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9 May 2018

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

By email: RTWreview@sa.gov.au

Dear Mr Mansfield

Independent Review of the *ReturnToWork Act* 2014

1. I acknowledge receipt of your letter dated 8 May 2018 and the attached Finity Consulting Pty Ltd memorandum.
2. Thank you for bringing to my attention the contents of the memorandum and for providing the Society an opportunity to provide a further submission.

3. The Society questions a number of specific assumptions in the Scheme Actuarial Variation as at 31 December 2017 and wishes to make some additional observations.

4. On page 1 of the Finity memorandum is a quotation extracted from the reasons of the South Australian Employment Tribunal in the matter of *ReturnToWorkSA v Mitchell*[1]. The quotation is from paragraph 3 but represents only part of the paragraph. The balance is important in the context of the use sought to be made of the portion quoted in the Finity memorandum. The balance is as follows:

> "The result was that as well as his continued low back and bilateral leg pain, he began to experience chronic constipation, abdominal pain, belching, bloating, gastric reflux, jaw clenching, tooth grinding, dry mouth and diarrhoea. He also experienced urinary leakage and loss of rectal control. **There was no issue that all these complications resulted from the low back injury.**" (emphasis added)

5. Importantly, the Full Bench in *Mitchell* noted, as is evident from the quotation within the Finity memorandum, that there was not a simple correlation between the use of opioid medication and the complications which developed in that case. Firstly, the array and powerful nature of the medications used was described as "extraordinary". At

[1] [2017] SAET 81.

paragraph 9, the Full Bench referred to the amount of medication as "excessive". Secondly, not all of the complications were directly related to the opioid use.

6. The Society notes that, generally, opioid based drugs are the strongest form of pain relieving medication prescribed by doctors and typically, as a last resort, in circumstances of chronic and severe pain. It is a logical inference that, in appropriately managed cases, the prescription of opioids would generally be associated with the more severe injuries and where there is likely to be at least a 5% whole person impairment giving rise to an entitlement to a lump sum payment. That is regardless of the effect of the opioid medication.

7. The tables within the Finity memorandum assume (without apparent foundation) a correlation between the use generally of opioid medication and a consequential entitlement to a lump sum for impairment. It is suggested that follows from the decision in *Mitchell* but the reasoning is fundamentally flawed because, as noted above, the opioid use in *Mitchell* was "extraordinary" and "excessive".

8. The Society notes that the Finity memorandum contains statistics, received from the ReturnToWork Corporation of South Australia, in relation to the number of claimants who have claimed medication costs for opioid medication. In the circumstances, the Corporation would be in a position, if it were so inclined, to ascertain from those files what claims have been made for lump sum payments for permanent impairment and, importantly, claims made for consequential impairment attributable to the effects of the use of opioid medication. In the circumstances, we suggest that it is unsatisfactory to rely upon a report from Finity which is based upon assumptions rather than available evidence. This is particularly where the Scheme has now been in operation for almost 3 years and many assessments have been undertaken during that period.

9. On page 5 of the Finity memorandum a statistic is provided that of 750 claims per annum that have opioid use and obtain a lump sum, around 550 have evidence of legal representation at some point in their past. There is no attempt to provide statistics of the percentage of those claims where solicitors were involved in the s22 process for the assessment of whole person impairment. Those statistics should be readily available. No statistics are provided as to the injuries involved and the percentages of whole person impairment. It should have been a relatively straightforward exercise to provide Finity with the statistics, in relation to those 750 claims, of the percentage of whole person impairment and what that percentage related to. In particular, the relevant statistics of what was paid for the primary injury and what (if anything) was paid for consequential impairment related to the opioid use, should have been provided.

10. The Society contests the assumptions which are set out on page 6 of the Finity memorandum. The suggested number of claims appear to be pure speculation. Moreover, there is no attempt to identify the extent to which the whole person

impairment relates to primary injury and the extent to which it is related to evidence of opioid use.

11. In the circumstances, it is not surprising that the conclusions reached in the Finity memorandum are heavily qualified. As noted on page 10, the authors of the document have relied upon the accuracy and completeness of data and other information provided by the Corporation. For the reasons explained above, that is not a proper basis for drawing any conclusions. Not surprisingly, the authors of the document caution that other parties should conduct their own due diligence and should place no reliance on the advice or the data contained in the document which would result in the creation of any duty or liability by Finity to the third party. Essentially, the authors of the document are not prepared to accept responsibility for the conclusions reached. That is understandable because the support for those conclusions appear to be open to question. Your attention is invited, in particular, to what is recorded in the Finity memorandum under the heading "limitations in our work" on page 11.

12. The percentage suggested as transitional from non-seriously injured worker to seriously injured worker status on page 8 of the Finity memorandum appears to be based upon an assumption that the percentages of whole person impairment, for the "add-ons" which were allowed in *Mitchell,* would apply in all cases. There is no basis for such an assumption. The Society, in the circumstances, submits that there is no proper basis for the suggestion that most claims with an underlying WPI in the range of 21% to 29% would exceed the 30% threshold if the decision of the Full Bench in *Mitchell* is not reversed. There is no proper basis for the suggestion that 50% of claims within the range of 11% to 20% WPI for the primary injury would reach a status of seriously injured worker as a result of the reasoning of the Full Bench in *Mitchell.* There is no proper basis for the suggestion that 10% of those in the range of 5% to 10% WPI for the primary injury would reach the status of a seriously injured worker as a result of consequential impairments associated with the use of opioid medication. The Society considers the conclusions reached not only to be speculative but also highly questionable having regard to the anecdotal evidence from its members. Put simply, if the risk were anything like that suggested then the Corporation should be in a position to present evidence, from matters already determined, to support its case. It has failed to do so.

13. The Society wishes to make the following further observations:

    13.1. There can be no doubt that Mr Mitchell has been left with very severe permanent impairment. In referring to the percentage allocated, being 70% as a "very high score" a comparison is sought to be made with other types of injuries on page 2 of the Finity memorandum. That is not helpful as comparisons of severity of impairment are open to interpretation. The Society could provide many illustrations where, it can be reasonably suggested that the application of the relevant Impairment Assessment Guidelines produces an unfairly low percentage

of whole person impairment. More importantly, as noted above, the circumstances in *Mitchell* should be treated as "exceptional" and not a basis upon which it would be appropriate to make recommendations to amend the way in which the assessments of whole person impairment are undertaken under the Scheme generally. No matter what scheme is adopted, there will always be anomalies at the edges.

13.2. The Finity report suggests that the percentage in *Mitchell* is important because the higher the percentage of whole person impairment then the greater the amount of compensation. However, in fact, with respect to lump sum payments for permanent impairment pursuant to s58 of the ReturnToWork Act 2014, the ceiling is reached with a 50% whole person impairment. Mr Mitchell would have received exactly the same amount of compensation pursuant to s58 if his WPI had been set at 50%. Further, with respect to the status of a seriously injured worker, it makes no difference as to the percentage allocated once the threshold of at least a 30% whole person impairment is reached. Lump sum payments for economic loss only apply up to a 29% whole person impairment. Accordingly, the Finity memorandum proceeds upon a false assumption as to the likely broad impact of consequential impairments related to the use of opioid medication.

13.3. The Society is very concerned by the assumption related to legal representation. It seems necessary for the Society to point out that the ReturnToWork Corporation of South Australia discharges a statutory function and it is not to act by reference to its own interests[2]. The remarkable inference from the Finity memorandum, which may apparently be drawn, is that injured workers are unlikely to have, assessed by way of whole person impairment, consequential injuries unless they seek legal representation and become aware, through legal advice, that they have a right to be so assessed. The inference is that the Corporation will not arrange an assessment of whole person impairment for consequential injuries arising from the use of opioid medication, unless it is asked to do so. Indeed that is consistent with anecdotal evidence from our members. It simply reinforces the important role that lawyers have in the Scheme to ensure that the Corporation does discharge its statutory functions properly.

13.4. On page 7 of the Finity memorandum there is a general reference to an increase in the percentage of WPI, in the *Mitchell* matter, from 26% to 70% as a result of "add-ons". However, the urinary/reproductive (bladder) and urinary/reproductive (sexual) impairments are directly related to the severe spinal injury sustained and the failed surgery to treat the spinal and neurological impairment. Applying the combined values chart to those percentages alone would still yield 58% whole person impairment. Even if the injuries more directly

[2] *Robbins v Harbord and General Motors Holden Automotive Ltd* (1994) 62 SASR 229 at [25] per King CJ.

related to the excessive opioid use were to be excluded, there would have been no material change in the financial liability to the scheme.

13.5. The Society has had, serious concerns throughout its submissions, in relation to the selected and targeted approach of the ReturnToWork Corporation. Given the inconsistencies noted, the Society is not prepared to accept the statistics referred to on page 7 by reference to compliance reviews of WPI assessments. Those compliance reviews, conducted internally, are frequently disputed.

13.6. The Society finds it concerning that the Corporation would be associated with a document which contains, towards the bottom of page 7 of the Finity memorandum and, onto page 8, the following:

> "Counter to this, it has been suggested by some that the timing of the assessment makes little difference given their belief that some of these impacts are significantly exaggerated as a result of coaching."

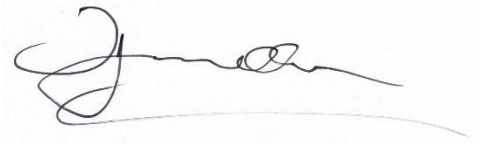
Without any evidence, and by reference to hearsay from an unidentified source, it is being suggested that the Scheme needs to be changed because of dishonest workers. Moreover, when the document is read as a whole, it is reasonable to infer that it is being asserted that lawyers are involved in such dishonesty. For example, on page 8, shortly after the above quoted statement, the following appears:

> "Participant behaviour, particularly from plaintiff lawyers – as noted above, ReturnToWork SA advised us that almost immediately after *Mitchell* they began seeing more claims seeking to have these impacts included in WPI assessments."

Under its statutory function to provide proper compensation to workers, the Corporation should of its own accord, make appropriate changes to its approach in response to court determinations.

14. The Society reiterates the concerns expressed in previous submissions that the approach of the Corporation, to the review, has had a single focus of reducing responsibility by reducing compensation payable to injured workers. In the process, it has seen fit to criticise, without evidence, the legal profession in this State. The Society urges you unequivocally and explicitly to reject these criticisms.

Yours sincerely



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