Review into the operation and administration of the Return to Work Act 2014

Submission of SA Unions

Introduction

1. SA Unions is the peak trade union Council for South Australia. The 31 registered unions operating in South Australia represent approximately 200,000 union members in all industries and sectors. Those unions have been consulted and have contributed to this submission.

2. Unions advocate for a fair, just and sustainable workers compensation scheme for the sake of injured workers and their families and provide their members with advice, support and representation on issues related to workers compensation and their return to work following a workplace injury.

3. Unions are in a unique position to observe the operation of the Return to Work Act 2014 ("the Act") and to describe the impact of the new legislation on their members. We welcome the opportunity to make some comments on the Terms of Reference.

4. The Act brought about the most significant changes to South Australia's workers compensation system since the enactment of the Workers Rehabilitation and Compensation Act 1986 ("WRCA").

5. Those changes had an immediate effect on the cost and viability of the scheme. The unfunded liability, which had sat at in excess of $1 billion immediately prior to the commencement of the Act, was eliminated immediately upon commencement of the Act. The average premium rate paid by employers was reduced from 2.5% to 1.95%, again immediately upon commencement of the Act.

6. The immediacy of those in effects shows that these effects on the cost and viability of the scheme were not brought about by any change of culture inculcated by the Act, or by improvements in the administration of claims, or decision-making in respect of claims, or in dispute resolution or by better return to work outcomes. The improvements to the cost and viability of the scheme were directly caused by the reduction in the rights to which injured workers had been entitled under the scheme existing under the WRCA.

7. The current scheme is now significantly overfunded. Its proportion of assets to liabilities is now approximately 120%, and that ratio appears to be increasing. This increase is despite the fact that at the commencement of the 2016/17 financial year, a further reduction in the average levy rate, to 1.8%, was provided to employers. While the scheme has only been operational for two and a half years it appears that this over-funding is structural; the total premiums being paid by employers continues to significantly exceed the costs associated with the rights provided to injured workers.

8. This structural over-funding provides the opportunity to correct some of the unfair and inappropriate reductions in the rights of injured workers effected by the operation of the Act. The main purpose of these submissions is to identify changes which ought to be considered in order for the operation of the Act to better achieve the objects of the Act.

9. Because that is the main purpose of these submissions, they will concentrate primarily on paragraph 10 of the terms of reference. However brief reference will be made to each of the other paragraphs of the terms of reference.

The extent to which the scheme, the dispute resolution processes, and the South Australian Employment Tribunal Act 2014 have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve disputes.

10. SA Unions understands that, overall, disputation has decreased under the new Act, and that, on average, the time taken for disputes to resolve has decreased. The South

Australian Employment Tribunal will, however, have more complete statistics identifying these general trends, and also subsets within them.

11. SA Unions notes the references in the submission from RTWSA to the number of appeals lodged since the new scheme commenced. There is an inference arising from the submission that the number of appeals may be related to the fact that costs of appeals are paid by the compensating authority regardless of outcome. We reject this suggestion. Given the significance of the changes to the scheme it is unsurprising that there has been an increase in the number of appeals; these appeals are settling contentious questions regarding the proper construction of the Act. We point out that for an appellant to be awarded costs on appeal their appeal must have been *reasonable.* In any event, a substantial proportion of appeals are brought by RTWSA..

Whether the jurisdiction of the SAET under this Act should be transferred to the South Australian Civil and Administrative Tribunal.

12. There is no warrant for transferring the jurisdiction from the SAET.

13. As the RTWSA submission notes, workers compensation is a complex area of law. Because of its historical development, it incorporates elements derived from the common law, elements derived from historical statutory provisions, and elements derived from the current legislative enactment. For these reasons it is peculiarly adapted to a specialist tribunal. It has been the province of a specialist tribunal in South Australia for half a century.

14. Further, recent reforms to the SAET have, for the first time in Australia, brought together into the one tribunal all matters pertaining to employment. This is a powerful concept, given the interrelationship between issues in employment which hitherto have given rise to remedies in different jurisdictions. Obviously, work injury is a significant matter pertaining to employment. The transfer of the jurisdiction relating to work injury out of the SAET would significantly undermine this recent reform. Further, given the

interrelationship of between issues in employment, it is likely that retaining the workers compensation jurisdiction within a broader employment tribunal, will enable that tribunal to address barriers to return to work which are not purely injury-related, and so better enable workers to return to work.

The extent to which there has been an improvement in the determination or resolution of medical questions arising under the Act

15. The most significant improvement in the determination or resolution of medical questions under the Act has arisen in respect of assessments of permanent incapacity. Under the Act, apart from exceptional circumstances, one assessment is made of permanent incapacity. Provided that that assessment conforms with the Act, all parties are bound by that assessment.

16. This contrasts with assessments of permanent incapacity under the previous scheme, in which the compensating authority and the injured worker would each obtain assessments (sometimes multiple assessments) and then disputes would arise as to which of those assessments should be adopted.

17. A key element of the confidence of injured workers in this new assessment model is that workers are provided the opportunity to select the assessor from the pool of accredited assessors. SA Unions notes the criticisms of RTWSA of this assessment process, to the effect that there is significant variation in permanent impairment assessment by different assessors, and that 6 assessors have completed a significant number of assessments. While there may be some variation in assessments, SA Unions does not accept that the variation is significant, and notes that a process of peer review adopted by RTWSA in respect of permanent impairment assessments is designed to ensure a consistency of outcome. And it is unsurprising, given the complexity of the permanent impairment assessment process mandated by the Act and the Guidelines made under the Act, that a small number of assessors have become recognised as expert and reliable.

18. SA Unions notes also the criticism by RTWSA of the SAET decision in the matter of *Mitchell*. SA Unions does not accept this criticism. The decision in *Mitchell* is a decision applying entirely orthodox principles of causation to the question of whether or not impairments arising from use of medication to treat a work injury arise from the same trauma or from the same injury or cause. SA unions does not accept that, as asserted by RTWSA, the cost basis of the new scheme is contrary to the decision in *Mitchell*; it does not understand how an actuary, if properly instructed, could have modelled the scheme on an alternative basis, and it does not understand how an actuary, if properly instructed as to the outcome in *Mitchell*, could have assessed an impact on claimed liabilities of between $166 million and $570 million, as asserted by RTWSA. SA Unions submits that these assertions ought be disregarded, or if the review were minded to consider them, that the review consider carefully the instructions provided by RTWSA to its actuary.

19. SA Unions similarly notes the criticisms by RTWSA of the SAET decision in *Li*. That decision is also the product of entirely orthodox reasoning. It has simply applied the settled meaning of the phrase "*must not arise wholly or predominantly from*" in respect of actions giving rise to psychological injury, in circumstances where neither the wording of that phrase, nor the context in which it appears, have relevantly altered. SA Unions submits that these assertions by RTWSA ought also be disregarded.

The performance of RTWSA in managing claims, including RTWSA's outcomes in reducing instances of work injury

20. In respect of that part of this term of reference raising RTWSA's outcomes in reducing work injury, SA Unions is unaware of any assertive action being taken by RTWSA in respect of employers which, by reference to the volume of injuries suffered by their employees, appear to have significant occupation health and safety problems at their workplaces, or any work which RTWSA is undertaking in conjunction with Safework SA in this respect. It may be appropriate for the review to seek information from RTWSA about the work it is doing in this area.

In respect of that part of the term of reference raising the performance of RTWSA in managing claims, it is SA Unions' experience that RTWSA claims managers still regard their role as primarily that of limiting the liability of RTWSA. There is little difference in this regard from their conduct under the former scheme. It does not appear that they conduct themselves in the manner in which sections 13 to 15 envisage RTWSA will conduct itself.

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

21. SA Unions confines its comments in respect of this term of reference to the performance of self-insured employers in dispute resolution.

22. A common experience of workers representatives in disputed claims involving self-insured employers is that the self-insured employers place heavy emphasis in dispute-resolution negotiations on the possibility of redemption, generally coupled with a cessation of the employment relationship.

23. This probably makes sense from the perspective of the self-interest of the self-insured employer - it reduces the claim to easily quantifiable terms, effectively avoids the possibility of future liability, and brings an end to the employment relationship so as to avoid any potential industrial issues on return to work of the worker, and the potential for further injury.

24. However, it is not consistent with the emphasis of the Act on restoring injured workers to work. And it does not serve well the interests of the scheme as a whole.

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

25. SA Unions notes that the data on return to work rates provided by RTWSA indicates improvement in return to work rates since the commencement of the Act.

26. However, it is important to understand the definition of "return to work" used by RTWSA in this data. SA Unions believes that "return to work" should refer to a sustained return to a meaningful level of work. If the data is capturing returns to work which are sustained for only a short period, or if the data is capturing returns to very minimal hours of work, SA Unions would not regard that as an accurate assessment of return to work.

27. Therefore, SA Unions submits that the review should request more detailed data on return to work rates from RTWSA in order to more fully understand changes in return to work rates. Further, SA Unions submits that the review should recommend that RTWSA provide greater transparency generally when producing data regarding return to work rates.).

Factors contributing to non-seriously injured workers failing to achieve a return to work within 2 years

28. RTWSA identifies a particular cohort of injured worker more likely to be unable to achieve a return to work within 2 years, that cohort being males, older than 40 years of age, with a prior workers compensation claim, and engaged in manual labour or a trade. That cohort is perhaps unsurprising. It is more likely that workers engaged in manual or trades work would be male; it is more likely that work of that nature would expose workers to risk of significant physical injury; it is more likely that the nature of that work would lead to repeat instances of injury; it is more likely that the capacity of those workers to cope with the physical injuries would lessen as they get older; and it is more likely that older workers carrying injury would find it difficult to attract prospective employers.

29. Notwithstanding that it may be unsurprising that this cohort is more represented in the pool of injured workers unable to achieve a return to work within 2 years of injury, it would obviously be desirable for RTWSA to develop programs designed to specifically address the difficulties experienced by this cohort.

30. For reasons set out below,[1] a further factor contributing to non-seriously injured workers being unable to achieve a return to work within 2 years is that there are some workers who, by reason of their work injury and consequent incapacity, have no reasonable prospect of being able to work, yet who are not assessed as having a 30% whole person impairment. For the reasons set out below, one of the changes which ought to be made to the Act is a change which addresses this group of workers..

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

31. SA Unions does not make any submission in respect of this term of reference.

Whether the scheme has yet achieved financial stability and, if not, when the scheme is likely to be mature and stable

32. As set out in our introduction, the changes to the workers compensation scheme brought about by the Act had an immediate effect on the cost and viability of the scheme. The unfunded liability was eliminated, and the average premium rate paid by employers was significantly reduced, immediately upon commencement of the Act. The immediacy of those effects shows that these changes to the cost and viability of the scheme were directly caused by the reduction in the rights to which injured workers had been entitled under the scheme existing under the WRCA.

33. The current scheme is now significantly over-funded. Its proportion of assets to liabilities is now approximately 120%, which ratio appears to be increasing notwithstanding further decreases in average levy rates. While the scheme has only been operational for two and a half years it appears that this over-funding is structural; the total premiums being paid by employers significantly exceed the costs associated with the rights provided to injured workers. This over-funding is right at the outer limit of the funding ratio target of the

[1] see paragraphs 46, 54 and following

RTWSA Board of between 90% to 120%, and it appears likely that it will soon exceed that outer limit.

34. Therefore, SA Unions does not accept that it is premature to draw conclusions regarding the financial position of the scheme. The combination of the immediate improvements to cost and viability on commencement of the Act, coupled with the attainment of a 120% funding ratio within 2 years of commencement of the Act, shows that the scheme is not only financially stable, but overshooting its financial requirements. There is no basis for concluding that this a substantial over-funding will not continue.[2]

35. It is for this reason that SA Unions submits that this review has the opportunity to correct some of the unfair and inappropriate reductions in the rights of injured workers brought about by the Act, which opportunity we address in the next section.

Any other recommendations consistent with the objects of the Act

36. The objects of the Act are set out in section 3. Relevantly for the purposes of these submissions they are as follows:

> *"3(1)* ***The object of this Act is to establish a scheme that supports workers who suffer injuries at work*** *and that has as its primary objective to provide early intervention in respect of claims so as to ensure that action is taken to support workers –*
>
> *(a)* ***in realising the health benefits of work****; and*
>
> *(b) in recovering from injury; and*
>
> *(c)* ***in returning to work****…; and*
>
> *(d)* ***in being restored to the community when return to work is not possible***.
>
> *3(2) In connection with subsection (1), the other objectives that apply with respect to this Act are -*

[2] SA Unions notes the references by RTWSA to *Mitchell* and *Li* as creating uncertainty about the financial stability of the scheme. For the reasons set out above, SA Unions does not accept that these assertions have any sound basis.

(a) ***to ensure that workers who suffer injuries at work receive high quality service, are treated with dignity, and are supported financially****; and*

(b)…

(c) ***to provide a reasonable balance between the interests of workers and the interests of employers****; and*

(d) - (f)…" (Our emphasis)

37. SA Unions has always acknowledged that there are some aspects of the scheme introduced by the Act which represent improvements over the scheme which had existed under the WRCA.

38. For those workers whose claims for compensation are accepted and who are able to return to work within 2 years of injury without further need of medical assistance the scheme is perhaps more beneficial than the previous scheme. Those workers are entitled to 100% of their notional weekly earnings for the first year after injury, and 80% of their notional weekly earnings for the second year after injury (as compared with a step down to 90% of notional weekly earnings after 13 weeks, and 80% of notional weekly earnings after 26 weeks, under the old scheme). They are entitled to a capital payment for economic loss (in addition to the pre-existing capital payment for noneconomic loss) where they sustain permanent impairment. They are entitled to enforce the obligation of their employer to provide suitable employment.[3]

39. For those workers who sustain injuries of sufficient permanent severity that they are regarded as seriously injured workers under the Act the scheme is also more beneficial than the previous scheme. Those workers are subject only to one assessment of their entitlement to be regarded as seriously injured workers, and are therefore not required to periodically satisfy the compensating authority of a continuing entitlement to support. They are then entitled to income support for their working lives, and compensation for medical services for life. Those workers cannot be required to undertake job search or other obligations without their agreement.

[3] Though see comments below regarding the adequacy of the remedy for non-compliance

40. However, there are many groups of injured workers who do not fall within these categories and in respect of whom the provisions of the Act are not consistent with the objects emphasised above. For workers who fall within these groups, the consequence of the changes to the scheme can be very serious. These categories are as follows:
    40.1. Injured workers who require continuing medical assistance more than 12 months after ceasing to receive weekly payments, in order to maintain their capacity to work;
    40.2. Injured workers whose permanent impairment from injuries are severe, but which impairments do not meet the 30% threshold necessary in order for the worker to be regarded as a seriously injured worker;
    40.3. Injured workers whose permanent impairment from injuries exceeds the 30% threshold, but who are not regarded as seriously injured workers by virtue of the fact that their permanent impairment arises from separate work injuries;
    40.4. Workers whose injury is psychological, where employment has been a substantial cause of injury, but whose claims are not accepted because employment is (or is argued to be) not **the significant** cause of injury;
    40.5. Workers whose injury is psychological, where permanent impairment arising from the injury is severe, but who are denied access to any lump sum compensation for permanent impairment.

41. In addition, while the provision enabling injured workers to enforce the employers' obligation to provide suitable employment is welcomed, SA Unions is concerned about the adequacy of the remedy in the event that suitable employment is not provided.

42. SA Unions suggests improvements in respect of each of these aspects of the scheme, as set out below.

Injured workers requiring continuing medical assistance

43. Section 33 (20) of the Act precludes an injured worker (other than a seriously injured worker) from being compensated for medical expenses 12 months after last receiving

weekly payments.[4] Effectively, this means that injured workers are entitled to receive compensation for medical expenses for a maximum of 3 years from the date of injury. This limit applies regardless of the necessity for receiving continuing medical treatment, or the costs of that treatment, or the ability of an injured worker to meet those costs.

44. Cases in which workers require ongoing treatment in order to maintain their capacity to work are legion. Many of our affiliates have reported these cases to us. There are two regularly-experienced effects: first, workers continue to receive treatment after the three-year period has elapsed, but do so at their own expense; and second, workers cease or reduce treatment but also reduce the hours which they work in order to accommodate their reduced capacity. Neither of these effects are consistent with the objects of the Act.

45. SA Unions submits that the review consider alternative provisions for the provision of compensation for medical expenses incurred more than 12 months after weekly payments have ceased, in particular provisions which extend the entitlement to medical compensation for longer periods, or provisions which apply to circumstances where the continuing medical treatment is reasonably necessary for the maintenance of the injured worker in employment, or in employment for the same working hours, and/or for the worker to carry out the activities of daily living.

Severe injuries not meeting the 30% threshold

46. The 30% whole person impairment threshold is used to determine whether or not a worker is to be regarded as a "seriously injured worker" under the Act.

47. The rationale underpinning the Act is that an injured worker with a meaningful capacity to work should not receive weekly payments for any longer than 2 years from the date of injury, and should not receive compensation for medical treatment for any longer than 3 years from the date of injury; whereas an injured worker with no meaningful capacity to return to work should receive continuing financial support. The 30% threshold is

[4] save for costs associated with therapeutic appliances or for surgery approved prior to the end of that 12 month period

therefore a proxy for determining whether a worker has any meaningful prospect of returning to gainful employment.

48. Under various guises since 1986, the workers compensation scheme has used some form of work capacity assessment to determine continuing entitlement to weekly payments. The Act has replaced those systems of work capacity assessments with the 30% threshold.

49. As with any arbitrary proxy, the 30% threshold will produce unfairness. Some workers with a reasonable capacity to return to meaningful work will receive ongoing support; while many others with no meaningful likelihood of returning to work will lose all support after 3 years from the date of injury.

50. An example of this type of unfairness can be seen in the facts of *Hillyer v Treasury Wine Estates*. [5] The worker sustained a hernia injury in 2007. Surgery to repair the hernia damaged a sensory nerve. That has led the worker to be in continuing severely disabling pain. As a result, he has not worked since 2007. There is no suggestion that he has any capacity to work. However, because of the way pain is considered in the permanent impairment assessment process, the worker was assessed as having only a 7% whole person impairment. Therefore, he could not be regarded as a seriously injured worker.

51. Similarly, a manual worker with a significant back injury, resulting in a spinal fusion and continuing sciatic pain and significant impact upon the activities of daily living is not, without more, entitled to a 30% whole person impairment, and so will not be regarded as a seriously injured worker. Yet, in most circumstances, that worker will not have any meaningful capacity to engage in work.

52. Similar issues arise in respect of the assessment of permanent impairment for psychological injury. The Impairment Assessment Guidelines adopt the GEPIC test, a test developed in Victoria. Calibrated to the 30% threshold test used in South Australia, the GEPIC requires workers to be profoundly disabled before they can reach the 30% threshold necessary to be regarded as a seriously injured worker. This is a level of

[5] [2017] SAET ##, but note the decision has been appealed.

impairment well beyond that which would render a worker unable to have any meaningful capacity to return to work.

53. SA Unions submits that the Act, or the processes for assessing permanent impairment, ought be amended to address the unfairness flowing from the 30% threshold. There are a number of ways in which this unfairness could be addressed:
    53.1. By reducing the threshold. Lowering the threshold will ensure that a greater proportion of those workers with no meaningful capacity to return to work will receive ongoing support (although some unfairness will still remain as between different workers falling either side of the lowered threshold);
    53.2. By amending the content of the Impairment Assessment Guidelines. The Guidelines and the AMA Guides referenced in the Guidelines do appear to produce some anomalous results. The treatment of pain by the Guidelines as evidenced in the matter of *Hillyer* is one such anomaly. Alternatively, while the worker with a significant back injury as outlined above will not meet the 30% threshold under the Guidelines, or a worker whose leg is amputated just below the knee will not meet the 30% threshold under the Guidelines, a worker who has a total knee replacement in each knee, even with a good outcome, will necessarily meet the 30% threshold. And the use of the GEPIC test, as required by the Guidelines, should be examined. The review could recommend the amendment of the Guidelines to reduce the unfairness it produces;
    53.3. By introducing a provision enabling RTWSA to regard an injured worker who has no meaningful capacity to engage in work, but who does not meet the 30% threshold, to be regarded as a seriously injured worker in appropriate circumstances. SA Unions submits that the provision would need to ensure that workers had equitable access to the remedy provided by the provision, but submits that such a provision would reduce the harshest consequences of the 30% threshold.

The 30% threshold arising from multiple injuries

54. SA Unions submits that in determining whether an injured worker is a seriously injured worker, as a matter of principle, it should not matter whether a worker's permanent

impairment arises from 1 injury or several injuries, or whether the worker's permanent impairment arises from related injuries or unrelated injuries. A worker who is severely disabled by 2 separate work injuries should be in no different position from a worker with precisely the same disability but which arises from 1 injury, or from separate injuries which are related.

55. Yet this is precisely how the scheme currently operates. Only those workers whose permanent impairment of 30% or more arises from 1 injury, or from related injuries, are regarded as seriously injured workers. Workers with permanent impairment assessments of significantly greater than 30%, but which impairments arise from separate work injuries, are not regarded as seriously injured workers.

56. As well as being wrong in principle, this operation of the scheme has been productive of significant disputation as to whether or not injuries are related, or arise from the same cause, or arise from the same trauma. *Mitchell* is an example of this disputation.

57. Another example is the case of *Brooks v RTWSA*. In *Brooks*, the worker has an accepted 33% whole person impairment. It arises from injuries to the worker's back and ankle sustained in a fall in December 2011. However, at the time of the fall, the worker was still recovering from a work injury to the same ankle which had been sustained in September 2010. The dispute has therefore narrowed to the question of what, if any, contribution to the worker's ankle impairment can be attributed to the September 2010 injury, and whether that contribution is sufficient to reduce the permanent impairment arising from the December 2011 fall to below 30%. It is difficult to see any justification in principle for these fine questions to have any significance.

58. SA Unions submits that the review should recommend that, in the determination of whether an injured worker is a seriously injured worker, it should be immaterial whether the workers 30% or more permanent impairment arises from 1, or several separate, injuries.

Acceptance of psychological injuries

59. Since 1994, the workers compensation scheme has distinguished between the criteria for compensability of psychological injury as compared with physical injury. Under the scheme prior to the commencement of the Act, a worker asserting compensable psychological injury had to show that employment was "a substantial cause" of the injury, and the compensating authority was able to reject a claim for psychological injury, even where employment was a substantial cause, where the injury arose wholly or predominantly from disentitling factors - essentially reasonable action by the employer.

60. This has meant that workers with psychological injury have regularly faced lengthy litigation in order to prove their claim. Many of those workers, even where they have ultimately succeeded in having their claims accepted, have been left with further deterioration of the mental health.

61. The Act has made proving a psychological claim yet more difficult. In addition to the retention of those provisions providing for the disentitling factors, the Act has replaced the requirement that employment be "*a substantial cause*" of the injury, with a requirement that employment be "*the significant contributing cause*" of the injury.

62. This new eligibility criterion is too high a bar. It is too high a bar in two senses.

63. First, it is likely to be the case that psychological injury is multifactorial. It will be derived from a person's biology, from their upbringing, from historical events in their lives, from their environment, and from events proximate to the time of their injury manifesting itself. Given the multifactorial nature of the injury, requiring a worker to prove that employment was the one significant contributing cause is unrealistic in many cases, even where employment is a clearly important factor in the development of their condition

64. Second, and probably more importantly, the requirement that a worker prove that employment was the one significant contributing cause of the injury makes disputation almost inevitable. A case will almost always able to be made, at least at the time of a compensating authority's determination, that there are factors outside the workplace contributing to the injury. And, in the disputation process, the requirement that the worker prove employment to be the one significant contributing cause will necessitate scrutiny of the workers prior history, prior episodes of grief or trauma or upset, as well as their private lives. So at the very time that a worker with psychological injury requires support and treatment, they are not only denied compensation, but the very things which are likely to have a bearing on their mental health are subject to scrutiny. The adverse consequences on their mental health are inevitable.

65. These adverse consequences on mental health produced by the consequences of the new test in turn adversely affect the possibility of any meaningful return to work. It is the routine experience of representatives of workers with psychological this that, after claims have been subjected to the dispute process, returning the worker to the work in which they were engaged prior to their injury is not possible. This routine experience runs completely counter to the objects of the Act.

66. These adverse consequences on mental health produced by the consequences of the new test in turn adversely affect the possibility of any meaningful return to work. It is the routine experience of representatives of workers with psychological this that, after claims have been subjected to the dispute process, returning the worker to the work in which they were engaged prior to their injury is not possible. This routine experience runs completely counter to the objects of the Act.

67. Therefore, SA Unions submits that the requirement that employment be "*the significant contributing cause*" of psychological injury the amended such that it is sufficient that a worker establish employment to be "*a significant contributing cause*" of injury.

Permanent impairment lump sums for psychological injury

68. Workers can find themselves permanently, and significantly, impaired by psychological injury. The effects upon their working capacity, and their lives, can be equally as debilitating as those arising from physical injury.

69. Yet the Act precludes any lump sum payment for either economic loss or non-economic loss in respect of psychological injury. It is difficult to identify a policy rationale for making such a stark distinction between physical and psychological injury. [6] It does not appear to be consonant with the objects of the Act, in particular the object set out in section 3 (2) (a) of the Act. SA Unions believes that it is a stark distinction which produces fundamental unfairness.

70. Some have contended that uncertainties in assessing the extent of such permanent impairment justify the exclusion from permanent impairment compensation. That claim is totally unsustainable as permanent impairment assessment is used to delineate which psychiatrically injured workers receive ongoing income compensation and medical expense compensation, and which do not.

71. In may not be unreasonable to require a higher threshold in respect of psychological injury, then the 5% whole person impairment threshold required in respect of physical injury. That is, it may be defensible to assert that a 5% impairment to psychological functioning has a lesser impact on work capacity, and a less debilitating effect on workers generally, and a 5% impairment to physical functioning. Such a distinction would produce less unfairness than does the current complete preclusion of lump-sum recovery, and would be more consonant with the objects of the Act.

72. Therefore, SA Unions submits that the review should recommend abolition of the preclusion of recovery of lump sums in respect of psychological injury, and instead substitute a higher than 5% threshold for recovery.

[6] other than a simple policy desire to reduce liability

The adequacy of the remedy for non-provision of suitable employment

73. For the first time, the Act enables injured workers to enforce the obligation of their employer to provide them with suitable employment. This is welcomed.

74. However, there is concern about the adequacy of the remedy available to a worker in the event that an employer refuses to provide suitable employment. The effect of sections 18(12)-(14) appears to be that in the event that the Tribunal orders an employer to provide employment, and that the employer fails to comply with that order, the worker will be entitled to financial support from the compensating authority in the form of the weekly amounts that the worker would be expected to receive from the employer if the order were complied with, but only for the period of 104 weeks from the date of injury.

75. SA Unions is therefore concerned that after 2 years from the date of injury, there is no effective remedy for non-provision of suitable employment.

76. It therefore submits that the Act be amended to make clear that the employers obligation to provide suitable employment, or to provide the weekly amounts that would be paid if suitable employment were provide, continues beyond 104 weeks from the date of injury.

77. SA Unions is concerned that, because a remedy is now available directly to workers, RTWSA does not regard it as a part of its role to enforce the obligations of employers to provide work. In particular, SA Unions is concerned about the effectiveness of the remedy apparently provided by section 15(2) of the Act, where a worker may reasonably request the corporation to investigate any circumstances where it appears the employer is not complying with requirements regarding employment or re-employment. The common experience of workers representatives is that RTWSA officers, engaged under section 15(2), refrain from taking any assertive action against employers. Rather, those officers encourage workers to take action themselves under section 18 of the Act. SA Unions

notes the practises adopted by equivalent officers under the Victorian legislation,[7] notes that there is nothing in the Act precluding the adoption of those powers by section 15(2) officers, and submits that they should be adopted here.

78. Therefore, SA Unions submits that the review recommend that RTWSA officers, engaged pursuant to section 15(2) of the Act, are empowered to take more assertive action against employers in appropriate circumstances.

Summary regarding suggested improvements to the Act

79. SA Unions has identified aspects of the operation of the Act which, in its view, means that the operation of the Act is not meeting the Act's objects in respect of certain groups of workers, as well as aspects of the right to enforce the employer's obligation to provide suitable employment. It has suggested means by which those deficiencies in the operation of the Act may be addressed.[8]

80. SA Unions acknowledges that some of those suggestions will have some impact upon the financial position of the scheme. However, as it has pointed out, the scheme is significantly over-funded, the ratio of assets to liabilities, at approximately 120%, is at the top of RTWSA's target range, and the ratio appears to be increasing notwithstanding further reductions in average levy rates.

81. Therefore, in the event that the review accepts that the scheme is financially stable, that the scheme's position of significant over-funding is likely to continue, and that there are aspects of the operation of the Act which mean that the operation of the Act is not meeting the objects of the Act, SA Unions submits that the review:

    81.1. model the impact of the relevant suggestions made by SA Unions upon the financial position of the scheme, and include SA Unions in the development of such modelling and any assumptions used therein;

[7] See https://www.worksafe.vic.gov.au/__data/assets/pdf_file/0018/208350/ISBN-Return-to-work-inspectors-information-2013-07.pdf

[8] See paragraphs 40, 50, 55, 63, 67, 71, 73

81.2. recommend the relevant change where that modelling shows the impact to be modest; and

81.3. identify the relevant impact where the modelling shows the impact to be more substantial, but also identify ways in which that impact may be able to be ameliorated.

82. SA Unions seeks to be able to supplement this submission with further material, in particular further case studies, to support the suggestions it has made for improvements to the operation of the Act. SA Unions representatives would be pleased to meet with members of the review, in the event that the review sought clarification of any matters raised in these submissions, or in the event that the review thought that it would be productive to discuss these submissions further.