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**THE 2004 CHANGES TO COMMON LAW  
PROCEDURES UNDER THE  
*WORKERS COMPENSATION AND INJURY  
MANAGEMENT ACT 1981 (WA)***

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**ABSTRACT**

In 2004 and 2005 the West Australian Labour Government significantly amended the *Workers Compensation and Injury Management Act 1981 (WA)*. These amendments followed a decade of uncertainty for the stakeholders in the workers compensation system. This working paper summarises the changes which made to the *Workers Compensation and Injury Management Act 1981 (WA)* which affected the rights of workers to commence common law claims for negligence against their employer and/or third party. These amendments ultimately took effect in November 2005. The paper outlines the changes to procedural steps required to bring a claim and also attempts to provide some guidance in relation to some of the substantive threshold changes.

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## INTRODUCTION

The *Workers Compensation Reform Act 2004* (WA) will amend a range of provisions within the *Workers Compensation and Injury Management Act 1981* (WA) (the Act)<sup>1</sup> which relate to the important procedures affecting legal practitioners. This paper, which will discuss these new provisions, is divided into two parts. The first part deals with the legislative thresholds set out in the Act effective from November 2005. These are referred to as the 2004 scheme changes because the relevant Act was passed in 2004. The paper will not deal in detail with the common law provisions prior to this time and it does not deal with the specific provisions relating to HIV/AIDS. The second part of the paper deals with the roles and responsibilities of the approved medical specialists (AMS) and the approved medical specialist panels (AMPS) and the issues of reporting and certification. It is important to note that the Government gave an undertaking to review the common law provisions after the first financial year of their operation.

## PART ONE

The constraints on work related common law claims were first incorporated into the Act in 1993. Prior to 1993 the Act had not been used as a mechanism for limiting common law claims and the general rule of interpretation was that that Act was to be interpreted as remedial and benevolent legislation. Over time this broad approach to interpretation has been reconsidered and the Supreme Court of Western Australia has noted that particular sections of the Act need to be considered in a different light. Those provisions, which limit access to common law, may be interpreted having regard to their intent.<sup>2</sup> Since 1993 there have been a number of changes to the

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<sup>1</sup> Previously known as the *Workers Compensation and Rehabilitation Act 1981* (WA).

<sup>2</sup> It has been said on a number of occasions that where there are competing constructions in relation to workers compensation legislation, the interpretation most favourable to the worker should be preferred, see in particular Fullagar J in *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328 at 335; and also *Dodd v Executive Air Services Pty Ltd* [1975] VR 668. In *Bird v Cth* (1988) 165 CLR 1; Dean and Gaudron JJ expressed the view that compensation legislation is remedial in its character and like all remedial legislation should be construed beneficially. Note also McGarvie J in *Accident Towing and Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529 at 549 expressing the view that where more than one construction is available, the interpretation which provides a coherent workable system should be preferred. Note also the High Court decision in *McGuire v Union Steamship Co of New Zealand* (1920) 27 CLR 570 at 580 discussing the

common law access. The chart below sets out in general terms the various constraint mechanisms enacted since 1993.



acceptance of no fault liability in relation to workers compensation legislation. Notwithstanding this line of authority which suggests that a beneficial approach should be taken to the interpretation of workers compensation legislation, the amendments to the Act in 1993, 1999 and now 2004 have placed constraints on the right of workers to proceed with common law claims. As a consequence, those sections which constrain common law proceedings are likely to be interpreted in a manner which is confined to the actual language of the Act. See *Hewitt v Benale Pty Ltd* [2002] WASCA 163, in particular, the discussion of this aspect by Heenan J at paras [116] and [124]–[126] is worthy of note. Section 3 of the Act was not amended in 1993 or 1999 to reflect any such change in the purposes of the Act. These obiter comments should also be considered in the light of the comments made by Miller J in *Midgley v Monger* [2000] WASC 291 wherein Miller J observed that such provisions should be construed liberally.

**Constraints on Common Law Claims incorporated into the *Workers Compensation and Injury Management Act 1981* (WA)**

<b>1993 provisions</b>	<b>1999 Provisions</b>	<b>2004 Provisions</b>
Common law claims restricted to circumstances where the worker had sustained either a pecuniary loss equal to the prescribed amount or a 30% disability of the body as a whole.	Common law claims restricted to circumstances where the worker had sustained either a disability of between 16%-29% or over 30% disability of the body as a whole.	Common law claims restricted to circumstances where the worker had sustained either a whole of body impairment of between 15%-24% or over 25% whole of body impairment.
Determination of threshold issues in the District Court by way of interlocutory proceedings, appeal to a Judge of the District Court and the Supreme Court.	Determination of threshold disability issues in the Conciliation and Review Directorate by way of referral to the Director with Review and Appeal to a Compensation Magistrate. The Director's determinations on referral also subject to challenge by prerogative writ.	Determination of impairment issues by an approved medical specialist (AMS) – <b><i>not subject to judicial review.</i></b> The AMS can be a specialist of the worker's choice. Once the AMS certifies 15% impairment the worker has automatic access to common law. The AMS assessment may be disputed at trial in the District Court.
Damages not capped	Damages capped for workers in the 16%-29% category to a maximum of the equivalent of twice the prescribed amount. Uncapped for those over 30% disability.	Damages capped for workers in the 15%-24% category to a maximum of the equivalent of twice the prescribed amount. Uncapped for those over 25% impairment
Assessment of pecuniary loss threshold based on affidavit evidence at first instance. Assessment of disability via WorkCover Guides WA.	Assessment of disability via WorkCover Guides WA, AMA Guides to the Evaluation of Permanent Impairment and Schedule 2 of the Act. Arguably the assessment of disability is a subjective assessment which considers the effect of an impairment or loss of function on a worker's capacity to work.	Assessment of impairment based on the WorkCover 'Western Australia Guides to the Evaluation of Permanent Impairment' – which includes reference where appropriate to the AMA Guides to the Evaluation of Permanent Impairment and also taking into account the NSW Guides to the Evaluation of Permanent Impairment. Impairment assessment is considered to provide a more objective assessment of loss of function and does

<b>1993 provisions</b>	<b>1999 Provisions</b>	<b>2004 Provisions</b>
		not take account of the affect of the impairment on the worker's capacity to work.
Proceedings at common law did not preclude continuation of compensation payments.	Proceedings at common law preclude continuation of compensation payments – the worker must elect common law or compensation.	Proceedings at common require worker to elect common law or compensation but payments are stepped down over 6 months.
At trial if threshold is not met the action may be dismissed.	The determination of the threshold disability issues was binding on the Court.	At trial if threshold is not met the action may be dismissed.
Worker was not required to elect or commence common law proceedings other than in accordance with the <i>Limitations Act</i> .	The worker was required to elect within 6 months of the date of first being paid compensation.	The worker's election is required within 12 months of the termination day and there is provision for an extension of the election date for a further period of 12 months where the condition has not stabilised.

Given the range of common law thresholds which have been or are to be put in place, the provisions dealing with common law are separated into Subdivision 1 'Preliminary Provisions' and Subdivision 2 – '1993 Scheme' and Subdivision 3 – '2004 Scheme'. Subdivision 1 contains provisions that apply to both the 1993 scheme and the 2004 schemes, whereas Subdivision 3 applies only to the 2004 scheme.<sup>3</sup> In addition, as a number of decisions have been considered by Parliament to disclose unintended consequences of some provisions of the Act, some special retrospective provisions have also been introduced. These are dealt with below. Section 93CB(1) of the Act provides that Subdivision 2 does not apply to any cause of action which arises on or after the day on which section 80 of the *Workers Compensation Reform Act*

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<sup>3</sup> Section 93B has been amended so as to also apply to the awarding of damages in respect of gradual onset noise induced hearing loss, based on exposure to noise in the workplace.

2004 comes into operation. These actions will be dealt with under the new common law provisions in Subdivision 3. In addition there are some special provisions in relation to hearing loss claims. In particular section 93CB(2) provides that the subdivision does not apply to the awarding of damages for noise induced hearing loss that is not an injury, that is, noise induced hearing loss that is covered in Schedule 7 of the Act. Section 93CB(2) preserves the existing position for the 1993 scheme in that it applies only if there is an injury by accident. These specific provisions in relation to hearing loss were considered necessary as the 2004 scheme allows a court to award damages for noise induced hearing loss even if it is not an injury.

#### *HEWITT V BENALE AMENDMENTS*

One of the specific amendments which arises as a consequence of the Supreme Court decision in *Hewitt v Benale*<sup>4</sup> which essentially held that the provisions of section 175 of the Act which deems certain persons to be an employer for the ‘purposes of the Act’, extends to all provisions of the Act, including the requirements relating to actions by workers seeking damages at common law. The effect of the decision was that workers needed to establish the same threshold requirements as against a principal (deemed) employer as they would against their employer at common law or under the Act. As a result this precluded many workers from proceeding against such a principal, as they had not obtained the requisite disability assessment within the prescribed time limits under the old provisions.<sup>5</sup>

Section 93B(5) now stipulates that a worker will not be constrained from pursuing a

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<sup>4</sup> [2002] WASCA 163.

<sup>5</sup> Where by virtue of s 175 a contractor or principal is deemed to be the employer of a worker then the party so affected will be entitled to indemnity from its insurer notwithstanding that its policy of insurance is limited to indemnity in circumstances where coverage is provided for an employer rather than a deemed employer. See *H I H Winterthur Workers Compensation (NSW) Pty Ltd v Thiess Contractors Pty Ltd* (unreported, SC(NSW), Handley and Sheller JJA, Fitzgerald AJA, CA 40373/96, 6 August 1998, BC9805817). In *Hewitt v Benale Pty Ltd* [2002] WASCA 163 the Western Australian Supreme Court followed the NSW Supreme Court in *OP Industries Pty Ltd v MMI Workers Compensation (NSW) Ltd* (1998) 17 NSWCCR 193; and held that legislation deeming a principal to be the employer for the purposes of the Act also required any procedural requirements for the commencement of proceedings to be complied with in the same manner as against the principal as against the actual employer. The effect of *Hewitt* was that no proceedings can be commenced against a third party principal (who would be a deemed employer) unless the worker has complied with ss 93D and 93E of the Act.



common law action against a principal employer even though that principal employer could be only a deemed employer under section 175 of the Act. The effect of these amendments appears to be that the matters discussed below in relation to employers, namely the constraints on common law claims, do not apply to deemed employers under section 175. Therefore workers are not restricted in their ability to claim at common law against the principal for negligence outside the workers compensation system using the law relating to public liability and occupier liability. The likely result of this legislative clarification is that third party actions against negligent principals will continue to be part of the common law landscape as the workers will be able to obtain easier access to common law against such principals and will not be limited in the amount of damages awarded because the damages caps will not apply to the deemed employer.

### *DUTCH AMENDMENTS*

Sections 93E(6a), 93EA and 93EB have been inserted to deal with decisions of the Supreme Court in *Re Monger; Ex Parte Dutch & Ors*<sup>6</sup> and *Re Monger; Ex Parte WMC Resources & Anor*<sup>7</sup> which affected the operation of the current section 93D of the Act. *Dutch* and *WMC Resources* dealt with the issue of medical certification for the purposes of section 93D(6) of the Act and had the effect of overturning numerous determinations by the Director of the Conciliation and Review Directorate who had accepted certain medical evidence as satisfying the requirements of that section. The effect of the Director's decisions (prior to *Dutch*) was that many workers were determined to have medical evidence of significant disability. The decisions in *Dutch* and *WMC Resources* effectively prevented these workers from proceeding with common laws claims because they could no longer obtain the appropriate medical certification within the strict time limits set out in the Act. These amendments will have retrospective effect. The intention of the changes is to allow workers to re-lodge and re-argue their referral of a matter to a Review Officer for determination of whether they had suffered a significant disability, subject to them meeting certain criteria as provided in section 93EA. The retrospective application is important to those workers with a significant disability (i.e. not less than 16%, but less than 30%), as workers in this category are required to comply with a strict timeframe for electing

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<sup>6</sup> [2001] WASCA 220.

<sup>7</sup> [2002] WASCA 129.

and commencing proceedings. This is discussed below.

In relation to the resurrection of these claims the amendment to section 93E(5) acknowledges the retrospective affect added to 93E(6a) under which an election may be made after the termination day. Section 93E(6a) provides that if the Director notifies the worker that the Director accepts a referral under section 93EA the worker may make an election 14 days after they receive notification from the Director of the recording of an agreement or determination of the 'question'. As the existing termination day and election requirement does not apply for those workers claiming a degree of disability of not less than 30%, workers in this category will not be constrained by the time limit above (only workers with a degree of disability of at least 16% but less than 30% are required to elect to pursue common law damages by the termination day).

Section 93EA(1) allows workers who were affected by the *Dutch* decision to be able to lodge a new referral of the 'same question' by producing fresh medical evidence that complies with the requirements of section 93D. In *Dutch* the Court held that it was not sufficient for a medical practitioner to assert a certain level of disability of the body as a whole without providing the basis for that opinion. The worker must have originally sought to refer 'the question' on or before 30 September 2001, which was two months after the *Dutch* decision was issued. It is considered that after this time, workers and medical practitioners would have been aware of the *Dutch* decision so as to be able to alter the manner and style of the medical certification to comply with *Dutch*. Section 93EA(2) provides that if the 'question' relates to whether the worker's degree of disability is not less than 16%, (which will be the bulk of the cases) the worker can only refer the 'same question' if the worker initially or originally produced the medical evidence not less than 21 days before the termination day as required by section 93E(6) or, if another day was fixed under 93E(7), before that day. This ensures these requirements are complied with in order for the worker to refer the 'same question' under section 93EA(3) which enables the worker to refer the same question originally referred to the Director under section 93D(5). The question must relate to the same injury and must not include secondary conditions or subsequent injuries that may have occurred since the initial proceedings. Section 93EA(4) provides that a question can only be referred if it is in a form specified in the regulations. Importantly for practitioners in this area, a new referral and fresh supporting medical evidence must be lodged with the Director within three months

after the day on which the amendments come into operation, or if a court overturns a decision of a review officer that dealt with the substance of the question, within three months from the date of the decision overturning the review officer's determination.<sup>8</sup> Section 93EA(5) requires the Director to notify the worker and employer as soon as practicable that fresh medical evidence complies with the requirements of section 93D(6) (ie *Dutch* compliant) and the referral is properly made. This notification will also advise the parties whether or not the referral is accepted and if it is accepted the notice will advise as to the requirement to make an election within 14 days (as now required by section 93E(6a)). As noted section 93EA(5) will not apply to workers with a degree of disability of at least 30% as they are not required to make an election under section 93E(6a). Section 93EC provides that where the Director by reason of section 93EB gives notice to the worker that a question referring fresh evidence has been accepted an action for damages may be commenced any time up until two years after the notification day even though the limitation period for commencing an action for damages has run out before the day on which the Director notifies the worker, or will run out on or before two years after that day.

### *COMMON LAW – GENERAL PROVISIONS*

This part of the paper mainly relates to the provisions which operate prospectively after November 2005. Section 93I provides that Subdivision 3 only applies if the cause of action arises on or after the day on which section 80 of the *Workers Compensation Reform Act 2004* comes into operation therefore confirming that the new common law provisions are prospective only.

As noted in the chart above and discussed in more detail below, an important part of the new regime is the shift from the use of thresholds which relate to the assessment of degree of disability of the body as a whole to the assessment of the whole person impairment (WPI). Section 93H(1) refers to the 'degree of permanent whole of person impairment' which is linked to the evaluation using the 'WorkCover Western Australia Guide to the Evaluation of Permanent Impairment', which are referred to in section 146A and discussed below. The term 'resulting from the injury or injuries' in this section probably has the effect that the impairment must result from the injury or injuries as defined in section 5(1) of the Act and therefore must be work related. This

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<sup>8</sup> This is an interesting provision and presumably attempts to mop up any claims still in the system.

should preclude an assessment taking account of non-work related features. However this provision needs to be considered in relation to the 'WorkCover Western Australia Guide to the Evaluation of Permanent Impairment' which in general terms require the assessment of impairment to take account of the worker's condition including any asymptomatic pre-existing condition, unless there is evidence that this condition has been symptomatic. Arguably this means evidence other than the worker's history at the time of the impairment assessment and would include formal medical investigations in the past which evidence symptoms. The term 'arising from a single event' suggests that different/separate impairments arising either with the same or different employers, cannot be combined in the evaluation of whole of person impairment. This amendment would appear to overturn various Supreme Court decisions which allow workers to satisfy the former threshold requirements notwithstanding that the assessment arose from a number of conditions some of which may not have been work-related. Section 93H also defines 'election registration day' which means the day on which the Director registers the election of the worker to proceed with a common law claim. Section 93H(2) also defines 'event' as it relates to 'single event' in section 93H(1) to include 'continuous or repeated exposure to conditions that results in the injury or injuries'. The effect of this definition would be to allow claims where the impairment arises either from injury by accident or disease.

#### *COMMON LAW CONSTRAINTS – THE NEW REGIME*

This part of the paper discusses the new provisions which restrict access to common law claims. The starting point is section 93K(1) which mirrors the current section 93E(13) which in turn provides that damages cannot be awarded if liability to pay compensation has been redeemed under section 67 of the Act. Sections 93K(2) and (3) also provide that damages cannot be awarded if the worker participates in the newly established and somewhat novel 'specialised retraining program' or where the worker has opted to receive the additional entitlement to medical expenses under clause 18A(1b). The importance of these provisions is that practitioners need to be aware of the effect of opting to take these benefits. As described below a worker will only be entitled to pursue the 'specialised retraining program' if they have a whole person impairment of at least 10% but less than 15% and have not otherwise settled their claim. This means that they could not have pursued a common law claim in any event. However if the impairment level is close to 15% the question may arise whether it is worth seeking another AMS report to try to establish the threshold level. In relation to the clause 18A(1b) benefits these are only accessible if the worker has impairment over the 15% threshold so that a practitioner needs to be careful to advise on the relative merits of opting for the less certain outcome of a common law action as against the relatively clear entitlement under clause 18A(1b). Of course the choice may be clear if the worker does not have any case for a negligence action.

Section 93K(4)(a) and (b) are similar to the existing 93E(3)(b) because damages can only be awarded if the worker elects in accordance with the regulations. The worker must elect before the termination day. 'Termination day' in section 93K has the same meaning as that given in section 93M which is discussed below. Section 93N(2)(a) requires either an agreement between the worker and employer that the worker's degree of permanent whole of person impairment is at least 15%, and also as to whether or not the worker's degree of permanent whole of person impairment is at least 25%. Section 93N(5) provides that only one agreement or the Director can record assessment and that it cannot be withdrawn. Section 93N(6) allows for only

one election to be registered in respect of the same injury or injuries and that election cannot be withdrawn. Somewhat curiously section 93N(7) allows for subsequent agreements or assessments to be made, after the Director upon the worker's request records an agreement or assessment. Any subsequent agreement or assessment may be made before or after commencement of court proceedings and may be used in court proceedings.<sup>9</sup>

Section 93M(1) provides that the 'termination day' is one year after the day on which the claim by way of weekly payments for compensation<sup>10</sup> is made, unless the question of liability to make weekly payments of compensation is not resolved within three months after the day on which the claim is made<sup>11</sup> or the Director extended the termination day in accordance with subsection (4). This subsection allows for an extension of the termination day for specific circumstances, in the first instance to allow the worker's condition to stabilise to the extent required for a normal evaluation in order to make an election; secondly, to allow the worker an opportunity to make an election if the worker's employer has failed to notify the worker of the necessary details of the termination day. Thirdly, an extension may apply if the Director is satisfied the AMS requires more time to give the worker the documents required to make an election such as where additional investigations are required to make an evaluation. Fourthly, extension may be available where the worker has requested an assessment in accordance with the regulations but the approved medical specialist could not give the necessary documents in the prescribed timeframe. Section 93M(6) limits extensions to the termination day to one year after the day that would have been the termination day had there been no extension, except in the latter case where the AMS has not provided the documents to the worker in the required time. In such a case the Director may give an extension for as 'long as the Director considers

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<sup>9</sup> It is not clear what is contemplated by this provision, perhaps an agreement which provides for a higher level of impairment? Subsection (8) also allows the Director to rectify any error that was made in recording an agreement, assessment or election.

<sup>10</sup> Section 93M(2) defines 'claim for compensation by way of weekly payments' links a claim for total or partial incapacity against an employer to section 178(1)(b) which deals with the requirements for making a claim. However, in the event liability has not been resolved within three months workers are to be given an adequate timeframe in which to elect to retain the right to seek damages.

<sup>11</sup> Section 93M(3) provides that if the question of liability to make weekly payments of compensation is not resolved within three months the termination day will be nine months after the dispute resolution authority determines the question of liability or the worker is first notified that liability is accepted. There is an expectation that most disputes will be resolved in three months, though this may be unrealistic in complex cases.

necessary to give the worker an opportunity to make an election.’<sup>12</sup> The extension of time must be notified in writing and given to both the worker and employer. Section 93T(e) allows for regulations to be made for procedures to apply for extensions under section 93M(4). Section 93M(8) allows for an extension to be given, even though the termination day has passed.

An election certificate will be issued to the worker by the dispute resolution authority with copies forwarded to the employer and insurer. Importantly section 93K(4)(c) mandates that the worker commence court proceedings within 30 days after the Director gives the worker written notice of the registration of the election or any further time provided for in the Regulations. Where the worker does not elect within the twelve (12) month period they will continue to remain eligible to receive workers compensation payments but will automatically forego their common law entitlement. As noted the election to pursue common law action is irrevocable.

Section 93K(4)(d) provides that court must also be satisfied the worker’s degree of permanent whole of person impairment is at least 15%. This must be a reference to the matter being heard in full at trial because consideration of damages would only take place at trial. Section 93K(5) applies a cap to the awarding of damages for less severe injuries. The maximum is referred as ‘Amount A’ set out in section 93F. The maximum amount can only be awarded ‘in a most extreme case’. If the permanent whole of person impairment is less than 25% the court can only order a proportion of the maximum amount according to the severity of the injury or injuries. The question arises as to how this proportion would be awarded, whether by reference to the actual percentage impairment or some other guidelines. In the past, courts have been slow to restrict themselves in the manner in which they assess damages and it seems likely that the percentage impairment would be only one factor to take into account, given that the essence of the assessment of damages is the effect that an injury has upon a person (often referred to as disability) rather than the simple measurement of loss of function. These views are consistent with the Court continuing to be able to assess pain and suffering and take into account secondary conditions whether psychological, psychiatric, or sexual when assessing damages, although not for the purposes of determining the threshold impairment. These limitations on damages awards do not apply to workers with a degree of permanent whole of person impairment of greater than 25%.

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<sup>12</sup> Possibly to be used for exceptional cases where an AMS cannot make a special evaluation as required and the maximum limit on extensions to the termination day would otherwise expire.

Significantly, by reason of section 93K(13) a court is not bound by an agreement or assessment as to impairment recorded by the Director of Dispute Resolution. The agreement or approved medical specialist assessment may be admitted as evidence relevant to the worker's degree of permanent whole of person impairment. This allows other types of evidence relevant to the worker's degree of permanent whole of person impairment being submitted to the court for consideration. The Court may order the plaintiff to pay all or any of the defendant's costs connected with the proceeding if the Court is not satisfied the worker's degree of permanent whole of person impairment is at least 15%.

#### *EMPLOYER OBLIGATIONS TO GIVE NOTICE OF CERTAIN THINGS*

Section 93O(1) incorporates into the legislation the existing regulation 19P which requires employers to notify workers about elections as to common law damages and are intended to prevent a worker losing access to common law by leaving it too late to seek an assessment of permanent impairment. A request for extension under section 93M(4)(d)(i) is linked to this section. Section 93O suggests that a determination can be made on what the time that an approved medical specialist could reasonably be expected to take after a request for an assessment was made. Section 93O(2) mandates that notice to the worker is to be given within a period of 14 days commencing on the day that is six months and 14 days before the termination day. Where the worker is given an extension to the termination day in accordance with section 93N(4), notice of the extended termination day is not required as the Director gives this information to the worker and employer. If the employer has failed to comply with section 93O the worker may be given an extension to the termination day in accordance with section 93N(4)(b). Any term of extension will be prescribed in the regulations under section 93T(e).

#### *THE EFFECT OF THE ELECTION ON STATUTORY PAYMENTS*

Section 93P deals with the effect of an election on statutory benefits. Pursuant to section 93P(2) and 93P(4) weekly payments for workers with an agreement or AMS impairment assessment of less than 25% are subject to step-downs. Immediately following the election, entitlements to weekly payments for these workers will be reduced to 70% of the weekly payments to which the worker would have been entitled had they not elected. After three months the payment is reduced to 50% of the payment at the time of election and payments cease at six months after election. Section 93P(3) makes it clear that all other benefits cease at time of election. The reduction in payments and loss of entitlements is a key area of concern to workers and an area where practitioners need to ensure adequate advice is given the worker at the time of the election. Workers with a WPI of not less than 25% continue to receive all statutory benefits.

## **PART TWO - ROLES AND RESPONSIBILITIES OF APPROVED MEDICAL SPECIALISTS**

### *INTRODUCTION*

Section 146A which replaces the current section 93D refers to ‘impairment’. Impairment is defined in terms of whole of person impairment (WPI) as assessed by an approved medical specialist (AMS) using the ‘WorkCover Western Australia Guides to the Evaluation of Permanent Impairment’ (WorkCover Guides). Because terms such as ‘impairment’ and ‘whole of person impairment’ which result from an ‘injury’ are now used in the WorkCover Guides, the term ‘injury’ now replaces the term ‘disability’ throughout the Act in appropriate circumstances.

In relation to common law claims once the worker has established the threshold level equal to or greater than 15% WPI, the WPI will be as agreed by the parties or determined by a District Court Judge at trial having regard to the medical assessments from approved medical specialists and other medical evidence submitted by the employer/insurer and worker. This will leave it open to the Judge to make the final determination based on a range of medical evidence. The onus is clearly on the worker to establish a robust WPI in the first place in the sense that whilst the worker may obtain an AMS assessment which allows access to common law some care would need to be taken in proceeding with a claim where it is clear that the employer/defendant has an alternative challenging/disputing impairment assessment which may be used at trial.

Section 146 of the Act provides for a range of activities to be conducted by an AMS. Section 146F sets out the procedures for the approval of an AMS. A fundamental requirement is that the AMS must be ‘sufficiently trained in the use of the WorkCover Guides.’<sup>13</sup> Other criteria apply, but these are not central to this paper.<sup>14</sup> An AMS is required to enter into a written agreement with WorkCover in relation to fees and procedures and other matters relating to the functions of an AMS.<sup>15</sup> Importantly, WorkCover is required under the Act to monitor the assessment of the AMS.<sup>16</sup> The

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<sup>13</sup> Section 146F(1).

<sup>14</sup> Note that by reason of section 186 no liability attaches to an AMS acting in good faith as a requirement of the Act.

<sup>15</sup> Section 146F(3).

<sup>16</sup> Section 146F(6). The information to hand from WorkCover WA is that it intends to undertake



requirement to monitor the assessment of the AMS is novel and involves a number of issues which are discussed below.<sup>17</sup>

The AMS has power to require the worker to attend an appointment for an examination<sup>18</sup> and to answer questions relevant to the assessment of impairment<sup>19</sup> and to produce relevant information or consent to the production of that information by another person.<sup>20</sup> If documents or information are not supplied as requested, sanctions apply to the worker or person who has failed to produce the documents or information.<sup>21</sup> An AMS may also seek information from WorkCover in relation to the worker and WorkCover may disclose this information with the worker's consent.<sup>22</sup>

Importantly for the purpose of this paper the AMS is required under the Act to provide to the worker and employer a report and certificate<sup>23</sup> specifying the worker's impairment or, where appropriate, whether the worker's condition has not stabilised, a certificate to that effect.<sup>24</sup> Significantly the Act also required the AMS to supply within that report or certificate brief reasons for the findings which have been made.<sup>25</sup> An AMS may be required to provide a report and/or certificate for a number of reasons. These include for the purposes of;

- a) Part III Division 2A – this relates to an assessment for the purposes of Schedule 2 claims for lump sum payment for specified injuries;

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reviews of assessments by approved medical specialists on an ad hoc basis to ensure consistency of evaluation. This process will include peer review and feedback from assessed workers although the protocols for these reviews are still to be established.

<sup>17</sup> A useful guide to workers compensation laws for medical practitioners is provided in C. R. L. Norris, 'Understanding Workers' Compensation Law' (1993) 9(2) *Hand Clinics* 231, which deals with the American systems – but the principles and approach are likely to be transferable to the Australian terrain.

<sup>18</sup> Section 146G(1)(c)(iii).

<sup>19</sup> Section 146G(1)(c)(i).

<sup>20</sup> Section 146G(1)(c)(ii).

<sup>21</sup> Section 146G(2)-(4).

<sup>22</sup> Section 146I.

<sup>23</sup> Section 146H(1)(a) and (b).

<sup>24</sup> Section 146H(2)(a) and (b).

<sup>25</sup> Section 146H(2)(c) and (d).

- b) Part IV Division 2 Subdivision 3 – which relates to a special evaluation for the purposes of common law proceedings;
- c) Part IXA – which relates to an assessment for a specialised retraining program; and
- d) Clause 18A – which relates to an assessment for the purposes of payment of additional medical and related expenses.<sup>26</sup>

If the report or certificate of an AMS contains an obvious error the AMS may be required by the Director of Dispute Resolution to correct the report or certificate. This provision is curiously worded and novel. It may be open to judicial scrutiny at some point. Although at first blush it appears to be limited to obvious errors of fact, such as the wrong date of birth or injury or perhaps an incorrect recital of the circumstances of injury, it might also be arguable that an obvious error could include an obvious miscalculation when applying the WorkCover Guides.<sup>27</sup> Another point of consideration is how this provision might be activated. It is clear that the Director could act upon his/her own motion, but the parties alerting the Director to the error might also activate it.<sup>28</sup> The opinions, assessments or other decisions of an AMS

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<sup>26</sup> Section 146H(3).

<sup>27</sup> This would be unlikely if WorkCover WA issues a practice direction in the same style as the New South Wales equivalent. The Workers Compensation Commission NSW, Practice Direction No. 4 – correction of an ‘obvious error’ in a certificate of determination – provides the following guidance: ‘WHAT CONSTITUTES “OBVIOUS ERROR” .The “obvious error” referred to (in sections 294(3) and 325(3) of the NSW Act) means a factual error that is apparent on the face of the document. It may be an error that conflicts with the actual decision or assessment that was made or an obvious mis-statement of that decision or assessment. It does not relate to the basis upon which the substantive decision or assessment was made, nor to the substance of any such decision or assessment. The decision of the Registrar as to ‘obvious error’ is made in the context of the contents of the Certificate of Determination, and statement of reasons, if provided. DECISION OF THE REGISTRAR. An “obvious error” in a certificate or statement may be brought to the notice of the Registrar by any party, a representative of a party, a member of the Commission or an Approved Medical Specialist. This may be done orally, in writing, or by electronic means. The Registrar may exercise the discretion to correct an “obvious error” once satisfied that an “obvious error” is contained in the document, unless there is good and sufficient reason not to do so. If the Registrar is satisfied that the Certificate of Determination or statement of reasons contains an “obvious error”, the Registrar may then proceed as soon as practicable to issue a replacement (in accordance with NSW Act section 294 or 325, whichever is applicable)’.

<sup>28</sup> Section 146H(5). This latter point seems likely, namely and worker or insurer writing to the Director to seek to point out an error. It also seems likely, given past practices in this jurisdiction that an exchange of letters is likely with perhaps an aggrieved party pursuing a remedy through the Supreme Court by way of mandamus to compel the Director to act on an obvious error, if this is

relevant to the assessments for the above reasons are ‘not amenable to judicial review.’<sup>29</sup> This latter issue will be discussed in more detail below.

### *EVALUATION OF IMPAIRMENT UNDER THE ACT*

It is important to emphasise that an AMS is appointed for the purposes of making assessments under the Act and that WorkCover has a role in monitoring those assessments. It follows that the assessments must be in accordance with the Act. This may mean that in some cases they do not accord with other medical assessment procedures. In particular the Act requires consideration of the WorkCover Guides. To a large extent these guides adopt the well-known ‘AMA Guides to the Evaluation of Permanent Impairment 5<sup>th</sup> Edition’ (AMA Guides)<sup>30</sup> but some important adjustments have been made for the purposes of the Act. An expert medical committee was convened by the WorkCover Commission to develop the standard impairment assessment guide. The Western Australian Guides are modelled on the WorkCover NSW Guide, which is based on the 5<sup>th</sup> Edition of the American Medical Association’s Guide to the Evaluation of Permanent Impairment. Sections 41, 42, 43, and 44 of the *Interpretation Act 1984* (WA) will apply to the Guides as if they were regulations. The effect of this is that where there is any conflict between the AMA Guides and the WorkCover Guides the latter prevails. The referral to an AMS is activated by section 146A(2) which provides that where a worker and employer do not agree on the evaluation of the workers degree of impairment it may be referred to an AMS. It is significant that section 146A(4) makes an explicit reference to the evaluation of pre-existing conditions and directs that no deduction in the assessment is to be made for

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established.

<sup>29</sup> Section 146J.

<sup>30</sup> A discussion of the predecessor edition appears in E. M. Shanahan and L.A. Le Lau ‘The American Medical Association’s “Guides to the Evaluation of Permanent Impairment”’ (1994) 10(4) *Journal of Occupational Health and Safety* 323 and C. Winer, G. Booth, P. Henke, L. Jones, L. Lee, and P. Niall, ‘Guide to the Assessment of Percentage “Impairment” of the Back, Neck and Pelvis’ (1992) (157(September) *The Medical Journal of Australia* 412. More recently there have been some suggestions for revision of the AMA guides, see E. Speiler, P. Barth, J. Burton, J. Himmelstein and L. Rudolph ‘Recommendations to Guide Revision of the Guides to the Evaluation of Permanent Impairment’ (2000) 283(4) *JAMA* p.519

any pre-existing condition which was asymptomatic.<sup>31</sup> As the WorkCover Guides note, when the pre-existing condition was symptomatic prior to the work injury this condition may be taken into account.

### *EVALUATION IN RELATION TO COMMON LAW CLAIMS*

Section 146C relates to an evaluation for the purposes of Part IV Division 2 Subdivision 3, which in turn relates to a special evaluation for the purposes of common law proceedings. In instances of this kind the AMS is to some extent the gatekeeper<sup>32</sup> for common law proceedings. A special evaluation is defined in section 146C(4). A special evaluation is made where the workers condition has not stabilised to the extent that an evaluation could normally be made under the WorkCover Guides. The WorkCover Guides provide as follows:

#### Special evaluation

It is a general principle that an assessment of permanent impairment only be done when a worker's condition has stabilised (i.e. has reached maximum medical improvement). However, in limited circumstances a special evaluation can be done for workers requesting an assessment of impairment in order to make an election by the termination day to pursue common law damages (section 93N), or for the further additional sum for medical and other expenses under clause 18A(2aa)(a) of Schedule 1 (exceptional circumstances) to the Act. A special evaluation allows for an evaluation to be done even if the condition has not stabilised and overrides anything in the AMA5 or the WorkCover WA Guides that requires the condition to be stable or to have reached maximum medical improvement.

Specifically section 93K of the Act restricts the right of workers to claim common law damages to those workers who elect to proceed in accordance with the Act. This is done by registering an election and an appropriate AMS assessment of impairment

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<sup>31</sup> This approach adopts the decision of the compensation magistrate in *National Mine Management v Bowden* (unreported CM (WA) 105/00 27 March 2001). It is also consistent with the directions in the AMA Guides 5<sup>th</sup> Edition.

<sup>32</sup> H. C. Burry 'Accident Compensation: Gates and Gatekeepers' (1990) 152(May 7) *The Medical Journal of Australia* 450.

with the Director of Dispute Resolution. Section 93L requires the election to be made where the worker has at least a 15% whole of person impairment. This election cannot later be withdrawn, so that the worker is thereby committed to proceed with a District Court case and in doing so surrenders the right to ongoing weekly compensation payments, which are phased out over six months from the election date. In general terms, by reason of section 93M the election has to take place within 12 months (the termination date), but section 93M(4) provides that this may be extended in certain circumstances. Importantly this section allows for the normal evaluation to be delayed and the so-called termination date extended. The extension can be up to 12 months after the usual termination date. The extension is granted by the Director on receipt of a report from an AMS to the effect that the condition has not stabilised.<sup>33</sup> These provisions in effect facilitate the special evaluation process. Section 93N provides that if the condition has not stabilised after six months from the usual termination date the worker may request a special evaluation. If at the time of examination the worker's condition has settled the AMS is to make a normal evaluation. However if at the time of examination the worker's condition has not settled the AMS is required to make a special evaluation. Whether or not a worker's condition has stabilised is a function of the concept of maximum medical improvement (MMI). The WorkCover Guides define MMI as:

An assessment of the worker's degree of permanent impairment is only to be conducted when the AMS considers that the worker's condition has stabilised to the extent required for an evaluation of permanent impairment. This is considered to occur when the worker's condition is unlikely to change substantially in the ensuing 12 months with or without further medical treatment (i.e., further recovery or deterioration is not anticipated). This is known as the time the worker has reached maximum medical improvement. The only exception to the principle that the condition be stable for an evaluation to be done, is in the limited circumstances outlined in the Act and these Guidelines, which provide for a special evaluation to be done.<sup>34</sup>

An important part of the evaluation for the purposes of sections 93H-N (which relate to common law claims) is that section 146C(6) prohibits the AMS from assessing any secondary condition. A secondary condition is defined in section 146 as a 'condition

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<sup>33</sup> Section 93M(4)(c) read with section 146H.

<sup>34</sup> Underlining added.

whether psychological, psychiatric, or sexual, that, although it may result from the injury or injuries concerned arises as a secondary, or less direct, consequence of that injury or those injuries.’

The question of what is a secondary injury is likely to be the subject of some litigation. Some examples of secondary conditions are provided in the WorkCover Guides. There is likely to be some contest as to whether a condition should be regarded as secondary or less direct or whether it is a symptom of the primary condition. Arguably the latter should be assessed as an element of the primary condition and not excluded from consideration altogether. Below is a table of some decided cases showing some ‘psychological, psychiatric’ conditions considered to be secondary. The question will always be a medical matter requiring careful reporting by the AMS. Some caution is required in considering the cases below as many relate to Commonwealth legislation where secondary conditions are specifically compensated and all matters depend on the specific medical evidence that case. In fact, under the Act incapacity which ‘results from’ an injury is compensated so that in the normal course of events workers are entitled to claim weekly payments and Schedule 2 lump sums for injuries with secondary conditions. For the purposes of common law claims evaluation these conditions are specifically excluded from assessment. Importantly the exclusion does not relate to secondary physical conditions, so that a worker with a back impairment consequent upon for example a trauma to the knee would be entitled to have both conditions assessed.

Case Name and Reference	Primary and Secondary Condition
<i>Preece v Repatriation Commission</i> [2004] AATA 442	Anxiety disorder and <b>secondary condition</b> of depression and alcohol abuse.
<i>Shingles v Defence Force Retirement and Death Benefits Authority</i> [2004] AATA 492	Post traumatic stress disorder and the <b>secondary condition</b> of alcohol abuse.
<i>Briscoe v Repatriation Commission</i> [2001] AATA 605	It was the primary submission for the applicant that he suffered PTSD as a primary diagnosis, the respondent claimed alcohol abuse and substance abuse first and then adjustment disorder as a <b>secondary condition</b> followed by insomnia.
<i>D’Costa v Comcare</i> [2004] AATA 582	Cervicobrachial pain syndrome and a <b>secondary psychological condition</b> .
<i>Smith v Repatriation Commission</i> [2001] AATA 248	PTSD and the <b>secondary condition</b> of depression.
<i>Cook v Comcare</i> [2003] AATA 16	Regional chronic pain disorder and the <b>secondary condition</b> of depression.

<p><i>Industrial Galvanisers Corporation Pty Ltd v Parmar</i> [2002] NSWCA 255</p>	<p>The primary judge found that the respondent had sustained permanent impairment of the back and neck (relying in part on the psychological injury), a permanent loss of efficient use of both legs above the knee secondary to pain referred from the permanent back impairment, and a permanent loss of the efficient use of organs of sex caused by pain from the permanent back impairment and loss of libido caused by the <b>secondary psychological injury</b>.<sup>35</sup></p>
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### *EVALUATION OF SCHEDULE 2 INJURIES*

Whilst it is not central to the issue of common law claims it is useful also to consider the application of the WorkCover Guides to Schedule 2 injuries. As indicated above, an AMS may be required to provide an assessment for a range of reasons. Section 146B deals with assessments for the purposes of Part III Division 2A, which relates to Schedule 2 claims for lump sum payment for specified injuries. An AMS is required to determine whether a worker's condition has stabilised to the extent that an evaluation of the degree of impairment can be made. Where the AMS considers the condition is stabilised (by reaching maximum medical improvement) the AMS is required to prepare a report and certificate to that effect. If the condition has not stabilised then the AMS is required to report that finding.<sup>36</sup>

In most instances the AMA Guides and the WorkCover Guides require the medical practitioner to assess radiculopathy as part of the primary condition. For example in the case of a back injury with radiating pain into the legs, the assessment is for the back only with account taken for this radiculopathy.<sup>37</sup> This may present some

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<sup>35</sup> This case refers to the New South Wales equivalent provision. This phrase means a psychological injury to the extent that it arises as a consequence of, or secondary to, a physical injury.

<sup>36</sup> Section 146B(2).

<sup>37</sup> For a discussion of the use of the AMA Guides for low back assessments see J. R. Langworthy 'Evaluation of Impairment Related to Low Back Pain' (1993) 17(3/4) *Journal of Medical Systems* 253. Note however this paper relates to predecessor AMA Guides.

challenges to lawyers who seek to have separate assessments for the back and the leg. There is legal authority to the effect that separate assessments may be appropriate.<sup>38</sup>

#### *EVALUATION FOR SPECIALISED RETRAINING PROGRAMS*

An AMS is also required to make assessments for the purposes of Part IXA which relates to an assessment for a specialised retraining program. This Part of the Act is novel as it provides additional entitlements to some workers who fall short of the required permanent impairment assessment required to commence a common law claim. Section 158A gives access to specialised retraining programs to workers who have a whole person impairment of at least 10% but less than 15% and who have not otherwise settled their claim.<sup>39</sup> There are many requirements of the specialised retraining programs, which must be met, monitored and agreed to, however these do not concern the AMS, whose task in this case will be to make a normal evaluation. Importantly, as in the case of common law claims, the AMS is not to assess any secondary conditions when making and evaluation for specialised retraining purposes.

#### *EVALUATION FOR ADDITIONAL MEDICAL AND RELATED EXPENSES*

Clause 18A of the Schedule 1 of the Act makes provision for the payment of medical and related expenses. An assessment by an AMS in relation to clause 18A will relate to an assessment for the purposes of payment of additional medical and related expenses. The WorkCover Guides provide that:

A special evaluation must also be done if a worker is applying for a further additional sum for medical and other expenses under clause 18A(2aa)(a) of Schedule 1 of the Act, (exceptional circumstances). An evaluation will be necessary for this purpose as one of the eligibility criteria will be that the worker has at least 15% whole of person impairment. In these circumstances an approved medical specialist is to assess the degree of impairment as if the worker's condition has reached maximum medical improvement.

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<sup>38</sup> *Fobco Pty Ltd v Harvey* (1996) 40 NSWLR 454 compared to *K B Hutcherson Pty Ltd v Correia* (1995) 183 CLR 50 and in particular *SA v Bulluco* 5 (1993) WCATR 1 and *Workers Rehabilitation & Compensation Corp v Bataglia* (unreported SC (SA) SCGRG 94/408 22 July 1994).

<sup>39</sup> Section 158(3).



As in the case of common law claims the special evaluation takes place despite the condition not being stable. Again, as in the case of common law claims, the AMS is not to assess any secondary conditions when making and evaluation for Clause 18A purposes.

The foregoing has described the four areas in which the AMS will be required to provide evaluations and to report and certify as to the worker's permanent impairment. In the event of disputes arising as to impairment assessments there is provision for those disputes to be referred to an Approved Medical Specialist Panel (AMSP) which are dealt with below.

### *APPROVED MEDICAL SPECIALIST PANELS*

Sections 146K through to 146Q set out the matters relating to the AMSP.<sup>40</sup> Matters which become disputed under section 31D(4) which relates to Schedule 2 assessments; section 158C(2)(b) which relates to specialised retraining programs and clause 18 relating to additional medical expenses may be referred to a AMSP. Notably there is not provision for use of the AMSP in relation to common law access. The AMSP is to consist of two AMSs.<sup>41</sup> An AMS who has treated the worker is excluded from the panel.<sup>42</sup> WorkCover may, with the worker's consent, supply information to the AMSP.<sup>43</sup> As in the case of an AMS the AMSP can examine the worker, require answers to questions and the production of relevant documents. Although no specific procedure is prescribed, the requirement to act with good conscience imports the requirement to accord natural justice, which mandates that a worker be entitled to comment on any adverse evidence<sup>44</sup> in the possession of the panel.<sup>45</sup> The AMSP is required to assess matters in the same manner as an AMS and the AMSP must likewise provide similar reports and certificates relating to assessment of impairment.<sup>46</sup> The assessment of the AMSP is 'final and binding', but as described

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<sup>40</sup> For a historical comment on the use of medical panels see A. Bale 'Medicine in the Industrial Battle: Early Workers' Compensation' (1989) (11) *Soc. Sci. Med.* 1113.

<sup>41</sup> Section 146K(1).

<sup>42</sup> Section 146K(2).

<sup>43</sup> Section 146K(3).

<sup>44</sup> Including video evidence.

<sup>45</sup> Section 146L (1) – (6). See *Masters v McCubbery* [1996] 1 VLR 635, *Weerappah v Nisselle* (unreported, SC (Vic) 8266/98 2 July 1998) and *Calleja v Franet Pty Ltd (The Medical Panel)* (unreported SC (Vic) 7429/98 1999).

<sup>46</sup> Section 146O.

below this does not mean that superior courts cannot be asked to review the reports of the AMSP.<sup>47</sup> The decision of the AMSP must be unanimous; if not, a fresh panel is convened.<sup>48</sup> Obvious errors of an AMSP may be subject to scrutiny by the Director and returned for correction as in the case of the AMS.<sup>49</sup>

### *THE QUALITY OF MEDICAL REPORTS AND CERTIFICATES AND THE PROSPECTS OF CHALLENGE TO IMPAIRMENT ASSESSMENTS*

Recently, the quality of medical certification and reporting has been subject to considerable comment by the Supreme Court of Western Australia, largely as a consequence of the rise of the use of medical panels and impairment guides to establish thresholds for various entitlements to workers compensation.<sup>50</sup> A primary requirement of the Act is that the determinations of AMSP are final and not subject to appeal. However, this does not exclude the Supreme Court of Western Australia from exercising its supervisory role over all inferior courts and tribunals within the state to overturn AMSP decisions if their reasons for making decisions outside the jurisdiction of the AMSP. This may occur if the decisions are either not clearly stated or inconsistent with the evidence, do not adequately describe the process by which the decision was made, or are formulated in a manner that is inconsistent with governing statutes. Interestingly the AMS by reason of section 146J is ‘not amenable to judicial review’. This phrase is clearly used in distinction to the provisions of section 146O(4), which declare that the decisions of the AMSP are ‘final and binding upon any dispute resolution authority, court or tribunal hearing a matter in which such a determination is relevant’. Section 146O leaves it open to the Supreme Court to review a determination of an AMSP where it can be shown to have exceeded its jurisdiction in the manner set out above. Arguably the phrase ‘not amenable to judicial review’ is an attempt to prevent a similar review of the AMS and given the common understanding of this phrase it may well be that the AMS is not subject to scrutiny by the Supreme Court.<sup>51</sup>

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<sup>47</sup> Section 146O(4).

<sup>48</sup> Section 146P.

<sup>49</sup> Section 146O(8).

<sup>50</sup> For example, the Western Australian Supreme Court Full Bench decisions in the related cases *Re Croser; ex parte Rutherford & Anor* (2001) 25 WAR 170; and, *Re Croser; ex parte Rutherford & Anor* [2003] WASCA 8.

<sup>51</sup> See for example the discussions of the breadth of judicial review in B. Selway ‘The Principle behind Common Law Judicial Review of Administrative Action – the Search Continues’ (2002)

As an aside although the phrase ‘not amenable to judicial review’ may prevent judicial review of an AMS report or certificate it may not prevent an indirect challenge to the assessment on the basis that a court officer (e.g. the District Court registrar) should not use an incorrect assessment to allow commencement of proceedings. In any event the AMS assessment for common law proceedings is not binding on the District Court at the trial. This means that special care should be taken to ensure that a worker is not put at peril in commencing proceedings which might be nugatory if in the end the District Court finds the impairment was less than 15%.

The AMS and AMSP will be used extensively to assess impairment levels of workers who seek to claim common law damages for work-related injury or disease. In such cases, they will be asked to consider the relevant available medical information,<sup>52</sup> to examine the worker (where appropriate) and, using the WorkCover Guides, make an assessment of the percentage impairment rating for the injury or disease with which the individual worker presents.<sup>53</sup> As noted ordinarily, the certification of an AMSP cannot be challenged by the worker unless the method by which the panel arrived at its opinion is not clear, has failed to apply the correct impairment tables or is otherwise inconsistent with statutory requirements. It remains to be seen whether similar challenges could be maintained against an AMS.

The Act specifies that the AMS and AMSP must provide reports and certificates for specific purposes which have been discussed above. The Act gives little guidance on the content of those reports and the regulations to the Act do not prescribe medical report forms or certificates for this purpose. That said, the Act does require adherence

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*Federal Law Review* 8 and J. Basten ‘Judicial Review – Recent Trends’ (2001) *Federal Law Review* 17.

<sup>52</sup> This may mean reference to available technical and medical literature some of which may be contentious such as the debate of RSI. See J. Ballard ‘RSI on Trial’ (1993) (September 11) *New Scientist* 24. G. Bammer ‘The Arguments about RSI: An Examination’ (1988) 12(3) *Community Health Studies* 348. G. Bammer *Occupational Disease and Social Struggle: The Case of Work-Related Neck and Upper Limb Disorders* (1990) (Working Paper 20): National Centre for Epidemiology and Population Health, Australian National University. G. Bammer. and B. Martin *Repetition Strain Injury in Australia: Medical Knowledge and Social Movement* (1990) (Working Paper 19): Canberra: National Centre for Epidemiology and Population Health.

<sup>53</sup> For a discussion of various alternative methods of functional capacity see M. Menard and A. Hoens ‘Objective Evaluation of Functional Capacity: Medical, Occupational, and Legal Settings’ (1994) 19(5) *Journal of Orthopaedic and Sports Physical Therapy* 249.

to the WorkCover Guides which in turn refer to the AMA Guides. The AMA Guides include important guidelines for reporting on the assessment of impairment, often referred to as the three steps approach. The purpose of this part of the paper is the review the cases before the Western Australian Supreme Court which will provide assistance to the AMS and AMSP in writing reports and certificates and integrate this information with the guidelines provided in the AMA Guides.

Guidelines on medical report writing which appear in the decisions of the Supreme Court are discussed below. In *Re Monger: Ex parte Dutch*<sup>54</sup> the Supreme Court considered what matters need to be addressed when a medical practitioner certifies as to a worker's condition. The requirement that a certificate or report be supported by sufficient medical evidence to justify the opinion expressed therein is central to this judgment. The Court held that 'medical evidence' means more than the mere expression of an opinion. The certificate must show material of a medical kind which is logically capable of supporting the opinion that is ultimately expressed. The concept of certification was discussed the previous year in *Vurlow v Leighton Nursing Homes*<sup>55</sup> where Burt J observed<sup>56</sup> that a proper certificate should set out details of the injury that formed the subject of the claim, and express an opinion as to the worker's condition, clearly identifying the grounds upon which that opinion is formed.

In *Re Croser; Ex parte Rutherford & Anor*<sup>57</sup> Rolfe AJ (with whom Murray and Templeman JJ agreed) attempted to provide some general guidance for medical panels in the preparation of certificates. Firstly, His Honour observed that there is often a legitimate difference of opinion between medical practitioners on matters of diagnosis and prognosis. Where this occurs, the difference cannot be glossed over in arriving at a conclusion. The panel or practitioner as the case may be must inform itself on the basis of all written evidence, together with its own examination of the worker as viewed through the prism of its own experience before arriving at its conclusion. Such a conclusion will necessarily view certain opinions and facts more favourably than others. To merely state its conclusions in a case of this nature will not discharge the onus on either a panel or medical practitioner to provide reasons for decision. In the words of Rolfe J, the 'law does not demand that the reasons should extend beyond those sufficient to enable the lay reader and, in some cases, the medical reader, to

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<sup>54</sup> [2001] WASCA 220.

<sup>55</sup> [1978] WAR 15.

<sup>56</sup> Above n 16.

<sup>57</sup> [2003] WASCA 8.

determine how the panel reached its decision.’ Specifically, where certain reports or other evidence are accepted and others rejected, the basis upon which such a determination has been arrived at must be disclosed.

Secondly, it may be that a panel or medical practitioner has discretion as to whether or not it examines or re-examines a worker. Should the panel or medical practitioner decide in the negative on this question, reasons for such a decision should be stated as a matter of course. Where a worker is examined or questioned by a panel or medical practitioner, the nature of the examination or questioning as the case may be should be disclosed in the determination. In addition, the impact on the panel or medical practitioner of the answers provided by the worker, and the way in which these are provided should also be disclosed. Where an examination occurs, any findings, viewed in the light of such history as has been obtained together with complaints made by the worker, should be disclosed.

In *Re Gillet; Ex parte Rusich*<sup>58</sup> the Supreme Court considered the question of what matters should be addressed in a certificate issued by a medical panel. It should be remembered that under the Act the medical panel is required to answer specific questions depending on the specific circumstances of each case. The guidelines suggested in *Rusich* might not therefore apply to all forms of medical report. Nevertheless, the comments of Miller J are still both relevant and instructive. His Honour observed that the medical panel should describe the following when considering the assessment of a lower-back injury;

- a) an analysis of the medical evidence it accepted;
- b) the findings on examination of the applicant;
- c) the extent to which the work-related injury had caused or contributed to the applicant’s condition;
- d) the extent to which (if any) the work-related disability had been aggravated by any specific work incidents and, if so, to what extent;
- e) the specific distinction (if it existed) between non-compensable disability and compensable disability;
- f) the ultimate disability in terms of Item 36A of Schedule 2 of the *WorkCover Act*.

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<sup>58</sup> [2001] WASCA 111.

The Court has made other comments in relation to the requirement to be clear and coherent in giving reasons for medical opinions. In *Wong; Ex Parte Hays*<sup>59</sup> the Supreme Court set aside a certificate of a medical panel on the basis that it merely listed the materials upon which it relied and did not disclose any basis upon which it considered the materials, or resolved any conflict between those materials. *Hays* has been followed in a series of cases where the Supreme Court has found the medical panel has not disclosed adequate reasons for its decision. For example *Re Anastas; ex parte Welshby*<sup>60</sup> where McLure J noted that the panel had failed to discuss all relevant disabilities to which it had referred.<sup>61</sup> However Wheeler J in *Palazzolo v Brown*<sup>62</sup> stressed that the panel should not be bound by rigid requirements to give detailed reasons and it was in order for it to refer to the materials before it as reference to some of its findings.

## CONCLUSIONS

The provisions which allow access to common law or constrain access depending on which perspective is adopted appear on their face to be highly complex. This probably arises because they attempt to cover a wide spectrum of circumstances. A central feature of the provisions is the requirement to elect to proceed with a common law claim which is in turn dependent upon the assessment of whole of person impairment. Linked to this concept is the gatekeeper effect of the approved medical specialists. It is anticipated that considerable focus will be given to the AMS role in the early stages of this legislation. No doubt attempts will be made to challenge the AMS reports and certification in a similar manner to the challenges that have bombarded existing medical panels. The success of the new regime will depend on a number of issues. First, how robust is the protection of the AMS from judicial review? If the Supreme Court declines to review the AMS process the procedures for common law access may become relatively simple. This is the clear intention of the legislation. Second, to what extent the Director will be prepared to interfere with the AMS process in correcting any obvious errors. Third, the level and frequency with which workers need to apply for extensions of the termination date. Fourth, the efficiency of the AMS practitioners in producing reports. Fifth, the frequency of litigation over

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<sup>59</sup> (Unreported SC (WA) 980575S 5 October 1998).

<sup>60</sup> [2001] WASC 178.

<sup>61</sup> Likewise in *Re Bannan; Ex parte Suleski* [2001] WASC 289.

<sup>62</sup> [2002] WASC 49.

threshold issues such as secondary sexual conditions and similar matters. Finally, the messages which come from the District Court in relation to the issues of assessment of damages and the willingness of Judges to look behind the AMS reports will have a big effect on the frequency of common law claims. All these matters will play a role in the success or otherwise of the system. That said, it does appear that compared to previous regimes, a concerted effort has been made to simplify and streamline the processes. One lingering doubt for workers' lawyers is the application of the WorkCover Guides and whether these will prove too great an evidentiary burden for workers who need appropriate assessment to commence common law claims.

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