



Institute of Actuaries of Australia

Workers' Compensation Western Australia The Last Decade

Dr Rob Guthrie, School of Business Law
Curtin University of Technology

Mr Peter Lurie
PricewaterhouseCoopers Actuarial Pty Ltd

Presented to the Institute of Actuaries of Australia
Accident Compensation Seminar 28 November to 1 December 2004.

This paper has been prepared for the Institute of Actuaries of Australia's (IAAust) Accident Compensation Seminar, 2004. The IAAust Council wishes it to be understood that opinions put forward herein are not necessarily those of the IAAust and the Council is not responsible for those opinions.

© 2004 Institute of Actuaries of Australia

The Institute of Actuaries of Australia
Level 7 Challis House 4 Martin Place
Sydney NSW Australia 2000
Telephone: +61 2 9233 3466 Facsimile: +61 2 9233 3446
Email: insact@actuaries.asn.au Website: www.actuaries.asn.au

**ADVENTURES OF A REPORT WRITER, THE ACTUARY
AND THE POLITICIANS**

**WORKERS COMPENSATION WESTERN AUSTRALIA
THE LAST DECADE**

**DR ROB GUTHRIE, SCHOOL OF BUSINESS LAW, CURTIN UNIVERSITY OF
TECHNOLOGY**

MR PETER LURIE, ACTUARY, PRICEWATERHOUSECOOPERS ACTUARIAL PTY LTD

1. Introduction

As the West Australian Labour Government moves towards amending the *Workers Compensation and Rehabilitation Act 1981 (WA)* (the Act)¹ this year it is an appropriate time to reflect upon the last decade of workers compensation legislative changes. The last ten years have been a tumultuous time for most of the stakeholders in the compensation system. This paper is a rough guide to that last decade.

This paper traces the significant changes made to the Act in WA starting from the June 1993 changes, through the protracted process leading to the 1999 Pearson Review² and amendments to the Act and moves on to the current package of changes currently before State Parliament.³

The paper reviews the objectives, intended impacts and key drivers behind the amendments and observes the extent to which the objectives have been achieved, in both qualitative and quantitative terms. The varying success of the 1993 and 1999 amendments to the Act in relation to behavioural change, robustness and erosion are also considered.

Finally, the paper includes commentary on the aspects which were successful/unsuccessful and what lessons can be learnt from the WA experience by report writers, actuaries, scheme regulators and politicians.

¹ The Act is to be renamed the Workers Compensation and Injury Management Act 1981(WA)

² Report of the Review of the Western Australian Worker's Compensation System 1999 WAGP

³ We anticipate events will unfold regarding the latest package of changes while the paper is being written and before it is presented at the Accident Compensation Seminar

2. The June 1993 changes

The starting point when looking at significant changes to the Act is 1993. In 1993 the Conservative Coalition Government amended the Act principally to reduce the potential for workers to make common law claims for damages. The accepted wisdom at the time of these amendments was that the workers compensation system in Western Australia was overheating and that the cost of common law claims in particular was increasing and the number of those claims was also on the rise. Overall, insurers claimed that if the trend continued and the cost of the scheme increased they would be unable to continue to support the system. It's worth reflecting that at the time in 1993 there were approximately 20 private underwriters in the West Australian system. At present there are less than 10.

The rapid acceleration of common law claims frequency and the accompanying reduction in average common law claim size is shown in the table one⁴ below. A key driver of this trend appears to be the increased propensity of insurers offering increased lump sum redemption⁵ at claim closure in exchange for a discharge of common law liability. This process may also distort the assessment of what is actually a common law component as against the true workers compensation payment. In practical terms this increased component is often referred to as a payment based on an "assessment of the likely costs of litigation".

⁴ The tables in this report are all extracted from published information available on WorkCover WA's website, mainly from P Lurie, PricewaterhouseCoopers 'Actuarial Assessment of Recommended Premium Rates for 2004/05' and 'Quarterly Overview of WA Workers' Compensation Experience : June 2003' and earlier years versions of both these reports

⁵ Redemption is a payment made pursuant to section 67 of the Act, being a lump sum to redeem all liability for future weekly payments. In practice although the Act has a formula for this type of payments, it is often calculated without reference to the formula and is based on the insurer's perception of the potential weekly payments that might be made in the future. In this way redemption is often less than the payment that would have been made under section 67. However, negotiated payments are often accepted as orders made under section 67 are rare and require that the worker should permanent incapacity.

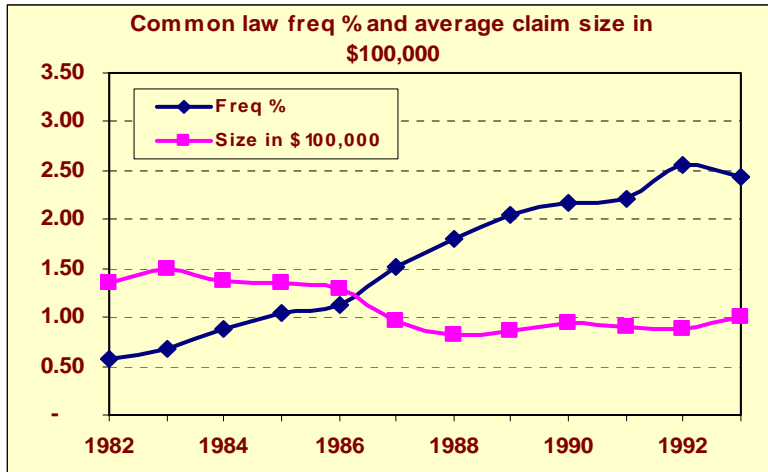


TABLE ONE

Table two shows the progress of payments per claim incurred by financial year for common law claims and lump sum payments⁶, weekly benefits and medical plus other payment types. The rapid rise in payments rates is shown extending for a year beyond the 1993 changes. Common law claims were escalating at 19% compound in real terms, ‘other’ at 17% pa while weekly benefits rose more moderately at 8% pa real. The data is in 30 June 2004 values.

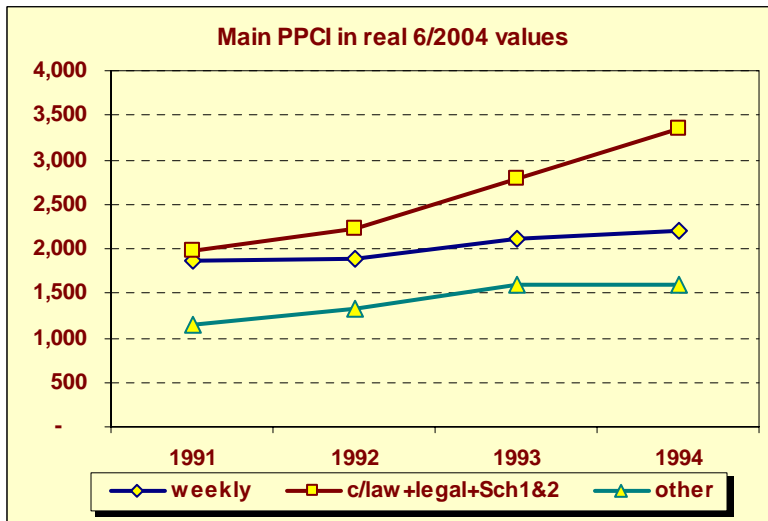


TABLE TWO

Table three below shows the payments per claim incurred across all payment types and accident years in 30 June 2004 values. The real increase over the four year period

⁶ This may include payments under section 67 of the Act by way of redemption and/or payment pursuant to schedule 2 of the Act by way of a payment for a permanent disability. In some cases this payment would be a combination of the both forms of lump sum.

is 13% pa compound. The increase once again extends for a year after the 1993 changes.

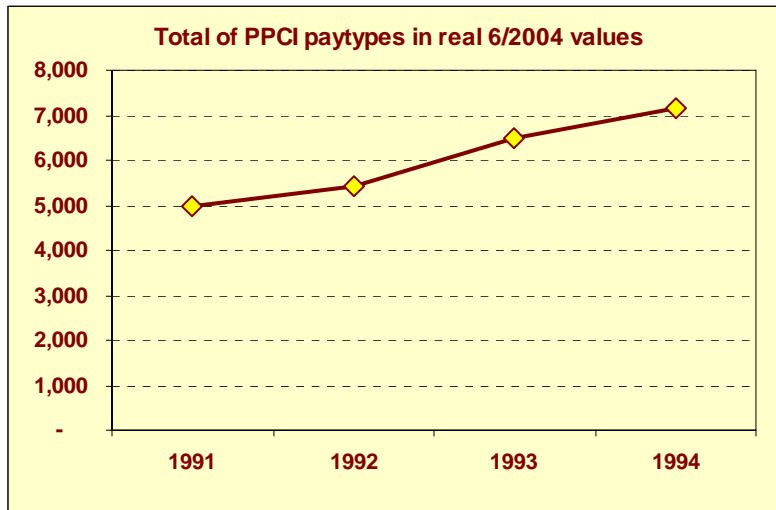


TABLE THREE

Given the trends shown above the Coalition Government moved to amend the Act in a number of ways to reduce common law claims against employers for damages for negligence. First, it set in place two thresholds through which workers were to pass in order to make a common law claim⁷. These thresholds, which later became known as gateways, required in the first instance a worker to establish a 30% disability of the body as a whole⁸. If that threshold could not be established a worker could still proceed with a common law claim by establishing an entitlement through the second gateway which required the worker to prove that as a result of the disability their pecuniary loss⁹ was greater than the prescribed amount¹⁰. Damages under these provisions were not capped so that if the worker was able to establish the necessary thresholds they could proceed to the District Court for assessment of a negligence claim unrestricted as to level of damages, which could be awarded.

⁷ Amendments were made to section 93 of the Act to put in place the thresholds.

⁸ This was calculated by a medical panel having regard to a variety of medical guides, including the AMA Guides to impairment and Schedule 2 of the Act.

⁹ This terminology proved to be very elastic. District and Supreme Court decisions in the mid 1990's held that this could include loss of wages, medical expenses, superannuation and other employment related remuneration and/or benefits.

¹⁰ The prescribed amount is the maximum amount of weekly payments available under the Act. As at 1993 it was set at \$100,000, but it is indexed to increase each year. It is also the benchmark for the level of medical expenses and rehabilitation allowances to be paid. In respect of the former this is set at an additional 30% of the prescribed amount and in respect of the latter it is set at 7% of the prescribed amount.

The second gateway creating the pecuniary loss threshold was a late addition to the 1993 amendments, as part of the political process. The 1993 amendments were foreshadowed by the Minister in a speech to parliament in June 1993. However the amendments did not pass through both houses until November 1993. The interlude between the announcement of the proposed changes and the passing of the legislation resulted in considerable lobbying and political compromise. As a result of pressure from potential common law claimants, their advocates and advisors, a transitional register was opened which in effect allowed claimants retrospective common law access under the pre-June 1993 rules. The transitional register was initially open for a three month period but was extended a number of times. The effect of the creation of the transitional register was a rush to register potential claims under the pre-June 1993 provisions.¹¹ Not surprisingly the resultant publicity created a heightened awareness of the need to claim and an increased exposure for insurers.¹²

The role of the actuary and the report writer advisors in the 1993 changes is not entirely clear, but it is noted that an actuarial costing of the impact of the second gateway showed minimal extra cost, assuming the access would be tightly controlled.¹³ The outcome of the 1993 amendments was very different to the projections due mainly to the design features of the common law thresholds and the drafting of the second gateway which allowed for expansive judicial interpretations of the thresholds.¹⁴

There are several basic lessons to learn from these events.

A number of other amendments were put in place, as well as the changes to the common law structures. Of significance was the fact that for the first time in Western Australia workers would be paid their average weekly earnings, including overtime, bonuses or allowances, under the compensation scheme for the first 4 weeks of their

¹¹ Which did not inhibit common law claims in any way.

¹² Neither author was involved in these amendments.

¹³ Report by Trowbridge Consulting to *Assess the effect of restricting common law in workers compensation in Western Australia to claimants whose injuries exceed a defined level of impairment*, for Hon Yvonne Henderson 1991 referred to by the Minister for Labour Relations Western Australian *Debates* 1993 Legislative Assembly 21st September

¹⁴ In fairness to the actuaries the report referred to in footnote 13 above was probably relied upon for purposes for which it was not prepared.

incapacity. After 4 weeks, benefits stepped down to exclude overtime, bonuses or allowances for non-award workers. In addition Schedule 2¹⁵ of the Act was amended to provide lump sum payments for permanent disabilities to the neck, back and pelvis. These forms of injury had not previously attracted lump payments. These additional payments to workers were included to compensate in part for the reduction in common law access¹⁶. Restrictions were also introduced on lump sum redemptions of future weekly benefits.¹⁷ The clear intention was to reduce the participation in lump sum payments in favour of weekly benefits.

As well as changes to benefits under the Act the dispute resolution system was radically overhauled and the Workers Compensation Directorate was established in place of the apparently adversarial Workers Compensation Board. The purpose of moving away from the Board to the Directorate was to put in place a less formal dispute resolution process. Importantly in an effort to contain legal costs legal representation at the Directorate was severely restricted.¹⁸

In addition to the changes to weekly payments and common law thresholds the government put in place section 84AA of the Act, which attempted to provide some employment security for workers with disabilities. This provision required employers to retain a workers position for at least 12 months after a compensable disability in the expectation that if the worker was fit to return to work during that period the position would be open for that worker's return. The drafting of the section was however lame as no real sanction was imposed on the employer for failure to retain the worker and no rights to reinstatement were created where the worker was dismissed within the 12 month period.¹⁹

¹⁵ Often referred to a table of maims – it is a schedule which lists body parts and senses. If a worker suffers a permanent disability a lump sum payment can be calculated according to the schedule when a medical assessment has been made.

¹⁶ In hindsight these trade offs increased the overall costs of the system as the thresholds were not sufficiently robust to reduce costs.

¹⁷ Section 67 was amended to allow redemption only for workers who had reached age 55. The intention of this discriminatory age restriction was to prevent younger workers gaining access to a lump sum – but in fact created an incentive to pursue a common law claim in order to obtain a lump sum payment.

¹⁸ The changes to dispute resolution were modelled on the changes made by the Victorian government to the *Accident Compensation Act 1985* (Vic) in 1992 following the election of the Kennett liberal government.

¹⁹ For a full commentary on the effect of section 84AA and a comparison with provisions in other States see R Guthrie 'The Dismissal of Workers Covered by Return to Work Provisions

The clear expectation and indeed the Coalition rhetoric as at 1993 was that the amendments would lead to reductions in scheme costs through the containment of common law and redemption costs. However, the significant changes as a result of the introduction of the common law thresholds and the dispute resolution procedures had many unintended consequences during the mid 1990's.

Contrary to the expectations of both Government and private insurers the cost of claims and the frequency of common law claims declined only in the short term as the thresholds removed the smaller common law claims and almost doubled the average claim size. However within a few years the frequency of common law claims increased to its pre-June 1993 levels, but with a much higher average claim size than the pre-June 1993 levels, as shown in table four below. It is important to note that the chart does not allow for the impact of the October 1999 amendments which we discuss in a later section of this paper.

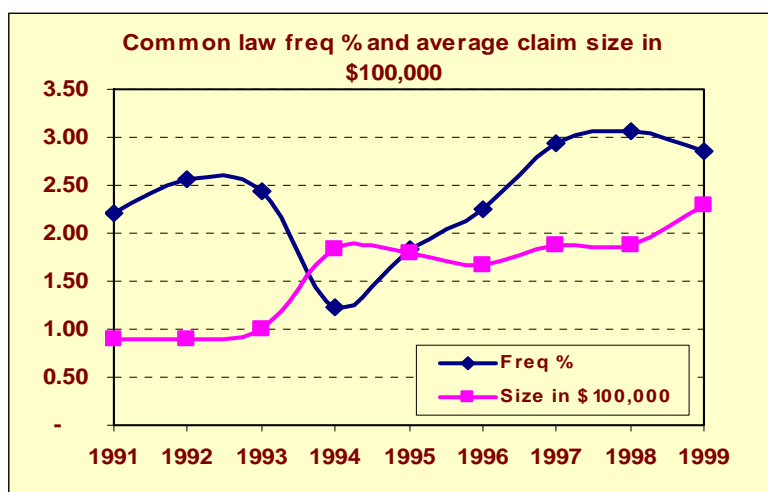


TABLE FOUR

The most influential claims driver was the number of District Court common law claims under the pecuniary loss common law threshold, which increased from 148 in the 1994 calendar year to 2,409 in 1998. The 1998 applications represented close to 4% of reported claims.

under Workers Compensation Laws' (2002) 44 (4) *The Journal of Industrial Relations* 545-561

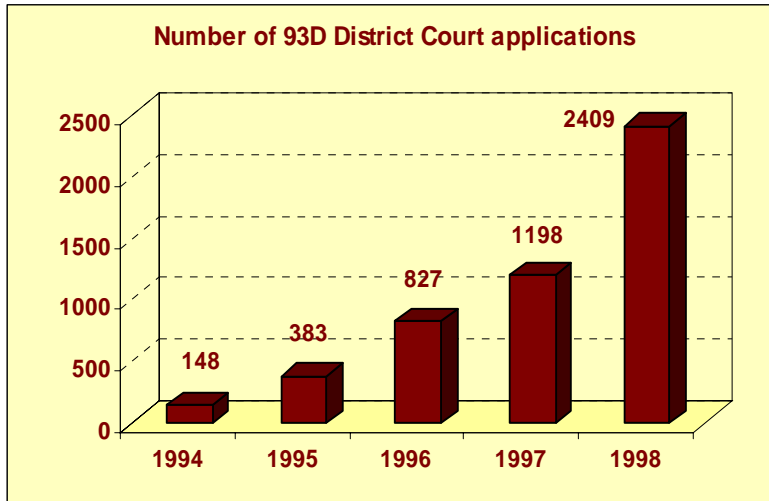


TABLE FIVE

Given that workers needed to establish the high *pecuniary loss* thresholds and/or the high levels of disability there were inbuilt incentives for workers to remain off work in order to satisfy these requirements. As a consequence of the drive towards establishing the prescribed amount in pecuniary loss, the duration of claims began to extend. In addition the District Court, which was the gatekeeper in relation to common law claims, gradually interpreted the threshold provisions in an expansive manner. The wording of section 93D of the Act allowed the District Court to interpret *pecuniary loss* as the loss of full pre-injury earnings to normal retirement age of the claimant, in some cases even where there was a retained earning capacity or the duration of the injury/claim was limited. In addition as the phrase *pecuniary loss* was novel the Court included in its calculations hitherto neglected losses such as loss of superannuation entitlements – the effect being that it was easier for workers to satisfy these requirements.²⁰ In short the thresholds, which were intended to reduce the cost for insurers of common law claims, had the contrary effect, as shown in table six below which shows the rise in payments per claim incurred by financial year for common law claims and lump sum payments, weekly benefits and medical plus other payment types.

The temporary impact of the June 1993 changes on common law payment rates is shown by the declines in 1995 and 1996 followed by the resumption of a strong real

²⁰ See in the Supreme Court *Crombie v Uniting Church in Australia Property Trust* (WA)(1997)17WAR 291

increase trend. The 'other' payment type is stable to declining from 1993 to 1995 and then increases again while the increasing weekly benefit trend appears largely unaffected. This delay in impact is probably attributable to the effects of the take-up of the registration of claims in the rush to register in November 1993. Table six is in 30 June 2004 values.

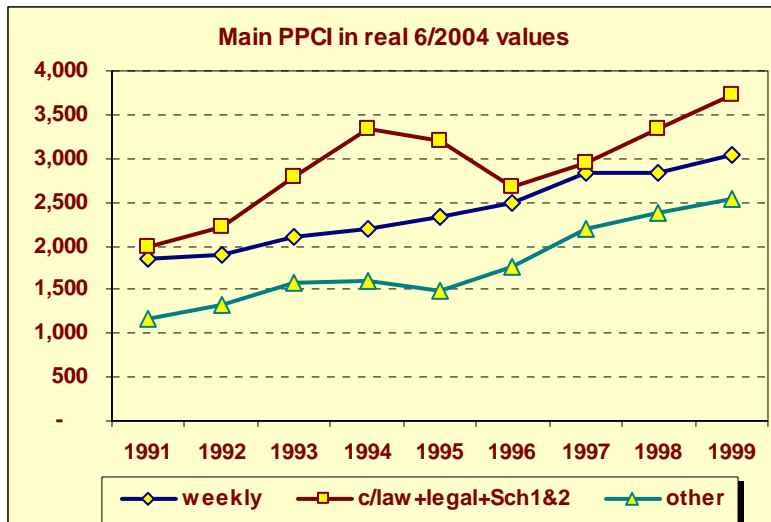


TABLE SIX

Table seven shows the payments per claim incurred across all payment types and accident years in 30 June 2004 values. The overall trend is dominated by common law claim increases with real growth at 10% pa over 1996 to 1999, consistent with the expansion of the second gateway (pecuniary loss threshold) discussed above.

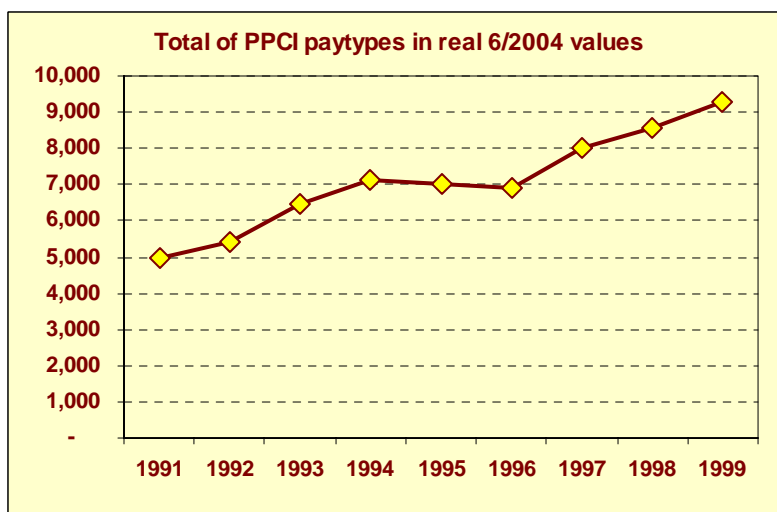


TABLE SEVEN

By the late 1990's it became clear that further legislative amendment was required to retard the effects of increased common law claims.

3. The October 1999 changes

In 1999 the Coalition Government requested the Auditor General Mr Des Pearson to review a number of features of the State's workers' compensation legislation. The *Pearson Report* in 1999²¹ recommended that the common law thresholds be adjusted by replacing the (narrative) pecuniary loss threshold by a disability-based only threshold. Further, the *Pearson Report* recommended that workers be required to elect whether or not to stay in the workers compensation scheme or to move to the common law damages scheme. In order to facilitate this process the *Pearson Report* recommended that workers be required to make an election, within 6 months of receiving compensation, whether to proceed with a common law claim or remain under the statutory compensation system.

As well as making recommendations in relation to common law thresholds the *Pearson Report* recommended that a cap of twice the prescribed amount be placed on damages for those workers who could not establish that they had a 30% disability of the body as a whole. A cap was also recommended for weekly payments at 1.5 times average weekly earnings. This meant that workers with wages in excess of 1.5 times average weekly earnings would be subjected to an immediate reduction of income at the time of suffering a disability.

The bulk of the recommendations of the *Pearson Report* were accepted however there were two significant departures. The report did not actually recommend that those workers who elected to proceed with common law claims and who could not establish a 30% disability would be subject to any alternative threshold. The *Pearson Report* recommended that in effect if a worker had less than a 30% disability, the threshold or disincentive to proceed with common law claim was the requirement to elect. At election the workers compensation payments would cease, providing a further disincentive to proceed. Instead of accepting this recommendation the Government

²¹ DR Pearson, B McCarthy and R Guthrie (1999) Report of the Review of the Western Australian Workers' Compensation System WAGP

moved to put in place a threshold which required that workers who could not establish a 30% disability would only be entitled to proceed to a common law claim if they could establish a disability of between 16% and 29% disability of the body as a whole. Those workers who came within this threshold would be entitled to proceed with a damages claim but that claim would be capped at twice the prescribed amount; that is a maximum of about \$250,000 as at 1999.

A further departure from the recommendations of the *Pearson Report* was that no significant changes were made to the dispute resolution process. The Pearson Report in fact recommended the reintroduction of legal practitioners into the dispute resolution process. As noted above as a consequence of the 1993 amendments and the establishment of the Directorate, legal practitioners were to all intents and purposes prohibited from appearing in the jurisdiction.²²

The affects of the 1999 amendments were significant and immediate. The number of common law claims dropped sharply after 1999 and since that time have remained low but with a recent increasing trend. Payments per claim incurred also dropped sharply but with a one year lag, as for the June 1993 changes. There is evidence that this trend has stabilized in 2003-4.

Table eight below is estimated from somewhat immature data particularly for 2003 and 2004, but extends the common law frequency and average claim size trends by accident year from 1998 to date.

²² It is also interesting to note that the recommendation to remove psychological overlay from the assessment of disability was removed during the Parliamentary process with an undertaking to support its removal if it became an element in a material number of common law lodgements. This has now occurred and the removal of psychological overlay in the assessment of whole person impairment is part of the current Government's package of changes. Anecdotally, psychological overlay is a factor in more than 40% of lodgements and is used to add sufficiently to the assessed physical disability levels and thereby achieve the necessary level for common law access.

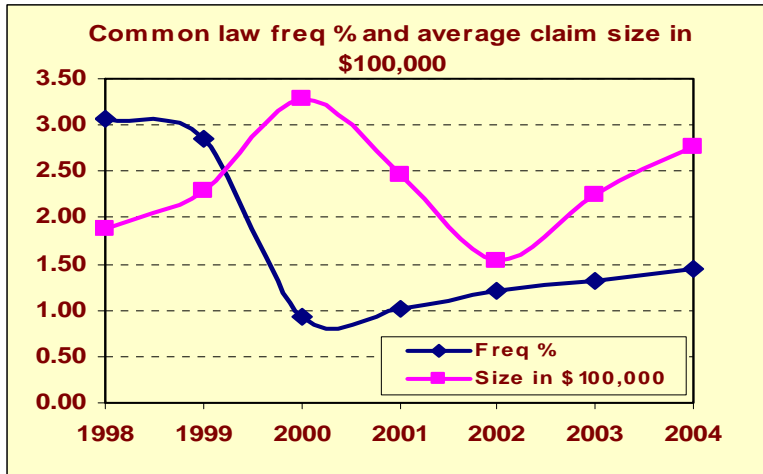


TABLE EIGHT

The apparent volatility in average common law claim size over 2000 to 2004 is due to the influence of a few very large claims over \$1M, with 2002 having no claims over \$1M and other accident years having 2 to 7 claims over \$1M with total case estimates of \$5.2M to 19.1M.

Table nine below shows the progress of payments per claim incurred by financial year for common law claims and lump sum payments, weekly benefits and medical and other payment types. Common law payment rates continue increasing for a year after the October 1999 amendments, decline significantly in 2001 and then are relatively stable. The 'other' and weekly payments decline slightly in 2000 and remain relatively stable thereafter. The chart is in 30 June 2004 values.

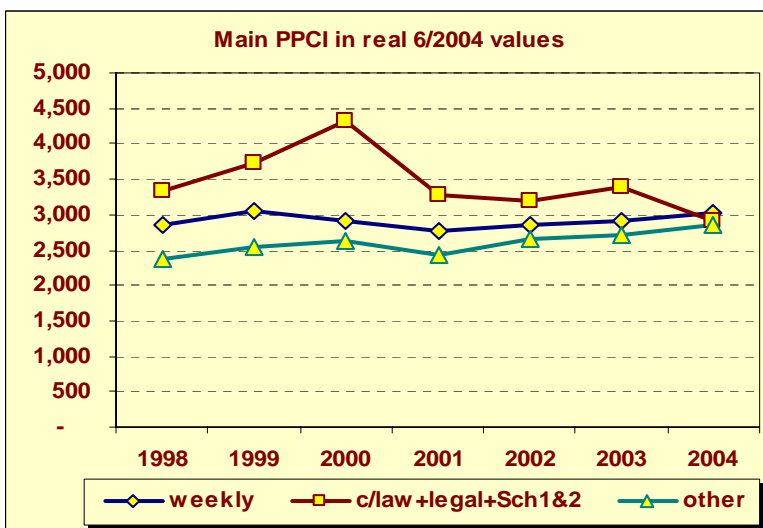


TABLE NINE

The next chart shows the payments per claim incurred across all payment types and accident years in 30 June 2004 values. The overall trend is dominated by common law with real growth over 1998 to 2000, followed by its significant decline in 2001. An increasing payment per claim incurred trend re-emerged over 2002 to 2004 but still at a much lower overall level than up to 2000.

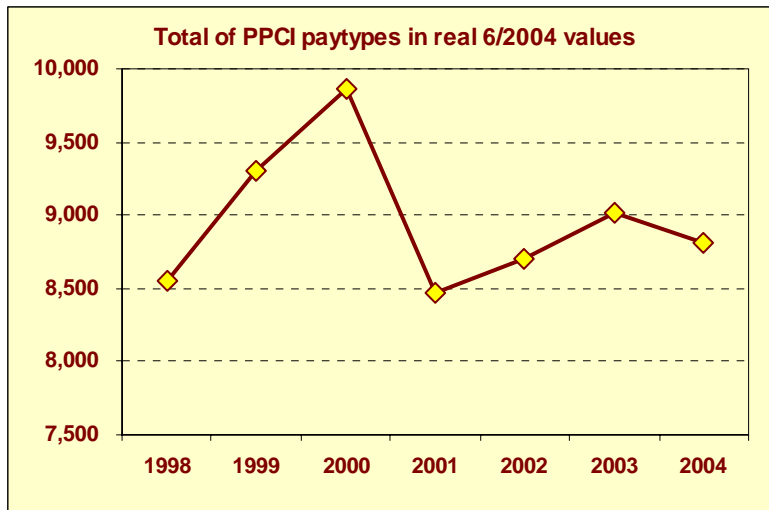


TABLE TEN

4. The proposed 2004 changes

In 2001 following the election of the Labor Government a further Report was prepared reviewing a wide range of workers compensation issues. The *Guthrie Report* was predicated upon the release of a Labor Party Direction Statement setting out a comprehensive policy on workers compensation prior to the 2000 election.²³

The 2001 *Guthrie Report* contained over 100 recommendations and covered many aspects of the workers compensation legislation. The *Guthrie Report* was released for public comment in about September 2001 and between that time and most of 2002 the Labor Government received submissions and sought consultations and comments from the public and major stakeholders. A Government policy was developed over that time based upon the 2001 *Guthrie Report*, and accepted the bulk of the recommendations of that report. A number of issues were not taken up in the

²³ R Guthrie (2001) The Report on the Implementation of the Labor Party Direction Statement in Relation to Workers Compensation WAGP

Government policy namely the introduction of second injuries schemes, the establishment of performance based insurance premium setting and a number of recommendations in relation to return to work provisions and incentives dealing with stress claims. Nevertheless, the current Government policy in relation to workers compensation reflects by and large the recommendations of the 2001 *Guthrie Report*. The current Labor Government policy is contained in a document entitled *Restoring Fairness – Balance and Certainty Workers Compensation Reforms* and appears on the Western Australian government website.

The actuarial assessment of the estimated cost impacts of the current package of changes at the time of writing this paper are summarised below. Two sets of cost estimates are presented for each element of the proposed package of changes, an initial cost impact and the estimated impact after erosion from better understanding and behavioural change of claimants and their advisors. Certain changes, mainly those to statutory benefits, will have a retrospective cost impact and the estimated cost of this is also separated. All actuarial costings only quantify the estimated impact on insurance premiums to employers and do not include the implementation costs or changes to the ongoing cost of running the system.

The estimated initial cost impact is an increase of 12.7% of the annual insurance premium pool rising to 20.4% allowing for some erosion. The once-off retrospective cost is \$41M and is due to the statutory benefit changes applying to all open claims at date of change; in this sense the effect is retrospective. The new common law claims access rules will apply to claims with date of accident on or after the effective date of the proposed changes. The estimated once-off cost of the *Dutch*²⁴ decision remedy was initially in the range \$27M to \$120M but this was later refined to reduce the top end of the range by around half.

The current Government proposals depart from the 2001 Guthrie Report in a number of ways. First, the recommendation that the common law thresholds be reversed so as to include a narrative threshold rather than a disability or impairment based threshold has not been taken up. The government currently proposes that a second gateway

²⁴ Discussed below

threshold of 15% impairment be established in order to allow workers to proceed with a common law claim. The first gateway threshold will be set at 25% impairment rather than 30% disability of the body. Weekly payments at the average weekly earnings will be extended from 4 weeks to 8 weeks initially, now extended further to 13 weeks. Payments will be capped at twice average weekly earnings. Workers with serious disabilities who cannot proceed with a common law claim will be entitled to specialised retraining programs. Legal representation will be introduced into the dispute resolution process with strict timeframes and cost thresholds for legal practitioners. The election period, which was previously 6 months, will be extended to 12 months and there will be provision for further extensions for workers who have injuries, which have not stabilised.

For those workers who do proceed with common law claims an election will be required. However, those workers who do elect will not have compensation payments ceased immediately as the present law provides. The government has proposed a gradual step down of weekly payments after election over a period of 6 months. The determination of common law thresholds will be shifted from the workers compensation jurisdiction to the District Court.

A number of other procedural amendments have been proposed by the government, which deal with various Supreme Court decisions, which have impacted upon the system. In particular the decision of the case of *Dutch*²⁵ which caused considerable concern for workers who had received medical assessments based upon total body disability. The Supreme Court held that in that case the worker who relied upon a medical certificate, which did not properly set out a medical opinion in accordance with the Act, could not use that certificate as the basis to establish the necessary common law threshold. Amendments will be made to allow some of the workers who were affected by that decision to proceed to common law claims. In another important decision of *Hewitt v Benale*²⁶ the Supreme Court held that the common law thresholds, which applied to claims against employers also applied to claims against negligent third parties. Amendments will be made to reduce the impact of that decision.

²⁵ Re Monger: Ex parte Dutch [2001] WASCA 220
²⁶ Hewitt v Benale Pty Ltd [2002] WASCA 163

These changes retrospectively increase the number of post- October 1999 common law claims, because it will allow some claims to be reactivated, but the estimated common law frequency in the tables above implicitly cover this impact but the PPCI tables do not as they are based on actual payments.

Interestingly, no action to remedy the impact of *Dossett v TKJ Nominees Pty Ltd*²⁷ is proposed. This High Court decision allowed workers injured prior to the 5 October 1999 amendments the right to access common law under the previous June 1993 regime. By June 2004, 34 new 93D applications have so far been lodged on the basis of *Dossett*. This creates a further window of latent erosion potential for the otherwise remarkably robust October 1999 changes. The estimated common law frequencies shown above are unlikely to contain any implicit margins for erosion from this source given the potential for this to be significant source of new unexpected common law claims.

Reflecting on the compensation system since 1999 there are a number of features of the current system, which demand attention and invite comment.

First, the current dispute resolution process is severely hampered by the number of features. As outlined in the 2001 *Guthrie Report* there is a lack of continuity between the conciliation and review dispute resolution processes. This causes the system to operate on a stop, start basis. Further, the prohibition on legal practitioners representing workers at various levels of the dispute process has had a counter intuitive effect. Workers, employers and insurers have not restricted their appetite for legal advice. Instead, they are continuing to seek legal advice and opinions and the current system has maintained an adversarial outlook. Although legal practitioners are limited in appearing at conciliation and reviews there are a number of advocates from law firms who regularly appear in the jurisdiction. There are numerous decisions of the Compensation Magistrates and now the Supreme Court, which have criticized the level of advocacy in the jurisdiction. It is hard not to accept that this is a

²⁷ *Dossett v TKJ Nominees Pty Ltd* (2003) 202 ALR 428

consequence of inexperienced advocacy caused through the restriction on legal practitioners appearing in the jurisdiction²⁸.

Also significant is the fact that the Directorate continues to be influential in determining the common law thresholds. There is a significant amount of litigation involved in determining the common threshold issues. For example there are numerous over the proper procedures involved in determining such claims.²⁹ Likewise there are arguments about whether pre-existing and degenerative conditions should be taken into account.³⁰ There are arguments about whether or not the symptoms of a disability should be considered and whether or not various disabilities should be aggregated or segregated when a Review Officer makes a determination.³¹ Further, there are voluminous claims, which relate to the capacity of medical panels to make confident determinations. There is a clear indication from the Supreme Court that the numbers of matters going to that court via prerogative writ to challenge the jurisdiction of medical panels is a source of irritation to the court.³²

Those who claim that the current system does not need to be changed must be unaware of the very dire condition of the some aspects of the current dispute resolution process.³³ It is argued that if there is no other change made to the Act then it should be to the dispute resolution process which is the cause of the highest number of complaints. The dispute resolution process affects all claimants not just those who are proceeding with common law claims. A move to restrict the use of medical panels and simplify the transition to common law claims is essential. Savings will be made in legal costs and costs relating to long duration claims by such changes.

²⁸ See for example *Summit Homes v Lucev* (unreported SC(WA) 67/95 3 April 1996) and *Kuligowski v Metrobus* [2002]WASCA 170

²⁹ See *Ansett Aust Ltd v Finn* (unreported CM(WA) 57/00 21 July 2000 and *Thorp v Wanneroo CC* (unreported CM(WA) 49/00 31 July 2000) and *Re Monger; Ex Parte United Construction Pty Ltd* [2002] WASCA 253

³⁰ *Jacob v BHP Iron Ore* (unreported CM(WA) 147/00 9 February 2001)

³¹ *Dzonlagic v the Mattress Renovators Perth Pty Ltd* (unreported CM(WA) 129/00 24 November 2000) and *Girrawheen Tavern v Joseph* (unreported CM(WA) 131/00 19 January 2001)

³² See the opening comments of Barker J in *Re Narula NG and Hammersley; Ex Parte Atanasoki* [2003] WASCA 156

³³ Recently a Chamber of Commerce spokesperson suggested no changes were necessary. See *West Australian* 9th February.

The current system is subject to huge logjam of cases which are unproductive; they are concerned with procedural and technical matters and do not, for the most part, concern the substantive rights and entitlements of workers. Employers often feel the after-effects of such claims as workers who suffer from delayed payments often engage in multiple claims. One striking example of this is the litigation between ***Suleski v Sons of Gwalia Ltd***, a matter which has been to the Supreme Court on at least five occasions on technical points and which, at last count, showed no signs of resolution.³⁴ Following the decision in ***Dutch*** referred to above a vast flow of litigation erupted, so much so that in ***Re Monger; Ex parte ABB Service Pty Ltd***³⁵ Roberts-Smith J noted (at para 16) that

I do not propose to go through the detail of the course of events related by Mr Harben in that affidavit as to the considerations that were given by the applicant and its solicitors thereafter. It is sufficient to observe that the panel solicitors for SGIO Insurance, McAuliffe Schwikkard, Jackson McDonald and Phillips Fox determined that SGIO had in excess of 100 matters that might require a prerogative writ.

The same judge said in ***Mitchell v Canal Rocks Beach Resort***³⁶ (at para 17)

The nature of proceedings before a review officer under the Workers Compensation and Rehabilitation Act 1981(WA) (“the Act”) is of a curious sort. While the proceedings are adversarial in character, a Review Officer may, in resolving a dispute, inspect any document, question any person or require any person to attend to answer such questions (s84ZB)...

The curious adversarial nature of the proceedings was also noted by McLure J in ***Kuligowski v Metrobus***³⁷ who in a dissenting judgement held that the doctrine of

³⁴ See for example *Suleski v Sons of Gwalia Ltd* [2004] WASCA 2, *Suleski v Sons of Gwalia Ltd* [2001] WASCA 289, *Sons of Gwalia Ltd v Suleski* [2003] WASCA 289, *Sons of Gwalia Ltd v Suleski* [2003] WASCA 279, *Re Bannan; Ex Parte Suleski* [2001] WASCA 289. Bear in mind that on many occasions these matters would have been on appeal to the compensation magistrates’ court as part the appeals process.

³⁵ [2002] WASC 299 (Emphasis added)

³⁶ [2002] WASCA 331

issue estoppel in relation to decisions and orders of Review Officers should be excluded. The dispute processes in place at present were touted by the coalition Government in 1993 as being non-adversarial quick and informal. None of these claims have been realised. There is a desperate need to reform the dispute resolution processes.

The current proposed amendments will no doubt increase the cost of workers compensation claims in the statutory scheme. The addition of a further 9 weeks of weekly payments at the average weekly earnings and the increase of those weekly earnings capped to twice average weekly earnings will no doubt increase the cost of most compensation claims. Added to this is the proposal to increase access to medical expenses and benefits and also increase access to payments beyond the prescribed amount will no doubt add to the cost for employers and insurers. On the other hand the government proposes to make changes to the injury management scheme, which should if put in place correctly, assist employers in returning injured workers to work and thereby reduce their costs. There is some strong evidence that a significant portion of this potential saving has already been made through the injury management programs introduced by the more proactive insurers. The actuarial costing of the proposed changes assumed injury management would be cost neutral, because of the subjectivity involved in quantifying the overall impact and the portion already achieved through insurers' programs.

Some commentators³⁷ claim that the common law thresholds will restrain the costs of common law claims and the increased benefits in the statutory system are likely to be an incentive for some workers to stay on weekly payments of compensation rather than seek a lump sum for common law damages. Costs savings are likely to result from these choices. However the actuarial analysis may not support these claims for of a number of reasons:

- (a) the maximum statutory benefit under the proposed changes may exceed the current capped common benefit (where an application is made under section 84E to extend the prescribed statutory payments)

³⁷ [2002] WASCA 170 at para 322.

³⁸ Various plaintiff lawyer advocates.

(b) the later election requirement (12 months instead of 6 months) could increase common law frequency

(c) the continuation of statutory benefits for six months after election, may remove the strongest disincentive to pursue common law.

Therefore the actuarial costing projects that common law frequency will increase somewhat for the lower impairment common law threshold.³⁹

The data in table twelve below on claims in Western Australia shows in general terms a significant decline in a number of claims for compensation over the past decade, with some stability over 1995 to 1998 and a slight increasing trend since 2002. The estimated number incurred decline by 37% from 61,600 in 1995 to 38,600 in 2004 while active claims declined by 32% from 32,100 in 1995 to 21,900 in 2004.

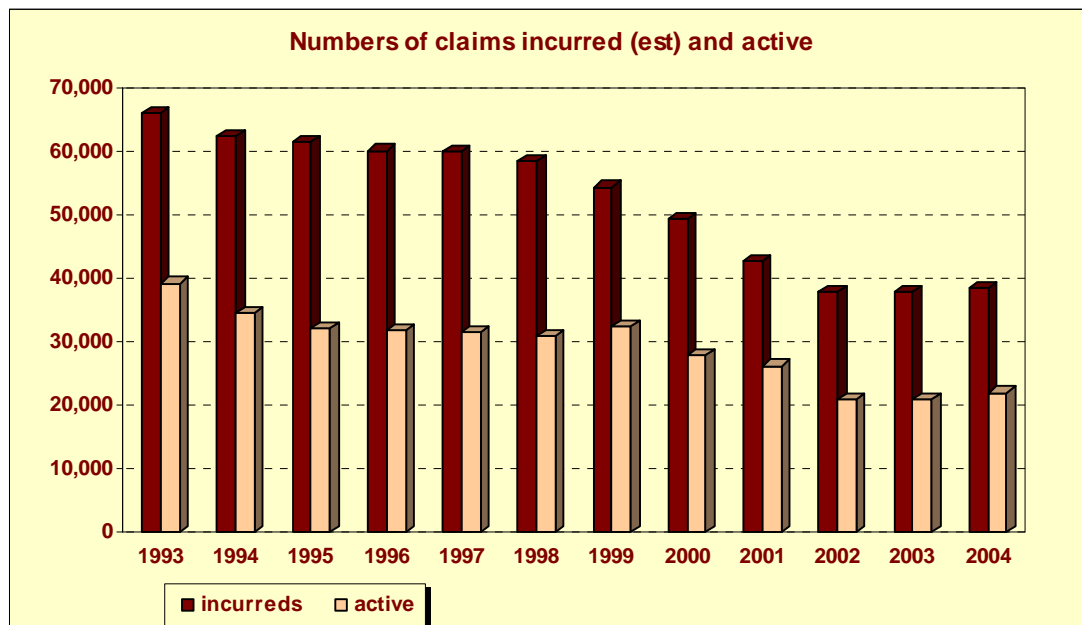


TABLE TWELVE

Table eight above shows a decline in the number of common law claims since 1999. It is a remarkable testimony to the robustness of the 1999 threshold and the circuitous litigation process that in the time of writing that very few common law claims under the current legislation has been processed for the District or Supreme Court. As noted

³⁹ The authors recognise this is a matter of serious debate. The change to an impairment based assessment structure is a feature that will be of considerable interest. For a discussion of some of the issues see R Guthrie 'Compensation: Problems with the Concept of Disability and the Use of the American Medical Association Guides' (2001) 9(2) *Journal of Law and Medicine* 185-199

above the effect of the imposition of thresholds based on disability only has had a striking affect on access to common law. This has been aggravated by the quagmire of medical panel and Supreme Court decisions around those thresholds which are referred to above. The current system simply does not in practice allow access to common law via the second/lower disability gateway although in theory it is open to workers to proceed through the twin gateways. However we must not forget that *Dossett vs TKJ Nominess Pty Ltd* now in effect reinstates the 93D pecuniary loss threshold for claims incurred prior to the October 1999 amendments and table five above shows graphically the dramatic effect that had on common law frequency. The proposal to change the common law thresholds should have a beneficial affect for workers and also employers and insurers because if common law claims are dealt with in a more timely fashion it is almost certain that long duration claims will be reduced. In other words it is possible to interpret the current system as aggravating long duration claims. In many ways the 1999 amendments have had counter intuitive effects on the statutory system. Whilst the number of common law claims has been reduced the number of long duration claims has increased. These are matters of continuing concern.

Tables thirteen and fourteen below are taken from WorkCover WA's published Statistical Reports and show the distribution of claims by number and cost by duration/time lost.

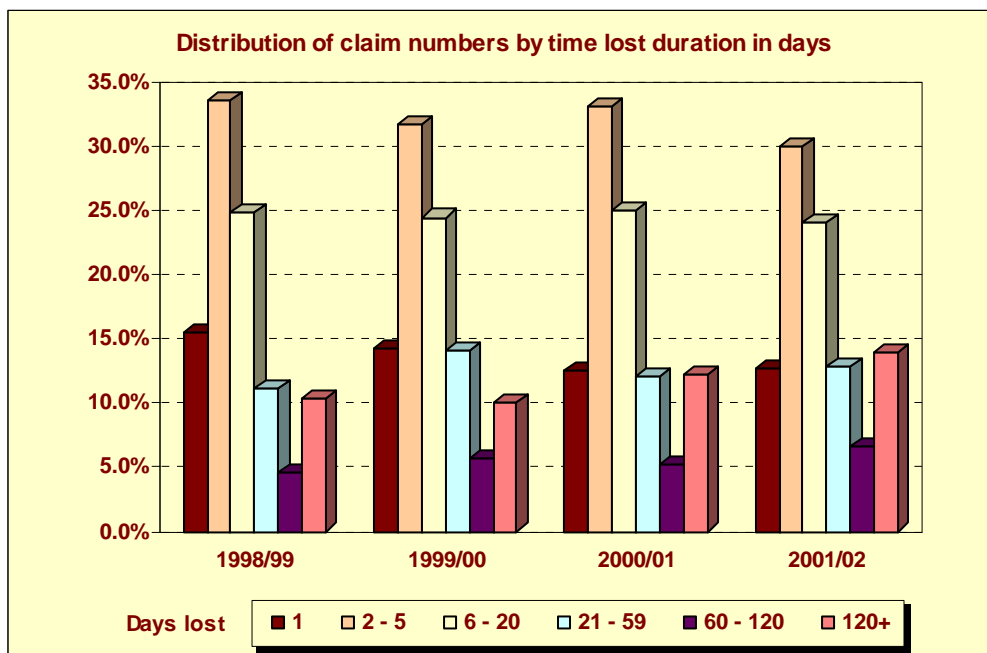


TABLE THIRTEEN

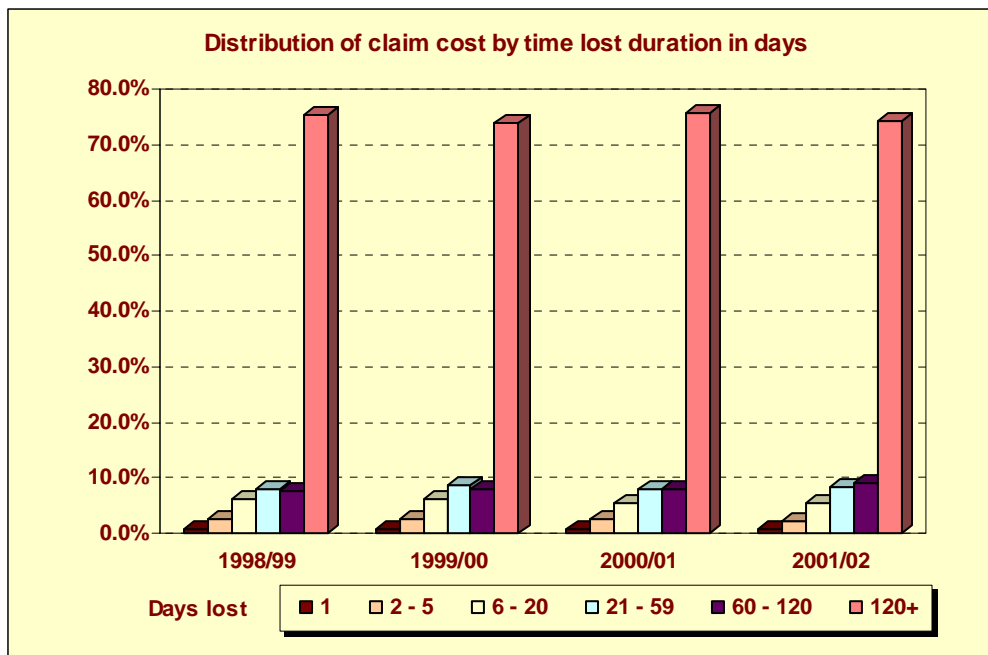


TABLE FOURTEEN

The above tables show that while the portion of claims with 60 days lost or more increased over the four year period from 15% to 21%, the distribution of the cost remained relatively stable at around 83%.

5. Conclusions

The process of amending the workers compensation Act since 2001 has been slow. Unlike the process, which occurred in 1993, the Labor Government has undertaken a detailed consultation process both in seeking submissions from stakeholders at the time of the 2001 *Guthrie Report* and almost continuously after the report. There is no doubt that the field of workers compensation has many interested stakeholders all of whom have a perception that their position or stance is the most appropriate, efficient and equitable. There is probably no other jurisdiction which is subject to so many competing interests. Notwithstanding these competing interests a common cause of concern is the inability of workers to return to work after their disability. No worker can profit from the current system because of the thresholds and caps, which are in place. For example after 4 weeks all workers will suffer some decline in their weekly

earnings, and with the cap set at 1.5 or 2 times average weekly earnings, some workers will still suffer immediate income reductions.

There is therefore for most workers a heavy incentive to return to work and table thirteen above shows that 80% to 85% of injured workers do return after 12 weeks. The 15% to 20% of claims which remain open after 12 weeks consume 83% of the costs of the Western Australian workers' compensation system.

On the other hand it has been asserted that, the higher the compensation benefit levels are as a percentage of pre-injury earnings ('the income replacement ratio') the lower the incentive for workers to return to work. In this sense it can be argued that step-downs create a financial incentive for early return to work which if combined with proper and practical injury management processes and employer communication can lead to efficient and effective outcomes for all system participants. These arguments have not received a great deal of support from worker advocates who note the financial hardship caused by arbitrary reductions in payments.

In 1999 the *Pearson Report* isolated the longer term claims as the focus for attention. Unfortunately, the attention has all too frequently been on attempting to prevent these workers from proceeding with common law claims. The emphasis needs to shift to provide re-training for those workers and a more focussed attempt at the injury management and return to work. That is where the remedy may lie and it is probably a distraction to be too preoccupied with the mechanics of common law claims and the quantum of statutory benefits. However given the complexity of compensation systems, it is clear that none of the major drivers can be ignored with impunity.

October 2004

© Robert Guthrie Curtin University

guthrie@cbs.curtin.edu.au

© Peter Lurie PricewaterhouseCoopers 2004 all rights reserved

peter.lurie@au.pwc.com