

September 1996

Forms of Power in Disputes Under the Workers Compensation and Rehabilitation Act 1981 (WA)

By

Robert Guthrie
Senior Lecturer
School of Business Law
Curtin University of Technology



ISSN: 1321-7828
ISBN: 1 86342 559 4

FORMS OF POWER IN DISPUTES UNDER THE WORKERS COMPENSATION AND REHABILITATION ACT 1981 (WA)

Abstract

This paper considers some of the results of the 1995 WorkCover Review of Dispute Resolution, which examined the operations of the dispute resolution system established by amendments in 1993 to the *Workers Compensation and Rehabilitation Act 1981(WA)*. The current system which has been in operation since March 1994, is characterised by its so called "non adversary" mode of operation. Features of the current system, include, a limited right to legal representation, restricted costs sanctions, conciliation of disputes and informal procedures. The WorkCover Review found, among other things, that there was a perception among a sizeable number of workers, that they felt disadvantaged by a restriction on the right to legal representation. This paper incorporates the work of Mayer and Wade who consider forms and sources of power in mediation and negotiation. The work of Galanter is also considered where reference is made to frequent users of the system. The findings of the WorkCover Review are considered in the context of the power relationships in the workers compensation system. The paper concludes that the changes made to the dispute resolution system may aggravate inherent power imbalances, and notes the caution of some of the above writers, that conciliation of disputes in such circumstances may not be appropriate where legal representation is not allowed.

of the Directorate will contact the parties to discuss the parties availability for conciliation. Sometimes the Conciliation Officer may contact either party by telephone, to see whether the matter can be settled without a meeting or to see whether some preliminary issue can be resolved.²

If a conciliation meeting is convened, neither party is entitled to be legally represented except in exceptional circumstances (see section 84Q of the Act). The Conciliation Officer does not "hear" the matter, nor take evidence. The parties are not put on oath. Witnesses are not necessarily required. The intention is to attempt to resolve the matter on an informal basis. Agreement is said to be the key to the process. The Conciliation Officer has, however, limited powers to "impose a solution" on the parties, by making various orders. These powers are discussed in more detail below. Conciliation is intended to be "non-adversarial".

The requirement that the proceeding be "non adversarial" has its origins in the Chapman report.³ The phrase "non adversarial" has no statutory basis and was not defined in the Chapman report. In Western Australia it seems to be a euphemism for resolution of disputes without lawyers. The same terminological transformation which occurred under the *Accident Compensation Act 1992 (Vic)* was, however, accompanied by a change in the dispute resolution procedure, which resulted in significant reduction in employer input. The Board established under that Act had investigatory powers, putting itself in the shoes of the original decision maker. This process effectively removed an adversary by giving the employer no automatic entitlement to appear. In this sense it was non-adversary. The Western Australian system is, by definition, adversary, because both parties (and the insurer) have a right to appear and take issue with the position presented by the other.⁴ Conciliation is however, mandated or compulsory, so that all claims, whatever the complexity and

² This is sometimes a sensitive issue. Legal Practitioners in this jurisdiction (who have discussed these issues with the writer) are concerned that the Conciliation Officers who are using the phone as a forum for gathering information, or for dispute resolution, may not impart all of the information gathered to the parties and by failing to do so, may breach the rules of natural justice.

³ Inquiry into Workers' Compensation Dispute Resolution System R, J. Chapman 30 July 1993

⁴ See Gardner, J. (1993) The Victorian WorkCare Appeals Board - An Investigatory Model Torts Law Journal 1(2) July p157

FORMS OF POWER IN DISPUTES UNDER THE WORKERS COMPENSATION AND REHABILITATION ACT 1981 (WA)

1. INTRODUCTION

1.1 The dispute resolution process under the Workers Compensation and Rehabilitation Act 1981 (WA).

Effective from March 1994 the *Workers Compensation and Rehabilitation Act 1981 (WA)* (the Act) requires that the resolution of workers compensation disputes in Western Australia be administered by the WorkCover Conciliation and Review Directorate (The Directorate). The Directorate, apart from its purely administrative functions, is a two tiered dispute resolution body, consisting in the first instance of Conciliation Officers, and in the second instance Review Officers.¹ A third but separate tier deals with appeals from decisions of the Review Officer - the Compensation Magistrate.

1.2 Conciliation Officers

Conciliation Officers are required to act in a manner which is fair, economical, informal and cheap (see section 84P of the Act) and generally without regard for legal technicalities. Procedurally, once a dispute has been notified to the Directorate (by the applicant completing the required application Form 1) the Conciliation Officer is required to act on the matter within 14 days. Experience shows, that due to the volume of work (around 3000 - 4000 applications for conciliation per annum) and the relatively small number of Conciliation Officers, it is not always possible to convene a conciliation meeting within 14 days. Often the support staff

¹ A matter of some significance, is the fact that Work Cover, to some extent wears two hats. In one capacity as the Workers Compensation and Rehabilitation Commission (the Commission) it is the administrator and enforcer of the Act. By reason of the establishment of the General Fund (s106), out of which claims are paid to workers employed by uninsured employers, the Commission is a party to proceedings involving uninsured employers (s174). It has a right to recover payments made out of the General Fund. It is a party to those proceedings. In another capacity, as the Directorate it is the employer of the Conciliation and Review Officers who resolve disputes.

whatever the limitations on the powers of the Conciliation Officer, must proceed to a conciliation of some sort.

1.3 Review Officers - Procedure and Evidence

Review Officers are not limited in their power to make orders for payments under the Act. In addition to the powers conferred upon the Conciliation Officers, the Review Officers have more formal procedural powers. Review Officers are able, for example, to administer an oath or affirmation (see section 84ZB of the Act). Review Officers can hear evidence and can refer matters to a Medical Panel. Although the Review Officer is required to proceed in a manner that is informal, there is no doubt that they are bound to act according to natural justice. With the requirement that natural justice be applied, comes the necessity to have some knowledge of the rules of evidence. This is so because the incorrect application of some evidentiary rules may lead to a denial of natural justice.⁵ Legal representation is permitted only where the parties all agree, or where there is an issue of law to be determined. These constraints tend to make the review process more formal than conciliation.

1.4 Denial of legal representation, costs, and power imbalance

A number of considerations bear upon the issue of the "unrepresented parties". There is no doubt that the provision prohibiting legal representatives, was enacted with an eye to reducing legal costs and reducing delays.⁶ The fact that neither side is entitled to be legally represented at conciliation may have the appearance of balance and fairness. The "appearance" of balance and fairness, however ignores the inherent imbalance of power in workers compensation matters.⁷ These power issues relate to economic, informational and educational power.⁸

⁵ See generally Forbes J,R,S. (1990) Disciplinary Tribunals Law book Company

⁶ Pollard, J. (1993) Kierath accuses law firms. Sunday Times August 14, 10

⁷ See generally Scutt ,JA. (1988)The Privatisation of Justice Women's Studies International Forum (11)5 p 501, who discusses the consequences of the use of conciliation in other jurisdictions, suggesting a masking effect to power inequality.

⁸ Power is referred to in various forms. Acland refers to Physical, Economic, Informational, Emotional and Educational power. Mayer lists ten categories of power which are referred to below in more detail below. See Acland A.F. A sudden

This paper focuses on the consequences of the prohibition of legal representation at conciliation, and the implication it has on the balance of power. It also looks at the consequence of the limitations on legal representation at review. The powers, (or lack thereof) of the Conciliation and Review Officers to make orders for costs are also considered in the context of the power sources. In considering these matters this paper explores the ten sources of power discussed by Mayer and more recently Wade.⁹ In addition the paper considers the work of Galanter, who explored the dynamics of dispute resolution between frequent users of the legal system and those who use the legal system infrequently.¹⁰

2. FORMS OF POWER UNDER THE ACT

Power inequality between the worker, employer, insurer and those who are required to resolve disputes under the Act are matters of considerable importance, given the rhetoric that surrounded the amendments to the Act in 1993.¹¹ Power has been described as "actual or perceived ability of one person to exert influence upon another person's behaviour or thoughts."¹² The inequality of power according to Wade, "is repeated as nauseam as reason for alleging the ethical unsuitability of certain types of negotiations or meditations."¹³ Wade notes that power imbalances are more complex than first meets the eye, and are always present.

outbreak of common sense. Managing Conflict through Mediation. Hutchinson Business Books p86

- 9 Mayer, B.(1987) The Dynamics of Power in Mediation and Negotiation Mediation Quarterly 16 Summer 75-86. See also Wade, J.H.(1994) Forms of Power in Family Mediation Australian Journal of Family Law p40-57
- 10 Galanter, M. (1974) Why the "haves" come out ahead: Speculations on the limits of legal change. Law & Society 9(2)95-160. Galanter uses the phrase "one-shotters" to denote those claimants who have only occasional recourse to the courts. He refers to those who have many occasions to utilise the courts as "repeat players."
- 11 The Minister for Labour Relations (WA) in his second reading speech introducing the Workers Compensation and Rehabilitation Amendment Bill 1993 said "the proposed Conciliation and Review system will be more accessible to the average worker as it is not a judicial system bound by legal form and technicality"
- 12 Wade, J.H.(1994) Forms of Power in Family Mediation Australian Journal of Family Law p41. A similar definition is given by Weber cited in Acland, A.F. A sudden outbreak of common sense. Managing Conflict through Mediation. Hutchinson Business Books p85
- 13 Id Wade, J.H. p40.

Mayer identified ten sources/forms of power in negotiation and mediation.¹⁴ Conciliation differs from mediation in a number of respects. A conciliator has power to make orders to resolve a matter. A solution can be imposed on the parties if they cannot reach agreement. Conciliation Officers have power which originates from the Act, a mediator has power derived from the parties. The Conciliation Officer is limited by the parameters of the Act, a mediator is not so restricted. Mediation is intended to be a final and lasting agreement, conciliation is subject to review. Despite these differences, the focus in conciliation under the Act is intended to be on agreement and negotiation. Mayer's analysis is a useful tool for analysing the various forms of power under the Act, so far as the conciliation process embraces negotiation as a medium of dispute resolution. What follows will be an application of Mayer's categories of power to workers compensation disputes under the Act.

2.1 Formal power

This is the power that derives from a position in a structure. Wade notes that there is a common belief that a judge or former judge will have particular control over both process and substantive result, by reason of their status.¹⁵ In the workers compensation context, the structure provides for three tiers of power of a formal kind. The Conciliation level, the Review level and the appeal level before a Compensation Magistrate. All levels confer certain decision making prerogatives.

Workers

Workers probably have no formal power, although there are certain rights conferred under the Act allowing for the workers appearance in the dispute resolution process, and rights to certain information which are discussed below.

¹⁴ Mayer, B and Wade, J,H. above footnote 9

¹⁵ Id Wade, J,H. p45-6

Insurers/Employers

Insurers and employers do not have any formal power within the dispute resolution structure of the Act. However insurers (also self insured employers) and employers have decision making prerogatives, prior to conciliation, that may impute some formal power. Section 57 of the Act sets out the procedure for the processing and approval of claims. In general terms section 57 requires the insurer and/or the employer to advise the worker on the progress of the claim. A notice must be sent to the worker advising whether the claim has been denied or admitted or, whether more time is needed to assess the claim. The initial decision to admit or deny a claim rests with the insurer or employer under this section.

Conciliation and Review Officers

Conciliation and Review Officers have certain decision-making powers. Conciliation Officer powers are set out under section 84Y of the Act which limits the amount of weekly payments that can be ordered following conciliation. If the parties agree to settle at conciliation, a certificate of the agreement is made and kept on the Conciliation Officers' file. If the parties do not agree, the matter may be referred to a Review Officer, or if the Conciliation Officer considers it appropriate, orders can be made for up to 10 weeks weekly payments and approximately \$2000 in medical expenses.

The Conciliation Officers are limited by these parameters, so that any payments in addition to the above limits have to be sought from the Review Officer. The Conciliation Officers have powers under sections 60, 61, and 62 of the Act to review and vary payments of compensation upon the application of the worker or employer/insurer.

A Review Officer can make an order for ongoing weekly payments and has power to make orders to review payments generally. The Review Officer hears evidence and makes findings of fact and law. These findings are delivered (if the parties require it) in writing.

The Compensation Magistrate sits to hear appeals from the decisions of the Review Officer. Formal power in this setting is obvious and with proceedings reflecting the adversary process

2.2 Expert /information power

This power is derived from having expertise in a particular area and is usually related to the fact that one party has more information than the other.

Workers

Workers are often "one off" participants in this dispute resolution system, appearing at conciliation infrequently, and probably having no knowledge or interest in the dispute resolution system until injured.¹⁶ Few workers can lay claim to expertise in this area unless they have had multiple exposures to the system. This may occur where the claim involves some novel point or added complexity. In such cases additional conciliation meetings may be required. Expert power seldom rests with the worker. Workers have some access to information power through the use of section 84 K(4) of the Act, which allows workers to obtain "relevant documents" before an application is commenced. The term, relevant documents, includes a range of documents such as medical reports, claims forms and employment contracts. Unfortunately workers are seldom in a position to take advantage of this provision, simply because they are unaware of its existence.¹⁷ If the worker does not obtain access to relevant documents before proceedings commence, then some form of discovery or disclosure must be sought at conciliation. Again workers are less likely to know the procedures and less likely to know of the existence of such procedures for discovery.

¹⁶ Galanter, M. above footnote 10

¹⁷ This is the inescapable conclusion that can be drawn from the results of the 1995 Review of Dispute Resolution. Dispute Resolution Review Committee, Workers' Compensation and Rehabilitation Commission of Western Australia June 16, 1995 p22-24 where the results show that nearly half of the workers who attended conciliation considered they were disadvantaged because they did not have sufficient experience or knowledge of the system.

One less known avenue to information for workers is through the *Freedom of Information Act, 1992 (WA)*, which provides generally, that public authorities must disclose documents that relate to a decision made by them that affects (in this context) workers.¹⁸ The State Government Insurance Commission (SGIC), the largest insurer in the Western Australia, is subject to the legislation. Even if a non government employer is not covered by the *Freedom of Information Act 1992 (WA)* documents can be obtained via the SGIC if the employer holds a workers compensation policy with that insurer. The worker would, prima facie, be entitled to any documents used by the SGIC to make a decision on the claim, and this would include the documents submitted by the employer.

Insurers/Employer

An insurance claims officer usually has familiarity with the jurisdiction, they are generally "repeat players".¹⁹ They acquire expertise from constant contact with the system, they are major participants. They have access to expertise from legal practitioners who provide opinions prior to conciliation. As to the aspect of information, often the insurer has superior access to certain information, having access to employer records, medical reports and private investigator reports, often not available at critical time to the worker. Some information may however, be held exclusively by the worker, for example, details of the accident, the names of witnesses and the whereabouts of some documents.

Galanter has analysed the characteristics of repeat players, which can be summarised as follows;

- 1 They have done it before, and have advance intelligence. Outside of litigation the repeat player is able to dictate terms. For example the requirements of a contract of insurance, and the methods of claims handling.

¹⁸ See the definition of Agency in section 9 and the Glossary of the FOI Act, effectively including most government instrumentalities.

¹⁹ See Guthrie, R. Workers Compensation Conciliation and Review: A Survey of Insurer Attitudes In press Curtin Business Law School Working Paper Series June 1996. The results of this survey indicate that claims officers are likely to attend at conciliation at least monthly and often more frequently than this. In addition claims officers have constant exposure to the Act, being its first-line administrative decision makers. See also footnote 10.

- 2 They develop expertise and have access to specialists. This may include para professionals as well legal practitioners. Galanter notes for example the importance of insurance loss adjusters (investigators).
- 3 They have opportunities to develop "facultative informal relations" with institutional incumbents. In other words they are able to develop friendly relations with court officials. Galanter notes other research showing evidence that repeat players are able to obtain favourable court listings, so as to minimise out of office time.²⁰
- 4 In order to function properly repeat players need to maintain credibility as a combatant.
- 5 They can play the odds, so as to minimise loss and maximise gain. This means that may chose to suffer losses in the short term in order to make a gain in the future. In the workers compensation context, this means forcing cases to trial to decide important issues, even if the amount in dispute is small. For example cases involving small amounts of medical expenses, arising out of some form of treatment that is controversial. An insurer may push these matters to trial(review) in order to prevent overuse of this modality. The costs of the hearing may be out of proportion with the small amount claimed, in the particular instance, but future claims may be prevented by this challenge.
- 6 They are able, as a group, to lobby for change. In fact the Insurance Council of Australia has a representative on the Workers Compensation and Rehabilitation Commission. The Insurance Council also had a representative on the 1995 WorkCover Review of Dispute Resolution (WorkCover Review).²¹

²⁰ Galanter above footnote 10 p99

²¹ 1995 Review of Dispute Resolution. Dispute Resolution Review Committee, Workers' Compensation and Rehabilitation Commission of Western Australia June 16, 1995.

- 7 They have greater knowledge of expected outcomes and therefore would attempt to settle cases where they expect an unfavourable outcome. They are therefore able, to some extent, to select cases for adjudication. This may tend to skew the precedent cases, towards those favourable to the repeat player. Another dimension to this, is that, repeat players usually have greater resources with which to pursue litigation. In the workers compensation context, this may be reflected in the number of cases taken on appeal to the Compensation Magistrate. Galanter suggests that repeat players have superior opportunities to trigger promising cases, and to prevent less promising cases from proceeding.
- 8 They may be able to concentrate their resources on rule-changes (decisions) that are likely to make a tangible difference.
- 9 They have superior resources. Galanter reflected on the American position, noting that repeat players were larger, richer and more powerful than one off players.

In many respects Galanter's analysis relates to the question of expert/information power. Some of the above characteristics relate to other forms of power, which are discussed below.

Conciliation and Review Officers

A Conciliation and Review Officer should have a knowledge of law and procedure in the area.²² They are continually exposed to the operations of the system. The Conciliation and Review Officers have power to obtain information under the Act, and (as some legal practitioners have noted), the fact that if, this information is not passed on to the parties, may create information power imbalances.

In many cases a heavy onus is placed on the Conciliation Officer to ensure fairness in access to information. Despite the lack of formality of the proceedings, there is a legislative direction that the Conciliation Officer is

²² Significantly it is not a requirement under the Act that Conciliation and Review Officers be legally qualified.

to act fairly. The temptation for a Conciliation Officers to assist the parties on the basis of a perceived weakness in presentation, may, sometimes be irresistible. As a matter of logic, insurance claims officer must acquire a level of expertise in this area, given the strong possibility of regular attendances at the Directorate. If this is so, a Conciliation Officer would need to be vigilant to maintain fairness where there is an imbalance in expertise. The Chapman Report, upon which the current dispute resolution is based, failed to note the potential for natural justice to be breached where the Review Officers (and Conciliation Officers) attempted to redress an imbalance. The report suggests "Review Officers must protect the rights of any unrepresented party who, in the opinion of the Review Officer, is disadvantaged due to lack of representation or knowledge of the procedures involved."²³ This suggests that the Review and Conciliation Officers, following these principles, would be coming close to "stepping into the ring". The line between an advocate and a third-party neutral becomes blurred.

It seems generally accepted that there should be a free exchange of documents by the parties at conciliation. Given that the Conciliation Officer is not bound by the rules of evidence, it seems to be encouraged that even documents which are privileged are exchanged. Workers are less likely to understand the concept of privilege and are more likely to surrender documents which may be adverse to their interest.²⁴ Preliminary letters of advice from lawyers and trade unions may be delivered up, when they would normally be covered by the rules of privilege, and not revealed. At the same time, it seems that insurers have also made available investigators reports, either because the documents are not privileged, or because there is no appreciation of the fact that the documents may be privileged. Perhaps the insurers are prepared to discover the investigators reports out of a desire to comply with the spirit

²³ Inquiry into Workers' Compensation Dispute Resolution System R, J. Chapman 30 July 1993

²⁴ The writer has received instructions from a number of workers following conciliation, noting that documents not normally discovered have been provided to the employer/insurers.

of conciliation.²⁵ An appreciation of sophisticated rules, such as privilege, may escape even the Conciliation and Review Officers.²⁶ Perhaps the legislation intends that such rules should have no place in proceedings. If this is so, then the potential for workers to hand up sensitive material seems apparent. Insurers, as repeat players may not always be so willing. The proceedings before the Conciliation Officer are not recorded, but the Conciliation Officer does make a note of the proceedings. These notes and other documents on file can later be viewed by the parties. The writers' experience is that the Conciliation Officer's file, may contain documents, which would have been unlikely to have ever been placed on any court file, due mainly to a relaxation or lack of appreciation of the rules of evidence and privilege. Having a collection of such documents may be an advantage for the Conciliation Officer to get the broadest picture. It does seem consistent with the inquisitorial/investigatory model of dispute resolution.²⁷ The problem is that the Conciliation Officer may, unwittingly, be given documents by unrepresented parties which do not accurately reflect the situation. An order by a Conciliation Officer could be made, taking into account irrelevant considerations and material.

Wade notes that expertise multiplies information power.²⁸ Conversely lack of information diminishes expertise. A worker who lacks information generally lacks expertise. How is the worker to know what questions to ask, when to speak, when to be silent, how to answer the difficult question? How is a worker to know the significance of some questions? The casually asked question about what the worker has been doing since he had the accident may be a trap well laid.

2.3 Associated power

This is the power that is derived from having an association with some one with power.

²⁵ In the case of the State Government Insurance Commission, the *Freedom of Information Act 1992 (WA)* may require the in SGIC to deliver up all documents relevant to a decision, thus exposing the SGIC file to more extensive discovery.

²⁶ See above footnote 22.

²⁷ Gardner, J. above footnote 3

²⁸ Wade, J.H. above footnote 9 p 46

Workers

Workers may derive some associated power through their connection with Trade Unions, support groups and legal practitioners. Because of the lack of previous contact with the Conciliation and Review Officers it is unlikely that a worker has any associated power due to a connection with those charged to resolve disputes. At conciliation workers will generally only have access to Trade Unions and support groups, as legal practitioners, in most cases, will not be able to attend the conciliation

Insurers/employers

Insurers derive this power from an association with the employer. The employer may have power over a worker in a number of areas. Employers have power in relation to the normal employment relationship, that is to hire and fire. As well employers often hold information that affects a workers compensation claim. For example the employer may be in possession of details of wage rates, claims for periods off work through sickness, accident report books, pre-employment medical information and similar documents. In addition, power is obtained by insurers by their familiarity with Conciliation and Review Officers. This is a matter that seems to have been identified by some legal practitioners, who in a recent survey expressed concern that insurers were "too familiar" with the Conciliation and Review Officers.²⁹ It is a matter that Galanter has highlighted as characteristic of a repeat player.

2.4 Resource power

The control over valued resources. Mayer indicates that this power has positive and negative connotations. Resource power can include the ability to deny resources, or to force others to expend them, as well as the ability to be able to distribute resources.

Workers

Workers have little resource power compared to most employers and insurers. Given that the costs of dispute resolution rests with the parties,

²⁹ See Guthrie, R. (1996) Workers Compensation Conciliation and Review: A Survey of Legal Practitioner Attitudes In press Curtin Business Law School Working Paper Series June 1996.

(a change from the previous system, where a successful worker was entitled to party/party costs) the worker is likely to be put to some expense even if they have been successful. Small claims (say, for small amounts medical expenses, or for short periods of incapacity) are likely not to be proceeded with because of the lack of cost benefit.³⁰ The workers lack of resource power may be offset in some cases, simply by refusing to negotiate. This is particularly so where the insurer is seeking to reduce or terminate payments (see nuisance power below). In addition, Galanter notes the potential power of a one-off player to threaten to go "all out", that is to threaten to single-mindedly put all their energy into pursuing the claim.³¹ Insurers may not be able (due to workload) to put an equal amount of attention on a single claim. Workers are also more likely than insurers to make use of the media where an injustice is perceived.³²

Employers/insurers

In workers compensation matters, the insurers, self insurers and employers have control over the resources sought as compensation. The employer may also hold some power in return to work situations, for example, by withholding resources for rehabilitation purposes. The employer has power to delay (either through apathy or intentionally) approval of claims by submitting claims late, or restricting the flow of information to the insurer. The worker has no control over these resources prior to the claim being accepted, and even on acceptance, approval for continued spending is usually required from the insurers/employers.

30 A similar trend was noted in South Australia following the introduction of the *Workers Rehabilitation and Compensation Act 1986*. (SA) Wilson, D. (1992) *Winning Workers Can Be Losers* Law Society Bulletin 14(1) 12 noted that, with provisions that did not allow for recovery of costs by a worker, even in the event that the worker was successful, the worker could still be put to considerable expense, by having to pay legal fees. This seems contrary to the general thrust of the legislation, which is required to be economical.

31 Galanter above footnote 10 p99 in footnote 10 citing the work of Ross.

32 Pollard, J. (1995) Injured worker tests law. The West Australian August 7:14. This article highlights one case where a worker obtained media coverage for his claim. Insurers usually only obtain media coverage when premiums are an issue. For example Ruth, J and O'Malley, S. (1993) Business hit hard as insurance fees soar. The West Australian August 24 :34

Workers have a limited range of responses to these forms of power, usually having to commence proceedings for conciliation, simply to force some decision or movement by the insurer or employer. It is worth remembering that whilst section 57 of the Act requires the employer to forward any claim to its insurer within 3 days of receipt of the claim, there is no sanction that the worker can access, against the employer for not doing so. Likewise an insurer can comply with section 57 by simply indicating that it has not had time to make a decision. A worker has no choice but to commence proceedings if the matter is to be progressed. Conciliation and Review Officers cannot order interest on overdue compensation, that would prompt an insurer into speedier action. There is no cost sanction to prevent wasteful defence of claims. At best the worker can achieve an interim order for payments from the Conciliation Officer and then proceed (at further expense) to the review. These matters support Galanter's finding noted above, that repeat players, have more control on how and which matters proceed.

Most importantly, again as Galanter has noted, repeat players are richer. They can more easily afford the costs of dispute resolution than most workers. They are relatively indifferent to the progress of a claim, having, in most cases, little incentive to resolve it quickly.³³

2.5 Procedural power

The control over procedure by which decisions are made, separate from control over those decisions themselves.

Workers

A worker familiar with the conciliation procedure may be able to exert some control over this process. For example, the worker may insist that the insurer make out its "case" first, in an application to reduce or terminate payments. Generally as a first-time/one-off player the unrepresented worker has little control over procedure. Workers are generally unsure of procedure.³⁴ Wade notes that;

³³ Except perhaps, cases of reduction or termination of weekly payments, where often there is a level of pressure placed on the Directorate to proceed quickly.

³⁴ See footnote 17.

"Often attempts to control procedure are also attempts to ensure that the 'opposition' spends more time, money and inconvenience on a war of attrition. The opposition is well aware of the ploy, identifies it and refuses to co-operate."³⁵

The opposition in this context more closely resembles the insurer, who is more likely to recognise a ploy to slow proceedings down.

Employer/insurer

Insurers, who are familiar with procedure may have some procedural power in the sense that they will not be taken by surprise and will be aware of the style of proceedings.

Conciliation and Review Officers

Procedural power rests mainly with the Conciliation and Review Officers. Conciliation and Review Officers will have control over seating arrangements, parties present and not present, who will commence discussions, the use of lay witnesses (if any) the disclosure of information, the use of medical witnesses and medical panels, the dates of hearing, the timing of adjournments and finally, but significantly, the manner in which questioning is to proceed.

2.6 Sanction Power

This power relates to the ability to inflict harm or to interfere with a party's ability to realise his or her interests.

Workers

Workers have little sanction power. There is no provision in the Act to penalise the employer and insurer for slow decision making. No sanction exists for any wrongful decision, (an award of costs is generally not available). A worker who is 'matched' against an insured employer or self insurer cannot make any significant threats other than the withdrawal from conciliation, but this can be met by pushing the matter to review.

³⁵ Wade, J.H. above footnote 9 p48

On the other hand, a worker has some sanction power over an uninsured employer who is at risk of prosecution, and may have personal assets exposed by the claim.³⁶ Making a claim against the (uninsured) General Fund does alert the Commission to the employers default. The Commission may instruct its lawyers to prosecute the uninsured employer. Slowness in payment can be matched with the rights (power) given to a worker under section 174 of the Act to make a claim against the General Fund if an uninsured employer does not pay within 30 days of an order for payments. When such a claim is made, the Commission has a right to recover money paid from the General Fund from the assets of the employer. An "all-out" approach by a worker in these circumstances, does give the worker access to some kind of sanction against the uninsured employer.

Employer/insurers

Insurers can inflict harm by terminating payments of compensation, failing to pay medical and rehabilitation expenses. These actions may be legal and in accord with practice. By contrast the worker is not in a position to exercise a similar power.

Conciliation and Review Officers

Very few sanctions are available to the dispute resolvers. A Conciliation Officer has limited sanction powers. These powers relate to the power to be able to order weekly payments for up to 10 weeks. Review Officers can make ongoing orders, but cannot penalise tardy behaviour with an order for costs or payment of interest. The power to order an adjournment in circumstances where one party is in a hurry, can however, operate as a sanction if that party is breaking procedural rules.

2.7 Nuisance power

The ability to cause discomfort to a party, falling short of the ability to apply direct sanctions.

³⁶ There is a statutory obligation to insure under section 160 of the Act

Workers

The worker may exercise nuisance power by seeking alternative medical opinion at the insurers expense, issuing applications at every turn and retarding the recovery processes. Nuisance power for a worker is the ability to be able to slow proceedings down, seek adjournments, get additional information from employers and insurers. Most potently it is the ability to be able to resist an application under sections 60, 61, and 62 at conciliation, relying on the fact that the Conciliation Officer may be reluctant to exercise the power to vary payments, without fully hearing the workers "case".

More recently, due to the reduced ability to redeem/commute weekly payments, so as to finalise a claim, workers may exercise nuisance power in not accepting settlement proposals. An insurer who wishes to "get a worker off their books" is hampered by the legislation and this can be aggravated by a worker who "holds out". The restricted redemption rights can work against the worker who would like to end a claim by payment of a lump sum, where insurers refuse to offer to settle.³⁷ In the past such "nuisance" claims may have been finalised quickly.

Amendments to the Act in 1993 increased the benefits to workers under Schedule Two of the Act, which provides for payments of lump sums if a permanent disability is suffered. The range of disabilities covered now extends to back, neck and pelvis injuries, not previous covered by Schedule Two. Insurers may refuse to redeem a claim, but offer the less financially attractive option of a Schedule Two payment. Somewhat ironically, the Government's efforts to reduce "nuisance" claims, may have actually aggravated the situation, by making it harder to finalise claims for small ongoing weekly payments for partial incapacity.³⁸ The Government seems to have failed to recognise that "nuisance" claims have both positive and negative qualities. The ability to be able finalise such claims swiftly, rather than not at all, seems to have been overlooked when the redemption provisions were amended.

³⁷ See section 67 of the Act as amended in 1993, where the worker has to be aged 55 years before redemption is allowed or otherwise show a special need for redemption. Criteria specified for special need is notoriously hard to satisfy.

³⁸ Lang, M.(1993) Kierath spreads the pain West Australian August 9

Astor and Chinkin in their discussion of Mayer's ten sources of power note that;

" The parties in a mediation may be able to draw on several of these sources of power. There may be an enormous imbalance in the level of power each holds, but it is unlikely that any party will be totally powerless. The power to refuse to co-operate in mediation at least may be present.....What appears to be intransigence may, in fact be desperation."³⁹

Employer/insurers

The insurer can likewise exercise the right to have the worker reviewed by almost any number of medical practitioners, and can make subtle use of insurance investigators to indicate an insurer presence.⁴⁰ These powers should not be under emphasised. They have been subject to much debate and public protest. The doctor shopping issue has been a matter of concern ever since workers compensation legislation was enacted. The use of insurance investigators is legal in Western Australia. So long as no criminal law is breached, and no civil action arises from the investigations, evidence obtained by investigators is admissible. Film evidence is admissible, but seems to be less used under the current system.

2.8 Habitual power

This power follows from allowing a particular state of affairs to continue.

Workers

A worker who is receiving payments has some habitual power. As noted the Conciliation Officer may be reluctant to terminate payments of compensation, therefore an application made under sections 61 and 62 (and possibly section 60) of the Act for reduction or termination of payment may depend very much on the habitual power issue. The party who is seeking to change the rate of payments, in these cases, does not

³⁹ Astor, H. and Chinkin, C. (1992) Dispute Resolution in Australia First Edition, Butterworths, Sydney p106

⁴⁰ See for example *Grigoletto v Myer Properties WA Limited* (unreported SC(WA)SCL8271 9 May 1990). In this case a worker had been referred to 9 specialists and refused to see another arranged by the insurer, relying on the ground that this was a reasonable refusal to see a doctor. The court held that the worker was still obliged to attend, and was unwilling to set an upper limit on the number of doctors that a worker might have to see.

appear to have the formal/sanction power backup from the Conciliation Officer, to make the change. This party may be confronted with the habitual power of an insurer or worker who does not seek change. The Act puts considerable emphasis on rehabilitation, so that often, an insurer will be put to proof that all efforts have been made for rehabilitation of the worker, before payments are reviewed.⁴¹

Employer/insurer

A worker whose payments have been terminated, or who is applying to commence payments finds that habitual power rests with the insurer. The worker has to make an application for conciliation in order to disturb the status quo.

The changes to the dispute resolution system in 1993 referred to above, also bring to light the concept of habitual power as between the employer and the insurer. Under section 84A of the Act, "dispute", is restrictively defined, so as to omit disputes between employers and insurers.⁴² An insurer therefore, also has the nuisance power of compelling the employer to issue proceedings in another jurisdiction, because the employer cannot proceed in the Directorate. In terms of habitual power, the insurer probably can rely on the fact that it usually, (habitually) is able, to maintain a denial of liability for sometime before proceedings force the parties to resolution.

On Galanter's analysis this may represent the competition between two repeat players. In such circumstances there may be other factors influencing the outcome. Galanter suggests that parties with "mutually beneficial relations" tend not to adjust their differences in court. Litigation is more likely in these cases when the relationship loses its future association.⁴³ In workers compensation cases, an insurer may decide not to "decline a policy", where the employer is large and future

⁴¹ The worker generally bears the onus of proof to establish an entitlement. However in circumstances where a review to weekly payments is sought, the applicant (who may be the employer/insurer) has the onus of showing a change in the workers condition. See *Weeks v Harbourworks Clough* (1985) WAR 327 per Burt CJ at 329

⁴² See *SGIO Insurance Ltd v Ivoclar Pty Ltd* (unreported CM (WA) 55/94 18 October 1994) where the Compensation magistrate held that a dispute between employer and insurer was not a dispute within the meaning of section 84A.

⁴³ Galanter above footnote 10 p113-4

premiums may be put at risk, with the disharmony caused by litigation. A smaller employer, or one that has changed insurers at the time of the claim, may not be so fortunate.⁴⁴

2.9 Moral power

The power which comes from an appeal to commonly held values, connected to the idea that someone is right.

Workers

Wade suggests that moral power relates to an assertion that a price should be paid by the allegedly unrighteous to the allegedly righteous.⁴⁵ Workers compensation is a no-fault system, so that in one sense, the cause of an accident (ie, whether by negligence or not) is of secondary relevance. However, for the worker, cause, may still be significant. This is especially so, in situations where, there has been employer negligence, as this may facilitate some bad feelings towards an employer, who has been tardy in processing a claim, or who is not co-operating with rehabilitation.

As well, the Act now sets threshold levels at which common-law claims for negligence can be commenced. In other words, the workers compensation system now becomes a reference point for common-law claims, by requiring, in some cases, a certain level of disability before proceedings at common-law can begin. Disability measurement is made via the Act, and in some cases may be assessed by the medical panels constituted under the Act. A threat to commence a common-law claim may be an assertion of moral power as well as sanction power.

Employer/insurers

The Act to some extent, rests some moral power with the employers and insurers, who may initiate recovery proceedings in relation to allegations of fraud and malingering. Section 188 of the Act makes fraud and

⁴⁴ See for example *Wesfarmers Insurance Ltd v Cotter and Velint Pty Ltd* (1990) 1 WAR 493. Where an employers policy was held to be defective and the insurer was not required to indemnify the employer. This was a matter dealt with under the Act prior to the amendments, but would, at the time of writing, have to be dealt with at common law.

⁴⁵ Wade, J.H. above footnote 9p50

malingering an offence, and these matters would be dealt with as complaints before the Compensation Magistrate. Recovery of the payments made, due to fraud or malingering, would be made by way of sections 60 and 62 (for review of payments) and by operation of section 71 (recovery of wrongfully obtained payments). In such proceedings the insurer can rely on some righteousness in their cause. Wade notes that asserting relative righteousness may remain a powerful tool, if the accused is influenced by conscience or a valued peer group.⁴⁶

2.10 Personal power

Personal attributes carry a power. Mayer notes that self assurance, the ability to articulate one's thoughts and understand one's situation, one's determination and endurance are all features of personal power. Wade deals specifically with a number of these aspects and adds a few more to the picture of personal power.⁴⁷

Workers

A self assured worker, may have significant power, particularly if coupled with the nuisance and habitual power referred to above. There are a number of aspects that affect the personal power of the worker. Some of these are dealt with below.

a) Literacy

The Act requires that claims for compensation, generally, be made in writing. Literacy skills play a part in the dispute resolution process from the outset. It is well documented that non-English speaking workers have significant difficulties with compensation claims.⁴⁸ Claim forms have to be completed in a manner that is

⁴⁶ Ibid

⁴⁷ Id p51-54

⁴⁸ These matters have been canvassed extensively in studies conducted in other states, in particular New South Wales. See for example Clapham, C. Schofield, T. and Alcorso, C. (1993) Managing the Work Injury of Women from Non-English Speaking Backgrounds. A report for the National Women's Consultative Council Occasional Paper No 4 January 1993. Similar findings were obtained in a South Australian study, McMenamin, A. (1993) Migrant Women and Occupational Injury- The Challenge. Working Women's Centre Adelaide March 1993. Both reports

consistent with other documents that make up the claim. Where there is an inconsistency between a medical history as recorded in say a certificate, then the workers claim is scrutinised more closely. Inconsistency is more likely to occur where there is difficulty in completing forms and relating histories as in the case of some non-English speaking workers. There is evidence that "migrant" women, for example are more likely have their claim rejected than English speaking women.⁴⁹

b) Memory and Credibility

A dispute about whether an accident occurred or how a disease was contracted may put special strains on the memory of a worker. The forgetful worker may appear unreliable and sometimes untruthful. A poor grasp of English may aggravate the problem. An employer is seldom put to such a test. Insurers likewise are seldom in a position of having to give evidence. The worker must, in conciliation and review (in some cases) be a witness and advocate. On the other hand, the fact that there may have been no witnesses to an accident, gives the worker sole knowledge of the circumstances. This power may be frustrating for the insurer, who has doubts about the workers credibility. It means that the worker's claim is either accepted on this point, or the insurer is put to the expense, of possibly, fruitless investigations. In the end result, restrictions on the style of questioning at conciliation and review, may prevent the kind of examination that is required that "puts the worker to proof".

c) Stress Claims

Stress claims, in particular, put enormous strain on the personal power of a worker. Consider the unrepresented worker in conciliation, attempting to describe the onset of stress related symptoms to an unsympathetic employer and cynical insurer. Add

highlight the difficulties for non-English speaking claimants in the workers compensation system.

49 Id Clapham et al p 6

to this, the complicating factors that attach to stress claims.⁵⁰ The Act requires the worker to show that the stress was not consequent upon some industrial relations issues, such as dismissal. Further, consider the difficulties of an unrepresented worker, who, having bought a stress claim, is faced with evidence from an employer that the dismissal (or some other industrial matter) caused the stress related condition. The worker must then attempt to marshal a case that the employer had acted in a manner that was harsh and unreasonable. The task is daunting to say the least, and hard enough for a worker who was not suffering symptoms of stress. It may in fact require applications to be issued in an industrial jurisdiction. Litigation is stressful. Conciliation whilst aspiring to informality, arguably makes the position of an unrepresented stress claimant more confronting.

d) Women

Wade, Astor and Chinkin note that gender may also be a factor in negotiations. Astor and Chinkin point to the fact that women are not equal in Australian Society, citing the fact that women are less likely to hold positions of power than men, more likely to be paid less than men and have fewer financial resources.⁵¹ Women are less likely to be union members than men and therefore less likely to have access to an important source of support and advocacy.⁵² In addition women have different rates of incapacity (duration) and tend to stay away from work longer, once injured, than men.⁵³

The higher "duration" rate for women suggests that women may be more exposed to applications under sections 61/62 to reduce or

-
- 50 Like a number of states Western Australia has included provisions in the Act that preclude stress claims where the disability is shown to arise out of industrial relations type issues, such as dismissal, redeployment, transfer etc.
- 51 Astor, H. and Chinkin, C. (1992) Dispute Resolution in Australia First Edition, Butterworths, Sydney p109
- 52 Lee, J. (1994) Women and Enterprise Bargaining: The corset of the 1990's Australian Journal of Public Administration Vol 53(2) 189-200
- 53 White, C.B. (Ed) State of the Work Environment: Occupational Injuries and Diseases. Western Australia 1994/95 WorkSafe Western Australia Perth, Western Australia 1996 p25

terminate payments, and may suffer more from doctor shopping. The longer a worker is off work, the greater the likelihood the employer will want to review the payment, and therefore seek a medical opinion. Astor and Chinkin properly caution against seeing women as victims in all cases. Women however do, more often, obtain part-time and casual employment than men, and the natural consequence of this is, that the provisions of the Act affect some women more severely.⁵⁴ Weekly payments are calculated as for full time workers, so that, any improvement in the fitness of a part-time or casual worker will put in peril their entire payment, not simply a portion of the payment as in the case of full time workers.⁵⁵

On the other hand some workers will connect with a sense of empowerment, having informed themselves beforehand of the process, by contact with legal advisers, trade unions or other support groups. These will be workers who have good communication skills, persistence and some patience with a sometimes lengthy process. A degree of inflexibility, may in the short term be a source of power, where a challenge to the worker's payment is being made by an insurer. Galanter notes the work of Ross, who suggested that because one-off players do not anticipate continued dealings with their opponents, they will "do their damndest" without fear of reprisals.⁵⁶ In workers compensation cases, some modification of this phenomena takes place, because in fact, there may be a continuing relationship of sorts, between the insurer and the worker. This is because, a claim, once established has no limitation period on the right to re-institute payments if they have been ceased. The relationship is only ended when the claim is settled, or where the worker has exhausted the payments prescribed by the Act.

54 Thornton, M. (1983) Job Segregation, Industrialisation and the Non-Discrimination Principle. The Journal of Industrial Relations March 38-50 and Owens, R. (1993) Women, 'Atypical': Work Relationships and the Law Melbourne University Law Review Vol 19 399-431. Both articles relate to the predominance of women in the part-time and casual workforce.

55 This is the effect of the First Schedule of the Act, see in particular clauses 12 13 and 14

56 Galanter above footnote 10 p99 in footnote 10

Employers/insurers

Some insurance claims officers may have significant personal power, others may be as intimidated by the process as a worker who is dealing with the system for the first time. As noted, insurers are however not under so much pressure. The onus of proving that a condition/injury is compensable rests with the worker. Even if the proceedings are informal and do not follow the adversary model, a claims officer can, in most situations, take some comfort in the knowledge, that they will have superior information and expertise and probably have received some kind of legal advice before going to conciliation. Insurers can and do institute programs for in-house training in conciliation and review procedures.⁵⁷

3. CONCILIATION AND REVIEW OFFICERS AND THE EXERCISE OF POWER

Mayer's analysis assists in locating the various sources of power in workers compensation disputes. Workers' principally rely on personal attributes and nuisance power so as to frustrate insurer efforts to review payments. Such power, to a large extent will depend upon the level of knowledge of the system that has been gained by the worker. If the worker does not have access to advice and representation there is a greater possibility of the worker perceiving an imbalance of power. This much appears to have been the finding of the Committee of the WorkCover Review, which considered, among other things, the perceptions of workers who had attended conciliation and review.⁵⁸ The most significant findings of the WorkCover Review, for the purposes of this paper, were that almost half of the workers surveyed thought that they had been disadvantaged by not being represented. A major factor was that workers thought that they had insufficient experience and knowledge of the system and felt intimidated.

Wade and most other writers on this topic have made their analysis of power, taking into account, not simply, that the parties may get legal advice, but, that they may be legally represented at the negotiations.

⁵⁷ The writer has been involved in such training for the past three years.

⁵⁸ 1995 Review of Dispute Resolution. Dispute Resolution Review Committee, Workers' Compensation and Rehabilitation Commission of Western Australia June 16, 1995 p22-24

Under the Act three factors have some bearing on power issues. First, conciliation is mandated, that is, it is compulsory, regardless of the kind of dispute. Second, there are significant statutory limitations on legal representation. Third, costs and other sanctions that could be used by the Conciliation and Review Officers have been removed or were never present.

Taking Mayer, Wade and Galanters' analysis together, and applying it to the workers compensation context under the Act, it is possible to conclude that workers may perceive an imbalance of power in the conciliation and review process. This much seems to have been anticipated in the Chapman report referred to above, and confirmed by the findings of the WorkCover Review. The perception of power imbalance by the Conciliation and Review Officer poses a dilemma. How best to deal with such a power imbalance?

Conciliation and Review Officers have some tools to assist with a power imbalance. So far as information is concerned, discovery and inspection of relevant documents may assist. Adjournments to allow time to consider information and sometimes further requests for information from the Conciliation and Review Officers may be appropriate. But what next? What if the parties have disparate expertise, presentation skills and resources. Potentially this is common in workers compensation disputes under the Act.

Acland places some emphasis on the educative power of mediators.⁵⁹ The educative power relates to the power of effecting change by helping the parties grow into greater understanding, wisdom, maturity and responsibility. In the context of conciliation it may relate to the process of informing workers and insurers of how the process works. It may go further, where one party is not aware of their rights and entitlements under the Act. Wade also takes up this point, noting however the role of lawyers in the education process. Wade notes that clients of lawyers, who have been trained in mediation skills often arrive at mediation sessions well prepared for the negotiation process.⁶⁰ Without the educative

⁵⁹ Acland, A.F above footnote 8 p86

⁶⁰ Wade, J.H. above footnote 9 p55

assistance of lawyers, what are the options for Conciliation and Review Officers?

Davies and Salem suggest that power imbalance can be dealt with.⁶¹ Their work deals with interpersonal disputes. They suggest that power imbalances can be addressed by recognising a number of features. These are summarised below;

- 1 The mediator should recognise that everyone has some power.
- 2 Mediation has empowering qualities, it allows for the exploration of options, it recognises the need to express emotions, it is impartial, it is confidential, it reaches voluntary settlement, it is an open process.⁶²
- 3 Mediation encourages to share knowledge.
- 4 Parties in mediation usually want to settle.
- 5 Mediators who are faced with a party with minimum negotiating skills should help that party identify their concerns.
- 6 The mediator can short circuit patterns of domination.
- 7 Accommodations for language can be made.
- 8 Young participants can be assisted, by giving them the same attention as adults.
- 9 Mediator should watch to see that no settlement takes place out of fear.
- 10 Mediation should be conducted in the context that offers information and support for both parties.
- 11 Mediators should not rush to settlement.

The differences between mediation and conciliation are worth recalling. The compulsory nature of conciliation means that the process must proceed, at least in part. Settlements are not always voluntary as the Conciliation Officer may make an order for payments. the conciliation and

⁶¹ Davis A.M, and Salem,R.A,(1984) Dealing with power imbalances in the mediation of interpersonal disputes. Mediation Quarterly (6): 7-26

⁶² This aspect is analysed and deconstructed effectively by Cobb, S and Rifkin, J (1991) Practice and Paradox: Deconstructing Neutrality in Mediation. Law and Social Inquiry 35. they argue that neutrality is a function of rhetoric.

review processes are not open. There is some pressure on Conciliation Officers to settle claims.⁶³

Davis and Salem however draw an important conclusion. They note that there will be occasions when the mediation/negotiation process should not proceed. These are occasions when the parties do not understand the process, are unwilling to accept guidelines, when they lack the ability to identify their claim/interests, when a party is so seriously deficient in information that any agreement will not be based on informed consent.⁶⁴ Wade suggests that a mediator has an ethical duty to end a mediation when the above conditions exist. He, like Davis and Salem, refers to Folberg and Taylor who suggest that mediation should cease when there is a total disparity in financial sophistication, intellect and language skills.⁶⁵

So, what is the position for the Conciliation Officer who discerns a power imbalance in conciliation? On the above analysis there is a real prospect that imbalances in information and expertise will exist, favouring the repeat player against the one-off player. Scutt writes with significantly less enthusiasm for alternative dispute resolution than do Davis and Salem. Scutt considers that the techniques of mediation and conciliation and counselling are a means of privatising disputes, but more importantly they hide the structural inequalities in society.

Scutt writes;

"The impetus to counselling and mediation approach was a perception that the adversary system, the traditional Anglo-Australian system of justice, was inappropriate for certain disputes.....Counselling, conciliation and mediation were put forward as positive in decreasing

⁶³ This is controversial. The Conciliation Officers that the writer has spoken with indicate that they are careful to insure that settlements are not rushed. Trade union officials and legal practitioners have anecdotally indicated that there is some pressure on workers to finalise a matter. Certainly there is some political pressure to make conciliation the focus for as many claims as possible. At the time of writing there is a Bill before the Western Australian parliament to amend the Act so as to require the parties to use their "best efforts" to settle at conciliation.

⁶⁴ Davis and Salem above footnote 58 p24

⁶⁵ Wade J.H. above footnote 9 p57 Davis and Salem above footnote 61 p24. See also Clarke, G and Davies, I.(1992) Mediation-When is it not an appropriate dispute resolution process? Australian Journal of Dispute Resolution May 70-81

conflict; of settling dispute without conflict; lessening time taken in dispute resolution; and keeping down the costs of justice."⁶⁶

Scutt considers that "privatisation" by which she includes the process whereby disputes are resolved in private (such as conciliation under the Act) are detrimental to the interests of the disadvantaged, in that it shuts off from view the very nature of the inequality from which the individual suffers. Scutt believes that the implication that disputes can best be resolved by mediation, conciliation, and counselling ignores the power differentials and inequality. She suggests that the idea that the problems of the adversary system (identified above as costs, delay and formalism) and traditional justice can be resolved by the establishment of alternative system, hides from view the fact that, despite criticisms of the adversarial system, positive aspects exist which should not be removed from the disadvantaged groups.⁶⁷ These positive aspects include, the right to representation, and the effects that publicised cases can have on changing employer behaviour (she gives examples of discrimination cases). For Scutt reducing openness (and perhaps accountability) poses a threat to justice.

4. CONCLUSION

The workers compensation dispute resolution system under the Act places considerable emphasis on the settlement of disputes by conciliation. A part of the conciliation process is negotiation. Conciliation is not a public process. The public cannot attend to view the process, nor can members of the public obtain details of the outcomes. Decisions made at conciliation are not reported. Workers in the system perceive themselves to be at a disadvantage, because they do not have the knowledge and information to deal with a claim. Repeat players have greater resources, knowledge and expertise. Workers, denied legal representation perceive an imbalance.

Writers who have examined the sources of power in mediation and negotiation, stress that these informal "privatised" methods of dispute

⁶⁶ Scutt, JA. (1988) The Privatisation of Justice Women's Studies International Forum (11)5 pp 504.

⁶⁷ Id p517.

resolution should not be proceeded with where power imbalances in information and expertise are patent. On all the evidence, any power imbalance in the conciliation process most often relates to the inequality of information and expertise. If we accept the cautions of Wade, Davis and Salem and others, conciliation, especially without legal representation, and away from public scrutiny is arguably an inappropriate means of resolving some workers compensation disputes, where such power inequality exists. Further if we accept that, as Wade suggests, lawyers have an educative role in the system, then the right to representation can be counted as one of those features which Scutt would identify as worthy of retention in a dispute resolution system.

Limitations on legal representation, which were instituted in order to focus on reduction of costs and speeding up the dispute resolution process, may have aggravated the power imbalances inherent in the workers compensation arena. The WorkCover Review of the operations of the dispute resolution system carried out in 1995 alerts us to the fact that the issue of legal representation in conciliation is a complex one, which should not be determined solely on the basis of cost and speed in the resolution of compensation claims. Regard should also be had to the effects on the parties perceptions of the fairness of the system, and the question of whether in the circumstances, conciliation of all compensation claims is appropriate.

SCHOOL OF BUSINESS LAW

WORKING PAPER SERIES

NUMBER AUTHOR & TITLE

- 94.01 Peter Williams - "The Disciplining of Government School Teachers in Western Australia: An Analysis."
- 94.02 Stephanie Fryer-Smith - "Attacking Official Corruption: The ICAC Model."
- 94.03 Lynne Oats, Dale Pinto and Pauline Sadler - "Penalties for Tax Return Preparers."
- 95.01 Dale Pinto, Anthony Travaglione and Ron Cacioppe - "Tax Effects and Human Resource Implications of Employee Share Plans."
- 95.02 Robert Guthrie - "Worker's Compensation and Age Discrimination."
- 95.03 Robert Guthrie - "Valentine's Day - A Decision in Relation to the *Parliamentary Retiring Allowances Act 1948-1973*."
- 95.04 Robert Guthrie - "Procedure and Evidence Under the *Workers Compensation and Rehabilitation Act 1981*."
- 95.05 Lynne Oats - "Taxing Corporations: Systems and Strategies."
- 95.06 Kevin G Brown - "Western Australian Workplace Agreements."
- 95.07 Cheryl Stickels and Robert Guthrie - "Do International Students with Disabilities Get 'A Fair Go' at Australia's Universities?"
- 95.08 Kevin G Brown - "Contracting out by Western Australian Government Departments and The Legal Implications Applicable to Safety and Health."
- 95.09 Lynne Oats - "Small Business and Income Tax: A Western Australian Survey."
- 95.10 Peter Williams - "Educational Negligence: An Australian Perspective."
- 95.11 Robert Guthrie - "A Western Australian Survey on Employer Attitudes and Awareness of the Industry Commission Report on Workers Compensation and Amendments to the Workers Compensation and Rehabilitation Act 1981 (WA)."
- 95.12 Robert Guthrie - "Workers Compensation and Industrial Relations Some Reflections on Stress Claims Under the Western Australian Workers Compensation and Rehabilitation Act 1981."
- 96.01 Peter Williams - "The Law and Students with Learning Difficulties: Some Recent Developments."

96.02

Robert Guthrie - "Forms of Power in Disputes Under the Workers
Compensation and Rehabilitation Act 1981 (WA)."

For further information on this working paper series, please contact:

Lynne Oats
Co-ordinator
Working Paper Series
School of Business Law
Curtin Business School
Curtin University of Technology
GPO Box U1987, Perth
Western Australia 6001

Fax (09) 351 3222
Telephone (09) 351 7785