30 October 2019

The Honourable President Justice Dolphin
South Australian Employment Tribunal
PO Box 3636
Rundle Mall SA 5000

By email: saet.pres.ea@sa.gov.au

Dear Judge

Proposed approach to managing Return to Work Act 2014 cases at hearing and determination

1. I refer to your correspondence of 20 September 2019 in relation to the proposed approach to managing the Return to Work Act 2014 cases at hearing and determination (“the Proposal”).

2. It is noted in your letter of 20 September 2019 that the enactment of the Return to Work Act 2014 (“the RTWA”) introduced new challenges to workers compensation litigation in South Australia and has increased the demand on the resources of the South Australian Employment Tribunal (SAET), particularly with regards to hearing and determination of Return To Work (RTW) cases.

3. The Society notes a Working Group was established in response to concerns with respect to the increase in time taken for RTW cases to reach resolution and a growing backlog of such cases at hearing and determination. The Proposal has been prepared by the Working Group, who were tasked with considering and designing alternative approaches to the SAET's management of RTW cases.

4. The Society is grateful for the opportunity to consider the Proposal and provides comment below with respect to the proposed reforms, which has been informed by its Accident Compensation Committee. The Society’s Accident Compensation Committee (ACC) comprises both solicitors and barristers; lawyers who routinely represent plaintiffs, workers and other claimants seeking compensation for injury; lawyers who routinely represent insurers in relation to such claims; and lawyers who routinely represent other parties to accident compensation litigation, including Return to Work SA (RTWSA) and both registered and self-insured employers. The ACC has drawn on its broad range of experience in providing a response to the Proposal.

Executive Summary

5. The Society supports the proposed introduction of a separate docket stream for preparation of some matters for trial at hearing and determination (H+D), however, it submits that the range of matters which should be docket listed ought to be greater than is presently proposed.

6. The Society is concerned with respect to the proposed general stream, because the inclusion of a range of genuinely urgent matters in the general stream is unlikely to improve the timing of the
listing of such matters. To deal with this issue, a proposal of the ACC as to a four-stream system is detailed below.

7. The Society considers that the absence of a system of early identification of the issues and facts which are not in dispute, and crucially, the identification of the issues which are to proceed to trial is a significant factor in delay and non-compliance with the present system of preparation for trial.

8. The Society supports measures to reduce the time spent by Presidential Members on inconsequential or unnecessary hearings. It is suggested that if Commissioners had capacity to do so, they could assist parties in the early identification of matters (as noted above) and provide assistance to Presidential Members in clarifying and reducing the issues in dispute.

9. The Society has concerns with respect to aspects of the Proposal which bestow responsibility on the Commissioner to both determine the allocation of the process pathway and prepare a Litigation Plan, without a hearing or conference with the parties and without judicial oversight.

10. Notwithstanding the importance of the concerns raised by the Working Group as to inconsequential and unnecessary appearances before Presidential Members, as well as issues of non-compliance, there are a number of systemic issues, in addition to issues that directly relate to the structure of the RTWA, that should also be taken into account and addressed as part of the reforms.

Relevant background

11. The Proposal should be considered against the background of the prevailing practices of the Tribunal, which developed over many years following the introduction of the former South Australian Workers Compensation Tribunal on 3 June 1996. As a consequence of the gradual development of these processes over many years, the following are the key features of proceedings at H+D:

11.1 Once Conciliation concludes, the Commissioner who conducted the Conciliation process completes a document entitled “Assessment and Recommendations” (A+R). This is sealed, but the Assessment part of the document is made available to the Presidential Member of the Tribunal to whom the matter is later allocated.

11.2 On completion of the A+R, the Registry then refers the dispute to H+D and it is allocated to a Presidential Member for the purpose of conducting Pre-Hearing Conferences (PHCs), including hearing and determining any interlocutory disputes, and otherwise for preparing the matter for the making of Trial Orders. This Presidential Member is often referred to as the Chamber Judge in respect of the particular dispute – we shall use that term for ease of reference and understanding;

11.3 Once Trial Orders are made, a dispute (or series of related disputes) is/are placed in a Callover list;

11.4 Callovers are usually held on Mondays and Wednesdays of the first two full weeks of any month (other than January and July);

11.5 Trial Orders include a staged process of preparation of witness affidavits, the completion of discovery and inspection and the preparation of a Trial Book containing the evidentiary material to be adduced by any party at trial. Witnesses to be called are identified in the Trial Orders;
11.6 A Compliance Conference is held before the Chamber Judge in the month prior to the Callover to ensure readiness for trial;

11.7 At any time prior to trial, a Judicial Settlement Conference (JSC) can be held before the Chamber Judge;

11.8 At Callover, a Presidential Member is appointed to hear the matter. Once again, we will use the commonly used term “Trial Judge” in this document – and other than in the case of matters which are not reached, the Trial Judge is likely to have had possession of the Trial Book for some days prior to the Callover;

11.9 Matters are routinely only listed for one, two or three days initially – such that any matter that can be expected to require more than three days hearing will proceed part-heard;

11.10 As it is likely, between listing for trial and Callover, many matters resolve or need to be vacated for various reasons, the Tribunal lists more matters in any Callover list than there are Presidential Members available to hear cases. Occasionally (and in particular, more often over the last two years than previously – albeit still in relatively low numbers), matters which would proceed to trial are not reached at Callover;

11.11 As the identity of the Trial Judge is not known before the Callover, arrangements for trials to proceed part-heard cannot be and are not made prior to Callover. Where the further hearings require the attendance of medical witnesses (as is usually the case), then the availability of busy judges, busy counsel and solicitors and busy medical practitioners often result in substantial adjournments prior to resumption of part-heard trials. Many such trials are part-heard on multiple occasions.

12. For many years, the Society has advocated to the SAET that cases which are long and complex, particularly those which can be expected to involve a trial of greater than three days (or at an earlier time when four and five day listings were provided, greater than five days) be removed from the Callover system – and docket managed by a Trial Judge appointed long before the listing for trial.

13. In or about 2013, the SAET proposed and ultimately introduced the “phasing” of trials, listing particular trials so that the evidence of the worker, with or without other lay witnesses, could be completed during the initial period of listing of the trial. This occurred in response to a number of factors, not the least being the concerns of the medical profession at being booked to give evidence for trial and those bookings then being cancelled “at the last minute”. Either because matters resolved or were not reached or because the evidence of the worker and/or other witnesses took longer than had been anticipated.

**Impetus for reform**

14. The Society notes the Proposal contains the following key reforms:

14.1 The creation of two pathways or “streams” of matters at H+D – docket or standard;

14.2 Following referral to H+D, docket matters will be managed to trial by the Trial Judge (who will be allocated the case at that time). The trial can be listed outside of Callover weeks;
14.3 All other matters will substantially be managed by the Commissioner who conducted the conciliation phase of the dispute and then by the Registry;

14.4 The Commissioner will prepare a Litigation Plan to be managed by the Registry;

14.5 Standard disputes will not come before a Presidential Member unless and until a Certificate of Readiness for trial has been prepared and signed by all parties;

14.6 Non-compliance with the Litigation Plan will result in standard matters going into a default list;

14.7 Once a Certificate of Readiness for trial is prepared then a PHC will be held before a Presidential Member and the matter listed for trial in a Callover.

14.8 Callovers will continue to be listed during “similar” (and the Society assumes, two) weeks of each month and Callover trials will be listed for one or two days.

15. It is noted in the Proposal that it is expected that the proposed reforms will lead to a reduction in the number of inconsequential appearances before Presidential members; and greater compliance with SAET orders, which will lead to better preparedness which in turn may lead to the earlier resolution of cases.

16. These expectations appear to reflect concerns with respect to inconsequential appearances and non-compliance with both general and trial orders. The Society accepts that these concerns should be addressed, however, it is considered that a number of other logistical, legal and justice issues also require attention and should be addressed as part of any reform of SAET’s processes at H+D.

17. Furthermore, in identifying the nature of the concerns, some consideration of what has led to them both in the recent past, and by reason of the nature of workers compensation litigation, needs to be considered in order to identify whether the proposed reforms are likely to achieve the intended outcomes or to lead to further difficulties. It is also necessary to address whether the identified concerns relate to matters which are long-term issues because of the nature of workers compensation litigation or because of the substantive terms of the RTWA, or whether they are temporary matters arising from the introduction of the RTWA. These issues are discussed below.

Particular litigation Issues arising from the Structure of the RTWA

18. The RTWA brings forward and creates “forward-looking” litigation, which is often difficult to resolve. In particular, injuries of medium to high seriousness are producing more litigation, with a greater proportion of that litigation going to trial.

19. The Society agrees with the Tribunal’s identification of cases involving whether or not a worker is a Seriously Injured Worker (SIW) as being in that category. However other “brought forward” litigation must be identified. That includes litigation as to future surgery (s 33(21)(b)(ii) of the RTWA) and applications for advance approval of medical treatment immediately required (s 33(17) of the RTWA).

20. The RTWA has raised an enormous number of transitional issues. That has led to a significant volume of test litigation, during the resolution of which, it has been difficult if not impossible, for parties to resolve a large volume of litigation.
21. A number of very significant issues as to the interpretation of the RTWA – those being matters as to the ongoing operation of the RTWA, have also been raised. This has resulted in a large phalanx of test litigation which has been generated and is still proceeding. This has further hampered the resolution of many matters.

22. It has also been suggested by the ACC, that in many areas of transitional and substantive uncertainty, policy positions adopted by RTWSA have meant that settlement by compromise is all but impossible.

23. A particularly large volume of work has been created by various transitional issues, and in particular, regulations which required compliance by 30 June 2016. That has been compounded by the decision of RTWSA to determine most, if not all, such applications on the basis of an ultimately erroneous understanding of the time frame within which it had to determine the application, and the requirements upon workers for the making of the application.¹

24. The Society considers that a number of these matters are temporary, however, it expects the pressures arising from transitional and test litigation to continue to affect the operation of SAET for a number of years.

25. On the other hand, the bringing forward of litigation in relation to permanent impairment (SIW matters) and future surgery applications are matters which will continue to affect the operation of the Tribunal even after the meaning of the RTWA becomes clearer.

Workload impacts upon all participants

26. It is important to note that while the factors have contributed to increasing judicial workloads, they have also contributed to vastly increased workloads for all participants in the RTWA scheme, including medical practitioners (both treating and medico-legal reporting), solicitors acting for all categories of party before the Tribunal, the Compensating Authorities themselves, counsel and the judiciary.

27. Those factors have contributed significantly to issues with compliance and not simply in relation to preparation of matters at H+D. They affect claim making and determination; the potential success of the conciliation process; the processes at H+D; and post-trial matters such as negotiation of costs.

28. The impact of workload on all involved was apparent (if not earlier, then at least) by 2016 when the former President, Senior Judge McCusker (as he then was) sought input from the Society on procedural matters. At that time, the Society’s response was prepared by Mr Tony Rossi (as his Honour then was). That response referred to the increase in workload of all concerned at that time. That situation has not improved in the three years since that correspondence.

29. The Society accepts that much judicial time is wasted by relatively inconsequential PHCs, as well as by the conducting of JSCs which are not ready to proceed. The Society supports reforms which seek to address those matters, so long as other significant countervailing factors are considered and addressed.

30. As is noted above, the SAET Proposal provides for the Commissioner who has conducted conciliation to have a function beyond conciliation in the preparation of matters for trial. The SAET Proposal does not fully identify the extent of that involvement. In particular, whether it involves

¹ Return to Work v Karpathakis; Return to Work v Rudduck [2018] SASC 45.
further hearings or simply decision-making based on what has occurred at conciliation. The Proposal also envisages the Commissioners conducting most of any further Conciliation Conferences to be held beyond referral to H+D.

31. The Society is not in a position to comment on whether the Commissioners have the capacity to undertake such actions. The Society would support the judicious use of the time of Commissioners in the proper preparation of matters for trial, so long as that clearly occurs after referral to H+D.

Further issues for consideration

32. Before addressing the Proposal in detail, the Society wishes to draw your attention to some additional systemic issues with respect to the nature of workers compensation claims and litigation, as well as issues pertaining to the investigation of claims.

The nature of workers compensation claims and litigation

33. It appears the Working Group has drawn from certain practices and experiences of the District Court in relation to litigation generally (particularly in relation to personal injury litigation) in preparing the Proposal. The Society notes there are significant differences between personal injury litigation in the District Court and workers compensation litigation in SAET. These differences affect the capacity of parties to predict the course of proceedings to trial in SAET.

34. First, District Court proceedings can be issued up to three years following the occurrence of an injury. By that time, significant levels of medical treatment can be expected to have occurred, along with factual and medical investigations by both parties, including as to the likely future of the Plaintiff. Prior to the institution of the litigation, parties are therefore much more prepared for the litigation than they can possibly be under a workers compensation system which, for good reason, requires the early notification of injuries and the making of claims and then, on the making of decision, provides for a time limit of one month for the institution of proceedings.

35. The District Court requires prospective parties to comply with a pre-action notice and response system designed, inter alia, to enhance preparation of litigation before it is instituted.

36. Further, the rules as to recovery of costs by those representing workers differ from those which operate in the District Court. Work prior to the institution of proceedings is covered by orders as to costs in the District Court. It is not covered in the case of workers compensation proceedings. Solicitors representing workers have ethical obligations, now the subject of statutory and regulatory provisions, requiring them to provide advice as to costs and cost recovery before obtaining instructions to act and before obtaining instructions to proceed with particular actions in pursuit of claims.

37. This combination of circumstances means that when litigation is instituted in SAET, no party can be expected to be as fully prepared for the institution of the litigation as parties are expected to be in the District Court.

38. In addition, many workers compensation claims involve the evolution of the claim and injuries, including by reference to return to work matters and further disputation about medical matters which had not arisen when initial disputes were instituted. These occur throughout the course of a claim. Where a dispute has arisen in relation to a claim at an early time, for example, because the claim is rejected, then the evolution of the claim and disputes itself affects the capacity of all parties to prepare the first dispute. Compliance with the time limit for institution of further proceedings becomes a priority. Compliance with regulatory and other deadlines, such as that
provided for by s 33(21)(b)(ii) of the RTWA become of importance. Compensating Authorities need to investigate further claims before determining them.

39. In all of these processes, to a very significant extent, the representatives of all parties are partially beholden to the decisions of others, particularly medical practitioners, as to their own prioritising of the need for cooperation with the parties and their representatives in the provisional certificates and reports.

Investigation of claims

40. The ACC also considers that the quality of decision-making by agents of the Compensating Authorities continues to add to litigation. Unlike in the early years of the operation of the now repealed Workers Rehabilitation & Compensation Act, 1986 (WRCA), RTWSA and its agents rarely use their investigatory powers to obtain statements or records of interview from workers and relevant employer witnesses, or otherwise to conduct factual investigations, prior to determining initiating claims for compensation, particularly claims for weekly payments. This change in practice has occurred over many years.

41. The absence of proper factual investigation of claims which are likely to be rejected (or, if accepted, disputed by employers) leads to all parties in the Tribunal being far less well informed as to the factual issues and the real prospects of success of the parties than would be the case if investigations had occurred. The implications of the absence of such investigations in appropriate cases, flow through the entire process of litigation in the SAET, including at conciliation and at H+D.

42. One particular concern in this respect raised by the ACC, is that there has developed a practice of respondents awaiting the worker’s Affidavit before seriously turning their minds to the question of what medical and related notes ought to be obtained by way of non-party discovery. If notes are required for the preparation of one party for trial, then they ought to have been made available to all parties before any have committed to sworn evidence, particularly in cases where witnesses (usually, but not only, workers) are being required to recall events occurring many years earlier. As is now routine in section 21(3) and 22/56/58 cases.

43. The Society suggests that proper and early investigation of claims and identification of the medical witnesses who need to report as to factual matters, would substantially improve all aspects of the processes of disputes in SAET.

44. The ACC has also noted that indulgences granted to parties who had the power and the means to conduct investigations, but did not do so, particularly investigations which provide significant forensic advantage at trial to those parties, reinforce the apparent benefits (to one party only) of the failure to properly investigate likely disputed claims when made.

45. One member of the ACC suggested that non-cooperation by workers in the investigation process potentially hampers the pre-decision investigation of claims by compensating authorities. Other members take the view that the powers granted to compensating authorities are sufficiently broad to overcome any such concern.

46. The Society suggests that, if compensating authorities are inhibited by non-cooperation (whether from worker or employer), then the response should be the use of the relevant powers, coupled with, where necessary, opposition to Applications for Expedited Determination, with detailed explanations given to the Tribunal.
47. Some practitioners with many years’ experience in the workers compensation system consider that there has been a very substantial reduction in the occurrence of pre-decision investigations since the introduction of a system of workers (and others) giving evidence in chief by written statement (later by affidavit).

The Proposal

48. The Society addresses below the proposed approaches contained in the Proposal.

A two-stream approach

49. The Society has long advocated for the creation of a docket list system. Previously that advocacy was in the context of identification that there were many matters which could be described as “long and complex”. Where either the issues were of sufficient complexity that a bespoke approach to the preparation of the matter justified the appointment of the Trial Judge long in advance of the commencement of trial; or alternatively, the fact that the trial was likely to be of greater than ordinary duration also justified the appointment of a Trial Judge; or, commonly, where both factors arose.

50. However, the Society is concerned that the inclusion of genuinely urgent matters in the general stream may not assist those matters in being brought to trial any earlier than presently occurs (other than by reason of the ultimate reduction in lists), once transitional and substantive interpretational test cases have resolved most of the “large issues” presently occasioning delay and large volumes of work for all concerned. Indeed, the inclusion of those matters in the general list may occasion even greater delay unless all parties are expected fully to identify all issues and anticipated evidence-gathering very shortly following referral to H+D, and late changes of position are seen as likely to occasion substantial injustice through delay.

Introduction of a docket stream

51. The Society supports the introduction of a docket stream (or pathway) as proposed in the SAET Proposal.

52. The Society accepts that the Tribunal has properly identified that SIW matters are more likely to proceed to trial than many other types of litigation. The Society understands that one of the reasons for the identification of such matters as being appropriate for docket listing is that, if too many SIW matters are listed in any particular Callover, then that increases the prospect of such matters (or other listed matters) not being reached. Anecdotally, the Society accepts that proposition to be likely to be accurate.

53. Although it supports the introduction of the Docket Stream, the Society considers that other matters in the Tribunal should also be docket listed. In the context that the SAET Proposal otherwise places all other litigation in one particular list, the Society submits that complex litigation which requires a bespoke approach (usually with the input of the Trial Judge) justifies the docket list being one for a greater range of litigation than simply SIW matters.

54. The Society suggests that such matters include the following:

54.1 Any (or at least most) disputes as to compensability of psychiatric claims where a defence is raised as to s 7(4) designated action;
54.2 Most disputes involving the question of compensability of injuries which are likely to result in a worker being found to be a SIW (and the Society notes that this may be contemplated by the SAET Proposal); and

54.3 Death and dependency cases – particularly those involving the interests of minors where Tribunal approval of any compromise will ultimately be required.

55. The ACC has proposed for the consideration of the SAET that a four-stream approach be adopted. If such an approach is not adopted, then the Society considers that the matters which it identifies as requiring urgent trial (broadly the initial acceptance of claims for weekly payments - whether disputed by worker or employer) and section 33(17) litigation (where the efficacy of outcome is affected by a s 33(20) deadline) should also to be included the docket list.

56. The Society agrees with the proposal that the docket list be managed by Presidential Members; and that the docket Judge, once fully informed as to the issues in dispute, should be entitled to give directions about the duration of evidence of witnesses.

57. The Proposal includes a proposed questionnaire to be completed by parties prior to the first PHC before the Trial Judge. The Society is unable comment on this aspect of the Proposal without details of what is proposed to be in the questionnaire.

**Allocation of cases between streams**

58. The Society notes that the Proposal appears to provide for Commissioners to determine the allocation of the process pathway without hearing from the parties as to the appropriate pathway. However, the proposal does not provide for decision as to the pathway by Presidential Members.

59. The Society does not fully support this aspect of the SAET Proposal. The decision as to the pathway becomes so significant to the rights and responsibilities of parties that the Society submits that it is not a decision which ought to be made by a Commissioner who has heard confidential communications from the parties in the course of conciliation. In any event, the Society considers that the matter is properly one for a Judicial Officer.

60. Further, section 66 of the *South Australian Employment Tribunal Act 2014* provides for the internal review of decisions of Commissioners, such that it may not be possible for the pathway decision of a Commissioner to be reviewed.

61. Notwithstanding, the Society suggests that, once a reasonable settling in period has occurred, it is likely to become apparent to all parties which pathway is likely to be chosen in relation to any particular dispute (and that is so whether there are two pathways as suggested by the SAET Proposal, four pathways as suggested by the Society or some other number of pathways). In those circumstances, the Society submits that there would be value in the parties being required to identify their positions in respect of the proposed pathway and if the parties were in agreement on that topic, then there would be no need for a decision by a Presidential Member on the point.

**Standard Cases**

62. In the absence of detail as to what is envisaged being included in the Litigation Plan prepared by the Commissioners; and as to what is envisaged being required by the Certificate of Readiness, the Society has significant concerns about the proposal in respect of standard cases, and in particular in relation to those matters which should be regarded as requiring urgent trials.
Litigation Plans

63. The Proposal appears to envisage that the Litigation Plan prepared by a Commissioner is to be prepared without a hearing or conference between the Commissioner and the parties. The Society does not support the absence of any hearing. Further, to the extent that any aspect of the Litigation Plan might be contested, the Society does not support the decision-making in this respect being undertaken by Commissioners, let alone without a hearing. If there is a contest about the way in which a matter must be prepared for trial, then the Society is of the view that that is a matter for adjudication by Presidential members of the Tribunal.

64. Further, if a hearing is envisaged, then the Society regards it as essential that there be a clear demarcation between the conducting of conferences before Commissioners in respect of conciliation and the conducting of conferences before Commissioners in respect of H+D.

65. The level of cost recovery by workers and registered employers at conciliation is insufficient to allow those parties properly to turn their mind to all matters necessary for the preparation of a matter for trial (even if it is often the case that preparation for trial may lead to a later review of the merits of settlement).

66. The Proposal appears to envisage that the Litigation Plan will include most of what are presently to be found in Trial Orders, other than a trial date. On the other hand, the process also envisages that, once a Certificate of Readiness is prepared following completion of the Litigation Plan, then a Pre-Hearing Conference will be held before a Presidential Member at which time a number of matters might be discussed which would appear to be inconsistent with the matter being ready for trial; and unfair to the worker (in particular) if he or she has been required to file an Affidavit of Evidence.

67. The Society is uncertain whether a Trial Book is to be filed as part of the Litigation Plan. It considers that same should not be required prior to the Pre-Hearing Conference – albeit that the equivalent of the District Court Trial Book, containing all relevant antecedent claims and decisions, as well as the documents which constitute the dispute could well be filed at an early date and may avoid the need for exhibition of documents to witness affidavits.

68. The Society considers if the parties are to file witness affidavits as part of the Litigation Plan process, then that process will not succeed in reducing the need for Presidential intervention unless all parties are required to identify all issues which each propose to take to trial, and to do so at an early time in the process. Further, discovery, including non-party discovery, needs to be complete before affidavits are prepared.

69. In addition, the Society suggests that requiring the early identification of issues may assist the Tribunal, because it will encourage representatives of all parties to obtain and record their clients’ real instructions on the important matters at an early stage. Not only will this allow the identification of issues, it will also assist counsel in advising on evidence.

70. If the Litigation Plan is envisaged to include the identification of all witnesses, including medical witnesses, then the Society considers that there must be a further hearing before a Commissioner, but only after it is clear that the matter has been referred to H+D.

71. Previously, the Tribunal has eschewed any system of formal pleadings. In part, this would appear to be because of a number of litigations in person involved in Tribunal matters.
72. Some of the difficulties which the absence of pleadings creates are that, if parties are not required to identify issues at an early stage, then the issues to be traversed in a witness’ statement are necessarily unclear (adding to time and cost of preparation); and the potential for the late raising of issues, gives rise to the potential for injustice in cases which ought urgently proceed to trial.

73. Unless further disputation arises, parties ought to be capable of identifying how long is needed to prepare for trial (assuming appropriate levels of co-operation in the process). Assuming that some level of obtaining of instructions and advice (on issues and evidence) has occurred, parties should then be capable of preparing for trial during the period between listing and trial.

74. A process which requires virtually complete readiness before listing builds in delay in listing of trials. The Society does not support this aspect of the SAET Proposal, especially in so far as it will affect the utility of outcomes in those matters which ought to be seen as requiring early trial.

Certificate of Readiness

75. In order fully to respond to the proposal in respect of the Certificate of Readiness, the Society would need to know what is to be included in that document and in particular whether it is substantially to differ from the District Court equivalent; and would also need to understand what is envisaged in relation to Rules.

76. In particular, the District Court provides for the Registry to complete a Certificate of Readiness if one or other party is unreasonably refusing to allow the matter to be listed. If the ordinary operation of the Certificate of Readiness process prevents a matter coming before a Presidential Member without a Certificate of Readiness, then this creates a “chicken and egg” problem.

77. The Society envisages that these issues may well be capable of being addressed but also considers that the potential for delay created by the need for a Certificate of Readiness is a further issue to be considered in relation to urgent matters (hence the preference for such matters to be in a separate stream).

78. If the Proposal envisages that the Certificate of Readiness is to be substantially in the form of the District Court Certificate of Readiness, then the Society questions if the matters to be discussed at PHCs are genuinely to be expected to be discussed, whether it would be possible for a Certificate of Readiness to be signed in advance of such a hearing.

Pre-Hearing Conferences

79. If the Proposal is substantially adopted in respect of Litigation Plans and Certificates of Readiness, the Society would support the holding of a PHC in order to list matters for trial. However, the Society has some concerns with respect to the list of matters to be considered PHCs as set out at page 5 of the Proposal, including:

79.1 The concept that the substantial expense of preparing a matter for trial might be undertaken prior to consideration of referral of a question of law to the Full Bench appears inefficient;

79.2 The concept that all witness evidence should be prepared (as appears to be envisaged by the Litigation Plan process) prior to decisions being made as to consolidating proceedings with other cases involving the parties would appear to be likely to result in substantial duplication of costs. It is likely to lead to workers having to file multiple statements in
multiple separate actions and that consideration may also be relevant to other witnesses; and

79.3 The process may inevitably result in what might otherwise be an urgent matter, and which is fully prepared for trial, not being able to be listed for trial on an urgent basis because of the need for the availability of counsel and, more particularly, expert witnesses, to be taken into account. In effect, the bifurcation of the substantive preparation of matters for trial and the logistical preparation of matters for trial, inevitably lengthens the period before a trial date can be offered in all general matters. This of greatest concern in relation to urgent matters.

Applications for Directions

80. In order for parties, and in particular the moving party (usually the worker) to be able to prepare cases for trial, all parties to the litigation need to cooperate in identification of issues, winnowing out of facts which can be agreed (so as to identify those matters which will be the subject of contest at trial) and the identification of all evidence to be adduced.

81. If there is lack of cooperation in this respect while a dispute is being “Registry-managed” on a Litigation Plan, then the moving party needs to be able to issue Applications for Directions to require compliance by the other party. It is not sufficient for matters to be left before the Registry until non-compliance results in the matter being in the default list, at which time there are foreshadowed issues as to costs.

82. The Society submits that all parties need to be able to call a matter on where there is non-cooperation which is likely to delay the compliance with the Litigation Plan.

83. The Proposal requires that, before an Application for Directions can be filed, the parties are to have conferred in order to attempt to resolve the issue in dispute. If one party refuses to participate in such a conference, the Society questions how practically an application can be brought? The Proposal is problematic in this regard.

Non-Compliance

84. As noted above, the Society envisages that the Proposal will not substantially improve levels of compliance unless the intention of the SAET is to require parties to identify issues (and, factual background) in the first instance; then deal with all matters relating to the gathering of evidence; and then proceed to preparation of trial evidence.

85. The topic of non-compliance is one in relation to which the ACC had diverging views. However, it was agreed that, if non-compliance is to be addressed, then substantial uniformity of approach by the members of the SAET is required.

86. Some Members of the ACC are of the view that the Proposal will inevitably impact far more substantially on workers (including as to costs and therefore access to justice) than it will in respect of any other party to litigation before SAET. Further, those Members are of the view that a substantial level of non-compliance, which presently occurs, does so because legitimate requests made of other parties as to the limitation of issues and agreement of facts does not ever achieve a response (and on this topic there is variation between Presidential Members as to whether or not Orders are made and enforced against Compensating Authorities and registered employers).
87. On the other hand, some members of the ACC are of the view that substantial non-compliance by workers and their representatives is a significant drain on the resources of Compensating Authorities and the Tribunal. In particular, non-compliance with Trial Orders leads to vacation of trials which should otherwise be ready.

88. Due to a culture of informality in the Tribunal, including at H+D, substantial communications are delivered to Presidential Members (through their associates) by e-mail. There is no doubt a cost saving involved in this; however, flexibility and informality can also lead to non-compliance or delayed compliance.

89. The ACC is of the view that, if the substantial aspects of “name and shame” involved in the default list process envisaged by the Proposal are to be enforced, then there will be an increase in costs because of the need to prepare formal applications and affidavits setting out reasons for delay.

90. The reasons why delays arise, beyond what can be hoped for when a matter is first referred to H+D, have been explored earlier in this submission.

91. The Society would support reform, which requires parties, in advance of deadlines which cannot be complied with, to formally place on the record what impediments to compliance have arisen. This would assist the Tribunal in being able to identify at a relatively early stage that a trial date cannot be maintained. The Society considers that this may also assist the Tribunal in being able to list more urgent matters at appropriate relatively short notice.

92. While one reasonable exception to the requirement of formality in this respect may be where parties seek adjournments or extensions by consent because medical reports are awaited, however, even in those circumstances, the requests for the report ought to be circulated.

Settlement Conferences

93. The Proposal provides for Settlement Conferences in matters which have been referred to H+D to be conducted by Commissioners, except in particular cases where good reasons identified for the conducting of a JSC by a Presidential Member.

94. The ACC’s experience through the course of many years of operation of the WRCA and the SAWCT, followed by the RTWA and SAET, is that there are many cases where the input of a Judge is of great assistance to one or other (or occasionally both) parties in achieving resolution. Often the assistance is in the form of validation of advice given by representatives.

95. So long as such matters are contemplated as being ones where a JSC might be conducted by a Presidential Members, then, in order to promote the saving of judicial time, the Society is prepared to support the proposal that settlement conferences beyond referral to H+D be conducted by Commissioners.

96. As will appear in more detail in relation to the four stream approach proposal below, the Society considers that, following referral to H+D, the Commissioners (including those who have conducted Conciliation Conferences in relation to particular disputes) may be able to conduct conferences which assist the parties in refining the issues in dispute or the facts in issue. The Society would support the greater use of the Commissioners than is contemplated in the Proposal in this respect.

97. The Society notes that the Proposal does not provide for Settlement Conferences within the docket stream (or pathway). It may be that a flexible approach is envisaged in this respect.
98. The Society’s preference is for matters which are allocated for trial to a docket Judge also to have allocated another Presidential Member who could conduct any Settlement Conference. If it were the case that decisions as to the allocation of pathways were to be made by a Presidential Member (or at least if those decisions were capable of being made by a Presidential Member if not agreed), then the Society suggests that the member who determines the pathway should then be potential JSC member. The corollary of this is that any Presidential Member who decides that a matter should be docket listed should not become the docket Judge. The Society submits that that is an appropriate structure in any event.

Hearing Dates – Callovers

99. The Society assumes that the SAET Proposal envisages that Callovers will continue to be listed during the first two full weeks of each month, with the third week being reserved for spill over, docket listing, part-heard trials (both docket and general list) and for other judicial duties.

100. The fourth week of each month is now used for appeals – and the Society supports the maintenance of that approach, for the reasons why it has emerged over time.

101. The Society submits for consideration by the Tribunal that the completion of matters in Callover weeks which are not capable of being completed in the time allocated, but which require only a short further period of hearing, may be best advanced by the listing of Callover weeks in the first and third full weeks of each month rather than in the first and second week.

102. That will then allow spill over from the first Callover week in the second week, thus enhancing the prospect of matters proceeding to a conclusion fairly promptly following the commencement of trial.

103. Similarly, albeit with some greater difficulty occasioned by Full Bench commitments, trials commencing the third week of each month might more readily conclude during the fourth week of each month and therefore within a short timeframe. Obviously from time to time, that position would be enhanced by there being a “crossover week” between months.

Other Matters for Consideration

104. The Society is concerned by the proposal in respect of timing of the allocation of pathways by a Commissioner. In particular, the Society is concerned that there is no maximum period of time following conciliation for the allocation of pathways (and indeed whatever further action is to be undertaken by Commissioners) to occur.

105. Presently, there are Commissioners who take many weeks to complete the Assessment and Recommendations document (A+R) following a final Conciliation Conference. In such matters, this process occasions delay. The Society is not in a position to identify the reasons for these delays, however, it is concerned that if Commissioners are required to attend to greater decision-making and preparation of materials following conciliation, and before formal referral of matters to H+D, then even greater delays in preparation of matters will occur. In this respect, the Society notes that its Members are under an obligation not to incur legal costs without instructions where same might be recovered if the work was performed in a different manner or at a different time.

106. If the period from Conciliation Conference to formal referral to H+D cannot be predicted with any certainty, then representatives are inhibited in making arrangements for the immediate (or early) obtaining of instructions and commencement of the process of retaining and briefing counsel.
Substantial certainty on this matter should allow planning immediately following the close of Conciliation.

107. If the Proposal (or any variation thereof) is to achieve its aims, then the Society submits that there must be a clear and early demarcation of the change in a dispute between conciliation and H+D. The Society sees no reason why there should not be a maximum period of five days following the final conciliation conference for the completion of the A+R, so that the dispute can formally be referred to H+D, with there being a written Order issued by the Registry by all parties to this effect.

108. As is noted above, the Society is of the view that Litigation Plans ought, if contested, to be prepared by Presidential Members rather than Commissioners. However, the Society is also of the view that, once a plan is prepared, then there is scope for Commissioners (and in particular the Commissioner who conducted the conciliation process in relation to the dispute) to facilitate the process of agreement of issues and facts. Including the recording of such agreements, before the parties formally identify issues and contentions and proceed to finalised discovery, inspection and preparation of evidentiary material for trial. These matters could be incorporated in Litigation Plans prepared by Judicial Officers.

109. As also noted above, once these processes have become familiar to all involved in workers compensation matters, then there is likely to be substantial agreement as to the process shortly following conciliation. In that event, the need for initial judicial involvement may be avoided or substantially reduced.

110. The Proposal does not address two particular matters, namely the potential for matters to be transferred between streams (particularly when further disputes arise) and the transition between the current processes of SAET at H+D and the proposed new system. No doubt these matters are to be addressed further once the broad details of the ultimate process are set. In those circumstances, the Society does not address the same topics in respect of the proposal below.

The ACCC four stream proposal

111. The ACCC considers that a four-stream proposal could be considered by the SAET, as an alternative approach to the suggest two stream model set out in the Proposal. The details of the four-stream proposal are set out below.

112. The ACCC has suggested that there be four streams of processes at H+D. Two of those streams would effectively be docket managed. One because it is long and complex and requires bespoke Presidential management; and the other because it relates to matters which need to be resolved without significant cost being incurred in the preparation of matters for trial.

113. There would then be two further streams of matters which would ultimately proceed to listing by Callover. Trials from the general stream can be envisaged to be listed “further out from trial”; and matters in the urgent stream should be capable of being listed closer to trial.

Allocation between streams

114. The Society proposes that, immediately upon the Registry delivering an Order that a matter has been referred to H+D, the parties should be required to identify which stream each party considers appropriate for the matter, together with short reasons. A one-page form capable of being filed electronically should be sufficient for this to occur.
115. If the parties are agreed as to the appropriate stream, then there is no need for Presidential Orders to be made in this respect, and the allocation can be made by Registry or by Commissioner.

116. Thereafter, depending upon the stream to which the matter is allocated, the matter should then be brought before a Presidential Member or a Commissioner (and if a Commissioner, then that would be the Commissioner who had conducted the Conciliation Conference, and only for the purpose of identifying whether the parties can then agree on issues, facts and further timetabling of preparation of the matter for trial).

117. Where the parties are not agreed as to the stream to which a dispute should be allocated, then the matter should be referred to a Presidential Member for urgent hearing and determination – without there being any possibility of appeal.

*Docket stream in detail*

118. The ACC proposes that, generally, matters to be allocated to the docket list should be the following:

- Section 21(3) application disputes;
- Most disputes as to the compensability of psychiatric claims where a defence is raised as to section 7(4) designated action;
- Most disputes involving a question of compensability of injuries which are likely to result in a worker being found to be a SIW;
- Death and dependency cases – particularly, as noted above, those involving minors; and
- Section 22 assessment matters where SIW status appears to be in issue.

119. The ACC proposes that docket matters under this model would be docket listed before a Presidential Member.

120. If the parties and Commissioner agreed as to docket listing, then the matter would be allocated to a docket Trial Judge by the Registry.

121. If there needed to be a decision made by a Presidential Member as to whether the matter should be listed as a docket matter, and the outcome was a docket listing, then in order to avoid any perception of “Judge shopping”, there should be a practice that there be a reallocation of the matter following the making of that decision.

122. The docket Judge would then be at liberty to list the matter for trial out of Callover and can list for greater than the usual lengths of time. Noting that many such matters will be long trials and therefore the avoidance of the enormous costs of the getting up for multiple resumptions of part-heard trials should be of benefit to all concerned.

123. Ordinarily it would be expected that, in docket matters, the first order of priority should be the identification of issues and of the factual matters which the parties can agree. As these matters inevitably involve the process of negotiation, it is not appropriate for this to occur in front of the Trial Judge. Either another Presidential Member needs to be allocated to the matter for the
purpose of conducting such conferences (and any settlement conferences which may ultimately be ordered); or alternatively the Commissioner who conducted the matter at the conciliation level of the Tribunal could be involved in this process. However, if further disputes are envisaged, it may be that docket management can delay final identification of issues while further claims and disputes are investigated and joined.

124. In listing docket matters, every effort should be made to ensure that “resumption times” are set in advance of previous hearings, so that witness availability is ascertained during adjournments, rather than during hearings. In this respect, the Society understands that some of the medico-legal reporting organisations require witness availability to be ascertained through the organisation, rather than from doctors directly. The experience of those involved in such matters has been that this has occasioned great difficulty in relisting matters, particularly when the identity of the Trial Judge is not known until the Callover. These matters could be obviated by the proposed docket process.

Urgent stream in detail

125. The ACC submits that the following matters should be included in the proposed urgent stream:

- Compensability disputes in respect of principal injuries – that is to say, not sequelae claims – where weekly payments are sought and SIW status is unlikely – including such disputes as are lodged by employers against decisions accepting such claims;

- Similar compensability disputes as to principal injuries where a substantial period of weekly payments is not sought, and thus there is the prospect that the s 33(20) period may conclude 12 months following the date of injury;

- Section 33(17) matters where the medical treatment involved will not be recoverable beyond a s 33(20) deadline;

- Section 48 disputes, where s 48(9) payments are being made or there is a realistic prospect of trial and judgment prior to the conclusion of the second entitlement period; and

- Section 18 disputes.

126. The urgent matters would be supervised to trial by the Presidential Member who determined to place the matter in that list, or by a Presidential Member allocated by the Registry if there was agreement before the Commissioner. However, involvement of the Conciliation Commissioner at an early stage could occur.

127. If the allocation of a dispute to this stream occurs by agreement, then the matter would return to the Commissioner immediately without any need for a Presidential hearing.

128. Identification of all issues in dispute and potentially agreed facts ought to be the immediate priority and that would be remitted to the Commissioner who conducted the conciliation. However, this would be only to achieve agreement, not to determine any contested matter. If this is to occur, then the fact of referral to H+D needs to be “on the record” before any such “remitter”.

129. Matters, once ready to be listed for trial would then be placed in a Callover within 2-4 months depending on the likely need to arrange medical witnesses.
130. Ordinarily, a dispute which requires an early trial should be a sole dispute, or if there is more than one dispute, then they should be proceeding together from the Conciliation stage. In those circumstances, the parties ought to be in a position very early following referral to H+D to identify fairly accurately how much further time is required to clarify the real issues, finalise medical and factual investigations and then be in a position to assure the Tribunal that the matter can be fully prepared for trial.

131. In this context, readiness for Trial does not require all witness statements to have been prepared but requires the parties’ representatives to be in a position to assure the Tribunal that, absent unforeseen circumstances, they have secured instructions and counsel advice which will allow complete preparation for trial and compliance with a staged timetable.

132. Alternatively, if, as should be the case, Compensating Authorities have properly investigated initiating claims, then it may be reasonable to assume that all parties substantially know the factual basis of each other’s cases and therefore the cost and delay associated with preparation of witness affidavits (including objections at trial) outweigh any extra time required in Court for the adduction of oral evidence in chief.

133. In this respect, it is noted that in credit matters there is a great deal of unfairness towards the party bearing the onus of proof, if its witnesses do not give evidence in chief orally, and the Trial Judge is only able to judge demeanour, credit and credibility from cross-examination.

**Summary Stream in Detail**

134. It is envisaged that the summary stream would be restricted to matters involving small quantum of medical expenses incurred or rehabilitation expenses, so long as there is no potential section 33(20) period likely to end, and thus result in any judicial decision being incapable of enforcement.

135. The summary list would be docket listed, but could be listed before the Presidential Member who decides that it should be dealt with summarily. Essentially, in summary matters, one pre-trial hearing ought be sufficient to allow the matter to be listed for trial and relatively shortly into the future.

136. If the allocation to this stream occurs by agreement, then although it might seem that the Commissioner could conduct the first hearing, then that would not allow the Presidential Member to list the matter at a suitable time. Therefore, even if cases of agreement as to streaming, the matter needs to be referred to a Presidential member for one (and only one) pre-Hearing conference.

137. In these matters, the Society doubts that there is any substantial saving of judicial time and that there is an increase in unnecessary cost by the preparation of witness affidavits, because there should be agreement that evidence is to cover only a very limited range of topics.

138. As in other areas, there needs to be a commitment by those representing workers and employers and to a lesser extent Compensating Authorities, to ensure that they have adequate factual instructions from their clients as early as possible, so that the one pre-trial hearing is effective in setting up an efficient trial.

**Ordinary Stream in Detail**
139. It is proposed that the ordinary stream would be comprised of all other matters, in particular:

- Average weekly earnings disputes;
- Sequelae disputes, not otherwise bound up in SIW matters;
- Section 22 matters, where SIW status is not a significant prospect; and
- Section 48 disputes where the worker is not in receipt of s 48(9) payments and there is no prospect that urgent listing would allow the Tribunal to adjudicate prior to the end of the second entitlement period.

140. The ordinary list would also be managed to listing for Callover by the Presidential Member who determined to place the matter in that list (and if there was agreement before a Commissioner, then the Presidential Member should be allocated by the Registry).

141. As with urgent matters, the first order of business should be the identification of issues and agreement of facts.

142. Due to the lack of urgency, there is greater scope for those matters to be remitted to the Conciliation Commissioner in order to supervise any further evidentiary and other investigations prior to listing, so long as it is clear that such proceedings before the Commissioner are actually part of the processes at H+D.

143. As with urgent matters, at an early time, the parties ought to be able to identify (again subject to unforeseen circumstances) how long is required in order for the parties to be ready to list the matter for trial (and be able to assure the Tribunal that the matter will then be readied for trial).

144. These matters should be listed for Callover with a longer lead time than the urgent matters – which, for the foreseeable future, is unlikely to be anything less than 6 months.

145. Each Callover list would only be “half filled” from the ordinary list, so as to allow the filling up of the Callover list by the urgent list within the period of 2-4 months out from the relevant Callover.

Concluding remarks

146. The Society is grateful for the opportunity to consider the Proposal and provides the following concluding remarks.

147. While the Society supports the introduction of a separate docket stream, as detailed above, it considers that the proposed range of matters which would be subject to a docket list could be expanded. In particular, with respect to urgent matters. It is hoped that the proposal put forward by the ACC will be helpful to the SAET in this regard.

148. The absence of a system of early identification of the facts issues which are not in dispute and most importantly, the identification of the issues which are to proceed to trial, is a significant factor in the delays and non-compliance with the present system. Such matters should be addressed as part of proposed reforms.

149. The Society supports measures to reduce the time spent by Presidential Members on inconsequential or unnecessary hearings. It is suggested that if Commissioners had capacity to do
so, they could assist parties in the early identification of matters (as noted above) and provide assistance to Presidential Members in clarifying and reducing the issues in dispute.

150. The Society has concerns with respect to the proposal that Commissioners determine the allocation of the process pathway without hearing from the parties as to the appropriate pathway and without oversight by a judicial officer. Similarly, the Society does not support the proposal that a Litigation Plan be prepared by a Commissioner without a hearing or conference with the parties and without judicial oversight.

I trust these comments are of assistance. The Society would be pleased to meet with you to discuss the matters raised in this submission and the Proposal further.

Yours sincerely

Amy Nikolovski
PRESIDENT
T: (08) 8229 0200
E: president@lawsocietysa.asn.au