WORKERS' COMPENSATION (COMMON LAW PROCEEDINGS) BILL 2004

Second Reading

Resumed from an earlier stage of the sitting.

MRS C.L. EDWARDES (Kingsley) [3.01 pm]: In continuing my remarks, I refer to the case of Henderson v KCut Pty Ltd & WMC Resources [2004] WADC 13, which also gives rise to some concern. The decision allows any worker who was injured prior to 5 October 1999 and whose claim falls within the six-year statute of limitations period to pursue a common law claim as if the pre-1999 legislation were in effect. In the case of Henderson, Judge Macknay held that a worker injured prior to 5 October 1999 could file a fresh originating summons for leave to proceed under the former future pecuniary loss provisions of section 93D of the Workers' Compensation and Rehabilitation Act. In reaching that conclusion, Judge Macknay relied upon and extended the High Court decision of Dossett v TKJ Nominees, which we have spoken about. The High Court decision was extended in that Judge Macknay also held that even if a worker had not lodged an originating summons seeking leave before 5 October 1999, the worker had the right to seek leave to proceed under those provisions. Accordingly, Judge Macknay held that the October 1999 amendments did not affect the worker's claim. He further held that it was irrelevant that the worker had lodged such an application prior to 5 October 1999 and had agreed to its dismissal after that date. Nothing prevented a worker from lodging multiple applications for leave under section 93D. This is one of the reasons that, in seeking to provide certainty within the workers compensation system, the Minister for Consumer and Employment Protection has introduced the Bill we are debating this afternoon. There is uncertainty because the decision means that employers, deemed employers and their workers compensation insurers will need to revisit their exposure to and, of course, their estimates for unfinalised claims for accidents that occurred after 30 January 1998 - the six-year limitation period - and before 5 October. Workers injured during that period who have not satisfied the 30 per cent threshold will be the biggest beneficiaries of that decision. The window of opportunity that was opened by the Dossett decision has been opened wider by the Macknay decision, as it extends a worker's ability to use the section 93D system.

The Conciliation and Review Directorate provided me with some further information about the Henderson decision. The note states -

> The situation in relation to the *Henderson* decision has been brought to the attention of review officers in a number of matters, in particular, the matter AP 549/02. This particular matter was heard by a review officer and he dismissed the worker's Form 22 referral. The broad reasons for this dismissal are contained in the following paragraphs:
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> . . . The worker's situation prior to 5 October 1999 was that he had the right and/or the capacity under the provisions of the then s.93D of the Act to seek the leave of the District Court by way or originating summons. His situation answered the terms of one or more of paragraphs (b), (c) and (f) of s.37(1) of the Interpretation Act. The worker's legal position, therefore, was that notwithstanding the purported repeal of the pre-October 1999 version of s.93D by the 1999 Act his right, power and capacity to institute a legal proceeding or a remedy which would enable him to pursue a claim for damages against his employer survived the purported repeal effected by the 1999 Act. Not only did it survive the introduction of the amending or repealing legislation, the effect of its survival was to restore the situation to what it had been immediately prior to the giving of the Royal Assent to the 1999 Act. So the worker found himself in the position he would have been in *"as if the repealing written law had not been passed or made"*: That such is the correct interpretation is, I believe, confirmed by the Decision of Macknay DCJ in the *Henderson* Decision.

For those reasons the review officer dismissed the form 22 referral. That decision has been appealed and is listed for hearing by the Compensation Magistrate's Court on 4 August 2004. Some 30 cases before the directorate fall within this type of scenario. Again, we do not know how many of those will, once that appeal has been heard, have the opportunity of going through the section 93D system or staying within the 1999 scheme. Of course, once this Bill is passed, all the cases will fall within the 1999 scheme and the appeal will have no relevance whatsoever.

Forty-two future pecuniary loss applications have been lodged in the District Court. Prior to the Bill coming into this House, a question was asked about whether workers in those cases could also access the 1999 regime. According to the decision in the case of Mokta v Metro Meat International Limited [2004] WADC 78, delivered on 4 May 2004 by District Court Judge Nisbet, the answer is no; the workers have no access to the 1999 scheme. Judge Nisbet referred in his judgment to the fact that the plaintiff could not simply take herself out the operation of the Workers' Compensation and Rehabilitation Act by refusing or failing to have the defendant's liability determined in accordance with the Act's provisions. He stated -

> Once this point is reached all that remains to be determined is what is to become of the action. Until the High Court ruled that the former provisions of the Act applied in circumstances where no leave had been obtained as required by the (former) s 93D(4) and the cause of action (if any) had arisen before the amendments wrought by Act 34 of 1999, the *Workers' Compensation and Rehabilitation Act 1999*, proclaimed 5 October 1999, came into effect, it was thought the former provisions only had a continuing application where leave to institute proceedings had been given: ***Dossett v TKJ Nominees Pty Ltd*** [2001] WASCA 179. But the High Court has now explained the true position, namely that s 37(2) of the *Interpretation Act 1984* applies to save the former provisions: . . . This being so, leave to institute these proceedings was required. It wasn't and hence HH Jackson DCJ had no power to stay the proceedings pending a determination of incapacity and should have either struck them out or stayed them permanently. As this is not a case like **Thomas v Arimco Mining Pty Ltd & Anor** [2000] WADC 151, the choice between permanent stay and striking out here is somewhat academic. His Honour's order, being interlocutory, can be reviewed by the court at any time: **Turner v Bulletin Newspaper Co Pty Ltd & Others** (1974) 3 ALR 491 per Jacobs J at 513. As no useful purpose can be served by staying the action permanently, as opposed to striking it out, and the stay previously ordered having been made without power, I will recall the order for the stay, discharge it and strike out the action.

District Court Judge Nisbet again highlights the level of uncertainty that is now coming into the system. The question the Government faced was whether to allow the judiciary to sort out the issue or bring forward the legislation and claim that it is providing some level of certainty. However, the difficulty is that there will be advantages and disadvantages on both sides. Some people will gain under the proposed changes. However, some people will be disadvantaged, because they will miss out. Some people will not get the 30 per cent, and some people will be out of time for the 16 per cent. Some people, who sought leave to commence proceedings under section 93D, only to have had their matter adjourned last week for a return date, will, after Tuesday night, no longer have that right.. The reason we are concerned about this legislation being rushed through the House is that it will affect people's rights. This is not the first time this has happened. I did it in 1999. We are now dealing with those cases that we believed would fall under the 1999 scheme and would not have the right to continue under section 93D. Those cases have now been channelled down to a small number. The minister should be able to tell us where those cases are in the system, and who will miss out and who will be advantaged. We were of the belief that these claims had effectively been struck out by the 1999 amendments, and that it was not intended that those workers would be entitled to come under the transitional provisions. However, the High Court created the window of opportunity to take action under section 93D, by virtue of Dossett. That has now been extended further by Short and Henderson. Mokta was then thrown in, and that has created an even greater level of uncertainty.

I emphasise to the Government that when it rushes legislation through this House, there are a number of consequences. The first is that unless the minister has personally identified who is in the District Court system and where they are within that system and who will miss out and who will be advantaged, he can have no confidence in what this legislation will or will not achieve. The minister will need to advise us how many people have cases that are on appeal in the District Court, and where they fall into the definition of "proceedings". Even in this new Bill there is still some uncertainty and lack of clarity in the definition of "proceedings" by virtue of what Mr Justice Kirby said in Dossett. Further, we do not know how many injured workers will fall under either Dutch or Dossett and be eligible to have their legal costs, which will now be thrown away, reimbursed. We also need some information on the impact of this Bill on the supplementation fund and how much the employers will need to pay over and above the reserves to ensure that not only the HIH claims but also the Dutch cases are covered, and to reimburse the legal costs that will now be thrown away. Many of the stakeholders have not had sufficient time to look at the Bill, so they are not in a position to give adequate advice to members in this Chamber. There is no knowledge about the specific cases before the courts. I urge the minister not to allow this Chamber to be usurped by the Legislative Council and to defer the debate on this Bill to enable the Legislative Assembly to receive that information and make a considered decision. At this stage, there is no way that we can determine our support or opposition for this legislation, because we have not been able to receive sufficient information in the short time that the Bill has been in the House, and there is a lack of knowledge and information among the respective stakeholders. The employers will be required to pay for the changes that are proposed in this Bill. That will impose an additional burden on them that perhaps was not recognised in trying to address the Dossett and Dutch cases. Some injured workers will lose their right to compensation because the minister brought in this Bill on Tuesday night. However, other workers will be advantaged by this Bill, because they would not have been able to achieve the bar that the section 93D provisions laid down in order to receive adequate compensation through the District Court. The real concern is that some people in the system who have already received compensation may now be led to believe that they can gain more compensation by going back

into the common law system, and that creates a level of uncertainty for injured workers, who really just want to get on with their lives.

DR J.M. WOOLLARD (Alfred Cove) [3.17 pm]: I will not support the Workers' Compensation (Common Law Proceedings) Bill 2004 because it is legislating on the run. This Bill was tabled on Tuesday evening, and it is being debated today as a matter of urgency. Whose urgency? The Bill has two major components: part 2, which deals with the Dossett decision, and part 3, which deals with the Dutch decision. What is this Bill all about? In the early 1990s, a worker who sustained an accident at work because the employer was negligent could seek damages through the courts, and the amount of damages was unlimited. In 1993 the first major changes were made to the Workers' Compensation and Rehabilitation Act. Those legislative changes meant that instead of the worker being assessed and damages awarded according to what the court felt the worker deserved to help him get over his injury, the worker had first to prove that the injury resulted in economic loss of more than $119 000. That was a big change for injured workers. Six years later there was another pulling back of damages for injured workers in a legislative change that came into effect on 5 October 1999. Those changes to the legislation meant that instead of damages being assessed for economic loss, they would be assessed on a worker's disability. That is where the two steps came in. The first step meant that an injured worker who was left with a 15 to 30 per cent disability could apply for an award of damages on a sliding scale, and an injured worker who was left with a 30 per cent or more disability could apply for uncapped damages. What did that mean to the system? This is where part 2 of the Act came in. It meant a great change to a worker such as Mr Dossett who was injured at work. It would not have applied only to manual workers. It would have applied equally to a nurse who slipped on a puddle of water left by cleaning staff in the bathroom where she was taking a patient for a shower. Alternatively, it could have applied to a pianist who lost fingers while participating in a production somewhere. The economic loss in the example of the pianist, particularly a famous pianist, would have been greater than $119 000 and he, therefore, would have had a good basis for taking his claim to court. However, with the changes made in 1999, that person would not have fallen within the 15 to 30 per cent disability provision. Those changes to the legislation, therefore, meant that an injured worker who could have made a claim for compensation under the 1993 legislation was unable to do so under the 1999 legislation. Mr Dossett, who was a manual worker, had his accident in 1996. Although he had filed a summons in the District Court for a hearing to determine damages, his case had not been heard at the time the 1999 legislation came into force. Therefore, he and other people like him were told that they could not make a claim under the old system and must claim under the new system. He and the other people felt that the new system with the 15 to 30 per cent disability provision would not give him and other people the amount of damages that they believed would assist them to retrain and move into other areas of work, which they would have to do as a result of their injuries, and cover all the costs associated with their injuries. Mr Dossett's case went to the District and Supreme Courts. The insurance company said that Mr Dossett's case must be dealt with under the new 1999 legislation because section 37(1) of the Interpretation Act headed "General savings on repeal" stated -

> Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears -

It then lists the different areas that the section addresses. The insurance company relied on the words "unless the contrary intention appears" in the Interpretation Act and on section 32(7) of the Workers' Compensation and Rehabilitation Amendment Act, which states -

> The amended provisions do not affect the awarding of damages in proceedings -
>
> (a) commenced before the assent day; or
>
> (b) for the commencement of which the District Court gave leave under the former provisions before the assent day,

The insurance company said that that section applied to Mr Dossett and that he could not claim under the old system. The insurance company relied on the words in the Interpretation Act "unless the contrary intention appears" and said that that was what the Workers' Compensation and Rehabilitation Act stated. Mr Dossett's case was taken to the Full Bench of the High Court and heard by Justices McHugh, Gummow, Kirby, Hayne and Heydon. They considered that case and basically said that the decisions of the District and Supreme Courts were rubbish. They said that the legislation did not close the door on people like Dossett who wanted to make a claim under the pre-1999 system; that is, the system that provided damages for economic loss. The High Court said that the District Court and Supreme Court decisions were wrong. It is not only Dossett who has been affected by this legislation but also other people in a similar position who were told they had to claim under the 1999 legislation, which, depending on the severity of their injuries, would not have assisted them.

I thank the minister for briefing me on this matter at eight o'clock last night. Again, that was necessary because the legislation is being done on the run and no decent time has been given to debate this Bill since it was tabled. It was pointed out to me in the briefing that the previous minister had said that damages would be awarded under the new common law provisions only if the proceedings had commenced before the assent day. I have since

discovered that it was not pointed out to me during that briefing that that comment was made after the Bill had gone through Parliament. The statement did not come from the Bill; it was merely the minister's post-enactment statement. That statement was, in fact, challenged in the Dossett case. It was pointed out that the only thing that is binding on us is the legislation that goes through this Parliament and what the Act states, not what a minister of the Crown says the Act states two weeks, three weeks or six months after the legislation is passed. We must look at the words of the Act. The High Court did that; it looked at the words of the Act and said that there was no reason that Dossett, and people like Dossett, could not apply under the pre-1999 system, before the change was made.

The member for Kingsley has already asked in this House for the figures. Why is this legislation suddenly being rushed through the Parliament? I know there are two parts. After listening to the background to the Dutch case, I feel more inclined to support part 3 of the Bill. However, again, I would like to see the facts and figures from the Dutch case. Because of what happened in the debate on the rehabilitation legislation, the minister wants to address the Dutch case and the outcome from that case. However, he is doing it in such a way that he is really putting apples and oranges on the table. I believe that a lot of people would support the Dutch case if they were given a bit of extra information about it. However, the minister is putting on the table the cases of the injured workers affected by the Dossett case alongside those affected by the Dutch case. People who pre-5 October 1999 were forced to go into the disability system could have argued for economic loss. This Bill is basically saying that it is either one thing or the other. The Bill is throwing out Dossett, because the Government does not like what the Dossett case said about the legislation. Therefore, the Government is now trying to say that the Bill meant one thing, when the Bill did not mean that. The statement on which the Government is relying was made by the minister several weeks after the Bill had gone through the Parliament.

We do not know how many workers this Bill affects. At my briefing I was told maybe 30 in the court system, and maybe 30 with WorkCover. I have been speaking to the member for Kingsley today, and she has given me figures completely different from those I was given at the briefing. Therefore, one does not know the true number of cases that are now affected by the decision in the Dossett case, and one does not know the number of workers who are affected by the outcome of the Dutch case. I may have been told in the briefing that the Dutch case will affect 200 people; however, I could not rely on that figure.

Under the decision in the Dutch case, if workers wanted to lodge a claim, the disability had to be between 16 and 30 per cent. The doctors who had assessed those workers had said that their disability was not less than 16 per cent. When that was investigated more fully later, those workers were found to not have a 16 per cent disability. Because the statement had been made so generally, they thought that they would be able to mount a claim for damages under step one of the post-1999 system, when they could not. Again, this appears to be a breakdown in the system because of the lack of communication between the injured worker, the medical practitioner and WorkCover. The minister has put on the table the changes in part 3 of this Bill. If the minister could provide the facts and figures on how many people are affected and what the damages are likely to amount to, I think he would probably get the support of the House for part 3. However, I hope that the minister will not get the support of the Liberal Party for part 2. Although the minister has the numbers in this House to get this Bill rubber-stamped - the Bill was put on the Table late on Tuesday and is being rushed through today - I hope that when the Bill goes to the upper House, it will not be rubber-stamped in the manner in which it will be rubber-stamped in this House. I hope that the two parts - that is, the Dossett case and the Dutch case - will be separated. If members have the full facts, the Dutch case may possibly be supported. However, I hope that the people who are affected by the Dossett case will have the freedom to elect whether to go under the system for economic loss or for disability. Bearing that in mind, during consideration in detail I will move an amendment. I would prefer to see the whole of the Dossett case taken out; but, if not, a modification of Dossett to allow freedom of choice.

MR J.C. KOBELKE (Nollamara - Minister for Consumer and Employment Protection) [3.37 pm]: I thank members opposite for their contribution in the hope that we can proceed fairly expeditiously with this amending Bill. It is a bit exceptional. In my reply I will seek to explain why it is exceptional that we are seeking to have this Bill passed in fairly short time. We will also seek cooperation to get it through the other place next week, if we can. The reason is to ensure that we reinstate and put beyond dispute the clear intention of the 1999 amendments. As we know from the High Court decision in Dossett, that has been overturned, and the actual black letter law must stand, as opposed to what was the intention in 1999.

Lots of different interests are involved. However, the clear, unequivocal interest that the Government wishes to pursue is the maintenance of a stable workers compensation system, and a higher degree of legal certainty is absolutely crucial to that. We must expedite it because if we leave that uncertainty, a lot of cases will continue to unfold through the court system, further complicating the mess that already exists. Therefore, there is some urgency to give certainty to this law at the earliest possible opportunity. That is important. There is a time relevance in what is before the House. People have had access to common law stopped by a simple technicality because of these cases. The Government wishes to ensure that people are not denied such access. Other

people's cases may proceed, and this measure will probably stop some cases. However, it will only stop cases in line with the clear intention of Parliament in its changes of 1999. Some people will be stuck in between, but they will be able to continue their action under the system they have chosen. The Government guarantees to cover the legal costs of people who fall out of the system because of changes to be made. The Government seeks to give certainty in the fairest possible way. In giving that certainty, a small number of people may feel they are disadvantaged or denied their full measure of justice. I accept that. The injustice done to a much greater number of people by leaving that uncertainty must also be weighed against that situation. The Government seeks clearly to establish justice and certainty for the greatest number of people in making these very much needed changes. The issue is costs. A range of costs cannot be quantified because uncertainty is the biggest cost. The way a lot of cases will go is unknown. Several more cases could go to the High Court, and huge costs are involved in that process. In getting certainty, the Government seeks to ensure that costs are contained and that injured workers are not put through the mill only to find they are unable to advance their cases. Cases will continue to roll through the courts. People must be given certainty to know what action they can take. The member for Kingsley indicated that lawyers are concerned about their professional responsibility. The situation is uncertain and they do not know how to advise their clients.

These problems were generated by the decision made by the previous coalition Government. The cause of Dossett was known to the last Government. In fact, the member for Kingsley as the then responsible minister made a ministerial statement on 21 October 1999 that related to two different matters. I did not at the time see the very important distinction between the two. The first matter was outlined as follows -

> It has come to my attention that a number of lawyers may have been of the view that if an application were made prior to assent, workers may seek damages under the old common law provisions.

That is what the Dossett case was about. The then minister knew that on 21 October 1999, but she did nothing about it. The second part of the statement related to problems relating to the election period for cases that had cause prior to 5 October 1999. By amendment to section 32(8) of the principal Act, the matter was fixed in a further amending Bill. I was not aware at that time - I am not a lawyer - that the legislation fixed only the second, not the first, matter.

Mrs C.L. Edwardes: Did the State intervene in the Dossett case in terms of protecting its legislation?

Mr J.C. KOBELKE: I will get advice on that matter later for the member. The Workers' Compensation and Rehabilitation Bill (No. 3) 1999 that fixed the second matter outlined in the ministerial statement was introduced into this House on 26 October 1999 at 4.00 pm, and it had completed its passage by the next day, 27 October 1999. There was not even a day in between to consider it and to secure legal opinion. The then Opposition accepted the Government's intention with the Bill and assumed that the Government had good legal advice and the matter was covered. Our confidence was misplaced. It was not covered.

Mrs C.L. Edwardes: I think you got legal advice from the same people. I would be careful if I were you.

Mr J.C. KOBELKE: We than had the Dossett, Henderson and Mokta decisions. How many more decisions will be made is unknown, further mixing up the complexities and leaving many people uncertain about their benefits and whether they will gain or lose from changes made. That situation cannot continue.

On that last interjection, if the member for Kingsley wants to get into that debate, it would be interesting to know whether she will release the cabinet papers from those days.

Mrs C.L. Edwardes: If you want to make it a political issue, minister, we can do that. Until this time, we have cooperated with you to the extent that it has been possible to do so. If you wish to get down to make it a political issue, I am very happy to do so. I could come back and repeat what you said when you were on this side of the House. I can do that. We either progress this -

Mr J.C. KOBELKE: I thank the member for Kingsley; I have checked *Hansard*.

Mrs C.L. Edwardes: So have I.

Mr J.C. KOBELKE: It is in *Hansard*. I said in *Hansard* that the way the then minister was trying to fix it prior to that measure - that is, by doing a deal - would not stand up. Check *Hansard*. When in opposition, I made it clear that the then Government had to fix the problem by legislation; that is, it could not be done by hoping people might just sort it out, which was the first approach.

I accept what the member for Kingsley said. The Opposition has had an open mind and been willing to cooperate. It has not declared whether it is willing to support the Bill, and I understand that view. In the little time available, the Government has tried to have the Bill available for a day so members can get legal advice. It is less than the full amount of time I would like available. Opposition members have cooperated by taking briefings at very short notice. I thank them for that cooperation. I hope the Bill will be allowed to proceed

through the Chamber today. The Opposition could hold it up if members opposite want to filibuster. Members opposite may not support the Bill, but a choice will be left open in sending it to the other place.

Mrs C.L. Edwardes: If you wish to attach blame, we could make it difficult.

Mr J.C. KOBELKE: Let me come back to that point. When the Bill goes to the Liberal Party room and the coalition room, and brought on for debate next week, I hope, in the Legislative Council, we will be working together. We want to ensure we fix the uncertainty that is totally unacceptable. I accept some risks are involved in that process. In my judgment, far greater risks are involved in not acting. I hope we can act in a bilateral way to fix the problem. If that is done, the member for Kingsley will not find me playing politics with the matter. I give that undertaking. If we do not get that support, the Government will have to manage the problem. I will then sheet home responsibility for the source of the problem.

Mrs C.L. Edwardes: What - that you did not intervene in Dossett to protect the State's position?

Mr J.C. KOBELKE: That is not true. That is not the cause of the problem. Check the 1999 *Hansard*. The member will find that I, in opposition, without any profound legal advice, pointed out to the then minister that the problem had to be fixed by legislation.

I now place a little more on the record about why it is important to deal with this Bill. The member for Alfred Cove suggested that my motivation was to throw out the Dossett case because I do not like it. I totally reject that claim. This Bill allows the Dossett case to continue; the Bill gives it special consideration.

Dr J.M. Woollard: What about the freedom of choice of people like Dossett? It is taking it away.

Mr J.C. KOBELKE: The member for Alfred Cove appears to be directed by very sectional interests. I am not directed by some sectional interest; as minister, I have responsibility for the proper functioning of the entire workers compensation system. I am not directed by some sectional interest that may wish to gain by taking one path or another. The member for Alfred Cove needs to be careful: she is not here as an advocate for people who want to make money out of the system. She should be careful of the stand she takes. The public interest is an amalgamation of many sectional interests. It is appropriate to look at sectional interests. If members are driven by one narrow sectional interest, it will come back to bite them. We must look to the public interest, which, in light of the High Court decision called Dossett of December 2003, followed by a District Court decision known as Henderson from January 2004 and another District Court decision known as Mokta in May 2004, is that we ensure that we re-establish the workers compensation scheme as was intended by the 1999 amending Bill. If we do not do that, these cases will unfold. I will put on the record a few questions that would have to be answered through a drawn-out legal procedure if we failed to act. My first question is: does the Mokta decision invalidate all causes of action taken since 5 October 1999 for cases arising before that date in which leave was pre-conditioned to proceeding with an action; and, if that is the result of the Mokta decision, how many hundreds of cases would have to go back to court or start action again? My second question is: will the Mokta decision stand or be overturned in full or in part on appeal? That decision itself might go to the High Court and, if that happens, there will be months or years of waiting and uncertainty about where cases will go because the Mokta decision may or may not stand in whole or in part. My third question is: will injured workers who have proceeded under the post-1999 provisions, or for whom the degree of disability has been assessed as exceeding 60 per cent, seek to have their future pecuniary losses assessed under the appeal provisions, and what legal actions are likely to unfold? If they win and if they seek to undo it and start again, employers will take counteraction, and where will that end? It might be resolved quickly or it could go on for years. My fourth question is: for injured workers who have had their disability assessed as exceeding 16 per cent and have elected to pursue a common law action, what will be the effect of their election if leave to issue a writ based on future pecuniary loss is granted? What will that open up? If the election were invalid, employers may be liable to retrospectively pay workers compensation that was illegally ceased. Proceedings already under way could be struck out on the basis that there was no course of action. What will be the liability of injured workers to pay for legal costs of both the ceased fraction and the Dossett application, which has no guarantee of success? There is the potential that people who have received their payout could come back and say that they have had their weekly payments cut off and that they should all be reinstated, and they might win that case. A range of actions could be taken to get money back from employers. On the other side, the employees are in jeopardy in that by embarking on these legal actions they could incur considerable legal costs and, because of the complexity of the cases, could get nothing. Their lives would be put on hold, placed under great duress, and at the end of the day some may get something and some may get nothing. They do not know what will be the likely outcome in an issue in which there is so much litigation of one case against another. My fifth question relates to injured workers whose course of action is fast approaching this six-year limitation period being able to issue a writ without first obtaining leave of the District Court to commence a common law action under the repeal provisions. Ordinarily, leave could not be obtained retrospectively to validate a writ under the repealed provisions, and such writs may be struck out or dismissed. What will be the consequences if the District Court now adopts a different approach? Three cases

have turned things around from what we thought they would be, and there is still the potential that other cases could strike out in directions that we do not expect, and where will the injured worker be left then? My sixth question is: in respect of injured workers who have issued a writ based on a disability exceeding 16 per cent, who may issue a fresh Dossett application alleging the same course of action with or without terminating the first action? In the former instance would an issue of estoppel arise; and, in the latter, would the District Court permit both to proceed to trial? Again, it is unknown. It is very difficult for legal advice to be given and it is obviously impossible for an injured worker to really understand the issues.

Mrs C.L. Edwardes: Some of those questions should have been answered before bringing the legislation into Parliament.

Mr J.C. KOBELKE: The member for Kingsley had a very simple case in 1999 on one matter.

Mrs C.L. Edwardes: At 11 o'clock today we did not even have the details of how many were in the District Court.

Mr J.C. KOBELKE: We now have a series of legal conditions that are contrary to what people expected, so there is a legal quagmire. I am simply indicating that that swamp could get muddier and deeper if we do not fix it. These are the sorts of issues I am talking about; even if only one or two of them end up proceeding, they compound the problem. My seventh question is: what is the practical effect of a post-1999 settlement for injured workers who have reached a settlement that fell within the Dossett category but did not pursue any legal advice and an action was no longer available? Can they now come back into the system? We do not know. Finally, will injured workers who have accepted a redemption seek to bring a Dossett application, notwithstanding that the 1999 amendments contain provisions whereby the worker forgoes any right to proceed with a common law claim? We do not know. Quite a lot of workers could pursue their cause and be put in a situation of financial jeopardy because the legal landscape is so confused. Employers do not know what action they should be taking through their insurers and lawyers to protect their position. Someone might wish to push the whole landscape further back and take radical action in another direction. The situation will be impossible if we do not act. I accept there are risks in the action, but the risks of not acting are far greater. I therefore urge members to support the Bill so that we can give greater certainty to the system.

I turn briefly to the Dutch aspects of the Bill. The rectification of matters that flowed from the Dutch decision was contained in the Workers' Compensation Reform Bill 2004, which has already been debated, and has simply been extracted from that Bill and put into this Bill. It has been the Government's clear intention since 2002 to seek to do this. There is a clear linkage between what we are seeking to do in the Dossett case and what we are seeking to do in the Dutch case. We are seeking to establish what was the clear intent of the Parliament in 1999, and that means that we are retrospectively giving rights to injured workers that were taken away by a court process and, in Dossett, we are in part giving back rights, but in a greater way we are removing the rights that were granted by the High Court. The principle in both cases is to establish certainty and re-establish what was the clear intent of the 1999 changes. Without that certainty we have major problems. I am happy to go into the issue of costs a bit later, but we have introduced through the supplementation fund a mechanism that will give greater certainty to the undertaking already given by insurers, which have been required to reserve funds for those Dutch decisions that were still afoot. Those cases were already on the books, and we were simply saying that they must pay those costs out of those outstanding amounts or reserve funds. As of this week, we have captured their current reserves for those cases, and we expect them to meet those costs. If the costs go beyond those reserves, we will pay the excess that is paid following the Dutch decision out of the supplementation fund. That way there will be even greater certainty that the Dutch costs will be met by the reserves that the insurers have quite rightly put aside for them.

The Opposition has been asked to consider this complex matter with very little notice. I appreciate the member for Kingsley's efforts to respond on behalf of the Opposition. We understand the Opposition has not had time to go to its party room, and it is proper and reasonable that it will not declare its position at this time. However, we hope that after considering the matter in its party room - we will certainly provide as many briefings as those opposite wish - the Opposition will support this Bill not only going through this Chamber today but also proceeding through the upper House next week. If this Bill does not go through next week, it will not stop us continuing to give that certainty; however, there is a risk that if it does not go through the other place until September or October, some of the cases that are already afoot will have progressed. The courts must act on the law as it is now, not on what might be the intention of the Parliament, because they cannot guess at that, and these cases will proceed. A range of new cases could come into the courts, and that would just make it more complex. How would we deal with the complexities of new case X or new case Y, because they would have progressed in ways that we could not foretell? Therefore, it is very important that the Bill be passed through both Houses of Parliament in this two-week period. Although people may wish to initiate actions through the courts in that time, it is highly unlikely that any decisions will be made by the courts. The law will be changed

within two weeks or so, and that will then be the basis on which to give certainty to decisions that the courts must make.

I thank members for the very serious consideration they have given to the Bill. I will be very happy at the consideration in detail stage to try to answer some of the more specific questions they have asked about particular parts of the Bill.

Question put and passed.

Bill read a second time.

Consideration in Detail

Clause 1: Short title -

Mrs C.L. EDWARDES: I will pick up on a couple of points that the minister has made. Any legislation that ministers and Governments bring to this House is drafted with the very best intentions and on the very best advice from the department, draftspeople and the State Solicitor's Office. I resent the minister's comment that I was criticising the people who provided me with the very best advice with the very best intentions at the time. I also point out a contradiction. The minister mentioned that he was not given sufficient time to seek his own legal advice; yet he was asked to pass legislation in less than a day. The fact has not been missed by the House that the minister has asked us to do exactly the same thing.

Dr J.M. WOOLLARD: The minister said that things went wrong in 1999 because the Bill was rushed through the House. This Bill was laid on the Table on Tuesday evening. Who has been consulted on this Bill? When did it go out to people for consultation? I have heard from different groups that it went out for consultation on Tuesday afternoon. The minister has not even had feedback from different groups in the community. Why was this Bill laid on the Table of the House on Tuesday, only to be rushed through the Parliament without appropriate consultation with stakeholders? Stakeholders were sent the Bill on Tuesday and were told that the minister values their input. However, we are discussing the Bill today. When were they meant to look at the Bill and provide feedback to the minister? The minister said that the problem with the previous system was that the Bill was rushed through the Parliament, yet he is asking us to do the same thing - to rubber-stamp this legislation. As usual, the minister has not provided the facts and figures behind this Bill, as happened with the rehabilitation Bill. He is trying to steamroll this Bill through this place. He might be able to steamroll it through this place, but I hope he is not able to steamroll it through the upper House until he has put the facts and figures - the evidence - on the table and has given stakeholders an opportunity to look at the Bill and provide their views to the Government and the Opposition. If members of the Liberal Party in the upper House support this Bill before they have received feedback from stakeholders, they will be asking for the problems that this Bill will create in 12 months or 24 months and they will have to deal with them if they are in power then.

Mr J.C. KOBELKE: I will respond briefly on the matter of the amendment Bill No 3 of 1999, which was introduced at 4.00 pm on 26 October and completed its passage by 1.15 pm on 27 October. That happened because the Labor Opposition supported it. That is why the Bill went through the Parliament so quickly. We supported it because we knew a problem had to be fixed. The Bill did not fix that problem properly, but we knew that it had to be fixed and that the Government was taking action to fix it. The member for Alfred Cove should come into the real world. The amendments were in effect in 1999, which meant that matters in the courts were going wrong or could potentially have gone wrong if they had not been fixed. That is why it had to be done expeditiously. We are in exactly the same situation now. Matters are afoot in the courts, and the courts are uncertain which way to go. In some cases the outcomes are likely to be unjust, while in other cases people may feel that they have done better. If the problem is not fixed straightaway, there will be greater uncertainty, because people will not know which law will apply when their case gets to court. That is why we could not consult.

Another point that may have escaped the member for Alfred Cove is that if we had consulted, some people might gain a personal advantage. That is a very real issue. She was not in the House when the then member for Albany was accused, with some justification, of letting someone know some information from the party room, which gave advantage to a legal firm. He did not live that down. We could not consult with some people and not with others, because it might have given legal advantage to particular clients. The very nature of this Bill precludes proper consultation. We simply have to make the call and get on with it. We set the program so that there would be at least 36 hours for the key groups to look at the Bill and get straight on the phone, as they clearly have done to the member. It seemed fair to allow input from people with a professional interest, understanding and concern in this area. However, it was not proper consultation, and I will never suggest that it was; it simply could not have been because of the nature of the matters we are dealing with.

Clause put and passed.

Clause 2: Commencement -

Mrs C.L. EDWARDES: I do not propose to speak to this clause, other than to indicate that when we deal with clause 5, I will refer to the commencement dates. It seems that it would be more appropriate at that point.

Clause put and passed.

Clause 3: Purpose -

Dr J.M. WOOLLARD: Will the minister table the information that he has? The minister has said that things are happening in the courts and that is why this Bill was laid on the Table so urgently on Tuesday. The Dossett case concerned a worker who was injured before the legislation changed in 1999. How many people are there like Dossett who, when the 5 October 1999 Bill came in, had not been granted leave and their case had not gone to court? How many people are there like Dossett who are still in the court system and whom WorkCover knows about? The insurance companies must know who those people are. Has the minister checked with the insurance companies what reserves have been put aside for those people? Can the minister give me some more information about why he is rushing through clause 3(a) in relation to Dossett?

Mr J.C. KOBELKE: We are dealing with the purpose clause, which is to ensure that workers are not disadvantaged by the effect of certain decisions of the Supreme Court in relation to the operation of section 93D of the Workers' Compensation and Rehabilitation Act 1981. There is great difficulty in getting all these figures, because the particular cases are sometimes in files and one cannot be sure how far they have advanced, but I understand that as of the last day or two, which is the period for which we could get data, there were 42 section 93D cases in the District Court, of which 28 had applications pending, nine had been granted leave, and three had their leave to proceed dismissed. There were two other cases, one of which was withdrawn and the other of which was adjourned sine die. While I am answering that question, I will answer the question about issues that then flowed through in some of the other cases. We are aware of one specific case in which the right to elect, or the form 22 referral, has been dismissed. The member will know what that means. A person who seeks to take a common law action under the current scheme must get a form 22 to start that process, and that must be done within the election time. Once the person has gone beyond that time, the person misses out. This person will now miss out, because he now has to go back and seek leave, and it is essentially too late to do that. The issue is that we are opening up the opportunity for such a person to go back and proceed through the system. That is just one case of that type. It is anticipated that more people will be caught in that way if we do not do something fairly quickly. People who seek through a form 22 to start common law proceedings under the existing system - their cause must be prior to 5 October 1999, so there will not be a huge number - will potentially have their case struck out unless we do something fairly quickly. Therefore, we know of one particular case, and there is potential for a small number of additional cases, about which we need to do something fairly quickly to enable those people to proceed, if that is their wish, under the current access provisions of common law.

Dr J.M. WOOLLARD: The minister has given me the number of cases. I also asked the minister how much the insurance companies had put aside in reserves for these cases. I would appreciate it if the minister could give me that advice. I also have a question about section 22, or the form -

Mr J.C. Kobelke: It is the form under section 22 that is required as part of the procedure for accessing common law under the current system.

Dr J.M. WOOLLARD: I propose to move an amendment with regard to that matter. I know the minister will reject it, but I want to give people a choice. Some people who were forced to go into the post 1999 system have been badly affected by that. Would my proposed amendment not permit the section 22 form to still apply?

Mr J.C. KOBELKE: I have not looked at the amendment at any great length, but from my understanding of it, the member is proposing to allow people, if their cause was prior to 5 October 1999, to choose whether to go through the new scheme or the old scheme. The issue, as I have tried to point out, is far more complicated than that. The case that I mentioned concerned the dismissal of a person's application through a form 22 referral. However, other cases are built on that. It is not just Dossett by itself. If we give people a choice, that will not fix that case. As this goes on, a range of cases will fall into slightly different subcategories. Therefore, it will become much more difficult to work it out and handle it. The member asked earlier - I do not think I answered her properly - how many more cases are like Dossett. I might be wrong, but I would hazard a guess that the answer is none, in the accurate sense of the word "same", because Dossett has been changed by Henderson, which has been changed by Mokta. Someone in the system now would not be treated in exactly the same way as Dossett, because all of those other decisions have flowed from Dossett. I understand what the member means in a general sense - that is, how many people might be advantaged or disadvantaged because of the Dossett decision - but there might be 20 different ways, or more, in which they might be slightly advantaged or disadvantaged. It is all conjecture, because we do not have their files, and we cannot wait for a month or three months to collect all their files and then make a decision on them all, because the courts will have marched on and it will be even more complicated than it is today.

Dr J.M. WOOLLARD: Was not that what Dossett was all about? Was it not saying that we should not make legislation retrospective? However, what the minister is doing here is making legislation retrospective. The minister is opening up a new ball game. I remind the minister of what I said two or three years ago when I was talking about all those people who had been affected by the finance broking scandal and about how the brokers had brought in their silks from the east yet our Director of Public Prosecutions did not even have a forensic accountant on the books. I asked the minister at that time whether he could do something to make the legislation retrospective to help those people who had been affected by the finance broking scandal, and the minister said in this House that the Government would not do that. It did not suit the Government at that time to help all those people who had been affected by the finance broking scandal because that would mean that it would have to enact retrospective legislation. I accepted that, because that was the way the Parliament worked. However, now, two years later, when it suits the Government, the minister is happy to change. It is like the policy on community assets. I will never forgive this Government for changing its policy on community assets and selling Duncraig House. It is a similar thing. All the people who were affected by the finance broking scandal were not given retrospective legislation. The minister would not help the thousands of elderly people who lost their life savings through the finance broking scandal, because the minister and the Attorney General told me in this House that the Government does not enact retrospective legislation. The minister is doing that today because it suits the Government. It does not happen when it suits the community or when it helps elderly people.

Mr J.C. Kobelke: Fixing up the Dutch decision is helping them retrospectively. The Dutch decision is retrospective.

Dr J.M. WOOLLARD: The minister is doing what he previously said he would not do. He is doing it only because it suits him. It is not proper. The minister says that not all cases are like the Dossett case.

Mr J.C. Kobelke: Not exactly; there is a class that can gain advantage from Dossett.

Dr J.M. WOOLLARD: There are people like Dossett. Dossett was injured in 1996, which was three years before the legislation was amended. He thought he was going to go to court. His summons was submitted in the middle of 1999. He was due to go to court five days after the submission. How many other people had to wait that length of time? It was not their fault. Because of the new legislation, other people were forced into a new system. They did not meet the 16 per cent disability criterion so they did not receive damages. It was improper to exclude those people. That is the judgment in the Dossett case in the High Court. It was ruled that it was a misinterpretation of the Interpretation Act. Two wrongs do not make a right. Those people were badly done by in 1999. The Dossett case now gives the Government the opportunity to set the record straight and to give those people the opportunity to have their cases heard.

Mrs C.L. EDWARDES: Clause 3(a) makes it appear that the Government is attempting, as far as possible, to enact section 32 of the Workers' Compensation and Rehabilitation Amendment Act 1999 in accordance with my ministerial statement of 21 October 1999. By referring to my ministerial statement, the Government is saying that section 32(7) is clear. Section 32(7) allows that the amended provisions do not affect the awarding of damages in proceedings commenced before the assent date or before the commencement date given by leave from the District Court under former provisions. However, in the Dossett decision, Mr Justice Kirby quite clearly questions the exactness of the term "proceedings", in relation to the course of the proceedings and their resolution in the District Court. Why has the Government tied the enactment to my ministerial statement, as against the terminology that the Government should have used? By reinforcing section 32(7), is the Government not compounding the problems that were already highlighted by Mr Justice Kirby in the Dossett judgment?

Mr J.C. KOBELKE: The proceedings are taken to be the action for damages commenced subsequent to the granting of leave.

Mrs C.L. Edwardes: How do you know that?

Mr J.C. KOBELKE: Because that is the definition of "proceedings". I refer the member to clause 5(3)(c) and (d).

Mrs C.L. EDWARDES: That is one of the points I was making very clear during the second reading debate. It is not clear. What sort of an action is the minister talking about? Is he talking about an originating summons? Is that a proceeding? If not, why not? How does the minister know that? Mr Justice Kirby said that the Parliament has to address the exact proceedings of the kind in question at different points in the course of their resolution in the District Court. As such, awaiting determinations of applications for leave were not resolved by use of the word "proceedings". Putting everything else aside, a question hangs, even though it does not form a major part of the Dossett decision. The question hangs that a future case could determine what we are talking about in terms of proceedings.

Mr J.C. KOBELKE: "Proceedings" as used in this clause are quite well defined in clause 5(3)(c) and (d). Perhaps it takes on different meanings in other statutes. For the purposes of this legislation, I am advised that the meaning of "proceedings" is quite clear.

Mrs C.L. EDWARDES: If the minister is trying to say that one of the purposes of the legislation is to reinforce my ministerial statement, which reinforces section 32(7) and which deals with proceedings said by Mr Justice Kirby to lack exactness, is it not just potentially creating a problem?

Mr J.C. KOBELKE: No. There is nothing in the purpose statement that can be relied on to change that.

Mrs C.L. EDWARDES: Clause 3(b) states that the purpose of the Act is "to ensure that workers are not disadvantaged by the effect of certain decisions of the Supreme Court in relation to the operation of section 93D of the Workers' Compensation and Rehabilitation Act 1981." Who are we talking about?

Mr J.C. KOBELKE: That is the Dutch decision. That concerned people who submitted medical certificates that were not seen to meet the required standard. We are seeking to cover that in clause 3(b).

Mrs C.L. EDWARDES: I am sure that workers who have not yet received leave from the District Court will feel that the minister is speaking with a forked tongue in clause 3(b)!

Dr J.M. WOOLLARD: Regarding clause 3(b) and the Dutch decision, is the minister able to provide me with the figures he read out earlier concerning the Dossett case? I would like a copy of them. Does the minister have some facts and figures concerning the Dutch case that he is able to provide me with, so that I can determine the number of people who are affected by the decision?

Mr J.C. KOBELKE: I have only handwritten notes but I will seek to obtain a copy for the member.

Dr J.M. WOOLLARD: Mr Acting Speaker (Mr A.D. McRae), are we able to wait a few minutes for those figures?

Mr J.C. Kobelke: I have already given the member the figures. I am happy to give them in writing.

Dr J.M. WOOLLARD: The minister gave the figures for Dossett. I am now asking for the facts and figures for the Dutch case in relation to clause 3(b).

Mr J.C. KOBELKE: I am sorry. I am sure the member for Kingsley is also interested in this issue. The Dutch provisions are in the reform Bill and have already been debated at great length in consideration in detail on that Bill. Revised data was given to the actuary who has given a preliminary response. Within a short time, hopefully, we will have a written report that will include those figures. The preliminary figures I have been given indicate that there could now be up to 490 cases. If we take an 80 per cent success rate, that would be 314 cases at a cost of $59.5 million. If it is a lower outcome at 70 percent, it would be 220 successful cases at a cost of $41.6 million. The actuary puts the best-case scenario at 60 per cent, which would be 107 cases at $20.3 million. Clearly that is below the current assessment of 200 cases. It is also affected by the fact that there has been a recalculation of some of the costs. Some of these people are getting weekly payments and as time goes on the weekly payments are taken off the award of damages, so the average cost could also come down. However, they are the latest figures, which I received an hour or so ago, from the actuary as preliminary advice.

Dr J.M. WOOLLARD: I would have liked to see those figures for Dossett so that I could talk about them. I intend to move an amendment to delete lines 11 to 18 of clause 3 on page 2.

The ACTING SPEAKER: I will give the member some guidance. She will need to complete the amendment. The question will be put to the Chamber in two parts, but she must show that she is deleting something and substituting it with something, as she has indicated in her circular to the House.

Dr J.M. WOOLLARD: In fact, I will be deleting paragraph (a) of clause 3, which are lines 11 to 18. There will be a subsequent motion, as I will move to insert new clause 4. Clause 3(b) would then become clause 3 and we would have a new clause 4 in the Bill. I was under the impression that I do not need to move those two parts together.

The ACTING SPEAKER: All the member's proposed changes deal with clause 3. Therefore, each element will be a separate question, but the member can move them as one proposition to the Chamber. The notice that the member has circulated indicates that she wishes to delete lines 11 to 18 and insert a number of other matters at line 22.

Dr J.M. WOOLLARD: Yes. I move -

> Page 2, lines 11 to 18 - To delete the lines and insert instead -
>
> The purpose of this Act is

Clause 3, if amended, would state that the purpose of the Act is to ensure that workers are not disadvantaged by the effect of certain provisions of the Supreme Court in relation to the operation of section 93D of the Workers' Compensation and Rehabilitation Act 1981.

The minister has stated that cases are occurring that have made it a necessity that the Bill come urgently to the House. He said he could not put out information to stakeholders. He said there were problems in 1993 when the first change to the legislation came into force. He said that information went to stakeholders and there was either a conflict of interest or some abuse of parliamentary privilege. We have not heard from the minister in the previous weeks or today which cases have made this Bill so urgent that it must be debated this week. The Dossett case occurred several months ago. The other case has gone through the District Court and will go to the Supreme Court and High Court, but that is not likely to happen in the next few weeks or the next few months. I ask the minister why this Bill is so urgent that it must be rushed through the Parliament today.

Mr J.C. Kobelke: I have already answered the question.

Dr J.M. WOOLLARD: I do not believe the minister has answered the question. It is wrong to put Dossett and Dutch on the table at the same time without giving the full facts because, as I said, the minister could get support on the Dutch amendments.

Mrs C.L. EDWARDES: I allow the member on her feet to continue her remarks.

Dr J.M. WOOLLARD: The reason I want paragraph (a) deleted is that the minister stated the cases are not the same. The Dossett case was about Mr Dossett. The minister does not know how many people are in a similar position. Although the Dossett case was about Mr Dossett, a manual worker who hurt his back, it was also about the parliamentary process. It was about the process that occurred in Parliament. Maybe "abuse" is the wrong word, but it was about the interpretation by the District Court following the enactment of the rehabilitation Bill. The High Court basically said that the District Court was wrong in saying that injured workers who had not had their case heard by 5 October 1999 could not have them heard under the system based on economic loss that existed prior to 5 October 1999 and that they were entitled to apply for compensation under that former system. I asked the minister for figures, and he read out some figures before. I would like to know which cases this decision throws out the window. How many people are involved, and what were their claims likely to have been? The minister said that he could not provide that information. However, I am under the impression that each year the insurance companies must keep so much in reserves. They know how many cases are on the books. Therefore, it should be possible for the minister to pull together that information. Only five people might be disadvantaged by this decision. The minister said that there will be some positives and some negatives. Let us look at all the facts. Let us look at how many people will be advantaged with this new system and how many people will be disadvantaged. We want to know what the numbers are really like. At the moment, I certainly do not have a clear picture of whom this affects, how many people it affects, and what the cost will be.

Mr J.C. Kobelke: The point is that this could open up a lot of cases that we do not even know about. Therefore, if we do not do something quickly, it could become a real problem. The member cannot ask me to give costs when we do not know what court decisions will be made and how many people might decide to change their position and take new action on the basis of the changes that the decisions have brought about.

Mrs C.L. Edwardes: I think the member is talking about the costs that will arise as a result of your Bill. You must have some understanding of that.

Mr J.C. Kobelke: We have for the Dutch case, and I have given those.

Mrs C.L. Edwardes: With Dossett, you must know what the estimates are for the cases of those who have not received leave. You must also have some idea of the legal costs.

Mr J.C. Kobelke: No, because there are so many of them.

The ACTING SPEAKER (Mr A.D. McRae): Order, members!

Mrs C.L. EDWARDES: The question that I asked - which I think was what the member for Alfred Cove was asking - was about those who are presently before the District Court and who will now be stopped from continuing their action. The minister must have some idea of the estimates for those cases. If the minister can tell us the estimates for the Dutch cases, he should be able to tell us the estimates for the -

Mr J.C. Kobelke: No, that is not fair. The Dutch case has been around for some time. We made a public statement in 2002, so we started working on the files. We were not in a position to work on files when we had not indicated publicly that we would take action in this area.

Mrs C.L. EDWARDES: The insurance companies would have some idea of the estimates that they have put aside for those cases. Are they talking about $100 000 a case?

Mr J.C. Kobelke: Some segments could be more accurately costed, but they would be only a segment of the total cost, because we do not know how many people might take new actions or change their stance.

Mrs C.L. EDWARDES: I ask the minister to consider the 28 people who have not been given leave. They are figures that he knows. What are the estimates for those cases and the potential throw-away legal costs of those cases?

Mr J.C. Kobelke: We would have to go through the 28 individual files. We have not been able to do that.

Mrs C.L. EDWARDES: How did the minister make the decision to come forward with the legislation without fully understanding how many people there were and what the costs were likely to be?

Mr J.C. Kobelke: Because of the genuine concern of legal practitioners that this was going to turn into a legal quagmire.

Mrs C.L. EDWARDES: Yes. However, given that an exact number was known, I would have thought that the minister would have been able to ask what the position was with those. The insurance companies have been going to the minister for a long time and asking him to do something about the Dossett case.

Mr J.C. Kobelke: That is not true.

Mrs C.L. EDWARDES: When I received my briefing on the minister's reform Bill, the insurance companies raised it with me. Therefore, I am very surprised that they did not raise it with the minister when he was receiving comments on the reform Bill.

Mr J.C. Kobelke: They raised it. When you say that they had been coming to me for a long time, it sounds as though they had been harping on about it. It was raised with me.

Mrs C.L. EDWARDES: The decision was handed down in only December 2003.

Mr J.C. Kobelke: The Mokta decision was only last month.

Mrs C.L. EDWARDES: For those cases that are currently in the District Court and for which leave has not been given, the minister does not know exactly what the estimates are or what the likely legal costs will be, and the situation is similar with the 30 cases that are with the directorate and are being held up pending an appeal.

Mr J.C. Kobelke: No, because the process would be to examine individual files, and that has not been done.

Mrs C.L. EDWARDES: The minister made the decision to transfer any excess costs for the Dutch cases to the supplementation fund and to reimburse thrown-away legal costs. However, he still does not know what impact that is likely to have on the supplementation fund.

Mr J.C. Kobelke: No. I expect it will be minimal; but, no, we do not know.

Dr J.M. WOOLLARD: The member for Kingsley just alerted me to what I was told when I had my briefing on this Bill. Some of the clauses that I will seek to have removed later have been inserted to account for the people who might have been affected by the Dossett decision and who are now being pushed out the door because of that decision. The minister is saying that this Bill will look after those people who have put forward a claim since the Dossett and Mokta cases; their legal costs will be met. Therefore, some costing has been done. What did the minister say about the files? I do not believe that he said the Dossett numbers were in the hundreds; I think he said they were in the tens. If the numbers are in the tens, why is it so difficult to get a costing? I would have thought that it would take one of his qualified personnel only a matter of days to go through those files and give an indication of what the costings might be. As the numbers are in the tens and not in the hundreds, I hope that the minister finds out the costings before this Bill goes to the upper House. If the minister does not do that, I hope that the Bill gets stamped on in the upper House, and certainly does not get the support of the Liberal Party.

The minister is rushing this legislation through without giving the Parliament the full facts. He is saying that because of the other cases after the Dossett decision, he does not know what the financial implications will be for the community, who might go back and who might do whatever. The questions that were asked earlier and the questions being asked now need to be answered, and they should be answered before this Parliament makes a decision on this Bill. That is not happening. Once again, we are being asked to take on good faith the minister's comments that this could be a very expensive exercise for the community and for employers, and it could open a can of worms. The minister should tell us what that can of worms could be, what the costs to the employers could be and what the costs associated with this decision could be, so that when a decision is made, it is made by an informed Parliament on behalf of the community - not by WorkCover and whoever else is assisting the minister with this Bill. That is not happening. I feel as though we are being asked to pass a Bill when we are in the dark.

Mrs C.L. EDWARDES: I refer again to Mr Justice Kirby. I have some genuine concerns about using the ministerial statement in the purposes of the Bill under paragraph (a), rather than using the exact wording and meaning the minister intends. Mr Justice Kirby said at page 27 of the case report -

> The statement by the Minister to the Western Australian Parliament, made after the enactment of the 1999 Act (assuming that it was admissible and relevant in this appeal) -

He did not accept that -

> scarcely represented the kind of considered adoption by Parliament of a law abolishing established rights and privileges that can be expected where law-makers set out to take away such legal entitlements.

Mr Justice Kirby outlined that the statement does not clarify the position that the minister seeks.

Mr J.C. Kobelke: He did not state that it does not clarify in a normal English sense; he said it does not clarify for the purposes of the law as it was not made during the passage of the legislation.

Mrs C.L. EDWARDES: He referred to the idea that even if it were "admissible", and he attacked the statement itself. He outlined that it -

> . . . scarcely represented the kind of considered adoption by Parliament of a law abolishing established rights and privileges that can be expected where law-makers set out to take away such legal entitlements.

Justice Kirby then quoted the Daniels Corporation case as follows -

> . . . those who set out to abolish established rights are obliged to face the consequences of what they have done . . . to assume political accountability for their actions.

If one takes away rights and privileges, one must make it very clear. He did not consider that statement as one that could be expected to be adopted by Parliament when law-makers set out to take away such legal entitlements. The minister is adopting the ministerial statement that has been questioned and putting it into the Bill to set out the purposes of the legislation. Therefore, I have concerns.

Mr J.C. KOBELKE: I accept that the first phrase or two of the statement read by the member for Kingsley indicated that the matter went beyond the fact that it was a ministerial statement; therefore, of itself, it could not inform the court in its determination. The member suggested that there was a lack of clarity or the exact wording was not adequate. There may be an element of that aspect. However, the nature of the statement is still potentially in the mind of a judge's consideration. In making a ministerial statement, the minister is not giving something that has the full consideration of this House, let alone Parliament. We clearly understand that the establishment of a statute requires a range of procedures. A fundamental procedure is the proceedings through the standing orders in both Houses of Parliament. The fact that the statement did not fit into that process, in my interpretation, is caught up in part of the reasons for the decision read by the member. The Government seeks in the purposes of the Bill to inform. Clearly, the statement goes to the purposes. It does not stand alone, whereas when the ministerial statement was made, I think it was very much seen as standing alone to complement an established law. The purposes provision in the Bill is to clearly guide the purposes of the enactment and to qualify it adequately to give the meaning required.

Dr J.M. WOOLLARD: I listened to what the member for Kingsley said. Unfortunately, I do not have the statement by Mr Justice Kirby in front of me. The words the member for Kingsley quoted from Justice Kirby related to a considered adoption by Parliament. The High Court decision in the Dossett case was not 3-2 or 4-1; it was unanimous. The High Court decided 5-0 that the amendment to the Act did not abrogate a fundamental premise upon which the rule of law is based; that is, that citizen's rights will not be retrospectively abolished or interfered with unless such an inescapable and intractable contrary intention was clearly manifest on the face of the amending statute. This is human rights - this Bill relates to people's rights. This Government is putting forward this legislation. Occasionally one hears whisperings in the dark corridors of this place about human rights Bills. How can there be such whisperings? The High Court said the measure should not abrogate a fundamental premise upon which the rule of law is based; that is, that citizens' rights will not be retrospectively abolished or interfered with. I understand that the minister is asking us today to endorse a statement made by the previous minister, the member for Kingsley, that he believes validated an earlier Act. Therefore, the minister will make this legislation validate the Act. I would like to pull out *Hansard* and see what debate occurred at that time on human rights and about taking away human rights. That is what the Act, and the High Court said the interpretation of that legislation, has done. The minister is asking this Parliament, which has not had time to consider this Bill, to support legislation that retrospectively takes away people's rights. People injured before 5 October 1999 were denied their right to seek damages through the court under the system. The High Court said these people should have had such access. It was stated that it was a basic human right. Legislation is not retrospective. The minister asks Parliament to rubber-stamp something that takes away human rights. Such an important Bill should not be rushed through Parliament. The Parliament should be given time to look at the legislation very seriously. The minister is asking us to accept the Bill in good faith: "Yes, we're taking away

human rights, but it's in a good cause." Taking away human rights is not in a good cause when people do not know what it is all about.

Amendment put and negatived.

Clause put and passed.

New clause 4 -

Dr J.M. WOOLLARD: I may need your advice, Mr Acting Speaker, as I did not check a matter with the Clerks earlier. Even though section 3(a) was not completed, I believe I can still move my new clause 4. I move -

Page 2, after line 22 - To insert the following -

4. Choice of proceeding

(1) In this section -

(a) **"1993 scheme"** means the law as provided for in the *Workers' Compensation and Rehabilitation Act 1981* as it existed between the period 24 December 1993 up to and including 4 October 1999;

(b) **"1999 scheme"** means the law as provided for in the *Workers' Compensation and Rehabilitation Act 1981* as it exists from 4 October 1999.

(2) If a worker commences or has commenced an action for damages at common law against his employer in respect of a disability, and if his cause of action wholly or partly arose on or before 4 October 1999, then the worker may elect to proceed with that action either under the 1993 scheme or the 1999 scheme.

(3) Notification of an election made under subsection (2) must be lodged with the court and is irrevocable once that notification is lodged.

(4) Nothing in this section affects the operation of the *Limitation Act 1935*.

As I have mentioned previously, some injured workers - such as nurses or manual labourers - who were injured prior to 5 October 1999, and in some cases in 1995, 1996 or 1997, were forced to go into the new disability scheme because that was the court's interpretation of the law. That injured worker may have been a potter, someone who used his hands or fingers for his livelihood. Under the previous legislation, that potter could have shown pre-1999 that the injury had a serious effect on his future economic loss - greater than $119 000. When that person's disability was assessed under the new legislation and it was found that he did not fall within the 16 to 30 per cent disability, there was nothing for him. If the six-year limitation period has not expired, those people have the opportunity to seek damages. This is not really a freedom of choice, but it gives some equality to those people who missed out when the new scheme was introduced.

Mr J.C. KOBELKE: The amendment by the member for Alfred Cove attempts to put in a new provision that is at variance with the intention of the previous Government in 1999, when the intention was not to give people a choice. If a person's injury occurred prior to 5 October 1999, there was no intention that he could then choose whether to opt for the old system or the new. That is what the member for Alfred Cove is attempting to do. The matter is far more complex than that. It is stating the obvious to say that it is not now 1999. A lot of things have moved on, people have made decisions, judgments have been made, people have obviously missed out and have been adversely affected in major ways, and people have received judgments and have gone off and started new lives and have spent the money. With this amendment the member wants us to pretend that we are back in 1999 and can give people a choice. It is not as simple as that. If we were to agree, there would still be a whole range of loose ends to deal with. What would be the outcome for people who had already accepted a payment under the new system? Would they have the opportunity to go back and start all over again if their accident occurred prior to October 1999? While this amendment might resolve some issues and give people a choice, it would not resolve a range of other matters. We cannot support this amendment.

Mrs C.L. EDWARDES: The member for Alfred Cove is putting forward an alternative, taking into account the fact that decisions have been made. It is somewhat limited to the matters that are currently before the directorate and are being held up as a result of the Dossett case. It would address the Mokta decision. It would not address the Short decision. It might address the Henderson decision. It does not put us back in the 1999 position. It deals with the matter in 2004. All the people who have matters currently before the District Court have a choice, even though they have already exercised a choice. That should be kept in mind. For instance, Mr Dossett has already exercised his choice; he wanted to go to common law. To some extent it might be said that he is having two bites at the cherry by now being able to decide whether he will stay in common law or go to the 1999

scheme. This amendment addresses some of the concerns about those people who are currently in the system. Some people may miss out because of the minister drawing the line in the sand. This amendment will protect those who could move into the 1999 scheme, whereas they will not get over that hurdle under section 93D, even though they have leave. The minister's Bill does not help those people if they do not get over section 93D. They have made their choice under the minister's Bill and, as such, they will have to live with that choice. The minister referred to it being a choice of proceeding, but it is a choice of proceeding in 2004; it is a new choice and a new decision. It is not something that is old and goes back to 1999; it is limited for some cases that have not been addressed. However, this is an alternative and, given more time, it could have been explored as being a realistic alternative for some of those people who could be missing out in the District Court as a result of the minister's line in the sand.

Dr J.M. WOOLLARD: I apologise for the delay in rising, but I was hoping the minister might address the issue. The member for Kingsley has just said that this amendment does not answer all the questions, but it would address some of the concerns that have arisen in some cases. The minister will not even respond.

Mr J.C. Kobelke: I did.

Dr J.M. WOOLLARD: He did not. The member for Kingsley has just said that this legislation addresses some cases but not others, and that some injured workers will miss out badly under this legislation.

Mr J.C. Kobelke: I responded to you and then the member for Kingsley responded to you.

Dr J.M. WOOLLARD: What about a response to the member for Kingsley's comments?

Mr J.C. Kobelke: I accept what she said. It was a fair statement.

Dr J.M. WOOLLARD: If it was a fair statement, is the minister willing to give my suggestion consideration? Why can we not allow this Bill to lie on the Table of the House, do some more homework on it and bring the debate on next week? Why is there a rush?

Mr J.C. Kobelke: I explained that earlier.

Dr J.M. WOOLLARD: The minister will not accept the new clause. I remind him again, and I will continue to remind him in the future, that this Bill will take away human rights. He would not draft retrospective legislation to deal with the people affected by the finance brokers scandal, but he will draft such legislation when it suits him. The Government is not treating the community consistently. I do not believe that this is accountability, when one set of rules fits one situation and a completely different set of rules fits another situation. This Bill is to deal with people who were injured at work. I do not know whether people who have been injured at work have been to see the minister in his office, but I have seen those people in my office. I have seen the families whose loved ones have committed suicide. I have seen people who have lost their homes because of work-related injuries and who are now living in caravan parks.

I am asking the minister to take a bit of time and look at those cases. If those cases number in the tens and not in the hundreds, he could ask someone in his department to give him an analysis of each of those cases - who is the person, what effect has the injury had on that person and that person's family, and what damages were awarded? The damages awarded might have been $50 000, $60 000 or $70 000, which might not mean much to the minister, but it might mean a great deal to an injured worker and his or her family. I am asking the minister to give some consideration to those people. He has said that it is not a great number of people; it is a limited number of people. How limited is that number and what are the costs? The Government is happy to spend billions of dollars on railway lines and other things. Let us look at the individuals. Let us think about where the money is going. Let us look after the people whose lives have been destroyed because of a work-related injury.

New clause put and negatived.

Clause 4: Terms used in this Part -

Mrs C.L. EDWARDES: I want to work through exactly what clause 4 deals with. The definition of "amended provisions" is sections 93A to 93G of the Workers' Compensation and Rehabilitation Act 1981, which were inserted through section 32 of the Workers' Compensation and Rehabilitation Amendment Act 1999. The 1981 Act is amended from time to time. Does that pick up any amendments that are likely to occur through the reform Bill?

Mr J.C. Kobelke: Yes.

Mrs C.L. EDWARDES: If that is the case, what will be the impact on those people who fall under sections 93A to 93G?

Mr J.C. KOBELKE: Some of the provisions in sections 93A to 93G were put in place by the 1999 amendments; others, such as the Dutch provisions, will be inserted through this legislation.

Mrs C.L. Edwardes: Is that what we are talking about in terms of the amendments?

Mr J.C. KOBELKE: Yes.

Mrs C.L. EDWARDES: The definition of "former provisions" in this Bill has the same meaning as in section 32(6) of the 1999 Act, which section states that the definition means part IV, division 2 of the principal Act before it was amended by that section. Is that part IV, division 2 of the 1981 Act?

Mr J.C. Kobelke: That is correct.

Clause put and passed.

Clause 5: Provisions applying to awarding of damages -

Mrs C.L. EDWARDES: This clause deals with the main amendment to the Act. Subclause (1) states -

> This section -
>
> (a) is to be read in conjunction with section 32 of the 1999 Act as if this section were incorporated with and formed part of that section; and
>
> (b) applies in addition to section 32(7) of the 1999 Act.

If paragraph (a) is to be read in conjunction with section 32 of the 1999 Act as if it were incorporated in that section, why is there a paragraph (b)?

Mr J.C. KOBELKE: I understand that the intent of the Parliament in section 32(7) was found not to be effective. This is just doubling up. Clearly, these provisions will now establish the intent of the 1999 Act, as opposed to the way in which it has been interpreted by the High Court. Section 32(7), the intent of which was found to be flawed and to not deliver the intent, will not be removed. Therefore, section 32(7) will be retained, but will be added to so that it will now have the effect in law intended in 1999.

Mrs C.L. EDWARDES: Subclause (2) states "Despite section 37 of the *Interpretation Act 1984*". Section 37(1) and (2) was referred to in the Dossett case. I will read that section into the *Hansard* for future reference. Section 37(1) of the Interpretation Act provides -

> Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears -
>
> . . .
>
> (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;
>
> (c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
>
> . . .
>
> (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made.

Section 37(2) declares -

> The inclusion in the repealing provisions of an enactment of any express saving with respect to the repeals effected thereby shall not be taken to prejudice the operation of this section with respect to the effect of those repeals.

Mr Dossett contended that he was entitled to proceed under the earlier regime even though his application did not fall within the savings provisions in section 32(7) of the Workers' Compensation and Rehabilitation Amendment Act; that is, that he had not received leave from the District Court to continue with his application. He contended that although his application was not saved by section 32, it was saved by the general savings provision in section 37 of the Interpretation Act, in particular paragraphs (b), (c) and (f) of subsection (1). The respondent contended that section 37 applies only if an enactment has been repealed, and that section 93D had not been repealed; that is, the Legislature had merely amended section 93D by substituting a new provision for the previous provision. However, the High Court held that that contention was without substance.

Clause 5(2) of the Bill states -

Despite section 37 of the *Interpretation Act 1984* and any other law, written or unwritten but except as otherwise stated in subsection (3) or in the amended provisions -

(a) the amended provisions apply to, and affect the awarding of damages in, a proceeding; and

(b) the former provisions do not apply to, or affect the awarding of damages in, a proceeding, . . .

What does that mean? Clause 4(1) of the Bill states -

"amended provisions" means sections 93A to 93G . . .

. . .

"former provisions" has the same meaning as in section 32(6) of the 1999 Act.

Can the minister explain the effect of paragraphs (a) and (b)?

Mr J.C. KOBELKE: The effect of subclause (2)(a) is to say that the amended provisions, which we know as sections 93A to 93G, will apply as they are established here - not as they were prior to 1999, and not as they might be changed at some time in the future, but as they are established at the relevant time. The effect of subclause (2)(b) is to say that the former provisions do not apply, whereas Dossett said they did.

Mrs C.L. EDWARDES: Subclause (2) continues -

unless it is a proceeding -

(c) commenced before the assent day; or

(d) for the commencement of which a court gave leave under the former provisions before the assent day.

Can I take it that the assent day in section 32(6) means the day on which the 1999 Act received the royal assent?

Mr J.C. KOBELKE: Yes - 5 October 1999.

Mrs C.L. EDWARDES: Subclause (3) states -

Despite subsection (2), section 37 of the *Interpretation Act 1984* and any other law, written or unwritten but except as otherwise stated in section 6(4) -

This is two fingers to the High Court, is it? It continues -

(a) the amended provisions do not apply to, or affect the awarding of damages in, a proceeding; and

(b) the former provisions apply to, and affect the awarding of damages in, a proceeding,

that is a proceeding -

(c) commenced before 23 June 2004 with the leave of the court under the former provisions; or

(d) for the commencement of which a court gave leave under the former provisions before 23 June 2004 or on District Court file number WC 93D 1194/1998.

What is the difference between paragraphs (c) and (d)? Can the minister take me through again why he believes an originating summons is not a proceeding? Although the Bill states that it is a proceeding under paragraphs (c) and (d), I am concerned that it will not cover the various stages of the District Court that occur before a person actually receives leave. In the case that I referred to, in which the worker had received leave but the case is now on appeal, if that leave were knocked back, where would that injured worker fit?

Mr J.C. KOBELKE: Paragraphs (c) and (d) basically reinforce and say the same thing, except that the latter part of paragraph (d) makes reference to a District Court file number, which is that for Mr Dossett.

Mrs C.L. Edwardes: I am glad the minister has confirmed that.

Mr J.C. KOBELKE: He is looked after there, because he has sought leave, but it has not been granted. The issue then is the member's concern that proceedings might capture an originating summons. That will not be the case because of the very nature of what is contained in paragraphs (c) and (d). The case must commence before 23 June, with leave of the court, so it is leave of the court rather than an originating summons. Similarly in paragraph (d), if a person has commenced proceedings in a court, then he is beyond an originating summons.

Mrs C.L. EDWARDES: What is the difference between paragraphs (c) and (d)? What stage are we talking about?

Mr J.C. KOBELKE: Other than the specific reference to Dossett there really is no difference, but they mirror the way in which the 1999 Act was set up.

Mrs C.L. Edwardes: You must have done it for a reason.

Mr J.C. KOBELKE: It might have been because we were under great pressure to put the Bill together in a very short time, so we looked at what is in the Act and sought to firm it up as best we could using the forms that are already there.

Dr J.M. WOOLLARD: The provisions prior to 5 October 1999, which were economic loss, are out the door, and so too are any cases up until 23 June 2004 based on the current disability system. The member for Kingsley asked the minister about subclause (3)(d), but I did not catch the minister's response. Subclause (3)(d) states -

> for the commencement of which a court gave leave under the former provisions before 23 June 2004 or on District Court file number WD 93D 1194/1998.

I know that is the Dossett case, but leave has not been given to Dossett. Therefore, does that mean that because of this subclause Dossett will also come under the disability system and will get leave under the disability system? Can the minister clarify that for me?

Mr J.C. KOBELKE: The effect of having "or on District Court file number WC 93D 1194/1998" is that Mr Dossett can continue to get leave, whereas other cases must have leave granted by 23 June 2004.

Dr J.M. Woollard: Bearing that in mind, if he did not get leave before, would the door still be closed to Dossett?

Mr J.C. KOBELKE: No, it means our legislation will not obstruct him. Mr Dossett can continue as he would have expected to continue through the normal proceedings.

Mrs C.L. EDWARDES: I will clarify that for the member for Alfred Cove. Mr Dossett did not get leave before because his application for leave was made on 8 October 1999 and the door was closed on 5 October. That is the reason he did not receive leave before; it was nothing to do with his case. Given that we are talking about the former section 93D provision in the Act and injured workers who are able to continue their application, will the minister remind the House what section 93D in the 1999 legislation was about. I ask him to do that because it will be important to understand that when we get to costs and limitations. I believe a number of people who have not been granted leave would not have met the bar in any event. I also believe that some who have been granted leave may find it difficult to get damages for pecuniary loss in the order they think they might get. Some of these injured workers may very well be totally disadvantaged.

Mr J.C. Kobelke: Do you want me to respond to that?

Mrs C.L. EDWARDES: Yes, please.

Mr J.C. KOBELKE: We are seeking to re-establish the provisions that were established in 1999; that is, section 93D as it was then. The issue is, as I said earlier, the complexity of cases that are now flowing from that provision. It is my expectation that there will continue to be further actions and that the complexity of that provision is likely to leave people disadvantaged. I accept, therefore, that drawing a line in the sand by using the date 23 June 2004 will mean that some people who might have expected to proceed will not be able to, which could be seen as a diminution of their rights. However, the fact is that many other people are likely to be left worse off if we do not create certainties. That is the balance.

Mrs C.L. Edwardes: I wanted the minister to outline the test that had to be made under the former section 93D of the scheme, not the new section 93D.

Mr J.C. KOBELKE: There are several pages on that provision. However, the key component is subsections (4) and (5), which state -

> (4) Proceedings in which damages are sought are not to be commenced without the leave of the District Court.
>
> (5) Leave is to be given if -
>
> (a) the disability results in the death of the worker or the parties agree that the degree of the worker's disability would, if assessed as prescribed in subsection (3), be 30% or more;
>
> (b) on a reference under subsection (7) or (8) it is determined that the degree of the worker's disability would, if assessed as prescribed in subsection (3), be 30% or more; or
>
> (c) the court determines that the worker is likely to have future pecuniary loss resulting from the disability of an amount that is at least equal to the prescribed amount.

Mrs C.L. EDWARDES: I thank the minister for that. From talking to some members of the legal profession, I believe the prescribed amount that they would need to meet now in terms of leave has changed. Will the minister remind the House what that would be?

Mr J.C. KOBELKE: Back in 1999 it was very close to or just over $119 000. It is now about $138 000. I do not have the exact figure in front of me; however, we referred to it in the consideration in detail stage. I cannot recall the exact amount, but it is about $138 000.

Mrs C.L. Edwardes: Would applications for the prescribed amount have to meet the new figure, not the old figure?

Mr J.C. KOBELKE: I cannot give the member an answer with absolute certainty. The general ruling is that the prescribed amount applies at the day of judgment. That goes to the awards. I therefore presume that when it comes to the test, the same rule would apply. As I said, there is a little shadow of doubt that that would be the case.

Mrs C.L. Edwardes: I thank the minister.

Clause put and passed.

Clause 6: Existing determinations unaffected -

Mrs C.L. EDWARDES: I will take clause 6 in several sections because of the consequences that flow from them. The clause states -

> (1) In this section -
>
> **"determination"** includes a decision, ruling, order, award, judgment, settlement or agreement but does not include a determination in respect of a proceeding referred to in section 5(2)(c) or (d).

Clause 5(2)(c) and (d) states -

> (c) commenced before the assent day; or
>
> (d) for the commencement of which a court gave leave under the former provisions before the assent day.

Why are paragraphs (c) and (d) excluded?

Mr J.C. KOBELKE: A consequence of Dossett is to cast doubt on the validity of decisions, rulings, orders, awards, judgments, settlements and agreements made under the amended provisions when a decision should have been made under the former provisions. Clause 6 provides for a determination to be made under the amended provisions. Final determinations are not subject to review on the basis they should have been made under the former provisions. The only determinations excluded are determinations in respect of proceedings referred to in clause 5(2)(c) and (d), in which it was wrongly determined that the amended provisions were the relevant provisions. Paragraphs (c) and (d) of subclause (2) are already covered anyway because they are prior to the assent day. It does not vary the effect; it is just covering in a correct technical way the fact that the cases that were determined prior to that day - that is, under 5 (2) (c) and (d) - are picked up as a different technicality.

Mrs C.L. Edwardes: While the minister is referring to that, to whom does clause 6(2)(a) refer?

Mr J.C. KOBELKE: If somebody has done something and had an outcome under the new provisions, and Dossett has opened up that that can be undone, this provides that it cannot be rescinded or set aside; it stands.

Mrs C.L. Edwardes: If people have already had a judgment from the directorate or wherever, that cannot be set aside. Under paragraph (b), it cannot be further appealed. Will the worker be entitled to any further payment?

Mr J.C. KOBELKE: The lead-in to paragraph (c) is that it "is not a reason for" further payment. Subclause (2) states -

> Where a determination was given, made or registered after the assent day on the basis that the amended provisions, and not the former provisions, applied, the fact that the determination was given, made, or registered on that basis is not a reason for -

Mrs C.L. EDWARDES: Subclause (4) states -

> Section 5(3) does not apply if the cause of action to which a proceeding relates is the subject of an award of damages, settlement or agreement to which subsections (2) and (3) apply.

Basically, that means that a person cannot start again. Therefore, why is subclause (4) in the Bill when that is already stated in subclause (2)(a) and (b)?

Mr J.C. KOBELKE: Subclause(4) makes it clear that someone who has already had an award of damages, a settlement or agreement cannot say that he wants to put that aside and start again. I understand that that also addresses the Short decision.

Mrs C.L. Edwardes: Is clause 6(2)(a) and (b) the same as clause 6(4)?

Mr J.C. KOBELKE: I have been advised that perhaps a way of putting it is that subclause (2) means that the decision cannot be set aside, and subclause (4) means that a person cannot relinquish what he has and try to start again.

Mrs C.L. Edwardes: Under subclause (3), if people have been given a determination on the basis of the amended provisions, that is okay. Therefore, whom are we talking about in subclause (3)?

Mr J.C. KOBELKE: We are obviously just making sure that it is absolutely correct. In subclause (2) we are saying that it cannot be set aside; in subclause (3) we are saying that that is valid.

Dr J.M. WOOLLARD: It seems to me that under clause 6(2) any decision is valid. Under clause 6(3), a decision cannot be invalidated after the assent day. Is the minister saying that subclause (3) is just a duplication?

Mr J.C. Kobelke: There is an element of duplication. Because people might pick over the exact meaning of the words and the clear intent, we are covering those distinct differences. In subclause (2), we are basically saying that those determinations cannot be set aside. In subclause (3), we are saying that such determinations cannot be made invalid. In subclause (4), we are saying that such determinations cannot be relinquished; that is, a person cannot give them up. They all go to the same effect, but they are on slightly different roads.

Dr J.M. WOOLLARD: The minister was just worried that something might go through the courts again, and basically this is to stop anything going through the courts.

Mr J.C. Kobelke: It is to stop a greater uncertainty coming in because a new interpretation is put on the intent.

Clause put and passed.

Clause 7: Jurisdiction removed and workers' costs indemnified -

Mr J.C. KOBELKE: I move -

> Page 6, line 3 - To delete "proceedings" and substitute "provisions".

That is a typographical error.

Amendment put and passed.

Mrs C.L. EDWARDES: This clause basically states that the court may no longer hear a former provisions matter, which has now been defined as meaning an application for leave to commence proceedings, an application for leave to appeal from a refusal to grant leave, an appeal from a refusal to grant leave, a proceeding to which section 5(3) would have applied but for the operation of section 6(4) - we have dealt with that; that is when a person cannot give back his damages and start again - or a proceeding for the commencement of which a court gave leave under the former provisions on or after 23 June 2004. That is yesterday - essentially, after the minister brought in the Bill on Tuesday night. Subclause (2) states that the court cannot hear a former provisions matter on and after the commencement day. Subclause (3) states that any of those matters that have been commenced but not determined before the commencement day are a nullity and are taken to have been dismissed by operation of the subsection, with no order for costs. That is an interesting way of determining those matters. I wonder why it has been done in that way. Subclause (4) states -

> A worker who, during the period commencing on 4 December 2003 and ending on 22 June 2004, has incurred legal costs in commencing or continuing a former provisions matter . . . is entitled to be paid reasonable costs so incurred.

Therefore, anybody who had commenced legal proceedings prior to that time and/or had attempted to have his matter heard up to 4 December 2003 pending the High Court decision in Dossett will not have his legal costs paid. Therefore, under Dossett, it is not likely that any of those legal costs will be reimbursed. Subclause (5) states that the executive director may determine what reasonable costs are. If there is a dispute, it can go to the registrar of the District Court or a taxing officer of the Supreme Court as though it were a taxation of costs. Costs to which that person is entitled will be paid from the general fund. Is the general fund the supplementation fund?

Mr J.C. Kobelke: No, the supplementation fund and the general fund are quite different.

Mrs C.L. EDWARDES: I wonder whether the minister would explain those points that I have raised.

Mr J.C. KOBELKE: I am not sure of the member's point in relation to Dossett. This provision seeks to look after people who will have opportunity to proceed with their case cut off by this enactment. Therefore, the Government will pick up their fair legal costs.

Mrs C.L. Edwardes: Are these legal costs only to be for people who have lodged applications and/or are stuck in the system, as well as their appeal costs etc, from 4 December 2003 to 22 June 2004?

Mr J.C. KOBELKE: Correct.

The general fund is moneys received by or for the commission, whether from levies, contributions, fines, interest or other sources, in the exercise of its functions under the Act. It relates to moneys borrowed by the commission and moneys required to be transferred to the general fund under section 6A(1) of the Employers' Indemnity Supplementation Fund Act 1980. Moneys can be paid from the fund for the salaries of the commission and a range of procedures to which it can be applied. The supplementation fund is specifically put together for matters such as the collapse of insurers. It is raised by a levy. Certain provisions allow money to go between the funds, but they are quite restrictive.

Mrs C.L. Edwardes: If there is not enough money in the general fund, can it can be topped up from the supplementation fund?

Mr J.C. KOBELKE: There are some provisions for money going between the two funds, but they are restrictive. The general fund is assessed each year. It is a levy on insurers. It would be assessed if there was an increased demand. As at May this year, the balance in the account was $6.8 million. I do not anticipate any liquidity issues from year to year.

Dr J.M. WOOLLARD: I apologise if the minister earlier gave the facts I seek. Clause 7(4) reads -

> A worker who, during the period commencing on 4 December 2003 and ending on 22 June 2004, has incurred legal costs in commencing or continuing a former provisions matter that is taken to have been dismissed by operation of subsection (3), is entitled to be paid reasonable costs so incurred.

Has the minister tabled what the figures are likely to be?

Mr J.C. Kobelke: We have no idea. We are trying to pick up fair legal expenses for people who start action that is cut off by this legislation.

Dr J.M. WOOLLARD: Could the minister give me some understanding of what is anticipated? The reference to the entitlement to be paid as "reasonable costs so incurred" would obviously be legal expenses -

Mr J.C. Kobelke: Correct.

Dr J.M. WOOLLARD: Would it include time off work to discuss the case with lawyers? What else would come into it? I wonder why it refers to reasonable costs, not legal costs. What other factors come into that definition of reasonable?

Mr J.C. KOBELKE: Different lawyers have different fees. The issue of reasonable costs is amplified by subclause (6). There are procedures in the District and Supreme Courts for taxing costs when a dispute arises. Established procedures are used regularly. Constituents come to me with a problem and a belief that a lawyer has overcharged them. I direct them through the process so that they can seek to have their costs taxed, and an officer in the court determine reasonable and fair fees for the work done. That would happen under this Bill. In order to avoid extra work for the courts, if the executive director determines reasonable costs that are acceptable to the worker and the lawyer, that is the end of the matter. If people do not think they were awarded a fair amount, they will seek a determination through the taxing processes in the courts. That will be the umpire. It is done all the time. There will be no need to use the taxing operations in the court if we can fix it in a more prompt manner.

Dr J.M. WOOLLARD: If I understand correctly, those reasonable costs are based on an hourly charge -

Mr J.C. Kobelke: Of the legal proceedings.

Dr J.M. WOOLLARD: That is rather than one person having two hours and another person having 20 hours, so a maximum of 10 hours will be paid. Will it not be based on an hourly rate, but on an average lawyer fee charge?

Mr J.C. Kobelke: It will be based on the hours that the worker has engaged a lawyer, and the amount of work that the lawyer or the law firm has done for the worker. There are standard procedures by which those costs are assessed. Some lawyers might charge below that determination - that is all right. Some might charge well above the accepted rate; if so, the taxing process will determine a fair or reasonable cost for the services rendered.

Dr J.M. WOOLLARD: It is a bit like the Medicare charge.

Mr J.C. Kobelke: I do not think so. It is a well-established process that we will follow.

Clause, as amended, put and passed

Clause 8 put and passed.

Clause 9: Section 93E amended -

Mrs C.L. EDWARDES: Can the minister confirm that this clause is exactly the same as the provision in the Workers' Compensation Reform Bill - has it been replicated exactly?

Mr J.C. KOBELKE: The following proposed sections replicate the reform Bill already considered by the Chamber. Clause 9 is taken from the reform Bill. It varies only in line 17 in the reference to 93EA(5)(b)(i) and 93EB, which is a new provision to be inserted through later provisions. The other proposed sections replicate the reform Bill.

Mrs C.L. EDWARDES: Again, rather than going through it all again, can the minister highlight whether proposed sections in clause 10 are replicated exactly from the reform Bill? If not, where is the change?

Mr J.C. KOBELKE: We dealt with matters concerning fresh evidence relating to the Dutch case and how to deal with time constraints. That has been done with existing provisions. Proposed section 93EB uses provisions for the Dossett matter exactly the same as those used for the Dutch matter. The very end of proposed section 93EB(5)(b) makes reference to section 93EB. Otherwise, it is verbatim.

Mrs C.L. Edwardes: Is proposed section 93EA(4) the same as the reform Bill in terms of commencement period and referral?

Mr J.C. KOBELKE: I had a quick look; I will confirm it.

Mrs C.L. Edwardes: Is the intention still to have it in the three-month period to refer?

Mr J.C. KOBELKE: It is the same.

Mrs C.L. Edwardes: Has a further extension been applied through the 2004 legislation that then gives them up to two years?

Mr J.C. KOBELKE: That is proposed section 93EC. The change there is to add section 93EB.

[Quorum formed.]

Clause put and passed.

Clause 10: Sections 93EA, 93EB, and 93EC inserted -

Mrs C.L. EDWARDES: I understand the limitation period will now apply for those cases that do not have the matters continuing to be heard before the District Court.

Mr J.C. KOBELKE: The limitation period is in proposed section 93EC. Proposed section 93EB deals with Dossett and enables any worker who sought to refer a question of his degree of disability to the director under section 93D(5), but was prevented from doing so based on the Dossett and related decisions, the opportunity to have the question referred. This applies only from the period of the Dossett decision on 4 December 2003 to the cut-off date of 23 June 2004 and to a situation in which a worker's case under the amended provisions may have been adjourned or dismissed in light of the Dossett et al decisions. This would have occurred on the basis that the worker should have sought leave under the provisions that applied prior to 1999, or the review officer or court could not determine the question in light of uncertainty of the Dossett et al decisions.

Mrs C.L. Edwardes: This relates to the 30 current cases that are in the directorate.

Mr J.C. KOBELKE: This is the termination date problem, in which we have to re-establish the termination date for the election period. They are out of time. We need a way of picking them up and setting the clock ticking again for a new termination date.

Mrs C.L. Edwardes: Is that for those whose cases are currently in the directorate? Does it not relate to those who are coming back from the District Court?

Mr J.C. KOBELKE: That is correct; those who are currently in the system and have the potential to get cut off if we do not fix this.

Mrs C.L. Edwardes: Is the statute of limitations being protected for those who are currently in the District Court, who do not have leave and are coming back into the 1999 scheme?

Mr J.C. KOBELKE: My understanding is that if that is the case and they are beyond time, they can come back and the clock starts ticking for them.

Mrs C.L. Edwardes: Is that under proposed section 93EB?

Mr J.C. KOBELKE: Proposed section 93EB(1)(b) gives the conditions for them so that they qualify.

Dr J.M. WOOLLARD: During the briefing I was told that proposed section 93EB applied to the Dossett and Mokta cases. I believe that the minister just stated that proposed section 93EB(1)(b) was applicable to Dossett. Which parts in proposed section 93EB are applicable to the Dossett and Mokta cases?

Mr J.C. KOBELKE: The provisions that were in the reform Bill dealt with the problem of people in the light of the Dutch decision who had gone beyond the time for election and then found that their medical evidence was not adequate. We are changing the law retrospectively to let them in through these provisions. Proposed section 93EB uses the same scheme of arrangement for people who are caught up by Dossett and other decisions that have flowed from Dossett. That is, if they want to come back into the current system and they are beyond the time limit to make an election but they are in the system through the conditions applied in this Bill, they can start the clock ticking again so that they do not have their rights cut off. Their rights will not be cut off by this legislation but by what would happen anyway.

Dr J.M. Woollard: Where does the Mokta case come into this?

Mr J.C. KOBELKE: Mokta is part of that. This provision will fix up Mokta. The decision of Mokta meant that injured workers who are currently in the system and are seeking to meet the disability and time requirements must also go back to court and get leave of the court in which case they would then run out of time. We are saying that they will not be excluded through that process. These proceedings will pick them up and allow them to go through the process with the variations required. They would otherwise have run out of time.

Dr J.M. Woollard: Does it basically stop them from having to seek leave of the court?

Mr J.C. KOBELKE: The point is that some of these people cannot seek leave and continue. They will now be under the new system. They are being caught by Mokta in which case they would have had to have met the old system also. Therefore, the clock could not be turned back and they would miss out. We are fixing up this provision so that they will not miss out.

Mrs C.L. EDWARDES: I refer to proposed section 93EC on page 12. I do not need to have a discussion on proposed subparagraph 93EB(5)(b)(i) linking back to subsection 93E(6) of the Act because I now know how that fits into the system. I refer to the extended time for commencing proceedings. Could the minister explain the notification day and, therefore, the two-year extension?

Mr J.C. KOBELKE: When the director notifies a worker that a question has been accepted and any limitation in law for commencing an action runs out before the day on which the director notifies the worker, or will run out on or before two years after that day, an action for damages may be commenced any time up until two years after the notification date. This provision is intended to ensure that workers to whom proposed sections 93EA and 93EB may apply will not be precluded from pursuing common law damages due to time limitations on commencing an action.

Mrs C.L. Edwardes: Can the minister explain who we are talking about here?

Mr J.C. KOBELKE: This will apply only to those people who will fall under proposed sections 93EA and 93EB. It is dangerous but I will seek to colour that a little. They are people whose accidents were caused prior to 5 October 1999, who have sought to go through the new system, which means that they have sought an election within the six-month period, but there is disputation or the matter is ongoing and they have not been precluded. This will give them additional time if it is required, so that they can continue -

Mrs C.L. Edwardes: A common law action under the 1999 scheme.

Mr J.C. KOBELKE: Yes.

Clause put and passed.

Clause 11: Section 154AC inserted -

Mrs C.L. EDWARDES: This is a large clause that deals with regulations for subsidy from the supplementation fund. I will not go into the details that I outlined in my contribution to the second reading debate on the level of data that has not been collected on the number of claims and who will be covered by an award in excess of the amount of reserves. There must be clear procedures in the regulations so that everybody fully understands how they can make a claim for an amount in excess of the reserves that have been set aside. Will the insurance companies be able to revise their position in the light of new information, which could well be new medical information etc? How does the minister see the proposed section playing out in the regulations, which obviously are not before us?

Mr J.C. KOBELKE: The cost impact of the Dutch amendments will be met by the employers' indemnity supplementation fund, but only if the amount paid is greater than the current estimated costs. We have collected

data on all these cases and the costs that have been kept on the books of insurers, so that they cannot seek to modify those costs in some way.

Mrs C.L. Edwardes: You are basically freezing that estimation.

Mr J.C. KOBELKE: Yes. We have collected that data and that will remain the amount that has been put aside in each of those cases. The draw on the employers' indemnity supplementation fund will be made only if the award exceeds the amount that the insurer carries. The regulations may specify how to determine the extent to which the cost may be regarded as attributable to a certain judicial decision. We have the regulation-making power to deal with the details that might arise in determining a matter.

Mrs C.L. EDWARDES: If the insurance company receives further medical evidence that might increase its estimation, will that amount come from the supplementation fund or from the insurance company?

Mr J.C. KOBELKE: No; it will be based on the current estimation. It is more likely that the awards will be lower. Insurers do not always regularly readjust the amounts they put aside for common law actions. However, their continuing to pay weekly payments reduces the net common law component of the award. It is likely that, in most cases, the actual award that must be paid will be lower than that which has been put aside, unless the insurer has recently updated the allocation it has made against common law damages on the basis of other payments that have been made.

Mrs C.L. EDWARDES: Will the minister give an update on the state of the supplementation fund and tell us the stage at which it is at now, how the HIH cases will go, what the minister believes is the likely explanation - he is pulling in data now - and whether he expects the one per cent levy to be continued?

Mr J.C. KOBELKE: I understand that the balance in the employers' indemnity supplementation fund was $14.7 million as at May. There was a five per cent levy in 2001, which was reduced to three per cent in 2003 and to one per cent in 2004-05. The liability of claims as at 30 June 2003 was $30 million and currently about 283 claims are in the system, with an expected cost of just over $20 million. The member can see that we are in the ballpark. It is hard to say how quickly there will be a run-off, because one large payment of several million dollars might come up, the fund might be eaten into and the one per cent might have to be kept going for a number of years. It is therefore difficult to predict how many more years the one per cent will be needed to meet the liability on HIH. If an additional liability comes into being from this, it would seem to be quite manageable and may mean one extra year of one per cent to cover it. The two would obviously be accounted for. We are looking at the net cash balance each year and then the total amount held in the fund.

Mrs C.L. Edwardes: What do you think the balance should be at full supplementation?

Mr J.C. KOBELKE: I gave an undertaking when we put in that amendment for supplementation that we would not seek to build it up over the then amount, which was the residue from a whole range of other cases. For example, there is the case of an insurer who went under about 20 years ago. We are still making small payments on that I think. From memory, the amount at the time was of the order of $6 million or $8 million.

Clause put and passed.

Clause 12 put and passed.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by Mr J.C. Kobelke (Minister for Consumer and Employment Protection), and transmitted to the Council.