Comments on the recommendations of the Parliamentary Committee on Occupational Safety, Rehabilitation & Compensation Final Report into the Referral for an Inquiry into the Return to Work Act & Scheme

Recommendation		Affected section	Comments
1	a. Early intervention strategies be implemented as soon as practically possible for all claims, and where appropriate, even prior to determination. b. Re-introduction of provisional liability in the Scheme, limited to only cover payment of early intervention services.	32, 33	a. This is already common practice among self-insurers and should be across the scheme if it is not currently. b. This is a redundant recommendation. Interim benefits under s.32 already require the offering of these benefits if the claim cannot be determined in 10 days. Provisional liability was a legally fatally flawed concept that was sometimes abused and posed a risk to worker entitlements and should never be re-introduced.
2	Amend section 7(1)(2)(b)(i) of the Return to Work Act, replacing 'the significant cause' with 'a significant cause'.	7(1)(2)(b)(i)	This is opposed outright. The reasoning behind the recommendation is flawed. The Committee appears to equate higher rejection rates of, and more thorough investigation of, psychological injury claims with there being something wrong with the causation wording. In the absence of evidence to support this conclusion, it is just as likely that these trends reflect more accurate investigation and determination of compensability that had not been occurring before – that is to say, claims were being accepted that should not have been and are not any longer. In the Committee's own words, *the change in wording is yet to be tested fully in the SAET* (page 22). It is therefore premature to be suggesting change. It is unlikely to be necessary anyway if the experience of the SAET interpretation of the physical injury causation wording in *Brealey & Rullo* is repeated.

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Recommendation		Affected section	Comments
3	Replace the term *seriously injured worker* with the term *worker with high needs* for those with WPI greater than 20 per cent, and the term *worker with highest needs* for those with WPI greater than 30 per cent.	21 and consequential	Agree in principle that 'seriously injured' is an inappropriate description for workers with substantial remaining work capacity. However the suggested replacement words are no better. Regardless, changing words in the Act rarely has anything more than symbolic value. It is what is required of all parties in respect of the injury status that matters.
4	• Include a narrative test to supplement the already prescribed WPI assessment processes. • Accredited doctors be trained in its use and application.	21, 22 & consequential	Vigorously opposed. Narrative tests are entirely subjective and cannot be made objective even by combination with WPI assessments and application by assessors or courts. The unvarnished truth is they are too easy to 'game'. When Victoria adopted a narrative test as an option to access common law and placed the test in the hands of the courts, common law claims exploded and put scheme funding under significant and ongoing pressure. Experience with WPI assessment in SA to date is also instructive. Some chapters of AMA 5 allow the assessor sometimes wide discretion to load the WPI% based on subjective assessment of impact on ADL and the like. This is a *de facto* narrative test and the many cases of major variations in WPI results show that any form of test based on subjective descriptions and discretions will lead at best to significant additional disputes and at worst major damage to the scheme. WPI assessment as it stands is an imperfect picture of the total effects of injury on workers but a narrative test is not the answer.

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Recommendation		Affected section	Comments
5	Broaden the coverage of medical expenses so there will be no time limit for coverage of: • reasonable costs associated with medication; or • treatment for which there is evidence that the treatment is required to maintain a worker to remain at work [sic].	33	Already common practice among many self-insurers. Under current provisions, such extended payments are legally on an *ex gratia* basis but this is a minor accounting consideration. Such a legislative extension would rely on the adequate application of the test of what is reasonable, including by the SAET. We must be cautious about provisions that may, for example, encourage the extended over-use of opiate or steroid medication. It may require mandated protocols to define reasonableness in the ongoing approval of the use of these types of medication.
6	Ensure that all injured workers have access to return to work services for the full duration allowed in the Return to Work Act, including for the 12 month period after income support ceases.	Part 3	Already common practice among most self-insurers. We are unable to comment on practices within the insured scheme.
7	The reasonable costs of future surgery associated with a compensable work-injury to be payable by the Scheme without the precondition the surgery was pre-approved.	33(21)(b)(ii) & (iii)	There is no doubt that forecasting future surgery needs for pre-approval purposes can be a fraught process. We are awaiting appeals to clarify what the current provisions actually require given the conflicting SAET decisions in *Ledo* and *Tinti*. How that appeal is determined will bear on the future conduct of the pre-approval process. To that extent this recommendation is premature. The current need for pre-approval has a legal basis. Under the current provisions, without pre-approval, any payment for services past the end of the statutory entitlement period is made outside the Act – in effect it is *ex gratia*, meaning that the provisions of the Act, such as fee schedules, the right to claim the costs and the obligation to pay the costs do not operate. In effect it becomes a common law liability claim which is cumbersome at best.

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Recommendation		Affected section	Comments
8	The 104 week income entitlement is based on the aggregate period of incapacity, whether consecutive or not.	39(1) & (3) & consequential	Taken literally, such a change would not increase the weekly benefit liability since there are no economic reviews of weekly benefits if the worker is not seriously injured and the benefits are received over a longer period. It would however, act to: • Increase the duration over which the 104 weeks of income benefits are paid in some cases • Increase the duration over which medical benefits are paid in some cases An actuarial opinion on the impact of this recommendation would be needed before reaching further conclusions.
9	Common law and its inclusion in the Scheme be reviewed as part of the mandated review.	Part 5	SISA has a well-developed position that common law has no place in a no-fault scheme and poses a risk to the RTW objectives of the rest of the Act. The total lack of common law claims since 1/7/15 indicates that it is in any case not a viable option for workers and could be removed from the Act.

Comments on the recommendations of the Parliamentary Committee on Occupational Safety, Rehabilitation & Compensation Final Report into the Referral for an Inquiry into the Return to Work Act & Scheme

Recommendation		Affected section	Comments
10	a. Ensure ReturnToWorkSA holds all employers accountable in providing suitable employment for their injured workers, as soon as the worker is certified fit to return to work. b. RTWSA develop a key performance measure for agent compliance with section 18; and with the outcomes to be provided to the Committee every 12 months.	15(2), 18	a. RTWSA subjects self-insurers to considerable scrutiny under s.18. We are unable to comment on the situation in the premium-paying scheme. However the terms of s.18(3) - (5) place this in the jurisdiction of the SAET, so RTWSA's role should be necessarily limited to advice rather than enforcement. b. This is an impractical recommendation. What is 'compliance under s.18'? Each and every case of what is 'reasonably practicable' turns on its own facts. S.18 'compliance' would have to be quantifiable in some way for there to be a viable KPM. It cannot be quantified because 'compliance' is a matter of opinions which can sometimes differ, even though each opinion is formed in good faith.
11	Minister for Industrial Relations review the compliance of the Corporation to meeting the Statement of Service Standards prescribed in Schedule 5 of the Return to Work Act, and report the findings to the Committee within 12 months.	Schedule 5	RTWSA subjects self-insurers to considerable scrutiny under Schedule 5. We are unable to comment on the situation in the premium-paying scheme. However the need for this is questionable give the extensive powers of investigation vested in the Ombudsman. When SISA last sought the Ombudsman's comments, his view was that there were few issues being brought to his attention under Schedule 5.

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Recommendation		Affected section	Comments
12	• Minister for Industrial Relations direct ReturnToWorkSA to review the information available on its website and the methods in which it disseminates information about the Scheme to injured workers to ensure it is easily accessible for all workers. • ReturnToWorkSA makes information freely available to workers and other stakeholders through print, telephone and other mediums to suit the varied ways people may wish to access information about the Scheme	N/A	Does not affect self-insurers.
13	Minister for Industrial Relations review and advise the Committee of the impact that the reduction of rehabilitation/return to work service provider spend has had on the outcomes of the Scheme.	N/A	Does not affect self-insurers. We are unable to comment on the situation in the premium-paying scheme. In general we are of the view that it is invalid to attribute scheme trends to any particular patterns of expenditure due to the multitude of factors that affect scheme outcomes
14	Minister for Industrial Relations require ReturnToWorkSA to review and advise on improvements of their services for regional and remote injured workers to ensure high quality services are afforded to all South Australians, regardless of location.	N/A	Does not affect self-insurers. We are unable to comment on the situation in the premium-paying scheme.
15	Minister for Industrial Relation cause RTWSA to hold regular forums/information sessions where they can connect workers who are most likely going to exit the Scheme at 104 weeks with agencies (such as Centrelink) who can explain the support mechanisms which may be available for them prior to their income support ceasing.	N/A	Does not affect self-insurers. We are unable to comment on the situation in the premium-paying scheme.

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Recommendation		Affected section	Comments
16	Allow workers with a psychiatric injury to receive payments for economic loss and non-economic loss similar to those who suffer physical injuries.	22, 55-58 & consequential	Vigorously opposed. Will cause major blow-outs in scheme funding. Aside from funding risks, history shows that psychiatric conditions, no matter how precisely diagnosed, usually have uncertain or very nebulous causal connections with the workplace except in the most clear-cut PTSD cases. The subjectivity of drawing causal connections is driven by the fact that it is based predominantly on the history as given by the worker and their presentation at examination. This is the same reasoning by which pain is not accepted on its own as an impairment.
17	Require that workers receive financial advice for any lump sum payments of over $50,000.	55-58	No objections.
18	Minister for Industrial Relations require ReturnToWorkSA to communicate to an employer the reason for any change to their premium.	Part 9	Does not affect self-insurers. We are unable to comment on the situation in the premium-paying scheme.