Demands on the Compensation Court: Preliminary Thoughts and Suggestions for Empirical Research

14 July 1993

Elsina M Rasink

LAW & JUSTICE FOUNDATION OF NSW
LIBRARY
GPO BOX 4264
SYDNEY NSW 2001

CHARTER OF THE CIVIL JUSTICE RESEARCH CENTRE

The principal purpose of the Civil Justice Research Centre is to help make the processes for resolving Civil claims in New South Wales more efficient, more cost effective, and more accessible to the public.

The Centre examines the policies that shape the civil justice system, the behaviour of the people who participate in it, the operation of its institutions and its effects on the community's social and economic systems.

The Centre adopts an interdisciplinary approach to the study of public policy issues; widely disseminates the results of its work to Government officials, legislators and judges; the unions; the business, consumer affairs, legal and research communities; and to the general public.

ACKNOWLEDGMENTS

This program of interviews would not have been possible without the cooperation of a number of people and organisations who provided most freely of their time. We are extremely grateful for this.

We would particularly like to mention the assistance provided by both the Chief Judge and the Registrar of the Compensation Court who were especially helpful in providing information and background material. The Judges and Commissioners of the Court were most cooperative, as were other staff members who provided assistance and information as requested.

The Chairman of the WorkCover Authority greatly assisted the program and the staff of the WorkCover Authority were helpful in commenting and providing information, as were the staff of the Attorney General's Department and the Department of Courts Administration.

We would also like to thank the barristers and solicitors who agreed to be interviewed and gave valuable assistance and feedback.

TABLE OF CONTENTS

APPENDICES

FIGURES

1.0 INTRODUCTION

1.1 Background

There is a growing awareness that if courts are to effectively promote the administration of justice, and adapt to changes in society and public administration, timely and accurate management information must be made available. Courts are not removed from the application of principles of efficient resource management and, like other publicly funded institutions, should be capable of adopting and adhering to measures of efficient performance.

In New South Wales, the Compensation Court is funded by the WorkCover Authority via a levy on all workers' compensation insurers. WorkCover is therefore concerned that its level of funding is justified by reference to meaningful statistical indicators. The Court itself provides one source of such information, as does the WorkCover claims database.

As in most organisations, the Compensation Court's "management" information is designed, as the name implies, to assist those involved in the ongoing processes of the Court. It is also used to discern trends and to evaluate the effects of previous strategies. Such management information, however, may not always be suitable to address broader policy issues that might arise from time to time. Also, there might be times when an independent source of information is considered appropriate.

The Civil Justice Research Centre was formed to provide a source of independent, empirical research to address the specific needs of those responsible for the civil justice system in New South Wales. It aims to provide relevant policy makers with the facts vital for their informed policy decisions, while maintaining a position of neutrality in policy debates and refraining from making specific recommendations for change.

The Attorney General requested that the CJRC consider conducting an independent program of empirical research focussed on the Compensation Court. This would aim to address issues of concern to the WorkCover Authority in which empirical data was not currently available. Particularly, the concerns of both the Attorney and the WorkCover Authority lay in four areas:

- the utilisation of Commissioners and the need for more Judges;
- the problems that exist in relation to the settlement of claims;
- the financial efficiency of the present Court circuit system; and
- the reliability of the recently introduced tracking system.

Before a program of empirical research can be formulated, broad areas of policy concern such as these need to be translated into researchable questions. The CJRC

therefore conducted a program of interviews with relevant individuals and organisations to clarify the context of the debate in each of these areas. This has allowed a number of specific research questions to be formulated while also providing the significant insight of a number of experts into the concerns of both the Attorney and the WorkCover Authority.

1.2 Approach Taken

This report is the second review of the resources of the Compensation Court since the changes to the Workers Compensation Legislation in 1987. Ernst & Young produced a resources review in May 1990 which dealt with resources then held, and required for the future, by the Court. While this report covers some of the same ground, it is considerably more specific in its aims and more circumscribed in its coverage.

It was recognised by the Ernst & Young report that the resource needs of the Compensation Court would be strongly influenced by the changes wrought by the new legislation on the broader compensation system. These changes include attempts to simplify the application of the law by the increased and expanded classification of claim/injury types, attempts to recognise a specific role for Claims Officers and Commissioners, the effects of the introduction of limited lump sum payments and the exclusion of the settlement mechanism except in very limited circumstances. Continued monitoring of the performance of the Court was seen as being necessary to fully determine the impact of the changes. This report identifies and discusses the effect of five years of such changes.

The Compensation Court itself has been the source of much of the data on which this report is based. It made available its monthly reports for the years 1990, 1991 and 1992 and almost all of the statistical data and graphs in this report have been derived from these. A summary of the information obtained from the monthly reports is included as Appendix 1.

As well, interviews were conducted with 27 people who work in, regularly use, or are affected by, the Court. Those interviewed included: Judges, Commissioners, Registrars and staff of the Compensation Court; Board members and staff of WorkCover; representatives from the Office of the Attorney General and the Department of Courts Administration; barristers and solicitors appearing mainly for applicants, and barristers and solicitors appearing mainly for insurers. These interviews have been used to identify issues of concern, to add meaning to the statistical data, and to suggest interpretations of the information gleaned from the Compensation Court's numbers.

1.3 Report Format

This report has been divided into sections which correspond to the four areas of concern raised with the CJRC by the Attorney General and the WorkCover Authority. In addition, Section 2.0 provides a summary of the principal findings of

the study and Section 6.0 includes details of a number of other issues which were raised by practitioners during the course of the study.

The first of the concerns raised, the utilisation of Commissioners and the need for more Judges, is considered in Section 3.0. This section includes an analysis of the listing and disposal performance of Judges and Commissioners, backlogs and projections.

The settlement of claims, and problems that exist in relation to settlement, is considered in Section 4.0; the Court circuit system, its financial efficiency and other parameters, in Section 5.0; and the computerised tracking system, its efficiency and reliability, in Section 6.0.

Three appendices complete the report. The first provides a summary of the Compensation Court's monthly statistical information. Appendix 2 presents dates for the expected retirement of Judges and Commissioners, and Appendix 3 provides details of the average costs of the Court's circuits.

2.0 SUMMARY OF PRINCIPAL FINDINGS

2.1 The Utilisation of Commissioners and the Need For More Judges

Listing Trends

2.1.1 Listing trends indicate a continuing increase in the number of matters coming before the Court.

2.1.2 When combined with the identified slow down in the disposal of cases, the difference between cases finalised and cases listed has steadily increased, to an average of 4,730 cases per month in the second half of 1992, compared with an average of 3,152 cases per month in the same period in 1991.

2.1.3 Requested listings are currently being allocated a hearing date some 28 to 30 weeks after the date the request for listing is filed.

2.1.4 Matters are not necessarily finalised on the allocated hearing date. Cases may not be ready or be only part-heard, requiring a new hearing date to be allocated in the next vacant slot, or may be struck out or stood over generally, requiring applicants to restart the process of applying for a request for listing. It is not possible to identify from the Court's figures precisely how many of the matters in the system have been subject to delays or have been through at least part of the process before.

The Utilisation of Commissioners

2.1.5 Commissioners were increasingly utilised in the latter half of 1992 by being given more matters to hear and Commissioners' productivity levels rose accordingly.

2.1.6 Commissioners' productivity levels are likely to continue at the higher rate, and to show some further improvement, if they continue to be allocated more matters.

2.1.7 Commissioners do not hear the full range of matters that come before the Court, some matters are given only to Judges for hearing. There is a view that the increasing complexity of cases gives less scope for allocation of matters to Commissioners and that this trend will continue.

2.1.8 Some of those interviewed believed that the two tiered system should be abolished. This would require either that Commissioners hear the full range of matters that come before the Court, rather than the limited range they now hear, or that they hear no matters at all and the Court be constituted entirely by Judges.

2.1.9 Commissioners are less costly than Judges, both in terms of salary and the conditions they receive and in terms of the number of support staff they employ.

2.1.10 Individual Commissioners show wide variations in the number of matters heard, with some Commissioners hearing on average as many or more cases per sitting day as Judges.

The Need for More Judges

2.1.11 Assuming that Commissioners' lists continue at their current level or a little above, and that no other changes are made to the current system, it was suggested that the appointment of two further Judges to the Court would enable the waiting time between request for listing and hearing date to be brought back to 16 to 20 weeks within a year (this being generally considered to be the optimum time between request for listing and hearing date). It would also enable Judges to take the leave owing to them and provide sufficient judicial strength to cope with the added workload of common law cases if this were considered desirable.

2.1.12 If Commissioners were able to be fully utilised then it was felt that the addition of one further Judge should enable the backlog of cases to be cleared in the same period of time or a little longer, depending on how leave entitlements were taken.

2.1.13 Full utilisation of Commissioners with no appointment of further Judges would result in an increased disposal of cases but it was thought that clearing the backlog could take over twice as long, depending on the range of matters allocated to Commissioners for hearing. The Court would be unlikely to be able to cope with additional workload in the form of common law cases.

2.1.14 It was considered that appointments could be made on a number of bases. One suggestion was that appointments could be made immediately, on the basis that as Judges retired they would not be replaced, so that the Court's total strength would be temporarily increased by one or two with a gradual reduction down to an agreed number of Judges as existing Judges retired. This option would enable the current backlog of cases to be finalised without permanently committing to the Court the full number of Judges required to do this.

2.2 The Problems that Exist in Relation to the Settlement of Claims

2.2.1 The right to settle claims as part of the litigation process was removed in 1987 for all future injuries. Those injured before the introduction of the amending legislation retained their settlement rights irrespective of the date on which they made a claim or appeared before the Court (subject to the Statute of Limitations).

2.2.2 Current matters before the Court include both pre-1987 injuries (where settlement is allowed) and post-1987 injuries (where no settlement is possible).

2.2.3 WorkCover believes that "the removal of the lump sum mentality associated with the former settlement provisions has been one of the major reasons for success" in achieving speedy rehabilitation in the majority of cases that fall within the scheme as a whole.

2.2.4 According to WorkCover, approximately 90% of claims under the scheme are finalised without dispute. Of those in dispute, approximately 60% are finalised without the need to go before the Court. The Court therefore sees about 4% of all claims made under the Act.

2.2.5 It appears from Court statistics that approximately 69% of cases brought under the pre-1987 legislation were settled either before or during their hearing. As these pre-1987 cases decrease, more cases run their full length so that today only around 32% of all cases coming before the Court are settled. This coincides with a measurable slowdown in the average time taken to dispose of a matter.

2.2.6 The lack of a formal settlement mechanism within the litigation process is felt by Judges, Commissioners and practitioners to be a major reason for the increase in the number of cases being run and the time taken to run them.

2.2.7 There is an informal settlement process. It requires the applicant to be eligible for a lump sum settlement under the Act, and does not therefore apply to all applicants, but where it does apply it appears to be widely used.

2.2.8 The informal settlement process is expected to be challenged and its survival is not certain. If a successful challenge is mounted then the number of cases being fully heard by the Court will increase, further slowing down the average disposal rate.

2.2.9 Once parties are within the litigation process, conciliation is considered to be difficult to achieve without a formal settlement mechanism.

2.2.10 Commutation of claims is considered by practitioners to be made excessively difficult for applicants by WorkCover. WorkCover believes that the Act is responsible for the degree of difficulty experienced.

2.2.11 Practitioners feel that there would be no necessity for more Judges if settlement provisions were reinstated. WorkCover is of the opinion that the reinstatement of a settlement mechanism would impede the successful resolution of the 96% of cases which do not go to Court and would result in significantly higher costs over the scheme as a whole.

2.3 The Financial Efficiency of the Present Court Circuit System

2.3.1 The cost of hearing a case on circuit will vary with the physical parameters of the circuit and the number of cases that are dealt with on that circuit. The financial efficiency of the system can be properly assessed only through more detailed research.

2.3.2 There are said to be significant non-financial benefits to applicants in having their cases heard on circuit. These include the availability of the applicant's own doctor and of access to known and trusted advice and support systems.

2.3.3 Taking the Court to the people is said to be one of the historical strengths of the Compensation Court.

2.3.4 All those interviewed agreed that it was preferable to start and finish a case in the applicant's area where possible. Solicitors indicated that it was often not possible to finish a case on circuit through lack of appropriate specialist advice in the area or the pressure of cases to be heard in the time allocated.

2.3.5 Even where cases cannot be fully heard on circuit and come into Sydney for completion, there are perceived to be benefits in commencing the case on circuit and taking evidence in chief there. It was generally felt to be less stressful for the applicant and considerably easier and cheaper to gain access to the applicant's doctor. It is not known how often a doctor's physical presence is, in fact, required. There was a view that most cases are decided on the basis of medical reports without the need for the practitioner's presence.

2.3.6 While the circuit system was generally considered to be an element that would be desirable to maintain if possible, some questioned the necessity and viability of some of the more exotic circuit locations.

2.4 The Reliability of the Recently Introduced Tracking System

2.4.1 The system is considerably more reliable than the manual system it replaced, although room for further improvement remains. Seventy five per cent of the Court's functions are currently computerised. The main tracking tool is the Registry Index Database.

2.4.2 The system continues to evolve according to the Court's perceived needs, at a pace apparently regulated by staff availability and budgetary constraints. There is room for significant further refinement and enhancement of the system.

2.4.3 Vulnerabilities in the staffing of the computer system that could cause disruption to its operation became evident during the course of this study. The Court has indicated that these have now been removed by further staff appointments.

2.5 Other Issues

Issues not strictly part of the brief, but raised by practitioners, are summarised below.

2.5.1 Both barristers and solicitors commented that the Compensation Court was extremely efficient compared with other courts in which they practised. All subsequent comments should be read with this in mind.

2.5.2 The quality of service offered by the Court's registry was of concern to a number of solicitors. In particular, they wished to be able to have files processed while they waited and then returned to them immediately. The Court has indicated that it is working on a system to achieve this.

2.5.3 The expense of, and length of time taken in, obtaining transcripts from the Court was an issue of concern to solicitors.

2.5.4 Both barristers and solicitors made the observation that there were "too many unnecessary and outdated rules" in the Court and that these should be streamlined rather than computerised. They also felt that the Court was overly pedantic in its administration of the rules.

2.5.6 The Court's current rules were adopted by the Rules Committee some two years ago. Although barristers and solicitors have representatives on this committee there did not appear to be any recognition of this avenue of influence on the rules among practitioners.

2.5.7 Both barristers and solicitors felt that the Judges' daily lists should be considerably longer. They said that this would inevitably result in the finalisation of many more cases. They felt the Court showed excessive concern about keeping the level of "not reached" cases down. They also felt that the lists were erratic, in the sense that some periods had very few cases listed while others were reasonably full.

3.0 THE UTILISATION OF COMMISSIONERS AND THE NEED FOR MORE JUDGES

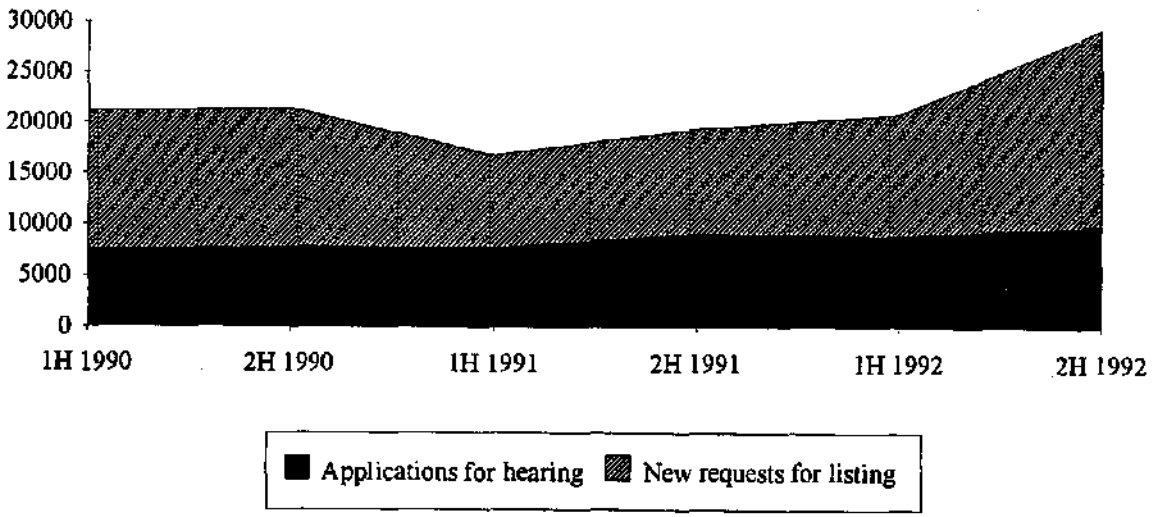
3.1 Listing Trends and Future Demands on the Court

There is an increasing number of matters coming before the Court, notwithstanding the fact that 96% of claims are finalised without recourse to litigation.

Figure 1: Applications for Hearing and New Requests for Listing gives an insight into the *likely* pressures on the Court. New requests for listing are the most likely to translate into Court appearances and, in any event, are actively monitored by the Court, thereby utilising Court time. Applications for hearing remain within the power of the applicant, but it is reasonable to assume that a consistent proportion of these will be processed by the Court. The growth in new requests for listing shown in *Figure 1* is an indication that the demands on the Court will increase as these cases move through the system.

During the second half of 1992 there were 9,788 applications for hearing made, an average of 1,631 per month, 19,358 new requests for listing were filed, an average of 3,226 per month.

Figure 1. Applications for Hearing and New Requests for Listing



Source: Compensation Court of New South Wales (see Appendix 1)

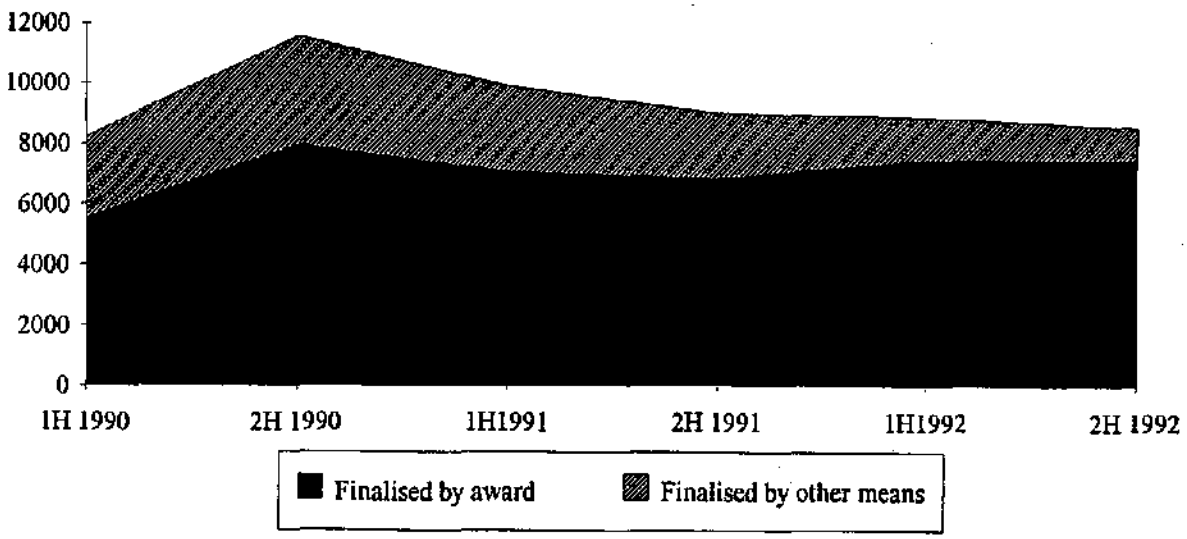
The Court keeps a record of matters "to be listed". Although the Court's assessment of matters "to be listed" is somewhat higher than the numbers used in this report the difference between the two has decreased over the period under

review, so that by the second half of 1992 the Court's monthly average number of matters "to be listed" is higher than the numbers shown in *Figure 1* by 1,727 per month. This difference appears to be largely made up of matters "to be mentioned", which average 1,623 per month over the second half of 1992.

Matters "to be mentioned" are matters already listed for hearing by the Court which need to come before the Court in some form to determine interlocutory or case management issues before being heard. The underlying cases are therefore already included in the statistics on matters listed; the Court's refinement appears to attempt to isolate the number of appearances that might be required, each one utilising Court time. Requests for listing and applications for hearing do not measure the number of appearances that may be required before the Court, but only the number of matters underlying such appearances. Predictions of the future needs of the Court should not differ significantly whether the number of matters likely to come before the Court are determined, as in this report, or whether the number of appearances likely to arise from such matters are isolated, as in the Court's figures. Both are based on the same number of cases in the system.

Figure 2: Finalised Cases shows the number of finalised cases slowing down after reaching a peak in the second half of 1990. Cases may be finalised in a number of ways, including by the issue of an award, by being struck out or stood over generally by the Court, or by being discontinued by the applicant. In all cases finalised by means other than an award, the applicant is able to re-start the process with a new application for hearing. It is thought that around one third of cases struck out or stood over generally come back into the system by being re-listed.

Figure 2. Finalised Cases



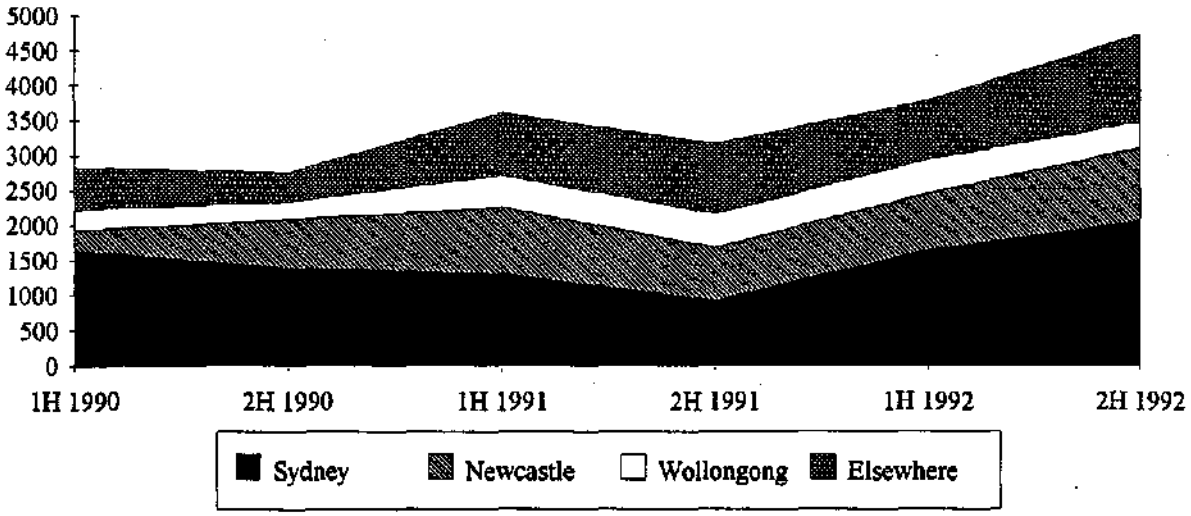
Source: Compensation Court of New South Wales (see Appendix 1)

The increase in requests for listing shown in *Figure 1* and the relatively flat number of finalised matters shown in *Figure 2* indicate that not only are more matters coming before the Court but an increasing number of matters are remaining in the system for longer periods, with a consequent increase in the time it takes for listings to be finalised.

Figure 3: Average Listed Cases shows the average number of listed cases in the Court system at any given time in each half year. This is the difference between existing cases brought forward from the previous month, plus new listings, less cases disposed of. There was an average of 4,730 matters listed for hearing at any given time in the second half of 1992. Annually, the average number of matters listed at any given time in 1990 was 2,784; in 1991 it was 3,379 and in 1992 it was 4,255.

These numbers show only cases which have come under the Court's control through the listing process. They exclude all matters for which an application for hearing has been made but which have not yet reached the stage of a request for listing being filed. They therefore give a very conservative estimate of the *known* pressures on the Court. The number of cases listed does not show the number of times any given matter may come before the Court for mention or re-listing before it is finally heard.

Figure 3. Average Listed Cases



Source: Compensation Court of New South Wales (see Appendix 1)

The basis on which the assessments of the future demand on the Court have been made is the number of matters listed for hearing by the Court or for which a request for listing has been filed. They are matters which are reasonably certain to

come before the Court in the near future. It has then been modified by including applications for hearing, of which some but not all will become requests for listing. Increases in the number of matters listed are brought about not only by new listings but also by the slowing down of disposal rates within the Court system.

Although hearing dates are currently being given within 28 to 30 weeks from the filing of a request for listing, these may be further delayed in many ways - if the Court's case management process is not adhered to, or if the case is not ready to proceed for other reasons - and the matter may need to be allocated a new date. In such a case it will be allocated the next available "slot" in the Court's calendar for matters of that kind. For example, not reached matters and expedited hearing matters are rescheduled as quickly as possible, currently to a date about six weeks after the rescheduling.

If the case is started on the hearing date but cannot be completed, it also needs to be fitted into the next available slot. Matters stood over to a date to be fixed are currently allocated dates commencing about eight to ten weeks after the date of standing over, provided the parties have filed certificates of readiness. All day or lengthy matters will not be rescheduled within ten weeks. Court vacations may increase these periods.

The three *Figures* taken together show a slowdown in finalising cases which has prevented the Court from keeping up with new listings. This has led to more matters staying in the system for longer periods. If these directions continue then applicants will face increasing periods between the filing of a request for listing and the finalisation of their matters.

3.2 The Court's Ability to Meet Demand: Sitting Days, Matters Listed, Cases Heard and Finalised

The Court's ability to meet the increasing demands on it is limited by the sitting days available to it and by the rate at which Judges and Commissioners can hear and finalise cases.

The Compensation Court currently has twelve permanent Judges, one Acting Judge and seven Commissioners. Two of the Judges are also members of the Dust Diseases Tribunal. The pressure of work in the Tribunal means that these Judges are largely unavailable for work in the Compensation Court. One Commissioner assists in registry functions, with the effect of lessening his time available for work as a Commissioner.

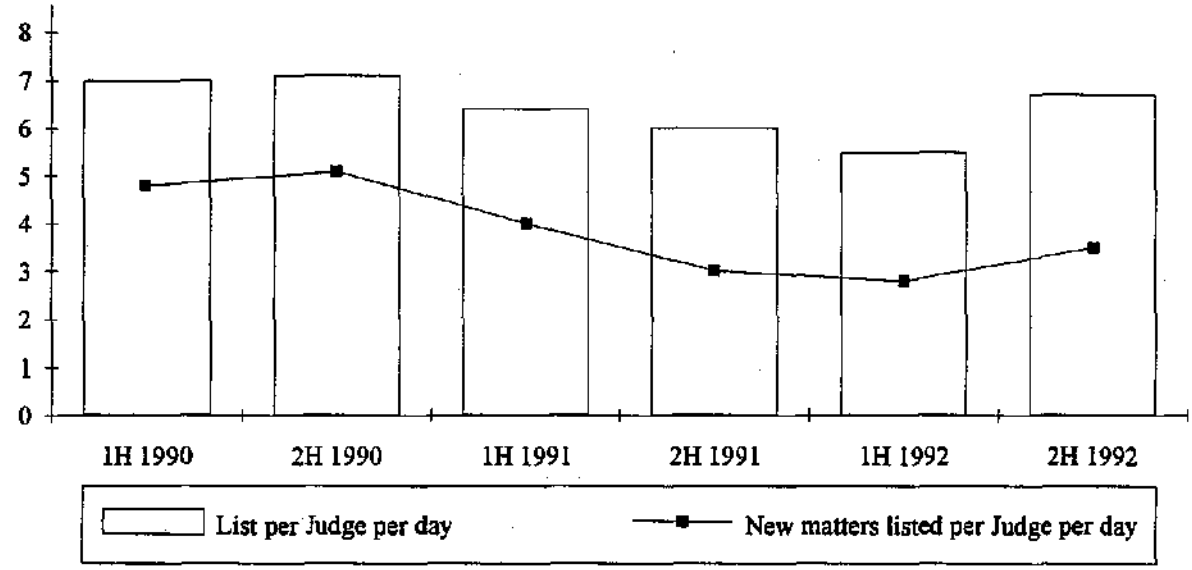
About a third of the Judges' sitting days take place in Newcastle, Wollongong and on circuit in other country areas. The proportion of work outside Sydney for Commissioners is significantly less, but appears to be growing steadily, reaching 10% by the second half of 1992. This is almost entirely made up of work undertaken in Newcastle and Wollongong.

Sitting days for both Judges and Commissioners are slightly less than the number of days in the Court calendar, reflecting unavailability due to illness or leave. A number of Judges have indicated their wish to take leave in the near future which will reduce the number of Judge sitting days in 1993 and 1994.

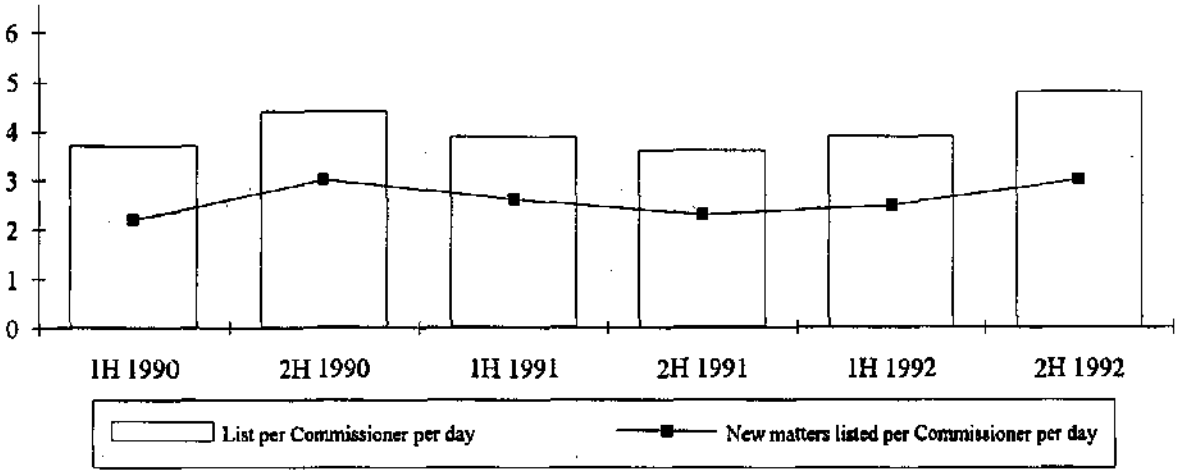
The average number of matters listed per Judge and per Commissioner per sitting day in Sydney is shown by *Figure 4: Average Matters per Sitting Day: Sydney 1990-1992.*

Figure 4. Average Matters per Sitting Day: Sydney 1990-1992

Judges



Commissioners



Source: Compensation Court of New South Wales (Appendix 1)

Listed matters per Judge per day declined steadily from 6.96 in the first half of 1990 to 5.48 in the first half of 1992. In the second half of 1992 listed matters per Judge per day increased to 6.73. Commissioners' lists fluctuated more narrowly, from 3.68 matters per day in the first half of 1990 to 3.87 matters per day in the first half of 1992. In the second half of 1992 they averaged 4.75 matters per day.

Judges average new matters listed fluctuated from a low of 2.98 new matters per day in the second half of 1991 to a high of 5.13 new matters per day in the second half of 1990. For Commissioners, new matters listed fluctuated between an average of 2.18 in the first half of 1990 and an average of 2.97 in the second half of 1992. The average number of new matters listed per day during the second half of 1992 was 3.51 for Judges and 2.97 for Commissioners.

Figures 5: Cases Dealt With and Actual Sitting Days compares the total cases actually dealt with by Judges and Commissioners with their total sitting days. Cases dealt with include cases which were settled, struck out or stood over. Historically, around one third of cases struck out or stood over reappear to be dealt with on a later occasion.

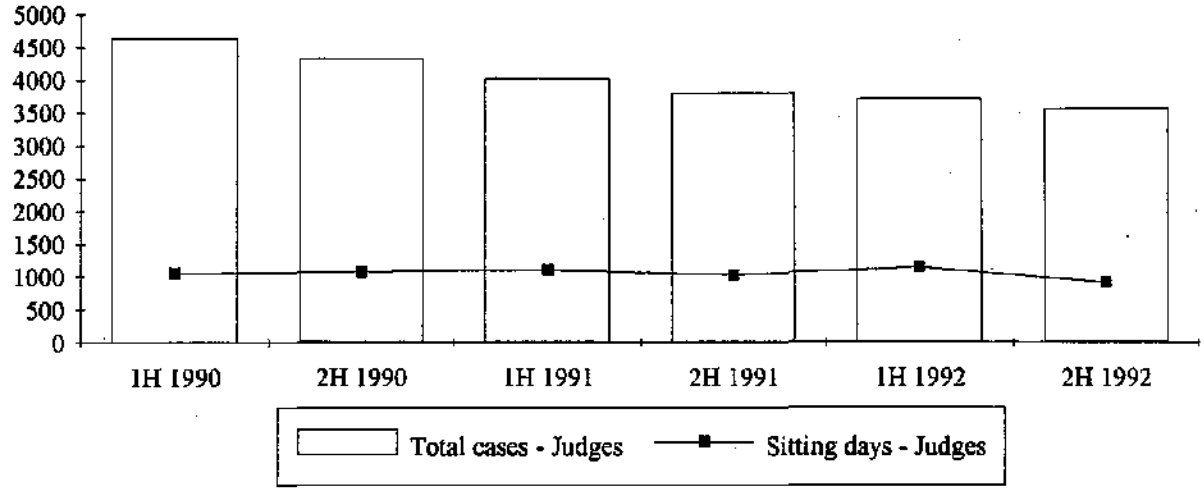
Total cases dealt with by Judges reduced in proportion to sitting days, which remained more or less constant up to the second half of 1992, when they decreased slightly. The number of cases heard by Judges in the first half of 1990 was 4,647. By the second half of 1992 this had decreased to 3,558. The number of cases dealt with continued to decline notwithstanding the increase in Judges' daily listings in the second half of 1992.

As an increase in listings is usually associated with an increase in matters finalised, and as cases dealt with include matters stood over, struck out or finalised by consent of the parties, this decrease indicates either a general lengthening of time taken for hearing cases, or a lessening proportion of settled, struck out and stood over cases. Both Judges and practitioners suggest that the inability to settle cases under the new legislation results in more matters being run and cases taking slightly longer than under the old legislation. The need for more detailed judgments is another factor tending to lengthen the time taken to hear and finalise matters. It was also suggested that fewer "easy" cases are now being litigated, these tend to be finalised without recourse to litigation, using guidelines laid down by earlier cases. The number of cases dealing solely with Sections 66 and 67, the lump sum provisions of the Act utilising many common law principles, also increased each year from 1990 to 1992. Under the guidelines set out in Schedule 3 of the Compensation Court Act only Judges can deal with Section 67 matters, to assess compensation for pain and suffering associated with an injury.

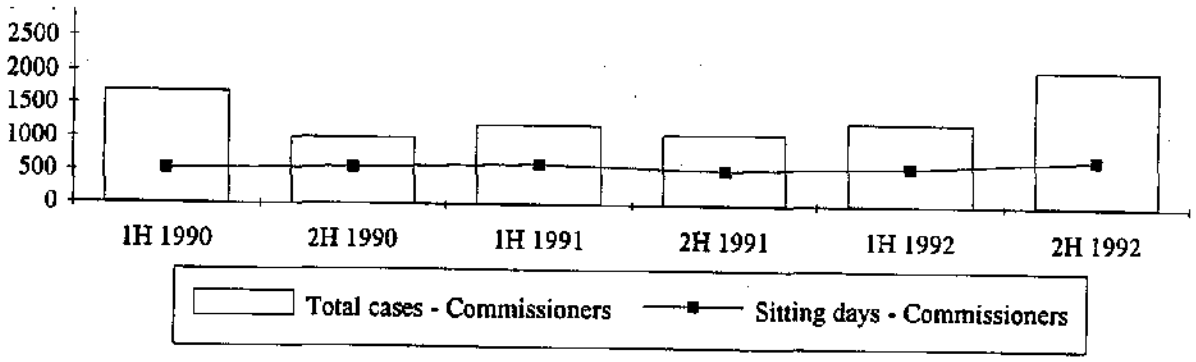
Cases dealt with by Commissioners moved from an initial high point of 1,694 cases in the first half of 1990 to average 1,088 per half year for most of the period. However, the number grew to 1,241 cases in the first half of 1992 and then to 2,059 in the second half of that year. This appears to coincide with an increase in the number of cases listed for hearing by Commissioners.

Figure 5. Cases Dealt With and Actual Sitting Days

Judges



Commissioners



Source: Compensation Court of New South Wales (Appendix 1)

3.3 Utilisation of Commissioners

Commissioners were increasingly utilised in the latter half of 1992 by being given more matters to hear and their productivity levels rose accordingly.

When looked at solely in group terms, the overall picture shows Judges as being somewhat more productive than Commissioners. The gap between the two groups, however, steadily narrows from a difference of more than three matters per day at the start of 1990 (with Judges each hearing 6.96 and Commissioners each hearing 3.68 matters per day on average) to a gap of less than two at the end of 1992 (with Judges each hearing 6.73 and Commissioners each hearing 4.75 matters per day on

average). New matters listed show a similar pattern, with very little overall difference showing from the second half of 1991. It would appear that, although Commissioners' productivity is not as great as that of Judges, when set against their lower cost structure it may be considered acceptable. In any event, the situation appears to be improving.

It is difficult to precisely ascertain the reasons for the average productivity gap between Judges and Commissioners. One reason was said to be the limitation on matters listed for hearing by Commissioners. The view has been taken that some cases are more appropriate for Commissioners to hear than others, and there has been a vetting of the types of cases listed for Commissioners, thereby reducing the pool of cases available for them to hear.

Over most of the period 1990 to 1992, Commissioners' average lists have been consistently smaller than those of the Judges, which may be both a cause and an effect of their lesser productivity overall. From the Court's statistics on matters listed and finalised, there appears to be a correlation between the number of matters listed and the number of matters finalised which holds true even if the matters listed are not reached. It was said by Commissioners, barristers and solicitors that the listing process itself, through bringing the parties together and focusing their minds on the relative strengths and weaknesses of their positions, was often sufficient to enable the parties to reach agreement on outstanding issues so that many matters were finalised without the need to appear before the Court for anything more than a consent order.

Where lists are limited there is less opportunity for this process to take place. From 1992, and especially the second half of 1992, there was a rise in the number of cases dealt with by Commissioners to an average of 3.86 cases per Commissioner per day in the first half of the year and an average of 4.75 cases per Commissioner per day in the second half. This rise was from a base of 3.61 cases a day in the second half of 1991. It appeared to coincide with an increase in the number of cases routinely listed for hearing by Commissioners. It also coincided with the increased utilisation of Commissioners in the city, where two Commissioners now generally sit at any given time, and with the increased presence of Commissioners in Newcastle and Wollongong.

Caution must be used in using past changes to predict the future. The makeup of cases heard by Judges and Commissioners, while apparently quite different in the past, appear to be coming closer together for the two groups as Commissioners are given a wider range of cases to hear. There are still, however, a number of areas where only Judges hear matters. It cannot be said with any certainty what effect the stricter past allocation system had on productivity levels, although it was commonly remarked that it was almost impossible to assess the difficulty of a matter before the hearing started.

Individual Commissioners show wide variations in the numbers of matters heard

The utilisation of Commissioners as a group thus appears to be improving, in the sense that more matters are being listed for them and a consequently greater number of matters are being finalised. However, among those interviewed there appeared to be a consensus that Commissioners cannot be looked at as a group but must be individually considered. Comments from almost all those interviewed indicated that Commissioners show such a wide range of competency and productivity that a great deal of care should be taken in dealing with them as a group. Thus, it was said that the average cases dealt with per sitting day by Commissioners generally will bear no meaningful relationship to the number of cases dealt with by any individual Commissioner. Some Commissioners have an output which is as high or higher than that of a Judge, others are significantly below that. It was said that some Commissioners were being appealed against much less than in the past while others continue to be consistently appealed against.

The average productivity gains therefore disguise the fact that within the group the very high utilisation of certain Commissioners appears to be offset by the very low utilisation of others. A key issue in increasing the utilisation of Commissioners generally is the extent to which simply increasing Commissioners' listings will result in more cases being finalised. It was indicated that there are often significant differences in the length of lists heard by different Commissioners. This is not necessarily a direct function of the Court's allocation processes, but includes a certain amount of self selection on the part of practitioners as they attempt, often successfully, to remove cases from one Commissioner's list into another's.

Once Commissioners are working at their various optimum levels of productivity, given their respective competencies and motivation, further listings could simply result in an increase in matters "not reached". Issues such as competency and motivation appear to be generally accepted as being the key to the differing productivity of different Commissioners, but there is no widespread agreement as to the best course of action to follow for the future encipher as improvements are concerned, nor is there any apparent consensus on whether Commissioners as a group should be retained or not.

On the basis of the workload carried by some Commissioners and the low rate of successful appeals against their awards, combined with the relative costs of a Commissioner as against a Judge - costs which include not only the higher salaries Judges receive but the relative staffing provisions as between Judges and Commissioners, where Judges each have an Associate, a Tipstaff and a Monitor while Commissioners each have an Assistant - it appeared to many of those interviewed to be worth trying to make the system work more effectively rather than abandoning it. It was suggested that the positive experiences of some Commissioners indicate that the problems which exist are not necessarily inherent defects of the underlying scheme and can, therefore, be remedied without going to the lengths of legislating for a new system. This view, taken by some Commissioners and practitioners, is by no means universal and a number of practitioners expressed considerable reluctance to use Commissioners, feeling that

it was an experiment that failed and that they would prefer the Court to use only Judges to sit on compensation matters.

To summarise the divergence of views on future options regarding Commissioners: Judges are generally against the appointment of further Commissioners, citing the changing nature of cases coming to the Court and the difficulty of case allocation. WorkCover has no position on the Court's internal structure, not seeing it as part of its role to comment on the matter. Practitioners are generally against the two tiered system, stating that it is inefficient and belittles the work of those in the "lower" tier. They would strongly prefer that Commissioners do "all or nothing" in terms of the types of cases they are allocated to hear. Commissioners have mixed views on possible options for their future, with some indicating a desire to see career paths established which might include appointments to other tribunals or to the bench for appropriately qualified Commissioners.

3.4 Future Options Regarding Commissioners

The perceived utilisation of Commissioners commented on by many of those interviewed inevitably leads to the issue of what options are open in relation to Commissioners. That is particularly so where WorkCover's goals of speed and efficiency in finalising claims, when added to the Court's goal of achieving justice for the parties before it, indicate the need to look for workable, cost-effective processes. To the extent that the Commissioner resource is under-utilised there may be an ability to increase Commissioners' productivity to overcome some of the increasing delays now evident in the system. During the course of interviews the following were mentioned as being possible avenues for further exploration.

Continuation of Compensation Court with no change to current structure or personnel

It was said that to continue to operate the Court in the same way with the same Commissioners would be likely to result in some further improvement in overall productivity as a function of the increased lists now being given to Commissioners. It was felt that it would also continue the forum shopping evident among practitioners as they attempt to avoid certain Commissioners, exacerbate the problems of collegiality and morale which inevitably occur when such a wide range of behaviours is allowed to persist without apparent censure for those at the low end or reward for those at the high, and increase the likelihood of the reputation of the Court being tarnished as applicants question why their cases are taken out of the lists for no apparent reason or as they are subjected to decisions which their Counsel assures them will be overturned on appeal.

Judges to hear all Workers' Compensation matters

It was suggested by some, having regard to the increasing complexity of matters coming before the Court, the increase in actions solely concerning Sections 66 and 67 with the latter's requirement for experience in common law adjudication, and the guidelines for determining the allocation of cases, that the legislation could be

amended to provide that only Judges would be able to hear and determine workers' compensation matters. Such an amendment might have effect only on new appointments, in which case the current Commissioners would simply continue until retirement but no new Commissioners would be appointed, or the amendment might take effect immediately on proclamation in which case the existing Commissioners would need to retire or to accept alternative appointments.

Improvements to Compensation Court's operations

Concerns were expressed on the disparity in contribution to the Court's work among Commissioners. It was felt by some that the operation of the Court could be improved by removing this cause for concern.

On a number of occasions during the study, the advantage of a legal background was raised. If Commissioners were retained and new Commissioners were appointed, it was felt that future appointees should have legal qualifications or experience. At the very least it was thought that non-legally qualified appointees would benefit from exposure to and training in relevant legal concepts and procedures before commencing to sit as Commissioners.

Amendments to the operation of the two tiered system

It was suggested that the continuation of the Court's two tiered system, by which only certain cases are allocated to Commissioners for hearing, was not inevitable. With less dichotomy in contribution between Commissioners and Judges, except for cases dealing with Section 67 and other statutory restrictions, it would be open to the Court to determine the allocation of cases between the two groups.

3.5 The Need for More Judges

In spite of the increasing utilisation of existing Commissioners, the gap between cases disposed of and new requests for listing continues to increase. Given the accumulated leave, pending retirements (see Appendix 2) and need to make provision for illness of the Court's Judges, and the fact that Judges are now indicating a wish to take accumulated leave, the filling of the gap between supply and demand for the Court's services is unlikely to come from the current Judges. In fact, all indications are that they will not be able to continue to contribute at the same level. The Court has requested the appointment of two additional Judges to meet the increasing demands.

This raises the issue of whether the Court's need is specifically for Judges, or whether resources could be more efficiently used by appointing further Commissioners, or a mixture of Judges and Commissioners.

For the sake of attempting to quantify the number and type of appointments it will be assumed that any Commissioners appointed would fully contribute to the output of the Court. This essentially means that there should be little difference in terms of number of matters heard irrespective of whether new appointees were Judges or

Commissioners. This would, however, depend on the allocation of sufficient matters to them. If, as was suggested by the Judges, cases are becoming more complex and if the present practice of allocating only certain categories of work to Commissioners remains unchanged then the appointment of Judges would give considerably greater flexibility than the appointment of Commissioners. Current Court practice also provides that only Judges go on circuit (other than to Newcastle and Wollongong). It is likely that circuits will increase with the increasing demand for listings from country areas.

The greater flexibility achieved by appointing more Judges carries a greater cost. Judges salaries are greater than those of Commissioners, they receive more generous allowances, leave entitlements, superannuation and other such provisions. Their sitting days are less and their staff considerably more than Commissioners. They also command a higher standard of chambers.

The number of appointments that are likely to be required will vary with other choices that are made in relation to the Court, its structure and procedures. Assuming that:

- no changes are made to the Court's jurisdiction;
- circuits continue at a level sufficient to meet demand;
- new listings continue to increase at about the same rate as in the past three years;
- the efficiency of the Court's internal systems does not change significantly;
- no changes are made to current appointments except those resulting from retirements in the normal course of the Court's business;
- Judges and Commissioners deal with three to four new matters per day; and
- Judges and Commissioners continue to sit for 190-195 days per year;

then the provision of two extra Judges as requested by the Chief Judge, and the maintaining of that judicial strength should enable the excess backlog of cases (accepting that a certain time is required to give applicants time to properly prepare their cases) to be eliminated within a year. The Court expects increased listings and the taking by Judges of their leave entitlements to provide ongoing work for the larger complement of Judges. It has also indicated that an increase of judicial capacity would enable it to hear common law personal injury cases governed by the 1987 Act.

There are many assumptions underlying this assessment. One of the most important is that no changes are made to current appointments. If changes in relation to

Commissioners were made then it would be unlikely that the permanent addition of two Judges would be needed. In such a case, or in the case where the workload did not increase as expected, it was suggested that one of the following could be considered:

- Two new Judges might be appointed to enable the immediate backlog to be dealt with, but no new appointments would be made on the retirement of the next two Judges. This would give an immediate boost to the Court's strength without permanently increasing judicial numbers.

- One new judicial appointment might be made, either on the same basis as outlined above or as a permanent addition to the number of Judges and the remaining backlog could be taken up by the increased productivity of the Commissioners.

- No new judicial appointments could be made, with the increased utilisation of Commissioners, achieved through measures discussed earlier, taking up the backlog. This would result in a slower reduction in the waiting list of cases than in either of the other options.

Any changes in the Court's jurisdiction, whether increasing or decreasing its scope, would obviously also affect the assessment of judicial strength required. The assumption of responsibility for hearing common law workers' compensation claims, for example, could be undertaken in conjunction with the appointment of additional Judges, whether as a permanent or as a temporary boosting of the Court's numbers, but would be less viable with the appointment of additional Commissioners.

3.6 Further Research

To more comprehensively address the concerns of the Attorney and the WorkCover Authority in relation to the utilisation of Commissioners and the need for more Judges, the CJRC could consider some of the following questions as part of a program of empirical research:

- What is the "real" time taken to finalise cases?

- What number of cases are heard once only, from start to finish?

- What number of cases go through the Court system a second or third time, and what factors determine this?

- Which types of cases are heard by Commissioners?

- Which types of cases are heard by Judges?

- What is the basis for the allocation of a case to a Judge or a Commissioner?

- How has such allocation changed over time?

- What are the appeal rates and success rates from Judges and Commissioners?

4.0 THE SETTLEMENT OF CLAIMS

One of the features of the 1987 legislation was that it removed the opportunity for the parties to a dispute to resolve the dispute by way of a lump sum settlement. Settlement, in this context, often meant the compromising of legal rights and liabilities associated with a claim in order to reach agreement on a single lump sum to be paid as full recompense for the injury. Parties are now restricted, except in certain limited circumstances, to compensation by means of ongoing weekly payments. When the new legislation was introduced it was expected that this would eliminate the lottery mentality effect of lump sum payments, encourage workers to resolve disputes and agree to compensation payments without recourse to law, and help workers seek an earlier return to employment.

These expectations appear to have been realised insofar as the vast majority of claims under the legislation are finalised without recourse to the law and 92% of injured workers are back at work within a year of their injury. For the small percentage of cases that are litigated, however, there is continuing debate as to whether the removal of lump sum settlement opportunities has been advantageous to the injured worker. Judges, Commissioners, barristers and solicitors are virtually unanimous in decrying the lost opportunities for settlement of cases. WorkCover, on the other hand, believes the principle of no settlement to be fundamental to the overall success of the scheme.

It is clear from the statistics that cases are taking longer to run overall, and that more cases are coming before the Court. Practitioners say that these cases include many that would have been settled under the previous rules, if not before the hearing then at least very soon after its commencement. This settlement process historically enabled the Court to dispose of its list very quickly. The Court's lists are increasingly being taken up by many of these cases now running their full course, and part of the increasing backlog is directly referable to this.

It is the view of both barristers and solicitors, independently given, that the major problem with the current legislation, and the major cause of the backlog of cases being experienced by the Court, is the inability of workers to compromise and settle cases once they have entered the Court system. They perceive settlement of claims to be both rehabilitative and effective for many injured workers, particularly younger workers for whom it often means the opportunity to pay off a mortgage and perhaps establish themselves in a small business. They say that these sorts of activities are simply not possible with ongoing weekly payments, which are often insufficient to meet mortgage and other commitments and can result in great family stress. It is also the view of practitioners that weekly payments often require the injured worker to continue to maintain the effects of the injury well beyond a period that would be considered desirable for speedy rehabilitation. It was stated by solicitors that their clients, by and large, would strongly prefer settlements and would not usually choose to become weekly pensioners.

WorkCover has equally strongly held views to the contrary. It believes that the re-introduction of settlement provisions would jeopardise the success it now achieves in the 96% of cases which are finalised without the need for litigation. It sees the litigation process as only a small, albeit expensive, part of the overall scheme which has rehabilitation as its main aim. To this extent, the applicants coming before the Court are not the typical applicant that the scheme deals with and for whose benefit the prohibition against settlement operates.

An indication of an apparent community need for some settlement mechanism is shown by the informal settlement procedure that appears to have arisen in spite of the lack of formal settlement mechanisms in the Act. Workers regularly elect not to pursue their rights under the weekly payment provisions, provided that insurers do not object to the worker's receiving a reasonable lump sum under the Section 66 and Section 67 provisions for compensation for permanent injuries and for pain and suffering. While this was no doubt not within the contemplation of the drafters of the Act, it is said to demonstrate a need among users of the system for a certain flexibility in its administration. Further research would need to be undertaken to examine the pervasiveness of such practices, and the extent to which these indicate a community need for a procedure that allows complete financial finalisation of a matter in some circumstances. Anecdotal evidence suggests that this informal settlement mechanism is in widespread use wherever the nature of the worker's injuries support a lump sum approach. There appears to be no indication, according to practitioners, that these informal settlement mechanisms result in payments that are excessive. They are said to be very much more an indication of applicants and insurers each wishing to finalise their rights and liabilities and not maintain an ongoing relationship. There was, among all of those spoken to, an awareness that this informal mechanism is under constant threat of challenge, and that if it is successfully challenged even this limited avenue of negotiation will close. Indeed, WorkCover indicated that it had the practice under observation and that it would consider a challenge if necessary. Other potential challengers would be applicants who had entered into such an informal arrangement, but considered themselves not bound by it for one reason or another.

Actuarial advice given to WorkCover indicates that the re-introduction of settlement provisions would result in substantially higher overall costs for the scheme as almost all applicants would again factor lump sum expectations into their calculations. It was suggested by practitioners that the fear of people "rorting" the system through the lump sum mechanism, by bringing on cases that had no intrinsic merit in the hope of achieving a lump sum figure from the insurer simply to avoid the time, effort and cost of running a case is largely illusory. It was said that any system would inevitably attract a certain proportion of people who would attempt to fraudulently gain from it and that this was not in itself a good reason for cutting out a workable mechanism. A return to a system of settlements under the supervision of experienced Judges, who were well able to identify such fraudulent claims as did occur, would better utilise the Court's time, enable more cases to be finalised, better suit injured workers and reduce the overall cost of the scheme by reducing the tail of claims now building up. It would also lessen the cost to individual employers of injured workers, whose premiums now increased for the

duration of the time an injured worker was paid under the scheme - which could be right up to retirement age - often very long periods in the case of younger workers. WorkCover agreed that the cost of the scheme was partly paid for by the increase in premiums borne by the employer of the injured worker but saw this as a political decision rather than an issue affecting its administration of the scheme.

The conciliation processes built into the Act, which utilise Conciliation Officers employed by WorkCover, were felt by practitioners to be of limited value as, at that early stage, the injured worker was generally not fully aware of the extent of his or her rights, the issues arising out of the case, or the strengths and weaknesses of the claim. The worker was not, therefore, in a position to make a meaningful decision in relation to it. Lack of any right or ability to have legal representation through this process was felt by practitioners to be inequitable to the worker, as that person would almost inevitably be inexperienced in negotiating, would not have a background against which to assess the reasonableness of any offers made and would be faced by a very experienced insurance officer on the other side.

WorkCover saw the conciliation process differently, saying that experience has shown that the parties to disputes which are conciliated at an early stage are not so entrenched as to prevent some genuine reconsideration of the issues in dispute. It believed that the proportion of disputes resolved without recourse to the law could increase by the greater use of the existing statutory conciliation procedures, although it stated that this process will be much more effective in the less complex disputes. It also pointed out that where all parties to a dispute and the Conciliation Officer agree, legal representation at conciliation conferences may occur.

Practitioners also indicated that any conciliation scheme needed to have a settlement mechanism to be most effective. Without such a mechanism there was little incentive for the parties to negotiate. It was pointed out that there is currently little incentive for parties to seriously enter conciliation processes, as there is very little that can be put on the table to make it worth their while. Lack of settlements meant more cases being run, because practitioners had already spent the time and the money getting them ready to go so they felt they might as well run them. It often appeared that practitioners' comments on conciliation processes were focused on conciliation attempts at a stage somewhat later than that being described by WorkCover, at a point when both the applicant and the insurer had obtained advice and attempts were being made to finalise the matter by consent.

The difficulty of commuting weekly payments to a lump sum with WorkCover's approval was mentioned as a stumbling block by practitioners. Although there is provision for this under the Act, it appears difficult to achieve in practice, even where all parties concerned are in agreement on all the major issues. Circumstances in which WorkCover permits commutation do not include cases in which liability is an issue, and commutation does not therefore allow a party's legal rights to be compromised for the purpose of settling a claim. WorkCover indicated that it was the Act itself which imposed rigorous requirements and WorkCover did no more than ensure that these were complied with.

To more comprehensively address the concerns of the Attorney and the WorkCover Authority in relation to the settlement of claims, the CJRC could consider some of the following questions as part of a program of empirical research:

- How many cases are settled by the parties consenting to a trade off between weekly payments and lump sums to which the worker might be entitled?

- Do these settlements occur in only certain classes of injury or with certain groups of injured workers or are they spread over all cases with the prerequisite lump sum components? If they occur in only some circumstances, what are these circumstances?

- What proportion of applicants who consent to lump sum awards in circumstances where they would ostensibly have been eligible for a weekly payment shortly afterwards become, for any reason, government pensioners? Would the receipt of the weekly compensation payment have affected the applicant's eligibility for such a pension?

5.0 THE COURT CIRCUIT SYSTEM

The debate in relation to the financial efficiency of the present Court circuit system revolves around the utility and desirability of maintaining the present Court circuit system, and the cost effectiveness of that system. The circuit system is a system whereby Judges and appropriate Court staff travel around New South Wales and interstate, and sometimes overseas, to hear cases in an injured worker's locality rather than requiring applicants to come to the Court's Sydney location. Commissioners' circuits are generally limited to sittings at Newcastle and Wollongong, where they sit in conjunction with a Judge at the same location. Newcastle and Wollongong, while still referred to as circuits, appear to have developed into seemingly permanent regional court structures.

It has not been possible to isolate the cost of circuits in proportion to matters dealt with for this review. Absolute costs for circuits, as provided by the Court, are included as Appendix 3. As a general rule the financial efficiency of the circuit system would be expected to increase as the number of cases listed for any given circuit increased, up to an optimum number. Proper financial management of the Court's business would suggest that effort be expended in ensuring that adequate listings were in place before finalising a circuit, and that circuits already organised and for which it became evident that only a small number of cases were left to be heard should be combined with other suitable circuits or postponed. The Court already monitors planned circuits and tries to take appropriate steps where it becomes obvious that there is less than a full list to be heard.

The Court has a long history of going to workers, rather than necessarily requiring injured workers to come to it. Many people interviewed identified this as one of the Court's distinguishing features. It was generally considered to be an element that it would be desirable to maintain if possible, although some questioned the necessity and viability of some of the more exotic circuit locations.

Practitioners identified a number of reasons why the Court should continue to go on circuit. One of the most important was the ready availability of the applicant's own doctor who would be familiar not only with the applicant's immediate situation but also with the applicant's medical history, often a critical factor in compensation cases. Another advantage of circuits which, although difficult to quantify was felt to be considerable, was the benefit to the applicant of having access to support networks - family, friends, advisers - which often enabled decisions to be made on the spot. This was felt to considerably speed up the resolution of cases.

There was general consensus among practitioners and Judges that commencing cases and taking evidence in chief on circuit was an advantage to both applicant and insurer. Opinions were quite sharply divided, however, on the desirability of finalising cases in the same place as they were commenced. Barristers were generally in favour of this while solicitors were generally opposed to it, preferring that cases started on circuit should have the option of being completed in Sydney.

They gave as one of their reasons the frequent need to call specialist evidence, almost always from city practitioners. This was partly because, although a country town might have one specialist in the relevant area it was unlikely to have two, leaving one party without specialist evidence or requiring considerable expenditure to bring a specialist from another town. The extent to which medical practitioners were in fact called to give evidence was queried by some, who were of the opinion that medical evidence was almost always given solely through a written report.

Another reason given for allowing cases to be finished in Sydney was that there were too many cases in each circuit to be able to complete more than a small number. In these circumstances solicitors felt it important not to limit matters to those which could be started and finished on that circuit but rather to start all the cases listed, taking the evidence in chief from all of them - including medical evidence from local GPs and specialists as required, and then finish the cases as part-heards in Sydney.

Having made these points, solicitors were clear that it was important to do as much as possible in the country, saying that their country clients found appearing in Sydney to be very stressful, both emotionally and financially.

Barristers generally considered that all cases should start and finish in the same place. They pointed out that this worked very well in Newcastle and Wollongong and felt that more cases were finalised under this regime.

To more comprehensively address the concerns of the Attorney and the WorkCover Authority in relation to the Court circuit system, the CJRC could consider some of the following questions as part of a program of empirical research:

- On the basis of the financial information contained in the Court files, is it possible to isolate the cost per day of running a case in Sydney, in Newcastle, in Wollongong and on circuit in three selected country areas?

- What are the relative costs of wholly running selected cases in each of these areas and, for each of these cases, what would be the costs of commencing the case in each of the country areas, taking evidence in chief there and finishing the case as a part heard in Sydney?

6.0 THE COMPUTERISED TRACKING SYSTEM

Every person working in the Court has a personal computer and 75% of the Court's functions are now computerised. One of the main tools used to track matters through the system is the Registry Index Database. This holds a record of every matter that comes into the Court. Within the database, physical file management is done by bar codes, backed up by fortnightly audits and a reservation system which 'marks' a file on the system until it is returned or the reservation is cancelled.

The Court is purely reactive up until the filing of a request for listing. Cases which do not reach this stage within nine months of first entering the system are culled as the result of a manual check, usually once a year in Court vacation time. Once a request for listing is made the computer system actively controls the progress of the file.

Computerisation of the system is not yet complete. For example, the projects current in March 1993 included:

- Testing a new subpoenaed documents database (estimated time: four weeks);
- Designing an Orders and Notations module - one of the stages in automating the listing process, whereby Court orders and notations could be put directly onto the relevant file through the computer system (estimated time: two months);
- Redoing the transcripts database to improve the original system installed (estimated time: long term).
- Including automatic date functions in various listing procedures (estimated time: one month).
- Auditing and archiving to improve response times (estimated time: two weeks).

The system is under constant revision, with things being done for the first time or being redone to overcome problems and bottlenecks experienced in testing or general use.

Vulnerabilities of the system hinge around the lack of backup of key people. For example, in the period in which this research was being done there was a total reliance on one person to do the specifications for each new project. The project then remained with that person right through the testing stages. It could not be handed over to another, as nobody else understood the system sufficiently to carry it through. This reliance on a few key people also creates bottlenecks and limits the speed at which the system can be implemented. It allows for very good quality

control, but with no backup staff in training to take over the key functions, makes the Court very vulnerable in the longer term. This vulnerability has been recognised, and the Court has indicated that new appointments have been made to overcome the problem.

The Court considers the system to be a significant improvement on the previous manual system of tracking files. Where previously the Court lost fifteen files a day, on average, it now loses one file every two days. There is clearly room for further improvement, but much has been done. Practitioners tend to agree with this assessment, and with the statement that less files than previously are being lost, but say that the figure is higher than one every two days, and is still at unacceptable levels. They also say that documents get lost for days.

The registry still physically moves large numbers of documents every day. Claims are filed on the ground floor. They are manually given a matter number and sent to operations, where staff key information into the system. Three people are involved in creating Court files in the registry index - they deal with the database, bar code labels, and the physical creation of the file. Once files are created the system relies on people observing the rules for dealing with them - entering their removal into the computer, for example - followed up by regular physical audits to track down files not properly recorded as being with a given person. As more registry functions are automated there will be increasingly less need to physically move files from one location to another, with correspondingly less opportunity for the loss of such files.

The tracking system appears to be working as well as could be expected, given the stage of its implementation. Further improvements should arise from the more complete implementation of the system.

7.0 OTHER ISSUES

The following issues were not part of the brief, but were raised by practitioners during the course of interviews. Both barristers and solicitors commented that the Compensation Court was extremely efficient compared with other courts in which they practised and all subsequent comments should be read with this in mind.

The quality of service offered by the Court's registry was of concern to a number of solicitors. In particular, they wished to be able to have files processed while they waited, and to have them returned immediately. Some solicitors believe the registry to be understaffed

There is still a division of functions on the ground floor. Applications are currently done in one area, processing in another. There is a listing area on the sixth floor and a transcript and a taxing area on the first floor. Solicitors walk their files from floor to floor to achieve the necessary processing. The Court is working on a 'one stop' system for filing. The aims are to minimise the movement of court files, to keep documents in one place and to give more flexibility in staffing. A new system is expected to commence this year, with the registry continuing to work on the problem of minimising the additional time that is expected to be spent by practitioners in filing documents under this new system. It is hoped to increase staff flexibility with this change.

Both barristers and solicitors observed that there were "too many unnecessary and outdated rules" in the Court and that these should be streamlined rather than computerised

There is felt to be a proliferation of unnecessary paperwork which could be significantly decreased by rationalising the registry process rather than attempting to computerise it in its current and, according to practitioners, overblown form. It was suggested that significant efficiencies and cost savings could be implemented if the rules and filing requirements were re-examined and streamlined.

The Registrar's increasing role in the litigation process is of concern to many barristers and solicitors. Their concern centres on the implications of this expanding role which they see as evidence of an expansion of rules which are, in their view, unnecessary. Certificates of Readiness were an example brought up by both barristers and solicitors as being unnecessary to the efficient working of the system. It was suggested that there was no reason why instead of filing a request for listing, followed by a the filing of a certificate of readiness, a party could not simply file a request for listing or an application for a listing date which could trigger the immediate allocation of a listing date, with appropriate sanctions for those not ready to proceed. Solicitors indicated that it took them up to one day a week to prepare certificates of readiness. This was considered to be a waste of time.

The Court's response to these observations was that it was imperative that it ensured that cases were ready to go on, and that these rules were designed to achieve that end. The rules were considered by a Rules Committee, on which both barristers and solicitors had representation, and any changes that were felt to be required and were brought up there would be seriously considered.

The other concern expressed by both barristers and solicitors was that the rules, which they felt to be often unnecessary and out of date in any event, were also very rigidly applied thereby slowing down cases in which both parties were happy to proceed. An example independently given by both barristers and solicitors was that if a party failed to file a required certificate of readiness, even if only by one day, then notwithstanding the fact that both parties might be ready and willing to go on the Court would often, but not always, put the matter back to start all over again. The Court indicated that this course of action was often the only possibility, as through failing to file a certificate of readiness, for example, the party would have forfeited the "slot" allocated for that case. On the assumption that the case was not ready, the time originally set aside for its listing or hearing would have been re-allocated to another case in the list. The late filing therefore resulted in the need to find a new date into which the case could be slotted, often quite some weeks later.

The expense of, and length of time taken in, obtaining transcripts from the Court was an issue of concern to solicitors

Solicitors indicated a concern with the cost of transcripts - between $350 and $500 per day - and the slow pace at which they were made available. They said that they were often unable to obtain a copy of the judgment within the appeal period of 28 days now that Judges no longer give their decisions to their Associates to type up but instead dictate them onto the transcript. Practitioners were then required to pay for the transcript in order to obtain a copy of the judgment.

Transcripts are provided by a commercial operation and are not, strictly speaking, part of the Court's own internal processes. The problem with time is recognised, although it was indicated that this was improving. The Court allowed practitioners extra time if they were unable to lodge an appeal within time through unavailability of the transcript. In terms of cost, it was pointed out that no other fees were payable by applicants for the services of the Court and so this might not be too onerous. An alternative might be for the cost of transcripts to be covered by WorkCover.

Both barristers and solicitors felt that the Judges' daily lists should be considerably longer. This would inevitably result in the finalisation of many more cases. They felt the Court showed excessive concern about keeping the level of "not reached" cases down. They also felt that the lists were erratic, in the sense that some periods had very few cases listed while others were reasonably full.

The Court attempts to keep the "not reached" figure at minimum levels, without risking a Judge or Commissioner having no cases left to hear. It therefore attempts

to allocate Judges seven matters a day and Commissioners, six. As well, a Liaison Officer has the function of smoothing out individual case loads by checking on matters not reached by Judges or Commissioners who have become caught up in a case and attempting to move these onto the lists of other Judges or Commissioners who may have disposed of their list quickly.

Practitioners generally applaud this case management approach, but feel that the Court's concern with keeping the "not reached" cases down is excessive. They say that it keeps the list too small and does not help parties reach agreement. Barristers indicated that many days finished with no cases not reached. They felt that they and their clients could live with five cases not reached a day. Their view was that this would promote the finalisation of cases and that applicants would rather be listed and not reached than not listed at all. If not reached, applicants would know that they would be first up the next time, currently some six weeks later, and they did not mind waiting for that period.

Both solicitors and barristers mentioned the seemingly erratic nature of the Court's listing process, with some weeks appearing to be extremely light in cases listed. Commissioners made the same observation.

To more comprehensively address these concerns of practitioners, the CJRC could consider some of the following questions as part of a program of empirical research:

What are the Court rules considered by barristers and solicitors to be "unnecessary and outdated"?

What proportion of cases listed before the relevant rules came into operation were not ready to be heard on their hearing date?

What proportion of cases listed after the relevant rules came into operation were not ready to be heard on their hearing date?

APPENDIX 1

Analysis of monthly reports: 1990-1992

1990

Event		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Restored to list		47	141	59	54	94	107	69	149	172	167	59	173
State Compensation Board Applications Filed		1379	1959	1679	6	0	0	0	0	0	0	0	0
New Applications Filed		659	1310	1400	1130	1460	1465	1486	1347	1095	1210	1559	1123
Awards:	Registrar	0	0	44	136	171	485	1379	506	367	361	483	185
	Judges	60	791	851	596	621	689	168	828	572	824	879	462
	Commissioners	33	237	264	150	231	174	21	201	141	222	274	89
Struck Out:	Registrar	-	-	-	-	-	-	-	-	-	-	3	-
	Judges	14	80	56	32	57	28	21	61	70	67	67	21
	Commissioners	0	11	21	22	35	15	4	43	18	44	43	9
Discontinued		71	201	115	87	165	83	107	158	107	125	110	24
Stood Over Generally:													
	Registrar	-	-	-	-	-	-	-	159	67	151	237	169
	Judges	62	212	228	123	51	40	-	76	32	97	1006	14
	Commissioners	0	45	113	137	95	96	23	33	22	47	365	1
Settled Out of Court		91	157	152	0	0	0	0	0	0	0	0	0
Reserved Judgements		11	15	16	14	11	17	13	17	14	16	15	17

Event		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Listed:	Sydney	3180	2172	1494	1037	1113	848	1030	716	1423	1899	1285	2034
	Newcastle	292	296	310	247	313	219	611	599	487	547	407	1429
	Wollongong	249	270	381	237	359	351	461	143	250	214	107	349
	elsewhere	430	438	551	538	965	653	1098	134	50	302	435	486
Part Heard		20	19	29	15	0	3	6	6	9	6	3	13
Stood Over		213	269	305	154	174	49	83	135	182	257	298	248
New Requests for Listing		496	2259	1552	3079	3014	3210	3640	2841	1809	1617	2103	1534
State Compensation Board Transfers		3893	1934	6	0	0	0	0	0	0	0	0	0
To Be Mentioned		232	434	259	307	448	660	803	849	803	633	827	1055
New To Be Listed (excluding new Requests for Listing)		4266	5708	8277	7453	6812	7152	5246	6982	6766	6241	5666	4303
Sydney - list per:													
	Judge per day	9.1	7.0	6.5	6.0	6.6	6.6	8.0	8.0	6.3	7.1	8.1	5.1
	Commissioner per day	3.7	3.8	4.2	3.4	3.1	3.9	5.5	4.2	3.5	5.4	5.6	2.4
New Matters Listed per:													
	Judge per day	8.4	5.1	4.7	3.3	2.9	4.1	6.9	5.6	4.1	5.2	5.9	3.1
	Commissioner per day	-	3.2	3.6	2.6	1.6	2.1	3.6	3.3	1.4	4.3	4.4	1.2
Circuit List per:													
	Judge per day	7.0	5.0	4.9	4.6	6.7	4.8	4.7	5.2	7.1	6.3	7.3	4.7
	Commissioner per day	-	-	-	-	-	-	-	-	-	-	-	-
Total Cases:													
	Registrar	-	-	44	136	171	485	1379	665	434	512	723	354
	Judges	192	1083	1135	751	729	757	192	965	674	988	1006	497
	Commissioners	48	293	398	309	361	285	48	277	181	31	365	99

Event	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Judge sitting days:												
Sydney	22	155	180	163	133	147	20	154	135	178	165	109
Other	8	51	58	28	59	43	19	57	66	77	80	10
Commissioner sitting days:												
Sydney	17	120	31	102	135	119	12	126	103	129	132	54
Other	0	0	0	0	2	0	0	0	0	0	0	0
Cull:												
Sydney	-	-	-	-	-	-	-	-	-	-	-	-
Newcastle	-	-	-	-	-	-	-	-	-	-	-	-

Source: Compensation Court of New South Wales

1991

Event	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Restored to list	42	295	338	223	235	245	56	300	231	206	275	125
State Compensation Board Applications Filed	-	-	-	-	-	-	-	-	-	-	-	-
New Applications Filed	919	1303	1403	1291	1315	1345	1522	1553	1371	1550	1723	1522
Awards: Registrar	519	432	485	376	445	307	381	389	462	381	440	435
Judges	129	795	642	610	753	635	273	673	726	620	721	480
Commissioners	28	190	216	180	188	157	38	145	186	178	173	159
Struck out:												
Registrar	-	24	313	315	95	8	-	13	2	15	5	-
Judges	14	52	40	37	46	43	9	36	38	25	31	14
Commissioners	3	35	34	21	28	19	1	27	27	15	28	4
Discontinued	88	146	98	57	99	59	67	85	75	81	70	59
Stood Over Generally:												
Registrar	20	106	136	100	145	79	24	66	122	104	42	2
Judges	16	64	50	29	36	22	6	27	38	677	41	8
Commissioners	2	17	269	23	17	18	4	14	31	208	20	2
Settled Out of Court	-	-	-	-	-	-	-	-	-	-	-	-
Reserved Judgements	19	21	15	17	14	21	34	27	28	27	29	25
Listed: Sydney	1378	1731	1319	1327	1129	986	1216	822	1106	592	155	1685
Newcastle	1429	1302	889	716	575	711	1009	743	790	848	710	400
Wollongong	479	475	572	426	425	438	481	512	460	525	455	427
elsewhere	919	734	921	781	974	1005	1175	1099	1088	1002	808	814

Event		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Part Heard		6	13	8	7	7	3	1	3	9	6	7	5
Stood Over		239	297	291	395	338	341	454	446	511	137	577	529
New Requests for Listing		1572	1500	1034	1574	1579	1726	1822	1327	1261	1910	1869	2054
State Compensation Board Transfers		-	-	-	-	-	-	-	-	-	-	-	
To Be Mentioned		1931	1690	1171	938	788	1137	776	467	811	314	556	2268
New To Be Listed (excluding New Requests for Listing)		4686	4632	5883	5688	7052	5442	5617	7517	6794	7787	8409	5852
Sydney - list per:													
	Judge per day	6.8	7.2	6.8	6.3	5.7	5.8	7.3	6.1	6.8	5.1	5.9	4.7
	Commissioner per day	2.6	4.6	4.7	3.9	3.4	3.9	3.1	3.9	3.9	3.3	4.3	3.2
New Matters Listed per:													
	Judge per day	5.2	4.9	4.2	3.6	3.0	3.0	3.8	2.8	3.2	2.7	2.4	n/a
	Commissioner per day	1.9	3.0	3.5	2.5	2.2	2.2	1.7	2.4	2.5	2.1	2.7	n/a
Circuit List per:													
	Judge per day	5.8	6.2	5.7	6.5	5.9	6.0	3.9	7.4	5.9	6.0	7.6	5.9
	Commissioner per day	-	-	-	-	-	-	-	-	-	-	-	-
Total Cases:	Registrar	539	562	934	791	685	394	405	468	586	500	487	437
	Judges	159	911	732	676	835	700	288	736	802	677	793	502
	Commissioners	33	242	269	224	233	194	43	186	244	208	221	165
Judge sitting days:													
	Sydney	29	132	121	137	166	152	39	125	123	137	131	87
	Other	26	75	81	53	82	48	25	79	81	93	76	24

Event		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Commissioner sitting days:													
	Sydney	18	118	113	108	134	110	18	101	121	117	98	50
	Other	-	-	-	-	-	-	-	-	-	4	11	-
Cull:	Sydney	-	-	-	-	-	-	-	-	-	-	-	-
	Newcastle	-	-	-	-	-	-	-	-	-	-	-	

Source: Compensation Court of New South Wales

1992

Event		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Restored to list		102	195	156	60	54	89	35	99	106	65	24	39
State Compensation Board Applications Filed		-	-	-	-	-	-	-	-	-	-	-	-
New Applications Filed		1245	1521	1533	1346	1689	1478	1824	1659	1513	1612	1606	1574
Awards:	Registrar	720	641	445	336	466	448	537	579	508	454	456	29
	Judges	90	527	689	617	758	757	361	488	555	545	824	573
	Commissioners	17	157	174	172	213	250	382	334	342	30	274	205
Struck Out:													
	Registrar	-	4	10	2	2	2	7	30	4	20	-	1
	Judges	4	32	25	39	18	34	22	46	21	20	15	18
	Commissioners	3	18	25	31	33	28	10	28	27	15	27	5
Discontinued		38	63	51	69	53	50	50	43	45	65	65	31
Stood Over Generally:													
	Registrar	23	99	60	79	123	167	27	62	93	34	37	41
	Judges	3	36	30	14	12	12	14	12	12	15	9	8
	Commissioners	3	20	30	20	15	32	10	17	23	40	13	7
Settled Out of Court			-	-	-	-	-	-	-	-	-	-	-
Reserved Judgements		31	34	30	25	30	20	23	30	27	33	27	10
Listed:	Sydney	1203	1561	1613	2026	1613	1872	2659	3043	2378	1758	1589	906
	Newcastle	885	840	810	737	800	793	951	993	994	1072	1114	1156
	Wollongong	461	431	518	469	531	458	439	415	314	356	369	355
	elsewhere	855	846	829	947	806	810	1192	872	1312	1358	1278	1505

1992

Event		Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Part Heard		8	7	-	5	8	10	-	3	5	4	2	-
Stood Over		413	518	433	383	373	371	293	154	130	119	82	51
New Requests for Listing		2323	2232	2306	2062	1172	1856	2673	4008	3831	2892	2841	3113
State Compensation Board Transfers		-	-	-	-	-	-	-	-	-	-	-	-
To Be Mentioned		2740	3427	2722	3061	2280	2123	2196	2099	1852	1504	1268	817
New To Be Listed (excluding New Requests for Listing)		5032	6000	4544	4126	6276	5363	2474	1401	2163	4079	4515	5521
Sydney - list per:													
	Judge per day	3.2	4.2	5.7	6.1	6.5	7.2	9.4	6.5	5.7	6.3	6.8	5.7
	Commissioner per day	3.6	3.3	3.1	3.9	4.3	5.0	6.0	5.0	5.2	4.8	4.5	3.0
New Matters Listed per:													
	Judge per day	1.6	1.9	2.6	3.1	4.0	3.8	5.2	2.7	3.2	3.6	4.3	2.1
	Commissioner per day	2.3	2.1	1.9	2.9	3.3	2.7	3.8	3.4	3.5	3.2	2.9	1.0
Circuit List per													
	Judge per day	6.4	6.7	5.4	4.9	6.3	5.7	5.2	7.1	6.1	5.1	7.2	5.2
	Commissioner per day	-	-	-	-	-	-	-	-	-	-	-	-
Total Cases:	Registrar	1297	1150	515	417	593	617	1646	672	606	508	493	418
	Judges	97	595	744	670	788	803	397	546	588	580	848	599
	Commissioners	23	195	229	223	261	310	402	379	392	355	314	217
Judge sitting days:													
	Sydney	36	148	156	143	130	145	43	90	97	102	135	108
	Other	26	78	79	63	62	73	27	57	71	83	71	22

1992

Event	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Commissioner sitting days:												
Sydney	0	95	122	103	111	103	86	123	120	124	109	69
Other	-	5	8	11	6	12	3	13	10	11	18	18
Cull:												
Sydney	358	406	-	-	2	-	995	1	1	-	-	-
Newcastle	196	-	-	-	-	-	80	-	-	-	-	84

Source: Compensation Court of New South Wales

APPENDIX 2

Retirement Dates for Judges and Commissioners

Office/ Age at retirement	Date of retirment
Judges: (retirement at 72 years)	30/12/1993
	29/07/1994
	27/03/1997
	19/03/2001
	19/11/2002
	21/10/2007
	19/11/2007
	13/01/2009
	03/10/2010
	31/10/2010
	18/11/2011
	10/06/2013
	25/08/2013
Commissioners: (retirement estimated at 60 years)	31/01/1996
	25/06/1997
	12/07/2001
	16/05/2002
	29/01/2003
	09/07/2006

APPENDIX 3

AVERAGE CIRCUIT COSTS

NEWCASTLE CIRCUIT							
PERIOD	OFFICER	SUBSISTENCE	HIRE CAR INC PETROL	FLY	TAXI/HIRE CAR PARKING	OTHER COSTS	TOTAL
5 days	Judge	$1,050	$527	-	-	-	$1,577
	Associate	$488	-	-	$25	-	$513
	Tipstave	$488	-	-	$50	-	$538
	Monitor	Nil travelling/subsistence costs as based in Newcastle	-	-	-	-	$0
							$2,628

WOLLONGONG CIRCUIT							
5 days	Judge	$1,050	$527	-	-	-	$1,577
	Associate	$488	-	-	$25	-	$513
	Tipstave	$488	-	-	$50	-	$538
	Monitor	Nil travelling/subsistence costs as based in Wollongong	-	-	-	-	$0
							$2,628

OTHER CIRCUITS - HIRE CAR							
5 days	Judge	$1,050	$552	-	-		$1,602
	Associate	$488	-	-	$25	Own Car $240	$753
	Tipstave	$488	-	-	$50		$538
	Monitor	$488	$425	-	$20		$933
							$3,826

OTHER CIRCUITS - FLY/HIRE CAR							
5 days	Judge	$1,050	$390	Note:	Range $314 - $548	$80	$2,068
	Associate	$488	-		Range $314 - $548	$25	$1,061
	Tipstave	$488	-		Range $314 - $548	$50	Freight $30 $1,061
	Monitor	$488	$335		Range $314 - $548	$20	$1,391
					Range $4200 - $5636		$5,636

NOTE: FLY COST For Broken Hill & Tweed Heads Circuits airfares are below. These circuits normally extend to 10 days.

Sydney/Tamworth/Sydney	*$314 per person*
Sydney/Bourke/ Sydney	*$548 per person*
Sydney/Broken Hill/Adelaide/Sydney	*$500 per person*
Sydney/Tweed Heads/Sydney	*$762 per person*