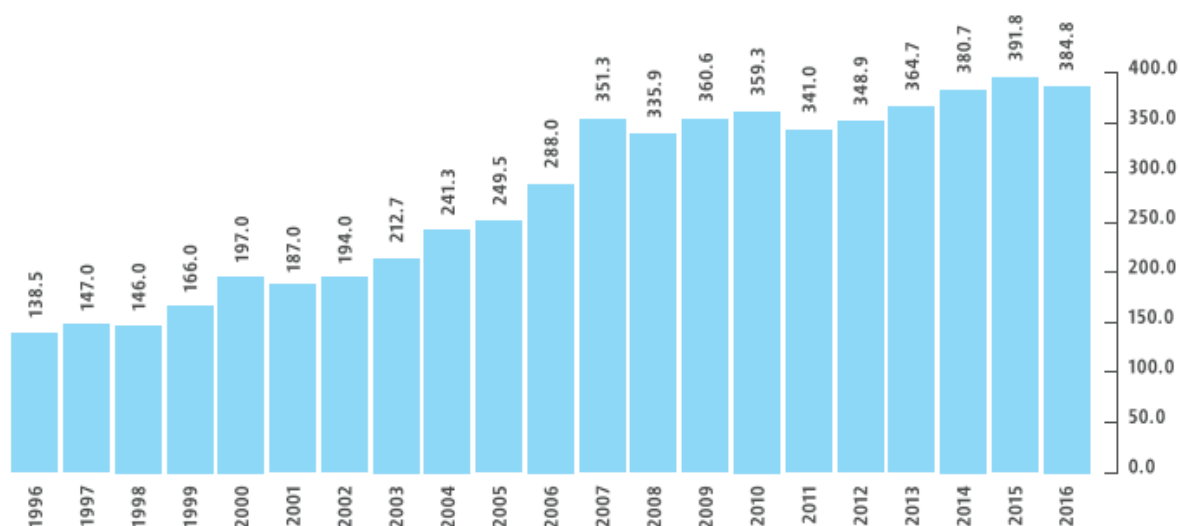
<sup>100</sup> SISA Submission p 4.

<sup>101</sup> SISA Annual Report 2016-17.

### Value of the SIICA (\$'000)<sup>102</sup>



### Value of Guarantees held by RTWSA (\$m)<sup>103</sup>



Self-insurers have consistently outperformed the registered scheme, although some submissions raised a concern that claims costs were unduly increasing. The view of Self Insurers of South Australia (“SISA”) is that the new Scheme has had minimal impact on self-insurers, aside from a few discrete issues.<sup>104</sup> That accords with RTWSA’s view that the performance of self-insured employers has been “mature”, “positive” and “stable”.<sup>105</sup> Of the existing 69 private self-insured employers, 29 have been self-insured for over 20 years; 23

<sup>102</sup> SISA Annual Report 2016-17, p 16.

<sup>103</sup> SISA Annual Report 2016-17, p 17.

<sup>104</sup> SISA Submission p 4.

<sup>105</sup> Submission of RTWSA (No 1), p 15.

employers have been self-insured for a period of between 10 and 20 years.<sup>106</sup> As at December 2017, the vast majority of self-insurers have been granted a 4 or 5 year period of registration (42) and a further 20 have been granted a 3 year period of registration.<sup>107</sup> Only 7 self-insurers have been granted periods of registration of less than 3 years and in those cases, that has been primarily due to reasons other than the employer's performance as a self-insurer (e.g. ongoing financial viability of the employer).<sup>108</sup> RTWSA has only recommended revocation of registration as a self-insured employer for reasons related to the insurer's performance as a self-insurer once in the last decade.<sup>109</sup>

As stated above, if a self-insurer fails, the effects of that failure are unable to be ameliorated by spreading the cost amongst other employers as happens in the registered scheme. SISA submitted that this drives self-insurers to continually improve their performance.<sup>110</sup> Some self-insurers were concerned that claims costs had been increasing. The assertion that the cost of claims has increased is supported by the data,<sup>111</sup> as can be seen below, but that is somewhat offset by the reduction in the number of claims.



These trends are equally apparent when the number of claims (per million dollars of remuneration) is compared with the median claim cost:<sup>112</sup>

<sup>106</sup> Submission of RTWSA (No 1), p 15.

<sup>107</sup> Submission of RTWSA (No 1), p 16.

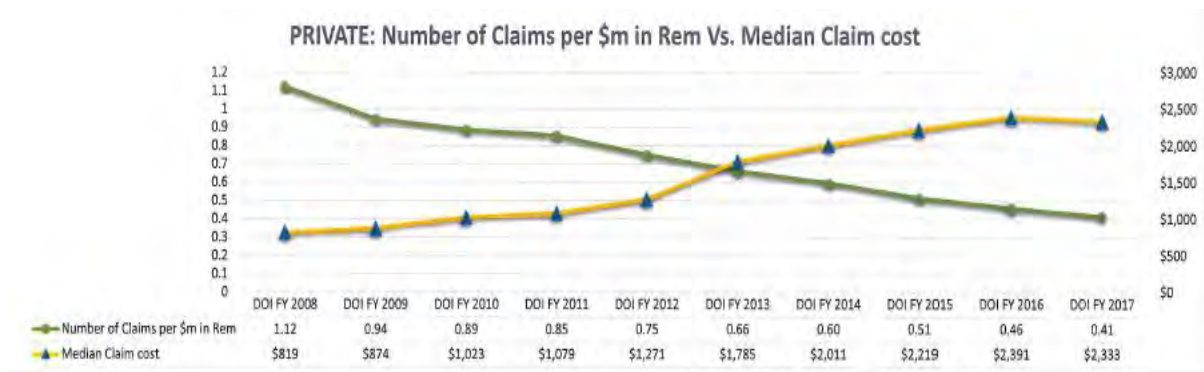
<sup>108</sup> Submission of RTWSA (No 1), p 16.

<sup>109</sup> Submission of RTWSA (No 1), p 15.

<sup>110</sup> SISA Submission p 4.

<sup>111</sup> Data supplied by RTWSA.

<sup>112</sup> Data supplied by RTWSA.



Bearing the costs of workplace injury is a strong incentive for self-insured employers to invest in significant financial, physical and human resources to prevent and manage workplace injury.<sup>113</sup> Self-insured employers tend to be larger companies that are already aware of the benefits of investing in injury prevention and management.<sup>114</sup>

## 9.2 Crown

The Crown did not provide any submission to the Review. This necessitated my seeking specific information from the Crown about various issues that had arisen as a result of issues raised in submissions received by other parties and by my own inquiries.

There are seven main groups that amount to the Crown self-insured total, categorised as follows:<sup>115</sup>

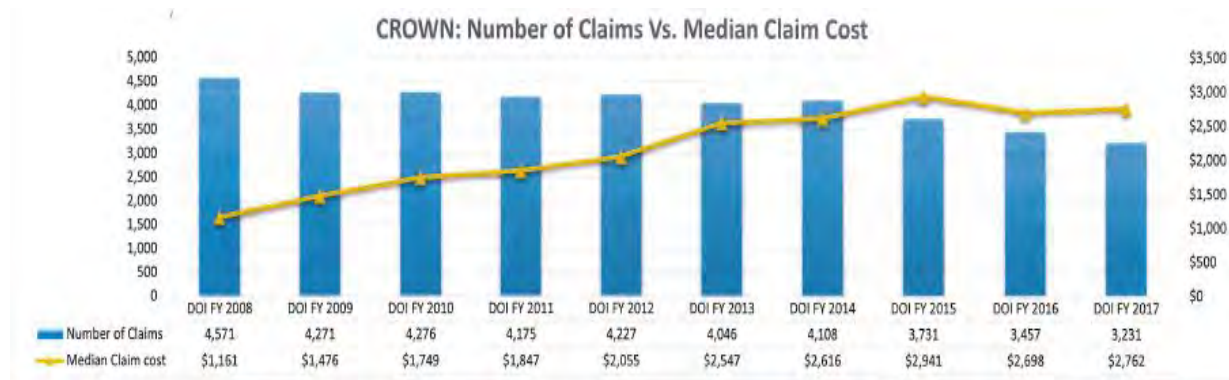
1. Department for Health and Ageing;
2. Education and Child Development;
3. SA Police;
4. Correctional Services;
5. Remaining Justice Agencies;
6. Department for Communities and Social Inclusion; and
7. Remaining Agencies.

<sup>113</sup> Submission of RTWSA (No 1), p 15.

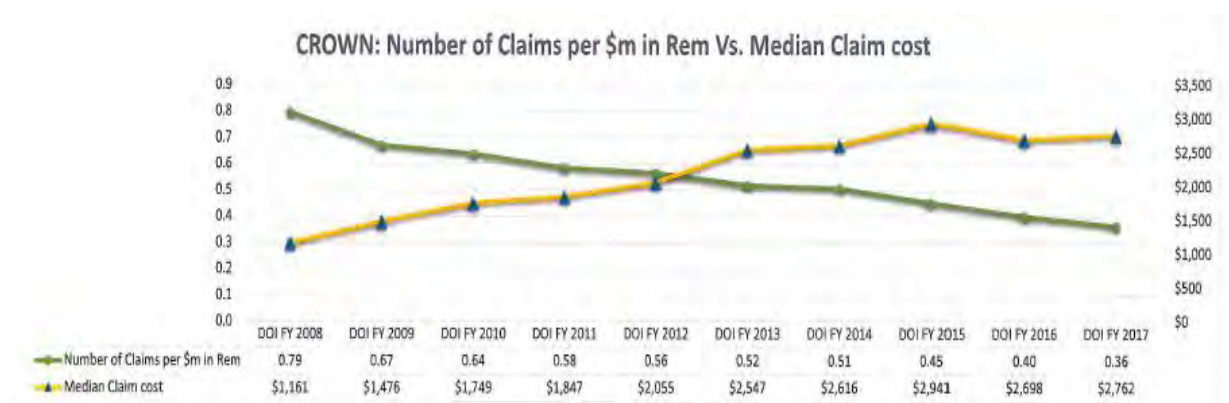
<sup>114</sup> Submission of RTWSA (No 1), p 15.

<sup>115</sup> I note that the names of some of these Departments and Agencies have changed since the commencement of the Review. The names as at 4 December 2017 are used here.

Crown has maintained stable costs for a long period of time compared to the insured scheme. As may be seen from the graph below, increased costs may be offset by the reduction in total numbers of claims.<sup>116</sup>



These trends are more readily apparent when the number of claims (per million dollars of remuneration) is compared with the median claim cost:<sup>117</sup>



There is no evidence that Crown has been managed poorly in a financial sense. Unlike public sectors in all other States, the Crown in South Australia has lower claims costs than the private sector, relative to remuneration. The estimated outstanding claims liability of each of the seven groups above is variable, but that is also affected by the differing sizes of each group. The total outstanding claims liability reduced by 4.9% as at 30 June 2017, when compared with that figure as at 30 June 2016.

<sup>116</sup> Data supplied by RTWSA.

<sup>117</sup> Data supplied by RTWSA.

There is significant variability in the payment types as a proportion of the total net liability. This could be explained by the different types of work performed by each of these groups, but might also be the result of inconsistency in claims management across agencies.

The major concern for Crown in terms of its claims management is that the incidence of psychological claims is over three times that of the registered scheme, which could be put down to differences in the occupational group, but for the fact that the incidence of psychological claims in the Crown in South Australia is also higher than in the public sectors in several other States.

The data in Crown's actuarial reports is conspicuously absent consideration of the outstanding liability associated with the extended benefits provided to Public Sector employees.<sup>118</sup> This caused me to question the validity of the information provided to the actuary to compile the reports and also to pursue further inquiries in respect of this matter, discussed in greater detail in Chapter 14. I encourage the Treasurer to have regard to these reports in full, which appear to provide an otherwise comprehensive overview of Crown activities.

The difficulties faced in collating the relevant information from the various Public Sector agencies, including the somewhat nebulous categorisation of agencies for the purposes of collecting data, and the deficiency I have identified above in the scope of the actuarial reports, are all problematic for identifying the specific areas in which the Crown could improve its performance. These issues stem from an approach that lacks the requisite transparency to enable stakeholders and other parties to analyse the Crown's activities and to draw comparisons between the registered scheme and the Crown's activities.

There is no persuasive reason to explain why the Crown ought to be exempt from providing actuarial valuations for public consumption to allow for that to be scrutinised by interested parties and the public generally. The expenditure of public moneys, particularly without proper estimates of liability, is a matter of significant public importance and interest. The publicly-released version of the Crown actuarial report should contain a level of detail comparable to the publicly-released versions of the Scheme Actuarial Valuation prepared by the scheme actuary, which are published on RTWSA's website on a six-monthly basis.

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<sup>118</sup> I understand from information provided by the Office for the Public Sector that the actuarial report for 2017-18 will include estimates in respect of such claims.

### Recommendation 10

That the Government release all future versions of the Actuarial Report for the Liability for Crown Workers Compensation Claims for public consumption.

The Crown is not immune from the transitional issues, discussed elsewhere in this report, that have also affected the registered scheme. Further data ought to be collated in relation to the financial stability of the Crown's operations and the claims management experience in the next 3-5 years to ascertain whether there is any reason to centralise claims management, in particular, to achieve consistency in policy and decision-making. I note that a previous attempt to transfer Crown claims management to RTWSA failed, in part, due to a lack of evidence that stakeholders would be better served by RTWSA.<sup>119</sup> I do not revisit that proposal here due to the transitional issues noted in my Review. However, there may be scope for the Office for the Public Sector to play a greater role in ensuring that Public Sector agencies adopt consistent policies in respect of claims management.

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<sup>119</sup> *Return to Work Corporation of South Australia (Crown Claims Management) Amendment Bill 2017.*



## 10. TERM OF REFERENCE 6: RETURN TO WORK RATES

RTWSA has provided a table setting out return to work rates at key milestones, for the four completed financial years from 2013-14, and then for the period July to November 2017.<sup>120</sup>

The table is as follows:

|                  | 4 weeks | 13 weeks | 26 weeks | 52 weeks |
|------------------|---------|----------|----------|----------|
| <b>Nov 2017</b>  | 79%     | 88%      | 89%      | 92%      |
| <b>2016-2017</b> | 75%     | 83%      | 87%      | 88%      |
| <b>2015-2016</b> | 75%     | 83%      | 86%      | 88%      |
| <b>2014-2015</b> | 75%     | 83%      | 86%      | 88%      |
| <b>2013-2014</b> | 73%     | 81%      | 86%      | 88%      |

It is one of the objectives of the RTW Act that there should be a greater focus on prompt consideration of the consequences of work injuries, so that the claims were dealt with efficiently and the focus was on returning the injured worker to work. To support that objective, RTWSA has implemented the claims handling strategies referred to elsewhere in the Review, and has also undertaken a substantial education program to educate allied health providers and doctors on focusing on returning an injured to work, including targeted education where the particular provider is an 'outlier' whose patients have a noticeably lower return to work rate than their peers.<sup>121</sup>

The table provided would indicate that has been a measurable improvement in return to work rates since about July 2016, that is, after the first year of operation of RTWSA under the RTW Act and Scheme.

It is not surprising that it took some time for the operation of the RTW Act and Scheme, and the administration of RTWSA, produced any measurable changes. It inherited what was uniformly agreed to be an unsatisfactory scheme, with a focus more on long term entitlement

<sup>120</sup> Submission of RTWSA (No 1), p 17.

<sup>121</sup> Submission of RTWSA (No 1), p 17.

to compensation, and the transitional process involved RTWSA taking all the existing claims under the former Scheme into its management. For the same reason, of the impact of the RTW Act and Scheme and the progressive familiarity of those involved with its administration would provide an explanation for what appears an improving trend at each of the key milestones in the current financial year.

That having been said, as has been pointed out in several of the submissions, there are a few matters which it is necessary to refer to. They have the effect of indicating that the table provided by RTWSA may not present a basis for confidence that the picture is as optimistic as the RTWSA table might suggest.

The Local Government Association of South Australia (“LGA”) has operated a Workers’ Compensation Scheme (“LGAWCS”) as a self-insurer on behalf of its members, and continues to do so. Part of its strategy in handling claims has been closely managed evidence based early intervention for many years prior to 1 July 2015, apparently much in the way RTWSA has done so since that date. The LGA’s statistics confirm that there was little change in return to work rates until, again, sometime in the 2016-17 financial year, and the sort of improvement then which looks to accord with what RTWSA has reported.<sup>122</sup> It therefore queries whether the return to work rates reported by RTWSA can be attributed to the quality and character of its claims handling. That is a legitimate observation. It is nevertheless the case that the return to work rates of the members of the LGA have also improved, perhaps largely as a consequence of the terms of the RTW Act and the Scheme it established. There is not yet sufficient information, due to the limited elapse of time since the RTW Act and Scheme commenced, to form any concluded view about the relative significance of the RTW Act and Scheme itself and the quality of the performance of RTWSA in administering it.

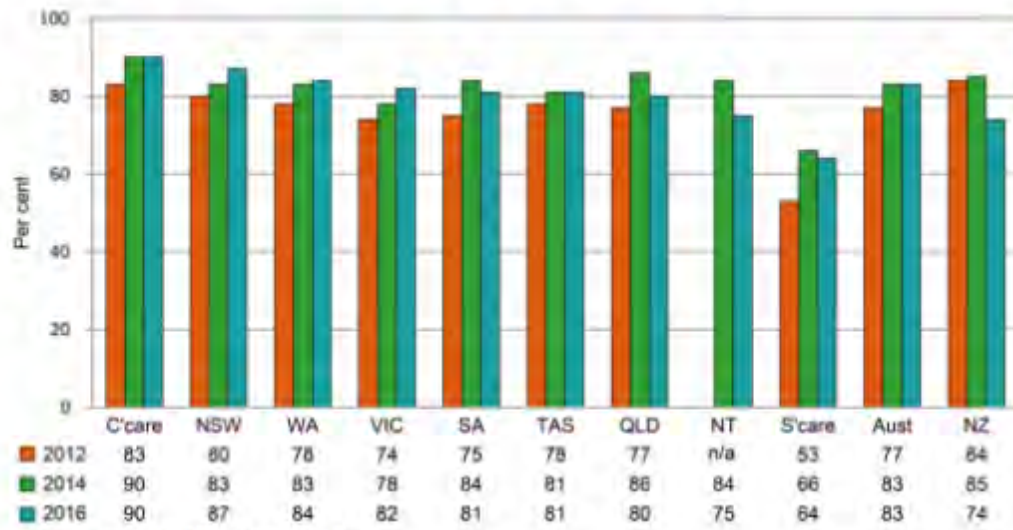
The second observation derives from a comparison of return to work rates of other schemes operating in Australia. That comparison, at a more macro level, indicates that the return to work rates under the RTW Act and scheme are somewhat lower than those of the schemes operating in New South Wales, Western Australia and Victoria. A table from Safe Work Australia’s current report<sup>123</sup> is set out below:

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<sup>122</sup> Submission of LGA (No 1), p 9.

<sup>123</sup> Safe Work Australia, 2017, *Comparative Performance Monitoring Report, Comparison of workers’ compensation schemes in Australia and New Zealand*, 18ed, March 2017, p30.

**Indicator 19 – Current return to work rate for 2012, 2014 and 2016**



Source: Safe Work Australia

It should be noted that that information does not include data for the current financial year. It is not tied to key milestones. The submission of South Australian Wine Industry Association Incorporated (“SAWIA”) commented on that comparison, and suggested there is a need for further consideration of initiatives to improve the return to work rates.<sup>124</sup>

That theme was taken by Business SA in its submission where it suggests further consideration of reskilling and return to work incentives of other jurisdictions, including the possibility of a short term 'host' employer in certain circumstances.<sup>125</sup> As with other submissions, it also urges a greater focus long term on those workers with a WPI of 30% or more to explore their employability, with appropriate incentives.

Australian Industry Group in its submission suggested the first step down in the rate of income support should be at week 13 of incapacity to provide an incentive to an injured worker to return to work as soon as possible.<sup>126</sup> There was no other submission which firmly proposed that course of action. I do not consider that the material available is such that any recommendation should be made to adopt that suggestion. It should be given further consideration if there becomes available information that the level of income support extending beyond the first 13 weeks of incapacity does operate as a disincentive for injured workers to take the opportunity to return to work at an earlier time. I do not intend to indicate

<sup>124</sup> Submission of SAWIA, p 6.

<sup>125</sup> Submission of Business SA, p 16.

<sup>126</sup> Submission of AI Group, p 19.

that, if there were such information available, it would routinely be appropriate to make the suggested change (see Chapter 11).

Finally, it should be noted that a number of submissions referred to the fact that the concept of 'return to work' is itself not a simple one. Does it encompass only fulltime return to work, or include part time or trial return to work? What is the position where there has been a temporary return to work?

RTWSA in its second submission did not specifically address the matters referred to. I infer that RTWSA at present does not have further explanatory data about rates of return to work.

I share the view of RTWSA and of a number of those who made submissions to the Review that the data provided by RTWSA does look promising, but it is too early to derive any significant about the longer term prospects of the return to work rates further improving, or to identify clearly the factors which have led to the current promising picture.

#### **Recommendation 11**

That RTWSA maintain records of the terms on which injured workers return to work, including whether the return to work is to the previous employment position or some other position, whether the return to work is to the same level of hours or some other hours, and whether the return to work is temporary or indefinite/apparently permanent.

#### **Recommendation 12**

That RTWSA consider, in consultation with other major employer and employee organisations, whether there are other initiatives which might be taken to better or more effectively secure the return to work of injured workers, including consideration of strategies used to achieve return to work of injured workers under other schemes operating in Australia.

#### **Recommendation 13**

That RTWSA maintain records of the return to work rates of the injured workers with a WPI of or greater than 30%, and consider the development of strategies to provide opportunities for such injured workers to return to work in some suitable employment.

# 11. TERM OF REFERENCE 7: FAILURE TO RETURN TO WORK IN 2 YEARS

There are several factors contributing to non-seriously injured workers failing to achieve a return to work within two years.

These factors may be divided into three broad categories:

1. Age, gender, injury, type of work and other individual traits;
2. Interaction with the Scheme, the employer and the community; and
3. General socio-economic conditions.

Many of the workers who have not returned to work have transitioned from the old Scheme. The average non-seriously injured worker that has transitioned to the new Scheme and has not returned to work tends to be aged around 48, on full income support, male, has made a prior claim, worked in manual labour or trades, sustained a musculoskeletal injury, has a claim duration of 4 years and resides in an area with socioeconomic challenges.<sup>127</sup> The demographic picture for workers who were injured after 1 July 2015 and have not returned to work within 2 years is very similar.<sup>128</sup>

Gallagher Bassett submitted that treating practitioners not focussing on work in treatment and lawyers prolonging disputes by focussing on litigation rather than rehabilitation contributed to workers' failure to return to work.<sup>129</sup> Sparke Helmore Lawyers submitted that the fact that workers were provided with 100% income support for the first 52 weeks in the Scheme disincentives a return to work in that period, as does the fact that the worker receives benefits pending any challenge of a decision to discontinue income support.<sup>130</sup> REG submitted that the length of time taken to resolve disputes was problematic.<sup>131</sup> Business SA submitted that worker characteristics, employer characteristics, ongoing claims

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<sup>127</sup> Submission of RTWSA (No 1), p 18.

<sup>128</sup> Submission of RTWSA (No 1), p 19.

<sup>129</sup> Submission of Gallagher Bassett, p 2.

<sup>130</sup> Submission of Sparke Helmore, p 4.

<sup>131</sup> Submission of REG, p 4.

and business and employment conditions generally all played a part in the failure of workers to return to work.<sup>132</sup>

Several submissions made the point that a worker who does not attain 30% WPI may not have the capacity to return to work within two years.<sup>133</sup> The South Australian Wine Industry Association submitted that RTWSA needs to pursue more initiatives to improve the return to work rate.<sup>134</sup> SA Unions submitted that such an initiative should be targeted at the cohort that RTWSA identified as having the most difficulty in returning to work.<sup>135</sup> AI Group submitted that the timely identification of workers at risk of not returning to their pre-injury duties and/or pre-injury employer would assist in achieving better outcomes.<sup>136</sup>

The Police Association of South Australia (“PASA”) submitted that section 18 of the RTW Act (applications for suitable employment) is yet to be fully tested.<sup>137</sup> The Australian Education Union (“AEU”) submitted that whilst section 18 could be further strengthened, it was an improvement on s 58B of the WRC Act because under the latter provision the WorkCover Corporation was ineffectual in requiring employers to provide suitable employment.<sup>138</sup>

Firstly, the 2 year limit was intended to encourage workers to make a prompt return to work and to disincentivise persons using income support payments as a form of ongoing welfare without making any attempt to re-enter the workforce. It would be unduly harsh to also restrict entitlements for workers within the 2 year period. I do not consider that a reduction in entitlements within the two year period would lead to better return to work outcomes. There is no evidence available to me to support that argument. Nor do I consider that such a change would serve the objective of the RTW Act to ensure that workers who suffer injuries at work receive high-quality service, are treated with dignity and are supported financially.<sup>139</sup>

#### **Recommendation 14**

The level of entitlements currently provided to workers in the two year income support period under the RTW Scheme should be maintained.

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<sup>132</sup> Submission of Business SA, p 18.

<sup>133</sup> See e.g. Submission of Wearing Law, p 7; Submission of Andersons Solicitors, p 6-7; Submission of the Hon. Tammy Franks MLC, p 4.

<sup>134</sup> Submission of SAWIA, p 6.

<sup>135</sup> Submission of SA Unions, p 6.

<sup>136</sup> Submission of AI Group, p 12.

<sup>137</sup> Submission of PASA, p 17.

<sup>138</sup> Submission of AEU, p 5.

<sup>139</sup> *Return to Work Act 2014* s 3(2)(a).

Secondly, it is evident that age, gender, injury, type of work and other individual traits are important determinants of whether a person is likely to return to work or not. RTWSA's ReCONNECT program, which aims to provide ongoing support to workers whose entitlements under the Scheme has ceased,<sup>140</sup> is a step in the right direction, but it does not appear to have a targeted approach.

The submission of Mr Peter Wilson, Director, Determined2, now a provider of rehabilitation services, about his experiences as an injured worker in the old Scheme and the new Scheme is enlightening:<sup>141</sup>

*"...my experience with the old scheme was very negative, I was always made to feel the victim and [that] inherently left me with an entitlement type attitude, I was never offered information that would empower me to make good choices instead [I was] treated like a criminal and constantly threatened, it appeared no one cared, and no one listened.*

*Since 2015 this has been tuned on its head... the simple act of listening to someone and tailoring services to their particular needs was completely exempt in the past and in my opinion was the root of most disputes, quite simply the claims managers didn't have enough personal information to make informed decisions to effectively manage the claim."*

Mr Wilson's submission emphasises the importance of workers' individual characteristics being considered by compensating authorities and service providers. The next step for compensating authorities to be pro-active in identifying persons who are "at risk" of not returning to work and providing them with the support they need before their entitlements cease. In a scheme that caps income support entitlements at 2 years, this sort of support service is a necessity and not seen as gratuitous bonus for workers.

It is imperative that a rapport is developed between workers and compensating authorities and rehabilitation providers to whom workers are referred<sup>142</sup> and that workers are able to build a relationship with their claims manager. The ReCONNECT process can feel like a "disconnect process"<sup>143</sup> for some workers because, by the time the worker's entitlements are about to cease (or have ceased), the worker may have already disengaged with service providers and disillusioned with the system. It is easier for a compensating authority and claims agents to prevent workers becoming disillusioned by continually addressing their

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<sup>140</sup> Submission of RTWSA (No 1), p 20.

<sup>141</sup> Submission of Mr Peter Wilson, Director, Determined2, p 1-2.

<sup>142</sup> Submission of ASORC, p 12-13.

<sup>143</sup> Submission of IMEGSA and Dr John Meegan, p 6.

specific needs than it is to re-engage with an already-disillusioned worker. Self-insurers are already performing well in this respect.

#### **Recommendation 15**

RTWSA should identify workers at risk of not returning to work within two years and commence providing ongoing support to those persons via the ReCONNECT program before the cessation of entitlements.

Thirdly, some workers may not return to work within two years because, even though not deemed to be seriously injured workers, those workers may have sustained an injury that renders them unable to work for a period of longer than two years. I received several submissions from injured workers and relatives of injured workers who wished for the details of their submissions to remain confidential. Upon reading these submissions, it is apparent that the new Scheme has left behind a group of workers who did not meet the 30% WPI threshold, but require an extended period of support and are not yet ready to return to work. It is vital that these workers are identified as being at risk of not returning to work within two years and that ongoing support is provided to them to enable them to return to work at a later date. The provision of reskilling services, discussed in the next chapter, will also be relevant to improving outcomes for this cohort.

Fourthly, I accept the submission that section 18 of the RTW Act is yet to be fully tested and that it would be premature to amend it to make it more similar to its predecessor, section 58B of the WRC Act, or to strengthen punishments for employers who are alleged to be non-compliant. Applications for suitable employment have been relatively rare thus far. However, section 18 appears to be working as intended when used.<sup>144</sup>

The matter of *Walmsley v Crown Equipment*, was the first (and only matter thus far) to thoroughly consider the operation of section 18 of the RTW Act. The applicant was a former employee who had suffered a compensable back injury during the course of his employment in 2012. The applicant returned to his pre-injury duties in 2013, but suffered a further back injury in June 2014. In April 2015, the applicant's employer terminated his employment on the basis that he was unable to fulfil the inherent requirements of his pre-injury role, and that his continued employment may result in further aggravation of his injury. In July 2015, the applicant served his former employer with a notice under section 18(3) of the RTW Act

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<sup>144</sup> *Walmsley v Crown Equipment Pty Ltd* [2016] SAET 4 (Hannon DPJ).



stating that he was ready, willing and able to return to work and which gave particulars as to the type of employment he considered he was capable of performing. His former employer declined to provide employment and the applicant then applied for an order for provision of employment under section 18(5). First, the SAET found that none of the grounds in section 18(2) applied to discharge the employer from its duty to provide suitable employment under section 18(1). Second, the SAET found that it was reasonable for the employer to provide the employment sought by the applicant. Thirdly, the SAET found that there were no other grounds, such as misconduct, workplace conflict, operational issues, why it should not order that the employer provide suitable employment. The SAET allowed the application, but left it to the parties to agree on precisely what duties were to be provided to the applicant.

Some issues may arise in future disputes that are worth consideration. Section 18 is not capped by a 2 year limit and does not specify for how long an employer must continue to re-employ a person in suitable employment if that employee had been employed on a casual basis or on a fixed-term contract when they sustained a work injury.<sup>145</sup> One can only assume that an injured worker formerly employed on a casual basis could only be entitled to return to work on a casual basis with a pre-injury employer. Similarly, is an employer only obliged to return an injured worker who was formerly employed on a fixed-term contract for the balance of that contract after the date of injury? Further, section 18 does not explicitly differentiate between the extent of the duty to provide suitable employment for a large, medium and small employer<sup>146</sup> (although such concerns could foreseeably form the basis of arguments about whether it is “reasonably practicable” for the employer to provide suitable employment under section 18(2)(a)). A core tenet of the RTW Act is certainty in parties’ rights and obligations. The application of section 18 is unclear in some respects and this may become a source of future disputes. Such disputes could be pre-empted by appropriate amendment.

#### **Recommendation 16**

That consideration be given to amending section 18 of the RTW Act to clarify parties’ rights and duties.

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<sup>145</sup> Submission of SISA, p 11.

<sup>146</sup> Submission of SISA, p 10.

## 12. TERM OF REFERENCE 8: RESKILLING SERVICES

This topic received the least attention in the submissions to the Review, but not in the sense of there being no interest in, or concern about. There was general consensus that reskilling to assist return to work by injured workers should be undertaken as soon as appropriate, and that achieving a return to work of an injured worker is a primary objective of the RTW Act and the RTW Scheme.

As noted in Chapter 10 of the Review, there was a particular focus in some submissions on ensuring that those injured workers with a WPI of 30% or more should not be overlooked, and that it is appropriate for particular programs or opportunities be explored to achieve their re-employment when possible.

RTWSA spent \$2.45m on retraining services in 2016-17, including on its specifically named “ReSkilling” program.<sup>147</sup> It appears from that submission that its focus, not unsurprisingly, is on those injured workers who have been off work for 3 months or more due to a work injury. No doubt, most workers who are off work for a shorter period make a full or very substantial recovery and return to work without problems. The 3+ months off-work category of injured workers is said there to represent some 1000 of the 12600 or so accepted work injury claims each year. RTW says that about half of that group of workers are unable to return to their former employment due to the nature of their injury, and it is necessary to explore their re-employment with a different employer. The ReSkilling program is designed to assist those workers. It includes skill maintenance, skills assessment, training / re-training and outplacement services.<sup>148</sup>

The submission of RTWSA at that point also explains that its ReSkilling program started as a three-year pilot program in July 2016, with a small cohort of workers, and has since been scaled up. In its first year, it involved some 500 injured workers. It achieved about one in three of those workers being able to return to work. It is, appropriately, cautious about claiming that such a result was entirely due to the ReSkilling program, as much depends on

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<sup>147</sup> Submission of RTWSA (No 1), p 21.

<sup>148</sup> Submission of RTWSA (No 1), p 21.

the individual worker's circumstances and impairment and upon external factors, such as the state of the labour market.

There is clearly a greater facility to encourage a return to work in areas with greater population, and therefore greater work opportunities. RTWSA is alert to that. Business SA expressed the same concern,<sup>149</sup> and encouraged greater focus on the difficulties confronting injured workers in more remote areas, due to isolation and greater distances, fewer employment opportunities and greater transport challenges. As noted, there was no submission critical of the focus of RTWSA on reskilling or on what it has done thus far. It has addressed this issue only partly through a pilot program, and is also clearly committed to refining the program and sensitive to the challenges it confronts.

RTWSA invited additional suggestions. There was a submission urging the greater use of the resources and skill of the appropriate professionals,<sup>150</sup> reflected in some submissions from other professional bodies. Business SA suggested the greater use of incentives to potential employers.<sup>151</sup> In New South Wales, there has been introduced an incentive scheme under which up to \$1000 is available to employees who are prepared to attempt to return to work with new employers and up to \$8000 is available for education and retraining and assistance in certain circumstances.<sup>152</sup> There was, in the submissions, a general interest in supporting the ReSkilling program.

#### **Recommendation 17**

That RTWSA continue to conduct its ReSkilling pilot program, including the consideration of the introduction of financial incentives to support the re-employment of injured workers, and at an appropriate time including consideration of a meeting of all groups properly interested in reskilling injured workers to encourage their return to work.

#### **Recommendation 18**

That RTWSA ensure that its ReSkilling program extends to seriously injured workers, including those who continue to receive income maintenance after the expiry of two years from their injury.

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<sup>149</sup> Submission of Business SA, p 19.

<sup>150</sup> Submission of Australian Rehabilitation Providers Association ("ARPA"), p 3.

<sup>151</sup> Submission of Business SA, p 21.

<sup>152</sup> State Insurance Regulatory Authority (NSW), April 2018, *Workers compensation benefits guide*, p 12.

## 13. TERM OF REFERENCE 9: FINANCIAL STABILITY OF THE SCHEME

I have considered whether the Scheme has yet achieved financial stability and, if not, when the Scheme will be likely to be mature and stable.

The Scheme is funded by collecting premiums from registered employers. Funding is also derived from fees from self-insured employers (section 146, RTW Act). Funds received from registered employers and self-insured employers are invested and the returns on those investments are an important additional source of funding for the Scheme.

RTWSA sets and collects premiums from employers and underwrites the Scheme and managing funds.<sup>153</sup> Premiums must strike a balance between covering the Scheme's costs without burdening employers with high premiums.<sup>154</sup>

### 13.1 Financial position

I have considered the Auditor-General's Financial Report for the 2016-17 financial year and the Scheme Actuarial Valuations as at 30 June 2017 and as at 31 December 2017 prepared by the scheme actuary.

The following table prepared by the Auditor-General's Department provides an overview of RTWSA's finances as at 30 June 2017 compared with the previous financial year.

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<sup>153</sup> Submission of RTWSA (No 1), p 22; Final Report of PCOSRC, p 98.

<sup>154</sup> Final Report of PCOSRC, p 98.

## Overview<sup>155</sup>

|  | 2017<br>\$'million | 2016<br>\$'million |
|--|--------------------|--------------------|
| <b>Underwriting result</b>                                     |                    |                    |
| Premium revenue from registered employers                      | 517                | 495                |
| Net claim paid   | (355)              | (560)              |
| Decrease (Increase) in net outstanding claims liability        | 6                  | 51                 |
| Claim management fees  | (66)               | (73)               |
| Other underwriting expenses                                    | (16)               | (23)               |
| <b>Underwriting result</b>                                     | <b>86</b>          | <b>(110)</b>       |
| <b>Net investment and other income</b>                         |                    |                    |
| Net investment profit  | 210                | 122                |
| Other income   | 12                 | 13                 |
| <b>Net investment profit and other income</b>                  | <b>222</b>         | <b>135</b>         |
| <b>Operating expenses</b>                                      |                    |                    |
| Employee benefits expenses                                     | (37)               | (33)               |
| Other expenses   | (27)               | (33)               |
| <b>Total operating expenses</b>                                | <b>(64)</b>        | <b>(66)</b>        |
| <b>Result from operating activities before tax equivalents</b> | <b>244</b>         | <b>(41)</b>        |
| Tax equivalents  | (73)               | -                  |
| <b>Other comprehensive income</b>                              |                    |                    |
| Re-measurements of defined benefits liability                  | 4                  | (3)                |
| <b>Total comprehensive result</b>                              | <b>175</b>         | <b>(44)</b>        |
| Net cash provided by (used in) operating activities            | 115                | (156)              |
| Net cash provided by (used in) investing activities            | (70)               | 57                 |
| <b>Assets</b>  |                    |                    |
| Investments  | 2 992              | 2 750              |
| Other assets   | 83                 | 100                |
| <b>Total assets</b>  | <b>3 075</b>       | <b>2 850</b>       |
| <b>Liabilities</b>   |                    |                    |
| Outstanding claims   | 2 460              | 2 481              |
| Other liabilities  | 114                | 44                 |
| <b>Total liabilities</b>                                       | <b>2 574</b>       | <b>2 525</b>       |
| <b>Total equity</b>  | <b>501</b>         | <b>325</b>         |

It may be seen from the above table that RTWSA's total comprehensive result was a profit of \$175 million after a \$44 million loss in the previous financial year. This was mainly a result of the following factors:<sup>156</sup>

1. premium revenue increasing by \$22 million to \$517 million, which was due to higher remuneration being reported by employers;

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<sup>155</sup> Source: Auditor-General's Department, *Return to Work Corporation of South Australia – 2017 Annual Report and Further commentary and analysis*.

<sup>156</sup> Auditor General's Department, *Return to Work Corporation of South Australia – 2017 Annual Report and Further commentary and analysis*.

2. net investment profit increasing by \$87 million to \$210 million, which was due to an increase in the market value of RTWSA's investments;
3. claims paid decreasing by \$218 million to \$365 million, which was due to fewer redemptions being paid to claimants and fewer claimants receiving income support / more claimants returning to work; and
4. the provision for outstanding claims liability remaining relatively stable, decreasing by \$6 million, taking into account that the risk margin (in lay terms, the margin of error) was increased from \$152 million to \$303 million.<sup>157</sup>

As at 31 December 2017, the scheme actuary recommended that RTWSA make provision for outstanding claims liability of \$2.439 billion, based on a central estimate of \$2.121 billion and a risk margin of \$318 million.<sup>158</sup> That provision for outstanding claims liability has a 75% probability of sufficiency,<sup>159</sup> which means in lay terms that there is a 3 out of 4 chance that the estimation of the amount of money required to pay outstanding claims will be enough. Using a 75% probability of sufficiency is standard practice for actuaries,<sup>160</sup> but it bears mentioning in light of the fact that the probability of sufficiency was only increased from 65% for the Scheme actuary's estimates for the 2016-17 financial year onwards.<sup>161</sup> The increase in risk margin for the 2016-17 financial year, noted above, is due to the increase in probability of sufficiency used to calculate the risk margin to 75%.

## 13.2 Funding ratio and average premium rate

Key indicators of financial stability are enshrined in the RTW Act, namely:

1. The Compensation Fund must have sufficient funds cover expenses and to provide benefits to workers (section 135, RTW Act); and

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<sup>157</sup> To reflect a 75% probability of sufficiency instead of 65%.

<sup>158</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 97.

<sup>159</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 97.

<sup>160</sup> Submission of RTWSA (No 1), p 22. The Australian Prudential Regulation Authority (APRA) requires insurance liabilities to be assessed with a minimum probability of sufficiency of 75%. While RTWSA is not required by law to comply with this requirement (as it is Government owned).

<sup>161</sup> Auditor General's Department, *Return to Work Corporation of South Australia – 2017 Annual Report and Further commentary and analysis*.

2. The average premium rate (“APR”) should not exceed 2% (section 137, RTW Act).

The answer to the question of whether the Scheme has sufficient funds is often expressed as a “funding ratio” (assets divided by liabilities). A funding ratio of 100% means that the Scheme is fully funded. A funding ratio of below 100% means that liabilities are greater than assets. A funding ratio of above 100% means that assets exceed liabilities. The APR is the premium charged by RTWSA to registered employers, on average, as a percentage of leviable wages. There is, of course, an interrelationship between the funding ratio and the APR. If the APR is inadequate, RTWSA will collect insufficient funds to pay claims. If the APR is too high, that translates to an additional burden on registered employers and increased payments equivalent to income tax for RTWSA.<sup>162</sup>

### **Funding ratio**

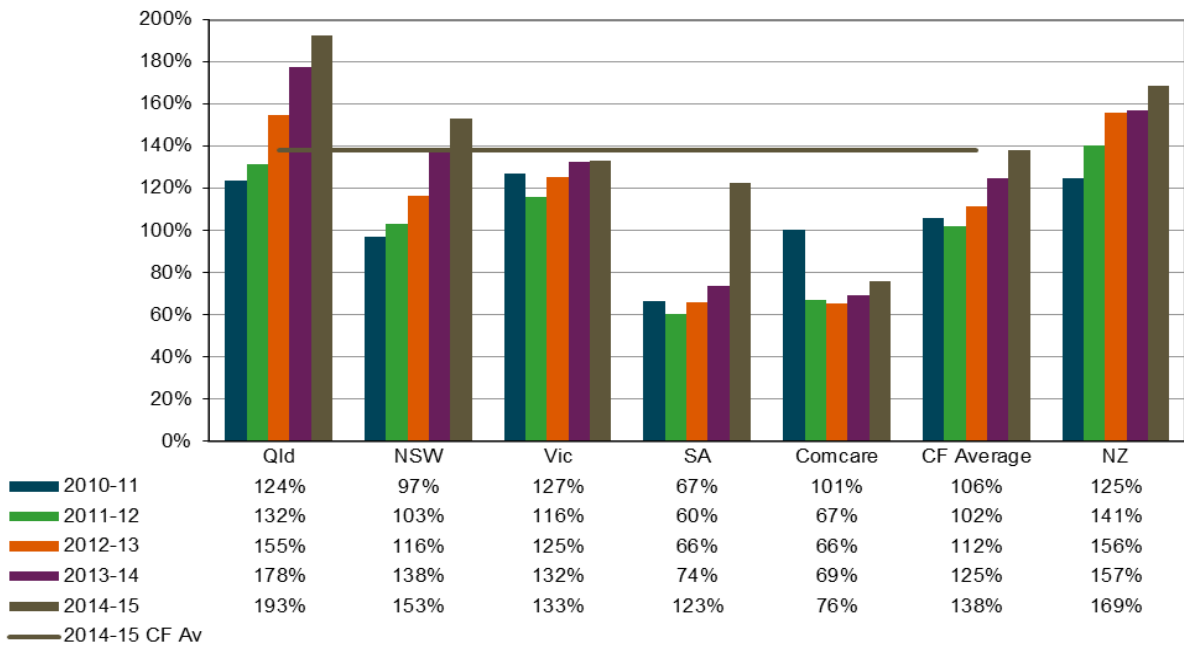
As at 30 June 2014, RTWSA held assets of \$2.9 billion against liabilities of \$3.9 billion, resulting in unfunded liabilities of \$1.1 billion. This equated to a funding ratio of 74%, which represented a slight improvement on the funding ratio in the previous years, but still well below 100% and much less than the current funding ratio of 119.5%.

The following two graphs, prepared by Safe Work Australia, show funding ratios from 2010-11 to 2014-15 for centrally funded schemes and privately underwritten schemes, respectively. South Australia lagged well behind most other jurisdictions by this measure under the old Scheme.

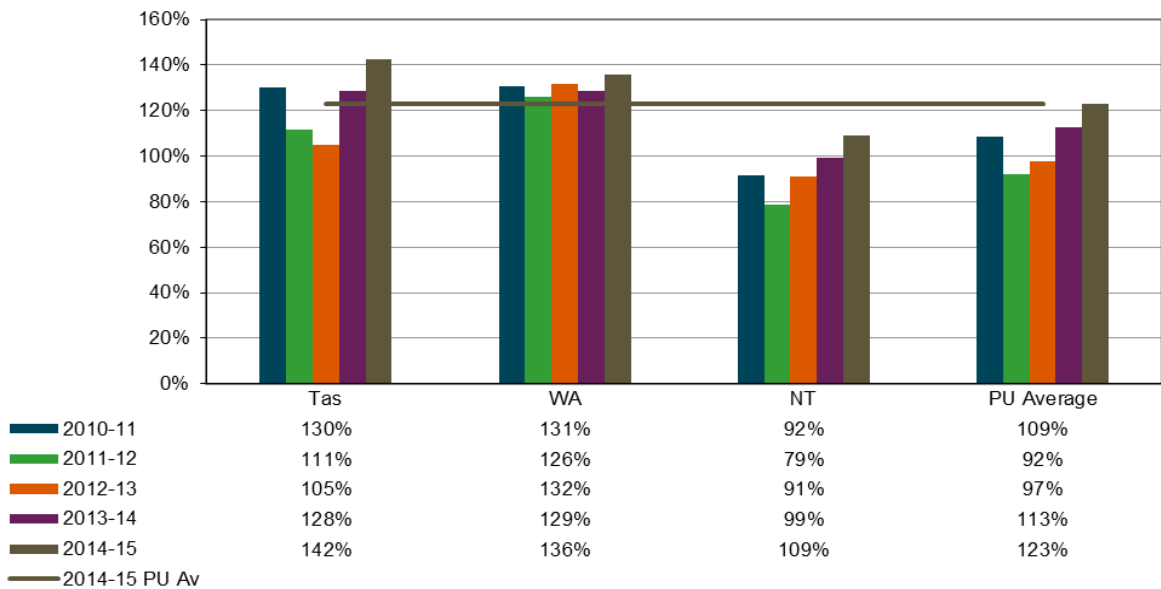
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<sup>162</sup> Under Treasurer’s Instruction 22 “Tax Equivalent Payments” and the RTW Corporation Act, RTWSA is required to pay an amount equivalent to corporate income tax (charged at 30%) on its operating profits in years where it achieved a funding level of 100% (with its outstanding claims liabilities at a 75% probability of sufficiency) and a profit from insurance operations. In the 2016-17 financial year, RTWSA paid \$73.4 million in tax equivalents.

**Funding Ratio (centrally funded schemes)<sup>163</sup>**



**Funding Ratio (privately underwritten schemes)<sup>164</sup>**



The RTW Scheme became fully funded for the first time in many years in 2014-15 and has remained fully-funded since then. The funding ratio was 123% in 2014-15, 112.9% in 2015-16 and 119.5% in 2016-17. The funding ratio is at the upper end of the key performance

<sup>163</sup> Source: Safe Work Australia, *Comparing workers' compensation scheme performance*, <https://www.safeworkaustralia.gov.au/workers-compensation/comparing-workers-compensation-scheme-performance>.

<sup>164</sup> Source: Safe Work Australia, *Comparing workers' compensation scheme performance*, <https://www.safeworkaustralia.gov.au/workers-compensation/comparing-workers-compensation-scheme-performance>.



indicator set by RTWSA in its Strategic Plan for 2015-18, which is a range between 90% and 120%, with a target of 105%.<sup>165</sup> The Scheme is compliant with its statutory objective of having enough funds to cover expenses and to provide benefits to workers.

### **Average Premium Rate (APR)**

The following graph compiled by the PCOSRC using data from Safe Work Australia and RTWSA shows the APR for each jurisdiction for the previous six financial years.

#### **Comparison of Average Premium Rates**<sup>166</sup>

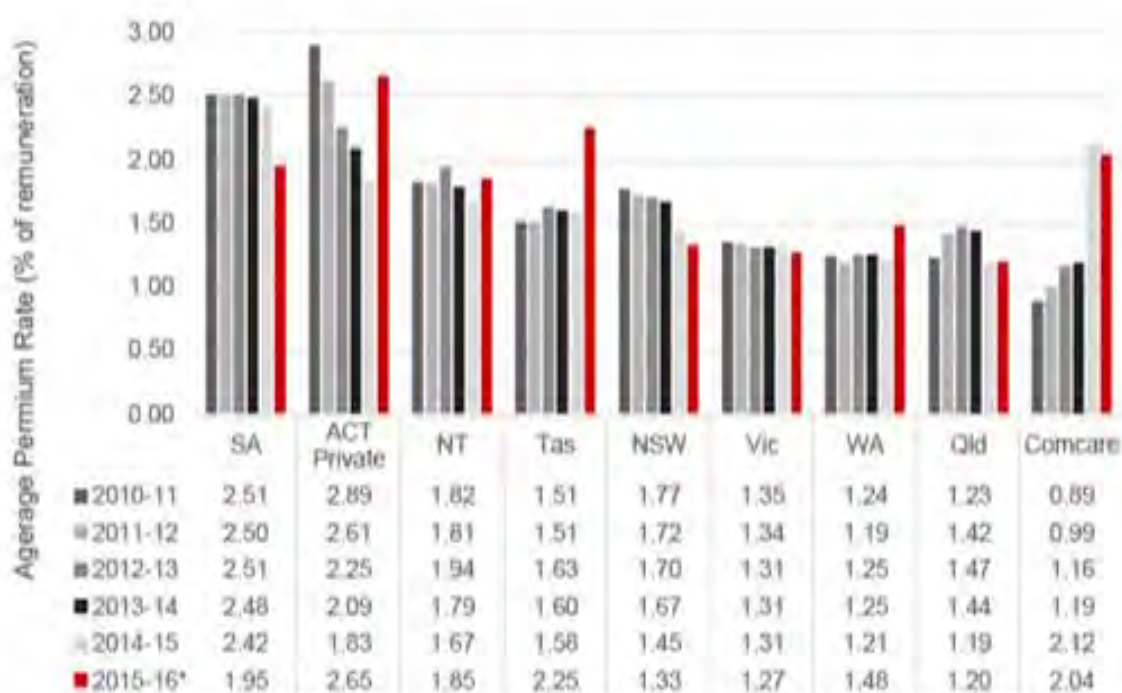


Figure 10: Standardised average premium rates (for 2010-11 to 2014-15) and average premium rate for 2015-16 shown as a % of employee remuneration.

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.

In the final year of the old Scheme, 2014-15, South Australia had the highest APR in the nation. The APR reduced to 1.95% in 2015-16. The APR remained at 1.95% in 2016-17<sup>167</sup> and was reduced to 1.8% in 2017-18. This is a significant improvement considering that the South Australian Scheme has historically had a relatively high APR compared to other

<sup>165</sup> RTWSA Strategic Plan 2015-18, p 3.

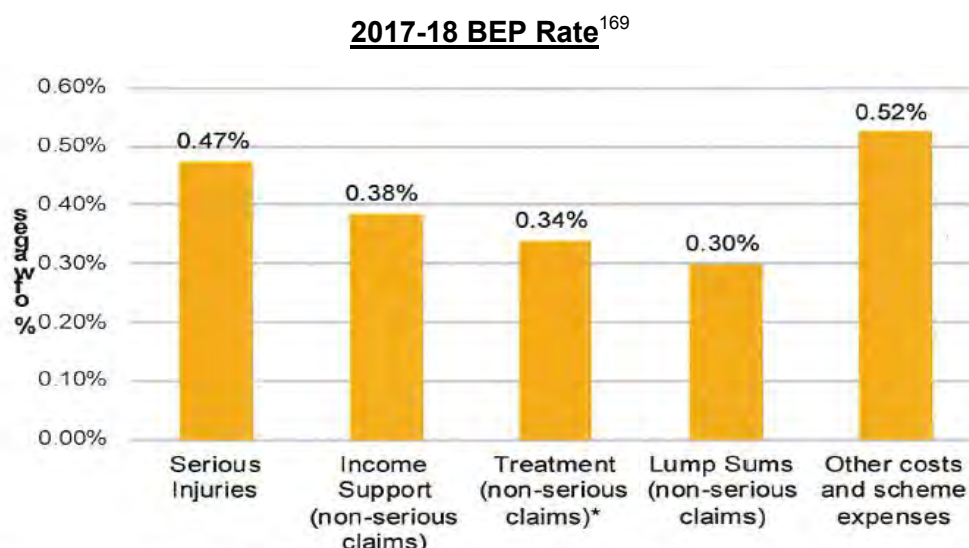
<sup>166</sup> PCOSRC, Interim Report, p 100.

<sup>167</sup> RTWSA Annual Report 2015-16, p 25.

jurisdictions and the highest in the nation in 2014-15. The RTW Scheme is compliant with its statutory objective of charging an APR of below 2%. The RTWSA Board recently announced that the APR is to be set to 1.70%, effective July 2018.<sup>168</sup> This rate is 5.5% lower than last year (1.80%) and is now the lowest in the Scheme's history.

### **APR vs. Breakeven Premium Rate ("BEP")**

The breakeven premium ("BEP") rate is a reflection of the estimated cost of running the Scheme for a year, including all future payments for claims incurred in the year after allowing for investment earnings, expressed as a percentage of leviable wages. In other words, if the RTW Scheme were to charge the BEP, that rate would be sufficient to cover claim costs. In current (2017-18) financial year, the BEP is made up of the following components:



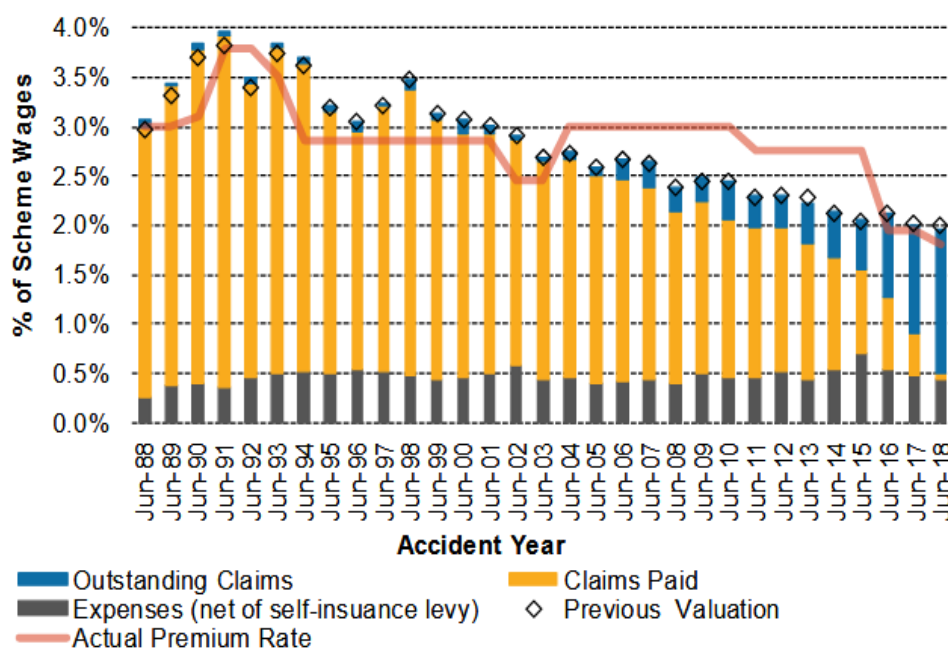
\*Medico-legal costs are included with Treatment in line with ReturnToWorkSA's accounts, although they are more correctly classified as investigation or dispute related, along with the other costs in the final column

The Scheme Actuarial Valuation (as at 31 December 2017) provides the following diagrammatical summary of the estimated BEPs:

<sup>168</sup> RTWSA, 16 April 2018, *ReturnToWorkSA announces \$28m saving for employers*, [https://www.rtwsa.com/about-us/news-room/articles/returntoworksa-announces-\\$28m-saving-for-employers](https://www.rtwsa.com/about-us/news-room/articles/returntoworksa-announces-$28m-saving-for-employers).

<sup>169</sup> Source: Submission of RTWSA (No 2), Annexure prepared by Finity Consulting Pty Ltd entitled "Costing Scenarios – Potential Changes to Scheme Boundaries", 20 February 2018, p 5.

### Break Even Premium Rate\* and Actual Premium Rate Charged<sup>170</sup>



\* The Break Even Premium Rate in this Figure is calculated using the risk free rate, so that a like with like comparison can be made over the history of the scheme. For clarity, this is not the same as the scheme's pricing basis as the scheme targets a higher than risk free rate of return when premiums are set.

The current estimate of the BEP (assuming risk-free rates) for 2017-18 is 1.96%, down from 1.99% for the 2016-17 year, which is mainly the result of lower expenses.<sup>171</sup> The Scheme actuary expects to see some further reduction in BEP as activities relating to the transition from the old Scheme to the new Scheme are completed.<sup>172</sup> The most important caveat is that the BEP estimates in the above graph include a significant outstanding claims estimate (shown in blue) and are therefore likely to change.<sup>173</sup>

In the insightful paper submitted to the Review by Mr Greg McCarthy, he referred to the following as the “cornerstone” to the long-term success of the Scheme:<sup>174</sup>

<sup>170</sup> Source: Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 10.

<sup>171</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 10.

<sup>172</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 11.

<sup>173</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 11.

<sup>174</sup> McCarthy, Greg, *Insights for success in work injury insurance*, p 1.

*“When considering whether a scheme can afford either a reduction in premium and/or an increase in benefits then for that scheme to remain sustainable and fully funded in the long term you CANNOT fund either premium reductions and/or benefit increases out of a surplus. Benefit increases and/or premium reductions should only be considered if there is a positive gap between the average premium rate (APR) and the breakeven premium rate (BEP) and you are confident that gap is sustainable.”*

The question that Mr McCarthy implores the reader to ask as a precondition to considering premium reductions or benefit increases is whether there is a sustainable gap between the BEP and the APR.

The graph above comparing BEP and actual premium rate charged shows that, under old Scheme, the WorkCover Corporation consistently undercharged premium to employers (until June 2004). The fact that the premium rates were consistently less than the cost of running the Scheme led to the WRC Scheme’s significant unfunded liability.<sup>175</sup> This was not financially sustainable policy.

Whilst the graph above also appears to show that the APR is now below the BEP and has been since June 2016, attention must be paid to the small-print which states that the BEP in the graph is calculated using the “risk-free” rate. The “risk-free” rate is based on the level of returns RTWSA would get from investments if RTWSA invested only in 10 year Australian Government bonds. However, RTWSA’s pricing basis for setting premium targets higher return on investments than the “risk-free” rate. The value of RTWSA’s investments is substantial and, thus, the BEP in is actually lower than as shown in the graph above. In other words, RTWSA is charging less than the BEP as calculated on risk free rates in anticipation of earning higher investment returns than the risk free basis. Obviously, if something were to go awry in the investment market, it would have serious consequences for the Scheme’s financial stability.<sup>176</sup>

The following table shows that the BEP, as calculated based on investment rates, remains below the APR:

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<sup>175</sup> Finity Consulting Pty Ltd, “Costing of the RTW Act 2014”, p 12.

<sup>176</sup> PCOSRC Interim Report, p 99.

### **Comparison of BEP and APR**<sup>177</sup>

|                        | <b>2017-18</b> | <b>2018-19</b> |
|------------------------|----------------|----------------|
| BEP - Risk free rates  | 1.97%          | 1.91%          |
| BEP - Investment rates | 1.82%          | 1.71%          |
| APR                    | 1.80%          | 1.70%          |

If APR is above BEP, the corollary of Mr McCarthy’s “cornerstone” principle is that the RTW Scheme will remain sustainable and fully funded in the long term. The current position is a substantial improvement on the old Scheme. The Scheme continues to generate significant surpluses and has a positive funding ratio at the higher end of targets set at its outset. I consider that the Scheme has therefore been set up on a foundation that is financially stable and sustainable in the long-term. However, as discussed below, that stability is subject to a number of potentially significant short-medium term risks that militate against any significant increases to the benefit package or further reductions to the APR for the time being.

It is not particularly useful to answer the question of when the RTW Scheme is likely to reach “maturity” speculatively, based on general actuarial assumptions about when comparable schemes tend to mature (e.g. anywhere between 5 and 10 years), as was suggested in some submissions that I received. This is still a scheme that is facing risks that are related to its recent transition from the old Scheme. It is more useful to consider the specific risks to the Scheme and how they might be navigated to give a clearer picture of when the RTW Scheme will exit this transitional phase.

### **13.3 Risks to financial stability**

The risks to the Scheme identified by the Scheme actuary, with one significant exception (risks arising from the legal precedent set in the matter of *Mitchell*), have been factored into the central estimate of outstanding claims liability and the provision for the outstanding claims liability.<sup>178</sup> The risks factored into the provision for the outstanding claims liability may be grouped into four categories:<sup>179</sup>

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<sup>177</sup> Source: Data supplied by RTWSA.

<sup>178</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 104.

<sup>179</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 108.

1. Economic uncertainty: variation in unemployment rates, wage inflation and investment earnings.<sup>180</sup>
2. Uncertainty in legal precedent: variation in the interpretation of provisions of the RTW Act which are subject to appeal.<sup>181</sup> Other than the matter of Mitchell, RTWSA also drew specific attention in its submission to the matter of *Li v Department for Health and Ageing*,<sup>182</sup> which is on appeal to the Supreme Court and, if upheld, is expected to lead to a material increase in the number of psychological injury claims.<sup>183</sup>
3. Short term claims: It is possible that the early changes in the Scheme's experience might not be sustained if patterns of behaviour revert towards those of past years.<sup>184</sup> There is also likely to be pressure on the rules governing WPI assessments because of the significant differences between the compensation available above and below 30% WPI.<sup>185</sup>
4. Serious injury claims: The actuarial estimates are sensitive to increases in the number of such claims, escalation of costs of claims and changes in the life expectancy of claimants.<sup>186</sup>

The above categories are not mutually exclusive. It is to be expected that, for example, the outcome of matters subject to appeal will create legal precedents that, in turn, influence the numbers of future claims and the costs of claims.

These risks are not out of the ordinary for a workers compensation scheme and the provision for outstanding claims liability is an adequate measure to deal with them. There will always be risks to the financial stability of the Scheme and that there is never a perfect time for reform. No amendments have been made to the RTW Act since its commencement. There is no basis to continue the prohibition on making any amendments to the RTW Act.

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<sup>180</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 104-5.

<sup>181</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 105.

<sup>182</sup> *Li v Department for Health and Ageing* [2017] SAET 75.

<sup>183</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 18.

<sup>184</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 105-6.

<sup>185</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 11.

<sup>186</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 106-7.

Incremental refinements, as and when required, ought to be considered by the Minister. However, it is crucial that amendments do not undermine or extend the boundaries that have been set by the Government, unless those changes have first been subject to rigorous, independently verified costings and have been found to be financially sustainable *in the long-term*.

I now turn to the matter that was submitted by RTWSA and some other parties to be the most significant risk to the RTW Scheme's financial stability: legal precedent risk resultant from the matter of *Mitchell*.<sup>187</sup> This potential impact has not been factored into the outstanding claims liability. The Scheme Actuarial Valuation (as at 31 December 2017) prepared by the scheme actuary states that:<sup>188</sup>

*"...all of our valuation work has been undertaken on the basis that the Mitchell decision will be overturned on appeal. This means there is no allowance for Mitchell - related costs in the central estimate projection, other than legal costs. ...Importantly, we note that if the Mitchell decision were to be upheld, the expected increase in the central estimate would exceed the current recommended provision at the 75% probability of sufficiency level."*

RTWSA submitted that if the decision in *Mitchell* is upheld by the Supreme Court, there would be an immense impact on outstanding claims liabilities, such that liabilities could exceed the net value of RTWSA's assets. RTWSA also submitted that it could result in an increase to BEP that, at worst, would render the South Australian Scheme the worst-performing in the nation by this measure (assuming that, in turn, causes the APR to be increased).<sup>189</sup>

The actuarial reports before me support RTWSA's submission and show three scenarios of potential financial impact: low, medium and high.<sup>190</sup> The outstanding claims liability impacts range from +166m (at best) to +\$570m (at worst) and the range of impacts on the BEP from +0.16% (at best) to +0.58% (at worst).<sup>191</sup> The validity of the actuarial estimates was challenged in several submissions and that is discussed in greater detail below.

If the decision in *Mitchell* is upheld, RTWSA submits that the Government will have to give consideration to changes that are necessary to maintain the financial sustainability of the

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<sup>187</sup> [2017] SAET 81.

<sup>188</sup> Finity Consulting Pty Ltd, March 2018, Scheme Actuarial Valuation (as at 31 December 2017), p 11.

<sup>189</sup> Submission of RTWSA (No 1), p 8.

<sup>190</sup> Memorandum of Finity Consulting Pty Ltd to RTWSA, 8 May 2018.

<sup>191</sup> Memorandum of Finity Consulting Pty Ltd to RTWSA, 8 May 2018.

RTW Scheme. The suggestions proposed by RTWSA to address the higher-than-expected assessments of iatrogenic impairments include amending the RTW Act to specifically address the decision in *Mitchell* and/or amending the IAGs by:

1. Capping WPI% for medication-related impairments to below 5% WPI; and
2. Amending the assessment requirements for various impairments; and
3. Requiring specialists to diagnose and assess certain injuries.

RTWSA noted that if the proposed changes to the IAGs are made, that the impact of the *Mitchell* decision on premiums would only be +0.18% (at worst). However, there would be no change to the projections in relation to the outstanding claims liability because the changes to the IAGs would only apply to claims from injury dates after the amendment of the IAGs. The solution to this problem proposed by the scheme actuary is that the RTW Act be amended so that the new IAGs apply to all PIAs after the date of the amendment.

I agree with RTWSA's submission insofar as, if the decision in *Mitchell* is upheld by the Supreme Court, there is a possibility that it will threaten the financial sustainability of the RTW Scheme and that will need to be addressed. However, the proposed amendments to the RTW Act and the IAGs are premature at best. The Supreme Court's decision in *Mitchell* is yet to be delivered as at the date of writing and there is significant uncertainty about the extent to which that decision will impact the outstanding claims liability and the premium rate. This uncertainty is self-evident from the estimates of potential impact on outstanding claims liabilities, which varies over \$400 million from the best case scenario to the worst case scenario. The potential impact on premium rates also varies by over 0.4% from the best case scenario to the worst case scenario.

Another important factor that influenced my conclusion that the proposed amendment is premature is that I have cause to doubt the assumptions underpinning the scheme actuary's estimates.<sup>192</sup> The scheme actuary has proceeded to estimate financial impacts on the basis that the *Mitchell* decision will foster a culture whereby a large proportion of injured workers in the RTW Scheme using opioids, of which there are many, will make a claim for significant associated impairments.<sup>193</sup> I consider this assumption to be somewhat pessimistic. I do not

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<sup>192</sup> Submission of Law Society of South Australia (No 3); Submission of SA Unions (No 3).

<sup>193</sup> Memorandum of Finity Consulting Pty Ltd to RTWSA, 8 May 2018.



understand Mr Mitchell’s circumstances to be typical of most injured persons using opioids. The impairments suffered by Mr Mitchell were particularly severe and the result of “excessive”, “extraordinary” and “prolonged” opioid use. Mr Mitchell’s treatment was said to have been “mismanaged”<sup>194</sup> by doctors. It is more likely that injured workers who use opioids do so at a lower dosage and for a shorter period of time. Most persons using opioids have a much lower risk of developing severe side-effects and permanent impairment than in Mr Mitchell’s case.<sup>195</sup>

Furthermore, the combination of disabilities arising from the same trauma<sup>196</sup> in circumstances where some of those disabilities resulted from the use of medication to treat the original disability is not unprecedented in the SAET: *K v WorkCover Corporation (Mondello Farms Pty Ltd)*<sup>197</sup> (“*K v WorkCover*”), delivered on 18 March 2016. RTWSA’s submissions, and supporting actuarial reports, were absent any data showing that the claims experience<sup>198</sup> or culture had substantially changed since the SAET’s decision in *K v WorkCover*.<sup>199</sup> The actuarial estimates would appear to assume that the matter of *Mitchell* is rather novel in terms of the SAET’s approach to combining side-effects from medication with the permanent consequences of an initial work injury for the purposes of calculating WPI. That is not the case.<sup>200</sup>

If the decision in *Mitchell* is upheld, further data ought to be collected about the extent to which iatrogenic add-ons are affecting the claims experience and the RTW Scheme’s long-term financial stability. This process should aim to independently verify any actuarial estimates prior to the Minister considering any amendment to the RTW Act and/or RTW Regulations. There is no great risk to the RTW Scheme if RTWSA’s proposed amendment to the RTW Act and the IAGs is delayed for a short period of time to allow for the confirmation of the actuarial estimates, especially given that the amendments are intended to apply to all future PIAs (as opposed to all future injuries).

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<sup>194</sup> [2017] SAET 16, [43].

<sup>195</sup> Submission of SA Unions (No 3), p 2-3.

<sup>196</sup> See *Pollidorou v Return To Work SA* [2017] SAET 101, a matter in which RTWSA successfully cross-appealed the SAET’s decision to combine disabilities for the worker’s WPI assessment, where some of those disabilities were the result of the use of medication, but were not caused by the same trauma as the other injuries.

<sup>197</sup> *K v WorkCover Corporation (Mondello Farms Pty Ltd)* [2016] SAET 5.

<sup>198</sup> Submission of Law Society of South Australia (No 3), p 3.

<sup>199</sup> [2016] SAET 5.

<sup>200</sup> The decision in *Mitchell* at first instance was delivered nearly a year later, on 20 February 2017.

**Recommendation 19**

That consideration be given to the amendments, proposed by RTWSA, to the RTW Act and the IAGs if the decision in *Mitchell* is upheld by the Full Court; and independently verified data collated after the Supreme Court's decision is delivered definitively indicates that that precedent threatens the financial sustainability of the RTW Scheme.

# 14. TERM OF REFERENCE 10: OTHER MATTERS

## 14.1 Extended benefits for public sector employees

This topic has been referred to above. In short, by amendment or proposed amendment to a range of industrial Awards and Enterprise Agreements, the State has agreed with its employees variously to extend the benefits available under the RTW Act and Scheme in the case of a work injury being sustained in certain circumstances. I understand the additional benefits have been provided on the basis that, in certain circumstances, the work obligations of certain public sector employees require them to be exposed to dangerous situations. One obvious example is the work of a police officer in certain circumstances.<sup>201</sup>

In one sense, this matter might be said to be outside the Terms of Reference for the Review. It is a matter of Government policy. I do not comment upon that. But, in my view it is noteworthy for the purposes of the Review for two reasons. It is necessary to note briefly the nature of the extended benefits and the circumstances they may be received to explain why that is so. For that purpose, I have received certain information from the State through the Office for the Public Sector.<sup>202</sup>

The Office for the Public Sector has also provided information setting out the range of Industrial Awards and Enterprise Agreements which have been amended to include “Extended Workers Compensation Arrangements”. They are in both the State and Federal jurisdictions. They can be identified by reference to the SAET website or the Fair Work Commission website. It is not necessary to recite them in the Review. They are extensive in number in relation to Public Sector employees. At the time of the letter, some were still in the process of procedural completion. The Office for the Public Sector also provided samples of the terms applying to the extended benefits in the case of police officers, paramedics, firefighters, but also general salaried employees. The latter Award applies to many employees who would usually only perform administrative and clerical tasks and are not readily exposed to criminal offending or inherently dangerous situations in the course of employment.

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<sup>201</sup> Submission of PASA, p 10-11.

<sup>202</sup> Letter of Ms Erma Ranieri, Commissioner for Public Sector Employment, dated 22 March 2018.

The entitlement to extended benefits arises only in the case of an 'eligible injury'. That requires the injury resulted from conduct that is, or appears to be, a criminal offence, or occurred as a direct and immediate result of conduct that is or appears to be a criminal offence, or occurred as a result of the uncontrolled or unpredictable work environment work environment and the injured worker had to engage in activities which were inherently unsafe, or fourthly where the injury occurred in other circumstances where the worker was placed in a dangerous situation. In the case of such injuries, the entitlement is to receive medical and related expenses and income compensation until retirement (on the basis that the injured worker is not working or able to return to work). That is a simplification of the operation of most of these arrangements.

The extended benefits, broadly speaking, are available in the case of an eligible injury, irrespective of whether the injured worker has less than a 30% WPI.

As noted earlier in the Review, there is no relevant 'claims experience' available concerning the extended benefits.

The first reason for referring to those arrangements is to point out that the State, as a self-insured employee, has thereby extended its potential liability in certain circumstances beyond that contemplated by the RTW Act and Scheme. At the present time, there has been no actuarial analysis of the extent of that potential liability. The State, as a self-insurer, does not attempt to 'fund' its present and future liability by setting aside funds specifically for that purpose. There is a risk, notwithstanding the extended entitlements sit upon the entitlements and procedures under the RTW Act (some of which are in parallel in the particular extensions of the Awards and Agreements) that the departure from the "hard boundary" policy evident in the RTW Act may increase its exposure significantly.

The 'modification' of the RTW Act by those instruments, therefore, may in the future make the management of claims under the RTW Act in the case of Public Sector employees more difficult, and may make the achievement of outcomes consistent with those being achieved by RTWSA and by other self-insured employees.

The second reason for referring to this matter is a cautionary one. The terms 'criminal offence', 'uncontrolled or unpredictable environment', 'inherently unsafe' and 'dangerous situation' are not defined.

As I have said, I do not comment on the policy of the State in relation to the extended benefits to Public Sector employees. It is easy to understand, in a general way, the reason for the State taking that action. I simply point out that the range of criminal offences may include relatively trivial conduct, and what is a dangerous situation may be interpreted broadly. The intent of the extended workers compensation benefits would appear to be to capture the relatively few employees who may sustain injuries as a result of having been placed in inherently dangerous situations in the course of employment (but who did not meet the threshold of sustaining injury resultant from apparent criminal offending. However, the suffering of a work injury might be said in many instances to be a result of a dangerous situation. Many accidental injuries result from conduct which might be categorised as dangerous, and the consequent injuries as resulting from a dangerous situation, simply because they have occurred. The submissions of the Ambulance Employees Association of SA (“AEA”) shows the range of circumstances in which the potential application of the extended benefits might occur.<sup>203</sup>

The third reason for referring to these instruments is that the resolution of disputes relating to their interpretation will necessarily have to occur outside of the jurisdiction conferred upon the SAET under the RTW Act. The SAET has jurisdiction conferred by State and Commonwealth legislation to interpret industrial instruments for specific purposes. It is not yet known what impact the extended workers compensation benefits will have on the dispute resolution processes of the SAET.

As these instruments do not change the entitlements or benefits under the RTW Act or Scheme, but in effect supplement them in certain circumstances, I do not consider it appropriate to make any recommendation with respect to them.

## **14.2 Other issues**

### **Psychiatric injuries**

There would appear to be no rational reason for distinguishing psychiatric injuries from other types of injuries in terms of compensability or causation under the RTW Act.<sup>204</sup> This is a policy position that merits review once the RTW Scheme has matured.

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<sup>203</sup> Submissions of AEA (No 1 and No 2).

<sup>204</sup> Submission of PASA, p 35; Submission of the LSSA, p 1-2.

## **Ongoing medical expenses for persons who have returned to work**

I have considered the partial removal of the “hard boundary” for ongoing medical expenses that is applicable to non-seriously injured workers. The justification for such a boundary is less compelling if it results in the small number of persons for whom treatment or medication is necessary to continue working being denied such treatment or medication on an ongoing basis. Access to compensation for ongoing medical expenses would be subject to the worker having returned to work and proving that the medical expense is necessary for their continued work. The entitlement would be subject to review at regular intervals. I note the view of Mr Cordiner that the costs of ongoing medical expenses were not one of the biggest drivers of the WRC Scheme and that the question of providing ongoing medical support to keep someone at work was one for Parliament.<sup>205</sup> That being said, if any change is proposed to be made in this regard, it ought to be subject to detailed costing. It would be inconsistent with the objects of the RTW Act if workers experienced a deterioration in their condition after 3 years because they were unable to access ongoing treatment and, consequently, left the workforce.

### **Recommendation 20**

That consideration be given to amending the RTW Act and/or RTW Regulations to allow for persons who are working to receive compensation for medical treatment necessary for their continued employment beyond the three year limit.

## **Use of sick leave entitlements**

Some injured workers submitted that they had used leave entitlements to maintain or supplement their income after cessation of their entitlements under the RTW Act.<sup>206</sup> This is an unintended consequence of the two year limit on income support payments. It is unclear whether this is having any effect on return to work rates. Whether sick leave, in particular, can or should be granted after the cessation of entitlements under the RTW Act in respect of an injury that was compensable is a matter for the parties to the employment relationship to determine in their particular circumstances.

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<sup>205</sup> PCOSRC Final Report, p 34.

<sup>206</sup> See also: Submission of AEU, p 4.

### **14.3 Amendments**

The submissions of various participants in the Review, including the Second Submission of RTWSA, suggested many amendments to the RTW Act to clarify its intent or to make it better and more effective.

Almost universally, although with varying degrees of forcefulness, the suggested amendments were contentious. That is, for each proposal there was an opposing view or views.

I do not propose to rehearse each of the proposals. The principal reason is that, as was almost universally agreed in submissions, the Fund for the application of the RTW Act is not yet sufficiently stable to be satisfied on the one hand that increased benefits could be granted without increasing premiums, or on the other hand that premiums could be significantly reduced if the current level of benefits stands. To make that point, it is only necessary to refer to the second submission of RTWSA generally, including Section D, and to the response of the Australian Workers Union. It would be preferable, unless there were general consensus about particular amendments, for further time to elapse and further definitive Supreme Court and SAET decisions to be made before further consideration is given to those proposals.

### **14.4 The Parliamentary Committee Report**

This Review notes that a number of submissions were made based on the Report of the Parliamentary Committee referred to earlier in the Review. The Terms of Reference of that Committee are set out in its Report. They involve, not surprisingly, more policy considerations, and the correctness or otherwise of the principles underlying the RTW Act. That is, in my view beyond the Terms of Reference for this Review. For that reason, I have referred to the submissions and to the recommendations in that Report only so far as I have considered they relate to specific matters for this Review.

## **14.5 Concluding Remarks**

Finally I express my appreciation for the very extensive and thoughtful contributions of all those persons and entities who made submissions to the Review. Many sought substantial changes to the level of benefits under the RTW Act, and some sought further restrictions on the level or availability of benefits under the Act. In all cases, it is clear that the views put forward were genuinely held and carefully considered.

The Review would not have been possible without that degree of genuine participation.



## 15. APPENDICES

### 15.1 List of submissions received

Persons who made confidential submissions to the Review were asked whether they wished for their submission to be published in the list below. This list is inclusive of only some of the persons who made confidential submissions to the Review.

| No. | Author   | Date             |
|-----|--|------------------|
| 1   | Ambulance Employees Association of South Australia (No 1)                      | 28 February 2018 |
| 2   | Ambulance Employees Association (No 2)   | 9 April 2018     |
| 3   | Andersons Solicitors   | 9 March 2018     |
| 4   | Australian and New Zealand Society of Occupational Medicine SA Branch (ANZSOM) | 8 February 2018  |
| 5   | Australian Education Union (SA Branch)   | 9 February 2018  |
| 6   | Australian Hotels Association  | 13 February 2018 |
| 7   | Australian Industry Group  | 13 March 2018    |
| 8   | Australian Lawyers Alliance  | 9 February 2018  |
| 9   | Australian Medical Association (South Australia)                               | 16 March 2018    |
| 10  | Australian Rehabilitation Providers Association                                | 9 February 2018  |
| 11  | Australian Society of Orthopaedic Surgeons                                     | 16 February 2018 |
| 12  | Australian Society of Rehabilitation Counsellors Ltd (No 1)                    | 9 February 2018  |
| 13  | Australian Society of Rehabilitation Counsellors Ltd (No 2)                    | 10 April 2018    |
| 14  | Business SA  | 2 March 2018     |
| 15  | Ms Julianne d’Auvergne (No 1)  | 1 March 2018     |
| 16  | Ms Julianne d’Auvergne (No 2)  | 10 April 2018    |
| 17  | Determined2  | 8 February 2018  |
| 18  | Ms Linda Deuter  | 9 February 2018  |
| 19  | Employers Mutual SA  | 9 February 2018  |
| 20  | Hon Tammy Franks MLC   | 16 February 2018 |
| 21  | Gallagher Bassett Services Pty Ltd   | 9 February 2018  |

|    |  |                  |
|----|--|------------------|
| 22 | Independent Medical Examiners Group of SA  | 15 February 2018 |
| 23 | Ms Heather Jeffries (No 1)   | 9 February 2018  |
| 24 | Ms Heather Jeffries (No 2)   | 9 April 2018     |
| 25 | Johnston Withers Lawyers (No 1)  | 8 February 2018  |
| 26 | Johnston Withers Lawyers (No 2)  | 30 May 2018      |
| 27 | Law Society of South Australia (No 1)  | 22 February 2018 |
| 28 | Law Society of South Australia (No 2)  | 17 April 2018    |
| 29 | Law Society of South Australia (No 3)  | 17 April 2018    |
| 30 | Local Government Association Workers Compensation Scheme (No 1)                                | 9 February 2018  |
| 31 | Local Government Association Workers Compensation Scheme (No 2)                                | 10 April 2018    |
| 32 | Mr Greg McCarthy   | 8 February 2018  |
| 33 | Minister's Advisory Committee  | 22 February 2018 |
| 34 | MinterEllison  | 9 February 2018  |
| 35 | Motor Trade Association of South Australia   | 18 January 2018  |
| 36 | Ombudsman SA   | 12 February 2018 |
| 37 | Parliamentary Committee on Occupational Safety, Rehabilitation & Compensation (Interim Report) | 14 December 2017 |
| 38 | Parliamentary Committee on Occupational Safety, Rehabilitation & Compensation (Final Report)   | 14 December 2017 |
| 39 | Police Association of South Australia  | 1 March 2018     |
| 40 | REA Group Limited  | 9 February 2018  |
| 41 | Registered Employers Group SA Inc  | 16 February 2018 |
| 42 | Restaurant & Catering Australia  | 13 February 2018 |
| 43 | ReturnToWorkSA (No 1)  | 11 January 2018  |
| 44 | ReturnToWorkSA (No 2)  | 23 March 2018    |
| 45 | Royal Australian and New Zealand College of Psychiatrists                                      | 4 April 2018     |
| 46 | SA Unions  | 16 February 2018 |
| 47 | South Australian Civil and Administrative Tribunal   | 7 February 2018  |
| 48 | South Australian Employment Tribunal   | 20 February 2018 |
| 49 | South Australian Wine Industry Association   | 9 February 2018  |
| 50 | Sparke Helmore Lawyers   | 23 February 2018 |
| 51 | Mr Damien Stewart  | 9 February 2018  |
| 52 | Voice of Industrial Death (VOID)   | 8 February 2018  |

|    |                   |                  |
|----|-------------------|------------------|
| 53 | Wearing Law       | 16 February 2018 |
| 54 | WK Lawyers (No 1) | 9 February 2018  |
| 55 | WK Lawyers (No 2) | 16 February 2018 |

## 15.2 List of reference materials

The following list is not exhaustive and is to be read in conjunction with the materials referred to in the body of the Report.

1. Bentley, Philip and Latham Chris, *Review of the Management of Work Injuries within the South Australian Government*, dated 21 June 2016.
2. Finity Consulting Pty Ltd, *Scheme Actuarial Valuation* (as at 31 December 2017 and as at 30 June 2017).
3. Office for the Public Sector, 22 March 2018, Letter of Ms Erma Ranieri in response to request for information regarding extended workers compensation.
4. RTWSA, *Significant Cases List* (Confidential)
5. RTWSA, Info - Alternative Dispute Resolution - RTWSA comments on reviewable decisions
6. RTWSA, Instruction to Gallagher Bassett Pty Ltd - exercise of financial authorisations - Return to Work Act 2014 - May 2017 - Commercial in Confidence
7. RTWSA, Instruction to Employers Mutual SA Pty Ltd - exercise of financial authorisations: *Return to Work Act 2014* - January 2018 - Commercial in Confidence
8. RTWSA, Conditions and limitations of delegation; and financial authorisations to Gallagher Basset Services Pty Ltd - 22 December 2016 - Commercial in Confidence
9. RTWSA, Conditions and limitations of delegation; and financial authorisations to Employers Mutual SA Pty Ltd - 18 January 2018 - Commercial in Confidence
10. RTWSA, Claims Agent Business Model - Instruction to Claims Agents - Commercial in Confidence
11. RTWSA, Claims Agent KPI Standards for second half of FY2018 - Commercial In Confidence
12. RTWSA, Costing of the *Return To Work Act 2014* - Return to Work Scheme South Australia - February 2015 - Finity Consulting Pty Limited - Cabinet in confidence
13. RTWSA Finity Report - Scheme Actuarial Valuation as at 30 June 2016 - August 2016 - Finity Consulting Pty Limited – Confidential
14. SACAT Annual Report 2016-17
15. SACAT Year in Review 2016/2017
16. SAET Presentation - Appearing in the new South Australian Employment Tribunal
17. SAET Presentation - Both Sides of the Fence, Conference on 17 – 16 October 2015

18. SAET Presentation - Law Society Country Conference 26-28 February 2016
19. Taylor Fry, *Actuarial Report for the Liability for Crown Workers Compensation Claims* (for 2016-17, 2015-16, 2014-15, 2013-14 and 2012-13).
20. The Hon. David Bleby QC, 1 August 2017, Statutory Review of the SACAT.