Review of the *Return to Work Act 2014*

Self Insurers of South Australia Inc

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SISA
Self Insurers of South Australia

Contents

Glossary

AMA5	American Medical Association Guides to the Evaluation of Permanent Impairment Edition 5
Impairment Assessment Guidelines	Guidelines established under s.22 of the RTWA
LSA	Lifetime Support Authority
LSS	Lifetime Support Scheme
NEL	Non-economic loss
PI	Pre-injury
Regulations	Return to Work Regulations 2015
RTW	Return to work
RTWA or 'the current Act'	Return to Work Act 2014
RTWSA	ReturnToWorkSA
SAET	South Australian Employment Tribunal
SISA	Self Insurers of SA Inc
WHS	Work health & safety
WPI	Whole person impairment
WRCA or 'the repealed Act'	Workers Rehabilitation & Compensation Act 1986 (repealed)

Introduction to this submission

Due to the unusual nature of the terms of reference provided to the review by the Act itself and the Government, SISA is presenting this submission in parts in the following order:

1. Some background on self-insurance and SISA to place our comments in broad context when the review considers our submission alongside those of RTWSA and other key stakeholders.
2. Summary responses to the terms of reference – many of the terms of reference are either not amenable to a direct response from SISA or can be responded to simply. Others are likely to prove difficult for the review to respond to for reasons we outline in that part.
3. Issues with the legislation for consideration. We acknowledge that our primary submission could be summarised as simply pointing out that this review, while mandated by the RTW Act, is premature. The scheme is a long way off being mature and stable, and so changes to the RTW Act would be likely to further delay the process of maturing and stabilisation. It may seem perverse, therefore, to be also making comments on what parts of the Act could be improved by amendment.

   We see it as necessary, however, to provide the review with our views on the elements of the Act that are:

   - Likely to pose significant funding threats to the scheme due to issues of interpretation by the courts; or
   - Are not operating in a manner that best supports the scheme's primary objective of returning injured workers to meaningful and sustainable work as efficiently and safely as possible.
4. Our views on one very critical element of the scheme – seriously injured status and the adverse impact it has in some cases on the scheme's ability to return injured workers to meaningful and sustainable work as efficiently and safely as possible.
5. 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* as tabled in Parliament November 2017. We include this part on the assumption that the Committee's report will have been early reading for the review. What is presented in this part of this submission is taken directly from the response SISA made to the Committee's report that was considered by the Committee in November 2017. Some of the recommendations were in our view ill-considered and would pose a direct threat to the scheme and all of its stakeholders. Thus we took the unusual step of placing our responses on the record after the Committee's report was tabled in Parliament.
6. Our views on common law generally in the context of no-fault personal injury insurance.

SISA stands ready to assist the review in any way we can and we would welcome further questions and discussion.

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Part 1 - About SISA and self-insurance

The Self-insurers of South Australia (SISA) is an incorporated association that represents most of South Australia's largest private sector employers that are self-insured under the *Return to Work Act 2014.* Our membership represents about 19% of the State's employment by remuneration. The South Australian public sector, which represents a further 19%, is also self-insured in its entirety but is at present under a Premier's direction to not be members of, or participate in, SISA[1].

SISA was first incorporated on 3rd August 1984 as the Employer Managed Workers Compensation Association (EMWCA). Although it was known as SISA for many years beforehand, the name was officially changed from EMWCA to SISA in November 2005.

SISA is recognised as the sole representative organisation for self-insured employers. It provides its member organisations with assistance and support in their interactions with the return to work scheme and promotes best practice in the prevention and management of workplace injuries.

SISA's objectives are to promote excellence in return to work and work health and safety, and to develop and support the interests of its members by communication and liaison with RTWSA, Government, unions and other organisations in regard to self-insurance.

SISA Services:

- To provide a single voice for self-insurers and associate members, and promote, foster, develop and support the interests of members.
- To contribute to sustainable and efficient workers compensation and WHS regimes on behalf of self-insurers.
- To provide resources, information and a support network to members.
- To promote work health & safety and injury management best practice.
- To provide education and training to members in regard to work health & safety and injury management.
- To advocate improvements to legislation and work health & safety and injury management practices.

About workers compensation self-insurance

Self-insurance in workers compensation terms describes larger employers that fund and manage their own claims under a licence or grant provided by the relevant workers compensation regulator. Self-insurance has been a part of most Australian schemes since their early genesis. The exception is Queensland, where it is a relatively recent addition.

[1] This was in apparent retaliation for SISA's part in a successful 2017 campaign to defeat legislation that would have removed self-insurance from the public sector.

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Exceeding the benchmark – the history of self-insurance

Before the implementation of statutory workers' compensation arrangements in the late 1800s, injured workers seldom succeeded in actions against their employer for negligence. The *Employment Liability Act 1880* enacted in England and replicated in the Australian colonies fell short of its intent and new 'no fault' laws began to appear in the early 20th century to improve conditions for injured workers. However, early no-fault coverage for workers' compensation was limited.

Some larger employers that sought to improve coverage for their employees were given statutory exemptions from this early legislation on condition that they would put in place workers compensation arrangements that were no less favourable to workers than those mandated by the legislation. Section 9 of the South Australian *Workmen's Compensation Act 1900* is one example of such legislation, and called the process 'contracting out'. These employers were later called 'exempt employers' because they were, in those times, exempted from the operation of the relevant Acts.

As the various Acts were changed and replaced over the 20th century, self-insurance evolved from this notion of exemption from legislation to the self-insurance we know today, where it is a self-funding arrangement within the legislation, rather than outside it.

Interestingly, the term 'exempt employer' was only excised from the South Australian Act in 2008 and is still in the Western Australian Act. This is despite the fact that self-insurance has for a long time been an employer status *within* the legislation, and to which the relevant Act generally applies. It is equally odd that in South Australia, employers that are insured by RTWSA are colloquially known as 'registered employers', as if self-insurers are not registered, which of course is not true. They are registered, but under different sections of the Act. More accurate terms for employers that are not self-insured are 'insured' or 'premium-paying', and this submission uses those terms interchangeably.

Given this history, it can be said that self-insurance is as old as statutory workers compensation itself and has its genesis in a group of employers that wanted to look after their workers to a greater extent than the law of the time required. Exceeding the benchmark has been in the genes of Australian self-insurance ever since. This has been well recognised both locally and nationally, with South Australian self-insurers and their employees winning local and national awards for their commitment to workplace health and safety and return to work.

At a national level, most of our largest brands are self-insured under either the State/Territory or the Commonwealth schemes – for example BHP Billiton, Glencore, Rio Tinto, Coles, Woolworths, Santos, Viterra, Asciano, all of the major banks, Telstra, Optus, Australia Post, John Holland – over 170 large organisations around Australia from practically all major industries covering around 15% of the Australian workforce.

The self-insurance model as a driver of improvement

In insurance terms, self-insurance is 100% experience rating; or zero cross-subsidy. Every dollar of cost incurred by a self-insurer though WHS failures or inadequate management of workplace injury is felt immediately, rather than through the long delayed and muffling effects of the insured scheme's premium system.

Not only that, but because the self-insurer is not part of the premium pool, there are no cross-subsidies to help mitigate the impact of the loss by spreading the cost among others in the pool. Given that a self-insurer feels the effects of failure in real time, there is an inbuilt drive to improve. Corporate culture can be driven by this model because the benefits of doing it well are all too apparent, as are the consequences of dropping the ball. No other employers in the scheme feel this sort of direct pressure to continuously improve. As a consequence, self-insurers are generally acknowledged to have lower lost time injury frequency, lower claim durations and lower claim costs. The result is that self-insurers have historically carried proportionally lower claim liabilities than the insured scheme.

This is the principal reason why self-insurers declined to get involved in the debate over the 2008 amendments to the legislation other than to be quietly critical of its sometimes flawed provisions. In short, our members did not need those amendments, as their workers compensation funding positions were satisfactory. The commencement of the 2014 Act produced a similar result. The loss of so much existing legislation and the introduction of a new law offered our members little more than additional administrative burden, much higher lump sum costs and the loss of many years of judicial precedent and understanding of the previous provisions.

Why self-insurers can achieve better RTW performance

At the outset we point out that 'return to work performance' is an often used but misleading phrase. There is no clear and reliable measure of return to work performance. It is more by way of an indirect measure using financial data; primarily numbers of workers on weekly payments at specified chronological points. The challenge for the scheme lies in the small proportion of injured workers who have not returned to work within 2 years when weekly benefits expire. Self-insurers generally do not have that challenge, and for a very good reason.

In self-insurance, all claims and return to work activity is carried out and/or led from the workplace. The only critical communication axis is between the employer and worker. There is no distant, often unsighted third party taking control and changing the employer-worker relationship. The workplace-based nature of the self-insurance model confers a number of telling advantages:

1. The employer knows the worker, knows his/her needs, any external problems that might affect the return to work and has an intimate understanding of the worker's workplace and situational risks. In this way, risks are often known before they become manifest, rather than reacting to problems after they occur.
2. Suitable modified duties can be quickly identified and established so there is no actual cessation of work, or at least no unnecessary delay in commencing the return to work process. Retraining needs can also be quickly identified and steps taken.
3. Return to work activity is generally responsive to changes in medical diagnosis or condition or other alterations of the worker's situation. In a few cases this can involve early recognition that return to work is not going to be achieved and the claim is quickly finalised by mutual agreement.

4. Claims administration and communication are direct and there tends to be shorter response times to worker requests and the delivery of entitlements. This generally reduces the possibility of small things becoming big things.
5. Lower case file loads allow self-insurer case managers to focus more directly on each claim, which, when added to the direct knowledge of and access to the worker and workplace, adds up to higher quality management, with less of a 'one size fits all' approach.
6. The workforce is formally consulted on the policies and procedures for the management of workplace injuries and claims and regular satisfaction surveys are conducted. Further, the policies, procedures and their operation are subject to disciplined internal audit, external scrutiny and a continuous improvement management overlay including formal complaints management systems.

We hasten to add that we make the above points without any inference about the practices or performance of RTWSA or its claims agents. The total management of injuries within the workplace is not something the insured scheme can do under its present insurance-based claims management model. Considerable strides have been taken down this path with the improvement in the role and training of the return to work coordinators, the introduction of mobile case managers and so on. Recent improvements in the performance of the insured scheme show that good progress is being made.

In short, we submit that as long as claims are centrally managed, the insured scheme can only emulate the self-insurance model in a limited way, and comparisons of the two are probably invalid to that extent.

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Part 2 - Summary responses to 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.

  SISA submits that much more time is required before dispute numbers and duration data can be regarded as a stable. With disputes dealing with key aspects of the Act still working their way through the higher courts and large numbers of other disputes on hold pending those higher court decisions, there remains too much volatility in this relatively new dispute resolution jurisdiction to reach conclusions on this term of reference.

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

  SISA submits that with the SAET now well established, this is no longer an issue and we would answer this term of reference with a simple 'no'. Our primary concern has always been that the SAET must have the necessary resources to deal with its multitude of jurisdictions without incurring unwarranted delays in hearing and determining matters.

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

  SISA submits that much more time is required before this term of reference can be answered meaningfully. To date there have been few referrals to Independent Medical Advisers (IMAs) by the SAET as far as we are aware. The SAET seems to be generally committed to resolving most questions of medical fact itself rather than making referrals to IMAs. SISA remains firmly of the view that the disbanding of the Medical Panels established in 2008 under the repealed Act was a grave error and was based on what we saw as unfounded and partisan criticism of that system.

- Any other matters that the Minister considers to be relevant to a Review of the Return to Work Act:

  - The performance of ReturnToWorkSA in managing claims, including ReturnToWorkSA's outcomes in reducing instances of work injury.

    SISA notes that RTWSA has provided the response to this term of reference. We observe that the Act only allocates to RTWSA a supporting role in reducing instances of work injury, rather than it being a primary objective – see s.3(2)(e).

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

    SISA notes that RTWSA has provided the response to this term of reference. We do not ourselves collect claim data from our members for reasons of confidentiality and practical use. Preventing workplace injuries is a front-line task for all competent employers including self-insurers. We note that the RTWSA initial submission at pages 15-16 rightly observes that private sector self-insurers have demonstrated sound performance from the standpoint of the standards and requirements set by RTWSA that cover both work health and safety and return to

work systems. There is a well-established history of collaboration on these matters between RTWSA and our members.

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

  SISA notes that RTWSA has provided the response to this term of reference. We would observe that:

  - *The scheme is still too immature for stable trends to be identified;*
  - *Changes in such trends are subject to a multitude of influences ranging from the macro (economic and financial conditions, decisions by superior courts etc) to the micro (changes in claims policy or practices etc). Identifying all such influences and determining their relative degrees of influence would be at best exceedingly difficult.*
  - *Measuring returns to work is not an easy thing to do at a database level. Returning to work is as much a social outcome as it is a financial one. Equating the cessation of weekly benefits prior to 2 years directly with returns to work is at best an inexact measure. Benefits may cease for a range of reasons not connected with returning to work. It is for this reason that RTWSA these days reports on weekly benefits continuance rather than returns to work.*
  - *The national return to work survey conducted by Safe Work Australia does look at returns to work via telephone surveys of worker cohorts in each participating State and Territory. The most recent iteration of that survey in 2016 shows relatively flat RTW numbers nationally with SA somewhat behind other jurisdictions. The report also showed that self-insurers tend to be on par with or slightly better than the large premium paying employers.*

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

  We would offer much the same response to this term of reference as to the one immediately above. Such factors would run the entire gamut of influences such as:

  - *The worker's injuries*
  - *The worker's mental state and desire to return to work*
  - *Levels of transferrable skills and knowledge and the ability to improve these via training*
  - *The employer's behaviour*
  - *The employer's true ability to offer suitable and sustainable work*
  - *Poor management of the claim (for example refusal to provide upskilling/retraining)*
  - *Disputes*

- *Business and employment conditions generally*

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

  SISA members generally take a pro-active approach to re-skilling and re-training. The general rule is that as soon as it becomes clear that a worker cannot return to work without some sort of re-training or up-skilling, then steps are normally taken without undue delay to facilitate it. It is very important to take the following into consideration:

  - *The training must be within the scope of the worker's abilities*
  - *It must have a realistic prospect of leading to work that the worker can safely and sustainably carry out*
  - *It should not be of excessive duration (a period of years for example)*

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

  SISA submits that the scheme is far from stable and will not be until much more case law is established and more years of experience are gained. In this industry, new schemes generally take up to 9 to 10 years to mature and stabilise IF they are not changed substantially in that time. The scheme established by the repealed Act was seldom stable due to multiple efforts by the Parliament to amend that Act to improve scheme performance and lower its cost. In all, that Act had nearly 800 individual amendments made to it in its 30 years of operation. We see a similar experience in NSW to an even greater extent. If the RTW Act is amended in any substantial way in the coming years, then the process of maturing and stabilising may have to start again.

- Any other recommendations consistent with the objects of the Return to Work Act.

  The primary objective of the RTW Act is, in our view, to establish a scheme that is sustainable, affordable and delivers the best possible results for workers and employers. In this context, and at the risk of suggesting that we lengthen the time required for the scheme to stabilise, we have a range of points to raise with regard to the terms of the RTW Act. These are set out on the following pages.

Part 3 - Issues with the legislation for consideration

RTW Act 2014

Item	Subject	Section	Problem	Recommendation
1	Federal Minimum Wage	5(15)(b) & 42	The split decision of the Full Bench in *Robinson* [2017] SAET 27 held that a deemed weekly amount set under a prior redemption agreement could not reduce weekly benefits below the Federal Minimum. The effect was that the worker gained a windfall weekly benefit in the amount that the deemed redemption income would have lowered the benefits below the Federal Minimum Wage. Such double compensation would not have been the intent of Parliament.	Amend s.5(15)(b) & s.42 to specifically include a provision to make the Federal Minimum Wage floor subject to deemed income under previous redemption agreements. Leave has been granted to appeal SAET 27 2017 to the Full Court of the Supreme Court – with judgement unlikely before the Review is concluded, our recommendation is subject to the Court's decision
2	Causation	7(3)(a)	Intent of the current wording was to raise the threshold of compensability for aggravations etc of prior compensable injuries. However the Full Bench decision in *RTWSA v Brealey & Rullo* [2017] SAET 133 nullified the phrase *'…employment must be a significant contributing cause…*', thus returning the effect to that of s.30 of the repealed Act	Replace ss.7(3)(a) with something along the lines of: *(a) in the case of an injury other than a psychiatric injury—the prescribed event must have occurred in the course of employment…* Leave has been granted to appeal SAET 133 2017 to the Full Court of the Supreme Court – with judgement unlikely before the Review is concluded, our recommendation is subject to the Court's decision

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Item	Subject	Section	Problem	Recommendation
3	Causation	7(3)(b)	Intent of the current wording was to raise the threshold of compensability for psychiatric injuries, particularly around the reasonableness of management action. However the Full Bench decision in *Li v Department for Health and Ageing* [2017] SAET 75, while it is a case under the WRCA, has the same effect on the equivalent wording of the RTWA and significantly weakens the standard.	Leave has been granted to appeal SAET 75 2017 to the Full Court of the Supreme Court – with judgement unlikely before the Review is concluded, our views on the need for amendments will be subject to the Court's decision
4	Suitable employment	15(2)	The Corporation's power to investigate employers regarding the retention, employment or re-employment of workers cuts across the jurisdiction of the SAET under ss.18(5) and has potential to generate conflicting and/or unsustainable positions	Amend ss.15(2) by deleting all after '…under this Act' (subject to any changes made to s.18).
5	Suitable employment	18(2)	The current ss.18(2) does not include the employer size exception that was in ss.58B(2)(e) of the WRCA. In many cases it remains impractical for businesses as small as this to offer suitable employment to injured workers on an open-ended basis	Reinstate the wording as ss.18(2)(f): *(f) the employer currently employs less than 10 employees, and the period that has elapsed since the worker became incapacitated for work is more than 1 year.*

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Item	Subject	Section	Problem	Recommendation
6	Suitable employment	18(3) – (16)	The scheme of worker applications and SAET review of rejections of applications: 1. Is unwieldy and will always remain of uncertain effect due to the fact that decisions will always turn on their own facts and little precedent can ever be gained; 2. Is unreasonably open-ended – it effectively lasts the worker's entire working life; 3. Has only resulted in a single SAET decision of note (*Walmsley* [2016] SAET 4) that proved to be of no lasting benefit to the worker or the employer and set no precedent.	1. *Preferred* – delete all after ss.18(2) 2. *Other option 1* - delete all after ss.18(2) and include the alleged failure to provide suitable employment as a reviewable decision under s.97 3. *Other option 2* – leave as is but limit the ability to apply under ss.(3) to a period of 2 years after the date on which the incapacity for work first occurred, with a bar on extensions of time.

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Item	Subject	Section	Problem	Recommendation
7	Seriously injured status	21(2)	Providing ongoing benefits at 30% WPI can be highly deleterious to the long-term health and welfare of some workers. It serves to encourage workers with plenty of work capacity to stop working and has created an entire new field of costly litigation around WPI assessment – see Part 4 for a more detailed submission on the impact of not working on workers with work capacity. There were cases where workers with 30+% WPI under the repealed Act who were working in safe and sustainable employment left their employment on being informed that under the RTW Act, they were no longer required to work. We submit that this was a perverse outcome that was diametrically opposed to the core objectives of the Act.	This is a very complex question and SISA does not claim to have a definitive answer. Some options to explore singly or in combination could be: • Raise the threshold for ongoing benefits; and • Reasonably require that residual work capacity be exercised up to a certain point by removing the blanket ban on requiring some sort of RTW in 30%+ WPI cases up to the level of the raised threshold • Introduce stepped benefits based on degree of WPI over 30% topping out at a higher level – say 50% (but avoiding if possible the complexity as seen in NSW). Here we insert a note of caution – the more thresholds, the more litigation. • At all costs, SA must avoid introducing a narrative test – our reasoning for this is set out in our responses to the Parliamentary Committee Recommendation 4 at page 25 below.
8	Seriously injured status, WPI & interim decisions	21 & 22	There are some cases where workers have sought to force the allocation of interim serious injury status with a view to then avoiding a WPI assessment to ensure that the status continues indefinitely without the risk of a sub-30% assessment at some later stage	Amend to allow the compensating authority to require a WPI assessment as soon as stability and maximum medical improvement have been certified. Failure to submit to the assessment should lead to loss of interim serious injury status

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Item	Subject	Section	Problem	Recommendation
9	WPI – aggregation of assessments	22	The ability to aggregate impairments that have little or no impact on the ability to work, including matters such as sexual function, mastication/deglutition etc can take cases from sometimes quite low assessments to unrealistically high ones. The effect of the problem is that people with high levels of remaining capacity for work are classed as 'seriously injured' and no longer required to participate in RTW activities, with all the health and financial consequences for workers, employers and the scheme that are spelled out in Part 4 below. We submit that this ability to argue that a worker cannot, and should not be required to, work due to conditions that don't reduce the capacity to work is entirely out of step with the basic objectives of the RTW Act and scheme as expressed in section 3(1)(a) to (c).	The ability to aggregate impairments that are sequelae of the original injury (what we might call 'consequential impairments') should be limited by reference to the effects of those impairments on work capacity. For example, a loss of sexual function would not impact on a worker's ability to be a mechanic or a plant operator. Digestive problems would be at best highly unlikely to entirely prevent a worker from working in an office or sales environment.
10	RTW Plans	25(10)	The word 'need' is legally meaningless and generates much confusion as to what may or must be done	Delete 'need' and replace with 'may'. This is not a diminution of workers' rights - if there is any dispute as to whether there should be consideration of new or other employment options in a RTW plan, it is reviewable by virtue of s.97(c)).

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Item	Subject	Section	Problem	Recommendation
11	RTW Coordinators	26	It is pointless to require self-insurers to maintain RTW Coordinators when their entire claims/recovery/RTW are managed or overseen in house. It serves only to increase red tape and complexity without conferring any benefit.	Insert new subsection stating that s.26 does not apply to employers registered as self-insurers under s.129 or s.130. Alternately, insert a clause to similar effect in regulation 18.
12	Future surgery	33(21)(b)(ii)	The imprecision of the wording has resulted in conflicting SAET decisions in *Ledo* [2017] SAET 21 and *Tinti* [2016] SAET 72. Issues are around the amount and precision of information required for approval of future surgery. While higher courts may clarify, there is a clear need for improved wording SAET 21 2017 has gone on appeal, so our recommendation is subject to the Court's decision	1. Insert wording to require applications to contain prescribed information 2. Make regulations to prescribe the information; for example: a. Worker and claim identification information b. A written opinion from an appropriately qualified medical expert: i. That the worker will require a surgical procedure after the end of the entitlement period ii. Identifying the procedure iii. That the procedure will be required within a specific period to be defined in months or years iv. Setting out the benefits of the procedure in terms of the worker's quality of life and/or ability to work and the consequences of not carrying out the procedure

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Item	Subject	Section	Problem	Recommendation
13	Prescribed allowances	38	At present there are no allowances prescribed, which allows workers to continue to receive certain allowances as part of their weekly benefits while not actually working and thus not incurring the cost or risk that the benefits are intended to cover.	Make a regulation setting out the main allowances in question. Examples: • Remote work or zone allowances • Travel, meals & accommodation • Uniform • 'Dirt' or site allowances • Meal allowance • Liquid Plant allowance (specific to Veolia) • Asbestos allowance • Camping allowance • First Aid Allowance • Tool Allowance • Shift allowance • Lead Hand allowance
14	Common law	Part 5	Given the nature of the ongoing financial benefits available to seriously injured workers, the common law provisions are not an advantageous choice for workers and serve only to pose a risk that a seriously injured worker could simply make a bad choice or be inveigled by an unscrupulous adviser into seeking common law rather than staying with ongoing periodic benefits. See part 6 below for a more detailed submission.	Delete Part 5 and make consequential amendments

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Item	Subject	Section	Problem	Recommendation
15	Self-insurance	129(11)(a)	It is widely acknowledged that the number of employees has no bearing on, nor is it an indicator of, either the financial strength or the capabilities of an employer. The financial criteria are a more than adequate safeguard. The presence of ss.11(a) serves only to increase red tape and complexity without conferring any added security for the Fund.	Delete s.129(11)(a)

Regulations

Item	Subject	Regulation	Problem	Recommendation
16	RTW Coordinators	18	See comments on s.26 of the RTW Act above	If s.26 is not amended to exclude self-insurers, insert a clause into regulation 18 exempting self-insurers from the operation of s.26.

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Impairment Assessment Guidelines & Assessor accreditation

Item	Subject	Clause	Problem	Recommendation
17	Selection of assessor	17.3 & 17.4	See also comments on s.22 of the Act at 8 and 9 above. Specifies that the worker must be given the opportunity to choose the assessor subject to set conditions. This requirement is unbalanced and is not supported by s.22. It has led to workers choosing relatively few preferred assessors leading to major delays in assessments and increased frequency of reviews and disputes over WPI assessment results. See also the RTWSA Initial Submission at page 9.	Subject to any amendments to s.22, amend the 1st paragraph of 17.3 along the following lines: *Once there is medical evidence (e.g. from the treating doctor(s) or specialist(s)) that the work injury has stabilised/reached MMI and a permanent impairment assessment is required, the requestor, (claims agent, self-insured employer or ReturnToWorkSA, as relevant), must assemble a list of assessors from which the worker must be given the opportunity to choose the assessor who will assess their whole person impairment caused by their work injury.* *Workers cannot choose assessors that are not on the list provided by the requestor.* *Workers cannot choose an assessor before the requestor has provided a list.* *The list must be compiled by the requestor considering the following factors:* Also amend 17.4 to provide the worker 21 days to select from the list provided. Where the worker fails or refuses to make a selection, the requestor can proceed to arrange the assessment and provide the worker with the details. Failure to attend the assessment will be deemed to be a breach of s.48 of the Act.

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Item	Subject	Clause	Problem	Recommendation
18	Accreditation of assessors		The system of accreditation places insufficient focus on the specialist qualifications of the chosen assessor relevant to the injury being assessed - for example, rehabilitation physicians assessing nerve damage cases where there is a clear need for specialist neurological qualifications. In some cases assessors hold accreditation for multiple body systems but with no specialist qualifications in any of them. We consider this entirely inappropriate	Upgrade the accreditation and assessor selection processes to require that preference be given to assessors who hold specialist qualifications directly relevant to the injury wherever reasonably possible. We recognise that some specialties are rare among the assessors or not represented at all, so some flexibility will still be needed.
19	Assessor discretions		There is lack of clear constraint of the often broad discretion afforded by AMA5 to assessors in some classes of injury that are resulting in wide inconsistencies in assessments and the targeting of particular assessors, resulting in major backlogs of assessments (see also our comments on assessor selection at 17 above). Primary areas of concern are: • Cardiac • Spinal • Joint replacements	Amend the Guidelines to restrict the use of AMA5 discretions by assessors.

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Part 4 - 'Seriously injured' status

There is ample evidence readily available[2] that prolonged absence from work has major debilitating effects on workers and their families. The following is a summary of one such body of evidence:

Work absence tends to perpetuate itself: that is, the longer someone is off work, the less likely they become ever to return.

If the person is off work for:

- *20 days the chance of ever getting back to work is 70%;*
- *45 days the chance of ever getting back to work is 50%; and*
- *70 days the chance of ever getting back to work is 35%.*

…

Unemployment has a significant negative impact on physical health and mental health and results in increased mortality rates. And…the problem is not merely one of association: on the balance of the evidence…unemployment causes, contributes to or accentuates these negative health impacts.

Their review found unemployment to be associated with:

- *Increased rates of overall mortality, and specifically increased:*
- *mortality from cardiovascular disease; and*
- *suicide;*
- *Poorer general health;*
- *Poorer physical health, including increased rates of:*
- *cardiovascular disease;*
- *lung cancer; and*
- *susceptibility to respiratory infections;*
- *Poorer mental health and psychological well-being;*
- *Somatic complaints;*
- *Long-standing illness;*
- *Disability; and*

[2] See for example *Working for a Healthier Tomorrow*, Dame Carol Black, March 2008 and the work of Prof Sir Mansel Aylward in the UK, who most recently wrote 'Overcoming Barriers to Return to Work: Towards Behavioural and Cultural Change', chapter 7 of *The Handbook of Return to Work: From Research to Practice*, Izabela Z. Schultz, Robert J. Gatchel (eds) ISBN 978-1-4899-7627-7. Sir Mansel was in Adelaide in September 2016 to provide an update on his work.

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- *Higher rates of medical consultation, medication consumption and hospital admission.*[3]

J.F. Ross wrote in 1995 that "The health risk of being out of work for long periods of time is equivalent to smoking 10 packets of cigarettes a day and research has shown that young men out of work for more than six months have a 40 times increased risk of suicide"[4].

We submit that the impact of the 30% whole person impairment threshold for ongoing weekly payments will eventually be positive by ensuring that people with a capacity for work, (which those under 30% and most over 30% will have), are not encouraged by the availability of ongoing entitlements to simply stop working and unwittingly face the very real risks to health, family and life set out above and elsewhere in the cited research.

Instead, we submit, the focus should be on ensuring that compensating authorities are focused on what the RTW Act already emphasises – early intervention and the earliest possible safe return to work as a first priority. We do not agree with the view that open-ended benefits should be more easily available.

We believe that the best interests of workers, employers and the State are best served by moving away from that obsolete and risky viewpoint.

We believe that levels of whole person impairment cannot viably be equated to total incapacity for work or the need for ongoing benefits. We cite the following examples of workers with high-range impairments who have remained at work. These are drawn from among our members:

Age	Pre-injury job	PI hours	Injury	WPI	Post-injury job & hours
42	Teacher	4 days/wk	Knee replacement	31%	Teacher, 2 days/week
45	Service deli operator	Full time	2 cervical fusions	31%	Checkout operator, full time
47	Registered Nurse	Full time	Chronic Regional Pain Syndrome	35%	Business Continuity & Telecommunications Project Officer, full time
42	Office worker	Full time	Spinal fracture	21%	Office worker, full time
58	Firefighter	Full time	40% burns to whole body	73%	000 operator and admin, full time
50+	Forklift driver	Full time	Amputated left leg above knee	36%	Youth worker, fitness trainer, boxing teacher, full time
50+	Production line worker	Full time	Bilateral arthritis of wrists	Over 50%[1]	Plant operator, full time
1. In cases where the WPI is obviously over 30%, it can be deemed appropriate to not subject the worker to an assessment and determine them to be seriously injured. In these cases the exact level of WPI is not known.					
40	Teacher	Full time	Spinal cord injury in 2001, incomplete paraplegia with severe spasticity	Over 30%[1]	Classroom support 10 hours per week with possible future increase
64	Teacher	Full time	MVA resulting in paraplegia in 1987	Over 30%[1]	Curriculum development, full time

[3] *Australian and New Zealand Consensus Statement on the Health Benefits of Work*, Royal Australasian College of Physicians and the Australasian Faculty of Occupational & Environmental Medicine, 30 March 2011 pp 12-13

[4] J.F. Ross, 'Where do the real dangers lie?', *Smithsonian* Issue 8 Vol 26 1995

Age	Pre-injury job	PI hours	Injury	WPI	Post-injury job & hours
55+	Teacher	Full time	Knee replacement with poor outcome in 2011	Over 30%[1]	Teacher, full time
55	FIFO mine worker	Full time	Septic arthritis - amputated left leg below knee in 2007 physical & mental sequelae	52%	Store manager/tyre retailer, 25 hrs/week
54	Storeman	Full time	Spinal, right knee, plantar fasciitis, neuroma right foot and hips	34%	Stock controller, full time
61	Grader operator	Full time	Knee replacement	30%	Office and deliveries, full time
66	Finance clerk	Full time	Cervical fusion	31%	Finance clerk, full time
48	Registered nurse	32	Cervical fusion	27%	Registered nurse, 32 hours per week
62	Registered nurse	38	Writing and keyboard overuse injury arms-WPI of cervical, left arm & right arm combined	40%	Registered nurse with permanent modifications, 38 hours per week
47	Registered nurse	28	Gradual onset, manual handling of heavy patients-cervical fusion 2009	31%	Registered nurse, 26.5 hours per week with restrictions to driving - different role to pre-injury
60	Administrative officer	37.5	Undertaking repetitive computer and clerical work-repetitive strain injury to right and left hands-multiple surgeries	41%	Administrative officer, 37.5 hours per week-different position & location to pre-injury
47	Registered nurse	38	Struck right knee on bed rail-requires knee brace and walking stick/scooter	35%	Registered nurse, 37.5 hours per week-different position & location to pre-injury
61	Personal carer	30	Slipped on a wet, slippery ramp and twisted knee-right knee replacement assessed as poor result	29%	Personal carer, 30 hours per week-pre-injury position & location
28	Registered nurse	24	Rolling patient to change pad and bedding-patient non-cooperative-injured left shoulder and low back	25%	Registered nurse, 24 hours per week-different position to pre-injury, but same location
33	Trainee medical specialist	38	Worker riding motorcycle to work lost control and crashed resulting in severed spinal cord	86%	In first year of four years of rehabilitation medicine-working full time since 7/2016-current contract to 2/2017

We submit that it could not be rationally argued that these people and the many like them are better off not working. Making ongoing benefits automatically available on the basis of any level of WPI where suitable employment opportunities that are within the worker's capacity are on offer is to us counter-intuitive and dangerous to the workers in the long run.

By the same token, labelling these workers as 'seriously injured' does nothing to enhance resilience and the will to remain at work.

With all that said, we note that the 30% whole person impairment threshold serves multiple purposes that could, should the need arise, be varied. It is, as the Review will be aware, the threshold for ongoing weekly benefits. It is also the threshold for:

- Seriously injured status, which apart from ongoing weekly benefits, also confers ongoing medical and allied health costs and no RTW obligations; and
- The right to sue at common law for future economic loss.

SISA has considered this convergence of thresholds around the 30% WPI level since before the Act commenced. Seriously injured status under the Act includes the ability to reach service and funding agreements with the Lifetime Support Scheme (LSS, which is the SA version of the acquired injury segment of the National Disability Insurance Scheme (NDIS)) under section 176 of the RTW Act. However, this is well out of step with the entry criteria for the LSS that applies to others not covered by the RTW Act (for example motor accident victims). Those criteria are injury-based and prognostic in nature rather than based on an assessment of whole person impairment[5].

While we do not minimise the impact of 30% whole person impairment on anybody, a 30% assessment will probably arise where, for example, a person has two successful knee replacements. In such a case, there is likely to still be a significant capacity for work. Compare that with the types of injury set out in the LSS Rules and the poor fit between section 176 of the Act and the LSS entry criteria is clear.

Types of injury required by the LSS Rules include major amputations, total blindness, severe burns, major spinal and brain damage. In effect, the LSS is designed for people who are catastrophically injured. 30% whole person impairment falls well short of that.

This incompatibility is created by the nexus between serious injury status, the ability to make agreements with the LSS, ongoing benefits and access to common law. However the integrity of the benefit structure is not greatly dependent on this nexus.

We submit that there is a need to remove the negative connotations that come with the automatic application of the label 'seriously injured' to people who have substantial remaining capacity for work[6]. In saying this we further submit that there should not be any consideration given to any form of narrative test as a supplement to WPI assessment as suggested in the Standing Committee Report at recommendation 4. Some years ago such a test was inserted into the common law provisions of the Victorian legislation as an alternative to WPI assessment[7]. This resulted in a drastic increase in the number of claims qualifying as

[5] See the *Lifetime Support Scheme Rules* Part 3 – Injury Criteria, page 14

[6] See also Recommendation 3 of the Standing Committee Report on page 25 of this submission

[7] See s.325(2) of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic). At 30 June 2017 common law accounted for 35 per cent of WorkSafe's total scheme liability, with damages payments accounting for 25 per cent and legal costs 10 per cent – see page 39 of the WorkSafe Vic Annual Report 2016-17. See also Recommendation 4 of the Standing Committee Report on page 25 of this submission

seriously injured for common law purposes as the much more subjective narrative test was interpreted more and more broadly over time. That in turn has led to a significant threat to that scheme's sustainability that remains to this day.

Part 5 - 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 as tabled in Parliament November 2017

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. Early intervention services can by law be covered by the current s.32.
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* (Committee Report 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, since few workers read the Act. 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 gives 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 – see Part 6. 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.
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.

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Recommendation		Affected section	Comments
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 given 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.
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.

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Recommendation		Affected section	Comments
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.
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.

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Part 6 – Common Law

This part is intended to place our views on common law on the review's record in response to Recommendation 9 of the Parliamentary Committee on Occupational Safety, Rehabilitation & Compensation Final Report into the Referral for an Inquiry into the Return to Work Act & Scheme

Background

The workers compensation policy paper published by the SA Government on 24th January 2014 as a precursor to the introduction of the then *Return to Work Bill 2014* contained the following passage:

Access to common law

Currently, there is no access to common law in the South Australian workers compensation scheme. Common law will be re-introduced to the South Australian system. This recognises that a variety of compensation approaches is often useful in a community, in order to suit different needs. A benefit dependency cycle may be avoided where a worker receives a common law settlement, and can then take responsibility for the ongoing management of their injury and control of their life.

Common law will be available to workers with a compensable work-related injury, subject to appropriate thresholds and restrictions. Our common law approach will ensure workers clearly understand the process, likely timeframes and estimated damages and costs. This will put workers in the best possible position to make their decisions. There will be special provisions for seriously injured workers to ensure funds for lifetime care and support are protected.[8]

The statement generated speculation and concerns about the final result. Much of that was based on a misunderstanding of the form and role of common law in the workers compensation setting. For example, in an opinion piece, the then President of the SA Law Society stated the following:

Key to the reforms is the reintroduction of common law. What that means in practice is that an injured worker can sue his or her employer in negligence for having caused an injury. This is welcome news, both from the point of view of injured workers as well as the scheme, which stands to be repaid the sums paid in statutory benefits from the proceeds of the common law claim. It is, in other words, a claw back of benefits paid by the WorkCover Corporation[9]*.*

This statement does not reflect how common law works as a component of Australian no fault workers compensation law and reflects an ongoing misconception of its role that persists to this day.

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[8] *A new recovery and return to work system for South Australians: A workers' compensation policy statement,* SA Government 28/1/14 page 5.

[9] Morry Bailes, 'Workers comp reform step in right direction', *The Advertiser* 3/2/14 page 18

A point frequently forgotten is that the now repealed SA workers rehabilitation & compensation scheme allowed for common law claims to be brought against employers from the scheme's commencement in 1987, until it was removed from the scheme by the Bannon Government in 1991. Those provisions can be summarised as follows:

- It was limited to non-economic loss (NEL) and solatium ('pain and suffering').
- It was capped at 1.4 times the applicable prescribed sum for statutory non-economic loss lump sums.
- Statutory payments made for non-economic loss under the repealed section 43 were offset against any common law damages award.
- Actions were dealt with under the SA *Civil Liability Act 1936*, which applied the standard civil burdens and standards of proof to cases seeking to prove negligence against employers, as well as to workers/plaintiffs for contributory negligence.
- Employers were indemnified against common law damages by the scheme.

Common law in the workers compensation context

The most fundamental point to understand about common law in the workers compensation setting (as it is currently understood) is that the workers compensation scheme indemnifies the employer against common law damages (though this is not a consideration for self-insurers). The Bailes article quoted earlier inferred that employers would have to find a separate means to fund or be indemnified against common law liabilities.

In reality, the scheme indemnifies the employer at common law and no other liability arises outside the Act or beyond the limits specified by the Act. In other words, common law is not in normal practice an open-ended exposure to tort under the *Civil Liability Act* - it is just another form of capped, statutory compensation, as ironic as that may sound[10].

Other points to be noted are:

- In normal practice, there is a bar on double compensation. This works in one of two ways. Common law payments can be offset by any statutory entitlements paid for the same thing. So, if a worker was paid a $30,000 lump sum for a loss and then won $50,000 at common law, then the worker would only receive an additional $20,000. In the case of recovery of compensation from common law payments made under the compulsory third party motor accident scheme, or where a worker sues some other third party for damages, then full damages are awarded, including compensation benefits already received, with the latter recovered by the compensating authority under section 66 of the current Act.
- It is usual for there to be a threshold on common law access[11] – 30% WPI in SA.

[10] The ACT scheme is a notable exception to these limitations.

[11] Again, the ACT scheme seems to be the exception.

- The Act requires seriously injured workers who opt for a lump sum rather than ongoing weekly benefits to make an election between a lump sum redemption of weekly benefits or the pursuit of a common law action for damages for future economic loss.
- The concept of the scheme clawing back payments from a worker who successfully sues only their own employer suggested in the Bailes article, can only be realised if there is different insurance applying to the employer's common law liability. This is not the case in SA.
- Workers can, at their option, sue more than just the employer at common law. Building site accidents are a frequent example. This raises all sorts of issues about apportionment of liability between the various defendants (which in other areas of the law is subject to the principle of proportionate liability), and how much they will each have to ultimately pay if the action is successful against all those sued. This is often in turn affected by contractual arrangements that might apply between defendants who are sued (e.g. between a labour hire employer and a 'host' employer), dictating who should pay what or who should indemnify who, and what insurance if any is available to provide protection in this regard.

Common law versus no fault

Few issues ignite workers compensation regulatory and stakeholder passions more than access to common law. Given the wide (and sometimes changing) range of approaches to common law access among the Australian workers compensation jurisdictions, it is certainly a basic issue that will have to be settled once and for all. Taken at its most fundamental level, this is, among other things, a debate over the role of workers compensation.

In December 2001, Dr Andrew Fronsko published a useful analysis of the history of the common law/no fault debate in both Australian and overseas statutory insurance schemes[12]. In it, he used the following quote to summarise the issue:

O'Connell et al (1998) provide an eloquent summary of the common law v no fault debate, drawing from a wide body of literature:

*Traditional **tort liability** for personal injury from auto accidents has long been criticised on the grounds that its costs are too high and that any compensation therefrom is inefficient, unfair, and dilatory.*

*But **no-fault** laws themselves are criticised for infringing upon the fundamental legal right to be paid based on fault not only economic but also non-economic damages (primarily for pain and suffering), and for failing in their promise to suppress auto insurance costs. The latter criticism is countered with the argument that no-fault laws' financial shortcomings are due to*

[12] A.L. Fronsko *No-Fault V. Common Law - Overview of Australian Compulsory Third Party (CTP) Insurance Schemes & 75 Years of Debate No-Fault V. Common Law Compensation for the Victims of Motor Vehicle Accidents,* December 2001 (ISBN 0-9580203-0-2).

preserving too many tort claims (above thresholds of either dollar losses or verbally described severity of injury) payable in addition to no-fault[13]*.*

Common law in the workers compensation context

In its historical form, common law is an adversarial concept with an objective aimed at compensating for loss and/or punishing a negligent party. Under pure common law, a settlement, (or in the absence of a settlement, a court), will decide the quantum of damages based on the evidence. However, there are four factors that limit the applicability of the pure common law concept in statutory insurance classes:

- In most if not all Australian workers compensation jurisdictions, the quanta of most heads of common law damages are, for better or worse, statute-limited under State and Territory civil liability legislation. In effect, they are simply another form of capped statutory entitlement once liability is established.
- In most workers compensation schemes where common law access is available, it is limited to economic or non-economic[14] loss (or both), meaning it arguably does little more than replace the equivalent statutory benefit (bearing in mind that those heads of damage are usually capped).
- Punitive or exemplary damages are not permitted.
- The punishment of negligence on the part of employers who injure employees is dealt with under the various work health and safety laws that contain criminal sanctions and significant penalties for this purpose. To suggest that workers compensation laws should also have a punitive element, (other than for breaches of those workers compensation laws), is redundant.

All Australian workers compensation schemes retain at least limited access to common law as part of their entitlement structures. In South Australia, it was deleted from the now repealed Act in 1991, (although a limited scope of action against negligent third parties still existed under s.54 of that Act). In 2014 it was re-introduced in its current form.

To us, the question of common law has to be addressed in this context – does its inclusion or exclusion affect the compensation that is ultimately payable? If the statutory entitlement structure directs higher proportions of compensation to more severely disabled workers, is this not a replication of one principal function of common law?

We observe that the existence of common law in its current variations does not appear to have a major influence on scheme funding. Before the commencement of the current Act, South Australia was in the worst funding position of all but one of the Australian schemes, and it had no common law from 1991 to 2015.

Each scheme has a funding balance in which weekly payments, lump sums, common law and the like work as segments of a single cost model that in turn partly drives scheme

[13] Fronsko p.21 quoting O'Connell, J., Carroll, S., Abrahamse, M.H. & Karan, A. 1998, *The Effect of Allowing Motorists to Opt Out of Tort Law in the United States*, Cahier de Driot, numero special 1998, Faculte de Droit, Universite Laval, Quebec,

[14] Also described by some schemes as 'pain and suffering'.

funding and heavily influences premium settings. If one cost component changes without corresponding changes to something else, the equation is upset and premiums have to be adjusted to reflect the different risk and liability balance. For example, if common law was made more accessible in South Australia, statutory lump sum entitlements and/or weekly payment levels would have to be adjusted downwards to at least achieve cost-neutrality.

Considerable enthusiasm is shown by some scheme participants for common law. However, SISA submits that their reasons are at best obsolete and ill-founded and at worst, ignorant of, or uncaring for, the consequences of unfettered common law actions for the parties involved and the broader interests of the entire scheme.

Perhaps more important than the above points is the unavoidable truth that an adversarial common law system cannot do anything other than conflict with the balance of an Act that relies for its operation on a collaborative relationship between the employer, employee and the compensating authority. This principle and much of the previous discussion was recognised as long ago as 2007-08 by the then Clayton Walsh review of the repealed Act:

The Review argues for the South Australian scheme, at all levels of its operation, being focused on return to work outcomes. The delays associated with, and adversarial nature of, the common law action are inimical to that goal. As well, empirical studies of the operation of common law demonstrate that it tends to over-compensate minor injuries and significantly undercompensate more serious injuries compared to long tail statutory arrangements such as exist in South Australia. The pre-requisite requirement of having to demonstrate fault for access to common law damages departs from the philosophical no fault basis of statutory workers' compensation schemes. As well, the relatively high transaction costs associated with common law means that it is a less efficient mechanism for delivering benefits to injured and ill workers than statutory benefit arrangements.[15]

It is significant that in the nearly 3 years since the commencement of the current Act, not one common law claim has been commenced to our knowledge. If anything, this is a clear indication that Part 5 of the Act could be deleted for all of the above reasons with no adverse consequences for any key stakeholder.

[15] *Review of the South Australian Workers' Compensation System* - Bracton Consulting Services Pty Ltd & PricewaterhouseCoopers, December 2007 page 19