

ALA SUBMISSION TO THE REVIEW PURSUANT TO SECTION 203 OF THE *RETURN TO WORK ACT 2014*

Introduction

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia.

The ALA has particular interest in workers compensation matters, as many of our members regularly represent those who have been injured at work in South Australia.

We also regularly exchange information with members of the ALA in other states, who have an understanding of the practical challenges associated with other operating schemes.

Members of the ALA therefore have a good understanding of the issues posed by workers compensation schemes.

Term of Reference No 1

The extent to which the Scheme established by the Act and the dispute resolution processes under the Act in the South Australian Employment Tribunal Act 2014 have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve matters (especially when compared to the Scheme and processes applying under the Repealed Act).

The ALA understands that the South Australian Employment Tribunal (the Tribunal) will provide numbers with respect to disputes and accordingly the ALA does not comment on dispute numbers.

Our submission on the time taken to resolve disputes is based on feedback from members that there has been an increase in the length of time to resolve disputes. This can be attributed to a number of matters including that this is a new Act with significant changes in terminology and concepts and lengthy and complex transitional provisions.

In addition the number of cases proceeding to appeal in the Tribunal and in some cases to the Supreme Court is at very high levels. As the appeals to the Full Tribunal and the Supreme Court all relate to matters of law and in many cases relating to new concepts, terminology or provisions of the Act, Regulations and Guidelines this has resulted in matters at the hearing stage before a single member being delayed pending decisions of the Full Tribunal or the Supreme Court of South Australia.

In addition different decisions about similar provisions of the Act by differently constituted Full Tribunals are contributing to delays. An example of the conflicting Full Tribunal decisions are the case of *Pennington v ReturnToWorkSA* (2016) SAET 21 and *Andrzejczak v The Department for Education and Child Development* (2017) SAET 183.

However, it can be anticipated that clear decisions from the Full Court of the Supreme Court of South Australia will lead to a resolution of this legal uncertainty which will in turn lead to decreased numbers of disputes and decreased delays in the resolution of disputes.

Term of Reference No 2

Without limiting paragraph 1, whether the jurisdiction of the SAET under the Act should be transferred to the South Australia Civil Administration Tribunal.

It is the view of the ALA that the answer to this should be no.

The Return to Work Act 2014 covers a specialist area of the law relating to injury in employment. As it deals with employment issues it should remain

within a specialist tribunal namely the South Australian Employment Tribunal.

In addition as the Tribunal, particularly the Commissioners carrying out conciliation for Applications for Review under the Act are dealing on a daily basis with the Act and the many specialist concepts including medical evidence this contributes to a high resolution rate at the initial conference stage.

Term of Reference No 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).

It is not apparent at this time that there has been an improvement. A considered discussion of this term of reference cannot occur until the issues raised with respect to Term of Reference No 1 relating to test cases and Court delays are resolved.

It can be expected that particularly with respect to determinations as to whether a worker is a seriously injured worker and the complexities relating to the Impairment Assessment Guidelines coupled with the Guidelines to the Evaluation of Permanent Impairment (AMA 5) and ancillary guides for example GEPIC that there will be disputation where the Claimant's assessment is close to 30% WPI.

With respect to pre-approval of surgery for non-seriously injured workers [Section 33 (21) (b) (ii)] which will involve medical questions and the interpretation of the terminology "reasonable and appropriate" that there will continue to be significant legal disputes between RTWSA and workers as RTWSA will want to limit its liability for medical expenses to a defined period and this will conflict with the injured worker's need to ensure that future expensive surgery is covered.

Term of Reference No 4

The performance of RTWSA in managing claims including RTWSA's outcomes in reducing incidences of work injuries.

The ALA does not comment on RTWSA's outcomes in reducing incidences of work injury. This will be a matter for statistics to be provided by ReturnToWorkSA.

In terms of managing claims the ALA is concerned at what appears to be the attitude taken by ReturnToWorkSA in its submission in relation to Applications for Review lodged by workers. ReturnToWorkSA it appears fails to understand that Applications for Review are only lodged by workers where they are adversely affected by a decision, for example rate of weekly

payments, acceptance of the claim, payment of weekly payments, refusal to pay medical expenses or the level of Permanent Impairment Assessment.

While it would be easy to be critical of ReturnToWorkSA a more benign description may be that the Act is currently in a test phase, that is that many test cases are being run and in time once the test phase has passed, we may have a better understanding of how well ReturnToWorkSA are managing claims and the Scheme. However, there appears to be a very strong emphasis by ReturnToWorkSA on the level of premiums and financial durability of the Scheme when in the view of ALA this needs to be balanced with what is the appropriate level of support and compensation for injured workers. ReturnToWorkSA would appear to have a very employer focused approach to the Scheme at this time.

Term of Reference No 5

The performance of self-insured employers including outcomes in reducing instances of work injury.

The ALA makes no submission on this Term of Reference.

Term of Reference No 6

Changes in return to work rates at key milestones outlining factors influencing any improvement or deterioration.

The ALA makes no submission on this Term of Reference.

Term of Reference No 7

Factors contributing to non-seriously injured workers failing to achieve a return to work within two years.

The primary problem with this concern is the wide range that the term “non-seriously injured workers” covers. This covers any worker with a Whole Person Impairment (WPI) up to 29%. It is the ALA’s submission that there are many workers falling within the category of up to a 29% WPI who are totally or significantly, and often permanently, incapacitated for work. There are also categories of workers who are totally incapacitated for work and who require support longer than two years of weekly payments and three years of medical expenses in order to make a return to work who do not achieve a 30% WPI. It is the experience of ALA Members over many years that the provision of good treatment that is not time limited contributes to a meaningful and sustained return to work.

Term of Reference No 8

Any additional recommendations regarding re-skilling service to assist return to work outcomes.

The ALA makes no submission on this Term of Reference.

Term of Reference No 9

Whether the Scheme has achieved financial stability and if not when the Scheme would likely to be mature and stable.

The ALA does not make a submission in relation to this area. The ALA recommends that the review be provided with and carefully consider the actuarial information including the underlying actuarial assumptions.

Term of Reference No 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.

The ALA refers to its submission to the Occupational Safety Rehabilitation and Compensation Committee in its Inquiry into the Return to Work Act and Scheme (copy of submission attached).

Patrick Boylen
SA President
Australian Lawyers Alliance

9 February 2018



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

31 October 2016

CONTENTS

Who we are	3
Our standing to comment.....	3
Introduction.....	4
Executive Summary	4
The potential impacts on injured workers and their families as a result of the changes to the Return to work act, including the tightening of the eligibility criteria for entry into the return to work scheme.	5
Alternatives to the overly restrictive 30% wpi threshold for ongoing entitlements to weekly payments.	6
The current restrictions on medical entitlements for injured workers	8
Potentially adverse impacts of the current two year entitlements to weekly payments.....	9
The restriction on accessing common law remedies for injured workers with a less than 30% wpi	10
Matters relating to and the impacts of assessing accumulative injuries	13
The obligations on employers to provide suitable alternative employment for injured workers	14
The impact of transitional provisions under the Return To Work Act.....	14
Workers compensation in other Australian jurisdictions which may be relevant to the inquiry, including examination of the thresholds imposed in other States.....	15
The adverse impacts of the injury scale.....	20



WHO WE ARE

The Australian Lawyers Alliance ('ALA') is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia.

OUR STANDING TO COMMENT

The ALA has particular interest in workers compensation matters, as many of our members regularly represent those who have been injured at work in South Australia.

We also regularly exchange information with members of the ALA in other states, who have an understanding of the practical challenges associated with other operating schemes.

Members of the ALA therefore have a good understanding of the issues posed by workers compensation schemes.

INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Occupational Safety Rehabilitation and Compensation Committee in its inquiry into the Return to Work Act and Scheme.

EXECUTIVE SUMMARY

Terms of Reference

By reference to the Terms of Reference, a brief summary of the ALA submission is as follows:-

- (a) It is too early to tell the impact of these changes. The ALA recommends that the Committee obtain statistics from ReturnToWorkSA and self-insured employer, as to the number of claims received and the determinations made.
- (b) The 30% WPI threshold is overly restrictive and its harsh effects should be ameliorated by the introduction of a narrative test.
- (c) The restriction of payment of medical expenses for non-seriously injured workers is overly restrictive. The restrictions may act as an impediment to workers being able to continue in productive employment. The entitlement to medical expenses should be based on the injury, capacity, nature of the treatment and circumstances, rather than a WPI number.
- (d) The current system of weekly payments only being paid for two years after the date of the injury is unfair. Workers should be entitled to two years of weekly payments, regardless of the period of time. The cut off of weekly payments after two years based on a worker not reaching a 30% whole person impairment is unfair. There are many examples of workers with a less than 30% whole person impairment who cannot work or who have a reduced work capacity and the ALA submits that a narrative test taking into account the individual's circumstances should be considered and introduced.
- (e) The common law entitlements at Part 5 of the Act are very limited and are only a token acknowledgement of common law rights. As the only workers entitled to common law rights are those who are seriously injured (a WPI of greater than 30%) and accordingly entitled to lifetime care and support and weekly payments to pension age, it is unlikely that a worker would be best



advised in most cases to pursue a common law claim.

- (f) The current 30% WPI fails to fairly compensate where a worker has injuries from multiple trauma.
- (g) The ALA supports the retention of the obligation of employers to provide suitable employment and considers that this is an essential part of a return to work scheme. The ALA considers that no changes are currently required to Section 18 of the Act.
- (h) The ALA does not comment on this term of reference and refers to the submission of the Law Society of South Australia.
- (i) The ALA sets out in detail the workers compensation schemes for New South Wales, Queensland and Victoria.
- (j) Not applicable.
- (k) No submission.

THE POTENTIAL IMPACTS ON INJURED WORKERS AND THEIR FAMILIES AS A RESULT OF THE CHANGES TO THE RETURN TO WORK ACT, INCLUDING THE TIGHTENING OF THE ELIGIBILITY CRITERIA FOR ENTRY INTO THE RETURN TO WORK SCHEME.

The SA Committee of the Australian Lawyers Alliance (hereinafter ALA) makes the following submissions:

- There have been insufficient cases determined by the South Australian Employment Tribunal (hereinafter the Tribunal) to determine what impact the changes will have.
- Anecdotal “evidence” reveals that fewer claims have been accepted. The ALA recommends to the Committee that it obtain statistics from ReturnToWorkSA and self-insured employers to make a comparison between the numbers of claims submitted for the three year period prior to the commencement of the *Return To Work Act 2014* (“**the Act**”) and the number of claims submitted since the introduction of the *Act* and details of claims rejected relying on the test for compensability (refer to Section 7 of the *Act*). The statistics should also distinguish between:

- cases of “*other than a psychiatric injury*” (Section 7(2)(a)); and
- “*psychiatric injury*” (Section 7(2)(b)).
- The test under Section 7 is not dissimilar to the tests under the *Safety Rehabilitation and Compensation Act 1988* which has significantly reduced the ability of injured workers to claim compensation.

ALTERNATIVES TO THE OVERLY RESTRICTIVE 30% WPI THRESHOLD FOR ONGOING ENTITLEMENTS TO WEEKLY PAYMENTS.

The 30% threshold applies for access to long term weekly payments, medical expenses and care costs, and the entitlement to pursue a common law claim. The 30% WPI threshold limits benefits to injured workers below the threshold.

Under the RTW Scheme, for two years’ worth of weekly payments to be fully received by the worker, payments must be taken consecutively from the date of injury. Should the worker, despite being significantly impaired to undertake the workers normal duties, return to work early but need more time off later, the entitlement still fully ceases 2 years from the date of injury whether or not 104 weeks of this allowance has been used or not.

However if a worker is ultimately assessed as having a WPI of 30%, that percentage must relate either wholly to either physical injury or to psychiatric/psychological injury. The two cannot be aggregated. Naturally this begs the question of why an injured worker with a physical impairment of say 25% WPI who also may have suffered a nervous shock or other serious psychiatric condition during the injury trauma of say 20% WPI cannot reach the 30% threshold. Such a worker may possibly be more seriously injured and achieve a higher rating than 30% were the physical and psychological/ psychiatric conditions were combined. In that regard if either one or other of the above types of injury can be the basis of the minimum 30% WPI under this test, why should they not each be calculated together to arrive at 30% WPI or more. The Scheme continues to ignore the nature of the effect of serious mental trauma, whereas if the injured worker receives proper acknowledgement, treatment and improved recovery, return to work is more likely.

In cases where the injury is wholly physical or wholly psychological/ psychiatric, the



30% threshold requires significant levels of disability and impairment such that only a very small percentage of workers annually are likely to obtain this level of WPI on either assessment separately. Without having access to the recent statistical and actuarial material, it is difficult to comment directly upon what may be a more realistic percentage WPI percentage for this test. It was suggested that 15% may be a more appropriate threshold test when the RTW scheme legislation was first introduced into the South Australian Parliament.

A further difficulty arises for workers who are injured in the employment of employers registered under the RTW Act. If a worker is injured in the employment of a self-insured employer, there is much more scope for these larger organisations to find alternative positions for injured workers to return to work either in the short or the long term depending on the nature of the injuries. Self-insured employers have a well recorded history outlined in many submissions over the years under the previous Workers Rehabilitation and Compensation Act.

Injured workers whose employers are registered with RTWSA are less likely to make a safe and early return to work following injury. The time for full recovery, consideration of alternative duties for at least a period of time together with ongoing rehabilitation will indeed use some of the 2 years of weekly payments, albeit intermittently, for example while recovering from an operation.

Where an injured worker is unable to return to his/her pre-injury employment, workers must retrain and attempt to find alternative placements within the period of 2 years from injury. While ALA does not have the current numbers or statistics to identify how many injured workers below the 30% WPI threshold are likely to find that after 2 years their weekly payments will cease, such workers may be bound to apply to Centrelink in circumstances today where it is becoming much more difficult to access the Disability Pension. Such persons are likely to be continually subject to seeking employment without the benefit of rehabilitation or case management.

ALA recommends that unless there is a significant reduction in the 30% WPI threshold for ongoing entitlements for weekly payments, RTWSA should consider introducing a narrative test to supplement significant injuries which under the Whole Person Impairment Scheme that fall short of the 30%. ALA refers to the narrative test as it is applied under the Victorian Workers Compensation Scheme to meet the threshold to access other entitlements. The narrative test can take into account not only the nature of the injuries but also the effect on the injured workers likelihood of being in a position to gain suitable employment within the present 2 year period from injury. A narrative test, combined with a Whole Person Impairment threshold below the present overly restrictive 30%, could enable RTWSA to extend the period of time within which weekly payments may be taken, even if the gross amount of

such weekly payments were confined to a period of time post injury. This is a balancing act which can only be properly considered with access to current statistical and actuarial information. Without this, it is difficult to consider that the possibility of an economic loss claim under section 56 of the Return to Work Act will necessarily suffice as an alternative to a meaningful return to work.

Finally, it is often difficult with the situation where various injuries arise from the same trauma and each reaches Maximal Medical Improvement (MMI) at different times. This can be particularly so with one or more surgeries over time. Any WPI threshold as the basis for entitlement to weekly payments is bound to suffer from delay in stabilisation of the workers conditions.

In summary, ALA supports reducing the threshold to 15% and/or introducing a narrative test to compliment the present highly restrictive 30% Whole Person Impairment threshold and to enable an injured worker to have the benefit of at least 2 full years weekly payments over such times as the worker needs to use that time away from employment, with the 2 years not limited to that period from the date of injury.

THE CURRENT RESTRICTIONS ON MEDICAL ENTITLEMENTS FOR INJURED WORKERS

The Act ceases the entitlement of an injured worker, who is a seriously injured worker, to claim reasonable medical treatment expenses 12 months after the worker has not had an entitlement to weekly payments.

The automatic ceasing of all treatment places an unfair burden on many workers, especially those who rely on the treatment to maintain their work capacity. An injured worker may rely on medication or occasional periodic treatment to remain in the workplace. By ceasing the entitlement for the treatment to be funded potentially forces the worker out of the workplace. This may result in a termination of employment and force the worker onto unemployment benefits.

The fact that treatment ceases 12 months after the entitlement to weekly payments has ceased is also potentially unfair on a worker who, following injury, has a limited period of time off work but requires ongoing treatment, has their claim rejected and then spends lengthy periods up to 12 months challenging the decision in the SAET. That worker can find themselves at the conclusion of the dispute having no future entitlement to medical treatment, and has been deprived of the opportunity to have treatment during the dispute process as they haven't been able to pay for it out of their own funds.



The ALA submits that if the limitation in s33(20) is to remain that there should be a further test available to the worker that is based on their injury, capacity, the type of intended treatment and circumstances, such that the entitlement can be extended. It does not need to be indefinite but should be an extended period but with the right of review.

Whilst there is an opportunity to apply for funding for future surgery before the entitlement to medical treatment has ended, and the changes do not apply to therapeutic appliances. This is very limited and does not fully address the ongoing medical needs of most injured workers.

POTENTIALLY ADVERSE IMPACTS OF THE CURRENT TWO YEAR ENTITLEMENTS TO WEEKLY PAYMENTS

The ALA has two main points it wishes to make in relation to the two-year entitlement to weekly payments.

Firstly, the two-year entitlement to weekly payments commences from the date of the injury regardless of whether an injured worker has made a claim for weekly payments. In practice, this can result in an injustice to injured workers who continue working but require time off outside of the 2-year period for treatment or retraining. Injured workers are at risk of exhausting their entitlement to 2 years of weekly payments without having received 2 years of weekly payments. The ALA submits that if the 2-year entitlement period is to be maintained, it ought to be on the basis that injured workers are entitled to two years' of weekly payments.

Secondly, the two-year entitlement to weekly payments blatantly fails to acknowledge the reality that there will be injured workers who will not meet the 30% threshold and are unable to return to work after two years. The RTW scheme does not answer to injured workers in those circumstances. The ALA is concerned that there will be injury-related unemployment and a reliance on government welfare for many injured workers beyond the two-year period.

The ALA submits that consideration should be given to a narrative test that enables weekly payments to continue beyond the two-year period in certain circumstances. The ALA takes the opportunity to bring to the attention of the Committee the narrative test within the Victorian *Workplace Injury Rehabilitation and Compensation Act 2013* (set out below) and strongly recommends that an enquiry

be made into its effectiveness and fairness to injured workers:

165 Continuation of weekly payments after second entitlement period

- (1) *A worker who has a current work capacity and is, or has been, entitled to compensation in the form of weekly payments under this Division, may make an application at any time, in accordance with this section, to the Authority or self-insurer, in a form approved by the Authority, for a determination that the worker's entitlement to weekly payments does not, or will not, cease by reason only of the expiry of the second entitlement period.*
- ...
- (4) *The Authority or self-insurer must not approve an application under subsection (1) unless it is satisfied that—*
- (a) *the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings, or current weekly earnings together with nonpecuniary benefits within the meaning of section 155(1)(d), of at least \$177 per week; and*
- (b) *because of the injury, the worker is, and is likely to continue indefinitely to be, incapable of undertaking further additional employment or work which would increase the worker's current weekly earnings.*

THE RESTRICTION ON ACCESSING COMMON LAW REMEDIES FOR INJURED WORKERS WITH A LESS THAN 30% WPI

The entitlement to pursue a common law claim against a negligent employer is reserved for injured workers with a whole person impairment of 30% or more only (sections 73 to 84 of the Act). Effectively, the vast majority of injured workers are unable to access common law remedies.

Furthermore, for those who qualify, the right to a common law claim is not unfettered. There are numerous disincentives within the Act for injured workers considering the common law option:

- Section 71(2) - an employer is not liable for a psychiatric injury unless the psychiatric injury was primarily caused by the negligence or another tort of the

- employer. Furthermore, the employer is not liable for consequential mental harm.
- Section 71(3) – a worker cannot commence proceedings in a Court for damages unless/until an assessment of whole person impairment has been undertaken.
 - Section 71(9) – the right to pursue a common law claim is not applicable where the employer is a body corporate and the worker is a director and employee of the body corporate.
 - Section 73(2) – a worker is not entitled to claim damages for treatment, care or support from the employer, only damages for economic loss.
 - Section 73(2) – a worker pursuing a common law claim is not entitled to a redemption of a liability to make weekly payments and future economic loss lump sum payment.
 - Section 73(6) – to pursue a common law claim, the worker must have received advice about the consequences of that decision from a legal practitioner.
 - Section 82 – damages awarded by the Court are apportionable, which is not in keeping with the doctrine of ‘joint and several’ liability at common law.

The ALA considers that the right to make a common law claim in its current form is only a token acknowledgement of common law rights. The ALA anticipates that there will be few common law claims under the Act.

The introduction of the Act was an opportunity to examine the benefits of common law actions both for the worker and for the system.

An opportunity was lost to bring in a more comprehensive return to the common law principles.

What remains in Part 5 of the Act is a common law claim that is of such little utility that very few, if any, injured workers will ever take it up nor will they ever be so advised.

The Act essentially does not have a practical common law aspect to it.

The benefits of common law systems have long been debated and actuaries around the country and internationally have from time to time suggested the no-fault schemes are more economic. It depends upon the premises upon which the actuaries work as to the conclusions they reach.

Whether something is more efficient economically does not necessarily equate to it being more just.



There is no doubt that the entire risk management industry has developed in part because of the sanction of common law actions which increased premiums, which require the payment of damages and which Insurers do not wish to do unless required by law to do so.

The deterrent effect of common law actions is a significant factor that is now missing from the scheme.

Premiums can still go up and fines can be implemented, but unfortunately it is the injured who miss out on any relevant common law compensation, particularly where in general a significantly greater sum recovered at common law rather than under the current WorkCover Act and its scheme.

The costs of common law actions has been criticised by many. You need to look at the cost of administration to compare aspects of each type of system.

Queensland runs a hybrid scheme where you can do either or both, depending on your level of disability. It is submitted that such an approach in South Australia is also more appropriate, particularly in obtaining justice for those injured who do not meet the very high threshold of 30% whole person impairment and will be cut from their income support after two years. The ability to bring an action for common law damages at that point or at some other point would have been an appropriate remedy to give to the injured rather than reduce their benefits as has occurred in this case.

In Victoria the common law access still exists. There is no doubt that a sense of injustice is also something that a victim of a work injury feels. Common law damages has, and does, deal with that issue, which is a very important aspect particularly in terms of rehabilitation and moving on with their lives after being left often with significant disabilities. Actuaries cannot put a number on that and Insurers do not want to.

The common law aspect has positive aspects to it as can be seen in the Queensland situation, and further study of that process and the availability of common law damages is something this Committee should consider very strongly and we say recommend its reintroduction.

MATTERS RELATING TO AND THE IMPACTS OF ASSESSING ACCUMULATIVE INJURIES

While a worker may suffer various injuries, none of which in itself is sufficient to reach a 30% Whole Person Impairment, there no doubt are and will be many circumstances where events arising out of more than one trauma may lead to various entitlements to weekly payments. This could lead to one or more such traumas and to entitlements beyond 2 years generally. If a worker suffers numerous injuries over a period of years, taking all injuries into account, the worker may become classified as a seriously injured worker. In the normal course of events for each injury a worker suffers, time is need to reach Maximal Medical Improvement before a Whole Person Impairment for the injury can be assessed. A worker may also face multiple injuries from the same trauma where the Maximal Medical Improvement for each injury arises over different periods of time. As accumulative injuries are not defined in the RTWSA Act, consequential injuries may not necessarily be limited to an aggravation of a pre-existing injury under the present legislation.

As this is a compensation system providing support for the recovery of an injured worker, ALA submits that interpretations of accumulative injuries should be broad. If, over time, a series of injuries for example under the same employer with the same duties leads to a higher level of WPI and incapacity, the injured worker should be entitled to a medical review as to whether a series of injuries over time have indeed taken that worker to a level of WPI that would otherwise entitle the worker to meet any of the 30% thresholds including access to weekly payments where necessary beyond 2 years, and ongoing medical expenses.

ALA says that society would be failing to support workers who may otherwise be disenfranchised for future care and medical expenses whether or not such a worker may find a suitable alternative position from time to time. The burden will fall, in our respectful submission, more heavily on workers whose employers are registered with RTWSA. Indeed any gateway assessment for serious injury whether purely physical, purely psychiatric/psychological or by means of an accumulation of assessments over time should be treated as favourable to the worker given that workers compensation is remedial in its nature.

At each point where a gateway test such as the overly restrictive 30% WPI threshold is used, ALA recommends the narrative test as referred to previously



herein will ensure a minimum of fairness if the current 30% rate to access more than 2 years of weekly payments, claim damages at common law for economic loss and the entitlement to care and medical expenses for life should apply to an injured worker under the accumulation of injuries over time.

THE OBLIGATIONS ON EMPLOYERS TO PROVIDE SUITABLE ALTERNATIVE EMPLOYMENT FOR INJURED WORKERS

The duties of employers are dealt at s 18 of the Act. The Section is not dissimilar to s 58 of the previous Act. There has always been an obligation on employers to provide suitable duties although the obligation is now greater given that specific remedies have been introduced that enable an injured worker to apply to the Tribunal for an order that the employer provide suitable employment. There are costs implications that can apply to the employer.

The impact of s 18 is not evident at this stage and is unlikely to be fully tested until after 1 July 2017 when the entitlement to weekly payments for those in receipt of payments as at 1 July 2015 ceases (unless they are seriously injured). Just how an employer treats an injured worker with an ongoing incapacity, but with no entitlement to weekly payments, remains to be seen.

The ALA supports the retention of the obligation on employers to provide suitable employment and considers that it is an essential part of a return to work scheme.

THE IMPACT OF TRANSITIONAL PROVISIONS UNDER THE RETURN TO WORK ACT 2014

The ALA refers to and adopts the submissions of the Law Society of South Australia.

WORKERS COMPENSATION IN OTHER AUSTRALIAN JURISDICTIONS WHICH MAY BE RELEVANT TO THE INQUIRY, INCLUDING EXAMINATION OF THE THRESHOLDS IMPOSED IN OTHER STATES

The Terms of Reference include a consideration of other Workers' Compensation Schemes in other States. For the information of the Committee details of some of the comparable State based schemes.

1. New South Wales

In June 2012 a significant overhaul of the compensation laws occurred. Three years later in 2015 it underwent another round of reforms.

The reforms of 2015 do not apply to Police Officers, Coal Miners, Paramedics or Firefighters.

New South Wales - Weekly Benefits

In 2012 distinct entitlement periods were created much as existed in the local SA legislation. A formula was created for calculating benefits dependent upon whether or not the worker is totally or partially incapacitated. Entitlement periods were calculated cumulatively rather than on a consecutive basis. The first entitlement period was week one to 13, the second was week 14 to 130 (Sections 36 to 37 of the *Workers' Compensation Act 1987 (NSW)*).

A third entitlement period, weeks 131 to 260 means the worker must satisfy one of the following criteria.

To be eligible to receive weekly benefits the worker in this period has to satisfy one of the following:-

1. Assessed by the Insurer as having a partial capacity for work and as being incapable of undertaking additional hours and has returned to work for not less than 15 hours a week and is earning at least \$176.00 a week.
2. Secondly the worker has been assessed by the Insurer as having no capacity for work and likely to continue to have no capacity.

To receive weekly benefits beyond 260 weeks the worker has to continue to satisfy one or two of the above as well as having a WPI greater than 20% (compared to SA of 30%). Where workers continue to satisfy the requirements of a third period of eligibility and the whole person impairment then workers will continue to receive weekly benefits until one year after retirement age.

The 2015 amendments meant that workers of a greater whole person impairment of 30% are eligible to receive weekly benefits of at least \$788.00 with the amount to be indexed periodically. If there was a higher amount available for earning then a higher amount is to apply.

Medical Expenses

Reasonable and necessary medical expenses are claimable under Section 60 of the Act. Characteristics of the Scheme are:-

1. Pre-approval needs to be sought and obtained for each medical expense unless it falls within the exceptions generally.
2. Those with a 20% or less whole person impairment receive medical expenses for a set period of time commencing on the date of their claim or on the date the weekly benefit was last paid, whichever is the latter.
3. If the whole person impairment is not assessed or assessed at 10% or less then you receive medical benefits for two years. If the whole person impairment is between 11% and 20% then you receive medical benefits for five years. If the whole person impairment is greater than 20% then there are no time limits and may continue for the rest of their lives to receive benefits.
4. The ability to receive further medical expenses is reinvigorated if there is a further entitlement to weekly benefits. If a worker requires surgery but is not entitled to reinvigoration of weekly benefits because the periods have past, the worker is then entitled to receive special weekly benefit compensation at the rate for the period not exceeding 13 weeks thereby able to claim the expenses of any surgery. The reasonableness of medical expenses has Guidelines which essentially each treatment needs to alleviate the consequence of injury, maintaining the worker's state of health or slower prevent deterioration of the injury.
5. Regardless of the whole person impairment workers are able to claim medical expenses until retirement for continued access to home and vehicle modifications, crutches, artificial parts, eyes or teeth, artificial aids or special glasses including hearing aids, any secondary surgery for the same part of the body that is a direct consequent of the earlier surgery.

Work Capacity Decisions

A distinct characteristic of the New South Scheme are work capacity decisions. These are reviewable but are distinct from whole person impairment assessments and are relevant to the issue of partial and total incapacity.



Fees that are incurred in challenging them are generally not recoverable although amendments in 2015 have created limited circumstances where that can occur. These decisions normally decide whether there is a liability to pay weekly benefits or any other benefit.

For death benefits and funeral expenses the 2015 amendment increased the death benefit to \$750,000.00 for death claims and \$15,000.00 for funeral expenses. Interestingly when amended those changes applied regardless of the date of injury so claims in the system are immediately increased. This is not a common feature of legislation around the country.

Re-Training and Education

Where someone cannot return to their former work then there is an entitlement up to \$1,000.00 for the provision of training, education, childcare, clothing, equipment and similar services or assistance. Those with a whole person impairment of greater than 20% will also be able to claim up to \$8,000.00 towards re-training or education.

Disease, Injury, Heart Attack, Stroke and Nervous Shock

Similar to the South Australian amendments the scope of compensation has narrowed. The worker's employment has to have been the main contributing factor to the injuries and regarding heart attack and stroke there has to be a significantly greater risk of the worker suffering the injury because of the employment concerned.

Nervous shock claims brought by non-employees like relatives of the injured worker are excluded, although workers who suffer from same are entitled to compensation.

Journey Claims

Journey claims are still available but workers are excluded from claiming compensation for injury which occurred on a journey since 2012 unless there is a real and substantial connection between the worker's employment and the injuries sustained.

Whole Person Impairment

Since the 2012 amendments claims for pain and suffering are no longer available. The compensation is payable for physical impairment greater than 10%, with



psychiatric remaining at 15%. Notably if there is deterioration on a later occasion only the one claim can be made. Hearing loss is an exception to the rule but each deterioration will need to be greater than 10% to be entitled to further compensation. That amendment is not restrictive.

2. Queensland

In September 2015 Queensland saw a significant restoration of rights in its Workers' Compensation Scheme following the change of Government in January 2015. The former threshold of 5% WPI was removed and there are no thresholds for common law. There are number of procedural requirements of giving notice, having an assessment and the like contained with in Section 237 but with the appropriate documentation a worker can access a common law action.

Workers with more than a 20% whole person impairment can pursue both damages and receive statutory lump sum compensation under the Act. Those with less than 20% whole person impairment must make an election between receiving lump sum compensation under the Act or pursuant a damages claim. Similar procedural requirements remain but they still allow for access to common law.

Firefighter Provisions

Firefighters in Queensland have specific rules applicable to them with a positive presumption existing regarding some specified diseases subject to rebuttal evidence.

Claims History

Workers are required to disclose pre-existing injuries or medical conditions when requested.

Additional Compensation Queensland for the Newman Amendments

For the period of the Newman Government specific legislation has now brought about provisions which seek to create fairness to those who suffered significant loss during that period of time.

Summary

Queensland retains access to common law and has traditionally had the lowest premiums in the country. Provision of an up to date analysis of premium rates around the country will be provided.

3. Victoria

Some amendments occurred to the Act in 2013 which simplify the *Accident*



Compensation Act with only minor amendments to the worker's entitlements.

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) attempted to simplify processes whilst retaining benefits to workers and are largely re-enacted in the former Act and a more logical structure now exists. Some anomalies remain. This structure became operational on 1 July 2014. The Act's focus is on rehabilitation and there are positive obligations on workers to attend to that. There is a reasonableness test as to participating and often that may rely upon doctors' evidence as to the benefits of such a process.

Certificates of Capacity

Certificates are necessary to receive compensation on an ongoing basis unless an Application is made to the Court to do away with the requirement. Certificates need to be no older than 90 days. It is matters such as these which occupy the Tribunals and Courts in Victoria in seeking the Certificates of Capacity.

Definition of Ordinary Earnings.

The definition of weekly payments is the ordinary earnings taken from the 52 weeks prior to the injury where they have worked such a period.

Common Law Access

Common Law Access is still available in Victoria. An injury needs to be satisfied as having to be a serious injury and a certificate to that effect needs to be obtained.

To obtain a serious injury certificate you need to have an assessment of 30% whole person impairment.

Injured Victorians have available to them the narrative test which means the thresholds can be disregarded if, in fact, there is a proper reason under the narrative test which takes into account the effects of the injury in a detailed way to grant a certificate which then enables the matter to resolve or proceed to trial and acts as a gateway.

Entitlement to Weekly Benefits

There are entitlements to weekly benefits up to a level of 130 weeks if you have no work capacity then they can continue onwards.

There is an entitlement to medical expenses in accordance with the Act being reasonable and relevant to the injury and they can continue onwards indefinitely.



Death Claims

A lump sum of approximately \$850,000.00 is available in death claims in addition to a capped funeral benefit and in addition to counselling fees and a pension for 3 years.

Summary

Overall there are many aspects of Victoria and Queensland which could be adopted in South Australia to alleviate the unfairness of the effect of the current Act.

THE ADVERSE IMPACTS OF THE INJURY SCALE

The ALA does not comment on this Term of Reference as it believes the reference to “injury scale value” is an error.