

27 February 2019

Senator Rachel Siewert
Committee Chair
Community Affairs References Committee

Dear Senator Siewert

Re: Inquiry into Support for Australia's Thalidomide Survivors

Recently, I was requested by Mr Peter Gordon of Gordon Legal to provide you with a brief description of how I went about the process of assessing the respective entitlement of the then-recognised thalidomiders to compensation under the ANZ Thalidomide Trust *Ex Gratia* Scheme in 2010. Since receiving his request, I have also received a request from your Committee to answer certain questions about the process. I shall answer those questions in a separate letter

As you are aware, I was one of a panel of three people who assessed the entitlement of the beneficiaries to compensation under the 2010 Trust. The other two panel members were Professor Janet McCredie and Professor Earl Owen. The three of us conferred at some length at my chambers in Phillip Street, Sydney in December 2010 to assess the respective entitlements of the 46 Trust beneficiaries. I was briefed to perform this work by Mr Gordon and I understood the client to be Mr Youdale and the ANZ Thalidomide Trust.

At the end of our evaluation and discussions concerning each case, *vis a vis* the others, we agreed upon the assessment of each beneficiary. We had been informed that a similar exercise had been conducted in the United Kingdom for thalidomiders there; that trust payments to those thalidomiders had been scaled in accordance with the severity of their disabilities, and that it was the intention of Mr Youdale and Diageo (which was funding the exercise,) to achieve a similar result. The English exercise had been based on some published medical research as to the needs of thalidomiders and it is my recollection that we were informed of this research.

For each thalidomider, all members of the panel were provided with a summary of their circumstances and they were also interviewed and examined by one or both of the doctors on the panel.

I am aware that Professor McCredie has submitted to your Committee that she arrived at her own assessment of the severity of each survivor's disability by counting the number of affected nerves and providing an additional component for internal injuries and then arriving at a numerical point score for each survivor.

While this may have been the approach adopted by Professor McCredie, it was certainly not the approach which I adopted in performing my task on behalf of the Trust. My understanding was always that it was the degree of each survivor's disability, measured by comparison to the degree of disability of the other survivors, which should determine the entitlement of each to a payment under the Trust. Indeed, I retain records which demonstrate that I challenged the appropriateness of the approach Professor McCredie advocated because it was disconsonant with the objectives of the trust as they had been outlined to me.

Assessing the degree of disability of an individual for the purposes of the determination of compensation, while taking into account compensation awarded to other persons with similar disabilities but of different severity, is a process with which I am very familiar. As a barrister specialising in the assessment of damages for personal injuries over the last 44 years I have performed such assessments on innumerable occasions.

My assessment of the entitlement to compensation of the beneficiaries under the Trust was based purely upon the degree of disability of each person, in the same way in which a common law assessment of the ongoing consequences of injuries, whatever their cause, is customarily undertaken.

Professor Earl Owen has sadly passed away since he participated, with Professor McCredie and me, in the panel's determination. Clearly I cannot speak with certainty as to the manner in which he undertook the task of assessing the respective entitlements under the 2010 Trust of the thalidomide beneficiaries. Nevertheless my recollection from our discussions in the course of our determinations is that the late Professor Owen appeared to adopt the approach which I adopted, namely that of broadly assessing the extent of each survivor's disabilities relative to those of the other survivors.

I also retain records which demonstrate clearly that the scale of payment attributed to each beneficiary was indeed based on an overall assessment of the degree of their disability (and not a counting of affected nerves.) Subject to arrangements which ensure there would be no breach of confidentiality, no breach of the terms of my retainer and no breach of my obligations as to legal professional privilege, I would have no objection to the disclosure of my relevant written records to the Committee.

Yours faithfully

Peter Semmler QC