



**REPORT OF THE
JOINT STANDING COMMITTEE ON DELEGATED
LEGISLATION**

IN RELATION TO

***WORKERS' COMPENSATION & REHABILITATION
AMENDMENT REGULATIONS (No 11) 1999***

Presented by Hon Bob Wiese MLA (Chairman)
And
Hon Tom Helm MLC (Deputy Chairman)

Report 52

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:

November 19 1987

Terms of Reference:

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
- (b) unduly trespasses on established rights, freedoms or liberties;*
- (c) contains matter which ought properly to be dealt with by an Act of Parliament; or*
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

Members as at the time of this inquiry:

Hon Bob Wiese MLA (Chairman)
Hon Tom Helm MLC (Deputy Chairman)
Hon Ray Halligan MLC
Hon Simon O'Brien MLC
Hon Jim Scott MLC
Ms Katie Hodson-Thomas MLA
Mr Norm Marlborough MLA
Mr Bill Thomas MLA

Staff as at the time of this inquiry:

Mr Nigel Pratt, Advisory Officer
Ms Jan Paniperis, Committee Clerk

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
Website: <http://www.parliament.wa.gov.au>

ISBN 0 7307 6441 9

CONTENTS

1	EXECUTIVE SUMMARY	1
2	INTRODUCTION.....	3
3	BACKGROUND TO THE AMENDMENT REGULATIONS	3
4	THE LEGAL CHALLENGE TO NEW REGULATION 19M.....	5
5	NEW REGULATION 19M	7
6	NEW REGULATION 19N	11
7	CONCLUSION.....	26

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO

WORKERS' COMPENSATION AND REHABILITATION AMENDMENT REGULATIONS (No 11) 1999

1 EXECUTIVE SUMMARY

- 1.1 On the basis of the Supreme Court decision of *Re Monger; Ex Parte Woodford*, the Committee accepts that new regulation 19M is within power and has resolved not to recommend disallowance.
- 1.2 The Committee has some reservations regarding the expression “major surgery” in new regulation 19N as a criterion for the exercise of the Director’s discretion to grant a worker an extension of time in which to elect for a common law damages claim. The Committee is concerned that the use of this expression has the potential to lead to an uncertain and inconsistent application of the Director’s discretion. As a consequence, the regulation may be subject to legal challenge as to its validity.
- 1.3 Despite these concerns, the Committee has resolved not to recommend disallowance of new regulation 19N. The regulation arose from negotiations between the Government and the Opposition when Parliament debated the *Workers’ Compensation and Rehabilitation Amendment Bill 1997*. In debating amendments to the Bill, the Parliament has considered section 93E(7) and the restrictive circumstances to be prescribed in regulations by which the Director can exercise his discretion to extend the period in which a worker can elect. During the debate, Parliament rejected an amendment to the Bill that would have broadened considerably the scope of the Director’s power to grant an extension.
- 1.4 The Committee therefore is of the view that it should not seek to interfere with Parliament’s intent by recommending disallowance of new regulation 19N or by insisting that additional circumstances be added in which an extension of time may be granted.
- 1.5 However, the Committee is of the view that regulation 19N should be clarified and urges the Minister to consider introducing the following amendments to the Principal Regulations and the Act:

- 1.5.1 Provide a definition of “major surgery” in the new regulation 19N or elsewhere in the Principal Regulations so as to ensure a consistency of outcome for applications for an extension of time;
- 1.5.2 Amend the Act to permit an appeal from a refusal by the Director to extend time under new regulation 19N. The appeal could be to a specialist body comprised of members with appropriate medical qualifications such as a medical panel constituted under Part VII of the Act; and
- 1.5.3 Include a medical authorisation in Forms 26 and 27 to the Principal Regulations to provide workers with the option of authorising their treating specialist to discuss the worker’s medical condition with the Director when considering an application for an extension of time under new regulation 19N.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO

WORKERS' COMPENSATION AND REHABILITATION AMENDMENT REGULATIONS (No 11) 1999

2 INTRODUCTION

- 2.1 In the exercise of its scrutiny function, the Joint Standing Committee on Delegated Legislation ("Committee") reviewed the *Workers' Compensation and Rehabilitation Amendment Regulations (No 11) 1999* ("Amendment Regulations").
- 2.2 Under the Committee's Joint Rules, if the Committee is of the opinion that a matter relating to any regulation should be brought to the attention of the House, it may report that opinion and matter to the House. It is also a function of the Committee to consider and report on any regulation which appears not to be within power of the enabling legislation.

3 BACKGROUND TO THE AMENDMENT REGULATIONS

- 3.1 The Amendment Regulations were published in the *Government Gazette* on December 14 1999 and tabled in the Parliament on December 15 1999. The Amendment Regulations amend the *Workers' Compensation and Rehabilitation Regulations 1982* ("Principal Regulations") and came into operation on the date of gazettal.
- 3.2 The Amendment Regulations are attached as "Annexure A".
- 3.3 The Amendment Regulations *inter alia* repeal the former regulations 19M and 19N of the Principal Regulations and replace them with new versions of 19M and 19N. The original versions of regulations 19M and 19N had been in operation since October 15 1999.¹ This report is concerned with new regulation 19M and 19N. The former regulations 19M and 19N are attached as "Annexure B".
- 3.4 The former regulations 19M and 19N were introduced as a consequence of amendments made to the *Workers' Compensation and Rehabilitation Act 1981* ("Act") in 1999 by the *Workers' Compensation and Rehabilitation Amendment Act 1999*.²

¹ *Workers Compensation and Rehabilitation Amendment Regulations (No 4) 1999*, *Government Gazette* No 195 Special, Friday October 15 1999.

² See section 32 of the *Workers' Compensation and Rehabilitation Amendment Act 1999* – No. 34 of 1999.

- 3.5 The *Workers' Compensation and Rehabilitation Amendment Act 1999* inserted section 93E into Division 2 of Part IV of the Act. This Division is headed "Constraints on awards of common law damages". This section came into operation on October 5 1999.³ Section 93E places restrictions on the award of common law damages to a worker arising from a work caused disability. Section 93E(3) provides that damages can only be awarded if:
- (a) it is agreed or determined that the degree of disability is not less than 30% and that agreement or determination is *recorded in accordance with the regulations*; or
 - (b) the worker has a significant disability and elects, *in the prescribed manner*, to retain the right to seek damages and the election is *recorded in accordance with the regulations*.
- 3.6 The new regulation 19M sets out the procedure for making an election under section 93E(3)(b). The regulation applies to an election under section 93E(3)(b) that is commenced on or after the day on which the Amendment Regulations came into operation. Workers making an election on or after December 14 1999 are affected by the new regulations. The Amendment Regulations do not affect those workers who had their elections registered during the period October 15 to December 13 1999.
- 3.7 A "significant disability" for the purposes of section 93E(3)(b) is defined by section 93E(4) as being a degree of disability agreed to or determined of not less than 16% and recorded in accordance with the regulations.
- 3.8 The worker's election to retain the right to seek damages must be registered on or before the "termination day" which is defined in section 93E(1) as "... the day that is 6 months after the day on which weekly payments commenced....".⁴ Subject to the exceptions dealt with below, a failure to elect within this time period will result in a worker being denied the right to pursue a claim for common law damages unless it is determined or agreed that his or her degree of disability is not less than 30%. In this event, the worker is put into the position of a worker under section 93E(3)(a).

³ This was the day the *Workers' Compensation and Rehabilitation Amendment Act 1999* received the Royal Assent. The Amendment Act was proclaimed on October 15 1999, *Government Gazette* No 195 Special, Friday October 15 1999.

⁴ The definition was qualified by section 93G(8). This sought to provide workers, who did not have a disability of 30% or more and had been in receipt of weekly payments prior to the assent day, with a three-month period from the assent day (October 5 1999) in which to have their election registered (ie. to January 5 2000). Section 93G(8) was amended by the *Workers' Compensation and Rehabilitation Amendment Act (No 3) 1999* because its operation did not accord with Parliament's intent. It operated to deny workers from making an election for common law damages if they had been in receipt of weekly payment for more than 6 months prior to the assent date. To avoid any uncertainty the *Workers' Compensation and Rehabilitation Amendment Act (No 3) 1999* was deemed to come into operation immediately after the *Workers' Compensation and Rehabilitation Amendment Act 1999* came into operation.

- 3.9 The election has important consequences for the worker. Subject to the worker reaching a 30% disability, the election means that compensation is not payable to the worker under the Act "...in respect of the disability, or any recurrence, aggravation or acceleration of the disability occurring after the day on which the election is registered or any expenses incurred during such period."⁵ The worker with a significant disability is therefore left with a choice. The worker can remain in the workers' compensation system or alternatively forfeit his entitlement to workers' compensation payments and take the chance of succeeding in a claim for common law damages against the employer.
- 3.10 The requirement to make an election within 6 months of receipt of workers' compensation payments is subject to two exceptions. The first is where there is a dispute regarding whether the worker has a degree of disability of not less than 16% which is not resolved until after the termination day. In these circumstances the worker is permitted to make the election within 7 days after the dispute is resolved.⁶
- 3.11 The second exception is where the Director extends the period in which a worker can make an election. Section 93E(7) gives a discretion to the Director "in such circumstances as are set out in regulations" to extend the period within which an election can be made under subsection (3)(b) for up to six months after the termination day.
- 3.12 New regulation 19N sets out the procedure by which the Director may extend the time for a worker to make an election under section 93E(3)(b).

4 THE LEGAL CHALLENGE TO NEW REGULATION 19M

- 4.1 New regulation 19M was subject to legal challenge from its inception. In *Re Monger; Ex Parte Woodford*⁷, a worker sought to have his election registered by the Director before his degree of disability had been agreed or determined as being a significant disability under section 93E(3) of the Act.
- 4.2 The Director refused to register the prescribed election form lodged by the worker. The worker commenced proceedings in the Supreme Court by prerogative writ seeking a declaration that the Director's action in refusing to register his election form was an invalid exercise of executive power and that his election be registered. This prompted a consideration by the court of whether the new regulation 19M and Form 25 were beyond the power of the Act.

⁵ Section 93E(8)

⁶ Section 93E(6).

⁷ Unreported Supreme Court of Western Australia [1999] No WASC 273, delivered December 31 1999, McKechnie J.

- 4.3 The worker's fundamental submission was that there was nothing in the Act which made it a precondition that the degree of disability be agreed or assessed within the six month period limited for an election. Despite some reservations, Justice McKechnie refused the worker's application. In his view, "... the overall structure of s 93E makes manifest Parliament's intention that the degree of disability should be resolved prior to an election by the worker under s 93E(3)(b)."
- 4.4 According to the Explanatory Memorandum provided by WorkCover Western Australia, the Amendment Regulations were required to put beyond doubt the legislature's intent that:
- (a) a worker should not be able to elect before getting an agreement or determination that they have a significant disability as defined in section 93E(4); and
 - (b) a worker should receive no compensation from the date the worker elects.⁸
- 4.5 The Committee first considered the Amendment Regulations in detail at its meeting on March 20 2000. At that meeting, Committee member Mr Norm Marlborough MLA tabled a copy of a letter from the Law Society of Western Australia dated March 17 2000 expressing concerns with the Amendment Regulations. A copy of this letter is attached as "Annexure C".
- 4.6 Due to its own concerns and the concerns raised by the Law Society, the Committee resolved to conduct a hearing into the Amendment Regulations. This hearing was held on Monday, April 3 2000. Mr Harry Neesham, Executive Director, and Mr Ross Monger, Director, WorkCover Western Australia, gave evidence before the Committee. Mr Robert Guthrie, Senior Lecturer, Curtin University of Technology also gave evidence to assist the Committee in its deliberations.
- 4.7 Mr Guthrie was a member of a committee, comprising the Auditor General, Mr Des Pearson (Chairman), and Mr Brendan McCarthy, Director Operations of the Chamber of Commerce, which was commissioned by the Government to inquire into the Workers' Compensation system. One of the terms of reference was to provide options to the Government to stabilise workers' compensation costs. The *Report of the Review of the Western Australian Workers' Compensation System to the Minister for Labour Relations*, known as the Pearson Report, was published on June 30 1999.

⁸

Explanatory memorandum from WorkCover Western Australia dated February 24 2000. p. 2.

5 NEW REGULATION 19M

- 5.1 The Law Society of Western Australia has urged disallowance of new regulation 19M on the ground that it has retrospective operation. This retrospectivity is said to arise from the fact that the Amendment Regulations were published in the *Government Gazette* at 4:00pm on Tuesday, December 14 1999 and had effect from the beginning of that day. This resulted in applications for an election being lodged by workers that day being refused registration in circumstances where the worker did not have an agreed or determined degree of disability of 16% or more.
- 5.2 The former regulation 19M(4) appeared to permit a worker to lodge an election form before an agreement or determination as to the degree of disability was recorded. Under the former regulations, the Director was prevented from registering an election “until at least 14 days after the agreement or determination is recorded.” Former regulation 19M(6) deemed an election to be recorded on the fifteenth day after the agreement or determination is recorded. If a worker lodged an election after an agreement or determination as to the degree of disability is recorded, the election is taken to have been registered on the day that it is received by the Director.
- 5.3 On the basis of the subsequent decision in *Re Monger; Ex Parte Woodford* the Committee is of the view that any retrospective operation of the Amendment Regulations does not detrimentally affect substantive rights.⁹ This is because the current decided law on the operation of section 93E(3)(b) of the Act makes it clear that a worker does not have any entitlement to elect prior to an agreement or determination of a significant disability. In these circumstances, the Director was acting in accordance with the intent of the Act and in accordance with new regulation 19M by refusing to register a worker’s election form lodged on December 14 1999 prior to an agreement or determination on the required level of disability.
- 5.4 New regulation 19M sets out the requirements for a worker making an election under section 93E(3)(b). The Committee is of the view that new regulation 19M is authorised by section 93G of the Act which states:

“Regulations may provide for –

(a) the notification to be given to workers of the effect of the provisions of this Division;

(b) the form and lodgment of elections under section 93E(3)(b);

⁹ There is a rebuttable presumption against retrospective operation of statutes; *Maxwell v Murphy* (1957) 96 CLR 261. The presumption applies to statutes as well as subsidiary legislation; *Broadcasting Co of Australia v The Commonwealth* (1935) 52 CLR 52. The presumption against retrospective operation is concerned with retrospective changes in the law which adversely affect substantive rights.

(c) the registration by the Director of elections under section 93E(3)(b) if an agreement or determination for the purposes of section 93E(4) has been recorded, and the power of the Director to refuse to register an election if not satisfied that the worker has been properly advised of the consequences of the election;

(d) the recording by the Director of an agreement or determination under section 93E as to the degree of disability of a worker;

(e) the way in which applications under section 93E(11) are to be made and dealt with.”

5.5 The Committee is of the opinion that the effect of new regulation 19M does not offend any of its terms of reference. The current decided case law indicates that it is not *ultra vires* the Act. The operation of the Amendment Regulation on the day of its publication in the *Gazette* did not adversely affect existing substantive rights by including elections sought to be made that day. These rights were altered by the operation of section 32 of the *Workers’ Compensation and Rehabilitation Amendment Act 1999*, which added section 93E to the *Workers’ Compensation and Rehabilitation Act 1981*. Section 93E became operative on October 5 1999.

5.6 The Committee accepts that the requirement that a worker must first obtain an agreement or determination of a significant disability before proceeding with an election can result in unfairness. However, any unfairness arises from the primary legislation rather than new regulation 19M as it has been interpreted by the Court. This is a matter for Parliament and not for this Committee. Justice McKechnie acknowledged this potential for unfairness in *Re Monger; Ex Parte Woodford* when he said:

“Counsel for the applicant suggested that a worker might have good reason to elect now and await a determination later. The worker might be back at work with an unresolved injury, which may sometime in the future be agreed or determined to be a significant disability.

There is some force again in this example. I do not know whether Parliament considered all the ramification to workers before enacting s 93E in its present form.

The example gives some weight to the submission that, because the requirement of reg 19M may lead to an injustice in such a case, Parliament did not intend the resolution of the question of significant disability should be a pre-condition for election.

This weight, however, is not sufficient to dissuade me from the view I have previously expressed about Parliament's intention.

The combined effect of the sections, which comprise the *Workers' Compensation and Rehabilitation Act*, Part IV, Division 2 is, notwithstanding that there may be an occasional injustice, nevertheless, Parliament clearly intended the question of significant disability be resolved before an election is made.”¹⁰

- 5.7 The evidence of Mr Guthrie was that the interpretation of the election provisions in the Act resulting from the decision in *Re Monger; Ex Parte Woodford* places workers under a considerable burden both administratively and financially. This is because to obtain an agreement or to present evidence to the Director in a situation where the employer disputed that the worker was suffering a significant disability, medical evidence in the nature of a specialist report is required. According to Mr Guthrie, this made the six-month election period illusory in certain circumstances: He said:

“**Mr Guthrie** ... The point I am making is that Woodford's decision shows that the six-month election is illusory for some people. They must elect well before that. If we put into play the other factors at stake here, in the first instance we are relying on getting specialist medical evidence that is currently very difficult because of the flood of people seeking opinions. It is always difficult to get a specialist medical opinion inside a month. It is frequently up to three months. Quite often a considerable sum must be paid to get a report. These days a specialist report often costs \$500 and it is not unheard of to cost \$1000. Practical issues are at stake.”¹¹

- 5.8 For workers in the transitional group the period in which an election could be registered was actually three months, not six months. The transitional group comprised those workers who were already in receipt of weekly payments but had not commenced or received the leave of the District Court to commence a common law action at the time section 32 of the *Workers' Compensation and Rehabilitation Amendment Act 1999* came into operation. Section 93E came into operation on October 5 1999. The termination date for workers in the transitional group was January 5 2000.¹² The former regulation 19M came into operation 10 days later on October 15 1999.

¹⁰ *Re Monger; Ex Parte Woodford* [1999], unreported Supreme Court of Western Australia No WASC 273, delivered December 31 1999, McKechnie J at p. 12.

¹¹ Corrected transcript of evidence taken at Perth, Monday April 3 2000, Session 1 of 2, p. 5.

¹² See sections 93G(7) and (8).

5.9 Workers in the transitional group who failed to elect “in the prescribed manner” to retain the right to seek damages at common law and have their election “registered in accordance with the regulations” on or before January 5 2000 would be shut out of the common law system. The only exceptions to the requirement to elect on or before the January 5 termination day are contained in sections 93E(6) and (7).

5.10 Mr Guthrie raised concerns that the short period for an election would possibly undermine the intent of the election process to reduce common law claims:

“**CHAIR**—You referred to its being illusory. How much earlier than six months do you believe they must make that election?

Mr Guthrie—The practitioners would be better able to provide that information. People were talking about elections three months out from receiving compensation payments, because they had to see a specialist, get a report and send it to their employer. If the employer does not agree, a dispute arises. The whole process is starting very early, and problems are arising. Because it is so early, there is a likelihood from the employers' and the insurers' point of view that the assessment will be high. My experience is that when a worker is assessed at an early stage, invariably his injury is worse and the assessment comes in high. That is a disadvantage to employers and insurers. On the other hand, it also upsets the rehabilitation process. Once people go into the election mode at six months, their rehabilitation allowance ceases. That is contrary to the intent of the legislation as it stands. We want to rehabilitate them and get them back to work. If I had been asked about whether the election should be at six months, I would probably have said that it should not — I would prefer 12 months. The fact that we are coming in below six months is a concern.”

5.11 Mr Guthrie also advised the Committee that the requirement that the worker achieve a level of disability of not less than 16% to enable an election for common law in accordance with the Amendment Regulations did not arise from a recommendation of the Pearson Report. He said:

“**Mr Guthrie**: We dealt with it within the boundaries of the inquiry. I, Brendan, and Des Pearson discussed it at length. The others agreed that the election process — the requirement that a worker forgo his compensation at a period; in this case six months — is a severe enough disincentive that did not warrant further restriction. We did not include in our report the restriction of 16 per cent and below, because we felt that a severe enough deterrent existed. Obviously the minister wrote to us when the report was handed to her some time afterwards, requesting that we consider this matter. I did not want to make any further submission on it to the minister because I felt that the report

we provided was sufficiently comprehensive and that the deterrent of the election was sufficiently severe. I felt that the six-month election was harsh.

I preferred that it be 12 months. I am prefacing my remarks by saying that the regulations are not a creature of the Pearson inquiry. They are a creature of the bureaucracy that took over the running of the report some time afterwards.”

- 5.12 The Committee accepts that the six-month election period prescribed by the Act places considerable pressures on workers and the medical profession. The need to obtain an appointment with a specialist and then a written report regarding the worker’s degree of disability must be carried out as soon as possible after weekly payments of compensation have commenced. This is to ensure that the necessary evidence can be obtained of the worker’s degree of disability well prior to the expiry of the six-month termination date.
- 5.13 In the case where the employer does not agree that the worker has a significant disability, the worker must present medical evidence to the Director not less than 21 days before the termination day indicating that the degree of disability is not less than the relevant level. This is so the worker can take advantage of the procedure in section 93E(6) of the Act. This section provides one of the exceptions to the prohibition in section 93E(5) on workers making an election after the termination day.¹³
- 5.14 The other exception to the prohibition on an election being made after the termination day is provided for in section 93E(7) and new regulation 19N. Where a worker does not have medical evidence indicating a level of disability of not less than 16% before the termination day, there can be no dispute under section 93E(6). The Act therefore provides for the Director to grant a worker an extension of time for a further six months “in such circumstances as are set out in regulations...”

6 NEW REGULATION 19N

- 6.1 There is broad power in the Act to make regulations to extend the period of time within which an election can be made under section 93E(3)(b). Section 93E(7) provides:

¹³ The Parliament is proceeding with amendments to section 93E(6) to provide for a period of 14 days (rather than the existing 7 days) in which a worker can elect to retain the right to seek damages after a dispute on whether the degree of disability is not less than 16% has been agreed or determined. This will provide further time for the worker to consider his position and to be notified of the outcome of a dispute. The *Workers’ Compensation and Rehabilitation Amendment Bill 2000* was third read in the Legislative Council on June 1 2000.

“(7) Despite subsection (5), the Director may, in such circumstances as are set out in regulations, extend the period within which an election can be made under subsection (3)(b) until a day (not being a day that is more than 6 months after the termination day) to be fixed by the Director by notice in writing to the worker.”¹⁴

6.2 The power to extend time is expressly given to the Director. The discretion is limited to “such circumstances as are set out in regulations...”. The extension of time is limited to a period of six months. By reason of the extension provisions, the maximum time in which a worker can have his election registered is 12 months from the receipt of weekly payments assuming the maximum extension period is granted.

6.3 There are three circumstances provided for in new regulation 19N for the Director to grant an extension of time. These are set out in sub-section (2):

- where the Director is satisfied that the worker will require major surgery in respect of the disability in the extension period;
- medical evidence that the worker will require major surgery in respect of the disability in the extension period has not been obtained despite all reasonably practical steps having been taken by or on behalf of the worker to obtain that evidence; or
- a medical panel under section 36 of the Act has determined that the worker’s disability is of a kind mentioned in section 33 or 34 of the Act.¹⁵

6.4 New regulation 19N differs from the former regulation in one major respect. It alters the previous requirement for the grant of an extension that the Director must be satisfied that the worker is “likely to” require major surgery within the next six months. The new requirement is that the worker “will” require major surgery within the extension period. In this sense the new regulation is more restrictive.

6.5 The Law Society of Western Australia has urged disallowance of new regulation 19N unless extra grounds are added. The Society’s letter being “Annexure C” to this report cites the following reasons for disallowance:

¹⁴ Section 93E(7) arose from an amendment to the *Workers’ Compensation and Rehabilitation Amendment Bill 1997* moved by the Attorney General, Hon Peter Foss MLC, on Wednesday, September 15 1999. The amendment was one of several agreed between the Opposition and the Government. See Supplementary Notice Paper No 9-2, Legislative Council Minutes of Proceedings No 11, Wednesday, September 15 1999, p. 167 and Parliamentary Debates (Hansard), Thirty-Fifth Parliament, Third Session 1999, No 4, pp 1165-1181.

¹⁵ Sections 33 and 34 of the Act deal with the industrial diseases of pneumoconiosis, mesothelioma or lung cancer (section 33) and chronic bronchitis and pneumoconiosis (section 34).

- the regulation places an unreasonable burden on workers to obtain evidence to support an application for an extension of time;
- the grounds for an extension are overly restrictive; and
- the regulation removes the ability of workers to lodge a form 25 (Election to Retain Right to Seek Damages) and then pursue a referral of the question of degree of disability by lodging a Form 22.

6.6 Another issue raised by Mr Guthrie in his evidence before the Committee is the imprecision of the expression “major surgery”.

6.7 Subject to further legal pronouncement, the last of the grounds raised by the Law Society appears to have been disposed of as a result of the decision in *Re Monger; Ex Parte Woodford*. This decision makes it clear that the agreement or determination of significant disability is a precondition to making an election. The worker therefore is not in a position to seek registration of his election before getting an agreement or determination on the degree of disability.

6.8 The Committee also considered whether the discretion vested in the Director offended the Committee’s Joint Rule 5(d) in that regulation 19N “unduly makes rights dependent upon administrative, and not judicial, decisions.” The Committee is of the view that the regulation does not offend the Joint Rule. This is because the section 93E(7) of the Act expressly provides for an administrative process in which the Director is required to exercise discretion.

Does regulation 19N place an unreasonable burden on workers to obtain evidence to support an application for an extension of time?

6.9 The evidence supporting an extension of time must be lodged with the Director in all cases at least 21 days before the termination day. This is no different from former regulation 19N. There is no power in the Act for the Director to grant a retrospective extension of time to workers who have not applied prior to the termination day.

6.10 The requirement to obtain medical evidence from an appropriate specialist is no more onerous than the requirement under the Act to obtain medical evidence to support a significant disability for the purpose of a worker making an election. The requirement in new regulation 19N to submit the application within 21 days of the termination day appears to allow a reasonable time for the Director to determine the application.

6.11 In circumstances where a specialist report cannot be obtained, the Director can nevertheless grant an extension where he is satisfied that all reasonable efforts have been made to obtain such evidence. This would appear to provide a safeguard for

workers who make every effort to obtain a specialist report but for reasons outside their control are unable to provide this evidence within the time stipulated.

- 6.12 The Committee is not satisfied that new regulation 19N places a burden on workers which is any more onerous than the requirements in the Act to make an election. The Act contemplates circumstances in which the Director can exercise his discretion to grant an extension of time prior to the termination date. In practical terms, this discretion can only be exercised on the basis of evidence presented by the worker attempting to satisfy the circumstances provided for in new regulation 19N.

Are the grounds for an extension overly restrictive?

- 6.13 New regulation 19N restricts application for an extension of time to certain workers. Those workers who cannot satisfy the Director that they will require “major surgery” in respect to the disability in the extension period or have not been determined by a medical panel to suffer pneumoconiosis, mesothelioma or lung cancer or chronic bronchitis and pneumoconiosis are denied the opportunity of an extension of time.
- 6.14 This will prevent workers with a disability of less than 16% who have a deteriorating condition (other than those specified industrial diseases) for which major surgery is not required from applying for an extension of time in which to elect. A worker whose condition may not amount to a significant disability before the termination day may have a disability of not less than 16% determined or agreed in the six month period after the termination day. In this scenario, the worker will have no entitlement to elect by reason of section 93E(5) which prevents an election being made after the termination day. Also, because the worker’s condition does not require major surgery within the election period, he is not able to apply for an extension of time under section 93E(7). On the other hand a worker who can satisfy the Director that he will require major surgery in the extension period keeps alive his right to elect for up to a further six months.
- 6.15 Mr Guthrie pointed out to the Committee that many workers who developed serious conditions who did not require “major surgery” in the extension period would be denied the opportunity to extend the time in which to make an election for up to a further six months. The following exchange between Mr Guthrie and members of the Committee highlights this concern:

“Hon J.A. SCOTT—A significant range of work-related injury can be indirect — for example, chemical inhalation and asbestosis, which take a long time to resolve. In some cases the injury may not require surgery but intensive treatment of another type.

Mr Guthrie—That is correct. The concept of major surgery is wrongheaded.

It does not address the issue of whether a person has a severe disability. A person could have major surgery that rectifies the problem. Many conditions go untreated in the sense that no operation is required. Many people with repetitive strain injury do go on with treatment. Nothing much can be done for people suffering from chemical inhalation, mesothelioma and asbestosis. Of course, they may have a better prospect of showing significant disability. Some people present with psychological injuries brought about by a specific trauma. I am not referring to workload induced repetitive injuries or stress. However, a train or bus driver might have had to stop a vehicle because someone has jumped on the rail or the road and as a result the driver suffers a stress-related condition. Such people will not undergo major surgery, but in time their disability may be over 16 per cent. These things manifest slowly. That is why the six-month election is very difficult.

CHAIR—You mentioned the chemical inhalation problem. In the farming industry and many other industries there is prolonged exposure to materials that at this stage may not be damaging, but 10 or 15 years down the line there may be a problem. How are those cases dealt with?

Mr Guthrie—They would probably be precluded from common law claims. If a person suffers a chest condition as a result of chemical inhalation, it may be a year or two before the symptoms manifest. Effectively, they are precluded, unless they come into at more than 30 per cent.

CHAIR—If after five or 10 years — that is the time span we are talking about — a person has major problems, he would still be able to go on, providing the disability was above 30 per cent.

Mr Guthrie—Yes, but members should bear in mind that that is a very high level. For many people, 30 per cent disability would be totally disabling. The changes made in relation to back injuries indicate that 30 per cent is very disabled. A paraplegic comes in at about 50 per cent and a quadriplegic comes in at about 65 to 70 per cent. If they do not get the 30 per cent, they are precluded and the election is not possible.”¹⁶

- 6.16 The Committee acknowledges that the circumstances are restrictive. Some workers, such as those with deteriorating back injuries or whose medical condition has not stabilised and do not require major surgery in the extension period are effectively shut out from being granted an extension. However, the Committee finds that the limited circumstances for the grant of an extension reflect the intent of the primary legislation.

¹⁶

Corrected transcript of evidence taken at Perth, Session 1 of 2, Monday, April 3 2000, pp 6-7

This is to have the matters of degree of disability and the worker's election dealt with within six months of the commencement of weekly unless there are exceptional circumstances to warrant an extension of time.

- 6.17 The rationale for including a discretion to extend the termination date for workers who had to undergo major surgery was explained to the Committee by the Executive Director of WorkCover Western Australia Mr Harry Neesham, as follows:

“Mr Neesham—It arose through the Labor Party's negotiations with the minister in having a six-month termination - end of story; namely, the worker was out of the system if he or she did not elect prior to that time. No capacity existed for a worker to have a matter processed if within two weeks of that termination date he was to have a major operation which could impact on those entitlements. The procedure had no capacity to take that into account in determining workers' entitlements. Therefore, the ability was given to the director to extend the date in specific circumstances. If a worker faced a major operation in the next six months, he would have the opportunity to extend for a period allowed under the Act before making an election. That was part of the negotiations involved in the passage of the legislation. It was a means of overcoming cases with a clear potential for disadvantage to an injured worker who was to have a major operation in a short time and could, within six months of the termination date, be precluded from accessing common law because he did not have the operation beforehand.”¹⁷

- 6.18 Later in his evidence, the Executive Director explained why the wording of regulation 19N had been changed from “likely to ” to “will” require major surgery. He said:

“Mr Neesham: ...Clearly it was a policy decision made by the Government. However, to some extent the confusion that we talked about over what is major surgery is exacerbated by the term ‘is likely to require’, as compared with ‘will require in the next six months’. That is because we are looking at a six month period only, and the issue, if workers have a sore back is whether they are ‘likely to require’ a laminectomy or must make a determination ‘in the next six months’ as to which system they will be in. They must understand that at this point, in order to meet the criteria, they must establish their level of disability, which is not currently able to be established. That is the general basis on which that decision would be based. Saying it is ‘likely to require’ means in effect that any person who can establish that they may need an operation or major surgery in the next six months can extend for that period before they have to make an election; whereas saying we accept that at this

¹⁷ Corrected transcript of evidence taken at Perth, Session 2 of 2, Monday, April 3 2000, pp 4-5.

point the workers cannot establish that, but the doctor has clearly indicated they will require this operation in that time will give workers the basis upon which they can access or make an election on which system to use. That is the fundamental basis for that change.”¹⁸

- 6.19 Two classes of workers are advantaged by new regulation 19N. Those workers who have a disability of not less than 16% and could make an election prior to the termination date but require major surgery during the extension period. These workers, if required to elect before the operation, would be denied compensation under the Act due to section 93E(8). This would include the cost of the major surgery required by the worker. The other class of workers advantaged are those not meeting the 16% disability threshold and requiring major surgery who may achieve the significant disability threshold for election within the extension period.
- 6.20 The argument to extend the circumstances in which the Director could grant an extension was the subject of debate in the Parliament. An amendment to the *Workers' Compensation and Rehabilitation Amendment Bill 1997* was proposed in the Legislative Assembly to give the Director power to grant an extension “where a worker’s disability is not sufficiently stabilized to allow an informed choice at election, or such other circumstances.” The proposed amendment was defeated on a division of the House by 27 votes to 17.¹⁹
- 6.21 In debate over the proposed amendment, the Minister for Labour Relations Hon. Cheryl Edwardes MLA, said:

The Government will not support the amendment moved by the member for Nollamara. The reason is very clear. Probably out of all the amendments it is the most critical. Six months is critical for ensuring that there will be the ability to be able to reduce the cost pressures in the system and so reduce premiums. If the member for Nollamara’s amendment is accepted, where a worker’s disability is not sufficiently stabilised to allow for an informed choice of election or in such other circumstances, we might as well substitute 12 months for six months. There would be no need for an extension because every worker will be saying that the injury is not sufficiently stabilised to allow for an informed choice at six months.

I have given a commitment that the regulations for the extension of six months will be related to the fact that the director must be satisfied that the medical condition is serious. The member for Nollamara used the words

¹⁸ Ibid, p. 14.

¹⁹ Parliamentary Debates (Hansard), Thirty-Fifth Parliament, Third Session 1999, No 5, Tuesday, September 21 1999, p. 1455.

“extreme’ and “major”. I would add that medical intervention by operation is imminent. It is a six month election unless there is to be an immediate medical intervention by way of an operation and the medical condition is serious and extreme. So it is extreme, serious and major.

This is not just about a disability which is not sufficiently stabilised to allow the worker to make an informed choice. That is why the Government is not supporting the amendment. We are not walking away from our commitment. We will give a commitment that the regulation will be drafted along the lines that I have intimated to the House. I will provide the member for Nollamara with a copy so that he can see that it is in accordance with what I have stated. We are talking about a serious medical condition in the circumstances to which we have referred, where there might be an operation in the next week or two or whenever. Somebody would be concentrating on the operation because the person’s medical condition would be serious enough to cause that major concern or medical intervention and he believes he needs that further extension. I give that commitment.”²⁰

- 6.22 The Committee finds that the former regulation 19N was in accordance with the Minister’s commitment by requiring the Director to be satisfied that the worker’s disability is of such seriousness that the worker is likely to require major surgery within the next six months.
- 6.23 The Committee also finds that the new regulation 19N, although somewhat more restrictive by replacing “likely to” with “will”, also accords with the Minister’s commitment and the intent of amendments to the *Workers’ Compensation and Rehabilitation Amendment Bill 1997* which resulted in section 93E(7). In other respects, new regulation 19N appears to be less restrictive than originally contemplated by the Minister. The inclusion of paragraphs (b) and (c) in new regulation 19N(2) broaden the Director’s discretion provided in former regulation 19N. Paragraph (b) acknowledges the difficulties some workers may have in obtaining specialist medical opinion to support their application for an extension of time. This is a sensible addition and provides a safeguard given the limited timeframe available to workers to submit this evidence. Paragraph (c) includes workers determined to be suffering an industrial disease specified in sections 33 and 34 of the Act without the need for “major surgery”. This addition acknowledges the seriousness of these industrial diseases and their progressively debilitating nature.
- 6.24 The Committee accepts that the current circumstances in which the Director can grant a worker an extension of time are restrictive. The Committee acknowledges that some

²⁰ Ibid, p. 1453.

workers will be disadvantaged by the restrictive circumstances by being denied the ability to elect access to common law. Workers with injuries that may result in slow deterioration and increased disability over time such as chronic back injuries and chemical exposure respiratory conditions are examples. However, the Minister made it clear to the Parliament that the circumstances, which would be included in regulations would be limited.

- 6.25 In debating amendments to the *Workers' Compensation and Rehabilitation Amendment Bill 1997*, the Parliament has considered section 93E(7) and the restrictive circumstances in which the Director can exercise his discretion to extend the period in which a worker can elect. During the debate, Parliament rejected an amendment to the Bill that would have broadened considerably the scope of the Director's power to grant an extension. The power was proposed to be included in the primary legislation. In these circumstances, the Committee is not minded to interfere with Parliament's intent by recommending further circumstances be added to regulation 19N or by recommending disallowance on this ground or the other grounds put forward by the Law Society of Western Australia.
- 6.26 The Committee considers it regrettable that the circumstances in which an extension of time can be granted were not specified in the *Workers' Compensation and Rehabilitation Amendment Act 1999*. This would have made it clear on the face of the legislation what circumstances would be subject to the Director's discretion. The regulations could then solely deal with the administrative process by which applications for an extension of time could be considered. Instead, the regulations have been used to alter the circumstances in which an extension can be granted to suit the demands of policy. Because these changes are contained in subsidiary legislation made by the Executive, rather than by amendments to the Act, the opportunity for debate in the Parliament on the changes is limited.

Meaning of "Major Surgery"

- 6.27 The Committee was concerned with the meaning of "major surgery" as a ground for the exercise of the Director's discretion in new regulation 19N(2)(a). The expression "major surgery" is not defined in the Amendment Regulations, the Principal Regulations or the Act. Mr Guthrie pointed to the difficulties with the meaning of major surgery in his evidence before the Committee. He said:

"Mr Guthrie:-...Section 93E at one point provides that, in order to get an extension of time, a worker must provide some medical evidence to the director to satisfy him that there is a prospect that the extension should be made. There seems to be only one criterion for getting an extension; that is, the requirement for major surgery. That is an alarming criteria; first, because the phrase is not defined. Even if it were defined, there would be difficulties

with the phrase. Does "major surgery" mean major in terms of what the medical profession considers, or does it mean major to the individual? For example, having practised in the jurisdiction I know that a person who undergoes a laminectomy considers that to be a major operation. However, an orthopaedic surgeon invariably says it is a safe and quite minor operation. The consequence of a laminectomy going wrong is sometimes paralysis. "Major surgery" is a vague and difficult criterion for the director to arrive at in the first instance."²¹

- 6.28 "Major surgery" is one of three criteria that can be considered by the Director in determining whether to exercise his discretion in favour of the worker. The Committee was concerned that the expression "major surgery" was so vague or uncertain that the Director would not be capable of attributing a meaning to it when attempting to exercise his discretion.
- 6.29 In Australian law, uncertainty is not a separate ground for finding delegated legislation invalid.²² When interpreting primary legislation, any ambiguities and uncertainties arising from the words or expressions used in a regulation have to be resolved by construction and interpretation. A court when faced with ambiguities in a statute must place a meaning on the words. Subsidiary legislation is approached in the same manner. However, if a meaning can be attributed to words in subsidiary legislation but the application of that meaning to the subject matter results in uncertainty in the operation of the regulation, the regulation may be invalid as an improper exercise of the regulation making power.²³
- 6.30 Does the expression "major surgery" have a generally accepted or technical meaning? Is the meaning to be attributed to the expression based on the worker's view of whether the surgery is major surgery or the treating surgeon's or on the view of the Director? Is an objective or subjective standard contemplated?
- 6.31 The Oxford Dictionary defines "major" in the surgical context as including an operation involving danger to the patient's life.²⁴ In this sense "major surgery" has a generally accepted meaning.
- 6.32 Mr Monger, the Director who considers the applications for an extension of time, is not a qualified medical practitioner. In these circumstances, he can only exercise his discretion favourably if he is satisfied on the medical evidence presented that the worker will require "major surgery". His reliance on the medical evidence supplied

²¹ Corrected transcript of evidence taken at Perth, Session 1 of 2, Monday, April 3 2000, p. 5.

²² *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184, per Dixon J at p. 194.

²³ *Ibid*, p. 197. See also *Cann's Pty Ltd v The Commonwealth* (1946) 71 CLR 210.

²⁴ The New Shorter Oxford English Dictionary, Vol 1, Clarendon Press, Oxford, 1993, p. 1670.

by the worker's treating specialist and the process he is to follow under new regulation 19N was outlined to the Committee in the following evidence:

“Mr Monger ...The regulation indicates that I am to be satisfied that a worker is to undergo major surgery; in other words, it does not require me to determine whether major surgery is necessary or not. It is for me to be satisfied on the medical information that is provided to me that the worker needs major surgery; in other words, it is the responsibility of the medical information that is provided to me to indicate the nature of the surgery and the fact that it is major surgery. That responsibility rests with the provider of the medical evidence. If I do not get that information, I seek it out before I can make the decision that I am satisfied that the worker will require major surgery.

Hon TOM HELM—Will you take us through an example of how you would arrive at the decision to extend the election time?

Mr Monger—As you are aware, there are probably three main criteria: First, the worker must apply not less than 21 days before the termination day.

Hon TOM HELM—That is six months from the time a worker first gets workers compensation?

Mr Monger—Yes. The termination day is defined in the legislation, so it is a clearly defined day.

Hon TOM HELM—We are asking for your application of the legislation.

Mr Monger—The application must be made not less than 21 days prior to the termination day. It must be accompanied by medical evidence to indicate that the workers will require major surgery within the extension period. The application is filed with us. We check that it is made within the appropriate time. Then I examine the medical evidence to decide whether on the medical evidence I am satisfied that the worker will require major surgery. The regulations provide that I make that decision within 14 days of the receipt of the application. It enables me first to contact the other party, which is generally the employer and insurer, give them a copy of the application and indicate to them that if they wish to make any submission, they are required to do so by close of business the day prior to the expiration of 14 days. At the same time it gives me the opportunity to ask the worker if he or she has any further support in regard to the nature of the disability insofar as it may or may not require major surgery. I make the decision based on the information

before me at the time; that is, at the expiration of the 14 days. Clearly if I have not the medical evidence before me to support the fact of major surgery, the application would not be granted.

There is a second kind of application now, as a result of the amendment to 19N, which enables workers who have taken reasonably practicable steps to obtain medical information that they will require major surgery, to make an application. They are a little more difficult to process simply because I must still process them within the 14-day time line and invariably workers have not provided very much support for their application on those bases. If that occurs, I have on occasions contacted by phone the specialist involved. I have also asked the workers to provide further support for the application. The regulations allow that under 19N(4)(b). For example, I might ask the worker what action he or she has taken to obtain that information from the medical practitioner, what medical reports the worker has from the specialist relating to the nature of the disability and what is the possibility of the worker requiring major surgery within the extension period.”²⁵

- 6.33 The Director indicated that he relies upon the expert opinion of the treating medical specialist as to whether the surgery to be undertaken by the worker is major surgery. This is generally spelt out in the medical report supplied by the worker. Mr Monger acknowledged that the absence of a definition of major surgery could result in different surgeons coming to different conclusions as to whether the same surgical procedure could be considered major surgery. The following exchange between the Director and members of the Committee highlights this difficulty with the criterion of “major surgery” It also highlights the lack of any appeal process from the Director’s determination other than by way of prerogative writ in the Supreme Court:

“Mr Monger—I make the decision based on the medical evidence. I have to read and re-read the medical evidence to ensure that nothing is hidden away which indicates that the surgery is major surgery. Generally speaking, if surgery were to be regarded as major surgery, a medical practitioner or specialist would indicate in his letter that it is regarded as major surgery. If that is provided in the report, I am happy with that and there is not a problem. With a laminectomy and a problem like that in which it is not spelt out, in the interest of the worker, it is appropriate for me to make some inquiries. By the same token, the onus is on the worker to ensure that the information I get satisfies me that it is major surgery.

CHAIR—The worker has no ability to tell the doctor what he will put in the

²⁵ Corrected transcript of evidence taken at Perth, Session 2 of 2, Monday, April 3 2000, pp 2-3.

report.

Mr Monger—The worker's solicitors often encourage that thinking, but that is a matter for them. To define major surgery would be a difficult task for anyone, because there would be a difference of opinion; for example, orthopaedic surgeons may not necessarily consider a laminectomy as major, but rheumatologists and the like may consider it major surgery.

Mr MARLBOROUGH—And the worker might.

Mr Monger—There is no doubt about that and, generally speaking, any surgery is serious surgery, particularly if a person is to have general anaesthetic. There is a difference between serious and major and that is why we encourage the responsible medical practitioner to tell us whether, in his or her view, it is major surgery.

CHAIR—How would that ultimately be sorted out if it became a matter of dispute? Would that have to go to the Supreme Court?

Mr Monger—Yes, it would. Without pre-empting what the court would say, obviously I would produce the information that I had before me at the time I made the decision.

Hon TOM HELM—What if the employer making an objection to this extension provides medical evidence?

Mr Monger—If we receive no objections from the insurer, generally I will grant the application.

Hon TOM HELM—What if he had an objection?

Mr Monger—It would not make any difference. Based on the information before me, I would then decide whether I was satisfied, and then I would grant it.²⁶

- 6.34 It would appear that in the absence of the worker's treating specialist stating in his report that the worker will require "major surgery" in the extension period, the Director must interpret the specialist's report to determine whether to exercise his discretion in favour of the worker. The Director's evidence is that he attempts to clarify the matter by speaking direct with the specialist concerned. If the surgeon

²⁶ Corrected transcript of evidence taken at Perth, April 3 2000, Session 2 of 2, p. 11.

advises the Director that in his opinion, the procedure is major surgery, the Director is satisfied and will grant the application. In the absence of this information or if the specialist advises that it is not major surgery, the Director will not exercise his discretion in favour of the worker.

- 6.35 The reliance by the Director on the subjective expert opinion of the worker's treating specialist may result in different outcomes for applicants having to undergo the same surgical procedure. For example, a worker having to undergo a laminectomy may obtain a report from specialist A (a rheumatologist) stating that this is major surgery. On the basis of the Director's evidence, he would be satisfied and grant the worker's application for an extension. Another worker undergoing the same procedure may be unable to obtain this evidence because specialist B (an orthopaedic surgeon) does not share the same opinion as specialist A as to what constitutes major surgery. In these circumstances, the Director will not be satisfied and will not grant the application. In this example, the Director's application of the regulation results in an inconsistent outcome to what are essentially identical applications.
- 6.36 The Committee is concerned that the absence of an objective standard or definition of "major surgery" which can be applied consistently will result in a legal challenge to new regulation 19N. There may be some prospect of such a challenge succeeding based on the argument that no certain standard has been prescribed by the Amendment Regulations. If the Court were to accept this argument, regulation 19N(2)(a) and (b) would be invalid.
- 6.37 In circumstances where the specialist's opinion is equivocal regarding the need for major surgery, the Director's own enquires may be hampered where there is an absence of a medical authority from the worker directing the specialist to disclose information to the Director regarding the worker's medical condition. The consent authority contained in the claim form for workers compensation payments in the Principal Regulations only provides for the worker to authorise any doctor to discuss the worker's medical condition with the employer and their insurer.²⁷
- 6.38 The Committee recommends that Form 26 and 27 of the Amendment Regulations be amended to provide workers with the option of authorising their treating specialist to discuss their medical condition with the Director solely for the purpose of an application for extension of time. This would avoid a situation where a medical report is equivocal regarding the requirement for major surgery but the doctor properly refuses to discuss his patient's medical condition despite the fact that the doctor may be of the opinion that the worker will require major surgery.

²⁷ See Form 2B of the *Workers' Compensation and Rehabilitation Amendment Regulations 1982*.

- 6.39 The Executive Director said in evidence that approximately 1400 workers were subject to the regulations consequential to the amendments made to the Act by the *Workers' Compensation and Rehabilitation Amendment Act 1999*, the relevant sections of which came into operation on October 5 1999. From this transitional group, whose termination date was January 5 2000, there were approximately 50 applications to the Director for an extension of time in which to elect.
- 6.40 The Director gave evidence that he had received 16 applications for an extension of time in relation to workers who were not included in the transitional group. Of these applications, four were rejected as not being made within the prescribed time, eight were granted and four not granted. In relation to the four which were not granted, two were not granted on the basis that the workers concerned submitted medical evidence indicating they had a disability of 16% or greater and so did not require an extension of time under regulation 19N.²⁸ Subsequent to the hearing, the Director provided the Committee with a summary of the four applications that he rejected. This summary is attached as "Annexure D".
- 6.41 Despite its concerns with the use of "major surgery" as a criterion for the grant of an extension of time by the Director, the Committee has not resolved to recommend disallowance of the new regulation 19N in whole or in part. The expression "major surgery" does have a generally accepted meaning. The Director, not being medically qualified, must rely on the evidence submitted by the worker and where possible his own discussions with the worker's treating specialist to determine how he will exercise his discretion. The Director is not qualified to determine what is "major surgery" and must rely upon the expert opinion of the worker's treating specialist. Expert opinion can vary. The Committee acknowledges the potential for inconsistency in the outcome of applications arising from the criterion "major surgery".
- 6.42 An alternative to the procedure set out in new regulation 19N is to have all applications for an extension of time referred to a medical panel rather than the Director to determine whether the worker's surgery is major surgery. The Committee is of the view that this would promote a consistency in approach to the meaning of the expression "major surgery".
- 6.43 Permitting an appeal from an adverse determination by the Director other than by way of a prerogative writ in the Supreme Court may also reduce the potential for inconsistency in the outcome of applications. The appeal could be referred to a specialist body comprising suitably qualified personnel such as a medical panel under Part VII of the Act.

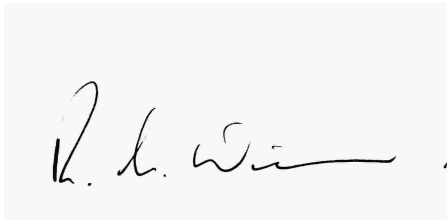
²⁸ See "Annexure D", files 98/2000 and 1896/99.

- 6.44 Finally, the expression “major surgery” could be defined in the new regulation 19N. This would have the advantage of a high degree of certainty. However, depending upon the definition used, it may not achieve the restriction on the number of workers seeking an extension of time under new regulation 19(2)(a) as originally intended by Parliament.

7 CONCLUSION

- 7.1 On the basis of the Supreme Court decision of *Re Monger; Ex Parte Woodford*, the Committee accepts that new regulation 19M is within power and has resolved not to recommend disallowance.
- 7.2 The Committee has some reservations regarding the expression “major surgery” in new regulation 19N as a criterion for the exercise of the Director’s discretion to grant a worker an extension of time in which to elect to claim damages. The Committee is concerned that the use of this expression has the potential to lead to an uncertain and inconsistent application of the Director’s discretion. As a consequence, the regulation may be subject to legal challenge as to its validity.
- 7.3 Despite these concerns, the Committee has resolved not to recommend disallowance of new regulation 19N. The regulation arose from negotiations between the Government and the Opposition when Parliament debated the *Workers’ Compensation and Rehabilitation Amendment Bill 1997*. In debating amendments to the Bill, the Parliament has considered section 93E(7) and the restrictive circumstances to be prescribed in regulations by which the Director can exercise his discretion to extend the period in which a worker can elect. During the debate, Parliament rejected an amendment to the Bill that would have broadened considerably the scope of the Director’s power to grant an extension.
- 7.4 The Committee therefore is of the view that it should not seek to interfere with Parliament’s intent by recommending disallowance of new regulation 19N or by insisting that additional circumstances be added in which an extension of time may be granted.
- 7.5 However, the Committee is of the view that regulation 19N should be clarified and urges the Minister to consider introducing the following amendments to the Principal Regulations and the Act:
- 7.5.1 Provide a definition of “major surgery” in new regulation 19N or elsewhere in the Principal Regulations so as to ensure a consistency of outcome for applications for an extension of time;

- 7.5.2 Amend the Act to permit an appeal from a refusal by the Director to extend time under new regulation 19N. The appeal could be to a specialist body comprised of members with appropriate medical qualifications such as a medical panel constituted under Part VII of the Act; and
- 7.5.3 Include a medical authorisation in Forms 26 and 27 to the Principal Regulations to provide workers with the option of authorising their treating specialist to discuss the worker's medical condition with the Director when considering an application for an extension of time under new regulation 19N.
- 7.6 The Committee extends its thanks to the Officers from WorkCover Western Australia and Mr Guthrie for their assistance.

A handwritten signature in black ink, appearing to read 'B. L. Wiese', is displayed on a light gray rectangular background.

Hon Bob Wiese MLA

Chairman

June 20 2000