

# WORKERS' COMPENSATION DISPUTE RESOLUTION PROCEDURES IN WESTERN AUSTRALIA – THE NEW REGIME

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*Since November 2005, workers' compensation disputes have been resolved by the Dispute Resolution Directorate (DRD). The process of dispute resolution involves three stages: conciliation, arbitration and, where necessary, appeal. As with other dispute resolution schemes adopted in Western Australia and elsewhere the DRD emphasises speedy, informal resolution of disputes. However, the current system departs from its predecessor the Conciliation and Review Directorate in a number of important aspects which are examined in this paper. The Western Australian DRD has adopted the 'front loaded' form of application as developed in New South Wales, but has designed rules and regulations unique to the Western Australian system. The primary purpose of these rules is to facilitate prompt resolution of disputes through full disclosure of evidence at the earliest opportunity. This paper examines the new scheme in detail and reflects on previous disputes processes adopted in Western Australia. It offers some reflections on the evolution of the Western Australian system.*

## I INTRODUCTION

In November 2005 a new system for the resolution of workers' compensation disputes in Western Australia was introduced under the *Workers' Compensation and Injury Management Act 1981* (WA) (the Act). Reforms to the Act abolished the previous system of conciliation and review with appeals to a compensation magistrate. Disputes involving workers' claims for compensation are now managed by Arbitrators, who initially seek to conciliate matters. If conciliation is unsuccessful, then an Arbitrator will adjudicate the dispute. Interestingly, the Arbitrator who manages the conciliation is not

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prevented from conducting the arbitration. Arbitrators, along with the Director and other officers, form part of the new Dispute Resolution Directorate (the DRD). Appeals against the decision of an Arbitrator are made to the Commissioner, who has the status of a District Court judge, and then to the Supreme Court.

By way of background to the recent reforms, this paper sets out a brief history of workers' compensation dispute resolution in Western Australia. It then discusses the practices and procedures used for managing disputes by the DRD at first instance. It includes an examination of the scope of the DRD's jurisdiction to hear and determine disputes, and reviews the Arbitrators' powers. Particular consideration is given to the more novel first instance dispute processes. Finally it compares and contrasts the DRD with its predecessor the Conciliation and Review Directorate and analyses the impetus for change to dispute resolution and reflects upon the consequences of the reforms.

## II A BRIEF HISTORY OF WORKERS COMPENSATION DISPUTE RESOLUTION IN WESTERN AUSTRALIA

Although workers' compensation legislation has been in operation in Western Australia since 1902<sup>1</sup> the most appropriate starting point for this discussion is with the Workers' Compensation Board (the Board) which commenced operation in 1948 and continued until it was abolished in 1993. It was replaced by the Conciliation and Review Directorate. Prior to 1948 dispute resolution was more or less in the hands of industrial magistrates and there was no specialist workers compensation tribunal. The Board comprised three members; one judicial member and two lay representatives. Lay representatives or nominee members were selected on the nomination of the Trades and Labour Council of Western Australia (now known as Unions WA) and the Chamber of Commerce and Industry of Western Australia.<sup>2</sup> The Board had jurisdiction to hear and determine all matters relating to disputed compensation claims. By reason of the repealed section 112 of the Act, the Board was a Court of Record, although under the repealed section 118 the Board heard and determined matters according to 'equity and good conscience, and the substantial merits of the case without regard to technicalities or legal forms'. The Board was not 'bound by legal precedent or its own decisions and rulings in any other matter nor by any rules of evidence' but could 'inform its or his mind on any matter in such a way as it or he regards as just'.<sup>3</sup>

Under the Board system there were two streams of dispute resolution. First, the Board heard chambers applications. Applications under sections 58, 60, 61 and 62 were made in chambers. These applications usually took place within 10-12 weeks of filing of the application, and involved the examination of affidavit material submitted by the parties to the Board, which would also consider oral submissions made by the parties.<sup>4</sup> Usually these applications were to commence payments or review payments on an interim basis. In the vast majority of cases lawyers represented the parties. The Board could order the

<sup>1</sup> *Workers Compensation Act 1902* (WA).

<sup>2</sup> There was one nominee from each organisation. Lay members did not have to be legally qualified, and so far as one of the authors was able to ascertain, no lay member ever held legal qualifications.

<sup>3</sup> Similar requirements and procedures are prescribed for the Western Australian Industrial Relations Commission under the *Industrial Relations Act 1979* (WA) Division 2.

<sup>4</sup> Affidavit evidence included a statement of the matters of fact relevant to the claim (in most cases a statement that the worker had suffered a disability and had not been paid compensation despite having made a claim) together with supporting medical evidence.

employer to make payments on an ongoing basis or could reduce or increase payments. Workers often did not know or understand the process by which payments had been affected, relying on lawyers to represent them in chambers and to relay the result at a later stage. If there was a genuine dispute as to either legal or factual issues the Board was obliged to dismiss the application.<sup>5</sup> In general about one third of chambers applications would not proceed to hearing either because the parties had negotiated a modification of payments or because payments were commenced without the need to seek an order of the Board.

These sections, whilst modified to some extent over the past two decades remain central to the Act as they provide various mechanisms for commencement, review and reinstatement of weekly payments.

Second, the parties could proceed by way of ‘substantive application’ which would proceed to a pre-trial conference about 12 weeks after filing.<sup>6</sup> Pre-trial conferences were used as settlement conferences. Lawyers representing the parties would attend with their clients before a Registrar of the Board. Although the Registrar had no power to adjudicate they could use facilitative, and to some extent coercive, tactics to bring about settlements. The predominant mode of settlement was lawyer-assisted negotiations inside and outside the conference with claims often being settled by payment of a lump sum to the worker. In such cases the worker often had little involvement in the process, frequently being excluded from the proceedings whilst lawyers negotiated claims in conference rooms and corridors. The strategy adopted by the worker's lawyer was crucial. Workers generally speaking had little impact on the course or outcome of the claim. The outcome of the negotiations was generally unlikely to be questioned by the worker themselves.<sup>7</sup> If a matter did not settle at the pre-trial conference the Registrar would list it for trial. Before this occurred, however, the parties would have to attend a ‘callover’ to indicate to the Registrar whether there was any prospect of settlement prior to hearing. In many instances the callover turned into yet another pre-trial conference. In practice, for the worker, these events often resulted in a confusing continuum of procedures culminating in an agreement to redeem future weekly payments (ie pay a lump sum) and end their involvement in the compensation system.<sup>8</sup>

If a matter did go to a hearing before the Board the normal court-based adjudication processes were followed. The parties would present oral evidence, and then make concluding submissions. Expert evidence, usually medical, was a feature of these hearings and parties could examine, cross-examine and re-examine witnesses. Again, workers depended on lawyers to muster the appropriate evidence, and make submissions on their behalf. The Supreme Court heard appeals from the Board on matters of law or fact.

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<sup>5</sup> *Damon v Main Roads WA* (1989) 10 WCR (WA) 71.

<sup>6</sup> Substantive applications were commenced by filing and serving a simple application setting out the particulars of the parties and the relief sought.

<sup>7</sup> Similar findings have been made by Genn in relation to damages claims. H Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1987) 40.

<sup>8</sup> This pre-trial system was the first of its kind used in compensation disputes. It was implemented on the initiative of the Registrar of the Board who was a former Registrar of the Family Court. The Family Court had used the pre-trial system since its inception in 1975. The compensation pre-trial conference system was praised in the Cooney Report on the Victorian compensation system. B C Cooney, *Report of the Committee of Enquiry into the Victorian Workers' Compensation System* (Government Printer, 1984) 8, 34.

Like other so-called adversarial systems the bulk of claims made did not come to adjudication, negotiation of claims being the central feature of the pre 1993 system. The style of bargaining usually involved forms of so-called hard bargaining, with one party adopting a rigid position and holding out for concessions. The key to this form of negotiation lies in assessing the strength of the other party's position. The Board, although in one sense playing only a minor role in the direct disposition of claims, had a significant role in signalling possible outcomes. In addition the listing of a matter for trial operated as stimulus to settlement, although in some cases the delay from pre-trial to trial aggravated relations between the parties, exacerbated attempts to reduce compensation payments and increased the overall costs of claims.<sup>9</sup> In June 1993 the Western Australian Liberal Government (the Government) amended the Act to:

1. Abolish the Workers Compensation Board and introduce a 'non adversarial' dispute resolution system;<sup>10</sup>
2. Limit the parties right to legal representation in disputed claims;
3. Modify the rules for legal costs, so that in general each party would bear their own dispute costs; and
4. Create the Conciliation and Review Directorate and amend the processes of dispute resolution accordingly.

All of these changes had an effect on the resolution and management of disputed compensation claims and will be discussed below. At the time of its demise the system administered by the Board was portrayed in the *Inquiry into Workers' Compensation Dispute Resolution System Western Australia 1993* (The Chapman Report)<sup>11</sup> as a Kafkaesque legal and bureaucratic maze. The Report asserted:

Simple Chambers Applications, which deal with disputes of an urgent nature for commencement of weekly payments, proceed by way of preparation of an Application and Affidavit to the (Workers Compensation) Board prior to the hearing. Preparation of an Affidavit is beyond most workers, requiring, by necessity, to seek legal advice. In a similar manner, formal legal procedures apply for Pre-Trial conferences and Callovers.<sup>12</sup>

In order to modify the method of dispute resolution the Government established in place of the Board the Conciliation and Review Directorate. The creation of the Directorate was an explicit attempt to move away from the 'adversarial' mode of adjudication of disputes towards an 'administrative' 'non-adversarial system'.<sup>13</sup>

<sup>9</sup> On 14 April 1994, whilst one of the authors was giving evidence in relation to this aspect to the Standing Committee on Legislation in relation to the *Workers Compensation and Rehabilitation Amendment Act 1993* (WA), the Hon Ross Lightfoot MLC remarked that 'nothing concentrates the mind better than a hanging', referring to the need to set timely hearing dates.

<sup>10</sup> In addition the Government provided for an increase in the amounts of compensation payable for the first four weeks of incapacity. There was an increase in the 'prescribed amount' from \$88 000 to \$100 000 and the creation of extra items in the second schedule of the Act which allowed for lump sum payments. Compensation for disabilities sustained travelling to and from work was abolished. The amendments in relation to dispute resolution took effect in March 1994.

<sup>11</sup> R Chapman, *Inquiry into Workers' Compensation Dispute Resolution System Western Australia* (Western Australian Government Printer 1993) 1 (the Chapman Report).

<sup>12</sup> Ibid 2 (emphasis added).

<sup>13</sup> The term 'adversarial' was not defined but in all likelihood it was used in the Chapman Report to denote the use of aggressive confrontationalist tactics by lawyers rather than as a descriptor of any court processes. The term 'administrative' as used in the Chapman Report denotes a system which limits any form of advocacy and involves a process of decision making by reference to existing paper work and file information rather than via trial or hearing.

### III THE CONCILIATION AND REVIEW DIRECTORATE

As noted above after 1993 workers compensation disputes were resolved in Western Australia by the Conciliation and Review Directorate. The Conciliation and Review Directorate was basically a three stage dispute resolution process. At first instance Conciliation officers attempted to resolve disputes informally by conciliation. If the matter was not settled it was referred for arbitration before a review officer. Appeals to Compensation Magistrates were allowed on matters involving questions of law. Conciliation officers<sup>14</sup> were required to resolve compensation disputes in a manner that was fair, economical, informal and quick, without regard for legal technicalities.<sup>15</sup>

Once a dispute had been notified to the Conciliation and Review Directorate (by a worker, employer or insurer) the conciliation officer was required to act on the matter within 14 days. It was not always possible to convene a conciliation meeting within that time and often the support staff of the Conciliation and Review Directorate would contact the parties to discuss the parties' availability for conciliation as a means of commencing the process. Sometimes the conciliation officer might have contacted one or both parties by telephone to explore whether the matter could be settled without a conciliation meeting or to see whether some preliminary issue could be resolved.<sup>16</sup> 'Telephone Conciliation' became an integral part of the conciliation meetings as was anticipated and encouraged in the Chapman Report, which noted the use of a similar practice in Victoria.<sup>17</sup> If the Telephone Conference did not achieve an outcome the conciliation officer would usually require the parties to attend face-to-face. When a conciliation conference was convened the conciliation officers did not 'hear' the matter or take evidence. The parties were not put on oath and witnesses were not generally called. Notes made by the conciliation officers during the conference were placed on the Conciliation and Review Directorate file. Formal reasons for any orders<sup>18</sup> made were not given although a conciliation certificate recorded the proceedings.<sup>19</sup> Conciliation

<sup>14</sup> Conciliation officers were appointed under repealed s 104A(1) of the *Workers' Compensation and Injury Management Act 1981* (WA). The repealed s 177 of the *Workers' Compensation and Injury Management Act 1981* (WA) provides that Conciliation officers were officers of WorkCover and were subject to the *Public Service Management Act 1994* (WA). Under s 177(3) the duties of the officers of WorkCover were as prescribed and directed by WorkCover. However s 104B(2) provided that a conciliation officer was not subject to direction as to a decision to be given in a particular matter. In relation to administrative matters the Director of Conciliation and Review was responsible to the Executive Director of WorkCover. In relation to matters concerning the resolution of disputes the Director was responsible directly to the Minister of Labour Relations. It follows that the Minister could not directly affect the decisions of the conciliation officers but could influence the procedures that are used to resolve disputes. Because the Executive Director of WorkCover also had control of administrative matters in relation to the Directorate, the Executive Director could affect the efficiency of the Directorate in relation to the supply of administrative staff. Directorate staff remain staff of WorkCover and therefore subject to direction by the Executive Director of WorkCover.

<sup>15</sup> See repealed s 84P of the *Workers' Compensation and Injury Management Act 1981* (WA).

<sup>16</sup> Chapman, above n 11, 12. Some lawyers in this jurisdiction who discussed these issues with one of the authors expressed concern that the conciliation officers, who used the telephone as a means of gathering information or for dispute resolution may not have imparted all of the information gathered to the parties and, by failing to do so, may have breached the rules of natural justice.

<sup>17</sup> In *Ventura Homes v Hyde* (Unreported Magistrates Court (WA), Magistrate Heath, 16 April 1997); the compensation magistrate noted that it was inappropriate for review officers to engage in telephone conversations with the parties where there was no prospect that an accurate record of the conversation could be kept. Doubtless the same principle applied to conciliation officers.

<sup>18</sup> A Conciliation officer could make an order for up to 10 weeks weekly payments of compensation.

<sup>19</sup> The parties could view these notes and other documents on file after conciliation.

officers had limited, but important, adjudicative powers. These included the capacity to order weekly payments up to a maximum period of ten weeks and to order payment of medical expenses of up to \$2000. Significantly, conciliation officers did not have power to cease or reduce payments under repealed section 60, 61 or 62 and had to rely on the process of conciliation to achieve an alteration to the quantum of weekly payments. If agreement could not be reached under these sections the matter was referred to a review officer. Conciliation officers could also refer matters that raised a conflict of medical opinion to a medical assessment panel. Conciliation under the Act was compulsory, regardless of the issues or complexity of the claim.

If a conciliation meeting was convened neither party was entitled to be legally represented other than in exceptional circumstances, namely where the parties agreed and where the conciliation officer consented.<sup>20</sup> Persons who did not hold legal qualifications were allowed to represent parties at any time. No orders for costs could be made arising from conciliation meetings.

Review officers heard matters referred from the conciliation officers that had not been settled or which were not subject to orders at conciliation. Parties to review hearings could not be legally represented unless there was a question of law to be resolved and the review officer considered legal representation was appropriate. Save in exceptional circumstances the costs of review hearings (like conciliation meetings) were borne by the parties. Review officers could hear evidence and could refer matters to medical assessment panels. Although a review officer was required to proceed in a manner that was informal, they were bound, to act according to natural justice. Review officers had greater formal procedural powers than conciliation officers. They were able to administer an oath or affirmation and were required to give reasons in writing for their decisions if requested by the parties.<sup>21</sup> Proceedings before the review officers were recorded and then transcribed if required for appeals. It was not a prerequisite for appointment that conciliation or review officers be legally qualified. In contrast to conciliation and review officers compensation magistrates were required to be legally qualified,<sup>22</sup> as they heard appeals from decisions of the review officers 'where a question of law is involved'.<sup>23</sup> Legal representation of the parties was permitted before the compensation magistrate and most appeals did in fact involve lawyers. The unsuccessful party paid the costs, except where the appeal was made by the employer/insurer and the worker was unsuccessful.<sup>24</sup> Workers however were liable for

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<sup>20</sup> See repealed s 84Q of the *Workers' Compensation and Injury Management Act 1981* (WA). One of the authors appeared as counsel on behalf of a worker at a conciliation meeting where the worker was suffering from severe anxiety and was unable to attend. The respondents to the claim agreed that liability was not in issue, the only live issue being which insurer of the employer should pay. In that case the disability occurred over a period in which the employer had changed insurers.

<sup>21</sup> See repealed s 84ZB of the *Workers' Compensation and Injury Management Act 1981* (WA).

<sup>22</sup> Compensation magistrates are Stipendiary Magistrates who are selected by the Chief Stipendiary Magistrate to act as the Compensation Magistrates pursuant to s 113(4) of the *Workers' Compensation and Injury Management Act 1981* (WA).

<sup>23</sup> See repealed s 84ZN of the *Workers' Compensation and Injury Management Act 1981* (WA). This section allowed for questions of fact associated with the question of law to be considered. See *Bednarczk v Natcorp Investments Ltd (Formerly Wilcox Mofflin Ltd)* (Unreported, Supreme Court of Western Australia, Franklyn J, 23 July 1997) 6.

<sup>24</sup> Amendments effective from 5 October 1999 provided that an unsuccessful worker was not required to pay costs where the insurer appeals a decision of a review officer.

costs when they instigate the appeal and were unsuccessful. The Supreme Court was authorised to hear appeals ‘on a question of law’ from the compensation magistrates.<sup>25</sup>

A key recommendation of the Chapman Report was for the increased use of medical panels.<sup>26</sup> The Act provided that review officers, conciliation officers and compensation magistrates could refer matters to the medical assessment panels. Medical panels have been a part of the Western Australian system for some time, having been introduced in the 1920s as a consequence of the increasing incidence of chest diseases relating to mining activities. In particular the Pneumoconiosis Medical Panel (PMB) deals with specific mining related diseases and has the power to diagnose pneumoconiosis conditions and provide a binding certificate of its findings. In 1993 medical assessment panels were established under section 145 of the Act to resolve disputes other than those relating to industrial diseases.<sup>27</sup> A panel comprising of at least two doctors,<sup>28</sup> constituted the panel which could examine the worker and could inform itself ‘as it sees fit’ in relation to the medical condition of the worker. None of the panel members were to have any prior experience of the worker’s history or treatment but the panel was supplied with all the medical reports and material from the worker’s treating doctors. Neither workers nor employers could have legal representation at the medical assessment panel. No appeal was allowed from the determination of a medical assessment panel as the certificate of the panel was binding upon conciliation and review officers and compensation magistrates. If the aggrieved party believed that the panel had exceeded its jurisdiction it could challenge the certificate by issuing proceedings for a prerogative writ in the Supreme Court.<sup>29</sup>

#### IV REFLECTIONS ON THE PRE-2005 DISPUTE RESOLUTION PROCESSES

As noted the system that operated prior to 1993 depended heavily on the input and participation of lawyers. Few workers were unrepresented. Proceedings were often complex and characterised by hard bargaining techniques. Workers (and to a lesser extent some insurers) were dependent on lawyers to inform them of the intricacies of their claims and the nature of the disputing process. The Chapman Report heavily criticised this pre 1993 system and led ultimately to the abolition of the Workers Compensation Board and the removal of the right to legal representation at most levels of dispute resolution under the 1993-2005 system. The approach adopted under the 1993-2005 processes promoted alternative informal modes of dispute resolution. This system was touted as freeing the client from the domination of lawyers and

<sup>25</sup> An appeal from Review officer to the Magistrate was pursuant to repealed s 84ZN of the *Workers’ Compensation and Injury Management Act 1981* (WA), which allowed for an appeal ‘where a question of law is involved’ whereas the appeal to the Supreme Court under s 84ZW could only be made ‘on a question of law’.

<sup>26</sup> Chapman, above n 11, 9.

<sup>27</sup> Under s 145 of the *Workers’ Compensation and Injury Management Act 1981* (WA) the medical assessment panel was required, when a worker was referred to it, to provide a certificate certifying to the nature of the disability (diagnose) and the extent of the disability (whether permanent or temporary).

<sup>28</sup> The Act provided for up to three medical practitioners.

<sup>29</sup> This limitation is imposed by repealed ss 84R, 84H, 84ZR and 145 of the *Workers’ Compensation and Injury Management Act 1981* (WA). In this regard, the Supreme Court had held on a number of occasions that medical panels must confine their opinions to the matters circumscribed by the *Workers’ Compensation and Injury Management Act 1981* (WA). Gratuitous comments may be expunged from the certificate and are of no evidentiary value.

characterised the parties in the system as responsible, empowered, informed and competent. It was implicit in the Chapman Report that non-adversarial systems promote empowerment of the participants. Freed from the lawyer-client relationship the parties were supposedly able to make their own agreements. This assumption was reflected in the comments of the Attorney General in the second reading debate introducing the changes:

The Bill returns the focus of attention of workers compensation to where it rightfully belongs - in the workplace, where injured workers and employers can work together to overcome the unfortunate consequences of workplace injuries. Both injured workers and employers win.<sup>30</sup>

Disputes were returned to the 'true' participants of the system, namely the employers and workers. In this scenario, lawyers, doctors and others in the compensation system are seen as service providers. This suggests a transformative or empowering political practice.

According to Bush and Folger empowerment involves a number of features. It includes the ability of the parties to recognise the key issues in dispute, to understand the choices available to arrive at solutions to problems. Empowerment also involves, ultimately, an improvement in the capacity of the parties to listen, to communicate and to organise arguments and solutions. It involves an appreciation of the resources available to achieve their goals and interests and an awareness of the strengths and weaknesses of their arguments and the other parties'.<sup>31</sup> Galanter refers to these latter qualities as party capability.<sup>32</sup> Alder, in contrast to Bush and Folger, has cautioned that 'ADR in this instance mythologises a return of a disputing process to a more personal and comprehensive level of discourse'.<sup>33</sup>

There are a number of issues that arise in relation to empowerment. First, some commentators have observed that forms of ADR which are settlement focused or problem-solving focused may actually disempower participants because the focus on settlement requires the 'neutral' to have tight control over the processes of dispute resolution in order to achieve a result.<sup>34</sup> Where the resources to resolve the dispute are limited, mediators/conciliators are under pressure to deal with disputes in less and less time. Conciliation systems that operate under bureaucratic public processes are prone to budgetary constraints. The overall concern is to resolve the dispute quickly. This reduces the capacity of the mediators to explore the possibilities for 'mutual agreement'.<sup>35</sup> In short, the pressure on bureaucratic 'neutrals' to settle encroaches on the potential for empowerment. Menkel-Meadow opines that the efficiency-minded

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<sup>30</sup> Western Australia, *Debates*, Legislative Council, 9 November 1993, 6397 (Hon Peter Foss QC MLA).

<sup>31</sup> R A Bush and J Folger, *The Promise of Mediation: Responding to Conflict through Empowerment and Recognition* (Jossey-Bass, 1994) 86-7.

<sup>32</sup> M Galanter, 'The Duty Not to Deliver Legal Services' (1996) 30 *University of Miami Law Review* 929, 936.

<sup>33</sup> P S Adler, 'Is ADR a Social Movement?' (1987) 3 *Negotiation Journal* 61.

<sup>34</sup> C A Nims, 'You and Me Babe': *An Inquiry into Applications of Rhetoric to Mediation and Empowerment* (Unpublished PhD, New Mexico State University, 1997).

<sup>35</sup> J A Mastroski, 'Mediation in Court Based Systems: More Variations Than Similarities' (1990) 6 *Negotiation Journal* 257.



settlement officer seems to be more likely to use coercive techniques, making the quest for efficiency counter productive to fairness.<sup>36</sup>

Second, it is necessary to consider the evidence available on issues relating to empowerment. So far as workers are concerned, it is important to note that in 1995 a review of the 1993 amendments was undertaken by WorkCover. Its findings are reported in the *Workers' Compensation and Rehabilitation Act 1981: 1995 Review of Dispute Resolution Western Australia* (the 1995 Review). The 1995 Review noted among other things that:

Review and conciliation officers believe that workers felt more comfortable if they have some level of support from their union, family or friend. Genuine attempts at resolving the dispute at Conciliation are often more successful if workers are encouraged to bring a support person(s) to a conciliation conference or review hearing.<sup>37</sup>

The 1995 Review also provided the following information in relation to legal representation.<sup>38</sup> The 1995 Review established that, at the time of the survey, most workers were not represented at conciliation and review and that about 47% of workers felt that they were disadvantaged by not having legal representation. It also established that whilst lawyers could not represent workers at most levels of disputes and that although unions have a substantial role in representation of workers, lawyers are still the dominant source of assistance and advice. As Grillo has observed 'don't call me-call my lawyer' are sometimes the most empowering words imaginable.<sup>39</sup>

The 1995 Review reported that 75% of workers and approved self-insurers were satisfied with the new dispute resolution system.<sup>40</sup> This result was considered to be evidence that there was 'broad support for the present structure'.<sup>41</sup> However this conclusion seems inconsistent with the other findings in the survey noted above. Overall there is little evidence that the 1993-2005 system empowered workers, rather the contrary appears to be the case. In addition, in 1997, a WorkCover review of the procedures in relation to rehabilitation referrals found that:

The research indicated that in the majority of cases there was little or no understanding (by workers) of the system including where to access information...Lack of understanding may have a negative impact on the return to work process, as workers may perceive a level of victimisation and powerlessness which may distract from their willingness to actively participate in the process.<sup>42</sup>

In relation to employers, the insurers' right of subrogation negatives any attempt to increase the input of employers other than as providers of information. Employers in their own right make very few applications for resolution of disputes. With the

<sup>36</sup> C Menkel-Meadow, 'Judges and Settlement' (1985) *Trial* 24, 27.

<sup>37</sup> Workers Compensation and Rehabilitation Commission, (WorkCover) Western Australia (1995). WorkCover, *Workers' Compensation and Rehabilitation Act 1981: 1995 Review of Dispute Resolution Western Australia* (1995) 24 (the 1995 Review).

<sup>38</sup> Tables 12-15 are extracted from the 1995 Review.

<sup>39</sup> T Grillo, 'The Mediation Alternative, Process Dangers for Women' (1991) 100(6) *Yale Law Journal* 1545, 1599.

<sup>40</sup> WorkCover, above n 37, 7, see summary of findings.

<sup>41</sup> Ibid, summary iii.

<sup>42</sup> Western Australia, Workers Compensation and Rehabilitation Commission, *Review of Rehabilitation. Perth* (1997) 23.

exception of self-insurers employers seldom attended conciliation conferences at the Conciliation and Review Directorate as witnesses. The terms of insurance contracts prevent the employer from making decisions on liability even for small claims. In effect, save for self-insurers, often employers serve only as conduits for workers claims. The 1993-2005 procedures did not require the employer to be present to negotiate or present a case at conciliation because in effect the employer is a nominal defendant.

Third, in relation to the issue of empowerment, it is necessary to briefly examine what changes were made to the Act after 1993 in an attempt to make it easier for the parties to recognise the key issues in dispute and understand the choices available for solutions. One way to improve access to legal services is to change the rules. Changing from fault based rules to a no-fault system should have had the effect of providing easier access to remedies by diminishing the complexity and technicality of claims. Despite the creation of compensation systems and the reduction and/or abolition of common law remedies around Australia there has been little simplification of claims criteria. More often than not, amendments to compensation legislation having attached qualifications and exclusions that actually add to the complexity in the statute. Interestingly in 1990, Mr Kierath as shadow Minister for Labour Relations and Productivity, who was later the Minister responsible for the 1993 amendments, observed that the compensation legislation was a 'legal minefield'<sup>43</sup> requiring the assistance of lawyers to cope with the provisions.

Changes to the application forms after 1993 made the commencement of proceedings easier; for instance, it was no longer necessary to file detailed and complex affidavits to commence proceedings. The fact that proceedings could be commenced with relative ease however did not reduce the complexity of negotiations and review hearings. The key entitlement sections of the Act remained essentially the same. However in some cases where exclusion provisions had been added, these parts of the Act were more complex and imprecise, in particular the provisions dealing with stress claims, travel claims and redemption. Ironically, these rule changes tended to increase complexity which leads to greater dependence on lawyers and other legal advisers.<sup>44</sup> Between 1993 and 2005 arguably no significant changes were made in order to minimise the need for special expertise. Workers in particular suffered disadvantage where there are imprecise legal standards. The more able negotiators had an advantage, because vague legal standards lead to a wider range of outcomes. A wider range of possible outcomes to a claim allows greater opportunities for strategic bargaining.<sup>45</sup> Insurers are generally more informed, better resourced, and consequently more able, negotiators in such circumstances where the worker is unrepresented or represented by non-specialists. Boule has noted that the 'innocence regained' ideal of including alternative dispute processes (now referred to as primary processes) is often promoted for 'crass economic or political objectives.'<sup>46</sup> In other words, the key motivation for the introduction of non-adversarial procedures may have more to do with cost savings rather than empowering the parties. After all, the effect of empowering workers may be that they are more successful in negotiating claims for compensation benefits.

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<sup>43</sup> An opinion echoed by Sir Laurence Street. L Street, *Report on a Model of Conciliation for the New South Wales WorkCover Scheme* (unpublished report for WorkCover New South Wales, 1996) 15-17.

<sup>44</sup> Galanter, above n 32, 933.

<sup>45</sup> R H Mnookin and L Kornhouser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950, 979-80.

<sup>46</sup> L Boule, *Mediation: Principles, Process and Practice* (Butterworths, 1996) 33.

If the Chapman Report meant that ‘non-adversarial/administrative/non-legal’ systems would lead to a reduction in the use of adjudication as a mode of dispute resolution then the 1993-2005 system did not reach this goal. In relation to other issues such as disputant empowerment, the evidence appears to contradict these projections. If the Report meant that ‘non-adversarial/administrative/non-legal’ systems embraced the concept of investigatory/inquisitorial dispute resolution then the Chapman Report did not acknowledge that parties actually retained the right to be legally represented in those investigatory/inquisitorial systems. The exclusion of lawyers was a major feature of the 1993-2005 system, yet the Chapman Report provided virtually no analysis of the benefits or disadvantages of this serious inroad on the ordinary rights of citizens. Looking back, the pre 1993 so called adversarial model and the 1993-2005 model represented some contrasting aspects. The 1993-2005 system represented a significant departure from the formal structures of the Workers Compensation Board. It introduced systematic informal processes and abolished legal representation at most levels. Importantly, whilst attempting to reduce formality it may have unintentionally disempowered many workers who felt they could not cope with the complexities of the system and it may have imbedded power differentials by failing to account for the significant advantages insurers had in terms of financial and legal resources.

These matters in turn provided some impetus for the post 2005 system. The post 2005 system has reinstated the right of workers to be legally represented, allowed them to claim costs in the event of a successful application. In addition, it is now a prerequisite for appointment under the post 2005 system that an Arbitrator be legally qualified. These changes represent some return to the pre 1993 system. However the post 2005 system retains the structured conciliation processes of the 1993-2005 system but with a hybrid process that allows the third party neutral to conciliate and arbitrate matters. The post 2005 system is now discussed in detail.

## V THE DISPUTE RESOLUTION DIRECTORATE

This part of the paper examines the post 2005 dispute resolution system in Western Australia. The DRD is established under Part XVII<sup>47</sup> of the Act. The purposes of the Act are reinforced by mandating explicitly the ‘main objectives’ of the DRD. Section 279 of the Act establishes four specific objectives for the DRD:

- a) To provide a fair and cost effective system for the resolution of disputes.
- b) To reduce administrative costs across the system.
- c) To provide a service that:
  - i) is timely and ensures that workers’ entitlements are paid promptly;
  - ii) meets user expectations in relation to accessibility, approachability and professionalism;
  - iii) is effective in settling matters; and
  - iv) leads to durable agreements between the parties.
- d) To establish effective communication and liaison concerning the role of the DRD.

Section 280 of the Act identifies the officers of the DRD as:

- a) The Commissioner;

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<sup>47</sup> *Workers Compensation and Injury Management Act 1981 (WA) s 278.*

- b) The Director;
- c) Arbitrators; and
- d) other officers of the DRD.

Officers of WorkCover WA are to be available to assist as officers of the DRD.<sup>48</sup>

#### A *The Commissioner*

The Commissioner must be a judge of the District Court and is appointed by the Governor on the Minister's recommendation after the Minister has consulted with both the Chief Justice of the Supreme Court and the Chief Judge of the District Court.<sup>49</sup>

#### B *The Director*

The Director is an officer of WorkCover WA and must be a legal practitioner and approved by the Minister.<sup>50</sup> Section 289 specifies the Director's functions as:

- exercising all the functions of an Arbitrator;<sup>51</sup>
- being responsible for DRD administration; and
- allocating work to Arbitrators.<sup>52</sup>

The Director is responsible both to the CEO of WorkCover WA in relation to DRD administration, and notably to the Minister 'directly' for dispute resolution matters.<sup>53</sup> Section 290 allows the Director to delegate in writing the Director's powers and duties.<sup>54</sup> However, the officer exercising the delegated power cannot then delegate that power or duty to another.<sup>55</sup> The Director cannot delegate the powers and duties of Arbitrators to other officers of the DRD.<sup>56</sup> Officers, other than Arbitrators, can exercise delegated power connected with the administration of the DRD, and possibly that connected with the allocation of work to Arbitrators.

#### C *Arbitrators*

Arbitrators are appointed under section 286 as 'officers of Work Cover WA'. Their appointment must have the approval of the Minister and potential appointees must be legally qualified and currently practising in Western Australia under the terms of the *Legal Practice Act 2003* (WA).<sup>57</sup> Under the transitional arrangements, existing review

<sup>48</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 291; and see also s 295 in relation to the public service more generally.

<sup>49</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 281.

<sup>50</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 288.

<sup>51</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 289(1).

<sup>52</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 289(2).

<sup>53</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 289(2) and (3).

<sup>54</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 290(1) and (5).

<sup>55</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 290(3). This is an explicit statement of the principle in Administrative law that a delegate can not themselves delegate the delegated power.

<sup>56</sup> To do so would infringe the express provisions of the *Workers Compensation and Injury Management Act 1981* (WA) and the exercise would be invalid or ultra vires.

<sup>57</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 286(2) and (3).

officers who were not legal practitioners were eligible for approval as Arbitrators under section 286(3).<sup>58</sup>

The Act does not guarantee tenure to Arbitrators. Their office can be terminated under the terms of their contracts, or the *Public Sector Management Act 1994* (WA). Arbitrators exercise their functions 'subject to the general control and direction of the Director'.<sup>59</sup> Significantly, this authority does not extend to allowing the Director to intervene in an Arbitrator's determinative capacity.<sup>60</sup> The Director's ability to exercise general control and direction over Arbitrators appears to be limited to the allocation of workload and their professional performance.<sup>61</sup> It would be possible for the Director to allocate no work to an Arbitrator where there was some issue relating to performance. This capacity to terminate the contract of employment and the control over workloads might arguably undermine the determinative freedom of an Arbitrator.

## VI JURISDICTION

The provisions dealing with the new system of dispute resolution are contained in Parts XI and XII of the Act. Part XII relates to interim orders and minor claims, such as applications to suspend or reduce weekly payments, or for an order for weekly payments of not more than 12 weeks.<sup>62</sup>

The jurisdiction of Arbitrators is to initially conciliate, examine and determine the facts, interpret and apply the law, and make orders. Their powers are limited, as they are based on statute.<sup>63</sup> The originating power is with an Arbitrator. This jurisdiction can not be extended or diminished by agreement between the parties, tacit acquiescence or by any provision in an employment instrument. Employment agreements or instruments can not over-rule the jurisdiction of the DRD.

The jurisdiction of the DRD is based on the existence of a dispute. The definition of a dispute in section 176 is significant in granting to the DRD exclusive jurisdiction. Section 176(1) states:

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<sup>58</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 286(3). WorkCover initially appointed approximately 16 full-time and part-time Arbitrators with six of those appointed under the transitional arrangements. The effect of s 188(2) is to allow existing Review officers, who are not legal practitioners, to continue in office until their contracts terminate lawfully. The Act is not explicit on their termination. If a Review officer under the previous arrangements was employed on a fixed term contract, and the contract expired, then the officer would be ineligible for reappointment unless the person had the status of a qualified legal practitioner. In the case of others on contracts of indefinite duration, the contract would end by notice or summary dismissal.

<sup>59</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 287(1).

<sup>60</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 287(2).

<sup>61</sup> The allocation of workload may, however, have a subtle effect on the independence of the Arbitrators as technically this would allow the Director not to allocate work to a particular Arbitrator. This observation is reinforced by *Workers Compensation and Injury Management Act 1981* (WA) s 289(2), which refers to one of the Director's functions as 'the allocation of work to arbitrators'. The ambiguous relationship between WorkCover, the CEO of WorkCover and the Director of the DRD might lead to difficulties in relation to this aspect given that Arbitrators are engaged on limited term contracts in combination with requirements of s 289(2).

<sup>62</sup> For example see *Workers Compensation and Injury Management Act 1981* (WA) ss 238 and 241.

<sup>63</sup> Compare with: *Walker v Hussmann Australia Pty Ltd* (1991) 24 NSWLR 451.

Dispute means –

- a) a dispute in connection with a claim for compensation, or the liability to pay compensation, under this Act;
- b) a dispute in connection with an obligation imposed under Part IX;
- c) any other dispute or matter for which provision is made under this Act for determination by an arbitrator;
- d) any other matter of a kind prescribed by the regulations.

This definition does not follow the 'means and includes' strategy of the former provisions.<sup>64</sup> Therefore, the definition in section 176(1) is limited superficially to the subject matter identified in subsections (a) to (d). The words in subsection 176(1)(a) refer to two types of dispute; one connected with a compensation claim and the other with the employer's or insurer's liability.

Section 176(1)(b) refers to disputed obligations under Part IX, concerning injury management and, in particular, the establishment of injury management systems,<sup>65</sup> employee return to work programs,<sup>66</sup> and an insurer's obligation under section 155D. Under Part IX, an Arbitrator's power to intervene is limited to disputes connected with return to work programs.<sup>67</sup> In the event of such a dispute, an Arbitrator may require a worker to participate in a return to work program if the program complies with the provisions of section 155(1) and accords with the code of practice for injury management as determined by WorkCover. If the program does not comply, an Arbitrator can require a worker to participate in an alternative program.<sup>68</sup> WorkCover also has power to provide mediation assistance in this type of dispute.<sup>69</sup> It is likely that this mediation power excludes the Arbitrator's conciliation function. Both roles appear distinct and the mediation role is likely to be very informal and probably a precursor to conciliation if there is no settlement.

Under section 176(1)(c), an Arbitrator has power to determine 'any other dispute or matter for which provision is made under this Act'. An Arbitrator's power to determine a dispute is, therefore, very broad in scope and subject matter, covering matters as varied as discretion to treat an illegal contract as valid, to all aspects of liability for, or discontinuance of, payments.<sup>70</sup>

<sup>64</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 84A.

<sup>65</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 176(b).

<sup>66</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 155C.

<sup>67</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 156B.

<sup>68</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 156B(3).

<sup>69</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 157B.

<sup>70</sup> Other matters include:

- discretion to treat an illegal contract as valid under s 192;
- authorising another person to take evidence under s 208;
- correcting mistakes under s 216; making orders for total liability under s 217;
- making compensation orders for persons under a legal disability or dependants under s 218;
- making orders to pay interest under s 222;
- determining interim orders and minor claims under pt XII;
- suspending or reducing the effect of interim orders under s 238;
- awarding costs under pt XV; determining disputes over weekly payments under s 57A by insured employers or self-insured or uninsured employers under s 57B(5);
- making determinations of liability under s 58;
- determining the discontinuance or reduction of weekly payments under s 67;
- ordering the recovery of weekly compensation to which claimants are not lawfully entitled under s 71;

Section 176(3) grants Arbitrators, subject to the Act, exclusive jurisdiction to ‘examine, hear and determine all disputes’.<sup>71</sup> Further, a ‘determination of a dispute is not capable of being brought other than under [Part XI] or Part XII’.<sup>72</sup> It seems, therefore, that exclusive jurisdiction is conferred on Arbitrators for disputes within the meaning of Parts XI and XII, and for the determination of other disputes by reference to the definition of a dispute itself, as discussed above. It follows that no other tribunal or court is competent to hear workers’ compensation disputes at first instance or in competition to workers’ compensation Arbitrators. This is consistent with the DRD now having clear powers of enforcement, unlike the previous regime.

## VII DISPUTE RESOLUTION PROCESSES UNDER THE DRD

The Western Australian workers’ compensation dispute process embraces a range of conventional dispute resolution processes, which in combination create some novel dispute resolution mechanisms. An application under Part XI results in the commencement of a three-stage process to resolve the dispute.<sup>73</sup> Initially the Arbitrator will arrange for a teleconference between all parties to the dispute and their representatives. Should the matter not resolve at the teleconference, the Arbitrator will convene a face to face conciliation conference, followed by a determination of the dispute by arbitration should the dispute not settle at the conciliation conference. The matter is presided over by the same Arbitrator at each stage of the process.

In the first instance, the dispute process adopts the combined conciliation model in tandem with the arbitration model – a mode of dispute resolution that has long been adopted in industrial disputes. The National Alternative Dispute Resolution Advisory Council (NADRAC) describes this process as the combined or hybrid dispute resolution process.<sup>74</sup> The combination of conciliation and arbitration as a model for dispute resolution has been enshrined in the Western Australian Industrial Commission procedures for decades, but has not previously been applied to the workers’ compensation arena until adopted in New South Wales under the *Workers Compensation Act 1987* (NSW). It could be said that Western Australia has adopted the New South Wales model; however, it is clear that the inspiration for this blended approach was from its industrial cousins closer to home.

In addition to adopting this blended approach, the DRD rules and regulations provide a distinctive contrast between the resolution of interpersonal disputes and statutory entitlement disputes. The former are characterised by dispute processes centrally underpinned by mediation, probably because a key element of such disputes is the development of resolutions which are ‘owned’ by the parties. It is much more difficult

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- suspending payments to prisoners under s 72;
  - suspending or ceasing payments to claimants who fail to undertake a medical examination under s 72A or fail to engage in a return to work program under s 72B; and
  - determining disputes between employers or insurers over the liability to claimants under ss 73 and 74.

<sup>71</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 176(3).

<sup>72</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 176(2).

<sup>73</sup> *Workers Compensation (DRD) Rules 2005* (WA) pt 7 div 3.

<sup>74</sup> National Alternative Dispute Resolution Advisory Council (NADRAC), *Dispute Resolution Terms* (2003)

<[http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~1Report8\\_6Dec.doc/\\$file/1Report8\\_6Dec.doc](http://www.nadrac.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~1Report8_6Dec.doc/$file/1Report8_6Dec.doc)> at 29 January 2007.

to envisage the concept of ownership in the resolution of workers' compensation claims, where the disputes are often characterised by limited statutory benefits that inhibit the creativity of the parties and have the potential to entrench power imbalances in favour of the employer/insurer.

The use of a hybrid or combined process for the resolution of disputes often raises concerns regarding the effect of the third party's varying roles on the integrity of the process, in particular issues of confidentiality, neutrality and perceived bias. This is particularly so where the same third party neutral acts in a facilitative role, as in conciliation and then moves to a determinative one, such as an Arbitrator.<sup>75</sup>

Consideration is given below to both the particular processes employed by the DRD and some of the issues arising.

### VIII REQUIREMENTS PRIOR TO COMMENCING PROCEEDINGS UNDER PART XI

In a novel approach to the dispute process, on lodgement applications for the determination of disputes must include all relevant documents, material and information, and copies are to be served on the respondents.<sup>76</sup> This has been referred to as the 'front loaded system'. It differs from previous models in that it requires the parties to submit key documents at the commencement of proceedings instead of being acquired and lodged on a progressive basis. If there is a default in this requirement, then the applicant may have difficulty in seeking the admission of new material. The requirements for minor or interim order claims made under Part XII are necessarily different to Part XI claims as interim claims are usually dealt with more quickly and the paperwork is somewhat less onerous.<sup>77</sup>

In addition, a worker or applicant must include 'certificates, reports and a list of names of medical practitioners consulted; reports of approved vocational rehabilitation providers; statements of the substance of any expert evidence (which is not medical); and witness statements'.<sup>78</sup> If a worker cannot provide all the information on which he intends to rely, the applicant must specify in detail why the information cannot be supplied.<sup>79</sup> The applicant must supply copies of the material to the Director and respondents when it is available, but no later than 14 days before the formal conciliation

<sup>75</sup> For example, H Astor and C Chinkin, *Dispute Resolution in Australia* (Butterworths, 2<sup>nd</sup> ed, 2002) 91-3; L Boule, *Mediation: Principles, Process, Practice* (Butterworths, 2<sup>nd</sup> ed, 2005) 134-8; M F Hoellering, 'Mediation & Arbitration: a Growing Interaction' (1997) Spring *Dispute Resolution Journal* 23; R Hunt, 'The Arbitrator or Mediator as Dispute Manager – Choosing Horses for Courses (a Multi-Faceted Approach to Dispute Resolution)' (2000) 19(1) *The Arbitrator* 10; F S Nariman, 'May the Same Persons Consecutively Act as Mediators/Arbitrators in Respect of the Same Dispute' (1999) 18(1) *The Arbitrator* 17, 19-22; D G Pruitt, 'Process and Outcome in Community Mediation' (1995) 11(4) *Negotiation Journal* 365; W H Ross and D E Conlon, 'Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration' (2000) 25(2) *The Academy of Management Review* 416, 420-1 <<http://www.jstor.org/>> at 15 November; M B Shane, 'The Difference Between Mediation and Conciliation' (1995) July *Dispute Resolution Journal* 31.

<sup>76</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 58(1). Also refer to *Workers Compensation and Injury Management Act 1981* (WA) ss 178, 179 and 180.

<sup>77</sup> See *Workers Compensation (DRD) Rules 2005* (WA) pts 4 and 6.

<sup>78</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 58(2).

<sup>79</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 58(4).



conference, or such lesser period as prescribed by the practice notes.<sup>80</sup> The requirement to furnish late information does not apply to applications under section 60 to discontinue or reduce weekly payments, applications under section 62 to review weekly payments, and applications under section 70 to refund compensation and expenses.

Replies to applications are also subject to strict deadlines. Workers must reply to employer actions under sections 60 and 62 within 21 days.<sup>81</sup> Other respondents have 14 days.<sup>82</sup> Replies must be in an approved form and state concisely, with reasonable particularity, what is admitted or denied and the grounds for dispute. The Rules provide further procedure for deferments of a reply, where a response is required should a reply raise new issues or the determination of a dispute by an Arbitrator in the event that a party fails to lodge a reply.<sup>83</sup> These formal requirements differ markedly from the 1993-2005 processes which was noteworthy for its minimal use of form, rules and regulations. The current system attempts to address some of the problems that arise from an excess of informality.

## IX PROVISION OF INFORMATION AND DOCUMENTS

Discovery of documents or provision of information is facilitated under the Act in two ways. Initially, the Act and the rules require parties to furnish as much information or documentation as possible along with an application or a reply, as discussed above. A request for the provision of documents can also be made before proceedings commence. In most cases this provision is utilised by an applicant to obtain documents from the employer and/or insurer. The request must be complied within seven days.<sup>84</sup> If there is resistance to the process or a default, subsequent requests can be made, and if necessary orders for discovery sought. Further opportunities arise during the conciliation or arbitration phase. Part 9 of the DRD rules control the process for disclosing documentation or information in the case of resistance or default. The duty is binding

<sup>80</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 58(5). On this basis it may be possible to attend a telephone conciliation conference without all the documentary material being available.

<sup>81</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 59(1)(a).

<sup>82</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 59(1)(b).

<sup>83</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 59(3). Rule 59(4) allows directing deferment of a reply if an application is referred wholly or partly under pt XII. Rule 60 allows an Arbitrator to determine the dispute if a party fails to lodge a reply and that party is treated as if it did not object to any part of the application. Rule 61 specifies similar requirements for providing information or documents, for their lodgement and service, when a party is making a reply. If a worker is subject to an application for discontinuance or review of weekly payments under *Workers Compensation and Injury Management Act 1981* (WA) ss 60 and 62, the worker must supply detailed information in the reply about any forthcoming medical examinations. Rule 62 allows an applicant who has received a reply, which raises issues not raised in the application, to lodge and serve a reply limited to the new issues. Rule 63 imposes similar requirements for providing information or documents, and for providing time lines in respect of the lodgement and service of giving a reply. The information or documentation provided must be relevant to the response. Rule 64 deals with the lodging of late documents related to replies or further responses and documentation or information. The party must file an application to grant leave to lodge late documents, and an Arbitrator has discretion to grant it: r 64(1). The application must be lodged no later than 14 days before the date set for the formal conciliation conference: r 64(2). The application must explain why the reply or response or the documents cannot be lodged within the normal time limit: r 64(3). An Arbitrator must determine the application before the date of the conciliation conference: r 64(5). An Arbitrator must grant leave if he is satisfied that granting leave is necessary *to avoid injustice*: r 64(6).

<sup>84</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 55 facilitates the production of documents under *Workers Compensation and Injury Management Act 1981* (WA) ss 180(2) or (3) by written request.

once a party is served with a request for documents or information under rule 83. The scope of the request is constrained by the relevancy test<sup>85</sup> and claims of privilege authorised by section 206 of the Act.<sup>86</sup>

The Act and Rules generally promote voluntary disclosure and set stringent timeframes in which to produce a list of documents.<sup>87</sup> Pursuant to rule 83(4), a party who is the subject of a request for documents is required to give a copy of the documents to the person making the request, or to allow the person to inspect them within seven days of the request. If the request is disputed in whole or in part, rule 84 authorises an Arbitrator to make orders to facilitate discovery. An Arbitrator has power to vary the time lines prescribed for producing the list of documents or for allowing inspection of the documents.<sup>88</sup> Orders made under rule 84 or section 193 must not be issued unless an Arbitrator is satisfied that the order 'is necessary for the fair, economical, informal, or quick resolution of the dispute'.<sup>89</sup> Rule 86 imposes a continuing obligation on the parties to disclose documents as soon as they become available, if they have not been previously disclosed, which continues until 'the end of the proceeding'.<sup>90</sup>

## X CONCILIATION

The conciliation process is regulated by part 7 division 3 of the DRD Rules. Initially, the rules provide for a conciliation telephone conference,<sup>91</sup> and if no settlement is reached in that setting, a formal conciliation conference follows.<sup>92</sup> If the conciliation conference is unsuccessful, then the parties may be directed by the presiding Arbitrator to sign a joint statement setting out the facts and issues, whether agreed or disputed,<sup>93</sup> as a precursor to arbitration.<sup>94</sup>

Generally, once the parties have filed their papers - an application or a reply to an application - conciliation must take place. Arbitrators are empowered to resolve disputes by conciliation and arbitration. An Arbitrator must attempt to conciliate the dispute before using the arbitration power. Section 185 is introduced by the heading 'Arbitrator to attempt conciliation', and the body of the text refers to the Arbitrator using one's 'best endeavours to bring the parties ... to a settlement acceptable to all of them'.<sup>95</sup>

<sup>85</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 82(b).

<sup>86</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 82(2).

<sup>87</sup> That is disclosure without an order being made under *Workers Compensation (DRD) Rules 2005* (WA) r 83. An applicant must not give notice 'more than seven days after lodging [a] certificate of service': r 88(2)(a). Other parties must not give notice 'more than seven days after lodging the certificate of service of reply': r 83(2)(b). Parties who receive notices requesting disclosure, must provide a list of documents 'within fourteen days of being given the notice': r 83(3). The list must specify the documents within the parties' possession or control, or documents which are not within the parties' possession or control, or documents to which privilege attaches under *Workers Compensation and Injury Management Act 1981* (WA) s 206: r 83(a), (b) and (c).

<sup>88</sup> See *Workers Compensation (DRD) Rules 2005* (WA) rr 5, 64, 84, 85 and 87.

<sup>89</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 87(1).

<sup>90</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 86(1).

<sup>91</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 66. The Director is responsible for scheduling conciliation telephone conferences, once certificates of service are filed under r 66(1). The Director specifies the date and time of the meeting.

<sup>92</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 69.

<sup>93</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 70.

<sup>94</sup> The process is similar to the practice in the WA Industrial Relations Commission where, after a s 44 conference has failed, the parties draft the terms of reference to support the arbitration.

<sup>95</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 185(1).

Section 185 allows the DRD rules to describe the process.<sup>96</sup> Under section 185, the Arbitrator can embark on the arbitration process without the parties' request or agreement. In this sense, the conciliation process is defined as 'using the Arbitrator's best endeavours to bring the parties to a settlement'. Interestingly, given the central role in dispute resolution, or perhaps because it, there is no other definition of conciliation in the Act. Academics and peak bodies both in Australia and overseas have often lamented the lack of consistency and clarity in the use of terms describing dispute resolution processes. A number of commentators assert that a common understanding of terms used in the process assist with user expectations and satisfaction, efficient referral services, and a consistent maintenance of standards by service providers.<sup>97</sup>

Recently WorkCover WA released a DVD entitled *Understanding Dispute Resolution - Information for Injured Workers* (the WorkCover DVD) explaining the dispute resolution process employed by the DRD.<sup>98</sup> Presumably this is an attempt to explain the dispute resolution processes used by the DRD. The WorkCover DVD is available free to all participants in the system and plays on a continuous loop at the DRD offices in the DRD waiting rooms. For this reason some attention is paid to the content of the WorkCover DVD. From the depiction portrayed, it is clear that Arbitrators, when acting in their capacity as conciliator, are to take an interventionist role. This role should not be confused with a purely facilitative process, such as mediation. At a practical level, users of the DRD may not be too concerned with whether the Arbitrator is operating in a purely facilitative manner or in an interventionist way. It may be that, as with industrial disputes, parties are mostly concerned with having the dispute resolved expeditiously and in a cost effective manner.<sup>99</sup> More significant issues arise when the Arbitrator, acting as a conciliator, then performs the functions of decision maker in the same matter, for reasons referred to above and discussed in more detail below.

Under the Act, the conciliation process is mandated and the parties must attend meetings or discussions. However, parties cannot be compelled to settle their dispute in conciliation. Any settlement must be 'acceptable to all of them'.<sup>100</sup> Obdurate or ill-

<sup>96</sup> The *Workers Compensation and Injury Management Act 1981* (WA) is not as fulsome or as directive about the conciliation process like s 32 *Industrial Relations Act 1979* (WA). In that regard the Commission is empowered 'to endeavour to resolve the matter by conciliation' and to 'do all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter'.

<sup>97</sup> NADRAC, above n 74, 5. See also NADRAC, *Legislating for Alternative Dispute Resolution. A Guide for Government Policy Makers and Legal Drafters* (2006) <[http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/\(960DF944D2AF105D4B7573C11018CFB4\)~Legislating+for+alternative+dispute+resolution.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(960DF944D2AF105D4B7573C11018CFB4)~Legislating+for+alternative+dispute+resolution.pdf/$file/Legislating+for+alternative+dispute+resolution.pdf)> at 24 January 2007. See also Astor and Chinkin, above n 75, 29.

<sup>98</sup> WorkCover, *Understanding Dispute Resolution - Information for Injured Workers* (DVD) <<http://www.workcover.wa.gov.au/Dispute+Resolution/How+the+Dispute+Resolution+Directorate+operates/Understanding+dispute+resolution+information+for+injured+workers.htm>> at 24 January 2007.

<sup>99</sup> H Forbes-Mewett et al, 'The Role and Usage of Conciliation and Mediation in Dispute Resolution in the Australian Industrial Relations Commission' (2005) 13(2) *Australian Bulletin of Labour* 171. The authors reviewed the literature and noted that the understanding of the terms conciliation and mediation differ in Australia, Europe and North America. The definition of mediation being less interventionist was adopted as the prevailing view amongst Australian authors and practitioners. The authors undertook empirical research in relation to the relative roles of conciliation and mediation. They concluded that in the Australian Industrial Relations Commission an interventionist manner is strongly supported by users of the jurisdiction, particularly employers.

<sup>100</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 185(1).

informed parties, or perhaps even experienced repeat-players who might benefit from delays, have an ability to force a dispute to arbitration. The words in section 185(1) tend to contemplate settlements, which reflect the hope of securing a constructive or integrative result, although it is well known that personal injury matters invariably involve large elements of distributive zero-sum negotiations. The section does not rule out settlements which are less than satisfactory compromises or are the result of pragmatism or competitive bargaining.<sup>101</sup> Such settlements would have to satisfy the general policy and determinative principles of the Act. A question arises as to whether an Arbitrator would agree to sign off on a settlement reached by the parties which did not sit comfortably with the general principles of the Act.

There is no specific sanction in the Act or the Rules if a party fails to participate in the conciliation process at all or in good faith. In some jurisdictions where conciliation is mandated, failure to participate in the conciliation procedure renders the remaining process invalid.<sup>102</sup> It is interesting to note that in the Act it is the Arbitrators, not the parties, who are exhorted to use their 'best endeavours' to settle the matter. As such, the Act departs from other Australian legislative models where alternative dispute resolution processes have been made compulsory as part of a pre-litigation process, and which also require parties to participate in good faith, or make a genuine effort.<sup>103</sup> A line of cases<sup>104</sup> and NADRAC<sup>105</sup> suggest that the imposition of a requirement of 'good faith' may not be appropriate in the context of mandated dispute resolution process and that a best endeavours clause is most effective. The apprehension here is that the Act concerns itself only with the actions of the Arbitrators, rather than ensuring all parties accept responsibility for their own best efforts in the conciliation process.

A dispute resolution authority, here the Arbitrator, can issue a written order to obey the rules or any order made under them.<sup>106</sup> Presumably, failure to comply with the order or misconduct that amounts to an obstruction or hindrance of the performance of the functions of the Arbitrator is an offence under Part XIV of the Act.<sup>107</sup> Further, there may be cost consequences should there be no participation in the conciliation process, although this is expressed in the positive in the legislation, as a means of encouraging early settlement of disputes, rather than as a sanction against recalcitrant parties.<sup>108</sup>

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<sup>101</sup> It is accepted that this is a possible outcome, as noted in *Skilled Engineering Australia Pty Ltd v Aitken* (Unreported, Magistrates Court (WA), Magistrate Heath, 27 October 1997) and *WorkCover/Vero Workers Compensation (SA) Ltd v Mathis* [2005] SAWCT, where it was noted that a robust form of negotiation might take place in conciliation which would involve some give and take.

<sup>102</sup> E Gaillard and J Edestein, 'Mediation in France' (2001) 55(4) *Dispute Resolution Journal* 74, 76.

<sup>103</sup> See NADRAC, above n 97, 44-6.

<sup>104</sup> *Aiton v Transfeild* [1999] NSWSC 996 [156] and *Hooper Baile Associated Ltd v Nutcom Group Pty Ltd* (1992) 28 NSWLR 194.

<sup>105</sup> See NADRAC, above n 97, 46-7.

<sup>106</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 9.

<sup>107</sup> See *Workers Compensation and Injury Management Act 1981* (WA) ss 255 and 259.

<sup>108</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 264(7). See NADRAC, above n 97, 46-7. Note the costs sanctions in the Family Court and the NSW Dust Diseases Tribunal specifically impose the sanctions for failure to make a genuine effort to resolve the issues or participate in good faith.

## XI TELECONFERENCING

A telephone conference is not mandatory,<sup>109</sup> although information on the WorkCover WA website indicates that it is the DRD's intention to utilise this process fully in any attempt to resolve disputes.<sup>110</sup> Conciliation telephone conferences cannot be set down until the day on which the reply to the application should have been filed has expired.<sup>111</sup> Parties, who are given notice of the direction, must 'participate' in the teleconference. Interestingly, the rule also specifies that a party must 'attend in person', unless an Arbitrator decides otherwise.<sup>112</sup> This second requirement is difficult to reconcile with the process being described – a *teleconference*. Apart from a requirement to participate, it is difficult to see in the context of the technology what *attending in person* means. Arbitrators now require the parties to be present at the teleconference and not merely represented by a legal practitioner; the clear intention of the process being to allow the Arbitrator to finalise a case in appropriate circumstances. If the parties are not present, then finalisation is delayed. In general there is apparently a high rate of observance of this requirement.

The WorkCover DVD describes the teleconference as a means by which 'all parties involved in the dispute discuss the issues in a joint teleconference ... The Arbitrator's main objectives are to narrow issues to the most important and, if necessary, to make orders to help resolve the dispute. The Arbitrator is also interested in any agreed facts that may help resolve the dispute'.<sup>113</sup> It emphasises that the worker will always have the opportunity to speak, promoting the idea that at this stage of the process the parties are to participate fully in the discussion of issues and developing outcomes suitable for the resolution of the dispute.

The Arbitrator reviews all the relevant documents before the teleconference, however, with the exception of medical witnesses, Arbitrators are prevented from interviewing parties or witnesses, unless there is a conference or a hearing.<sup>114</sup> The rule on a literal reading appears designed to stop private discussions outside formal processes or during the teleconference, which could affect or bias an outcome, however, in practice Arbitrators do speak separately with the parties provided the parties consent to this process.<sup>115</sup> The normal rules as to bias and the requirement to act fairly apply in all these circumstances.

<sup>109</sup> *Workers Compensation (DRD) Rules 2005 (WA)* r 66 uses the word 'may'. Further, *Workers Compensation (DRD) Rules 2005 (WA)* r 69 envisages a situation where a teleconference may not have been held.

<sup>110</sup> WorkCover WA, *Dispute Resolution* <<http://www.workcover.wa.gov.au/Dispute+Resolution/Default.htm>> at 29 January 2007.

<sup>111</sup> *Workers Compensation (DRD) Rules 2005 (WA)* r 66(2). Each party is given notice of the direction specifying the date and time of the conference: *Workers Compensation (DRD) Rules 2005 (WA)* r 66(3).

<sup>112</sup> *Workers Compensation (DRD) Rules 2005 (WA)* r 66(4). A body corporate complies with this requirement through the participation of an authorised officer, who has power to negotiate.

<sup>113</sup> WorkCover, above n 98.

<sup>114</sup> *Workers Compensation (DRD) Rules 2005 (WA)* r 68.

<sup>115</sup> In *Heperi v Castang* (Unreported, Magistrates Court (WA), Magistrate Cockram, 4 December 1997) a review officer failed to explain the procedure to a worker who was confused as to the review officer's position and role and confused the review officer with the insurers' representative. The worker was unrepresented.

There are various reasons to support the introduction of the use of a dispute resolution mechanism that utilises technology such as the telephone. It has been suggested that the benefits of using such technology includes enabling access (particularly significant in jurisdictions as large as Western Australia and ones that deal with claims by incapacitated workers), savings in costs for all parties (including the government agency), and ease of scheduling times. It has also been suggested that non face-to-face methods of dispute resolution reduces power imbalance because of the lack of physicality and promotes a more objective dialogue due to the reduction in emotional content.<sup>116</sup> One of the most frequent criticisms of resolving disputes using technology is the lack of non-verbal cues between participants, although in some circumstances this may be helpful and in fact calm proceedings, allowing parties to move forward. Other issues include a perception that it may be easier for parties to remain positional when not faced with a 'real worker' or employer representative. Additionally, there are often concerns about confidentiality, as a party must trust that only those persons introduced are actually 'in the room'.<sup>117</sup> Some of these issues could be addressed by using video conferencing, however, the scenario used in the WorkCover DVD demonstrated use of a telephone only. There have been early indications that the DRD will make use of video conferencing when the facilities are available and in the appropriate cases.<sup>118</sup>

If the application or the dispute is not settled by the teleconference, the presiding Arbitrator must issue a certificate of outcome, which sets out the remaining issues in dispute.<sup>119</sup> The parties are bound by this certificate and cannot dispute its contents unless an Arbitrator grants them leave.<sup>120</sup> Because of this limitation, it is imperative that all parties ensure that the Arbitrator has identified exactly the matters in dispute or agreed before the conference concludes; particularly if the proceedings are not recorded. It is also possible for the parties to make further submissions to the Arbitrator at this stage if they agree that the Arbitrator can make a decision on the papers. Written reasons for the Arbitrator's decision will be given if the parties make a request for reasons within 14 days of any orders being made.<sup>121</sup>

## XII FACE TO FACE CONFERENCING

A face-to-face conciliation may be conducted in the event that a telephone conference is unsuccessful or not conducted.<sup>122</sup> Similar rules apply regarding giving notices to parties and others who are required to attend.<sup>123</sup>

<sup>116</sup> L S Coltri and E J Hunt, 'A Model for Telephone Mediation' (1998) 36(2) *Family Court Review* 179, 192; T Sourdin, *Alternative Dispute Resolution* (Law Book Co, 2002) 164.

<sup>117</sup> L S Coltri and E J Hunt, 'A Model for Telephone Mediation' (1998) 36(2) *Family Court Review* 179, 190; T Sourdin, *Alternative Dispute Resolution* (Law Book Co, 2002) 164.

<sup>118</sup> See, for example, *Franco Librizzi v Western Power Corporation* (Unreported, Magistrates Court (WA), Commissioner Nisbett, 4 May 2006).

<sup>119</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 67(1).

<sup>120</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 67(2).

<sup>121</sup> WorkCover, above n 98, and the *Workers Compensation (DRD) Rules 2005* (WA) pt 7 div 3.

<sup>122</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 69(1).

<sup>123</sup> *Workers Compensation (DRD) Rules 2005* (WA) rr 69(2) and (3). In carrying out the conciliation function, an Arbitrator may give directions under *Workers Compensation and Injury Management Act 1981* (WA) s 190. These extend to providing information under s 193 since the provision of information is vital to any decision-making process.

The WorkCover DVD describes the conciliation conference as ‘an informal discussion where everyone has the right and opportunity to talk and be heard’.<sup>124</sup> The goal of the Arbitrator is described as to ‘assist the parties to reach an agreement and guide the parties towards resolution’. In the scenario, the Arbitrator urges parties ‘to maintain control and develop outcomes that they can agree on rather than having a decision imposed on them’. It goes on to state that the ‘Arbitrator cannot advise how the parties should put their case or negotiate, but can highlight to the worker the risks or limitations to their position’.

On the face of these statements, it appears that the model used is more of a facilitative one, where during the conciliation phase the parties have ‘ownership of the solutions’ with very little intervention on the part of the Arbitrator acting as conciliator.

However, review of the role-play contained in the DVD suggests otherwise, with the Arbitrator behaving in a manner consistent with the NADRAC definition of conciliation as ‘an impartial party [who] facilitates discussion between the parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement’. The Arbitrator highlighted the risk or limitations to the unrepresented worker in a joint session with all parties present, not in a private session or caucus with the individual parties, and made recommendations regarding settlement.<sup>125</sup>

As noted previously, the combined or hybrid model raises some aspects of concern, specifically as to whether a conciliator who acts in a facilitative role can then go on to be an effective decision maker, without being at risk of compromising their neutrality and perception of bias. In the scenario described above from the WorkCover DVD, unless the Arbitrator (as conciliator) was to highlight the risk or limitations for both parties in the same session, the Arbitrator in these circumstances (as conciliator) undermines his neutrality and risks a perception of bias in his ensuing role as decision maker.<sup>126</sup>

The other concern that is often raised in relation to the combination of a facilitative process and a determinative one with the same third party neutral used in both stages (here the Arbitrator as conciliator) is the compromise to confidentiality, perceived or otherwise, and its effect on the parties’ participation in the process. Many authors suggest that confidentiality is a cornerstone of facilitative dispute resolution processes, here conciliation, particularly where the third party is permitted to hold private sessions

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<sup>124</sup> WorkCover, above n 98.

<sup>125</sup> It is not clear how much input the officers of the DRD or Commissioner had in the making of the DVD.

<sup>126</sup> Further, in the role-play presented on the DVD (which it is assumed has been selected for its common factors) an offer was made by the employer’s insurer to the unrepresented worker. The worker was of the view that it was too low and gave his reasons why. The Arbitrator, acting in his capacity as conciliator, in a joint session with all parties, stated that given all the risks faced by the worker, he thought the offer was ‘On balance ... something well worth considering’. In the scenario presented, the worker accepts the offer. However, if the worker had not accepted the offer and the matter proceeded to an arbitration hearing, the parties might arguably have a clear understanding of the Arbitrator’s view of the matter (remembering that all of the documents that the parties want to rely upon have to be lodged by this stage under the new front loaded system). Bias might be assumed in these circumstances. The language in the DVD is intended to be subtle; apparently leaving it to the worker to reconsider. But the comment is not neutral because the recommendation that the offer be considered or not is value laden.

with the parties in order to encourage information sharing and allow for extensive reality testing. An Arbitrator may confer separately with the parties subject to the rules and the requirement to act fairly and as noted with the consent of all parties.<sup>127</sup> The WorkCover DVD states that ‘all discussions at conciliation are treated as “off the record.” If the dispute goes to an Arbitration hearing any details from the conciliation discussions are treated at the hearing as if they haven’t been heard before’.<sup>128</sup>

In fact, the concept of ‘off the record’ is dubious as all parties have heard and noted the information in conciliation discussions. In practice, Arbitrators stress that the discussions are not evidence and, therefore, if the matter proceeds to a hearing all matters have to be proven. It is difficult to imagine that Arbitrators can ‘unhear’ everything, despite their best endeavours. The accepted view is that parties will not disclose sensitive information to a third party neutral who may in time become the decision maker, even if that information might assist in the resolution of the dispute, because of concern of prejudice to their case should conciliation fail.<sup>129</sup>

Further, although Arbitrators are specifically obliged to observe the rules of natural justice,<sup>130</sup> the obligation does not extend to reporting private discussions to the other party. As a matter of natural justice, an Arbitrator who intends to make a determination based on information arising out of private discussions, must give the opposite party an opportunity to comment on that information, particularly if it was adverse to that party’s interests.<sup>131</sup>

There is, therefore, an almost irreconcilable tension between a dispute resolution process that requires the sharing of information in circumstances of confidentiality to assist with the early resolution of disputes that is expedient, fair to all (or at least one that all parties can live with) and cost effective, and a determinative decision making process that requires the adherence to the rules of natural justice. These issues are largely overcome if the Arbitrator does not act as both conciliator and decision maker in the same matter. This may simply be a matter of altering the conference listings to allow other Arbitrators to take over after a conference which does not reach a settlement.

The Director is responsible for scheduling of the process, and has power to list both a conference and a hearing.<sup>132</sup> The implication is that an arbitration hearing could commence, once it became apparent that conciliation was not making progress or had failed. If conciliation is not successful, an Arbitrator is likely to direct that arbitration

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<sup>127</sup> Compare with *Robe River Iron v AMSWU* (1986) 66 WAIG 1553.

<sup>128</sup> WorkCover, above n 98.

<sup>129</sup> L P Love, ‘The Top Ten Reasons Why Mediators Should Not Evaluate’ (1991) 24 *Florida State Law Review* 937. The contrary view detailed in Pruitt, above n 75, 369-70, raises the countervailing view that statements made in private session can be ‘self serving falsehoods’ and as a result the third party can be misled. The authors suggest, therefore, that once a conciliator takes on an Arbitrators decision making role he needs to reveal all information being relied upon. However, there is a tension between this and statements by WorkCover that anything said is ‘off the record’ to promote early settlement of disputes.

<sup>130</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 188(1).

<sup>131</sup> *Ventura Homes v Hyde* (Unreported, Magistrates Court (WA), Magistrate Heath, 16 April 1997); *Challenge Bank v Vulich* (Unreported, Magistrates Court (WA), [insert name of Judge], 28 April 1999); and *Homeswest v Lyall* (Unreported, Magistrates Court (WA), Magistrate Brown, 11 June 2003).

<sup>132</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 69(4).



take place on another date.<sup>133</sup> If there is an interval, then the parties have time to settle any agreed or disputed facts and issues.<sup>134</sup> A statement of issues and facts made under rule 70(1) cannot be disputed later unless the Arbitrator gives leave.<sup>135</sup> Again care has to be taken in the drafting of this type of statement, particularly in establishing agreed facts or common ground.

### XIII ARBITRATION

If a dispute fails to resolve at conciliation, the Arbitrator may direct that the proceeding be heard and determined by him,<sup>136</sup> potentially on the same day as the conciliation.<sup>137</sup>

The practice and procedure relating to arbitration is set out in Part XI Division 4 of the Act and the Rules. Section 188(5) of the Act provides that ‘to the extent that the practice and procedure of an Arbitrator are not prescribed under this Act, they are to be as the Arbitrator determines’. In this context the prescription includes any provision of the regulations or the DRD Rules. In addition, under section 190(1) an Arbitrator has discretion ‘to give directions at any time ... and to do whatever is necessary for the speedy and fair conduct of the proceeding’. Directions may be at an Arbitrator’s initiative or on a party’s application.<sup>138</sup> The power is not confined to directions hearings held prior to an arbitration hearing.<sup>139</sup> In essence, these sections set the policy and tone about the operation of the rules of natural justice, the reception of evidence, and the extent to which the rules of natural justice or evidence are adhered to or departed from. Section 188(1) asserts that the general principles of natural justice apply unless the Act authorises an express or implied departure.<sup>140</sup> Section 183 and Part 10 of the DRD Rules present a specific application of the fair hearing rule and the rules of evidence. These provisions combine to place a greater emphasis on the requirement ‘to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms’.<sup>141</sup> In addition, because an Arbitrator ‘may inform himself on any matter as the Arbitrator thinks fit’,<sup>142</sup> the role is akin to an inquisitorial process, rather than adversarial proceedings. This means that cross-examination is likely to be confined; particularly where credit is involved.

The rules regulating the lodgement and service of applications, replies, witness statement and other documents, are designed to facilitate the principle that each party should have a reasonable opportunity of knowing the opposing party’s case and to respond to that case through the presentation of evidence and submissions. This probably arises out the fact that despite the flexibility of the old system, the Supreme Court of Western Australia in various decisions said that natural justice should apply anyway as a matter of good conscience.<sup>143</sup>

<sup>133</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 71(1).

<sup>134</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 70(1).

<sup>135</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 70(1).

<sup>136</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 71(1).

<sup>137</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 71(2).

<sup>138</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 190(2).

<sup>139</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 190(3).

<sup>140</sup> See the principles set out in *Summit Homes v Lucev* (1996) 16 WAR 566, which is likely to be applied in similar circumstances to the DRD.

<sup>141</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 188(2)(b).

<sup>142</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 188(3).

<sup>143</sup> Most particularly *Summit Homes v Lucev* (1996) 16 WAR 566.

Although section 188(2) excludes the application of the *Evidence Act 1906* (WA) and the rules of evidence at common law, the DRD rules may require certain rules or any practice or procedure applicable to courts of record to apply.<sup>144</sup> Early indications are that some rules of evidence will be applied where they assist in the decision making process.<sup>145</sup> Section 183 regulates the admissibility of evidence by controlling the information exchange through its subsections or by delegation through the DRD rules. Section 183 imposes an obligation on parties to adhere to the DRD rules.<sup>146</sup>

In subsequent subsections, the Act prohibits the admission of evidence in three circumstances. Firstly, section 183(3) prevents the admission of a worker's statement to the employer or insurer concerning the details of their injury, unless the employer has sent the worker or his agent a copy of that statement. Secondly, section 183(4) prevents the production of documents, material or information that have not been previously tended in accordance with DRD rules. Lastly, under section 183(5), a witness is not allowed to appear if the party calling that witness has failed to file a statement from that witness.

Workers, who are not represented by agents, are protected from the application of these prohibitions under section 183(6).<sup>147</sup> Section 183(7) allows the DRD rules to relax the rigour of the prohibitions in respect of a failure to provide information or a witness statement. It permits the rules to authorise an Arbitrator to admit materials or evidence in specified circumstances, which would have been otherwise prohibited. If an Arbitrator finds that a party has failed without reasonable excuse to comply with requirements of section 183, he may do one or more of the following:

- refer the matter to WorkCover;
- note the matter in a certificate; or
- order a specified amount or proportion of costs, if recoverable by the defaulting party, not to be paid.<sup>148</sup>

The DRD rules<sup>149</sup> follow the policy set out in section 183. The rules tend to prefer witness evidence in writing and restrict the opportunities for using unscripted oral testimony. This practice has implications for the treatment of hostile witnesses and the scope of cross-examination. The rules of natural justice do not require complete adherence to the rules of evidence. Hence rights to examine witnesses can be restricted by statute expressly or by implication. Under the Act, if a party proposes to use oral evidence, then the evidence of the witness must be reduced to writing, signed by the witness, lodged with the Director and served on respondents.<sup>150</sup> Witnesses who have not lodged and served a statement on their own account or through the party calling them,

<sup>144</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 188(2)(a).

<sup>145</sup> *South Western Sydney Area Health Services v Edmonds* [2007] NSWCA 16.

<sup>146</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 183(1), which uses the expression 'must provide'. The obligation is backed up by a penal sanction under s 183(2) if a party fails to comply.

<sup>147</sup> They are, nevertheless, not excused from following the obligation to adhere to DRD rules in general. Exception relates to s 183(2) – the penal sanction, (4) – the provision of information, and (5) – the provision of witness statements.

<sup>148</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 183(8)(a), (b) and (c).

<sup>149</sup> See *Workers Compensation (DRD) Rules 2005* (WA) pt 10 – witnesses.

<sup>150</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 89(1).

cannot give evidence unless the party seeking to call them lodges and serves a statement which the Arbitrator considers fully and properly specifies –

- (a) the substance of the evidence;
- (b) the reliance the party intend to place on the evidence;
- (c) the reasons why the evidence has not been included in a [witness] statement; and
- (d) the time the evidence is expected to be so included.<sup>151</sup>

This provision is intended to limit opportunities for litigation ambush and to forewarn parties of the nature and quality of potential or apparent witnesses. Whether or not the statement satisfies the criteria in rule 89(2)(a)-(d) would become apparent during the course of the hearing. The impact of this limitation is more likely to affect proceedings initiated under the 1993 Amendment Act because rule 89(3) allows the Arbitrator greater flexibility to admit unannounced evidence for proceedings brought within Part XI of the new dispute resolution procedures if ‘it would assist in the determination of the dispute in a manner that is fair, economical, informal and quick’. This latitude does not licence the admission of evidence tactically withheld. Fairness requires an open and level playing field. This exception is probably designed to admit evidence that has been overlooked or recently discovered. Under rules 90 and 91, medical reports will be taken as witness statements of medical practitioners who in the normal course of events do not give oral evidence. Medical practitioners may give evidence with leave, usually in circumstances where there is a demonstrated conflict in medical reports produced by the same practitioner.<sup>152</sup> The party wishing to adduce oral medical evidence must apply for leave ‘not less than 14 days prior to the date set for the conciliation conference’ stating the grounds.<sup>153</sup>

In addition, the rules impose limitations on the number of medical reports (and their sequencing) that parties are entitled to produce.<sup>154</sup> In effect, each party is limited to producing one medical report in a particular area of practice and up to three medical reports in separate areas of practice.<sup>155</sup> If one medical report covers more than one area of practice, then the ability to optimise the use of three medical reports is diminished.<sup>156</sup>

The requirements of rule 89 do not require duplication of information already lodged. Rule 89(5) allows a certificate, report or previously lodged statements to be treated as witness statements. These include:

- a copy of a worker’s statement to the employer or insurer under section 183(2);<sup>157</sup> and

<sup>151</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 89(2).

<sup>152</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 90.

<sup>153</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 90(2).

<sup>154</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 91.

<sup>155</sup> *Workers Compensation (DRD) Rules 2005* (WA) rr 91(1)(a) and (b). See *Taramore Pty Ltd T/as Ontraq Haulage v Greenwood* [2006] C3 of 2006 (Unreported, Commissioner Nisbet, 16 March 2006) where it was held that pathology and radiology reports and similar tests do not constitute medical reports for the purposes of this rule.

<sup>156</sup> *Workers Compensation (DRD) Rules 2005* (WA) r 91(2).

<sup>157</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 183(2) authorises the production of this statement only if the employer or the insurer forewarns the worker or his agent by giving the worker or his agent a copy.

- certificates or reports presented by registered medical or other health or ancillary providers.

Section 188 introduces further modifications to the rules of evidence. Under section 188(4), an Arbitrator has discretion to admit transcripts of evidence from courts or judicial officers like coroners, and draw his own conclusions of fact from the transcript. The purpose is to facilitate economically the progress of the dispute.

In addition to relying on the transcript, the Arbitrator has discretion to adopt 'any finding or decision or judgment of a court or other person or body acting judicially'.<sup>158</sup> In this context, section 188(4)(b) modifies the common law rule in *Hollington v Hewthorn*,<sup>159</sup> that a certificate or judgment from another court or tribunal is not evidence of the facts in issue, and thus such documents are not admissible to prove facts or conclusions in another court or tribunal.

#### XIV REPRESENTATION

Generally speaking, legal practitioners and registered agents may represent parties at all levels of the dispute process, however, they are not guaranteed automatic rights of audience in a hearing or conference before an Arbitrator. A person struck off the practitioners' roll is prohibited from appearing.<sup>160</sup> Under section 195(2), an Arbitrator has discretion to deny representation to an employer or insurer if the worker is not represented. It is uncertain how this discretion would be exercised and whether the issue would be raised automatically whenever an unrepresented worker appears. An Arbitrator has a further discretion to ban an agent if he is 'of the opinion that the agent does not have sufficient authority to make binding decisions'.<sup>161</sup> The exercise of this power is significant in the case of conducting effective conciliations or managing co-operation during the interlocutory process. The parties also have a right to be assisted by an interpreter under section 197.

Part 4 of the Rules regulates the ability of parties to appoint representatives, like legal practitioners and registered agents.<sup>162</sup> This practice follows other courts or tribunals in

<sup>158</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 188(4)(b), although the decisions on this provision under the previous dispute process were inconsistent see the line of cases commencing with *Abbott v Galvin* (Unreported, Magistrates Court (WA), Magistrate Cockram, 25 May 1998) which conflicts with *McMahon v Griffin Coal Mining Co* (Unreported, Magistrates Court (WA), Magistrate Cockram, 9 September 1997) and *Robertson v Kraft Foods Ltd* (Unreported, Magistrates Court (WA), Magistrate Heath, 28 July 1999). Issues of estoppel arise in these cases, such that the adoption of evidence or transcript from another tribunal may require a finding consistent with that tribunal.

<sup>159</sup> *Hollington v Hewthorn* [1943] 1 KB 587.

<sup>160</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 195(3). There is no discretion to ignore this ban. This is interesting as this has not previously been done and there are several advocates in the jurisdiction who will be unable to practice now.

<sup>161</sup> *Workers Compensation and Injury Management Act 1981* (WA) s 293(4).

<sup>162</sup> Unregistered agents have no automatic right of audience. Within seven days of the appointment of an agent party, who engages a representative, the client must lodge with the Director a notice of appointment: *Workers Compensation (DRD) Rules 2005* (WA) rr 22(1) and (2). *Workers Compensation (DRD) Rules 2005* (WA) r 22(3) appears to allow an exception to the requirement if the representative signs the party's application or reply and provides an address for service. Then the need to produce the notice is dispensed with. It would be prudent, nevertheless, to have written authority from the client to act on their behalf. Whenever an agent is changed, the principal must file another notice within seven days: *Workers Compensation (DRD) Rules 2005* (WA) rr 23(1) and (2).

requiring parties to file warrants of authority. The process ensures that the agent is properly authorised to act and to give undertakings.<sup>163</sup>

## XV EVALUATION OF THE 2005 WORKERS COMPENSATION LEGISLATIVE REFORMS

During the passage of the Act the Government undertook to the review the changes after one year of operation. The outcomes of that review have now been published in the *Evaluation of the 2005 Workers' Compensation Legislative Reforms* (the 2005 Review).<sup>164</sup> Although the 2005 Review covered all aspects of the 2005 amendments to the Act, it specifically addressed the issue of the operations of the DRD. The comments provided by the stakeholder to the 2005 Review are significant. The key issues can be summarised as follows:

1. There were concerns that the DRD appears to be focused on rules rather than on outcomes.
2. There was confusion about the DRD rules.
3. Some stakeholders felt over burdened by the 'front-loading' requirements.
4. Delays with the registry processes as result of strict enforcement of filing rules.
5. Perceptions that the reintroduction of lawyers had created delays and a more adversarial system.
6. Teleconferences were being treated as fact-finding processes rather than an opportunity for resolution of disputes.
7. The dual role of the Arbitrators criticised as retarding settlements.

WorkCover responded to many of the stakeholder concerns in the 2005 Review. In general terms it maintained that the DRD rules that had resulted in positive outcomes because full discovery of information at the 'front end' was a key element for the successful resolution of the claim. The Review also found that legal costs were being contained by a strict legal costs scale, and although there was some evidence that costs were now a factor in the administration of claims this did not detract from the system. WorkCover has maintained that the perceptions that the system is overly complex and legalistic 'may demonstrate a limited appreciation of the concept of dispute resolution under the new system'.<sup>165</sup> Importantly WorkCover has recommended that the dual role of the Arbitrators be examined.

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If a party elects to dispense with an agent, the party must also send a notice to the Director: *Workers Compensation (DRD) Rules 2005* (WA) rr 24(1) and (2).

<sup>163</sup> Proceedings can be vitiated if the agent lacks the proper authority: compare with *Collen v Wright* [1843–60] All ER 146; and *Toynbee v Yong* [1910] 1 KB 251. Arbitrators have power to appoint persons, not under a legal disability, to act as litigation guardians for children: *Workers Compensation (DRD) Rules 2005* (WA) r 25. *Workers Compensation and Injury Management Act 1981* (WA) s 196 authorises the DRD rules to regulate such appointments. The litigation guardian must give notice of the person's appointment to parties, who are identified as interested parties by the Arbitrator: *Workers Compensation (DRD) Rules 2005* (WA) r 25(2). By virtue of the appointment, a litigation guardian is bound by the WC (DRD) rules and must carry out the obligations under the rules and has capacity under the rules to act for the child's benefit: *Workers Compensation (DRD) Rules 2005* (WA) rr 25(3)(a), (b) and (c).

<sup>164</sup> WorkCover WA, *Evaluation of the 2005 Workers Compensation Legislative Reforms* (Western Australian Government, 2007) (the 2005 Review).

<sup>165</sup> *Ibid* 16, para 41.

## XVI COMMENTS AND CONCLUSIONS

As noted previously, power imbalances in workers' compensation disputes are a defining feature of the workers compensation jurisdiction characterised by one-shot player in contest with frequent litigators. To some extent this is alleviated by the re-introduction of legal representation, which allows workers to have access to experienced advocates. Ironically, this throws up the issue of the delicate balance between the right to representation and the appropriate costs scales. Arguably, if the costs scales are too low, experienced and competent practitioners may not think it worthwhile to operate in the jurisdiction. At the same time, those practitioners without the expertise to operate efficiently are less likely to be able to remain in the jurisdiction. At the time of writing the costs scales have been criticised by some stakeholders as noted in the 2005 Review. In the second half of 2007 the costs scale was revised upwards by the Costs Committee appointed under the Act to review the scale.

The new DRD regulations attempt to address the power imbalance in the way disputes regarding workers' claims have been processed in the past.<sup>166</sup> For example, the current costs scales limit the costs in respect of legal services to both insurers' and workers' lawyers – this is novel, as in the past insurers have been free to pay their advisors almost without regard for costs scales, although in practice they are usually limited by competitive tendering arrangements among those lawyers who seek insurer work. The central tenet of the costs scale is payment for work done so as to promote efficiency on both sides. In theory at least, the costs scale drives both insurers' and workers' lawyers to complete various tasks. Time is almost always the enemy of the worker who may be on reduced payments or no payments at all at the time of litigation. Insurers have often exploited this by offering lower than market value settlements to an impecunious worker. It is often also the enemy of an insurer where they are seeking to terminate or reduce a worker's payment, or resolve a claim in circumstances where a worker's claim is unmeritorious or where a worker has an inflated expectation of what their claim is worth, processes that require an application to the DRD.

Telephone conferencing is not entirely novel. It is part of the array of techniques available for dispute resolution. It is, however, a novel addition the workers' compensation arena. It does allow workers to remain outside the sometimes intimidating physical precincts of the tribunal, as well as allowing some distance to remain between the worker and the respondent institution employer/insurer where there might be some tension. On the other hand, that same distance may continue a feeling of alienation to the worker who might perceive that they are remote from the whole process. There is a clear need for skilful handling of telephone conferences from all parties, particularly from the Arbitrators who 'control' the process. It would appear that the teleconferencing system has not been used decisively to promote settlement, but rather as a warm-up for further discussions.

There are other novel DRD rules which affect the dispute process. Obviously the front loading of applications is unique; it requires almost complete preparation of documents before filing. This can be onerous on both sides, and where the insurer is a respondent, it has very limited time in which to respond. It is also noteworthy that for the first time some limits are placed on the gathering of evidence. Clear attempts are now made to

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<sup>166</sup> See Boule, above n 46, 365-6.

curtail 'doctor shopping' by limiting the number of insurer/employer reviews of the worker. Likewise the modest cost scale reduces the potential for the worker to seek numerous opinions. Limits are also placed on the use of documents that have not been properly discovered due to a failure to disclose those documents in accordance with the rules. These rules attempt to speed up disclosures and reduce the potential for adjournments. Information is power, particularly in litigation, and the sooner information is disclosed and shared by both parties the less likely there are to be inappropriate power imbalances. The front loaded system is a clear departure from both the pre-1993 and the 1993-2005 systems. Both these previous systems were premised on simple filing procedures. The adoption of the New South Wales model has led to a considerable learning curve for practitioners and also some litigation in relation to the DRD rules. It is likely that as the system settles there will be less criticism of this aspect of the DRD system.

As discussed previously, the combined or hybrid model raises some aspects of concern, specifically whether a conciliator who acts in a facilitative role can then go on to be an effective decision maker, without being at risk of compromising their neutrality and perceptions of bias. It is also uncertain whether this hybrid model can be relied upon to deliver the competing goals of the sharing of information in circumstances of confidentiality to assist with the early resolution of disputes in a manner that is expedient, fair to all and cost effective, and a determinative decision making process that requires the adherence to the rules of natural justice. These issues are largely overcome if the Arbitrator does not act as both conciliator and decision maker in the same matter. This latter aspect has already received considerable stakeholder and WorkCover attention in the 2005 Review and it is likely that some adjustment to the role of the Arbitrators will be made in the future.

Reflecting on the genesis of the DRD it is possible to assert that the DRD is the progeny of its predecessors. It has inherited the formalism of its pre 1993 parent by resurrecting the right to legal representation, the greater emphasis on arbitration and the requirement for legal qualifications of arbitrators. At the same time it has some of the characteristics of its 1993-2005 progenitors in that it has retained the structured procedures for conciliation. It has borrowed the formality of its front loaded filing system from its New South Wales cousin. The combination of these traits has presented a challenging visage to the stakeholders who in the first two years of operation have struggled to recognise the new face of dispute resolution in Western Australian workers compensation dispute resolution. The 2005 Review clearly indicates that some refinements are required to bed the system down.