REPORT OF THE
STANDING COMMITTEE ON LEGISLATION
IN RELATION TO

Workers' Compensation and Rehabilitation Amendment Bill 1997

Presented by Hon Bruce Donaldson (Chairman)

Report 43

STANDING COMMITTEE ON LEGISLATION

Terms of Reference:

1 There is hereby appointed a standing committee to be known as the *Legislation Committee.*

2 The Committee consists of 5 members.

3 A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice.

4 A referral under clause 3 includes a recommittal.

5 The functions of the Committee are to consider and report on

(a) Bills referred under this order;

(b) what written laws of the State and spent or obsolete Acts of Parliament might be repealed from time to time;

(c) what amendments of a technical or drafting nature might be made to the statute book;

(d) the form and availability of written laws and their publication.

Members at the time of this inquiry:

Hon Bruce Donaldson MLC (Chairman)
Hon Bill Stretch MLC (Deputy Chairman)
Hon John Cowdell MLC
Hon Derrick Tomlinson MLC
Hon Jim Scott MLC (as substitute for Hon Giz Watson MLC)
Hon John Halden MLC (as temporary substitute for Hon John Cowdell MLC)

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CHAPTER 1

EXECUTIVE SUMMARY AND RECOMMENDATIONS

1.1 Executive Summary

This report sets out the results of this Committee's inquiry into certain amendments to the *Workers' Compensation and Rehabilitation Act 1981* ("**Act**") proposed by the Legislative Assembly in its *Workers' Compensation and Rehabilitation Amendment Bill 1997* ("**Bill**"). The Legislative Council and Legislative Assembly are in disagreement over 3 of the 61 clauses of the Bill and the Council has referred those clauses to this Committee for consideration and report.

The key issue for this inquiry is whether the Council should accept the changes proposed by the Legislative Assembly to the circumstances in which an injured worker can access common law damages under the Act.

Under the Act an injured worker cannot seek damages at common law for a work related injury except where:

- the degree of disability suffered by the worker is at least 30%, based on the statutory scale ("**first gateway**"); or

- the future pecuniary loss suffered by the worker is at least the prescribed amount, currently $106,382 ("**second gateway**").

The Legislative Assembly proposal for consideration by this Committee has two elements. First, it will **restrict the first gateway** by excluding what might loosely be called "psychological factors" from counting towards the 30% degree of disability. Secondly, it will **close the second gateway** altogether.

While generally commending Western Australia's workers' compensation and rehabilitation system, most witnesses to this inquiry agree that some legislative action is required to stem recent and ongoing increases in the cost of the system, and in insurance premiums payable by employers. Witnesses do not, however, agree on what area of costs is to blame for the cost increases, and consequently should be the focus of legislative change. The continued viability of the system may be in doubt without reform.

By way of background, substantial amendments to the Act in 1993 were intended to shift the focus of the system **away** from awarding punitive common law damages to the worker, **towards** getting the worker back to work with compensation for lost earnings. It was

expected that an increase in weekly compensation payments, medical costs and rehabilitation costs would occur, but that the increase would be more than balanced by an expected substantial decline in common law payments.

The justification for the Assembly's proposal is essentially that the anticipated decline in common law payments has not occurred and that further legislative action is required to ensure that it does.

Opponents of the Assembly's proposal, however, point out that there have been equal or greater cost increases in other areas of the workers' compensation system. Further, it is generally agreed that a substantial proportion of common law payments falls within this category only because of flaws elsewhere in the legislation, notably the lack of any other avenue by which claims can be finalised, or "redeemed". They suggest on these grounds that the Assembly's proposal to cut back workers' common law rights is an inappropriate, badly directed and probably ineffectual response to the cost increases.

On the basis of these arguments, the Committee has made the following key findings.

1. A difficulty with the operation of the Act since the 1993 amendments has been the blurring of what are conceptually two quite different things:

   - the statutory compensation and rehabilitation system for returning injured workers to work and compensating them for income lost during that period, which the employer funds, generally through an insurance company, on a no-fault basis; and

   - the common law damages system which identifies and punishes negligence on the part of the employer where that negligence causes serious disability to a worker.

   The interaction of the statutory and common law systems leads to anomalies such as the following.

   - The common law damages system is used in many cases as a surrogate for statutory compensation as it offers certain procedural advantages to all parties. Many common law settlements are referred to as "de facto redemptions". This results in a confusing picture of where costs are being incurred.

   - The Act sends conflicting signals to a seriously injured worker: on the one hand, it provides for rehabilitation to promote the worker's return to work, while at the same time the common law can reward the worker who is unable to return to work. One result is that the rehabilitation system is not always effective in more serious cases potentially involving a common law claim.

   - Insurance arrangements tend to bundle together the compulsory, or statutory, component of insurance with the non-compulsory, common law

or general liability component. If the common law component were separated, a workplace with a good safety record and therefore low common law costs could be rewarded with lower premiums. The complex inter-relationship between common law costs and statutory costs makes it difficult for insurers to accurately assess potential liability and thence offer insurance conditions which reflect a workplace's safety record.

2. While there have been substantial cost increases in areas other than common law, legislative action to address the common law cost increases is justified because it was in this area that costs were expected to decrease substantially. Employers and insurers legitimately expected in 1993 that they would be able to fund an improved rehabilitation and weekly payments scheme because common law costs would decrease. It is appropriate for Parliament to deal with the difficulties caused by the failure of the 1993 legislation to achieve what was intended.

3. However, there are shortcomings both in the arguments used to justify the Assembly's proposal and in the actual form taken by the proposal. One important consideration is that employers and insurers need to operate within a predictable, consistent system which does not suffer from violent swings in cost allocation. Workers' compensation and rehabilitation is a dynamic system wherein the various cost factors are inter-related, so that an alteration to the rules in one area will affect the operation of other areas. Severely restricting common law claims, as the Assembly proposes, could result in costs increasing exponentially in other areas such as weekly payments and rehabilitation.

   While these flaws do not derogate from the need for legislative action, the Committee questions whether the Assembly's proposal is the most appropriate model for reform of the gateway system.

4. **The Committee understands that discussions on differing options for reform of the second gateway have continued between the Government and interested parties during the period of this inquiry.** In addition, various witnesses to this inquiry have raised options for reform which appear to be of merit and worth further consideration. Clearly, the Assembly's proposal is not the only possible model for reform. The Committee has not considered alternative proposals in detail but in this report briefly outlines a number of models to indicate what other approaches might be taken.

5. In these circumstances, the Committee has recommended that the Council does not agree to the Assembly's proposal.

6. Parties should be allowed, as they were until 1993, to agree to finalise a claim through a liberal redemption system in those cases where finalisation is appropriate. Most witnesses agree that liberalising the redemption system under the Act would remove a significant proportion of cases currently brought at common law, thereby going part way towards relieving common law cost pressures and presenting a more realistic picture of system costs.

7. Witnesses before the Committee raised a number of concerns about the operation of areas of the Act other than the second gateway. As noted, the system is dynamic and reform should not be undertaken in isolation. Although reform of the second gateway should remain the priority for Parliament, a general review of the Act, including consideration of the matters discussed in Chapter 12 of this Report, is merited once immediate concerns have been addressed by the Bill.

1.2 Recommendations

Recommendations are grouped as they appear in the text.

Recommendation 1: that the House agree to clause 13 of the Bill as requested by the Legislative Assembly in its Message No. 139.

Recommendation 2: that the House agree to clause 22 of the Bill as requested by the Legislative Assembly in its Message No. 139.

Recommendation 3: that the House disagree to the version of clause 32 proposed by the Legislative Assembly in its Message No. 139 and convey to the Assembly that it does not agree with the proposal to restrict the first gateway.

Recommendation 4.1: that the House disagree to the version of clause 32 proposed by the Legislative Assembly in its Message No. 139 and convey to the Assembly that it does not agree with the proposal to close the second gateway.

Recommendation 4.2: that the House request that the Government give serious consideration to Recommendations 5 and 6, concerning liberalisation of the redemptions system and other options for changes to the gateways.

Recommendation 5: that the Bill be amended to introduce a system of redeeming claims under section 67 of the Act as similar as practical to that which was in place prior to the enactment of the *Workers' Compensation and Rehabilitation Amendment Act 1993*, with the proviso that the Act should allow the employer agreeing to redeem a claim to be confident that no common law claim can be made for the same injury.

Recommendation 6: that the Government give further consideration to options for determining whether an injured worker may seek damages at common law, including:

1. alternate gateway models, such as:

- **establishment of a gateway tribunal;**
- **a single gateway requiring a 20% degree of disability;**
- **election between common law and statutory benefits;**

2. modification of the dual gateway system, by measures such as:

- **a higher threshold for the second gateway;**
- **second gateway threshold as a multiple of earnings;**
- **capping damages claimable through the second gateway;**
- **a more rigorous common law test for "negligence"; and**

3. alteration to procedure, such as:

- **initial access to common law in a lower Court.**

Recommendation 7: that the operation of the *Workers' Compensation and Rehabilitation Amendment Act 1981* be subject to a full review, considering among other things:

- **the role of common law in work related injuries;**
- **distinguishing between statutory and common law insurance;**
- **the ability of injured workers to "rehabilitation shop";**
- **preventing "double dipping";**
- **timely and consistent referral to rehabilitation; and**
- **controlling medical costs.**

CHAPTER 2

BILL'S HISTORY AND REFERENCE TO COMMITTEE

Following passage by the Legislative Assembly, the Bill was introduced into the Legislative Council on 25 November 1997 and read a first time on the motion of Hon Max Evans MLC.

The Bill went through second and third readings in the Council on 1 April 1998, on motions of Hon Peter Foss MLC, with amendments to clauses 13, 22 and 32 (ie the clauses discussed in this report). The Council, in Message No. 83 of 2 April 1998 to the Assembly, informed the Assembly that it had agreed to the Bill subject to the three amendments.

The Assembly, in Message No. 139 of 25 June 1998 to the Council, informed the Council that it had disagreed to the first two amendments proposed by the Council, and disagreed to and substituted a new amendment for the third.

On I July 1998 the Council passed a motion in the following terms:

> "***HON TOM STEPHENS*** *(Mining and Pastoral - Leader of the Opposition):*
>
> *That Legislative Assembly Message No 139 be referred to the Standing Committee on Legislation.*"[1]

This Committee was therefore instructed to consider not the Bill as a whole, but only the Legislative Assembly Message setting out the Assembly's response to the Council's proposed amendments. The Committee commenced its consideration of the Bill on 14 July 1998.

Parliament was prorogued on 7 August 1998, upon which the Bill (and consequently the referral to this Committee) lapsed.

Subsequent to resumption of Parliament on 11 August 1998 the Bill was restored to the Notice Paper of the Legislative Council, at the request of the Assembly, on 13 August 1998.

Legislative Assembly Message No. 139 was referred again to the Committee on 13 August 1998 on the following motion:

1 Hansard, Legislative Council 30/6/1998, p4964 and 1/7/1998, p5046

"***HON TOM STEPHENS*** *(Mining and Pastoral - Leader of the Opposition): I move without notice, consequent upon the decision of the House in respect of Message No 1 -*

> *That the Order of the Day for consideration in Committee of the Whole House of the amendments made by the Legislative Assembly, contained in message No 139, to the Workers' Compensation and Rehabilitation Amendment Bill be discharged, and the amendments referred to the Legislation Committee.*"[2]

The Committee re-commenced its consideration of the Bill at its meeting of 19 August 1998.

[2] Hansard, Legislative Council 13/8/1998, p181-182

CHAPTER 3

PROCEDURE OF THIS INQUIRY

The Committee conducted hearings with a number of witnesses in the course of the inquiry. Witnesses are listed at Appendix A. The Committee thanks the witnesses for offering their time and expertise to the inquiry.[3]

The Committee did not advertise publicly for submissions on the inquiry. A number of submissions were received, some from persons or groups who also appeared before the Committee. Submissions are listed at Appendix B. The Committee thanks submitters for their efforts.

Legislative Assembly Message No.139 concerns 3 clauses of the Bill, clauses 13, 22 and 32. Clause 32 proved of most interest to submitters. Accordingly, the bulk of this report is devoted to evidence, findings and recommendations in relation to clause 32.

The remainder of this Report is set out as follows:

Chapter 4 Clause 13 - Incapacity for Work

Chapter 5 Clause 22 - Medical Assessment Panels

Chapter 6 Clause 32 - Access to Common Law

Chapter 7 Clause 32 - Restriction of the First Gateway

Chapter 8 Clause 32 - Closure of the Second Gateway

Chapter 9 Liberalisation of the Redemption System

Chapter 10 Other Options for Changes to the Gateways

Chapter 11 Other Matters Raised in the Course of the Inquiry

[3] Where a witness provided a paper as part of their evidence to the Committee, whether in the course of or subsequent to the hearing, the paper is referred to in this report as part of the witness's evidence to the Committee rather than as a submission.

CHAPTER 4

CLAUSE 13 - INCAPACITY FOR WORK

In this Chapter the Committee considers the first part of Legislative Assembly Message No. 139, relating to clause 13 of the Bill.

4.1 Effect of the proposed amendment

Clause 13 of the Bill reads as follows:

> ***Section 61 amended***
>
> ***13.*** *Section 61(1) of the principal Act is amended by deleting "wholly or partially recovered"and substituting the following -*
>
> *"total or partial capacity for work".*

The principal Act is the *Workers' Compensation and Rehabilitation Act 1981*, referred to in this report as the "Act". Section 61(1) of the Act reads as follows (emphasis added):

> "*Subject to subsections (7) and (8) and section 84, where weekly payments of compensation for total or partial incapacity are made to a worker under this Act, they shall not be discontinued or reduced without the consent of the worker or an order of the Directorate unless the worker has returned to work or a medical practitioner has certified that the worker has* ***wholly or partially recovered*** *or that the incapacity is no longer a result of the disability and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with at least 21 clear days prior notice of the intention of the employer to discontinue the weekly payments or to reduce them by such amount as is stated in the notice, has been served by the employer upon the worker and unless within that period the worker has not made an application to the Directorate under subsection (13).*"

Summarising the effect of this proposed amendment:

- currently, payments to an incapacitated worker can be discontinued or reduced where a medical practitioner certifies that the worker has **wholly or partially recovered** from the incapacity;

- under the proposed amendment, payments to an incapacitated worker can be discontinued or reduced where a medical practitioner instead certifies that the worker has **total or partial capacity for work**.

4.2 Legislative Council debate on clause 13

In the Legislative Council's Committee of the Whole, a number of concerns were raised about clause 13[4]. They can be summarised as follows.

- The capacity for work involves much broader non-medical considerations than that of recovery from an injury. It is therefore inappropriate for a medical practitioner to administer the test.

- The clause would make it easier for employers to terminate weekly payments to workers who are yet to recover from their injuries.

- The amendment will make it easier for compensation payments to cease before the worker has actual rather than notional capacity to return to work.

- People in the workers' compensation field advise that it is a much simpler task to show a capacity for work than to show the current requirement of being wholly or partially recovered.

- The proposed test risks aggravating an injury that has not properly healed.

The Attorney General's response to these concerns was as follows.

> "*A person could be recovered but not be capable of working. I do not think one could say that a person is capable of working if he is not recovered. If he is capable of working, perhaps he should. If a person's disability prevents him from working, then he is obviously not capable.*"[5]

Following the debate the Council amended the Bill by deleting clause 13.[6]

4.3 Legislative Assembly response to Council's amendment

The Assembly, in Message No. 139, disagreed to the Council's amendment in the following terms:

> "*This amendment is disagreed to as entitlement to workers' compensation benefits are determined on the basis of a medical practitioner determining the worker's "incapacity" for work. The issue of "wholly or partially recovered" does not relate to the ability of a worker to return to employment. The words "total or partial capacity for work" protect both the worker from further injury if "recovered" but not fit for work and the employer in employing a worker beyond his capacity.*"[7]

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4 Hansard, Legislative Council 1/4/1998, p1234-1235
5 Hansard, Legislative Council 1/4/1998, p1235
6 Hansard, Legislative Council 1/4/1998, p1235
7 Hansard, Legislative Council 30/6/1998, p4959

COMMITTEE FINDINGS ON CLAUSE 13 OF THE BILL

The dispute over this clause is whether discontinuance or reduction of payments should be upon the worker having "wholly or partially recovered" from injury or having "total or partial capacity for work".

As a preliminary point, the Committee questions the Attorney General's contention that "a person could be recovered but not capable of working". If a person is not capable of working due to an injury, it is difficult to see in what sense they can be said to have "recovered" from the injury.

That issue aside, the Committee agrees with the Government that section 61 should be couched in terms of total or partial capacity for work, on the following grounds.

A person injured in the course of employment, such that work is not possible, is entitled to "no fault" weekly payments up to a prescribed amount. The payment is made, not because the worker is injured, but because he or she is incapable of work. When partially recovered, the worker may be capable of light duties, hence is capable of working. Payments might then cease or be reduced, but only if a doctor certifies the worker is medically capable of working, even if on light duties.

The critical issue is not that the worker is injured, but rather that the injury renders the worker incapable of working. It follows that cessation of payments should relate to certified medical capacity for work. The rules determining the amount by which payments may be reduced are set out in section 18 and Schedule 1.

Further, the language proposed by clause 13 is consistent with the language used in section 61, which refers to "weekly payments of compensation for total or partial incapacity"[8], and section 18 and Schedule 1 Item 7, which refers to total or partial "incapacity for work". If payments are made for "total or partial **incapacity** for work", it follows that they should cease or be reduced where the worker has "total or partial **capacity** for work".

The Committee recognises the concern raised in the second reading debate that a matter to be certified by a medical practitioner should fall within the realm of medical expertise. If the opponents of the clause are correct and the question of whether a worker has total or partial capacity to work does go beyond medical competence, medical practitioners are likely to be reluctant to certify their opinion, which could defeat the purpose of the amendment. However, on balance, the Committee accepts the Government's assertion that a medical practitioner should be able to competently certify whether or not a worker has "total or partial capacity for work".

The Committee also recognises that a worker who has returned to work (ie has total or partial capacity for work) should not be taken to have necessarily recovered from their injury. However, the Bill does not raise difficulties in this regard: it will not prevent a worker

[8] As a matter of drafting, the reference should probably be to "incapacity for work", not "incapacity".

receiving payments, as at present, under section 18 and Schedule 1 of the Act to the extent that they retain partial **incapacity** for work.

Accordingly the Committee accepts the Legislative Assembly's position and supports clause 13 in its present form.

The Committee notes that if Parliament wishes to clarify the nature of the matter to be certified by a medical practitioner under the clause 13 amendment to section 61, the clause could be amended, eg to the effect that a medical practitioner is to certify that the worker has:

> "*total or partial capacity for work, taking into account the physical and mental condition of the worker and the nature of work available to the worker*".

Recommendation 1: that the House agree to clause 13 of the Bill as requested by the Legislative Assembly in its Message No. 139.

CHAPTER 5

CLAUSE 22 - MEDICAL ASSESSMENT PANELS

In this Chapter the Committee considers the second part of Legislative Assembly Message No. 139, relating to clause 22 of the Bill.

5.1 Effect of the proposed amendment

Clause 22 of the Bill reads as follows:

> ***Sections 84R, 84ZH, and 84ZR amended***
>
> ***22.*** *(1) Sections 84R, 84ZH, and 84ZR of the principal Act are each amended in subsection (1) -*
>
> *(a) by deleting "required to do so under Part VII" and substituting the following -*
>
> *"permitted by section 145A to do so"; and*
>
> *(b) by deleting "is to" and substituting the following -*
>
> *"may".*
>
> *(2) Sections 84R, 84ZH, and 84ZR of the principal Act are each further amended in subsection (1) by deleting "as to the nature" and everything in the subsection that is after those words and substituting the following -*
>
> *"as to -*
>
> *(a) the nature or extent of a disability;*
>
> *(b) whether a disability is permanent or temporary; or*
>
> *(c) a worker's capacity for work,*
>
> *for determination by a medical assessment panel.* ".

Sections 84R, 84ZH and 84ZR each govern the referral (at different stages of a review process) of a "question" to a medical assessment panel.

Turning first to **clause 22(1)**, this subclause follows other amendments to the Act proposed by clause 37 of the Bill (which clause was passed at second reading by the Council). Currently under section 145A of the Act, a review body **must** refer questions to a medical assessment panel. Under clause 37 of the Bill, however, a dispute resolution body is given **discretion** as to whether to refer a question under section 145A to a medical assessment panel.

Clause 22(1) merely changes the language of the sections relating to section 145A (ie 84R, 84ZH, and 84ZR) to reflect the clause 37 change from compulsory to discretionary referral under section 145A. Clause 22(1) is a consequential, mechanical change.

It might be commented that if the Council had disagreed to the change from compulsory to discretionary referrals being made, it should have disagreed to clause 37, and only consequentially disagreed to clause 22. As the Council did not do so, the Committee has not considered clause 22(1) further.

Clause 22(2) is, however, a substantive amendment to the present Act. Clause 22(2) relates to clause 13 of the Bill (discussed in Chapter 4 above) but is not a consequential amendment. It has the substantive effect of introducing a new type of question which may be considered by a medical assessment panel, as follows.

- Currently, in the course of determining a dispute between worker and employer/insurer, a dispute resolution body (under section 84R, 84ZH, or 84ZR) can refer two questions to a medical assessment panel: a question as to "the nature or extent of a disability", and a question as to "whether a disability is permanent or temporary". The question under section 61 of the Act of whether a worker "has wholly or partially recovered" cannot be referred to a medical assessment panel by a dispute resolution body.

- Clause 22(2) proposes that the new question under section 61 (as amended by clause 13 of the Bill), whether a worker "has total or partial capacity for work", will be able to be referred to a medical assessment panel by a dispute resolution body under sections 84R, 84ZH, and 84ZR.

5.2 Legislative Council debate on clause 22

In the Legislative Council's Committee of the Whole, a number of concerns were raised about clause 22.[9] They can be summarised as follows.

- Under the proposal, more resources will be directed towards medical assessment panels, potentially at the expense of conciliation officers.

- Medical assessment panels will not work in the best interests of the injured worker and can be very intimidating.

9 Hansard, Legislative Council 1/4/1998, p1236-1238

- The amendment places too much emphasis on the physical condition of the injured worker and does not consider sociological and psychological factors that are important in rehabilitation and return to the work force.

- There is no avenue of appeal against a medical panel decision, which is a denial of natural justice.

- The clause fails to recognise the inherent imbalance of power in workers' compensation matters, between the powerful insurers and the workers. There is some contradiction in government legislation in this area; that is, the use of legal representation is encouraged in some tribunals, but this clause deliberately limits the use of legal representation.

- The Chapman report and the Guthrie report recommended that matters for consideration by medical assessment panels be limited to medical conditions. The proposal before the Committee extends beyond the determination of medical conditions. Doctors are not qualified to assess the question of a worker's capacity for work.

- There are cases in which people have accepted payments, believing they have no choice, only to find when they consult their lawyer that other options were available. By then, it is far too late. The insurers are familiar with processes and legalities, and they have developed expertise and access to experts in the area.

The Attorney General's response to these concerns in Committee of the Whole can be summarised as follows[10].

- The medical assessment panels are paid for by the directorate, and not the worker.

- Panels obviate the problem of doctor shopping. There were well known insurers' doctors and well known insureds' doctors. When a dispute arose between the two, the matter went to legal hearings, which also involved considerable legal expense. The clause will enable a much cheaper and simpler process.

- Medical panels are empowered to make decisions on the nature or extent of disability, which is their field of expertise. The amendment will not alter that role. In deciding the issue of a worker's capacity to work, doctors will not be required to consider the availability of jobs, which is an area outside their field of expertise.

- Section 145D of the Act requires the panels to act in accordance with good conscience, without regard to technicalities or legal forms. That is consistent with natural justice.

- Decisions of the panel are found, final and binding on the medical issues within their purview only. If medical panel determinations could be set aside, the review officer

[10] Hansard, Legislative Council 1/4/1998, p1238-1241

or compensation magistrate would have to adjudicate between conflicting medical evidence submitted by the parties. Medical panels were introduced to enable medical disputation to be determined with expertise and precision not available to non-medically qualified persons, and they have been very successful in achieving this aim.

- The insurer has no role on a panel, as it is not an adversarial process. The worker is present to have his incapacity assessed. The panel is an independent panel of doctors doing what doctors are expected to do; that is, assess the worker's incapacity. Striking out this amendment will not change the system of medical panels.

Following the debate the Council amended the Bill by deleting clause 22.[11]

5.3 Legislative Assembly response to Council's amendment

The Assembly, in Message No. 139, disagreed to the Council's amendment in the following terms:

> "*This amendment is disagreed to as the current Act wording provides no discretion for the dispute resolution body on whether a medical dispute is or is not referred to a Medical Panel. Given some medical disputes could be minor in nature this discretion is essential to ensure delays in resolution do not disadvantage either the injured worker or employer. Further, this clause includes an ability for the Medical Panel to determine a worker's "capacity for work" for the same reasons as set out in response to amendment 1.*"[12]

COMMITTEE FINDINGS ON CLAUSE 22 OF THE BILL

The dispute over this clause is whether the question of a worker's capacity for work is an appropriate one to be determined by a medical assessment panel.

Under section 145A, the question of capacity for work can only be referred to a medical assessment panel where there is a conflict of medical opinion between a medical practitioner engaged by the worker and one provided and paid for by the employer. It follows that the resolution of the conflict should also be by a medical body, in the case of the Act a medical assessment panel. This is what is proposed by clause 22.

Disputes about other, non-medical questions brought before a dispute resolution body remain with the dispute resolution body.

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11 Hansard, Legislative Council 1/4/1998, p1241

12 Hansard, Legislative Council, 30/6/1998, p4959

Accordingly the Committee accepts the Legislative Assembly's position and supports clause 22 in its present form.

The Committee notes that the question of a worker's capacity for work is only one of the two matters which may be certified by a medical practitioner under amended section 61, the second being whether the worker's "incapacity is no longer a result of the disability". For consistency, it might be expected that the Bill would also propose that this second question may be referred to a medical assessment panel. It is not clear why the Bill does not do so.

Recommendation 2: that the House agree to clause 22 of the Bill as requested by the Legislative Assembly in its Message No. 139.

CHAPTER 6

CLAUSE 32 - ACCESS TO COMMON LAW

6.1 Introduction

The bulk of the Committee's inquiry was devoted to the proposed amendments to clause 32 of the Bill, which affects sections 93A and 93D. This Chapter describes the series of proposed amendments to these sections put forward by the two Houses. Chapter 7 discusses the Legislative Assembly's final proposed clause 32 insofar as it affects the "**first gateway**" to common law damages. Chapter 8 discusses the Legislative Assembly's final proposed clause 32 insofar as it affects the "**second gateway**" to common law damages.

6.2 Effect of initial proposed clause 32

Clause 32 of the Bill (ie the original version of the clause considered by the Council in Committee of the Whole) reads as follows:

> ***Sections 93A and 93D amended and transitional provisions***
>
> ***32.****(1) Section 93A of the principal Act is amended by deleting the definition of "future pecuniary loss" and substituting the following definition -*
>
> *" **"future loss of earnings"** means the loss of earnings except to the extent that it has already been incurred at the time when the amount of that loss is required to be determined by a court; ".*
>
> *(2) Section 93D of the principal Act is amended in subsection (2) (b) and subsection (5) (c), by deleting "future pecuniary loss" and in each case substituting the following —*
>
> *" future loss of earnings ".*
>
> *(3) The amendments made by subsections (1) and (2) have no operation in relation to a cause of action arising wholly before the day on which this section commences.*

The effect of this version of clause 32 is to substitute for the broad concept of "pecuniary loss", which could include medical costs and any other costs relating to the worker's disability, the narrower concept of "loss of earnings".

6.3 Legislative Council debate on clause 32

The Council, in Committee of the Whole, debated clause 32 and then amended the Bill by deleting clause 32. The debate has not been considered by this Committee, for the reason that the clause as it then was has been superseded by a further amendment proposed by the Legislative Assembly, discussed below.

6.4 Legislative Assembly response to Council's amendment

Instead of merely disagreeing with the Council's proposed amendment, as it had done for the first two amendments discussed in Chapters 4 and 5 above, the Assembly substituted a different proposed version of clause 32 as follows[13]:

> ***32.*** *(1) Section 93A of the principal Act is amended by deleting the definition of "future pecuniary loss".*
>
> *(2) Section 93D(2) of the principal Act is repealed and the following subsections are substituted -*
>
> *" (2) A disability is a serious disability if, and only if, the degree of disability would, if assessed as prescribed in subsection (3), be 30% or more.*
>
> *(2a) In assessing the degree of disability of a worker under subsection (3), no regard is to be had to any mental ailment, disorder, defect, morbid condition or symptom of the worker that arises, recurs or is aggravated or accelerated as a consequence of, or secondary to, a physical disability of the worker."*
>
> *(3) Section 93D(3) of the principal Act is amended by deleting "For the purposes of subsection (2)(a)" and substituting the following -*
>
> *" Subject to subsection (2a), for the purposes of subsection (2) ".*
>
> *(4) Section 93D(5) of the principal Act is amended -*
>
> *(a) by inserting "or" after paragraph (a);*
>
> *(b) in paragraph (b) by deleting "; or" and substituting a full stop; and*
>
> *(c) by deleting paragraph (c).*

[13] Hansard, Legislative Council, 30/6/1998, p4960

For ease of reference, in the remainder of this report this further proposed version of clause 32 is referred to as "**final clause 32**".

The Assembly in its Message No.139 proffers the following explanation for final clause 32:

> "*The clauses remove the current alternative access of workers, who do not meet the serious disability threshold, to Common Law and are essential to save the workers' compensation system in this State from total financial collapse, a situation which would seriously impact on both employers and injured workers for whom the system is designed.*"[14]

6.5 Effect of final clause 32

Section 93D(1) of the Act at present allows a worker to seek damages in court outside the compensation provisions of the Act (ie at common law) where the disability suffered by the worker is a "serious disability". One of two threshold tests, colloquially referred to as the first and second "gateways", must be met for a disability to qualify as a serious disability.

Section 93D reads as follows (noting that the first and second gateways are respectively set out in section 93D(2)(a) and 93D(2)(b)):

> ***No damages unless death or serious disability***
>
> ***93D.****(1) Damages can only be awarded if the disability results in the death of the worker or it is a serious disability.*
>
> *(2) A disability is a serious disability if, and only if —*
>
> *(a) the degree of disability would, if assessed as prescribed in subsection (3), be 30% or more; or*
>
> *(b) the future pecuniary loss resulting from the disability is of an amount that is at least equal to the prescribed amount.*

For the purposes of section 93D(2)(b), section 93A defines "future pecuniary loss" as follows:

> ***"future pecuniary loss"*** *means pecuniary loss other than that which has already been incurred at the time when the amount of that loss is required to be determined by a court;*

The gateways are affected as follows by final clause 32.

- **Restriction of the first gateway:** the first gateway requires that the degree of disability suffered by the worker is assessed in accordance with the Act as 30% or

[14] Hansard, Legislative Council, 30/6/1998, p4960

more. Proposed section 93D(2a) under final clause 32 will have the effect of excluding a number of factors, which could be broadly grouped as "psychological" factors, from counting towards the 30% degree of disability.

- **Closure of the second gateway:** the second gateway requires that the future pecuniary loss resulting from the disability is at least equal to the prescribed amount ($106,382 at I July 1998). Final clause 32 will remove altogether the second gateway. The result will be that if the first gateway test is not met, it will not be possible for workers to seek damages at common law in relation to a disability, regardless of the quantum of future pecuniary loss.[15]

Legislative Assembly Message No. 139 was referred to this Committee prior to being considered in the Council, meaning that final clause 32 has not been debated in the Council.

[15] Under the original Bill, as noted above, the second gateway was restricted but not closed.

CHAPTER 7

CLAUSE 32 - RESTRICTION OF THE FIRST GATEWAY

This Chapter sets out arguments advanced for and against the restriction of the first gateway under final clause 32. The Committee's findings and recommendations follow.

7.1 Arguments FOR restriction of the first gateway

7.1.1 The first gateway costs too much

SGIO Insurance, through Mr Garry Moore, General Manager, Commercial, in a briefing paper tabled as evidence before the Committee, comments on the restriction of the first gateway:

> "*We strongly support the retention of common law access for seriously injured workers via the primary gateway subject to the exclusion of secondary psychological factors.*"[16]

SGIO Insurance warns that if the first gateway is not restricted it could be removed altogether, as has occurred in other States which have experienced cost increases where the first gateway is not restricted. SGIO Insurance comments that under final clause 32:

> "*. . . secondary psychological factors have also been excluded from the determination of the 30% disability to avoid the first gateway being undermined as per the experience in Victoria. The problems in Victoria eventually lead to Common Law being abolished altogether in that State consistent with SA and the NT. Access to Common Law is still available in Queensland and NSW subject to a serious disability threshold of 20% and 25% respectively. Tasmania still provides unlimited access but the system is also under pressure from a blow-out in common law costs.*"[17]

7.1.2 30% threshold is too easily reached

Mr Harry Neesham, the CEO of the Workers' Compensation and Rehabilitation Commission of Western Australia (known as "WorkCover"), suggests that if the first gateway were not restricted as proposed, costs could blow out for the reason that it

16 Mr Garry Moore, 14/7/98, evidence to the Committee

17 Mr Garry Moore, 14/7/98, evidence to the Committee

is too easy for injured workers to reach the 30% threshold if psychological factors count towards the threshold. Mr Neesham states that the Victorian situation:

> "*. . . had reached the point where it was being manipulated. The way in which people were accessing their 30 per cent threshold was by having a 5 or 10 per cent physical disability and a 25 or 30 per cent psychological overlay on top of that system. The end result was that Victoria's system went from being funded to being very much underfunded, in terms of the State's liability. At one stage it was moving to approximately $2.4b underfunded.*"[18]

The response of the Victorian Government was earlier this year to remove the first gateway altogether. The Bill proposes a more limited response.

7.1.3 Rewarding a mental condition promotes the condition

The Attorney General suggests that the availability of a reward for contracting a morbid condition makes it more likely that an injured worker will contract a morbid condition:

> "*Hon DERRICK TOMLINSON: It has been put to us that [restricting the first gateway] is unfair as the physical condition is just as real as the mental condition. You may say it is a consequence of the expectation of getting more money; but the mental condition is a very real condition.*
>
> *Hon PETER FOSS: That is very true but the problem is similar to the repetitive strain injury epidemic some years ago. It spread like an infectious disease and is now gone. The compensation receivable was one of the biggest causes of it. The best way to get rid of a disease is to tackle the underlying problem. I would rather these people did not have these morbid conditions and, strangely enough, one of the best ways of stopping them developing the conditions is to take away the money they can receive for having them.*
>
> *. . . A genuine morbid condition is no good for the person except in dollar terms. People would be better off if they did not have these morbid conditions, and if the system is increasing the rate of development of these conditions it should be changed.*"[19]

7.2 Arguments AGAINST the restriction of the first gateway

7.2.1 Psychological factors should not be ignored

The Committee asked Mr Graham Guest, a clinical psychologist specialising in rehabilitation of injured workers, his response to suggestions that counting

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18 Mr Harry Neesham, 14/7/1998, evidence to the Committee, p2

19 Hon Peter Foss MLC, 9/9/1998, evidence to the Committee, p28

psychological factors towards the 30% threshold could have a deleterious effect on the worker's mental condition:

> "*I do not think they are in a position to say that because they are saying that when there is some sort of psychological intervention, it will result in that person becoming more psychologically disabled.*
>
> *It is probably true sometimes. Certainly in our own profession, we need to get our act together to some extent, but I also believe that most people who work as psychologists are interested in helping people become more active and live a more productive lifestyle which is inconsistent with promoting disability. Psychologists are certainly aware of psychological sequelae of injury and life disruption. Our job is to minimise that, not to promote that, so that is the first point.*
>
> *The second point is that it is beyond reproach that minor injuries can result in major psychological disturbance. That is not me saying that; this has been demonstrated time and time again.*
>
> *. . . It is self-evident that an injury can result in a major life disruption which can lead to psychological problems.*"[20]

Mr Paul O'Halloran, a plaintiff solicitor, tabled as evidence before the Committee a briefing paper which includes the following comment:

> "*In my view, the issue of depression and psychological problems occurs in the vast majority of claims . . When one is seriously injured it causes huge collateral damage including marital breakdowns, loss of a house, loss of dignity and so on. . . To slap all these people in their face by ignoring their mental problems is an absolute outrage as these people are the most vulnerable and seriously injured people in the community. They do not have fraudulent claims at all but have serious disabilities from a physical and mental point of view. If their evidence is not supported by solid medical evidence then the claim will simply not stand up to scrutiny in the District Court of Western Australia.*"[21]

7.2.2 The amendment is badly drafted

The Law Society of WA believes the amendment is badly drafted.[22] As examples of perceived flaws, the Society suggests it is not clear:

- how a person suffering both physical and mental impairment would be affected; and

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20 Mr Graham Guest, 19/8/1998, evidence to the Committee, p25
21 Mr Paul O'Halloran, 28/7/1998, evidence to the Committee
22 Mr Gray Porter, 14/7/1998, evidence to the Committee, p29

- how the amendment would affect claims relating to pain.

7.2.3 The first gateway recognises serious injury

Mr Kim Mettam, Chairperson of the Self Insurers' Association of Western Australia, opposes the restriction of the first gateway:

> "*. . . we recommend leaving the first gate as it stands, with no change. That is a practical way to recognise that somebody with a very serious injury should access a common law system with no change. That is a highly equitable approach.*"[23]

COMMITTEE FINDINGS ON RESTRICTING THE FIRST GATEWAY

The arguments for restricting the first gateway appear to be based essentially on an attempt to minimise cost. While considerations of cost are important, the Committee is reluctant to support cost saving measures which have no foundation in reasoned argument and sound policy.

The proposal to exclude psychological factors from counting towards the first gateway runs counter to long-standing recognition by the legal system that psychological trauma may be compensable at common law. As such, the proposal is a symptom of the confusion between common law punitive damages and statutory compensation which runs through much of this area. The question of what types of injury are compensable at common law should, as a general rule, be left to the courts to determine.

Further to this point, the Committee takes the view that the simplistic approach of counting all common law payments as just another cost to the workers' compensation and rehabilitation system produces a misleading picture. Common law payments certainly need to be considered as costs to the employer. However, the distinction should be made between statutory compensation and rehabilitation costs, which are appropriately controlled by the Act, and common law payments, which are essentially a matter for court determination. Conceptually, common law payments to injured workers are more akin to public liability costs than to costs under the Act.

Although the Act has had some effect on common law, the distinction between common law and statutory compensation remains of practical importance and should be respected. If the legislature proposes to amend the judiciary's application of common law, it must have a sound policy basis for doing so.

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[23] Mr Kim Mettam, 19/8/1998, evidence to the Committee, p35

If there were sound medical evidence that there is a clear distinction between physical problems arising from an injury and mental problems arising from an injury, this might justify counting the first category but not the second towards the 30% degree of disability threshold. In some cases it might be that an individual worker seeks to exaggerate a psychological condition so as to reach the threshold. However, the Committee has not seen evidence which would enable it to accept that, as a general rule, psychological factors are not genuine or are less real to the injured worker than physical problems.

The Committee accepts that there is a need to control the costs of the workers' compensation system. At the same time, the Committee notes that the proposal to restrict the first gateway is to a degree based on the Government's concern that if the second gateway is closed, injured workers may be more likely to seek access to common law through the first gateway. If the second gateway, however, is not closed, the anticipated flow to the first gateway will not eventuate.

It might be that a different, soundly based proposal to alter the first gateway in such a way as to limit costs would be acceptable. However, it is not clear that restricting the first gateway as proposed by final clause 32 is the most appropriate measure to take. The Committee considers that the cost-based arguments for the proposal are outweighed by the difficulties that the restriction would cause for workers who suffer genuine psychological problems arising from their injury.

Accordingly, the Committee does not accept the Legislative Assembly's position in relation to restricting the first gateway and does not agree with the Assembly's final version of clause 32.

The Committee discusses alternative approaches to amending the gateway system in Chapters 9 and 10.

Recommendation 3: that the House disagree to the version of clause 32 proposed by the Legislative Assembly in its Message No. 139 and convey to the Assembly that it does not agree with the proposal to restrict the first gateway.

CHAPTER 8

CLAUSE 32 - CLOSURE OF THE SECOND GATEWAY

This Chapter sets out arguments advanced for and against the closure of the second gateway under final clause 32. The Committee's findings and recommendations follow.

8.1 Arguments advanced FOR closure of the second gateway

8.1.1 The second gateway costs too much

By way of background, the Committee notes that WorkCover breaks down payments made each year in the area of workers' compensation and rehabilitation generally into a number of categories. The two claims payments tables on the following pages are the most recent information supplied to the Committee by WorkCover, with amounts respectively in actual dollars and in dollars CPI-indexed to 1989/90 figures.

The following changes since the last substantial amendments to the Act in 1993 have been raised by submitters as significant (all figures in CPI-indexed dollars, in millions per financial year):

- weekly payments increased from $85.2 in 1993/94 to $112.7 in 1997/98;
- common law payments fluctuated around $84.0 between 1993/94 and 1996/97, then increased to $100.5 in 1997/98;
- combined medical practitioners and vocational rehabilitation payments increased from $30.1 in 1993/94 to $53.1 in 1997/1998; and
- redemption payments decreased from $26.7 in 1993/94 to $3.8 in 1997/98.

It is important to note that these figures do not make any allowance for increases in the workforce between 1993/94 and 1997/98. Australian Bureau of Statistics figures indicate that the number of employed people in Western Australia rose from 765,700 in July 1993 to 885,600 in July 1998, an increase of 16%.[24] Other things being equal, it might therefore be expected that a 16% increase would occur over the period in each of the areas listed in the WorkCover tables.

[24] Australian Bureau of Statistics pub. no. 6202.0

Claims Payments

	92/93	93/94	94/95	95/96	96/97	97/98
Weekly Payments	91.1	92.4	99.4	111.4	127.5	133.0
Common Law	80.6	91.2	106.3	86.3	102.0	118.6
Medical Practitioners	26.4	26.9	28.7	33.3	40.1	44.1
All Other Treatment	16.5	16.6	16.6	18.8	19.9	21.0
Legal Expenses	22.4	27.2	24.7	20.6	18.6	19.9
Vocational Rehabilitation	4.3	5.8	7.8	10.5	16.0	18.5
Hospital Expenses	11.1	12.2	13.1	13.4	14.0	13.7
2nd Schedule	4.0	5.8	6.9	10.8	13.9	15.9
Miscellaneous	10.2	9.8	10.0	11.4	13.2	15.8
Redemptions	22.6	29.0	10.4	7.4	8.0	4.5
Fatal	1.1	1.3	0.8	2.0	1.1	2.0
Total ($m)	290.3	318.1	324.8	326.1	374.3	407.0

Source: WorkCover WA Annual Report 1997/98
Data not adjusted for inflation
Compiled: 10 September 1998

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CPI-Adjusted Claims Payments

	92/93	93/94	94/95	95/96	96/97	97/98
Weekly Payments	85.8	85.2	88.5	95.5	107.8	112.7
Common Law	75.9	84.0	94.7	73.9	86.2	100.5
Medical Practitioners	24.9	24.8	25.6	28.5	33.9	37.4
All Other Treatment	15.5	15.3	14.8	16.1	16.8	17.8
Legal Expenses	21.1	25.1	22.0	17.6	15.7	16.9
Vocational Rehabilitation	4.0	5.3	6.9	9.0	13.5	15.7
Hospital Expenses	10.4	11.2	11.7	11.5	11.8	11.6
2nd Schedule	3.8	5.3	6.1	9.2	11.7	13.5
Miscellaneous	9.6	9.0	8.9	9.8	11.2	13.4
Redemptions	21.3	26.7	9.3	6.3	6.8	3.8
Fatal	1.0	1.2	0.7	1.7	0.9	1.7
Total ($m)	273.3	293.2	289.2	279.4	316.4	344.9

Source: WorkCover WA Annual Report 1997/98
Data adjusted using the Consumer Price Index (base year 1989/90)
Compiled: 10 September 1998

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The other point which should be made by way of background is that when the second gateway was introduced in 1993, an actuarial firm estimated that the cost of second gateway payments would be around **$2 million/yr**.[25] An estimate by Coopers & Lybrand Actuarial and Superannuation Services Pty Ltd, in a 1998 report titled *Workers' Compensation & Rehabilitation Commission of Western Australia - Actuarial Analysis of Access to Common Law - March 1998*, suggests that in fact second gateway payments are currently costing **$107 million/yr**.[26]

Submitters arguing FOR the closure of the second gateway approach the issue of cost in a number of ways, as set out in the rest of this section.

In a letter to Members of the Legislative Council dated 29 June 1998, the then Minister for Labour Relations claims that:

> "*Due predominantly to the cost escalation of common law claims, premium rates will rise by 13.6% in 1998/99 and may increase by as much as 30% in 1999/2000 if the two common law gateways are retained."*

SGIO Insurance reiterates this in a briefing paper tabled as evidence before the Committee:

> "*The common law thresholds have not operated as intended and are causing substantial increases in claims costs. The Second Gateway in particular is costing over $100M a year compared to around $2M estimated in 1993.*
>
> *Premiums have risen substantially over the last 12 months and will continue to rise by around 30% per annum to keep pace with the increase in common law costs.*"[27]

SGIO Insurance goes on to state that:

> "*In 1997 around 1.25% of claims were getting through the thresholds and accounted for 34% of total claims costs which amounted to $140M (around 750 claims). Clearly a disproportionate allocation of system costs to a small number of claims.*
>
> *. . . The substantial amount of this increase has been in the last 18 months as awareness grows over the ability to access a lump sum settlement via the second gateway.*"[28]

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25 Coopers & Lybrand Actuarial and Superannuation Services Pty Ltd (1998): *Workers' Compensation & Rehabilitation Commission of Western Australia - Actuarial Analysis of Access to Common Law - March 1998*, p19

26 Coopers & Lybrand (1998), p1

27 Mr Garry Moore, 14/7/98, evidence to the Committee

28 Mr Garry Moore, 14/7/98, evidence to the Committee

SGIO Insurance submits in relation to its costs that:

> "*SGIO needed to add around $25M in outstanding claims costs at 30 June 1997 and a further $51M at 30 June 1998 due to the increase in the number of common law claims emerging in the system.*
>
> *In the coming twelve months the premium pool paid by employers in the WA Workers' compensation system will increase by more than $90M to meet costs, without any 'claw back' of the large losses incurred in the past two years. The recently announced PRC [Premium Rate Committee] gazetted rate increases averaging 13.6% do not reflect the real increases in the market place. Market increases averaging 30%-40% were applied at the 30 June 1998 renewals.*
>
> *WA currently has the most expensive workers' compensation system in Australia and we expect premiums to continue to rise by 30% per annum to keep pace with the increase in common law costs."*

The National Insurance Brokers Association of Australia Ltd in its submission to the Committee states that:

> "*If the proposed legislative amendments are not accepted, we foresee:*
>
> - *A continuation of the current high claims for insurance companies, resulting in continual large financial losses that will eventually be passed on to someone/everyone.*
> - *Fewer insurance companies interested in pursuing Workers Compensation insurance in Western Australia (less competition).*
> - *Significant premium increases for Employers, and a reduction/removal of quarterly instalment facilities currently provided by insurance companies to employers . . .*
> - *Further unemployment generally, and also indirectly (in related service industries ie insurance, Occupational Health & Safety, Rehabilitation etc).*
> - *An electoral backlash against political parties; Commerce and Industry cannot continue to suffer substantial financial losses. The proposed legislation has the ability and can clearly rectify the disastrous consequences that have resulted from the unexpected impact of the second gateway."*[29]

[29] Submission No.2

Mr Daryl Cameron of the Insurance Council of Australia concedes that costs in areas other than common law have risen more than common law costs, but reiterates that common law costs are its major concern because they were expected to fall substantially from 1993, but have not done so:

> "*The real concern is that we have a no fault statutory system which is being supplemented by a growing number, or an increasing participation rate, of common law access on top of the statutory. The statutory system in this State works very well, and insurers generally speaking do not have any concerns, despite the significant growth in weekly payments, medical costs and rehabilitation costs. That was expected in 1994 when we changed the system; and in the belief that we would remove many of the small common law claims, there was a significant increase in the statutory benefits.*
>
> *Therefore, although they have blown out - and the percentage increase in weekly benefits has gone ahead of common law over the past two or three years - that was expected.*
>
> *What was not expected, and where the insurers were caught short with the so-called discounting in the marketplace, was that not all of the three major thrusts of the changes that were implemented in 1993-94 would work. Two of them certainly did work - the focus back onto rehabilitation and medical, and getting people maintained and back to work or starting to work, albeit at a cost . . . We certainly intended the weekly benefits to go up, because people get four weeks' full pay to start with, plus the total statutory amount was increased by some $20 000.*"[30]

Mr Neesham of WorkCover told the Committee that in the last year Western Australia's average workers' compensation and common law combined premium has risen from 2.8% to 3.1 % of wages. This compares with the Victorian figure of 1.9% and New South Wales' figure of 3%.[31]

8.1.2 The second gateway has not operated as intended

Many submitters supporting the closure of the second gateway raise the argument that the second gateway should be closed because it has not operated as intended in 1993 when it was introduced by the *Workers' Compensation and Rehabilitation Amendment Bill 1993*.[32]

In the course of the second reading speech for that Bill the then Minister for Labour Relations made the following remarks:

> "*One of the submissions made to the Government stressed that some workers who were not otherwise seriously disabled might suffer a*

30 Mr Daryl Cameron, 14/7/1998, evidence to the Committee, p73
31 Mr Harry Neesham, 9/9/1998, evidence to the Committee, p28
32 See for example Mr Harry Neesham, 14/7/1998, evidence to the Committee, p1

> *disproportionately high loss of earning capacity due to the nature of their disabilities and not have access to common law. An example given was that of a concert pianist who lost the use of two fingers. The Government has acknowledged this concern by providing an alternative gateway to common law in this Bill consisting of a threshold of the prescribed amount, $100,000 for future economic loss at the date of determination."*[33]

Mr Patrick Gilroy of the Chamber of Minerals and Energy Western Australia Inc notes that in an industry such as mining where wages are high the threshold will be met fairly easily in most cases:

> " *. . . we do not support the second gateway. In our industry the average income might be $60 000 a year. In fact, we have miners earning $150 000 a year, so the threshold is fairly meaningless for us because anyone with a relatively serious injury will get through that gate. . . In our industry it means an automatic access to common law.*"[34]

Many submitters point to the discrepancy between the 1993 estimate that the second gateway would cost $2 million/yr and the actual cost in 1997/98 of $107 million as proof that the second gateway is not working as intended.

8.1.3 Courts have allowed too many claims

Closely related to the argument immediately above is the argument that the courts in applying the 1993 amendments have been too lenient in allowing access to the common law gateways. Coopers & Lybrand claim in their 1998 report that:

> "*Trowbridge Consulting costed the introduction of the second gateway in 193 at only $2M but it is currently costing $107M per year (26% of the scheme). This is mainly due to the way the Courts have applied the economic threshold.*"[35]

Mr Harry Neesham of WorkCover offers examples of cases which he believes were wrongly decided by the courts in favour of plaintiffs:

> "*Hon J.A. COWDELL: You have mentioned the figures for the number of actions lodged. One might anticipate that includes a range of frivolous actions that have no chance of success. What is the success rate for those lodged?*
>
> *Mr NEESHAM: Unfortunately, the success rate is almost 100 per cent and the reason for that is simple. An example that came to my notice is of a part time worker earning $9 000 a year. One would think that to get to a future economic loss of $100 000, that person would suffer a loss over a*

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33 Hansard, Legislative Assembly 21/9/1993, p4235

34 Mr Patrick Gilroy, 28/7/1998, evidence to the Committee, p29

35 Coopers & Lybrand (1998), p19

significant period of time. The reality of that case was that the person said, "But, I wanted to be a police officer earning $40 000 a year". The registrar at the District Court determined that this was an appropriate expectation for this particular worker and made an exponential determination as to what that person could be, even though the person in the meantime had had a baby, and was medically determined as having the ability to be a bank clerk, earning $20 000 a year.

The outcome was that that person was accepted as having a future economic loss of the prescribed amount of $106 000. The insurer appealed on the grounds that it was totally unreasonable for the claim to be based solely on the person's statement that she wanted to be a police officer and, therefore, that it could then be exponentially determined she had met that criterion. The court upheld that worker's case, and a number of similar situations have since occurred.

Included in the second gateway, are certainly people who have a 30 per cent disability. In fact, I think it was estimated to be about 17 per cent of those claims. However, the reality is, why should people worry about trying to prove 30 per cent disability when they can get through on the sort of scenario given above. Other examples are available. I think the second example was a truck driver earning about $600 a week who was injured. He commenced work as a part time taxi driver earning $200 a week. When he injured himself, his employer offered him a job as a transport supervisor on $550 a week, but he declined that. The court determined his future economic loss on the basis of the difference between his earnings as a truck driver and his earnings as a part time taxi driver. The end result was that this person was not only accepted into the system, but was paid out in excess of $250 000 under common law."[36]

8.1.4 There are too many common law claims

Mr Harry Neesham told the Committee that the number of common law claims being brought under the second gateway is increasing exponentially, particularly over the last 2 years:

". . . in the first six months of this year [1998], 1 146 matters were lodged against this particular section of the Act in the District Court, which is almost the same as the total for last year, and on our current projections, the number is likely to be in the order of 2 300 for this year.

. . . The reality is that we are currently just meeting, and getting the costs associated with, the 140 claims that were made in 1993-94. They are coming into the system now. The lodgment date is the first hurdle. Once a person gets into the system, it then takes between three and five years to

[36] Mr Harry Neesham, 14/7/1998, evidence to the Committee, p3

progress the matter through to resolution, subject to negotiation and settlement that occurs. We are dealing with the 1994 group now, and in the following year almost three times as many claims were made. The claims increase exponentially from thereon. The issue is, therefore, that without any changes whatsoever, the system will experience significant premium increases for the next four to five years. . .

Hon DERRICK TOMLINSON: The premiums will increase over the next five years even if something is done now?

Mr NEESHAM: Yes."[37]

The Committee asked Mr Neesham why the Government is seeking to remedy the problems it regards as being due to the common law, at this late date when the remedies will have no effect for 5 years:

"*Hon J.A. COWDELL: If, regardless of what we are doing, five years worth of premium increases are on the way through, why has it taken four years to identify this problem and start addressing it?*

Mr NEESHAM: The problem was twofold. Firstly, when the Government in 1993 drew the line on all common law claims that occurred before 1993, in the period immediately post-1993 a significant number of common law matters under the old system were brought into the system to be paid out. This was expected.

. . . The cost of common law in fact increased in 1994-95, but it was expected to drop by 70 per cent.

In 1996-97 the actuary indicated that 55 per cent of matters were still pre-1993. I may have to correct that date. However, because they were paid off over a period of years after 1993, a high proportion of claims were still pre-1993.

That dropped away almost totally by 1997-98, and we are now seeing two things. Firstly, the first lot of 93D(2)(b) applications are now coming into the system to be paid - they are the 1994 matters. However, because of the experience in the first payment year for the 93D matters, the insurers are now required by the Insurance Commission to make provision for those matters now being registered. The courts have made their observations and determinations on the 1993 and 1994 matters, so they cannot say, "We expect things to get better" or "We expect them to go away." As the lodgments are made, they are now required to make substantial provision for them."[38]

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37 Mr Harry Neesham, 14/7/1998, evidence to the Committee, p4

38 Mr Harry Neesham, 14/7/1998, evidence to the Committee, p5

The Committee asked Mr Neesham what effect the delay would have on premiums over the next few years:

> "*Hon DERRICK TOMLINSON: . . . it has been put to us that closing the gateway now will do nothing for the premiums for at least five years. . . In 1998, we are dealing with common law claims put in train in 1993 or 1994. . . Therefore, even if we close the second gateway now we can quite realistically anticipate a continuation or escalation of premiums. Do you have any evidence to refute that?*
>
> *Mr NEESHAM: I do not have evidence to refute that but if the legislation goes through - particularly in regard to redemptions - a lot of matters at the lower end of the scale will move back into the normal system through redemptions. These are matters put in by lawyers in protection of their own positions. That was a legitimate thing to do as the lawyers are concerned that this opportunity will be closed and if they have not taken appropriate action, they place themselves at risk of being taken to task. This legislation would mitigate those claims by providing an opportunity for redemption.*
>
> *However, the projection of the actuary - we have to work on that - is that premiums will increase. They will increase 13.6 per cent this year and, on his projection after two quarters of 1997-98, they will increase by 20 per cent next year and be on-going. Given that the costs have continued to rise since he made that projection, that figure would be a lower-end estimate.*
>
> *However, if this package of changes goes through, there will be a significant trade-off with redemptions and the matters currently listed. The current projection is almost 1 600 claims in the first eight months. It is projected that figure will reach around 2 800."*[39]

8.1.5 Second gateway is unique in Australia

A number of submitters, such as Mr Garry Moore of SGIO Insurance[40], query why WA is the only jurisdiction which offers a pecuniary loss threshold in addition to a degree of disability threshold.

The Self Insurers' Association notes that there is also a trend in the USA to decrease access to common law:

> "*The other crazy aspect is that places like the United States have difficulty understanding that this area of law exists in Australia. The world's most litigious society removed this area of law when it traded off for the no-fault system. Only a few US States maintain this area of law. A tort reform movement in the US is pushing similar sorts of initiatives. There is tort*

39 Mr Harry Neesham, 9/9/1998, evidence to the Committee, p28

40 Mr Garry Moore, 14/7/98, evidence to the Committee

reform across the board in public liability, medical negligence and product liability in more than 33 of the 52 US States."[41]

8.1.6 Common law can undermine rehabilitation

Ms Cynthia Davis, the director and founding principal of WorkFocus, Western Australia's largest private provider of rehabilitation services to injured workers, told the Committee that the workers' compensation and rehabilitation system offers conflicting incentives to injured workers:

> "*Rehabilitation is about returning people to work and people who do not return to work - people who fail rehabilitation - suffer a loss of earnings which often makes them eligible to pursue a second gateway payment. Ninety-four per cent of all workers who complete rehabilitation programs return to work successfully. They are then of little further cost to the system and have a negligible impact on a second gateway payment or other aspects of the system. On average, a person who returns to work following a completed rehabilitation program costs $2 300; that is, $2 300 from a possible $7 000 entitlement.*
>
> *Therefore, if most people completing rehabilitation programs returned to work and if these are not a problem, where is the problem? I believe that the problem is that about 30 per cent of injured workers who undergo rehabilitation never complete their program and fail to return to work. Most of these workers suffer minor impairment and they are entitled to second gateway payments because they have not been successfully rehabilitated.*
>
> *Will the closing of the second gateway alleviate this problem? It is fair to say that we do not know for sure. It has always been my opinion that the current system fails as on the one hand it says to us all that a return to work is the ultimate goal following injury although rewarding people with the prospect of financial compensation for failing to achieve that goal.*"[42]

Mr Graham Guest, a clinical psychologist, presented a case scenario suggesting that the availability of the second gateway, and its concomitant requirement on the worker to prove their disability, could have a negative effect on the worker's rehabilitation:

> "*From my perspective, I believe that the second gate being opened, as the system is defined, probably means that people are unnecessarily required to prove their disability. That has psychological affects and probably evidences greater disability than necessary. I am not saying it is a*

41 Mr Kim Mettam, 19/8/1998, evidence to the Committee, p35

42 Ms Cynthia Davis, 31/8/1998, evidence to the Committee, p2

conscious thing, but results from the system in which people find themselves."[43]

However, Mr Guest goes on to qualify this by saying that closing the second gateway may be inadvisable for other reasons*:*

"Social equity issues are involved. I have seen many very hardworking people of ethnic background with a major disability, but one not sufficient for them to access common law through the first gateway. These people's lives are absolutely destroyed as far as their financial future is concerned. Their families depend on them. Many times, their spouses do not speak English and their employment opportunities are limited. It seems very heartless to deny these people the opportunity to seek rightful compensation as a result of the injuries they have suffered. It is a dilemma.

. . . I argue that we do not know enough to say whether to close the gate."[44]

Mr Daryl Cameron of the Insurance Council of Australia states that:

"*. . . The problem with a no fault system that incorporates a fault system is that you are more likely to get a lump sum and you are more likely to develop the mentality and environment for a lump sum the longer you are off work. "*[45]

8.2 Arguments advanced AGAINST closure of the second gateway

8.2.1 Insurance cost rises are due to previous discounting

The Trades and Labour Council of Western Australia, through its Secretary, Mr Tony Cooke, makes the following comments in a briefing paper tabled as evidence before the Committee:

"*. . . the alleged problems with the "second gateway" have not been demonstrated or corroborated other than by the claims of the insurance industry. That industry in its turn has, due to market behaviour to secure premium, indulged in a very long history of discounting below the recommended rates for insurance premiums in this area.*

As the Minister's briefing note to the Parliament indicated there has been a 35.5% reduction in recommended premium rates since the 1993 amendments. To then compound that reduction by the discounting behaviour of insurers it becomes clear that an under funding situation will inevitably occur over a short space of time. It is our formal submission that this is indeed what has occurred and the insurance industry is now seeking

43 Mr Graham Guest, 19/8/1998, evidence to the Committee, p21
44 Mr Graham Guest, 19/8/1998, evidence to the Committee, p22
45 Mr Daryl Cameron, 14/7/1998, evidence to the Committee, p73

> *to recover from employers that amount of money which was always needed to adequately fund the system."*[46]

The Law Society of WA states in a submission forwarded by its President, Ms Kate O'Brien, that:

> "*The issue is being driven by poor premium pricing by insurers and there is a real concern that the attack on the first and second gateways is a furphy to allow the insurance industry to use legislative solutions to solve shortfalls in reserves built upon past price discounting.*"[47]

Mr John Gordon of Slater & Gordon Solicitors also suggests in his submission that the insurance companies' problems are of their own making, citing first the decrease in recommended premiums of 35.5%, and secondly discounts against those recommended premiums of "*up to 31%*", as evidence of insurers' "*risk taking and poor planning*"[48].

Mr Paul O'Halloran, a plaintiff solicitor, claims in a briefing paper tabled as evidence before the Committee that:

> "*For the past 5 years the insurers have been competing for market share and have artificially tried to keep their premiums down so as to prove that Mr Kierath's changes are working and also to fight for market share. It has been long overdue for a significant premium increase and therefore there is nothing unusual about this.*"[49]

Dwyer Durack Solicitors, in its submission to the Committee, regards final clause 32 as a statutory "bail out" of insurance companies who have made mistakes:

> "*This is a Government which relies on market forces as largely being the cure all, the arbiter of all things. Why then does this Government seek to bail out insurers who after all have been operating in these markets for a long time who should know the principles involved and are in the best position to assess risks and vary the premium revenue they are collecting to respond? Why should they be bailed out for their bad decisions? . . . Has WA Inc been bought back to life by the government . . . ?*"[50]

Mr Harry Neesham of WorkCover rejects all the above arguments as irrelevant, appearing to suggest, somewhat surprisingly, that the position of insurers should not be considered when looking at the operation of the Act:

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46 Mr Tony Cooke, 28/7/1998, evidence to the Committee
47 Submission No.5
48 Submission No.4
49 Mr Paul O'Halloran, 28/7/1998, evidence to the Committee
50 Submission No.6

"*The fact that [insurers] have subsidised Western Australian employers by massive discounting is a commercial decision they have made. That is totally irrelevant to the fact that the only parties to our Act in terms of the system are the injured worker and the employer.*"[51]

8.2.2 Many common law claims are "de facto redemptions"

A "redemption" under section 67 of the Act occurs where payment in respect of a claim by an injured worker is made by way of a lump sum, rather than by ongoing instalments as otherwise would occur under the Act. Prior to 1993 redemptions were available under the Act in a wide range of circumstances.

Since 1993 redemptions have been available only in limited circumstances, where the worker has permanent total incapacity and meets certain other criteria. This means that there is in most cases no mechanism **under the Act** for finalising a claim by way of a lump sum in full settlement. Therefore in most cases the only way to finalise a claim by way of a lump sum payment is **under common law**. This is not a "redemption" as such, but is referred to by some as a "de facto redemption" for the reason that such lump sum settlements occur in circumstances where before the 1993 amendments a redemption could have occurred.

Mr Daryl Cameron of the Insurance Council of Australia describes the advantages to all parties of using redemptions:

"*The Insurance Council of Australia has always supported the retention of redemptions and did not approve their being taken away last time. It must be recognised that sometimes redemptions are used as a means to an end rather than a cost saver. They are used simply to get rid of a claim in the most commercial circumstances that suit both parties.*"[52]

Slater and Gordon Solicitors claims that:

"*the increase in weekly payments [from $91.1 million in 1992/93 to $133.0 million in 1997/98] would have been more dramatic but for the fact that insurers have tried to get around the prohibition on lump sum redemptions of weekly workers compensation payments, by offering workers lump sum payments by way of common law damages, even if the insurer did not think that the worker could establish negligence on the part of the employer, and even if the claim would not have been entitled to common law damages by reason of not satisfying the test to proceed through the second gateway.*"[53]

The Chamber of Commerce and Industry (which supports the closure of the second gateway) told the Committee that even in 1993 it had been foreseeable that the costs

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51 Mr Harry Neesham, 14/7/1998, evidence to the Committee, p5

52 Mr Daryl Cameron, 14/7/1998, evidence to the Committee, p85

53 Submission No.4

of weekly payments and common law claims would blow out if redemptions were prohibited:

> "*An employee who has been off work for a long time sometimes gets into a position of saying, "I can't get back to work; I won't get back to work." I am not worker bashing here; it is a position that employees get into. The employer gets into a position of saying, "We are not likely to get this worker back to work in our organisation." It then becomes decision time, where it is in the interests of both the worker and the employer to make a decision and a settlement so that the worker can get on with his or her life.*
>
> *That used to be through weekly payment redemptions. However, because weekly payment redemptions have been blocked off, workers, lawyers and insurers - not employers - look for other avenues. Those other avenues are either blowouts in weekly payments; workers simply continuing on workers' compensation weekly payments, which I do not think is in anyone's interests; or, as has happened, blowouts through the second gateway. It was not unpredicted.*"[54]

Mr Paul O'Halloran states in a briefing paper tabled as evidence before the Committee that:

> "*. . . many of the so-called common law claims going through the second gateway are in fact redemptions dressed up in common law clothes. In the vast majority of cases they are initiated by the insurance companies who are desperately trying to bring finality to these claims despite Mr Kierath's unworkable 1993 legislation.*
>
> *. . . It is simply a situation where the parties might agree to disagree and the Defendant lawyer (insurance company) will agree to deal with the matter by way of a consent judgment because redemptions have all but been abolished. There is no conspiracy about any of this. It is simply a means by which people can get on with their lives and the insurance company can close their file sooner than later.*"[55]

Mr John Fiocco, representing the Law Society of WA, reiterates the point:

> " *It is important in trying to assess what is going on to see whether the data you have been given has been properly categorised. When redemptions were not possible - that is, people could not get out of the workers' compensation system by taking a lump sum for future weekly benefits - insurance companies were stuck with the situation that they could not finalise claims. Consequently, they had a long tail, and every claim would be worth $106 000, which is the present figure. There was no way of getting rid of one for $20 000, $30 000, $40 000 or $50 000. Those figures*

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54 Mr Brendan McCarthy, 14/7/1998, evidence to the Committee, p42

55 Mr Paul O'Halloran, evidence to the Committee, 28/7/1998

> *are now reported as negligence claims but, in fact, the insurance companies have been using the second gateway as a mechanism for redemption.*"[56]

The Committee notes that the Bill goes part way to reversing the 1993 virtual prohibition of redemptions. Section 67 at present allows redemptions only in limited circumstances where a worker has "permanent **total** incapacity". Clause 14 of the Bill amends section 67 of the Act to allow redemption in some circumstances where a worker has "permanent **partial** incapacity". Proposals to further liberalise the redemption scheme are discussed in Chapter 9 below.

8.2.3 1993 estimate of second gateway cost was incompetent

Submitters arguing for closure of the second gateway frequently cite, as evidence that the second gateway is not working as intended, the 1993 estimate that the second gateway would cost $2 million per year. Instead, the figure is currently over $100 million per year.

In response, submitters arguing against the restriction, such as Slater & Gordon Solicitors, suggest that the estimate was "*an astonishing display of incompetence*"[57]. The argument is that the inaccuracy of the 1993 estimate is not in itself a legitimate reason to close the second gateway.

8.2.4 Statutory payment increases are primary concern

Figures provided to the Committee by Mr Harry Neesham of WorkCover show that between 1993/94 and 1997/98:

- common law payments (indexed to CPI) increased **19%**, from $84.0 to $100.5 m/yr; while
- a number of ongoing statutory payments (weekly payments, medical expenses and rehabilitation payments) (indexed to CPI) increased collectively by **43%**, from $115.3 to $165.8 m/yr.

Drawing on these figures, some submitters suggest that the real problem for insurers lies with increases in ongoing statutory payments, and these are the areas the Government should address as a priority.

The Law Society in its submission states that:

> "*Between 1992/93 and 1996/97 weekly payments increased by 35%, whilst rehabilitation costs have increased by 275%. . . Further restricting [common law] claims will result in the number of files that are finalised*

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56 Mr John Fiocco, 14/7/1998, evidence to the Committee, p20

57 Submission No.4

being reduced so that ongoing costs associated with weekly and other payments will increase."[58]

The Insurance Council of Australia notes that the effect of closing the second gateway will be limited:

"*From the perspective of the insurance council, abolition of the second gateway should not be seen as the long term solution to Western Australia's common law problems, because it is not. At best, it will reduce the total cost of the system by about 15 per cent. All it will do, in our view, is slow things down and give us a chance to see for how long this tail will go on.*"[59]

Slater & Gordon Solicitors state in their submission that:

"*. . . as expected, as a result of the change which abolished the right of insurers and workers to agree to a lump sum redemption of future weekly payments under workers compensation, weekly payments began to explode.*"[60]

They also suggest that steep increases in the costs of medical practitioners and attempted rehabilitation are due to the switch in the focus of the Act from redemption payments to weekly payments.

Dwyer & Durack Solicitors make the point in their submission as follows:

"*It is our view that if these amendments are allowed then in four or five years time workers whose only hope is to obtain weekly payments and some small amount of compensation for their injuries will remain in the system. The number of people using the prescribed amount, developing depression, anxiety and neurosis as a result of injuries which mean they will not be able to work, will increase and the cost of the workers compensation system will really blow out. This already is our experience since the amendments were made in 1993.*

The previous system allowed matters to be resolved quickly by way of unlimited access to common law. This in fact allowed people to get out of the system quickly and allowed them to get on with their lives and allowed both them and the system to benefit in terms of keeping the overall costs of the system down."[61]

8.2.5 Insurance cost claims are flawed

58 Submission No.5
59 Mr Daryl Cameron, 14/7/1998, evidence to the Committee, p.77
60 Submission No.4
61 Submission No.6

The Chamber of Commerce and Industry told the Committee it has concerns about the figures put forward by insurance companies as justification for their position:

> "*We had, for example, outstandings' fluctuations. We provided [the Minister] with a graph covering 1976 to 1992. The last two years, 1991 and 1992, actually had reductions in provisions for outstandings; which seems quite ridiculous given that the experience at the time saw common law claims going through the roof. Insurers were apparently underestimating their provisions for outstandings in the two years when common law claims were going through the roof. Prior to that, outstandings in 1989-90 were reduced compared to 1988, 1987 and beyond. Therefore, from 1982 through to 1988 there was a gradual increase in outstandings, then a drop followed by a big drop, which did not relate to the common law experience.*
>
> *The CHAIRMAN: Could it be a case of insurance companies trying to balance their books to make it look better and healthier?*
>
> *Mr McCARTHY: That is possible. Insurers might be trying to buy market; or they might be taking a more realistic approach to their outstandings. It could be for a variety of reasons. The question you raise is the suspicion that we have long held that, through the manipulation of outstandings, insurers can make their books look like whatever they want them to look like. That is the core of the problem in the system.*"[62]

The Law Society states that:

> "*We are concerned that the underlying assumptions of analysis provided for the Minister for Labour Relations could perpetuate this furphy [that the insurance industry is at risk because of common law costs]; and would recommend that the analytical material be reviewed. In particular the Society would like to see if the weekly payments embedded in the common law lump sum payments have been properly attributed to weekly payments columns. Secondly we note that the analysis to date has only focussed upon the common law component of the system, rather than analyse the system as a whole.*"[63]

The Committee notes in relation to the Law Society's claim that Mr Neesham of WorkCover specifically rejects the suggestion that Government figures for common law payments include statutory benefits such as weekly payments:

> "*A common law settlement is made subsequent to the receipt of statutory payments. People receive weekly payments, and medical and other benefits under any second schedule entitlement, as statutory benefits. The common law settlement is made on the basis of a total amount for pain and suffering*

62 Mr Brendan McCarthy, 14/7/1998, evidence to the Committee, p39

63 Submission No.5

> *and all the other heads of damages under common law, and whatever has been received by way of statutory benefits is subtracted. For the purposes of our statistics, we take the common law component as the component that stays with the common law cost. The statutory component still remains with the statutory cost.*"[64]

A number of submitters, including the Trades and Labour Council, Self Insurers Association and the Chamber of Minerals & Energy, make the point that comparing 1997/98 figures to 1992/93 figures is somewhat misleading. The 1993 estimates of cost of the workers' compensation system were based on payments made under awards. However since 1993 there has been a marked shift away from awards towards enterprise bargaining agreements, packaged entitlements and workplace agreements. Because under these systems weekly payments are often higher, it is to be expected that workers' compensation payments based on workers' entitlements are higher. The argument is that the Government appears not to have made allowance for this factor.

Another point which tends to diminish the probative value of figures provided by WorkCover is that the figures are silent as to the increase in the number of workers covered by the State's workers' compensation and rehabilitation scheme. The figures used by WorkCover to argue for closure of the second gateway appear not to have taken into account the increase of 16% in persons employed, making it more difficult to assess the real position in relation to cost increases.

8.2.6 Common law should not be further eroded

A number of submitters, principally law firms, protest that final clause 32 is a further erosion of the right of an employee to sue at common law where they are injured as a result of negligence on the part of the employer.

The Law Society of WA told the Committee:

> "*If common law is effectively abolished for injured workers, they will be discriminated against in this society because everybody else - including the gentlemen sitting around the table - has common law rights if they are injured in a supermarket, or whatever else may happen. This is a very important moral issue that must be addressed before a step is taken to abolish someone's rights which have existed in Western Australia ever since our foundation and in Australia for over 200 years.*"[65]

Dwyer Durack Solicitors compare the limitations placed on workers' tortious claims with the Government's approach to commercial torts:

> "*Is this Government so willing to diminish rights that it would be prepared to, for example, legislate to reduce the availability of torts for*

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64 Mr Harry Neesham, 14/7/1998, evidence to the Committee, p13

65 Mr John Fiocco, 14/7/1998, evidence to the Committee, p36

misrepresentation relating to the purchase and sale of businesses so that prospective litigants face an arbitrary hurdle of 30% loss before they can prosecute such a claim. Naturally not. This Government's constituency is seen to be other than the workers of this state and this Government seems to be prepared to sacrifice injured workers on the altar of profitability to enable badly run, organised and unsafe businesses to continue profitable operations."[66]

COMMITTEE FINDINGS ON CLOSURE OF THE SECOND GATEWAY

The Committee agrees that insurers and employers are facing a real problem in cost increases for workers' compensation and rehabilitation as a whole that have emerged as a result of the 1993 amendments.

Despite this, the case for closure of the second gateway is not as compelling as some submitters promoting this course make out, for the following reasons.

- WorkCover figures suggest that common law payments have not increased in real terms to the same degree as ongoing statutory payments since the introduction of the 1993 amendments, which tends to undermine claims that increases in overall costs are due to common law.

- Recommended insurance premiums decreased by in the order of 35.5% between 1994 and 1997, with particular discounts in many cases apparently exceeding that amount. In this context, an increase of 13.5% in 1998/99 and a projected further increase in 1999/2000 is not necessarily cause for alarm. The legislation has been in place only 4 or so years. The marked fluctuations in premiums indicate that insurance companies have experienced initial difficulties in determining appropriate premiums.

- The most substantial contributors to cost increases in recent years have been the increases in weekly payments, rehabilitation and medical expenses.

Accordingly, the Committee finds that the recent increases in premiums are not in themselves sufficient reason to close the second gateway.

Nevertheless, the Committee considers that there are two elements to the common law situation which are of real concern.

- The decline in common law costs since 1993 has been marginal where it was expected to be substantial. The forecast in 1993 was that the cost of the second

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66 Submission No.6

gateway would be $2 million per year, whereas in fact current costs are over $100 million a year. Based on this highly inaccurate forecast, employers and insurers assumed that expected increases in costs for weekly payments and rehabilitation would be more than offset by savings in common law costs. The expected savings did not eventuate.

In itself, as noted by several submitters, the gross inaccuracy of the 1993 forecast does not justify amending the legislation. Nevertheless, insurers and employers are justified both in their complaint that the 1993 amendments have failed to deliver the benefits promised to them and in their conclusion that some remedial action on the part of Government is required.

- The number of common law claims has significantly increased in the most recent periods for which figures are available. Given that there is often a considerable time lag between the date of injury and a common law claim being finalised, this suggests that common law costs will continue to increase in future, perhaps substantially.

Final clause 32 will go part way to achieving the desired result of containing common law costs. The Committee therefore considers that there is some merit in the Government's introducing final clause 32.

However, the Committee finds that there are also the following shortcomings in final clause 32.

- It fails to deal with the fact that weekly payments, rehabilitation payments and medical expenses have since 1993 increased much more rapidly than common law payments.

- It will cause difficulties for injured workers who will no longer be able to sue at common law for damages where the 30% degree of disability threshold is not met.

- The history of workers' compensation and rehabilitation legislation indicates that a cost decline in one area is often offset by a cost increase in another area, meaning that the proposal is not likely to solve cost problems once and for all.

The Committee also understands that discussions on differing options for reform of the second gateway have continued between the Government and interested parties during the period of this inquiry. In addition, various witnesses to this inquiry have raised options for reform which appear to be of merit and worth further consideration. Clearly, the Assembly's proposal is not the only possible model for reform. It is not clear that adequate consideration has been given to other measures which might ameliorate the problems with the current workers' compensation and rehabilitation system, and thereby obviate the need to close the second gateway.

The Committee has considered these shortcomings against the positive features of final clause 32. On balance, the Committee does not consider that final clause 32 is an appropriate way of dealing with the increases in workers' compensation and rehabilitation costs since the 1993 amendments.

Accordingly, the Committee does not accept the Legislative Assembly's position in relation to closing the second gateway and does not agree with the Assembly's final version of clause 32.

Other proposals for amendment of the Act to contain common law costs are discussed in Chapters 9 and 10 and are the subject of Recommendations 5 and 6. These should be considered by the Government before amendments to this area of the Act are finalised.

Recommendation 4.1: that the House disagree to the version of clause 32 proposed by the Legislative Assembly in its Message No. 139 and convey to the Assembly that it does not agree with the proposal to close the second gateway.

Recommendation 4.2: that the House request that the Government give serious consideration to Recommendations 5 and 6, concerning liberalisation of the redemption system and other options for changes to the gateways.

CHAPTER 9

LIBERALISATION OF THE REDEMPTION SYSTEM

9.1 The Bill's proposal for liberalising redemptions

The Bill liberalises to a degree the system of redemptions under section 67 of the Act. In this Chapter the Committee considers arguments for and against liberalising the system of redemptions to a greater degree than is proposed under the Bill.

Summarising the Act's treatment of redemptions at present, redemptions are available only in the very limited circumstances where:

- the worker has suffered **permanent** and **total** incapacity;
- weekly payments have continued for at least 6 months;
- the worker is at least 55 **or** will use the sum for a prescribed purpose;
- the worker has special need of the lump sum or other circumstances justify the redemption; and
- the worker and employer/insurer agree on a sum OR a sum is settled under Part IIIA.

Turning to the proposal under the Bill, once clause 14 takes effect redemptions will be available under the Act, in addition to the above circumstances, where:

- the worker has suffered **permanent** and **partial** incapacity;
- the rate of weekly payments is greater than the prescribed amount (as yet unknown); and
- (a) the worker has special need of the lump sum **or** (b) other circumstances justify the redemption **or** a dispute resolution body under the Act determines that (c) the worker has taken reasonable steps but failed to find employment **or** that (d) rehabilitation is inappropriate.

9.2 Arguments FOR further liberalising redemptions

In the Committee of the Whole Hon Jim Scott made the following comment:

> "*The answer [to insurance cost increases] is in the redemptions. Since this legislation came into effect in 1993-94, redemptions have reduced from a high of $26.7m to $6.8m. However, at the same time weekly payments have increased from $85.1m to $108m. That is where the big increase can be found. The common law claims have increased from $73.9m to $86.4m as a direct result of the redemptions.*"[67]

Mr Daryl Cameron of the Insurance Council of Australia describes how redemptions can suit the needs of all parties:

> "*. . . if a person is receiving $50 a week and still has $80 000 to go, and he is permanently or partially incapacitated so that the insurer will be paying that person $50 a week for the next 30-odd years, rather than write out a $50 cheque every week for the next 30 years, the insurer decides to give the person $50 000 as a lump sum. That person can use the $50 000 to fit out his home to accommodate his special needs or to provide him with some financial advantage by paying off his mortgage, or whatever. In that way, the impact on that person's loss of income is reduced, because he has the use of that money immediately.*
>
> *From the insurer's point of view, the administrative costs drop dramatically. It is not writing out a cheque every week. The medical costs drop back, because the person does not have to go to the doctor every week to obtain a medical certificate to say he is still incapacitated.*"[68]

However, Mr Cameron also warns against placing too much store on the capacity of redemptions to lower costs:

> *"Many lawyers believe that redemptions will save a lot of money out of the system. That is a total falsehood.*"[69]

Mr John Fiocco of the Law Society of WA told the Committee how redemptions worked before 1993:

> "*Prior to these amendments in 1993 . . . an injured worker who had received, say, $20 000 worth of workers' compensation in weekly payments, might clearly, on the basis of medical evidence, be deemed as partially incapacitated. . . That person would be partially incapacitated for a relatively long time, and in that time, an insurance company might have to pay out between $60 000 to $70 000. It could just simply leave the worker, who would get payments by what we call the drip-feed method, which would be either equivalent to the full workers' compensation or the partial incapacity entitlement. If he had been earning $400 a week, and it was a $200 a week incapacity, he would get $200 a week.*

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67 Hansard, Legislative Council 1/4/1998, p1238

68 Mr Daryl Cameron, 14/7/1998, evidence to the Committee, p85

69 Mr Daryl Cameron, 14/7/1998, evidence to the Committee, p85

. . . You could, if I can use the vernacular, do a deal, and the person would get a lump sum payment. It could be done in such a way that it would be tax exempt, and the person would be able to move on with their life. That has not been possible since 1993."[70]

The Law Society of Western Australia, in a letter to the then Minister for Labour Relations dated 1 May 1998 and tabled as evidence before this Committee, states that:

"*1. The complete abolition of common law is not warranted and if undertaken may result in unintended and undesirable outcomes.*

2. The increase in costs for the 1996/97 year is attributable more to ongoing workers' compensation entitlements (weekly payments, rehabilitation, medical practitioner expenses etc) than to common law costs.

3. In any event a large proportion of the so-called common law payments represents defacto redemption payments.

4. An increased availability of the redemption facility would in all probability lower the costs of weekly payments, rehabilitation and statutory allowances generally.

5. In order to "close their files", insurance companies generally prefer to finalise the scope for common law claims and at the same time achieve redemption of compensation. There is an acknowledged nexus between the inaccessibility of redemptions and the use of the second gate.

What follows from the propositions set out above is that there is a need for a method of finalising claims - either by redemption or consent common law judgments. Such a facility will enable insurers to reduce their estimates (which have been artificially high in recent years) and close their files sooner. Claimants can proceed to normalise their lives without having to persist with the maze of medical appointments, rehabilitation and weekly payments. . . The Society believes that re-introducing a method of finalising claims will have a significant effect on the level of ongoing workers' compensation. This effect will outweigh any associated increases in redemption amounts or common law payments."[71]

The Self Insurers Association of Western Australia believes that redemptions should be available:

- where the employer and employee agree, without limitation; and
- where the employer and employee do not agree, at the order of the directorate where the worker has received weekly payments over a period such as six months and there

[70] Mr John Fiocco, 14/7/1998, evidence to the Committee, p20
[71] Ms Alison Gaines, 14/7/1998, evidence to the Committee

> is little or no prospect of a return to work or rehabilitation, or where special circumstances justify the order.[72]

The Committee notes that the second of these tests is similar to that introduced by clause 14 of the Bill, with the difference that the criteria set out in clause 14 apply both where the parties agree and where they disagree. That is, clause 14 retains strict limitations on redemptions in all cases. The SIA view is that such limitations are not warranted where the parties themselves wish to redeem. Essentially the SIA's proposal is to return to the regime which existed prior to the 1993 amendments to the Act.

The Law Society of Western Australia also advocates this approach as its preferred option. In its appearance before the Committee the Law Society points out that regardless of what amendments are made to the common law gateways, the amendments will have little or no effect in isolation for some years. Liberalising the redemption regime, on the other hand, will have an immediate effect:

> "*Another problem this committee should be looking at is how insurers are going to clear the backlog of claims. A massive backlog has built up. Only in recent times, within the past nine to 12 months, have insurers started to be more inventive in the way of clearing this backlog. That is why we have seen this increase in common law claims - they are desperate. They want to be able to write down their future provisions on the claims they have trapped within the system.*
>
> *A suggested change which does not allow free access to redemptions will not clear the backlog. If you stop common law claims today, it will not solve the problem for three or four years. The committee must focus on that. The Law Society has been saying for three years, "What are you going to do about redemptions?" Even the redemption proposed is far too restrictive in this current Bill; it will not work.*"[73]

The Chamber of Commerce and Industry supports a reversion to the pre-1993 system in respect of redemptions, suggesting that the pre-1993 problems should have been fixed by limiting common law rights but leaving redemption rights intact:

> " *We said that while the Act amendment should discourage lump sum redemptions, it is unreasonable to prohibit such action except in very limited circumstances, and particularly without inbuilt incentives for injured employees to return to work. . . We said also that a major criticism of the previous system was that an injured worker could receive a lump sum under schedule 2 and then pursue a common law claim.*
>
> *The amendment Bill places severe restraints on both common law claims and lump sum redemptions. We said that this double restriction was undesirable and unwarranted, given that in many cases both the employer and employee prefer to settle the claim as expediently as possible. We recommended . . . that the Act be amended to allow for the dispute resolution body that was being looked at and*

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72 Mr Kim Mettam, 19/8/1998, evidence to the Committee

73 Mr Gray Porter, 14/7/1998, evidence to the Committee, p34

> *created at that time to approve payment of lump sums in circumstances where the injured worker and the employer agreed to such a settlement.*"[74]

Mr Paul O'Halloran describes the advantages of the pre-1993 system:

> "*The system of redemptions allows for the gathering in of future weekly workers compensation payments (First Schedule) in the form of a lump sum payment thereby allowing the injured worker to get on with his life and for the insurer to close the file. This was a common practice prior to 1993 and worked extremely well. Often the redemption would be coupled with a consent common law judgment signed by the injured worker which then brought a finality to the whole thing and ensured that there was a once and for all settlement of both the workers compensation claim and the common law (negligence) claim. Mr Kierath abolished this primarily so that lawyers could not be involved in the system. . . The problem is, however, that he is creating a massive tail of unresolved claims which will blow out and which is already becoming evident.*"[75]

Slater & Gordon Solicitors suggest that a large proportion of settled claims are de facto redemptions, proposing the following as a solution to insurance companies' present problems:

> "*Introducing lump sum redemptions of future statutory weekly workers compensation entitlements will cut the common law costs by* ***MORE THAN 50%*** *(currently most claims at common law are settled for less than $150,000. Most (all below $106,000) are de facto redemptions of future weekly payments with or without an added amount to resolve any potential common law entitlement). This will also reduce the costs of the entire system by more than 20%.*"[76]

Coopers & Lybrand's 1998 report finds that of all common law claims, 50% by number (28% by amount) are settled for less than $100,000.[77] Slater & Gordon suggests that all these claims are de facto redemptions and would therefore cease being brought at common law if a more liberal redemption system were in place.

9.3 Arguments AGAINST further liberalising redemptions

Some evidence before the Committee indicates opposition to returning to the pre-1993 redemption system. For the most part the opposition came from representatives of the Government. Other witnesses warn that although a more liberal redemption system would be of some assistance, it should not be seen as a complete answer to the current pricing difficulties.

The then Minister for Labour Relations in his letter to Members of 29 June 1998 describes the pre- 1993 system as an "*adversarial, costly, slow, legalistic dispute resolution system*". The Minister contrasts this with the "*current non-adversarial system based on conciliation and*

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74 Mr Brendan McCarthy, 14/7/1998, evidence to the Committee, p41
75 Mr Paul O'Halloran, 28/7/1998, evidence to the Committee
76 Submission No.4
77 Coopers & Lybrand (1998), p11

review, which has proved to be a quicker, more informal system, better suited to the workers' compensation jurisdiction."

Mr Neesham of WorkCover disputes the notion that redemptions would provide an alternative to common law:

> "*As a committee you will have people talk to you about the fact that if redemptions were reintroduced, that would solve the problem. The reality is that currently people are going through the statutory scheme, getting redemptions and then still going into the common law system. If we ignored this totally and implemented what the Government has, which reintroduces almost effectively total redemption - it is not part of the contentious part of the Bill, everyone has agreed to it - the system is now such that there is no guarantee that there will be any change in the number of matters going into the common law system. That has been portrayed as being part of the solution to the problem.*
>
> *The reality is that, unless workers signs a sign-off of their common law entitlement, there is no preclusion to them taking a redemption in the statutory system and progressing on to common law. I would argue that in negotiating a statutory redemption, certainly the parties would be looking to tie up that other issue of common law but there is no guarantee of that.*"[78]

SGIO Insurance in a briefing paper tabled in evidence before the Committee states that:

> "*Some interested parties believe "redemptions" are likely to temper the cost pressures. Redemptions will only impact statutory benefits and do not restrict access to a lump sum in addition to the prescribed amount as is occurring through the unintended use of the second gateway.*"[79]

The Insurance Council of Australia in its letter, attached to a letter dated 29 June 1998 from the then Labour Relations Minister to Members of the Legislative Council, makes a similar claim and adds that:

> "*An analysis of 1000 past* [post?] *1993 common law claims carried out by WorkCover showed that the average cost was $136,000 (weekly payments and common law) which indicates clearly that claimants have been able to increase their entitlement from the system via use of the second gateway. Only 5% of the claims were below $50,000 and could be categorised as potential redemptions.*"

SGIO Insurance in the same briefing paper estimates that 25% of the common law claims settled by them "*would revert to redemptions under the current Bill if the second gateway is removed*" and "*have arisen due to mutual agreement between the parties to allow the worker to exit the system*". However, SGIO claims that as these tend to be smaller claims, they would make up only 7% by value of total settlements.[80]

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78 Mr Harry Neesham, 14/7/1998, evidence to the Committee, p10

79 Mr Garry Moore, 14/7/1998, evidence to the Committee

80 Mr Garry Moore, 14/7/1998, evidence to the Committee

It should be noted that SGIO's estimate is "under the current Bill". SGIO does not offer an estimate of the percentage of claims which might revert to redemptions under a return to the more liberal pre-1993 redemption system as proposed by the submitters quoted above. SGIO's claim is therefore not incompatible with claims such as Slater & Gordon's that around 50% of common law cases (roughly, those under $100,000) would revert to redemptions under a more liberal redemption regime.

SGIO in the same briefing paper draws a distinction between common law claims which are de facto redemptions and common law claims which "*have resulted from a successful application and are the unintended consequence of the manner in which the second gateway allows access to a lump sum in excess of the . . pecuniary loss threshold.*" It does not regard these claims as likely to revert to redemptions.

COMMITTEE FINDINGS ON LIBERALISATION OF THE REDEMPTION SYSTEM

Most submitters who addressed the issue of redemptions advocated a broadening of the availability of redemptions to a system something like the pre-1993 system. Those submitters arguing for closure of the second gateway generally think liberalisation of redemptions should be undertaken **in addition**, as a further improvement to the system, while those opposing the closure of the second gateway think liberalisation of redemptions should occur **instead of** closure of the second gateway.

The Committee finds that the reintroduction of the pre-1993 redemption regime would have the following advantages.

- The proposal involves only marginal alteration to the Bill, which already contains a proposal for some liberalisation of the redemption regime. The proposal should be generally acceptable to interested parties.

- Redemptions offer an appropriate mechanism for finalisation of a claim where the injured worker and the insurer agree that payment of a lump sum is preferable to ongoing weekly payments and other costs.

- Allowing insurers and workers to redeem claims for lump sum payments removes an unnecessary constriction on the operation of the market and gives each party more control over their own affairs.

- Claims which are currently being settled at common law as "de facto redemptions" because there is no other redemption mechanism available will no longer have to be brought under the artifice of the second gateway. On the evidence the Committee has heard, this is likely to result in a diminution of the number of second gateway claims of between 25% and 50%. Only the more serious claims will go to common law.

The Committee is aware that liberalisation of the redemption regime will not meet all the concerns of the insurers and employers, who would prefer that both steps, closure of the second gateway and reintroduction of full access to redemptions, be taken. Nevertheless, in the Committee's view many of the concerns of insurers and employers are met by broadening access to redemptions.

If redemptions were available, all second gateway claims would be genuine common law claims rather than de facto redemptions. This would make it easier to accurately assess common law costs over the next few years, leading to clearer analysis of where cost increases are occurring than has been possible in relation to the current form of the Act. It is clear that de facto redemptions have at least some effect on the common law figures, but not clear how great that effect is. If common law costs remain unacceptably high following liberalisation of the redemption regime, the argument for closure of the second gateway will be far more persuasive than at present.

The case for redemptions being liberalised relies on the fact that where an injured worker redeems their claim they are not subsequently able to mount a common law action in respect of the same injury. The Committee does not agree with submitters who argue that redemptions will have little effect for the reason that access to redemption does not close off access to common law. A competent insurer or lawyer should have little difficulty ensuring that a redemption precludes further common law action in relation to the same injury. However there is no difficulty in making further provision for this in the Act if this is thought by Government to be necessary.

Accordingly, the Committee considers that instead of closing the second gateway, the Bill should reintroduce to the Act a system of redemptions similar to that which was in place before 1993.

Recommendation 5: that the Bill be amended to introduce a system of redeeming claims under section 67 of the Act as similar as practical to that which was in place prior to the enactment of the *Workers' Compensation and Rehabilitation Amendment Act 1993*, with the proviso that the Act should allow the employer agreeing to redeem a claim to be confident that no common law claim can be made for the same injury.

CHAPTER 10

OTHER OPTIONS FOR CHANGES TO THE GATEWAYS

The possible approaches to allowing access to common law are not restricted to a choice between the Act and the Bill. Any of a number of variations could apply to determine whether an injured worker is allowed to seek redress through the common law. In this Chapter the Committee briefly outlines other proposals for amendment to the first and second gateways which have been raised in the course of the inquiry.

Options 10.1 to 10.3 are proposed alternate gateway models, options 10.4 to 10.7 involve modifications of the dual gateway system and option 10.8 relates to procedure.

Alternate gateway models

10.1 Establishment of a gateway tribunal

The Self Insurers Association suggested to the Committee that it is too easy at present for an injured worker to satisfy the test for leave to be granted by the District Court under section 93D(5) of the Act.[81] Although to succeed in an action for damages the worker must ultimately show that the disability was caused by the negligence of the employer, the District Court is not required to consider the question of negligence before giving leave for commencement of proceedings under section 93D(4).

Accordingly, it is proposed that a preliminary determination of the appropriateness of a claim proceeding at common law should occur. The body which would undertake this function would be a "gateway tribunal".

The gateway tribunal would be required to consider a carefully formulated, single gateway test. The test could involve consideration for each claimant of specified matters relevant to common law, such as:

- nature of the workplace;
- adequacy of measures in place to reduce risks in the workplace;

81 Mr Kim Mettam, 19/8/1998, evidence to the Committee

- nature and extent of the injury;
- quantum of actual and anticipated losses;
- possibility of punitive damages being awarded; and
- adequacy of statutory compensation payable in the particular case.

The gateway tribunal would serve to determine at first instance whether an injured worker is adequately catered for under the statutory system or should be allowed to proceed to seek damages at common law. Because they would be less formal, tribunal proceedings should be less costly for the parties than District Court proceedings.

10.2 A single gateway requiring a 20% degree of disability

This proposal is something of a compromise between closure of the second gateway and leaving it in its present form. It is suggested that it would be reasonable to close the second gateway if it were easier for the injured worker to access the first gateway. One way of easing first gateway access is to lower the degree of disability required from 30% to, say, 20% (as in Queensland).

10.3 Election between common law and statutory benefits

One of the reasons many employer and insurer bodies favour the liberalisation of the redemptions system is that redemptions bring finality to a claim, so the insurer can close its books on the injury. This is perceived by insurers as highly desirable: in many cases insurers encourage workers to lodge common law claims which can then be settled on terms which preclude further statutory payments.

However, the availability of two parallel forms of compensation creates difficulties for the employer/insurer. Some difficulties raised in the course of this inquiry are as follows.

- An injured worker bringing a common law claim continues to receive statutory payments while the claim is on foot, which can lead to what has been described by insurers as the funding of the common law claim by statutory payments. The Attorney General told the Committee that in his experience as an insurance lawyer:

> "*. . . some people used the workers compensation process as a fund for the common law process. That was probably the most futile and stupid system possible. They spent an awful lot of money from their workers compensation to fund their common law claim. That process went on interminably; the common law process is necessarily long and often aggravated because people do not believe they have a common law liability.*"[82]

[82] Hon Peter Foss MLC, 9/9/1998, evidence to the Committee, p2

- A worker who loses a common law claim continues to receive statutory payments for the injury despite the loss.

- A worker who wins a common law claim might or might not continue to receive statutory payments, depending on the nature of the judgment.

Insurers consider that the barriers to pursuing a common law claim are too low, ie there is little or no disincentive for workers to pursue a common law claim. If the aim of the system is to allow only genuine, meritorious and serious cases to proceed at common law, there needs to be a significant disincentive to pursuing common law so that other cases do not proceed, as it were, on a speculative basis.

To achieve this, it is suggested that an insurer facing a common law claim should not have to continue statutory payments while a common law claim is under way. To effect this, once a person lodges a common law claim, their entitlement to statutory payments would cease. This is referred to as an "election" system: the worker elects to receive statutory payments or pursue common law damages, but cannot do both.

A variation on this proposal is to introduce a bond scheme, whereby a person electing to seek redress at common law must pay a bond of, say, $10,000 to the court to be forfeited if the claim is not successful.

Another variation is to provide that where a court awards common law damages lower than the worker's statutory payments would have been had the worker remained within the statutory system, the difference (or a proportional amount) would be payable by the claimant by way of fine. This would be a disincentive to pursue common law claims except where the worker has a strong case that the employer is negligent and the loss substantial.

Modification of the dual gateway system

10.4 Introducing a higher threshold for the second gateway

A number of witnesses discussed whether the current "future pecuniary loss" test determining access to the second gateway should be replaced by a different threshold test. Further, a number of options for restricting access to the second gateway without closing it were considered by the accountants Coopers & Lybrand, at the request of the Minister. The evaluation of those options set out in Coopers & Lybrand's report to the Minister is set out at Appendix C.

Representatives of SGIO insurance were doubtful that any effective restriction could be found:

> "*Hon J.A. COWDELL: You ask us to agree to the closure of the second gate. In coming to that conclusion, you have decided, presumably, that no claims of merit should continue to go through the second gate; that is, there are no ways of appropriately restricting it. . . Therefore, did you consider that there were no claims of merit whatsoever below the 30 per cent going through that gate? . . .*

Mr KIDNER: Yes. I would agree with you if there were a way of isolating the genuine cases as intended by the introduction of the second gateway. I am sure you have heard of the examples of the brain surgeon and the concert pianist.

Hon J.A. COWDELL: Yes; what about other than those?

Mr KIDNER: Only a handful of claims each year meet that criteria. The problem is finding a way to bring down costs of $100m to $2m with legislation. Certainly, one of the things we considered - and I know WorkCover also considered it - is how to physically do it. We have received legal advice on it. There is no easy solution to legislating the special case. What is the special case? How does one define it? When you try to define it, all of a sudden another potential loophole is created that everybody goes through again. Therefore, we come back to the reality that we try to design a system for the majority of workers, not the half dozen who might be disadvantaged through not having access to common law. Let us not forget, with the exception of Tasmania, we are the only State that provides this opportunity by way of this second entry point."[83]

10.5 Second gateway threshold as a multiple of earnings

A number of submitters suggest that the second gateway would be a more equitable test if access were determined on the basis of a multiple of earnings rather than a fixed amount, as at present.

The Self Insurers Association of Western Australia is one of those proposing a multiple earnings test. The SIA proposes that the amount should be 4.5 times average net yearly earnings for the past three years, explaining its thinking as follows:

"*The second dimension of the second gate would be to remove the arbitrary $107 000 and convert it to a multiple rate. That would recognise that the work force is not just the mainstream full-time high income earner. There are more part-timers in the work force these days, many of whom are women. A part-timer earning $10 000 a year would find it far more difficult to receive a sum higher than the $107 000 than if he were working in the mining industry earning $60 000 a year. Therefore, in a sense, the rule is discriminatory.*

A more equitable approach would be to change it to a multiple rate. We chose 4.5 per cent because that is the standard that tends to govern the prescribed amount."[84]

A difficulty with this proposal is that it could be problematic to determine a definition of "earnings" which is satisfactory in all cases. A plumber, a fly in fly out mine worker and an accountant with similar earnings could have completely different salary packages. In this sense the present definition may be preferable as it accommodates all types of earnings.

10.6 Capping damages claimable through second gateway

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83 Mr Robert Kidner, 14/7/1998, evidence to the Committee, p68

84 Mr Kim Mettam, 19/8/1998, evidence to the Committee, p37

An effective way of containing common law payments would be to limit the amount of economic loss claimable at common law for a work related injury. This could be achieved in a number of ways. One way would be to set a simple maximum figure on the amount that a court can award at common law. Another way would be to require the court to calculate economic loss on the basis of average earnings over the three years prior to the injury, rather than projected earnings. A third way would be to exclude certain types of loss from calculations.

The Self Insurers Association discussed some possible approaches to capping damages as follows:

> "*We also suggest that superannuation and future medical expenses be excluded from future economic loss calculations. Another crazy thing about the law is that at present someone can double dip by getting an economic loss from their employer through a superannuation fund and sue the employer for damages. There is an hour's conversation about why that is the case. However, I think it relates to the historical low level of superannuation in Australian industry which has now changed. We are now in a different scenario. The law must be rediscovered to pick that up.*
>
> *The community cannot afford several million dollar type awards in economic loss. There should be a cap on awards of economic loss. The cap could follow a similar line to the equitable access test; that is, consideration be given to net yearly earnings, but with a cap on the basis of a reasonable figure the community can afford. For example a driller earning $70 000 a year would not be able to sue his employer for a loss of $70 000 a year for the next 30 years. He may be able to sue his employer for a loss at a level the community sets.*"[85]

Coopers & Lybrand in their 1998 report note that while reform options under consideration by the Government are aimed at reducing the **number** of common law claims, the issue of the **amount** claimed in individual actions has not been tackled:

> "*While removing access to common law is likely to make a significant impact on lowering frequency rates, none of the options do anything to cap the very large claims. This is an issue which may require investigation in the near future.*"[86]

The Attorney General supports the SIA's proposal but argues that it is a mere surrogate for the preferable approach of abolishing common law altogether:

> "*Hon J.A. COWDELL: The Self Insurers Association - the alternate model - said that the big problem is the huge payout in these awards of economic loss. Why not just put a cap on awards of economic loss? That will stem the flow and you do not need to chop off the second gateway. How do you respond to that?*

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85 Mr Kim Mettam, 19/8/1998, evidence to the Committee, p37

86 Coopers & Lybrand, p20

Hon PETER FOSS: That would be very positive. The biggest problem we have in common law damages is the High Court's constraint on the ability to discount future economic loss. Future economic loss became unbelievable when it stuck its oar in. I do not know if that is the only solution but it would certainly make a substantial difference to future economic loss. It is a suggestion, and it certainly addresses a major problem.

. . . If a cap is put on common law damages, why not get rid of common law altogether? What you will try to do is keep it so there is no major difference between what a person will receive under workers compensation and what that person will receive under common law. So why not get rid of common law altogether?"[87]

10.7 A more rigorous common law test for "negligence"

The Self Insurers Association told the Committee that one of the objections self insurers have to a return to open access to common law is that the common law tests for liability amount to what it refers to as a "no blame" system. The SIA does not mean by this that the courts do not seek to determine blame for a workplace injury. Rather it means that the very liberal interpretation of the common law by the courts means it is far too easy for a worker to establish negligence on the part of the employer and thus become eligible for common law damages. As the SIA puts it:

"*Over time the laws of common law have changed to the point where a probable risk or a foreseeable risk is a breach of duty. The courts have decided that the only things that are not predictable or foreseeable risks are things that are remote or fanciful. Therefore, everything else is a foreseeable risk. . . Basically, if anything is possible it is a foreseeable event. That is where most of the problem has come. Our proposal is to . . . [redefine] aspects of the test of negligence back to a commonsense, human behaviour blame system from the point it has reached.*"[88]

The SIA's proposal to deal with this perceived bias against employers in the law is to introduce a more rigorous statutory test for two of the key elements which go to establish negligence, foreseeability and breach of duty. The proposal is as follows:

"*Define a foreseeable hazard/risk as amounting to a substantive risk which is objectively very real and seriously substantial in a practical sense as opposed to a risk which is remote or fanciful.*

Define breach of duty where an employer failed to take reasonable care having regard to:

- *Seriousness and severity of any potential injury or harm to the worker.*

87 Hon Peter Foss MLC, 9/9/1998, evidence to the Committee, p23

88 Mr Kim Mettam, 19/8/1998, evidence to the Committee, p35

- *The significant likelihood and substantial probability of the potential harm or risk occurring as determined in a very practical, proximate and industry sense.*

- *The means of identifying and removing or significantly mitigating the very potential risk when weighted against the difficulty, inconvenience and expense of taking any ameliorating measures.*

- *Onus of proving the above is on the plaintiff."*[89]

Against the proposal put forward by the SIA is the consideration that the common law tests for negligence have been developed by courts over many years. Without clear indications that the entire field of common law negligence requires revamping because it is not being adequately dealt with by the courts, it would not seem sensible to replace the existing store of learning with a completely novel test.

Further, from a legal point of view, the actual wording of SIA's proposed test raises difficulties in that a number of variables need to be considered before practitioners, employers, courts and other interested persons can determine whether the test is satisfied. SIA's proposed test would be difficult for practitioners to advise upon, and for a court to apply. The result might well be that issues which are reasonably straightforward under common law at present would become matters of uncertainty and contention, at least until a new set of common law principles were arrived at by the courts.

The Attorney General points out difficulties in practice with implementing the proposed narrowing of the definition, suggesting that plaintiff lawyers . . .

> *". . . will look for a way in the same way that they found their way through the second gateway. It was not that lawyers did not look for fault in the old days, sometimes they did not find it, but they certainly all looked for it. There may be some self-elimination at an early stage with people saying that it is not worth the cost. I am a little hesitant. If that law is written, firstly, we will have trouble holding it up in the High Court, which does not like having its laws changed - although strictly speaking we can change the common law - and secondly, everyone will spend their time busily trying to get around that definition. I defy anyone to write a definition that will be so clear that people will say, "Yes, it is a common law claim or it is not a common law claim."* "[90]

Alteration to procedure

10.8 Initial access to common law in a lower Court

The Self Insurers Association proposes that initial access to common law actions should be through a magistrate's court or compensation magistrate rather than the District Court as at present under section 93D(4):

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89 Mr Kim Mettam, 19/8/1998, evidence to the Committee

90 Hon Peter Foss MLC, 9/9/1998, evidence to the Committee, p13

". . . an initial assessment should be made about whether someone might be successful. . . We are suggesting the process be moved to a compensation magistrate with the ability for the right of appeal to the Supreme Court. In a sense the Supreme Court should supervise the interpretation. This should not be just an administrative matter. The compensation magistrate would work very hard at being able to set parameters for making the recodified definition work, rather than setting a precedent through which everybody is able to go - in a way that is what has happened - on the basis that everyone should have their day in court.

We believe the magistrates would be more immediate and accessible. Lower legal cost would be involved because it is a lower court. There would be less likelihood of a catastrophic result for individuals; that is, because a magistrate was making an assessment upfront an individual would not have to take the case through to the very end and then find he has lost the case. We are also returning to the philosophy of the ultimate supervision by the Supreme Court with the compensation magistrate being the expert."[91]

COMMITTEE FINDINGS ON OTHER OPTIONS FOR CHANGES TO THE GATEWAYS

Earlier in this report the Committee set out its reasons for disagreeing with the Assembly's proposal to restrict the first gateway and close the second gateway. However the Committee also noted that there are legitimate concerns about the operation of section 93D of the Act and that there is therefore scope for amending the section.

The Committee has not given detailed consideration to the proposals mentioned in this Chapter as to do so would be outside its purview. There may be alternatives which have not been raised before the Committee. Further, the Committee understands that the Government has had discussions with interested parties and retains an open mind on options for section 93D.

In light of the availability of alternatives to closure of the second gateway, the Committee considers that the Government should consider what option goes closest to meeting the objectives of the workers' compensation and rehabilitation system in this State. Options to be considered include those outlined briefly in this Chapter, without excluding other options prepared by or put to the Government.

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91 Mr Kim Mettam, 19/8/1998, evidence to the Committee, p38

Recommendation 6: that the Government give further consideration to options for determining whether an injured worker may seek damages at common law, including:

1. alternate gateway models, such as:

- **establishment of a gateway tribunal;**
- **a single gateway requiring a 20% degree of disability;**
- **election between common law and statutory benefits;**

2. modification of the dual gateway system, by measures such as:

- **a higher threshold for the second gateway;**
- **second gateway threshold as a multiple of earnings;**
- **capping damages claimable through the second gateway;**
- **a more rigorous common law test for "negligence"; and**

3. alteration to procedure, such as:

- **initial access to common law in a lower Court.**

CHAPTER 11

OTHER MATTERS RAISED DURING THE INQUIRY

In this Chapter the Committee briefly reviews other matters which have been raised in the course of the inquiry. The Committee has not considered these matters in detail as to do so would be outside the Committee's purview.

11.1 Full review of the Act

A number of submitters suggested to the Committee that the Bill makes "piecemeal" amendments to the Act, when what is required to address the acknowledged difficulties with the workers' compensation and rehabilitation system is a thorough review of the system. Several submitters focus on the fact that cost increases in workers' compensation and rehabilitation are not unique to Western Australia or indeed to Australia but are evident in many industrial countries. Given this, it is argued that a substantial review of the entire system is merited.

The Housing Industry Association in a letter to the then Minister for Labour Relations, attached to a letter dated 29 June 1998 from the then Minister to Members of the Legislative Council, makes the following points:

> "*It is recognised that the decision to increase premiums stems from the proliferation of claims under the second gateway provisions of the Act (1981). Clearly, the drain on funds is a major concern to the Government. HIA would submit, however, that this current situation is symptomatic and that there is a more obvious need to review the existing legislation.*
>
> *A review of the legislation would be consistent with the competitive neutrality provisions of National Competition Policy and thereby facilitate consideration of alternative delivery mechanisms, including privatised models."*

An interesting point is made in Coopers & Lybrand's 1998 report. Having calculated expected savings offered by a number of options for reform of the workers' compensation system, Coopers & Lybrand offers the caveat that for each option, "*[c]omplete erosion of the savings within 3 to 5 years is expected*".[92] This indicates that if long-term cost savings and/or improvements in rehabilitation are to be achieved, options entailing more substantial reform should be explored.

[92] Coopers & Lybrand (1998), p7

Coopers & Lybrand goes on to explain that the caveat is necessary because:

> *". . . the common law and statutory benefits are both integral to the cost of the system and are inter-related, as reflected by our discussion of the erosion and transfer/substitution effects.*
>
> *. . . It is accepted that benefit changes in accident compensation schemes are* ***ultimately less effective than anticipated*** *because there is often a transfer of costs from more restricted to less restricted benefits and claimants take action to minimise the effect of revised benefit levels eg inflate claim costs to above the new thresholds."*[93]

The Chamber of Commerce and Industry agrees with other witnesses both that the system is dynamic, meaning that costs saved in one area are liable to emerge in another area, and that full review is advisable. However, it does not see this as an argument for retaining the second gateway until a full review is undertaken:

> "*Hon DERRICK TOMLINSON: I return to your first proposition that there needs to be a review of the system. That is probably right. Given that it is a dynamic system and that adjustment in one will result in compensatory adjustments in the others - in effect, no change in costs or outcomes - should we delay the closure of the second gate until the review is undertaken or is it absolutely necessary to close the second gate as a holding strategy until the review is completed?*
>
> *Mr McCARTHY: I cannot put it strongly enough how urgently the total closure of the second gateway should occur. It is critical that that gateway be closed now. The reason is the longer it is open, more claims will be made, those claims will be higher, premium escalation will be higher, and the cost to the system will be higher. If it is delayed three months, those things will occur. However, if it is delayed six months, we can count in multiples the degree of problems we will experience. The longer the problems take to solve, the harsher will be the remedy. The remedy will eventually be cuts in benefits because of the total cost of the system blow-out; that is the only avenue left to address. The longer it is left, the harsher must be the cuts in benefits. . .*
>
> *Hon DERRICK TOMLINSON: However, on your proposition, all you would achieve is a temporary reprieve. The pattern since 1994 has been a real decline in common law payments, followed in the immediate past year by an increase in common law payments. The common law payments are now slightly above what they were in 1994, and the historical trend is towards escalation. Therefore, all you achieved in 1994 by restricting common law was a temporary reprieve. If you closed common law now, you would have a temporary reprieve, but there would then be an adjustment in other parts of the system. There would be an increase in the cost of both premiums and payments, but it would be in a different mix of payments.*

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93 Coopers & Lybrand, p11

> *Mr McCARTHY: What happened in 1995 was a one year holiday, and the trend pre-1994 has continued post-1995 at a higher level. I agree entirely with the proposition that if the second gateway were closed, we would be likely to have a period of 12 months, 18 months or two years before we started to experience a blowout in some other form. I suggest that during that period, there should be a comprehensive review of the system."*[94]

Ms Cynthia Davis of WorkFocus refers to the inter-relationship between common law access and other cost areas:

> "*Should the gateway be closed, I believe many costs currently expressed under the gateway will surface elsewhere. The workers' compensation and rehabilitation system is just that, a system. It is a system that rightly attempts to assist workers to regain maximum capacity following injury and do so in a way that is affordable to all of us. Currently, the goals of the system are not being achieved and changes need to be made. However, changes to any part of the system ultimately will affect other parts of the system. Therefore, consideration to changing any part of the system cannot be given adequately without viewing its impact on the system as a whole.*"[95]

Dwyer Durack Solicitors submits that the issue of workers' compensation cannot be divorced from other issues such as workplace safety:

> "*It is necessary to comprehensively review the whole system and ensure that amendments put in place an adequate system of work place safety both in terms of quality assurance, policing and compensation.*
>
> *Has the committee for example considered whether employers who obtain appropriate quality assurance in respect of their workplaces should gain a reduction of premium? Where is the consideration of other systems to ascertain whether the system as a whole can be modified to accommodate the interests of all parties involved rather than simply the profitability of insurers?"*[96]

Mr Daryl Cameron of the Insurance Council of Australia, in contrast to the above submitters, suggests that essentially the Act is working well and the only real problem is the fact that the second gateway remains so accessible:

> "*What was not expected, and where the insurers were caught short with the so-called discounting in the marketplace, was that not all of the three major thrusts of the changes that were implemented in 1993-94 would work. Two of them certainly did work - the focus back onto rehabilitation and medical, and getting people maintained and back to work or starting to work, albeit at a cost. Perhaps at this stage it is not very effective or efficient, and we are still probably paying more than we should for the results that we are getting, but at least it has started. We certainly*

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94 Mr Brendan McCarthy, 14/7/1997, evidence to the Committee, p50

95 Ms Cynthia Davis, 31/8/1998, evidence to the Committee, p3

96 Submission No.6

intended the weekly benefits to go up, because people get four weeks' full pay to start with, plus the total statutory amount was increased by some $20 000.

However, while those two parts are working . . . we still have a problem at the long term end. The problem with a no fault system that incorporates a fault system is that you are more likely to get a lump sum and you are more likely to develop the mentality and environment for a lump sum the longer you are off work. That is a fact of life. It is not just psychological overload that comes into account; it is the fact that the longer people are out of society or out of the work force, the harder it is for them to get back into it in a meaningful way."[97]

The Attorney General was non-committal as to whether he would advocate a full review of the Act but noted that in essence the statutory system is the same as that introduced in 1902. He comments that the risk in making amendments to the system is that any change introduces potential for litigation to clarify what the change means.[98]

11.2 The role of common law in work related injuries

Each Australian jurisdiction takes a different approach to allowing common law damages claims for work related injuries.

The approach taken in Victoria, where access to common law for work related injuries has been removed altogether, was discussed by a number of witnesses.

The Attorney General told the Committee that, unlike the Government, he personally favours abolition of common law in this field:

"*I believe we should abolish common law claims altogether and go for a more generous, no-fault system which is what much of this legislation [the Act and the Bill] tries to do. There should also be a generous redemption system. The removal of those redemptions was a bad idea.*

. . . That is not the Government's position. It has taken the view that there should be a common law system but in order to limit access it should have these two gateways. However, I do not think that is a sensible idea from the worker's point of view. You are far better off with a generous, no-fault system which is properly administered and brought to a quick end."[99]

Mr Patrick Gilroy of the Chamber of Minerals & Energy Western Australia Inc gave the Committee his industry's view:

"*The industry philosophy is for no common law access at all. Workers' compensation was introduced to eliminate common law, but we have kept the two streams going. We believe that common law can be a negative, although we have*

97 Mr Daryl Cameron, 14/7/1998, evidence to the Committee, p73
98 Hon Peter Foss MLC, 9/9/1998, evidence to the Committee, p18
99 Hon Peter Foss MLC, 9/9/1998, evidence to the Committee, p2

settled on a view that at a 30 per cent total loss there should be an opportunity, in the case of gross negligence, for people to sue an employer."[100]

Representatives of SGIO discussed with the Committee the possibility of removal of all access to common law:

"Hon J.A. COWDELL: Did you consider the option of closing common law altogether?
. . .

Mr KIDNER: The whole system then would have to be totally restructured as you would not be able to have a prescribed amount within the system. Every other State that has no common law has weekly compensation and medical benefits through to age 65; the Commonwealth system is exactly the same. It becomes a social service system.

The CHAIRMAN: But that does not encourage people to return to work.

Mr KIDNER: No, it does not. There is another way of looking at it.

The CHAIRMAN: There will be more people on workers' compensation in Western Australia.

Mr MOORE: Comcare has problems, Northern Territory has problems, even problems in South Australia are emerging. We must initially address the current problem. However, we can look at the system in a different way. There could be two separate systems; namely, a statutory system similar to what we have and separate common law legislation. The obligations that an employer has to its employees could be embroiled in that legislation. In other words, common law provided under statute regulations like the Occupiers' Liability Act. When people enter premises, a liability is owed to people on those premises and it is strict. The problem here is that if you are injured at work, you are protected under a common law claim because there is no control. The common law system says if you are injured at work, there is an obligation on the employer to supervise or provide training. If someone twists, turns or lifts someone incorrectly, an employer is liable under the Act. However, are they negligent?

Potentially, we could set up system with separate statutory obligations on employers with strict liability so that employers are clear about their obligations to their employees. If they breach those obligations, the employee would have access under common law. It would be strict and tough; however, it would allow individuals the right to sue if there is negligence on behalf of the employer. Currently, there is not. Most of these claims are really quasi workers' compensation claims getting into the common law system, and once they are in the system they end up getting a lump sum because that is how the process works.

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100 Mr Patrick Gilroy, 28/7/1998, evidence to the Committee, p29

Hon J.A. COWDELL: Therefore, would you like to separate them?

Mr MOORE: It is not the first time that this has been raised. It has been discussed at WorkCover and at premium rates committee meetings. Historically, work has been done to see what legislation would require to embrace those things. It is something worth investigating as a long term situation if we want to keep common law in the system."[101]

11.3 Distinguishing between statutory and common law insurance

One of the anomalies which results from the blurring of statutory compensation and common law damages is that insurance companies generally offer employers a single insurance package, covering employers for both the statutory component of insurance and the non-compulsory, common law or general liability component.

Common law claims, being fault based, should tend to provide a better indication than statutory claims of the quality of workplace safety in a particular workplace. If the common law component of insurance were determined separately to the statutory component, it might be expected that a workplace with a good safety record and therefore low common law costs could be rewarded with lower premiums for the common law component.

However, for this to be feasible, the Act would have to clarify the distinction between the two types of costs. As things stand at present, the complex inter-relationship between common law costs and statutory costs makes it difficult for insurers to accurately assess potential liability for each costs area and thence offer insurance conditions which reflect a workplace's safety record.

The liberalisation of the redemption system, as recommended in Chapter 9 above, should assist in this process of clarification by removing from the category of common law payments those claims which are settled under common law but are described as "de facto redemptions".

Other measures which would encourage insurers to offer separate coverage for statutory and common law liability should be considered and pursued as far as practical.

11.4 The ability of injured workers to "rehabilitation shop"

Representatives of SGIO Insurance told the Committee they are concerned that the open-ended nature of the Act's weekly payments system presents an incentive to workers to remain on rehabilitation programs indefinitely:

"*Hon DERRICK TOMLINSON: . . . In the past 18 months, weekly payments have also escalated at the same historical trend as common law claims.*

Mr KIDNER: It is because of the pot of gold. People do not want to go back to work. The fundamental reason for this legislation is to get people back to work, and

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101 Mr Robert Kidner, Mr Garry Moore, 14/7/1998, evidence to the Committee, p68

that is being missed right across the board. . . We need to take that out and allow redemptions only for people who have made a genuine attempt to return to work, for whatever reason.

. . . The ones who get up our nose are the ones who do not have a go at it and keep chopping and changing. We cannot get them out of the system. They do not have a crack at it because they know that ultimately there may be $200 000 in it for them. The cost for us to go down that path is exorbitant. Those people stay on compensation. They go to the doctor every three weeks, because they have to; and they see the physio. Physiotherapy costs have not decreased but are increasing in line with everything else because people attend more often.

. . . Hon J.A. SCOTT: It seems to be broadly acknowledged that the rehabilitation system is not working very well. Can you comment on that?

Mr KIDNER: It is not working, firstly, because of the lump sum and, secondly, because the current legislation has no teeth to address problems when they arise. A worker can refuse to take a trial job which has been arranged. If the guy says he will do it, we can apply to the WorkCover directorate which says, "Okay, go back and do it. Keep paying him in the meantime." He then fronts up, spends a day there and goes off again and says he cannot do it anymore. If the doctor says that he can, we have to go back to WorkCover three weeks later, and it says, "You didn't have a good crack at it. Give him another chance." The cycle goes on."[102]

Most submitters to the inquiry acknowledge that there are some injured workers who do not make genuine attempts to return to work. Further, of the majority of workers who do seek to return to work some will encounter psychological or motivational problems due to the effects of being out of work.

Measures which would discourage workers from continuing to receive weekly payments where there is no genuine need for them to do so should be considered.

11.5 Preventing "double dipping"

The Self Insurers Association suggests that superannuation and future medical expenses should be excluded from common law damages.

"*We also suggest that superannuation and future medical expenses be excluded from future economic loss calculations. Another crazy thing about the law is that at present someone can double dip by getting an economic loss from their employer through a superannuation fund and sue the employer for damages. There is an hour's conversation about why that is the case. However, I think it relates to the historical low level of superannuation in Australian industry which has now changed. We are now in a different scenario. The law must be rediscovered to pick that up.*"[103]

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102 Mr Robert Kidner, 14/7/1998, evidence to the Committee, p72

103 Mr Kim Nettam, 19/8/1998, evidence to the Committee, p37

11.6 Timely and consistent referral to rehabilitation

A matter on which there appears to be general agreement is that rehabilitation is more effective where it is undertaken as soon as possible after a worker sustains an injury. A difficulty with delivering timely rehabilitation, however, is that the great majority of injured workers return to work within the first few weeks after an accident and without requirement of rehabilitation. Therefore to ensure that workers who need rehabilitation receive it as soon as possible means that an assessment has to be done to separate out the minority of workers in this position. Inevitably, this takes some time. Streamlining of the process to determine within the first week or two after an injury which workers will need intensive rehabilitation counselling is desirable but may be difficult to achieve.

Ms Cynthia Davis of WorkFocus explains the dynamics of the referral system as follows:

> "*We, as providers, receive referrals from referring parties. The main referring parties are insurers, employers and doctors. There are encouragements in the system to refer earlier, but there is no compulsion to do that. If you were to ask an insurer, "Why do you not refer earlier?", the argument is, "Sometimes these problems solve themselves." An insurer may have 10 claims and a percentage of those will be all right after a few months, but the insurer does not know that at the time. In hindsight, it can be regretful that it did not refer Mr Brown, but at the time the insurer thinks, "Mr Brown just has a broken leg; that takes eight weeks. I will wait until he is better and I will not need rehab." At eight weeks, Mr Brown then has a sore hip because he has been limping and then it is, "He is going to a specialist for an X-ray; I will just wait for that and then we will send it." There are times when you are always waiting, understandably, for things to occur.*
>
> *By the time the end is reached, you will find that in five months this person has been at home, nobody has visited him, someone else is in his job, he has heard that his mates are not very happy with him and they think he is bludging. He starts not wanting to go back because he feels hard done by and then he comes to us. It is very difficult by that stage to say, "They really do like you at work, your job is there and you are going to get better." . . .*
>
> *Hon J.A. SCOTT: Do you see any way around the problem?*
>
> *Ms DAVIS: Early referral is a significant factor. With early referral, we can set up the dynamics quickly so that we do not have those problems. We might see more people but we would not see them for nearly as long and it would not be nearly as expensive. Every piece of research the world over has shown that if we want a rehabilitation system, we need to get people into rehabilitation quickly.*"[104]

A second way in which it has been suggested that rehabilitation processes could be improved is to ensure consistency in the method of referral to a rehabilitation counsellor. The Rehabilitation Providers' Association told the Committee that it is difficult for their members

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104 Ms Cynthia Davis, 31/8/1998, evidence to the Committee, p6

to plan for rehabilitation in many cases because referrals can come from a range of sources, including employers, insurance companies, doctors and workers themselves.

Ms Cynthia Davis of WorkFocus takes this view of how rehabilitation interacts with other areas under the Act:

> *"To date, in an attempt to address the spiralling costs in workers compensation, the following have been undertaken -*
>
> *(1) The Workers' Compensation and Rehabilitation Commission conducted a review of rehabilitation and proposed radical and far reaching changes to the rehabilitation aspects of workers compensation and rehabilitation.*
>
> *(2) The present Government has proposed that the Workers' Compensation and Rehabilitation Act be amended such that a worker's access to financial compensation under the second gateway be precluded.*
>
> *Changes such as proposed by both (1) and (2) above will have far-reaching consequences to the system as a whole. However, because of their limited focus, they are unlikely to achieve the desired outcome of an effective system to the benefit of any party. Indeed, changes based on such limited foci have the potential to exacerbate the problem.*
>
> *. . . Because of the limited focus of this review [in (1) above], it cannot hope to address the current difficulties in its functioning. Rather than getting to the heart of the issues involved in the current system, the review has largely ignored the fact that rehabilitation is part of a larger system and a thorough review of the system is required if beneficial changes are to occur. Similarly, as I stated, problems taking place in the second gateway are not isolated; they are ultimately related to the system as a whole.*
>
> *In conclusion, I appreciate that the field of reference for the committee is limited to considerations around closing the second gateway or otherwise. I assert, however, that this aspect of the legislation is part of a complex and integrated system. It is accepted generally that the system is too expensive, far more expensive than it was ever intended to be, and too expensive for the community to support. Changes must be made.*
>
> *I urge the committee to consider what I say and recommend that a comprehensive review of the functioning of the system as a whole occurs; not just that the second gateway be closed or otherwise; or not just that the way we rehabilitate our workers be overhauled. "*[105]

105 Ms Cynthia Davis, 31/8/1998, evidence to the Committee, p.2

Ms Davis notes that the rehabilitation system was the subject of a recent review commissioned by WorkCover. She does not endorse the review and advocates better evaluation and consideration of rehabilitation issues as part of a broader review of the operation of the Act:

> "*I believe - it is also the opinion of the Rehabilitation Providers Association - that a review must be independent and representative and it must address its terms of reference. The review did not address its own terms of reference.*
>
> *We have a report by Dr Nicholas Buys which I am prepared to table. He is Australia's leading academic in the field of rehabilitation. He has a PhD from the United States and is a senior lecturer at Griffith University. He has provided a review of the review and has recommended that a further independent review take place. Any review of an industry must have some representation of industry people on the review. There was not one person from the rehabilitation industry on that review; that was notwithstanding verbal and written requests to the contrary. I find it remarkable that a system can be reviewed without adequate involvement of the people in the system itself. . . Any review firstly, must address its terms of reference; secondly, it must be representative and; thirdly, it must review the system as a whole and its relationship to other aspects of the system.*"[106]

The Introduction to the report by Mr Buys is attached as Appendix D to this report.

Mr Harry Neesham of WorkCover notes that some changes are currently under consideration:

> "*A comprehensive review of the whole rehabilitation area was conducted and is in the process of being evaluated for implementation. This will introduce a change from rehabilitation to injury management because, contrary to everybody's belief, the greatest rehabilitator is the employer. In almost all cases he will take his injured worker back on light duties until he is better; he knows that in the first six months of a person being injured, it will cost him about $50 000 to select, recruit and train a person to do that job. After that the effect is minimised and is of less cost. A real evaluation has been done. The concept is that at four weeks the doctor will be required to determine whether specialist vocational rehabilitation intervention is necessary and that will be monitored as part of this review. That is certainly part of the recommendations that have been made and are in the process of being implemented.*"[107]

Mr Neesham, however, concedes that where there is a need for rehabilitation the delay in offering the worker this is longer than it should be:

> "*It is the ones who go beyond 12 months who are the high cost, but the need for vocational rehabilitation has to be determined. In a lot of cases the employer actually takes the worker back and, in conjunction with the doctor, works out a program. You do not need the specialist rehabilitation person to be involved in that. Generally, they come in when the worker is going to a different employer and a*

106 Ms Cynthia Davis, 31/8/1998, evidence to the Committee, p3

107 Mr Harry Neesham, 9/9/1998, evidence to the Committee, p18

different job or the same employer in a different job, because in those circumstances they are required to assess the worker's physical capability and to do a workplace assessment to determine what the worker can do and put them through a training program. At present, they do not generally get a referral for six to nine months. We are looking at having that referral brought back to four weeks. You cannot put a rehabilitation person on that early panel because one of the benefits in the package is that the worker has the choice of vocational rehabilitation provider, even though 70 per cent are referred by insurers. The worker has the right over the insurer for referral to the provider of their choice."[108]

11.7 Controlling medical costs

According to WorkCover's figures, medical practitioners' costs have risen from $26.4 million in 1992/93 to $44.1 million in 1997/98. The Committee is concerned at this cost increase and proposes that it be subject to review.

COMMITTEE FINDINGS ON OTHER MATTERS RAISED DURING THE INQUIRY

The Committee considers that a full review of the Act is merited. Ideally such review would have taken place before the introduction of the Bill, the second substantial alteration to the system in 5 years. However, the Committee accepts that there is a need for some immediate amendment to the Act.

Recommendation 7: that the operation of the *Workers' Compensation and Rehabilitation Amendment Act 1981* be subject to a full review, considering among other things:

- **the role of common law in work related injuries;**
- **distinguishing between statutory and common law insurance;**
- **the ability of injured workers to "rehabilitation shop";**
- **preventing "double dipping";**
- **timely and consistent referral to rehabilitation; and**
- **controlling medical costs.**

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[108] Mr Harry Neesham, 9/9/1998, evidence to the Committee, p21

Hon Bruce Donaldson MLC
Chairman

Date:

APPENDIX A: LIST OF WITNESSES

Hearing held on 14 July 1998

Mr H T Neesham
Chief Executive Officer
WorkCover WA

Ms A Gaines
Executive Director
Law Society of Western Australia

Mr J Fiocco
Lawyer
Member of the Personal Injuries Committee of the Law Society

Mr G Porter
Legal Practitioner
Convenor of the Personal Injuries Committee & Member of the Law Society

Mr B P McCarthy
Director Operations
Chamber of Commerce & Industry

Ms A H Bellamy
Group Manager
Chamber of Commerce & Industry

Mr G Moore
General Manager Commercial
SGIO Insurance Ltd

Mr R Kidner
National Claims Manager
SGIO Insurance Ltd

Mr Daryl Cameron
Group Manager WA & NT
Insurance Council of Australia

Tuesday 28 July 1998

Mr A Cooke
Secretary of the Trades & Labor Council of WA

Ms Kathy Digwood
Trades & Labor Council nominee to the Workers' Compensation & Rehabilitation Commission

Mr P O'Halloran
Barrister & Solicitor

Mr I Marshall
Barrister

Mr P Gilroy
Deputy Chief Executive Officer
Chamber of Minerals & Energy of WA Inc

Wednesday 19 August 1998

Mr D Pearson
Auditor General & Chairman of Premium Rates Committee

Ms G Cammarano
Secretary
Premium Rates Committee

Ms L Csendes
Registered Psychologist/Rehabilitation

Mr G Guest
Clinical Psychologist
White Tennyson & Associates

Mr R Olney
State Insurance Manager
Woolworths (WA) Pty Ltd

Mr W Vincent
Secretary
Self Insurers Association of WA
Jardine Local Government Insurances Services

Mr K Mettam
Chairperson
Self Insurers Association of WA

Monday 31 August 1998

Ms C Davis

Director
WorkFocus

Ms C Greenwell
President
Rehabilitation Providers Association

Wednesday 9 September 1998

Hon PG Foss MLC
Attorney General

Mr H T Neesham
Chief Executive Officer
WorkCover WA

APPENDIX B: LIST OF SUBMISSIONS

No	Date	From
1.	12.7.98	Ms Stella Zavier
2.	21.7.98	Mr Neil T Magee Chairman, Western Division National Insurance Brokers Association of Australia Ltd
3.	16.7.98	Ms Linda Schiel
4.	16.7.98	Mr John Gordon Slater & Gordon Barristers & Solicitors
5.	22.7.98	Ms Kate O'Brien President Law Society
6.	31.7.98	Mr Guy Stubbs Senior Partner Dwyer Durack Barristers & Solicitors
7.	5.8.98	Ms Carolyn Orriss Managing Director Vintage Insurance Brokers
8.	5.8.98	Mr Sukhwant Singh President Australian Plaintiff Lawyers Association Inc - WA Branch
9.	6.8.98	Mr Greg Stenberg Manager Graham S Knight & Associates Insurance Brokers
10.	6.8.98	Ms Cynthia Davis Director WorkFocus Western Rehabilitation Pty Ltd
11.	6.8.98	Ms Jenny Van Doornum General Manager Pyrotherm Pty Ltd
12.	6.8.98	Mr Geoff O'Regan Managing Director O'Regan Group Insurance Brokers
13.	7.8.98	A R Joyce Director Forrest Croft & Associates Insurance Brokers

14.	7.8.98 17.8.98 4.9.98	Mr Brian Nugawela Senior Associate Friedman Lurie Singh Barristers & Solicitors
15.	7.8.98	T Zammit
16.	10.8.98	Mr Ian Carpenter Kaymac Insurance Brokers
17.	10.8.98	J D Deykin Parkside Insurance Brokers
18.	10.8.98	Mr Rick Purslowe Director Triton Broking Services (WA) Pty Ltd
19.	11.8.98	Mr Max Crane
20.	12.8.98	Mr Graham F Parker
21.	12.8.98	YH Lim Managing Director Hanwha Advanced Ceramics Australia Pty Ltd
22.	18.8.98	Mr John Nelson
23.	18.8.98	Mr Jeff Hollands Westcourt Group Insurance Brokers
24.	18.8.98	Mr Neil Bartholomaeus Chairman Workers' Compensation & Rehabilitation Commission
25.	19.8.98	Mr Kim Hurley Managing Director Design Sales Office Interiors Pty Ltd
26.	20.8.98	R J Whitney Sunshine Everdure
27.	21.8.98	Mr Colin Cowden Cowden Ltd, Insurance Brokers
28.	undated	Mr Brian Clohesy
29. 30. 31.	21.8.98	Mr Graham S Knight Mr Shayne Knight Mr Ben McGregor Graham Knight & Associates Insurance Brokers
32.	21.8.98	Mr Greg Walsh V & V Walsh Wholesale Butchers
33.	22.8.98	G T Nagy

34.	24.8.98	Mr John R Dawson John Dawson Insurance Consultants
35.	25.8.98	Mr L C Dry Managing Director Dry Shand Insurance Brokers Pty Ltd
36.	28.8.98	M G McLean Director Master Builders' Association of WA
37.	31.8.98	Mr Graham McCorry
38.	2.9.98	Mr John Hylton-Davies Cleanaway
39.	9.9.98	Mr Con Manetas Director Leed Insurance Brokers Pty Ltd
40.	10.9.98	S C Nigam SC Nigam & Co Barristers & Solicitors
41.	13.9.98	Ms Janet Cosmetto
42.	7.10.98	N Marchesani
43.	24.9.98	Mr Ron Smith
44.	4.9.98	Dr Nigel Jones WA State President Institute of Private Clinical Psychologists of Australia
45.	24.9.98	Mr Brian Lyster
46.	24.9.98	Mr David Todd
47.	7.10.98	Mr Alan McCarthy McCarthy's Carcraft
48.	2.10.98	Rehabilitation Providers Association (WA) Inc
49.	2.9.98	Mr Ron Rouwenhorst Technicon Industries Pty Ltd
50.	3.9.98	Mr John Ley Senior Vice President Law Society of Western Australia
51.	9.10.98	Mr Ashley Jardine

APPENDIX C: EXTRACT FROM COOPERS & LYBRAND ACTUARIAL AND SUPERANNUATION SERVICES PTY LTD: *WORKERS' COMPENSATION & REHABILITATION COMMISSION OF WESTERN AUSTRALIA - ACTUARIAL ANALYSIS OF ACCESS TO COMMON LAW - MARCH 1998*

3 The cost of the changes

3.1 Summary of mid-range results for each option

To give some weight to the issues of *projection uncertainty and erosion discussed in this report*, the costings are done on a high/initial level and a low/interim level. The ultimate level would have little or no savings. Complete erosion of the savings within 3 to 5 years is expected.

For summary purposes the average of the low and high levels are shown below. The high/initial level and the low/interim level cost impacts are fully detailed in the appendices.

Option	Estimated overall cost impact (a)			
		Election impact		Remove common law
	Base impact	2 years	3 years	
1 (b)	-13.6%	-14.5%	-13.8%	-19.6%
2a (b)	-8.6%			-14.1%
2b (b)	-3.4%			-8.6%
3a (c)	-1.7%	-3.7%	-2.1%	
3b (c)	25.3%	23.3%	24.9%	
4	1.0%			1.3%
	7 years	10 years		
5 (c)	-8.3%	-6.8%		

Notes: (a) 34% of the arithmetic average of the high and low levels from App A

(b) The base impact for options 1 and 2 is removing the second gateway

(c) proof of negligence is required.

Options are as follows :

- 1 - remove second gateway and all common law rights
- 2 - as for Option 1, but increase PA by 10% (2a) or 20% (2b)
- 3a - retain current gateways with election and negligence proof
- 3b - remove all gateways with election and negligence proof
- 4 - increase Schedule 2 from 60% to 90% of PA for back injuries
- 5 - revise second gateway as 5 times earnings over the period shown.

3.4 Option 3

Option 3a has relatively little impact except in the short initial period after change. The impact is very quickly eroded (86%).

Option 3b acts to **increase, rather than save costs** and will do nothing to restore balance to the cost of the scheme. There are no thresholds to common law access in this case. Erosion in this instance causes scheme costs to escalate further.

3.5 Option 4

Option 4 adds marginally to costs only. However when combined with common law restrictions, the usage of the back benefit as part of Schedule 2 is expected to rise dramatically. Because Schedule 2 is mainly used as a commutation of remaining weekly benefits upto the PA, the net extra cost to the system is still fairly low, being restricted to the lost interest only (see Appendix A.6).

3.6 Option 5

Option 5 is only just more than half as effective as removing the economic gateway. There are expected to be major practical difficulties with implementing this option as described elsewhere in this report. The cost savings achieved are likely to erode quickly as shown by a 46% erosion effect from the initial to interim level costings.

3.7 Impact on premiums and reserves

It would be imprudent to anticipate the potential impact on premium levels or reserving of these changes. The financial impact will depend on the timing of any benefit changes ie both the date of introduction of change and the specific phase-in arrangements.

*The **definition of the effective date of any change** in the economic common law threshold will affect the time taken for the changes to emerge :*

- *if based on date of accident event, savings will take more than two years to commence emerging*
- *if based on date of notification of common law action, potential savings will start emerging earlier ie over the next two years.*

However with costs of the scheme currently escalating at around $82m (20%) per year, it is advisable to introduce the changes as quickly and effectively as possible.

These comments apply equally to the removal of the second gateway or common law rights entirely.

APPENDIX D: EXTRACT FROM DR NICHOLAS BUYS: *REHABILITATION PROVIDERS ASSOCIATION RESPONSE TO THE WORKERS' COMPENSATION AND REHABILITATION COMMISSION REVIEW OF REHABILITATION - NOVEMBER 1997*

Rehabilitation Providers Association Response to the Workers' Compensation and Rehabilitation Commission Review of Rehabilitation

1.0 EXECUTIVE SUMMARY

The Rehabilitation Providers Association (W.A.) Inc. (RPA) is a representative body of accredited Rehabilitation Providers in Western Australia and consists of Rehabilitation Agencies, Single Providers and Employer Based Providers.

Western Australian Vocational Rehabilitation Providers have been at the forefront in the development and implementation of injury management, preventative strategies and training initiatives for Western Australian industry and workers.

The RPA supports the concept of an injury management model, many of the Review recommendations and welcomes the ongoing development of performance indicators and accountability for all key stakeholders in the system. However the RPA has specific concerns regarding;

- How the model may impact on early referral for Vocational Rehabilitation.
- The deletion of the definition of vocational rehabilitation within the Act.
- The possibility of bureaucratic and procedural delays resulting from the vocational rehabilitation model as outlined.
- The additional costs to the system of establishing and operating the independent facility.
- The feasibility of small business implementing the injury management model.
- The feasibility of busy medical practitioners fulfilling the requirements of the injury management model.
- Medical consultations being funded from the vocational rehabilitation entitlement.
- The possible development of non accredited practitioners undertaking return to work activities.
- Vocational Rehabilitation Providers becoming "provider of last resort" where earlier involvement may have resulted in a better and more timely outcome.

The RPA has made recommendations which are included in the Conclusion section of this submission.

The RPA would welcome the opportunity to discuss this submission with the Commissioners of WorkCover.

Rehabilitation Providers Association (W.A.) Inc.

Rehabilitation Providers Association Response To The Workers' Compensation and Rehabilitation Commission Review of Rehabilitation

2.0 INTRODUCTION

The Rehabilitation Providers Association (W.A.) Inc. (RPA) is a representative body of accredited Rehabilitation Providers in Western Australia and consists of Rehabilitation Agencies, Single Providers and Employer Based Providers.

Rehabilitation Providers are Accredited and Monitored by WorkCover Western Australia. The process of accreditation of Rehabilitation Providers and the allocation of a specific vocational rehabilitation entitlement has been part of the Workers' Compensation Act (1981) since amendments were made in 1991.

Vocational Rehabilitation Providers provide services to assist injured workers to return to work. The range of services includes case management, support counselling, vocational guidance, return to work monitoring, back education, workplace evaluations, functional capacity evaluations, vocational evaluations and assistance in job seeking. The expertise base in delivering these services is from Psychologists, Occupational Therapists, Exercise Physiologists, Rehabilitation Counsellors and other health and behavioural science related disciplines.

RPA members also offer services related to accident prevention and general occupational safety and health. An additional benefit of directly working with an injured worker is a safer workplace for all employees and reduced workers compensation costs to employers and insurers.

In February 1996 the Commissioners of WorkCover WA determined that a Review of Rehabilitation should occur.

The RPA has welcomed the Review as it recognises that there are issues within the workers' compensation and rehabilitation system which need to be addressed. However the RPA has a number of concerns regarding the Review process and some of the information being used to support proposed changes to the system.

The RPA believes the current system of Workers Compensation and Rehabilitation in Western Australia contains many of the elements which have been shown world wide to produce effective outcomes in returning workers to work and containing costs. Other systems have been trialled in other Australian States with varying success.

RPA Response to the Review 3

This submission is the RPA's response to the WorkCover Review of Rehabilitation. We believe the Review is timely in beginning to address shortcomings and issues within the current system. The RPA's position was outlined in the submission to the Review Committee in August 1996. In that document, the RPA identified the following six major issues which effect the efficacy of vocational rehabilitation in the Western Australian Workers' Compensation and Rehabilitation System:

1. Failure of the system to facilitate early rehabilitation
2. Ambiguity in the goals and definition of vocational rehabilitation
3. The individual roles of the workers' compensation system stakeholders
4. Decision making and control of rehabilitation
5. Inadequate evaluation of vocational rehabilitation performance
6. Untimely and/or inappropriate case closure.

Please refer to the August 1996 submission for further details on these issues.

The Report to the Workers' Compensation and Rehabilitation Commission Review of Rehabilitation (September 1997) has addressed some of these issues. The RPA supports the recommendations which will have a positive influence on reducing costs and improving injured workers' return to work rates. However we also believe that there are areas of the Review which require further consideration.

The RPA is concerned regarding the overall costs within the Workers' Compensation System. The WorkCover 1996/1997 Annual Report states that the Scheme costs in 1996/1997 were $374 million. This represents an increase of $48 million from the previous financial year. The greatest costs were in the areas of;

Weekly Wages -	$127 million
Common Law -	$102 million
Medical Expenses -	$40 million

Costs for vocational rehabilitation were quoted as $16 million. The average cost per case for an injured worker undergoing vocational rehabilitation has therefore only increased 8% since 1994/1995. Given the overall costs to the system the RPA believes that further analysis is required as to which areas are contributing to the increase in costs and how the cost issues can be best addressed.

The legislative changes made to the workers' compensation and rehabilitation system in 1993 were intended to reduce costs through greater emphasis on vocational rehabilitation. Changes were also made to the common law system and dispute resolution through the introduction of the Conciliation and Review Directorate. The changes resulted in the removal of the opportunity for injured workers to redeem their workers' compensation claims. One consequence of these changes has been to increase the number of long term claims. Therefore it is difficult to attribute success or failure to one element of the system without also reviewing the effects of other changes.

The RPA believes a comprehensive study into the workers' compensation and rehabilitation system should be commissioned to answer remaining questions particularly issues relating to the increase in common law costs over the last year.