

Curtin University of Technology

**The Development of a Holistic Framework for
Workers Compensation in Western Australia**

Robert Guthrie


**This thesis is presented for the
Degree of Doctor of Philosophy
of Curtin University of Technology**

November 2002

Declaration

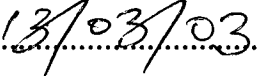
This thesis contains no material which has been accepted for the award of any other degree or diploma in any university.

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:



Acknowledgements

Professor Margaret Nowak alerted me to the potential of my work to be submitted for this degree. She later became one of the three wonderful supervisors who assisted me with this work. Professor Leonie Rennie, as chair of the committee, has been a great enthusiast for the process and has given me much support in getting the job done. Her technical skills are unequalled. Dr Alison Preston completes the trio of inspirational colleagues, generous of spirit and time and inordinately interested in work outside their disciplines. *Thank you Margaret, Leonie and Alison.*

Thanks to my partner Trish and children Lucy and Nic. They put up with a lot of *compo stuff*. I am sure there should be a law against talking about workers compensation at dinner time!! *Bless you.*

Finally thanks to fellow travellers Dr Pauline Sadler, John Maltas and Colin Huntly all of the School of Business Law: *all is for the best in the best of all possible worlds!!*

Abstract

This exegesis describes and interprets a body of work produced by the writer from 1991 until 2001. This work includes three State Government reports and a commentary on the *Workers Compensation and Rehabilitation Act 1981* (WA) contained in a Loose-leaf service published by Butterworths. In addition four refereed journal articles are included to complement the final report completed in 2001.¹

This work shows the progressive development of a framework to describe the Western Australian compensation system. The first report, completed in 1991, explores the links between the resolution of disputed compensation claims and other elements of the compensation system. The second report, completed in 1999, is concerned with the issue of cost containment within the compensation system and the final report, completed in 2001, combines the insights of the previous two reports with the work of other commentators to develop a broad holistic framework for a compensation system in Western Australia. Underpinning the compilation of the three government reports is the legal analysis contained in the *Workers Compensation Western Australia Loose-leaf service*. These works, taken together with the four journal articles, evidence a link between theory and practice which provides the framework for a holistic approach to workers compensation in Western Australia.

¹ These articles have been developed from of the discussion papers included in the 2001 Report.

Table of Contents

ACKNOWLEDGEMENTS.....	I
ABSTRACT.....	II
TABLE OF CONTENTS.....	III
LIST OF CASES.....	V
LIST OF TABLES.....	VI
INTRODUCTION.....	1
CHRONOLOGY OF INQUIRIES INTO WORKERS COMPENSATION AND MAJOR LEGISLATIVE CHANGES.....	8
LINKING THE SUBMITTED WORKS – THE DEVELOPMENT OF A HOLISTIC FRAMEWORK FOR WORKERS COMPENSATION.....	14
THE LOOSE-LEAF SERVICE.....	20
AN OVERVIEW OF THE SUBMITTED WORK IN THE CONTEXT OF ESTABLISHED WORKERS COMPENSATION THEORY: DEVELOPMENT OF THEORY AND PRACTICE 1967 – 1991.....	23
DESCRIPTION OF THE SUBMITTED WORKS.....	27
THE 1991 REPORT.....	27
THE 1999 REPORT.....	34
THE 2001 REPORT.....	39
CONTRIBUTION OF THE SUBMITTED WORKS TO COMPENSATION THEORY AND PRACTICE.....	46
CONTRIBUTION OF THE 1991 REPORT TO COMPENSATION THEORY AND PRACTICE.....	46
CONTRIBUTION OF THE 1999 REPORT TO COMPENSATION THEORY AND PRACTICE.....	47
CONTRIBUTION OF THE 2001 REPORT TO COMPENSATION THEORY AND PRACTICE.....	52
AFTERWORD.....	53
APPENDICES.....	55
APPENDIX ONE R GUTHRIE, ‘POWER ISSUES IN COMPENSATION CLAIMS’ (2001)12(4) AUSTRALASIAN DISPUTE RESOLUTION JOURNAL 225.....	56

APPENDIX TWO R GUTHRIE 'IMBALANCE OF POWER, GOOD FAITH AND INSURERS' CONDUCT IN WORKERS COMPENSATION CLAIMS'(2001) 18(2) JOURNAL OF OCCUPATIONAL HEALTH AND SAFETY AUSTRALIA AND NEW ZEALAND 125-136	57
APPENDIX THREE R GUTHRIE, 'THE DISMISSAL OF WORKERS COVERED BY RETURN TO WORK PROVISIONS UNDER WORKERS COMPENSATION LAW' (2002) 44 JOURNAL OF INDUSTRIAL RELATIONS 545-561 (IN PRESS) UNCORRECTED PROOFS.....	58
APPENDIX FOUR R GUTHRIE, 'COMPENSATION: PROBLEMS WITH THE CONCEPT OF DISABILITY AND THE USE OF AMERICAN MEDICAL ASSOCIATION GUIDES' (2001) 9 JOURNAL OF LAW AND MEDICINE 18	59
APPENDIX FIVE R GUTHRIE, 'SEX IN THE CITY: DECRIMINALISATION OF PROSTITUTION IN WESTERN AUSTRALIA?' (2001)7(2) JOURNAL OF CONTEMPORARY ISSUES IN BUSINESS AND GOVERNMENT 61.....	60

List of Cases

<i>Australasian Correctional Management Pty Ltd v Francis</i>	24
<i>Bradshaw v Education Department</i>	34
<i>Chalmers v Conaust WA Pty Ltd</i>	18
<i>Compton v Geraldton Regional Hospital</i>	17
<i>E v Cabassi and Federation Insurance Ltd</i>	17
<i>Mokta v Metro Meats International Ltd</i>	47
<i>Skywest Airlines Pty Ltd v Barnett</i>	17

List of Tables

TABLE 1: Subsequent Publication of 2001 Report Discussion Papers.....	6
TABLE 2: Major Reports in the Development of Workers Compensation	8
TABLE 3: Major Western Australian Legislative Changes in Compensation	11
TABLE 4: Major Amendments to the <i>Workers Compensation and Rehabilitation Act 1981 (WA)</i> Since 1982	27

Introduction

This exegesis traces research into a range of workers compensation issues over a period of approximately 10 years. The major themes of the research addressed relate to the development and integration of a range of apparently disparate features of the Western Australian compensation system into a holistic approach. In 1991 an investigation was undertaken into the dispute resolution system for compensation claims in Western Australia. The major theme of the resultant report, which is discussed below, is the management of compensation claims using a blend of conventional and alternative dispute resolution models. Notably the issue of legal representation of the participants was not in issue at the time. During the period from 1993 until the present, legal representation of the participants in the workers compensation system has been a key issue. This exegesis notes how legal representation of the participants has become a major consideration. It also observes the very significant ramifications that changes to dispute resolution may have on other aspects of the compensation system.

The effect of changes to dispute resolution impact on the viability of the return to work programs, work safety issues and the length of time a worker is in receipt of compensation (duration). The work of Kenny, especially in the late 1990's illustrates the importance of appropriate injury management systems. These themes were taken up in the *Report of the Review of the Western Australian Workers Compensation System 1999* discussed below. In particular, Kenny has highlighted the literature which incriminates legal representation of participants as a retardant to the rehabilitation process. Likewise Purse, whose commentary in this area has developed from the late 1990's onwards (which is referred to in Discussion Paper Two (see below) entitled *Return to Work Provisions and Unfair Dismissal in Compensation Legislation in Australia* and subsequent journal articles by the writer) has observed the importance of return to work provisions in Australian compensation systems. The influence of Kenny and Purse is taken up as a major theme of the *Report on the Implementation of the Labor Party Direction Statement In Relation To Workers Compensation 2001* also

discussed below. This report is the culmination of a decade of research in compensation matters. The foundation of the latter report is a detailed understanding of the Western Australian compensation provisions which is captured in a careful review of judicial interpretation of those provisions included in these papers.

As noted in the section below dealing with workers compensation theory, in the last two or three decades there has not been a concerted attempt to amalgamate the body of research into workers compensation into a coherent whole. The tendency has been for Governments to view workers compensation in a piecemeal fashion. The argument presented in this exegesis shows how the available research can be integrated into a more comprehensive or holistic approach

In order to develop the theme of a holistic approach to workers compensation this exegesis sets out an explanation of the academic contribution of the work which is represented in four major documents and supported by five peer-reviewed journal articles.² Those major documents consist of:

1. Workers Compensation Western Australia Butterworth's Loose-leaf Service 1998 and continuing (referred to as the Loose-leaf Service). This continuously updated service is used by legal practitioners and court officials as a legal reference.
2. Inquiry into Workers Compensation Dispute Resolution System in Western Australia 1991 by the writer, R Guthrie (referred to as the 1991 Report). This inquiry was conducted at the request of the Western Australian Labor Government.
3. Report of the Review of the Western Australian Workers Compensation System 1999 Chaired by Mr Des Pearson Auditor General for Western Australia (referred to as the 1999 Report). This inquiry was conducted at the request of the Western Australian Coalition Government. The writer was a co-author of the report. Details of the portions of the report authored by the writer are included in the supporting papers.

² See Table 1, one other journal article is in press and no proofs are available at the time of submission.

4. Report on the Implementation of the Labor Party Direction Statement In Relation To Workers Compensation 2001 by R Guthrie (referred to as the 2001 Report). This inquiry was conducted by the writer at the request of the Western Australian Labor Government. The final report contains draft legislation and a series of discussion papers. The discussion papers have been published in amended form in refereed journals and are also submitted for assessment in this thesis.

The four discussion papers included in the 2001 Report are;

- i. Discussion Paper One is entitled *Negotiation and Power in Conciliation and Review of Compensation Claims*. It details the power imbalance in workers compensation dispute resolution caused primarily by the prohibition of legal representation at Conciliation. This discussion paper notes that whilst the 1993 amendments to the Act apparently reduced legal costs, this was not a true reflection of the costs to the system as only insurer legal costs are recorded under the current system. The discussion paper points to clear evidence of disadvantage to workers through the inability to be legally represented in complex compensation matters.³
- ii. Discussion Paper Two is entitled *Return to Work Provisions and Unfair Dismissal in Compensation Legislation in Australia*. It is a comprehensive survey of the return to work provisions in Australia. It highlights the advantages of the New South Wales and South Australian systems, and supports the recommendations made in Chapter 7 of the 2001 Report to create provisions which allow industrial tribunals to determine questions of unfair dismissal

³ This discussion paper emanates from research undertaken during the 1999 Report. A related theme was developed in the writer's LLM thesis and completely revised for the 2001 discussion papers. A short version of this discussion paper has been published in R Guthrie, 'Power issues in Compensation Claims' (2001) 12 (4) *Australasian Dispute Resolution Journal* 225. A longer revised version (almost the entire discussion paper with amendments made pursuant to referees comments) has been accepted for publication in *Law and Policy* (Journal of the Baldy Center for Law and Social Policy, State University of New York, Buffalo – Blackwell Publishers Ltd) and will be published in volume 24 of that journal in late 2002.

arising from the dismissal of workers in receipt of compensation payments.⁴

- iii. Discussion Paper Three is entitled *Recent Developments in Workers Compensation – Problems with the concept of Disability and use of AMA Guides*. This discussion paper surveys the recent developments in workers compensation highlighting the problems with the concepts of disability and the use of American Medical Association impairment tables in compensation claims.⁵ This discussion paper concludes that the overuse of the tables in Australia has often caused problems of interpretation of tables and resulted in tensions between the legal system and medical practitioners.
- iv. Discussion Paper Four is entitled *Compensation in the Sex Industry – Future Directions in Western Australia*. This discussion paper discusses the growing prospect of workers compensation claims within the sex industry.⁶ In Western Australia although prostitution is still illegal, recent cases show a trend towards compensation being payable for workers in the sex industry. This discussion paper notes the developments in other States, in particular New South Wales where active steps have been taken to review work safety for sex workers. Whilst the issue of compensation for sex workers was not specifically addressed in the Labor Party Direction Statement, the paper was included in the report on the basis that the Labor Government needed to be informed on impending trends which could have cost implications for the compensation system.

⁴ At the time of writing this paper is in press for publication in the *Journal of Industrial Relations*, volume 44 December 2002 545-561. It will be published under the title of 'The Dismissal of Workers covered by Return to Work Provisions under Workers Compensation Laws'.

⁵ This discussion paper has been published as R Guthrie, 'Compensation: Problems with the Concept of Disability and the use of American Medical Association Guides' (2001) 9 *Journal of Law and Medicine* 185.

⁶ This discussion paper has been published as R Guthrie, 'Sex in the City: Decriminalisation of Prostitution in Western Australian?' (2001) 7 (2) *Journal of Contemporary Issues in Business and Government* 61.

For ease of reference Table 1 below shows where the discussion papers contained in the 2001 Report have been published.

Table 1: Subsequent Publication of 2001 Report Discussion Papers

2001 Report Discussion Papers	Subsequent Journal Publication
<i>Negotiation and Power in Conciliation and Review of Compensation Claims</i>	A short version of this paper appears in R Guthrie, 'Power issues in Compensation Claims' (2001)12(4) <i>Australasian Dispute Resolution Journal</i> 225 and a longer version in R Guthrie, 'Negotiation, Power in Conciliation and Review of Compensation claims' (2002) 24 <i>Law and Policy</i> (in press). A specific case study of the power issues is presented in R Guthrie 'Imbalance of power, good faith and insurers' conduct in workers compensation claims'(2001) 18(2) <i>Journal of Occupational Health and Safety Australia and New Zealand</i> 125-136.
<i>Return to Work Provisions and Unfair Dismissal in Compensation Legislation in Australia</i>	R Guthrie, 'The Dismissal of Workers covered by Return to Work Provisions under Workers Compensation Law' (2002) 44 <i>Journal of Industrial Relations</i> 545-561 (in press)
<i>Recent Developments in Workers Compensation – Problems with the concept of Disability and use of AMA Guides</i>	R Guthrie, 'Compensation: Problems with the Concept of Disability and the use of American Medical Association Guides' (2001) 9 <i>Journal of Law and Medicine</i> 185.
<i>Compensation in the Sex Industry – Future Directions in Western Australia</i>	R Guthrie, 'Sex in the City: Decriminalisation of Prostitution in Western Australian?' (2001)7(2) <i>Journal of Contemporary Issues in Business and Government</i> 61.

This introduction includes a time-line set out in Table 2 to show the chronology of workers compensation inquiry and provide an overview to link the submitted works. The contribution of the works, when taken together, is that they demonstrate the development of a holistic framework for workers compensation. The balance of this exegesis will be divided into three parts. First, there will be a preliminary discussion of the major documents to show the links between the separate works, to place them in context and to show how they establish a comprehensive framework of current workers compensation practice and procedure. Second, the major documents will be described together with an explanation of how and why they were conceived. In each case, there will be an explanation of the contribution of the document to the writer's understanding of workers compensation matters. Third, the significance and implications of each document will be demonstrated by outlining the contribution to academic debate of each document and drawing implications for applied purposes and the likely future developments in workers compensation theory and practice.

The exegesis takes into account other significant work in workers compensation, notably Woodhouse and other commentators in related fields, such as Quinlan and Kenny, whose contribution is noted below. This exegesis illustrates how the body of work presented here can be integrated with the work of others into a holistic framework so as to allow a better understanding of how workers compensation operates in practice.

Chronology of Inquiries into Workers Compensation and Major Legislative Changes

In order to locate the context of the submitted work, a time-line is provided which documents major reports in the development of workers compensation since 1975. Chapter 13 of the 1991 Report, Chapter 9 of the 1999 Report and Chapter 1 of the 2001 Report contain detailed reviews of the documents listed below. The shaded sections indicate references to submitted works.

Table 2: Major Reports in the Development of Workers Compensation

Year & Title	Commentary
<p>1975</p> <p><i>The Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia (The Woodhouse Report).</i></p>	<p>This was a seminal work of a committee headed by Justice Woodhouse. The report was prepared for Federal Labor Government. It recommended the abolition of lump sum damages awarded as common law claims for personal injury and disease at work. It urged greater emphasis on rehabilitation and the payment of benefits on periodic basis.</p>
<p>1980</p> <p><i>Report of the Tripartite Committee on Rehabilitation and Compensation of Persons Injured at Work, South Australia. (The Byrne Report)</i></p>	<p>The Byrne Report was a wide-ranging review of the compensation system in South Australia which was strongly influenced by the Woodhouse proposals. In 1984 the recommendations to abolish common law claims were accepted by South Australian Government.</p>

Year & Title	Commentary
<p>1981</p> <p><i>Report of the Judicial Enquiry into the Workers Compensation Act of Western Australia. (The Dunn Report)</i></p>	<p>The Dunn Report focussed on the entitlements available under the existing Western Australian legislation. The Report did not attempt any radical changes to the system, but did recommend enlarging the scope of disabilities covered by the legislation. This report resulted in the <i>Workers Compensation and Assistance Act 1981 (WA)</i>. This Act was renamed the <i>Workers Compensation and Rehabilitation Act 1981(WA)</i> and introduced provisions to provide compensation for injury and diseases not previously compensable.</p>
<p>1983-4</p> <p><i>Report of the Committee of Enquiry into Victorian Worker's Compensation System (The Cooney Report)</i></p>	<p>The Cooney Report was a wide-ranging review of the Victorian system. It was the blueprint for the <i>Accident Compensation Act 1985 (Vic)</i>. That Act resulted in significant changes to dispute resolution processes, rehabilitation and entitlement provisions.</p>
<p>1984</p> <p><i>Report of the Board of Inquiry into the System of Worker's Compensation in the Northern Territory 1984 (The Doody Report)</i></p>	<p>The Doody Report was heavily influenced by the Byrne Report in South Australia and the Woodhouse Report. It resulted in the abolition of common law claims in the Northern Territory through the introduction of the <i>Work Health Act 1987 (NT)</i>.</p>
<p>1986</p> <p><i>NSW Workers Compensation Scheme Options for Reform – Green Paper.</i></p>	<p>This Green Paper put forward four options for reform of the New South Wales system. Promoted the abolition of common law claims and changes to dispute resolution. It influenced the introduction of the <i>Workers Compensation Act 1987 (NSW)</i>.</p>

Year & Title	Commentary
<p>1991</p> <p><i>Enquiry into the Workers Compensation Dispute Resolution System in Western Australia 1991 (The Guthrie Report)</i></p>	<p>This report examined the dispute resolution processes in Western Australia and surveyed dispute systems in other jurisdictions. It resulted in amendments in 1992 to the <i>Workers Compensation and Rehabilitation Act 1981 (WA)</i>.</p>
<p>1993</p> <p><i>Report into the Impact of Common Law Claims and Associated Costs (The Trenorden Report) and the Inquiry into Workers Compensation Dispute Resolution Western Australia (The Chapman Report)</i></p>	<p>The Trenorden Report and the Chapman Report were prepared as blueprints for the newly elected Coalition Government of Western Australia for the reform of the compensation system. They recommended significant changes to common law entitlements and dispute resolution. These changes were subject to criticism in 1999 in the Pearson Report (Chapter 9) and 2001 Report (2001 Report – Chapter 1)).</p>
<p>1999</p> <p><i>Report of the Review of the Western Australian Workers Compensation System (The Pearson Report) [co – authored by the writer]</i></p>	<p>This Report examined the effects of the legislation introduced in 1993 following the Trenorden and Chapman Reports. It concluded that 1993 reforms had been ineffective and increased costs. The Report recommended further changes to common law entitlements and dispute resolution and referred a range of other matters for further examination.</p>
<p>2000</p> <p><i>Review of Medical and Associated Medical Costs in Western Australia (The Knowles Report)</i></p>	<p>This Report reviewed the increasing medical costs problems and made a range of recommendations on these aspects.</p>

Year & Title	Commentary
2000	
<i>Review of Workers Compensation Insurance Arrangements in Western Australia (The Ansell Report)</i>	This Report reviewed the private insurance system in Western Australia. It recommended increased monitoring of insurers, and the introduction of insurance mutuals.
2001	
<i>The Report on the Implementation of the Labor Party Direction Statement in Relation to Workers Compensation.</i> ⁷ (The Guthrie Report 2001)	This Report was a wide ranging review of the Western Australian Workers Compensation system which recommends changes to dispute resolution, common law access, rehabilitation and injury management, insurance arrangements and accident prevention.

It is also useful to include a summary of the major legislative changes in Western Australia over the last 20 years. This period is crucial as it marks the commencement of the introduction of the current Act and tracks the most significant changes to the system since its inception in 1902.

Table 3: Major Western Australian Legislative Changes in Compensation

Year & Change	Government
1982 The commencement of the operations of the <i>Workers Compensation and Assistance Act 1981</i> (later renamed the <i>Workers Compensation and Rehabilitation Act 1981</i>).	Coalition Liberal and National Government
1986 Amendments were made to allow increase in medical benefits to workers.	Labor

⁷ Contains the four discussion papers referred to above and set out in Table 1.

Year & Change	Government
<p>1991</p> <p>Compensation claims procedures were revised, and vocational rehabilitation allowances introduced.</p>	<p>Labor</p>
<p>1992</p> <p>Following the 1991 report discussed above, workers were allowed to claim additional medical expenses, and dispute resolution procedures were amended, in addition medical panel referral were allowed.</p>	<p>Labor</p>
<p>1993</p> <p>This amending legislation involved major restructure of dispute resolution, with changes to the weekly payments regime and restrictions on common law access. In addition there were amendments to reduce the workers capacity to make stress claims, and introduction of return to work provisions. Also there was a significant reduction in the rights to legal representation.</p>	<p>Coalition</p>
<p>1995-1998</p> <p>During this time various amendments were debated, but not introduced. These related to further reductions in rights to commence common law claims. During this time various Parliamentary Standing Committees reviewed the Act. No major changes to the Act were made during this time.</p>	<p>Coalition</p>
<p>1999</p> <p>There were significant amendments to the Act to reduce common law access, using AMA tables. There was a reduction in weekly compensation benefits and the introduction of new procedures to process common law claims.</p>	<p>Coalition</p>

It can be observed from the above table that since 1982 the Coalition Governments have had a significant influence on the compensation system in Western Australia. Although the Labor Governments have made some changes to the system, these changes have been largely cosmetic. The changes to the Act made by the Coalition have been far reaching and during 1993 resulted in significant changes to practice and processes in the system. Since 1999, the compensation system has been more stable with declining costs of claims.

Linking the Submitted Works – The Development of a holistic Framework for Workers Compensation.

In the last ten years at least, there has been a growing recognition of the interconnectedness between the elements within the workers compensation system. Workers compensation systems, as with other payments systems, are subject to competing demands of various interest groups. In the case of workers compensation these groups include trade unions, employer groups, insurers, medical and rehabilitation professionals in the formulation and implementation of social and financial policy.⁸ Such powerful, highly organised groups influence the priorities of compensation systems.

Recent years have seen an increasing “medicalisation” of the compensation system due the increased reliance on standardised medical tables. These tables attempt to objectify a worker’s injury or disease and focus on the worker’s impairment. It is no co-incidence that employers and insurers support this move to medicalisation of workers compensation. The concept of impairment reduces a worker’s injury to the narrow assessment of loss of function of a body part and does not take into account the effect of the injury or disease on the worker. Therefore, the use of medical tables usually has the effect of reducing a worker’s entitlement to compensation, or reducing access to some other benefit. The use of medical assessment tables was promoted in the first instance by WorkCover⁹ administrators and supported by the

⁸ C Arup. ‘WorkCare; Administrative Rationality, Legal Process and Political Reform’ (1990) 3 *Australian Journal of Labour Law* 159 at 159. Similar views were expressed in relation to the tensions involved in occupational health policy by 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 *Australian Journal of Labour Law* 33 at 67. Quinlan’s early work is also important, see for example M Quinlan, ‘The profits of death; workers health and Australian capitalism’ (1980) 8 *Journal of Australian Political Economy* 29, and M Quinlan, ‘Occupational illness, industrial conflict and state regulation; establishing some linkages’ (1987) *Australian Industrial Relations Readings* 343. Note also a similar theme in D Kenny, ‘The relationship between workers’ compensation and occupational rehabilitation; an historical perspective’ (1994) 10(2) *Journal of Occupational Health and Safety* 157.

⁹ Each state has some kind of WorkCover authority. It is the department which is responsible for administration and enforcement of the provisions of compensation legislation.

medical profession in an attempt to reduce disputes on medical issues.¹⁰ The benefit to the medical profession was two-fold. First, the use of medical assessment tables allows recourse to standardised tests for impairment assessment with which the profession is familiar. Second, the impairment tables used in tandem with so called non-adversarial compensation dispute systems reduce the need for doctors to attend court to give evidence to justify their opinions. The discussion in Chapter 3 of the 2001 Report and its Discussion Paper Three, which relates to the use of American Medical Guides in workers compensation cases (The AMA paper) shows that, in fact, disputes on medical matters are often exacerbated by the use of medical assessment tables. Adopting medical assessment guides based on impairment is but one example of how compensation systems can be distorted or thrown off balance by the adoption of a concept convenient to a major interest group. It is not a holistic approach to dispute resolution or to the compensation system overall.

While there has been an attempt to balance these competing demands in the last decade, the recognition that the various elements of the system are intimately interrelated has not been so readily accepted. Throughout the 1990s, there has been a tendency by governments and compensation administrators to focus reform on particular aspects of the compensation system without consideration of the flow on effect to other elements of the system. This is particularly noticeable even after the 1999 Report, when the Western Australian Coalition Government conducted separate inquiries into medical costs and insurance arrangements with little appreciation of the links between these complex sub-systems of the compensation framework. As already noted, the increased use after 1999 of medical tables is also an indication of the lack of understanding of the interconnectedness of dispute resolution and compensation entitlements and the duration of claims.

A holistic approach to the compensation system recognises that savings or increases in costs made in one area of activity may have implications for

¹⁰ Similar trends can be observed in New South Wales, Victoria and Queensland (2001 Report: Discussion Paper 3).

another area. Firstly, there is a need to match the dispute resolution procedures with the form of compensation benefits and access to common law. Systems that provide for the payment of lump sum (as under the current system) require mechanisms to facilitate early settlement of claims. Conciliation is appropriate in such claims. Where the benefits are open-ended then arbitration may be required where no agreement is reached. On the one hand, failure to provide such mechanisms may put in peril the delicate balance between the length of time that a worker is in receipt or the “duration” of weekly payments and increasing costs to employers generated by extended payment of benefits. On the other hand, a compensation scheme that attempts to divert workers away from lump sum settlements (because of employer/insurer pressure to reduce these payments) towards rehabilitation may put in peril savings made in compensation payments by increasing rehabilitation costs. A number of commentators have alluded to the pressures and tensions in these areas of policy from a political and social perspective.¹¹ From the economic viewpoint, some Western Australian researchers into the 1993 reforms (which are discussed below) have noted the concept of *moral hazard* has some application to compensation claims.¹² Moral hazard in this context is the notion that workers compensation benefit provisions may encourage workers to behave opportunistically by filing claims when absence from work is unnecessary (fraud), or delay return to work by reporting injury symptoms despite medical recovery (malingering). This concept implies that a worker consciously chooses a particular course of action depending on financial benefit. If applied, without a comprehensive understanding of a compensation system, it would ignore the non-financial benefits of return to work, such as improved self-esteem and reductions in depression and absenteeism. Interestingly, these researchers found no evidence to support a change in behaviour by workers to capitalise on any benefit from the legislative changes that took place in 1993.¹³ This is not at all

¹¹ Note 8 above.

¹² D Morrison, F Ying, P Flatau and G Wood ‘The 1993 Legislative Reforms and Their Impact on Weekly Payments. Report for the Worker’s Compensation and Rehabilitation Commission’ March 1999.

¹³ Note 12 at xxi.

surprising given that the 1993 amendments actually reduced payments of weekly compensation after 4 weeks absence.

Compensation systems that focus on disputed entitlements and ignore the fact that 90% of all claims are not in dispute will also neglect the important area of injury management. Chapter 13 of the 1991 Report brought this latter aspect to prominence. In the 2001 Report, the recommendations made in Chapter 5, relating to Injury Management and Chapter 7, relating to *Insurance Matters*, attempt to link those issues to costs of the system and worker entitlements. The 2001 Report recommends a formal structure for the management of injury and disease as an integral part of the system, not as some ancillary feature. Further, Chapter 5 of the 2001 report makes mention of the need to go behind the compensation process and include some focus on accident prevention, an area neglected by all other Western Australian compensation inquiries. By focusing on injury management and prevention, the 2001 report taps into the few areas of common interest in the compensation system. That is, all participants express an interest in accident prevention and injury management, although the motivation and rationalisation for desiring reduced injury and disease and duration of claims may vary.

Bearing in mind the number of interest groups involved in the compensation system, the designers of dispute resolution systems also need to recognise the inherent power imbalance between worker, employer, and insurer, which is generally in favour of the latter. Where one party (usually a worker) is particularly disadvantaged by such a power imbalance, the 1993 to 1999 experience shows that they will tenaciously seek out and pursue rights in alternative avenues where they have a right to representation. As documented in Chapters 7 and 8 of the 1999 Report, between 1993 and 1999 the rate of common law claims gradually increased because many workers considered that they were disenfranchised by a compensation system that denied them legal representation for their claim. They sought instead to pursue negligence claims in the District Court. Savings were made in the

compensation system but lost in the common law system. Overall, employers who had supported the reduction in rights to representation on the basis that it would save in legal proceedings and costs, lost out because of the increases in cost in other areas, such as increased duration of claims caused by delays in dispute resolution caused by increased numbers of workers representing themselves,¹⁴ increased costs in defence of common law claims¹⁵ and increased rehabilitation costs.

A holistic approach to workers compensation provides incentives for both employers and workers to reduce the incidence of injury and disease and for the early return to work of those who sustained that injury or disease. Workers are provided with incentives to return to work by the provision of suitable employment and injury management.¹⁶ For employers, compliance with injury management and rehabilitation represent potential insurance premium savings.¹⁷

In the context of the writer's contribution to a holistic approach to compensation systems, the 1991 Report recognised the interconnectedness between dispute resolution and other elements of the compensation system. This Report contributes to the thinking on dispute resolution by noting, in Chapter 13, that whilst administrative systems have a contribution to make in compensation systems, any changes made to dispute resolution should be matched by changes to the forms of entitlements. Further, the 1999 Report documents the counter-intuitive effects of attempting to abolish and restrict workers rights, namely that this resulted in increased costs rather than savings. The 1999 Report is a signpost to the need to bring medical and

¹⁴ It is a notorious fact that "in person" representation causes delays in proceedings.

¹⁵ Note 12, Executive Summary.

¹⁶ D Kenny, 'Barriers to occupational rehabilitation; An exploratory study of long-term injured workers' (1995) 11(3) *Journal of Occupational Health and Safety* 249 notes the importance of employer and worker compliance with return to work strategies. Kenny was also involved extensively in reforming the NSW compensation system.

¹⁷ D Kenny, 'Employers' perspectives on the provision of suitable duties in occupational rehabilitation' (1999) 9(4) *Journal of Occupational Rehabilitation* 268 describes the difficulties for employers in providing suitable duties. Most employers recognised the benefits of return to work programs as a means of reducing costs.

insurance issues into focus when altering a worker's access to entitlements. Of course, simply focussing on a worker's entitlement to compensation and neglecting the employer's concern for increased costs ignores a key element in a holistic approach to the system. The 2001 Report attempts to integrate all of the key features of the system in a comprehensive, complementary approach incorporating the frequently neglected areas of injury management and prevention. The underlying thesis of the 2001 Report is that savings to the compensation system can only be made in the long run if fewer workers sustain injury or disease and those that do are returned to suitable work as effectively as possible.

The Loose-leaf Service

In addition to the reports outlined above, the writer has since 1998, been the author of the Butterworths Workers Compensation Western Australia Loose-leaf Service.¹⁸ This Loose-leaf Service provides annotations to the *Workers Compensation and Rehabilitation Act 1981* (WA). The service comprises the Act and, where appropriate, particular sections of the Act are annotated with commentary and references to decided cases. The Loose-leaf Service commentary includes discussion on all provisions relating to workers' rights and entitlements, together with commentary in relation to particular aspects of dispute resolution. In other words, the Loose-leaf Service is a practitioner's guide to the current law. It is also a comprehensive review of the judicial interpretation of the Act. The Service is updated tri-annually. Summaries of all the relevant decisions are provided in the Loose-leaf Service under the appropriate provisions. The Loose-leaf Service is also a source of reference for judicial officers and has been cited with approval in the Workers Compensation Magistrate Court. For instance, it was referred to in *Brambles Manford v Russell* (CM (WA) 4/98 15 July 1998) as supporting the appellant's submission on a question of statutory interpretation. In another case of *Skywest Airlines Pty Ltd v Barnett* (CM (WA) 60/00 20 October 2000), Magistrate Cockram of the Compensation Magistrates Court noted:

With reference to s25 and item 37 the appellant relies on a passage at p239 from *Workers Compensation Western Australia* authored by Mr Robert Guthrie in which the learned author states with reference to item 37.... In support of that view the learned author relied on authorities including *E v Cabassi and Federation Insurance Ltd* [1986] Volume 6 WCRWA 71 and *Compton v Geraldton Regional Hospital* [1983] volume 2 part 1 WCRWA 87... I therefore accept that the above decisions of the Board support the view expressed by Mr Guthrie.

In *Chalmers v Conaust WA Pty Ltd* (CM (WA) 31/01 8 August 2001), Magistrate Cockram said:

¹⁸ The forerunner to the Loose-leaf Service was a monograph written by the author in 1995.

In support of this submission, the applicant refers to the following point at [s18.1] at 1773 of Butterworth's Workers Compensation Western Australia at which the learned author [Mr Robert Guthrie] states....

The Loose-leaf Service links the decisions of the courts with the provisions of the Act. Cases and comments are noted under most sections of the Act. As new cases are decided, they are added and comment made on the developments in the law. Where decisions of the courts and tribunals indicate a trend for future developments the Loose-leaf Service comments on the likely trends.¹⁹ The latter element of the Loose-leaf Service assists the courts and practitioners in making submissions on untested areas of law. The above cases show how this use of the Loose-leaf Service is developing. The Loose-leaf Service is the only Western Australian annotated version of the *Workers Compensation and Rehabilitation Act*. Practitioners in the field frequently use it as it provides information on the latest court decisions.

The production of the Loose-leaf Service is the foundation stone of the research which has been done by the author on workers compensation matters. It is this research into legal decisions that has allowed the writer to be a commentator on the broader aspects of compensation systems as it has facilitated the ability to be able to assess the effectiveness of legislation. Reflections on decided cases appear in the footnotes of the 1991 Report on pages 33, 49, 51, 52, 87, 124, 136, 143 and 156 and in the body of the 1999 Report on pages 29 to 32 and again on page 115. In relation to the 2001 Report, the detailed discussion of the ineffectiveness of the AMA guides in Chapter 3 and in AMA Paper is based on the writer's knowledge of the case law surrounding this area. The material for the latter report is largely generated from the commentary that appears in the Loose-leaf Service under sections 24, 25, 93D and Section 145, as well as the cases discussed under Schedule 2 of the Act. In addition to the specific case references in the AMA Paper there are frequent references to cases throughout the balance of the 2001 report. Likewise the basis of the Discussion Paper Two (the Return to

¹⁹ For example the comments in relation to the operations of medical panels under section 145.

Work Paper) is the commentary contained under section 84AA of the Loose-leaf Service. In relation to Discussion Paper Four, (the Illegal Contract of Employment Paper) of the 2001 Report, the basis for the material contained therein is the commentary under section 84H of the Act.

*An Overview of the Submitted Work in the Context of Established
Workers Compensation Theory:
Development of Theory and Practice 1967 – 1991*

As noted in Chapter 7 of the 1999 Report, the starting point in Australian literature for workers compensation theory is probably the major Commonwealth study conducted in 1974-5 by Justice Woodhouse, which resulted in the seminal work *The Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (The Woodhouse Report).²⁰ The Woodhouse Report provided a comprehensive study of the Australian compensation systems. Justice Woodhouse and his committee focused attention on the delivery of compensation benefits, challenging the appropriateness and retention of the common law damages system as a means of paying compensation. The Report promoted the abolition of common law rights to damages and the centralisation of compensation, rehabilitation and insurance authorities. Woodhouse relied heavily on the work of Ison²¹ who referred to the common law system of damages as a *forensic lottery*. The concept of the forensic lottery is grounded in the notion that if monetary damages are recoverable based on proven negligence of the defendant, then the focus of litigation will be on proving fault. Fault-based litigation draws attention away from the effects of the injury on a worker because the initial hurdle for success is proof of negligence. Only relatively small numbers of claimants can prove negligence on behalf of the employer, so the vast bulk of claims would go uncompensated but for the statutory compensation system. The “lottery” occurs because those “fortunate” enough to be able to prove negligence have common law rights whilst those who cannot, fail to obtain damages.²² Ison’s work has had a significant effect on

²⁰ 1974 Australian Government Printing Service, Canberra.

²¹ T Ison, *The Forensic Lottery: A Critique of Tort Liability as a System of Personal Injury Compensation*, Staples Press 1967, and more generally; P Cane, *Accidents, Compensation and the Law*, Butterworths Sydney 5th Ed, 1993; H Luntz, *The Assessment of Damages for Personal Injuries*, Butterworths Sydney 3rd Ed, 1990.

²² This notion has recently been invoked in the context of compensation for the stolen generations of Aboriginal people, some of whom might be able to establish proof of abuse whilst others may not be able to satisfy the required tests. See R, Graycar

the compensation discourse because it threw doubt on the continued existence of hitherto sacred common law rights. These insightful reflections on the merits of the common law system have continued to be considerations in almost every inquiry into compensation systems in Australia. When the New South Wales system was reviewed in the late 1990's and again in 2001, Ison's influence was still present in relation to the issue of whether the common law was an appropriate vehicle for the payment of compensation for injury. The fickle nature of the common law system, and the priority that it gives to cause as opposed to the effect of an injury upon a worker, led Woodhouse to the view that a more reliable and consistent system should be implemented. His recommendation that the common law system of damages be abolished followed a similar recommendation that he had made to the New Zealand government in 1967.²³ Abolition of common law rights would establish a more predictable system of entitlements that would reduce fluctuations in claims and lend itself to government or centralised insurance systems.²⁴ Given that in the 1970s all States had privately insured compensation systems, these recommendations were regarded as radical.

The Woodhouse Report has been a significant influence on compensation system design and development; however, it is noteworthy that the Report did not address in any detail the question of dispute resolution of compensation claims, assuming (without any detailed discussion) that an administrative system would be appropriate for such claims.²⁵ The only other reference to dispute resolution in the Report was contained in a draft of

'Compensation for the Stolen Children: Political Judgements'. (1998) 4(3) *University of New South Wales Law Journal Forum* 24.

²³ Royal Commission of Inquiry, Report on Compensation for Personal Injury in New Zealand 1967 New Zealand Government Printers. Note that Ison's Forensic Lottery was also published in 1967 and was almost certainly an influence on this Report.

²⁴ Woodhouse observed that lawyers often moralise about the implications of fault on the basis that people should be free to pursue negligent defendants; also because they claim the negligence action has a beneficial effect upon conduct by acting as a deterrent. O Woodhouse, 'The Philosophy of Compensation' Paper for the New Directions Conference Adelaide 1984.

²⁵ This in itself was a radical suggestion, as in practice this would have reduced the input of legal representatives in a major way.

proposed legislation annexed to the report.²⁶ The draft legislation makes provision for the establishment of a tribunal to resolve disputes arising from the sickness/accident compensation system. The tribunal under the draft legislation was directed to hear and determine disputes “with as little formality and technicality and with as much expedition as the requirements of the Act and the proper consideration of the matters and questions before the Tribunal permit”.²⁷ However, the balance of the draft provisions make clear the Tribunal was to operate in a similar way to existing compensation tribunals. In fairness to Woodhouse, the development of alternative dispute resolution in Australia was a decade away.

Figure 1 below illustrates the complexity and interconnectedness of the compensation system in Western Australian. Figure 1 reproduces a similar diagram contained in the 1999 Report²⁸ but incorporates additional concepts that have been developed in the 2001 Report. It is implicit in this model that the main focus is on disputed claims. As noted in Chapter 7 of the 1999 Report, in fact only about 10% of claims actually go to some form of litigation. The bulk of claims are settled or admitted without any contest. However those 10% of claims, which are disputed, consume about 65% of the claim costs of the system. This means that particular focus is given to these claims. They are the most expensive because they often involve the most complex legal issues, the most severe disability or where injury management and/or rehabilitation have been the least successful.²⁹ The system is complex because it is a dual system, that is; it allows for the continuation of the common law system in conjunction with the statutory compensation system. As Woodhouse observed, where there is a need to investigate whether a party is negligent there will be an increase in costs and delays in determining claims.

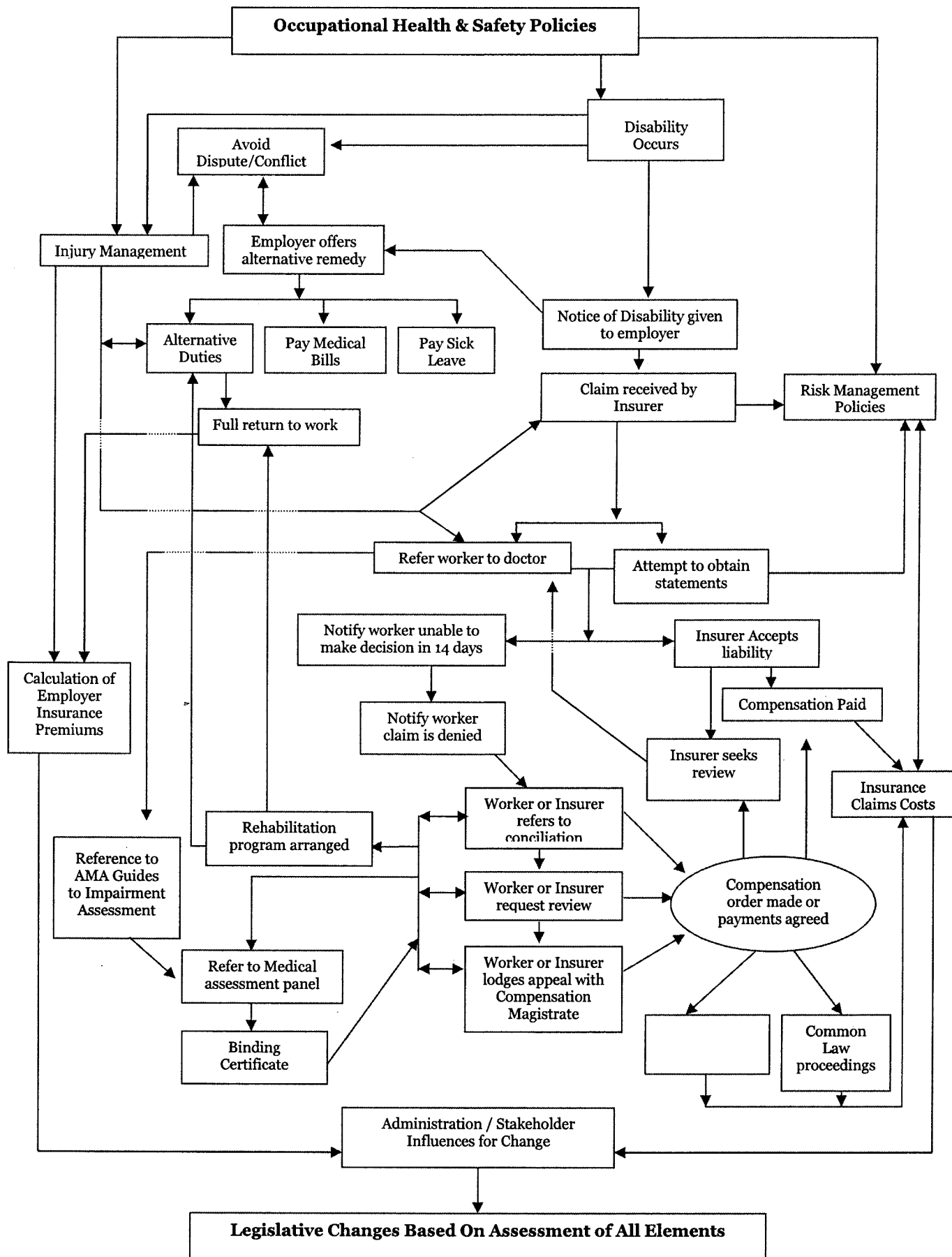
²⁶ Note 20 above at 261.

²⁷ Note 20 above, section 78 at 291.

²⁸ The author prepared this Figure for the 1999 Report.

²⁹ 1999 Report at 75-77.

Figure 1: Interconnectedness in Workers Compensation in Western Australia



Description of the Submitted Works

The 1991 Report

In 1991, then Minister for Productivity and Labour Relations commissioned the writer to prepare the 1991 Report. The purpose of the inquiry was to consider issues relating to delays in dispute resolutions in the Western Australian workers compensation system.³⁰ The Western Australian compensation system has been in existence since 1902.³¹ The first legislation in relation to workers compensation was the *Workers Compensation Act WA 1902*, which provided a rudimentary scheme of entitlements to a limited number of employees in the event that they sustained injury in the course of their employment. This exegesis is concerned primarily with the *Workers Compensation and Rehabilitation Act 1981(WA)*. Set out in Table 4 below is a summary of the major amendments made to that Act since 1982, when the Act commenced operation.

Table 4: Major Amendments to the *Workers Compensation and Rehabilitation Act 1981 (WA)* Since 1982

Year	Commentary
1982	Commencement of the operation of the <i>Workers Compensation and Rehabilitation Act 1981 (WA)</i> . This Act provides weekly payments, medical expenses and lump sum payments for permanent injuries. Rehabilitation expenses are paid for only in limited circumstances. The Act also allows for continuation of the common law scheme.
1986	The Act was amended to increase the amount payable for medical treatment.
1990	Introduction of provisions relating to rehabilitation, including payment of expenses.

³⁰ Referred to in the decision of Magistrate Hogan in *Australasian Correctional Management Pty Ltd v Francis* (CM (WA) 225/01 10 January 2002) at 14. The Report was tabled in Parliament in 1992. (Second Reading Speech, Legislative Assembly 5 November 1992 Hansard Western Australia, at 6313 – 6317).

³¹ *Workers Compensation Act (WA) 1902*

Year	Commentary
1992	Following the 1991 Report, additional expenses for medical treatment were allowed, together with changes to dispute resolution processes to speed up disputed claims.
1993	Following a change of government the Colation made major changes to the Act to establish the Conciliation and Review Directorate reduce access to common law entitlements and lump sums payable under the Act. Amendments were made to the definition of <i>disability</i> to reduce access for stress related conditions. In addition return to work provisions were inserted.
1999	Following the 1999 Report amendments were made to the Act to further reduce access to common law claims, using the AMA guides as a reference point for the determination of common law thresholds. Weekly payments capped at 1.5 average weekly earnings.

Whilst the Western Australian legislation relating to benefits was significantly amended over time, the means by which disputes arising out of that legislation had to be resolved did not alter significantly throughout a period of approximately ninety years prior to 1993. In general terms, dispute resolution in the workers compensation jurisdiction was resolved either by judicial means or via a tribunal.

The Workers Compensation Board was the tribunal that was empowered to resolve compensation disputes. The Board comprised three members, namely a judicial member and two lay or nominee members. The judicial member had the status of a District Court judge and was the Chairman of the Board. The Board would sit and determine disputes between employers, insurers and workers in relation to rights and entitlements under the *Workers Compensation and Rehabilitation Act 1981* (WA) (The Act). The Board had a long history, having been established in 1948 under predecessor legislation. Over time, the number of disputes in the compensation jurisdiction had increased and consequently the Act made provision for more

than one Workers Compensation Board. As at 1991, disputes were resolved by the Workers Compensation Board and a Supplementary Board, which also consisted of a judicial member and two lay or nominee members. Lay or nominee members were appointed by the Minister upon recommendation in the first instance by the Chamber of Commerce and Industry, who nominated a representative and in the second instance the Trades and Labour Council, who did likewise.

When disputes arose in relation to a compensation matter, a worker or an employer or insurer was entitled to take that matter to the Workers Compensation Board. The procedures of the Board were essentially adversary in the sense that the parties to proceedings were entitled to be legally represented and the practice and procedure of the Board, although in some respect informal, generally followed the procedure of most courts. That is, the Board did not take any part in the gathering of evidence, as this was left to the parties to present to the Board as part of their case. In addition, the process of examination and cross-examination of witnesses put evidence to the Board in the traditional way.

The Board would sit and determine matters after hearing the evidence provided by the parties. The judge alone would determine issues of law, whilst all three members would resolve questions of fact. A characteristic of workers compensation disputes is that the nature of cases before the Board is often complex. Frequently compensation disputes involve questions of medical evidence, factual issues and interpretation of the Act.

The purpose of the 1991 inquiry was to examine the practice and procedure of the Board with the view to recommending procedures that might prevent delays in compensation disputes. The 1991 inquiry contained a description of the various participants in the compensation dispute process, namely workers, employers, insurers, medical care providers, legal practitioners and the compensation bureaucracy, now known as WorkCover. In addition, Chapters 10 and 11 of the 1991 Report contain specific reference to the

composition of the Workers Compensation Board, its practice, procedures and workloads. In Chapter 10 of the report, it is noted that there were essentially two forms of disputes resolution, namely chambers applications and substantive applications. The Board in Chambers dealt with chambers applications after examining affidavit (evidence by sworn statement) and hearing submissions from the parties to proceedings. In general, chambers applications did not involve oral evidence and on most occasions, the Board was able to give extempore decisions at the time of hearing. Thus, the chambers applications were characterised by speedy resolution of disputes. A substantive application was commenced where a dispute could not be resolved in chambers. A substantive application generally involved more procedural steps and ultimately required the parties to present their case before the Board by admission of oral and documentary evidence. A substantive hearing might take place over a number of days, whereas a chambers application was invariably dealt with in less than an hour.

Chapter 3 of the 1991 Report provides an overview of the relationships of the participants in the compensation system in relation to the dispute resolution system as was mandated by the terms of reference which required a “review and report on the procedures and practices for the resolution of disputed claims in the workers compensation system”.³² The terms of reference of the inquiry did not extend to a full examination of the rights and entitlements of workers to workers compensation and common law damages payment. In other words, the inquiry was limited in its scope. This raises two issues. First, it was implicit that, at the time of the inquiry and apart from dispute resolution, the other elements of the compensation system were considered by government and most of the participants to be sound and not requiring any change. Second, from an examination of the terms of reference it is clear that there was no recognition of the interconnectedness of the various elements of the compensation system that would require an examination of the system as a whole.

³² The full terms of reference are at (x) in the 1991 Report.

The findings of the 1991 report were unremarkable, in the sense that it was self-evident that there had been a gradual decline in the rate of disposition of claims over the three years preceding 1991. The report found that the major reason for the decline in dispositions of cases related to the inability of the Board (specifically one judge) to deliver timely decisions. In many substantive applications, the complexity of the claims required much consideration and it was common for the Board to reserve its judgement on a case. The Report found that there were numerous examples of reserved decisions being delayed for over twelve months. It also found that the delay in writing a reserve decision had a number of effects. In many cases, the parties to those proceedings were held in limbo until the decision had been handed down. Where a worker was without payments at the time the case is heard, she/he may continue to be without those payments until the decision is delivered. The judge responsible for writing the decision was required to devote considerable time and effort to complete each decision. As more and more cases were reserved, the individual judicial officer was placed under increasing pressure. Consequently, a judge often chose not to sit and determine cases to allow time to write decisions. In effect, this meant that the Board, which comprised two tribunals in 1991, often had only one functional tribunal because one judge would be occupied in writing decisions.

The purpose of the 1991 Report was to provide the Minister with advice on how to resolve this problem. Judges of the Workers Compensation Board were appointed for life so that, save for misconduct, they could not be removed. This factor presented some difficulty as it meant that unless the Workers Compensation Board was abolished, there needed to be some means by which output of the Board could be increased. One solution was to appoint more judges to the Board. Another solution, which was recommended in Chapter 10 of the 1991 Report, was to reorganise the functions of the Board to allow for other members of the Board to perform judicial functions. As at 1991, in addition to the judicial and lay members of the Board, the Board also consisted of Registrars, who were empowered to sit and determine procedural matters before cases were referred to the Board for determination. The major recommendation of the 1991 Report was to

increase the power of those registrars to relieve the judicial members of some of their caseload.

The 1991 Report contributed to the body of compensation theory by examining the causes of delay specific to compensation cases. Until then there had been no detailed survey of the reasons for delay in compensation systems, although there was a developing volume of literature on the causes of delay in general civil litigation which is discussed in Chapter 1 of the 1991 Report. The 1991 Report put into context the concept of delay noting, "Delay is a vague term. It must be put into context and in this case the context is the litigation process ... Delay is not (necessarily) the equivalent to the passage of time".³³ Previous examination of compensation systems, noted and discussed in Chapter 13 of the 1991 Report, had not attempted to identify the causes of delay or its effects on the participants.

The 1991 Report was conservative in its recommendations and outlook. In Chapter 13 it did, however, discuss the issues relating to the adversarial system. The importance of that discussion is that other compensation systems had, during the late 1980s and early 1990s, moved to so-called non-adversarial systems. Those systems invariably attempted to reduce the formality of compensation disputes and empowered non-judicial officers to resolve disputes. The thrust of those developments was to attempt to provide an administrative dispute resolution process. As noted in Chapter 13 of the 1991 Report, such systems had been implemented in Victoria and South Australia at the time of the 1991 Report.³⁴ Given the benefit of a decade of examination of compensation systems it is possible to reflect on the weaknesses of the 1991 report as an example of "tinkering". As Woodhouse observed in relation to the work of the Byrne Committee (noted above) that:

³³ 1991 Report at 1.

³⁴ The WorkCare Appeals Board as provided for in the *Accident Compensation Act 1985* (Vic) and the Review Officer system under the *Workers Rehabilitation and Compensation Act 1984* (SA).

(It) avoided what is a perennial temptation for committees of inquiry: the temptation to tinker and compromise or go to half measures for imagined political reasons that ought properly be left to the politicians.³⁵

That said, it is significant that Western Australia, unlike other states, did not undergo a broad based review of the compensation system during the 1980s. Rather, a series of small-scale inquiries addressed isolated issues within the compensation system. For example as noted in Chapter 13 of the report, in the early 1980s there was an inquiry into the insurance arrangements for compensation claims, and in 1978 there had been an inquiry into the rights and entitlements of workers to compensation payments as noted in the foreword to the report.

³⁵ Note 24 above.

The 1999 Report

The 1991 inquiry report was released publicly in late 1991. During 1992 the 1991 Report was the impetus for legislative amendment to the Act. The Western Australian Labor Government adopted the bulk of the recommendations of the 1991 Report. In early 1993, there was a change in the Western Australian Government and by mid-1993 the newly elected Coalition Government had released radical proposals for change in the workers compensation system. Those proposals included significant changes to the dispute resolution system, which abolished the Workers Compensation Board and put in its place a so-called non-adversary structure. In addition, changes were to be made to the rights and entitlements of workers which aimed to reduce workers' capacity to bring common law negligence proceedings against an employer. Further, there were changes to compensation entitlements and the style of benefits to reduce and, in some cases, abolish the right of workers to obtain lump sum entitlements in place of the usual weekly benefits. In November 1993, after considerable opposition from a range of participants in the system, these proposals were implemented by significant amendments to section 93 and various clauses of the first schedule of the *Workers Compensation and Rehabilitation Act 1981* (WA). In particular, the Law Society of Western Australia opposed changes to the dispute resolution system which would prevent the parties to dispute being legally represented. In addition, there was opposition to proposals to implement a system of medical panels that would be empowered to resolve medical disputes in a manner which would be final and binding upon the dispute resolution body. The major opponents to these dispute changes claimed that workers in particular would be disadvantaged by the inability to obtain legal representation. Whilst all parties to compensation disputes would be denied legal representation at initial stages of the dispute, it was generally accepted that insurers would be advantaged in that they would be

more competent in representing their interests due to their continual exposure to the compensation system.³⁶

The impetus for the 1993 amendments was a perception that the costs of the compensation scheme had been steadily rising for the three years before 1993. In particular, there were concerns that an increased number of claims by workers alleging negligence against employers resulted in increased lump sum damages awards. The result of increased costs of a compensation system was that the approved insurers were required to raise insurance premiums and consequently the costs of insurance policies for employers had risen. The remedy for these sharp increases in costs proposed by the Coalition Government was the reduction in common law rights for workers and the reduction in the worker's capacity to obtain lump sum payments under the compensation system. The intention of the Coalition Government was that by reducing a worker's capacity to bring common law proceedings, costs would be saved due to the decline in cases commenced and damages awarded. Further, the marked reduction in the capacity of workers to obtain lump sum benefits under section 67 of the *Workers Compensation and Rehabilitation Act 1981* (WA) would require workers to continue to receive weekly benefits and give greater options for rehabilitation. It is worth observing that the 1993 amendments to the Act had a superficial resemblance to the Woodhouse proposals outlined in the previous section. It will be recalled that Woodhouse had advocated the abolition of common law claims and the introduction of administrative dispute resolution systems. However, Woodhouse also insisted that workers compensation benefits be paid as periodic payments on a pension basis, not as a lump sum as is the case with common law claims. The reduction of common law rights consequent upon the amendments to the *Workers Compensation and Rehabilitation Act 1981* (WA) was not an attempt to be consistent with Woodhouse's

³⁶ The ability of insurers to retard a workers' claim is discussed in R Guthrie 'Improper Conduct and Good Faith in Workers Compensation' (2001) 12 (2) *Insurance Law Journal* 141, where it is noted that even genuine claims can be delayed.

recommendations; rather it was a cost cutting measure.³⁷ In addition, the changes to dispute resolution were likewise introduced under the guise of efficiency but were clearly intended to reduce the worker's negotiation and bargaining power and thereby reduce payouts to workers.³⁸ Moreover, there was no suggestion in the 1993 amendments that private insurers should vacate the system as was suggested by Woodhouse. One view is that, on the one hand, private insurers were being given a free reign to operate in the system under the auspices of a market economy, whilst on the other hand and at the same time, they were deriving advantage from a structured benefit regime.

The changes implemented in late 1993 operated throughout the period 1993 to 1999. In 1999, it was clear that the changes made in 1993 had not had any significant effect and in fact, there was evidence that since 1993, there had been a gradual increase in the costs of the compensation system. The then Minister for Labour Relations, Hon Cheryl Edwardes, appointed Mr Desmond Pearson, Auditor-General, in his capacity as Chairman of Workers Compensation Premium Rates Committee, to conduct a review assisted by a reference group comprising Mr Brendan McCarthy (Director of Operations of the Chamber of Commerce and Industry of WA) and the writer. The report of the review of the Western Australian Workers Compensation System 1999 was the product of the deliberations of Mr Pearson, Mr McCarthy and the writer.³⁹ The 1999 Report recommended that there be further changes to the Act in an attempt to achieve stability in the costs structures.

³⁷ Minister for Labour Relations Hon G Kierath. (Second Reading Speech, Legislative Assembly 20 October 1993 Hansard Western Australia, at 5212)

³⁸ R Guthrie, 'Forms of Power in Disputes under the *Workers Compensation and Rehabilitation Act 1981* (WA)' (1996) Working Paper Series Curtin University of Technology Perth. R Guthrie, 'Resolving Workers Compensation Disputes in Western Australian without Lawyers' (1997) 3(2) *Journal of Contemporary Issues in Business & Government* 57.

³⁹ The 1999 Report was subsequently referred to as an aid to statutory interpretation in *Bradshaw v Education Department* (CM (WA) 23/00 31 May 2000) at 23 per Magistrate Packington.

Whilst the report purported to be a review of the Western Australian workers compensation system, the focus of the review was essentially limited in relation to common law negligence costs, and related issues. A number of issues were touched on but not addressed in detail in the report. In particular, brief reference was made in Chapter 9 of the need to review insurance arrangements for employers to allow for procedures for discounted compensation premiums.⁴⁰ Later in the same Chapter, attention was drawn to the increasing costs of medical care.⁴¹ Earlier in Chapter 9, some detailed reference was made to the need to make changes to the dispute resolution system.⁴² In relation to the latter discussion, although particular attention was paid to dispute resolution, recommendations 15 to 19 of the report in relation to the necessary changes were general and clearly required more specific attention.⁴³ An important recommendation in the 1999 Report was that legal representation be allowed for all participants in the system. This recommendation was based on a WorkCover review of dispute resolution conducted in 1995 and a series of surveys carried out by the writer in 1995-6 referred to in the 1999 Report at page 128. The outcome of those reviews and surveys was that workers in particular felt considerably disadvantaged by not having legal representation in compensation claims. The 1999 report (at pages 138-147) recognised the potential for an increase in legal costs to occur with such a change, but also noted the research which indicated that under the existing system, where disputes were resolved with considerable delays, the return to work process could be retarded by using rehabilitation as a bargaining chip in negotiations. As such the recommendation to re-introduce legal representation appeared counter-intuitive to some commentators and was not taken up by Government. It should be observed that whilst the recommendation appeared controversial at the time, other jurisdictions in Australia with the exception of Victoria, allowed legal representation. The recommendation to allow for legal representation illustrates a friction between the issue of legal/human rights and cost

⁴⁰ 1999 Report at 150.

⁴¹ Note 40 at 155.

⁴² Note 40 at 99-145.

⁴³ Note 40 Executive Summary at xiv-xv.

imperatives and injury management success. This apparent conflict in demands were addressed in the 2001 Report discussed below. The consequences of the 1999 Report were that further significant changes to the procedures required for workers to commence common law claims were made. These changes included the creation of thresholds and restrictions on such claims based on medical impairment which are discussed in detail below. The references made to insurance arrangements and medical costs resulted in two further reviews, which took place in 2000.

The 2001 Report

The effects of the amendments made consequent upon the 1999 Report were immediate and significant. There was a significant reduction in a number of common law claims made and a reduction in most costs associated with the compensation system. Because of the cost reductions after 1999, workers compensation insurance premiums also declined.

In 2001, the Labor Party was elected, having released before the election a Direction Statement in relation to workers compensation. That Direction Statement was very broad in its terms and attempted to set out the legislative direction which a Labor Government would take on election. The direction statement referred to the following issues:

1. The balance between common law entitlements and statutory benefits.
2. The access to common law entitlements.
3. Dispute resolutions procedures.
4. Improvements and statutory benefits.
5. Insurance arrangements.
6. Rehabilitation and injury management.
7. Legal representation.
8. The role of medical panels in compensation dispute.

The Minister for Consumer and Employment Protection appointed the writer to report on the processes required to implement the Labor Party directions statement. The 240 page 2001 Report contains 4 discussion papers and 7 appendices including selected draft legislation.⁴⁴ This report addresses the issues outlined in the direction statement and in doing so attempts a comprehensive coverage of all elements of the workers compensation system. The 2001 Report contains 117 recommendations dealing with all elements of the compensation system. As in the 1999 Report, particular attention is paid

⁴⁴ The 2001 Report can be viewed at the WorkCover WA website at: www.workcover.wa.gov.au/pubs/default.asp

in Chapter 3 to the relationship between workers compensation entitlements and the right to proceed with common law actions against the employer. In Chapter 4, the 2001 Report addresses in detail issues relating to dispute resolution, building on the recommendations made in the 1999 Report and recommending the reintroduction of legal representation in dispute resolution subject to strict controls on legal costs and delays in proceedings.⁴⁵ These strict controls on costs and delays were an acknowledgement of the tension between the competing demands for the right to legal representation in order to properly present a case and the potential for lengthy disputes to retard return to work procedures. Chapter 4 of the 2001 Report proposes the establishment of the Workers Compensation Commission in place of the existing dispute system of the Conciliation and Review Directorate. The proposals for a new dispute resolution system outlined in the 2001 Report combined the less formal procedures of the Workers Compensation Board with the best practices of Conciliation and Review Directorate. Unlike the 1999 Report, Chapters 5 and 7, respectively of the 2001 of the Report address the issues relating to medical costs and insurance arrangements.

As noted above, the body of the 2001 Report consists of nine Chapters covering the main recommendations of the report. Chapters 10 and 11 outline briefly some extra recommendations. In addition to the body of the report there are annexures including the actuarial report commissioned by the writer to cost the proposals in the report. Annexure 7 includes drafts of various legislative provisions prepared by the writer in an attempt to resolve some non-contentious issues early in the public discussion phase of the report. Significantly, those draft provisions draw heavily on other state compensation systems. For example, the provisions of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) have been used as a model for injury management in Western Australia. No previous Western Australian workers compensation report has contained a draft of

⁴⁵ Tabled in Western Australian Parliament by the Minister for Employment Protection Hon J Kobelke. (Statement to the Legislative Assembly 18 September 2001 Hansard Western Australia, at 3840).

legislative proposals.⁴⁶ Finally, as discussed above, the 2001 report attaches four discussion papers which flesh out some of the information in the body of the report. All of the discussion papers have now been accepted for publication in various refereed journals.

Chapter 1 of the 2001 Report contains a review of all inquiries into compensation matters completed in Western Australia between the period 1991 and 2001. This Chapter serves as a useful review of literature relating to compensation systems over the preceding decade. It was observed in that Chapter that, notwithstanding the considerable number of inquiries completed significant numbers of recommendations made in those inquiries have been neglected or not pursued. In particular, the 2001 Report notes the consistent observations in relation to the necessity to create links between the need for accident prevention, premium rate reduction, safety and return to work issues. Woodhouse had made similar observations in 1974-5. The 2001 Report proposes a holistic approach to compensation matters. It attempts to integrate the issues of dispute resolution with compensation payments and rehabilitation concerns. In addition, unlike previous Western Australian inquiries, the 2001 Report attempts to link the deterrent effects of increased insurance premiums with employer accident prevention performance. Chapter 1 of the 2001 Report should be read in conjunction with the discussion papers and subsequent publications as representing a significant review of the compensation literature. The work of leading commentators such as Purse, Kenny and Lippel is noted therein. In particular of Purse and Kenny have contributed to the debate on the importance of robust injury management and rehabilitation systems. Lippel has contributed to outlining the complexity of stress claims in the compensation arena, a matter taken up in Chapter 6 of the 2001 Report.

⁴⁶ Interestingly, the draft proposals have already been the subject of study in recent conference papers. For example P, A Paroczai 'Profiling Accredited Training to Assist Employers to Develop Workplace Injury Management Systems' *WorkSafe and Beyond 2002*, Hyatt Regency Perth 26-27 March 2002 Unpublished Conference Papers and H Neesham, 'Evaluating Legislative Changes and Performance in Workers Compensation within the States' and 'Assessing the Implications of the WA Scheme Review on Rehabilitation' *Workers Compensation 2002 National Summit* Sydney.

The 1999 Report identifies the significant cost drivers of the system to be, among other things, rehabilitation costs and the extended duration claims. Extended duration claims occur when workers are unable to return to work because of their injury. There is clearly a connection between successful rehabilitation and reduction of the duration of claims. There has not in the past, however, been any relationship between a successful return to work of a worker and incentives in the insurance premium structure. The 2001 Report proposes that the employer be entitled to a statutory insurance discount where the employer is able to show satisfactory return to work rates, substantial compliance with occupational health and safety legislation, stable accident and lost time rates and compliance with injury management programmes. Where this is established, a scheme of discount is to be put in place. In addition, there are links between the employer's injury management performance and section 84AA of the Act, which requires the employer to make a reasonable attempt to return the disabled workers to work within twelve months of injury or disease. Section 84AA does not, however, provide any mechanism by which a worker can enforce a right to return to work. The proposals in the 2001 Report suggest an amendment to section 84AA to give the worker the right to reinstatement if the employer has dismissed the worker within twelve months. Further, the recommendations propose that in the event of a worker being dismissed, the employer is required to give the worker 28-days' notice of termination of employment. These provisions, borrowed from New South Wales and South Australia, are linked to the insurance incentive previously discussed. If the employer maintains adequate return to work rates, then insurance discounts are available.⁴⁷

⁴⁷ These recommendations also assist with the overall scheme of injury management. See also D Kenny, *Occupational Rehabilitation in New South Wales: A Report to the WorkCover Authority in New South Wales on the Practice of Occupational Rehabilitation in the Newcastle, Hunter and Upper Hunter regions* (1995) New South Wales Government Printer. Some of the studies conducted by Kenny are referred to in the third discussion paper to the 2001 Report, *Return to Work Provisions and Unfair Dismissal in Compensation Legislation in Australia*.

Further, in Chapter 7 which deals with insurance matters, the 2001 Report proposes incentives for employers who engage workers who have suffered disability with a previous employer. These schemes, known as Second Injury Schemes, provide protection for new employers against claims arising from a recurrence of injury or disease suffered with a previous employer. In addition, they provide for wage and other subsidies to allow for the start-up costs of employment of a disabled worker. These systems are interlinked to the proposals in relation to injury management.

The 2001 Report recommends that there be a statutory scheme in relation to injury management. Injury management requires the cooperation of employers, workers and medical practitioners in the management of a worker's disability. The 2001 Report also recommends that all large employers be required to put in place an injury management policy and that insurers and insurance brokers assist small employers in the development of policies. The compliance by an employer with an injury management policy is, as noted above, a factor that is to be taken into account in allowing an employer an insurance discount.

The effect of the recommendations made in Chapter 5, relating to injury management, and Chapter 7, relating to insurance matters, is that the 2001 Report attempts to link the issues of accident prevention with insurance premium rates. In turn, these matters are linked to the issues relating to access to common law detailed in Chapter 3. Further, the Return to Work paper of the 2001 Report sets out in detail the need to review the return to work provisions operating in Western Australian which are inadequate. The system proposed by the 1999 Report required workers to elect whether to proceed with a common law claim. If the worker elected to proceed, then compensation payments cease. In addition to the requirement to elect, the worker needed to establish an assessment of 16% disability of the body as a whole. A medical practitioner using disability assessment guides made this assessment. As outlined in detail in the AMA Discussion Paper Three serious difficulties have arisen with the use of the medical guides for assessment and,

consequently, there have been grave difficulties with the dispute resolution procedures required to resolve disputes relating to medical assessment.

As noted Chapter 3 of the 2001 Report recommends a new system of common law thresholds based on weekly earnings loss rather than the assessment of impairment. That is, a worker would only be entitled to proceed with common law claim where she/he has shown a particular level of loss of earnings. Loss of earnings is related to the duration of a claim. Where a worker is able to return to work quickly, then the loss of earnings is minimised and the potential for common law claims is decreased. Therefore, the thresholds proposed in Chapter 3 of the 2001 Report link the compliance with injury management and return to work with the worker's access to common law. It follows that an employer who is able to achieve successful injury management rehabilitation and return to work rates is also likely to reduce exposure to common law claims and thereby obtain insurance premium reductions.

The dispute resolution procedures proposed in the 2001 Report (Chapter 4), emphasised the need for early resolution of claims. This is achieved by the creation of Review Officers with power to resolve disputes by dealing with them in an informal and summary manner. All parties would be entitled to be legally represented and all cases would be subject to forms of conciliation. The structure of legal costs is linked to the various stages of dispute resolution rather than to any hourly payment. There is therefore an incentive for legal practitioners to resolve disputes quickly. The inadequacies of the 1993 to 1999 dispute processes, previously chronicled in Chapter 9 of the 1999 Report, are revisited and more strongly articulated in Discussion Paper One. The speedy resolution of disputes similarly has a beneficial effect on the duration of claims because early settlement of claims is linked to short duration of claims. Specific recommendations have been made in relation to the use of medical evidence and medical panels that are designed to reduce the use of medico-legal experts. The 1999 Report showed a link between duration of claims and increase in medical costs and, further, showed a link

between increased medical costs and disputes in relation to medical issues. The 2001 Report attempts to draw these threads together by creating incentives for better performance which, in turn, will reduce the duration of claims and reduce compensation costs.

*Contribution of the Submitted Works to
Compensation Theory and Practice*

**Contribution of the 1991 Report to
Compensation Theory and Practice**

Notwithstanding the limitations of the 1991 inquiry, it was observed that the management of the dispute resolutions system had a critical effect on the other elements of the compensation system. That is to say, if the dispute resolutions system did not function efficiently, it may affect the operation of other aspects of the system. For example, if there were delays in compensation payments, workers might seek other means by which to obtain payments. Alternatively, if an insurer or employer was unable to review or terminate a worker's compensation payment because of delays in the dispute resolutions system, it might make offers of settlement to the worker outside of the compensation system. In short, one of the significant contributions made by 1991 Report to the body of compensation theory is that it showed that the isolated examination of one particular element or feature of a compensation system may be ineffective, and that there is a need to recognise the interconnectedness of all of the features of a compensation system. Unlike the Woodhouse Report, the terms of reference of the 1991 report did not facilitate a full examination of the merits of the common law and compensation benefits systems. However, Chapter 13 the 1991 Report did note that, given that common law entitlements were to continue, the appropriate form of dispute resolution system for determining those entitlements was the so-called adversary system, provided it retained pre-trial conferences and conciliation as part of the dispute process.

Contribution of the 1999 Report to Compensation Theory and Practice

In the context of the Woodhouse Report, the recommendations made in the 1999 Report in relation to the insurers to increase monitoring of their operations represent an initiative to place greater controls on private insurers. Whilst not going so far as to recommend the abandonment of private insurers in favour of a centralised sole insurer, the “Review of Workers’ Compensation Insurance Arrangements in Western Australia”⁴⁸, which was an offshoot of the 1999 Report, did promote the increased use of self-insurers and, more importantly mutual or collective self-insurance schemes. Mutual insurance schemes allow employers to collect and manage levies to underwrite their own claims costs, without direct insurance cover. This model has important repercussions for other aspects of the compensation system, in particular rehabilitation and injury management, which will be discussed below.

The 1999 Report made a significant contribution to the body of compensation literature insofar as it attempted to explore the effect of altering the mechanisms by which workers can proceed with common law claims. The report illustrated that unless those mechanisms are robust, it is likely that any initial savings achieved through the contraction of common law access will be lost by the expansion of those gateways by judicial interpretation. The report detailed the ineffective nature of the amendments made in 1993 and drew attention to the dissonance between compensation entitlements and the form of dispute resolution in 1993. In particular, the 1993 amendments to the Act purported to reduce the adversarial nature of compensation disputes. Those amendments introduced procedures for informal conciliation and review, together with the reduction of the right to legal representation during these processes. The model for such changes appeared to be the Victorian WorkCover system, which had been in operation for only a year at the time of the Western Australian changes. What was evident by 1999 was that parties

⁴⁸ 2000 (‘the Ansell Report’) Chaired by Mr Campbell Ansell.

to proceedings not only continued to have a strong need for legal representation, but they managed to achieve this by a range of substitutions and subterfuges. For example, as the 1999 report noted in Chapter 9, the insurers would use lawyers before and after any conciliation of claims, in many cases more often than prior to 1993.⁴⁹ Law firms drafted opinions which were often quoted at length by insurers during proceedings which were intended to be non-adversarial. Workers obtained representation through law firms from law clerks and legal executives, and likewise had written advice on claims before any proceedings. Review hearings continued to evidence an adversarial approach to claims, with workers often subject to cross-examination and interrogation as before. The benefit structure remained similar to pre-1993 provisions. In other words, the 1993 changes merely altered the terminology of disputation, but not the substance or style. As a result, in many cases those insurers who had made efforts to train their claims officers found they had an advantage over unrepresented workers. Represented workers found they were put to extra time and expense because their lawyers would have to send clerks to the proceedings who might not be competent to handle the claim and, all in all, the rate of disputed claims continued to rise. Overall, the 1999 report chronicled the power imbalance which eventuated through the prohibition of legal representation in the compensation jurisdiction. The experience during the period 1993 to 1999 had made clear that the reduced access to legal representation in the compensation jurisdiction had not resulted in a non-adversarial dispute resolution process, but had rather aggravated the power imbalances in the compensation system.⁵⁰

An additional matter, which was highlighted in the 1999 Report, was the relationship between the duration of claims, rehabilitation and the ability of workers to obtain lump sum entitlements. The prohibition on redemption of weekly payments for workers since 1993 had had a counter-intuitive effect; because workers were unable to finalise their claims within the compensation

⁴⁹ Note 48, at 111.

⁵⁰ This aspect is discussed at length in the 1999 Report at 99-145 and also at note 2.

system, they had chosen to proceed with common law claims (which they might otherwise not have done) in an effort to exit the compensation system. The result, which was noted in Chapter 8 of the 1999 Report, was that instead of modest settlements for lump sum payments (redemptions) under the workers compensation system, there was increased pressure in the common law stream of cases and consequently an increased number of claims which, not surprisingly, resulted in increased damages awards.⁵¹ In other words, the experience between 1993 and 1999 made clear what had been touched on only briefly in 1991: *that the compensation system is a complex and interrelated system whereby alterations to one element of the structure will have consequent effects on other elements of the system.* The 1993 to 1999 experience showed that attempts to reduce costs by closing, or attempting to close, one avenue of claims may counter-intuitively place pressure on another avenue of claims, and thereby increasing costs overall. In addition, the attempt to alter the dispute resolution culture by legislative directive, from an adversarial system to a so-called non-adversarial system, failed because the underlying nature of disputes remained the same. The 1999 Report highlights the fact that the legal requirements for entitlements to compensation remained the same after 1993 so that the issues in disputes continued to be identical. Attempting to implement a non-adversarial system without putting in place measures which would increase the areas of common interest simply led to a change in the personnel who were involved in disputes, rather than leading to a change in the culture of dispute resolution. Notably, discussion in Chapter 9 of the 1999 Report in relation to dispute resolution was revisited in 2001; however, by 2001 the connections between benefits, dispute resolution and other key areas such as injury management and prevention were becoming clearer. These aspects would be taken up in the 2001 Report.

As the key term of reference for the 1999 Report related to reduction of costs, it was not surprising that the report recommended changes to the mechanisms for common law claims. Whilst noting the position taken in the

⁵¹ Note 40, as per the graph at 66.

Woodhouse Report, it was not suggested that common law claims be abolished. Twenty five years after the Woodhouse Report, the idealism of a universal compensation and social security system had been harshly affected by the cynicism of workers and trade unions who had, in most states, seen the gradual decline in common law rights without a commensurate return of benefits to the compensation systems. The prospect of the complete abolition of the common law system was too risky. Thus in Western Australia, as in New South Wales and Victoria, workers and unions clung to the remnants of the common law system. Given this background, the 1999 Report in Chapter 9 recommended new thresholds to the common law claims, namely a system requiring the worker to elect within 6 months whether to proceed with a negligence action. No monetary or medical impairment threshold was recommended, but if a worker elected to proceed with a common law claim, weekly compensation claims would cease. In addition, those workers would only be entitled to damages up to a limit of \$250,000. A worker who had suffered a 30% impairment would not be required to elect and could proceed with a common law claim unencumbered. These mechanisms were designed to restrict common law claims in both volume and amount.⁵²

The Western Australian Coalition Government accepted the bulk of the 26 recommendations of the 1999 Report but made some significant changes to the common law thresholds described below. Legislation to implement the 1999 Report (with amendments to the common law thresholds) was passed in November 1999 after several torrid parliamentary debates.⁵³ Of importance was the requirement that not only would workers with less than 30% impairment have to elect to proceed with a common law claim, they also needed to show an impairment level of not less than 16% of the body as a whole. This made common law claims for workers with less than 30% extremely difficult. More importantly, it converted the system of compensation assessment from a disability-based process to an impairment-

⁵² Note 38, recommendations at 86-96.

⁵³ The writer publicly distanced himself from the Governments legislation because it differed from the recommendations of the 1999 Report in relation to the additional 16% threshold requirement.

based process.⁵⁴ The former assessment process requires disputes to be resolved, having regard for the effects of an injury or disease on a worker and taking into account the worker's education, training, age and skills. The impairment model relies on medical assessments and medical assessment panels to assess the loss of use of a particular limb or sense because of an injury or disease. The effect of the additional threshold caused a fundamental shift in the Western Australian compensation system, increasing reliance on medical practitioners and panels, thereby affecting the manner of dispute resolution. As was chronicled in the 2001 Report, the changes to threshold led to massive increases in the costs of dispute resolution and to expressions of concern by Supreme Court Judges⁵⁵ who found they were dealing with more compensation disputes than ever before.⁵⁶

⁵⁴ This aspect is discussed at length in the third discussion paper in note 42 and appears in a published form in R Guthrie, 'Compensation: Problems with the Concept of Disability and the use of American Medical Association Guides' (2001) 9 *Journal of Law and Medicine* 185. An early draft of the discussion paper was referred to with approval in the District Court of Western Australia by Jackson DCJ in *Mokta v Metro Meats International Ltd* CIV 16/2000 27th June 2001.

⁵⁵ These concerns are mostly evidenced in cases where the Supreme Court has held that the medical panels have failed to give proper reasons for their certificates, which in turn has led the Supreme Court to set aside the panel's certificates and refer the matter for re-hearing. Such matters do not actually address the substance or the merits of the claim, but rather the form of the certification. In effect, the Court is involved in overseeing how the certificate has been written which is a rather extravagant use of the Court's time. These cases are noted in the commentary under section 93D in the Loose-leaf Service.

⁵⁶ The plethora of cases dealing with challenges to the jurisdiction of the medical panels and the Director for Conciliation and Review is dealt with in the Loose-leaf Service under the commentary for sections 93D and 145.

Contribution of the 2001 Report to Compensation Theory and Practice

The 2001 Report is, at the time of writing, subject to public comment and will in due course be the foundation for a comprehensive restructure of the compensation system in Western Australia.⁵⁷ This is likely to take place in a number of stages. The first stage will include changes to the dispute procedures and the common law thresholds. These are the changes which will most affect the costs of the system. They are the most politically sensitive areas because any changes to these elements will affect the rate at which benefits are paid and the quantum of payments. The second stage will, no doubt, include changes to the insurance structures allowing for discounted premiums which in turn are connected to the proposals in relation to injury management, second injury schemes and return to work provisions. These proposals represent significant shifts in the philosophy of the system which has hitherto been focussed on the issues of compensation for injury and disease with little reference to prevention and management of disability. This second raft of amendments gives effect to the central theme of the 2001 Report which relates to the interconnectedness of these elements. It is anticipated that legislation will be considered in the latter half of 2002.

⁵⁷ As at October 2002 the Labor Governments Position Paper appears on the Minister for Consumer and Employment Protection website at http://www.ministers.wa.gov.au/Feature_stories/Kobelke_WorkersCompensationReform.pdf . At page 1 of the Position Paper it is noted that "The reforms implement the majority of the key recommendations of the Guthrie Report".

Afterword

In 2001 momentous events had significant impact on the insurance industry. One of the heaviest costs for insurers arising out of the events of September 11 2001 was the cost of workers compensation claims. Most of those killed on that day were in the course of their employment. In Australia these events have increased re-insurance costs. Added to this is the recent collapse of HIH Insurances. HIH was a major workers compensation insurer in Australia and its exit from the market has directly affected compensation claims in Western Australia. The Western Australian Labor Government was forced to levy an extra premium on employers to account for claims against employers who had coverage with HIH.

All these factors have led to a recent re-examination of the concept of compensation and a re-appraisal of the common law damages system. Further, public liability insurance costs have risen in response to increased claims and higher awards for persons injured in non-work related situations where they are able to show that there was some negligence by a public body or association. It is likely that severe restrictions will be placed on the ability of claimants to pursue such common law claims. It is noteworthy that the present Federal Ministers for Employment and Workplace Relations and Small Business and Tourism have both averted to the need to consider national compensation schemes in order to reduce compensation and personal injury claims.⁵⁸

It is significant that the reference to the need to establish a national scheme or a national framework is made in the context of the desire to reduce costs to employers and associations affected by apparently rising claims, rather than as Woodhouse proposed, because of the need to abolish the forensic lottery of

⁵⁸ Both Ministers have referred to this subject in the press and in Parliament, see for example, Minister for Employment and Workplace Relations Hon A Abbott MP 'Government To Consider Workers' Compensation Reform' Media Release 24 July 2002. www.dewr.gov.au/ministersAndMediaCentre/mediacentre/printable.asp?show=2403

injury claims. The 2001 Report maintained that limitations on common law claims were necessary but did not go so far as to recommend their abolition, being mindful of the propensity of government not to replace what has been taken away.⁵⁹

The aim of this exegesis has been to describe a number of works published by the writer which demonstrate the development of a theme in workers compensation study. The exegesis serves to show the connections between the presented works and to synthesise them with the work of others to present a coherent holistic framework for use at a community level. In that sense, this collection of work presents a demonstration of theory in practice rather than theory which is abstract and removed from application of the concepts in practice. The overall theme of this exegesis has demonstrated how a wide range of issues need to be considered in workers compensation legislation. Developments during the years from 1991 to 2001 have shown that an exclusive focus on any particular area of a compensation system is likely to result in what some commentators call the “balloon effect,” where squeezing one area, say weekly payments, results in a bulge in another area, such as common law claims. Likewise a focus solely on injury management without considering the legal right of parties so as to exclude legal representation may lead to a resentful worker who does not respond to even the best injury management and rehabilitation processes. At the time of writing the 2001 Report has progressed to actuarial costing in preparation for implementation. A draft Bill is expected in the latter part of 2002. As with the 1991 and 1999 reports the bulk of the recommendations have been accepted by the Government of the day with the outcome being a change to the legislation.

⁵⁹ Some would say the 2001 Report does not go far enough in that it did not recommend the abolition of common law claims for work accidents. On the other hand as was observed in the Introduction, any changes to compensation laws are met by competing demands from highly organised and political powerful groups.

Note: For copyright reasons Appendices 1-5 and additional material, which contain the following articles, have not been reproduced.

(Co-ordinator, ADT Project (Bibliographic Services), Curtin University of Technology, 9/07/03)

Appendix One:

Guthrie, R. (2001). *Power issues in compensation claims*. Australasian Dispute Resolution Journal, 12(4):225-239

Appendix Two:

Guthrie, R. (2001). *Imbalance of power, good faith and insurers' conduct in workers compensation claims*. Journal of Occupational Health and Safety Australia and New Zealand, 18(2):125-136

Appendix Three:

Guthrie, R. (2002). *The dismissal of workers covered by return to work provisions under workers compensation law*. Journal of Industrial Relations, 44:545-561

Appendix Four:

Guthrie, R. (2001). *Compensation: problems with the concept of disability and the use of American Medical Association guides*. Journal of Law and Medicine, 9(2):185-199

Appendix Five:

Guthrie, R. (2001). *Sex in the city: decriminalisation of prostitution in Western Australia?* Journal of Contemporary Issue in Business and Government, 7(2): 61-70

Additional material:

Guthrie, R. (1991). *Enquiry into the workers' compensation dispute resolution system in Western Australia 1991, vols 1 and 2*.

Pearson, D.D.R., McCarthy, B. & Guthrie, R. (1999). *Report of the review of the Western Australian workers' compensation system to the Minister for Labour Relations, 30th June 1999*

Guthrie, R. (2001). *Report on the implementation of the Labor Party direction statement in relation to workers' compensation, 31 July 2001*