

# NSW Law Reform Commission

## REPORT 41 (1983) - ACCIDENT COMPENSATION INTERIM REPORT: WORKERS' COMPENSATION (AMENDMENT) BILL 1982 AND COGNATE BILLS

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**REPORT 41 (1983) - ACCIDENT COMPENSATION INTERIM REPORT: WORKERS' COMPENSATION  
(AMENDMENT) BILL 1982 AND COGNATE BILLS**

## **Letter to Attorney General**

### **New South Wales Law Reform Commission**

The Honourable D.P. Landa, LL.B., M.L.C.,

Attorney General for New South Wales.

### **Accident Compensation**

Attached to this document is the interim report of this Commission relating to the Workers' Compensation (Amendment) Bill, 1982 and Cognate Bills.

Ronald Sackville

*Chairman.*

J.R.T. Wood, Q.C.

*Commissioner.*

H.D. Sperling, Q.C.

*Part-Time Commissioner.*

## **REPORT 41 (1983) - ACCIDENT COMPENSATION INTERIM REPORT: WORKERS' COMPENSATION (AMENDMENT) BILL 1982 AND COGNATE BILLS**

### **Preface**

On 2 December, 1982, the Workers' Compensation (Amendment) Bill 1982 and four other cognate Bills were presented to Parliament by the then Attorney General, the Honourable F.J. Walker, Q.C., M.P. In March 1983 a request was made by the Honourable D.P. Landa, LL.B., M.L.C. to the New South Wales Law Reform Commission to consider the Bills in the course of its current reference concerning accident compensation. Pursuant to section 12A(l) of the Law Reform Act, 1967, a Division of the Commission had previously been constituted for the purpose of this reference, and the examination of the Bills was referred to certain of its members. The Division is comprised of the following members:

#### **Chairman**

Professor Ronald Sackville

#### **Full-time Commissioner**

Mr. J.R.T. Wood, Q.C.

#### **Part-time Commissioners**

The Hon. Mr. Justice Andrew Rogers

Ms. Philippa Smith

Mr. H.D. Sperling, Q.C.

This interim report has been prepared by the following members of the Division:

Professor Ronald Sackville

Mr. H.D. Sperling, Q.C.

Mr. J.R.T. Wood, Q.C.

The members of the Division who prepared this report were substantially assisted by preliminary work carried out by the following:

Mr. H.D. Sperling, Q.C.

Mr. Michael Wright, Workers' Compensation Commission

Mr. Dallas Booth, Research Officer, Department of the Attorney General and of Justice

We are grateful to the Chairman and Registrar of the Workers' Compensation Commission for making the services of Mr. Michael Wright available to us for this purpose. We acknowledge the substantial assistance provided by each of Mr. Wright and Mr. Booth. Mr. Ian Ramsay, Legal Officer, New South Wales Law Reform Commission, also made a very valuable contribution to the preparation of this report.

For reasons mentioned in the interim report, it has not been possible to consider all of the questions raised by the Bills, or involved in the reform of the law concerning workers' compensation. By necessity, the scope of the report is limited. However, where possible we have formulated recommendations in relation to the proposed legislation. In those areas where the available information does not permit us to reach any firm conclusion on the issues

raised, or where the question is beyond the scope of an interim inquiry, we have stated this to be the case and have refrained from formulating any recommendation.

It is intended that this interim report be provided to the Attorney General in response to his request for advice on the Bills. It is not our intention formally to publish this report as part of our permanent series of issues papers, working papers, or reports.

## REPORT 41 (1983) - ACCIDENT COMPENSATION INTERIM REPORT: WORKERS' COMPENSATION (AMENDMENT) BILL 1982 AND COGNATE BILLS

### I. Introduction

#### Preliminary

1.1 This is an interim report of the New South Wales Law Reform Commission in response to a request made in March, 1983, by the Attorney General, the Hon. D.P. Landa, LL.B., M.L.C., to consider the following Bills, which were presented to Parliament on 2 December, 1982, by the then Attorney General, the Honourable F.J. Walker, Q.C., M.P.:

Compensation Court Bill, 1982.

Workers' Compensation (Amendment) Bill, 1982.

Workers' Compensation (Brucellosis) Amendment Bill, 1982.

Sporting Injuries Insurance (Workers' Compensation) Amendment Bill, 1982.

Miscellaneous Acts (Workers' Compensation) Amendment Bill, 1982.

1.2 In this State, provision is made for workers' compensation by the Workers' Compensation Act, 1926. This Act prescribes the benefits to be paid by employers for work-related injuries and disease, and provides for compulsory insurance or regulated self-insurance by employers. The Act confers on the Workers' Compensation Commission of New South Wales, a body consisting of judges, the function of determining questions arising under the Act, including disputed claims for compensation. The Commission is also given certain administrative functions, including the licensing and supervision of insurers and self-insurers, the regulation of insurance premiums, and the administration of certain ancillary arrangements such as the Bush Fire Fighters' Insurance Scheme and the Uninsured Liability Scheme. In broad terms, the proposed legislation abolishes the Workers' Compensation Commission and confers the previous judicial functions of the Commission on a new court to be called the Compensation Court of New South Wales. A Board to be called the State Compensation Board is constituted to assume the administrative functions of the Commission. In addition, a number of important changes are proposed in the Organisation and operation of the Compensation Court compared with the present Organisation and operation of the Workers' Compensation Commission in its judicial capacity. Important changes are also proposed in relation to the administrative functions to be transferred from the Commission to the State Compensation Board.

1.3 In this report the following abbreviations will be used:

"The Act" means the Workers' Compensation Act, 1926.

"The Commission" means the Workers' Compensation Commission constituted under the Act.

"The Court Bill" means the Compensation Court Bill, 1982, tabled in Parliament on 2 December, 1982.

"The Amendment Bill" means the Workers' Compensation (Amendment) Bill, 1982, tabled in Parliament on 2 December, 1982.

"The court" means the Compensation Court proposed by the Court Bill.

"The Board" means the State Compensation Board proposed by the Amendment Bill.

#### The Scope of this Report

1.4 The scope of this report is limited by the circumstances in which we have been asked to make it. We currently have a reference to inquire into, report on and make recommendations concerning the extent to which, the circumstances in which and the means by which compensation should be payable in respect of death or personal injury. The reference requires us to consider, *inter alia*, whether the principles and practices relating to compensation for death or personal injury under the workers' compensation legislation should be modified and, if so, in what way. We shall in due course report in relation to compensation for work-related injuries and disease. The report will include an examination of existing procedures for determination of disputed claims for compensation, and any recommendations for reform of those procedures which we consider appropriate.

1.5 The Bills were not drafted in response to any recommendation which we have made in relation to work-related injuries and disease. The amendments proposed by the Bills assume the continuance, in broad terms, of the present arrangements for workers' compensation in this State, including private insurance or self-insurance by employers, the licensing of a large number of insurers, and the determination of disputes under a traditional judicial system including the adversary process. These assumptions and other fundamental features of the present legislation may or may not be accepted by us when we come to make recommendations in relation to compensation for work-related injuries. For example, we have, in relation to a possible Transport Accidents Compensation Scheme developed a concept, provisional at this stage, for the creation of a new transport accidents compensation authority, and the determination of claims by a non-adversary administrative process, subject to provision for judicial review. It may be that the approach we have suggested in relation to transport accidents will be applicable in some measure to disputed claims for compensation for work-related injuries and disease. Indeed, it is possible that more sweeping changes to compensation arrangements might be recommended. We do not therefore regard this report as pre-empting a fundamental examination of the present arrangements for compensation for work-related injuries. Rather, it is the function of this report to identify and consider specific policy questions raised by the Bills on an assumption that the basic approach to workers' compensation remains, for the time being at least, intact.

1.6 The Bills are the culmination of deliberations recorded in a series of documents with which we have been supplied, being Items 1-16 in the Schedule to this report. When the Bills were tabled in Parliament on 2 December 1982, the then Attorney General, the Honourable F.J. Walker, Q.C., M.P., stated in the second reading speech that the opportunity would be given for comment before the legislation proceeded further.<sup>1</sup> We have received documents from various persons and organisations, being Items 18-3S inclusive in the Schedule to this report, which we refer to as submissions although that term is not apt in all cases. The submissions show that in many respects the amendments proposed are not contentious but that serious objection is taken by commentators to some aspects of the proposed legislation.

1.7 Having regard to these considerations we perceive the scope of this report as follows.

First, we are to assume the continuance of the present arrangements for workers' compensation in all those respects which are not the subject of amendments proposed by the Bills, and we are to do so without prejudice to our reference to inquire into and report generally in relation to compensation for work-related injuries and disease.

Secondly, we are to identify the policy questions arising out of the proposed amendments by reference to the submissions and our assessment of such other aspects of the Bills as raise issues worthy of comment.

Thirdly, we are to review each such policy question and recommend what the Bills should or should not provide in answer to each such question. After giving a resume of the Bills we will specify the relevant policy questions.

## **The Court Bill**

1.8 The Court Bill creates the Compensation Court of New South Wales. It provides for the appointment of a Chief Judge and of judges of the court and prescribes their qualifications for appointment. Provision is made for the appointment of a lower tier of judicial officers, called commissioners, who may have qualifications other than legal qualifications. Provision is also made for the appointment of a registrar and assistant registrars. The court is given jurisdiction to determine all matters and questions arising under the Act and provision is made for the exercise of that jurisdiction by the judges, commissioners and registrars. Proceedings before commissioners are to be as informal as practicable. Parties may be represented before commissioners by advocates who are not

qualified to practise law, or by a solicitor. Special provision is made in relation to pre-hearing conferences and for reference to arbitration. There is an appeal from the court to the Supreme Court on a question of law or in relation to the admission or rejection of evidence. There is also an appeal from a commissioner or registrar exercising the judicial functions of the court to a judge of the court on questions of fact and law but with limited provision for calling further evidence. A Rule Committee is constituted on which the judges, the commissioners and the legal profession are to be represented.

### **The Amendment Bill**

1.9 The Amendment Bill constitutes the State Compensation Board which is to assume the present administrative functions of the Commission. The Board is to consist of four members, one of whom is to be the Chief Executive Officer of the Board. The remaining three members are to be part-time members, intended to be representative of workers, employers and insurers respectively. Apart from the transfer of the major administrative functions of the Commission to the Board, special provision is made for the Board to act in relation to the vocational re-education and rehabilitation of disabled workers and in relation to the settlement of disputed claims for compensation by a conciliation process.

### **Related Bills**

1.10 The Workers' Compensation (Brucellosis) Amendment Bill and the Sporting Injuries Insurance (Workers' Compensation) Amendment Bill also serve to transfer to the Board certain administrative functions previously exercised by the Commission. The Miscellaneous Acts (Workers' Compensation) Amendment Bill makes necessary consequential amendments.

### **The Policy Questions**

1.11 The policy questions which we identify as raised by the proposed legislation are set out below. They will be reviewed in turn.

Should there be a separation of the present judicial and administrative functions of the Commission?

What should be the qualifications for appointment as a judge of the court?

Should there be a lower tier of judicial officers such as commissioners and, if so, what limits, if any, should there be as to their jurisdiction?

What should be the qualifications for appointment to a lower tier of judicial officers, such as commissioners?

Should proceedings before commissioners be informal?

Should legally unqualified advocates be permitted to appear before commissioners?

What rights of appeal should there be from commissioners?

What should be the functions of registrars of the court?

What provision should be made for pre-trial procedures?

What should be the rule-making power of the court?

What provision should be made for interest on unpaid compensation?

What should be the composition of the Board?

Are the amended provisions in relation to licensing of insurers and self-insurers satisfactory?

## FOOTNOTES

1. Schedule: Item 17.

**REPORT 41 (1983) - ACCIDENT COMPENSATION INTERIM REPORT: WORKERS' COMPENSATION (AMENDMENT) BILL 1982 AND COGNATE BILLS**

## II. Should There Be A Separation Of The Present Judicial And Administrative Functions Of The Commission?

### Background

2.1 Background material submitted to us<sup>1</sup> suggests that this amendment is intended to achieve several objectives.

First, there are considerations of principle supporting a separation of judicial and administrative functions. Executive and judicial power have traditionally been separated, to preserve independence of the judiciary. Combination of both functions may infringe this principle and, in some circumstances, may create an impression of conflict of interest.

Secondly, it is desired that the judicial time available for the determination of claims for compensation be increased as a contribution to the control of delays. This might be assisted by relieving the judges of their present administrative functions.

Thirdly, the proposed Board is seen as having a positive role in the development of policies and programs in relation to accident prevention, rehabilitation, compensation practices, compilation of statistics and conciliation. It is intended that the present conciliation power vested in the Commission be transferred to the Board in an expanded form. It is envisaged that such function could be utilised particularly in circumstances where the Board is approached for advice upon non-payment or cessation of the payment of compensation. The purpose is to effect a speedy and informal resolution of some disputes in this way.

### Submissions

2.2 The Chairman of the Workers' Compensation Commission has suggested to us that the present administrative functions of the Commission should be retained by the judges.<sup>2</sup> We were informed that the administrative functions of the judges of the Commission had not significantly affected the amount of time spent by them on their judicial functions. The major areas of administration were seen to be areas which had been developed by the Commission in a unique way, and in which considerable expertise had been acquired. There was a danger that this expertise might be lost if the administrative functions were denied to the court. It was also submitted that the various functions had been efficiently and successfully carried out by the Commission, with a single administration and at a single administrative cost. In the area of licensing of insurers and self-insurers procedural means had been adopted to remove any opportunity for conflict. There were seen to be advantages in the employment of judicial skills in the course of administrative decisions and an overlapping of functions in practice.

### Issues Involved

2.3 We have given consideration to the following matters in formulating a recommendation on this policy question:

independence of the judiciary;

responsibility of the Chairman as a permanent head;

administrative costs;



increase of judicial time;

policy advice; and

budget and financial administration.

### Independence of the Judiciary

2.4 We believe there are strong reasons of principle and practice for the separation of the present judicial and administrative functions of the Commission. The foremost reason of principle is the traditional independence of the judiciary. Holdsworth has written of the judiciary in England:

“The judges hold an office to which is annexed the function of guarding the supremacy of the law ... The Judiciary has separate and autonomous powers just as truly as the King or Parliament; and, in the exercise of those powers, its members are no more in the position of servants than the King or Parliament in the exercise of their powers.”<sup>3</sup>

The Judicial Committee of the Privy Council has said of the judiciary in Australia:

“...in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.”<sup>4</sup>

The independence of the judiciary from the executive promotes confidence in the rule of law and the administration of justice.

2.5 The judges of the Commission perceive the possibility of conflict as more apparent than real. In the only area in which they believe there is any potentiality for conflict, the supervision of insurers and self-insurers, procedures have been adopted with a view to avoiding such conflict. In particular, each judge has a panel of insurers and he absents himself from any meeting of the judges in which any criticism of an insurer on his panel is raised. This is done so that in the event of proceedings being instituted in the Commission against such an insurer the judge will be in a position to try the proceedings without having taken part in the administrative processes which led to the proceedings being instituted.<sup>5</sup> These arrangements show that the judges, as one would expect, are themselves keenly aware of the potential conflict between their executive and judicial responsibilities, and great weight should be given to their opinion that it is suitably resolved. Nonetheless, we regard this consideration as a matter of fundamental importance. Not only should the conflict be avoided but the appearance of conflict should be avoided. We regard it as unsatisfactory that a judge exercising the judicial functions of the Commission should try a question upon which the Commission has, in its administrative capacity, decided that there is a *prima facie* case to be answered.

2.6 The proceedings concerning the cancellation of the licence of F.A.I. Insurance Limited under the Act illustrate the manner in which there might be a possibility of an appearance of conflict, in the absence of a separation of function. These proceedings were determined by Judge McGrath of the Commission (as he then was) on 31 October 1980. An appeal from his decision was dismissed by the Supreme Court of New South Wales, Court of Appeal, on 21 December 1981.<sup>6</sup> Although we stress that we do not suggest that the proceedings were in any way affected by any conflict of judicial and executive power, we mention three respects in which an appearance of conflict might have arisen.

First, in the course of the proceedings before the Commission, subpoenas were issued on the application of the insurer directed to the Registrar of the Commission requiring production of documents. In response to the subpoenas, claims of privilege on the ground of public interest were made, supported by an affidavit sworn by the then Chairman of the Commission. Cross-examination of the Chairman on the affidavit was sought. As a consequence, a judge of the Commission was required, at an interlocutory stage, to deal with a claim for privilege in relation to documents in the possession of the Commission, and to determine whether its Chairman should be cross-examined in relation to the claim for privilege.

Secondly, in the course of the insurer's appeal to the Court of Appeal, the Registrar of the Commission filed a notice of contention, and advanced a submission, to the effect that Judge McGrath, a member of the Commission, had no authority to consider, in exercising the Commission's judicial function, some of the questions which he had considered.

Thirdly, the judge, exercising the judicial function of the Commission, was required in the course of the proceedings to consider, *inter alia*, whether the arrangement of the arrangements of the insurer's affairs had been such that the Commission should exercise its powers under section 29 of the Act in relation to its licence. Amongst the matters taken into account were non-compliance with, and stated intentions not to comply with, certain general guidelines issued by the Commission, in the exercise of its administrative function. Although a policy had been adopted of excluding the judge who would determine judicial proceedings to which an insurer was a party from all administrative deliberations concerning that insurer, nonetheless, that judge would normally be a party to the formulation and adoption of general policy guidelines. Although there was not unanimity in the Court of Appeal as to the approach which should be taken to the guidelines, the majority on this question (Hope J.A. and Hutley J.A.) said:

"We have no doubt that the Commission, in its judicial role, and this Court on appeal, may and indeed should have regard to any relevant guidelines in this class of case."<sup>7</sup>

The majority did not regard the guidelines as the end of the inquiry, and indeed, Judge McGrath had considered in each case whether the relevant guideline provided an appropriate criterion.

2.7 The proceedings show the manner in which a possibility of conflict may arise on procedural aspects. They also show that a judge of the Commission may find it necessary to examine, in a judicial capacity, the appropriateness or application of general guidelines adopted by the Commission, in the formulation and adoption of which he may have participated in an administrative capacity.

2.8 Furthermore, the members of the Commission are amenable to the direction of Government in relation to their administrative functions under the Act. It is inconsistent with the tradition of judicial independence from the executive that judges should be amenable to directions of this kind albeit in relation to their administrative functions.

### **Responsibility of the Chairman as a Permanent Head**

2.9 A related complication is the role of the Chairman of the Commission as a permanent head with the responsibility of advising a Minister, the Attorney General, on matters of policy. The relationship of a permanent head and a Minister has been described as "a highly personal and individual one" and as a partnership requiring both the survey of policy objectives and, on occasions, improvisation "to stave off or survive crises or sudden pressures of the moment."<sup>8</sup> It has also been said that the first requirement of the public service and hence of a permanent head is to recognise those developments which will lead towards political decisions and to advise on matters requiring political decision.<sup>9</sup> More recently, the need has been emphasised for the public administration to respond more adequately to the modern challenge of policy development, including the exploration of underlying issues and the development of options for Ministerial consideration.<sup>10</sup> Whilst it is to be acknowledged that those judges who have occupied the position of Chairman of the Commission have always been available to Government for advice in relation to the Act and its administration, the close working relationship between a permanent head and his Minister, necessary to discharge to the full the foregoing objectives, is not feasible. In our view it is inconsistent with the preservation of the appearance of judicial independence, which may involve making decisions contrary to the interests of government.

### **Administrative Costs**

2.10 There will be costs associated with the constitution of a Board with an infrastructure separate from that of the proposed court. Such costs should be substantially limited to higher management, since the present administrative staff of the Commission would be available to perform under the Board the same functions as they presently perform in the Commission. To the extent that it is envisaged that the Board would undertake functions in addition to or in amplification of those presently performed by the Commission, there would, of course, be

additional costs involved. We do not believe that any additional policy question is raised for our consideration in relation to such matters.

### **Increase of Judicial Time**

2.11 As we have stated, one of the objectives of the separation of judicial and administrative functions is to increase the judicial time available for the determination of claims for compensation. The judges of the Commission presently allocate one day per calendar month to the administrative functions of the Commission, representing one-twentieth of each judge's time. Other work is done by the judges in discharge of their administrative functions, particularly by the Chairman of the Commission, outside normal court hours. In theory, in a Commission comprised presently of 13 judges, the application of one day per calendar month to administrative functions by each judge would represent approximately two-thirds of the contribution to court work which would be made by an additional judge. However, the judges point out that a large part of the time occupied in this way relates to the management of those administrative functions which are ancillary to the judicial function of the Commission and which would persist notwithstanding the separation of functions. We doubt therefore whether there is likely to be any significant increase in the availability of the judges for judicial work as a result of the proposed legislation

### **Policy Advice**

2.12 At the present time there is a need for the generation of initiatives and policy advice in a number of areas. These include rehabilitation, industrial safety, occupational health and the cost to employers of the benefits provided by the Act as reflected in insurance premiums. The Amendment Bill has been framed on the basis that policy advice and other initiatives would most effectively be provided by a body with specialised administrative and policy-generating responsibilities. This is a matter of public administration which raises issues that go beyond the scope of this report. Accordingly, we make no comment on whether a separation of the judicial and administrative functions of the Commission would facilitate this objective.

### **Budget and Financial Administration**

2.13 We mention one final matter which arises out of the separation of the Commission into a Board and court. Although not mentioned in earlier submissions of the Chief Judge of the Commission it emerged in discussion - that concern was entertained in respect of the financial control of the court. The proposed Bills accept the continuance of the present position whereby the costs of the court would be met out of funds levied from the licensed insurers and self-insurers.<sup>11</sup> There are, however, some changes which are consequential upon separation of the functions of the Commission. The Board has the primary responsibility for raising the funds required for its operations and the operations of the court. It will be required to pay out of the fund belonging to and vesting in it (which includes contributions from insurers and self-insurers) amounts which are to be determined by reference to an annual estimate of expenditure made by the Chief Judge, as and when requisitioned by the Chief Judge.<sup>12</sup> These funds are to be paid into a special deposit account in the Treasury known as a Compensation Court account.<sup>13</sup> This account is to be administered by the Minister,<sup>14</sup> whose approval would be required for payment of any amount required to meet expenditure of an exceptional or unusual nature.<sup>15</sup> From this account are to be paid all amounts required for remuneration, fees and allowances of judges, commissioners, and officers and staff of the court, and of arbitrators appointed under the Act, and of any other costs of operation of the court (including the provision of court accommodation and judges' chambers).<sup>16</sup>

2.14 The Chairman of the Commission has asserted that it is essential to the effective operation of the court that it have the same real financial independence and discretion in administration as the existing Commission. This is said to be essential to facilitate recruitment of the precise staff required, to provide adequate court reporting services, particularly on country circuits, and to satisfactorily respond to emergent needs of the court. It was accordingly submitted that subject to the need for ministerial approval to payment out of any amount required to meet expenditure of an exceptional or unusual nature, the court fund should be administered under the control of the Chief Judge in all respects, within the scope of his annual estimates. Attention was also drawn to the absence of any provision for the creation of reserves to deal with any shortfall in estimates, or for the making and presentation of supplementary estimates during the year.

2.15 We do not consider financial control or administrative procedures to be properly within the scope of this interim report, and we make no recommendation in relation thereto. We do, however, point to some ambiguities in the proposed legislation as framed.

It is not clear what force or significance the annual estimate of the Chief Judge required by clause 40(4) of the Court Bill has. In particular, it is not clear whether the total annual payment to the Compensation Court account is to be confined within the limits of the annual estimate, or whether the estimate is intended as an aid to the Board in fixing contributions, or whether the Board may disagree with the estimate and pay a lesser sum to the account. If the Board can reject an estimate, no machinery for resolution of any resulting dispute is provided.

The effect of a requirement by the Chief Judge for payment by the Board to the Compensation Court account is similarly not clear. In particular, it is not clear what the Board should do if a requirement is made for an amount in excess of the estimate, or in excess of available funds (after allowance to meet the Board's own operating costs).

The extent of the Minister's administration of the Compensation Court account for expenditure otherwise than of an exceptional or unusual nature is also not clear. Similarly, it is not clear what the role of the Chief Judge should be, or whether he is intended to have day to day control of the account in relation to normal operating costs.

The procedure to be followed in the case of any shortfall in estimates or of the fund is also not made clear.

2.16 While not making recommendations in relation to these matters, we believe that there is considerable ambiguity in the legislation as framed, which should be rectified.

## Summary

2.17 For the reasons outlined, we do not suggest any change in the proposal for a separation of the present judicial and administrative functions of the Commission, by the constitution of a Compensation Court and a Compensation Board. However, as we have already mentioned, we may in the course of our reference, ultimately recommend a quite different administrative and judicial structure for the management of workers, compensation claims. We assume, in expressing this advice, that the Board would be so constituted and staffed that it could continue to conduct the administrative functions with the same expertise as has been exercised by the Commission in the past. We make no recommendation as to staffing levels, qualifications or training, as we do not consider this to be within the scope of our interim report. For the same reason, we make no recommendation in relation to the financial arrangements for the court. We do, however, point to some ambiguities in the legislation as framed.

## FOOTNOTES

1. Schedule: Items 1-17.

2. Schedule: Item 19.

3. Sir W.S. Holdsworth, "His Majesty's Judges" (1932) 173 L.T. 336, at pp.336-337.

4. *Attorney General (Cth) v. The Queen* (1957) 95 C.L.R. 529, at pp. 540-541.

5. Schedule: Item 19.

6. *FAI Insurance Limited v. The Registrar of the Workers' Compensation Commission of New South Wales*, 21 December, 1982, Supreme Court of New South Wales, Court of Appeal. Leave to appeal to the Privy Council has since been granted by the Court of Appeal [1982] 1 N.S.W.L.R. 239.

7. *Id.*, Transcript of Judgment, p.31.

8. L.F. Crisp, *Australian National Government* (4th ed. 1978), p.456.
9. P.Hasluck, *The Public Servant and Politics* (1968), p.2.
10. Interim Report of the Review of New South Wales Government Administration, *Directions for Change* (New South Wales Govt. Printer, 1977), pp.17-19.
11. Amendment Bill, Schedule 6, Item (4)(a).
12. Amendment Bill, Schedule 6, Item (4)(c), (d).
13. Amendment Bill, Schedule 6, Item (4)(c), and the Court Bill, cl.40(l).
14. Court Bill, cl.40(l).
15. Court Bill, cl.40(3).
16. Court Bill, cl.40(2).

### III. What Should Be The Qualifications For Appointment As A Judge Of The Court?

#### Background

3.1 The Court Bill provides that a person is qualified to be appointed a judge of the court if he or she is a judge of the District Court, a barrister of not less than five years' standing or a solicitor of not less than seven years' standing, or has been on the roll of barristers or on the roll of solicitors for a continuous aggregate period of not less than seven years.<sup>1</sup>

3.2 This provision assimilates the qualifications for appointment as a judge of the Compensation Court to the qualifications for appointment as a judge of the District Court and, so far as barristers and solicitors are concerned, to those applicable for appointment as a judge of the Supreme Court.<sup>2</sup>

3.3 Historically, the qualifications for appointment as a member of the Commission have been stricter than those for appointment to the District Court. The Act presently provides that a person is qualified for appointment as a member of the Commission if he or she is a District Court judge or a *practising* barrister of not less than five years' standing or a *practising* solicitor of not less than seven years' standing.<sup>3</sup> There was previously a practising requirement in relation to the District Court,<sup>4</sup> removed by amendment in 1982,<sup>5</sup> that the appointee should have been in practice or should have held some judicial or legal office under the Crown within the two years immediately preceeding his or her appointment. This was less stringent than the present requirement for appointment to the Commission that the appointee should have been in practice *for the whole* of the qualifying period.

#### Submissions

3.4 The Chairman of the Workers' Compensation Commission<sup>6</sup> and also the Law Society of New South Wales,<sup>7</sup> have, in their respective submissions, argued for the retention of the requirement that a judge of the Compensation Court, when appointed from the profession, should have been a *practising* barrister or solicitor for the full qualifying period. The reason advanced in support of this view is that the experience of legal work derived from practice as a barrister or solicitor is a necessary qualification for the requirements of judicial office.

#### Issues Involved

3.5 The views which have been expressed appear to be inconsistent with the policy reflected in the present qualifications for appointment both to the Supreme Court and to the District Court as we have indicated. There is a strong case to be made for consistency in the qualifications for judicial office among the various courts. Furthermore, judges of the Commission and of the District Court have always enjoyed equal status and there is no reason for stricter requirements for appointment to the Compensation Court compared with those for appointment to the District Court insofar as the nature of the work is concerned. In practice, appointments would usually be made from the ranks of practising barristers or solicitors, but there may be circumstances in which a person with other relevant experience would be a suitable candidate for judicial appointment.

#### Summary

3.6 Accordingly, we recommend that the qualifications for a judge of the court should be as proposed by the Court Bill.

#### FOOTNOTES

1. Court Bill, cl.8(2).
2. District Court Act, 1973, s.(2), and Supreme Court Act, 1970, s.26(2), (3).
3. The Act, s.31(2).
4. District Court Act, 1973, s.13(3).
5. District Court (Amendment) Act, 1982, Schedule 2(2).
6. Schedule: Item 18.
7. Schedule: Item 27.

## IV. Should There Be A Lower Tier Of Judicial Officers Such As Commissioners And If So What Limits Should There Be As To Their Jurisdiction?

### Background

4.1 In Section V of this report we explain that the practical effect of the Bill as framed is that commissioners would perform the same judicial functions as judges of the Commission, with some limitation as to the scope of their jurisdiction.

4.2 The Bill provides that a commissioner may exercise the functions of the court specified in Schedule 3 of the Court Bill,<sup>1</sup> although this is subject to any amendment of Schedule 3 by regulation.<sup>2</sup> When exercising any function of the court conferred by or under the Act, the commissioner is deemed to be the court.<sup>3</sup>

4.3 The jurisdiction specified in Schedule 3 includes:

jurisdiction under section 9 of the Act, ( which covers weekly compensation for total incapacity) where the total amount of compensation involved does not, as at the date of the filing of the application for determination under that section, exceed \$5,000 or other prescribed amount;

jurisdiction under section 11(1) of the Act (which covers compensation for partial incapacity) where the worker is employed in some suitable employment or business;

jurisdiction under section 15 of the Act (which relates to the redemption of liability under the Act by payment of a lump sum) ;

jurisdiction under section 16 of the Act (which relates to lump sums for specified disabilities); and

jurisdiction to make interim awards, to determine appeals from decisions of taxing officers, to make summary awards of compensation where no answer has been filed, and to hear interlocutory applications.

In addition to the jurisdiction specified under Schedule 3, a judge of the court may refer any matter to a commissioner for determination.<sup>4</sup>

4.4 The Bill provides for the Chief judge to be responsible for arranging the business of the court.<sup>5</sup> However, there is an obvious omission which requires mention. Under the Bill, the Chief Judge is responsible for making arrangements as to *the judge* who is to exercise the court's jurisdiction in particular matters or classes of matters.<sup>6</sup> If there are to be commissioners it would be appropriate for the provision to include the power to arrange the business of the court as between judges and *commissioners* where they have concurrent jurisdiction.

4.5 The intention of the legislation is that the commissioners should have a jurisdiction concurrent with tile judges of the court in those matters specified in Schedule 3 together with such other matters as may be referred to them by a judge of the court on a case by case basis. There is only one exception to this, namely, in relation to pre-hearing conferences. The Bill provides that the Chief Judge may direct that a pre-hearing conference shall be arranged between the parties or their representatives to be presided over by a commissioner or a registrar as the Chief Judge thinks fit.<sup>7</sup> In consequence, a judge has no jurisdiction to preside over a pre-hearing conference ordered pursuant to that provision. This would also appear to be an omission, and it should, in our view, be rectified.

### Submissions



4.6 Most of the submissions support the idea of commissioners in principle, but, as will appear, there is no uniformity of view as to the jurisdiction they should have, or as to the manner in which that jurisdiction should be exercised. Some of the submissions which have been received challenge the appointment of commissioners as judicial officers performing the same role as judges. They favour a conciliation role, or an informal adjudication role, with either party having a right to relitigate the case if dissatisfied with the result. We explain in Section V of this report that this is not the effect of the Bill as framed and that alternative approaches to the resolution of disputed claims are beyond the scope of this report. Support for commissioners performing a role different from that prescribed for them by the Court Bill is not support for commissioners as proposed.

4.7 In his written submissions,<sup>8</sup> the Chairman of the Workers' Compensation Commission did not raise objection to the appointment of commissioners in principle, although he strenuously opposed the appointment of persons without legal qualifications to such office. He suggested some limitations on their jurisdiction. He also suggested that the "results which the new proposals relating to Commissioners seem designed to achieve could better be achieved by an extension of the conciliation procedure already in the present Act."<sup>9</sup> We have since had the benefit of conferring with the Chairman and other judges of the Commission, from which it appears that there is serious opposition to the appointment of commissioners at all on grounds of practicality. We will deal with these arguments when we have reviewed the balance of the written submissions which concern this policy question.

4.8 The Legal Panel for the Labor Council of New South Wales<sup>10</sup> supported the concept of appointing commissioners as a means of dealing with delays in the hearing of cases, at a cost which would be less than appointing additional judges. It also favoured the adoption of an informal approach before commissioners provided the findings did not operate as an estoppel, and would not limit subsequent proceedings in the court, if either party was dissatisfied with the decision of a commissioner. The panel criticised the way in which Schedule 3 of the Court Bill defined the jurisdiction of commissioners by reference to sections of the Act, an approach which it regarded as fundamentally misguided. They contended that it was illogical to include within the jurisdiction of commissioners section 11(1) claims for partial incapacity where the worker was employed in suitable employment, but to exclude from their jurisdiction section 11(2) cases where the worker was not provided with suitable employment. Although the apparent purpose of Schedule 3 is to limit the jurisdiction of commissioners to less important or complex cases, it could not be said that section 11(2) applications are inherently more complex than section 11(1) applications and should therefore be excluded from the jurisdiction of commissioners. If criteria of the kind envisaged by Schedule 3 were to be preserved, then the jurisdiction should be limited to closed period claims (that is, claims in relation to the period before the worker recovered and returned to work), and claims for medical, hospital and rehabilitation expenses. The submission implied that if commissioners were to be legally qualified there would be less objection to an unlimited jurisdiction. In particular, the panel submitted that redemption applications should not be heard by a commissioner unless he was legally qualified and had long experience in the jurisdiction.

4.9 The Insurance Council of Australia Ltd. in its submission<sup>11</sup> criticised the concept of a \$5,000 jurisdictional Limit on the determination by commissioners of claims for weekly compensation for total incapacity. It referred to this approach as impractical.

4.10 In its submission, the Federated Municipal & Shire Council Employees' Union of Australia<sup>12</sup> recognised the need for speedy, informal adjudications while preserving the right of the worker to the usual kind of determination before a judge in the event of the claimant being dissatisfied with the result. It supported any measures which would achieve speedy determination of claims provided those measures did not unfavourably affect the workers' present entitlements. In relation to small claims it was recognised that benefits of expedition might outweigh a right of appeal.

4.11 If His Honour Judge Manser, in his written submission<sup>13</sup> saw no objection in principle to the appointment of legally qualified commissioners. However, he recommended that there be excluded from the commissioners' jurisdiction:

claims for weekly compensation pursuant to sections 9 and 11(1); and

redemption of weekly payments pursuant to section 15.

4.12 Mr. Goss, Registrar of the Commission, in his submission<sup>14</sup> suggested a re-organisation of Schedule 3 as follows:

claims for medical, hospital and rehabilitation expenses should be within the jurisdiction of commissioners;

the \$5,000 limit should be a general limit which would encompass the whole claim;

applications for redemption of weekly payments and applications for lump sum payments for certain disabilities should have no monetary limit; and

commissioners should have jurisdiction to hear a claim which exceeds \$5,000 where the parties to the claim consent.

4.13 The New South Wales Bar Association in its submission<sup>15</sup> saw no objection to a confined jurisdiction for commissioners encompassing, for example, certain consent orders, procedural matters and small closed period claims in which the only issue was incapacity. The Bar Association criticised the wide jurisdiction for commissioners in Schedule 3 of the Bill, pointing out that the great majority of claims for total incapacity pursuant to section 9 of the Act would fall within a monetary limit of \$5,000 at the date of filing the application. The Bar Association also referred to the jurisdictional problems which would arise in the event that a commissioner found partial incapacity in lieu of total incapacity, and was then precluded from making an award pursuant to section 11(2) of the Act, on the basis that there had been a failure to provide suitable employment for a partially incapacitated worker.

4.14 Mr. M.J. Joseph, Barrister, said in his submission<sup>16</sup> that there was a place for a lower tier judicial officer such as a master of the Supreme Court, but suggested that the creation of such a position raised problems in relation to the definition of jurisdiction. He criticised the definition of jurisdiction contained in Schedule 3 of the Act, giving detailed reasons for rejecting the assumption, implicit in the Schedule, that jurisdiction so defined identified less important classes of cases. He recommended the deletion of claims for weekly compensation and section 15 redemptions from the Schedule.

4.15 The Compensation Department of the Labor Council of New South Wales<sup>17</sup> affirmed its support for the concept of commissioners as an aid in reducing delays. The Council favoured the use of commissioners as a means of providing an informal adjudication with an unrestricted right of appeal to a judge, where the proceedings would be heard afresh, if either party was dissatisfied with the result. The submission noted, however, that the proposed legislation as framed provides for proceedings before a commissioner to be heard and determined in the same manner as proceedings before a judge. The council thus expressed reservations about the extent of the jurisdiction given to a commissioner. It suggested, as an alternative to a right to bring proceedings afresh before a judge, that the jurisdiction of commissioners might be limited to:

claims for medical, hospital and rehabilitation expenses;

claims for weekly payments not in excess of \$1,000; and

claims for a lump sum for specified disabilities pursuant to section 16,

provided that such decisions would not raise an issue estoppel between the parties.

4.16 In a second and lengthier submission<sup>18</sup> the Labor Council of New South Wales said that it had anticipated that the appointment of commissioners would be designed to make proceedings more simple and thereby achieve a speedier hearing. It had expected that commissioners would have a function similar to that of Conciliation Commissioners under the Industrial Arbitration Act, 1940, rather than being judicial officers exercising a function similar to that of a judge and subject to the same limitations as a judge. The Council recommended modification of Schedule 3 of the Court Bill so as to restrict commissioners' jurisdiction to:

closed period claims for total incapacity of up to four weeks and not involving more than \$1,000;

closed period claims for partial incapacity to a limit of \$1,000;

medical, hospital and rehabilitation expenses to a limit of \$1,000;

section 16 claims for lump sums for specified disabilities without limit;

interlocutory applications; and

consent orders and certain minor matters.

4.17 The New South Wales Society of Labor Lawyers<sup>19</sup> approved in principle the appointment of commissioners to relieve judges of some of the less difficult work, but criticised the definition of jurisdiction contained in Schedule 3 of the Court Bill. In particular, the Society criticised the definition in relation to the limit of \$5,000 for claims for total incapacity, in relation to claims pursuant to section 11(1) of the Act for partial incapacity, in relation to redemption applications pursuant to section 15 of the Act, and in relation to section 16 lump sums. The Society did not make any specific recommendation as to how the jurisdiction of commissioners should be defined. In conference with us, the Society recommended that any disputed claim for compensation should be capable of being brought before a commissioner for speedy determination upon whatever materials were available, but without any issue estoppel arising, and with an unfettered right to relitigate the case in the usual way.

4.18 We have reviewed these submissions in detail in order to show the extent of divergence of opinion as to the jurisdiction or function which should be given to commissioners. It is implicit in many of the submissions that the concept of appointing commissioners would be opposed if they were to have a jurisdiction or function significantly different from that envisaged by the party making the submission. We cannot therefore interpret the submissions as a general support for the appointment of commissioners irrespective of what was decided about their jurisdiction or function. Indeed, the contrary would seem to be the case.

4.19 We now come to the views expressed to us in conference by judges of the Commission. The Chairman of the Workers' Compensation Commission, with the support of the judges with whom we have conferred, is opposed to the appointment of commissioners at all, on practical grounds.

First, it is said that there is no present need to increase the number of judicial officers since the backlog in cases is being reduced by current listing procedures. In this respect it is said that the average period between a request for listing and a hearing date is currently 35 hearing weeks. It is hoped to reduce this to 26 hearing weeks by the end of 1983.

Secondly, it is said that any attempt to define the jurisdiction of commissioners would be unsatisfactory.

Thirdly, it is said that at present all members of the Commission can determine any kind of case without differences between them as to the jurisdiction they can exercise. As a consequence work can be passed between them subject only to the demands of their own lists. If commissioners were to be appointed this could not be done so readily or efficiently. Further, commissioners could not be sent on country circuits because there would be cases listed for those sittings outside their jurisdiction. It was said that this could cause serious problems if there were to be more than one or two commissioners.

### Issues Involved

4.20 In considering whether commissioners should be appointed with a judicial function we have taken into account the following issues:

problems in definition of jurisdiction;

composition of the court;

savings of hearing time; and

savings of costs.

### Definition of Jurisdiction

4.21 The perceived difficulties stem from the attempt to define the jurisdiction of commissioners on the basis of distinctions between more and less complex or important matters. Several submissions suggest that Schedule 3 does not limit the jurisdiction of commissioners to less complex or important cases because it includes claims arising under section 9 of the Act (even to a limit of \$5,000 at the time of filing the application), claims under section 11(1) of the Act (notwithstanding the qualification that the worker is in employment), and applications for redemption of liability pursuant to section 15 of the Act.

4.22 Claims under section 9 to the limit specified would, we are informed, include a very large proportion of claims under that section. Claims falling within section 11(1), even as qualified, would in turn comprise a significant proportion of the claims for weekly compensation. We agree that the issues which arise in claims for weekly compensation which are subject to the limitations specified in Schedule 3, are no different from the issues which would arise in the balance of claims for weekly compensation, with the sole exception of the operation of section 11(2) of the Act (which deems partial incapacity to be total incapacity if suitable employment is not provided). This last qualification makes no significant difference to the relative complexity or importance of claims for weekly compensation which would come within the jurisdiction of commissioners as specified in the Schedule.

4.23 Applications for approval of redemptions pursuant to section 15 of the Act, it is argued, involve assessment of the worker's prospects of recovering or retaining weekly compensation and therefore require in many cases, a close examination of the issues which would arise in a disputed claim. They also involve an important supervisory function in relation to the value to the worker of the rights being redeemed. We agree, and conclude that section 15 does not identify a less complex or less important aspect of the jurisdiction of the Commission.

4.24 Accordingly, we are satisfied that Schedule 3 as framed is not effective to confine the jurisdiction of commissioners to less complex or less important cases. It is not possible, in our view, to achieve this objective, by granting jurisdiction by reference to particular provisions of the Act. A line between cases which are free of any degree of complexity and those with some potential for complexity cannot be drawn consistently or logically in this way. We are also satisfied that no limitation by amount would achieve the objective since similar issues tend to arise irrespective of the amount at stake. Indeed, we were informed by one practitioner, with a very large applicants' practice, that it was common for small claims to be litigated in order to preserve rights for the future. In order to limit the jurisdiction of commissioners to less complex or less important matters it could be necessary to exclude jurisdiction in relation to weekly compensation and section 15 redemptions altogether.

4.25 If commissioners are to be appointed with a judicial function then the alternatives are as follows.

The grant of unlimited jurisdiction co-extensive with that of the judges, subject only to the power of the Chief Judge to arrange the business of the court with a view to assigning only simple cases, on a case by case basis, to commissioners, and with a view to ensuring that cases of unusual difficulty or importance are always heard by judges.

The grant of a limited jurisdiction excluding, for example, claims for weekly compensation and section 15 redemptions.

Each of these alternatives presents its own problems.

4.26 There are serious problems arising from the grant of unlimited jurisdiction. Pursuant to his power to arrange the business of the court, the Chief Judge could endeavour to ensure that cases of more than usual complexity were not allocated to the commissioners. It would, however, be exceedingly difficult to predict consistently those cases which would not give rise to a particularly difficult question of law or fact.

4.27 The alternative of a limited jurisdiction (excluding, for example, claims for weekly compensation and section 15 redemptions) raises the question of whether there would then be sufficient work to occupy even one commissioner full-time. The judges say that there would not be sufficient work and we will review their reasons for this conclusion.

4.28 The listing arrangements need to be mentioned in this context. There is at present a Listing Committee, composed of certain of the judges of the Commission, which formulates listing procedures and monitors their application. The system requires specific steps to be taken to ensure that cases are ready for trial when they come into the list for hearing. There is a callover system to supervise these requirements, and there is a rotating

duty judge who deals with listing matters on a day to day basis. The judges believe that the present listing system is working well but consider that its effectiveness is dependent upon supervision by someone with the authority and status of a judge. Accordingly, they would be strongly opposed to a transfer of this function to a commissioner or lesser judicial officer.

4.29 Under the duty judge arrangements, there is always one judge fully occupied, or almost fully occupied, with interlocutory applications, section 15 redemptions and the supervision of the listing procedures. It is largely in this area that work would have to be found to occupy a commissioner if the alternative of a very limited jurisdiction were adopted. We are informed that if redemptions and listing matters were removed from a duty judge's daily list, there would be substantially less than half a day's work for one commissioner left.

4.30 The analogy of masters in the Supreme Court is said to be inappropriate. The nature of that jurisdiction is such that there is sufficient interlocutory work, and readily definable less complex work, such as motor vehicle cases, to occupy several masters effectively. This is an element in the argument with which we agree.

4.31 There are several elements in the argument as a whole that we are not in a position to evaluate within the scope of an interim report. They involve practical considerations which would require an in-depth study of the current operations of the Commission, including a survey of the work distribution. In the absence of such information we are unable to determine whether a jurisdiction for commissioners could be suitably defined, so as not to disrupt the workings of the court, and at the same time ensure that even one commissioner would be kept fully occupied. These matters are beyond the scope of an interim report where time does not permit a detailed review of existing arrangements. Nonetheless, we accept that there is a very serious question whether sufficient work could consistently be reserved for a commissioner with a suitable jurisdictional limit.

4.32 We add that the proposed legislation implicitly acknowledges the difficulty of the question of whether there should be commissioners at all. In particular, this is indicated by the detailed provisions in relation to appeals. It is unusual that there should be two separate avenues of appeal from a low ranking judicial officer, one direct to a superior court on questions of law, and another to a judge of the same jurisdiction on questions of law and fact. This has led to an intricate provision in relation to stays of proceedings in the case of an appeal from a commissioner to a judge.<sup>20</sup> The provision is designed to ensure that if a claim for compensation comes before a commissioner rather than a judge, a worker will not suffer postponement of any award of compensation which may be made, pending an appeal by the employer to a judge of the court. Such intricacies are symptomatic of the difficulty of devising a concurrent jurisdiction as between judges and commissioners which is consistent with the interests of workers and the efficiency of the proposed court.

### **Composition of the Court**

4.33 A serious question arises as to whether it is appropriate at all that there should be a lower tier of judicial officers exercising a jurisdiction concurrent with that of the judges of the court. From the standpoint of the judges, their status would be reduced by lower ranking judicial officers discharging the same functions as themselves. So far as the commissioners were concerned, they would be receiving lesser emoluments and enjoying lesser status whilst being expected to discharge much the same functions as the judges. One can readily perceive that such a situation would be likely to affect the morale of the court and consequently its efficiency. The repercussions of such a situation could very readily negate any saving in costs which might be expected from the appointment of a lower tier of judicial officers.

### **Savings of Hearing Time**

4.34 Unless a sufficient volume of work could be found for commissioners, it is unlikely that their appointment would bring about any significant reduction in listing delays. While it is true that informal procedures might hasten the hearing of individual cases, there are problems involved in the introduction of informality which we mention below. In any event, the duration of individual hearings is not normally a problem of any significance in the Commission, and we doubt that it contributes in any measure to listing delays. Savings of listing time might also be illusory if there were to be a substantial number of appeals from decisions of commissioners. It might also be illusory if arrangements for the transfer of work between judicial officers of the court, or for the disposal of country lists, became disrupted by difficulties in the allocation of work.

### **Savings of Costs**

4.35 Commissioners would certainly be less expensive to maintain than judges in terms of salary, staff, chambers, and courtroom or conference room accommodation. The salary envisaged for a commissioner would be approximately two-thirds of that payable to a judge and other information supplied to us suggests that the overall cost proportion would be in that order. Whether commissioners would be less expensive than judges in practice is, however, not so clear.

First, the saving in the cost of maintaining a commissioner in lieu of a judge may be eroded by appeals from a commissioner to a judge of the court. Later in this report we advise revision of this avenue of appeal which could substantially negate this difficulty.

Secondly, the use of commissioners would save costs only if they were kept occupied. This would depend on what they are empowered to do.

Thirdly, the office of commissioner would be unlikely to attract persons of the same calibre as judges. They may not have the same capacity for work as judges and more appeals may be generated.

4.36 The cost efficiency of appointing commissioners rather than judges to do some of the work which the judges now carry out has not been established at this stage to our satisfaction. The success of the proposal depends on the allocation of jurisdiction to the commissioners which is extensive enough to keep them supplied with work and restricted enough to meet the legitimate interests of those who, for a variety of reasons, argue that commissioners should have a limited jurisdiction. The legislation as framed fails to achieve this synthesis to a sufficient degree of satisfaction. In this jurisdiction, unlike the Supreme Court, there is no obvious basis upon which to allocate to a lower tier of judicial officers a significant segment of work which is, with any degree of confidence, identifiably less complex or important or which may be considered suitable by any other criteria. No solution has been suggested in the submissions which would be generally acceptable. The apparent agreement that there should be commissioners with a limited jurisdiction or different function in order to save cost or reduce delays, masks the implication that there should not be commissioners at all unless the question of their jurisdiction or function is satisfactorily resolved. We doubt that this question is capable of immediate resolution to the general satisfaction of those who have a legitimate interest in the efficient operation of the jurisdiction.

## Summary

4.37 The role of commissioners has not, in our view, been sufficiently worked out. In the original proposals and discussions, commissioners were conceived as conciliators along the model of the Conciliation Commissioners under the Industrial Arbitration Act, 1940. This concept was supported in some of the submissions, but is not incorporated in the legislation. The Bill creates quasi-judges, who are to be members of the court having a jurisdiction which is largely concurrent with that of the judges. The legislation also provides for conciliators and arbitrators. The former are to carry out conciliation function imposed on the Board under the Amendment Bill,<sup>21</sup> while the latter may be appointed under the Court Bill.<sup>22</sup>

4.38 No clear guidance has been given as to the manner in which the roles of these three kinds of officers should be integrated. There is no doubt that each would be capable of fulfilling some of the objectives of the relaxation of formality and expedition of proceedings which have support in the submissions. However, until the integration of their functions is clarified, and guidelines provided for the roles they are to perform, the operation of the legislation is unclear. Certainly, we are unable, at this stage, to see a requirement for all three kinds of officer in addition to judges. Serious questions therefore arise as to the proper role of commissioners, and of the extent to which conciliation and arbitration and the encouragement of informal resolution of disputes should be the function of the court or the Board. In our view, these matters should be resolved before the legislation proceeds.

4.39 Serious questions arise as to whether there is any role for commissioners as quasi-judges. The difficulties we have identified include the following:

it is not possible in advance to distinguish simple from complex matters, or unimportant from important matters;

if an unlimited jurisdiction is given, there are doubts as to the competence of commissioners to determine the issues correctly, and problems with the proposed appeal provisions; and

if a limited jurisdiction is given, there may be insufficient work for commissioners, and problems with the efficient listing of the court's business.

4.40 In our view, no role has been established, at this stage, for commissioners as quasi-judges. If it is thought that the potential for savings in cost or for reduction in delays are such as to warrant the appointment of commissioners, we recommend that a study be undertaken to determine what work would be suitable for a lower tier of judicial officers sufficient to keep at least one commissioner occupied. Such a study would involve an examination of each kind of case heard by the judges, of their various court functions, of the time occupied by each category of work, and of the extent to which a transfer of such work to a commissioner would be consistent with the maintenance of efficiency in the jurisdiction.

4.41 If commissioners are to be retained as quasi-judges without any inquiry being made, the preferable course, not without difficulty, would be to allow the Chief Judge to allocate work to them, on a case by case basis, with the intention of excluding all cases having any degree of complexity or long-term implications for the worker.

4.42 We have not been able to assess the value of commissioners as conciliators, or the future role of conciliators acting under the auspices of the Board. There is a strong body of support for a conciliation role, and for the encouragement of this function. We can see substantial advantages in conciliation, although we are aware of comments that the existing conciliation function of the Commission<sup>23</sup> has been little exercised, and is largely ineffective. If there is to be effective conciliation, it may be that the proper course is actively to develop the Board's role in this respect. We are not in a position to make final judgment on this question, but we do recommend that careful consideration be given to restructuring the role of commissioners, and to re-examining conciliation generally.

4.43 Finally, we observe that while the possibility of reference to arbitration is mentioned in the Court Bill, no provision is made for the manner in which arbitrators are to be appointed or to proceed, or in relation to the kinds of matter which should be referred to arbitration. Arbitration may be a useful tool, for example, in resolving disputes between insurers, and we do not believe that the legislation should be left at large in this way. Decisions are necessary as to the circumstances in which arbitration is to be used, and as to the procedural aspects involved. We are not in a position to resolve these questions at this stage since they need to be considered in the light of the whole machinery for determination of disputes arising under the Act. We do, however, draw attention to the provisions relating to arbitration in the District Court<sup>24</sup> from which assistance may be gained.

## FOOTNOTES

1. Court Bill, cl.25(l).
2. Court Bill, cl.25(3).
3. Court Bill, cl.25(2).
4. Court Bill, cl.16(l).
5. Court Bill, cl.21.
6. Court Bill, cl.21(a).
7. Court Bill, cl.31(l)(d).
8. Schedule: Items 18, 19
9. Schedule: Item 19, p.8.
10. Schedule: Item 22.

11. Schedule: Item 20.
12. Schedule: Item 25.
13. Schedule: Item 26.
14. Schedule: Item 28.
15. Schedule: Item 30.
16. Schedule: Item 31.
17. Schedule: Item 34.
19. Schedule: Item 35.
19. Schedule: item 33.
20. Court Bill, cl.39.
21. Amendment Bill, Schedule 6, Item (2).
22. Court Bill, cl.31.
23. The Act, s.39(b).
24. See District Court Act, 1973, ss.63, 63A; District Court Rules, Part 51; and Arbitration (Civil Actions) Act, 1983.



## V. What Should Be The Qualifications For Appointment To A Lower Tier Of Judicial Officers, Such As Commissioners?

### Background

5.1 This question and the three following questions arise only if the provisions for commissioners are to be retained in the Court Bill and, in particular, if they have judicial or quasi-judicial functions.

5.2 The Court Bill provides that the qualifications for appointment as a commissioner are the same as for a judge or, if in the opinion of the Minister, the appointee has had sufficient experience in workers' compensation or in other fields of compensation considered by the Minister to be relevant to the functions of a commissioner, or the appointee has satisfactorily completed studies in the field of law or industrial relations or some other field of study considered by the Minister to have substantial relevance to the functions of a commissioner.<sup>1</sup> As we mention below, there is also a provision that proceedings before a commissioner shall be conducted with as little formality and technicality as the proper consideration of the matter before the commissioner permits.<sup>2</sup> A party may be represented before a commissioner by a solicitor or by a person who is not qualified to practise law but who belongs to a class of persons prescribed by the rules for this purpose.<sup>3</sup>

5.3 It is clear from the background documents that there have been varying ideas concerning the intended function of commissioners. In the form in which the Court Bill has been drafted, the functions of commissioners are virtually identical with those of a judge, deciding cases in the usual way albeit with some jurisdictional limitation as to the class of case. Alternative ideas have been that the commissioner would function more as a conciliator or that he or she would provide a speedy adjudication on whatever materials were quickly available but in either case, with a right to subsequent determination of the case by a judge in the ordinary way if either party was dissatisfied with the result. Some elements appropriate to such alternative approaches have been carried into the proposed legislation with what we would regard as unsatisfactory results, for reasons which we mention below.

### Submissions

5.4 The submissions which have been received overwhelmingly argue against the idea of unqualified commissioners. The Legal Panel for the Labor Council of New South Wales in its submission<sup>4</sup> said that the qualifications for appointment as a commissioner were misguided and were an invitation to appoint persons who have not worked and practised in the workers, compensation jurisdiction. According to the Legal Panel, the proposal "invites future administrations to make political appointments which may prove disastrous both for the administration of the system and for the appearance of justice".<sup>5</sup>

5.5 The Chairman of the Workers' Compensation Commission in his submissions<sup>6</sup> said that these provisions would seriously lower the level of qualification, practical experience, and expertise which the community has come to regard as essential in judges and subordinate judicial officers in a court which deals with one of the most important areas of the law for members of the work force. Points made in the submission included the following:

the appointment of unqualified Commissioners would seriously impede the realisation of the Government's desire that the new court work smoothly and expeditiously and be capable of discharging its judicial functions in a manner which would retain the confidence of the people appearing before it;

any ineptitude on the part of commissioners, because of the lack of legal skills would increase the number of appeals;

the community was entitled to expect that legal rights would be adjudicated upon by judges and judicial officers with legal qualifications;

a court of high calibre will have fewer of its decisions upset on appeal, and consequently the jurisdiction it exercises will be held in high regard, thereby increasing the consistency and acceptability of its decisions;

the introduction of a mixed bench of judges and members without legal qualifications could operate to lower judicial morale.

5.6 The Insurance Council of Australia in its submission<sup>7</sup> stated that commissioners ought to be experienced barristers or solicitors. The proposed legislation could result in the appointment of commissioners with no experience and training in the principles of the common law and its concepts of justice.

5.7 His Honour Judge Manser<sup>8</sup> indicated that the assumption that cases arising under the Act were simple as to fact and law and were therefore capable of being dealt with by unqualified persons, was misconceived. His Honour saw it as wrong for the Government to appoint persons not qualified in law to judicial office.

5.8 The Law Society of New South Wales<sup>9</sup> was opposed to the appointment of commissioners without legal qualifications because of the nature of the work of the Commission.

5.9 The New South Wales Bar Association<sup>10</sup> said that a function which required the administration and, from time to time, interpretation of the law, and which affected legal rights, was a judicial function which should only be exercised by legally qualified persons. The appointment of unqualified commissioners was against the trend requiring higher qualifications for lower ranking judicial officers such as magistrates and would set a dangerous precedent.

5.10 The Compensation Department of the Labor Council of New South Wales in its submission<sup>11</sup> noted that the appointment of commissioners in accordance with the Bill would require them to perform a judicial rather than a conciliation function but the Council did not specifically address the question whether commissioners, as judicial officers, should be legally qualified.

5.11 The New South Wales Society of Labor Lawyers said in its submission<sup>12</sup> that there were objections in relation to the qualifications of commissioners since the essential characteristic of appointments of this kind was not only relevant legal training but also a practical knowledge of relevant medical treatment and a technical understanding of workers' compensation.

### Issues Involved

5.12 As we mention below, commissioners would be bound to conduct proceedings in accordance with legal principle. They would be bound by the precedent of decided cases of higher authority and they would be bound by the rules of evidence. This is so notwithstanding the provision that proceedings before a commissioner should be conducted with as little formality and technicality as the proper consideration of the matter permits.<sup>13</sup>

5.13 The idea of a commissioner without legal qualifications would be consistent with a conciliation function, or with a speedy adjudication of disputed claims which was not binding on the parties. In the context, however, of the questions which arise for determination under the Act, it would not be satisfactory for disputed claims for compensation to be determined with finality by a person without legal qualifications. Whatever may be said in favour of a non-legally qualified tribunal in other areas, the criteria prescribed by the Act for the receipt of compensation are technical and often difficult concepts, which frequently raise intricate questions of law. We take, for example, the first substantive provisions of the Act. In section 6, the definition section, it is provided that "Dependant" includes a person to whom the worker stands *in loco parentis*. This is a legal concept. "Worker" is defined by reference to a contract of service which also involves a legal concept and is the subject of voluminous case law. The law of contracts is also involved in section 6(3)(a) which extends coverage under the Act to employees of contractors in some circumstances. The same is the case in relation to section 6(3A) which extends coverage to contractors themselves in certain circumstances, and section 6(5)(a) which concerns certain rural workers. Section 6(11) requires a determination as to whether there has been a contract of bailment. As one proceeds through the Act, such legal concepts arise again and again. In order to achieve consistency in the application of the Act it is unavoidable that determinations must be made in accordance with legal principle, including the rulings of appellate courts which have binding force. The determination of disputes under this legislation by commissioners without legal qualifications would, in our view, lead to unsatisfactory and

inconsistent results, with the likelihood of a spate of appeals. It is no answer that errors of law, whether as to matters of principle or procedure, including the admission or rejection of evidence, can be corrected on appeal, since appeals will frustrate any savings of time or costs.

5.14 In our view, the court's jurisdiction in interlocutory applications should also be administered only by legally qualified judicial officers. The case law relating to such matters as particulars, discovery, interrogatories and subpoenas (with the complication, in many instances, of legal professional or other privilege) requires legal training and experience to understand and apply satisfactorily. This is the inevitable consequence of the adversary process in relation to proceedings required to be decided in accordance with legal principle, a situation the proposed amendments are not designed to displace.

### Summary

5.15 For these reasons, if there is to be provision for commissioners and if they are to perform judicial or quasi-judicial functions, we recommend that they should be legally qualified.

### FOOTNOTES

1. Court Bill, cl.12(2)(b).
2. Court Bill, cl.26(1).
3. Court Bill, cl.26(2).
4. Schedule: Item 22.
5. Ibid., p.2.
6. Schedule: Items 18, 19.
7. Schedule: Item 20.
8. Schedule: Item 26.
9. Schedule: Item 27.
10. Schedule: Item 30.
11. Schedule: Item 34.
12. Schedule: Item 33.
13. Court Bill, cl.26(1).

## **VI. Should Proceedings Before Commissioners Be Informal?**

### **Background**

6.1 As we have mentioned, the Court Bill provides that proceedings before a Commissioner shall be conducted with as little formality and technicality as the proper consideration of the matter before the commissioner permits.<sup>1</sup> This may be consistent with a desire for speedy adjudication of disputes and the use of unqualified advocates but, as we mention later, it is not necessarily consistent with an exercise of judicial power.

### **Submissions**

6.2 The Chairman of the Workers' Compensation Commission, in the first of his submissions,<sup>2</sup> suggested that the purpose of the provision would appear to be to induce the parties to endeavour to resolve what can be resolved expeditiously by agreement and final award, leaving only substantial matters for contest. It was suggested that the proposed appeal provisions would frustrate this intention.

6.3 The Legal Panel for the Labor Council of New South Wales, in its submission<sup>3</sup> welcomed the proposal in principle, but suggested there were dangers as well as benefits associated with informal proceedings before commissioners. It inquired as to the guidelines which would be employed in practice and stressed the importance of ensuring that justice continued to appear to be done as well as ensuring that it was done. The Legal Panel stated that it would be necessary to ensure that commissioners' findings in informal proceedings did not give rise to an estoppel.

6.4 In his submission, Mr. Joseph, Barrister,<sup>4</sup> observed that while the objective of informality could be applauded, the Court Bill adopted the wrong means to achieve this end. It was suggested that informality could be achieved by other means such as the abolition of court dress for barristers. It was also pointed out that formality is often of benefit in the presentation of cases, especially when lay witnesses are giving evidence.

6.5 The Compensation Department of the Labor Council of New South Wales, in its submission<sup>5</sup> suggested that unless the appeal procedures concerning decisions of commissioners are altered, it would not be possible for proceedings to be conducted in an informal manner. No responsible solicitor would adopt such an approach as the worker whose case was involved would be bound by the evidence presented to the commissioner.

6.6 It is apparent that those who made submissions on this topic had very different ideas about what was meant by informality.

### **Issues Involved**

6.7 The Act, from its inception, provided that the Commission should not be bound to follow strict legal precedent.<sup>6</sup> It further provided that no award, order or proceeding of the Commission should be vitiated by reason of any informality or want of form.<sup>7</sup> However, the supervisory jurisdiction given to the Supreme Court in relation to questions of law and in relation to the admission or rejection of evidence<sup>8</sup> has operated to impose upon the Commission the binding force of legal precedent and compliance with the rules of evidence.<sup>9</sup>

revisions, The original provisions, both as to procedure and appeal are repeated in the Bill,<sup>10</sup> and would be construed by the appellate courts in the same way. To these provisions there is added the requirement that proceedings before a commissioner should be conducted with as little formality and technicality as possible.<sup>11</sup> However, the right of appeal to the Supreme Court on a question of law or on a question of admission or rejection of evidence applies to a commissioner when sitting as the court as much as to a judge. A commissioner would therefore be bound by legal principle, legal precedent and by the rules of evidence when deciding a disputed claim for compensation, however minor or uncomplicated the case might appear to be. It follows that the

objective of informality in anything more than form would not be achieved in proceedings before commissioners who are required to act judicially.

6.8 In rejecting the alternative that commissioners should proceed by way of conciliation or by way of informal adjudication on whatever materials were quickly available, whilst preserving the right of determination by a judge, those responsible for the Bill have no doubt had regard to the obvious duplication of work and attendant cost which this alternative would involve. That is not to say that there is no place for conciliation. The Amendment Bill gives the Board a conciliation function<sup>12</sup> which may prove to be an effective tool, without imposing the process on a large body of claims unselectively.

6.9 There is some limited scope for reducing formality under the Bill as presently framed, such as by dispensing with robes or by the provision of a conference room venue rather than a courtroom. If such provisions were thought to be desirable, they could be effected by rules of court or administrative edict. However, consistency dictates that the same considerations should apply to judges as to commissioners when performing the same functions, as with judges and masters in the Supreme Court.

6.10 We do not oppose in principle the informal and non-technical determination of compensation rights. There is much to be said for the view that compensation for injured workers should be a simple matter, that legalism should be reduced, and that proceedings for the determination of compensation rights should be informal and non-technical. We are conscious of this view and in our consideration of compensation arrangements for accident victims generally, including work-related injury, it may be that recommendations will ultimately be made to revise the criteria governing entitlement to compensation and the administration of compensation laws, such that it would then be practicable for rights to be determined in a more informal way.

## Summary

6.11 As we do not, at present, recommend the appointment of commissioners, we do not make any recommendation as to a relaxation of formality in proceedings before them. Depending on further consideration of the function they might perform, it may be possible to formulate procedures which would achieve the objective of informality. We accept that this objective has sufficient merit and support from commentators to warrant careful examination, but recommendations must await further resolution of the role which commissioners would perform.

## FOOTNOTES

1. Court Bill, cl.26(l).

2. Schedule: Item 18.

3. Schedule: Item 22.

4. Schedule: Item 31.

5. Schedule: Item 34.

6. The Act, s.36(3).

7. The Act, s.37(l).

8. The Act, s.37(4).

9. *Burns v. Knott* (1926) 1 W.C.R. 17; *Deigman v. State Coal Mines*(1956) 30 W.C.R. 169; *Waide v. Smith's General Contracting Pty. Ltd.*, 5 August 1977, Supreme Court of New SouthWales, Court of Appeal.

10. Court Bill, cl.17, 33.

11. Court Bill, cl.26(l).

12. Amendment Bill, Schedule 6(2), cl.38A.

## VII. Should Legally Unqualified Advocates Be Permitted To Appear Before Commissioners?

### Background

7.1 The Court Bill provides that a person may be represented before a commissioner by a solicitor or by a person who is not qualified to practise law but who belongs to a class of persons prescribed by rules.<sup>1</sup> This is in keeping with the concept of a commissioner conducting limited proceedings with a minimum of formality, although the reason for excluding representation by barristers is not clear.

### Submissions

7.2 The submissions were almost unanimous in their condemnation of this proposal. The Legal Panel for the Labor Council of New South Wales in its submission<sup>2</sup> thought it "deplorable" that unqualified persons might conduct proceedings on behalf of injured workers, and suggested that ethnic workers would be prey to unscrupulous advocates who were not constrained by the ethics of the legal profession.

7.3 The Chairman of the Workers' Compensation Commission<sup>3</sup> warned of the absence of control over unqualified advocates and of the risk they posed for migrant workers. He expressed the view that the use of unqualified advocates was unlikely to reduce delays, and indeed thought the contrary might be the result. The prospect of a workers' legal rights being protected by an unqualified advocate appearing before an unqualified commissioner under circumstances where the worker was refused the right to be represented by counsel was, in his view, "devastating".

7.4 The Federated Municipal and Shire Council Employees' Union of Australia, New South Wales Division<sup>4</sup> considered that the prohibition against barristers appearing before commissioners would do nothing more than restrict the rights of representation that the workers of the State had enjoyed since 1926. The Union was apprehensive as to the harm that could be caused by unqualified advocates amongst the ethnic community, anticipating that such advocates would advertise themselves as compensation consultants over whom there would be no control as to their ethics or activities.

7.5 As we have mentioned, His Honour Judge Manser<sup>5</sup> indicated that the assumption that less complex matters were so simple as to be capable of being dealt with by unqualified persons was misconceived, particularly having regard to the limitations on appeals. As a corollary, he indicated that there was a need for persons to be adequately represented. The prohibition against barristers appearing before commissioners was, in his view, contrary to the interests of workers, and there was no good reason for limiting their freedom of choice to representation. The concept of unqualified advocates gave rise to serious questions as to the nature of the relationship between the advocate and the worker, their liability for negligence (including the prospect of vicarious liability attaching to the management committees of unincorporated unions who employed lay advocates), and the absence of disciplinary procedures and professional ethical standards for lay advocates. He considered that the proposed system of lay advocates gave rise to the risk of exploitation of immigrant workers by a new class of "God Fathers".

7.6 The Law Society of New South Wales<sup>6</sup> expressed concern at several aspects of the proposal. It was thought that, particularly if commissioners are not legally qualified, they would need the assistance of experienced barristers or solicitors. Unqualified advocates gave rise to the risk of abuse, and problems were seen in relation to the sanctioning and control of their conduct. It was suggested that unqualified representation should be limited to employees of firms of solicitors, so as to ensure compulsory professional indemnity insurance cover.

7.7 The New South Wales Bar Association<sup>7</sup> stated that it emphatically protests if the intention of the legislature is to prevent a party to proceedings before a commissioner being represented by a barrister. In its view, it is "outrageous" that litigants should be deprived of the opportunity of being represented by a barrister if they

wished. The Association asked what provisions there would be to regulate the ethics, fees, and terms and conditions for the employment of lay advocates, and the duties which they might owe to the tribunal before whom they appeared. Imposition and enforcement of standards of competence and diligence would require careful attention. It was also pointed out that clients of lay advocates would not enjoy the benefit of legal professional privilege.

7.8 Mr. Joseph, Barrister,<sup>8</sup> also stated that the proposal deprived workers of a right to proper representation. In particular, he suggested that if commissioners were to retain the jurisdiction proposed, then workers should have such representation as their advisers thought fit. He pointed out that there were unlikely to be savings in costs or time achieved by the introduction of lay advocates and the exclusion of barristers.

7.9 The Labor Council of New South Wales, Compensation Department,<sup>9</sup> in its first submission, said that it regarded the concept of paid unqualified advocates as fraught with danger in that cases would not be competently presented, and workers, particularly ethnic workers, would be exploited. Lay advocates would not be governed by the statutory code of conduct that applies to solicitors and would not be covered by the compulsory professional indemnity insurance scheme. In their view, unqualified representation should be limited to employees of solicitors. The submission also suggested that the exclusion of barristers could only operate to create an inequality of representation since insurers would inevitably employ "in house" counsel. It was suggested that it was a curious concept to deny workers the best representation available.

7.10 The Labor Council of New South Wales in its second submission<sup>10</sup> noted the apprehension of affiliated unions as to the possible harm that might be occasioned amongst ethnic workers at the hands of unqualified advocates who were not subject to controls as to their ethics or responsibilities.

7.11 The New South Wales Society of Labor Lawyers said in its submission<sup>11</sup> that the proposals could only operate to the disadvantage of workers and could be circumvented by insurers. The present arrangements provide experienced and qualified representation according to the Society and there is little reason for major change.

7.12 The Water & Sewerage Employees Union (Salaried Division), in its submission,<sup>12</sup> thought it dangerous to place the future welfare of injured workers in the hands of lay advocates. It pointed to the risk of responsibility which might attach to union officials, and also to the possibility of workers with a poor command of English being taken advantage of by lay advocates.

7.13 The only contrary view expressed in relation to lay representation was received from Mr. J.P. Flaherty M.P., Member for Granville, on behalf of the Granville State Electorate Council.<sup>13</sup> He advised that the State Electorate Council endorsed proposals to broaden the scope of representation before the court to persons outside the legal profession.

## Issues Involved

7.14 As in the case of the provision for legally unqualified commissioners, the provision for legally unqualified advocates has to be considered in the light of the intricacy of the questions which arise for determination under the Act. We agree that these questions will commonly be beyond the competence of lay advocates, and we generally agree with the objections which have been raised in the submissions. Advocates who are not legally qualified would not owe to the court or to the client the professional duties incumbent upon barristers and solicitors. They would not be subject to ethical rules or the sanction of disciplinary action, and they would pose a serious risk of improper practices. Further, in our view, they would be unable to represent adequately claimants in proceedings before commissioners having the jurisdiction conferred under the Court Bill, as presently framed. There would inevitably be a decline in standards, a substantial risk to the interests of claimants, and a real possibility of a proliferation of appeals which would have been unnecessary had the claimant been properly represented at first instance. We see absolutely no merit in the proposals. In particular, we do not believe that there would be any savings in costs either to the parties or the administration, or any reduction in delays, achieved by the introduction of lay advocates.

7.15 We feel sure that the implied prohibition against barristers appearing before commissioners is not intended to discriminate in favour of one branch of the profession against the other. Rather we assume that it is a reflection



of the idea, not achieved in the Bill as framed, that proceedings before a commissioner would not have to be determined in accordance with strict legal principle. We do not agree with the prohibition, since we do not see why representation by one branch of the profession alone would reduce legalism. Further, any such proposal is in conflict with our first report on the legal profession<sup>14</sup> in which we recommend the common admission of barristers and solicitors.

## Summary

7.16 We recommend that the provision allowing representation by legally unqualified advocates be deleted. We also recommend that representation by barristers be permitted as well as by solicitors.

## FOOTNOTES

1. Court Bill, cl.26(2).

2. Schedule: Item 22.

3. Schedule: Item 18.

4. Schedule: Item 25.

5. Schedule: Item 26.

6. Schedule: Item 27.

7. Schedule: Item 30.

8. Schedule: Item 31.

9. Schedule: Item 34.

10. Schedule: Item 3S.

11. Schedule: Item 33.

12. Schedule: Item 29.

13. Schedule: Item 32.

14. New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure*, L.R.C 31 (1982).

## VIII. What Rights Of Appeal Should There Be From Commissioners?

### Background

8.1 The Bill presently provides for two separate avenues of appeal from commissioners.

There is an appeal direct to the Supreme Court of New South Wales, Court of Appeal, on a point of law or in relation to the admission or rejection of evidence.<sup>1</sup>

In addition, there is an appeal against an award by a Commissioner to a judge of the court,<sup>2</sup> the appeal being by way of re-hearing,<sup>3</sup> with a prohibition against further evidence being taken except by leave in special circumstances.<sup>4</sup> This formula denotes an appeal on fact and law, but limited to the record of evidence given below, subject to the restricted power to admit further evidence.<sup>5</sup>

### Submissions

8.2 The Chairman of the Workers' Compensation Commission, in the first of his submissions,<sup>6</sup> pointed to the undesirability of separate avenues of appeal, particularly as it might be possible for there to be a wider review in the Court of Appeal in relation to evidentiary matters. He also pointed to the inconsistency of treatment of appeals from judges and commissioners, even though under the Bill, their jurisdiction is largely concurrent. The Chairman recommended that the court should be the sole avenue of appeal from commissioners. It was suggested that having any avenue of appeal direct to the Supreme Court would only encourage parties to conduct "full dress" cases before commissioners with a view to appealing directly to the Supreme Court, thereby frustrating the objective of informal and economic proceedings before commissioners.

8.3 The Federated Municipal & Shire Council Employees' Union of Australia, New South Wales Division,<sup>7</sup> submitted that the proposed limitation on the introduction of fresh evidence in appeals from commissioners to the court would be unduly restrictive. It stated that this provision may operate against a worker who, in a genuine endeavour to obtain a quick resolution of his claim, has the matter brought before a commissioner for early determination and then fails because of the omission to call some available evidence.

8.4 The Law Society of New South Wales also submitted<sup>8</sup> that the right of appeal from commissioners contained in the Bill was too limited, particularly if commissioners did not have legal qualifications.

8.5 The Labor Council of New South Wales, Compensation Department, in its submission,<sup>9</sup> suggested that in view of the wide jurisdiction granted to commissioners under the Court Bill, appeals to the court should be by way of a re-hearing with a right to call further evidence. In its further submission,<sup>10</sup> the Council stated that affiliated unions held the same fear concerning the introduction of fresh evidence as that mentioned earlier (paragraph 8.3).

### Issues Involved

8.6 We take the view that there should be an appeal to a judge of the court only in relation to interlocutory matters. Assuming commissioners are to be legally qualified, the position would then be analogous to that which presently obtains in the Supreme Court, where there is an appeal from a master to a judge of the court on interlocutory matters, and an appeal direct to the Court of Appeal in proceedings for final relief.<sup>11</sup> It is true that, unlike the position of a master in the Supreme Court, there would be no supervision of a commissioner's jurisdiction in relation to findings of fact. However, neither is there any supervision of a judge of the Commission, or of the proposed court, in relation to findings of fact. Provided a commissioner is legally qualified, there is no compelling reason of principle why a determination by him in relation to a disputed claim for compensation should

be any different from a determination by a judge of the court. The reason we support retention of a supervisory jurisdiction in relation to interlocutory applications is to reserve to the judges of the new court control of, and responsibility for, consistency in the procedural aspects of the jurisdiction.

8.7 Provided that the work allocated to commissioners is confined to simple cases there are also practical reasons for dispensing with appeals to a judge of the court on grounds of fact. Otherwise, there is a substantial risk that a large volume of appellate work would be generated for the judges of the Commission relative to the disposal of compensation claims by commissioners. This risk would be exacerbated by the provision as to costs in the Bill which strictly limits the circumstances in which costs may be ordered against a worker.<sup>12</sup> The incidence of such appeals would dilute the saving in costs to be achieved by the appointment of commissioners as a less expensive tier of judicial officers,<sup>13</sup> and could eliminate the savings altogether depending on the amount of contested work being done by commissioners.

8.8 If it is thought that the right of appeal to a judge of the court should not be limited to interlocutory matters, the appeal provisions should be amended to ensure that both interlocutory determinations and final determinations of claims for compensation are included. As presently framed, the Bill does not make this clear, although probably an interlocutory order is encompassed within the definition of an award.<sup>14</sup> We also take the view that a provision akin to section 75A(10) of the Supreme Court Act, 1970 should then be added, so as to ensure that on appeal from a commissioner, the judge is free to dispose of the case on its merits rather than merely affirm or reverse the decision of the commissioner.

## Summary

8.9 If there are to be commissioners with a judicial or quasi-judicial function, then we consider it important that they exercise jurisdiction only in less complex cases. On that basis, we make the following recommendations:

that an appeal should lie to judges of the Compensation Court only on interlocutory determinations;

that an appeal should lie to the Supreme Court! Court of Appeal, on the same basis as applies to appeals from judges, namely, on a point of law or in relation to the admission or rejection of evidence; and

that if the right of appeal to a judge of the Compensation Court is not limited to interlocutory matters, then the judge should have power to dispose of the application on its merits.

## FOOTNOTES

1. Court Bill, c11.25(2), 33, 34.

2. Court Bill, cl.36.

3. Court Bill, cl.37(l).

4. Court Bill, cl.37(2), (3).

5. See, e.g., *Do Carmo v. Ford Excavations Pty.Ltd.* [1981] 1 N.S.W.L.R. 409; *Warren v. Coombes* (1979) 53 A.L.J.R. 293 for the limitations on the circumstances in which additional evidence may be received on appeal and the principles governing the powers and duties of an appellate court.

6. Schedule: Item 18.

7. Schedule: Item 25.

8. Schedule: Item 27.

9. Schedule: Item 34.

10. Schedule: Item 35.

11. Supreme Court Rules, Part 60, Rules 9, 10, 17.

12. Court Bill, cl.18(3).

13. See *infra.*, paras.4.35-4.36.

14. Court Bill, cl.32(1).

## **IX. What Should Be The Function of Registrars Of The Court?**

### **Background**

9.1 The Court Bill provides a wide jurisdiction for registrars of the court. A judge may refer any matter to a registrar.<sup>1</sup> A commissioner may also refer any matter within his jurisdiction to a registrar.<sup>2</sup> It is further provided that a registrar may exercise the functions of the court specified in Schedule 4 of the Bill, which include jurisdiction defined by reference to specified sections of the Act, and the hearing of interlocutory applications.<sup>3</sup> There is also jurisdiction to preside over pre-hearing conferences.<sup>4</sup> The Chief Judge is given responsibility for making arrangements for the distribution of work as between commissioners and registrars.<sup>5</sup>

### **Submissions**

9.2 The submissions generally did not touch on the role of registrars, although the judges of the Commission, in discussion with us, expressed similar views in relation to the judicial role of registrars as they did in relation to commissioners. They did, however, accept the possibility of registrars exercising a function in relation to pre-trial procedures on a trial basis.

### **Issues Involved**

9.3 We do not favour registrars being given power to hear claims for compensation, or interlocutory applications, even on reference by a judge on a case by case basis. Our reasons are as follows.

The function of registrars in the administration of the court is important for its efficient operation and should not be eroded by other responsibilities.

Registrars need not be legally qualified and in principle should not have power to determine finally legal rights.

We deal later in this report with the provision for registrars to preside over pre-hearing conferences (paragraph 10.11).

9.4 We see no reason why the registrars should not retain the traditional jurisdiction to tax bills of costs. This can be provided for by the rules. We believe that it would be helpful for the rules to provide definitively for the functions of registrar. The rule-making power should therefore be wide enough to enable and encourage the making of such rules. We make recommendations later in relation to the court's rule-making power (paragraphs 11.3-11.5).

### **Summary**

9.5 We recommend that the provisions of the Court Bill giving jurisdiction to a registrar to exercise the jurisdiction of the court in relation to proceedings for compensation and in relation to interlocutory applications be deleted.

### **FOOTNOTES**

1. Court Bill, cl.16(1).

2. Court Bill, cl.28(1).

3. Court Bill, cl.30(1).

4. Court Bill, cl.31(1).

5. Court Bill, cl.21.

## **X. What Provision Should Be Made For Pre-Trial Procedures?**

### **Background**

10.1 The object of such procedures is to reduce the cost of proceedings, to reduce delay in cases coming on for trial, and to facilitate early settlement of disputed claims.

10.2 The Court Bill provides that where proceedings are pending in the court, the Chief Judge may direct the Registrar to arrange a conference between the parties to the proceedings or their representatives, to be presided over by a commissioner or registrar as the Chief Judge thinks fit. The procedure for arranging or conducting a pre-hearing conference is to be in accordance with the rules.<sup>1</sup> The rule-making power includes a specific power to make rules in relation to pre-hearing conferences.<sup>2</sup>

10.3 In recent times there have been a number of developments which indicate that much may be gained by pre-trial procedures and, in particular, pre-hearing conferences. In the Supreme Court, particularly in the Commercial List of the Common Law Division, directions hearings, including hearings at which the parties are required to be present, have shortened by a considerable margin the time previously taken to prepare cases for trial. They have been effective to narrow the issues, or simplify the reception of evidence, in complicated litigation. In the District Court, pre-trial hearings have substantially increased the settlement rate before trial, particularly in relation to country sittings. In Western Australia, pre-hearing conferences in that State's workers' compensation jurisdiction have been extremely successful in reducing delay and facilitating early settlement.<sup>3</sup> It is anticipated that Master Greenwood's forthcoming report on pre-trial procedures in the United States may encourage the further use of such procedures in this State.

### **Submissions**

10.4 The Legal Panel for the Labor Council of New South Wales said in its submission<sup>4</sup> that it welcomed any attempt to break the established pattern whereby, it was asserted, employers and their insurers were willing to contemplate resolving disputes only at the door of the court. It was hoped that pre-hearing conferences and other measures such as conciliation and arbitration might serve a useful purpose in this regard, although the panel was not optimistic that this would necessarily occur.

10.5 Mr. Goss, Registrar of the Commission said in his submission<sup>5</sup> that the provisions relating to pre-hearing conferences would require legislative amplification in the light of the expected report of Master Greenwood.

10.6 Although not dealt with in written submissions, the judges of the Commission in conferences with us indicated that they would be prepared to accept the idea of registrars conducting pre-hearing conferences on a trial basis. They say that additional resources and funding would be necessary if a pre-hearing procedure was added to the existing listing procedures which they insist must be presided over by a judge.

### **Issues Involved**

10.7 We think that the question of pre-hearing conferences gives rise to some important issues involving at least one question of policy. The material we have seen and the submissions we have received indicate that one of the purposes of a pre-hearing conference is to facilitate early settlement. This would necessarily include the opportunity of settlement by way of a lump sum redemption. In the course of our deliberations under the accident compensation reference we have given consideration to whether there should continue to be a right to redeem periodic payments of compensation. One of the criticisms of redemption in principle is that a person entitled to periodic payments of compensation may be prevailed upon to compromise his or her rights in return for the certainty of a settlement. If negotiations are to be encouraged or even pressed upon the parties at an early stage there would be the added incentive to compromise rather than wait out the period of time before the case came to court. Insofar as the idea of pre-hearing conferences implies encouragement to settle claims by way of

redemption, it raises an important policy question which is beyond the scope of this interim report. Accordingly, we make no recommendation in this respect.

10.8 However, we see scope for pre-hearing conferences as a means of encouraging speedier preparation for trial, as a means of clarifying the issues in the case, and as a means of facilitating a fair trial by directions as to interlocutory matters and as to the manner in which the trial itself is to be conducted

10.9 We take the view that the provisions in the Court Bill in relation to pre-hearing conferences should be strengthened by deletion of the provision empowering the Chief Judge alone to direct, on a case by case basis, that a pre-hearing conference be arranged.<sup>6</sup> We think it appropriate that the Rule Committee should be empowered to make rules applicable to all cases providing for pre-hearing conferences, and other pre-trial procedures for the purposes of:

reducing delay in bringing cases on for trial;

the early identification and clarification of issues; and

the giving of all necessary directions in relation to interlocutory matters and the manner in which the trial should be conducted.

10.10 The rules need not necessarily make a pre-hearing conference mandatory in every case. Such procedures could, as is the case in Western Australia, be optional in the first instance. It might, however, be advantageous to add a provision allowing the court to direct a compulsory pre-hearing conference in any particular case, as is presently provided by the Bill at the instance of the Chief Judge alone.

10.11 We believe that the intended objectives would be more likely to be achieved if pre-hearing conferences were presided over by a judicial officer of the status of judge or commissioner (if there are to be commissioners) rather than by a registrar. This would, however, be a matter for the Rule Committee and we are not opposed to the idea of allowing registrars to exercise the function on a trial basis. It might therefore be wise to give registrars the power to preside over a pre-hearing conference, in case the trial was successful, or in case the function could be exercised by them in a limited class of cases.

10.12 Although of more general application than in relation to pre-hearing conferences, we think it important that the court have a power to dispense with the rules of evidence and to require admissions to be made in appropriate circumstances, as is the case in the Supreme Court and the District Court.<sup>7</sup> In any provision for pre-hearing conferences, care should be taken to ensure that such powers are exercisable at that stage of the proceedings. This reinforces the view that pre-hearing conferences should be presided over by a qualified judicial officer.

## Summary

10.13 Accordingly, we recommend that:

the proposal for pre-hearing conferences should be generally implemented, although modified so as to be regulated pursuant to rules of the court and to not be dependent on order of the Chief Judge alone;

pre-hearing conferences should, in general, be presided over by experienced judicial officers of the court, although there may be room for allocating some of the work to registrars on a trial basis; and

there be provision expressly directed to allowing dispensation with technical rules of evidence, and permitting the court to require admissions in appropriate cases along the lines of section 82 of the Supreme Court Act, 1970.

## FOOTNOTES



1. Court Bill, cl.31(1), (2).
2. Court Bill, cl.44(1)(d).
3. Schedule: Item 16.
4. Schedule: Item 22.
5. Schedule: Item 28.
6. Court Bill, cl.31(1).
7. Supreme Court Act, 1970, s.82; District Court Act, 1973, s.69.

## **XI. What Should Be The Rule-Making Power Of The Court?**

### **Background**

11.1 The Court Bill contains two clauses empowering the court to make rules.<sup>1</sup> For clarity and drafting consistency these clauses should be combined. The Bill further provides that the rule-making power of the court may be exercised by a Rule Committee upon which the judges, commissioners and the legal profession are represented.<sup>2</sup> The Committee would comprise the Chief Judge, three other judges, a commissioner, a practising barrister and a practising solicitor. This clause should be amended to ensure that the rule-making power is given exclusively to the Committee as distinct from the court, which we think to have been the intentions.<sup>3</sup>

### **Submissions**

11.2 The submissions did not deal with the rule-making power of the court, although his Honour Judge Manser in his submission<sup>4</sup> argued for the standardisation of powers and procedures as between the new Compensation Court, the Supreme Court and the District Court.

### **Issues Involved**

11.3 We support the creation of a Rule Committee, and offer no criticism of its proposed composition. The opportunity should, however, be taken to give a lead to the proposed Rule Committee by encouraging a thorough-going revision of the rules which presently govern the operation of the Commission. We suggest that for this purpose section 161 of the District Court Act, 1973, may be taken as a model. We suggest that there is much to be gained from drawing on the rules of the Supreme Court and the District Court. Encouragement in this direction may be given by a rule-making power which is framed in similar terms to the District Court rule-making powers.

11.4 Reference is made to our recommendation for a special rule-making power relating to pre-trial procedures.<sup>5</sup>

### **Summary**

11.5 We recommend implementation of the proposal to create a Rule Committee, and to authorise the making of rules of court. We suggest that the drafting of the necessary clauses could be improved, and the Rule Committee encouraged to consider the extent to which practices in other courts could be adopted with a view to uniformity.

### **FOOTNOTES**

1. Court Bill, cll. 22, 44.

2. Court Bill, c1.42.

3. Cf. Supreme Court Act, 1970, ss.123, 124.

4. Schedule: Item 26.

5. *Infra.*, paras.10.9-10.10.

## **XII. What Provision Should Be Made For Interest On Unpaid Compensation?**

### **Background**

12.1 The Act presently provides for interest on awards at 10 per cent per annum or at a rate prescribed, from the date of award.<sup>1</sup> The Amendment Bill increases the rate to 15.5 per cent per annum calculated at monthly rests and substitutes as the commencement date the time of incapacity for which compensation has not been paid.<sup>2</sup>

12.2 The intention is twofold. First, the rate of interest is to be increased. Secondly, interest is to be payable on all unpaid compensation which becomes the subject of an award from the time of the incapacity rather than from the date of the award, as is presently the case. However, one of the unintended consequences of the amendment is to remove the present entitlement to interest as from the date of the award on compensation other than for incapacity (for example, medical expenses or death benefits).

12.3 We observe that doubts have recently been raised as to whether section 62A of the Act applies to an order redeeming liability pursuant to section 15 of the Act. An opportunity is now presented to remove any such doubts.

### **Submissions**

12.4 In its submission, the Legal Panel for the Labor Council of New South Wales<sup>3</sup> pointed to the possible effect of high interest on claim entitlements in encouraging insurers to enter into early negotiations for settlement. The Insurance Council of Australia Ltd.,<sup>4</sup> however, expressed concern at the proposed increase in the interest rate and suggested that it could result in a serious escalation in the cost of claims because of the compounding effect of the provision. The Council suggested that the provision be amended to bring it in line with the Supreme Court Act, 1970.

### **Issues Involved**

12.5 We believe it appropriate that section 62A of the Act be repealed and a new provision enacted in its place to make it clear that it applies to redemption orders. For the purposes of interest from the date of the award, we are of the view that in the interests of uniformity, a provision should be inserted in the Court Bill analogous to the corresponding provisions relating to judgments in the Supreme Court and the District Court,<sup>5</sup> where interest is payable on judgment debts at a prescribed rate. It may be appropriate to fix the rate applicable under the Court Bill by reference to that obtaining from time to time under the Supreme Court Act, 1970. Alternatively, the rate could be changed by amendment from time to time.

12.6 We also believe that it is appropriate for the court to have a power to award interest in respect of the period prior to the date of award. In the interests of uniformity, it would be appropriate for a provision to be inserted in the Court Bill analogous to that obtaining in the Supreme Court and the District Court, where there is a discretion to include interest as part of the judgment.<sup>6</sup> The Chief Judge could fix, by practice direction, the rate of interest applicable to such awards in respect of various periods, as is done in the Supreme Court.<sup>7</sup> The power to award interest prior to the date of the making of the award should apply to all types of workers' compensation.

12.7 In a recent Report,<sup>8</sup> this Commission recommended an amendment to section 94 of the Supreme Court Act, 1970 and section 83A of the District Court Act, 1973 to remove certain procedural difficulties. It would be appropriate for those amendments to be included in the provision to be inserted in the Court Bill.

### **Summary**

12.8 We support the proposal to award interest in respect of moneys payable under the Act prior to the making of an award. We recommend that the provisions be amended to ensure that:

for the purposes of uniformity, the provisions are analogous to those obtaining in the Supreme Court and the District Court for the periods both before and after the making of an award under the Act; and

the provisions apply to all types of compensation, including redemption of weekly payments.

## FOOTNOTES

1. The Act, s.62A.
2. Amendment Bill, Schedule 9, Item (14).
3. Schedule: Item 22.
4. Schedule: Item 20.
5. Supreme Court Act, 1970, s.95; District Court Act, 1973,s.85.
6. Supreme Court Act, 1970, s.94; District Court Act, 1973, s.83A.
7. Practice Note No.25, issued by the Chief Justice on 16 December, 1982.
8. New South Wales Law Reform Commission, Community Law Reform Program, Second Report, *Interest on Certain Debts*, L.R.C.35 (1983).

### **XIII. What Should Be The Composition Of The Board?**

#### **Background**

13.1 The Amendment Bill provides for a Board comprised of four members. There is to be one full-time member who is the Chief Executive Officer. Three other persons are to be appointed by the Governor as part-time members.<sup>1</sup> Of the three part-time members, one is to be selected from a panel submitted by the Labor Council, one selected from a panel submitted jointly by the Employers' Federation, the Metal Trades Industry Association and the Chamber of Manufactures, and one is to be a person nominated by the Minister to represent the interests of insurers.<sup>2</sup> One of the part-time members is to be appointed by the Governor as Chairman of the Board.<sup>3</sup>

#### **Submissions**

13.2 The Legal Panel for the Labor Council of New South Wales stated in its submission<sup>4</sup> that the effect of these provisions is to reduce worker representation to a permanent minority on the Board, that it is to be anticipated that employers and insurers will speak as one, and that workers ought to have a majority voice on the Board.

13.3 The Labor Council of New South Wales has informed us that on 19 January, 1983 a meeting was held of representatives of unions affiliated with the Council. A resolution was passed insisting that union representation in a system of compensation for workers must not be outnumbered by employer/insurer representation, and that the Board should be expanded to five members with a full-time Chairman. The text of this resolution is attached to the second submission of the Labor Council of New South Wales.<sup>5</sup> In that submission it was also said that the Chairman should be a person sympathetic to the cause of workers and their dependents and should be appointed by the Minister from outside the staff of the public service. A similar view was expressed in the submission of the Labour Council of New South Wales, Compensation Department.<sup>6</sup>

13.4 In its submission, the Federated Municipal and Shire Council Employees' Union of Australia New South Wales Division<sup>7</sup> said that the provision made for the constitution of the Board was totally unsatisfactory. It also suggested that the Chairman should be a full-time employee, and a person sympathetic to the cause of workers, appointed by the Minister From outside the public service.

#### **Issues Involved**

13.5 We make no recommendation as to the composition of the Board, which we regard as beyond the scope of our interim report. However, the evident difficulty of striking a balance of sectional interests raises for consideration whether it would not be preferable to avoid sectional interests altogether in constituting the Board. As an alternative, provision could be made for sectional interests to be represented on a standing consultative committee. There could even be several standing committees each representing a particular sectional interest. It is, however, beyond the scope of this inquiry to investigate whether a Board of Management on which sectional interests are directly represented affords the best prospect of administrative efficiency and the achievement of the objectives envisaged for the Board.

#### **Summary**

13.6 No recommendation is made for the reason outlined in the preceding paragraph.

#### **FOOTNOTES**

1. Amendment Bill, Schedule 6, cl.31(3).

2. Ibid., cl.32.

3. Ibid., cl.33.

4. Schedule: Item 22.

5. Schedule: Item 35.

6. Schedule: Item 34.

7. Schedule: Item 25.

## XIV. Are The Amended Provisions In Relation To The Licensing Of Insurers And Self-Insurers Satisfactory?

### Background

14.1 The Act presently provides that, on application, the Commission may issue a licence to carry on business as a workers' compensation insurer or may refuse such an application.<sup>1</sup> The Commission may suspend or terminate the licence of an insurer or vary the conditions of the licence.<sup>2</sup> The Act also provides that the Commission may grant a licence to an employer as a self-insurer, with the same powers to suspend, terminate and to vary the conditions of a self-insurer's licence as in the case of a licensed insurer.<sup>3</sup> De-licensing proceedings are instituted by the Registrar and are determined by the Commission. Reasons are required to be given and an appeal lies to the Supreme Court of New South Wales, Court of Appeal on fact and law.<sup>4</sup>

14.2 The Amendment Bill proposes that the power to issue licences to self-insurers and insurers should vest in the Board.<sup>5</sup> The power to suspend or terminate a licence or to vary the conditions of a licence are also vested in the Board.<sup>6</sup>

14.3 Such powers are to be exercised by the Board on notice to the licensee, setting out the grounds upon which the Board proposes to take action. The Board is required to make due inquiry and give due consideration to such evidence as the licensee may submit and to such information, documents, particulars and other evidence as the Board may receive.<sup>7</sup> The Board is required to give notice of the grounds for making a decision adverse to a licensee.<sup>8</sup> There is an appeal from the Board to the new Compensation Court.<sup>9</sup>

14.4 Notably, there is no provision in the Amendment Bill for any appeal to the Supreme Court on fact and law. Presumably, the general right of appeal from the Compensation Court to the Supreme Court would operate, namely, an appeal limited to questions of law or the admission or rejection of evidence.<sup>10</sup>

### Submissions

14.5 The only submission dealing with the question of licensing of insurers and self-insurers was the second submission of the Chairman of the Workers' Compensation Commission.<sup>11</sup> However, this was principally directed to the question of whether there should be a separation of the Board and the court, it being asserted that there were merits in a continuation of the present system, so far as the supervision of insurers and self-insurers was concerned. It was asserted that the supervisory power over licensed insurers and self-insurers was more effectively exercised by the judges, and that transfer of this power to the Board would lead to a number of appeals against either refusal to license or cancellation of licences.

### Issues Involved

14.6 Certain aspects of the proposed amendments may warrant reconsideration. They include the following.

Neither the Act nor the Amendment Bill make specific provision for any appeal from a decision refusing to grant a license.

The Amendment Bill provides that in the event of an appeal to the Compensation Court concerning a de-licensing matter, the court shall have regard only to the circumstances existing up to the time of the making of the decision appealed against.<sup>12</sup> Consideration should be given to whether there should, in certain circumstances, be a right to call additional evidence before the court.

Consideration might also be given to whether there should be a general right of appeal to the Supreme Court from the Compensation Court on both fact and law in the case of licensing decisions rather than an appeal limited to questions of law or the admission or rejection of evidence.

An appeal from the Board direct to the Supreme Court, Court of Appeal could be considered, as an alternative, by-passing the Compensation Court altogether.

14.7 We are of the view that consideration of these questions should be undertaken only in conjunction with a full review of the licensing provisions of the legislation which, by and large, have been preserved in their existing form subject to certain procedural changes. Such an inquiry is beyond the scope of this interim report, which is limited to changes in the legislation proposed by the Bill. We note, however, that the Insurance Council of Australia Ltd.<sup>13</sup> has not raised objection to the procedural changes proposed by the Amendment till in relation to licensing and de-licensing.

### Summary

14.8 Although we support the separation of functions of the Board and the court, and consider it appropriate that the Board, as the administrative arm, should be concerned with the supervision of the licensing provisions, we make no recommendations, at this stage, in relation to those proceedings. It would be premature to do so for the reasons advanced in the preceding paragraph.

### FOOTNOTES

1. The Act, s.27.
2. The Act, ss.29(1), 29C.
3. The Act, s.18(1A).
4. The Act, s.29(3).
5. Amendment Bill, Schedule 4, Items (2), (5).
6. Amendment Bill, Schedule 4, Item (7).
7. Amendment Bill, Schedule 4, Item (7) (g).
8. Amendment Bill, Schedule 4, Item (9).
9. *Ibid.*
10. Court Bill, cl. 33, 34.
11. Schedule: Item 19.
12. Amendment Bill, Schedule 4, Item (9)(c).
13. Schedule: Item 20.



## **XV. Summary Of Recommendations**

15.1 The introduction to this report describes the limited scope of our inquiry and the policy questions raised by the proposed legislation which we have identified. We now summarise our recommendations in relation to each of the policy questions.

### **Should There Be a Separation of the Present Judicial and Administrative Functions of the Commission?**

15.2 We do not see any objection to the proposed separation of the present judicial and administrative functions of the Workers' Compensation Commission of New South Wales and the formation of a Compensation Court and a State Compensation Board to assume these respective functions. There are sound reasons for this approach which include, in particular, maintenance of the independence of the judiciary from the executive arm of government, in appearance as well as in actuality. We do, however, caution that in our final report, we may recommend a quite different structure for the administration of compensation laws. We make no recommendations in relation to the financial arrangements for the court, but we do point out several areas where further consideration should be given to the legislation to overcome ambiguities or omissions.

### **What Should Be the Qualifications for Appointment as a Judge of the Court?**

15.3 We recommend that the qualifications for a judge of the proposed court should be as specified in the proposed legislation, particularly in order to preserve uniformity with other courts.

### **Should There Be a Lower Tier of Judicial Officers Such as Commissioners and, if so, What Limits, if any, Should There Be as to Their Jurisdiction?**

15.4 leaving regard to the data presently available or readily obtainable, we do not, at this stage, support the proposal for the appointment of commissioners as a lower tier of judicial officers within the proposed court. We advise that before any such proposal could proceed, a detailed study of the judicial functions of the Workers' Compensation Commission would need to be made to determine whether such a provision would be a cost saving measure, and whether a suitable jurisdiction for such commissioners could practicably be found. We suggest that consideration be given to the possible restructuring of the role of commissioners, and the means by which the most effective utilisation and integration of the conciliation and arbitration processes could be achieved.

### **What Should Be the Qualifications for Appointment as a Commissioner?**

15.5 If the provision for the appointment of commissioners is to be retained, and if they are to perform judicial or quasi-judicial functions we recommend that they should be legally qualified.

### **Should Proceedings Before Commissioners Be Informal?**

15.6 We do not, at present, make any recommendation as to the relaxation of formality in proceedings before commissioners. We consider this must await further resolution of the role which commissioners would perform.

### **Should Legally Unqualified Advocates Be Permitted to Appear Before Commissioners?**

15.7 We recommend that the proposed provisions relating to legally unqualified advocates be deleted. We further recommend that there should be a right to be represented before commissioners, either by a solicitor or a barrister.

### **What Rights of Appeal Should There Be From Commissioners?**

15.8 If the provision for the appointment of commissioners is to be retained with a judicial or quasi-judicial function, we recommend that the right of appeal from a commissioner to a judge of the court, proposed by the

Court Bill, should be limited to interlocutory applications. The main reason for this recommendation is to avoid the expense of the large number of appeals which the proposed provision would generate. We consider it appropriate that an appeal from a commissioner exercising the jurisdiction of the court should be the same as an appeal from a judge of the court, namely, an appeal to the Supreme Court on questions of law or the admission or rejection of evidence. We make an exception in relation to interlocutory applications in order to ensure that the judges of the proposed court retain control over the procedures of the court. We further recommend that if the right of appeal to a judge of the court is not limited to interlocutory matters, the judge should have power to dispose of the application on its merits rather than merely affirm or reverse the decision of the commissioner. It would also be appropriate for there to be express provision allowing for appeals in respect of interlocutory orders.

#### **What Should Be the Function of Registrars of the Court?**

15.9 We recommend deletion of the provision in the proposed legislation giving a registrar jurisdiction to determine claims for compensation and interlocutory applications. We advise that the functions of registrars should be limited to the traditional duties of such an office, including the administration of the court and the taxing of bills of costs. We would not oppose them exercising a role in relation to pre-hearing procedures on a trial basis, as we believe this to be a worthy concept.

#### **What Provision Should Be Made for Pre-Trial Procedures?**

15.10 We recommend strengthening of the proposed provisions for pre-hearing conferences, for the purposes of identifying issues, of facilitating speedier preparation for trial, and of giving directions as to how the trial should be conducted. We think it desirable that all judges have a power to direct the holding of such conferences. We make no recommendation as to whether such pre-trial procedures should be used to encourage early settlement of claims by way of redemption, because we have reservations, which we have not yet resolved, as to whether redemption of periodic payments is to be encouraged in principle. We also recommend the introduction of a power to dispense with the rules of evidence and to require admissions to be made, in appropriate circumstances. We further recommend that pre-hearing conferences should, in general, be presided over by experienced judicial officers of the court, although as we have mentioned earlier, there may be merit in allowing registrars to exercise this function on a trial basis. Amendment of the Bills would be required to enable judges to direct or preside over pre-hearing conferences.

#### **What Should Be the Rule-Making Power of the Court?**

15.11 We recommend amendment to the proposed provision relating to the rule-making power of the court in order to ensure that it is exercisable exclusively by the proposed Rule Committee. We also recommend that as far as practicable the rules should provide the opportunity for standardisation of procedure as between the new court, the Supreme Court and the District Court.

#### **What Provision Should Be Made for Interest on Unpaid Compensation?**

15.12 In relation to interest on unpaid compensation, we recommend that the proposed provision be amended to ensure uniformity with the law and procedures adopted for the Supreme Court and the District Court, both in relation to the period before award and after award. We further recommend that the Amendment Bill be amended so as to ensure the power to award interest applies to all types of compensation, including redemption of weekly payments.

#### **What Should Be the Composition of the Board?**

15.13 We make no recommendation as to the composition of the proposed Board, but we raise for consideration by Government the question as to whether a board of management on which sectional interests are directly represented affords the best prospect of administrative efficiency, and the attainment of the objectives of the proposed legislation.

#### **Are the Amended Provisions in Relation to Licensing of Insurers and Self-Insurers Satisfactory?**

15.14 We make no recommendation in relation to the provisions of the proposed legislation so far as they concern the licensing and supervision of insurers and self-insurers. We consider that there should be no

recommendation on this topic in the absence of a detailed review of the licensing provisions generally, which is beyond the scope of this report. We do, however, point to several aspects of the proposed legislation, of a machinery kind, which require attention.

## REPORT 41 (1983) - ACCIDENT COMPENSATION INTERIM REPORT: WORKERS' COMPENSATION (AMENDMENT) BILL 1982 AND COGNATE BILLS

### Schedule

#### Background Papers

1. Mr. B. Wallace, Chairman, Panel of Solicitors retained by the Labor Council of New South Wales	Submission to the Attorney General re: Appointment of Temporary Judges and Reconstitution of the Workers' Compensation Commission	28 March 1978
2. Department of the Attorney General and of Justice	Discussion Paper on Alternations to Workers' Compensation Administration	April 1978
3. Labor Council of New South Wales	Proposal for a Workers' Compensation Board to Alleviate Delays in the Hearing of the Cases Before the Commission	19 June 1978
4. Mr A.L Goss Registrar, Workers' Compensation Commission	Submission to The Attorney General Concerning Delays in the Workers' Compensation Commission and on Proposals Generally	17 July 1978
5. Attorney General of New South Wales	Letter to The Chairman of The Workers' Compensation Commission of New South Wales Outlining Proposals Under Consideration for the Elimination of Delays	October 1978
6. Department of The Attorney General and of Justice	Workers' Compensation of New South Wales - Proposals for Change and Comments on Proposals involving Re-Organisation of the Jurisdiction: A Report	December 1978
7. His Honour Judge C.C Langsworth , Chairman , Workers' Compensation Commission	Comment of Matters raised in Reports on Proposals Involving Re- Organisation of the Jurisdiction of The Commission	July 1979
8. Department of the Attorney General and Justice	Proposals for Change in the Workers' Compensation Commission of New South Wales: A Commentary on the report and Reply by the Chair of the Commission	December 1979
9. Mr A.L Goss, Registrar , Workers' Compensation Commission	Report on Overseas Inquiries into Some Aspects of Workers' Compensation Administration and Court Hearings	July 1980
10. Working Party Established by the Attorney General	Review of Some Aspects of the Workers' Compensation Act, 1926: A report	January 1981
11. Cabinet Minute	Proposed Legislation to Replace Workers' Compensation Commission	1 April 1982

	with the State Compensation Board and Compensation court of New South Wales	
12. Workers' Compensation Commission of New South Wales	Instructions to Parliamentary Counsel to Draft Amending Bills	July 1982
13. Mr A.L. Goss Registrar , Workers' Compensation Commission	Servicing Workers' Compensation Claims with Expedition: Paper Delivered at Workers' compensation Conference, Darwin ,1982	August 1982
14. Ad Hoc Committee on Workers' Compensation Premiums	Report on Workers' Compensation Premiums	22 October 1982
15. Cabinet Minute	Compensation Court Bill, 1982 and Cognate Bills	26 November 1982
16. Mr A. Warwick, Registrar , Workers' Compensation Board of Western Australia	Preliminary Hearing and Pre- Trial Conferences in Western Australia	15 November 1982
17. Attorney General of New South Wales	Second reading Speech to the New South Wales Legislative Assembly	2 December 1982
<b>Submissions</b>		
18. His Honour judge McGrath Chairman, Workers' Compensation Committee		Undated
19. His Honour Judge McGrath , Chairman , Workers' Compensation Commission (further submission)		Undated
20. Insurance Council of Australia Ltd		15 November 1982 10 December 1982 24 March 1983 11 April 1983
21. Chamber of Manufactures of New South Wales		18 November 1982
22. Mr. D.Kirby, Legal Panel, Labor Council of new South Wales		29 November 1982

23. Mr. F Stevens, Barrister	14 December 1982
24. New South Wales Law Reform Commission	6 January 1983
25. Federated Municipal and Shire Council Employee's Union of Australia (New South Wales Division)	17 January 1983
26. His Honour, Judge R. Manser, Workers' Compensation Commission	27 January 1983
27. Law Society of New South Wales	4 February 1983
Mr .A.L Goss, Registrar, Workers' Compensation Commission	16 February 1983
Water and Sewerage Employees' Union (Salaried Division)	17 February 1983
New South Wales Bar Association	22 February 1983
Mr. M.J Joseph, Barrister	23 March 1983
Mr J.P Flaherty, M.P Member for Granville	20 April 1983
New South Wales Society of Labor Lawyers	May 1983
Mr T. Reynolds, Compensation Department, Labor Council of New South Wales	4 May 1983

Mr B. Unsworth, Secretary, Labor Council  
of New South Wales

11 May 1983