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17 April 2018

The Hon. John Mansfield AM QC
GPO Box 464
ADELAIDE SA 5001

By email: RTWReview@sa.gov.au

Dear Sir

Independent Review of the administration and operation of the ReturnToWork Act 2014

1. The Society refers to its submission dated 22 February 2018. Recently, the Society's attention has been drawn to a supplementary submission of the ReturnToWork Corporation of South Australia ("the Corporation") dated 23 March 2018.

2. The Society wishes to make a supplementary submission in relation to some of the supplementary submissions of the Corporation.

3. In its first submission dated 11 January 2018, the Corporation noted:

> "A very significant challenge for ReturnToWorkSA in implementing the new Scheme has been managing the consequences of the legislative provisions that brought people with existing claims from the old Scheme into the new ReturnToWork Scheme, instead of "running off" their claims under the old Scheme."

4. It then referred to a significant reduction in dispute numbers before the South Australian Employment Tribunal.

5. In its submission dated 22 February 2018, the Society noted that the reduction in disputes identified by the Corporation was on the basis of excluding, in its figures and tables, the disputes relating to the transitional provisions.

6. In its supplementary submission the Corporation, inconsistent with its first submission, suggests at page 11:

> "…that both the number and type of reviewable decisions in the Act supports a litigious and adversarial culture in the scheme. The volume of disputes also

has an impact on the timeliness of decision-making, a worker's focus on recovery and returning to work and a proportion of premium collected being spent on costs associated with disputes rather than recovery and return to work".

7. The Corporation then proceeds to identify, at page 14 of its supplementary submission, an amount of $28.8 million having been spent "on legal costs" in 2016-17. Based on previous experience with various schemes and the bald figure stipulated with respect to "legal costs" the Society wrote to the Corporation seeking a breakdown of what constituted the relevant "legal costs".

8. In particular, the Society wishes to know whether the "legal costs" includes the following:

   8.1 Internal legal costs of the Corporation.

   8.2 Costs paid to lawyers representing the Corporation in all matters or just confined to the dispute resolution process.

   8.3 The amount paid to solicitors acting on behalf of injured workers.

   8.4 The amount paid to barristers representing injured workers.

   8.5 Whether it includes what would be commonly referred to as disbursements of the proceedings including expert fees for reports, conferences, cancellation fees and attendances in court. This relates primarily to medical experts but accounting expert evidence is sometimes also received.

9. The response received by the Society, from the Corporation, is as follows:

> "I am afraid the RTWSA's system doesn't record the categories of expenses requested at such a granular level – we'd be happy to provide the information if it was readily extractable. Pulling that information would be a labour-intensive exercise."

10. Importantly, the figure quoted by the Corporation does not separate the costs related to the transitional provisions of disputes and the costs related to claims for compensation under the new scheme not involving a transitional provision dispute. In its first submission the Corporation considered this to be important.

11. Moreover, the single figure of costs does not identify the proportion of costs related to proceedings which have included appellate proceedings seeking to clarify the construction of various provisions in the *ReturnToWork Act* 2014 ("the RTW Act").

12. The Society submits that no decision or recommendation should be made, based upon the figure of "legal costs" put forward by the Corporation unless and until a complete breakdown of the generic description is provided.

13. The Society notes it was recently reported that there are some 17 matters involving appeals to the Full Bench of the South Australian Employment Tribunal and where the unsuccessful party is seeking permission to appeal to the Full Court of the Supreme Court of South Australia. The Corporation refers to it in its supplementary submission.

14. Consistent with the experience after the introduction of the Work Cover Scheme in 1987, the Society expects a reduction in disputed proceedings and, consequentially costs, as relevant provisions have been finally interpreted by the Supreme Court and transitional cases have been finalised. The current legal costs are not a reliable indicator of ongoing costs.

15. It is of interest to the Society that the Corporation identifies a correlation between disputed proceedings and return to work outcomes but does not disclose the percentage of disputed proceedings, proceeding through the appellate stages, where it is the Corporation itself that is either instituting the appeal or seeking permission to further appeal.

16. Anecdotally, the Society is aware of the following:

    16.1 It is substantially the Corporation or the Compensating Authority that is seeking to appeal and further appeal decisions of the Tribunal in matters involving the construction of provisions of the RTW Act.

    16.2 In other disputed proceedings involving the question of law sought to be addressed on appeal, the Corporation is frequently declining to negotiate an outcome until the question of law is finally resolved.

17. There can be no doubt that, particularly the Transitional Provisions, but also new concepts in the RTW Act, which have not previously operated in the Workers Compensation Law in this State, have given rise to complex questions of law. Moreover, not only are substantial sums involved, the Tribunal is frequently dealing with the livelihood of injured workers. The social implications for our society of the construction and application of the provisions of the RTW Act are profound. These considerations inform the position consistently in this State, and over many decades, that injured workers, in particular, should be entitled to legal representation and to recover the reasonable costs associated with that, from the scheme.

18. A review of the jurisdictions which have included a form of administrative review reveals:

18.1 In some jurisdictions, the administrative review is potentially just another layer of dispute resolution process and potentially involving additional cost rather than saving cost.

18.2 In other jurisdictions, rather than involve a cost effective administrative process resulting in the right outcome, frequently, there are applications to the Supreme Court by reference to principles of procedural fairness and jurisdictional error.

19. In this context it is noteworthy to have regard to the main objectives of the South Australian Employment Tribunal set out in s8 of the *South Australian Tribunal Act 2014* ("the SAET Act"). It has a legislative responsibility to be independent, provide procedural fairness, deliver high quality and consistent decision making and at the same time be flexible and cost effective. It is the Society's submission that the Tribunal operates in this manner and that the representation of parties, by solicitors, before the Tribunal is an integral part of achieving the objects.

20. In its supplementary submission the Corporation advocates for a limitation in the types of decisions that should be reviewable by the Tribunal. This should be rejected. The RTW Act and the SAET Act set up a relatively complete code for the Tribunal to deal with disputes between parties to the proceedings. Notably, the SAET Act was recently amended, with the insertion of s26A, so as to allow the Tribunal to grant declaratory relief. The Parliament thereby recognised that, contrary to the position of the Corporation, the Tribunal should address all matters of dispute between relevant parties. That is desirable. The position of the Corporation would be likely to lead to otherwise unnecessary applications to the Supreme Court by way of judicial review. It is preferable that the specialist Tribunal deal with all matters at first instance and upon initial appeal. The Society supports the current regime of a further appeal to the Supreme Court only with its permission.

21. It is naive to and wrong to suggest, as the Corporation appears to, that 80% of the issues raised in the Tribunal should be capable of being resolved, by agreement within one month. Under the current scheme, with a requirement that decisions be made, ordinarily, within 10 days, it frequently takes longer than one month to obtain the relevant evidence when the decision is sought to be reviewed in the Tribunal.

22. The Society agrees that unnecessary appeals should be discouraged. At page 7 of the Corporation's first submission it states:

> "In terms of the SACAT's remit to keep costs at a minimum, the Act provides that the insurer pay costs for all parties on appeal at the SAET Full Bench and Supreme Court."

23. This is partly erroneous. While the Full Bench of the SAET has held that a party to proceedings on appeal before it is entitled to its reasonable costs provided it has acted reasonably in the conduct of the appeal, that does not apply in relation to further appeals to the Supreme Court. The Supreme Court has a general discretion with respect to the costs of such appeals.

24. The Society is troubled by other matters raised, for the first time, by the Corporation in its supplementary submission, as follows.

    24.1 In relation to the concerns expressed with respect to the *Mitchell* decision, it would seem that the concerns of the Corporation are based largely upon the actuarial report of Finity dated 20 February 2018. However, the commissioning letter and information relied upon by Finity to prepare its report has not been disclosed. The report, with respect to the Mitchell decision, is couched in general terms such as a prediction of "…a significant deterioration in the Scheme liabilities…" and that the current financial position is strong but "…this would materially worsen if Mitchell were upheld, as any increase in the liabilities leads to a dollar for dollar reduction in the Scheme's net asset position". The Society submits that such generalised and uncertain predictions are unhelpful and not a proper basis for a recommendation to amend the legislation.

    24.2 The Society is troubled by the submission, at page 2 that the decision in *Mitchell*:

> "…has significant cultural impacts, is contrary to the objects of the legislation, encourages a culture of sickness/dependence and litigiousness, incentivises "doctor shopping" and discourages recovery and return to work."

    24.3 In response, the Society submits:

        24.3.1 The relevant question arising from *Mitchell* is when percentages of whole person impairment, accepted to have been suffered, should be combined to reach an overall percentage of whole person impairment.

        24.3.2 The Corporation fails to explain what it means by "doctor shopping". Section 22 of the RTW Act provides that there can be only one

assessment of whole person impairment. There can be no relevant "doctor shopping" which is typically a reference to obtaining a second, third, fourth and so-on opinion where a party is not happy with the first opinion received.

24.3.3 It is difficult to follow the contention the Corporation that the decision discourages a return to work. The RTW Act imposes an ongoing obligation upon every injured worker to mitigate his or her loss. The availability of ongoing income support, for a seriously injured worker, is provided in recognition of the difficulty likely to be experienced for someone who is assessed as having been left with at least a 30% whole person impairment, in securing suitable employment. The Corporation's submission overlooks that. It seeks, by legislative force, to alter what ordinarily would be calculated by reference to the American Medical Association Guidelines for the Evaluation of Permanent Impairment, Fifth Edition, which is the primary source of the assessment of whole person impairment. Moreover, the submission overlooks the harsh reality that if *Mitchell* is overturned then one can expect that there will be many workers who may effectively be rendered totally and permanently incapacitated for work, who will receive no income support or treatment support because of an artificial separation of percentages of whole person impairment. It also means that those who do have a residual work capacity but would be benefited by ongoing treatment in order to sustain work activity would be precluded from accessing that treatment under the Scheme.

24.3.4 The Society does not support the Corporation's position of restricting the choice of doctor to assess an impairment. The Corporation should not be permitted to restrict and colour that choice based on its view. Section 22 of the RTW Act sets out a system for the accreditation of medical experts. If a medical expert has been appropriately accredited, under the Scheme, then the Society does not agree that a doctor should not be selected to undertake an assessment because the Corporation considers that there is another doctor more eminently qualified to do so.

24.3.5 It is important to note that the assessment of impairment is intended to be an objective method of assessing impairment. It does not involve complex interpretation of radiological and other investigations, clinical diagnosis, questions of causation or medical management. If

the Corporation is correct in its concern, then consideration should be given to a recommendation to replace the scheme of assessment of impairment altogether.

24.3.6 The Society would always urge caution in relation to retrospective operation of legislative amendment and the Society submits that a compelling reason has not been advanced for the amendment of s22(6) in the manner proposed by the Corporation.

24.3.7 The Society does not agree with the concern expressed by the Corporation that recent decisions of the Tribunal, such as that in Brealey has made the requirement of the relevant nexus between the injury and the workplace unclear. In particular, the Society does not agree with the contention of the Corporation that the intention of s7 is to require the connection between injury and employment to be "clear and strong". If that was what was intended by the Parliament then it would have used such terms in the section itself.

24.3.8 In relation to "emerging issues", as noted above, the Society understands that, shortly, there will be up to 17 matters proceeding to the Supreme Court. Significantly, with respect to the two cited cases of *Vodden*[1] and *Andrzejczak*[2], in each instance, it is the compensating authority that is seeking permission to appeal to the Supreme Court.

24.3.9 With respect to the submissions concerning a narrative test for seriously injured workers and psychological injury, the Society maintains its original submission.

25. Any review of a worker's compensation scheme should be balanced and have regard to the interest of all stakeholders. However, fundamentally, a primary object of any workers compensation scheme is to provide an appropriate level of compensation and an ability to effectively seek a review of decisions which can have a serious impact upon workers and employers. The Society notes that much of the submission of the Corporation has been directed to cost saving measures, by reducing compensation payable to injured workers. That ought not be the overriding basis for a review of a workers compensation scheme. The approach is particularly surprising noting the announcement by the Treasurer on 16 April 2018 of a further reduction in the base premium rate to 1.7% of payroll. That is a competitive rate when compared to other

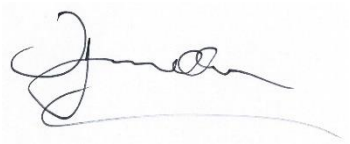
[1] *Vodden v RTWSA* [2018] SAET 3
[2] *Andrzejczak v Department for Education and Child Development* [2017] SAET 183.

States. The Society notes that the Chair of ReturnToWorkSA, Joanne Denley has also been quoted as reporting that the Scheme is currently, and has been for the last couple of years, fully funded.

26. The Society also notes that whilst further erosion in compensation payable to injured workers is being advocated by the Corporation, a statutory body, the Department of Premier and Cabinet is currently negotiating with various public sector unions to effectively reinstate compensation levels under the previous *Workers Rehabilitation and Compensation Act* 1986 through enterprise bargaining provisions, for a variety of public sector employees. The Society is concerned by the distinction being created between public sector and private sector employees as to the level of compensation payable for injured workers. That is neither desirable nor appropriate.

27. The balance of the Corporation's submission appears to be based on disappointment that its submissions as to the construction of various provisions of the RTW Act have been held, to date, to be wrong. The Society considers that it is preferable to have the outcome of the series of appeals to the Supreme Court before considering whether the legislation, as finally interpreted, should be the subject of legislative amendment with respect to those matters.

Yours sincerely



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