LABOUR RELATIONS REFORM BILL 2002

Consideration in Detail

Resumed from 19 March.

Clause 4: Part VID inserted –

Debate was adjourned after Division 6 had been agreed to.

Division 7: Register -

Mrs EDWARDES: Division 7 deals with the register and the provisions relating to the registration of an employer-employee agreement. Proposed section 97WB defines "protected information" because EEAs are subject to public access although some aspects of EEAs are protected under that definition. However, the definition covers public sector employees within the meaning in the Public Sector Management Act.

Concern has been expressed about opening the register to public access to provide information on individual workplace arrangements between employers and employees. Government members have constantly argued that the secrecy of workplace agreements was anathema to them. Workplace agreements are not secret to either of the parties. They are free to discuss them with anybody but they are not open to third parties. There is no such agreement under this proposed section. By entering into an EEA, the parties agree to the document becoming public. "Protected information" means that the name and address of an employee in an EEA will be protected. I do not know the reason for that provision in the proposed section because the right-of-entry provisions that apply to EEAs state that the name and address of an employee may be made available to a union. The information therefore will be protected only in that the name and address of an employee will not be made public; however, access to the register may be sought by a union or its representative under the right-of-entry provisions. We will debate the set-up of the register in forthcoming provisions of the Bill, but an employer's name and address and type of business will be readily available. As I indicated, a union or its representative can gain access to that information under the right-of-entry provisions. They can therefore target not only employers but also individual employees. There is no real protection or privacy for an employee and no provision for employees to indicate that they do not want the information made public. Under the right-of-entry provisions in an EEA, employees can tell employers that they do not wish unions to have access to that information. However, the registrar has no power to deny publication of that information.

Why is the name and address of an employer not protected information? As I said, an employee's name and address is not protected because it is readily identifiable under the right-of-entry provisions. A visit to the registrar would provide access to that personal information. Why is an employer's name also not protected information? The terms and conditions of an EEA provide that information.

Mr JOHNSON: This proposed section concerns me too. I support the comments of my colleague the member for Kingsley. The clause is a nonsense because there is no protection of information. It will be simple for an interested party, such as a union, to find out the details of an EEA. If, for example, a union knows the name of a small business employer - it could be a small supermarket or a small building company, rather than a large, well-known corporation - that employer could be at a disadvantage because protection is given only to an employee. That is what the minister says is in this clause, but there is no protection. It will be simple for anyone to seek access to an EEA. If the name and address of an employer is open to public inspection, people do not need to be Rhodes Scholars or whiz-kids to work out who is employed by that small business person. Anyone who knows the name and address of an employer can ask to see any EEA lodged in the name of that employer. The only information not accessible by a third party under this clause is the name and address of an employee. Which interested party would want to see that sort of information? The only party who comes to mind is a union official. I cannot believe that any other member of the public would want to see the details of an EEA between an employer and an employee. However, the unions would be very interested in an agreement between a small business person and an employee and all of that information will be available to the unions. The only information that will be protected is an employee's name and address. If a union knew that a small business - let us call it ABC Trading Ltd - employed 10 people, it would be a simple task to work out that information. I presume that the terms and conditions would be virtually the same in the EEAs.

Mr Murray: Presume nothing.

Mr JOHNSON: That is a very intellectual interjection by the member for Collie. I am astounded at the brevity of it.

Mrs Edwardes: We don't presume anything in respect of this Bill. It is open to everything.

Mr JOHNSON: Absolutely. The member for Collie probably has not even read the Bill.

Mr Murray interjected.

Mr JOHNSON: Perhaps some government members might speak on the Bill.

Mr Watson: You are still as arrogant as ever.

Mr JOHNSON: The only members opposite who have probably read the Bill are the members for Peel and Cockburn because they have a vested interest in it.

Mr Murray: Again, presumptions.

Mr JOHNSON: Yes, this place is full of presumptions, my friend. If the member for Collie wants to prove me wrong, he should tell us about some of these clauses. I am pretty sure he has not even read the Bill. It is a very convoluted Bill, and any member who has been in this place a long time has some problems -

Mr Watson interjected.

Mr JOHNSON: I love the way I wind up some of the guys opposite.

Mr Watson: You are now amusing yourself.

Mr JOHNSON: One of my colleagues told me yesterday that the Labor Party was saying that I could talk under wet concrete. I had never heard that expression before. I thought it sounded like a compliment. I then told one of my colleagues, who is a dinky-di Aussie, that Labor Party members were saying that I could talk under concrete.

Mr Kobelke: Did he agree?

Mr JOHNSON: No. He is one of my colleagues. I had never heard that expression before. He said that it meant I could talk about anything and that I talk a lot.

I get easily diverted by members opposite.

Several members interjected.

Mr JOHNSON: I had an hour of diversion in the early hours of one morning when members on the other side kept interjecting. I must learn not to rise to those interjections. Mr Acting Speaker (Mr McRae), now I have run out of time.

Mr KOBELKE: I thought the member was just giving a point of view, rather than seeking a response. I am happy to respond with a point of view, though I am not sure what light it would shed on the debate. The member for Hillarys related his comments to proposed section 97WB, which will protect information about employees who are parties to an EEA. This has been a bit of a political football, but all the Government is doing here is applying a standard that existed in Western Australia prior to the industrial relations legislation of the previous Government and that will exist once again when the present legislation is passed. This standard applies across Australia.

Mrs Edwardes: In what way? What do you mean by a standard?

Mr KOBELKE: Generally, it is with regard to the ability and right to inspect employment records.

Mrs Edwardes: Is that inspection to be done by government inspectors?

Mr KOBELKE: Yes, as well as by union officials. Other people can go in, but they do not have access, through the up-front process, to the name and address of the employee.

Mrs Edwardes: This is an individual agreement, and therefore what might have applied previously would have been awards and industrial agreements. It would not apply to contracts of employment.

Mr KOBELKE: Yes, but the Government is ensuring that the accountability that applies to people on the award system also applies to EEAs. The Government believes that is as it should be and does not accept that any individual contract should also be a private or secret contract. Having an open and accountable system, with the ability to uphold the rights of workers to compare wages and conditions with one another, requires that level of openness. That is why EEAs will be made available, while providing protection by excluding the names and addresses of employees.

Mrs EDWARDES: The minister did not answer two of the questions I posed. Firstly, why did the Government not consider including the protection of the employer's name and address? The minister has indicated that the Government wants openness -

Mr Kobelke: It would then be very hard to reference something, because it would be able to be done only by using the award used for the no-disadvantage test. If people are competing against another company, they may

think that company does not seem to be paying proper wages, and it will be possible to go in and look up the EEAs entered into by that company.

Mrs EDWARDES: So can even competitors go in and look at what a company is paying its employees?

Mr Kobelke: Yes. That is on the basis that the system is fair; and the Government wishes to maintain fair minimum standards.

Mrs EDWARDES: The minister referred to the issue as one of secrecy, but the Opposition sees it as one of privacy. That applies to both the employee and the employer. Without this privacy, commercially sensitive information, such as the inclusion of a productivity bonus in an EEA, may simply be excluded from future EEAs, particularly if the system allows a competitor to come in and compare its rates of pay. That is absolutely outrageous. This does refer to an individual agreement. If anybody is brave enough to put his feet in the water and do an EEA, some benefits should flow back. From the employer's side, this will be one of the provisions that will make people think twice before entering into an EEA. There is a flow-on effect for the employee, in the event that productivity bonuses that could expose company documents will not be offered.

The second matter I raised, which the minister did not refer to, is that although the name and address of the employee will be protected through the register, under the right of entry provisions, unless that employee directs the employer that the union representative is to have no access to personal information, that information will be readily identifiable.

Mr MARSHALL: I have some reservations about this proposed section, because, although protecting the name and address of the employer and the employee is appropriate, the conditions in the contract will be open to everyone. In a company with a large staff, some people on that staff will naturally give the employer more work time than others. Although there are standard wages, sometimes the employer wishes to give an incentive to the people who are doing the right thing and increasing their productivity. Having those conditions open for examination will create unrest. As soon as the shop steward comes in and checks the agreements, he will want to know why one employee is receiving an incentive, while another worker at the other end of the factory is not. The employer will explain this. There are no names and addresses and no pack drill as we know, but unrest will result once word gets around that some people are receiving extra incentives. Productivity will then decline, and a strike may result. The conditions, as well as the names and addresses of employees, must be protected.

To say that all the players on the football field are equal and should be paid the same is absolutely ridiculous, because the champions carry the also-rans. Five players can make a champion football side, and they carry the other 18. Those other players, who are the battlers and glad to be in the shadow of the champions, are happy for the champions to receive more money and to kick the goals when they count. The champions lift the standard of the work force. The average work force must not be able to lower the standard of productivity. I disagree with this proposed section. The conditions should not be open. The employer should be able to employ, under the EEA, on the conditions that suit his productivity. The employer wants to get the best results and to reward the best workers for what they give. The rate of employment will not drop. A wide range of people are needed. In any community there are the stars, the average performers and the others who need help. The unions are there for the people who need help, not to hold back the star performers.

It is not fair that the conditions are open to everyone. Someone in the work force who is working diligently and has five or six children to support should not be at the same level as a younger person with no responsibilities. Someone without the responsibilities will not go to work with the same earnest endeavour to achieve the best results and a better wage. I have seen a situation in which a certain amount of money is paid for a minimum of 20 cases, and a commission is paid for every case produced above that amount. Some workers have achieved their productivity average and have then loafed for the rest of the day, while others who have children and other responsibilities have reached the average and have then gone hell for leather to earn the commission on everything they produce for the rest of the day. When it is revealed that they are doing so well, shop stewards have come to tell them to slow down, because they are ruining it for other people. That is not fair. The conditions should not be open for everyone to peruse, and cause disruption in the work force.

Mr JOHNSON: The longer members participate in debate on this proposed section, the more things come to mind. The simple question that should be asked is: why should any of the detail contained within an EEA be open to the public to scrutinise and investigate? I ask why because there can be nothing untoward in an employer-employee agreement that the registrar has approved, otherwise it would not be registered. The minister says that the provision provides openness and accountability. If the employer and the employee are happy with the terms and conditions and wages under the EEA, and the registrar is also happy that there have been no irregularities and that the EEA has been entered into properly and no-disadvantage tests have been applied, why then should the contract between the employer and employee, which has been approved by the

registrar, or his deputised officer, be open slather for anybody to have access to? The member for Kingsley raised a good point that I had not thought of. I thought that just a union official might want to find out what an employer had agreed to with an employee, but it could easily be the competition seeking that information. It is a bit like predatory pricing, in which the big boys find out what the little boys are paying in the shopping centres and then immediately undercut them by a few cents. This could be a similar situation, in which a competitor knows that the firm with which it is competing employs 10 to 20 people. The competitor may not know how much the employer is paying its employees or what the conditions are within that EEA, but the minister has made it possible, through this proposed section, for the competition to access that information. The competition will not need to know the names and addresses of the employees -

Mrs Edwardes: But they will get that information anyway.

Mr JOHNSON: Of course they will, but they do not need to know that information. From the perspective of unfair competition, the people seeking that information could examine all EEAs registered under the name of that employer because that information will not be confidential. It is the easiest way to find out the details in an EEA. If a union official or a competitor knew the employer, they might be able to find 10 EEAs in place and registered under the name of that employer. As I said before, I cannot think of any reason that anyone else in the world would even know of the existence of an EEA within a particular company. However, a union official and a competitor would know it existed.

The minister has certainly put employers at a disadvantage by not respecting the privacy rights that they deserve. I wonder whether the federal Privacy Act would come into play and scupper some of the things that the minister wants to do through this provision. The minister is saying that he wants to retain privacy by not allowing people to see the employee's name and address. However, that has been shot down in flames because he is prepared to let the employer's name and address be published and be open and accessible to anybody - possibly the unions or a competitor - who wants information about the registered EEAs. If I were running a company with 10 employees, the last thing I would want is for my competitor to be able to access that information. The minister is prepared to give him that right for a small charge - I do not know how much - that is provided for in another proposed section. The minister is creating unfair competition practices by allowing the employer's name and address to be used. I can see no purpose in it. If the registrar, the employer and the employee are happy, perhaps the minister can convince me of reasons, other than openness and accountability, that the EEAs should be open for the public to view.

Mr AINSWORTH: Industrial issues might arise from the information that would be so readily available under this provision. However, if that is all put to one side, there is still the serious problem of the fundamental right to individual privacy. It is easy to imagine that some people, who might have no commercial interest in this information, would, for reasons malicious or otherwise, still be interested to find out what certain people were earning and the terms and conditions under which they were employed. It would be highly offensive to average workers to know that anyone off the street could find out precisely the conditions under which they were employed, which they have a right to keep private if they so wish. The employer also has that same right. I have less concern about the EEA terms and conditions being made available to specified people who have a direct interest in the process. However, outside that fairly narrow definition, this sort of information could be widely disseminated by anyone who chose to access it, which is quite frightening. The civil libertarians in our midst might also say that this is a breach of personal privacy. In this case, I have to agree with them. It is an unnecessary provision, given all the constraints and checks and balances within the legislation to make sure that an EEA does not include unsatisfactory industrial provisions. There are mechanisms by which to check that everything has been properly done and agreed to by not only the employer and the employee, but also the registrar who has to vet these agreements after they have been signed. All the issues relating to the documentation that might otherwise be a concern to the employee or the employer are adequately covered for the protection of all concerned. Beyond that point, there is no need whatsoever for any other party to have access to what is essentially personal, private and confidential information.

Mr KOBELKE: The points of view put by members opposite are premised on a feeling, or an understanding, that individual contracts are somehow secret, or give protection to private information, which a person would not have in a normal form of employment. It is a valid point of view but we are not setting up the legislation in that way. We are providing EEAs as statutory individual contracts that are a valid and available form of employment contract, as are awards or industrial agreements. Currently, through right of entry and access to time and wages records, that information is not private and confidential. It is information on a person's standard rates of pay and other standard issues. We do not believe that that information should be kept secret, personal or private on the basis that a party has entered into an EEA. That is a philosophical position to take and I understand that members opposite may take a different point of view, and they have every right to do that. However, it is not our point of view. We provide for that access because if we want EEAs to be taken up by any number of people, the

EEAs are then in the marketplace alongside the awards and the industrial agreements. We do not think they should be kept separate from those agreements. That is the Government's philosophical point of view. The other point of view is valid and I accept it, but it is not the Government's point of view. It might be argued that a problem arises when an employer makes a special arrangement that gives him a competitive advantage, and that there should be some form of intellectual property right attached to that. Another provision allows for that right to be protected. However, we are talking about hypothetical cases because the studies done on workplace agreements show that they are all standard. Only a very small number of agreements do not fit lock, stock and barrel into the standard agreement. Therefore, there is no reason that they should not be accessible. We are not designing or promoting EEAs on the basis that they provide confidentiality. A union official, for example, would have the same level of access to an EEA as he would to an award.

The Government believes that EEAs will deliver flexibility to the employer if the award is too restrictive. That is the advantage. The Opposition might want other advantages included, such as a form of confidentiality. However, the Government does not share the Opposition's point of view, and that is why it is not being offered. The Government seeks to protect names and addresses - mainly because so much marketing occurs - and it does not want people to obtain access to lists of names and addresses of people in a certain industry in order to bombard them with offers of tools or equipment that might be used in that industry. That would not be appropriate. The Government looked at a range of different models to determine how it could prevent that situation occurring. It has also been said that an employee wants to be protected if he or she is earning a higher level of remuneration than that of his or her coworkers. This would result in two subclasses. An employer should be able to pay more to an employee if he or she is more productive, or has special skills. This can be written into a workplace agreement and an EEA without disclosing the employee's wage. A schedule of payments that the employee must work through could be attached, or it could be stated that the employee's productivity bonus is based on a certain formula. The agreement or EEA does not have to stipulate what the employee is receiving, provided that the base meets the no-disadvantage test, and that the schedule or EEA states that the wage will be paid according to certain criteria. If an assessment is made on the basis of certain criteria by which an employee can reach the top of the ladder, that will not be stated in the document. The structure of the EEA allows for the matter to remain confidential.

The other scenario is that in which an employee is carrying out work of a similar standard to that of the other workers. It will be possible to make a comparison, and if the employee is being paid more or less, that issue will arise. Incredible flexibility exists in EEAs, and that is the whole point. The Opposition should not suddenly baulk at shadows because of the way in which EEAs might be abused, or because of problems that may arise. In doing so, it fails to take into account that right of entry is already standard practice.

Mr GRYLLS: How does the Government envisage protecting the employer whose information will be available? As a small business owner, I have discovered that small businesses are the target of direct marketing, and that is a major problem.

Mr KOBELKE: Lists of employers are already available in the *Yellow Pages*, and they are also compiled by a range of services. I do not envisage that EEAs will be used as a profitable base for developing such information. We are not specifically excluding such information, but it is already available from many other sources.

Mrs EDWARDES: It is obvious that the Government and the Opposition have different philosophical views about this issue. The minister stated that, although an EEA is a statutory form of individual agreement, it ought to be treated like an award or an industrial agreement. During the time that I have been involved in the interpretation of individual agreements, I have never seen an industrial agreement registered, or the outcome of the registration process. Will the names and addresses of employees who participate in IAs be listed and accessible?

Mr KOBELKE: I hope I made it clear that, by various means, this is a different approach. However, the end result is that there will not be confidentiality in a workplace agreement, industrial agreement or award, because under the right of inspection of times and wages, the amount an employee is being paid is available information. An employee can refuse that access under an award or an EEA. The mechanisms are different, they are applied differently, and they do not cover exactly the same areas. However, similar results can be achieved through different processes.

Mrs EDWARDES: I did not think that an authorised representative was precluded from looking at such information. I did not know that an employee on an award could write to his employer and ask that his information be kept secret.

Mr Kobelke: I am sorry, the member for Kingsley is correct. It does not apply to award employment.

Mrs EDWARDES: Only those on an EEA are provided for under this legislation. Even if an employee is a non-union member, he or she cannot write to his or her employer asking that his or her information be kept private and confidential.

During debate we talked about the lack of choice for public servants, and the minister indicated that people within the public sector will have access to EEAs -

Mr Kobelke: Where the Government decides it is appropriate to use them.

Mrs EDWARDES: Yes. The minister mentioned chief executive officers and also people who were attracted to specific locations, positions and the like. The minister indicated that the Government would agree to allow such people to move on to an EEA. If that is the case, their names and addresses will not be protected. Having been Attorney General and Minister for Community Services, I believe that the availability of CEO's names and addresses to the public will make CEOs vulnerable. Has the Government considered this and can protections be put in place?

Mr MARSHALL: The minister stated that award rates are open to everyone and that employees are aware of their conditions under a workplace agreement. Has the Government considered the emotions and the psyche of the worker? In the areas of business in which I have worked, many people did not want to disclose the amount they earned. When I go to the United States, the first questions I am asked are about the type of work I perform and the amount of money I make. That is contradictory to the Australian way of life. People become self-conscious when they are asked to disclose how much money they make. They do not want those facts known on the open market. An award rate is important as it stabilises productivity and it is good to know what people must receive in order to survive. However, productivity is increased when an individual is offered incentives.

I once managed two sports shops, and we sold more tennis balls in Western Australia than did any other shop in the country. We had a monopoly, and the more tennis balls we sold, the better the rates we achieved. Our competitors wanted to know our rates. However, I would not disclose that information because, once they knew our rates and buying price, they would be arguing for the same rate. Of course, they did not have the volume that we had, which was achieved with the best buying price. We were able to increase our business and put on more staff. It was a very delicate and secret condition. The availability of such information will cause unrest. This clause will not be beneficial for the employer or productivity. An open condition takes away incentive for the best workers in the area, because the lesser workers will loaf on the better ones. The average performance of the factory will show that a certain percentage are not pulling their weight and are being carried by the star performers.

I have always believed that we should pay our staff according to their performance. I had 26 people working for me at one stage. Forty years ago I had a workplace agreement on a piece of paper, because I could not keep tabs on what I had promised people. People would come in and be measured up, and they would be given an award as such and incentives, and after a while if I did not write the information down I could not remember it; so we virtually had a workplace agreement. However, not all employees were the same. Some had more responsibility, and some were not achieving the same sales productivity as others. Everyone was different. It was certainly a harmonious group because everyone in my firm knew their capabilities. They were happy with what they were being paid - they were paid over the award rates - but the stars were confident and they had the incentive to work a bit harder and develop their flair. Open conditions are not the way to go.

Mr KOBELKE: I will respond to a couple of matters put by the member for Kingsley. First, the provision for public sector agreements to be available for inspection by any person is not new but is already in the Workplace Agreements Act.

Mrs Edwardes: Does that include names and addresses?

Mr KOBELKE: I am coming to that. A similar provision states that the contents of workplace agreements that are lodged with or registered by the commission are to be open for inspection by any person.

Mrs Edwardes: What is the protection in that instance?

Mr KOBELKE: I do not think there is any. It relates to various sections that apply in the public sector. Section 40 states that section 39 is not applicable to public sector agreements.

The more important point raised by the member for Kingsley is the issue of providing security about a senior person's address. We need to look at how that is handled through regulation, because although the address may be required if people are asked for it, the disclosure of the address is not a requirement for registration.

Mrs Edwardes: The minister might then change the definition of "protected information".

Mr KOBELKE: No. We are saying that if the address were required it should not be disclosed. We are looking for a way in which people can simply ask that their place of work rather than their residence be put down as their address. It could be done in the regulations. We will look at that in case there is an issue so that we will not be hidebound by the regulations to do something that would not be good public policy. There is a way around it. Names must be collected, but the legislation provides protection for the name and address.

Mrs EDWARDES: I thank the minister for that. I ask him to look seriously at this issue. If the minister wanted to provide that personal addresses would not be required, he could change the definition so that it was the name and the work address. It would then be without doubt. This relates to not only vulnerable public servants but also employees who may have been abused or may have a violence order against a particular party, possibly an ex-partner, who may be seeking to find out the address. A woman might have shifted several times in an endeavour to keep her address private. However, when filling out a document for an EEA she could with the slip of a pen and without thinking of the consequences make that information readily available. People may be using the register to not only seek the terms and conditions but also access the personal addresses of employees. That is a total invasion of privacy. Some vulnerable people will not be protected by this provision.

Mr KOBELKE: The member makes a good point and I have asked that a note be taken. This may relate to people who are seeking to escape from domestic violence or are the victims of stalkers etc. We are aware of those problems and we need to ensure that this does not become a loophole that will enable those people to be persecuted further. They should be given that protection.

Mrs EDWARDES: I thank the minister, because that is an important issue to many people. I now refer to an issue dealt with by the Attorney General at the weekend; that is, victims of prisoners who are to be released. Those victims do not wish to be a target or to have friends of the prisoner knock on their door. It has happened. Information was allegedly given by Ministry of Justice prison officers to members of a bikie gang. That is horrific. That open access to information provides all sorts of opportunities for people with other designs on the information.

Proposed section 97WC states -

> (1) The Registrar must keep a register for the purposes of Division 5.
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> (2) The register -
>
> (a) must record particulars of every EEA that is registered under Division 5; and
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> (b) may do so in a form and manner determined by the Registrar.

What will be contained in the register? Will the agreement be accessible? What will be accessible are some of the details of wages, conditions, the no-disadvantage test and all the rest of it. The next proposed subsection states -

> (3) The Registrar may determine that the register is to be in the form of information stored on a computer.

Is it the computer information that is accessed?

Mr Kobelke: According to division 5, it is up to the registrar to determine how that is to be done, and proposed subsection (3) provides that it can be done by electronic means.

Mrs EDWARDES: The minister has obviously had discussions about how this might occur. Will the minister advise how this will occur?

Mr Kobelke: No, not as yet.

Mrs EDWARDES: Will the agreement, or a summary of the contents of that agreement, be the document that is to be made available for access?

Mr KOBELKE: The agreement.

Mrs EDWARDES: The register must record particulars of every EEA that is registered under division 5, and may do so in the form of information stored on a computer. Will the information stored on the computer be made available for access? That would basically mean a summary, as against compiling all of the information on the agreements.

Mr KOBELKE: The registrar will have to develop a system. It may be a minimalist system, with names and several parameters for cross-referencing. He may have to access the actual agreement, which would be kept as a record. He needs to look at how long he keeps those records and provisions. We cannot at present indicate the specifics of what will or will not be kept. As the proposed section states, there are certain requirements under

division 5 and the registrar must keep a register for the purposes of the statute. The registrar is able to do so in a manner that he or she determines. He or she can use electronic means to store the information if it is judged to be an efficient and effective way of doing it.

Mrs EDWARDES: An easier way for lodgment could be through e-mail. Will that be a permissible form of lodgment?

Mr Kobelke: I think it allows for that.

Mrs EDWARDES: Proposed section 97WD is entitled "Inspection of register". It states -

> (1) The Registrar must allow any person, on payment of the fee (if any) prescribed by the regulations, to inspect an EEA registered under Division 5.

I ask the minister to clarify whether a fee is proposed, and what ballpark figure we are looking at.

MR KOBELKE: We have not considered that, but it is my expectation that there will be a fee. It states "if any" as there may be cases that involve certain circumstances or people, such as those involved in unfair dismissal. In those circumstances, people may not have to pay a fee. It is a matter to be dealt with by the registrar.

Mrs Edwardes: Would it be $10 or $50?

MR KOBELKE: In order to have the matter not disallowed by Parliament, it is most likely to be on a cost recovery basis.

Mrs EDWARDES: The proposed section allows for any person to inspect a registered EEA, but it does not include the inspection of protected information. Proposed section 97WE is entitled "Commission may exempt an EEA from inspection". Taking the two proposed sections together, I wonder how they interrelate and whether the provisions of the federal Privacy Act have been considered in relation to these proposed sections. With regard to commercial confidentiality, proposed section 97WF deals with protected information not to be disclosed. We are talking about public interest, not actual commercial confidentiality. That is of specific concern to employers who wish to provide that form of benefit because it works better for their work environment. If an application has to be made under proposed section 97WE to have information exempted, there could be a blow-out in the number of applications made by employees as well. Has the minister given any consideration to the numbers expected?

Mr KOBELKE: No. As in all these areas, we have not got down to the numbers. We sought legal advice, not specifically on this proposed section but in other areas, about potential conflict with the federal Privacy Act. We were told definitely that there would be none. I am sure the same principles apply here. I am confident that there is no issue.

The member asked about the relationship between the proposed sections. Proposed section 97WE relates to an issue raised much earlier in today's debate. An employer may have a particular value in his EEA, such as intellectual property, that he wishes to maintain. There may be issues of security about matters that need to be kept confidential. Although it is necessary to go through a commissioner, a commissioner may provide that whole or part of the matter is not available for public scrutiny. Although I would rather do it administratively, this may be an appropriate section to deal with someone who may be at the risk of personal threat and who wishes to keep his place of work secret. Such a person may apply under proposed section 97WE, as I judge that to be in the public interest. It may not be the best way to do it. Hopefully, it can be done administratively and a person can apply if he has sufficient reason to believe that he is under threat of violence or stalking. On that basis, there would be some confidentiality attached to such a person's particulars. If that cannot be done through the registration process and the design of the official forms, it could be done through proposed section 97WE.

Mrs EDWARDES: Although proposed section 97WE does not highlight the fact that a person will make an application, I presume that is the basis upon which the commission will make an order. Can it be done of its own volition?

Mr Kobelke: I do not think so. A form will have to be designed by regulation. I assume that the person who is party to the EEA will make an application.

Mrs EDWARDES: This proposed section does not prevent the commission doing so of its own volition.

Mr Kobelke: It does under proposed subsection (3).

Mrs EDWARDES: Sorry. A person can look at these subsections only so many times.

With regard to security, would it not reinforce a person's role as a victim if he had to declare why information should be kept private? It would be far better if, administratively, the form provided that a person's work address was an appropriate address. Requiring someone to make a submission requesting administratively that

information be kept private for certain reasons would only reinforce the situation. I have spoken to many victims. They get fed up with filling in forms that make them go through the process again and relive it.

Mr Kobelke: It is a valid point.

Mrs EDWARDES: I refer to proposed section 97WE, which states -

> (1) The Commission may, by order -
>
> (a) exempt the provisions of an EEA, or any particular provision . . .
>
> if it considers that it is in the public interest to do so.
>
> (2) An order under subsection (1) may be revoked by the Commission if it considers that the continuation of the order is no longer in the public interest.

The Opposition highlighted a number of issues that may clearly be regarded as involving public interest. One of them was commercially sensitive information. This provision allows very broad discretion. I propose in another section that the information be kept confidential when it gets to good faith bargaining. That would be the case in this instance also, and commercially sensitive information ought to be covered by a provision if it is clearly in the public interest. The commission would still have to determine that information is commercially sensitive and it is in the public interest that it be kept confidential. In this instance, who is the commission? It could be one commissioner.

Mr Kobelke: Yes.

Mrs EDWARDES: One commissioner can make that decision, but there is no ability to provide for consistency or continuity as there are no appeal provisions.

Mr Kobelke: It is not excluded.

Mrs EDWARDES: Under which provisions could a person appeal?

Mr Kobelke: There is more than one section of the Act that provides appeal rights. Section 49 is the most likely place.

Mrs EDWARDES: We will consider that provision later. What other items does the minister think might be considered by the commission as being in the public interest?

Mr KOBELKE: This is an enabling provision. If it were not included and an issue cropped up, the commission would not have the powers to make a determination. Proposed subsection (2) enables the commission to say that circumstances have changed and that a matter should be reconsidered.

Mrs EDWARDES: I submit that the concept of "in the public interest" should be broadened. A broader range of grounds could have been identified and provided.

Mr Kobelke: The public interest is the key part of the test for the original exemption. Proposed subsection (2) requires the commission to use the same test to determine whether an exemption should continue to apply.

Mrs EDWARDES: I am talking about proposed subsections (1) and (2), not simply proposed subsection (2). I agree with having the same test in both cases. The range should be broader, and the public interest test could be at the end of a list. That would make much more sense. The commission would then be aware that this Parliament believes that one of the serious matters deserving exemption should be commercially sensitive information, for a number of reasons. Although the Government will allow a company's competitors to inspect EEAs and see the wages and conditions paid to employees, information specific to that company, such as how it runs its operations and the like, should not be readily available. A regularly occurring example is that of productivity bonuses. These can apply in organisations ranging from the kebab shop to the big mining companies; that is, from a tiny agreement to those agreed to by the mining industry. Productivity bonuses have become a very popular benefit to employees. They suit employers because they can provide incentive and encouragement to their employees. Employees also appreciate bonuses at particular times of the year. By not including in the legislation the potential disclosure of commercially sensitive information as a reason for exemption, the Government could restrict the commission from considering it. I ask the minister to put on the public record, as a flag to the commission, that the commission will be able to accept commercially sensitive information as a reason for exemption.

Mr KOBELKE: I am happy to put on the public record in progressing this Bill that proposed section 97WE allows for exemption of an EEA from inspection and asks the commission to consider the public interest; and that matters of genuine commercial confidentiality related to some sort of intellectual property are clearly part of the public interest. They would need to be taken into account. The member's suggestion that we list the various

grounds for providing an exemption could narrow the effect of the provision, because the commission could interpret the proposed section as applying to only those specific purposes. The term "public interest" is very broad. I am indicating, on the record, that we mean that to include consideration of matters of commercial confidentiality for a company that is a party to the EEA.

Mrs EDWARDES: Proposed section 97WF refers to protected information not to be disclosed, and states that a person to whom the proposed subsection applies must not, directly or indirectly, disclose information. Does this proposed section apply to those persons who have had access to the information or does it refer to only the protected information? The title of the proposed section is "Protected information not to be disclosed". Although it is not referenced to proposed section 97WE in any way -

Mr Kobelke: I think proposed subsection (2) answers that question.

Mrs EDWARDES: It relates to public servants.

Mr Kobelke: It relates to people who receive that information through their office.

Mrs EDWARDES: I thought that would have been a given.

Mr Kobelke: This is making it clear.

Mrs EDWARDES: Does it extend to anybody else?

Mr Kobelke: It is the same section as that in the Workplace Agreements Act.

Mrs EDWARDES: I am happy to have that identified, but we are dealing with the EEAs. We will deal with the Workplace Agreements Act shortly, and we will have some fun with it then.

Proposed section 97WG provides for the provision of certified copies when necessary.

Division put and passed.

Division 8: Disputes -

Mrs EDWARDES: This will be a major factor in determining the popularity of EEAs. No-one questions the insertion of a dispute resolution clause into an agreement. Everyone likes dispute resolution clauses. Over the years, redress through the courts has become less popular, and commercial arbitration or other mechanisms have become an important part of the dispute resolution process. Western Australia has an Act that deals with commercial arbitration. A number of issues relate to this division, one of which is that there is no avenue for appeal against the arbitrator's decision. The arbitrator can be a layperson without relevant qualifications or any form of accreditation. I ask the minister to explain who will be able to be an arbitrator. The Western Australian Industrial Relations Commission can also act as an arbitrator. The minister said yesterday that it was hoped that employers would use the Industrial Relations Commission as the arbitrator. He said that he would encourage that practice. I support the reasons the minister gave yesterday; however, the other powers available to the commission could extend the application of this division and raise questions about what may be contained in dispute resolution clauses. I suggest that it would allow parties to take non-industrial matters to the commission, something they have previously not been able to do. We talked yesterday about the definitions of terms used in dispute resolution clauses, and we referred to "any question, dispute or difficulty". I said at the time that although "any question or dispute" has been the subject of previous legislation, the concept of "difficulty" is new. The other powers available to the Industrial Relations Commission provide the opportunity for parties to widen the range of disputes brought before it. For instance, an employer and employee may have a dispute relating to damage to a motor vehicle that was driven by the employee out of work hours and for reasons that did not relate to his employment. That could be taken to the commission. The Industrial Relations Commission has over the years shown some latitude and flexibility in defining its role. Its decisions show that it has not always interpreted its powers in a literal or narrow sense. The Western Australian Industrial Relations Commission has been very broad in its interpretation of the matters that come before it. Those matters may also include an assault that has occurred at the workplace, not on the employer or another employee, but on a third person who has come onto the work site. Essentially, this will widen the types of disputes that will potentially come before an arbitrator.

Mr Kobelke: Isn't it good that matters are resolved and there is a harmonious workplace?

Mrs EDWARDES: The Western Australian Industrial Relations Commission is there for industrial matters, not non-industrial matters.

Mr Kobelke: This also allows for them to be resolved outside the commission.

Mrs EDWARDES: The arbitrator can be a layperson and can resolve some of those issues before they get to the court.

Mr KOBELKE: I am happy to continue this discussion with the member for Kingsley.

Mrs EDWARDES: Although we can have some level of confidence in the decision making of the members of the commission as opposed to that of laypersons, because of their experience in dealing with these matters, the role and the powers that they have broadly may extend the proposed dispute resolution section and the definition of what constitutes a dispute. This will create the ability for an arbitrator to go much wider than was anticipated in the first instance. Who can be an arbitrator? What will be the level of quality control of the arbitrators? There is a concern about the definition of dispute, particularly if the commission is appointed as the arbitrator, and the extension of that dispute then rolling into the other powers of the commission. Under the Workplace Agreements Act, the arbitrator does not have the ability to make an order that is enforceable. This is a change to the arbitrator's powers. The arbitrator can make an enforceable order rather than a determination on interpretation. The other aspect is that that decision cannot be appealed. Again, this is different, because the Workplace Agreements Act allows a limited appeal to the Supreme Court, but it does not deal with an enforceable order, unlike this provision.

A number of the key provisions about how disputes will be determined are of major concern, particularly to businesses and employees. If we go off on very broad tangents, it will bring the dispute resolution clause into disrepute, because the potential may exist to go far broader than what the community would ordinarily regard as being the subject of a dispute between an employer and an employee.

Mr KOBELKE: I have listened to the point of view put by the member. I do not have any concerns about that. We are providing for arbitration and dispute resolution outside the commission, but the designer of the employer-employee agreement - the employer - has the choice of using the commission, using the commission in part or remaining totally outside the commission. It will be interesting to see what models employers come up with. However, we are certainly providing for flexibility and a wide scope of approach in these statutes.

Mrs EDWARDES: Employer-employee agreements will not be popular because of the mechanisms that are incorporated in this Bill and the wide-ranging aspects that will be able to be included in a dispute. That is why the federal system will be far more popular in this area; it provides certainty. The minister often talks about EEAs providing certainty, but in practice they certainly will not do that. The definition is very broad. It does not have to be an industrial matter. Another example that has been put to me is the opening and closing hours of business. An attempt has been made to take that into the commission. That matter should not be included. However, there is the potential for an arbitrator to make an enforceable order on the opening and closing hours of business. Can the minister tell me that that is clearly not the case? My interpretation, and that of members of the legal profession and those who work in the industrial relations arena, indicates that that matter would clearly be open to arbitration and an enforceable order could be made that was not subject to appeal.

Mr KOBELKE: That is a commercial matter for the company; it is not an industrial matter. It may relate to the hours that employees work. It then becomes a rostering issue. If that has cost implications and impinges on the hours of operation, indirectly it does become an employment matter. However, a clear distinction would have to be made between a matter that relates to the commercial matters of the company and a matter that involves the course of employment.

Mrs EDWARDES: I will explore that further. The minister has not denied that the definition of a dispute that an arbitrator can determine may include non-industrial matters. He has said that it is a good thing to have the employer and employee talk about, say, the motor vehicle situation or the assault situation -

Mr Kobelke: The motor vehicle would not be allowed in that example you gave because it does not relate to the course of employment.

Mrs EDWARDES: It was a company motor vehicle.

Mr Kobelke: I do not think that relates to the course of employment.

Mrs EDWARDES: I beg to differ. The words "out of and in the course of employment" can be read fairly widely, as cases have determined in the past. Therefore, that would be one of the issues that could be the subject of arbitration. The minister is saying that the commercial matters of business - I think they were the minister's words - should not be included in non-industrial matters that are the subject of a question, dispute or difficulty that goes before an arbitrator. Can the minister clarify that?

Mr Kobelke: That is what I said.

Mrs EDWARDES: Can the minister clarify that in a succinct way for the arbitrators?

Mr KOBELKE: I think I have made that quite clear. That is an issue for which the boundary will be clearly drawn. My position is not to draw that boundary but to give a clear indication of the intent, which is that there be a clear distinction between commercial matters and matters that relate to the course of employment. The only area in which there might be some difficulty is that the matters that can be taken up as a dispute about the course of employment may nudge the boundary in terms of what is an industrial matter under the Act.

Mrs EDWARDES: I thank the minister. I am sure his words will be quoted many times before arbitrators and the commission.

Proposed section 97WI deals with the arbitration jurisdiction of the relevant industrial authority and picks up on some of the comments I have just made. A relevant industrial authority has jurisdiction to deal with and determine any dispute that is referred to the authority for arbitration under a provision of the kind that is included in EEA dispute provisions. Proposed subsection (2) states -

> In conducting an arbitration the relevant industrial authority -
>
> (a) must comply with the provisions of the EEA concerned; -

That is, the dispute resolution clause -

> and
>
> (b) may exercise powers under this Act, other than this Division, only to the extent that the authority is empowered by the provisions of the EEA to do so.

I read that fairly broadly because of the definition of "dispute". What does that proposed section mean?

Mr KOBELKE: There is an important line between my seeking to give legal advice, which I cannot, even with the help of my officers, and stating the intent of the legislation. The intent is that when a dispute is properly referred to a relevant industrial authority, that authority can deal with only those matters that are clearly designated within the EEA. It will be up to the employers to define that. They may allow all industrial matters, according to the definition in the Industrial Relations Act, to be referred to the commission. Hamersley Iron Pty Ltd was generally opposed to the use of the commission, and in some of its workplace agreements it used commissioners for dispute resolution in a limited way. It will be up to the employer, in designing the EEA, to decide on the extent to which it wishes the commission or the relevant industrial authority to be involved, and it will designate that in the dispute resolution procedures when it registers its EEA.

Mrs EDWARDES: The industrial commission has at its fingertips all those powers to deal with disputes, as opposed to those of a single arbitrator. I know that model provisions will be provided to assist people in drafting EEAs. People cannot define what a dispute will involve, because that is provided by the Act. People cannot even define it as not dealing with non-industrial matters. Will the minister clarify whether he was suggesting that people could define what would be included or excluded from those areas that would be the subject of a question, dispute or difficulty?

Mr KOBELKE: I have already answered that question. I indicated that it would be up to the commission. For example, what is an industrial matter? The commission looks at that question from time to time in its interpretation of the statute in cases that come before it. It is not my role to define that or the more specific part about which the member asked. That will be a matter for the commission to decide.

Mrs Edwardes: What about a single arbitrator? The commission is used to dealing with industrial matters; the arbitrator may not be if he is not a member of the commission.

Mr KOBELKE: That will have to be tested in the tasting in the context of how the arbitrator complies with the requirements. The whole issue is to get employers and employees to settle these matters and resolve them as expeditiously as possible. If we try to tie down the situation too tightly, clearly we will restrict the ability to resolve matters. The member is going to the other end of the spectrum and saying that because it is not tied down as tightly as one might like, that opens up the potential for perhaps pushing the boundaries, which could lead to some form of abuse of the system. We believe we have got it around the middle, and time will tell whether there will be any form of abuse because we have tried not to be more prescriptive. I believe it is prescriptive enough.

Mrs EDWARDES: Expanding the boundaries can be a livelihood. The looser that clauses and provisions are, the more people are encouraged to see where the line is drawn. I suggest to the minister that this is very loose and open to interpretation, and will cause a considerable number of problems. The minister mentioned that the employer who writes the EEA can incorporate what he wishes in the dispute resolution provision. That is circumscribed by the provision that deals with the definition of a dispute. That is broad and wide open, and clearly deals with non-industrial matters.

Proposed section 97WJ states that an employer or an employee may be represented by his or her bargaining agent in connection with a dispute, including in proceedings before an arbitrator under EEA dispute provisions. We went through the section that deals with bargaining agents. I look forward to a future time when there is some form of prescription for not only the bargaining agents but also the industrial agents.

On the weekend I came across a clause - we can obviously deal with it when we reach the section that covers industrial agents - in the federal Workplace Relations Act, which provides for an agent to be subject to the costs. Therefore, it puts a bit of onus and responsibility back onto the agent. The minister might like to consider that provision before we deal with the industrial agents.

Proposed section 97WK is a major part of this provision. It deals with a referral to the relevant industrial authority when a delay is alleged in the dispute resolution. As I understand this clause, if there has been a dispute and delay is alleged in the dispute resolution, the delay - not the dispute - can be referred to the industrial authority. I would like clarification that that is how this clause is meant to operate. Under what provisions does the relevant industrial authority have jurisdiction, and what does it do as a result of such a referral?

Mr KOBELKE: The situation, to which I have already alluded, is that the employer has the ability to design the dispute resolution procedure so that he can sit outside the commission if he wishes. In those cases, or when certain parties sit outside the commission, those matters can go into the commission only when the prima facie case that there has been a failure to meet the time requirements has been made. If there is a failure to do that, it will become a test case. Once it is agreed that there has been a failure, the commission can take over and hear the original dispute.

Mrs Edwardes: It does not have to send the matter back to the -

Mr KOBELKE: No, it takes over the whole thing. It puts pressure back on the arbitrator to get the matter sorted out, because if he does not and one party wishes to use that trigger of failure to meet the time requirements, the matter can go to the commission.

Mrs EDWARDES: Proposed section 97WK(1)(b), which obviously deals with the issue to which the minister just referred, states -

> a party to the EEA concerned alleges that the other party has failed to comply with any time limit included in the EEA dispute provisions . . .

Will the time limits in the EEA dispute provisions be included by way of regulations?

Mr Kobelke: Yes, they will be set down in regulation.

Mrs EDWARDES: Therefore, it will not be left open to the employer to determine for itself when it will carry out particular acts, such as lodge documents, appear and all the rest of it. It will be set down by way of regulations and incorporated in those model provisions.

Mr Kobelke: Yes, but the regulations could be framework regulations, which state that the first discussions between the employer and employee cannot go beyond 21 days or something like that.

The actual EEA may specify that it be done in seven days. The point of regulations is to allow as much flexibility as possible. The regulations may specify a time frame for the various steps through the process or they may provide a framework by which the individual EEAs could use a shorter time frame if the parties wish.

Mrs EDWARDES: Are the negotiations between an employer and an employee before a referral to an arbitrator likely to be one of the key premises upon which the arbitration is based?

Mr Kobelke: That is my view.

Mrs EDWARDES: Is that likely to be incorporated in the regulations as one of those time frames that must be met?

Mr Kobelke: If there were one time frame set from start to end, it would not constrain people and move them through the process. The regulations would have to be broken down to the key component parts, which are standard for any form of dispute resolution, and some time requirement would have to be set.

Debate interrupted, pursuant to standing orders.

[Continued on page 8626.]