

School of Business Law

**The Convergence of Industrial and Workers Compensation Laws
In the 1990s in Western Australia**

Robert Guthrie

**This thesis is presented for the Degree of
Master of Commerce
of
Curtin University of Technology**

November 2003

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university.

To the best of my knowledge and belief this thesis contains no material previously published by any other person except where due acknowledgment has been made.

Signature: .

Robert Guthrie

Date:

1/6/04

Abstract

This dissertation describes and interprets the effects of the significant changes to the workers compensation, industrial and related laws that occurred in the early 1990's in Western Australia. These could be characterised as motivated by a desire by the then Coalition Government to reduce access to legal representation in compensation claims, limit the potential of workers to claim damages for negligence and reduce the use of collective bargaining mechanisms to resolve industrial disputes. Arguably, the common philosophical themes were to individualise the relationship between employer and employee and to reduce the bargaining strength of workers. In general terms, these themes were presented under the guise of "flexible workplace relations." Whether these outcomes were achieved is not the subject of this analysis, rather, the aim is to show that one (perhaps unintended) consequence of the legislative changes of the early 1990's was to create significant areas of overlap in various employment related laws. These areas of overlap have led to some difficulties within the various tribunals involved in the resolution of employment related disputes. Over the last decade, the issues arising from the 1990's amendments have crystallized into important principles, which are discussed in this work. The thesis of this dissertation is that an examination of the development of the industrial and workers compensation laws in Western Australia in the 1990's establishes sufficient commonality between the industrial relations and compensation systems to warrant the rationalisation of these two jurisdictions.

Acknowledgements

I thank my supervisors Dr Pauline Sadler, Associate Professor Kevin Brown and Associate Professor Alan Nankervis for their thoughtful comments, valuable insights and encouragement with this work, which would not have been completed without their assistance. I also thank Colin Huntly (again) for assisting me with the formatting of the dissertation.

I thank my partner Trish Cowcher who has to live and breathe workers compensation as part of the matrimonial bargain. She suggested that I put this material together.

The dissertation is dedicated to all the students at Curtin University of Technology who have tolerated my passion for the subject matter of this work. It is also dedicated to my late father Kevin David Guthrie and my mother Cathleen Guthrie.

Contents

Declaration.....	ii
Abstract.....	iii
Acknowledgements.....	iv
Contents.....	v
Table of Cases.....	vii
Table of Statutes.....	xii
Citation Reference.....	xiii
Introduction.....	1
Examining The Relationship Between Industrial Relations And Compensation ...	4
Thesis.....	5
Methodology.....	5
Chapter 1.....	8
The Resolution of Disputes.....	8
1.1 The Structure and Procedure of the WA Industrial Relations Commission	8
1.2 The 1993 Amendments to Industrial Laws.....	20
1.3 The Workers Compensation Jurisdiction.....	23
1.4 Interaction between the Jurisdictions – Questions of Evidence.....	29
1.5 The Role of Unions and Legal Practitioners.....	36
1.6 The Role of Employers.....	39
1.7 The Role of Government.....	42
1.8 Overview and Comment.....	43
Chapter 2.....	47
Industrial & Compensation Laws -- Eligibility Criteria.....	47
2.1 The Relationship of Employer and Employee.....	47
2.1.1 The Control Test.....	48
2.1.2 The Organisational/Integration Test.....	51
2.1.3 The Economic Reality Test.....	59
2.2 The Definition of the term “Worker” under the <i>Workers Compensation and Rehabilitation Act 1981 (WA)</i>	72
2.3 Summary.....	76
Chapter 3.....	78
Stress Claims and Industrial Relations.....	78
3.1 Historical Development of Stress Claims.....	78
3.2 The 1993 Amendments to the Definition of Disability.....	82
3.3 The Process of Claiming Compensation for Stress.....	84
3.4 Cases on Stress.....	87
3.5 Overview - The Merging of the Jurisdictions.....	100
Chapter 4.....	103
The Calculation of Wages and Compensation.....	103
4.1 The First Schedule of the <i>Workers Compensation and Rehabilitation Act 1981 (WA)</i>	103
4.2 Calculation of Compensation by Reference to an Award.....	106
4.3 Workplace Agreements and Compensation Payments.....	107
4.4 1999 Amendments to Clause 11A.....	110
4.5 Compensation and Leave Entitlements.....	113

4.6	Travel Provisions, Make-up Pay and Accident Pay.....	118
4.7	Comment.....	122
Chapter 5.....		125
Return to Work Provisions, Frustration of Contract and Discrimination on the Grounds of Disability.....		125
5.1	Western Australian Return to Work Provisions	126
5.2	Failure to Return to Work and Frustration of the Contract of Employment 132	
5.3	Discrimination on the Grounds of Disability.....	139
5.4	Workers Compensation Claims and Constructive Dismissal	145
5.5	Some Comments on the interaction of Return to Work Provisions and other laws	148
Chapter 6.....		150
Other Industrial Matters Affecting Compensation.....		150
6.1	Disclosure of Employment Related Information.	150
6.1.1	Pre-employment Medical Tests and Examinations.....	152
6.1.2	Medical Tests and Examinations during the Course of Employment 157	
6.1.3	Employer Justifications for Seeking Medical Information	165
6.2	Disentitlement to Compensation, Summary Dismissal and Misconduct	178
6.3	Redundancy.....	184
6.4	Illegal Contracts of Employment	190
6.5	Compensation Cases and the issue of Illegality.....	192
6.6	Compensation Cases involving immigration issues	194
6.7	Sex Workers and Compensation Claims	200
6.8	Rehabilitation and return to work	203
6.9	Trends in cases involving Illegality	204
6.10	Contracting Out of Entitlements	207
6.11	Overview - Forum Shopping	214
Conclusion		219
Bibliography.....		225

Table of Cases

Cases

<i>A Complainant & Anor v The State of Western Australia</i>	189
<i>Abalos v Australian Postal Commission</i>	20
<i>Abbott v Galvin</i>	96
<i>Abonyi v Australian Postal Corp</i>	166
<i>Accident Compensation Commission v Odco Pty Ltd</i>	59, 75
<i>Adams v GKS Fibreglass Pty Ltd</i>	56
<i>Addis v Gramophone Co Ltd</i>	157
<i>ALHMWU (WA) v Commissioner of Main Roads</i>	56
<i>Allegretta v Prime Holdings Pty Ltd</i>	184
<i>Amalgamated Metal Workers and Shipwrights Union of WA v Hamersley Iron Pty Ltd</i>	13
<i>Amalgamated Metal Workers and Shipwrights Union of WA v State Energy Commission of WA</i>	18
<i>Amprino v Waverley Lighting</i>	104
<i>Anderson v Mineral By-products Pty Ltd</i>	186
<i>Andrews v Uniting Church in Australia Frontier Services</i>	139
<i>ANI v Massey</i>	206
<i>Ansett Australia Ltd v Burgess</i>	100
<i>Ansett Transport Industries (Operations) Pty Ltd v Wardley</i>	203
<i>Application by Tasmanian Confederation of Industry to vary the Marine Boards Award</i>	227
<i>Ardeshirian v Robe River Iron Associates</i>	197
<i>Arnotts Snack Products Pty Ltd v Yacob</i>	108
<i>Australia Meat Holdings Pty Ltd v Kazi</i>	215
<i>Australian Iron & Steel Pty Ltd v Banovic</i>	203
<i>Australian Railway Union of Workers, West Australian Branch and Ors v West Australian Government Railways Commission</i>	172
<i>Australian Workers Union Western Australian Branch, Industrial Union Of Workers v Robe River Iron Associates</i>	196
<i>Automotive Food Metals Engineering Printing and Kindred Industries Union of Workers Western Australian Branch v DOM-UIE Pty Ltd</i>	177
<i>Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union Of Workers, Western Australian Branch v Leighton Contractors Pty Ltd</i>	126
<i>AWU v Argyle Diamond Mines Pty Ltd</i>	128
<i>Balfour v Travelstrength Ltd</i>	102
<i>Ball v Hunt</i>	108
<i>Bank Voor Handel En Scheepvaart N.V. v Slatford</i>	55
<i>Baron v George Weston Foods Ltd</i>	31
<i>Bates v Mountway Nominees Pty Ltd</i>	233
<i>Baxter v Burswood Resort Management Limited</i>	186
<i>Bechara v Gregory Harrison Healey & Co (No2)</i>	153
<i>Bell v Lever Brother Ltd</i>	168
<i>Bell v Western Australian Fire Brigades Board</i>	34
<i>Benck v Hamersley Iron Pty Ltd</i>	169
<i>Berry v Cotech Pty Ltd</i>	164, 165
<i>BHP Coal Pty Ltd v Various Coal Industry Employees</i>	176
<i>BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australian, Western Australian Branch</i>	171
<i>BHP Steel (AIS) Pty Ltd v Birtasic</i>	229
<i>Bird v Commonwealth</i>	103
<i>Blair v Curren</i>	32
<i>Bliss v South East Thames Regional Health Authority</i>	162
<i>Blyth Chemical Limited v Bushnell</i>	186
<i>Bogunovich v Bayside Western Australia Pty Ltd</i>	158
<i>Borg v Troubleshooters Available Pty Ltd</i>	59
<i>Bottrill v James Hardie and Co Pty Ltd</i>	167
<i>Brash v WorkCover</i>	47

<i>Brown v Metro Meat International Ltd</i>	37
<i>Building Workers Industrial Union v Odco Pty Ltd</i>	58, 62
<i>Byrne & Frew v Australian Airlines Ltd</i>	120
<i>Cam & Sons v Sargent</i>	57
<i>Campbell v ACT Community Care</i>	165
<i>Capodicasa v Herald and Weekly Times Ltd & Ors</i>	158
<i>Carrigan v Darwin City Council</i>	138, 140
<i>Casey v State Electrical Commission of Victoria</i>	202
<i>Catholic Care v Wrafter</i>	95
<i>Catlin v Weinel</i>	186
<i>Caufield & Ors v Gunnedah Coal Limited</i>	203
<i>Charles Moore & Co (WA) Pty Ltd v FCT</i>	225
<i>Churchill v Town of Cottesloe</i>	150
<i>Clements v Norm Wrightson t/as Hairways</i>	39
<i>Clouston & Co Ltd v Corry</i>	96
<i>Coastal District Timber Hewers' Union v Millars' Karri & Jarrah Co (1902) Ltd</i>	12
<i>Codelfa Construction Pty Ltd v State Rail Authority of New South Wales</i>	145
<i>Commission for Safety and Rehabilitation of Commonwealth Employees v Chenhall</i>	100
<i>Commissioner, Public Service Commission & Ors v Civil Service Association of WA</i>	226
<i>Commonwealth v Oliver</i>	82
<i>Concrete Constructions (NSW) Pty Ltd v Nelson</i>	71
<i>Confederation of WA Industry (Inc) v West Australian Timber Industry Union, Industrial Union of Workers, South West Land Division</i>	226
<i>Corcoran v The Great Fingal Gold Mining Company</i>	77
<i>Cosma v Qantas Airways Limited</i>	155
<i>Courts v Wigmore's Tractors Pty Ltd</i>	204
<i>Crengle v Lake Brunner Sawmilling Co</i>	103
<i>Curro v Beyond Productions Pty Ltd</i>	144
<i>Cusato v The Atlas Group Pty Ltd</i>	152
<i>Davis Contractors Ltd v Fareham Urban District Council</i>	145
<i>De Bono v TransAdelaide</i>	169
<i>Dean v Tempo Services Ltd</i>	223
<i>Devries and Another v Australian National Railways Commission and Another</i>	20
<i>Dowell Australia Ltd v Archdeacon</i>	130
<i>Duggan v Shore Inn Pty Limited</i>	184
<i>Duncan v Royal Perth Hospital</i>	228
<i>Durham v Westrail</i>	136, 144
<i>Emmerson v Housing Industry Association</i>	140
<i>Engineering Workers Union Western Australian Branch and Others v AMEC and Others</i>	177
<i>Ettridge v Transadelaide</i>	194
<i>Ex parte Mt Newman Mining Co Pty Ltd</i>	20
<i>Ex Parte Rusich</i>	37
<i>F C Shepherd and Co Ltd v Jerrom</i>	145
<i>Federal Broome Co Pty Ltd v Semlitch</i>	91
<i>Federal Commissioner for Taxation v J. Walter Thompson (Aust.) Pty Ltd</i>	53
<i>Federated Clerks' Union v Victorian Employers' Federation</i>	12
<i>Fernandes - v. Comgroup Supplies Pty Ltd</i>	133
<i>Finch v Sayers</i>	146
<i>Flour Daniel Pty Ltd v Construction, Forestry, Mining and Energy Union & Others</i>	177
<i>Gardiner v State of Victoria</i>	134
<i>Garrity v Commonwealth Bank of Australia</i>	154
<i>Gates v Stoddart</i>	28
<i>Gehrig v McArthur River Mining Pty Ltd</i>	182
<i>General Motors-Holden Limited v D'Andrea</i>	227
<i>Gerrard v Mayne Nickless Ltd & Ors</i>	70
<i>Ghale v Low Key Pty Ltd</i>	56
<i>Glover v Eltham College</i>	233
<i>Gordon & Gotch (Australiasia) Limited v Cox</i>	168
<i>Gregory v Philip Morris Ltd</i>	95

<i>Griffin Coal Mining Co Ltd v The Coal Mining Industrial Union of Workers of Western Australia</i>	117
<i>Gunes v Hankar Nominees Pty Ltd</i>	232
<i>Gunnedah Shire Council v Grout</i>	156
<i>Haley v London Electricity Board</i>	178
<i>Harding v EIG Ansvar Ltd</i>	70
<i>Hart v Robowash Pty Ltd</i>	157
<i>Heat Containment Industries v Kimberley</i>	109
<i>Henderson v Electrolytic Zinc Company of Australasia Limited</i>	180
<i>Hillview Nursing Home v Hospital Employees' Industrial Union, WA</i>	18
<i>Hilton Hotels of Australia Limited v Pasovska</i>	147
<i>Hind v Attorney-General for Tasmania</i>	190
<i>HJ Heinz Company Australia Ltd v Turner</i>	184
<i>Hobbs v Capricorn Coal Management Pty Ltd</i>	191
<i>Hocks v Davies</i>	12
<i>Hoddy v Department of Corrective Services</i>	189
<i>Hoffman v Western Australian Aboriginal Media Association</i>	144
<i>Holdlen Pty Ltd v Walsh</i>	103
<i>Hollingsworth v Commissioner of Police</i>	167
<i>Horner v Rymer</i>	225
<i>Howell v State Rail Authority</i>	190
<i>Human Rights and Equal Opportunity Commission v Mount Isa Mines & Ors</i>	191
<i>Humberstone v Northern Timber Mills</i>	53
<i>Iliadis and Comcare</i>	187
<i>Johnson v Marshall & Sons & Co Ltd</i>	194
<i>Johnstone v Department of Conservation & Natural Resources</i>	150
<i>Kaiser v Burswood Resort (Management) Ltd</i>	32
<i>Karel v Hospital Laundry and Linen Service</i>	123
<i>Kavanagh v Commonwealth</i>	82
<i>Kay v Cargill Foods Australia</i>	170
<i>Kemcor Australia Pty Limited v Various Chemical Industry Employees</i>	176
<i>Kirkwood v Oaksbury Pty Ltd</i>	180
<i>KP Welding Construction v Herbert</i>	224
<i>Kukulj v Newcrest Mining Limited</i>	113
<i>Kuligowski v Metrobus</i>	36
<i>Le Good v Stork Electrical Pty Ltd</i>	229
<i>Lister v Romford Ice and Cold Storage Co Ltd</i>	198
<i>Lloyd v R J Gilbertson (Qld) Pty Ltd</i>	158
<i>Lourdes House Hospital v Wheeler</i>	228
<i>Madafferi v City of Northcote</i>	181
<i>Margio v Fremantle Arts Centre Press</i>	96
<i>Marriot v Maltby Main Colliery</i>	103
<i>Marshall v Harland and Wolff</i>	146
<i>Martin v International Freight Consolidators Pty Ltd</i>	104
<i>Masters v Local Boys Pty Ltd</i>	141
<i>Matchett v Wincol Homes Pty Ltd & Ors</i>	227
<i>Mathews & Ors v Queensland Corrective Services</i>	190
<i>May v Lilyvale Hotel Pty Ltd</i>	164
<i>McFarlane v Daniell</i>	224
<i>McNair v Press Offshore Limited and Another</i>	33
<i>McPhee v Simpson</i>	168
<i>McPherson v WA Print</i>	93
<i>McQuillen v The University of Melbourne</i>	179
<i>Mercedes-Benz (Australia) Pty Ltd v The Commissioner for Equal Opportunity and Ors</i>	232
<i>Mercer v Thomas P Clarke (Aust) Pty Ltd</i>	104
<i>Metals and Engineering Workers Unions Western Australian Branch v East Perth Electrical Services and Others</i>	163
<i>Mocerino v Cellulose Fibre Insulation Pty Ltd</i>	111
<i>Mohazab v Dick Smith Electronics Pty Ltd</i>	157
<i>Montreal v Montreal Locomotive Works</i>	63

<i>Munby v Telstra Corporation Limited</i>	137
<i>Mutual Acceptance Co Ltd v Federal Commr of Taxation</i>	111
<i>Narich v Commissioner of Payroll Tax</i>	58
<i>Newcastle Catering v Ahmed</i>	225
<i>Noack v BGC (Australia) Pty Ltd</i>	33, 135
<i>O'Sullivan v Noarlunga Meats</i>	119
<i>Osborne v CSR Timber Products</i>	182
<i>Papa & Others v Finemores</i>	71
<i>Paris v Stepney Borough Council</i>	178, 190
<i>Pearce v Lake View & Star Ltd</i>	25
<i>Peck v Commissioner of Corrective Services</i>	181
<i>Performing Right Society v Mitchell and Booker (Palais de Danse) Ltd</i>	51
<i>Perlidis v Brambles Security Services Limited</i>	155
<i>Perth Finishing College Pty Ltd v Watts</i>	102
<i>Perzorno v Workers Rehabilitation Compensation Corporation</i>	114
<i>Phelan v Main Roads Board</i>	75
<i>Porter v Eltin Underground Operations Pty Ltd</i>	198
<i>Pozzi v Aylen</i>	75
<i>Qantas Airways v Christie</i>	154
<i>Quality Bakers of Australia Ltd v Goulding & Anor</i>	230
<i>Queensland Stations Pty Ltd v Federal Commissioner of Taxation</i>	69
<i>R v Conciliation Commissioner; Ex parte Coastal District Committee, Amalgamated Engineering Union</i>	20
<i>R v Foster, Ex Parte Commonwealth Life (Amalgamated) Assurances</i>	57
<i>R v Industrial Commission of South Australia; ex parte Adelaide Milk Supply Cooperative Ltd</i>	199
<i>R v Watson: Ex parte Armstrong</i>	17
<i>R. J Brodie (Holdings) Pty Ltd v Pennell</i>	130
<i>Ranger and Comcare</i>	187
<i>Ramayake v Sir Charles Gairdner Hospital</i>	142
<i>Re Coldham; ExParte Australian Social Welfare Union</i>	12
<i>Re Cram; Ex Parte N.S.W. Colliery Proprietors Association Ltd</i>	12
<i>Re Dingjan: Ex parte Wagner</i>	70
<i>Re Monger ; Ex Parte Dutch & Ors</i>	37
<i>Re Monger; Ex Parte WMC Resources Ltd & Anor</i>	37
<i>Re Porter: Ex parte TWUA</i>	64
<i>Re Schofield v Comcare</i>	187
<i>Re; Rogelio Benito</i>	219
<i>Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance</i>	63
<i>Redbar Excavations Pty Ltd v Construction, Forestry , Mining and Energy Union</i>	174
<i>Reilly v Roads Corporation</i>	151
<i>Riley v WorkCover/Alliance Australia (Robinvale Transport Group (SA) Pty Ltd)</i>	212
<i>Riverwood International Australia Pty Ltd v McCormick</i>	120
<i>Robe River Associates v Coombes</i>	198
<i>Roberts v Dorothea Slate Quarries Co Ltd</i>	83
<i>Robertson v Kraft</i>	33
<i>Robowash Pty Ltd v Hart</i>	157
<i>Ruf v GMH Ltd</i>	186
<i>Ryder v Clackline Refractories</i>	108
<i>Schlipalius v Petch & Anor</i>	189
<i>Senior v Lower North Metropolitan Health Service Board of Management</i>	153
<i>Silaphet and South Western Area Health Service</i>	104
<i>Simmons Ltd v Hay</i>	146
<i>Sinnott v F J Trousers Pty Ltd</i>	190
<i>Soares v Bayer Australia Ltd</i>	232
<i>South Maitland Railways Pty Ltd v James</i>	196
<i>SSTU v Minister for Education</i>	98
<i>State Energy Commission v Van Zyl</i>	83
<i>State of New South Wales v Seedman</i>	190
<i>Stevens v Brodribb Sawmilling Co Pty Ltd</i>	55

<i>Stevenson Jordan and Harrison v MacDonald & Evans Ltd</i>	54
<i>Stockwin v Cablesands Pty Ltd</i>	137
<i>Stowar & Others v Myer Stores Ltd</i>	71
<i>Stratton v Illawarra County Council</i>	94
<i>Summit Homes v Lucev</i>	31, 78
<i>Taxpayer v FCT</i>	225
<i>Taylor v Department of Lands and Surveys</i>	108
<i>Tenix Defence Systems Pty Ltd v Various Shipping Industry Employees</i>	175
<i>The Broken Hill Associated Smelters Pty Ltd and Human Rights and Equal Opportunity Commission</i>	192
<i>The Eugenia</i>	145
<i>The Independent Schools Salaried Officers' Association of Western Australia, Industrial Union of Workers v Christ Church Grammar School Inc</i>	125
<i>The Western Australian Builders Labourers, Painters and Plasterers Union of Workers v Adsigns Pty Ltd and Others</i>	119
<i>Thiess Contractors Pty Limited v Various Coal Industry Employees</i>	175
<i>Thompson v Armstrong and Royse Pty Ltd</i>	108
<i>Tolchard v Mansard Home</i>	78
<i>Trewin v Comcare</i>	101
<i>Tsarkiroglou and Co Ltd v Noblee Thorl GmbH</i>	145
<i>Turner v Sawdon and Co</i>	143
<i>United Constructions & Others v Various Building, Metal and Civil Construction Industry Employees</i>	176
<i>Vurlow v Leighton Nursing Homes</i>	109
<i>Waghorn v South Blackwater Coal Limited</i>	141
<i>Wallis v Attorney General</i>	120
<i>Wardle v Castelemaine Perkins Ltd</i>	197
<i>Watson v JK Colero Enterprises Pty Ltd</i>	232
<i>Western Australia v Mathai</i>	90
<i>Western Australian Prison Officers' Union of Worker v AGG and Ministry of Justice</i>	189
<i>Weston v Great Boulder Mines Limited</i>	196
<i>Wheatley v Smith</i>	232
<i>Williams v Williams</i>	196
<i>Wishart v MPL Laboratories</i>	111
<i>Withers v AV Jennings Pty Ltd</i>	206
<i>Wolmar v Travelodge Australia Ltd</i>	82
<i>Woodhouse v Wood Coffill Funerals Pty Ltd</i>	151
<i>Worden v Diamond Offshore General Company</i>	170
<i>Workers Rehabilitation and Compensation Corporation v Rubbert</i>	92
<i>Wormald Security Australia Pty Ltd v Rohan</i>	177
<i>Wright v Hodgeman Enterprises Pty Ltd</i>	223
<i>X & Anor v State of Western Australia</i>	190
<i>X v Department of Defence</i>	191
<i>Zammit v The Queensland Corrective Services Commission</i> (.....)	190
<i>Zickar v MGH Plastic Industries Pty Ltd</i>	82
<i>Zubrinich v Pasmenco Metals-BHAS Pty Ltd</i>	156
<i>Zuijs v Wirth Brothers Pty Ltd</i>	52
<i>Zurich Australian Insurance Pty Ltd v Amec Services Pty Ltd & FAI General Insurance</i>	272

Table of Statutes

Statutes

<i>Accident Compensation Act 1985 (Vic)</i>	59
<i>Anti-Discrimination Act 1991 (Qld)</i>	197
<i>Criminal Law (Sentencing) Act 1988 (SA)</i>	213
<i>Disability Discrimination Act 1992 (Cth)</i>	154
<i>Education Act 1928 (WA)</i>	97
<i>Equal Opportunity Act 1984 (WA)</i> .. 105, 106, 139, 149, 155, 158, 161, 167, 178, 179, 189, 202, 231, 233	
<i>Equal Opportunity Act 1995 (NSW)</i>	185
<i>Industrial Arbitration 1979 (WA)</i>	10, 13
<i>Industrial Arbitration Act 1912 (WA)</i>	10
<i>Industrial Arbitration Act 1940 (NSW)</i>	72
<i>Industrial Conciliation And Arbitration Act 1900 (WA)</i>	8
<i>Industrial Conciliation and Arbitration Act 1902 (WA)</i>	10
<i>Industrial Employee Relations Act 1994 (SA)</i>	223
<i>Industrial Relations Act 1990 (Qld)</i>	197
<i>Industrial Relations Act 1991 (NSW)</i>	72
<i>Industrial Relations Act 1996</i>	72
<i>Industrial Relations Act 1996 (NSW)</i>	72
<i>Long Service Leave Act 1958 (WA)</i>	118
<i>Mines Safety and Inspection Act 1994 (WA)</i>	173
<i>Mines Safety and Inspection Act 1994 (WA)</i>	176
<i>National Insurance Act 1965 (UK)</i>	225
<i>Occupational Health and Safety Act 1985 (NSW)</i>	185
<i>Occupational Safety and Health Act 1984 (WA)</i>	161, 183
<i>Occupational Safety and Health Act 1984 (WA)</i>	161
<i>Prison Act 1981 (WA)</i>	120
<i>Rail Safety Act, 1998 (WA)</i>	173
<i>Safety Rehabilitation and Compensation Act 1988 (Cth)</i>	99
<i>Superannuation Guarantee Administration Act 1992 (Cth)</i>	61
<i>Work Health Act (NT)</i>	138
<i>WorkCover Queensland Act 1996 (Qld)</i>	215
<i>Workers Compensation Act 1912 (WA)</i>	83
<i>Workers Compensation Act 1971 (SA)</i>	227
<i>Workers Compensation and Assistance Act 1981 (WA)</i>	83
<i>Workers Rehabilitation and Compensation Act 1986 (SA)</i>	248
<i>Workplace Agreements Act 1993 (WA)</i>	22, 23, 43, 107, 112
<i>Workplace Relations Act 1996 (Cth)</i>	69

Citation Reference

<i>AC</i>	<i>Appeals Cases (UK)</i>
<i>AILR</i>	<i>Australian Industrial Review</i>
<i>AIRC</i>	<i>Australia Industrial Relations Commission</i>
<i>ALD</i>	<i>Australian Law Digest</i>
<i>ALJR</i>	<i>Australian Law Journal Reports</i>
<i>All ER</i>	<i>All England Reports (UK)</i>
<i>ALR</i>	<i>Australian Law Journal</i>
<i>BWCC</i>	<i>British Workers Compensation Cases</i>
<i>CLR</i>	<i>Commonwealth Law Reports</i>
<i>CM (WA)</i>	<i>Western Australian Workers Compensation Magistrates Court</i>
<i>DLR</i>	<i>Dominion Law Reports</i>
<i>EOC</i>	<i>Equal Opportunity Commission Reports</i>
<i>ER</i>	<i>English Reports</i>
<i>EWCA</i>	<i>European</i>
<i>FCA</i>	<i>Federal Court Appeals Cases</i>
<i>FCR</i>	<i>Federal Court Reports</i>
<i>HCA</i>	<i>High Court Appeals</i>
<i>IR</i>	<i>Industrial Reports</i>
<i>IRLR</i>	<i>Industrial Relations Law Reports (UK)</i>
<i>NSWCC</i>	<i>New South Wales Compensation Court</i>
<i>NSWLR</i>	<i>New South Wales Law Reports</i>
<i>QB</i>	<i>Queens Bench Reports (UK)</i>
<i>QCA</i>	<i>Queensland Supreme Court Appeals</i>
<i>SAIRC</i>	<i>South Australian Industrial Relations Commission</i>
<i>SASC</i>	<i>South Australian Supreme Court Appeals</i>
<i>SASR</i>	<i>South Australian State Reports</i>
<i>SC (WA) SCL</i>	<i>Unreported Decisions of the Western Australian Supreme Court</i>
<i>TLR</i>	<i>Times Law Reports (UK)</i>
<i>VR</i>	<i>Victorian Reports</i>
<i>VSCA</i>	<i>Victorian Supreme Court Appeals</i>
<i>WAIG</i>	<i>Western Australian Government Gazette</i>
<i>WAIRC</i>	<i>Western Australian Industrial Relations Commission</i>
<i>WALR</i>	<i>Western Australian Law Reports</i>
<i>WAR</i>	<i>Western Australian Reports</i>
<i>WASCA</i>	<i>Western Australian Supreme Court</i>
<i>WCR (WA)</i>	<i>Workers Compensation Reports Western Australia</i>
<i>WLR</i>	<i>Weekly Law Reports</i>

Introduction

The legal framework overseeing industrial relations¹ and compensation systems in Western Australia is an example of how government seeks to rationalise competing demands from powerful interest groups.

These systems and laws are frequently the subject of media attention, government pronouncement and ongoing legislative review. They are characterised by tensions over the need to maintain industrial production, employer profits, and the operation of the labour market while at the same time providing reasonable and affordable wages, benefits and compensation payments. Often, changes to legislation meet resistance from highly organised and powerful interest groups such as trade unions, employers, government administrators, lawyers and a range of health care providers.

The reform of industrial and compensation systems inevitably becomes a delicate balancing act, involving financial and symbolic factors. The financial factors focus on the costs and benefits of the systems, while the symbolic factors include the pursuit of high employment, improved living standards, low inflation, international competitiveness through high productivity and flexible labour markets, and the maintenance of work incentives. These factors also include the allocation of fault for disabilities suffered by workers; accident deterrence and the prevention and the preservation of professional autonomy and workers' rights.

¹ Throughout this thesis the phrase "*industrial relations*" is used as an umbrella phrase to cover a range of activities, which have variously been described as workplace relations, employee relations and human resource matters.

Often, workers compensation claims and industrial relations disputes are dealt with as though they are mutually exclusive. In addition, over time workers compensation matters seem to have been regarded as the poor cousin of industrial relations on the basis that changes to wages and conditions, negotiated under industrial relations regimes, have a major impact on all employers and employees whereas workers compensation is often seen as an esoteric area of curiosity which only concerns a small group of unfortunate workers. This attitude may ignore the fact that huge sums of money are spent each year as a result of deaths, injury and disease in the workplace. Even after a decade of declining accident rates, 20,000 workers' compensation claims are still made each year in Western Australia.² In addition, the benefits available under the State's compensation and industrial relations systems contribute to the overall terms and conditions of employment. At the same time, both systems affect the costs and profits in an employer's business. Both are usually handled by separate jurisdictions, even though the issues often overlap and the major interest groups involved are the same, i.e. employers and trade unions.

Historically, considerable attention has been paid to dispute resolution within industrial relations. The outbreak of industrial trouble in Australia during the 1890's was the catalyst for the creation of the federal industrial relations system. That system and the Western Australian system have developed and changed over the last 100 years. In Western Australia, the 1990's saw departure from the award based system and a move towards structured enterprise and individual workplace bargaining. This came about through amendments to the *Industrial Relations Act*

² Pearson D R, McCarthy B and Guthrie R, (1999) *Report of the Review of the Western Australian Workers Compensation System 1999* WAGP p 61-77.

1979 (WA) and the proclamation of the *Workplace Agreements Act 1993*(WA) and the *Minimum Terms and Conditions of Employment Act 1993*(WA)

Western Australia was second only to South Australia in legislating for a workers' compensation system. The *Workers Compensation Act 1902* (WA) established a basic framework for workers entitlements. However, this Act limited access to workers' entitlements by defining "worker" according to strict monetary limits and requiring the worker to be employed in a hazardous industry. These thresholds prevented claims by higher paid workers and non-manual workers. The 1902 Act was repealed with the introduction of the *Workers Compensation Act 1912* (WA), which remained in place until 1981. The 1912 Act maintained certain limits on access to benefits but by the 1960's a comprehensive system of entitlements for a broad range of work related disabilities had been developed. The 1912 Act was replaced with the *Workers Compensation and Assistance Act 1981* (WA), which was later, renamed the *Workers Compensation and Rehabilitation Act 1981* (WA). This Act provided comprehensive and broad based entitlements to workers and operated on that basis until 1993. In 1993, the *Workers Compensation and Rehabilitation Act 1981* (WA) was significantly amended with important consequences.

The election of a Liberal/National Party Coalition government in Western Australia in 1993 led, as noted, to considerable changes in both the industrial relations and compensation systems. Some of these changes, discussed in detail below, led to jurisdictional overlaps which had previously not been evident. For example, after 1993, the resolution of compensation claims for stress related conditions required consideration of a range of industrial relations issues; the calculation of

compensation payments was referable to a relevant award or workplace agreement; and, workers who were injured and able to return to work within 12 months were given employment protection which could only be enforced in the Industrial Relations Commission. Before 1993 very few issues crossed jurisdictions. This study examines and interprets the significant changes in the Western Australian industrial relations and compensation laws during the latter part of the 20th Century. It also reflects on those changes by referring to some recent case developments.

Examining the Relationship between Industrial Relations and Compensation

Even though they often seem to be the subject of conflicting government agendas, the fact that the major participants (employers, unions and government) are almost always involved in issues associated with Western Australia's industrial relations and compensation systems, makes it is important to consider these systems concurrently. Also, any legislative change can affect both areas of the law.

There are three reasons for this joint approach. Firstly, if the systems continue to be considered separately, duplications and inconsistencies in dispute resolution processes are likely. As will be shown in the discussion in chapter 1, disputes over compensation issues can be the subject of related industrial relations disputes.

Secondly, unnecessary expense may occur where separate jurisdictions resolve disputes which could have been dealt with in a single jurisdiction. This is particularly the case with stress claims, and questions relating to the employment

relationship/status of the parties in dispute, which issues are discussed in chapters 2 and 3.

Thirdly, in recent years, a trend has developed to erode compensation benefits, with a tendency for benefits lost under compensation systems to be the subject of negotiation in the industrial arena. In other words, what is lost in one jurisdiction is often claimed or negotiated in another. This phenomenon will be illustrated in the discussion in chapter 6.

Thesis

The thesis of this dissertation is that an examination of the development of the industrial and workers' compensation laws in the 1990's establishes that there is sufficient commonality between the industrial relations and compensation systems in Western Australia to warrant the rationalisation of the two jurisdictions. This could be brought about through a merger of the courts or tribunals that administer the relevant laws or by the cross vesting of specific powers to allow them to deal with a range of employment-related issues in a single convenient form of action.

Methodology

This dissertation includes an examination of the legislative changes to industrial and compensation laws in Western Australia in the 1990's and the relevant parliamentary debates.

Relevant case law is also considered and explained. In particular, decisions of both the industrial courts and tribunals and the compensation courts and tribunals are analysed. An analysis of the effects of the 1993 legislative changes is included. Finally, more recent cases are discussed in the context of the 1990's amendments and there are some reflections on their continuing influence.

Chapter 1 examines the concept of resolution of disputes and discusses the approach taken in the WA Industrial Relations Commission under the *Industrial Relations Act 1979* (WA) and the Workers' Compensation Directorate under the *Workers' Compensation and Rehabilitation Act 1981* (WA). The effect of the 1993 changes on dispute resolution in the industrial relations arena is analysed. The chapter also introduces the participants involved in such disputes and details their role in the industrial and compensation systems.

Chapter 2 discusses the major eligibility criterion that is common to both industrial and compensation laws, namely the threshold requirement of establishing the employer/employee relationship. It also examines how the traditional criteria have been expanded by legislative amendment and judicial pronouncements.

Chapter 3 looks specifically at the topic of stress. This is a developing area of overlap between industrial and compensation laws. It provides an examination of the inter-relationship of decisions made by industrial commissioners and their effects on compensation claims.

Chapter 4 examines the calculation of wages and compensation claims. This is another specific area of overlap between industrial and compensation systems and highlights some of the unexpected consequences of the 1993 changes.

Chapter 5 covers the increasingly important area of employees being forced from work by illness. It examines the consequences, under compensation legislation, of the application of the doctrine of frustration of contract as well as the laws dealing with discrimination on the grounds of disability. It also examines the power of an industrial tribunal to intervene in such situations.

Chapter 6 considers a broad range of issues where there is an overlap between jurisdictions concerned with industrial laws and workers compensation. These areas include the disclosure of information in relation to medical conditions, pre-employment medical examinations; various leave entitlements and the calculation of compensation for unfair summary dismissal and redundancy. It examines the difficult area where there is potential for overlapping payments of compensation and wages due to public holiday and leave entitlements. Finally, there is a discussion of various issues associated with illegal contracts of employment and compensation payments

The dissertation concludes with a summary of the previous chapters and a statement of the argument in support of the thesis, together with some reflections on recent decisions.

Chapter 1

The Resolution of Disputes

This chapter examines the structure, procedure and processes involved in the resolution of disputes under the *Industrial Relations Act 1979* (WA) *Workplace Agreements Act 1993* (WA) *Workers Compensation and Rehabilitation Act 1981* (WA). The chapter begins with an investigation of the structure of the WA Industrial Relations Commission and the Conciliation and Review Directorate before 1993 and looks at the effects of changes made in 1993.

1.1 The Structure and Procedure of the WA Industrial Relations Commission

A system for industrial conciliation and arbitration was first introduced into Western Australia in 1900. The *Industrial Conciliation And Arbitration Act 1900* (WA) was based on New Zealand legislation which provided for the registration of industrial unions and associations and for limited protection for a limited class of employees.³

The *Industrial Conciliation and Arbitration Act 1900* (WA) made provision for industrial agreements to be reached between unions and employers and also provided for conciliation and arbitration where disputes could not be settled.⁴ The *Industrial Conciliation and Arbitration Act 1900* (WA) also established a Board of

³ *Industrial Conciliation and Arbitration Act 1894* (NZ)

⁴ Sections 20-25 *Industrial Conciliation and Arbitration Act 1900* (WA).

Conciliation, with powers to settle industrial dispute referred to it. The board was required to act “*carefully and expeditiously and to inquire into and investigate any industrial dispute of which it had cognisance*”.⁵

The board could make a report or recommendation but had no powers of enforcement. If it was unable to settle the matter it was referred to the Court of Arbitration, which consisted of three members and was presided over by a judge. The court had power to determine disputes, make awards and hear and determine breaches of the *Industrial Conciliation and Arbitration Act 1900 (WA)*.⁶

A unique feature of this industrial system was that it allowed the Board of Conciliation and, subsequently, the court to commence proceedings of its own motion. That is, the Board could summons parties to attend for conciliation, even though they may not have contemplated proceedings themselves.⁷ Known as compulsory conciliation, it became characteristic of most Australian industrial systems including the federal system. Also significant is the limitation on legal representation set out in section 45(7) of the Act, which provided that no counsel or solicitor could appear before a board or its committee unless all parties expressed their consent. As discussed below, the right to legal representation may be a key issue in dispute resolution.

⁵ Sections 45-52 *Industrial Conciliation and Arbitration Act 1900 (WA)*.

⁶ Sections 53-86 *Industrial Conciliation and Arbitration Act 1900 (WA)*.

⁷ Sections 47-52 *Industrial Conciliation and Arbitration Act 1900 (WA)*.

The *Industrial Conciliation and Arbitration Act 1900 (WA)* was repealed after two years to be replaced by the *Industrial Conciliation and Arbitration Act 1902 (WA)*. Significant amendments were made to the legislation again in 1912 when it was replaced by the *Industrial Arbitration Act 1912 (WA)*. The Act remained in force for 68 years. In March 1980, the *Industrial Arbitration Act 1979 (WA)* was introduced. That legislation and the amendments to the Act in 1993 are the focus of the current dissertation.

In 1979, the Western Australian coalition government made a major overhaul of the State's industrial legislation. The main feature was a change in the structure of the WA Industrial Relations Commission which has changed little since.

In March 1985, the *Industrial Arbitration Act 1979 (WA)* was amended and its name changed to the *Industrial Relations Act 1979 (WA)*. The Industrial Arbitration Commission became known as the Western Australian Industrial Relations Commission. The amendments emphasised conciliation and encouraged industrial agreements, increasing the commission's flexibility to act quickly to resolve industrial disputes and to broaden its coverage of employees and industrial matters. In short, the 1985 amendments facilitated an increase in the jurisdiction of the commission.

The Western Australian Industrial Relations Commission (the Commission) currently consists of a president who is a judicial officer, a chief commissioner who has experience in industrial relations, and a number of commissioners and acting commissioners as required for the purposes of the Act.

The Commission is a court of record and has four distinct levels. Firstly, the president may sit alone with specific powers under section 14 of the *Industrial Relations Act 1979* (WA). Secondly, the Commission may sit as a full bench comprising the president and two other members pursuant to section 15(1) of the *Industrial Relations Act 1979* (WA). Thirdly, it may sit as the Commission in court session, consisting of at least three commissioners sitting together pursuant to the section 15(2) of the *Industrial Relations Act 1979* (WA). Fourthly, a commissioner sitting alone may conciliate and arbitrate on industrial disputes.

The jurisdiction of the Commission is established under section 23(1) of the *Industrial Relations Act 1979* (WA) which provides that the Industrial Relations Commission has jurisdiction to inquire into and deal with any industrial matter. The term “industrial matter” is defined in section 7 of that Act and includes those matters which have a “*substantial connection with the relationship, or proposed relationship of employer and employee*”. As noted before, this reinforces the requirement that an employment relationship be established. The definition of an “industrial matter” has been the subject of considerable state and federal judicial attention and is discussed in greater detail in chapter 6.⁸

The Commission, however constituted, is obliged by section 26 of the *Industrial Relations Act 1979* (WA) to act “*according to equity, good conscience and substantial merits of the case, without regard to technicalities or legal forms*” and

further, it “*shall not be bound by any rules or evidence, but may inform itself on any matter in such a way as if things just.*”

The fact that the WA Industrial Relations Commission is not bound by the rules of evidence does not mean that it can completely disregard them.⁹ In most cases, the usual procedures for examination, cross-examination and re-examination of witnesses takes place. A number of cases have established that the word “just” imports the requirement that the Commission must act according to rules of natural justice.¹⁰

Natural justice provides that each party has the opportunity of presenting a case, and to contradict any statement or evidence tendered in opposition to their case. The concept of “*equity, good conscience and the substantial merits of the case*” requires the Commission to act “fairly”, a concept sometimes contrasted with the requirement to act with a legal approach. In some cases this may mean that the Commission may adjourn a case to allow further evidence to be called or even suggest that the parties may present evidence in a particular form.¹¹

In addition, the Commission is required to take into account the “*interests of the persons immediately concerned whether directly affected or not and where*

⁸ See *Re Coldham; ExParte Australian Social Welfare Union* (1983) 153 CLR 297, *Federated Clerks' Union v Victorian Employers' Federation* (1984) 154 CLR 472 and *Re Cram; Ex Parte N.S.W. Colliery Proprietors Association Ltd* (1987) 163 CLR 117.

⁹ See *Coastal District Timber Hewers' Union v Millars' Karri & Jarrah Co (1902) Ltd* (1906) WAR 93 at 95.

¹⁰ See *Hocks v Davies* (1987) 67 WAIG 1527 at 1528.

*appropriate for the interests of the community as a whole” and further to take into account “the state of national economy, the state economy, the capacity of employers to pay, the likely effects of its decision on the economy and finally any changes in productivity that might occur or are likely to occur as a consequence of any decision made by the Commission.”*¹²

It follows that the Commission, on the one hand, must have regard for natural justice in relation to the parties before it at the time of any hearing, but may be required to consider much broader issues relating to the wider community when making its decision.

In the first instance, an application is made to the Commission and is referred to a single commissioner. It is a task of the chief commissioner (pursuant to section 16 of the *Industrial Relations Act 1979 (WA)*) to allocate and reallocate the work of the Commission. The chief commissioner usually allocates work from a particular industry to a particular commissioner.¹³ It is the duty of the commissioner to attempt to resolve the dispute by conciliation.

Matters may be referred to the commissioner via two routes. Where an individual employee, a trade union or an employer makes an application, the matter is referred under section 32 of the *Industrial Relations Act 1979 (WA)* for a conciliation conference. Section 32 requires the commission to resolve the matter by

¹¹ *Amalgamated Metal Workers and Shipwrights Union of WA v Hamersley Iron Pty Ltd* (1980) 60 WAIG 1286.

¹² Section 26 *Industrial Arbitration Act 1979 (WA)*

conciliation and “*to do all things as appear to it right and proper to assist the parties to reach an agreement on terms for the resolution of the matter*”. Section 32(3) lists what the commission may do to assist the parties to reach agreement. Under this subsection, the commissioner is given power to arrange a conference of the parties or their representatives, to be presided over by the commission, or to arrange a conference where the commission’s presence is not required. In addition, the commissioner is entitled to confer with the parties separately.

A conciliation conference convened under section 32 need not be in private, although, in practice, all conferences are held in private as this generally assists negotiations.

Under section 32, the commission has power to give directions and make such orders as “*will prevent the deterioration of industrial relations in respect of the matter until conciliation or arbitration has resolved the matter and to encourage the parties to exchange or divulge attitudes or information which would assist in the resolution of the matter*”.

These are regarded as interim orders. However, the scope of these provisions is broad and may allow the commission to obtain information not normally disclosed by formal admissions, discovery, inspection or production of documents. The commission is, however, limited by sections 33(3) to (5) of the *Industrial Relations*

13 There is no fixed rule on this procedure.

Act 1979 (WA) which prohibits it from making public disclosure of trade secrets or the profits or financial position of any of the parties without their consent.

Any order or declaration the commission makes must be produced in writing as soon as practicable together with a preamble setting out the circumstances leading to the making of the order (See section 32(4)).

Conciliation under section 32 (and section 44 discussed below) is not conciliation in the pure sense, in that the commissioner has power to impose an interim solution on the parties. Conciliation, in the classical sense, restricts the third party (in this case the commissioner) to a neutral role, making suggestions and facilitating a solution that is ultimately arrived at by the parties without any coercive powers. The conference does not normally deal with legal argument or legal issues, but is directed towards attempting to adduce what the parties have done to achieve settlement. The proceedings are informal, often with only a brief statement of the matters in dispute. The presiding commissioner is obliged to be aware of the matters which may influence the circumstances of the dispute. If the commissioner is unable to resolve the matter, then pursuant to section 32(6) it may be referred for arbitration.

As noted, a unique feature of the Australian industrial relations dispute procedures is that industrial tribunals (including Western Australia's) have the power to commence proceedings of their own volition. Section 44 of the *Industrial Relations Act 1979* (WA) provides that the commission may summons any person to attend a conference at any time and place. This generally involves an informal request for

employers, employees and their organisations to attend. A summons issued pursuant to section 44 is not, however, limited to the employer and employees in dispute and may extend to other parties and unions who may assist in the resolution of the matter. A person who fails to attend a compulsory conference after being summoned can be fined.

A compulsory conference must be held in private with the commissioner attempting to resolve the matter by conciliation. The commissioner may make any suggestions and give any directions considered appropriate in conducting such a conference. Like section 32 conferences, the proceedings are informal and a free exchange between the parties is encouraged. Pursuant to section 44(6) (b) (a) of the *Industrial Relations Act 1979* (WA) the Commission, during a compulsory conference, may “*give such direction and make such orders so as to prevent the deterioration of industrial relations*” in a manner similar to section 32.

Again, as in a case of section 32, any orders or directions made are interim only. Where the matter is settled at a conference the commissioner may make an order in terms of that agreement which is binding upon the consenting parties. The agreement is set out in a memorandum and is lodged with the commission. Sections 32 and 44 provide that where the matter is not settled, it may be referred for arbitration.

In the case of section 44 that provision allows a party to the conference to object to a particular commissioner hearing the matter at arbitration. If this occurs, the matter is referred to the chief commissioner, who may reallocate the matter to another

commissioner. In the case of section 32, however, no similar provision exists, so that, if any party objects to the commissioner proceeding to arbitration, it must be established that to do so would be contrary to the requirement of natural justice. This may occur where any of the parties “*might reasonably suspect*” that the commissioner is “*not unprejudiced and impartial*”.¹⁴

If the matter is referred for arbitration, a more formal process takes place whereby the commissioner will hear evidence, usually given on oath. This process also allows written and oral submissions. As a general rule, once the matter proceeds to arbitration, normal court procedures apply. As noted, the commission is not bound by the rules of evidence but does not lightly disregard those rules. Similarly, while the commission is not bound by the rules of precedent, it rarely departs from established precedent without good cause.¹⁵

Section 31 of the *Industrial Relations Act 1979* (WA) limits the rights of parties to engage legal representation before the commission. As a general rule parties are entitled to be represented by an agent, but legal representation is only permitted where:

- a) *either the Trades and Labor Council, the Confederation of West Australian Industry, the Mines and Metals Association, the State Minister or the Federal Minister is a party to the proceedings;*

¹⁴ *R v Watson: Ex parte Armstrong* (1976) 136 CLR 248 at 262.

¹⁵ See *Amalgamated Metal Workers and Shipwrights Union of WA v State Energy Commission of WA* (1979) 59 WAIG 494 per Wickham J at 496, who observed that Commissioners ought to have regard to decisions of the Full Bench. Note also the comments of Burt J who considered that the WA Industrial Relations Commission should follow decisions of the High Court “directly on point”. See *Hillview Nursing Home v Hospital Employees' Industrial Union, WA* (1974) 54 WAIG 783.

- b) *the proceedings relate to unfair dismissal or denial of a benefit pursuant to section 29(1) (b);*
- c) *the proceedings relate to an entitlement for long service leave subject of a compulsory conference under subject 44;*
- d) *all parties consent to legal practitioners appearing; or*
- e) *a question of law is raised.*¹⁶

Decisions of a single commissioner may, within 21 days, be subject to an appeal to a full bench. No less than three members, one of whom must be the president, constitute the full bench. Its primary jurisdiction is to decide upon those matters on appeal from a single commissioner. The full bench will not hear an appeal unless it is of the opinion that the matter is of such importance in the public interest that an appeal should proceed. The appeal is heard and determined on the evidence and matters raised at the original proceedings, though occasionally fresh evidence is admitted. It is permissible for jurisdictional points to be raised on appeal, even if the issue is not raised at first instance. The full bench may determine the case by dismissing the appeal, or it may quash or vary the original decision or suspend that decision and remit the case to the single commissioner for further hearing. If the full bench varies the decision, it must be in terms that could have been awarded by the commissioner in the first instance.

Where the full bench is divided, the majority view prevails. If the members of the bench are equally divided, the president has the casting vote. Where a question of law arises, the full bench may seek a declaration of the law from the Industrial Appeals Court. Otherwise an appeal from the full bench must go to the Industrial

¹⁶ Emphasis added.

Appeals Court. The Supreme Court of Western Australia has supervision of the jurisdiction and may determine issues of jurisdiction on prerogative writ.

An appeal to the full bench does not require that an issue of law be involved. The full bench has discretion not to hear an appeal, even though an error of law may have arisen. Presumably, however, where an error of law arises, the matter would be of sufficient importance to warrant the hearing of an appeal. The usual approach of the full bench is that it is necessary to show not only that it would have made a different decision had it heard the matter in the first instance, but that the commissioner erred in assessing the tabled material.¹⁷

Where it can be established that the decision of the full bench is wrong in law, an appeal is heard by the Western Australian Industrial Appeal Court, which consists of four members who are judges of the Supreme Court. One judge is nominated as presiding member and another as deputy presiding judge. Three members constitute the court.

In addition to the Industrial Appeals Court, the Supreme Court has a limited role in supervising the jurisdiction of the Industrial Relations Commission by the use of prerogative remedies, which allow it to issue writs of *prohibition*, *certiorari* and *mandamus*, where the commission has failed to exercise its jurisdiction correctly.¹⁸

¹⁷ See *Devries and Another v Australian National Railways Commission and Another* (1992-3) 177 CLR 472 at 479 and *Abalos v Australian Postal Commission* (1990) 171 CLR 167. The essence of both these decisions is that the decision of the court of first instance should be preserved where that court has the benefit of hearing the evidence and observing the witnesses.

¹⁸ *R v Conciliation Commissioner; Ex parte Coastal District Committee, Amalgamated Engineering Union* (1963) WAR 210, where a writ of prohibition was issued against a Commissioner. In *Ex parte*

1.2 The 1993 Amendments to Industrial Laws

A significant change to the industrial relations system in Western Australia occurred in 1993 with the introduction of workplace agreements. Up until then the Industrial Relations Commission was able to sanction a form of industrial agreement under section 41 of the *Industrial Relations Act 1979* (WA). Such agreements are negotiated between unions and employers and are usually referable to existing awards. They are registered on the basis that they are designed to prevent and resolve disputes, disagreements or questions relating to a dispute over any industrial matter.

A commissioner is obliged to register any such agreement where the parties apply for registration. The commission is not permitted to register any agreement which applies to more than one enterprise and which contains any terms which are contrary to the *Industrial Relations Act 1979* (WA) and in particular the provisions of section 51. However, where the agreement is limited to a single enterprise it can be registered notwithstanding that it doesn't comply with section 51. Section 51 makes provisions for the determination of wages for employees in Western Australia covered by State awards and orders. After 1993, a new form of industrial agreement

Mt Newman Mining Co Pty Ltd (1980) 60 WAIG 2144 a writ of certiorari was issued to the Commission to quash an order made in excess of the jurisdiction.

was introduced and made available with the passing of the *Workplace Agreements Act 1993* (WA)¹⁹

This Act allows for an increased focus on enterprise bargaining, permitting employers and employees to decide for themselves the way in which the enterprise should operate. At the same time, the State Government enacted the *Minimum Conditions of Employment Act 1993* (WA) which operates as a “safety net”, setting minimum conditions of pay and certain types of leave, below which the parties are not entitled to negotiate.

Workplace agreements now exist as an alternative to awards, which continue to exist, but which are less influential in the dispute resolution process. Significantly, following amendments in 1993 to the *Industrial Relations Act 1979* (WA), the Commission cannot enquire into or regulate workplace agreements which are no longer defined as industrial matters. The Minister explained the objectives of the *Workplace Agreements Act 1993* (WA) as follows:

The aim of the workplace agreements legislation is to decentralised the industrial relations framework and provide a genuine choice for both employers and employees as the type of employment arrangement that will best suit their organisation and individual needs at the workplace.²⁰

A workplace agreement may cover a single workplace, or a number of workplaces, and may be an individual or a collective agreement. It may completely replace any

¹⁹ At the time of writing the *Workplace Agreements Act 1993* (WA) and related legislation have been repealed, the law discussed in this dissertation relates to the law in operation prior to 1 August 2002, being the commencement date of the *Labour Relations Reform Act 2002* (WA).

pre-existing award, as long as it does not conflict with the *Minimum Conditions of Employment Act 1993* (WA). Unions have some role in negotiating workplace agreements but only when they have been appointed as bargaining agents. Unlike the provisions of the *Industrial Relations Act 1979* (WA), which automatically recognises and encourages the participation of unions, the *Workplace Agreements Act 1993* (WA) provides no such automatic recognition. Significantly, each workplace agreement must contain a clause which provides a mechanism for the resolution of disputes outside of the commission structure. A breach of a workplace agreement is heard in the Industrial Magistrates Court. This court is prevented from granting a remedy until a certificate under section 54 of the *Workplace Agreements Act 1993* (WA) has been issued stating that the dispute resolution processes under the workplace agreement have been exhausted.

Two trends have emerged from the use of workplace agreements, which are relevant to compensation issues. Firstly, it is implied in every workplace agreement that the employer must not “*unfairly, harshly or oppressively dismiss from employment any employee who is a party to the agreement*”.²¹ Where such a dismissal occurs, then pursuant to section 51 of the *Workplace Agreements Act 1993* (WA), an employee may take action in the Industrial Magistrates Court. As is discussed in chapter 3, the circumstances surrounding the dismissal of an employee may be relevant in relation to compensation claims under the *Workers Compensation and Rehabilitation Act 1981* (WA).

²⁰ G D Kierath, ‘Industrial Relations Reforms in Western Australia 1993’ (1995) 37 *Journal of Industrial Relations* 52.

²¹ Section 18 *Workplace Agreements Act 1993* (WA)

The second trend, which emerges, is the use of annualised wage payments. These payments have the effect of eliminating many allowances, bonuses and other entitlements, which are provided for under industrial awards by amalgamating them with the base weekly wage to fix an annual global sum. One means of arriving at a weekly wage, under workplace agreements, is for the average annual earnings of the worker arrived at under an award to be divided by 52 to provide a weekly payment. This system has the advantage that weekly payments are easy to calculate and are not subject to the fluctuations which occur because of overtime and other allowances. This may also provide greater flexibility in working hours. These methods of wage calculation have had an impact on the calculation of compensation entitlements and are discussed in chapter 3.

1.3 The Workers Compensation Jurisdiction

Until 1993, the Workers' Compensation Board resolved all workers' compensation disputes. The board comprised three members: one judicial member and two lay representatives. Lay representatives or "nominee members" were selected by the Trades and Labor Council of WA and the Chamber of Commerce and Industry of WA. The board had jurisdiction to hear and determine all matters relating to disputed compensation claims.

Operating under the now repealed section 112 of the *Workers Compensation and Rehabilitation Act 1981* (WA), the board was a court of record, although under repealed section 118, the board heard and determined matters "according to equity

and good conscience, and the substantial merits of the case without regard to the technicalities or legal forms". Like the WA Industrial Relations Commission, the board was "not bound by legal precedent or its own decisions and rulings in any other matter nor by any rules or evidence, but could inform its or his mind on any matter in such a way as it or he regards as just." ²²

The Board dealt with two forms of applications -- chambers and substantive. Chambers applications dealt with submissions for commencement, reduction or termination of weekly payments. These applications were regarded as interlocutory proceedings and orders made by the board were interim in nature. In the vast majority of cases, lawyers represented the parties, as there was no limitation or prohibition on legal representation. Applications in chambers involved the examination of affidavits submitted to the board, and consideration of oral submissions made by the parties.

Substantive applications required the parties to attend a number of preliminary hearings and pre-trial conferences to establish whether the case could be settled before going to a full hearing or arbitration. The parties were invariably represented by lawyers at these hearings. The bulk of cases would be settled at pre-trial conferences with lawyers participating in negotiations. If the matter could not be settled, it would proceed to a full hearing before the board where the normal court-based adjudication processes were followed.

²² This direction was discussed in *Pearce v Lake View & Star Ltd* (1969) WAR 84 and recently in relation to the Conciliation and Review Directorate in *Summit Homes v Lucev* (unreported SC (WA) SCL

As with the WA Industrial Relations Commission, the parties (usually through their lawyers) would present evidence, and provide submissions. Expert evidence, usually medical, was a feature of these hearings and parties could examine, cross-examine and re-examine witnesses. Again, workers depended on lawyers to muster the appropriate evidence and make submissions on their behalf. Appeals from the board were made to the Supreme Court on matters of law or fact.

In June 1993, the West Australian Coalition Government amended the *Workers' Compensation and Rehabilitation Act 1981* (WA) to:

1. Abolish the Workers' Compensation Board and introduce a non-adversarial dispute resolution system, namely the Conciliation and Review Directorate;
2. Restrict the rights of parties to legal representation in disputed claims, by prohibiting legal representation at conciliation and some other stages of dispute resolution;
3. Modify the rules for legal costs, so that, in general, each party would be at their own dispute costs;
4. Narrow the ability of workers to make claims for stress related disabilities and abolish travel claims;
5. Introduce gateways to restrict workers' capacity to make claims for damages against negligent employers; and
6. Reduce workers' ability to claim lump sums in redemption of weekly payments of compensation.

These changes all have had an effect on the resolution and management of disputed workers' compensation claims. The new dispute resolution system established a three-tiered dispute process known as the Conciliation and Review Directorate. In the first instance, conciliation officers are required to resolve disputes in a manner that is, "*economical, informal and quick, without regard to legal technicalities*". Once a dispute is notified to the Directorate, conciliation officers are required to act on the matter within 14 days.²³

In many cases it is not possible for a hearing to be convened within that time. However, support staff of the Directorate will contact the parties within 14 days to discuss the availability of conciliation conferences. Sometimes a conciliation officer may telephone one or both of the parties to explore whether the matter can be settled without a conciliation meeting, or to see whether some preliminary issues can be resolved. Conciliation officers are not empowered to hear or take evidence. The parties are not put on oath and witnesses are not generally called. Notes by the conciliation officer made during the conference are placed on the directorate files. Formal reasons for the orders made are not given, although conciliation certificates record the proceedings and any orders made by the conciliation officer. The parties cannot be legally represented at conciliation unless all parties agree. Persons who do not hold legal qualifications may represent the parties at any time and trade union officials regularly represent workers in this jurisdiction. Insurance claims officers may represent employers and insurers.

²³ Section 84P of the *Workers Compensation and Rehabilitation Act 1981*(WA)

Conciliation officers have some adjudicative powers. These include the capacity to order weekly payments up to a maximum period of 10 weeks and to order payment of medical expenses up to \$2,000. If the matter cannot be settled at conciliation, either party may request that the matter go to a review officer, who may initially convene a preliminary hearing to establish the issues in dispute. Neither review officers, nor conciliation officers, need to be legally qualified. Unlike conciliation officers, review officers have unlimited powers to make orders for payment under the Act.

Parties to review hearings may not be legally represented unless there is a question of law to be resolved and the review officer considers legal representation is appropriate. Save for exceptional circumstances the cost of a review hearing is borne by the parties.²⁴

Review officers can hear evidence and refer matters to medical assessment panels where there is a conflict of medical evidence.²⁵ Review officers are required to proceed in a manner that is informal but they are, not surprisingly, bound to act according to the rules of natural justice.²⁶ They may administer an oath or an affirmation and they are required to give reasons in writing for their decision if requested by the parties. Proceedings before the review officers are recorded and if required, are transcribed for appeals.

²⁴ For example in *Gates v Stoddart* (unreported, 12CM (WA) 84/97, 20 January 1998) costs were awarded in favour of the successful worker due to the complexity of the claim and the number of interlocutory appeals that had taken place during the passage of the claim.

²⁵ See section 84 ZH of the *Workers Compensation and Rehabilitation Act 1981* (WA).

²⁶ See section 84ZA of the *Workers Compensation and Rehabilitation Act 1981* (WA).

The third stage of dispute resolution is on appeal to a legally qualified compensation magistrate, who will hear an appeal from decisions of review officers where a question of law is involved.²⁷ Legal representation is permitted before the compensation magistrate. On most occasions, lawyers represent the parties. Generally, no evidence is given. The unsuccessful party pays the costs, except where the appeal is made by the employer/insurer and the worker is unsuccessful. A further right of appeal exists to the Supreme Court, which is authorised to hear appeals on a question of law from the compensation magistrate.²⁸

The post-1993 dispute resolution process also establishes and encourages the use of medical assessment panels. Although such panels have been a part of the WA compensation system since the 1920s, they initially dealt almost exclusively with specific chest diseases relating to the mining industry. In 1993, medical assessment panels were established to assist the resolution of disputes other than those relating to industrial diseases.

Medical panels comprise at least two doctors.²⁹ The panel may examine the worker and can inform itself, as it sees fit, about the medical condition of the worker. None of the panel members is to have any prior experience of the worker's history or treatment but the panel is supplied with all the medical reports and material from the worker's treating doctors. Neither workers nor employers can be legally represented

²⁷ See section 84ZN of the *Workers Compensation and Rehabilitation Act 1981* (WA).

²⁸ See section 84ZW of the *Workers Compensation and Rehabilitation Act 1981* (WA).

²⁹ See section 145C of the *Workers Compensation and Rehabilitation Act 1981* (WA).

at the medical assessment panel.³⁰ Significantly, decisions of the panel cannot be appealed against with a certificate of the panel binding the conciliation and review officers and the compensation magistrates. The certificate can only be challenged where it is established that the jurisdiction of the panel has been exceeded. In such a case, a prerogative writ can be sought from the Supreme Court.³¹

1.4 Interaction between the Jurisdictions – Questions of Evidence

Neither the West Australian Industrial Relations Commission nor the Workers' Compensation Board or its successor, the Conciliation and Review Directorate, is, or were, bound by the rules of evidence. Further, all three dispute resolution bodies are, or were, required to act informally without regard for legal technicalities. As noted, despite the apparent procedural freedoms provided by legislation in industrial and compensation dispute resolution, there are numerous authorities to the effect that a complete disregard for the rules of evidence may warrant the intervention of an appeals court.

A number of common problems arise in jurisdictions where informality is a legislative sanction. Firstly, the question of whether or not hearsay evidence should be admitted. Secondly, whether, and if so, what regard should be given to findings or decisions made by other related tribunals dealing with similar issues currently in dispute in a different forum under different legislation. In the case of hearsay, such

³⁰ See section 145D of the *Workers Compensation and Rehabilitation Act 1981* (WA).

³¹ *Ex parte Ansett Australia Ltd v Medical Assessment Panel* (unreported SC (WA) 980364, 26 June 1998).

evidence is not inadmissible but it is clear that the commission, Workers' Compensation Board and Conciliation and Review Directorate have consistently observed that relevant hearsay evidence will be admitted and will be accorded only such weight as is warranted having regard to all of the evidence.³² The WA Industrial Relations Commission has taken this approach. In *Baron v George Weston Foods Ltd* Commissioner Fielding commented that;

The evidence adduced in the proceedings has ranged far and wide. Nothing is to be gained by repeating it at length. Much of it was of doubtful relevance, a lot of it was hearsay, and some of it expression of opinion, without evidence to support that opinion. Whilst by reason of section 26 of the Act such evidence is not inadmissible, that section does not relieve the parties of proving that which they are required to prove by credible evidence. In proceedings of this nature, where the occurrence of misconduct is in issue, hearsay evidence and the like should be treated with the utmost caution, and I propose to so regard it on this occasion.³³

Thirdly, in relation to the more complex area of overlapping findings and decisions by tribunals, it is noteworthy that section 84ZB of the *Workers Compensation and Rehabilitation Act 1981* (WA) provides that review officers are entitled

...to receive in evidence any transcript of evidence in proceedings before a court or other personal body acting judicially and draw a conclusion of fact from the transcript and adopt as the review officer thinks fit, any finding, decision or judgement of a court or other person or body acting judicially that is relevant to the review.

The purpose of the above section is to allow a review officer to save time by not hearing a repetition of evidence already dealt with in another jurisdiction. There is no similar provision in the *Industrial Relations Act 1979* (WA). The effect of section

³² *Summit Homes v Lucev* (unreported SC (WA) 67/95, 3 April 1996).

84ZB of the *Workers Compensation and Rehabilitation Act 1981* (WA) on review officers is as yet unclear, and there are a number of conflicting decisions from the compensation magistrate. Some decisions suggest that the effect of section 84ZB is that review officers are not bound by the doctrine of issue estoppel and res judicata.³⁴ Those doctrines have been explained by the High Court in a number of cases. The best-known judgment in relation to estoppel is that of Dixon J. in *Blair v Curren*³⁵ where he said:

A judicial determination directly involved in issue of fact or of law disposes once and for all of the issue, so that it cannot afterward be raised between the same parties or their privies. The estoppel covers only those matters which prior judgement, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restraint or that rights be declared. The distinction between res judicata and issue estoppel is that in the first very right of cause of action claimed or put in suit has in the former proceedings past inter-judgement, so that it is merged and has no longer an independent existence while in the second, for the purpose of some other claim or cause of action, a state of act or law alleged or denied the existence of which is a matter necessarily decided by the prior judgement, decree or order.

Nothing but what is legally indispensable to the conclusion is thus finally close or concluded. In matters of fact, the issue estoppel is confined to those of facts which form the ingredients in the course of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim, which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived...

33 *Baron v George Weston Foods Ltd* (1984) 64 WAIG 590 at 590.

34 See the decisions of Magistrate Heath in *Abbott v Galvin* (unreported, CM (WA) 16/98, 25 May 1998) and *Kaiser v Burswood Resort (Management) Ltd* (unreported, CM (WA) 34/99, 21 July 1999). These decisions conflict with some decisions by Magistrate Cockram mentioned below.

35 (1939) 62 CLR 464 at 531-3.

The effect of issue estoppel is that where a determination has been made in relation to issues of fact in one tribunal and those matters are relevant to another case before another tribunal, then the latter tribunal may be bound by the findings of the former. The better view is that section 84ZB of the *Workers Compensation and Rehabilitation Act 1981* (WA) does not diminish the effect to the doctrine of issue estoppel as a principle rule of evidence but appears to supplement it by permitting a review officer to take into account the findings of another tribunal where issue estoppel does not directly apply.³⁶

There is nothing to indicate that the Industrial Relations Commission is not bound by the doctrine of issue estoppel or res judicata, especially where a finding of fact has been made by a superior court. In fact, it is clear from some decisions that the WA Industrial Relations Commission considers that estoppel does apply to it from decisions of the Conciliation and Review Directorate. In *Noack v BGC (Australia) Pty Ltd*³⁷ Commissioner Beech considered that he was bound by the Supreme Court decision in *McNair v Press Offshore Limited and Another*,³⁸ which determined that a matter previously decided by a review officer in the Conciliation and Review Directorate could not be re-argued in the District Court. He, therefore, found that he was bound by the decision and findings of a review officer where the same parties were litigating a related matter before him.

³⁶ This view was taken in *Robertson v Kraft* (unreported, CM (WA) 46/99, 28 July 1999) by Magistrate Cockram.

³⁷ (1998) WAIR 253

³⁸ (1996) 17 WAIRC 191.

Likewise, the full bench of the commission held in *Bell v Western Australian Fire Brigades Board*³⁹ that it was estopped from enquiry into the economic losses suffered by a worker who claimed unfair dismissal, but who had also consented to a District Court award of damages which incorporated future economic loss.

The 1993 changes to the *Workers Compensation and Rehabilitation Act 1981* (WA) have, as noted above, raised a potential flow-on or overlap into two distinct areas. Firstly, in relation to stress claims, it is sometimes required that whether the employer's conduct was harsh or unreasonable be taken into consideration. This also applies in unfair dismissal cases before the WA Industrial Relations Commission.

Usually, the worker alleging unfair dismissal applies to either the State or Federal Industrial Relations Commission to have that matter expedited.⁴⁰ During subsequent proceedings, it may become evident that the worker also has a work-related disability (usually a stress condition) that might be the subject of a workers' compensation claim. Often, in these cases, the State or Federal Industrial Commission is able to make a decision over the dismissal before the matter goes before the Conciliation and Review Directorate. In such cases, the findings of fact and determinations of the Industrial Commission are relevant to the review hearing. The commission's decision may be taken into account either by reason of the doctrine of issue estoppel or alternatively pursuant to section 84ZB. It follows that,

39 (1996) WAIRC 219

40 In both jurisdictions there are strict time limits on applications. For example in the Federal jurisdiction an application must be made in 21 days.

should the matter of the employer's conduct be first determined by the Conciliation and Review Directorate, the question of issue estoppel may arise in the Industrial Commission. In *Noack* (discussed above) the worker made application to the WA Industrial Relations Commission to determine an unfair dismissal application after the matter had been to review. The commission held that it was bound by the Directorate's decision.

Secondly, a related issue is the calculation of wages, allowances, overtime and other benefits available to employees, which may have an effect on the calculation of compensation for workers. A determination by the WA Industrial Relations Commission in relation to the quantum of wages may have a binding effect on the Conciliation and Review Directorate. Both these matters will be the subject of further investigation in chapters 3 and 4 respectively.

The cases on estoppel in relation to workers' compensation were revised recently in *Kuligowski v Metrobus*⁴¹. In *Kuligowski*, the Supreme Court of Western Australia considered a worker who had commenced proceedings in the District Court against his employer for negligence. The worker had previously been involved in workers' compensation proceedings and a review officer has determined that his original work-related injury had resolved and that his current disability was not work-related. It was argued (successfully) by the employer in the District Court that the worker could not, therefore, claim damages for negligence in that his current incapacity was attributed to a work-related condition. This argument was based on the premise of

41 [2002] WASCA 170

the doctrine of estoppel. A majority decision of the Supreme Court dismissed the workers' appeal and held that the worker was estopped by the findings of the review officer, so that the negligence action could not proceed. It is noteworthy that there was strong dissent from the majority by McLure J (with whom Wallwork J agreed). The essence of her dissenting decision was that the decisions of the review officers were not "final and conclusive" and, perhaps more significantly, the informality of the proceedings had limited the role of lawyers and therefore by inference the application of the doctrine of estoppel. Her honour considered that *McNair* (referred to above) was wrongly decided and that estoppel should not apply to review officer decisions.⁴² It is too early to determine whether her minority judgement will be adopted in later decisions, but it does suggest that there are some cracks appearing in application of the doctrine of estoppel to Review officers. It is also important to pause to reflect on *Kuligowski* for other reasons. Although it is not a case decided in the 1990's, it nevertheless relates directly to the 1993 amendments. *Kuligowski* and a number of other cases⁴³ show a growing irritation by the Supreme Court over the number of workers' compensation claims reaching the court. Bearing in mind the essence of the dispute resolution changes was to reduce high cost litigation; this aim seems to have comprehensively failed with more matters being determined by arbitration after 1993, than before the changes.⁴⁴ In addition, at times the Supreme Court has been almost overwhelmed with prerogative writs seeking to

⁴² At page 92

⁴³ *Brown v Metro Meat International Ltd* [2000] WASCA 123 (in relation to discovery of documents). *Ex Parte Rusich* [2001] WASCA 111 and *Re Monger; Ex Parte Dutch & Ors* [2001] WASCA 220 in relation to medical panels. *Re Monger; Ex Parte WMC Resources Ltd & Anor* [2002] WASCA 129 (in relation to the administrative powers of the Director)

⁴⁴ Pearson D R, McCarthy B and Guthrie R, (1999) *Report of the Review of the Western Australian Workers Compensation System 1999* WAGP p 128-9

challenge the jurisdiction of medical panels, the Director and review officers.⁴⁵ The issue of estoppel is symptomatic of the friction which has developed across the compensation jurisdiction and the common law jurisdiction of the District and Supreme Courts. The dissenting decision of McClure, in particular, shows some attempt to review the dispute resolution processes of the Directorate.

1.5 The Role of Unions and Legal Practitioners

Trade union representation of employees before industrial tribunals has been an integral part of the industrial relation system in both federal and state jurisdictions. Both jurisdictions recognise the existence of unions, contemplate their formation and operation and, where necessary, their registration. Industrial tribunals can determine all these matters. In both jurisdictions, representation of employees by unions is an integral part of the structure. In many cases, provisions of the *Industrial Relations Act 1979* (WA) allow for the application for relief to be made on behalf of an individual employee by a union.⁴⁶

Under the *Industrial Relations Act 1979* (WA) (as noted above), legal representation is restricted to a number of areas, but given the nature of many industrial proceedings (that is, that they frequently raise issues of law) the restriction on legal representation is not significant. Unions are frequently represented where the matter before a single commissioner is over an issue of law and are always legally

⁴⁵ *Ex Parte Rusich* [2001] WASCA 111 and *Re Monger; Ex Parte Dutch & Ors* [20001] WASCA 220. Dutch was a test case for dozens of similar cases, all contesting the referral by the Director to medical panels.

represented in cases that go to the full bench and the Industrial Relations Appeals Court. In addition, unions have had continued and heavy exposure to industrial tribunals and are experienced in representing individual workers in such matters.

Until 1993 in the workers compensation jurisdiction, there were no restrictions on the rights of parties to be legally represented. In 1993, however, legislative changes limited legal representation at conciliation and review to situations where all parties first had to agree to legal representation and the review officer accepted that it was appropriate. In other words, the final decision to allow legal representation rested with the conciliation and review officers and was not rigidly determined by statute.⁴⁷

Since 1993, there has been a marked decline in the use of lawyers as advocates in compensation matters. They can give advice before conciliation and review, and the parties may continue to receive advice throughout the course of the claim, as long as the legal advisor does not actually participate during the conciliation meeting or review hearing. However, there are no restrictions on representation before the compensation magistrate and lawyers frequently appear on such occasions.⁴⁸

In the industrial jurisdiction, the role of unions as advocates has remained unchanged since 1993 under the *Industrial Relations Act 1979* (WA). However, the range of matters which can go before the commission has been reduced. As a consequence of the increased use of workplace agreements, the role of lawyers in the

⁴⁶ Sections 29B and 31 *Industrial Relations Act 1979* (WA).

⁴⁷ *Clements v Norm Wrightson t/as Airways* (unreported, CM (WA) 80/97, 4 March 1998).

industrial arena has also undergone change. Between 1993 and 1996 there was an increase in cases of unfair dismissal and, in such cases, legal representation is permitted. Changes to federal laws in 1996, restricting unfair dismissal claims have probably reduced the role of lawyers in the federal jurisdiction, but seem to have had little impact on the number of cases before the WA Industrial Relations Commission.⁴⁹

In short, since 1993 trade unions have been relegated to a secondary role in negotiating workplace agreements. They have maintained a presence in unfair dismissal cases and award matters or collective workplace agreements.⁵⁰ There has also been increased pressure since 1993 for unions to appear as advocates in the Conciliation and Review Directorate. Ironically, while the underlying intention of much of the changes to the industrial laws in 1993 was to reduce the influence of unions in industrial matters, heavier reliance has been placed on them in order to assist with the efficient disposal of cases in the Conciliation and Review Directorate.

At a time when union resources are diminishing and union membership is declining, the union movement is being pushed to re-invent its advocacy role in the workers' compensation jurisdiction, placing considerable pressure on its officials.⁵¹ Before 1993, it was customary for most unions to refer compensation cases to a small group

48 As noted in Pearson D R, McCarthy B and Guthrie R, (1999) *Report of the Review of the Western Australian Workers Compensation System 1999* WAGP p 38.

49 *Thirty-Sixth Annual Report of the Chief Commissioner of the WA Industrial Relations Commission 1998/1999*, WAGP, pp 10-11.

50 Ibid.

51 Personal communications with Janine Freeman, union organiser and compensation advocate with the Miscellaneous Workers Union of WA March 2000.

of specialised legal practitioners. In most cases, the union operated as a referral service in much the same way as employers referred claims to their insurers. In Western Australia there are currently 16 private insurers constantly involved in compensation claims, and as a result there is a substantial pool of information and experience in the industry.

In dispute resolution, these insurers usually have an advantage, particularly where a worker is unrepresented. Since 1993, unions have been required to re-educate their officials to cope with the added responsibilities of the compensation jurisdiction, in order to provide an adequate service to their members.

1.6 The Role of Employers

Employers in Western Australia are able to gain workers compensation insurance through a range of private companies. The *Workers Compensation and Rehabilitation Act 1981 (WA)* allows larger employers to self-insure, but apart from this exception, it is compulsory for all employers to obtain insurance.⁵² When a worker makes a compensation claim, the employer is required under that Act to forward the claim to its insurer. The employer must also complete a report form on which a claim for indemnity from the relevant insurer is made. If, because of death or liquidation an employer has ceased to exist, the worker has a right to claim directly against the insurer. Workers' compensation insurers have a contractual right of subrogation which allows the insurer to represent the employer at all levels

⁵² Section 160 of the *Workers Compensation and Rehabilitation Act 1981 (WA)*.

of dispute resolution. The key right of the insurer is to represent the employer at the conciliation phase, the level at which most workers are either unrepresented or represented by union advocates.

Self-insured employers administer their own claims, usually through a combination of in-house compensation claim officers and lawyers, who assist with decisions about liability. Employers are not entitled to be legally represented at conciliation and review. Most are not required to attend conciliation and review, except on the rare occasions where they might be required to give evidence.

The *Workers Compensation and Rehabilitation Act 1981* (WA) places the primary liability to pay compensation on the employer but acknowledges and promotes the existence of insurers in the system. Because of the contractual rights of subrogation, insurers “stand in the shoes” of employers. In most cases, therefore, the employer is a nominal defendant, and any order made to pay compensation is an order against which the employer may seek indemnity from its insurer.

In industrial matters, the employer may appear at any WA Industrial Relations Commission hearing to which he/she is a party and by reason of section 44 of the *Industrial Relations Act 1979* (WA) may be the subject of a summons to attend a compulsory conference. There is no scheme of insurance covering industrial relations matters and the employer, once ordered to make payments or provide particular benefits, must make these payments or provide the benefits directly. Employers do, however, frequently appear through peak employer bodies such as the Chamber of Commerce and Industry of WA, which provide an advocacy service for

its members. Because of the increase in workplace agreements at both State and Federal levels, it can be surmised that employers have more direct contact with industrial relations issues today than they had prior to 1993, when many were bound by awards or subject to industrial agreements.

Awards, in particular, provided blanket minimum payments and conditions. Awards also applied across a particular industry rather than a specific workplace, so that that particular industry award would bind employers in that industry whether or not they had been a party to the proceedings before the Commission. Before 1993, some employers would take little or no part in industrial proceedings but would be nevertheless be governed by the outcome of WA Industrial Relations Commission or Australian Industrial Commission hearings.

In contrast, the use of workplace agreements requires the employer to negotiate directly with the employee to fix the rates of pay and other conditions. The negotiations may be direct or through intermediaries. In either case, the employer clearly has an active role in making these crucial decisions. In some cases, the 1993 amendments may have caused some employers (usually smaller employers) discomfort in that by choosing to opt for workplace agreements they were unable to rely upon the award structure to set wages and conditions. Under the *Workplace Agreements Act 1993* (WA), employers moving outside the award structure must ensure they are informed and active in negotiations.

The *Workers Compensation and Rehabilitation Act 1981* (WA) does not require the employer to be informed of the provisions of that Act. The employer can adequately

comply with the provisions by promptly forwarding to its insurer documentation received from the worker. Apart from return to work provisions discussed in chapter 6, the employer has very few other direct obligations.

1.7 The Role of Government

The State Government has several responsibilities in workers' compensation dispute resolution procedures. Firstly, as instigator of the system, it promotes, fosters and encourages certain methods of dispute resolution. Secondly, the Government may appear as a party to a dispute either directly as an employer and indirectly through its own insurer. This requires careful consideration given the opportunities for conflict in that the government is both a major employer and government corporations dominate as insurers. Thirdly, in workers' compensation matters the Government can affect the rate of dispute resolution by either expanding or contracting staff numbers at the directorate. Finally, it can affect spending priorities through, for example, emphasising rehabilitation of workers over benefit payments and dispute resolution.

Similarly, in the area of industrial relations, the Government is able to promote and encourage certain methods of dispute resolution and industrial relations philosophy. It may appear before the commission as an employer or can intervene in matters such as the State Wage Case pursuant to section 51 of the *Industrial Relations Act 1979* (WA). By reason of section 29(a) (iii) of that Act the Minister is entitled to refer an industrial matter to the commission and may (pursuant to section 44(4) (a) (ii) of the Act) request the commission to call a compulsory conference or apply for

a general order, or an addition or variation or rescission of the general order, pursuant to section 50(2).

The Government has an institutionalised role within industrial relations legislation, but under workers' compensation legislation, has no formal right of intervention. But it may intervene through its authority, WorkCover.

1.8 Overview and Comment

Before 1993, the methods of dispute resolution in industrial relations and workers' compensation had some similarities. The WA Industrial Relations Commission was, and is still, required as an initial step in any dispute, to attempt to conciliate and resolve the matter without proceeding to arbitration. In the conciliation process it is possible for the commissioner to make interim orders in an attempt to resolve a dispute. Otherwise, it proceeds to arbitration. Similarly, the Workers' Compensation Board would list a matter for a pre-trial conference in an attempt to settle it informally before taking it to arbitration, but the board was unable to make any interim orders.

After 1993, the structure of the two systems moved even closer with workers' compensation disputes being resolved by the Conciliation and Review Directorate. This is a three-tiered system, initially providing for conciliation. The conciliation officer has power to make interim orders at review, before the matter proceeds to arbitration. Such orders are subject to appeal to the compensation magistrate. An industrial commissioner operates within the industrial relations system in much the

same way. It is not necessary for a commissioner, or a review or conciliation officer, to hold legal qualifications, although there are many commissioners and review officers who do.

Both systems have their own internal appeal structures with appeals from the review officers to the compensation magistrate and appeals from a commissioner to the full bench of the Commission. One difference may be that appeals are given greater status in industrial relations matters, as the full bench must include a presidential member who has judicial status. It is noteworthy that the compensation magistrates are drawn from a roster of stipendiary magistrates who sit and also hear matters relating to breaches of workplace agreements and awards in the Industrial Commission. They also preside in the Court of Petty Sessions and the Local Court. The compensation magistrates are not specialists, unlike the review officers and commissioners. In both jurisdictions there are similar statutory directions as to how disputes are heard and determined with neither being bound by the rules of evidence or legal technicalities and precedent.

Despite the apparent flexibility of these jurisdictions, there are instances of both receiving directions from the Supreme Court which effectively binds them to the rules of natural justice, warning that disregard of the rules of evidence may lead to an error of law. Neither jurisdiction allows for unlimited rights of appearance by legal representatives, although, in practice, lawyers frequently appear in the industrial jurisdiction. The 1993 changes to the *Workers' Compensation and Rehabilitation Act 1981* (WA) have, however, led to a dramatic decline in the appearance of lawyers in compensation cases. A decline in the influence of unions

in the industrial relations jurisdiction following the introduction of workplace agreements legislation has, in turn, limited the jurisdiction of the commission. In contrast, the involvement of unions in the compensation matters has increased since 1993.

One case of note is worth mentioning at this point. In *Brash v WorkCover*⁵³ Commissioner Gregor of the WA Industrial Relations Commission heard an application by the review officers of the Conciliation and Review Directorate for a reclassification of their positions to make them eligible for improvements in wages and conditions. The review officers appealed to the commission under the terms of a workplace agreement which governed their conditions of work and which allowed for appeals over reclassification matters. The thrust of the review officers' case was that decisions of the Supreme Court, referred to above, forced them to "act judicially" in resolving disputes and that they should be accorded the same rights, entitlements and privileges as a judge. The review officers (through their counsel⁵⁴) argued that as the chair of the Workers' Compensation Board had the equivalent status to a District Court judge, they too should have similar status.

Commissioner Gregor, who noted that a large number of tribunals operated under similar circumstances to the Conciliation and Review Directorate without according the benefits of judicial status to the decision makers, disposed of the matter with some alacrity. He noted that the requirement to "act judicially" was simply a direction to review the matter in accordance with due process. It did not require the

⁵³ (Unreported WAIRC 1/97, 8 July 1997).

decision maker to be re-classified as judge! The fact that similar directions bound the commissioner would not have escaped the attention of the parties or the commissioner. The similarity of the style of operations of the commission and the Conciliation and Review Directorate did not, however, tempt the commissioner into agreeing to a re-classification of his industrial cousins.

54 Ironically no restrictions on legal representation applied to the review officers.

Chapter 2

Industrial & Compensation Laws -- Eligibility Criteria

2.1 The Relationship of Employer and Employee

Establishing the relationship or status of employer and employee is essential to both the industrial relations and compensation systems in Western Australia. The rights, obligations and duties, which are owed by one party to the other, are largely defined by whether that arrangement can be characterised as a relationship of employer and employee. The *Industrial Relations Act 1979* (WA) which is the main source of industrial relations legislation in Western Australia provides *inter alia* that its objective is to “*encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes*”.⁵⁵

Industrial disputes are not defined in the *Industrial Relations Act 1979* (WA), but by implication include those things which involve disputes about “industrial matters”. Industrial matters are defined in this Act to include *inter alia* “*any matter affecting or relating to the work, privileges, rights or duties of employers or employees in any industry or of any employer or employee therein.*”⁵⁶ An employer is defined in the Act as “*a person, firm, company or corporation employing one or more*

⁵⁵ Section 6 (b) *Industrial Relations Act 1979* (WA)

⁵⁶ Section 7 *Industrial Relations Act 1979* (WA). Emphasis added.

employees".⁵⁷ An employee is defined as "any person employed by an employer to do work for hire or reward including an apprentice or industrial trainee."⁵⁸

Notwithstanding this circuitous route, it is clear that the operation of the *Industrial Relations Act 1979 (WA)* and related industrial legislation depends on the existence of an employment relationship. That relationship is not succinctly defined in any legislation and therefore is dependent on an understanding of the common law meaning of the concept of the employment relationship. At common law this relationship is often referred to as a *contract of service* and is distinguished from a *contract for services*, which relates to the classification given to an independent/sub-contractor and principal relationship. In general terms, protection under industrial laws and benefits provided under compensation laws attach to, or are governed by, the classification of a contract of service. The courts have developed various approaches in an effort to define the employment relationship and contract of service. These approaches have varied over time, with influences from English cases being a major early determinant.⁵⁹ Set out below is a discussion of the various approaches.

2.1.1 The Control Test

⁵⁷ Section 7 *Industrial Relations Act 1979 (WA)*.

⁵⁸ Section 7 *Industrial Relations Act 1979 (WA)*

⁵⁹ See A Khan, 'Who is a Servant?' (1979) 53(12) *Australian Law Journal* 832-839 for a discussion of the influences of English decisions and generally in relation to the variation in judicial themes in this area.

The so-called “control test” has often been considered a vital factor by the courts in deciding the legal quality of the relationship of employer and employee. Most commentators agree that the test is easier to devise than to apply. The best known formulation of the test is stated by McCardie J in *Performing Right Society v Mitchell and Booker (Palais de Danse) Ltd* who said:

*It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleging to be the person. This circumstance is, of course, one only of several to be conceded, but it is usually of vital importance.*⁶⁰

Over the years, Australian courts have relied on the test of control. This test has to be applied to the totality of the relationship between the participants and not to the actual work itself. That is, the courts do not use this test to ascertain whether the work done is subject to the control and direction of an employer, but rather to establish whether a relationship exists between two persons.

Control by the employer may take a number of forms. The employer may have control over the work to be performed, when it is to be performed and where it is to be performed. As well, the employer may have control as to how the work is to be performed. It is this last element that is given most attention by the court. Often the worker’s skill and expertise is beyond that of the employer and the worker is awarded a degree of discretion as to the manner in which the skills and expertise will be exercised.

⁶⁰ [1924] 1 KB 762 at 766-768. Emphasis added.

In some instances, the employer is not qualified to direct the actual performance of the worker's duties. A number of cases illustrate that the courts did not regard the absence of direct control as being sufficient to negate the existence of a contract of service. For example in *Zuijs v Wirth Brothers Pty Ltd*⁶¹ the High Court considered the case of a highly skilled trapeze artist working in a circus who was injured in a fall while performing. The circus proprietors had no say in the performance of the worker's act, which had been devised by the performers themselves. The injured worker had been engaged as part of a team, after the team had demonstrated their routine to the circus management. The High Court found that the injured man was employed under a contract of service and was entitled to payment of workers' compensation. The court said:

There are countless examples of highly specialised functions in modern life that must as a matter of law be performed on the responsibility of persons who possess particular knowledge and skill and who are accordingly qualified. But those engaged to perform a function may nevertheless work under a contract of service. The fact that the performance of a task depends on a natural gift or on some laboriously acquired accomplishment does not necessarily mean that the performer cannot be a servant. It is only in the most mechanical of operation that anyone can dictate absolutely the mode of performance. The nature of the task is not conclusive.⁶²

These comments are consistent with the earliest statement made by Dixon J (as he then was) in *Humberstone v Northern Timber Mills* when he said:

The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his

61 (1955) 93 CLR 561.

62 Ibid at page 571-572

work resided in the employer so that he was subject to the latter's orders and directions. ⁶³

It is noteworthy that in *Humberstone* the case involved a workers' compensation matter. The issue was whether a timber worker, who was an owner/driver of a lorry, was employed under a contract of service. It was found that the driver was engaged as an independent contractor, but the case is not authority for the general proposition that all owner/drivers are independent contractors. The distinction between authority to control and the actual exercise of control was an issue in the case of *Federal Commissioner for Taxation v J. Walter Thompson (Aust.) Pty Ltd*⁶⁴ where the question was whether certain radio actors participating in radio plays were employees. If they were employees then the defendant in that case would be liable for taxation payments. Latham C.J. said:

*The fact that the artists are skilled does not make it impossible for them to be in the relation of servants to an employer. It is a mistake to think that only unskilled people can only be described as servants. If they are subject to detailed control in the manner in which they do their work, they may be servants. The fact that the remuneration is described as a fee rather than as wages is not decisive. The real character of the relationship must be determined, whether the payment made is described as wages, fee, salary, Commission, or by any other term. ... The employment of a servant may be limited to a particular occasion or may extend over a period. It may be continuous during that period or discontinuous.*⁶⁵

2.1.2 The Organisational/Integration Test

⁶³ (1949) 79 CLR 389 at 404-405

⁶⁴ (1944) 69 CLR 227

⁶⁵ At page 230

Despite the frequent application of the control test the courts have increasingly recognised that they may not be the sole determining factor in categorising the employment relationship. This may be due, in part, to the fact that many employers are seen to have little control over employees, as work becomes more specialised and expert. English courts attempted to deal with the difficulty in applying the control test by the development of the organisation or integration test. In *Stevenson Jordan and Harrison v MacDonald & Evans Ltd*⁶⁶ Lord Denning observed that:

*One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but only accessory to it.*⁶⁷

In a later judgement, *Bank Voor Handel En Scheepvaart N.V. v Slatford*⁶⁸ Lord Denning noted that the test of being “*a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation*”. The test has not however received much support in Australia. In *Stevens v Brodribb Sawmilling Co Pty Ltd*⁶⁹ (hereafter *Stevens*) Mason J. (at 27) observed, that in essence, the organisation test was not an alternative to the control test, but was one of the number of *indicia* assisting in determining the employment relationship. The common theme running through the judgements in *Stevens* is that while control is a significant consideration in determining an employment relationship, there are a number of relevant factors which should be taken into

⁶⁶ [1952] 1 TLR 101

⁶⁷ At page 110-111

⁶⁸ [1953] 1 QB 248.

⁶⁹ (1986) 160 CLR 16.

account when assessing the totality of the relationship. Dawson and Wilson J.J.

stated:

The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or his own equipment, the creation by him of goodwill or sellable assets in the course of his work, payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of a contract will always be of considerable importance.⁷⁰

As can be seen, the High Court in *Stevens* set out some indicators of control. In the WA Industrial Relations Commission, this approach has been generally adopted with frequent reference made by it to *Stevens*. Interestingly, in determining the employer/employee relationship for the purposes of the *Industrial Relations Act 1979* (WA), reference is often made to the fact that one indicator of control is the payment by one party of workers' compensation premiums in order to cover another party to the contract.⁷¹ In *ALHMWU (WA) v Commissioner of Main Roads*⁷² the full bench of the WA Industrial Relations Commission observed that the respondent in that case had claimed on various documents that it was the employer.

⁷⁰ (1986) 160 CLR 16 at 35.

⁷¹ For example *Adams v GKS Fibreglass Pty Ltd* (1998) WAIR 267... See also *Ghale v Low Key Pty Ltd* (1996) WAIRC 237.

⁷² (1996) WAIRC 216.

These documents included taxation group certificates, workers' compensation forms and statements of taxation payment (employer) forms. Taken together, with a number of other factors which indicated a high level of control by the respondent over certain workers, it was held that the respondent was estopped from denying it was the employer.

In the *ALHMWU* case, the full bench relied on the doctrine of promissory estoppel which makes an offer binding (in this case an offer of work made by an employer), not because it was accepted but because there was a detrimental reliance by the offeree (the workers) encouraged or condoned by the offeror. Estoppel precludes a party (an employer, for instance) from asserting against another party, facts, legal rights or the absence of legal obligations, to the extent that it would be unconscionable to do so. In the *Main Roads* case it was held to be unconscionable for the commissioner to deny that he was no longer the workers' employer, for the purposes of paying a redundancy package under an award, when he had continued to represent himself as such for other purposes, in particular for workers' compensation.

The actual terms of the contract are frequently the subject of attention by the courts. Of themselves, they do not prove whether or not a particular worker is an employee or an independent contractor.⁷³ The express intentions of the parties can be useful in determining the relationship, especially where it is not possible to clearly characterise the contract as one of service or for services. However the label, which

⁷³ *R v Foster, Ex Parte Commonwealth Life (Amalgamated) Assurances*(1952) 85 CLR 138 at 151.

the parties use to characterise their relationship, is not conclusive of the nature of that relationship. The courts have frequently insisted that they are entitled to look behind the specific terms of a contract. An early decision in this regard is *Cam & Sons v Sargent*⁷⁴ where Dixon J (as he then was) noted:

The court should look at the substance of the transaction and treat a written agreement, which was designed to disguise its real nature, as not succeeding in doing so if it amounted merely to a cloud of words and, without really altering the substantial relations within the parties, described in by elaborate provisions expressed in terms appropriate to some other relation ...

In *Narich v Commissioner of Payroll Tax*⁷⁵ the Judicial Committee of the Privy Council held that a clause in a contract which attempted to categorise the relationship between the parties as one of principal and contractor failed where the effect of the agreement as a whole was to establish the relationship of employer and employee. Some commentators have referred to this approach as “piercing the veil of self-employment”.⁷⁶

Similarly, the terms of the contract were examined closely in the case of *Building Workers Industrial Union v Odco Pty Ltd*⁷⁷. In that case a company trading under the name of “Troubleshooters Available” supplied builders with labour in the construction industry in Victoria. The workers were invited to sign a contract that stated that the relationship created was not one of employment. The contract did not provide for taxation deductions, holiday pay, or long service leave but did provide

⁷⁴ (1940) 14 ALJR 162 at 163.

⁷⁵ (1983) 50 ALR 417.

⁷⁶ See a discussion of this concept in B Napier, ‘Whither the Contract of Service?’ (1977) 127(5814) *New Law Journal* 779-781.

that the worker was to be a financial member of the union covering his trade. The contract explicitly acknowledged that the workers would not be covered by workers compensation. The Building Workers Industrial Union objected to this form of contract on the basis that its use would undermine conditions of employment in the industry. As a consequence, the union took industrial action against the clients of Troubleshooters to try to prevent them from using labour from that organisation. In turn, Troubleshooters took action seeking damages and injunctions against the union. The question to be determined was, *inter alia*, whether or not the workers engaged were employed under a contract of service.

The Federal Court concluded that no contract existed between the builders and the workers and that the contracts between Troubleshooters and the workers were not contracts of service. The court accepted that the parties had clearly expressed an intention that the contract created a relationship of principal and contractor. The bulk of the terms of the contract indicated that workers did not intend themselves to be regarded as employees.⁷⁸

Interestingly, in a related case which was determined by the High Court in *Accident Compensation Commission v Odco Pty Ltd*,⁷⁹ the court determined that the workers were engaged pursuant to section 9(2)(a)(ii) of the *Accident Compensation Act 1985* (Vic) by Trouble Shooters as “a person to whom during a financial year, under a relevant contract the services of persons are supplied for or in relation to the

⁷⁷ (1991) 29 FCR 104.

⁷⁸ A Western Australian application of this case appears in *Borg v Troubleshooters Available Pty Ltd* (1995) WAIRC 129.

performance of work. Thus the workers fell within the “extended” definition of the concept of worker specifically provided for in the relevant compensation Act. Similar provisions, which apply in Western Australia, will be discussed below.

In its findings the High Court disregarded the specific clause in the Troubleshooters contract, which provided that Troubleshooters would not cover the worker for workers’ compensation benefits. The High Court found that Trouble Shooters were liable to take out compensation insurance to cover the workers, despite the terms of the contract.

The courts have also been willing to look behind other arrangements, such as partnerships, and have determined, in more than one case, that even though a putative employer who has contracted with a partnership may nevertheless be an employer of one of the partners for the purposes of workers’ compensation claims.⁸⁰

As a consequence of the judgement in *Stevens*, reference is now often made in Australia to the application of the multiple factor or indicia test. Despite refinement of the control test and the development of the multiple factor test, its application has often been controversial. In *Vabu Pty Ltd v Federal Commissioner for Taxation*⁸¹ the Supreme Court of New South Wales had to consider whether a putative employer was required to lodge a superannuation guarantee statement pursuant to the *Superannuation Guarantee Administration Act 1992* (Cth) on the basis that

⁷⁹ (1990) 64 ALJR 606.

⁸⁰ D Williams, ‘Zurich Australian Insurance Pty Ltd v Amec Services Pty Ltd & FAI General Insurance’, (1998) 13(5) *Australian Insurance Law Bulletin* 65-67.

couriers engaged by it were employees. *Vabu* asserted that the couriers were not employees but independent contractors. One commentator observed that the company subjected the workers to a plethora of rules governing, among other things, their mode of dress, appearance and behaviour, and the timing of their annual leave.⁸² The Full Court of the Supreme Court of New South Wales found that couriers conducted their own operation, permitting, for their own economic advantage, supervision by the company but that supervision did not amount to control sufficient to categorise the relationship as employer/employee. The Court looked past the considerable measure of control, which the company exercised over the workers, and relied instead on the costs borne by the workers in performance of work and the method by which they were paid and taxed.

Vabu suggests that a heightened level of control, exercised by a principal contractor over a sub-contractor, may be tolerated by the law before the relationship tilts into the realm of employment.⁸³ Meagher J.A. in *Vabu* asserted that the “*old test of control is now superseded*”, perhaps suggesting that *Stevens* is of declining influence.⁸⁴

However, while it is clear that the High Court noted that control was not the sole relevant factor, it did so to create a more liberal and inclusive test, probably in recognition of the greater degree of discretion allowed to modern employees. The

81 (1996) 33 ATR 537.

82 D Chin, 'Losing Control', (1996) 34(10) *Law Society Journal* 52.

83 *Id.*

84 (1996) 33 ATR 537 at 539

decision in *Vabu*, in fact, works the other way, producing a more restrictive or exclusionary result. This decision of the Court of Appeal has been subject to considerable criticism; one commentator suggesting that it could lead to “*eccentric fiscal, social and industrial results*”.⁸⁵ Indeed, the corollary of *Vabu* is that the protection available under various industrial laws could be lost to some putative employees. For example, if the trend in *Vabu* was followed, it would be easier for employer/principals to “convert” employees to independent contractors, arguing that they are not obliged to pay annual holidays and long service leave entitlements or superannuation.⁸⁶ As will be discussed below, the *Vabu* litigation resurfaced in the High court in 2001 with interesting results.

2.1.3 The Economic Reality Test

The Troubleshooters arrangements inspired litigation over a cluster of cases centring on the distinction between employees and independent contractors. The High Court refused special leave to appeal against the decision of the Federal Court in *Building Workers Industrial Union v Odco Pty Ltd*⁸⁷, thus refusing to take up the opportunity to re-examine the decision in *Stevens v Brodribb Sawmilling Co Pty Ltd*. A number of commentators have criticised the adherence to the test laid out in *Stevens*. One commentator suggested that industrial laws should be amended to allow tribunals to

⁸⁵ See P Gerber, ‘Employees and Independent Contractors Revisited’, (1999) 73(1) *Australian Law Journal* 29-34 and D Chin, ‘Losing Control’, (1996) 34(10) *Law Society Journal* 52-55.

⁸⁶ As will be discussed below, the more cumbersome provisions of section 127C of the *Workplace Relations Act 1996* (Cth) may become relevant where the courts find that a contract for services is unfair. See also K Tarkah, ‘Employee or Independent Contractor?’ (1996) 2(5) *Human Resources Law Bulletin* 56. See also I Székely, ‘Employees v Independent Contractors: Weighing up the Advantages’, (1996) 12(2) *National Accountant* 45-47 who throws doubt on whether in fact independent contractors benefit from taxation arrangements.

set conditions for independent contractors, in addition to the powers to deal with unfair contracts, which are discussed below.⁸⁸ Other commentators have drawn attention to the “considerable judicial support” for the “economic reality” approach, first discussed in Britain in the 1950’s and 1960’s, and which grew stronger throughout the 1970’s and 1980’s.⁸⁹

In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*,⁹⁰ MacKenna J concluded that the appellant was not the employer of the worker named Latimer because Latimer was “*a small businessman rather than a servant*”.⁹¹ Lord Wright in *Montreal v Montreal Locomotive Works*⁹² observed that “*it is in some cases possible to decide the issue by raising as the crucial question, whose business it is, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior*”.⁹³

In Australia, some Federal Court decisions reflect an attempt to introduce consideration of the economic reality of the relationship into the equation. In *Re*

87 (1991) 9 FCR 104. Leave to appeal was not granted in (1991) 33 AILR 235.

88 C Fenwick, ‘Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry’, (1992) 5 *AJLL* 237.

89 W B Creighton, W J Ford and R J Mitchell ‘*Labour Law Text and Materials*’ Second Edition Law Book Company Sydney 1993 p 71

90 [1968] 2 QB 497.

91 At page 525-6

92 [1947] 1 DLR 161.

93 At page 169

*Porter: Ex parte TWUA*⁹⁴, Gray J heard an application relating to the eligibility of certain persons to vote for the election of TWUA office holders. Gray J had to determine whether owner-drivers and taxi drivers were employees. He held that some owner-drivers were employees, despite the fact that they owned their own vehicles and were paid according to results, rather than by hourly rates. Taxation was not deducted from these payments. Gray J considered that this merely reflected the employer's non-compliance with taxation laws. There were set hours of work. However the drivers could work for other employers. Gray J regarded this freedom as illusory. He observed the capital costs borne by the drivers varied, and considered that, in reality, this was evidence of an attempt by the employer to shed the capital costs of trucks, rather than indicating that the drivers were in business in their own right. In short, while Gray J noted that there were some indicators that showed the drivers might be independent contractors, he found that there was a significant level of *"economic dependence of one party upon another, and the manner in which the economic dependence may be exploited"*.⁹⁵

It is noteworthy that in a survey of the use of independent contractors carried out in the mid 1990s, Wooden and Vandeneuvel found that many contractors had little or no influence over the hours of work, were precluded from subcontracting the job to

94 (1989) 34 I.R. 179

95 At page 184

another, that payment was often on a time spent basis and that many contractors never or only rarely provided services concurrently to other firms.⁹⁶

The approach that Gray J took in *Re Porter: Ex parte TWUA* can be contrasted with the New South Wales Full Court decision in *Vabu*, above, where couriers were held to be independent contractors although “*in reality*” they were economically dependent on the other party for the supply of work, and the principal in *Vabu* had clearly managed to shed the capital costs of equipment to the couriers. Likewise, the approach of Gray J can be contrasted to the High Court in *Humberstone*, above, where the court held that owner-drivers were independent contractors in circumstances very similar to the situation in the TWU case.

It can be observed that the law covering the categorisation of the employment relationship has numerous sources, including industrial law and compensation law, together with taxation and superannuation law. Gray J in *TWUA* observed “*it is unfortunate that ...it should be necessary for people to obtain a decision of a court to know the true nature of their relationship*”.⁹⁷

⁹⁶ M Wooden and A Vandenneuvel, ‘The Use of Contractors in Australian Workplaces’, (1994) 8(2) *Labour Economics and Productivity* 163 at 185. They found that 38% of those surveyed could be regarded as “*dependent contractors*”.

⁹⁷ (1989) 34 I.R. 179 at 184

As noted, a number of commentators have criticised adherence to the dichotomy of employee and independent contractor. In particular, Brooks⁹⁸ has observed that, in many cases, the agreed arrangement is for the performance of work rather than for the acquisition of particular skills. De Plevitz has also observed that while Federal and State industrial legislation has attempted to open up the labour market to more flexible arrangements, adherence to the control test may lead to courts overlooking the imbalance of power inherent in a relationship where the worker's next job is dependent on accepting the principal's terms as in *Vabu*.⁹⁹

The above cases illustrate a mixture of approaches. There is an element of benevolent paternalism shown by those decisions which work towards the penetration of the "veil" of self-employment. On the other hand there is now a line of cases showing a level of judicial tolerance to parties having the right to decide the terms under which people will sell their labour.¹⁰⁰ In relation to workers' compensation (discussed below) most States have extended coverage to certain classes of independent contractors, suggesting an acknowledgement of the economic reality test. .

Principal and contractor surveys conducted in the mid-1990s showed that the use of independent contractors in Australia is widespread and particularly prevalent in the

98 A S Brooks, 'Myth and Muddle - An Examination of Contracts for the Performance of Work', (1998) 11 *University of New South Wales Law Journal* 48.

99 L De-Plevitz, 'Dependent Contractors: Can the Test from *Stevens v Brodribb* Protect Workers who are Quasi-employees?' (1997) 13 *Queensland University of Technology Law Journal* 263-275.

100 See B Napier, 'Whither the contract of service?' (1977) 127(5814) *New Law Journal* 779-781.

mining, construction and transport industries.¹⁰¹ Notably, these industries tend to have high levels of accident and disability rates.¹⁰² As noted above, a number of decisions have determined that the rights and obligations of parties need to be examined to ascertain the status of the work contract. For various reasons, some parties may complete a particular form of contract to create the appearance that the relationship is one of a contract for services.

For example, the party supplying the services may gain certain taxation advantages by being considered an independent contractor, hence the prevalence of cases involving the Commissioner of Taxation. The other party may gain a benefit by not being classified as an employer and thus be exempt from a range of statutory impositions, such as superannuation levies, workers' compensation premiums and payroll taxes. Wooden and Vandenheuvel found that a major reason for engaging contractors was the desire to avoid costs of complying with government regulations and charges and to obtain cheaper labour.¹⁰³ There may, however, be some disadvantages, particularly to the party who stands to lose the protection and benefits afforded under legislation, awards or compensation statutes. From an occupational health perspective there is also evidence that the decline in union influence,

¹⁰¹ M Wooden and A Vandenheuvel, 'The Use of Contractors in Australian Workplaces', (1994) 8(2) *Labour Economics and Productivity* 163 at 170-174.

¹⁰² C B White, *State of the Work Environment: Occupational Injuries and Diseases, Western Australia 1997/9*, WorkSafe Western Australia, Perth, 1999.

¹⁰³ M Wooden and A Vandenheuvel, 'The Use of Contractors in Australian Workplaces', (1994) 8(2) *Labour Economics and Productivity* 163 at 178-9.

contracting out and enterprise bargaining may have an adverse effect on work safety.¹⁰⁴

For example, the worker who “converts” to an independent contractor may find difficulty claiming workers’ compensation benefits or protection under occupational safety and health legislation.¹⁰⁵ In order for the contract for services to be distinguished from a contract of service, the parties can take a number of initiatives. From the cases above, it is clear that the most important initiative is that the intention of the parties to agree on a contract for services should be clearly stated. Further, the decision in *Humberstone* indicates that the courts are more likely to consider a long-term arrangement as indicative of a contract of service, whereas a contract which provides for the performance of one certain and specified task is more likely to be a contract for services. In order to overcome this problem, some contracts provide that a particular task is to be performed as part of a continuing agreement with a separate request made at the time of providing the service.¹⁰⁶ Payment, which is regular or periodic, is more likely to indicate a contract of service, so that payment by task or job is more likely to be an indicator of an independent contract.

104 J Crittal, ‘Risk Management for the 1990’s. Enterprise bargaining and occupational health and safety’ (1995) *Journal of Occupational Health and Safety* 11(6) 587, J George ‘More OH and S disputes inevitable’ (1997) *Australian Safety News* 68(5) 4, C Mayhew and M Quinlan ‘The management of occupational health and safety where subcontractors are employed’ (1997) *Journal of Occupational Health and Safety* 13(2) 145

105 K B Brown, ‘Contracting Out by Western Australian Government Departments and the Legal Implications Applicable to Safety and Health’, (1995) *School of Business Law Working Paper Series 95.08* Curtin University of Technology.

106 This device was used in the Troubleshooters contracts.

As has been shown, the level of control is still a significant factor in determining the employment relationship, so that a contract for services should not be seen as evidence for any significant levels of control over the suppliers of services. Clauses which provide that the workers should provide their own tools and equipment are usually indicative of a contract for services (see *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*¹⁰⁷). Independent contracts should avoid fixing the hours of work and should allow the suppliers of work to delegate the performance of contractual duties to another person. In addition, such a contract should allow the suppliers of services to be engaged by competitors of the business. The non-payment of benefits such as long service leave, holiday pay and sick leave are generally indicators of a contract for services, as is the absence of the requirement to deduct taxation on a PAYE basis.

It is not clear at which point the courts will interfere with the legitimate attempts to avoid employment status. In most cases, avoidance of the employment classification is for the benefit of the principal and to the detriment of the worker. Sections 127A to 127C of the *Workplace Relations Act 1996* (Cth) make provision for the Federal Court to review contracts entered into by independent contractors and vary or set them aside on the ground that they are harsh or unfair.¹⁰⁸ Early decisions under these provisions established that the court had power to make orders; even where the relevant contracts of services had been terminated.

¹⁰⁷ (1945) 70 CLR 539.

¹⁰⁸ Some limitations apply. The contractor must be performing work for a corporation. *Re Dingjan: Ex parte Wagner* (1995) 183 CLR 323. T Gooch 'Powers of the Federal Industrial Relations Commission: Recent High Court Decisions', (1995) 47(6) *Australian Company Secretary* 271-272.

In one case, an order was made that pending determination of the issues; the contracts remain “on foot”. Further, where it was shown that the contracts were unfair.¹⁰⁹, the employer had an obligation to find alternative employment for contractors whose contracts had been terminated. In *Harding v EIG Ansvar Ltd*¹¹⁰ the Federal Court declined to grant interim relief to prevent an insurance agent from having his contract terminated by the respondent. At the substantive hearing, damages of \$5000 was awarded, not on the basis that the contract was unfairly terminated, but on the basis that its terms were unfair in failing to provide adequate notice to the agent of the termination of the contract, so as to allow him to dispose of his client register; an asset of some value.

The court has no power to award monetary compensation for unfairness, but if orders are made pursuant to section 127B, the parties may pursue other rights, for example under Trade Practices, Fair Trading Legislation¹¹¹ or at common law for breach of contract.

¹⁰⁹ *Gerrard v Mayne Nickless Ltd & Ors* (1996) 135 ALR 494.

¹¹⁰ [2000] FCA 46 (20 January 2000).

¹¹¹ Although the indications are not promising in this regard as indicated by the High Court in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 193, where the Court did not accept that the employment events in that case were in the course of the employer’s trade or business. A more optimistic view is taken by J Clarke ‘Misleading Negotiations and the Contract of Employment: Applying s 52 of the Trade Practices Act’ (1993) (6) *Australian Journal of Labour Law* 57.

In *Lee v Aerial Taxi Cabs Co-Operative Ltd*¹¹², a taxi driver applied for relief under section 127A and on the grounds that the contract he was engaged under was a restraint of trade. Under the contract, the driver was required to comply with the respondent's by-laws and disciplinary procedures in return for use of the respondent's radio system. A case of unfair contract, under section 127A, was not made out because it was held that the use of the radio equipment was part of a bailment agreement and not a contract for services. However, the respondent was unable to justify the restraint of trade placed upon the drivers in the use of the radio transmission system. The case emphasises that a number of avenues may be open to an independent contractor, but given that such relief is usually via the court system, rather than tribunals, the cost of relief may be higher and certainly requires more technical argument.¹¹³

At the time of writing, the New South Wales Government is seeking amendments to its industrial relations laws so that the relevant tribunal can treat independent contractors as employees under certain circumstances. New South Wales had in place broad provisions dealing with unfair contracts section 88F(1) of the *Industrial Arbitration Act 1940* (NSW) and its predecessors - section 275 of the *Industrial Relations Act 1991* (NSW) and the current section 106 of the *Industrial Relations Act 1996* (NSW). The current provisions apply to both independent contractors and employees. South Australia and Queensland both have similar unfair contracts provisions.

112 [1999] FCA 1727 (10 December 1999).

113 For example *Papa & Others v Finemores* [1994] 1498 AIRC (31st August 1994) where orders were made in favour of freight contractors and *Stowar & Others v Myer Stores Ltd* [1993] NSWIRC 59, where a successful application was made under the New South Wales unfair contract provisions on behalf of Lorry Owner Drivers who had been forced to accept terms dictated to them by the respondents.

Howe and Mitchell have observed it's only recently that the concept has developed that the employment relationship is common to all classes of wage earners. Indeed, as will be shown below, Australian courts and legislatures have contemplated different classes of worker, described by the terms "servant" "worker", "employee" and "independent contractor". As noted immediately below, many workers did not fall into these categories, due to legislative restrictions based on income, type of work or industry. Over time, with the extension of legislative protections, the above categories have begun to merge, requiring reconsideration of the need to distinguish between different classes of worker.¹¹⁴

To conclude this section it is appropriate to mention the most recent decision of the High Court in this area. *Vabu Pty Ltd* returned to court in 2001 to contest another claim that its workers should be considered as employees. In *Hollis v Vabu Pty Ltd*¹¹⁵ the plaintiff/appellant was injured by a courier engaged by *Vabu Pty Ltd*. He sued *Vabu Pty Ltd* on the grounds that the courier was an employee and that *Vabu Pty Ltd* was vicariously liable. It was critical to the success of the plaintiff's case that it establish the New South Wales Court of Appeal had been in error in the earlier *Vabu* case (now referred to as the taxation decision). A majority of the High Court applied the principles outlined in *Stevens*; namely the multi-idicia test, and held that the courier was an employee and that the contracts of engagement and the other matters relied upon by *Vabu Pty Ltd* as indicators of a contract of services

¹¹⁴ J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion', (1999) 12(2) *Australian Journal of Labour Law* 113-130.

were not sufficient to outweigh the many indicators of control. Callinan J dissented, but applied the same tests as the majority to arrive at a conclusion that the couriers were contractors. Callinan J's dissent is unremarkable because the tests used to establish the employer-employee relationship require an assessment of which factors should be regarded as indicators of such a relationship and the weighing of those factors. There is clearly room for differences of opinion over the relevance and weight to be attached to the various factors. The most interesting judgment is that of McHugh J who, while adopting the principles of the majority in deciding the employer/employee relationship, considered that it was inappropriate to effectively reverse the finding of the Court of Appeal in the taxation case, when Vabu Pty Ltd's business arrangements were based on that decision. Instead, McHugh opined that vicarious liability should extend to make a principal contractor liable for a sub-contractor in the same way as an employer is vicariously liable for an employee. This is an adventurous departure from long established precedent and would, if adopted, have radical consequences for employers and contractors. In the first instance, it would require a revision of insurance practices to extend this coverage. In the second instance, it would influence the costs of business, as one of the main incentives for contracting out is that insurance is not required to cover contractors for such liabilities. That said; the decision of McHugh J has the attraction that, had the majority adopted it, previous findings covering employer's obligations such as payroll taxation, superannuation and workers compensation would not have been affected. The majority decision suggests that a class of workers, who are apparently contractors (by reason of the written terms of their engagement), will be capable of

being considered employees. There are whispers of Gray J in the *TWU* case in the decision of McHugh J. Whether his fellow judges eventually reach a similar conclusion is something for the future.

2.2 The Definition of the term “Worker” under the *Workers Compensation and Rehabilitation Act 1981 (WA)*

So far, discussion has centred on the requirement that the employment relationship be established in order to take advantage of protection provided under industrial relations laws. Such protection is made available when it is established that a person is employed under a contract of service.¹¹⁶ The *Workers’ Compensation and Rehabilitation Act 1981 (WA)* provides that the benefits of that Act accrue to a person who is categorised as a “worker”. A “worker” is defined in section 5 of that Act to include *inter alia* “any person who has entered into or work under a contract of service” but also includes “any person engaged by another person to work for the purpose of the other person’s trade or business under a contract with him for service, the remuneration by whatever means of the persons so work in being in substance for his personal manual labour or services”.¹¹⁷

This latter provision is referred to as the *extended* definition. Its effect is to provide compensation coverage for a certain class of persons who would normally be categorised as independent contractors. The extended definition in the Western Australian legislation has its counterparts in most States. A similar provision was noted above in the case of *Accident Compensation Commission v Odco Pty Ltd*¹¹⁸.

¹¹⁶ Early compensation cases determined the central issue to be whether or not an injured person was engaged under a contract of master and servant rather than as an independent contractor. The control test was established early in Australian law as a means of making this distinction. See *Pozzi v Ayles* (1918) 20 WALR 104 and *Phelan v Main Roads Board* (1927) 30 WALR 76.

¹¹⁷ Emphasis added

¹¹⁸ (1990) 64 ALJR 606

In *Humberstone*, the policy behind these extensions was discussed by Dixon J. who said:

...a consideration of the policy of the provision as well as of its text appears to me to show that the distinction it seeks to draw is between on the one hand an independent contractor whose relation with the principal is special or particular either because it is outside the course of the general business of the contractor or the general practice of his trade or business or because he has no such general business or he is not a general practitioner of his trade, and on the other hand an independent contractor who performs work successively or perhaps concurrently for his customers or others in the course of a definite trade or business carried on systematically or who holds himself out as ready to do so...no doubt the policy is a matter of inference, but it seems reasonable to suppose that it was considered proper that a person conducting a business in the course of which he contracted to perform work should himself carry the risk of personal injury as one of the hazards of his business, while the men who work under contract but only for the employer or without any general trade or business or outside his trade or business should, like an ordinary employee be insured by the Act against the risk of injury in his work.¹¹⁹

The need for such a provision was explained this way when introduced into parliament in Western Australia in 1923:

It is proposed to bring two sets of people within the scope of the Workers' Compensation Act, the person working in connection with the felling, hauling, carriage, sawing or milling of timber for another person who is engaged in the timber industry and persons employed at group settlements.... It will cover all timber workers, either those engaged on piecework or on wages. The occupation is perhaps more dangerous than any other and it is proposed by the Bill to protect those engaged in it.¹²⁰

Historically, in Western Australia, compensation was limited to certain classes of worker usually determined by level of income (thus restricting access to senior

¹¹⁹ (1949) 79 CLR 389 at 402 (emphasis added).

workers, casuals, outworkers and often non-manual workers) or by industry. Early legislation was designed to cover workers in the most dangerous industries. Over time, the definition of worker was extended. This was linked with the timber industry, after the early case of *Corcoran v The Great Fingal Gold Mining Company*¹²¹ established that most timber workers were independent contractors and not entitled to compensation. By extending the definition to include workers in that industry whose remuneration was in substance for manual labour, the stage was set for further extensions to cover other workers.¹²² In later years, the extended definition was amended to delete reference to timber workers, thus extending coverage to all workers whose remuneration fell into the prescribed category.

While the primary definition, that is that part which deals with the contract of service, relates to an examination of the relationship between the parties, the extended definition appears to require an examination of the kind of work performed and the manner of the remuneration. The Western Australian provision requires that protection be granted to persons who provide their personal manual labour or services, but only where those services are the major determinant of the remuneration. The extended definition requires that the remuneration of a person so working to “*be in substance for his personal manual labour or services*”.¹²³

120 WA Parliamentary Debates Legislative Assembly 18 January 1923 2685 (Sir James Mitchell).

121 9 WALR 192.

122 The definition only covered timber workers when first introduced.

123 Section 5 of the *Workers Compensation and Rehabilitation Act 1981* (WA)

To determine whether or not a person falls within this category, it is necessary to determine the reason why the applicant is being remunerated. This approach was adopted in Western Australia in a series of cases, commencing with *Tolchard v Mansard Homes*¹²⁴ and culminating in the important decision of *Summit Homes v Lucev*.¹²⁵ Both cases show that an examination of the services provided by the applicant is an essential part of any sub-determination. In *Tolchard's* case, the applicant was a cleaner who provided her manual labour and services as well as cleaning supplies, detergents, mops and brooms. It was held that the supply of the materials and equipment was a minor part of the services provided, and that the payment was “*in substance for her personal labour or services*”. It is noteworthy that the applicant was a partner in a contract cleaning business, but the court did not consider this prevented her from making a claim under the extended definition.

In *Summit Homes v Lucev*, the Supreme Court sanctioned an enquiry into the income, expenses and capital outlay of the applicant to determine what the applicant was paid for, but cautioned against placing too high an emphasis on any one of these expenses incurred by the applicant which might distort the overall financial relationship between the parties. In effect, the extended definition gives some statutory force to the *economic reality* approach, set out in the decision of Gray J in the *TWUA* case discussed above, because it requires consideration of the level of capital outlay of the parties and whether a party is, in effect, dependent upon the other for work.

124 (Unreported SC (WA), SCL 4522, 26 May 1982).

125 (Unreported SC (WA), Full Court, 67/95, 3rd April 1996).

2.3 Summary

The requirement to establish the employment relationship is central to both industrial and compensation laws. In some instances, it might be difficult to determine the precise nature of the relationship. Recent cases have confirmed the importance of control as one of the indicators for establishing that relationship. There are signs that the High Court decision in *Stevens* is under pressure to include consideration of the economic reality or potential of one party to shift capital costs to the other. But the most recent decision in *Hollis v Vabu* has re-asserted the authority of *Stevens*, while at the same time (via the McHugh J judgment) left it open for future decisions to explore the possibility of extending vicarious liability for employers to independent contractors.

Industrial tribunals and compensation courts undergo similar enquiries to establish the threshold eligibility criteria. The workers' compensation laws provide for an extended coverage of workers and include not only those persons engaged under a contract of service, but also a class of persons employed under a contract for services. There is, therefore, some danger in industrial courts regarding the payment of compensation or the procurement of an insurance policy to cover compensation, as an indicator of control. Industrial tribunals need to examine the circumstances under which the compensation payment is made or under which the policy is operating. In some cases, the policy of insurance may be taken out as a statutory obligation, due to the operation of the extended definition, rather than the existence of an employer/employee relationship. It may, therefore, not be an indicator of

control but in fact an indicator that the parties are operating in a principal/contractor relationship.

In addition, in some circumstances, even where the contract entered into is illegal, compensation benefits may be awarded. This is because of the discretion granted to compensation tribunals to allow payments in such circumstances.¹²⁶ Therefore, in certain cases, workers who do not have the protection of industrial laws may be entitled to benefits under compensation legislation. This presents some difficulties for employers who wish to contract out their labour. In some circumstances this may not alleviate exposure to liability for compensation payments or to obligations under occupational safety and health legislation. This latter aspect is discussed in more detail in chapter 6.

¹²⁶ This aspect is discussed in more detail chapter 6.

Chapter 3

Stress Claims and Industrial Relations

This chapter examines a specific area of compensation law relating to applications for payment of compensation as a consequence of work-related stress. In 1993, amendments to the *Workers Compensation and Rehabilitation Act 1981* (WA) reduced the capacity of workers to make claims for stress-related conditions (stress claims). This chapter looks at a number of issues arising out of stress claims and their interaction with the industrial relations jurisdiction.

3.1 Historical Development of Stress Claims

When compensation legislation was first introduced into Western Australia in 1902, the threshold requirement of any claim was that workers needed to establish they had suffered a “*personal injury by accident arising out of and in the course of the employment*”. The effect of this requirement was that workers had to demonstrate that the activity causing the injury fell within the requirements of their specific duty statement. It was possible that an injury could arise out of the employment, but not be in the course of the employment, and vice versa.

In 1924, the conjunctive threshold requirement was amended to a disjunctive threshold requirement so that an injury would be compensable if it was a “*personal*

injury by accident arising out of or in the course of the employment".¹²⁷ High Court decisions subsequently established that the effect of this amendment was to provide compensable claims for workers in two circumstances.¹²⁸ Firstly, claims would be compensable if workers were injured as a consequence of the physical activity of their job. Secondly, claims would also be compensable if workers were injured in the course of their employment but not necessarily performing the physical requirements of their job.

The effect of the expansion of the threshold requirement was that injuries became compensable for a range of circumstances not necessarily directly related to the physical tasks for which workers were employed. A series of cases established that claims could be made for injury sustained at, for example, sponsored employer social events such as Christmas parties and sporting activities.¹²⁹ However, workers still needed to show that the nature of the harm was in the style of a "*personal injury by accident*", which requires the establishment of a specific physiological harm.¹³⁰ In other words, conditions of gradual onset (such as a repetitive injury or some kinds of stress claims) were generally not regarded as a personal injury by accident.¹³¹ In short, many work-related conditions were still not compensable despite the expanded definition in operation after 1924. Conditions such as repetitive strain injuries, a variety of work-related infectious diseases and stress-related conditions

¹²⁷ *Workers Compensation Act 1912* (amendment Act No 40 of 1924 section 4).

¹²⁸ *Kavanagh v Commonwealth* (1960) 103 CLR 547.

¹²⁹ *Commonwealth v Oliver* (1962) 107 CLR 353, (sporting events), *Wolmar v Travelodge Australia Ltd* (1975) 26 FLR 249, (social events and Christmas parties).

¹³⁰ *Kavanagh v Commonwealth* (1960) 103 CLR 547 and more recently *Zickar v MGH Plastic Industries Pty Ltd* (1996) 140 ALR 156. Note however that the physical harm may be very slight and may be a series of small injuries.

and psychological harm were usually not compensable unless they could be traced to a specific event where medical evidence established a sudden physiological change for the worse.¹³²

In 1979, the West Australian Coalition Government commissioned a review of workers' compensation legislation, which ultimately led to the repeal of the *Workers Compensation Act 1912* (WA) and the implementation of the *Workers Compensation and Assistance Act 1981* (WA). The name of the Act was subsequently changed to the current *Workers' Compensation and Rehabilitation Act 1981* (WA). A significant feature of the 1981 Act was the expansion of the threshold requirement of work-related injury to include gradual onset conditions. Section 18 of the new Act provided with deceptive simplicity that:

*If a disability of a worker occurs, the employer shall, subject to this Act, be liable to pay compensation in accordance with schedule 1.*¹³³

In chapter 2, there is a discussion of the issues relating to the definition of a worker in section 5. Section 5 also defines for the purposes of the *Workers' Compensation and Rehabilitation Act 1981* (WA), the requirements of a "disability" and includes the following:

Disability means:

(a) a personal injury by accident arising out of or in the course of the employment, whilst the worker is acting under the employer's instructions;

¹³¹ *Roberts v Dorothea Slate Quarries Co Ltd* [1948] 2 All ER 201.

¹³² *State Energy Commission v Van Zyl* (unreported SC (WA) SCL 4879 27 April 1983).

¹³³ Emphasis added

- (b) *a disabling disease to which part 3 division 3 applies;*
- (c) *a disease contracted by a worker in the course of his employment at or away from his place of employment and to which the employment was a contributing factor and contributed to a recognisable degree;*
- (d) *the recurrence, aggravation, or acceleration of a pre-existing disease where the employment was a contributing factor to that recurrence, aggravation or acceleration and contributed to a recognisable degree;*
- (e) *a disabling loss of function to which part 3 division 4 applies.*¹³⁴

The addition of paragraphs (c) and (d) of the definition allowed for the introduction of claims of gradual onset. Significantly, paragraph (c) of the definition of *disability* allowed for claims for *diseases*, defined in section 5 to include “*any physical or mental ailment, disorder, defect, or morbid condition whether of sudden or gradual development*”. The word “*disease*” also appears in paragraph (d) of the definition of disability.

After May 1982 (when the *Workers’ Compensation and Rehabilitation Act 1981* (WA) came into effect), there was no doubt that a condition of gradual onset could be compensable provided that the worker was able to establish that the employment had contributed to the condition. From 1982 the work contribution to the disease did not have to be a major factor in the onset of the condition. As long as it could be established that the disease had some element of work-relatedness workers were entitled to claim compensation. As a result, claims previously not compensable

¹³⁴ Emphasis added

became subject to claim. In particular, repetitive strain injuries and stress claims began to increase. Throughout the 1980's, a number of commentators expressed alarm at the rise in repetitive strain injuries.¹³⁵

In the late 1980's and early 1990's, statistics began to show an increase in the rate of stress claims. Because the diagnosis of such claims was difficult to disprove, and the return to work was often poor so that the cost of these claims was frequently much higher than any other form of claim.¹³⁶ Even though the number of stress claims was less than 2% of all claims, the cost of stress claims was on average double most other claims.¹³⁷

3.2 The 1993 Amendments to the Definition of Disability

As part of a package of 1993 reforms to compensation legislation in which it sought to reduce the prospect of an increase in stress claims, the State Government amended the definition of disability. This was done in two ways. Firstly, the employment contribution to the disease was altered to require that it be a significant

¹³⁵ See for example, G Bammer, 'The Arguments about RSI: An Examination', (1988) 12(3) *Community Health News* 348-358. G Bammer, *Occupational Disease and Social Struggle: The Case of Work-related Neck and Upper Limb Disorders*, National Centre for Epidemiology and Population Health, Australian National University, 1990. G Bammer, *Repetition Strain Injury in Australia: Medical Knowledge and Social Movement*, National Centre for Epidemiology and Population Health, Australian National University, 1990. C D Browne, B M Nolan and D K Faithful, 'Occupational Repetition Strain Injuries: Guidelines for Diagnosis and Management', (1984) March 17 *The Medical Journal of Australia* 329-332. Note the controversial views in Y Lucire, 'Neurosis in the Workplace', (1986) 145 *The Medical Journal of Australia* 323, who considered that RSI was not an organic condition. See also R Spillane and L Deves, 'RSI: Pain, Pretence or Patienthood?' (1987) 29 *Journal of Industrial Relations*, 41. R Spillane and L A Deves, 'Psychosocial Correlates of RSI Reporting', (1988) 4(1) *Journal of Occupational Health and Safety*, 21.

¹³⁶ *Work-Related Stress 1994/5 -1997/8* WorkCover Report, 1999.

¹³⁷ *Id.*

contributing factor. Secondly, the legislation now quarantines stress claims so that in some circumstances such claims are no longer possible. Under section 5, the definition of disability was amended to read as follows:

A disabling loss of function to which part 3 division 4 applies but does not include a disease caused by stress if the stress wholly or predominantly rises from a matter mentioned in subsection (4) unless the matter is mentioned in paragraph (a) or (b) of that subsection and is unreasonable and harsh on the part of the employer.¹³⁸

Subsection 4 provides:

For the purposes of the definition of disability, the matters are as follows –

- (a) the worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment;*
- (b) the worker is not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment, and*
- (c) the worker's expectation of (i) a matter; (ii) a decision by the employer in relation to matter referred to in paragraph (a) or (b).*

Subsection 5 provides;

In determining whether the employment contributed or contributed to a significant degree, the contraction, recurrence, aggravation or acceleration of a disease for the purposes of the definition of disability and relevant employment, the following shall be taken into account:

- a) the duration of the employment;*
- b) the nature of, and particular tasks involved in, the employment;*
- c) the likelihood of contraction, recurrence, aggravation or acceleration of the disease occurring despite the employment;*

¹³⁸ Emphasis added.

- d) *the existence of any hereditary factors in relations to the contraction, recurrence, aggravation or acceleration of the disease;*
- e) *matters affecting the worker's health generally;*
- f) *activities of the worker not related to the employment.*

In short, stress claims are now unavailable to workers who have been subject to a range of industrial relations activity which may lead to a stress-related condition, unless it can be established that the employer's conduct in such matters is *unreasonable and harsh*.

On the face of it, the effect of this provision is to reduce the potential for stress claims. A corollary is that in order to proceed with a claim it is often necessary to examine the behaviour of an employer, not simply in the context of how a disease or injury arose, but also in the context of management behaviour and prerogatives. Western Australia is not the only state to have enacted such provisions. They have already appeared in Victoria, New South Wales, and South Australia and in Federal legislation.

3.3 The Process of Claiming Compensation for Stress

Workers alleging stress-related conditions must initially provide their employer with medical support of their claim, usually in the form of a report or certificate. The certificate must include a diagnosis, linking it with the work circumstances. Once the certificate has been lodged, the employer is obliged under the *Workers' Compensation and Rehabilitation Act 1981 (WA)* to forward the claim to the

insurer¹³⁹ which has 14 days to notify the worker whether it's been admitted or denied.

The insurer may deal with the matter in a number of ways. If it is soundly based, it may simply be admitted and compensation paid. The employer is then instructed to make payments of wages, as directed, from time to time by the insurer. In the event that the insurer has some doubts about the claim, it may, under section 64 or 65 of the *Workers Compensation and Rehabilitation Act 1981* (WA), request that the worker be examined by a medical specialist of the employer/insurer's choosing. The worker is advised that no decision is to be made on the claim, pending the outcome of further investigations.

At that point, the worker may choose (provided that 14 days has expired) to refer the matter to conciliation. Otherwise, the worker must await the outcome of the insurer's investigations. In many cases this may take some months, as appointments with specialists are frequently delayed. There are generally two grounds on which the employer/insurer can doubt the claim. Firstly, the employer/insurer has to consider whether or not the diagnosis can be traced to the work circumstances. Secondly, even if the condition is work related, the claim can be challenged on the grounds that it relates to matters outlined in subsection 4 of the definition of disability (above), namely that the stress is connected to an industrial relations matter.

139 Section 57 *Workers Compensation and Rehabilitation Act 1981* (WA)

In such cases, a worker is advised that the claim is declined, either on the grounds that the worker did not suffer a disability or that the disability was sustained but is not compensable.

A worker may challenge these decisions and attempt to show that the stress-related condition is, in fact, work-related and not related to industrial relations matters, such as the interaction between employer and employee. Alternatively, the worker can accept that the condition is related to industrial relations matters but allege that the employer's conduct was unreasonable and harsh.

It should be clear that stress claims are usually extremely complex and require not only medical evidence to support them, but also an understanding of the legal technicalities as well as sufficient evidence to rebut the counter claims of an employer. A worker, who has been dismissed and alleges that the employer's actions are unreasonable and harsh, must also establish that the dismissal was unfair.

Not surprisingly, there is considerable overlap between the types of matters which must be considered in the Conciliation and Review Directorate, and those which would be considered in the WA Industrial Relations Commission.

In particular, under the *Industrial Relations Act 1979* (WA) section 29(b) provides:

An industrial matter may be referred to commission in the case of an employee –

- (i) that he has been harshly, oppressively or unfairly dismissed from his employment;*

*(ii) that he has not been allowed by his employer a benefit, not being a benefit under an award or order to which he is entitled under his contract for service.*¹⁴⁰

In addition the *Workplace Relations Act 1996* (Cth) has provision for application for unfair and unlawful dismissal which may be used by a disgruntled employee/worker. The federal provisions are subject to strict time limits requiring applications to be made within 21 days.¹⁴¹

3.4 Cases on Stress

A case that may have provoked the 1993 amendments to the definition of disability was *Western Australia v Mathai*.¹⁴² The worker had a “*pre-existing abnormal degree of insecurity and anxiety*”. It was claimed that this condition was aggravated by her employment, when due to her low productivity; she received adverse reports on her employment performance. The reports were shown to Mrs Mathai and discussed with her. She alleged that as a result, her pre-existing anxiety state became worse. She became unfit for work and lodged a claim for compensation. The employer disputed the claim. The Workers’ Compensation Board ruled in her favour. On appeal, the Supreme Court held that the reporting process was part of her employment and that this process had exacerbated her anxiety. As a result, a pre-existing disease had been aggravated with her employment contributing to a recognisable degree. Compensation was payable even though there was a

¹⁴⁰ Emphasis added

¹⁴¹ See E Cooke, ‘Making a late application for unfair dismissal’, (1998) 72(7) *Law Institute Journal* 64-67. In some cases extensions of time have been granted due to employees’ illness.

considerable body of evidence that the onset of her condition pre-dated the intervention of the adverse employment report. The employer's appeal to Supreme Court was dismissed.

In *Mathai*, the Supreme Court was in no doubt that the anxiety state was a form of disease and that the question of whether the employment was a contributing factor was essentially a question of fact. In so finding, the Western Australian Supreme Court followed the decision of the High Court in *Federal Broome Co Pty Ltd v Semlitch*¹⁴³ in which a worker who suffered from schizophrenia injured her back during the course of her employment. She recovered from the physical injuries but continued to suffer delusions of abdominal pain. The abdominal pain incapacitated her and she claimed compensation. The employer/insurer defended the claim on the grounds that the delusions of pains were a new manifestation of a pre-existing non-work-related disease, namely schizophrenia. The High Court, on appeal, was satisfied that the abdominal pain was a manifestation of an aggravation of a pre-existing disease and the incapacity caused by that aggravation was compensable.

A little earlier, but in a case similar to *Mathai*, King CJ of the South Australian Supreme Court in *Workers' Rehabilitation and Compensation Corporation v Rubbert* observed:

It may seem strange that an illness which is a perhaps unreasonable reaction to a proper disciplinary measure can be the subject of compensation, but I see no escape from the view that the counselling session and change of roster were incidents of the employment. There is a clear causal connection between those

¹⁴² (Unreported SC (WA) SCL 6960 4 December 1987).

¹⁴³ (1964) 110 CLR 626.

*incidents and the worker's depressive illness. That illness therefore arose in the course of the employment.*¹⁴⁴

In the same case, Millhouse J commented, “*I must say though I regret the result. It seems absurd that a women, upset by a merited reprimand, can get worker's compensation.*” Sentiments such as these, no doubt, contributed to the spread of legislation to curtail such claims.

The above three cases illustrate that employers may have difficulty in defending stress claims, particularly where there is a pre-existing propensity for mental illness. An aggravation of that condition will be compensable unless the threshold requirement is sufficiently high to preclude the work contribution. In other words, if the threshold requirement is merely that the work-related condition is “*recognisable*” then most claimants will be able to establish that the work aggravated a pre-existing illness. However, if the threshold is set at a “*significant*” or (as in the case of the Commonwealth legislation) a “*dominant*” work contribution, then the claim for compensation will be made more difficult.

Where legislation precludes claims, which relate to industrial relations issues, claims would be made even harder to sustain. The circumstances in *Mathai's* case would be subject to both limitations. That is, were Mrs Mathai to proceed with her claim post-1993, it is likely that she would have had some difficulty in establishing that the employment contribution to her anxiety state was “*significant*”. Further, given that the aggravation to the pre-existing stress related condition was precipitated by

¹⁴⁴ (1991) SASC 2862 22 May 1991.

“discipline or of the expectation of discipline”, which arose from the discussion of her work performance report, it is likely that her claim would be unsustainable, unless she was able to show that the employer’s action was unreasonable and harsh.

The first significant Western Australian case dealing with the new provisions was *McPherson v WA Print*¹⁴⁵ where the Full Court of the Supreme Court of Western Australia heard an appeal on whether a worker who had not been informed as to whether he was to be dismissed, redeployed or transferred, had any *expectation* in relation to these matters. The review officer had found that because the worker had received no information as to his future, he therefore had no expectation as to any of the matters enumerated in subsection 4. Any stress-related condition, which was consequent upon the employer’s failure to inform him of his future, was not precluded by subsection 4 of section 5 of the definition of disability under the *Workers Compensation and Rehabilitation Act 1981 (WA)*.

The Supreme Court overturned the review officer’s decision and held that a state of uncertainty in which the fear about dismissal, retrenchment, demotion¹⁴⁶ or redeployment may occur, amounts to an expectation for the purposes of that subsection. Interestingly, the case directly involved the Minister who introduced the amendments to the *Workers’ Compensation and Rehabilitation Act 1981 (WA)* (Mr Kierath). He had been responsible for the restructuring of State Print, the employer

¹⁴⁵ (Unreported SC (WA) SCL 960697 5th December 1996).

¹⁴⁶ It should be noted that demotion itself could amount to dismissal in some circumstances. In particular where a positional change within employment is construed as a unilateral repudiation of the employment by the employer. This in turn may lead to applications for unfair dismissal even though the employee continues to work in the same workplace. Per *Stratton v Illawarra County Council* (1979) 2

who was the subject of the application. Ironically, the review officer had also held that, if the fear induced by the failure to advise the worker of his circumstances amounted to an expectation, then the employer's conduct had been unreasonable and harsh. Not only was the Minister subject to political scrutiny because of the restructuring of a previous government department, but also subject to the scrutiny of the Conciliation and Review Directorate.

A number of cases have now been decided which touch on the issue of interpretation of the words "*unreasonable and harsh*". It is noted that the worker needs to establish that the conduct was the conjunctive "*unreasonable and harsh*" rather than in the disjunctive as appears in section 29 of the *Industrial Relations Act 1979* (WA). These words have been the subject of considerable judicial discussion in the industrial arena. In the Conciliation and Review Directorate, the compensation magistrate considered the words "*unreasonable and harsh*" in *Catholic Care v Wrafter*¹⁴⁷ finding that such words should be given their ordinary meaning, noting that whether or not the employer's behaviour was unreasonable and harsh was a question of fact.

Referring to *Gregory v Philip Morris Ltd*¹⁴⁸, the compensation magistrate noted that "*unreasonable*" in the industrial context denoted human behaviour that failed to conform to a course of conduct, which a reasonable person would have adopted in the circumstances. By reference to the Oxford Dictionary, the compensation

NSWLR 701 See also J Catanzariti, 'When a demotion is an unfair dismissal', (1999) 37(9) *Law Society Journal* 36-37.

147 (Unreported CM (WA) 60/96 28 October 1996).

148 (1988) 80 FLR 455.

magistrate found that word “*harsh*” referred to repugnant feelings or judgments; cruel; unfeeling. The words “*unreasonable and harsh*” therefore contemplate not simply the substantive nature of the matter but also its procedural nature. In other words, the compensation magistrate found that the employer could behave in a manner which was unreasonable and harsh even though the action taken by the employer was justified, but the means by which the action was taken was unfair.

In the industrial context it is well established that the WA Industrial Relations Commission will inquire, not simply into the reasons for dismissal, but also the manner in which dismissal occurred.¹⁴⁹ It is also well established that the employer is entitled to dismiss the employee for incompetence, misconduct, prolonged absence from work and dishonesty.¹⁵⁰ However, even if it is established that the employer has good grounds for the dismissal, it is also necessary for the employer to show that the employee has been given adequate opportunities to answer any allegations made by the employer. The failure to do this is, in effect, a denial of natural justice and is consequently unfair or unreasonable and harsh.

As indicated in chapter 2, the merging of the jurisdictions becomes clear where stress claims are concerned. It is noted in the discussion (in relation to estoppel in chapter 2) that there may a direct relationship between the findings of the WA Industrial Relations Commission and the Conciliation and Review Directorate. In

¹⁴⁹ For example, that the employee be given fair and specific warning that he risked dismissal and given the opportunity to respond. *Margio v Fremantle Arts Centre Press* 70 WAIG.

¹⁵⁰ *Clouston & Co Ltd v Corry* [1906] AC 122.

*Abbott v Galvin*¹⁵¹ the compensation magistrate held (probably wrongly) that a review officer did not have to accept the findings of a judicial registrar of the Industrial Relations Court. This was whether an injured person was an employee under the *Industrial Relations Act 1988* (Cth) for the purposes of assisting in a finding of whether or not the injured person was a worker under the *Workers' Compensation and Rehabilitation Act 1981* (WA). Subsequent decisions however, suggest that where the findings of industrial courts are directly on point, issue estoppel would operate to preclude the review officer from disregarding the findings.

The case of *Abbott v Galvin* appears to be wrongly decided given that if there were a finding that the applicant was an employee, such a finding would satisfy the primary definition of a worker. Decisions by the Supreme Court, for example in *Waddington v Silver Chain Nursing Association*¹⁵² confirm that res judicata and issue estoppel have application to review hearings. *Waddington's* case therefore suggests that if there were a finding in the WA Industrial Relations Commission that, for example, the worker's dismissal was harsh, a review officer would be bound by that finding.

This possibility can be observed in *State School Teachers Union of WA (Inc) v Minister for Education*,¹⁵³ where a teacher claimed that her transfer from one school to another (pursuant section 7(3) of the *Education Act 1928* (WA)) was unfair. The finding of the WA Industrial Relations Commission was that the transfer (in

151 (Unreported CM (WA) 16/98 25 May 1998).

152 (Unreported SC (WA) 171/97 14 December 1997).

153 [1995] WAIRC 144

November 1994) was not unfair, unlike an earlier decision (in a different case) in which it was held that the transfer had been “*done for ulterior motives*”.¹⁵⁴ A finding of the unfairness or otherwise of a transfer could be relevant to proceedings in the Conciliation and Review Directorate in a case where a stress-related condition arose from that action. It transpired that the matter was the subject of an application to the directorate with the employer raising the issue of estoppel in an attempt to stop the worker from pursuing the compensation claim. The review officer found that estoppel did not apply, but the reasons given by review officers are not made public. Surprisingly, there was no appeal from the review officer’s preliminary decision on estoppel. However, the transcript of the proceedings before the commission was put into evidence pursuant to section 84ZB of the *Workers’ Compensation and Rehabilitation Act 1981* (WA).

In October 1996, the same parties proceeded to a full hearing in the Directorate; 12 months after the commission had dealt with the matter. The application was dismissed on the grounds that the transfer, which was found not to be unfair, brought on the worker’s condition. An appeal to the compensation magistrate was dismissed on 10 December 1997. In July 1999, the worker, Mrs Jenkins, successfully appealed to the Supreme Court. The Supreme Court found that the review officer and the compensation magistrate had erred in law because they had failed to take into account that while the initial decision to transfer the worker may not have been harsh and unreasonable, the employer’s insistence that she remain in the position when she was not coping, could be considered harsh and unreasonable.

¹⁵⁴ *SSTU v Minister for Education* (1994) WAIG 2027.

The matter was returned to the review officer for further consideration. In effect, this worker had been subject to proceedings in the Western Australian Industrial Commission and the Directorate on very similar issues, with the Supreme Court ultimately making a finding contrary to the commission.

The *Jenkins* case highlights the legal complexities of some stress claims. It also shows that proceedings in the Directorate may be extremely protracted and, probably, very expensive. Interestingly, it may also show that in some cases the Directorate may take different considerations into account when assessing some industrial relations issues. The decision of the Supreme Court in *Jenkins* may now have some effect on the commission on issues surrounding transfers under the *Education Act 1928* (WA) or subsequent legislation. It is submitted that the commission would be obliged to consider, not only the initial decision to transfer the worker/employee, but also the effect of the transfer on the employee's performance and health. As the decision in *Noack*, discussed in chapter 1, shows, the commission is aware that decisions made under the *Workers Compensation and Rehabilitation Act 1981* (WA) may have some bearing on its jurisdiction.

In addition to the matters which relate to whether the employer's behaviour was unreasonable and harsh, there are also considerations as to whether the employer's actions fall within the class of matters dealt with under subsection 4 of section 5 of the *Workers Compensation and Rehabilitation Act 1981* (WA). For example, what is "discipline" for the purposes of that subsection? As noted, a number of other jurisdictions have put in place similar provisions to the Western Australian subsection 4. In particular, the *Safety Rehabilitation and Compensation Act 1988*

(Cth) limited the scope of stress claims where stress arose out of various management and industrial relations issues. The Commonwealth legislation precludes payments of compensation where the stress is the result of “a reasonable disciplinary action”. This was discussed in *Commission for Safety and Rehabilitation of Commonwealth Employees v Chenhall*.¹⁵⁵ Cooper J observed that “disciplinary action” meant “no more than reasonable action lawfully taken against an employee in the nature of or to promote discipline”.¹⁵⁶

However, action taken simply to determine whether disciplinary action should be initiated would not fall within the parameters of this subsection. In order to define “disciplinary action” Cooper J opined that 3 questions should be asked:

1 What discipline or rules of conduct apply to an employee?

2 In what circumstances can the employer take action of a disciplinary nature to enforce the discipline or rules of conduct against the employee?

*3 What type of action may the employer take against the employee if the circumstances giving occasion to the taking of disciplinary action exists?*¹⁵⁷

Chenhall's case was noted and followed in the Western Australian decision of *Ansett Australia Ltd v Burgess*.¹⁵⁸ In that case, the compensation magistrate observed that whether or not the action taken was a form of discipline, regard should be given to the practice and procedures set out in any applicable award, industrial

¹⁵⁵ (1992) 109 ALR 361.

¹⁵⁶ At page 369

¹⁵⁷ At page 370

¹⁵⁸ (Unreported CM (WA) 29/99 1 July 1999).

agreement or written contract. It is clear from the decisions in *Chenhall* and *Burgess* that to determine what constitutes discipline or disciplinary action, an inquiry into the terms and conditions of the worker's employment is necessary.

Again, it is possible to observe an interaction between the industrial and compensation jurisdictions where reference to awards and industrial agreements is a subject to inquiry at a compensation review. Cooper J in *Chenhall's* case made Coalition reference to cases decided by industrial tribunals when deliberating the nature of disciplinary action.

Subsection 4 of section 5 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) also precludes a claim for compensation for stress-related conditions where the stress arises from the worker not being in "*receipt of any benefit*" from the employment. In *Trewin v Comcare*,¹⁵⁹ the meaning of the term "*benefit*" is considered Herrey J held that "*benefit*" meant "*anything that was for the good of a person or thing*". There is no authority on this point from a West Australian compensation decision. However, under the *Industrial Relations Act 1979* (WA) section 29, consideration has been given to the term "*benefit*" in a number of cases.

In *Balfour v Travelstrength Ltd*,¹⁶⁰ Commissioner Johnson held that the term "*benefit*" included any "*advantage, entitlement, right, superiority, favour, good or prerequisite by the action of the employer*".¹⁶¹ A similar approach was adopted in

¹⁵⁹ (Unreported Federal Court of Appeal 19 June 1998).

¹⁶⁰ (1980) 60 WAIG 1015.

¹⁶¹ Referred to with approval in *Perth Finishing College Pty Ltd v Watts*(1989) 69 WAIG 2307 at 2313

*Perth Finishing College Pty Ltd v Watts*¹⁶² when the Full Bench considered that the term should be interpreted widely. However, some caution should be taken in transposing the term “benefit” from one Act to another. The purpose of section 29 of the *Industrial Relations Act 1979* (WA) is to grant access to relief, whereas the purpose of the words in section 5 subsection 4 *Workers’ Compensation and Rehabilitation Act 1981* (WA) is to reduce the capacity of the worker to seek relief.

However, the *Workers’ Compensation and Rehabilitation Act 1981* (WA) provides that the Act be interpreted in favour of the worker where there is any doubt or ambiguity.¹⁶³ This suggests that it might be appropriate to confine the reading of the term “benefit” for the purposes of the *Workers’ Compensation and Rehabilitation Act 1981* (WA), but to liberally construe the meaning of the same term under the *Industrial Relations Act 1979* (WA).

It should be noted that not only is the employer liable to pay compensation to the worker if the stress-related claim is proven, but in some circumstances even more drastic events may lead to additional liabilities. In the case of workers who commit suicide as a consequence of a work-related injury, there is a well established line of cases that holds that compensation is payable to the worker’s dependents where it can be shown that:

1. At the time the worker committed suicide he or she was, in fact insane
2. That the insanity was a result of the disability
3. That the suicide was a result of the insanity.¹⁶⁴

¹⁶² (1989) 69 WAIG 2307.

¹⁶³ *Bird v Commonwealth* (1988) 165 CLR 1

¹⁶⁴ Per *Marriot v Maltby Main Colliery* (1920) 13 BWCC 353 and *Crengle v Lake Brunner Sawmilling Co* [1953] NZLR 765.

This is not to suggest that all stress claims are made by potentially insane persons. However, the natural progression of stress-related conditions such as anxiety and depression might have this unfortunate result. The employer's liability does not end with the death of the worker.¹⁶⁵ Significantly, a recent case has suggested that the test for claiming compensable suicide may not be as difficult as the early cases suggest. In *Holden Pty Ltd v Walsh*, Giles J held that provided the compensable condition contributed to the death by suicide, this would be sufficient to ground a claim.¹⁶⁶

Many workers' compensation claims with a stress-related component arise from forms of discrimination, or harassment. Subjecting another worker to any form of harassment is, in most cases unlawful, and if this leads to personal injury may give rise to a compensation claim against the employer on the basis of vicarious liability or against a co-worker direct under some other head of damage. There is no mechanism which prevents a worker making both a compensation claim and a claim under anti-discrimination legislation, although it is probably the case that a tribunal making an award under the anti-discrimination laws would take into account any compensation already paid.¹⁶⁷ In addition, it is clear that a worker dismissed as a

165 M Pittard, 'Compensation for Suicide Due to Work Stress', (1996) 2(4) *Human Resources Law Bulletin* 40.

166 (2000) 19 NSWCCR 629.

167 M Spry 'Workplace Harassment; What is it, and what should the law do about it?' (1998) *Journal of Industrial Relations* June 235.

consequence of unlawful discriminatory behaviour has a remedy in the industrial arena.¹⁶⁸

3.5 Overview - The Merging of the Jurisdictions

When dealing with stress related claims, review officers are now required, to consider the management behaviour of the employer in addition to the medical and legal aspects. In most claims, such behaviour is generally found to be irrelevant to the worker's claim. As the worker must establish that the disability was sustained in the course of the employment, sometimes the employer is required to give evidence as to the scope of the employment. The employer is usually not required to detail issues relating to management practices over transfer, promotion, redundancy and the other matters detailed in section 4 of section 5 of the *Workers' Compensation and Rehabilitation Act 1981* (WA). Significantly, unlike industrial commissioners, who must have experience in industrial relations, review officers are not required to have any prerequisite qualifications.¹⁶⁹

Another area affected by the introduction of subsection 4, is that covering equal opportunity in employment. The concept of unreasonable and harsh behaviour by the employer includes behaviour which would be contrary to law, discriminatory or arbitrary. Where the dismissal, transfer, failure to promote, etc. is related to

¹⁶⁸ *Mercer v Thomas P Clarke (Aust) Pty Ltd* Print (950226) 23 May 1995 – dismissal unlawful where related to disability (kidney failure), *Amprino v Waverley Lighting Print* (960338) 1 August 1996 – dismissal unlawful where related to disability (brain injury) *Silaphet and South Western Area Health Service*[1998] NSWIRC 124 – unlawful dismissal related to back injuries. *Martin v International Freight Consolidators Pty Ltd* (1996) 3-428 unlawful dismissal on grounds of pregnancy.

¹⁶⁹ This lack of pre-requisite qualifications did not escape the attention of Commissioner Gregor in *Brash v WorkCover*, referred to in chapter 2.

discriminatory practices, contrary to, for example the *Equal Opportunity Act 1984* (WA), the review officer would be entitled to make a finding that the employer's behaviour was unreasonable and harsh.

Some interesting questions emerge from this prospect. In particular, there are some gender implications over the effects of subsection 4. For example, women suffer more stress claims than men. Women are also slower to return to work than men following a work-related disability. Statistics also indicate that a large percentage of women's stress-related claims arise from sexual harassment and/or sexual discrimination.¹⁷⁰ Further, some research indicates that the peak age for women's claims is broader but older than men, so that often women will be recipients of compensation payments later in life.¹⁷¹ This is likely to have an adverse effect on women's return to work and rehabilitation.¹⁷² When this occurs, it is conceivable that a claimant suffering a stress-related condition brought about by discriminatory practices by an employer, may be entitled to claim compensation under the *Workers' Compensation and Rehabilitation Act 1981* (WA) and also damages under the *Equal Opportunity Act 1984* (WA). It is more likely that this will occur in the cases of women who are claimants rather than men. There seems little doubt that decisions made by industrial tribunals on issues relating to unfair dismissal will be relevant, if not binding, to the Directorate, and similarly in reverse. Practitioners in this area have to keep a watchful eye on the developments in the law in both jurisdictions.

¹⁷⁰ *Work-related Stress 1994/5-1997/8* WorkCover Report 1999.

¹⁷¹ I V Gluck and A Oleinick, 'Claim Rates of Compensable Back Injuries by Age, Gender, Occupation, and Industry - Do They Relate to Return-to-work Experience?' (1998) 23(14) *Spine* 1572-1587.

¹⁷² D Morrison, G Wood, S MacDonald and D Munrowd, 'Duration and Cost of Workers' Compensation Claims: An Empirical Study', (1993) 9(2) *Journal of Occupational Health and Safety*, 117.

Chapter 4

The Calculation of Wages and Compensation

As noted in chapter 1, a developing area of overlap between jurisdictions is the issue of the calculation of entitlements. Compensation benefits are frequently calculated having regard to award rates and wage rates paid under industrial agreements.

The inter-relationship between the fixing of wage rates pursuant to the *Industrial Relations Act 1979* (WA) the *Minimum Conditions of Employment Act 1993* (WA) the *Workplace Agreements Act 1993* (WA) and the calculation of weekly payments of compensation under the *Workers' Compensation and Rehabilitation Act 1981* (WA) is examined in this chapter.

4.1 The First Schedule of the *Workers Compensation and Rehabilitation Act 1981* (WA)

It was noted in the preceding chapter that section 18 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) provides compensation to be paid in accordance with schedule 1 of the Act. That schedule provides a detailed framework for the calculation of weekly payments for full-time, casual and part-time workers. It also provides for the payment of allowances, medical expenses, rehabilitation expenses and benefits to dependents in the event of the death of a worker. Of particular interest to this study are the provisions contained in clauses 7, 11 and 11A of schedule 1 of the *Workers' Compensation and Rehabilitation Act 1981* (WA).

Clause 7 provides that when there is total incapacity for work, a weekly payment shall be made equal to the weekly earnings of the worker. When the worker is partially incapacitated, the payment is the sum equal to the amount of the total weekly earnings, less the amount which the worker is earning, or is able to earn, after the disability is taken into account. Incapacity means a physical incapacity for doing work in the labour market in which the worker was working or might reasonably be expected to work.¹⁷³ In considering the work a worker is able to perform, his or her background, physical characteristics, age, pre-existing physical disabilities, employment background, skills, expertise, training and education can be taken into account.¹⁷⁴

However, it is generally not permissible to take into consideration the labour market at the time of the injury. In other words, if there was a high rate of unemployment, which prevents a worker from returning to work, this does not contribute to the incapacity. Compensation is payable in respect of the disability, and it is not essential for the contract of employment to be on foot after compensation payments have commenced. The worker is entitled to payment even after ceasing work. The calculation of weekly earnings is dealt with in clause 11 of the *Worker's Compensation and Rehabilitation Act 1981 (WA)*

¹⁷³ *Arnotts Snack Products Pty Ltd v Jacob* (1985) 155 CLR 171, *Thompson v Armstrong and Royse Pty Ltd* (1950) 81 CLR 585 and *Ball v Hunt* [1912] AC 496.

¹⁷⁴ *Taylor v Department of Lands and Surveys* (1986) 7 WCR (WA) 163, *Ryder v Clackline Refractories* (1986) 6 WCR (WA).

Difficulties arise where a worker is unable to return to pre-accident employment, but there is evidence of some recovery in the worker's condition that would allow the worker to return to some work. Clause 7 contemplates that compensation payments may be reduced. Sections 60, 61 and 62 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) facilitate the means by which employers/insurers can apply to the Conciliation and Review Directorate to reduce the worker's payments on the basis of what the worker is earning, or is able to earn, in some suitable employment or business. This invariably involves a contest in which the worker seeks to establish ongoing total incapacity while the employer/insurer seeks to adduce medical evidence to show that the worker is fit for some work. It is not necessary for the employer to show that the worker has any experience in such work. Payments may be reduced where it is determined that the worker's capacity allows a return to work notwithstanding that the job is unavailable or that the worker has no experience in that employment.¹⁷⁵

Prior to 1993, clause 11 of schedule 1 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) provided that in the event of the worker proving incapacity, compensation would be paid at the award rate for the employment in which the disability occurred. This rate excludes payment of overtime, bonuses or incentives, and any form of allowances. For many workers, the effect of the operation of clause 11 was that in the event of a disability there was an immediate reduction in their income. The award rate did not, in most cases, reflect the average weekly earnings of most workers.

¹⁷⁵ *Vurlov v Leighton Nursing Homes* [1978] WAR 15, *Heat Containment Industries v Kimberley* (1990) 2 WAR 47.

Award rate wages were set by State and Federal industrial commissions and, in particular, in Western Australia, pursuant to section 51 of the *Industrial Relations Act 1979* (WA) which provides that the commission in court session shall determine the State Wage Case. Section 41 of the *Industrial Relations Act 1979* (WA), as noted, does allow employee/workers to enter into an industrial agreement, but such agreements are generally referable or complementary to awards. Most awards comprise a basic minimum payment, together with various allowances and overtime payments.

In 1993, clause 11 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) was amended to include clause 11A, which provided that for the first 4 weeks of incapacity, over-award payments such as overtime, allowances, bonuses and incentives could be taken into account in the calculation of the “*average weekly earnings*” to be paid to the worker. The intention of this section is to provide some parity between wages being paid to the worker prior to the disability and compensation payments made thereafter. If, after 4 weeks, the worker remains incapacitated, compensation payments continue at a reduced rate, i.e. the basic award rate.

4.2 Calculation of Compensation by Reference to an Award

The amount of compensation payable to injured workers who are not subject to industrial awards or agreements is covered under clause 11 of the *Workers' Compensation and Rehabilitation Act 1981* (WA). This provides for the

Conciliation and Review Directorate to determine an award or an agreement which may “*fairly be applied*” to the work that was being performed by the worker at the time of the disability. This procedure requires a detailed examination of the nature of the work performed, the type of industry involved, any written documents describing the worker’s duties and the application of those matters to work descriptions contained in industrial awards or agreements.¹⁷⁶ In short, this requires some kind of matching process. Parties to the proceedings must be familiar with relevant industrial awards.

A detailed examination of the manner in which allowances and other benefits are paid is often necessary. The classification of a payment is critical after the initial 4-week period. If a payment is classified as an allowance, overtime, benefit or incentive it may be excluded from the payment to be made after the first 4 weeks. Frequently, this also requires an examination of the award or agreement in question.¹⁷⁷

4.3 Workplace Agreements and Compensation Payments

The pre-1993 calculation of compensation payments did not present many difficulties other than those outlined above. In most cases, it was easy to discern the worker’s award and the form of payments made under that award. After 1993, as a consequence of the introduction of the *Workplace Agreements Act 1993* (WA) and

¹⁷⁶ *Mocerino v Cellulose Fibre Insulation Pty Ltd* (unreported, SC (WA) SCL 2106 25 August 1977).

¹⁷⁷ *Mutual Acceptance Co Ltd v Federal Commr of Taxation* (144) 69 CLR 389 and *Wishart v MPL Laboratories* (unreported SC (WA) SCL 960529, 17 September 1996).

the growth of enterprise bargaining agreements in the federal arena, many workers were no longer paid according to award coverage. Despite the changes to industrial laws, the post-1993 schedule 1 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) provisions continued to contemplate the use of awards as a benchmark for compensation payment/wage fixing.

Consequently, the change in industrial relations procedures had significant unintended effects on the calculation of weekly payments. One of these was that weekly payments of compensation increased. This was not simply because the 1993 amendments provided for average weekly earnings to be paid for the first 4 weeks, but also because it was difficult to discern from some workplace agreements whether there was any basic award payment that could be made after 4 weeks of disability.

As noted in the previous chapter, the introduction of enterprise and workplace agreements usually led to wages being annualised. Instead of a basic wage, with additional allowances and benefits comprising the average weekly earnings, the global income per annum was divided by 52 to give a weekly payment. Many workplace agreements did not refer to an award rate or the payment of allowances. The effect of these forms of agreements was that many workers on work place agreements were not subject to the clause 11A reductions after the first 4 weeks. In other words, once the average weekly payment was calculated the worker continued to be paid at that rate because it was impossible to discern what part of the wage constituted over-award payments.

In some cases, perhaps wrongly, review officers have inquired into the terms of the workplace agreement to examine whether or not award and over-award payments could still be determined despite wages being assessed on an annual basis. For example, in *Kukulj v Newcrest Mining Limited*¹⁷⁸ the worker was paid under a “fly-in-fly-out agreement”, which annualised her wages. The preamble to the agreement noted the basis upon which the annualised payments had been calculated and made reference to specific allowances, which had been included. The review officer received evidence on what part of the annualised payments was regarded as allowances under the previous award. The compensation magistrate considered that it was permissible to take this extrinsic evidence into account when describing the implementation of the agreement to ascertain the part of the wages considered to be allowances.

A different approach, though, was taken in a South Australian case where the Chief Justice of the Supreme Court in *Perzzorno v Workers’ Rehabilitation Compensation Corporation*¹⁷⁹ noted that, in construing an enterprise agreement:

I agree with the conclusion of the review officer and the tribunal that the amount of a former site allowance, even if it was possible to quantify it should no longer be regarded as amount perceived by way of a site allowance. In my opinion the character of the relevant amount has been determined by reference to circumstances under which it is paid. Whatever the relevant amount and whatever its origin, it is no longer being paid as site allowance. The relevant amount did not retain that character because as a matter of history, it has once been paid as a site allowance. It would be identifiable as and to be excluded as a site allowance only if, in my opinion, it was paid under circumstances such that it retains the character of a site allowance. In my

¹⁷⁸ (Unreported CM (WA) 17/97 11 January 1997).

¹⁷⁹ (1997) 69 SASR 211 (Emphasis added).

opinion, the effect of enterprise agreement was that it simply became a component of a basic hourly rate.

The effect of the comments made by Doyle C J above would indicate that once an agreement is reached where there is no identification of the components making up the basic hourly rate, it would be inappropriate to apply the provisions of clause 11A to reduce the worker's payments after 4 weeks. This was the result in many cases, so that after 1993, the overall cost of weekly payments became a larger proportion of the cost of the compensation system. The payments of many workers on workplace agreements (particularly those in the mining industry) continued to equal their average weekly earnings throughout the period of their incapacity. They weren't reduced after 4 weeks, as was the case for workers on awards.

4.4 1999 Amendments to Clause 11A

The operation of clause 11A of the *Workers' Compensation and Rehabilitation Act 1981* (WA) was the subject of a 1999 review of the Act which focused on the increasing costs of compensation payments. Noting that the change in industrial practices had had an unintended effect on compensation payments, the *Report of the Review of the Western Australian Workers' Compensation System*¹⁸⁰ recommended that clause 11A be amended to take into account the increased use of workplace agreements.¹⁸¹

¹⁸⁰ D R Pearson, B McCarthy and R Guthrie, *Report of the Review of the Western Australian Worker's Compensation System*, WAGP (The Pearson Report) 1999.

¹⁸¹ Id p 90.

Clause 11A now provides two methods of calculating weekly payments. Firstly, workers covered by awards are entitled to average weekly earnings for the first 4 weeks plus all over award payments, overtime and allowances. Payment is to be made to a maximum of 150% of the average adult minimum wage. After 4 weeks incapacity, payment will be reduced to the basic award rate. Workers not covered by an award, who are paid pursuant to an agreement clause 11A of the *Workers Compensation and Rehabilitation Act 1981 (WA)*, receive the average weekly earnings for the first 4 weeks up to a maximum of 150% of the average adult minimum wage. After 4 weeks, the worker's wage will be reduced to 85% of their average weekly earnings. The clear intention of these new provisions is to provide parity between award and non-award rate payments.¹⁸²

The changes to clause 11A are ironical. The Coalition Government promoted the introduction of workplace agreements in Western Australia as benefiting employers by providing for more flexible working hours, allowing for the reduction of the use of overtime payments. For employees, the agreements were touted as allowing greater flexibility and facilitating wage increases. However, these increases had a flow-on effect to the compensation system, which increased the cost of the system and led to rises in compensation insurance premiums for employers, who consequently experienced increased overheads.¹⁸³ The overall effect, in some instances, may well have been to force some employers to cease operating or to reduce their workforce.

¹⁸² These changes operate from November 1999.

These events placed pressure on the government to amend clause 11A so that the introduction of the workplace agreements scheme was taken into account. Further, the amendments to clause 11A provides parity between the compensation paid for award and non-award workers, which, arguably, in turn creates a disincentive for workers to enter into workplace agreements. Workers in some industries achieved significant pay increases above the 150% cap now placed on weekly earnings in clause 11A.¹⁸⁴ These workers now not only suffer a drop in income after 4 weeks, but also as a result of the cap of 150% of the average adult minimum wage, suffer a further decrease in wages from the time of disability. It should also be remembered that wherever wages increase, either pursuant to an agreement (which provides for graded increases) or by virtue of decisions of the state and federal industrial commissions, compensation costs also increase accordingly. Therefore, the negotiation of wages may affect cash flow in terms of wage payments and insurance premiums. A poignant example of the consequences of the 1999 amendments to the *Workers' Compensation and Rehabilitation Act 1981* (WA) is illustrated in *Griffin Coal Mining Co Ltd v The Coal Mining Industrial Union of Workers of Western Australia*.¹⁸⁵ In *Griffin* the employer had agreed to pay injured workers according to the pre-1999 provisions of the *Workers' Compensation and Rehabilitation Act 1981* (WA). When the Act was amended, *Griffin Coal* objected to the enforcement of the terms of an industrial agreement it had previously negotiated with unions on the basis that it was paying more than was legally required under the Act under that agreement. The Supreme Court held that this industrial agreement which was

183 *The Pearson Report* pp 55-71.

184 Particularly the manufacturing and mining industries. See *Pearson Report* p 67.

185 [2000] WASCA 107

registered under the *Coal Industry Tribunal of Western Australia Act 1992* (WA) was binding in its terms and the employer was obliged to continue to pay over and above its statutory obligations under the *Workers Compensation and Rehabilitation Act 1981* (WA).

4.5 Compensation and Leave Entitlements

There are two provisions in the *Workers' Compensation and Rehabilitation Act 1981* (WA) which specifically refer to the payment of compensation in conjunction with leave entitlements. Section 80 provides as follows:

(1) Compensation is payable in accordance with this Act to a worker in respect of any period of incapacity notwithstanding that the worker has received or is entitled to receive in respect of such period any payment, allowance, or benefit for annual leave or long service leave under any Act of the Commonwealth or of the State, any industrial award or industrial agreement under any such Act, or any other industrial agreement applicable to his employment, and the amount of compensation so payable shall be the amount which would have been payable to the worker had he not received or been entitled to receive in respect of such period any such payment, allowance, or benefit.

(2) A worker is not entitled to receive from any employer payments for sick leave entitlements for any period for which he receives weekly payments of compensation for disability under this Act, and where the first-mentioned payments are made and the second-mentioned payments are subsequently made in respect of the same period, the worker shall reimburse to the employer the first-mentioned payments and the employer shall reinstate the worker's sick leave entitlements as a credit to the extent that the worker does so reimburse the employer.

(3) To the extent, if any, that a worker fails to reimburse an employer as required by subsection (2), the employer may sue and recover the relevant amount, and to the extent of recovery the employer shall reinstate as a credit.

It will be observed that compensation may be paid in conjunction with annual and long service leave. This means where a worker is incapacitated at the time of annual leave, payment in lieu of annual leave can be made. The long service leave provision has a similar effect. A further interaction between long service leave and compensation payments arises because long service leave continues to accrue under most awards or pursuant to the *Long Service Leave Act 1958 (WA)* for at least 26 weeks of disability. That is, most long service leave entitlements accrue as a consequence of the worker establishing a period of “*continuous service*”. The *Long Service Leave Act 1958 (WA)* provides that the period of continuous service will not be broken where absence is due to a disability which incapacitates the worker for less than 26 weeks. After 26 weeks, the period of continuous service may be broken and long service leave entitlements affected.¹⁸⁶

Subsection (2) of section 80 of the *Workers’ Compensation and Rehabilitation Act 1981 (WA)* provides that compensation and sick leave payments cannot be paid concurrently. It is the usual practice for employers, particularly in the public service, to pay sick leave pending the approval of a compensation claim. Subsection (2) also provides that where the claim is subsequently approved the sick leave entitlements will be re-credited.

Section 81 of the *Workers Compensation and Rehabilitation Act 1981 (WA)* provides as follows:

¹⁸⁶ Similar provisions often appear in awards, see for example *The Western Australian Builders Labourers, Painters and Plasterers Union of Workers v Adsigns Pty Ltd and Others* [1996] WAIR 73

Notwithstanding any provision that applies to or in relation to the employment of a worker apart from this Act, where during any period in respect of which weekly payments are payable pursuant to this Act a public holiday occurs, an employer shall not be liable to make any payment to the worker in respect of that holiday other than payment for that day as a part of those weekly payments.

The effect of section 81 is that employer is not required to pay wages to a worker during a public holiday where the worker is in receipt of compensation payments. This State provision may be overwritten by a federal award or law, which provides to the contrary.¹⁸⁷

There are few cases which examine the interaction of the *Workers' Compensation and Rehabilitation Act 1981* (WA) and the right to payment in lieu of notice of termination of the contract of employment. One such case was *Wallis v Attorney General*¹⁸⁸ where Commissioner Gregor examined the circumstances of an employee whose contract of employment was brought to an end by ill health. The worker had sustained a disability in the course of his employment, for which he was paid compensation and ultimately, which was settled at common law by a District Court consent judgment. The issue for determination was whether or not the worker/employee was entitled to receive 4 weeks wages in lieu of the notice period, consequent upon his termination.

The commissioner declined to order the payment of wages finding that payment in lieu of notice was contingent upon the incorporation or implication of the *Prison Act 1981* (WA) regulations into the employee's contract of employment, a result which

¹⁸⁷ *O'Sullivan v Noarlunga Meats* (1956) 95 CLR 177 at 185-6.

the commissioner was not prepared to accept.¹⁸⁹ He also decided that the District Court consent judgment disposed of all claims in respect of wages and loss, consequent upon the disability. So, the principle of res judicata or issue estoppel applied to prevent any further claims over the same disability. Finally, the claim was declined on the basis that pursuant to section 26 of the *Industrial Relations Act 1979* (WA), the commission was bound to act according to equity, good conscience and the substantial merits of the case, without regard to the technicalities and legal formalities.

This procedural provision was invoked by the commissioner to deny a substantive remedy on the grounds that to pay compensation and wages would have been inequitable. In relying on section 26 to determine the remedy, or lack thereof, the commissioner was adopting a different approach to that taken by the Workers' Compensation Board and the Conciliation and Review Directorate.¹⁹⁰ Similar provisions, which appear in the *Workers' Compensation and Rehabilitation Act 1981* (WA), as noted in chapter 2, have been held to be determinative of procedural matters rather than to the granting of remedies. There was also passing reference by the commissioner of provisions in the *Workers' Compensation and Rehabilitation Act 1981* (WA) which prevented "double dipping". This may apply in relation to holiday pay and sick leave. It does not apply in respect of annual and long service

¹⁸⁸ (1997) WAIRC 137/97 8 July 1997.

¹⁸⁹ This follows from *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410, where the High Court declined to imply the terms of an award into the contract of employment where it could not be shown that the contract would not operate without such implied terms. Note however that in some cases where there are multiple contracts, manuals and policy documents a term may be incorporated into the employment contract as in *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 where the Full Federal Court held that the benefits of a redundancy agreement contained in a company resource manual were incorporated into the employees contract of employment.

leave which clearly are benefits which accrue as a consequence of continuous service.

Annual and long service leave can be distinguished from sick leave and holiday pay because the former are a form of deferred wage payment, whereas the latter are benefits that accrue depending on the production of medical certificates and pursuant to the *Minimum Conditions of Employment Act 1993* (WA). Annual and long service leave may be taken concurrently with the payment of compensation, whereas sick leave and holiday pay cannot. The commissioner's reasoning in relation to the *Workers' Compensation and Rehabilitation Act 1981* (WA) seems flawed, but the judgement is sustainable on the first ground. The writer's view is that neither the damages award or the *Workers' Compensation and Rehabilitation Act 1981* (WA) prevented payment in lieu of notice.

There are other forms of leave, which may interact with the *Workers' Compensation and Rehabilitation Act 1981* (WA). For example, compensation is payable even if a worker has taken unpaid maternity or paternity leave. The *Minimum Conditions of Employment Act 1993* (WA) provides, in sections 32 and 33, for up to 52 consecutive weeks unpaid parental leave. The fact that such leave may be taken does not allow the employer to cease compensation payments if the worker is disabled at the time of taking such leave. Compensation is payable on the basis that if the disability continues, payment of compensation continues despite the fact that the worker would be on unpaid leave.

190 It should be noted that the Commissioner's approach to section 26 was not unusual.

In *Karel v Hospital Laundry and Linen Service*,¹⁹¹ the Workers' Compensation Board held that an employer was not entitled to cease compensation payments during the period of the worker's maternity leave where the worker's disability (in that case RSI) continued throughout the confinement and afterwards. This decision was made even though the worker's award made provision only for unpaid maternity leave.

The *Minimum Conditions of Employment Act 1993* (WA) also provides that it is an implied term of all contracts of employment that there be a minimum entitlement of 4 weeks annual leave. The same Act also provides that annual leave may be contracted out. That is, the employee may take an equivalent benefit in lieu. This provision is consistent with section 80 of the *Workers' Compensation and Rehabilitation Act 1981* (WA), which allows for concurrent payment of annual leave entitlement and compensation payments.

4.6 Travel Provisions, Make-up Pay and Accident Pay

The 1993 amendments to the *Workers' Compensation and Rehabilitation Act 1981* (WA) abolished the right of workers to claim compensation where they had sustained a disability in the course of a regular journey to and from their place of employment. Section 19 of that Act was amended to abolish such claims but provided compensation for claims in more limited circumstances. In particular,

¹⁹¹ (1986) 7 WCR (WA) 72.

compensation will be payable where a worker is injured while collecting wages or compensation payments or travelling to attend a medical examination. Compensation will also be payable where the employer agrees to the journey being made which is not usually part of the duties. The rationale for the abolition of general entitlement to compensation for travel to and from work was that the employer has little or no control over the manner in which workers travel and that the employer's liability should only arise where they have some control over the worker's behaviour.

Notwithstanding the rationale for the abolition of travel claims, there was significant protest when section 19 was amended. The amendments had a number of flow-on effects. In many cases, workers and their unions sought out forms of insurance equivalent to the *Workers' Compensation and Rehabilitation Act 1981* (WA) which covered claims for disability occurring in the course of journeys to and from work. The cost of that insurance is usually moderate, if not nominal, but it may not cover all expenses previously covered under the *Worker's Compensation and Rehabilitation Act 1981* (WA).¹⁹² Often such policies cover only loss of wages and do not cover medical expenses, so the costs of medical care are often shifted to the Commonwealth through claims on Medicare or on private health insurers through private claims. In some cases, there have been attempts to pass on the cost of this type of insurance to employers by inserting travel insurance provisions into workplace agreements and awards. In other words, the costs of travel insurance were initially "shifted" to workers because of the abolition of the coverage for

¹⁹² For example insurance offered to members of the National Tertiary Education Union is approximately \$25.00 per annum.

disabilities sustained “to and from” work, but in some cases that liability was “shifted” back to the employer by obtaining coverage under an agreement or award. Previously a workers’ compensation issue, this became an industrial issue.¹⁹³

As has been discussed above, the amendments to the calculation of weekly compensation payments, which provide for a reduction after 4 weeks, are likely to have a similar flow-on effect. In some industries, there has been a tradition, over time, that accident or make-up pay is paid to a worker in addition to compensation payments. This tradition arose particularly in the building industry where under the pre-1993 *Workers’ Compensation and Rehabilitation Act 1981* (WA) workers were paid at the basic award rate for all periods of incapacity. As noted, for many workers this meant an immediate reduction in income when a disability occurred. To counteract this reduction some unions negotiated with employers so that despite the provisions of the *Workers’ Compensation and Rehabilitation Act 1981* (WA), workers would be paid their full wages for a period of 26 weeks after a disability. These agreements were enshrined in awards and industrial agreements made under the *Industrial Relations Act 1979* (WA).¹⁹⁴

Given that the 1999 amendments to the *Workers’ Compensation and Rehabilitation Act 1981* (WA) operate in a similar fashion so that many workers will suffer a

¹⁹³ An example of this appears in *The Independent Schools Salaried Officers’ Association of Western Australia, Industrial Union of Workers v Christ Church Grammar School Inc* (1997) WAIR 143 17 July 1997.

¹⁹⁴ A Western Australian example is the *Fire Brigade Employees Award 1990 Award No A 28 of 1989* clause 25. A New South Wales example of these types of clauses appears in the *Clothing Trades (State) Consolidated Award Clause 44*.

decline in income after 4 weeks, it is likely that there will still be pressure to include provisions for make-up pay and accident pay in workplace agreements and awards.

This raises some interesting issues in relation to the federal legislation. The *Workplace Relations Act 1996* (Cth) provides for the formation of individual and collective workplace agreements, provided they only include “*industrial matters*”. There seems little doubt that accident/make-up pay would be regarded as an industrial matter. However, the *Workplace Relations Act 1996* (Cth) also provides for the negotiation of awards provided that they are limited to “*allowable matters*” under section 89A. One of the matters described as an allowable matter is the negotiation of allowances.¹⁹⁵ In the *Automotive, Food, Metals, Engineering, Printing And Kindred Industries Union Of Workers, Western Australian Branch v Leighton Contractors Pty Ltd*,¹⁹⁶ Commissioner George observed that the Full Bench of the Australian Industrial Relations Commission had concluded that accident pay was a form of allowance and therefore an allowable award matter. It can therefore be asserted that similar provisions would be “*industrial matters*” capable of being inserted into Western Australian awards and workplace agreements. In some industries, schemes for sickness and accident have simply been incorporated into offers of employment.¹⁹⁷

¹⁹⁵ M Pittard, ‘Accident Pay and Medical Expenses: Award Matters?’ (1997) 3(3) *Human Resources Law Bulletin* 25-26.

¹⁹⁶ (1997) WAIRC 1133/97.

¹⁹⁷ For example the Argyle Diamond Mine Sickness and Accident Scheme. See *AWU v Argyle Diamond Mines Pty Ltd* (1994) WAIRC 25

A further flow-on effect from these provisions is likely as employers seek to insure for the costs of accident/make-up pay. It appears that the amendments to the *Workers' Compensation and Rehabilitation Act 1981 (WA)* in 1993 and 1999, which were intended to reduce the overheads and costs for employers, may have the reverse effect as pressure is placed on employers to include these lost entitlements into industrial awards and agreements.

4.7 Comment

The calculation of compensation payments in Western Australia is directly linked to the payment of wages determined by the industrial relations system. Any increase in wages is reflected in increases in compensation benefits and may reflect in an increase in compensation premiums which are based on overall wage costs of the employer. Where legislation inhibits benefits of weekly compensation in an effort to reduce compensation costs, this may have only a short-term effect. Often the response by unions to reductions in compensation benefits is to attempt to negotiate for them to be offset by increased industrial payments. For example, a common union response to the capping of compensation payments at 150% of the average weekly earnings was to negotiate clauses in industrial agreements to “top-up” payments for injured workers. The employer would pay any losses in income suffered by the capping. Such agreements are a saving to insurers in compensation payments, but an increased cost to employers through the payment of top-up payments and subsidies.

Another response (particularly in the public service) is that workers who have accumulated large sick leave entitlements may choose to take sick leave instead of workers compensation, on the basis that sick leave will be paid at the full rate of wages, rather than capped at 150% of the average weekly wage. In many cases public servants exceed the cap applied to compensation payments. The result is a distortion of the compensation data, so that fewer claims are made for compensation. There are also increased costs for employers, who in paying sick leave (often for extended periods) are not able to recover these costs from their insurers, as the worker has made no compensation claim.

Some preliminary evidence of this phenomenon appears from the recent data showing an otherwise inexplicable decline in stress claims in the past 2 years. In Western Australia in particular, this is evident in the Education Department which has the highest rate of such claims.¹⁹⁸ Employees in the public service are usually able to accumulate large sick leave entitlements. The capping of workers' compensation payments has almost certainly led to a decline in claims in this area of employment and an increase in claims for extended sick leave. Submissions by some employer representatives to a recent review of workers' compensation arrangements in Western Australia' urged the removal of capped payments substantially on the basis that payments are not being reduced after four weeks because it is too damaging to employee relations. In effect, these employers are making payments which are not required by law because they consider that it is not

¹⁹⁸ R Guthrie, *Report on the Implementation of the Labor Party Direction Statement on Workers Compensation* WAGP, 2001, pp 186-196.

good business practice to do so.¹⁹⁹ It follows that this area of law shows that workers' compensation and industrial matters are inextricably linked and that savings in one area may be lost in another area, highlighting the need for coordinated policies.

¹⁹⁹ *Ibid* page 120-5.

Chapter 5

Return to Work Provisions, Frustration of Contract and Discrimination on the Grounds of Disability.

In an effort to address the issue of return to work for disabled workers the Coalition Government inserted section 84AA into the *Workers' Compensation and Rehabilitation Act 1981* (WA) in an attempt to provide some employment security for disabled workers as part of a rehabilitation process. Like return to work provisions in other states, this requires the employer to attempt to re-employ a disabled worker if the worker is able to recommence some form of work within 12 months of the date of injury or the onset of disease.²⁰⁰ The obligations on employers usually do not apply if it is not “*reasonably practicable*” to provide “*suitable duties*” or if the worker has been dismissed on the grounds of “*serious and wilful misconduct.*”²⁰¹ The return to work of disabled workers is often problematic, raising issues relating to unfair dismissal, frustration of contract and the overlap of industrial and compensation jurisdictions. This chapter will review the

²⁰⁰ These types of provisions have a long pedigree. Commencing with provisions which deemed partially incapacitated workers as totally incapacitated where the employer could not provide employment. Most notable is section 11 of the *Workers Compensation Act 1926* (NSW) which provided that in the event that the employer was not able to provide suitable work for the partially disabled worker the employer would (subject to certain requirements) be obliged to pay the worker as though they were totally incapacitated. There is a considerable body of cases that discuss the concept of “mutuality” which describes the obligation of the worker to be ready willing and able to accept suitable duties when offered by the employer. See for example *R. J Brodie (Holdings) Pty Ltd v Pennell* (1968) 117 CLR 665 and *Dowell Australia Ltd v Archdeacon* (1975) 132 CLR 417. In *Dowell* Mason J described the burden imposed on the employer by section 11 as “*intolerable*”.

²⁰¹ Section 84AA of the *Workers Compensation and Rehabilitation Act 1981* (WA)

introduction and effectiveness of the return to work provisions in the *Workers Compensation and Rehabilitation Act 1981 (WA)*.²⁰²

5.1 Western Australian Return to Work Provisions

Section 84AA of the *Workers' Compensation and Rehabilitation Act 1981 (WA)* attempts to put in place a structure for the return to work of workers who attain partial or total capacity for work within 12 months from the date on which they became entitled to weekly payments of compensation. Section 84AA provides that:

- (1) *Where a worker who has been incapacitated by disability attains partial or total capacity for work in the 12 months from the day the worker becomes entitled to receive weekly payments of compensation from the employer, the employer shall provide to the worker;*
 - (a) *the position the worker held immediately before that day if it is reasonably practicable to provide that position to the worker; or*
 - (b) *if the position is not available, or if the worker does not have the capacity to work in that position, a position;*
 - (i) *for which the worker is qualified; and*
 - (ii) *that the worker is capable of performing, most comparable in status and pay to the position mentioned in paragraph (a).*

Penalty: \$5 000.

- (2) *The requirement to provide a position mentioned in subsection (1) (a) or (b) does not apply if the employer proves that the worker was dismissed on the ground of serious or wilful misconduct.*
- (3) *Where, immediately before the day mentioned in subsection (1), the worker was acting in, or performing on a temporary basis the duties of, the position mentioned in paragraph (a) of that subsection, that subsection applies only in respect of the position held by the worker before taking the acting or temporary position.*

²⁰² A more detailed account of the Australia wide position is contained in R Guthrie 'The Dismissal of Workers covered by Return to Work Provisions under Workers Compensation Laws.' (2001) 44 (4) *Journal of Industrial Relations* 545. This section of the dissertation attempts to address the Western Australian cases only.

- (4) *For the purpose of calculating the 12 months mentioned in subsection (1), any period of total incapacity for work is not to be included.*²⁰³

There are a number of noteworthy features of this section. Firstly, it provides a penalty for employers who do not comply and is, therefore, in essence a criminal provision rather than a provision that creates any rights for workers. This point was made in a case before the Australian Industrial Relations Commission where allegations of unlawful or unfair dismissal had been made. In *Fernandes v Comgroup Supplies Pty Ltd*²⁰⁴ Ritter JR considered a case where a worker had been dismissed in the course of a rehabilitation program. The employer maintained that the worker had abandoned her duties, while the employee maintained that she had gone home sick from her work injury. Ritter JR found the employer in breach of the Industrial Relations Act 1988 (Cth) and ordered payment of compensation for unfair dismissal. In relation to section 84AA he noted as an aside that;

*I find that but for the respondent's contravention of the (Industrial Relations) Act the employee would have been likely to have remained employed with the respondent. Indeed, Mr Melville drew to my attention Section 84AA of the Workers' Compensation and Rehabilitation Act (Western Australia) 1981 (as amended). The effect of the section is to make it an offence if an employer does not preserve the employment of a "worker" injured at work for a period of twelve months from the date of the incapacity. Further, Section 84AA (4) excludes periods of total incapacity for work in calculating the 12 month period. The applicant's injury occurred on 5 July 1994, so the employer would have had to preserve her employment until beyond 4 July 1995, given her periods of total incapacity for work.*²⁰⁵

The question of whether such a return-to-work provision gives rise to a duty of the employer to provide work, or re-employ a disabled worker, or gives rise to any

203 Emphasis added

204 AIRC Print (950656) 22 June 1995

205 Emphasis added.

private rights on the part of disabled workers, was discussed by the Victorian Supreme Court in *Gardiner v State of Victoria*.²⁰⁶ In *Gardiner*, the worker had resigned but then claimed a right to re-employment. Section 122 of the *Accident Compensation Act 1985* (Vic) (the Victorian equivalent to section 84AA) was considered not to create any private civil rights for workers. An employer, who does not comply with such a provision, by providing suitable work for a current employee may be liable for no more than a fine. Given the decision in *Gardiner*, return-to-work provisions such as section 122 of the *Accident Compensation Act 1985* (Vic), and probably other States such as Western Australia (which is similar) do not currently provide any right to *suitable duties* if the contract of employment has been terminated at the volition of the worker.

Section 84AA does not apply where it can be established that the worker was dismissed from the employment on grounds of serious or wilful misconduct. The removal of the apparently protective return-to-work provisions due to wilful misconduct, gives rise to considerable overlap with industrial laws generating some litigation in this area. In effect, section 84AA(2) requires examination of matters similar to those under the consideration of the Western Australian Industrial Relations Commission when dealing with applications for unfair dismissal under section 29 of the *Industrial Relations Act 1979* (WA).

At common law, an employer is entitled to summarily dismiss an employee where it can be established that the employee has been guilty of serious and wilful

²⁰⁶ [1999] VSCA 100.

misconduct. If the effect of the procedure adopted is unfair, the worker may challenge the termination of employment. In *Noack v BGC (Australia) Pty Ltd*²⁰⁷, Commissioner Beech noted that a review officer of the Western Australian Conciliation and Review Directorate had determined that a worker had not been guilty of serious and wilful misconduct for the purposes of section 22 of the *Workers' Compensation and Rehabilitation Act 1981 (WA)*.²⁰⁸ In an application by the employee to demonstrate unfair dismissal, it was held that the employer could not re-argue wilful misconduct.²⁰⁹

In *Durham v Westrail*²¹⁰, an employee claimed his dismissal was unfair because he was forced to resign in order to obtain a settlement of his damages claim against the employer. The president of the Western Australian Industrial Relations Commission (who gave a minority decision) found that the employee's contract of employment had not ended through work-related disability, despite the employee having been absent from work for an extended period.²¹¹ President Sharkey found that the worker had been forced to resign his position with the employer in order to obtain a damages settlement. The resignation, the president found, was non-consensual and

207 (1998) WAIRC 2031/97 27 November 1998.

208 This section disentitles a worker to compensation where there is a finding *inter alia* of wilful misconduct.

209 It was held that the doctrine of estoppel applied. Likewise a finding by the Western Australian Industrial Relations Commission that a worker had been guilty of misconduct may provide the employer with a defence for the purposes of section 84AA(2) of the *Workers Compensation and Rehabilitation Act 1981 (WA)*.

210 (1995) WAIRC 19305/94 17 May 1995.

211 The President also found that the contract had not been frustrated and his decision contains a useful survey of the law in this regard.

obtained under duress.²¹² The President took account of the fact that the employer was under an obligation to re-employ and attempt to rehabilitate the employee under the *Workers' Compensation and Rehabilitation Act 1981* (WA). The other members of the full bench did not agree, finding that the resignation was not obtained by duress.²¹³ The majority, having found that the employee resigned of his own volition, concluded that it had no jurisdiction to make a finding of unfair dismissal.

Section 84AA of the *Workers Compensation and Rehabilitation Act 1981* (WA) was specifically referred to by Commissioner Beech in *Stockwin v Cablesands Pty Ltd*.²¹⁴ The employee submitted that he could not be dismissed because section 84AA prevented the employer from dismissing the employee within 12 months of the date that compensation was first paid. The commissioner accepted that section 84AA required the employer to preserve the employee's position for 12 months until the employee returned to work, unless the employee was dismissed for serious and wilful misconduct. The commissioner found that section 84AA had no application in this case, because the employee had not been able to return to work within the 12-month period prescribed. The commissioner noted that despite section 84AA, it was still possible for the employer to dismiss the employee. The commissioner observed that even if the *Workers' Compensation and Rehabilitation Act 1981* (WA) prohibited a specific act, it did not necessarily mean that the act done had no effect. He noted however, that a dismissal in such circumstances might amount to an unfair

212 Evidence given at first instance showed that had the claim not been settled the employer would have continued to attempt to rehabilitate the worker and that his employment would have continued indefinitely.

213 With respect to the majority decision it could be argued that their decision is naïve. The reality being more in line with the President's position, namely that; the financial pressures on a worker long absent from work are likely to operate so as to force a settlement with contingent resignation.

dismissal.²¹⁵ It might also be that reinstatement was an appropriate remedy for the employee/worker. Commissioner Beech also made reference to section 84AA in *Pacey v Modular Masonry*.²¹⁶ In *Pacey*, the worker claimed his dismissal was unfair because he was receiving workers' compensation. He relied on section 84AA. The commissioner observed:

Therefore, if an employer does dismiss an employee who is absent from work on workers compensation for a reason other than serious or wilful misconduct, the dismissal may well be of no effect where the employee attains partial or total capacity for work in the 12 months from the day the employee becomes entitled to receive weekly payments of compensation from the employer. Therefore, since section 84AA came into effect an employer should not use the employee's absence on workers compensation as a reason to dismiss the employee particularly where, as in Mr. Pacey's case, the absence had only just commenced and its duration is just not known. (In that respect, the Workplace Relations Act 1996 (Cth) in section 170CK (2) (a) contains a similar, though not identical, restriction on dismissing an employee by reason of temporary absence from work because of illness or injury). If an employer did so, the dismissal may, depending upon the circumstances, be harsh or oppressive against the employee and amount to an abuse of the right to dismiss.

The commissioner went on to find that, in fact, the dismissal of Mr. Pacey had been harsh and oppressive.²¹⁷ An order for compensation was made, but an order for reinstatement was not made on the grounds that section 84AA would, if Mr. Pacey became fit for work, entitle him to return to work in any event. It will be observed that the Western Australian Industrial Relations Commission had little difficulty in accepting that section 84AA applied to its deliberations. Yet, there is nothing in the

214 (1997) WAIRC 528/96 7 January 1997.

215 A similar comment was made in *Mumby v Telstra Corporation Limited* AIRC 873/99 P Print R7673 (29th July 1999) in relation to the application of similar Commonwealth workers compensation provisions to the *Workplace Relations Act 1996 (Cth)*

216 (1998) WAIRC 1468/97 13 March 1998.

217 In *Carrigan v Darwin City Council* the Federal Court Print 970101 20 March 1997 held that the equivalent Northern Territory return to work provisions, (75A of the *Work Health Act (NT)*) could be taken into account to assess whether the employer had acted in good faith, noting that these provisions in effect required the employer to assist the worker with rehabilitation. A breach of the return to work provisions might therefore be a breach of the common law implied duty of trust and confidence.

Workers' Compensation and Rehabilitation Act 1981 (WA) or the *Industrial Relations Act 1979* (WA), which gives the commission jurisdiction to deal specifically with such matters. The *Equal Opportunity Act 1984* (WA) provides remedies for discrimination on the grounds of disability which include *inter alia* damages and reinstatement.²¹⁸

5.2 Failure to Return to Work and Frustration of the Contract of Employment

In a Federal industrial matter, Commissioner O'Connor made passing reference to section 84AA of the *Workers' Compensation and Rehabilitation Act 1981* (WA) and the doctrine of frustration in *Ratnayake v Sir Charles Gairdner Hospital*.²¹⁹ The employee had made an application to the Australian Industrial Relations Commission alleging that his termination was harsh, unjust and unreasonable under section 170CE of the *Workplace Relations Act 1996* (Cth).

The employee had become incapacitated for work following an injury to his hand in January 1996. He returned to work for various periods and was offered alternative duties on a number of occasions. Eventually, he was dismissed in August 1997 when it became clear that he could not return to work. The employer argued that even though a notice of termination of employment had been given to the employee,

²¹⁸ This remedy is also available under similar legislation in most States and under the *Disability Discrimination Act 1992* (Cth). Space does not permit a full examination of the application of these laws to the return to work provisions except to say that applications for discrimination on the grounds of disability seem to be on the rise.

²¹⁹ AIRC Print Q0091 9 April 1998.

the contract was nevertheless frustrated. In a somewhat confusing judgement, Commissioner O'Connor said:

It may well be that at this point in time (March 1996) the contract was frustrated. However, had the employer attempted to remedy the frustration at that time, he would have fallen foul of the Workers' Compensation and Rehabilitation Act.²²⁰

No mention was made by the commissioner of section 170CK of the *Workplace Relations Act 1996* (Cth), which, as was noted in *Pacey* (discussed above under the Western Australian section) prevents termination on the grounds of temporary ill health. The commissioner went on to observe that the employer had continued to employ the applicant beyond the 12 months specified in section 84AA. He then said:

After reviewing all the witness evidence, submissions and exhibits I find that there was a valid reason for the termination of Mr Ratnayake, due to his incapacity to fulfil his contract of service as a cleaner. I find that the question procedural of fairness does not arise since the applicant agrees he could not fulfil his contract as a cleaner, and all suitable alternatives had been exhausted. I find that SCGH Rehabilitation Department went to extreme lengths to try to place Mr Ratnayake, but were frustrated by limitations placed on them to find a permanent position that did not require the lifting of weight beyond 5kg and also that did not involve shift work.²²¹

Commissioner O'Connor appears to imply that the contract was frustrated, but if this was the case then it was not necessary for him to make findings in relation to procedural fairness or whether the employer had a valid reason to dismiss the employee. If the contract was frustrated, then the termination of employment was not at the volition of the employer and the commission consequently had no

220 At page 2

221 At page 5. Emphasis added.

jurisdiction. Return to work provisions appear to modify two common-law principles in relation to the contract of employment. In the case of *Weinel v Rojas*²²² it was noted that these provisions modify the common law principle that, as a general rule, there is no obligation to provide the employee with work.²²³ More importantly, return-to-work provisions also appear, in some cases, to modify the common law doctrine of frustration. Briefly stated, this provides that the contract of employment will terminate without any action on behalf of the employer or employee, where it can be established that either or both of the parties, due to circumstances or events beyond their control, become unable to perform or complete the contract.²²⁴ Such events must not have been foreseen in the contract itself. In *Hoffman v Western Australian Aboriginal Media Association*²²⁵ where Commissioner Beech summarised his previous opinions in relation to section 84AA.

Even so, if the common law doctrine of frustration did apply, in my view, it is overridden by the provisions of section 84AA of the Workers Compensation and Rehabilitation Act I do agree, as Mr Woodward has said, that the Commission is not the body to enforce the Workers' Compensation and Rehabilitation Act, 1981. However, I also agree that it is a provision that I can take into account in exercising my discretion. I have, on two earlier occasions, in the case of Stockwin v. Cable Sands a matter with which Mr Clohessy was involved (77 WAIG 509), and in Pacey v. Modular Masonry (78 WAIG 1421) had occasion to consider section 84AA and I was of the opinion then, and I am of the opinion now, that section 84AA obliges an employer to hold the employee's job open for 12 months whilst the employee is in receipt of worker's compensation.

I am supported in that opinion by the decision of the Industrial Relations Court in Fernandez v. Comgroup Supplies Pty Ltd, a decision of Judicial Registrar Ritter of 11 December 1995. I only have the unreported decision. I do not have the citation of where it is reported. The relevance of that decision

222 [1993] SAIRC 17

223 Per *Turner v Sawdon and Co* (1901) 2 KB 653 although in some rare circumstances an obligation to provide work may arise, see *Curro v Beyond Productions Pty Ltd* (1993) 32 NSWLR 33.

224 *Durham v Westrail* [1995] WAIRC 56 at 5 per Sharkey P referring to various authorities mentioned below.

225 [1999] WAIRC 230

is that it leads me to the conclusion that section 84AA says that if somebody's absence is less than 12 months, then they are able to return to the job, and that is an indication, at least, that the length of Ms Hoffman's absence, being less than 12 months, does not allow frustration of the contract to operate.

For those reasons, I am of the view that there is no proper foundation for the respondent to say, as it did, either that "The contract has been terminated by operation of frustration", or "It has now been terminated by us because of frustration."

Whether a contract of employment is frustrated is a question of law.²²⁶ In the first instance, it is a matter of construction of the terms and conditions of the particular employment contract.²²⁷ In *Davis Contractors Ltd v Fareham Urban District Council*²²⁸ Lord Radcliffe said that frustration occurs when “*a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract*”. The party asserting that a contract has been frustrated bears the onus of proving not only the occurrence of the frustrating event or events, but also that these events were not caused by any default of that party.²²⁹

In most circumstances, for the worker, frustration occurs through a disability which may be caused by either work or non-work matters. The question seems to be whether the incapacity is likely to continue for such a period that future performance of the worker's obligations would either be impossible or would be radically different from the original duties.²³⁰ The modern Australian rule, as discussed in

²²⁶ *Tsarkiroglou and Co Ltd v Noblee Thorl GmbH* (1962) AC 93.

²²⁷ *The Eugenia* [1964] 2 QB 226 per Lord Denning at 239-40.

²²⁸ [1956] AC 656 at 729. These principles were also accepted by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

²²⁹ *F C Shepherd and Co Ltd v Jerrom* [1987] 1 QB 301.

²³⁰ *Marshall v Harland and Wolff* [1972] 1 WLR 8999 at 904.

the cases of *Finch v Sayers*,²³¹ suggests that frustration does not apply until all entitlements to sick leave, long service leave, annual leave and the like are exhausted.²³² In that case Wootten J said:

*...it may well be that, in many areas of employment in contemporary society, particularly where one is dealing with an indefinitely continuing relationship, and not the performance of a specific task, there is relatively little room for the operation of the doctrine of frustration due to illness.*²³³

Wootten J relied on *Marshall v Harland and Wolff*,²³⁴ where it was suggested that in order to determine whether the contract was frustrated by illness or disability, it was necessary to take into account its terms, including any provision for sick pay, how long the employment was likely to last in the absence of illness, the nature of the employment, the nature of the illness and how long it had already continued, the prognosis, and the period of past employment.²³⁵

Finch v Sayers was followed and applied generously in the recent case of *Hilton Hotels of Australia Limited v Pasovska*.²³⁶ In *Pasovska*, the New South Wales Industrial Relations Commission held that frustration of contract had not occurred in

231 [1976] 2 NSWLR 540.

232 An earlier Australian case of *Simmons Ltd v Hay* (1964) 81 WN (Pt1) (NSW) 358 determined that a printery engineer was permanently incapacitated so he was not able to discharge his duties thus frustrating the contract. The facts in *Finch v Sayers* were not dissimilar given that Finch had been absent from work for an extended period. A discussion of the cases noted appears in G J McGarry, 'Master and Servant - Incapacitating Illness of Servant - Frustration of Employment Contract', (1987) 61(1) *Australian Law Journal* 35-36, J McMullen, 'Termination of the Contract of Employment by Frustration', (1977) 127(5819) *New Law Journal* 905-907, C Manchester, 'Frustration or Dismissal?' (1978) 128(5861) *New Law Journal* 674-676 and A L Samuels, 'Frustration of Contract', (1976) 121(2) *Solicitors' Journal* 25-26. There seems to be a less generous approach taken in England. *Egg Stores (Stamford Hill) Ltd v Lebibovici* [1977] ICR 260, frustration of contract at 5 months. In *Hart v A R Marshall & Sons (Bulwell) Ltd* [1977] 1 WLR 1067, frustration of contract at 20 months. In *Notcutt v Universal Equipment Co (London) Ltd* (1986) 1 WLR 641, frustration of contract after less than 12 months.

233 *Ibid* at 558.

234 [1972] 1 WLR 899.

235 [1972] 1 WLR 899 at 903-4.

February 2000, even though the worker had ceased work with the appellant in 1993. The worker had suffered an injury to her back in 1989 and due to this injury became progressively incapacitated. She ceased work in November 1993 and in compensation proceedings in 1995 was declared to be totally incapacitated. She did not resign her position and the employer took no action to terminate her employment. In 1999, her solicitor wrote to her employer making a demand for unpaid leave, which was eventually paid to the worker in February 2000 on the basis that her employment had ceased as at the 1995 date declared by the workers compensation courts. The worker took issue with the calculation of the payments and the matter proceeded to the New South Wales Industrial Relations Commission on the question of whether the workers contract of employment was still on foot after 1995. The commission observed that most cases dealing with frustration of contract had not been decided in the context of industrial awards or agreements. In this case the worker was protected by an award, which among other things set out the means by which an employee could be given notice. No notice has ever been given by the employer in this case. The Commission concluded;

54 Notwithstanding this situation, we do not consider that the circumstances of the respondent's employment, including its history, the nature of the employment, the nature of the award coverage and the circumstances in which payment of accrued entitlements came to be made, permit any available scope for the operation of the doctrine of frustration. In any event, we do not consider that the appellant has discharged the onus on it in that respect. We do not consider that the respondent's employment, regulated by comprehensive award provisions and statutes such as the Long Service Leave Act, could be said to require for its effective operation implied terms as to termination of employment or provide any basis for the doctrine to operate. The employer had ready means of terminating employment at short notice and

incapacity of a worker would, subject to any other statutory protection (see, for example, the present s 93 of the Industrial Relations Act 1996), provide a readily available basis for termination of employment. Finally, we do not consider that the appellant's reliance on the "no work, no pay" cases is relevant to the issues in these proceedings. As was conceded by Mr Grant, the cases in that line of authority stand alone; their usefulness in the circumstances of these proceedings is, at best, merely an analogy.

The commission declared that the worker's employment had continued up until February 2000, when the employer had forwarded what it thought were the correct leave entitlements to the worker. In effect, this meant the worker had remained employed since 1993, notwithstanding that she had not worked for nearly 7 years. The decision may be considered somewhat alarming to employers and highlights the need to give an employee notice in accordance with any award or industrial agreement. Such notice would however have to take account of return-to-work provisions as Western Australian cases have already shown that notice given or termination effected prior to the usual 12 month moratorium will be ineffective.

The return-to-work provisions would appear further to alter the doctrine of frustration because in combination with the obligation to pay for and encourage rehabilitation of the worker, the employer must attempt not only to return the worker to work but make some allowance for modified duties. In *Ratnayake*, the employer went to great lengths to offer alternatives to the employee and would have complied with the obligations under section 84AA.

The foregoing suggests that the premature termination of an employee might lead to litigation for unfair dismissal. In addition, where an employer has engaged a worker

to replace the disabled worker, the former may seek compensation when faced with being dismissed to make way for the return of the previously injured worker. For employers, the return-to-work provisions have been taken into account when considering the doctrine of frustration and are likely to extend the period of the contract of employment and delay the operation of the doctrine.

5.3 Discrimination on the Grounds of Disability

As can be seen, employers' obligations under the *Workers' Compensation and Rehabilitation Act 1981* (WA) and the *Industrial Relations Act 1979* (WA) might also have to be reconciled with obligations under the *Equal Opportunity Act 1984* (WA). It has been noted in the preceding section that there is potential for discrimination against workers who are wrongly perceived as health risks to themselves or to co-workers. In the same way, there is potential for workers with disabilities to be treated less favourably when they return to work.²³⁷ For example in *Johnstone v Department of Conservation & Natural Resources*²³⁸ a tradesman who had been injured in 1986, returned to work in 1987. On his return he was given the work of an apprentice, was not given the opportunity to work on equipment and machinery with which he was familiar and following a successful work trial was not offered a job at an alternative workshop. It was held that the worker had been

²³⁷ It is worth observing that in the USA there was some doubt as to whether a worker could bring an action for workers compensation and for disability discrimination. It was thought that because workers had bargained away any rights to common law actions in order to secure a compensation system that no discrimination cases would be brought. It is now clear that both actions are available. See E Moscowitz Outside the "Compensation Bargain". Protecting the Rights of Workers on the Job to File Suits for Disability Discrimination. (1997) 48 (5) *Labour Law Journal* 272. There is no restriction on a worker in Western Australia bring both forms of action.

²³⁸ (1993) EOC 92-533.

treated less favourably and damages were awarded for loss of wages, hurt, pain, humiliation and suffering.

A more difficult case was *Churchill v Town of Cottesloe*,²³⁹ where the applicant had been receiving compensation for hip and back injuries she sustained during the course of employment. On her return to work, she was offered a promotion to clerk/cashier, which duties she gradually became unable to perform because they involved physical work which was not originally encompassed by the position. She was promised physical support which never eventuated. She was advised to work part-time, but the employer was unable to accommodate her, insisting that she needed to be fully fit. In due course, her employment was terminated. It was held that discrimination had occurred because the medical evidence accepted by the Equal Opportunity Tribunal showed that she was fit for work, with some limitations, which the employer should have been able to accommodate. By contrast, in the earlier case of *Reilly v Roads Corporation*,²⁴⁰ a claim for discrimination on the grounds of impairment was dismissed when the employer established that a worker who had been in receipt of compensation payments, could no longer perform the heavy duties required of his pre-accident position. He was off work from 1986 until his dismissal in 1988. The employer also established that no “light duties” work was available to the worker.

It is noteworthy that *Churchill* was dealt with before the introduction of section 84AA of the *Workers Compensation and Rehabilitation Act 1981 (WA)*, but the

²³⁹ (1993) EOC 92-503.

tribunal was prepared to require the employer to investigate thoroughly the medical evidence and attempt to modify the worker's duties to take account of any residual disability. In a Victorian decision under similar legislation, it was held that an employer was required to retrain a worker in order to assist him in complying with the inherent requirements of his job. It was accepted by the tribunal that the disability might have made him dangerous to co-workers.²⁴¹ Under anti-discrimination legislation, an employer must attempt to modify the work place to accommodate an employee's disability and may only decline to do so if the expense of the modification creates an unjustifiable hardship.²⁴²

Section 84AA of the *Workers Compensation and Rehabilitation Act 1981* (WA) has no application if an employer offers re-employment to a worker following a compensable claim, although a dispute may arise where the worker objects to the form of work offered if it does not suit the physical capacity of that worker. If the employer makes a genuine effort to provide reasonable re-employment for the injured worker, then the worker may not claim unfair dismissal where the employment is brought to an end because of the worker's unsatisfactory work performance. *Cusato v The Atlas Group Pty Ltd*,²⁴³ is authority for the principle that section 84AA has no application and provides no protection to the worker when a genuine offer of work has been made. In *Cusato*, Commissioner Scott observed that

240 (1992) EOC 92-407.

241 *Woodhouse v Wood Coffill Funerals Pty Ltd* (1998) EOC 92-942. In that case the employee was required to carry coffins and had difficulty doing so because of a severe leg injury. Re-training would have allowed him to adjust his gait to carry the coffins smoothly.

242 K Eastman, 'Employers' Obligations Towards Disabled Employees', (1999) 37(8) *Law Society Journal* 38.

243 (1998) WAIRC 1468/97 13 March 1998.

following a conciliation conference in the Conciliation and Review Directorate, the employer and worker had agreed on a program of return to work and rehabilitation. The worker did not return to his pre-disability work but was given alternative duties. After a period, the worker refused to return to these alternative duties and was dismissed. The commissioner found the employer's efforts at rehabilitation were reasonable and that the worker's expectations of the rehabilitation program were too high. He found that the worker's dismissal in the circumstances was not unfair. The commissioner noted that the employer had checked with the worker's doctor to ascertain that the duties offered were suitable. However, where the return to work program is not genuine; that is where it is so short-lived or so inappropriate in its allocation of duties as to be regarded as a sham, then the WA Industrial Relations Commission may disregard that period of work and invoke section 84AA. In other words, the employer must make a bona-fide offer of re-employment/work return. Some support for this proposition is found in *Senior v Lower North Metropolitan Health Service Board of Management*²⁴⁴ where Ritter JR opined;

*The fact that the applicant has not worked for the respondent since February 1996 has been, at least in part, because she has been physically unable to do so because of the injuries received at work. Ms Senior is being paid worker's compensation, although this is now less than the amount she would have received if she was still working, because of the lack of payment of penalty rates; although she may benefit from Section 84AA of the Workers Compensation and Rehabilitation Act (Western Australia) 1981 (as amended). If the employment in 1996 was shown to be solely for the purpose of defeating the applicant's application to this Court, the case may have been decided differently.*²⁴⁵

244 AIRC Print 960342 (26th July 1996)

245 Emphasis added

In Senior's case, the applicant's claim for unfair dismissal was dismissed on the grounds that the termination of employment was not brought about at the initiative of the employer.

Such an offer was found to exist in *Bechara v Gregory Harrison Healey & Co (No2)*,²⁴⁶ a case which did not involve a workers' compensation claim. A solicitor was dismissed from her employment, but failed to gain damages for unfair dismissal on the grounds that she had been unable to mitigate her loss in not accepting a genuine offer of re-employment. It was held that it was not necessary for the offer of re-employment to be in precise terms. However, *Bechara* was a case that did not warrant the examination of the employee's ability to perform the work. Where the worker's capacity to do the work is a live issue, it follows that an offer of re-employment should have some precision.

In a recent decision of *Garrity v Commonwealth Bank of Australia*,²⁴⁷ the Human Rights and Equal Opportunity Commission suggested that special arrangements have to be put in place for disabled employees. In *Garrity*, the employer was subject to the *Disability Discrimination Act 1992* (Cth) which permits discrimination only where the employee is unable to perform the inherent requirements of the job and where any modifications²⁴⁸ would impose an unjustifiable hardship on the

²⁴⁶ (1996) 65 I.R. 382

²⁴⁷ (1999) EOC 92-966.

²⁴⁸ Discussed by the High Court in *Qantas Airways v Christie* (1998) 152 ALR 365. See A Chapman, 'Qantas Airways Ltd v Christie', (1998) 22(3) *Melbourne University Law Review* 743-762. The Court was divided on the meaning of the phrase. The majority of the Court included an element of reasonableness in consideration of what was an inherent requirement of the job, importing an allowance for operational or administrative efficiency by the employer. Kirby J dissented in this approach, opining that inherent requirement meant the "permanent requirements" of the position.

employer. The applicant claimed that she had, by reason of her diabetic condition and vision impairment, been denied access to the employer's policies, a career path and opportunities for transfer and promotion. She said she was not placed on a proper roster and was not provided with proper lighting and space at her workstation. The commission held that the employer had failed reasonably to accommodate the applicant's needs which would not have imposed any hardship on the employer.

It follows from these cases that the obligations created under section 84AA may be extended further by the effects of the provisions relating to unjustifiable hardship under the *Equal Opportunity Act 1984* (WA), requiring the employer not simply to re-employ but also to modify the workplace to accommodate the worker's disability.²⁴⁹ Further, as was noted in *Cusato* above, the WA Industrial Relations Commission may need to consider these matters when examining whether a dismissal has been unfair, harsh or unreasonable. In the final analysis, it appears that the combination of the above legislation requires the employer (subject to downturn in business and genuine positional adjustments) to retain a disabled worker's position for at least 12 months, where the disability is work related. In addition, if the worker shows only a partial capacity to work, the employer must attempt to accommodate the worker and may be required to continue (through its

²⁴⁹ Recently this has been held to be so. In *Cosma v Qantas Airways Limited* [2002] FCA 640 it was held that the employer was required to attempt to modify the work place to accommodate a worker who was not longer able to do his pre accident work following a compensation claim. Failure by this employer led to a finding of discrimination on the grounds of disability. A similar result occurred in *Perlidis v Brambles Security Services Limited* [2003] NSWADT 11, where the NSW Administrative Appeals Tribunal held that worker had been treated less favourably following his work accident in not being given the opportunity to work overtime, and not being given assistance to perform his pre-accident work. These cases place a heavy onus on the employer, who was unable to avoid liability by raising occupational health and safety arguments to the effect that the workers should not be kept on in order to prevent further injury to themselves.

insurer) to pay the costs of rehabilitation programs. Further, the employer may be required to supply additional aids to assist in the worker's duties, even though such aids are not supplied to other workers. Termination in circumstances where the foregoing has not been attempted is liable to result in litigation.

5.4 Workers Compensation Claims and Constructive Dismissal

The WA Industrial Relations Commission and Australian Industrial Relations Commission have no jurisdiction in an unfair dismissal matter where an employee/worker resigns from employment because they are unable to perform the work.²⁵⁰ The jurisdiction of the commission is only invoked when there is a dismissal or termination of employment at the initiative of the employer. However, where a resignation is brought about because the employer's unreasonable behaviour has forced the worker to cease employment, the resignation may be regarded as a "*constructive dismissal*".²⁵¹

Often the return to work of an injured worker is not smooth. The employer may not have acceptable or reasonable duties for that worker, or the employment relationship may have soured because of the injury. This often occurs where it is alleged that the employer was negligent, and somehow responsible, for the injuries. In such cases, the employer may make the employee's life so uncomfortable that he resigns or

²⁵⁰ See for example *Gunnedah Shire Council v Groult* (1996) 40 AILR 3-305 where an employee resigned at short notice. The employer accepted the resignation. The court held that the employer was entitled to waive the requirement of proper notice. Despite the employee suffering from work-related stress at the time of the resignation it was held that he was not suffering such a degree of confusion or pressure as to make the resignation involuntary.

accepts revised terms of employment. It is also well recognised that a significant change in the status or content of a job constitutes a constructive dismissal.²⁵² A resignation which is tainted by the employer's unreasonable behaviour will be regarded as a "*constructive dismissal*" and is often found to be in breach of the employer's obligations.²⁵³ In such cases compensation may be awarded under section 29 of the *Industrial Relations Act 1979* (WA) on the grounds that the "*squeezing out*" process, and consequent dismissal, was unfair.

The WA Industrial Relations Commission also takes into account the impact of the dismissal on the employee/worker and has held that compensation should be assessed and paid for humiliation, stress and anxiety caused by the dismissal.²⁵⁴ Again, the interaction between the *Industrial Relations Act 1979* (WA) and the *Workers' Compensation and Rehabilitation Act 1981* (WA) becomes apparent when it is observed that stress conditions may be aggravated by the unreasonable and harsh behaviour of an employer, which in turn may be the subject of an unfair dismissal application under section 29. Compensation assessed under section 29 might in turn take into account the humiliation, anxiety and stress created by the

251 *Zubrinich v Pasmenco Metals-BHAS Pty Ltd* (1994) 61 SAIR 154 at 170 and *Mohazab v Dick Smith Electronics Pty Ltd* (1995) 39AILR 3-234.

252 *Hart v Robowash Pty Ltd* [1997] WAIRC 93, note the authorities cited therein at page 3 and on appeal in *Robowash Pty Ltd v Hart* [1998] WAIRC 53 at page 8.

253 *A.A. Russian v Woolworths (SA) Pty Ltd* (1995) SAIRC 59 10 October 1995.

254 It should be noted that this is because the right to claim unfair dismissal is a statutory remedy, and the WA Commission has allowed the claim to include humiliation and stress. At common law the position has been that no claim can be made in contract for the humiliation and/or stress caused by its wrongful termination. See *Addis v Gramophone Co Ltd* [1909] AC 488. *Addis* is English authority and has in recent times been under some scrutiny. The High Court has not as yet chosen to depart from this rule.

dismissal.²⁵⁵ It has been suggested by one federal industrial commissioner that the commission should decline to make an order for compensation covering such circumstances because it may usurp proceedings in a related workers' compensation claim.²⁵⁶ Again, there may be interaction with anti-discrimination legislation such as the *Equal Opportunity Act 1984* (WA) where the employer harasses or intimidates a worker to return to work. It is commonplace for employers to make enquires of doctors of a worker's medical condition. In fact, sections 64 and 65 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) allow the employer to make medical appointments for workers. If the employer goes beyond facilitating return to work and attempts to force a worker into action, it may be that the employer is discriminating against that worker on the grounds of disability.

For example, in the recent disability discrimination case *Capodicasa v Herald and Weekly Times Ltd & Ors*²⁵⁷ the employee/applicant was confronted at a medical centre by an employer representative and pressured to reveal when he was going to return to work. This was held to warrant an award to damages as such hostile treatment must have been attributable to the employee's disability and was therefore discriminatory.²⁵⁸ The employee suffered significant stress and depression because of the employer's behaviour. In addition, it is likely that any aggravation of the worker's condition caused by this form of harassment would have been compensable under the relevant compensation legislation.

²⁵⁵ *Bogunovich v Bayside Western Australia Pty Ltd* (1998) WAIR 191 23 September 1998. There is an ongoing debate about whether similar damages are available at common law, see *Emmerson's* case above and footnote above.

²⁵⁶ Per Madgwick J in *Lloyd v R J Gilbertson (Qld) Pty Ltd* AIRC 95/2135 (14th June) 960252 at page 8

²⁵⁷ (1999) EOC 92-969.

5.5 Some Comments on the interaction of Return to Work Provisions and other laws

The courts and industrial tribunals have taken various approaches to the operation of return to work provisions in the industrial arena. *Gardiner's* case establishes that standing alone, as they do in Western Australia, such provisions probably do not give an employee/worker a right of action for breach of statutory duty to provide work where the contract of employment has been terminated at the employee's volition. Return to work provisions may be used as an aid to deciding unfair dismissal cases. The approach taken by the Western Australian Industrial Relations Commission, in the series of cases outlined above, suggests that a breach of return to work provisions by an employer, which results in dismissal, may be a factor to be considered when assessing whether the dismissal was unfair. It may also be an indicator that the employer has breached the implied term of trust and confidence.

In Western Australia, there is no requirement for the employer to give the insurer notice of the employers' intention to terminate his or her employment. There are also no clear links with the Industrial Relations Commission as to jurisdiction and no real sanctions against employers who do not comply with return-to-work provisions. There is clearly room for strengthening such provisions in Western Australia to give them greater authority. If the State persists with return-to-work provisions that have the potential to raise industrial issues, it is logical that the Western Australian Industrial Relations Commission be given jurisdiction to deal

258 Overall and award of \$90,000 was made, this included an additional incident of discrimination.

with those matters. This may overcome the problems of enforcement of any rights given by the return-to-work legislation and would allow the Western Australian Industrial Relations Commission to consider questions relating to section 84AA, frustration of contract, rehabilitation and, perhaps, issues of discrimination. On the other hand, the commission's general reluctance to order reinstatement might either require specific strengthening of the provisions or reinforcing the argument for providing these powers to the compensation jurisdiction. As a preventative step against unfair dismissal, such provisions should also have a requirement that the employer notifies its insurer of the intention to terminate an employment relationship, so it can be ascertained whether insurance premiums would be affected. Further, provisions which link poor return-to-work performance with premium increases will act as disincentive against unwarranted dismissals. As well, incentives such as premium discounts for good performance should also be put in place.

Chapter 6

Other Industrial Matters Affecting Compensation

In addition to the specific matters discussed in the preceding chapters, a range of other issues arise under the *Workers' Compensation and Rehabilitation Act 1981* (WA) that have a corresponding, or complementary, effect within the *Industrial Relations Act 1979* (WA) and related legislation. In assessing them, this chapter will also offer some reflections on the interaction with other industrial legislation such as the *Equal Opportunity Act 1984* (WA) and the *Occupational Safety and Health Act 1984* (WA).

6.1 Disclosure of Employment Related Information.

Increasing numbers of employers use a variety of tests to assist in the selection and promotion of employees. These may include intelligence tests, personality inventories, past criminal records, medical tests and examinations.²⁵⁹ Often when a job requires certain physical attributes, employment may be offered subject to the prospective employee passing a pre-employment medical examination. In some instances it may be a statutory requirement, such as in some mining industries.²⁶⁰ There are no specific laws which regulate pre-employment medical screening, but its

²⁵⁹ Medical practitioners have to take care that the reports supplied and the examinations carried out do not breach anti-discrimination legislation. See for example the discussion of the American experience which is largely applicable in Australia, S Hoffman and G Pansky 'Pre-employment Examination and the Americans with Disabilities Act: How Best to Avoid Liabilities under the Federal Law' (1998) *Journal of Occupational Rehabilitation* 8(4) 255.

²⁶⁰ R. Johnstone, 'Pre-employment Health Screening: the Legal Framework', (1988) 1(2) *Australian Journal of Labour Law* 115.

use cuts across a range of issues.²⁶¹ As will be shown, information obtained from pre-employment medical examinations must be treated with some care.²⁶² There is, however, a general perception that such examinations may assist in reducing injuries, absenteeism and sick leave.²⁶³

The right to impose conditions upon an offer of employment is based on the general principles of contract, which allow for a conditional offer to be made so that the contract is complete only when those conditions have been met. Because it is the employer who imposes them, it may be thought that such conditions are a matter of employer prerogative.²⁶⁴ That is, only the employer can determine the conditions for pre-employment enquiries and checks.²⁶⁵ However, the Western Australian Industrial Commission has held that pre-employment conditions of contract are an “*industrial matter*”. So, attempts by an employer to impose conditions which would allow checks on “*prospective employees’ attitude and performance with regard to safety, ability to live and work in a remote site, general attitude to work, and any undisclosed workers compensation claims or any other false information on*

261 Ibid at 138.

262 Some American research shows that pre-employment medical checks are of limited value if not properly carried out. What is required is “pre-screening” to examine the specific attributes needed for a task and to match the screening appropriately. The same research suggests that pre-screening does not prevent injury, but may reduce the severity of and lost time due to disability. D W Nassau, ‘The Effects of Pre-work Functional Screening on Lowering an Employer’s Injury Rate, Medical Costs, and Lost Work Days’, (1999) 24(3) *Spine* 269-274.

263 American research supports this view. See J M Melhorn, ‘The Impact of Workplace Screening on the Occurrence of Cumulative Trauma Disorders and Workers Compensation’, (1999) (41)2 *Journal of Occupational Health* 84.

264 R Johnstone, ‘Pre-employment Health Screening: The Legal Framework’, (1988) 1(2) *Australian Journal of Labour Law* 115 at 117-119.

265 See *Bliss v South East Thames Regional Health Authority* [1985] 1 IRLR 308, which is English authority for the principle that where there is no express term in a contract which provides that an employee must undergo a medical examination the employer can only insist on an examination where it is shown that the employee is suffering from a disability that is likely to harm or adversely affect the interests of the employer.

an application for employment form”,²⁶⁶ is a matter which is subject to negotiation between employees, unions and the employer. In other words, the finding of the WA Industrial Relations Commission was that these matters are not confined to employer prerogatives and can be the subject of negotiation for the purposes of an industrial agreement or award. Further, there are often issues of privacy raised by the requirement to undergo pre-employment examinations and post-employment tests or by requests to provide other personal information. The issue seems to be one of achieving a balance between privacy and health and safety at the workplace.

6.1.1 Pre-employment Medical Tests and Examinations

It is frequently the case that prospective employees are requested to provide information on whether they have suffered any disability. Inquiries of this nature are usually directed to determining whether or not the prospective employee is capable of performing the physical tasks of the job in question.

Where a prospective employee provides false information to an employer over a critical aspect of their employment, the employer may be entitled to bring the contract of employment to an end. As Stanley J observed:

...there is no obligation on a workman to volunteer information to his prospective employer, but in my opinion, if a prospective employer requests information relative to the employment situation from a prospective employee with intent that the prospective employer will use such information to decide whether to employ the workman or not, then the employee runs the risk, if

²⁶⁶ *Metals and Engineering Workers Unions Western Australian Branch v East Perth Electrical Services and Others* (1995) WARC 9 (emphasis added).

*he gives false or misleading information to his prospective employer, that the employer in ascertaining that he has been deceived in a material manner pertinent to the work situation may well decide to dismiss the employee on this ground. I think it would require very exceptional circumstances which, in my opinion, do not exist in this case, before this court would judge a dismissal by the employer on this ground to be either harsh, unjust or unreasonable.*²⁶⁷

There are two circumstances which arise if the employee makes a false declaration in an application for employment. Firstly, where the false declaration is relevant to the performance of the task or physical requirements of the job, the employer may be entitled to summarily dismiss the employee where a false or misleading answer has been given. In contractual terms, the employer is entitled to repudiate the contract which is founded on false and misleading representations once the employer becomes aware of them.²⁶⁸ The employer may choose not to repudiate the contract, but cannot later dismiss the employee due to the false declaration.²⁶⁹ The false or misleading statement must be material to the contract.

In *Berry v Cotech Pty Ltd*²⁷⁰, Watson D P observed that an employee had failed to declare a 1993 workers' compensation claim made for injuries to his arm. The worker did, however, indicate that he had left his previous employment because of an arm injury. When the employee injured his arm again in 1997, the employer accepted the fresh compensation claim, but then terminated his employment on the

²⁶⁷ *Bottrill v James Hardie and Co Pty Ltd* [1975] 42 SAIR 711. (emphasis added)

²⁶⁸ *Berry v Cotech Pty Ltd* AIRC 1514/98 M Print R0038 (21 December 1998).

²⁶⁹ *May v Lilyvale Hotel Pty Ltd* (1995) 64 IR 206.

²⁷⁰ AIRC 1514/98 Print R0038 (21 December 1998)

basis of a false declaration over the 1993 incident. The dismissal was held to be unfair, as the false declaration was not material.²⁷¹

In *Campbell v ACT Community Care*,²⁷² Commissioner Lawson held that four instances of deliberately false statements, which materially affected the making of a new contract of employment, were sufficient grounds for dismissal. In *Campbell*, the employee had answered all questions relating to previous medical conditions in the negative, intending to convey a false picture of fitness for work, when she in fact, suffered from recurring back pain and stress related conditions. The respondent employer was engaged in rehabilitation programs for drug-dependent persons; a factor which suggests that there would be added emphasis on the frankness of disclosure of health issues.

A similar result ensued in *Abonyi v Australian Postal Corp*²⁷³ where the judicial registrar, hearing an application in relation to unfair dismissal noted:

The evidence establishes that the omission on the part of the applicant was not merely as a result of oversight or misunderstanding and it is clear having regard to the nature of the applicant's duties, that it was a significant omission in that it deprived the respondent of the opportunity to make reasonable inquiries or examination as to the applicant's fitness to perform duties. On that basis I am satisfied that the respondent had a valid reason to terminate the employment.

The omission related to a negative answer given to a general inquiry²⁷⁴ as to whether the employee had undergone a range of medical tests. The employee had

²⁷¹ AIRC 1514/98 Print R0038 (21 December 1998).

²⁷² AIRC Print S33565 192/00 (24 February 2000).

also advised that “*she had no doctor*”, when she had been under the care of a GP for 10 years. The false declaration was discovered after she fell at work and made a claim for compensation, in which she listed a previous injury to the same part of her body. Enquiries by her employer revealed the false declarations made in the pre-employment medical questionnaire.

The second circumstance in which an apparently false declaration may be made in an application for employment is where the employee has failed to make any declaration by leaving a particular question blank. In such a case the employer may not be entitled to summarily dismiss the employee, but may be entitled to dismiss the employee, with notice, on the grounds that the employee does not possess the degree of competence required to perform the work at hand.

The chagrin of the courts in relation to false declarations is noted in *Bottrill v James Hardie and Co Pty Ltd*²⁷³ where Bleby P stated:

Mr Harrison stressed that the contract of employment is not one uberrimae fidei, as was pointed out in Neale v Namco Industries (SA) (a decision of Judge Olsson 41 SAIR 632.) Mr Harrison complained that the learned trial judge “wrongly cast upon the applicant a duty to disclose his employment state of health to a would be employer”. The fact that the contract is not one uberrimae fidei merely means that there exists no obligation to volunteer information about one’s medical history; but Mr Harrison appeared to take the matter further and to suggest that in view of the social problem involved a prospective employee was entitled to withhold (sic) information even if specifically asked for, thereby deceiving his employer and gaining for himself

273 [1997] 696 FCA (16th July 1997).

274 As will be discussed below such general inquiries may offend against the *Equal Opportunity Act 1984* (WA) and similar legislation in other states.

275 [1975] 42 SAIR 711 (emphasis added).

employment which he would not otherwise have had. I have some difficulty in finding words strong enough to express my inability to acquiesce in any such double dealing course. It will be an evil day when the Courts find it possible to countenance what would amount to nothing less than a fraudulent misrepresentation.

The more difficult question of failure to complete a form or failure to make a declaration was dealt with in *Hollingsworth v Commissioner of Police*²⁷⁶ where the full bench of the New South Wales Industrial Relations Commission was divided on whether a student police officer should have declared that she had worked as a prostitute and a stripper when making application for employment to the Commissioner of Police. When the Police Commissioner became aware of the applicant's background she was dismissed and she applied for reinstatement. The case proceeded through all levels of appeal. At first instance, a single (industrial) commissioner ordered reinstatement of the applicant. The full bench of the commission overturned this order, but the court subsequently overturned its decision. For the majority (Peterson J dissenting), Wright J observed the contract of employment is not *uberrimae fidei* so as to render it incumbent on the employee to disclose all facts at the time the employment relationship begins.²⁷⁷ The court initially agreed with the approach of the commissioner holding that there was no requirement in the employment application form itself for the applicant to outline her work as a prostitute and stripper. The court found that there was "*not even the vague provision in the application form giving her direction to disclose any further information which she may feel may inhibit her application to join the Police*

²⁷⁶ [1999] NSWIRC 240.

²⁷⁷ The lack of such an obligation was noted in *Bell v Lever Brother Ltd* (1932) AC 161.

Service from being successful".²⁷⁸ That being the case, the court held that she was under no obligation to disclose additional information. The court, therefore, drew the distinction between the clear obligation to provide correct information to direct questions and the lack of obligation to volunteer information.²⁷⁹ These cases show that there is no positive duty of disclosure, that is; there is no obligation to disclose information where the employer does not request it. However, where specific information is requested there is a duty to answer these questions correctly.

6.1.2 Medical Tests and Examinations during the Course of Employment

Not surprisingly, claims for unfair dismissal arise where an employee is dismissed following an unsatisfactory result of a workplace medical examination such as a urine test, which discloses the presence of a non-prescribed drug. A number of cases touch on this point. In *Benck v Hamersley Iron Pty Ltd*,²⁸⁰ an employee was dismissed when his supervisor detected the smell of cannabis in the employee's work vehicle. The employer had a policy which provided that "*Participating (sic) of drugs and alcohol on the worksite...will be grounds for dismissal*"²⁸¹. Even though there was no scientific testing to detect the presence of the drug, it was held that the evidence of the supervisor was not contradicted and that the dismissal in the circumstances was not unfair.

²⁷⁸ At page 24, referring to the comments of the Commissioner below with approval.

²⁷⁹ The obligation to provide correct information derives from the decisions of *Gordon & Gotch (Australasia) Limited v Cox* (1923) 31 CLR 370 and *McPhee v Simpson* (1910) 10 SR (NSW) 786 discussed in G McGarry, 'The Employee's Right to Silence', (1983) 57 *Australian Law Journal* 607.

²⁸⁰ [1995] WAIRC 157

By contrast in *De Bono v TransAdelaide*,²⁸² the employee tested positive to a urine sample showing cannabis consumption. The employee's conditions of employment prohibited impairment by drugs. A notice on a bulletin board notifying employees of a change in policy to the effect that detection of illegal drugs would be deemed to be an impairment was held not to be incorporated into the existing policy as the commission was not satisfied that the bulletin board would have given the employee sufficient notice of the change to existing policy. The dismissal of the employee was held to be unfair, because the employer could not establish that the level of drug detected resulted in an impairment and therefore the employer had no a valid reason for dismissal

Similarly, in *Worden v Diamond Offshore General Company*,²⁸³ the applicant employee was a long-term cannabis user. He was dismissed when an alcohol and drug test revealed traces of cannabis and methamphetamines. He had been employed for approximately 10 years, over which time there was evidence that a policy of prohibiting drug use on the employer's oil rig was in place but, apparently, never enforced. The Australian Industrial Relations Commission held that the employer had, by neglect of its own policy, condoned²⁸⁴ the activities of the applicant. As in *De Bono*, above, there was no evidence that the level of cannabis

281 At page 11

282 AIRC Print R 8699 (7th September 1999).

283 AIRC Print S0242 (18th October 1999).

284 Put another way, the employer had not repudiated the contract at the time of the breach and therefore waived its right to take action on the basis of the breach.

and other drugs detected would result in impairment.²⁸⁵ The commission found the dismissal was unfair.

The employer was more successful in an earlier case of *Kay v Cargill Foods Australia*. An employee was held not to be unfairly dismissed when it was established that he had signed an acknowledgement of company policy prohibiting employees from “*being under the influence of drugs...when reporting for work, while working or while on company premises*”²⁸⁶, was subsequently detected as having a positive cannabis test. It was noted that he had also previously tested positive. Judicial Registrar Tomlinson observed that:

*...the whole context of the drug and alcohol abuse policy was to prohibit the use of drugs in order that industrial accidents could be contained and prevented. The respondent is engaged in the preparing of animal carcasses for human consumption - an undertaking that is inherently dangerous...The partaking of any sort of mood altering substance is...contra-indicated.*²⁸⁷

Nolan, a commentator on these cases, has noted that it has often been argued by employers that they must act positively to prevent injury and possible litigation.²⁸⁸ As a major employer, BHP Iron Ore Australia Pty Ltd introduced a program of random drug testing. Given the controversy surrounding the implementation of drug and alcohol detection policies, it is not surprising that unions oppose the application

285 The problem with drug testing has been discussed in J Nolan ‘Employee privacy in the electronic workplace Pt 2: drug testing, out of hours conduct and references.’ [2000] *Privacy Law and Policy Reporter* 61 at 3. Nolan notes that drug testing does not necessarily establish impairment at the time of testing due to the lag time for drug metabolites to appear in urine, so that it is possible for a person to be under the influence of drugs at the time of testing and not be detected.

286 At page 1

287 AIRC Print 960432 (6 September 1996) at page 8

288 J Nolan ‘Employee privacy in the electronic workplace Pt 2: drug testing, out of hours conduct and references.’ [2000] *Privacy Law and Policy Reporter* 61 at 1.

of such policies. In *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australian, Western Australian Branch*²⁸⁹, the employer sought a declaration that its policy was not unreasonable, harsh or unfair. The commission, in court session, noted that the union, in this case, did not condone the use of alcohol and illicit drugs in the workplace, but objected to those parts which related to the testing for drugs claiming that this constituted an unreasonable intrusion into an employee's privacy. Such testing required employees to give a body sample on demand. The commission accepted the argument that:

*...the Programme involves an intrusion into the privacy of individual employees. However, the current standards and expectations of the community concerning health and safety in the workplace as evidenced by legislative prescriptions and judgements of courts and industrial tribunals are such that there will, of necessity, be some constraint on the civil liberties at times and, in particular, an intrusion into the privacy of employees.*²⁹⁰

It should be noted that this program did not propose automatic dismissal, as it allowed considerable opportunity to employees to cease drug or alcohol use in their interests and that of fellow employees. The program contained formal mechanisms to review its reliability and safeguards were put in place to protect the confidentiality of the records kept by the employer.²⁹¹ On this issue, the union expressed concern that information gathered by the employer may not be protected by privilege for the purposes of criminal or civil proceedings. This concern was not considered by the commission to be significant and, in any event, was a matter that could be addressed within the internal review process. The commission approved the policy and this

289 [1998] WAIRC 130.

290 At page 6

approach was later followed in another Western Australian case of *Australian Railway Union of Workers, West Australian Branch and Ors v West Australian Government Railways Commission*²⁹². In the latter case, Commissioner Beech noted the employer had obligations under occupational safety and health laws to provide a safe place of work and the employee also had obligations under the *Rail Safety Act, 1998* (WA) not to consume drugs and alcohol while carrying out rail work. In the former case, the employer had obligations under the *Mines Safety and Inspection Act 1994* (WA) which prohibits anyone from being in or on a mine whilst adversely affected by drugs or alcohol.

Where illicit drug consumption and workplace safety is an issue, the balance struck seems to favour safety over privacy.²⁹³ However, given the concerns over fairness in most industrial legislation, it is likely that employees will be entitled to access information held by the employer.²⁹⁴ The issue seems to be that the policy must be reasonable, specific and must provide satisfactory means of detection of the use of drugs. Nolan has also observed that the policy should be acknowledged by the employee, preferably in writing, with timely reminders, which must be applied consistently and without discrimination.²⁹⁵

291 B Belling, 'Employment Disclosure and Other Privacy Issues', (1999) 5(2) *Employment Law Bulletin* 11 at 13.

292 [1999] WAIRC 14.

293 Banisar and Andrews have noted that drug testing is notoriously inaccurate, raising issues as to whether the invasion of privacy is warranted. Banisar D and Andrews S 'The World of Surveillance Pt 4 Workplace Privacy' [2000] *Privacy Law and Policy Reporter* 54 at 4.

294 Ibid.

295 J Nolan 'Employee privacy in the electronic workplace Pt 2: drug testing, out of hours conduct and references.' [2000] *Privacy Law and Policy Reporter* 61 at 5.

Workers generally have a right to cease work where there is an imminent risk of harm. At common law, an employee is not required to obey an unlawful direction, which may include a requirement to work in unsafe circumstances. Therefore, co-workers might be entitled to cease work if another worker was unsafe because they were under the influence of drugs or alcohol. Likewise collectively, the *Workplace Relations Act 1996*(WA) quarantines safety concerns from penal action by employers. In other words, section 127(2) of the Act, which allows an employer to seek a stop order against workers who cease work, does not operate where it can be shown that the reason for cessation is related to an imminent risk of harm. So it was held in *Redbar Excavations Pty Ltd v Construction, Forestry, Mining and Energy Union*²⁹⁶, when an order was sought by an employer to compel union workers to return to work on a demolition site. The site was the subject of a community-based picket which was attempting to prevent the demolition of a number of buildings. As a result of the picket, union workers were unable to demolish the building without interference from the public, which they said made the work site unsafe. Williams DP was satisfied there was an imminent risk of harm and refused to order them back to work. Not all so called “safety stoppages” have been successful, and in some cases the Australian Industrial Commission has been moved to call attention to the improper use of safety as a means of ceasing work to apply pressure to an employer. Such was the case in the *Thiess Contractors Pty Limited v Various Coal Industry Employees* case.²⁹⁷ Commissioner Hodder observed

Taking a line through this the behaviour of the parties is pertinent and reveals a pattern on the part of the workforce, in the instance of the 5 February 1998 stoppage of what I perceive as an attempt to take industrial action clothed in

²⁹⁶ AIRC M Print R5276 (28th May 1999). See also V Di Felice ‘Stopping or Preventing Industrial Action in Australia’ [2000] *MULR* 12 at

²⁹⁷ AIRC B Print Q3148 (29th September 1998)

an imminent danger scenario which when aligned with the stoppages as detailed earlier in this decision at pages 5 and 6 reveals a tendency to take unjustified industrial action with no adherence to Clause 13 of the agreement. The chronology of industrial action, followed by the action on 18 September 1998, can attract no other description than industrial action with no apparent justification, as there was no attempt to have any dialogue with Thiess about the issues raised within the aforementioned resolution which is a clear abrogation of the 9 May 1998 undertaking, referred to earlier. In that sense the 9 May 1998 undertaking given by the Union on behalf of its members and itself is significant. Dealing then with the 5 February 1998 stoppage on alleged imminent danger grounds the workforce should realise that the improper use of "imminent danger" as a method to take industrial action and the resulting legal immunity of such use devalues the rights of workers as provided for under the Act, if this is not genuinely involved, a right which I must say should be highly valued and not diminished for the wrong reasons. Clearly if safety issues were the reason that the stoppage took place the Lodge officers and the members who were responsible for the resolution failed in their moral obligation to themselves and collectively. Each and every person on a mine site has a moral and legal responsibility to ensure that the workplace is safe and to bring potentially dangerous work areas or practices to the notice of the appropriate persons. The employees failed to do this on their return to work following the 5 February 1998 stoppage.²⁹⁸

A similar conclusion was reached in *Tenix Defence Systems Pty Ltd v Various Shipping Industry Employees*.²⁹⁹ In *Tenix*, a submission was made on behalf of the respondents that no stop order should be granted on the basis that the relevant unions claimed that industrial action had been related to occupational health and safety. Commissioner Simmonds found that there had been no acceptable evidence presented to support this submission.³⁰⁰ The commissioner observed that the applicant company had procedures to deal with safety concerns and these could be utilised. In *United Constructions & Others v Various Building, Metal and Civil Construction Industry Employees*³⁰¹, Commissioner O'Connor granted a stop order in favour of various employers, even though there was some evidence of unsafe working conditions because the unions concerned had failed to follow the relevant

298 At Page 10 Emphasis added.

299 AIRC 1221/99 Print R9982 (11th October 1999)

300 The Commissioner did not accept affidavits with evidence relating to Legionnaires Disease.

safety procedures set out in the *Mines Safety and Inspection Act 1994* (WA).. Similarly, where unions had failed to raise safety concerns with management before taking industrial action, as in *Kemcor Australia Pty Limited v Various Chemical Industry Employees*³⁰², a stop order was made despite their attempt to raise safety issues at the hearing. In contrast' Commissioner Bacon in *BHP Coal Pty Ltd v Various Coal Industry Employees*³⁰³ adjourned an application for a stop order to allow the parties to assemble the evidence in relation to safety concerns. Similarly, Commissioner Merriman in *Flour Daniel Pty Ltd v Construction, Forestry, Mining and Energy Union & Others*³⁰⁴, in exercising his discretion not to grant a stop order, accepted undertakings from unions that they would follow health and safety procedures before taking industrial action.

There is a well developed line of Western Australian cases to a similar effect which have arisen out of the need to determine the question of employee entitlements to wages once they had ceased work.³⁰⁵ Although the legislation has been amended to some degree, the essence of the *Occupational Health Safety and Welfare Act 1984* (WA) was that an employee who ceased work on the grounds of a *risk of imminent and serious injury* was entitled to full pay. Likewise, an inspector of the relevant authority could prevent work if such risk was apparent. The Western Australian

301 AIRC 575/99 P Print R 5412 (1st June 1999)

302 AIRC 685/99 M Print R6103 (21st June 1999)

303 AIRC 418/00 B Print S5070 (13th April 2000)

304 AIRC 1506/98 M Print Q9883 (16th December 1998)

305 See for example *Wormald Security Australia Pty Ltd v Rohan* [1992] WAIRC 46, in relation to the danger inadequately secured spare wheels in vehicles; held to be an imminent risk. . In *Automotive Food Metals Engineering Printing and Kindred Industries Union of Workers Western Australian Branch v DOM-UIE Pty Ltd* [1995] WAIRC 149 where a claim for payment of wages was upheld on the basis that there was a risk of imminent and serious injury where workers were engaged in work involving asbestos. Likewise workers were entitled to cease work and claim payments in *Metals and Engineering Workers Union Western Australian Branch and Others v AMEC and Others* [1995] WAIRC 69 when they were exposed to rockwool fibres which cause skin irritations.

Industrial Relations Commission was, up until recently, the tribunal to determine questions of law in relation to disputes involving these kinds of matters and regularly had to traverse the *Occupational Health Safety and Welfare Act 1984* (WA). As a result of amendments to federal laws in 1996, federal and state industrial relations commissioners will be required to take State occupational health and safety laws into account when considering the issuing of orders to prevent industrial action.

6.1.3 Employer Justifications for Seeking Medical Information

An employer has a duty of care to make reasonable inquiries of a prospective employee, to establish whether or not the worker has a disability which may require the employer to guard against further injury. For that purpose, it is common practice for employers to seek information over past compensation claims. Negligence actions may arise if the employer fails to guard against further injury to an employee known to have a disability.³⁰⁶

In addition to the duty to provide a safe place of work at common law, with the introduction of the *Equal Opportunity Act 1984* (WA) and similar federal laws that prevent discrimination on the grounds of disability, employers need to ensure that they do not use information obtained in a manner that discriminates against employees/workers who have disclosed a disability. This is particularly so where

³⁰⁶ *Paris v Stepney Borough Council* [1951] AC 367 and *Haley v London Electricity Board* [1965] AC 778.

that disability does not impinge on the capacity of the employee/worker to perform their work.³⁰⁷ An employer must take care to set out properly the requirements of the job in advertisements and later at interview. Failure to do so, may lead applicants with disabilities to allege discrimination if they are later told that they would be unable to perform the work required.

Unnecessary litigation may follow an employer's failure to clarify descriptions.³⁰⁸ As noted above (in section 6.1.1) some employer enquiries may be general in nature and may provoke allegations of discriminatory treatment if information obtained is not used correctly. For example, in *Berry* (supra), the employer application form included the following question:

Have you every (sic) made a claim for Workers' Compensation?

Such a question is not disability specific and does not allow the employer (without more information) to assess whether such a claim is relevant. Similarly, in *Abonyi* (supra) one question asked was:

*During the past 5 years have you ever had any medical examination, advice or treatment, attended or been admitted to hospital for treatment or had any tests such as X-Rays or electrocardiogram?*³⁰⁹

Such a sweeping question is bound to elicit information which is in no way relevant to the employment application. If employment is declined on the basis of answers to

307 See sections 4(i) and 66B-66P of the *Equal Opportunity Act 1984* (WA).

308 *McQuillen v The University of Melbourne* (1994) EOC 92-574.

309 At page 2

such a question, an allegation of discrimination on the grounds of disability is likely to follow. A more acceptable question was used in *Campbell* (supra), which was:

*Are you aware of any medical condition or other factor relating to your health and physical fitness which may prevent you from performing the duties identified...?*³¹⁰

This style of question assumes that the applicant is conversant with the duties of the job which the employer should have made clear. This latter aspect is also crucial in relation to the actual medical examination. Medical practitioners will ultimately be asked to express an opinion on whether the applicant is fit for the work on offer. Similar considerations apply in relation to workers' compensation claims.

Discrimination cannot occur if the employer does not know of the applicant/worker's disability.³¹¹ It will be discriminatory and unlawful for an employer to dismiss a worker simply because they have made a claim for workers' compensation and must be absent from work to attend a medical appointment.³¹² Potentially, if the employer focuses only on the medical information obtained rather than consideration of the duties of the job, discrimination on the grounds of impairment or disability may occur.³¹³

310 At page 2

311 *Henderson v Electrolytic Zinc Company of Australasia Limited* (1994) EOC 92-616.

312 *Kirkwood v Oaksbury Pty Ltd* Print P9638 24th March 1998

313 As shown in the cases discussed, above but also more recently in *Peck v Commissioner of Corrective Services* 920020 EOC 93-236. In *Peck* the employer was held to have discriminated against prospective employee in relying on a pre-employment medical report which determined the applicant unfit by reason of a left leg injury. It was held that this was discriminatory because the applicant could in fact perform the inherent requirements of the job and had been treated less favourably because of the adverse medical report.

For example in *Madafferi v City of Northcote*³¹⁴ a council was found to have discriminated against an applicant for a job, after it relied only on a medical report which based its prognosis on a statistical survey of effects of injury, rather than on the applicant's overall credentials and health. The medical report provided to the employer, following a pre-employment medical examination, determined that the applicant would be a "substantial WorkCover risk"³¹⁵. This assessment was made despite the applicant having never made a claim for compensation in the past.

In a similar case,³¹⁶ an employer was found to have discriminated against an applicant by withdrawing a job offer after relying only on a pre-employment medical examination. This recommended that the applicant not be employed as an occupational nurse on the grounds of a back injury which was thought would preclude the applicant from carrying out the duties of the job. Even though the applicant provided contrary medical evidence, the employer failed to seek independent medical advice. The tribunal in this case also noted that the pre-employment medical report was not task specific and had failed to take into account the applicant's past history as a paramedic. Again, as in *Madafferi*, the medical opinion obtained by the employer was based on a statistical propensity of the applicant to suffer further injury, rather than having regard for the applicant's personal circumstances. Damages were awarded to the applicant for the humiliation and distress caused through the withdrawal of the job offer.

314 (1993) EOC 92-512.

315 At page 79,614.

316 *Gehrig v McArthur River Mining Pty Ltd* (1997) EOC 92-872.

In contrast to the above cases, is the decision in *Osborne v CSR Timber Products*,³¹⁷ where it was held that the employer was entitled to decline employment to the applicant, who had sustained permanent injuries to his wrist and forearms in the course of his previous employment. In *Osborne*, the applicant was off work for two years and unable to continue his pre-accident work as a sign manufacturer. He completed a timber industry training course and sought work with the respondent employer. That employer required him to undertake a functional capacity evaluation and medical examination. On the basis of these tests, the employer declined to offer the applicant work. It was held that although the applicant had been treated less favourably than someone who had not been injured, the employer was justified in not offering employment because the uncontested medical evidence showed that the applicant was at risk of further injury if he undertook the work in question.

It can be observed that considerable merging of occupational health and safety legislation, industrial legislation and workers' compensation legislation occurs in this area. As noted, it is the duty of an employer to make reasonable inquiries to establish whether it is necessary to guard against injury to a prospective employee. Such a duty arises under both the common law duty of care and *Occupational Safety and Health Act 1984 (WA)*.³¹⁸ Section 79 of the *Workers Compensation Rehabilitation Act 1981 (WA)* provides that:

Where it is proved that the worker has, at the time of seeking or entering employment in respect of which he claims compensation for a disability, wilfully and falsely represented himself as not having previously suffered from the disability a dispute resolution

³¹⁷ (1999) EOC 92-9777.

³¹⁸ In particular section 19 of the *Occupational Safety and Health Act 1984 (WA)*

*body may in its discretion refuse to award compensation which otherwise would be payable.*³¹⁹

This section pre-supposes the administration by the employer of a pre-employment procedures used to gather information in relation to the worker's state of health and medical condition. Section 79 provides that compensation will only be disallowed where representation by the worker is made wilfully and falsely. A representation made negligently or carelessly would activate this provision. The employer must establish that the disability suffered, and that which was not disclosed, are one and the same. Section 79 does not preclude compensation where the disability suffered in the course of the employment is not the same as the disability which has not been disclosed. Some caution is needed in this area, as focusing on one duty established under one piece of legislation may lead to neglect of another.

For example, in *Allegretta v Prime Holdings Pty Ltd*,³²⁰ the respondent employer dismissed a pregnant barmaid on the basis that her continued employment put her (and her unborn child) at risk of injury through falling on slippery floors. The employer argued that it had a duty to protect the employee from injury. The Equal Opportunity Tribunal of WA acknowledged that the employer had a duty to keep the employee safe, but found that the best way to do this was to improve the work conditions for all workers, rather than to treat the applicant differently.

319 Emphasis added

320 (1991) EOC 92-364.

A similar decision was reached in *Duggan v Shore Inn Pty Limited*³²¹ when a pregnant woman (who was medically fit to do her existing work) was transferred to another position. The employer claimed the transfer had taken place because of a concern for the health and safety of the applicant. The court found that the transfer was discriminatory. Interestingly, as a result of the employer's behaviour, the applicant in *Duggan* suffered a stress related condition which incapacitated her for work, which no doubt would have been compensable under workers' compensation legislation.

Duggan and *Allegretta* can be distinguished from a more recent decision of the New South Wales Court of Appeal. In *HJ Heinz Company Australia Ltd v Turner*,³²² it was held that an employer could raise a defence to a claim of disability discrimination if a policy to comply with state occupational health legislation had been put in place. This was because most state equal opportunity laws do not apply where the employer is acting in compliance with another law of the state.³²³ In *Turner*, the employee who had a long history of absence from work due to back and knee injuries, was placed on "restricted duties" and was precluded from doing overtime. This policy, which excluded all workers who were on "restricted duties" from overtime, was accepted by the Court of Appeal as putting in place a safe system of work for the purposes of complying with the requirement under section 21 of the *Occupational Health and Safety Act 1985* (NSW) to "provide and maintain

321 (1992) EOC 92-457.

322 Unreported CA (NSW) discussed in K Reid, 'Equal Opportunity Versus Occupational Safety: An Employer's Quandary', (1999) 27(1) *Australian Business Law Review* 79-81.

323 For example Section 69 *Equal Opportunity Act 1995* (NSW).

so far as practicable for employees a working environment that is safe and without risks to health”.

It has been noted in *Osborne’s* case that discrimination is warranted where an employee or prospective employee is unable to perform the physical requirements of the work. It is necessary, therefore, for an employer to ensure that inquiries at the pre-employment stage are specific to the work on offer. In short, when a prospective employee is asked whether he or she has suffered an injury in the past or has a disability, the relevance of that disability to the job in question should be established. Otherwise, if the prospective employee is not granted a job, it could be alleged that the information supplied has been used in a discriminatory fashion.

In *Baxter v Burswood Resort Management Limited*,³²⁴ Commissioner George held that a worker who had failed to disclose a pre-existing back injury could be dismissed with notice, where it was established that the employee was well aware of the pre-existing condition.³²⁵

Overall, the result for a worker who fails to declare a pre-existing medical condition is that the contract of employment may be brought to an end and where a similar disability is suffered during the course of that employment, compensation may be

³²⁴ (1992) 72 WAIRC 82

³²⁵ Generally dishonesty of a serious nature will be sufficient to allow the employer to terminate the employment contract, per *Blyth Chemical Limited v Bushnell* (1933) 49 CLR 66. It will be relevant where the dishonesty relates to previous injury that is not disclosed such as in *Catlin v Weinel* [1995] SAIRC 31 where it was held that a failure to disclose to a doctor a previous injury was dishonest within the meaning of the South Australian compensation legislation. The invention of an appointment to see a lawyer about a workers compensation claim could amount to dishonesty, per *Ruf v GMH Ltd* [1998] SAIRC 5

disallowed. It should be noted that section 79 does provide discretion for compensation to be paid despite a wilful and false declaration being made.

For example in *Anderson v Mineral By-products Pty Ltd*,³²⁶ the Workers' Compensation Board exercised its discretion to allow compensation to a worker who had misrepresented the fact that he did not suffer a previous disability. The Board found that the worker had intended to remain in the workforce and that he had made the misrepresentation with the intention he could discharge his duties to his new employer.

By contrast, operating under similar provisions to the *Workers' Compensation and Rehabilitation Act 1981* (WA) the Administrative Appeals Tribunal in *Re Schofield v Comcare*³²⁷ held that a worker who had falsely represented himself as not suffering from previous dizzy spells in 1986-7 was not entitled to compensation when he fell ill from inhalation of toxic chemicals in the early 1990s and suffered similar symptoms.³²⁸ In *Iliadis and Comcare*,³²⁹ however, the Administrative Appeals Tribunal (AAT) found that there had not been a situation of non-disclosure when an applicant failed to reveal past episodes of back pain and who then suffered back injury at work. The AAT said:

The Respondent submitted that the applicant was bound to disclose in the medical form her past episodes of back pain...

³²⁶ (1997) 8 WCR (WA) 37.

³²⁷ (1995) 38 ALD 124.

³²⁸ A similar result was reached in *Ranger and Comcare* [2000] AATA 233 at page 17 where the worker was held to have falsely represented that she did not have a depressive condition prior to her employment.

³²⁹ (1996) 41 ALD 576.

However the symptoms which the applicant failed to disclose cannot be regarded as false representations under s7 (7) unless the false representations related to a disease or an ailment, which if the word "wilful" is to have any meaning, she knew she had...Having found that the Applicant had no appreciation that the past episodes of back pain were symptoms of a back ailment or disease...I am not satisfied that she made a false representation in that regard. ³³⁰

It follows that *Iliadis* can be distinguished from *Schofield* because in *Schofield* it was established that the worker knew his previous symptoms amounted to some kind of ailment. One commentator has noted that provisions similar to section 79 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) are part of a piece of beneficial legislation and so a penal or disentitling provision of that nature should be construed narrowly.³³¹ The fact that in the *Workers' Compensation and Rehabilitation Act 1981* (WA) discretion to allow payments, despite non-disclosure, ameliorates against the potential for applying section 79 too rigidly.

One final consideration relates to the involvement of medical practitioners in pre-employment medical checks. In some cases, the employment application form may not adequately prompt or request suitable information and the employer relies upon a medical practitioner to provide a full medical picture. Where this occurs the medical practitioner may, in the interests of a full medical check up, ask general questions and report to the employer providing information, which may be irrelevant, and in some respects confidential. The danger for the employer in such circumstances is that where the employer acts on information in the medical report,

³³⁰ At page 587

³³¹ A Anforth, 'Wilful and False Disclosures Under the Safety Rehabilitation & Compensation Act 1988', (1996) 164 *Law Society of the Australian Capital Territory Gazette* 6-10.

which is irrelevant to the consideration of the employment question, the prospective employee may claim that the employer has committed an act of unlawful discrimination. This is likely to occur particularly where the worker has a latent disability or disease. For example HIV/AIDS conditions, which seldom present a danger to the employer or co-workers, but which the employer may perceive as a risk.³³² It is likely that a declaration that a worker has HIV/AIDS is irrelevant to most forms of employment so that the failure to disclose such a condition is unlikely to prejudice employment or compensation entitlements.

However, in some cases the declaration or disclosure of a latent disease may be highly relevant where there is a prospect of infection. In *Western Australian Prison Officers' Union of Worker v AGG and Ministry of Justice*,³³³ Commissioner Gregor held that there was sufficient risk to prison officers through contact with HIV positive prisoners that the employer should disclose to prison staff details of whether a prisoner was infected. This order was made having regard to the employer's duty to provide a safe workplace for employees in accordance with the *Occupational Safety and Health Act 1987* (WA). It was observed by the commissioner that the employer had been in breach of the *Equal Opportunity Act 1984* (WA) in segregating HIV positive prisoners from the rest of the prison population.³³⁴

332 For example in *Schlipalius v Petch & Anor* (1996) EOC 92-810 where a poor performing apprentice chef was dismissed after having been shown to be HIV positive. It was held that the dismissal was discriminatory, because the worker was treated less favourably than a poor performing apprentice without a disability.

333 [1997] WAIR 21 3 February 1997.

334 An early case of *Hoddy v Department of Corrective Services* (1992) EOC 92-387 established that prisoners with HIV had an impairment within the meaning of the *Equal Opportunity Act 1984* (WA) and that if rights to services within the prison were denied them they may have a claim for discrimination. Later in *A Complainant & Anor v The State of Western Australia* (1994) EOC 92-610 the WA Equal Opportunity Tribunal found in favour of two HIV positive prisoners who had been

It should be noted that Commissioner Gregor's decision was made even though evidence had been given to the Human Rights and Equal Opportunity Commission in *X & Anor v State of Western Australia*³³⁵ which asserted that provided there was rigorous application of existing prison regulations to prevent sexual relations and needle sharing between prisoners, there was little public health risk in allowing the integration of HIV positive prisoners with other prisoners.³³⁶ Despite the (somewhat naïve) findings in *X & Anor*, at common law, even if the risk of injury is slight, the employer may have a duty to take steps to prevent injury, if the consequences are serious.³³⁷ Further, even where the employer has not negligently inflicted injury, there is a line of cases that suggests the employer will be liable by not providing adequate counselling and assistance following a foreseeable traumatic event such as attack by a prisoner upon a prison officer.³³⁸ In addition, there is no doubt that prison officers infected by contact with HIV positive prisoners, would be entitled to claim workers' compensation for the resultant treatment and disability.

segregated from the rest of the prison population, awarding them damages for denial of services available to other prisoners.

335 (1997) EOC 92-878.

336 A similar conclusion was reached in a later Queensland case of *Mathews & Ors v Queensland Corrective Services* (1998) EOC 92-940.

337 *Paris v Stepney Borough Council* [1951] AC 367.

338 See *Howell v State Rail Authority* (unreported SC (NSW) 7 May 1998 and *Hind v Attorney-General for Tasmania* (unreported SC (Tas) 29 Sept 1995). These cases discussed in I Freckelton, 'Critical Incident Stress Intervention and the Law', (1998) 6(2) *Journal of Law and Medicine* 105-113. A case dealing specifically with prison officers was *Zammit v The Queensland Corrective Services Commission* (unreported SC (Qld) 1 September 1998). See also *Sinnott v F J Trousers Pty Ltd* [2000] VSC 124 and *State of New South Wales v Seedman* [2000] NSWCA 119 where such claims were made.

In another series of cases beginning with *X v Department of Defence*³³⁹, it was held by the Human Rights and Equal Opportunity Commission that the Defence Department had discriminated against an HIV positive soldier who was discharged from service, because it had been unable to establish that there was a risk of transmission of the HIV to non-infected soldiers. On appeal, the Federal Court overturned the decision of the commission and held that it was an inherent requirement of a soldier's employment that he or she had to "*bleed safely*", in the sense that there should be no significant risk to fellow soldiers.³⁴⁰

The latter finding seems consistent with the approach to employment risks taken by Commissioner Gregor in the *Western Australian Prison Officers' Union* case above. Likewise it is supported by the decision of the Australian Industrial Relations Commission in *Hobbs v Capricorn Coal Management Pty Ltd*³⁴¹ when the commission observed that the employer's common law duty to keep the employee safe was not a low one.

The overlap of occupational health laws, discrimination laws and industrial matters is further highlighted in the decision of the Federal Court in *Human Rights and Equal Opportunity Commission v Mount Isa Mines & Ors*.³⁴² It was held that the National Occupational Health and Safety Commission's task was to declare what it regarded as appropriate national standards, even though these may be contrary to

339 (1995) EOC 92-715.

340 (1998) EOC 92-909. This decision was affirmed by a majority of the High Court (2000) EOC 93-054.

341 AIRC 1547/99 Print S2201 (4th January, 2000).

342 (1993) EOC 92-548.

anti-discrimination legislation. The Federal Court also held that the commission had a duty to point out clearly which recommendations might contravene such legislation.³⁴³ What can be gleaned from these cases is that an employer has an obligation to take precautions to prevent the spread of disease in the workplace and this is not simply a matter of occupational health, but also an industrial issue. Preventative action may be taken as both an occupational health matter or, as has been shown, by order of the Western Australian Industrial Relations Commission or its federal counterpart. In some cases the obligation to protect workers may override anti-discrimination obligations.³⁴⁴

6.2 Disentitlement to Compensation, Summary Dismissal and Misconduct

A feature common to both industrial and compensation systems is the requirement to consider whether certain behaviour amounts to misconduct leading to a worker/employee being either dismissed or disentitled to compensation payments. It has been long established that the employer is entitled to summarily dismiss an employee who is guilty of misconduct. Summary dismissal means that the employee can be dismissed instantly, without any warning or notice, or pay in lieu of notice. It is the ultimate sanction, which can be imposed on an employee, which is only ratified by the industrial tribunal, where it can be established that the conduct was such that it can be shown that the employee had acted in such a manner as to

³⁴³ This was particularly relevant where the NOHSC recommended that women not be involved in job identified as "lead risk" activities.

³⁴⁴ This aspect was noted in *The Broken Hill Associated Smelters Pty Ltd and Human Rights and Equal Opportunity Commission* 12 AAR 98 where an exemption from anti-discrimination laws was granted to

completely disavow or repudiate the contract of employment. There is an unlimited number of ways in which misconduct may occur but they generally include insubordination, failure to obey reasonable or lawful directions/orders, malingering, or any other form of misconduct which is particularly relevant to the industry which is the subject of the application.

Related to this aspect of misconduct is section 22 of the *Workers' Compensation and Rehabilitation Act 1981* (WA), which provides that;

If it is proved that the disability of a worker is attributable to his—

(a) voluntary consumption of alcoholic liquor or of a drug of addiction, or both, which impairs the proper functioning of his faculties;

(b) failure, without reasonable excuse, proof of which is on him, to use protective equipment, clothing, or accessories provided by his employer for the worker's use; or

(c) other serious and wilful misconduct,

any compensation claimed in respect of that disability shall be disallowed unless the disability results in death or serious and permanent disablement.³⁴⁵

Serious and wilful misconduct is not defined in section 22 of the *Workers' Compensation and Rehabilitation Act 1981* (WA), but it has been held in *Johnson v Marshall & Sons & Co Ltd*³⁴⁶ that it denoted more than simple negligence. The term “wilful” imports that the misconduct is deliberate, whereas the term “serious” relates to the nature of the misconduct rather than the actual consequences of it.

prevent women from working in lead processing on the grounds that it was excessively dangerous to their health.

345 Emphasis added

346 [1906] AC 409.

Similar considerations apply across the compensation and industrial jurisdictions. This was highlighted in *Noack's* case (discussed in section 5.1) where it was held that the doctrine of estoppel applied to prevent an employer from alleging misconduct where it had been determined by a review officer, in the Conciliation and Review Directorate, that the worker had not been guilty of serious and wilful misconduct for the purposes of section 22 of the *Workers' Compensation and Rehabilitation Act 1981* (WA). Commissioner Beech observed that there was no practical distinction between misconduct that is gross, as required for the purposes of summary dismissal under the *Industrial Relations Act 1979* (WA), and that which is serious and wilful as required for the purposes of the *Workers' Compensation and Rehabilitation Act 1981* (WA).

In *Ettridge v TransAdelaide*,³⁴⁷ the Federal Court dealt with a bizarre example of the interaction of industrial and compensation laws, resulting in an application for relief for unlawful dismissal. Ettridge claimed compensation from the respondent arising out of an injury in 1988. His claim was initially accepted, but over the next decade he participated in sustained and vigorous litigation against the respondent over various compensation issues, mostly to do with the rates of compensation payment.³⁴⁸ In all, there were no less than 10 appeals to the South Australian Workers' Compensation Tribunal together with at least a similar number of applications for review of decisions to review officers.

³⁴⁷ The litigation is summarised in *Ettridge v Transadelaide* (1997) SASC 6422 (21 November 1997).

³⁴⁸ In fact, the respondent pursued bankruptcy proceedings against the worker, a matter which drew adverse comment from the Judicial Registrar in one hearing.

Ultimately, the respondent dismissed the worker, who not surprisingly commenced proceedings in the Federal Court, alleging that his employment had been terminated *inter alia* on grounds prohibited by the *Workplace Relations Act 1996* (Cth) section 170CK (2) (e), namely “*the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulation or recourse to competent administrative authorities*”. Under the *Workplace Relations Act 1996* (Cth) the employer has the onus of showing that it did not terminate the employment on prohibited grounds. The Judicial Registrar found that the respondent employer could not prove that the worker had not been terminated because of the litigation that he pursued against it, and accordingly held that the termination of employment was unlawful. The employer was unable to establish that *Ettridge’s* contract of employment had ended by reason of the doctrine of frustration, as there was no evidence to this effect.³⁴⁹ A modest award of \$11,000 was made, and the employer may have been comfortable with the result, notwithstanding adverse findings against it.

A further, though less striking, example of where this interaction may occur is highlighted in *Australian Workers Union Western Australian Branch, Industrial Union Of Workers v Robe River Iron Associates*³⁵⁰ where Commissioner Gregor of the WA Industrial Relations Commission held that an employee’s dismissal was justified as the behaviour of the employee in engaging in a fight amounted to misconduct. Numerous High Court decisions have established that certain forms of assault in the workplace may give rise to a liability upon the employer to pay

³⁴⁹ Clearly this was a significant flaw in the respondent’s handling of the case.

compensation.³⁵¹ These cases occur where the assault takes place in circumstances where the injured person is either unaware that an attack will take place, or participates in an altercation as a consequence of work related issues. In some circumstances, it may be that the altercation will be outside the course of employment and, for example, involve personal matters. In such cases, there may be grounds for summary dismissal and where injury is sustained, disentitlement for compensation. Compensation payments may be declined on the grounds that the injury was not in the course of the employment or alternatively, if the injury was in the course of the employment, it was sustained through the serious and wilful misconduct of the worker. Conversely, compensation was awarded to an employee (W) who was dismissed for striking a fellow employee (B) when it was established that the assault was triggered by a course of discriminatory conduct relating to the employee's physical impairment.

In *Wardle v Castelemaine Perkins Ltd*³⁵², Wardle (W) suffered from epilepsy and was harassed by another employee (B) who was egged on by other employees. After one incident, W assaulted B, who required medical treatment. W was dismissed. It was held that the dismissal was unfair and that the employer had been vicariously guilty of discriminatory practice. Notably, this matter was dealt with under the *Industrial Relations Act 1990* (Qld), which required the Industrial Relations Commission of that State to have regard for the *Anti-Discrimination Act 1991* (Qld).

350 {1992} WAIRC 84

351 For example *South Maitland Railways Pty Ltd v James* (1943) 76 CLR 496 assault on a worker in relation to quality of work - successful claim. *Weston v Great Boulder Mines Limited* (1964) 112 CLR 30 unexpected assault on worker successful. Cf *Williams v Williams* (1972) 126 CLR 146 unsuccessful claim for assault where it was shown that the parties involved were engaged in a personal dispute not connected with work.

Similar provisions do not apply in Western Australia so in *Ardeshirian v Robe River Iron Associates*,³⁵³ a Western Australian worker of Iranian extraction, who was dismissed for assaulting a co-worker following racist taunts directed at him, was required to seek redress in the Equal Opportunity Commission.

An additional issue arises with assaults that occur in the workplace. If the employer is obliged to pay compensation to a worker who is assaulted in the course of the employment, the employer may be entitled to take proceedings against the assailant to recover the compensation that has been paid. Section 93 of the *Workers' Compensation and Rehabilitation Act 1981* (WA) allows the employer to recover the compensation paid against the person whose negligence causes a disability to their worker. Negligence in these circumstances would include deliberate assault. Section 93 reinforces the common law entitlement of an employer to take action to recover costs incurred as a consequence of the negligence of the employee.³⁵⁴

Further, section 20 of the *Occupational Safety and Health Act 1987* (WA) provides that employees commit an offence if they do not have regard for the safety of themselves or others. In short, conduct, which constitutes gross misconduct, may lead to the dismissal³⁵⁵ of a worker and disentitlement to compensation and a penalty under the *Occupational Safety and Health Act 1987* (WA). In addition, the

352 Citation for this case

353 (1990) EOC 92-299.

354 *Lister v Romford Ice and Cold Storage Co Ltd* (1957) AC 555. A recent application of this principle occurred in *Robe River Associates v Coombes* (unreported Local Court (WA) 6 June 1996).

cost incurred by the employer as a consequence of the misconduct may be recoverable against a negligent employee or third party.

6.3 Redundancy

The *Minimum Conditions of Employment Act 1993* (WA) makes certain provision for an employee who is made redundant. Sections 40 – 43 of that Act provide, generally, that the employee must be informed of impending redundancy and be given sufficient time to make arrangements to seek alternative employment. Nothing in that Act makes provision for payment consequent upon redundancy. It has been left to industrial awards and agreements to provide for redundancy payments. In *R v Industrial Commission of South Australia; ex parte Adelaide Milk Supply Cooperative Ltd*³⁵⁶ Bray C J observed “a job becomes redundant when an employer no longer desires to have it performed by anyone”³⁵⁷. A similar definition is contained in the *Minimum Conditions of Employment Act 1993* (WA) which defines redundant as meaning “being no longer required by an employer to continue doing a job because, for a reason that is not a usual reason for change in the employer’s workforce, the employer has decided that the job will not be done by any person.”³⁵⁸

355 For example see *Porter v Eltin Underground Operations Pty Ltd* [2000] WAIRC 224 (14 November 2000), where a worker was dismissed for failure to ensure that a co-worker was wearing a safety harness.

356 (1977) 44 SASR 6

357 At page 8

358 Section 40 *Minimum Conditions of Employment Act 1993* (WA)

The leading decision on redundancy is the *Termination, Change and Redundancy Case*³⁵⁹ where the Australian Industrial Relations Commission set standards for redundancy provisions which were adopted in most federal awards and which also broadly apply at state level. These standards relate mainly to matters such as notice and termination payments. Legislative provisions for redundancy were introduced federally in 1993 and are currently contained in Division 3 of Part VIA of the *Workplace Relations Act 1996* (Cth). Section 170CL of that Act states that where 15 or more employees are dismissed, notice must be given to Centrelink as soon as practicable after a decision to terminate is taken. Sub-divisions D and E of that Division also confer certain powers on the Australian Industrial Relations Commission in relation to redundancy. An employee may apply to the commission for an order as to severance benefits to be paid by the employer. If the employer fails to give notice to Centrelink, in accordance with section 170CL, then the termination of employment may be unlawful, giving rise to an application for compensation under the *Workplace Relations Act 1996* (Cth).

Alternatively, the Commission may intervene to order that adequate notification or consultation takes place. In some cases, the termination through redundancy may simply be challenged on the grounds that it was harsh or unjust or unreasonable. The difficulty with this submission is that it requires that the commission to inquire into the good faith and judgment of the employer in managing their enterprise. It may also be argued that where the employer does make some severance payment,

³⁵⁹ (1984) 8 IR 34.

but that it is inadequate, the employee may allege that the dismissal was unfair on the basis that it did not conform to contemporary industrial standards.

Other opportunities to contest redundancy payments may be on the grounds that the payment, or lack of payment, was discriminatory of a particular group or individual. This gives rise to some questions in relation to workers' compensation. Firstly, whether the worker suffering a disability, and in receipt of compensation at the time of being made redundant, is entitled to receive both redundancy and compensation payments simultaneously. There is nothing in the *Workers' Compensation and Rehabilitation Act 1981* (WA), which prevents this occurring. It would appear that, apart from considerations of equity and good conscience which may arise in the WA Industrial Relations Commission, it is unlikely that both payments cannot be made. That is to say, in some cases the Industrial Commission has decided not to grant a payment on the grounds that it is in some way "double dipping". The *Minimum Conditions of Employment Act 1993* (WA) sets out under section 43 that 8 hours paid leave is available to an employee who has been informed that he or she has been, or will be, made redundant. Section 41 of the Act requires the employer to discuss with the employee the possibility of redundancy in order to minimise the effects and examine whether there are any alternatives available. These provisions would appear to apply to workers even if they are receiving workers' compensation payments. In other words, workers made redundant while on compensation, would be entitled to 8 hours paid leave despite the fact that they may be unable to seek alternative work due to a disability.

In *Pacey v Modular Masonry*³⁶⁰ Commissioner Beech considered that the employer was in breach of the Act by failing to consult Mr Pacey (who was in receipt of workers' compensation) about redundancy and determined that this was a matter to be taken into account in considering whether the employee had been unfairly dismissed. It is also arguable that a failure to consult and provide leave would be contrary to the *Equal Opportunity Act 1984* (WA).

In fact, treating worker a differently when considering redundancy because they are in receipt of compensation payments has been held to be discriminatory in a number of cases. For example, in *Casey v State Electrical Commission of Victoria* (SECV)³⁶¹ the refusal by the SECV to offer voluntary redundancy to a worker in receipt of WorkCare benefits as a result of a work-related injury was held to be direct impairment discrimination. It was noted that the redundancy package compensated employees for past years of service, not for future lost income. In that case an award of \$33,842 was made, being the difference between the retirement package offered and what would have been received under the redundancy package. Many awards, in fact, provide that a period of absence due to a compensable injury does not affect the requirement of continuous service that is a pre-requisite for a redundancy package.³⁶²

In this area, the potential for an inconsistency between state anti-discrimination legislation and federal awards is apparent. Where there is an inconsistency the

³⁶⁰ (1998) WAIRC 49 (13 March 1998).

³⁶¹ (1993) EOC 92-495.

federal award will prevail. Awards often make provision for reductions in workforce or redundancy and may establish a formula for payments which can be discriminatory.

A well-known example of a discriminatory practice is to provide for the “last on first off” method, which generally discriminates against women who are usually unable to establish the same length of service as men.³⁶³ Awards have rarely, however, been held to cover all aspects of employee relations and are usually held to allow for the concurrent application of state Acts on issues such as discrimination.³⁶⁴ Such was the case in *Caufield & Ors v Gunnedah Coal Limited*³⁶⁵ where the Equal Opportunity Tribunal of Victoria held that it had jurisdiction to deal with a matter that required consideration of an agreement between a union and employer in the *Coal Mining Industry (Production and Engineering) Interim Consent Award 1990 (Vic)*. This provided that voluntary redundancy packages would be offered to all employees retrenched except those who were then receiving workers’ compensation payments. The employer had claimed that the Tribunal did not have jurisdiction to interfere with an agreement reached under the award. The Tribunal held that it could enquire into whether the agreement reached breached anti-discrimination laws.

362 See for example *Building Trades (Construction) Award 1987* No R 14 of 1978, which provides for absence of up to 26 weeks on compensation to be included in continuous service.

363 This was discussed at some length in the High Court in *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165.

364 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1984) EOC 92-003.

365 (1997) EOC 92-893.

The first consideration in relation to redundancy and compensation payments suggests that employers may use a redundancy package as a means of terminating a disabled worker's employment. This might be done for a host of reasons, but one obvious reason might be to avoid the obligations under return-to-work provisions discussed in the previous chapter. A second consideration is whether a worker, who has been made redundant but who was not in receipt of compensation at the time of the termination of employment, should be entitled to receive compensation following the termination. This question involves consideration of two principles. First, the concept of the "benevolent" employer who, notwithstanding that the worker has a significant disability, continues to employ the worker in some special task, paying the worker as if there was no disability. It has been established that even if a worker is at work, he/she may be remain legally partially or totally incapacitated. A West Australian illustration of this principle is *Courts v Wigmore's Tractors Pty Ltd.*³⁶⁶ In *Courts*, the worker had been severely injured some 20 years before his employer terminated his services. It was held that even though he had been gainfully employed for those 20 years, he was, on retirement, totally incapacitated and had, in effect, been incapacitated for some considerable time. It follows that such a worker, on being made redundant, would be entitled to receive payments as for total incapacity.

The second issues that arises relates to whether a worker who accepts voluntary redundancy can then claim workers compensation on cessation of employment. In such a case, compensation payments may be payable where it is established that

³⁶⁶ (1983) 3 WCR (WA) 26.

there is ongoing work related incapacity. Often, the reason for taking voluntary redundancy is that the worker, in fact, has a disability, which gives rise to partial incapacity. In those circumstances, a partial incapacity payment may be warranted even if the worker has voluntarily removed himself or herself from employment.³⁶⁷ It may be difficult to establish that total incapacity payments are warranted in such a case unless the reason for continued employment can be attributed to the benevolent behaviour of the employer in retaining the employee despite the apparent inability to perform work.

6.4 Illegal Contracts of Employment

Creighton and Stewart note that labour law encompasses significant aspects of the law of contract. They observe that society legitimises and regulates the right of control of the employer over the employee by means of the common law contract of employment and statutory provisions. The common law has created “a series of rights and obligations under contract which may become binding on the parties as implied terms”. They further note that these rights and obligations apply “to the extent that they are not ousted by the express or implied intention of the parties”. The influence of the common law is “often felt well beyond the context of the principles themselves, for example in the interpretation of statutes and tribunal awards”.³⁶⁸ The specific principles that go to make up the common law contract of

³⁶⁷ *Withers v AV Jennings Pty Ltd* (1981) 1 WCR (WA) 107 and *ANI v Massey* (Unreported CM (WA) 21/99 26 May 1999).

³⁶⁸ See also in this regard S Honeyball ‘Employment Law and the Primacy of Contract’ (1989) 18 *Industrial Law Journal* 97.

employment are constantly subject to change.³⁶⁹ This section of the thesis will examine, in the context of workers' compensation law, the requirement at common law that the performance of a contract should not be tainted by illegality. The common law requires a contract, including a contract of employment, to be for a legal purpose and be performed in compliance with the law. It follows that the nomenclature *illegal contract* has an oxymoronic quality. Recent decisions of compensation and industrial courts and tribunals will be considered for the purpose of examining the latest trends in this area of compensation law.

A contract may be unenforceable if it is drawn up for an illegal purpose or in an illegal manner or if the contract is prohibited by statute,³⁷⁰ whether expressly or impliedly. Illegality in this contractual sense is not limited to criminal activity. The concept includes contracts which are prohibited by law, and those which are unenforceable because their objects, performance or underlying purpose is socially undesirable.³⁷¹ In the latter case the contract is said to be void as 'offending public policy'.³⁷² Illegality may arise from either statute law³⁷³, where it is established that a contravention of a statute has occurred³⁷⁴, or at common law where the courts

369 B Creighton and A Stewart *Labour Law An Introduction* The Federation Press Sydney 3rd Edition 2000 pp 9-10.

370 *Wilkinson v Osborne* (1915) 21 CLR 89 per Issacs J at 98.

371 *Holman v Johnson* (1775) 1 Cowp 341 at 343; ER 1120 at 1121.

372 Public policy is not fixed and may vary according to the state and development of society and the conditions of life in a community. See Dixon J in *Stevens v Keogh* (1946) 72 CLR 1 at 28.

373 *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 per Brennan and Dawson JJ at 462.

374 It is a pre-condition of the doctrine that a statute be breached. See for example *Cunningham v Cannon* (1983) 1 VR 641, which will be discussed in more detail below.

consider that the terms of the contract offend public policy.³⁷⁵ Parliament may prohibit particular arrangements, making them illegal, or it may declare that if such arrangements occur they are unenforceable. The issue of whether a statutory restriction will be construed as rendering the contract unenforceable is ultimately a matter of determining the intention of the legislature and ascertaining whether a declaration of statutory prohibition would further the objects of the statute.³⁷⁶

6.5 Discretion to pay Compensation where there is an Illegal Contract of Employment. .

Western Australia legislated to allow compensation, in certain circumstances, to persons employed under apparently illegal contracts of employment.³⁷⁷ Where this legislative amendment has taken place, compensation courts or tribunals are usually given discretion to treat the contract as if it were legal.³⁷⁸ Therefore, in Western Australia³⁷⁹, even if the contract was illegal the tribunal could still award compensation if it considered that there were grounds to exercise this discretion.

³⁷⁵ See for example *Fender v St John-Mildmay* (1938) AC 1, but note that Lord Aitkin in that case cautioned (at 12) against the application of the principle too freely, urging that the doctrine should be invoked in clear cases in which the harm to the public is incontestable.

³⁷⁶ *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 71 ALJR 653 and *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors* (1978) 139 CLR 410.

³⁷⁷ This is the suggested origin as noted by the learned author of *Mills Workers Compensation New South Wales* Butterworths 1996 pp1961-1963

³⁷⁸ Section 84H of the *Workers Compensation and Rehabilitation Act 1981* (WA), formerly section 128 of the Act. It would appear that these provisions were first introduced in Western Australia in 1981; the writer has been unable to find similar provisions in earlier Western Australian legislation. The inclusion of the provisions in 1981 does not appear to have been the subject of any specific debate at that time.

³⁷⁹ New South Wales has a similar provision but other States do not.

In *Erisir v Kellogg (Australia) Pty Ltd*³⁸⁰ Burke J outlined the genesis of the discretion provisions. He noted a contract was held to be *void ab initio* because it was illegal at the outset, as the terms and conditions of the employment were forbidden by statute. He noted that even where the English courts were given discretion to treat an illegal contract as valid, the discretion might not have been exercised in the worker's favour if the worker had full knowledge that the contract was illegal and had actively sought the arrangement.³⁸¹ The English workers' compensation cases suggest that the discretion was not exercised if there was an element of "moral turpitude" on the part of the worker.³⁸² Burke J noted that where in the Australian case of *Cluff v Finemores Transport Pty Ltd*³⁸³, a policeman had obtained additional employment contrary to the *Police Regulations Act 1899* (NSW), Jacobs JA observed (at 357) that the fact that the *Act* proscribed the applicant from doing a particular activity, such as entering into another contract of employment, it did not necessarily make that contract illegal. It was a proscription qua the worker's employment as a policeman and did not affect the other contract of

380 [1987] NSWCC 4

381 *Hardcastle v Smithson* (1933) 26 BWCC 15.

382 There is now a significant body of English authority on this area, which may have influence on current decisions in Australia. In particular, the leading authority in the UK, *Hall v Woolston Hall Leisure Limited* [2000] EWCA CIV 170, a case involving an allegation of sexual discrimination. In that case the House of Lords found that the employee had taken no active part in the fraud on the Inland Revenue and that the employee was entitled to proceed with a complaint of discrimination on the basis that the contract was intact. The fraud on the Inland Revenue had taken place when the employer had varied the employee's wages with a pay rise. The House of Lords also noted that in a case of discrimination, the core of the complaint was discrimination; any illegality consisted only of the manner of employer's payment of wages. The awareness by the employee of this illegality was not sufficient to deny jurisdiction of such a complaint. Note also *Hewcastle Catering Ltd v Ahmed* [1992] ICR 626, which was cited with approval in *Hall*. *Hewcastle* involved an employer who failed to pay VAT, a fact which was known to the employees. It was held that the contract of employment was not illegal as the obligation to pay VAT fell on the employer and the employee's participation in the fraud was not an affront to public conscience. A similar approach has been taken in Australia in *Holdcroft & Anor v Market Garden Produce Pty Ltd & Ors* [2000] QCA 396 which is discussed below.

383 [1972] 1 NSWLR 354.

employment, which was otherwise lawful.³⁸⁴ In *Erisir*, the applicant was employed by the Department of Immigration as a welfare worker but also worked on a casual basis for Kelloggs. Burke J observed, "The Commonwealth Public Service Act contains a proscription against public servants moonlighting, engaging in other employment, either concurrently or intermittently, or at any time."³⁸⁵ The contract of employment with Kelloggs was not, according to Burke J, illegal and consequently there was no need to exercise the statutory discretion.

6.6 Compensation Cases involving Questions of Illegality.

There have been several recent examples where persons who have apparently been working in circumstances prohibited by law have claimed compensation. There is now a group of cases which relates to the application of the *Migration Act 1958* (Cth) to compensation laws. The first case covered an application for compensation by a worker under the *Workers' Rehabilitation and Compensation Act 1986*(SA). In *WorkCover Corporation v Liang Da Ping*³⁸⁶, an illegal immigrant who had sustained a disability, was found not to be entitled to compensation on the grounds that his contract of employment was illegal because section 83(2) of the *Migration Act 1958* (Cth) provided:

Where a person who is an illegal entrant performs any work in Australia without permission, in writing, of the Secretary of the Department of Immigration the person commits an offence...

384 It would appear that the appropriate remedy was not to imperil the contract under which the injury was suffered but rather to take disciplinary proceeding in relation to the primary contract of employment under the Police Regulations.

385 [1987] NSWCC 4 (11 June 1987); (1987) NSWCCR 92

386 Unreported SC (SA) 30 March 1994.

The Supreme Court of South Australia found, on the basis of section 83 (2) that any contract entered into by an illegal entrant was illegal and therefore void. If the agreement was void then the applicant could not be a *worker*, as no contract existed.³⁸⁷ The court noted that in order to claim compensation the applicant had to establish an enforceable contract of employment to satisfy the requirement that the applicant be a *worker*. The court's reasoning in *Liang Da Ping* appears to be inconsistent with established authority which has held that the effect of illegality is usually that the contract is unenforceable rather than *void ab initio*.³⁸⁸ However, in a later decision on almost identical facts, the New South Wales Court of Appeal held in *Non-Ferral (NSW) Pty Ltd v Taufia*³⁸⁹ that an applicant was entitled to workers' compensation even though he was an illegal entrant at the time that he became disabled. In *Taufia*, despite the decision in *Liang Da Ping*, it was held that the contract of employment was not illegal; the court being satisfied that the purpose of section 83(2) of the *Migration Act 1958* (Cth) was a to impose a penalty for non-compliance, but not to make any contract of employment void. In addition, it was observed that a failure to allow compensation would be disproportionate to the seriousness of the unlawful conduct. Rendering the contract of employment illegal would not further the objects of the *Migration Act 1958*(Cth). It can be observed that *Taufia* sits more comfortably with the decision in *Fitzgerald v F.J. Leonhardt*

387 Catanzariti predicted that notwithstanding the result of *WorkCover Corporation v Liang Da Ping* it was likely that unlawful non-citizens would continue to pursue compensation claims, given that they often have a poor grasp of English, limited resources and may need to hastily regularise their visa status. The prediction is borne out in part by the cases discussed herein. The results of the more recent cases have been more favourable to the applicants, suggesting that there are even more incentives for non-citizens to make claims. J Catanzariti, "Workers compensation for an illegal worker?" (1998) 36 (1) *February Law Society Journal* 30.

388 See L Willmott S Christensen and D Butler, *Contract Law*, Oxford University Press South Melbourne 2001pp563-571

389 (1998) 43 NSWLR 312

*Pty Ltd*³⁹⁰ and the early decision of the High Court of *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors.*³⁹¹ *Yango*, which was referred to in *Fitzgerald*, is an important decision because the judgement of Gibbs ACJ and Mason J indicated that statutes which impliedly or expressly prohibited contracts only led to a *prima facie* conclusion that the contract was illegal, void or unenforceable. It was open for the court to examine the statute more closely to ascertain a contrary legislative intention.³⁹²

In another New South Wales case of *Viliami v National Springs, A Division of Hendersons Federal Springworks Pty Ltd*³⁹³, Burke J found that there was nothing illegal about the objects of a contract for unskilled labouring work entered into by a worker who was in breach of section 83 of the *Migration Act 1958* (Cth). The New South Wales decisions of *Taufia* and *Viliami* are consistent with the decision of the High Court in *Fitzgerald*. *Da Ping*, decided in South Australia before *Fitzgerald*, but after *Yango*, would now appear to have been wrongly decided.

The decisions in the above compensation cases are not explicable by reason of any difference between the compensation legislation in South Australia and New South Wales. The New South Wales decision did not rely on the exercise of the discretion (similar to the Western Australian provision) available under the *Workers' Compensation Act 1987* (NSW). The issue was identical, namely whether the *Migration Act 1958* (Cth) rendered the contract of employment in each case illegal.

390 (1997) 71 ALJR 653

391 (1978) 139 CLR 410

392 Gibbs ACJ at 413 and Mason J at 423

393 (1993) NSWCC 453.

The recent decisions of the High Court suggest that mere breach of a statute does not lead to an illegal contract. Therefore, even if the person engaged in work is an illegal entrant, or a person who has overstayed a visa or some other breach of the *Migration Act 1958*(Cth), if the work being performed is otherwise legal, compensation for a work induced disability will be payable. Where the nature of the work performed is illegal a closer examination of the circumstances may be warranted.³⁹⁴ As Devlin J noted in *St John Shipping Corp. v Joseph Rank Ltd*, ‘the fundamental question is whether the statute means to prohibit the contract’ as opposed to the mere conduct that gives rise to the statutory contravention in the first place.³⁹⁵ The disparity in authority now appears to be rectified with the recent decision by Olsson AJ in *Riley v WorkCover/Alliance Australia (Robinvale Transport Group (SA) Pty Ltd)*.³⁹⁶ In *Riley*, Olsson AJ dealt with the argument by an insurer that the applicant, a long distance heavy vehicle driver, was not entitled to compensation because at the time of suffering a disability he had been disqualified from holding a drivers’ licence due to non-payment of certain fines. It was argued that the disqualification made the contract of employment invalid. The disqualification occurred under the *Criminal Law (Sentencing) Act 1988* (SA).³⁹⁷Olsson AJ referred to the above authorities in detail. The decision of *Da Ping* was of considerable significance, having been decided by a superior court in the South Australian jurisdiction. Olsson AJ found that;

394 The difference may not often be easy to distinguish. Phang has noted the work of Professor Furmston on this latter point. Furmston observes that a contract may involve the doing of an act legal in itself (eg work as a storeperson), but with the intention that the work be for an illegal purpose. Such a contract is not illegal. A Phang ‘Of Illegality and Presumption: Australian departures and possible approaches’ (1996) 2(1) *Journal of Contract Law* 53.

395 [1957] 1 QB 267 at 286.

396 [2002] SAWCT 79

397 Sections 70E and 70F.

78 Against that background it is important to return to the policy and obvious purpose of s 70E and s 70F of the Criminal Law (Sentencing) Act. Unlike s 91 and s 93 of the Motor Vehicles Act 1959 which have, as their clear objects, the protection of the public by keeping off the roads persons who have been disqualified because of the manner of driving, the provisions of the Criminal Law (Sentencing) Act, have no such purpose. As has been seen, they are essentially pitched at revenue recovery. The sanction of suspension of licence is really in terrorem and designed to coerce delinquent payers into making proper arrangements for satisfaction of their fines liabilities. It is for that reason that the statute contemplates the cancellation of suspension, once proper arrangements for payment have been made. This may, for example, be by means of payment by instalment.

79 It follows that, having regard to the above authorities and my findings of fact, the contract of employment, having been entered into by both parties in good faith and ignorance of the licence suspensions, was inherently lawful. There was never any intention of either party to breach the law.

It is pertinent that at the time of his engagement the applicant had not been disqualified from driving. As to whether the contract of employment was tainted by illegality, Olsson AJ noted that there was nothing illegal about the contract of driving and said;

83 The Criminal Law (Sentencing) Act did not expressly or impliedly have that effect, for the reasons already canvassed. Not only did it not purport to prohibit such a contract, but its purpose had nothing directly to do with the creation of employment relationships -- the more so as it was never an absolute suspension for the period in question. Further, it certainly does not disclose an intention that any workers compensation rights should be unenforceable. Such a sanction would be wholly disproportionate to the seriousness of the applicant's conduct.

84 Furthermore, the imposition of such a sanction and the avoidance of a contract of employment is simply not necessary to protect the objects and purposes of the Criminal Law (Sentencing) Act. That Act erects its own system of quite severe penalties, which could be imposed on the applicant upon his breach of a

suspension. It is not reliant, for ensuring its integrity, upon any need to void a relevant contract of employment.

85 In other words, it contains its own enforcement code.

86 Additionally, there is no public policy consideration which, consistently with Fitzgerald, requires this Tribunal to deny a right compensation to the applicant (or to decline to permit him to rely on the existence of a contract of employment, so as to confer on him the status of a worker), by reason of the suspension of his licence during the period of his employment.

87 As to this, a key consideration is his unwitting breach of the law. He was unaware of the suspension and did not deliberately discharge his duties, well knowing that he had no right to drive. Had he been aware of the problem, he had the option of making suitable arrangements. Had he been aware of the suspension and deliberately flouted that statute, then other policy considerations might well have arisen.

88 Accordingly, I hold that the rejection of the applicant's claims, based on the alleged illegality of the contract of employment, or the mode of its performance, was inappropriate.

The decision in *Riley* is in accord with the line of reasoning in the High Court and in New South Wales. It would appear that any similar arguments in other states, and in particular Western Australia, would be decided in a similar fashion. As if to put the matter beyond doubt, Mullins J of the Queensland Supreme Court held in *Australia Meat Holdings Pty Ltd v Kazi*³⁹⁸, that the respondent, who was an unlawful non-citizen within the meaning of section 14 of the *Migration Act 1958* (Cth), was a worker within the meaning of the *WorkCover Queensland Act 1996* (Qld) when he injured his knee in the course of his employment. At the time of suffering injury, the applicant held a bridging visa which did not permit employment in Australia. Thus in *Kazi*, the issues were much the same as they appeared in *Da Ping*, *Taufia* and *Viliami*. Unlike Western Australia, the *WorkCover Queensland Act 1996* (Qld)

³⁹⁸ [2003] QSC 225

contains no discretion to disregard illegal contracts of employment. Mullins J noted that nothing in the *Migration Act 1958* (Cth) expressly made the contract of employment of a non-citizen illegal and, therefore, it was a matter of statutory interpretation to determine whether any such term could be implied in the Act. On this point, Mullins J followed the process outlined in the majority decisions in *Taufia* and declined to follow *Da Ping*. Consistent with *Taufia*, Mullins J found there was no public policy reason for declaring the contract of employment to be void. On the contrary, Mullins J noted the respondent undertook work in the course of a normal employee-employer relationship.

6.7 Sex Workers and Compensation Claims

Although none of the cases discussed in the preceding section originated in Western Australia, they clearly have application to the *Workers' Compensation and Rehabilitation Act 1981* (WA). Of some importance is the question of whether workers in the sex industry might be able to claim compensation for work disabilities.³⁹⁹ Because certain aspects of prostitution involve illegality, the discussion above is relevant. The question of decriminalisation of prostitution in Western Australia remains a vexed issue. The application of the principles discussed above may be of some significance in deciding the question of compensation in the sex industry. One argument against sex industry workers being entitled to workers' compensation is that any contract of engagement would be contrary to public policy, a matter considered in most of the cases in the preceding

section. In *Barac v Farnell*⁴⁰⁰ the Federal Court considered the question of illegality on the grounds that the contract offended public policy. In *Barac*, the injured person was employed in a brothel to perform work, apparently as a receptionist. However, it was noted by the court that the work was not limited to that of a receptionist but also included opening the premises for business each morning, keeping work sheets in respect of the persons employed in the brothel and making appointments for clients. In addition, the worker kept financial records and cleaned the brothel's bedrooms. A claim for compensation following a 1992 accident was declined, on the grounds that the applicant was employed under an illegal contract. The Federal Court found that neither statute law nor public policy made the contract of employment void for illegality. The court held that there was an enforceable contract of service. At the core of this decision is the fact that the work that was being performed was part of a normal employee-employer relationship. *Barac's* case did not involve a worker who supplied sexual services, but it is submitted that there would be little that would distinguish such a case from the above circumstances. In Western Australia and some other states, prostitution is illegal, but policies exist which attempt to contain brothels to certain areas. In other States, such as Victoria and New South Wales, prostitution is licensed and legal in particular areas. As a consequence, in Western Australia the question of legality would be an issue, while in Victoria and NSW this may not arise. In *Phillipa v Carmel*⁴⁰¹, the applicant was a sex worker engaged by the respondent, providing sexual services for men. The respondent was the madam of the brothel *Questa Case*

399 See R Guthrie 'Sex in the City: Decriminalisation of Prostitution in Western Australia?' (2001) 7(2) *Journal of Contemporary Issues in Business & Government* 61 for a more detailed account of these issues.

400 (1994) 53 FCR 193.

in Kalgoorlie, Western Australia. The respondent terminated the applicant's contract in November 1995 and the applicant claimed compensation for unfair dismissal under the *Industrial Relations Act 1988* (Cth). The judicial registrar determined that the respondent had sufficient control over the applicant to categorise the relationship as one of service. As to the question of the legality of the contract, it was held that even though the work performed under the contract was contrary to the *Police Act 1892*(WA), because no prosecution had taken place due to a "containment policy", the contract should not be declared void by reason of the strict statutory breach.⁴⁰² In relation to the issue of public policy, the registrar also declined to hold the contract illegal and void, observing that this would allow the madam to profit by this defence as foreshadowed by the Federal Court in *Barac*. The registrar also observed that both the applicant and respondent were paying taxation on their earnings - a factor inconsistent with holding the contract to be inoperative. The additional issue for consideration was whether the contract was one of service or for services. It was held that the madam had sufficient control over the applicant to warrant a finding of a contract of service. Compensation for unfair dismissal was awarded. There was no appeal from this decision and there is no higher authority on this point.

Western Australian compensation legislation provides that the dispute resolution body has discretion to order payments of compensation even though the contract is held to be illegal. Burke J observed in *Viliami*, "*surprising, but I do not think there is one case where the discretion has ever failed to be exercised in favour of a*

401 (1996) IRCA (WA) Print 960433 433/96 10 September 1996.

402 Under the containment policy the Commissioner of Police permitted continued operation of brothels in Western Australia notwithstanding that prostitution was contrary to the *Police Act 1892* (WA). The

worker". In *Taufia*, Sheppard AJA (at 336) listed various matters that might be taken into account in exercising the discretion. According to Sheppard AJA, consideration should be given to the following factors; first, the legislators, in allowing discretion, permitted the question of illegality to be overlooked; second, whether the worker disadvantaged any person by undertaking the employment; third, whether the work itself was illegal and finally, whether the employer was aware of the worker's breach of statute or law. In the case of sex industry workers it may be that the work itself is illegal in that it breaches a statute, but it is submitted that this would be neutralised by the fact that employer would also be aware of any breach.

6.8 Rehabilitation and return to work

Another matter for consideration may be the rehabilitation and return-to-work of disabled sex workers and illegal immigrants. All states have provisions which require rehabilitation of disabled workers. As noted in chapter 5, Western Australia has criminal sanctions under section 84AA *Workers' Compensation and Rehabilitation Act 1981* (WA) which apply to employers who fail to provide suitable duties to workers who are able to return to work. In New South Wales, the Industrial Relations Commission has power to reinstate workers whose employer has dismissed them contrary to return-to-work provisions.⁴⁰³ In South Australia, the employer is required to give the WorkCover authority notice of its intention to terminate the employment of a worker who is fit to return to work within 12 months

police have powers to close brothels under a range of criminal laws, but did not do so and allowed 7 brothels in Perth and 3 in Kalgoorlie to operate until July 2000.

⁴⁰³ *Industrial Relations Act 1996*(NSW) Part 7

of injury.⁴⁰⁴ Obviously, in the case of illegal immigrants the return-to-work provisions would have to be read subject to the *Migration Act 1958*(Cth), so as to render the former worthless because most workers in this position would not have an appropriate work visa and the employer could not be compelled to provide work contrary to a Commonwealth law.⁴⁰⁵

In the case of sex workers, no such prohibition would apply and presumably rehabilitation of these workers would include rehabilitation into other forms of employment. Return to work provisions may be rendered inapplicable if work in the industry is contrary to law.

6.9 Trends in cases involving Illegality

The determination of illegality of a contract of employment in the workers' compensation context has been significantly aided by a number of High Court decisions, notably *Fitzgerald* and *Yango*. It appears also from recent decisions in compensation cases that those courts and tribunals are reluctant to find contracts of employment illegal, either by reason of the breach of a statute or as being contrary to public policy and are more inclined to hold the employer liable for compensation payments. Most of the cases noted above concern employment related contracts.

404 *Section 58B Workers Rehabilitation and Compensation Act 1986*(SA)

405 Despite the cases becoming clear that a breach of the *Migration Act 1958* (Cth) will not, as a rule disentitle an applicant to workers compensation, that fact that a worker has such claim pending will not be grounds upon which a bridging visa will granted. In other words, the *Migration Act 1958* (Cth), may take effect to require the worker to leave Australia notwithstanding that a claim is on foot. See *Re: Rogelio Benito* [1998] IRTA 12988. It follows that the rehabilitation provisions would be of little benefit to illegal non-citizen applicants.

However, in *Holdcroft & Anor v Market Garden Produce Ltd & Ors*⁴⁰⁶, the Queensland Supreme Court considered the issues arising out of an attempt to enforce a sham contract of employment. In *Holdcroft*, the court found that although the parties were seeking to enforce an employment contract, the true nature of the contract was for the sale of shares where the purpose of the transaction was to minimise state stamp duty taxation payments. At the hearing, the question of illegality was not raised by either party. However, on appeal the Supreme Court decided to intervene so as not to enforce an illegal agreement. Thomas JA, with whom the other members of court agreed, noted that

*In determining whether policy requires the Court to refuse to enforce an agreement, the court will take into account many factors. These include, where appropriate, the degree to which each party is involved in intended illegality, the expected level of benefit of each, the seriousness of the illegality, the consequences to other citizens or institutions, public morality, whether the court can bring about a just result without undermining respect for the law, and many others.*⁴⁰⁷

Holdcroft neatly summarises the balancing act which the courts must play in determining if they will enforce an apparently illegal contract. It is also an example of where the court chose to determine the dispute on matters which were not raised by the parties. Such themes sit comfortably with a developing judicial approach towards equality and fair dealing in contractual matters, exemplified by High Court decisions in relation to unconscionability *and* good faith although the court has not gone so far as to imply an obligation of good faith and fair dealing into every

406 [2000] QCA 396 [29th Sept 2000]

407 Ibid at para 31

contract.⁴⁰⁸ There are good policy reasons for this. In principle, it would be wrong for an employer to escape liability for knowingly employing a person under an illegal contract. By holding employers liable under such arrangements there is greater certainty for workers and the issues of occupational health and safety and insurance premium collection can be dealt with consistently.

The discussion above suggests that as far as workers compensation cases are concerned, there is an increased level of judicial tolerance for contracts performed in breach of statutes and additionally, the field of work which is contrary to public policy seems to be narrowing. This has implications for the sex industry and government. Given that likelihood that claims by sex workers are sustainable, governments need to anticipate the effects of such claims by allocating appropriate resources to inspection of work places and collection of premiums. Insurers may need to adjust to different injury management and rehabilitation practices. It is noteworthy that the cases in which these issues have been raised, commenced in the 1990's, not as a consequence of any legislative amendment, but more likely as a consequence of an acute awareness of some emerging social issues. Western Australia is probably the beneficiary of a now consistent line of legal authority.

408 For example as to unconscionable dealings see *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 and *Louth v Diprose* (1992) 175 CLR 621, the latter being a case in relation to special disability. As to the issue of good faith and fair dealing see *Royal Botanic Gardens and Domain Trust v South Sydney Council* [2002] HCA 5 (14 February 2002) in particular see paragraphs 40 of the majority judgement and paragraphs 87-88 (Kirby J) and 155 (Callinan J). In *Royal Botanic* the High Court did not consider it necessary to imply a term requiring good faith and fair dealing in relation to a lease. There is a line of authority in the employment context which requires an employer not to damage the relationship of trust and confidence with the employee. See *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 and *Perkins v Grace Worldwide (Aust) Pty Ltd* (1997) IR 186.

6.10 Contracting Out of Entitlements

An area associated with the question of illegality of contract is the issue of contracting out of statutory benefits and protections. Both the *Workers' Compensation and Rehabilitation Act 1981* (WA) and the *Industrial Relations Act 1979* (WA) prevent parties from contracting out the provisions of the legislation. As established in the *Troubleshooters* cases (discussed in chapter 2), a term in a contract which blocked a party from being covered for compensation purposes was of no effect where the relationship created a statutory obligation to insure. Similarly, attempts to contract out of the *Industrial Relations Act 1979* (WA) and similar industrial laws are of no effect (unless somehow sanctioned by legislative provisions as is the case under the *Workplace Agreements Act 1993* (WA)).⁴⁰⁹

For example, in the South Australian case of *Dean v Tempo Services Ltd*,⁴¹⁰ an agreement by an employee to accept temporary work after she had been a permanent part-time worker for several years, was held to be contrary to the award governing her work. As the award was made pursuant to the *Industrial Employee Relations Act 1994* (SA), it amounted to a form of contracting out and therefore the agreement was unenforceable. The effect was that the employer was obliged to pay the employee according to the award.

⁴⁰⁹ See section 114 of the *Industrial Relations Act 1979* (WA). Similar provisions appear in most state industrial laws. A federal example is *AFMEU & Ors v Alcoa of Australia Ltd & Ors* 1995 AIRL 3-008, where the Australian Industrial Relations Commission refused to approve an agreement that sought to avoid paid rates obligations under an existing award. It is noteworthy that such agreements would now be possible under the *Workplace Relations Act 1996* (Cth).

⁴¹⁰ [1997] SAIRC.

The prohibition on “contracting out” does not make the work illegal, but does prevent employers from denying benefits due to the employee under the relevant legislation, award or agreement. In *Wright v Hodgeman Enterprises Pty Ltd*,⁴¹¹ the parties to the contract of employment agreed that the employee would be paid below the award rate, provided that the employer did not deduct taxation from the wages. While the conduct was in breach of taxation laws and contrary to the award, the contract was not considered illegal as the objects (namely the performance of certain work) of the contract were legal.⁴¹² The Industrial Magistrate noted:

*From the point of view of applying equity and good conscience this situation creates somewhat of a dilemma. Why should the employer be entitled to rely on the applicant’s agreement to accept tax-free money to overcome its responsibilities pursuant to the award? Furthermore why should the applicant be entitled to come to this court seeking the benefit of an award when he had agreed to enter into an illegal contract in accepting bonuses on which he paid no tax?*⁴¹³

The employer was ordered to pay wages at the award rate, conditional on full disclosure to the Taxation Department by the employee.⁴¹⁴ In *KP Welding Construction v Herbert*⁴¹⁵, an agreement of a similar nature would have proven fatal in a workers’ compensation case where it was held that the strict Northern Territory

411 [1992] SAIRC 4 31 January 1992.

412 Another approach is for the courts to enforce parts of a contract that is not illegal where these parts are severable from the rest of the contract. . Where illegal consideration does not extend to the whole contract that part may be severed. See *McFarlane v Daniell* (1938) 38 SR (NSW) 337. Illegal consideration usually arises by reason of breaches of Truck legislation. In WA this is now part of the *Minimum Conditions of Employment Act 1993* (WA).

413 At page 3

414 This decision demonstrates a Solomon-like wisdom. In fact a similar solution was recommended in the English context in H Carty, ‘Illegal Contracts of Employment: Void or Contractually Unenforceable?’ (1981) 131(6015) *New Law Journal* 871 at 873 in response to a series of disappointing cases that had declared that contracts to defraud Inland Revenue as void, where in fact only a portion of the wages claimed would have been subject to non-payment of taxation.

415 (1995) 102 NTR 20 at page 15

provisions applied to prevent an injured person from gaining the protection of the *Work Health Act* (NT) unless he had agreed to PAYE tax deductions. An attempt was made to argue that the applicant was entitled to be considered a worker on the grounds that PAYE deductions should have been made but were not. It was held that the applicant was not entitled to the protection of the Act even though he may have been an employee at common law. Kearney J acknowledged that an agreement not to pay PAYE tax would not have made the contract illegal, but would simply have attracted a penalty under the relevant taxation laws.

As in *Phillipa v Carmel* and *Barac*, above, the employer should not be seen to benefit from or hide behind a defence of illegality. The *Wright* case, above, contained elements of contracting out and illegality, but the commission still dealt with the matter.⁴¹⁶ *Wright's* case highlights the difference between the concept of a void contract and one that is unenforceable. If a contract is unenforceable, it is one which a civil court will not enforce, but may nevertheless be valid and in existence and capable of forming the basis of a statutory claim, such as a claim for unfair dismissal or denial of contractual benefits.⁴¹⁷

⁴¹⁶ A similar approach has been suggested in England, where parties have contracted to avoid payment of taxation. See the discussion in A G Henderson, 'Employment Law and Illegal Contracts', (1977) 127(5792) *New Law Journal* 232-233 which was critical of a decision by an Industrial Tribunal which declared an employment contract void due to the employer's failure to pay required insurance under the *National Insurance Act 1965* (UK). These decisions have probably be overtaken, if not overturned by those referred to in footnote 355 above.

⁴¹⁷ As provided for under section 29(2) (b) of the *Industrial Relations Act 1979* (WA). But note that the English approach may be different. For example in *Horner v Rymer* (unreported 1979) the English Employment Appeal Tribunal held that an employee could not take action for unfair dismissal where she had not declared a bonus to the taxation department. Mogridge has suggested that fraud on the revenue is a common means of avoiding employment contracts. See C Mogridge, 'Illegal Employment Contracts: Loss of Statutory Protection', (1981) 10 *International Law Journal* 23. A different approach was taken more recently in *Newcastle Catering v Ahmed* [1991] IRLR 473 where the Court of Appeal upheld a claim for statutory benefits notwithstanding that the employees had colluded with the employer in a scheme of tax evasion. In taxation law it has long been the case that income gained through illegal purposes is subject to taxation, see *Charles Moore & Co (WA) Pty Ltd v FCT* (1956) 95

If a contract is void, it is one which from the start of the apparent agreement has had no legal effect, and as such is not a contract at all. If the contract is void, it cannot form the basis of a statutory claim.⁴¹⁸ Arguably, it is because of the limitations of the common law that statutes such as the *Industrial Relations Act 1979* (WA) provide remedies in addition to the common law.⁴¹⁹

The issue of contracting out may take on a very technical perspective. For example, in the Western Australian case of *Commissioner, Public Service Commission & Ors v Civil Service Association of WA*,⁴²⁰ the Industrial Appeals Court heard submissions from the employer that a clause in an award which allowed for salary packaging, amounted to contracting out because the award could be varied without recourse to the Industrial Commission. The Industrial Appeals Court rejected this submission on the basis that the salary packaging was merely another means of implementing an award, because the packaging arrangement allowed another means of payment, so as to comply with the award.⁴²¹

CLR 344 More recently in *Taxpayer v FCT* [2000] AATA 625 the AAT held that a taxpayer was entitled to claim deductions on illegal earnings.

418 H Carty, 'Illegal Contracts of Employment: Void or Contractually Unenforceable?' (1981) 131(6015) *New Law Journal* 871 at 872.

419 For example the common law only provides a remedy for wrongful dismissal. The concept of unfair dismissal is a creature of statute.

420 [1998] WASCA 239 (9 September 1998) per Anderson J.

421 See by contrast *Confederation of WA Industry (Inc) v West Australian Timber Industry Union, Industrial Union of Workers, South West Land Division* (1991) 71 WAIG 15, where it was held that an attempt to vary an award without reference to the Commission was contrary to section 114 of the *Industrial Relations Act 1979* (WA) A Tasmanian example of a similar attempt appears in *Application by Tasmanian Confederation of Industry to vary the Marine Boards Award* (1991) AILR 214. Notably both cases were early attempts at enterprise bargaining.

In some instances, agreements reached at the termination of a worker's employment may implicate the contracting out provisions in both the *Workers' Compensation and Rehabilitation Act 1981* (WA) and the *Industrial Relations Act 1979* (WA). The usual provisions covering contracting out have the effect that the relevant Act will apply, despite any contract to the contrary. Therefore, it is not simply the benefits that are available under an Act, but also the right to apply to that jurisdiction which is protected.

In *General Motors-Holden Limited v D'Andrea*,⁴²² the full court of the Supreme Court of South Australia noted that a worker would still be entitled to compensation, despite an early retirement agreement accepted by the worker. An agreement, which attempted to prevent any future claim for compensation following termination of employment, would be contrary to the contracting out provisions.⁴²³

In the complex case of *Matchett v Wincol Homes Pty Ltd & Ors*,⁴²⁴ involving a number of putative employers, some of whom were uninsured and one of whom had applied for relief under the *Bankruptcy Act 1966* (Cth), the Compensation Court of New South Wales observed that any attempt by the parties to agree that the worker would not pursue certain rights under the relevant compensation legislation, so as to facilitate a settlement of the compensation claim and various matters in the Federal Court, would be void as contravening the contracting out provisions. In such a case,

422 (1985) 122 LSJS 301 See C J King at 307.

423 In that case section 86 of the *Workers Compensation Act 1971* (SA).

424 [1995] 11 NSWCC 294.

the worker could not be prevented from seeking any lawful entitlements to compensation.⁴²⁵

Any attempt to agree (either orally or in writing) that a worker receives less than a lawful entitlement to compensation would also be contrary to such provisions.⁴²⁶ It follows that the reverse would also apply. Namely, that an agreement to pay compensation, contingent on the worker/employee resigning, would breach contracting out provisions where the agreement purported to prevent any claim under industrial laws.

Interesting issues arise in such cases. For example, the employee may claim there was no resignation but rather a constructive dismissal, therefore enabling access to the *Industrial Relations Act 1979* (WA). On the other hand, an employer might argue that settlement of the compensation claim was merely a manifestation of the fact that the employee's contract of employment was frustrated because of the work related disability. Finally, it follows that an agreement to employ an illegal immigrant (as discussed above) contingent upon that worker making no claims for compensation, would also be void as offending contracting out provisions.

In some cases, the employer may rely on a deed of release to prevent employees from taking action to pursue certain claims. Such deeds will generally be valid and enforceable where they do not attempt to usurp any rights or benefits due under a

⁴²⁵ Section 272 of the *Workers Compensation Act 1987* (NSW).

⁴²⁶ *Lourdes House Hospital v Wheeler* NSWSC (94040145) 3 October 1996 per Clarke J A and *Duncan v Royal Perth Hospital* (unreported CM (WA) 64/00 23 June 2000); *BHP Steel (AIS) Pty Ltd v Birtasic* [1995] NSWCC 34.

statute or at common law. Considerable care is needed to ensure that a deed of release is not impugned because the employer has behaved in an unconscionable manner. This may occur where the employer rushed the employee into an agreement, where the employee has not been able to get advice or where the employee is at a disadvantage because of a disability.

Such was the case in *Le Good v Stork Electrical Pty Ltd*⁴²⁷, where the worker signed a redundancy agreement renouncing her rights to certain entitlements. The Federal Industrial Relations Commission held that the existence of the agreement was not conclusive in determining the employee's rights not to be dismissed in circumstances which were harsh, unjust or unreasonable.⁴²⁸ The deed was only one of the factors taken into account. In this case, the commission noted that the employee was under pressure to sign an agreement because she was about to undergo surgery for a debilitating medical condition, she had not been given notice of her redundancy, nor consulted over retraining, and was not legally represented at the time the deed was signed. It was not necessary to show that the employee had been subject to economic duress, as the *Workplace Relations Act 1996* (Cth) provides protection against such inequities in bargaining power. An important feature of this and other cases is that it was held that even if there is a valid reason for making an employee redundant, the termination of employment will be harsh if there is no consultation with the employee, and where there has been no attempt to offer alternative employment.⁴²⁹

427 (1999) 45 IR 4-047.

428 Pursuant to section 170 CH of the *Workplace Relations Act 1996* (Cth).

429 *Quality Bakers of Australia Ltd v Goulding & Anor* (1995) AIRL 3-165.

It follows, as in *Le Good*, that even if the employee is suffering from some illness or disability, the employer has a statutory obligation under the *Workplace Relations Act 1996* (Cth) and probably the *Industrial Relations Act 1979* (WA) to consult with the employee and explore alternative employment options. Agreements to the contrary will be of no effect. Further, failure to consult and examine job options in a manner that affords a disabled worker equal treatment, could lead to allegations of discrimination on the grounds of disability, as discussed above. It can be observed that objections to contracting out are less likely to be successful where legislation allows (and indeed encourages) agreements covering the terms and conditions of employment to be registered outside of award structures. However, such objections are likely to be made by individuals to protect rights accrued under statute, as in *Le Good*.

6.11 Overview - Forum Shopping

This chapter has canvassed a range of areas where it can be shown that there is some merger of the operations of the *Workers' Compensation and Rehabilitation Act 1981* (WA) and the *Industrial Relations Act 1979* (WA) and a number of other pieces of legislation, in particular the *Equal Opportunity Act 1984* (WA). In some cases, as in unfair dismissal applications, where the worker is in receipt of compensation, specific reference is made to the provisions of section 84AA of the *Workers' Compensation and Rehabilitation Act 1981* (WA). In other circumstances, because of the similar wording within different legislation, a finding that the worker has been guilty of some form of misconduct is transferable between jurisdictions so as to

disentitle the worker to compensation and/or be grounds for dismissal. In yet other circumstances, amendments to the *Workers' Compensation and Rehabilitation Act 1981* (WA) have led to costs and responsibilities from the compensation arena being transferred to the industrial arena with the inclusion of provisions for accident make-up pay and travel insurance in industrial awards and agreements.

An examination of specific provisions of the *Workers' Compensation and Rehabilitation Act 1981* (WA) may be required by the WA Industrial Relations Commission where the question arises as to dual entitlement to forms of leave, allowances and/or compensation. This examination has highlighted the potential for employees/workers/applicants to be involved in litigation in a number of forums. For example, a worker whose employment is terminated on the grounds that a stress-related condition has adversely affected her work performance could launch claims for unfair dismissal, workers' compensation and discrimination on the grounds of disability. There may, of course, be no such claims but the employer must face the prospect of litigation on many fronts.

In *Wheatley v Smith*⁴³⁰ the respondent employment was placed in exactly this predicament. The Equal Opportunity Board of Victoria noted that while evidence put forward at the hearing before the Industrial Commission for an unfair dismissal action was related, the commission was dealing with a narrower issue. Even though the claim for unfair dismissal had been dismissed, this did not prevent the board from considering the prospect that the dismissal may have been discriminatory.

⁴³⁰ (1994) EOC 92-655.

A similar conclusion was reached in *Mercedes-Benz (Australia) Pty Ltd v The Commissioner for Equal Opportunity and Ors*.⁴³¹ In that case, the employee had issued proceedings in the Industrial Relations Commission of Victoria for unfair dismissal. That matter was part heard when the employee also applied to the Equal Opportunity Commission of Victoria over sexual harassment arising out of the same incident. The Supreme Court of Victoria refused to prevent both matters from proceeding, holding that the two proceedings were not identical, although there was some overlap. The court also noted that if an award was made in one jurisdiction, it was assumed this would be taken into account in the other.

Perhaps mindful of the potential for dual proceedings, the respondent's lawyers in a later case of *Glover v Eltham College*⁴³² negotiated a settlement of an unfair dismissal claim to include settlement of any claim for alleged discriminatory behaviour by the employer. The Equal Opportunity Board of Victoria held that a deed of settlement to that effect barred the applicant from proceeding with a claim for discriminatory treatment.

⁴³¹ (1992) EOC 92-465. In *Soares v Bayer Australia Ltd* (1996) HREOCA 15 (15 July 1996) a claim for discrimination on the grounds of disability and race was allowed to proceed in conjunction with a claim in the Victorian Compensation Court for workers compensation on the basis that the damages payable in the Human Rights and Equal Opportunity Commission were different in nature to those in the Compensation Court. In *Gunes v Hankar Nominees Pty Ltd* (1998) WAIRC 182 (17 September 1998) and *Watson v JK Colero Enterprises Pty Ltd* (1998) WAIRC 259 (1 December 1998) the WA Industrial Relations Commission took into account the fact that the applicant in unfair dismissal proceedings was in receipt of compensation when assessing compensation under section 29 of the *Industrial Relations Act 1979* (WA).

⁴³² (1995) EOC 92-746.

Finally, in a Western Australian example of *Bates v Mountway Nominees Pty Ltd*,⁴³³ the applicant/employee lodged a claim in the WA Industrial Relations Commission under section 29(1) (b) (ii), for payment of a denied contractual benefit, namely, a salary increase and bonus payment. At the same time, she had issued proceedings under the *Equal Opportunity Act 1984* (WA) section 10, alleging discrimination on the grounds of pregnancy. The respondent employer argued that the applicant could not proceed in the WA Industrial Relations Commission, because of section 23(3)(d) of the *Industrial Relations Act 1979* (WA), which provides:

(3) The Commission in the exercise of the jurisdiction this Part shall not

*(a) regulate the suspension from duty in, discipline from, termination of, or reinstatement in, employment of any employee or any one of a class of employees if there is provision, however expressed, by or under any Act for or in relation to a matter of that kind and there is provision, however expressed, by or under that other Act for an appeal in a matter of that kind.*⁴³⁴

Commissioner Kenner found that the application for contractual benefits under section 29(1) (b) (ii) did not involve the commission in the regulation of the suspension from duty in, discipline in, dismissal from, termination of, or reinstatement in, employment of any employee. The commissioner did, however, suggest that had the claim been in respect of an unfair dismissal under section 29(1) (b) (i), the commission might have been denied jurisdiction, presumably on the basis that the Equal Opportunity Tribunal of WA would have jurisdiction to consider a matter relating to a dismissal. The effect of section 23(3) (d) may be to prevent, at

⁴³³ [1998] WAIRC 133

⁴³⁴ Emphasis added.

least to some extent, forum shopping over cases involving dismissal on discriminatory grounds. It is interesting to observe that specific attempts have been made in distinct and separate jurisdictions to reduce the prospect of an applicant making claims arising from a single event. This can be distinguished from a claim that for a particular remedy that is only available in one jurisdiction and which may have its genesis in events which require an application for a different form of relief in another jurisdiction. This is often the case where a stress claim arises out of an unfair dismissal. Only an industrial tribunal has the power to re-instate a worker in these cases, while only the compensation tribunal can award compensation for loss of wages caused by the disability. Clearly, even in these situations there is potential for an overlap in awards of compensation, particularly where re-instatement is not ordered and monetary compensation for loss of wages is ordered. A tribunal ordering payments of this kind would have to be mindful of a double payment to a worker who was entitled to receive workers' compensation for the same incident.

Conclusions

This dissertation has shown that there are numerous areas of overlap and commonality in workers' compensation, industrial and discrimination matters. The starting point for this discussion was the examination of the relationship of employer and employee and the various tests which have been employed by courts and tribunals to determine this dichotomy. Over a century of precedent has demonstrated the importance of the issues of control. For all the elaborate formulae proposed, the question of control is still significant and it is submitted that the real effect of cases such as *Stevens* and now *Hollis v Vabu* has been to confirm that control is a major consideration and that in determining the level of control a range of factors enumerated by the High Court must be taken into account. This multiple indicia test requires a fact finding exercise to weigh up relevant factors of control. The recognition that a finding that a worker is a contractor, which may result in that worker being unprotected by various employment laws, has spawned a range of provisions to extend protection to contractors. For example, most workers' compensation laws provide some coverage for contractors. Likewise, most occupational health laws impose duties on principal contractors as if they were employers. Unfair contract laws allow some industrial tribunals to interfere with the contractual relations of the parties where the bargain struck has been unfair. In addition, the beginnings of a new regime of vicarious liability to cover contractors looms on the horizon following the subversive decision of McHugh J in *Hollis v Vabu*. It can be concluded that the legislative changes to industrial and workers' compensation laws in the 1990's did not alter the importance of establishing the

employer-employee relationship to gain protection from these provisions. The move towards contracting out of labour in the 1990's however, did highlight the importance of the extended provisions of the compensation legislation which provide coverage for dependent contractors. While one of the reasons for the contracting out of labour might have been to avoid the costs of compensation insurance, this may not have been achieved due to the reach of the extended provisions. This lesson may explain the drive by the current Coalition Federal Government to shave back the coverage of industrial laws and its request to the Productivity Commission to identify a consistent definition of employer and employee for the purpose of workplace safety and compensation laws.⁴³⁵

Overall the 1990's can be seen as a period in which a conservative state Coalition government attempted to narrow and reduce the jurisdiction of the compensation and industrial courts and tribunals. In compensation matters, it did this by engineering a complex regime for the resolution of stress claims and implementing a dispute resolution system which reduced the range of matters subject to appeal. It also imposed caps on weekly compensation payments. Notably, despite the 1993 promise of quick and inexpensive dispute resolution, in 1999 the Government unwittingly gave the Workers' Compensation Directorate jurisdiction over the determination of threshold questions relating to common law claims, creating a massive workload for the directorate, suffocating its ability to quickly resolve disputes.⁴³⁶

435 Productivity Commission *National Workers Compensation and Occupational Health and Safety Frameworks Inquiry* 2003.

436 See section 1.4 .

In the industrial arena, the jurisdiction of the commission was limited by the introduction of workplace agreements which could not be the subject of arbitration. Due to workplace agreements and complementary federal legislation, collective agreements and awards were diminished in effect and number.

At the same time, other influences worked to increase the complexity of compensation and industrial matters. Stress claims invited determinations from both jurisdictions and return-to-work provisions also straddled industrial and compensation courts. As a result, evidentiary issues have become of considerable importance. In particular, the principle of *res judicata* and estoppel have been addressed on numerous occasions where findings of fact have been made by one tribunal which may have a bearing on the determination of another tribunal. Although similar cases occurred prior to the 1990's, they have never been as frequent. It is significant that cases decided in the new century are revisiting some important principles of the 1990's.

For example, the Supreme Court decision in *Kuligowski*, referred to in chapter 1, shows the beginnings of a re-evaluation of the compensation dispute resolution system. In that case a dissenting judge made the important distinction between court based processes and the informal processes of the compensation system. McLure J held that the compensation system was characterised by informal processes and the limited role of lawyers and that this was a significant consideration in determining whether a review officer's decision should be binding on a judge. She held such findings should not be binding. If other judges adopted her conclusions, the

interconnection between the jurisdictions would be weakened because industrial tribunals would not necessarily be bound or estopped by compensation tribunals. Although *Kuligowski* appears to address an esoteric point on evidentiary matters, the repercussions could be significant for the future formation of tribunals and the rules that govern them.

As noted *Hollis*, which is also a post-1990's decision, could be the beginnings of change in relation to the liability of employers for contractors. Taken together, the apparently unrelated cases of *Hollis* and *Kuligowski* show how the courts continually struggle with changes to the industrial landscape and how the potential for inconsistency in industrial and workers compensation decision remains. Both cases resonate with a plea for consolidation of the courts and tribunals that deal with these related areas.

As to the other areas discussed in this dissertation, it can be observed how the Western Australian Industrial Commission, in particular, has struggled with the interaction of the compensation provisions in relation to stress claims, misconduct and return to work provisions. As to the latter, Commissioner Beech has noted that section 84AA of the *Workers' Compensation and Rehabilitation Act 1981 (WA)* has altered the application of the principles of frustration of contract in the employment context; directly impacting on the manner in which the commission can order reinstatement. Similarly, findings by the Directorate over unfair dismissal and harsh and unreasonable conduct by an employer in stress cases can now, as a result of the 1990's changes, affect the orders which can be made in the Industrial Commission.

Finally, as a consequence of the manner in which employers, employees and unions in the Industrial Commissions, negotiate wages and conditions the payment of workers' compensation will be affected. As industrial agreements annualise and aggregate payments to workers it is more likely that compensation payments will increase if the obligation to pay average weekly payments remains. Further, if the trend towards shedding the obligations on employers to provide workers' compensation cover for particular activities of work activity continues (such as travel insurance) these matters will be pushed in the industrial arena.

To conclude, it is argued that it now appears that the two industrial cousins - workers compensation and industrial laws- are forever bound together by legislation which borrows concepts, overlaps with provisions and integrates decision-making. There is scope for legislation enabling these jurisdictions to cross vest powers, or for tribunals to sit jointly to determine the full range of issues which congeal when a worker becomes injured in circumstances requiring consideration of such issues as rehabilitation, misconduct, stress and the calculation of weekly payments. In addition, equal opportunity and occupational safety jurisdictions should be involved where the return to work is plagued by discriminatory action or where there are safety concerns. Magistrates who sit and determine breaches of industrial awards in the Western Australian Industrial Commission are already rotated through the compensation jurisdiction. It is appropriate for this to be taken a step further to give the magistrates jurisdiction over a broader range of related matters. Amendments to the relevant legislation along the lines of the joint sitting and appointment arrangements contained in the *Workplace Relations Act 1996* (Cth) and the *Industrial Relations Act 1979* (WA) serve as a good model for this proposal.

Bibliography

- S Adler and R Schochet, 'Workers' Compensation and Psychiatric Injury Definition', (1999) 22(5-6) *International Journal of Law & Psychiatry* 603-616.
- B Anderson, 'The Human Face of WorkCare', (1990) 26 *Scarlet Woman* 25.
- C Andrades, 'Abuse of Power and Discrimination in the Workplace', (1999) 35 *Plaintiff* 1, 6-8.
- A Anforth, 'Wilful and False Disclosures under the Safety Rehabilitation & Compensation Act 1988', (1996) 164 *Law Society of the Australian Capital Territory Gazette* 6-10.
- A Anforth and T Thawley, 'Refusals to Offer Suitable Employment', (1997) 5(2) *Torts Law Journal* 176-192.
- Anonymous, 'Technology Work and Women's Health', (1984) September *Australian Safety News* 25.
- J Antos, M Chandler and W Mellow, 'Sex Differences in Union Membership', (1980) 33(2) *Industrial and Labor Relations Review* 162.
- C Arup, 'Criteria in the New Work Accident Compensation System', (1985) 59(12) *Law Institute Journal* 1318.
- C Arup, 'Expectations of WorkCare: The Final Report of the Joint Select Committee on WorkCare', (1989) 2 *Australian Journal of Labour Law* 180.
- C Arup, 'WorkCare: Administrative Rationality, Legal Process and Political Reform', (1990) 3 *Australian Journal of Labour Law* 159.

- C Arup, *The Common Law and WorkCare (Best Practice Research Program Policy Research Paper 5)*, Victorian WorkCover Authority, Melbourne, 1993.
- C Arup, 'WorkCover: Convergence or Competition?' (1994) 4 *Australian Journal of Labour Law* 183.
- C Arup, 'WorkCover 1997 and the Abolition of the Common Law', (1998) 11 *Australian Journal of Labour Law* 186.
- P S Atiyah, 'Accident Prevention & Variable Premium Rates for Work Connected Accidents', (1975) 4 *Industrial Law Journal* 1.
- P S Atiyah, 'Justice and Predicability in the Common Law', (1992) 15(2) *UNSW Law Journal* 448.
- S J Atlas, V C Chang, E Kammann, R B Keller, R A Deyo and E E Singer, 'Long-term Disability and Return to Work Among Patients Who Have a Herniated Lumbar Disc: The Effect of Disability Compensation', (2000) 82a (1) *Journal of Bone & Joint Surgery - American* 4-15.
- A Bale, "'Hope in Another Direction": Compensation for Work-Related Illness Among Women, 1900-1960 - Part 1', (1989) 15(1) *Women & Health* 81.
- A Bale, "'Hope in Another Direction": Compensation for Work-Related Illness Among Women, 1900-1960 - Part 2', (1989) 15(2) *Women & Health* 99.
- A Bale, 'Medicine in the Industrial Battle: Early Workers' Compensation', (1989) 11 *Soc.Sci. Med.* 1113.

- A Bale, 'The American Compensation Phenomenon', (1990) 20(2) *International Journal of Health Services* 253.
- J I Balla, 'Knights in Armour: A Follow-up Study of Injuries After Legal Settlement', (1970) 22 *The Medical Journal of Australia* 355.
- J Ballard, 'RSI on Trial', (1993) September 11 *New Scientist* 24.
- G Bammer, 'The Arguments about RSI: An Examination', (1988) 12(3) *Community Health Studies* 348.
- G Bammer, *Occupational Disease and Social Struggle: The Case of Work-Related Neck and Upper Limb Disorders (Working Paper 20): National Centre for Epidemiology and Population Health, The Australian National University, 1990.*
- G Bammer and B Martin, *Repetition Strain Injury in Australia: Medical Knowledge and Social Movement (Working Paper 19)*, National Centre for Epidemiology and Population Health, Canberra, 1990.
- T W Beed, R W Fitzgerald and D Worthington, *The Role of Conciliation*, The Law Foundation of New South Wales, 1990.
- T Beed and R McEwin, *Lawyers in Civil Litigation*, The Law Foundation of New South Wales for the Civil Justice Research Centre, NSW, 1990.
- B Belling, 'Employment Disclosure and Other Privacy Issues', (1999) 5(2) *Employment Law Bulletin* 11-13.
- T L Bennett, 'Detection of Malingering and Invalid Test Scores', (1999) 14(6) *Archives of Clinical Neuropsychology* 563-564.

- D Biggins, 'The Social Context of Legislative Reform: Part 1 Nineteenth Century Origins of Health and Safety Legislation', (1993) 9(3) *Journal of Occupational Health and Safety* 217.
- D Biggins, 'The Social Context of Legislative Reform: Part 2 Twentieth Century Australian Reforms', (1993) 9(3) *Journal of Occupational Health and Safety* 223.
- D R Biggins, 'The Politics of Occupational Health', (1987) August *Current Affairs Bulletin* 27.
- K Blackmore, 'Law, Medicine and the Compensation Debate', (1993) 9(1) *Journal of Occupational Health and Safety* 59.
- C Blake, 'Human Rights Update: Human Rights Commission', (1999) 5(3) *Human Rights Law and Practice* 211-215.
- J Blessman, 'Differential Treatment of Occupational Disease v Occupational Injury by Workers' Compensation in Washington State', (1991) 33(2) *Journal of Occupational Medicine* 121.
- P S Borba and D Appel, 'The Propensity of Permanently Disabled Workers to Hire Lawyers', (1987) 40 *Industrial and Labor Relations Review* 418.
- J Bowers, 'Industrial Tribunals and Natural Justice', (1984) 3(8) *Litigation* 311.
- A Brooks, 'The Concepts of "Injury" and "Disease" in Workers' Compensation Law - A Re-Examination in the Light of Recent Reforms', (1987) 10(2) *University of New South Wales Law Journal* 38.
- A S Brooks, 'Myth and Muddle - An Examination of Contracts for the Performance of Work', (1988) 11 *University of New South Wales Law Journal* 48.

- B Brooks, 'Aspects of Casual & Part-time Employment', (1985) June *The Journal of Industrial Relations* 158.
- C D Browne, B M Nolan and D K Faithful, 'Occupational Repetition Strain Injuries: Guidelines for Diagnosis and Management', (1984) March 17 *The Medical Journal of Australia* 329.
- D Bryson, 'Neutral ground: Mediation and the Legal Profession in Victoria', (1984) 58(12) *Law Institute Journal* 1145.
- D Bryson, 'Conflict, Law and Alternatives', (1988) 11 *Community Quarterly* 25.
- D Bryson, 'Conciliation: Mediating Disputes with a Statutory Framework' (1997) Paper presented at *LEADR Fifth International Conference on Alternative Dispute Resolution*.
- D Bryson, 'When Wearing Different Hats: Suggestions for ADR Practice', (1999) 1(10) *ADR Bulletin* 125.
- E Buckley, 'Athlete or Employee? Is the Different Treatment Accorded to Professional Team Athletes Under Workers' Compensation Legislation Justified?' (1996) 26(6) *Queensland Law Society Journal* 523-534.
- A Buckman, 'Disability Discrimination: Duty to Make Reasonable Adjustments Applies to Dismissal', (1998) 76 *Occupational Health Review* 30-32.
- H C Burry, 'Accident Compensation: Gates and Gatekeepers', (1990) 152 *The Medical Journal of Australia* 450.
- S Cahan, 'Workers' Compensation Fraud Professional', (1993) 38(9) *Safety* 39-40.
- C Cain, 'Determining Cause of Injury Difficult: Attorney', (1985) 20 *Business Insurance* 20.

- M A Cameron, 'Women & the "Uneven" Development of Workers' Compensation Law', (1994) 30(1) *ANZJS* 36.
- R Cameron, 'Non-contractual Duty of Utmost Good Faith Considered by Supreme Court', (1992) 6(1) *Commercial Law Quarterly* 11-12.
- I Carlier, 'Trauma at Work: Post-Traumatic Stress Disorder - an Occupational Health Hazard', (1994) 10(3) *Journal of Occupational Health and Safety* 264.
- H Carty, 'Illegal Contracts of Employment: Void or Contractually Unenforceable?' (1981) 131(6015) *New Law Journal* 871-873.
- P Castile, 'Alternative Dispute Resolution in Workers' Compensation, and People of Non-English Speaking Background in New South Wales', (1993) 1(2) *Torts Law Journal* 184.
- J Catanzariti, 'Dismissal on Grounds of Illness or Injury: A Conflicting Debate', (1995) 33(9) *Law Society Journal* 19, 21.
- J Catanzariti, 'Workers Compensation for an Illegal Worker?' (1998) 36(1) *Law Society Journal* 30.
- J Catanzariti, 'Extending the Boundaries of an Employer's Duty of Care', (1999) 37(1) *Law Society Journal* 32.
- J Catanzariti, 'When a Demotion is an Unfair Dismissal', (1999) 37(9) *Law Society Journal* 36-37.
- J Catanzariti, 'Toongabbie Hotel Case Redefines "Casual Employee"', (2000) 38(1) *Law Society Journal* 33-34.
- A Chapman, 'Qantas Airways Ltd v Christie', (1998) 22(3) *Melbourne University Law Review* 743-762.

- R Chapman, *Inquiry into Workers' Compensation Dispute Resolution System Western Australia*, WAGP (The Chapman Report), 1993.
- D Chin, 'Losing Control', (1996) 34(10) *Law Society Journal* 52-55.
- K Clapham, 'Experiencing Occupational Rehabilitation in NSW: Non-English Speaking Background Women's Views', (1994) 29(1) *Australian Journal of Social Issues* 26-43.
- K Clapham, R Scholfield and C Alcorso, *Managing the Work Injury of Women from Non-English Speaking Backgrounds* (Report), National Women's Consultative Council, ACT, 1993.
- J Clarke and G Lanson, 'Employing People With Psychiatric Disabilities', (1996) 4 *Australian Disability Review* 3-11.
- A Clayton, 'Attack upon the Citadel: Reform of Australia's Anti-Rehabilitative Statutes', (1986) 3(4) *Journal of Occupational Health and Safety* 351.
- A Clayton, 'Accident Compensation - The Transmutation of an Ideal', (1988) 47 *New Doctor* 11.
- R Clynes, 'Workers' Compensation - Can an Insurer Decline Indemnity Because of a Subsequent Change in the Business Described in the Proposal?' (1993) 6(1) *Insurance Law Journal* 54.
- G Coates, 'When is an Injury a Disease and Vice Versa?' (1997) 19 *APLA Update* 9.
- A Colman, 'When Does an AWA Offer Amount to Duress?' (1999) 2(7) *Inhouse Counsel* 81.
- J Colvin and G McCarry, 'Performance Appraisal of Workers: Some Legal Considerations', (1992) 5(3) *Australian Journal of Labour Law* 209-236.

- E Cooke, 'Making a Late Application for Unfair Dismissal', (1998) 72(7) *Law Institute Journal* 64-67.
- B C Cooney, *Report of the Committee of Enquiry into the Victorian Workers Compensation System*, Victorian Government Printer, Melbourne, 1984.
- P Corkery and A D'Agostino, 'Misconduct, Mutuality and Deemed Total Incapacity under the *Workers Rehabilitation and Compensation Act 1986 (SA)*', (1989) 2(2) *Australian Journal of Labour Law* 171-173.
- B Creighton, 'Section 127 of the Workplace Relations Act and the Regulation of Industrial Conflict', (1998) 7 *Centre for Employment and Labour Relations Law Occasional Monograph Series* 49-54.
- W B Creighton and E J Micalieff, 'Occupational Health and Safety as an Industrial Relations Issue: The Rank-General Electric Dispute 1981', (1983) September *The Journal of Industrial Relations* 255.
- J Crittall, 'Enterprise Bargaining and Occupational Health and Safety', (1995) 11(6) *Journal of Occupational Health and Safety* 587-593.
- I Cunningham and P James, 'The Disability Discrimination Act - An Early Response of Employers', (1998) 29(4) *Industrial Relations Journal* 304-315.
- I Curlewis, 'Sexual Harassment, Discrimination and Stress in the Workplace', (1998) 58 *Australian Construction Law Newsletter* 40-44.
- L K Dasinger, N Krause, J I Deegan, R J Brand and L Rudolph, 'Physical Workplace Factors and Return to Work After Compensated Low Back Injury: A Disability Phase-specific Analysis',

- (2000) 42(3) *Journal of Occupational & Environmental Medicine* 323-333.
- R Davis, 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers', (1994) 68 *The Australian Law Journal* 734.
- M Deasey, "'I'm Not Mad, I'm in Pain!'" Shortcomings of the WorkCare System', (1989) 11(3) *Migration Action* 9.
- J C deCarteret, 'Occupational Stress Claims: Effects on Workers' Compensation', (1994) 42(10) *AAOHN* 494.
- L Delany, 'Accident Rehabilitation and Compensation Bill: A Feminist Perspective', (1992) 22 *VUWLR* 79.
- A Dempsey, 'Professional Players Are Being Kept Down', (1998) 36(9) *Law Society Journal* 60-63.
- D Denby, 'Recent Amendments to WorkCare - An Overview', (1990) 64(3) *Law Institute Journal* 165.
- D Denby, 'WorkCare Revisited', (1992) 66(12) *Law Institute Journal* 1074.
- L De-Plevitz, 'Dependent Contractors: Can the Test From *Stevens v Brodrigg* Protect Workers who are Quasi-employees?' (1997) 13 *Queensland University of Technology Law Journal* 263-275.
- V J Derebery and W H Tullis, 'Delayed Recovery in the Patient with a Work Compensable Injury', (1983) 25(11) *Journal of Occupational Medicine* 829-835.
- R M Dichraff, 'When the Injured Worker Retains an Attorney', (1993) 41(10) *AAOHN Journal* 491.

- A E Dillingham, 'Demographic and Economic Change and the Costs of Workers' Compensation', in *Safety and the Work Force*, ed J D Worrall, ILR Press, New York, 1983, pp 161-180.
- J Earnshaw, 'Workers' Compensation in Stress-Related Claims: Some Thought for Employers in the UK', (1991) 5(3) *Work and Stress* 253.
- K Eastman, 'Employers' Obligations Towards Disabled Employees', (1999) 37(8) *Law Society Journal* 38.
- B Eliashof, and J Streltzer, 'The Role of "Stress" in Workers' Compensation Claims', (1992) 34(3) *Journal of Medicine* 297.
- J Ellard, 'The Problems of the Migrant', (1969) 22 *Medical Journal of Australia*, 1039.
- A Emmink, 'Ten warning signs of workers' compensation fraud', (1996) 34(5) *Canadian Occupational Safety* 14-16.
- M Evans, 'The Workers Rehabilitation and Compensation Act 1986 - South Australia', *Australian Journal of Labour Law*, 96.
- C Fenwick, 'Shooting for Trouble? Contract Labour-hire in the Victorian Building Industry', (1992) 5 *AJLL* 237.
- M Feuerstein and R Theborge, 'Perceptions of Disability and Occupational Stress as Discriminators of Work Disability in Patients with Chronic Pain', (1991) 1(3) *Journal of Occupational Rehabilitation* 185.
- M Fletcher, (1990). 'State Comp Systems Need Reform: Experts', *Business Insurance*, 26.
- G Foley, J Gale, and L Gavenlock, 'The Cost of Work-related Injury and Disease', (1995) 11(2) *Journal of Occupational Health and Safety* 171.

- K Frankcom, 'Injured and Silenced: Working with Workers' Compensation Claimants and Their Families', (1992) 13(4) *A.N.Z. J. Family Therapy* 219.
- J Gardner, 'The Victorian WorkCare Appeals Board: An Investigatory Model', (1993) 1(2) *Torts Law Journal* 154.
- J Gardner and L Engelsmann, (1990). 'The Introduction of the WorkCare Appeals Board', (1990) 64(6) *Law Institute Journal* 494.
- S Garnett, 'Procedures for Initiating a WorkCare Claim', (1990) 64(3) *Law Institute Journal* 171.
- J Geisel, 'Skyrocketing Costs for Healthcare; Work Comp to Managers' Worries, says BI Opinion Poll', (1992) April 6 *Business Insurance*.
- H Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions*, Clarendon, Oxford, London, 1987.
- J George, 'More OH and S Disputes Inevitable', (1997) 68(5) *Australian Safety News* 4.
- P Gerber, 'Employees and Independent Contractors Revisited', (1999) 73(1) *Australian Law Journal* 29-34.
- P Ginters, 'In Search of the Outer Limits of the Unfair Contracts Jurisdiction: Sections 127a-127c and Beyond', (1996) 9(3) *Australian Journal of Labour Law* 247-258.
- I S Glass, 'Beliefs About and Use of Occupational Medicine Practice Guidelines by Case Managers and Insurance Adjusters', (2000) 42(4) *Journal of Occupational & Environmental Medicine* 370-376.

- I V Gluck and A Oleinick, 'Claim Rates of Compensable Back Injuries by Age, Gender, Occupation, and Industry - Do They Relate to Return-to-work Experience?' (1998) 23(14) *Spine* 1572-1587.
- L Goldman and J Lewis, 'Stressing the Positive', (2000) 52(2) *Occupational Health* 10-11.
- T Gooch, 'Powers of the Federal Industrial Relations Commission: Recent High Court Decisions', (1995) 47(6) *Australian Company Secretary* 271-272.
- R Guthrie, *Enquiry into Workers Compensation Dispute Resolution in Western Australia*, WAGP, 1991.
- R Guthrie, 'A Western Australian Survey on Employer Attitudes and Awareness of the Industry Commission Report on Workers Compensation and Amendments to the *Workers Compensation and Rehabilitation Act 1981* (WA)', (1995) 95.11 *Curtin University of Technology Business School Working Paper Series*.
- R Guthrie, 'Procedure and Evidence under the *Workers Compensation and Rehabilitation Act 1981* (WA)', (1995) 95.04 *Curtin University of Technology Business School Working Paper Series*.
- R Guthrie, 'Workers Compensation and Age Discrimination', (1995) 95.02 *Curtin University of Technology Business School Working Paper Series*.
- R Guthrie, 'Worker's Compensation and Industrial Relations Some Reflections on Stress Claims under the Western Australian *Workers*

- Compensation and Rehabilitation Act 1981 (WA)*', (1995)
95.12 *Curtin University of Technology Business School
Working Paper Series.*
- R Guthrie, 'Forms of Power in Disputes under the *Workers Compensation and
Rehabilitation Act 1981 (WA)*', (1996) 96.02 *Curtin Business
School Working Paper Series.*
- R Guthrie, 'Stress Claims and Management Prerogatives', (1996) 4(2) *International
Journal of Employment Studies* 95.
- R Guthrie, 'Worker's Compensation Conciliation and Review: A Survey of Legal
Practitioner Attitudes', (1996) 96.03 *Curtin University of
Technology Business School Working Paper Series.*
- R Guthrie, 'Worker's Compensation Conciliation and Review: A Survey of Trade
Union Official Attitudes', (1996) 96.04 *Curtin University of
Technology Business School Working Paper Series.*
- R Guthrie, 'Resolving Workers Compensation Disputes Without Lawyers', (1997)
3(2) *The Journal of Contemporary Issues in Business and
Government* 57.
- R Guthrie, *Workers Compensation Western Australia*, Butterworths, Sydney, 1998.
- P Handford, 'A Good Faith Tort', (1993) 1(2) *The Tort Law Review* 87.
- P Handford, 'Victoria Puts no Faith in Good Faith Tort', (1996) 4(1) *Tort Law
Review* 21-23.
- T P Hanson-Mayer, 'The Worker's Disability Syndrome', (1984) 50(3) *Journal of
Rehabilitation* 50.
- J M Harrington, 'Industrial Injuries Compensation', (1991) 48 *British Journal of
Industrial Medicine* 577.

- I S Harris, K L Mueller, P Low, J Phelan, C Ossler, J Koziol-Mclain and B Headley,
'Delayed Recovery: Taking Another Look', (1989) 55(3)
Journal of Rehabilitation 61.
- Heads of Workers Compensation Authorities, *Promoting Excellence*, HWA,
Melbourne, 1997.
- H Hemerik and K Cena 'Back Injuries among Migrant Workers in Western
Australia', (1993) 9(3) *Journal of Occupational Health and
Safety* 255.
- A G Henderson, 'Employment Law and Illegal Contracts', (1977) 127(5792) *New
Law Journal* 232-233.
- D Hewson, J Halcrow and C Selby-Brown, 'Compensable Back Pain & Migrants',
(1987) 147 *The Medical Journal of Australia* 280.
- A Hillier, 'Compensation for Stress in Unfair Dismissal', (1978) 128(5883) *New
Law Journal* 1212-1213.
- S Hoffman and G Pransky, 'Pre-employment Examinations and the Americans with
Disabilities Act - How Best to Avoid Liabilities Under
Federal Law', (1998) 8(4) *Journal of Occupational
Rehabilitation* 255-263.
- A Hopkins, 'The Social Construction of Repetition Strain Injury', (1989) 25(2)
ANZJS 239.
- A Hopkins, 'Stress, the Quality of Work, and Repetition Strain Injury in Australia',
(1990) 4(2) *Work and Stress* 129.
- A Hopkins, 'Are Workers' Compensation Statistics a Health and Safety Hazard?'
(1994) 53(1) *Australian Journal of Public Administration* 78.

- A Hopkins, 'The Impact of Workers' Compensation Premium Incentives on Health and Safety', (1994) 10(2) *Journal of Occupational Health Safety - Aust NZ* 129.
- 'Hot Topics', (1998) 19 September *Discrimination* 1-27.
- G Howard, 'Compensation for Injuries', (1990) 64(3) *Law Institute Journal* 174.
- G Howard, 'Disability Discrimination Act 1995: An Occupational Health Nightmare?' (1996) 48(4) *Occupational Health* 135-136, 138.
- G Howard, 'For the Record: Employers Need to Justify Requests for Medical Records on Staff or Job Applicants', (1998) 50(2) *Occupational Health* 13-14.
- G Howard, 'Equal Reaction', (2000) 52(1) *Occupational Health* 10-11.
- J Howe and R Mitchell, 'The Evolution of the Contract of Employment in Australia: A Discussion', (1999) 12(2) *Australian Journal of Labour Law* 113-130.
- G L Hughs, 'The Industrial Accident Compensation System in Victoria', (1986) 15 *Melbourne University Law Review* 438.
- D E Hyatt and B Kralj, (1995). 'The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity', (1995) 34(1) *Industrial Relations* 95.
- M Ierodionou, 'Sexual harassment issues in unfair dismissal', (1997) 71(7) *Law Institute Journal* 54-57.
- A W Imershein, A S Hill and A M Reynolds, 'The Workers' Compensation System as a Quality of Life Problem for Workers' Compensation Claimants', (1994) 5 *Advances in Medical Sociology* 181.

- Industry Commission of Australia, *Workers' Compensation in Australia*, Report No 36 (February 1994), AGPS, Canberra, 1994.
- I Iskander, (1991) 'Injured Immigrant Workers: The Experience of Compensation and Rehabilitation', in *Health Care and Immigrants: A Guide for the Helping Professions*, eds B Ferguson and E Browne, MacLennon and Petty, Sydney.
- T G Ison, 'The Significance of Experience Rating', (1986) 24(4) *Osgoode Hall Law Journal* 723.
- T G Ison, 'Changes to the Accident Compensation System: An International Perspective', (1993) 23 *VUWRL* 25.
- T G Ison, 'Promoting Excellence: National Consistency in Australian Workers' Compensation, 1996, Interim Report of the Heads of Workers' Compensation Authorities to the Labour Minister's Council', (1996) 4(3) *Torts Law Journal* 286-294.
- G L Iverson and L M Binder, 'Detecting Exaggeration and Malingering in Neuropsychological Assessment', (2000) 15(2) *Journal of Head Trauma Rehabilitation* 829-858.
- C James, 'Occupational Injury: Accidental or a Reflection of Conflict Between Capital & Labour?' (1987) 23(1) *ANZJS* 47.
- R Jamison, D Matt and W Parris, 'Treatment Outcome in Low Back Pain Patients: Do Compensation Benefits Make a Difference?' (1988) 17(12) *Orthopaedic Review* 1210.
- K Jarvis, R Phillips and E Morris, 'Cost per Case Comparison of Back Injury Claims of Chiropractic versus Medical Management for

- Conditions with Identical Diagnostic Codes', (1991) 33(8) *Journal of Occupational Medicine* 847.
- L Johns, 'The Obligation of Mutual Trust and Confidence', (1998) 72(6) *Law Institute Journal* 54-55.
- M Johnson, M Schultz and A Ferguson, 'A Comparison of Chiropractic, Medical and Osteopathic Care for Work-Related Sprains and Strains', (1989) 12(5) *Journal of Manipulative and Physiological Therapeutics* 335.
- R Johnstone, 'Pre-employment Health Screening: The Legal Framework', (1988) 1(2) *Australian Journal of Labour Law* 115-146.
- R Johnstone, 'Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking', (1999) 12(2) *Australian Journal of Labour Law* 73-112.
- M L Kasdan, 'An Inappropriate Title: "Why Most Workers With Occupational Repetitive Trauma Do Not File for Workers' Compensation"', (2000) 42(6) *Journal of Occupational & Environmental Medicine* 573-574.
- J F Keeler, 'Management & Review of Decision-making in Personal Injury Compensation Schemes: The Approach of Three Australian States to Reforming the Administration of Workers' Compensation', in *Australian Studies in Law: Administrative Law*, eds M Harris and V Waye, Federation Press, Annadale, 1991.

- E Kelloway, J Barling and A Shah, 'Industrial Relations Stress and Job Satisfaction: Concurrent Effects and Mediation', (1993) 14 *Journal of Organizational Behavior* 447.
- D Kenny, 'The Relationship Between Workers' Compensation and Occupational Rehabilitation: An Historical Perspective', (1994) 10(2) *Journal of Occupational Health and Safety* 157.
- D Kenny, 'Barriers to Occupational Rehabilitation: An Exploratory Study of Long-Term Injured Workers', (1995) 11(3) *Journal of Occupational Health and Safety* 249.
- D T Kenny, 'Employers' Perspectives on the Provision of Suitable Duties in Occupational Rehabilitation', (1999) 9(4) *Journal of Occupational Rehabilitation* 267-276.
- A Khan, 'Who is a Servant?' (1979) 53(12) *Australian Law Journal* 832-839.
- D Kidd, 'Anyone for Table Tennis?' (1997) 19(2) *Bulletin (Law Society of South Australia)* 24-25.
- P D Kiester and A D Duke, 'Is it Malingering, or is it 'Real'? Eight Signs that Point to Non-organic Back Pain', (1999) 106(7) *Postgraduate Medicine* 77.
- A Kocis, 'Breach of the Workplace Relations Act, Contract and Implied Term to Act Fairly', (1999) 3(1) *Inhouse Counsel* 4-5.
- N Krause, L K Dasinger and F Neuhauser, 'Modified Work and Returns to Work - A Review of the Literature', (1998) 8(2) *Journal of Occupational Rehabilitation* 113-139.
- M S Kuhar, 'Workers' Compensation: Is Fraud Flying High?' (1994) 56(8) *Occupational Hazards* 38-41.

- S F Lambert and G A Wood, *The Determinants of the Duration of Workers' Compensation Claims* (Working paper No. 81), Murdoch University, Perth, 1992.
- G I Larrabee, 'Somatic Malingering on the MMPI and MMPI-2 in Personal Injury Litigants', (1998) 12(2) *Clinical Neuropsychologist* 179-188.
- T J Larsson, 'We Need Applied Prevention - Not Statistics', (1991) 7(4) *Journal of Occupational Health and Safety* 287.
- J Lee, 'Women and Enterprise Bargaining: The Corset of the 1990s?' (1994) 53(2) *Australian Journal of Public Administration* 189.
- M Lee and M Quinlan, 'Co-ordinating the Regulation of Occupational Health and Safety in Australia: Legal and Political Obstacles and Recent Developments', (1994) 7(1) *Australian Journal of Labour Law* 33-68.
- M Lee and P Sheldon, *Workplace Relations*, Butterworths, Sydney, 1997.
- P Lees-Haley, C Williams and R Brown, 'The Barnum Effect and Personal Injury Litigation', (1993) 11(2) *American Journal of Forensic Psychology* 21.
- A Levy, 'Compensation Neurosis Rides Again', (1992) 6(5) *Brain Injury* 401.
- V Lin and W Pearse, 'A Workforce at Risk', in *The Health of Immigrant Australia: A Social Perspective*, eds J Reid and P Trompf, Harcourt Brace Sydney, 1990.
- K Lippel, 'Workers' Compensation and Psychological Stress Claims in North American Law: A Microcosmic Model of Systemic Discrimination', (1989) 12 *International Journal of Law and Psychiatry* 41.

- K Lippel, 'Workers' Compensation and Stress - Gender and Access to Compensation', (1999) 22(1) *International Journal of Law & Psychiatry* 79-89.
- Y Lucire, 'Neurosis in the Workplace', (1986) 145 *The Medical Journal of Australia* 323.
- H Luntz, 'The Role of Compensation in Health and Safety at Work', (1981) September *The Journal of Industrial Relations* 383.
- C Manchester, 'Frustration or Dismissal?' 128(5861) *New Law Journal* 674-676.
- F Marks, 'Stress in the Legal Context', (1985) 1(1) *Journal of Occupational Health and Safety* 16.
- J Mazurkiewicz, 'Workers' Compensation Hearings before the Federal AAT', (1993) 67(8) *Law Institute Journal* 708.
- G J McGarry, 'The Employee's Right to Silence', (1983) 57 *Australian Law Journal* 607.
- G J McGarry, 'Master and Servant - Incapacitating Illness of Servant - Frustration of Employment Contract', (1987) 61(1) *Australian Law Journal* 35-36.
- A McMenamin, *The Prevention, Early Reporting and Effective Rehabilitation of Occupational Musculoskeletal Injuries Amongst Women of Non-English Speaking Backgrounds*, Working Women's Centre, Adelaide, 1993.
- J McMullen, 'Termination of the Contract of Employment by Frustration', (1977) 127 (5819) *New Law Journal* 905-907.
- R P Meagher, 'Contracts and Employment in the Industrial Arbitration Act', (1976) 14(5) *Law Society Journal* 229-242.

- H Meekosha and A Jabubowicz, 'Women Suffering RSI: The Hidden Relations of Gender, the Labour Process and Medicine', (1986) 2(5) *Journal of Occupational Health and Safety* 390.
- J M Melhorn, 'The Impact of Workplace Screening on the Occurrence of Cumulative Trauma Disorders and Workers' Compensation Claims', (1999) 41(2) *Journal of Occupational & Environmental Medicine* 84-92.
- R Melzack, J Katz and M Jeans, 'The Role of Compensation in Chronic Pain: Analysis Using a New Method of Scoring the McGill Pain Questionnaire', (1985) 23 *Pain* 101.
- M Menard and A Hoens, 'Objective Evaluation of Functional Capacity: Medical, Occupational, and Legal Settings', (1994) 19(5) *Journal of Orthopaedic and Sports Physical Therapy* 249.
- G Mendelson, 'Persistent Work Disability Following Settlement of Compensation Claims', (1981) 55(6) *Law Institute Journal* 342.
- G Mendelson, 'Not "Cured by a Verdict"', (1982) August 7 *The Medical Journal of Australia* 132.
- G Mendelson, 'Compensation, Pain Complaints, and Psychological Disturbance', (1984) 20 *Pain* 169.
- G Mendelson, "'Compensation Neurosis": An Invalid Diagnosis', (1985) 142(May 13) *The Medical Journal of Australia* 561.
- G Mendelson, 'Occupational Stress Part 1: An Overview', (1990) 6(3) *Journal of Occupational Health and Safety* 175.
- G Mendelson and D Mendelson, 'Malingering', (1996) 31(7) *Australian Lawyer* 26-27.

- Z Mesarites, 'Occupational Health and Safety and Migrant Workers', (1987) 12(March) *Greek Action Bulletin* 21.
- D Meyers, 'Compensable Psychiatric Illness', (1992) 22(6) *Queensland Law Society Journal* 545.
- D Meyers, C Cooke and F Murphy, 'Medical Assessment Tribunals and Compensable Lung Disease in Queensland', (1992) 22(2) *Queensland Law Society Journal* 159.
- D Miles, 'No Miracle Cure for Workers' Compensation', (1985) 59(1-2) *Law Institute Journal* 2.
- H Miller, 'Accident Neurosis, Lecture 1', (1961) April 1 *British Medical Journal* 919.
- H Miller, 'Accident Neurosis, Lecture 2', (1961) April 8 *British Medical Journal* 992.
- C Mogridge, 'Illegal Employment Contracts: Loss of Statutory Protection', (1981) 10 *International Law Journal* 23.
- A Monaghan, 'Quandaries in Work Contracts: Implications for Compensation in Worker's Relationship to Employer', (1995) 33(5) *Law Society Journal* 53.
- R Monger, *Director of Conciliation and Review Operations Report December 1998*, (unpublished report for WorkCover WA in possession of the writer), 1998.
- A Morehead, M Steele, M Alexander, K Stephen and L Duffin, *Changes at Work - The 1995 Australian Workplace Industrial Relations Survey*, Addison Wesley Longman Australia Pty Ltd, South Melbourne, 1997.

- D Morrison, G Wood, S MacDonald and D Munrowd, 'Duration and Cost of Workers' Compensation Claims: An Empirical Study', (1993) 9(2) *Journal of Occupational Health and Safety* 117.
- E Moscovitz, 'Outside the "Compensation Bargain": Protecting the Rights of Workers Disabled on the Job to File Suits for Disability Discrimination', (1997) 48(5) *Labor Law Journal* 272-292.
- J Mussoff, 'Determining the Compensability of Mental Disabilities under Workers' Compensation', (1981) 55(1) *Southern California Law Journal* 193.
- B Napier, 'Whither the Contract of Service?' (1977) 127(5814) *New Law Journal* 779-781.
- D W Nassau, 'The Effects of Pre-work Functional Screening on Lowering an Employer's Injury Rate, Medical Costs, and Lost Work Days', (1999) 24(3) *Spine* 269-274.
- National Occupational Health and Safety Commission, *Compendium of Workers' Compensation Statistics, Australia, 1996-97*, AGPS, Canberra, 1998.
- National Occupational Health and Safety Commission, *A National Approach to Occupational Health and Safety for Women Workers*, AGPS, Canberra, 1990.
- W J Nelson, 'Workers' Compensation: Coverage, Benefits, and Costs, 1988', (1991) 54(3) *Social Security Bulletin* 13.
- W J Nelson, 'Workers' Compensation: 1984-88 Benchmark Revisions', (1992) 55(3). *Social Security Bulletin* 4.

- K Nicholson, 'Recovery of Money Paid under Mistake of Fact - Recent Cases in an Insurance Context', (1988) 1(2) *Insurance Law Journal* 67.
- B Nye, *Some Aspects of Workers' Compensation*, Government Printer NSW Ethnic Affairs Commission, Sydney, 1978.
- D O'Connor, 'Specialist Tribunals: General Problems', (1991) 16(5) *Legal Service Bulletin* 221.
- S O'Halloran, 'WorkCover: Acting for the Applicant', (1987) 25(7) *Law Society Journal* 32.
- R Otto, 'Stress: On the Factory Floor', (1982) 12(2) *Australian Social Welfare Impact* 17-21.
- D Parsons, 'Who's Fleecing WorkCare?' (1988) May *Australian Society* 15.
- S Peace, 'Egress For All', (1999) 29(5) *Occupational Safety and Health* 47-48.
- C L Peterson, 'Work Factors and Stress: A Critical Review', (1994) 24(3) *International Journal of Health Services* 495.
- J Peterson, 'The Duty of Good Faith in Insurance Relationships: The Decision in Gibson v Parkes District Hospital', (1994) 24(2) *Victoria University of Wellington Law Review* 189- 207.
- M Pittard, 'Compensation for Suicide Due to Work Stress', (1996) 2(4) *Human Resources Law Bulletin* 40.
- M Pittard, 'Accident Pay and Medical Expenses: Award Matters?' (1997) 3(3) *Human Resources Law Bulletin* 25-26.
- M Pittard, 'IRC's New 'No Strike' Powers', (1997) 3(2) *Human Resources Law Bulletin* 13.
- J Pollard, 'Injured Worker Tests Law', (1995) August 7 *The West Australian* 14.

- K Purse, 'Workers Compensation Policy in Australia: Best Practice or Lowest Common Denominator?' (1998) 40(2) *Journal of Industrial Relations* 179-203.
- M Quinlan and C Mayhew, 'Precarious Employment and Workers' Compensation', (1999) 22(5-6) *International Journal of Law & Psychiatry* 491-520.
- E Rasink, *Demands on the Compensation Court: Preliminary Thoughts and Suggestions for Empirical Research* (Report), The Law Foundation of New South Wales for the Civil Justice Research Centre, 1993.
- J Raue, 'The Key to Clerical Stress', (1992) 6(June) *Directions in Government* 22.
- J Reid and L Reynolds, 'Requiem for RSI: The Explanation and Control of an Occupational Epidemic', (1990) 4 *Medical Anthropology Quarterly* 162.
- K Reid, 'Equal Opportunity versus Occupational Safety: An Employer's Quandary', (1999) 27(1) *Australian Business Law Review* 79-81.
- A Revai and J Pochon, 'Recent Amendments to Workers Legislation', (1988) 1 *Australian Journal of Labour Law* 92.
- J Riekert, 'Disability Discrimination Demystified', (1996) 67(3) *Australian Safety News* 22-24.
- R Robertson, 'Enterprise Bargaining: Implications for Women', (1992) *Work and People* 19.
- M A Robinson, *Accident Compensation in Australia: No-Fault Schemes*, Legal Books Pty. Limited, Sydney, 1987.

- M A Robinson, 'Workers Compensation in Victoria: From WorkCare to WorkCover', (1994) June *The Journal of Industrial Relations* 213.
- K D Rosenman, 'An Inappropriate Title: "Why Most Workers With Occupational Repetitive Trauma Do Not File for Workers' Compensation', (2000) 42(6) *Journal of Occupational & Environmental Medicine* 574.
- K D Rosenman, J C Gardiner, J Wang, J Biddle, A Hogan, M I Reilly, K Roberts and E Welch, 'Why Most Workers With Occupational Repetitive Trauma Do Not File for Workers' Compensation', (2000) 42(1) *Journal of Occupational & Environmental Medicine* 25-34.
- S R Ross and K M Adams, 'One More Test of Malingering?' (1999) 13(1) *Clinical Neuropsychologist* 112-116.
- A Rubinstein, 'Mediterranean Back and Other Stereotypes: A Review of the Australian Literature Dealing with Industrial Back Injuries', (1982) 17(4) *Australian Journal of Social Issues* 295.
- J Ruth and S O'Malley, 'Business Hit Hard as Insurance Fees Soar', (1993) August 24 *The West Australian* 34.
- P Sachs, 'Policy Implications of Psychotherapy with Personal Injury Patients', (1989) 2(4) *Forensic Reports* 265.
- F Salter, 'Assessing Stress in the Workplace: An Interdisciplinary Review and Practical Guide', (1991) 7(4) *Journal of Occupational Health and Safety* 311.
- A L Samuels, 'Frustration of Contract', (1976) 121(2) *Solicitors' Journal* 25-26.

- G Sawyer, 'Estoppel in Workmen's Compensation', (1962) 36(August 30) *The Australian Law Journal* 91.
- D Scarlett, 'Workers Compensation Act 1987: What We Have to Work With in Advising Our Clients', (1990) 28(April) *Law Society Journal* 59.
- J Schmidt, 'Lump Sum Award in Workers' Compensation', (1987) 54(March) *Journal of Risk Insurance* 332.
- B D Scott, 'The Assessment of Chronic Illness Within the Compensation System', (1993) 60 *New Doctor* 16.
- R Seabrook and B Collins, 'The Duty of Care of the Occupational Physician in Assessing Job Applicants', (1999) 49(3) *Occupational Medicine-Oxford* 189-192.
- E M Shanahan and L A Le Lau, 'The American Medical Association's "Guides to the Evaluation of Permanent Impairment"', (1994) 10(4) *Journal of Occupational Health and Safety* 323.
- J Sloan and S Kennedy, *Weekly Benefit Arrangements Under the WorkCare Scheme: Some Options for Change* (Best Practice Research Program Policy Research Paper 3), Victorian WorkCover Authority, Melbourne, 1992.
- R Spillane, 'Psychological Aspects of Occupational Stress and Workers Compensation', (1984) December *The Journal of Industrial Relations* 496.
- R Spillane, 'Stress at Work: A Review of Australian Research', (1984) 14(4) *International Journal of Health Services* 589.

- R Spillane and L Deves, 'RSI: Pain, Pretence or Patienthood?' (1987) 29(March) *Journal of Industrial Relations* 41.
- R Spillane and L A Deves, 'Psychosocial Correlates of RSI Reporting', (1988) 4(1) *Journal of Occupational Health and Safety* 21.
- M Spry, 'Workplace Harassment: What Is It, and What Should the Law Do About It?' (1998) 40(2) *Journal of Industrial Relations* 232-246.
- B Stagoll, 'Work-injuries and Invalidism in Migrant Families: A Systems View', (1981) 2(2) *Australian Journal of Family Therapy* 63.
- T Stanley, 'WorkCover, the Current Picture: A Consideration of the Review Process, Preliminary Conferences, and the Medical Board', (1991) 13(4) *Law Society Bulletin* 104.
- M Staten and J Umbeck, 'Compensating Stress-Induced Disability: Incentive Problems', in *Safety and the Work Force*, ed J D Worrall, ILR Press, New York, 1983, pp 103-127.
- B Steinberg, 'Effective Workers' Compensation Controls', (1986) 34(7) *AAOHN* 337.
- J M Stellman, 'The Working Environment of the Working Poor: An Analysis Based on Workers' Compensation Claims, Census Data and Known Risk Factors', (1988) 12(3-4) *Women and Health* 83-101.
- D Stewart, *Workers' Compensation and Social Security: An Overview* (Reports and Proceedings 63), Social Policy Research Centre, Kensington, The University of New South Wales, 1986.
- D Stewart, *Workers' Compensation and Social Security: Personal and Social Costs* (Reports and Proceedings 93), Social Policy Research Centre, Kensington, The University of New South Wales, 1991.

- D Stewart and J Doyle, *Workers' Compensation and Social Security Expenditure in Australia: Anti-Social Aspects of the 'Social' Wage?* (Discussion Paper), Social Policy Research Centre, Kensington, The University of New South Wales, 1988.
- M Stiffe, 'Conciliation or the Courts? Advising on WorkCover Disputes', (1993) *Law Institute Journal*, 1054.
- W Stone, 'Repetitive Strain Injuries', (1983) 10(24) *The Medical Journal of Australia* 616.
- L Street, *Report on a Model of Conciliation for the New South Wales WorkCover Scheme*, (Unpublished report for WorkCover New South Wales in possession of the writer), 1996.
- I Szekely, 'Employees v Independent Contractors Weighing up the Advantages', (1996) 12(2) *National Accountant* 45-47.
- S Talo, N Hendler and J Brodie, 'Effects of Active and Completed Litigation on Treatment Results: Workers' Compensation Patients Compared With Other Litigation Patients', (1989) 31(3) *Journal of Occupational Medicine* 265.
- K Tarkah, 'Employee or Independent Contractor?' (1996) 2(5) *Human Resources Law Bulletin* 56.
- J C Taylor, *An Empirical Investigation of Claimants' Legal Representation & Workers' Compensation Case Outcomes in Florida*, Unpublished Masters Thesis UMI Dissertation Services, 1995.
- J Teicher, *Report on the Operation of Accident Make-Up Pay Provisions Applying to Workers Employed in Victoria*, (Best Practice Research

Program Policy Research Paper 4), Victorian WorkCover Authority, Melbourne, 1992.

J Tham, ““Take It or Leave It” AWAs: A Question of Duress?” (1999) 12(2) *Australian Journal of Labour Law* 142-148.

S Thomas, W Stone and K Greenwood, ‘Australian Workers with Back Injury: A Statistical Overview’, (1990) 13(3) *International Journal of Rehabilitation Research* 195.

B Van Den Bogart, ‘The Bilingual WorkCare Information Project (BWIP)’, (1986) 11(2) *Greek Action Bulletin* 13.

W G Van Gorp, L A Humphrey, A Kalechstein, V L Brumm, W I McMullen, M Stoddard and N A Pachana, ‘How Well Do Standard Clinical Neuropsychological Tests Identify Malingering? A preliminary analysis’ (1999) 21(2) *Journal of Clinical & Experimental Neuropsychology* 245-250.

T Van-Baren, ‘Move on Fraud Loophole’, (1997) September 19 *West Australian*.

B Wade, ‘Risk Management: Companies Turn Workers Comp Sword on Legal Costs’, (1992) July *Corporate Cashflow*.

J H Wade, ‘Forms of Power in Family Mediation and Negotiation’, (1994) *Australian Journal of Family Law* 40.

J H Wade, ‘Strategic Interventions Used by Mediators, Facilitators and Conciliators’, (1994) November *Australian Dispute Resolution Journal* 292.

N L Wallace-Bruce, ‘Prosecuting “Sick” Workers’, (1989) 2(2) *Insurance Law Journal* 89.

- V Walters, 'The Politics of Occupational Health and Safety: Interviews with Workers' Health and Safety Representatives and Company Doctors', (1985) 22(1) *Canadian Review of Sociology and Anthropology* 57.
- P Warren-Langford, D Biggins and M Phillips, 'Union Participation in Occupational Health and Safety in Western Australia', (1993) December *The Journal of Industrial Relations* 585.
- R Watson, 'WorkCover: Wonderful or Woeful?', (1992) 14(11) *Law Society Bulletin* 8.
- V E Weighill, 'Compensation Neurosis: A Review of the Literature', (1983) 27(2) *Journal of Psychosomatic Research* 97.
- M R Weinstein, 'The Concept of the Disability Process', (1978) 19(2) *Psychosomatics* 94.
- C B White, *State of the Work Environment Occupational Injuries and Diseases to Women Western Australia 1994/5*, WorkSafe Western Australia, Perth, 1996.
- C B White, *State of the Work Environment Occupational Injuries and Diseases Western Australia 1994/5*, WorkSafe Western Australia, Perth, 1996.
- C B White, *State of the Work Environment: Occupational Injuries and Diseases, Western Australia 1997/9*, WorkSafe Western Australia, Perth, 1999.
- R W Wildman, 'The Detection of Malingering', (1999) 84(2) *Psychological Reports* 386-388.

- D Williams, 'Zurich Australian Insurance Pty Ltd v Amec Services Pty Ltd & FAI General Insurance', (1988) 13(5) *Australian Insurance Law Bulletin* 65-67.
- E Willis, 'Commentary: RSI as a Social Process', (1986) 10(2) *Community Health Studies* 210.
- D Willson, 'Winning Workers Can Be Losers', (1992) 14(1) *Law Society Bulletin* 12.
- S R Wilson, (1982). 'Occupational Disease - The Problems of a Comprehensive System of Coverage', (1982) 11 *Industrial Law Journal* 141.
- C Winer, G Booth, P Henke, L Jones, L Lee and P Niall, 'Guide to the Assessment of Percentage "Impairment" of the Back, Neck and Pelvis', (1992) 157(September) *The Medical Journal of Australia* 412.
- O Woodhouse, *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia*, AGPS, Canberra, 1974.
- Workers Compensation and Rehabilitation Commission Annual Reports 1991-1994*
- Workers Compensation and Rehabilitation Commission, *Workers' Compensation and Rehabilitation Act 1981: 1995 Review of Dispute Resolution Western Australia*, WorkCover, Western Australia, 1995.
- Workers Compensation and Rehabilitation Commission, *Review of Rehabilitation*, WAGP, Perth, 1997.
- WorkSafe Australia, *The Cost of Work Related Injury and Disease*, National Institute, AGPS, Canberra, 1994.
- M Worsnop, 'The ComCare Scheme', (1991) 65(6) *Law Institute Journal* 502.

D Worthington, 'Matters Unresolved by Conciliation', *Civil Issues - The Bulletin of the Civil Justice Research Centre*, Law Foundation of New South Wales, 1991.

D Worthington, *Compensation in an Atmosphere of Reduced Legalism*, The Law Foundation of New South Wales for the Civil Justice Research Centre, 1994.

G D Wright, 'The Failure of the "RSI" Concept', (1987) 147(September 7) *The Medical Journal of Australia* 233.

A Wyatt, 'Reaction to OHS Industry Commission Report', (1995) 11(3) *Journal of Occupational Health and Safety* 219.

J R Youngjohn, P R Lees-Haley and I M Binder, 'Comment: Warning Malingerers Produces More Sophisticated Malingering', (1999) 14(6) *Archives of Clinical Neuropsychology* 511-515.