LABOUR RELATIONS REFORM BILL 2002

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 4: Part VID inserted -

Division 9: EEAs for persons with mental disabilities -

Subdivision 2: Approval of person to act on behalf of person with a mental disability -

Debate was interrupted after the subdivision had been partly considered

[Interruption from the gallery.]

The SPEAKER: Hopefully I will not have to warn those in the gallery every couple of minutes. It is not appropriate to make comments from the gallery. If the public wish to comment, they should do so outside this place. Members have a huge amount of work to get through on this Bill. Every time the proceedings are interrupted, the debate is delayed. I am sure those in the gallery support this legislation.

Mrs EDWARDES: Proposed section 97WW deals with the requirements for an application. Members on this side of the House have repeatedly raised the potential for delays. This provision states -

> (3) An application must be accompanied by a certificate in respect of the person with a mental disability -
>
> (a) in the form prescribed . . .

That is to be expected. The provision continues -

> (b) duly completed by a person who is stated in the form to be a medical practitioner.

The form to be completed is referred to in the next proposed section.

A new employee can be employed during this process. Mention was made earlier of a person being on trial or doing work experience. The employee might already be employed or on an EEA. It appears that a new EEA must be prepared on every occasion. Can the authorised representative remain the authorised representative without having to go through this process again?

Mr Kobelke: Yes.

Mrs EDWARDES: This process would be required only when dealing with a new employee.

Mr Kobelke: That is correct.

Mrs EDWARDES: I realise that this will take longer given the safeguards provided for those with a mental disability.

Proposed section 97WX provides for the forms to be prescribed. The form of application must include provision for the proposed representative to signify his or her consent to the application. I have referred previously to privacy. Asking for the representative's consent does not appear to be too difficult a requirement. The information being made available could easily be incorporated if it were to be provided to the Guardianship and Administration Board. The provision could easily incorporate that and it would not cause any undue delay.

Proposed subsection (3) provides -

> The form of certificate must be designed to show that, in the opinion of a medical practitioner, the person with a mental disability is in general incapable, because of that disability, of making a reasonable decision on the matters pertaining to an employer-employee relationship.

I know from past experience that getting doctors to sign forms is never easy. If they have a form readily available, it is obviously easier to get them to sign it there and then, and then put it in the mail. In this case, the form must be delivered and presumably picked up later. The issue is the delay and the difficulty created by the requirement to involve a medical practitioner.

Proposed section 97WY deals with who may be appointed or approved as a representative. We have discussed this proposed section at length previously. We talked about who would be likely to be the representative in the signing of the EEA. This proposed section provides that that person may be the spouse of the person with a mental disability, a close associate or someone belonging to a class of persons that is prescribed by the

regulation. Will the minister outline those classes of persons it is anticipated will be incorporated in that provision?

Mr KOBELKE: This must be taken in context with the hierarchy already established. We could require that the representative of the person with the mental disability be approved by the Guardianship and Administration Board. However, this class of people could act as the representative for the person. The member has indicated that that could be the spouse, a close associate over the age of 18, or a person belonging to some other group. This provides flexibility to amend the regulations to determine a class of person. As the member for Warren-Blackwood suggested, it could be a carer. Other classes of people might need to be more clearly designated. Proposed paragraph (c) allows that to be done by regulation.

Mrs Edwardes: Previously, bargaining agents and industrial agents have been able to advise people on employer-employee agreements.

Mr KOBELKE: The difference between a bargaining agent and a representative is that the representative has to be appointed for the purposes of subdivision 2. The representative person may be a close friend or family member and may not have the industrial knowledge or background; therefore, that person could appoint a bargaining agent. There will be a distinction between a representative for a person with a mental disability and a bargaining agent.

Mrs Edwardes: Is it anticipated that a bargaining agent could also be a class of persons that could be appointed as a representative?

Mr KOBELKE: No, that is not envisaged as it would confuse the different roles. We are not seeking to exclude it, but it is not suggested that the bargaining agent would represent a person with a mental disability.

Mrs Edwardes: Would an organisation such as a union be incorporated as a class of people who can act on behalf of a person with a mental disability?

Mr KOBELKE: The general principle is that it is someone who has the best interests of the person with the mental disability at heart. Therefore, we would not envisage a class of people who would automatically be able to do that. We have covered that already through the Guardianship and Administration Board. It may help at some later stage to have a clearer definition of the types of people who fit in here. We do not have any group in mind, because they are already outlined in proposed section 97WY(1)(a) and (b). We want to leave this open in case we need further clarification of the specific type of people who might be appropriate, in which case we are able to do that by regulation. Currently we do not have any group in mind that might be caught by that.

Mrs Edwardes: A family member of a person who might be regarded as having a mental disability expressed concern that a union representative could be approved as a representative. They were concerned that there was a push by the union into this area. I indicated that when we debated this last week that was not the Government's intention, but I seek clarification.

Mr KOBELKE: I am sure union members and officials will be approved as representatives, but that will be because they have a relationship with the person rather than because they fall into a class of people.

Mrs EDWARDES: Under proposed section 97WZ the registrar must make an order approving the proposed representatives. This is similar to provisions that we have already discussed in which the registrar must be satisfied that the application is not proscribed. Once the order is made the registrar must notify the represented person, the representative and the Guardianship and Administration Board of that order. Proposed section 97X relates to the effect of the order. An order approving a representative authorises the person so approved for as long as that order remains in force. Once a person has gone through the process of becoming an authorised representative, that order is in place until such time as revocation, resignation or death. Thereafter the ordinary provisions of an EEA apply.

Mr Kobelke: That is correct.

Mrs EDWARDES: What happens when a person is on a workplace agreement and an order is made under this provision? Is this something I should pick up with the division dealing with workplace agreements?

Mr Kobelke: We can pick that up later; it does not relate specifically to what happens here.

Mrs EDWARDES: In that instance, if a person does not have an authorised representative - perhaps because the disability has come on after the workplace agreement was signed - does he still have to go through those procedures? I will pick that up when we get to the division on workplace agreements. Proposed section 97XA deals with the refusal of approval if the registrar is not satisfied, in which case the registrar must provide a notice in writing within seven days and a statement of reasons. This does not provide an opportunity, as is provided

elsewhere, for an appeal to be made against that refusal to be brought within 14 days. Proposed section 97XZ deals with the determination of the appeal in a similar way to previous clauses.

Subdivision put and passed.

Subdivision 3: Functions of representative -

Mrs EDWARDES: Proposed section 97XD outlines in some detail the functions of a representative. Essentially, they are to act for and on behalf of the represented person in the enforcement and operation of the employer-employee agreement, and to perform any function that is spelt out in proposed subsection (2). Proposed subsection (2) picks up the functions a representative may perform on behalf of the represented person such as making the EEA, revising the EEA, cancelling the EEA, recovering any money and making any appeals. All the provisions that we dealt with are essentially highlighted in proposed subsection (2), which pulls them together. I did not have time to see whether anything had been left out. Why were the functions spelt out in this way?

Mr Kobelke: It is comprehensive and picks up all the requirements. People might ask why it is necessary, because it adds to the length of the Bill. It was to make the requirements absolutely clear, so that someone who is appointed as a representative can be directed to this page rather than having to hunt around the Act to find what a representative can do. This makes it clear what they can do on behalf of the person with the mental disability.

Mrs EDWARDES: Proposed section 97XE deals with the effects of the acts of representatives. It provides that the performance of a representative person has effect as though the representative were the represented person and had full legal capacity. Proposed section 97XF deals with the duties of the representative. It reads -

> (1) In performing the functions referred to in section 97XD a representative is to act according to his or her opinion of the best interests of the represented person.

Is the word "of" in the phrase "of the best interests" a typographical error and has that been fixed?

The ACTING SPEAKER (Mr McRae): The Bill before the House reads, "opinion of the best interests".

Mrs EDWARDES: Yes it does. Should it read, "opinion in the best interests"? Has that phrase been taken from the Guardianship and Administration Act?

Mr KOBELKE: I am advised that special attention was given to this proposed subsection and that the drafting is in keeping with what is written in the Guardianship and Administration Act.

Mrs EDWARDES: Proposed section 97XF(2) highlights where a representative might be acting in the best interests of the represented person. It reads -

> (a) as an advocate . . .
>
> (b) in such a way as to encourage the represented person to become capable of making reasonable decisions on matters pertaining to an employer-employee relationship;
>
> (c) in such a way as to protect the represented person from abuse or exploitation in employment; and
>
> (d) in consultation with, and taking into account the wishes of, the represented person.

The provisions do not all have to apply at any one time. They provide a guide if there is likely to be a revocation application as to whether the representative has been acting in the best interests of the represented person. Proposed subsection (3) states -

> A failure of a representative to observe the duty . . .

That is, to act in the best interests of the represented person -

> does not give rise to any liability on the part of the representative, but this does not affect the operation of -
>
> (a) Subdivision 4; or
>
> (b) any other written law.

Therefore, everything that has been done by the representative is still in accordance with the provisions under which they were done.

Subdivision put and passed.

Subdivision 4: Termination of representative's authority to act -

Mrs EDWARDES: Proposed section 97XG deals with the duration of the order approving a representative and states -

> An order . . . remains in force until -
>
> (a) the representative resigns in accordance with section 97XH; or
>
> (b) the order is revoked

Following proposed sections deal with revocation and where the person dies, or an order is made, but they do not deal with where a person resides. What happens between the resignation of the authorised representative and the new appointment being made?

Mr KOBELKE: That is answered in the next proposed section 97XH that states -

> (2) Where notice is so given the Registrar must approve the resignation.

Proposed subsection (3) provides the registrar with the ability to put conditions on the timing of the effect of that resignation and states that it can be done -

> (a) on the day on which notice in writing of the approval is given to the representative by the Registrar; or
>
> (b) on a later day specified by the Registrar in that notice.

When managing a case through the process, the timing is important and the registrar must have the ability to manage that transition. Obviously there will be difficulties if the representative person is deceased, which is dealt with later in the legislation. However, a withdrawal from the position can be handled by this provision.

[Interruption from the gallery.]

The ACTING SPEAKER: Members of the public gallery, earlier some people said that they could not hear some of the members speaking during this debate. The Speaker said that visitors to the gallery are welcome and that is important; all members of the public are welcome. However, it is also important for you, as well as other members here, that the noise is kept to a minimum so that people can hear the member speaking.

Mrs EDWARDES: I refer to where the person resides. When proposed sections 97XG and 97XH are put together, the provision may not be workable if there has been a breakdown in the relationship and the authorised representative is no longer willing to be involved with the represented person. There is a hiatus in the legislation and the matter comes up later when an application is made by the represented person for a revocation order. The application for the order may be for the same reason; that is, there has been a breakdown in the relationship and nobody is acting for the represented person in an official capacity.

Mr KOBELKE: These things happen from time to time and can be addressed through a range of measures. There is the potential to take the matter back to the Guardianship and Administration Board to seek a guardian, or other friends of the person with the mental disability might be able to find someone to take on that responsibility. However, if proposed section 97XH does not allow for a smooth transition by delaying the resignation, and the provision is abrupt in its effect, then another person must be found. There are several ways in which that process can be pursued once it has been established that it is necessary for the new representative to be registered and recognised for the purposes of this provision.

Mrs EDWARDES: I understand that either a member of the family or a friend might be willing to step in as a representative. However, the process of becoming an authorised representative is a lengthy one; it cannot be done in a short time. The Guardianship and Administration Act does not give the ability to appoint a guardian in that instance and I do not remember the Act providing for an interim appointment either.

Mr Kobelke: The Guardianship and Administration Act or the Industrial Relations Act?

Mrs EDWARDES: The Guardianship and Administration Act.

Mr Kobelke: The Guardianship and Administration Act is more cumbersome than the Industrial Relations Act. The latter Act provides a short-circuited way of putting someone in place to cover the employment side of the matter and does not address the wider range of matters that come under the Guardianship and Administration Act.

Mrs EDWARDES: In this instance a person must still make the application and consent to the form. He would still need to get a doctor's certificate, even though he already has one, because it is requested by the same form.

The minister might consider changing that to assist people when dealing with the same person who is being represented. Another issue might arise when the order is referred to the Guardianship and Administration Board. The board must then send the referral back to the registrar, so the process will not happen within weeks. There will be some delay and, in the meantime, a represented person does not have somebody to act for him in an official capacity. The legislation does not contain any interim provisions to give a level of retrospectivity to the actions that might be taken by somebody who steps into the breach in an interim capacity. The minister said that this situation is likely to happen. Having dealt with people over many years, including families in these situations with carers and the like, I know it happens regularly. Some of those relationships are rather tenuous and do not stay put for a lengthy period.

Mr KOBELKE: The member is alluding to a set of circumstances that might arise and, I suspect, will arise from time to time. However, this process must be dealt with expeditiously. We believe the provisions in this Bill do that. They will operate more quickly and simply than those under the Guardianship and Administration Act. The member is suggesting that there should be an interim arrangement. As has already been indicated, we are seeking to ensure a high level of protection for these people. We could not appoint someone as a representative for an interim period without also checking out that person. We would still require an approval process.

If the person has appointed a bargaining agent, that agent can continue to represent the interests of that person until another representative is appointed.

Mrs Edwardes: Will the employee have access to a properly appointed bargaining agent even if the representative is no longer available?

Mr KOBELKE: A properly appointed bargaining agent will continue to have the powers provided under the Act to assist the person with the mental disability.

Mr MARSHALL: I add a personal contribution. The House has passed subdivision 2, which provides approval to act on behalf of a person with a mental disability.

When I was growing up, a kid up the road from us was bullied at school and lost his confidence. His parents took him out of school at the age of 15 because they thought that if he could have six or seven jobs by the time other people had finished their matriculation and university studies, he would be experienced in the world. He had a slight mental disability. This lad was bullied in every job he took to gain experience. He had a greenkeepers job, which is an unskilled job. When the foreman and staff drank on Friday nights, they would give him trouble. He then got a job in the meat industry, and he was locked in the cooler room. He was mistreated in another job. He eventually got work with Dunlop Bedding. He was a swamper on a truck and learnt how to bludge. We know that word very well. His boss, the truck driver, would take him home at three o'clock for afternoon tea with his wife. They would loaf away on their employer's time. I was concerned about this lad. The work force in which he was involved and the so-called foreman did not understand people with mental disabilities. This lad's disability was slight. I am pleased that he has grown up. He is now working as a labourer - another unskilled job - in the north west. I hope he is being looked after, but I doubt it very much. People in the work force generally cannot see that others are not up to their standards. It is important that these people have representatives. However, none of these provisions spells out the qualifications of such a representative. The titles of the various proposed sections refer to the resignation of a representative, opportunity to be heard and so on, but no proposed section spells out the qualifications of a proposed representative.

Mr Kobelke: We have passed that proposed section. However, these conditions are not laid out in only one section; the arrangement of protections in the Bill seeks to achieve that aim. It is more than a list of specific criteria, although that is also included in the Bill.

[Interruption from the gallery.]

The ACTING SPEAKER (Mr McRae): Order! Members of the public gallery, it is important that members who are elected to represent all the people of the State are allowed to participate in this debate. You will have the chance to talk to other members outside this place, but you do not have the opportunity to interject on the debate. Please do not do that, and allow the member on his feet to speak.

[Interruption from the gallery.]

Mr MARSHALL: I was taught that the quieter I spoke, the more people would have to listen. That is worth remembering. My pep talks would always get my players over the line. I would get the best results. I always talk softly so that everyone must lean forward to listen.

I was pleased to hear what the minister said. I would like him to demonstrate how people in the work force have been educated about mental disabilities, as it is an area that people generally do not understand. Are young

people with disabilities entering the work force, supposedly with a representative looking after them, guaranteed to gain confidence because of that representative? Are they guaranteed that that representative will ease them into the work force? Are they guaranteed that the employer will be aware of their problems?

Mr Kobelke: All those things are important, but they are not covered by this Bill. They are referred to in this Bill; however, other organisations have a role in that education process. That is not the intent of this Bill.

Mr MARSHALL: I believe it should be an intent. I have seen one instance in my life, and there must be hundreds of others.

Mrs EDWARDES: Proposed section 97XI deals with the application to the Guardianship and Administration Board for a revocation order. I do not understand the purpose of this. The board must be notified that a person wants an authorised person as a representative. The board must then let the registrar know whether a guardianship order already exists. I understand that. We do not want to appoint an authorised representative if someone has already been appointed. However, why should we seek approval for revocation in the case of death or other reason? The process will not simply be that of notification followed by another application for a representative. The application must be made in accordance with the regulations for an order revoking the order. I would have thought that the registrar, rather than the guardianship board, would make that order. We have been through other related proposed sections. Have we read one of the earlier proposed sections incorrectly, and will it be that when a notice is given to the guardianship board, the responding notice will be an order of appointment? Who will make the appointment? I thought that it would be the registrar. All the provisions point to that. Other proposed sections deal with the origin of notice and the registrar satisfying himself that the provisions have been complied with. Why must we go back to the guardianship board to seek an order for revocation?

Mr KOBELKE: It is an important section. We need these specific provisions for revocation because it may, for a range of reason, no longer be appropriate for a person to act as the representative of a person with a mental disability. The nature of those issues means that it is appropriate to formally clarify the process so that the interests of the person are safeguarded.

[Interruption from the gallery.]

The ACTING SPEAKER: Members of the gallery, I thank you for your attendance and for staying reasonably quiet.

[Interruption from the gallery.]

Mr Birney: Why don't you pick on someone who is a bloke and not a four-foot-tall woman?

The ACTING SPEAKER: Member for Kalgoorlie, you are not helping.

[Interruption from the gallery.]

The ACTING SPEAKER: Thank you, members of the public gallery.

Mr KOBELKE: My contribution may not be as exciting, but it is more important, because we need to understand why this revocation clause is necessary.

Mr Sweetman: It is not too late to change your mind on this.

Mr KOBELKE: I am sorely tempted. The issue is that a mental disorder might be episodic, so the person with the mental disability might no longer seem to need an authorised representative. Obviously, that needs to be checked to determine whether it is true and not just a claim. There could be a breakdown or a purported breakdown in the relationship between the person with the mental disability and his representative. That clearly needs to be tested. A formal process is required. That would be referred back to the Guardianship and Administration Board because it has the expertise in that area. This is happening already with guardianship matters. Members should remember that the registrar of the Industrial Relations Commission controls the process. It is appropriate that if the process is to go to revocation, it should go through the Guardianship and Administration Board. The board has the professional background from which to make a decision on whether the grounds claimed for revocation can be substantiated and are within the standards normally set by the Guardianship and Administration Board.

Mrs Edwardes: The process seems to be more formal than is required for the appointment of the representative or the notice that the registrar sought in the first instance.

Mr KOBELKE: It must be tested. The Guardianship and Administration Board is the appropriate body. It can do that informally. That is the best basis upon which the registrar can make a decision on the revocation. The board makes the order.

Mrs EDWARDES: I accept that the Guardianship and Administration Board has the expertise and that it would be important for there to be some uniformity in who can be a representative of a represented person. However, I do not fully understand why the board seems to have a greater power than the registrar in this instance. Why is an application for revocation not simply referred back to the Guardianship and Administration Board for advice? Why will the Guardianship and Administration Board make the revocation order and not the registrar? That seemingly takes away the process put in place by the registrar. The registrar made the appointment, so why would the board determine the revocation?

Mr KOBELKE: We do not want duplication. The member for Kingsley is making a comparison with the initial process, which involves the lodgment of an EEA and what is required to make sure that the representative person is checked out and appointed. The registrar clearly has a role in that process and can seek assistance from the Guardianship and Administration Board, but that is caught up with the role of the registrar in registering the EEA. This situation involves the determination of cases in which medical, psychological judgment is needed to decide whether certain conditions that form the basis for revocation are present.

Mrs Edwardes: That would be only one reason for revocation. It could also be because the previous representative died.

Mr KOBELKE: That is covered by another part of the Bill. Although there may be some clear-cut cases, which the registrar could deal with, a lot will not be clear-cut. Why try to subdivide them into classes? Many will require professional judgment to determine whether the basis for revocation is valid. They should be lumped together and be determined by the people who have expertise in that area - the officers of the Guardianship and Administration Board. We should not try to duplicate the process by saying that easy cases should go to the registrar and difficult or complex cases should be given to the board. That is unnecessary duplication. We are not assuming that there will be a huge number of these cases, so why not let the people with the expertise in this field conduct the necessary procedures for the revocation?

Mrs EDWARDES: I understand the need to seek advice. I could understand this argument if the ability to appoint an authorised representative were separated from the registration of an EEA, but that has not been done properly. Why should not the Guardianship and Administration Board provide the order to appoint the representative?

Mr Kobelke: Because of the nature of the process, which I briefly went through. It is a broader process.

Mrs EDWARDES: Only in one instance. Proposed section 97XI(3)(b) states -

> that the representative has failed to act in the best interests of the represented person;

The minister is picking up on only one instance in which a revocation order might be required. I accept that.

Mr Kobelke: Why split it and have two processes when there will be some difficult cases? We decided to pass the whole process over to the Guardianship and Administration Board.

Mrs EDWARDES: Because two processes are already in place. The registrar makes the appointment and the Guardianship and Administration Board determines the revocation.

Mr Kobelke: There is only one revocation process. The key distinguishing issue is that the registrar deals with the administrative process in the registration of an EEA, to which a range of matters relates. The revocation deals with the best interests of the person with the mental disability. That is considerably different from the range of administrative matters with which the registrar deals. That is why it is best that the issues that deal with the best interests of the person with the disability be referred to the Guardianship and Administration Board.

Mrs EDWARDES: I understand that. That would be consistent and logical if under proposed section 97WS the registrar was not just seeking information from the Guardianship and Administration Board, but was obtaining from the board an order to say that the person was the authorised person. The registrar is doing two things. He is appointing the authorised person as well as registering the document. Yet when it comes to the revocation of the registrar's action, the Guardianship and Administration Board does it. That is inconsistent.

Mr Kobelke: Not at all.

Mrs EDWARDES: I put it to the minister that it is inconsistent. It duplicates the process. Two streams will operate. One is at the beginning and involves the registrar, and the other deals with the revocation order. I suggest that it might have been simpler to make it consistent. The minister might consider that in the future, because it would be too difficult to do that now. If the issue is that the expertise of the Guardianship and Administration Board is required, why not allow the board to make the order that a person is an authorised representative? That would mean that the body that has the expertise in that area would deal with the process

involving the representative of the person with the mental disability. It could provide that information back to the registrar by way of an order. That would take the registrar out of the loop. He would deal with his area of expertise; that is, the registration of an EEA.

Subdivision put and passed.

Subdivision 5: Approval of new representative -

Mrs EDWARDES: In fact, we did slip a couple of pages, quite unintentionally.

Mr Kobelke: If I had known I would not have let you go past them.

Mrs EDWARDES: I was dealing with the revocation provisions under proposed section 97XL. I am sure the minister would like proposed section 97XJ to be pointed out as his natural justice provision. That deals with the instance in which the application for a revocation order is not approved and gives the person the opportunity to be heard, and the board may then make the revocation order. Proposed section 97XL deals with the necessary changes to incorporate these provisions in the Guardianship and Administration Act.

This brings me to proposed section 97XM, in subdivision 5. Subdivision 5 deals with the approval of a new representative when a representative dies or approval is revoked. I return to the order from the Guardianship and Administration Board that the House has just been debating, because in this proposed section it would appear that the registrar is conducting the approval for the new representative in cases in which the approval is revoked. This highlights who plays the real role in appointment, revocation or anything to do with the authorised representative. This provision applies when a representative dies or the approval of a representative is revoked. Proposed section 97XM(2) reads -

> An application may be made to the Registrar by or on behalf of the person who immediately before the death or revocation was the represented person for an order approving a person to act in place of the representative who has died or whose approval has been revoked.

That is a fairly simple provision in outlining the administrative arrangements, but it does not deal with the situation in which the person resigns, which is the point I made earlier. Why does this proposed section not deal with a person who resigns?

Mr KOBELKE: Two different scenarios are involved. If there has been a resignation, then clearly that has been formally notified, and the process simply starts again. A death or a revocation of approval is a different process that needs to be brought into the system. To make it absolutely clear, the provisions in proposed section 97XM cover those eventualities. There is a signal that the registration of a representative has concluded, and the way is then open for the approval of a new representative.

Mrs EDWARDES: This is splitting hairs. The eventuality that a person might die could easily have been put in, but it slipped through. Therefore, the provision will automatically apply in any event, which means that this proposed section is not really necessary.

Mr Kobelke: It may seem a little like over-engineering, but that is better than leaving things to be worked out later and perhaps finding that a loophole exists.

Mrs EDWARDES: Proposed section 97XN deals with the approval of a representative. That has been dealt with previously, as has proposed section 97XO, which deals with the effect of the order. Proposed section 97XP deals with the refusal of approval, and proposed section 97XQ deals with an appeal against refusal of approval. The Government could have saved itself some trouble with all these proposed sections and not even had them inserted.

Subdivision put and passed.

Subdivision 6: Miscellaneous -

Mrs EDWARDES: Proposed section 97XR deals with the powers of the registrar, and reads -

> For the purpose of determining an application under section 97WV or 97XM, the Registrar may -
>
> (a) meet with the persons who are concerned in the application; and
>
> (b) otherwise obtain information in any way that the Registrar thinks appropriate.

There is no link here to proposed schedule 5 for this division. Is it considered that that will be automatic? It has obviously been left out of this part for a specific reason.

Mr KOBELKE: The registrar can inform the applicants in ways that are considered appropriate. The matters contained in proposed schedule 5 would obviously be considered appropriate if the registrar wished to use or

refer to them. The reason it is not included is that a range of penalties in that schedule would not be appropriate. It would be necessary to pick and choose the items within schedule 5. The registrar has the power to inform himself or herself on matters that are integral to the functioning of the Act or that the registrar wishes to take note of.

Mrs EDWARDES: Proposed section 97XS deals with the EEA not being affected by the revocation of the order or the vacancy in the position of representative. That just closes that section off. Proposed 97XT reads -

(1) The Registrar must keep a register for the purposes of this Division.

(2) The register -

(a) must record particulars of every order that is made under section 97WZ or 97XN; and

(b) may do so in a form and manner determined by the Registrar.

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

(4) The Registrar must allow any person to inspect the register on payment of the prescribed fee, if any.

Is it anticipated that this register will not include the name and address of the employee? What is the connection of this proposed section with the information that has come from the Guardianship and Administration Board?

Mr KOBELKE: I am advised that this register is not a public document.

Mrs Edwardes: Proposed section 97XT(4) allows any person to inspect the register on payment of the prescribed fee.

Mr KOBELKE: I apologise to the member. What I said earlier was not correct. People must be able to access the register. I am reminded that the register is the register of the representative person. A family member may wish matters to proceed before the Guardianship Administration Board and the family might try to get together a range of matters; therefore, they must be able to check out whether there is a registered representative person for that family member. Access would be needed for a range of reasons, and that would be made available under this proposed section. The focus is on who is the representative, not the person being represented.

Mrs EDWARDES: Does the minister not expect to limit the inspection right to those who might have a sufficient interest in the matter; that is, the subject of the register? Can anybody who wants to pay a fee -

Mr Kobelke: We are conscious of the potential for abuse; therefore, we may need to consider what regulations should apply. We must be careful to ensure that people who have a genuine interest in the welfare of a person can find out who the representative person is.

Mrs EDWARDES: Can that proposed section be limited by regulation? Would an amendment need to be made on this proposed section to determine whether anyone seeking access to that information would have sufficient access in the matter?

Mr Kobelke: We will take that on board. Although there are regulating powers, if we sought to introduce regulations, they might not fit that purpose because they could be ultra vires.

Mrs EDWARDES: The minister may be right. The register of EEAs of represented persons are incorporated into an EEA register without the name of the representative.

Mr Kobelke: The register for the EEA would be the same as if they were able-bodied people who were not caught by these particular proposed sections.

Mrs EDWARDES: Proposed section 97XU provides the same provision that we previously discussed for certified copies to be issued for a necessary purpose. Proposed section 97XV is titled "Information not to be disclosed". Again, we have discussed that on previous occasions. Proposed section 97XW, under the title "Proceedings under this division" provides that the commission may make regulations under the proposed section 113 for regulations and cannot be inconsistent with proposed section 97XL(1). Proposed section 97XL(1) deals with the application of the Guardianship and Administration Board for the purposes of proposed section 97XK, which refers to the power of the board to make a revocation order. The Bill is getting worse than the tax Act. Therefore, the provisions of the Bill cannot be inconsistent with any advice and/or order coming from the Guardianship and Administration Board. I do not know why that provision to make an application to the Guardianship and Administration Board has been put in this proposed section. Is it there to ensure that any regulation may not override the power that has been given or that the Guardianship and Administration Board already has?

Mr KOBELKE: The proposed section ensures that we do not have a jurisdictional overlap between this Bill when it is enacted and the Guardianship and Administration Act. This provision would sort out any potential jurisdictional overlap because a number of proposed sections are referenced across the jurisdiction of the board.

Mrs EDWARDES: Proposed section 97WX(3) allows the commission to exercise all of its powers under the Bill to expedite appeals that come before it. That brings us to the end of the section that deals with people with mental disabilities.

Subdivision put and passed.

Division put and passed.

Division 10: Certain conduct prohibited -

Mrs EDWARDES: I agree that although members in the public gallery who witnessed the debate on the previous proposed section might have thought it was like watching paint dry, it was an important section that has been well thought through and considered. It will be interesting to see how the bureaucratic levels will balance the protections that are required and make it workable. That area will need to be watched.

This division deals with some of the more meatier sections of the provisions of the Labour Relations Reform Bill. Proposed section 97XX deals with one of the critical elements of this legislation. It is critical to the Government because it is one of its key platforms to ensure that employees are given genuine choice of employment arrangements and are given sufficient information to help them make an informed decision. It is also critical because equally there is a view in the community that employers have the first right of choice.

When talking about the Government's position and the restriction on providing choice for the public sector employees, the minister said the Government had the first right of choice. It appears that choice from the Government's perspective depends upon with whom it deals. The Government regards that it has the first right of choice when dealing with the public sector, and when dealing with the private sector, the Government believes that the employees have the right of choice. If the minister reads *Hansard* he will find that he clearly said employers have the first right of choice. I was delighted when the minister said it. As the Government, it took that right of choice in respect of public sector employees.

Mr Kobelke: That is correct. I am trying to substantiate the member's second statement as it was clearly not my position.

Mrs EDWARDES: Which was?

Mr Kobelke: That employees have first choice in the private sector. They now have choice that they did not have before, but they do not have first choice.

Mrs EDWARDES: Yes, they do. The minister said that employees are given a genuine choice about employment arrangements. A number of other provisions follow.

Mr Kobelke: The choice is conditional upon an employer offering choice. If an employer does not offer choice, they will not have it.

Mrs EDWARDES: If an employer does not offer choice he is subject to a penalty.

Mr Kobelke: Not necessarily.

Mrs EDWARDES: We will get there and I will be pleased if the minister will show me that it is not the case. It appears that the employer does not have the first choice. The employer has to offer an EEA or the award. If an industrial agreement is in place the choice is between the industrial agreement and the award. EEAs are no longer possible. That is the choice presented to an employee. The employee can determine which one he wants to be party to. As such, there is no choice if the employee wants an EEA, but an industrial agreement is in place. I used the example that one employee can stop other employees from having individual agreements if that one employee wants an industrial agreement. That has happened in cases before the industrial commission. It is not hypothetical. There have been cases in which 99 employees in a workplace are on workplace agreements and one wants an industrial agreement, and that one employee has got an industrial agreement. In other workplaces, six out of 500 or 600 employees are on an award and the rest are on workplace agreements, but it has not always been the case that choice has been limited to the employee. The view of many in the community, particularly employer groups, is that they ought to have the first right to decide which workplace relationship they wish to provide to their employees.

Mr KOBELKE: I believe I have already addressed the issues. I am happy to take specific questions. I offer the member the chance to speak on another matter.

Mrs EDWARDES: The Bill before us contains a change from the Bill that was issued for consultation. The words "prospective employees" were removed. Are the words incorporated elsewhere in this Bill? It previously stated that employees and prospective employees were given a genuine choice. The term "employees" has not picked up the words "prospective employees". It may have been regarded as superfluous to use the words.

Mr Kobelke: I cannot recall the words being used in the draft Bill that was issued for consultation.

Mrs EDWARDES: It was, I have a copy with me.

Mr Kobelke: It was an issue at various stages and it was looked at. I am confused about which stage. We should address the substantive issue rather than the history.

Mrs EDWARDES: Sometimes a provision changes between the draft and final version of a Bill and the change is incorporated in other provisions. I cannot see where this has been picked up. It may have been regarded as superfluous phraseology.

Mr Kobelke: Because of the whole issue of choice, which the member has already commented on, we needed to make sure that there was jurisdictional cover when there was an offer of employment and a person had not started. It was an issue of when the matter could be picked up for consideration if there was dispute over whether a job had been offered and withdrawn because the person made a choice other than the first choice of the employer.

Mrs EDWARDES: Proposed section 97XY deals with the enforcement of the provisions in this division. It mentions a number of proposed sections: 97XZ deals with making employment, transfer or promotion conditional on an EEA being entered into; 97Y deals with certain advertising - that is, making employment conditional upon an EEA; 97YB deals with an employer offering an EEA to give choice as to employment arrangements; 97YD deals with threats and/or intimidation; 97YF deals with dismissal or detriment because of a refusal to make or cancel an EEA; and 97YE deals with misinformation. Those proposed sections are not offences, but they contain civil penalty provisions for the purposes of proposed section 83F. What is behind the phraseology in the claim that a contravention of those proposed sections is not an offence but is subject to civil penalty provisions?

Mr KOBELKE: That is to indicate the jurisdiction. Matters would then proceed through an industrial magistrate's court under civil jurisdiction and not be treated as a criminal offence. It is designed to make it absolutely clear.

Mrs EDWARDES: Proposed section 97YB relates to an employer offering an EEA in order to give choice about employment arrangements. Proposed section 97YF deals with dismissal or detriment because of a refusal to make or cancel an EEA. Both are enforceable under proposed sections 97YC and 97YG. Proposed section 97YC deals with an industrial magistrate's court, which is where an order would go to obtain compliance. Proposed section 97YG relates to an employee's remedy for breach of proposed section 97YF. Why has the Government provided for what appears to be an overlap in the jurisdictions? The matters are already able to go to an industrial magistrate's court. Is it to seek an order to put a person back in the position they ought to have been in; that is, to offer an employee covered by proposed section 97YB a choice of employment arrangement?

Mr KOBELKE: Proposed section 97YC is to ensure that there is a remedy for fulfilment of the clear requirements of the proposed sections in this division. The special provisions relate to compliance with the clearly laid down requirements of this division.

Mrs EDWARDES: I referred earlier to the issue of choice. Obviously we are talking about making employment, transfer or promotion conditional upon an employer-employee agreement being entered into. Under proposed section 97XZ, except as provided by proposed section 97YA, a person must not offer a person employment, promotion or transfer or even intimate to that person that he or she will be employed, promoted or transferred, unless the person agreed to enter into an EEA. We were talking earlier about the issue of choice and the fact that employers valued choice.

Choice was so valued by the Master Cleaners Guild that it recently won a case upon appeal for ensuring that a provision that the union wanted to insert into the award did not go into the award. Although in the first instance the Industrial Relations Commission determined that the application by the union had merit, that decision was overturned on appeal. We will deal with the case when we get to the proposed sections dealing with appeals, because such a case would never get up on appeal under the minister's new provisions. It would appear that whenever unions have lost an appeal, they have sought to remove the appeal provisions in Acts. That might be a bit of a cynical approach, but it would appear in some instances that Derek Schapper clauses keep coming into play.

The members of the Masters Cleaners Guild paid nearly $200 000 for the case. They were firmly committed to the principle of ensuring that the employer had the choice of offering the workplace agreement. The guild put into the fund in excess of $41 000 and its members put in close to $150 000. It was no weak-kneed approach. That is a lot of money for any small business people who are being asked to fund a case. They fought to ensure that they as employers were given the right to employ people under any legal instrument that was available to them. The guild's members are considerable in number. Some of them have supported the Government's no-disadvantage test. Although, instead of their outdated and inflexible award, they would prefer to have a no-disadvantage test linked to the minimum conditions of employment. The Government certainly does not support giving employers a wider choice of industrial instruments; it does not want them to have a choice.

The guild members would like to clearly put on the record that they are totally opposed to the employee choice of terms and conditions in the Labour Relations Reform Bill. They also totally oppose the right of entry, and they support the minimum conditions of employment, which I raised earlier. The Government's intention is out there in the marketplace. It is quite deliberately taking away an employer's choice to be able to offer a particular workplace arrangement to an employee. Those people will be very angry. They have put dollars into this issue. They have supported the Government, which has been no easy task in the light of all the other employer associations which have not supported or believed in the Government.

Mr BARNETT: This is an important point. What the member for Kingsley says is true: it is rare that people come out publicly and so strongly in support of a principle.

Mrs EDWARDES: The reference to the case is the Chamber of Commerce and Industry of Western Australia against the Australian Liquor, Hospitality and Miscellaneous Workers Union (WA Branch); Airlite Cleaning Pty Ltd against the Australian Liquor, Hospitality and Miscellaneous Workers Union (WA Branch), 2002, WASCA 24. The union may have won the case in the first instance but it lost on appeal. However, essentially the union will win and the employers will lose. Although the employers won the case, they will lose as a result of this industrial relations legislation. They paid nearly $200 000 to win a case, which this Government's legislation will overturn.

Parliament has a right to be involved in making laws. I do not deny that Parliament can make the decision to change laws. However, members will understand the frustration and anger of those people who have put hard-earned dollars into fighting a case to support a major principle in which they believe. They will be very angry about this. They will not blame the Parliament; they will blame the Gallop Labor Government. They can see the inconsistency of the Government of the day determining a policy for its employees. It can determine that it will not provide choice, but it will not give that right to the private sector. Not only will those people be angry that the Government will simply overturn a result that they have spent good hard-earned money in achieving, but they will also be angry about the fact that there is one rule for one and another rule for another. The Government's application of choice for employees is very inconsistent.

The minister has argued that the restriction of choice given to employees in the public sector resulted from difficulties in the public sector. I do not deny there were difficulties in organisations that had workplace agreements that paid well, because the Government did not want anybody shifting from them. The Department of Productivity and Labour Relations was a prime example. It set a model to be followed, yet when it came to much smaller departments that had not gone into the broad range of flexibility that DOPLAR had provided, they could not attract good people into their departments. I am not saying that there were not problems. However, the Government is denying to public sector employees a choice of what instrument they would like to be employed under. The Government's hypocrisy is that it exercises choice for its own work force but denies it for the private sector. A private sector organisation that has put nearly $200 000 into a fund for a firmly held principle will be very angry at the Government's level of hypocrisy, particularly when it sees that public sector employees are denied a choice of agreement. How will the Government explain to employers that the Government can do what it will prevent them from doing?

Mr KOBELKE: It was interesting to hear that case outlined by the member for Kingsley as it is relevant to choice. However, we outlined our policy in 2000 and the decision came down in 2001. We had therefore already established our position. It is not as if we followed through our position after the decision was made in that case.

Mrs EDWARDES: What will the minister tell employers such as the Master Builders Association when they ask why the minister can have employer choice and restrict employee choice for public sector employees but they are not permitted to do the same?

Mr KOBELKE: The situation is the same for private and public sector employers. The employer decides to use the award, an industrial agreement or an employer-employee agreement. That is the first decision to be made and all employers have that decision.

Mrs Edwardes: That is nonsense. The provisions impose a penalty because certain conditions prohibit it.

Mr KOBELKE: That applies to both private and public sectors. There are conditions on the registration of EEAs, for many reasons. There is also the issue of what is the best commercial outcome for an employer, and that conditions or limits the choice. However, it is the same in both the private and public sectors. The first decision to take on people, a decision to promote them or a decision on the basis of the contract of employment is the employer's choice. If the employer decides to use an industrial agreement, clearly that must be agreed with the employees through their union and both parties must enter into that agreement.

Mrs Edwardes: But what if an employer decides it wants to offer only an EEA? It cannot do that, yet you can offer only an industrial agreement.

Mr KOBELKE: The member conditioned the question by saying "wants to offer only an EEA". The point is that the employer has a choice to embark on the road of an industrial agreement, which he or she may or may not be able to put in place. The employer can then use the award which, although not conditioned by the other party's wishes, may be conditioned by commercial realities. Thirdly, an employer can offer an EEA. That is the employer's choice. It is the employer who seeks to offer it. The member is of the view that employers should be able to impose it under the current legislation. That is what we object to. An employer cannot impose an individual contract.

Mrs Edwardes: What have you done with the public sector?

Mr KOBELKE: If an employer offers only the award, that is the choice of the employer. There is then no choice for the employees and only the award is available.

Mrs Edwardes: You can offer an award or an industrial agreement or you can offer only awards or only industrial agreements, but you cannot offer just an EEA?

Mr KOBELKE: Employers in both the public and private sectors can offer EEAs but they are conditional on acceptance by employees. If an employee does not wish to accept it, that is the employee's choice.

Mrs Edwardes: That is not what the proposed section says. The conduct of offering only employment, transfer or promotion on the basis of an EEA is prohibited conduct.

Mr KOBELKE: The member is trying to determine that the employer will subsume the choice of the employee. She fails to accept that there is a hierarchy of choice. The initial choice is the employer's, which is conditional on a range of issues. That is then followed by the choice of the employee, which is further conditional. If an employer does not offer an EEA, it is not open to an employee to accept it. The provision is simple and straightforward but it may suit the member's political purpose to put it in a different complexion. It is clear how it works and it works equally for public and private sector employers.

Mrs EDWARDES: There is a hierarchy of choice. If the employer who has the first choice advertises employment on the basis of EEAs, that is prohibited conduct. The minister said it was a hierarchy of choice. He can offer that and the second choice is whether the employee wishes to accept it. The employee does not get the choice of accepting an EEA because that is prohibited conduct.

Mr Kobelke: Only when the employee has entered into an industrial agreement.

Mrs EDWARDES: No. Let us go back to EEAs and focus on one thing at a time. I am dealing only with EEAs. Public sector employees are not allowed to enter into EEAs by virtue of the policy of their employer, except in certain circumstances and are therefore denied that choice. The private sector also cannot offer EEAs as a first choice of employment arrangements.

Mr Kobelke: Why?

Mrs EDWARDES: It is prohibited conduct.

Mr Kobelke: Why?

Mrs EDWARDES: The minister should read proposed section 97XX, which states -

> The purpose of this Division is to ensure, as far as possible, that employees are given -
>
> (a) a genuine choice as to their employment arrangements . . .

Proposed section 97XZ states that a person must not offer a person employment or even intimate that the person will be employed only if the person agrees to the employment or the continued employment, as the case may be, being under an EEA to be entered into. Therefore, it cannot be done.

Mr Kobelke: What can't be done?

Mrs EDWARDES: An employer cannot offer only an EEA as the basis of employment. The minister should look at proposed section 97Y. I am happy for the minister to explain it to me.

Mr Kobelke: I understand your legal sophistry.

Mrs EDWARDES: Proposed section 97Y states -

> A person must not advertise the availability of employment in terms that show an intention that any employment relationship is to be under an EEA and not otherwise.

An employer is prohibited from advertising in *The West Australian* for an employee to fulfil a position stating that an EEA is available.

Mr Kobelke: No, he is not.

Mrs EDWARDES: Does that mean that the minister will not take action against employers who advertise in *The West Australian* for particular employees, stating that the employer's first choice is for an EEA?

Mr Kobelke: Of course they can do that. However, it must be absolutely clear that the employment is available on either an EEA or award basis.

Mrs EDWARDES: No, that is the employer's choice. If I want to join the public sector and I want an EEA, I do not have that choice.

Mr Kobelke: That is right.

Mrs EDWARDES: An employer has a choice of the instrument that is offered to public sector employees but I do not have a choice as an employee. The minister's view is that employees should be given a genuine choice about employment arrangements under proposed section 97XX. Let us say that I want to join the public sector and I want an EEA. I like having individual agreements and I do not want to be part of an award system. I do not want to be part of a union industrial agreement because I do not have a choice about being part of a non-union industrial agreement under this legislation. I therefore want an EEA and want nothing to do with the union movement. I cannot get that under the public sector whatsoever. Therefore, as an employee, I do not have a genuine choice in my employment relationship. In the private sector an employer does not have the same ability as the Government has to offer workplace arrangements. They will be restricted. It will be prohibited conduct because it will be conditional upon an EEA. There will therefore be a level of hypocrisy because the public sector and the private sector will have different options.

Mr Barnett: What choice was offered to public sector employees recently? Approximately six weeks ago I read a media release from the minister and the Premier that claimed a great success because public sector employees had voted to go into a union agreement. What realistic choice was offered to public servants? That will prove the case.

Mr KOBELKE: I will explain it for the third time. Members opposite do not have to agree with it; however, they cannot deny the logic of it. The member for Kingsley is using sophistry by saying that the employers do not have a choice because they cannot dictate. That is a totally different issue. The member for Kingsley seems to think a choice is being offered only if employers can choose to dictate to people. A choice will be available, followed by the employee's choice. The member for Kingsley does not consider that to be a valid choice. There is a very clear hierarchy of choice. The first choice is for the employer to decide whether to employ a person and what terms to offer the new employee. As in all similar circumstances, the terms and conditions an employer will offer will be conditioned and restricted by a range of matters. The employer has that initial choice. If the employer chooses to offer an EEA, the employee can then choose between an EEA or the award. That will be the second level of choice. EEAs are employer-employee agreements. They are established only when both parties want them, which is very different from the policy surrounding workplace agreements, which allowed one party to dictate that the other party sign one. Employees did not have a choice. The legislation will open up a considerable range of choices for the employer, although it will not be as wide as many people would like because some employers want the option of being able to dictate their requirements. However, they will have the choice of a range of options to underpin the contract of employment. The Bill will open up a genuine choice for the employee.

Mr Barnett: You have not answered my question on the choice offered to public sector employees recently.

Mr KOBELKE: That was a follow-up. The key choice was made when the Australian Labor Party won government and made it clear that for most areas within the public sector it would not offer individual contracts, which are currently workplace agreements. However, for the purpose of the Leader of the Opposition's argument they are the same as EEAs. After entering into negotiations with the Civil Service Association,

protracted negotiation occurred on what would be the framework agreement for certain broad areas across the public sector. A position was put to all CSA members to vote on, and a very high percentage of those who voted agreed that that position was acceptable as terms for an industrial agreement that would apply across that part of the public sector. Overwhelming acceptance was demonstrated among those who voted. Those general terms and conditions will be applied across that part of the public sector for 30 months.

Mr Barnett: You conducted that poll among CSA members. Proposed section 97XX provides that, as far as possible, employees be given a genuine choice as to their employment arrangements, and sufficient information to enable them to make informed choices about those arrangements. CSA membership may represent 20 per cent of that work force. I know of a few examples in which only two employees had a vote. The ballot papers arrived, two people voted and the other 30 or 40 employees were given no say or choice. That is hardly being genuine in giving an employee a choice. I do not mind CSA members voting on their position.

Mr KOBELKE: That is a more fundamental question of whether we support the collective or individual approach. The two exist in competition in various ways. At some time one must opt for one or the other. The coalition Government was very keen to push the individual approach. That has certain advantages, but on the whole I think it has more disadvantages. The ALP supports the collective approach, which is inherent in this amending Bill. Although we see huge strengths in the collective approach, we acknowledge that it can run into problems and not always deliver. That is the nature of industrial relations. There is no perfect system. However, this Government is opting for the collective approach, which we think will serve the employees of the State far better than the individual approach.

Mr BARNETT: I understand that there is a philosophical difference, which I will put to one side. I accept that the minister and the Labor Government want to take the collective path. That is fair enough. I can accept that the members of the CSA voted to take that route. They exercised their freedom of choice and I respect their collective decision. However, I cannot reconcile that a majority of public servants were not offered a vote. They may have voted with the CSA or they may have voted differently. However, only about 20 per cent of public servants exercised a vote or choice. The others were denied any say. That is hardly democratic.

Mr KOBELKE: I move -

Page 63, line 24 - To insert after “award” the following -

, enterprise order

This was an oversight in the drafting. The enterprise order is required as part of the potential outcome from good faith bargaining and should be in this section with the mention of “award or industrial agreement”.

Amendment put and passed.

Mrs EDWARDES: The only reason I did not object to the amendment is that the Opposition strongly opposes proposed sections 97XX, 97XY, 97XZ, 97Y, 97YA, 97YB and 97YF. They will interfere with an employer’s right to contract. The Opposition might philosophically differ in opinion on that. However, the Government is demonstrating a level of hypocrisy. I do not understand why an EEA, which is subject to a no-disadvantage test and linked to an award, cannot be the only contract offered rather than having to give an employee the choice of signing an EEA or an award. Will an employer be required to offer the whole range of options to an employee?

Mr KOBELKE: As I said, an employer will be able to offer an industrial agreement, which must go through processes and have agreement from a group of employees through their union. The employer may offer an award, in which case the conditions will be constrained to the award conditions. If the employer offers the EEA it will be conditional on the employee being able to opt for the award rather than the EEA. That is the basis of the choice.

Mrs EDWARDES: If the EEA is linked to the award through the no-disadvantage test, why will an employer need to offer both?

Mr Kobelke: This Government established in its policy document that it would do something the previous Government promised repeatedly it would do, but did exactly the opposite; namely, that it would increase the options available to employees.

Mrs EDWARDES: It is a different issue when it is not linked to a no-disadvantage test. However, other than the fact that it was incorporated into the policy, what philosophy underpins that?

Mr KOBELKE: It will provide more genuine choice to employees.

Mrs EDWARDES: A system will apply that will link the EEA through the no-disadvantage test to the award. In most instances it will no doubt be better than the award. Why will the employer have to offer both of those to the employee? What is the advantage of that to the employee?

Mr Kobelke: If employment is conditional on signing an employer-employee agreement, basically there is no choice for the employee.

Mrs EDWARDES: The minister is taking away the right of the employer to determine the operations of his business. The minister is taking away the employer's right to determine what will be the best possible method for running that workplace, particularly when awards may not be flexible enough in dealing with, for instance, shifts and fly in, fly out arrangements. Not many awards deal with that type of arrangement. Although some people might regard it as a relatively new phenomenon, it has been in existence for a fairly long time; but the awards have not caught up to that new phenomenon. How long have fly in, fly out arrangements been in existence - 15 years? The awards are outdated in some of those areas by at least that period. Therefore, an individual agreement may offer different requirements for the operation of a business. A number of employees in some mining operations are on workplace agreements and a handful are on awards. However, when there is a greater mix than that, real difficulties in rostering and the like arise, particularly if, for instance, the shift under the award is only eight or 10 hours and the operation is running a 10 or a 12-hour shift. Therefore, the rostering arrangements for both shifts are difficult. The Police Service found that out when it offered to new recruits workplace agreements that had different provisions. It needed to provide the same provisions under the industrial agreement as those under workplace agreements. That is what it ended up doing, which provided it with the ability to run a business.

Mr BARNETT: This is very important. It is an issue of choice in the workplace. Whatever a person's philosophical point of view, it is a fundamental principle.

Mrs EDWARDES: The minister is providing extremely inflexible arrangements for the running of a business. That is one of the reasons the EEAs will not be a popular instrument in large to medium-size organisations. There is a potential for groups of employees to be on different workplace arrangements, particularly when the awards are outdated. The cleaning awards, which I highlighted yesterday, are clearly outdated in exactly the same way. The minister has said that the commission is currently looking at all the awards and trying to simplify them. The minister used a different term -

Mr Kobelke: It is not undergoing any process on the awards. It is just getting them into order and doing some clerical work to make sure it is ready to follow through on whatever needs to be done.

Mrs EDWARDES: It is not going through the assessment of working out the obsolete provisions or what needs to be corrected.

Mr Kobelke: It is looking at gathering that data; it is not currently taking action to update.

Mrs EDWARDES: However, it is looking at those awards in a systematic way. It is not in a position in which it can say to the minister that about 50 awards have obsolete provisions. How many state awards are registered in Western Australia?

Mr Kobelke: It would be only a guess, but I suspect it is in excess of 200.

Mrs EDWARDES: Some of those awards should no longer be in existence.

Mr Kobelke: Most certainly.

Mrs EDWARDES: It is like legislation; time overtakes some legislation and we never get around to removing that legislation. Obviously a lot of work will need to be done on that. However, it highlights the real dilemma that is faced by an employer when some staff are on awards that are outdated and have obsolete provisions and some are on EEAs as such. The issue then is that if any one employee goes on to an industrial agreement, no choice is available for the employer or the employee. No-one working in that workplace can have an EEA once an IA is in place. At the expiration of the EEA, if an IA then comes in, again there is no opportunity to re-offer an EEA to employees; they must go on to the industrial agreement. There is no employee choice in that case either.

The minister's preference is for a union collective bargaining process for the workplace. The minister's contribution to employee choice is limited and narrow; in fact, it is misleading to employees in many respects. The minister's assurance that the employer has the first choice is not backed up by the legislation. The minister might say that it is sophistry in terms of interpretation, but that goes on in the courts and the commission every day. As legislators, we are trying to put in place legislation which we hope members of the community want, and which is workable and can be understood. When the minister's words do not match what is in the legislation, it is incumbent upon us to ensure that that is highlighted. That is exactly what I am doing. The choice is not there for employers. The choice was there for the public sector employer. The choice is not there for employees, as the minister claims, particularly once a union collective agreement is in place. The majority of employees who may not wish to have a union collective agreement will have no choice whatsoever.

Mr KOBELKE: I move -

Page 64, after line 4 - To insert the following -

(3) In this section and section 97YB -

"award" includes an award under the *Coal Industry of Western Australia Act 1992*.

This amends proposed section 97YA. This was a drafting oversight in that the award needed to include reference to the Coal Industry of Western Australia Act 1992.

Amendment put and passed.

Mr KOBELKE: I move -

Page 64, lines 19 to 22 - To delete the lines and substitute the following -

(a) under any relevant award or enterprise order;

Again, this is a technical oversight, as we also need to incorporate the concept of enterprise orders into this proposed section.

Mrs EDWARDES: We understand the reasons behind the changes to enterprise orders and industrial agreements. That highlights my point; that is, under an industrial agreement, there is no choice for employees. If, however, the commission makes an enterprise order as a result of the breakdown of good faith bargaining, EEAs are available under an enterprise order. As such, it is quite appropriate that those amendments are made to the EEA section. It is important that the industrial agreement is not presented as a real option to employees when clearly it will not be available to them if they want the choice of going on to an EEA.

Amendment put and passed.

Mr KOBELKE: I move -

Page 64, lines 24 and 25 - To delete the words "industrial agreement" and substitute "enterprise order".

This amendment is made necessary by a drafting oversight.

Amendment put and passed.

Mrs EDWARDES: Prohibited conduct is applicable when employers and employees have choice. This is a false premise, and there is no choice for either employers - except for the Government - or employees. It is certainly not necessary, when the employee may already have elected to be covered by an EEA. The employee can still enter into an EEA while the good faith bargaining is being carried out, and prior to the industrial agreement coming into play. Once that industrial agreement comes into existence, those employees do not have that choice. I ask the parliamentary secretary, what choice, under the industrial agreement, those employees would have if they wanted to go onto an EEA?

Mr MARLBOROUGH: The member for Kingsley has been around long enough, and has done enough work in her role as shadow minister, to come to grips with a fundamental change to the process she was used to when her party was in government. To be confronted with a genuine Bill, which offers genuine choice, is, historically, anathema to her side of Parliament. Under the Kierath regime, of which the member for Kingsley was part, that choice was not available. The minister has indicated, not only in this proposed division, but also in previous proposed sections, that those choices are intended to be genuine. Not only must the offer to the parties be genuine, but also it must be demonstrated that the choice is genuine. There is no point putting in the Bill the words that offer choice, without allowing a process that offers genuine choice. The Government believes that the offer of an EEA, an award, or any other form of agreement must be based on the employer offering the choice without any fear of retribution in terms of job opportunities, or any action that may be taken as a result of the choice of the employee not necessarily being the choice of the employer. The Government has tried to cover all the circumstances, so that the offer of choice is genuine.

Two parties want an outcome of genuine benefit. It is of benefit to the employer to have a worker who assists with the maximisation of productivity and thus of profit. The Government is not opposed to that. It understands that profit generated in that way has the possibility of being used to generate greater opportunities for that industry, and therefore the Government would hope that the workers employed by the industry, and the State, will benefit. Equally, the employer must understand that the employee needs to have in that choice a system of fair pay for a fair day's work. The inputs into the workplace that do not necessarily add up to dollars, but give the opportunity for such things as maternity leave, sick days and tea breaks, are all part of, and recognised as a fair offer in an EEA, an award, or any private arrangement between the parties. The Government believes that it is giving genuine choice, and that people of goodwill, at this level, will sit down and allow such choice to be

offered in fairness and, to the degree that it is not, the legislation puts in place the safeguards that will guarantee that.

Mr BARNETT: The parliamentary secretary has not answered the question. If an employee wishes to have an EEA, what choice does he have if a union-based industrial agreement is in place? If an employee, for whatever reason, wishes to have an EEA, that choice is denied. It is no good the parliamentary secretary waxing lyrical about choice, when someone who wants an individual agreement, even if it is a reduced individual agreement under the EEA structure, rather than a workplace agreement, does not have that option. That was seen recently in the case of public sector employees. Many public sector employees wanted to stay, if not on a workplace agreement, then on an EEA. They were not only offered no choice, but also no vote. Only Civil Service Association members were given a vote. A majority of public servants were not given a vote, which is disgraceful. If they had been given a vote, they would have been able to exercise some choice. It is wrong.

I do not mind the philosophical difference, or collective agreements. I would much rather see in this legislation the choice of non-union collective agreements, but in saying that I do not oppose union collective agreements. It is the right of association, and the right of a group of employees to form together in a union, or whatever association or structure they want, and to reach a collective agreement. If that right is supported, there should also be the right to have a group or collective agreement which is non-union, but most specifically, in this case, if someone wants an individual agreement, where is the harm? Such stringent tests are applied to the EEAs in any case that they will not be dramatically different, but why deny the choice for those who wish to have it?

Ms HODSON-THOMAS: I would like the Leader of the Opposition to speak further on this matter.

Mr BARNETT: The member for Kingsley has stepped out for a moment, and the minister has also gone out for a while. I do not mind if he takes a break, he has been working hard on this legislation.

Mr Marlborough: I can answer your question. Do not worry about the minister.

Mr BARNETT: The parliamentary secretary did not answer the question. I asked the question, I explained it again, and he just sat there. If the parliamentary secretary wants to stand up and offer an answer -

Mr Marlborough: My sitting here is an answer to your question.

Mr BARNETT: That is a particularly arrogant position to take. If that is the way the parliamentary secretary views the Parliament, he would probably be better off going out with a few of his mates into the courtyard, and relaxing and enjoying himself, while we pass some time until the minister comes back. Will the parliamentary secretary just sit there? Is he paid to be a parliamentary secretary?

Mr Marlborough: You ask the question, and I will demonstrate what I can do.

Mr BARNETT: I will ask the question again.

Mr Marlborough interjected.

Mr BARNETT: The parliamentary secretary does not have that choice, and it is not up to the staff to join in either.

I will ask the question again. Under this part of the Bill, employers have an obligation to offer choices to employees. If employees would like to have an employer-employee agreement, for whatever reason, why is this effectively denied them if a union-based industrial agreement is in place?

Mr MARLBOROUGH: I thought that the answers the minister and I gave were adequate. I am trying to envisage a workplace in which the majority of the work force is on awards, productivity is good and people are happy with an award situation, but the management mentality must somehow align itself with the Leader of the Opposition's mentality. In that situation I would say, "I know how I can add to the benefits of the award system I have in my industry. I will not offer the next employee who walks through the door the opportunity to be employed under an award. I will encourage that person to go down the EEA route." Somehow, I have leapt across the grand canyon of logic to meet the Leader of the Opposition, and in my thought processes I have discovered a way in which that single employee, by being able to work under an EEA, will be of significant productive benefit to the workplace I am trying to run. The truth of the matter is that a progressive-thinking management does not think like that. Why would it? There is absolutely no logic to it. The answer is clear.

It is no use the Leader of the Opposition going on a fishing exercise and throwing out a net that he hopes will somehow inadvertently catch something that is not there to be caught. The EEA is not meant to be anything other than an inducement that may be used to take people away - I cannot think of a manager who would want to do it - from a system under which the majority of the work force is working. If at the end of that award process the employer wanted to say to the collective work force that he does not want to go down the award route any

more and wants to talk to the work force about an EEA, nothing would stop that from happening. If that happened, that would be a sensible way to approach the matter. People would not sit their children around a kitchen table and say, "These are the rules for helping to make this a better household for all of us to live in, so we will share the television equally and you will not give so much cheek to mum and dad. However, we will have a different rule for you, little Johnny. You can be cheeky if you want to, watch as much TV as you like and stay up till midnight." Somehow, those people will have leapt across the barrier of commonsense to the position the Leader of the Opposition takes; that is, if Johnny is allowed to do that, it will somehow make a better household. That is a nonsense, and the Leader of the Opposition's question is a nonsense.

Mr BIRNEY: I am not sure whether that was an answer. The Leader of the Opposition's comments about this being a fairly significant part of the legislation were quite pertinent. I want to place on record what happened prior to the election on the issue of EEAs and workplace agreements etc. The Labor Party had decided that it would abolish workplace agreements. Therefore, over a period it spoke very strongly about the need to do that. However, my take on the matter is that a lot of people like workplace agreements. Therefore, when it came to crunch time, the Labor Party decided to jump onto the front foot and say to all those people who thought workplace agreements were a good thing, "Look, it's okay. Don't worry about it. We will actually have employer-employee agreements." However, in saying that, the Labor Party certainly did not advertise far and wide that if an industrial agreement were in place, the employer-employee agreement about which it was sprouting could not be offered to an employee.

It is now a foregone conclusion that these employer-employee agreements were never meant to come about. The Labor Party never for one minute thought that it would have a work force full of people on employer-employee agreements. The only reason that it worked those agreements into the legislation is that prior to the election it had worked out that it would suffer a backlash as a result of abolishing the workplace agreements because, surprise, surprise, some people thought workplace agreements were a good thing. Labor's local members and candidates were running around in their various electorates and getting feedback from people who said that they wanted to stick with workplace agreements. Therefore, as I said, the Labor Party jumped onto the front foot and said, "It's okay, you guys. There is no need to worry. We will have employer-employee agreements." The sad reality is that the Labor Party never intended that employer-employee agreements would come into place. They are Clayton's agreements designed to appease those people who think workplace agreements are worthwhile.

Mrs EDWARDES: I understand that in my short absence - I note that the minister will be back shortly - the question that I posed was not answered. I raise it again and seek an answer. What choice does an employee have when he or she wants an EEA but an industrial agreement is in place?

Mr KOBELKE: I thank the parliamentary secretary for handling matters so expertly while I was out of the Chamber for a short period. That question is very important. I honestly believe that I have attempted to answer it and surrounding matters on at least three occasions. The fact is that the hierarchy of choice is conditioned by a range of matters in the normal commercial course of events, and also specifically by the amendments contained in this Bill. The issue that is the basis of the member for Kingsley's question is that when an EEA is offered, it cannot be taken up or registered when an industrial agreement is in place. That clearly limits choice, specifically on the basis that the Government has a preference for a collective system. We cannot have a collective system that can be undermined by buying off people with individual contracts, which in this instance would be EEAs. Therefore, we must try to reconcile the fact that there are two different systems - the individual and the collective. The Government even went to the extent of stating in the objects of the Act that we believe the system should give primacy to the collective. On that basis, if there is agreement with the work force that a collective industrial agreement has been put in place, it is not appropriate to seek to undermine that by having individual contracts. Therefore, when an industrial agreement is in place, it will not be possible to register an EEA.

Mrs EDWARDES: When an industrial agreement is in place and an employee would like to enter into an EEA, that employee has two choices: Buckley's and none. The employee has no choice in that instance. The minister can say that the whole purpose of this part is to provide employees with choice. However, when it comes to the public sector there is no choice. In the private sector, if an industrial agreement is in place, there is no choice for the employee; and when we are talking about the employer's first choice, there is no choice either.

The minister can talk all he likes about a hierarchy of arrangements, but the question clearly comes back to what the minister has just said; that is, the primacy of union collective bargaining. The provisions in the Bill have clearly been drafted with that in mind. As a result they have become very bureaucratic. Significant concerns have been expressed about how the provisions will operate. As a result, employer-employee agreements will not be as popular as workplace agreements for a lot of reasons other than the no-disadvantage test. We have talked

about that and about the inflexibility of the awards, which will increase business costs. However, a lot of other costs and implications will arise out of the EEA process that will not make EEAs very popular.

The member for Kalgoorlie raised the point that an arrangement had been made with the unions, which clearly do not want to have individual agreements. Unions regard it as their right and their role to have control over workplaces. They believe that workplaces exist not for employers and employees but for unions. As a result they do not like individual agreements. The review clause highlights clearly the arrangements with the union movement to support the primacy of union collective agreements. I reiterate the fact that this is clearly an interference with the employer's right to contract.

Proposed section 97YB(2)(b) refers to a contract of employment that contains the same provisions as those of the proposed EEA. One of the points that has been raised is that this is the first time that the Industrial Relations Commission will be dealing with contracts of employment. However, I do not believe that is the case. I know that view has been expressed about the commission's involvement in setting the terms and conditions of employment. Some of the unfair dismissal applications have dealt with contracts of employment. I regard some of those applications as having been before the Industrial Relations Commission inappropriately, particularly when they have involved partnerships and the like. Maybe the issue is about determining what will be contained in the contract of employment. This is perhaps the first time that the commission has been involved in determining what will be contained in a contract of employment in the absence of the statutory mechanism of an EEA, workplace agreement, award, industrial agreement or enterprise order.

Mr KOBELKE: I am not sure exactly what the member is saying. Is the member suggesting that this is the first time that the commission will become involved in contracts of employment?

Mrs Edwardes: Yes, in setting the terms and conditions of contracts of employment.

Mr KOBELKE: Proposed section 97YB sets out those provisions. Proposed section 97YC contains the enforcement provisions. I do not see the point at issue about the question of primacy. I am no authority, but we are clearly extending what may have been the very minimal role of the commission when dealing with contracts so that it will now take on a larger role. I do not know if that is the point the member was getting at.

Mrs Edwardes: The minimal role that the commission has played in the past has been related to unfair dismissal provisions.

Mr KOBELKE: My confusion is that I am trying to relate the member's question to the provisions we are dealing with. Is the member making a more general comment?

Mrs Edwardes: It is probably a more general comment.

Mr KOBELKE: We have established that the member is making a general comment.

Mrs Edwardes: Although it may be a general comment and be picking up on the provision in the proposed section, I am genuinely seeking an answer.

Mr KOBELKE: I am not sure exactly what the question was.

Mrs Edwardes: It has been put to me that this is the first time that the commission will be involved in setting the terms and conditions of a contract of employment. This point has been raised a number of times with regard to this provision.

Mr KOBELKE: It depends what the member means by the commission's involvement. The legislation sets out how it will work. Obviously matters can be referred to the commission, but we are not dealing with those here.

Mrs Edwardes: The commission would be dealing with more than would normally be the content of an industrial instrument.

Mr KOBELKE: I suppose it is a new form of industrial instrument for the commission. I certainly agree with that.

Mrs Edwardes: A number of non-award situations have been dealt with as contracts of employment. However, this legislation will provide, for the first time, for the commission to deal with the terms and conditions of a contract of employment.

Mr KOBELKE: The enforcement will still go to the Industrial Magistrate's Court, which is what happened before.

Mrs Edwardes: Did that apply to common-law contracts?

Mr KOBELKE: We might try to tie this debate down to the proposed sections, although I was happy to enter into a more general debate to make the point that the commission is extending its role and that part of that role

will be contingent upon some of these matters. It is hard to give a clearer and perhaps semi-legal definition of what the role of the commission means in general terms. I am not a legal expert in these matters, and it is hard to do that without relating to the clauses before us. I have accepted the general proposition that this is a new form of industrial instrument and the potential exists for some level of involvement of the commission, although not necessarily. As a general comment, I think I can make that point, but it would help to progress the debate if we tied it to the proposed sections.

Mrs EDWARDES: My point was clearly picking up on this proposed section. I could have raised it when dealing with a number of proposed sections at an earlier stage, but I decided to endeavour to progress the debate and not to raise all the issues on one section. However, if the minister does not wish to deal with the point, I will be more specific in the future and will concentrate all my questions on one proposed section rather than have the debate progress. It works both ways. Normally the minister is quite accommodating. I suspect that what has been put to me is correct, and this is the first time that the Industrial Relations Commission has involved itself in a contract of employment that has been underpinned by an EEA, as referenced throughout this part of the Bill.

Mr Kobelke: I do not think that is correct. There is now the potential for some aspects of an EEA to involve the commission, but not under this division. We are talking about EEAs as a form of contract of employment, but under this division that does not involve extending the role and powers of the commission. The member might like to look at other proposed sections.

Mrs EDWARDES: I agree with the minister with regard to the specific role and powers of the commission. However, the Bill provides for the commission's role and powers in creating the contract of employment.

I do not want to labour the point because the minister has answered it. It is a new instrument and this is probably the first time a contract of employment has been regarded as an industrial instrument. Proposed section 97YD deals with threats and intimidation. Members opposite have raised this as a key issue of concern with workplace agreements. The perceived threat or intimidation has often been referred to as the choice of employers to offer only a workplace agreement.

Mr Kobelke: The legislation is not aimed specifically at employers or employees; it is quite even-handed.

Mrs EDWARDES: This would be a good section to be put into the division affecting industrial agreements! I will propose such an amendment. By the time we get to that division, this provision would be an excellent one to include. The proposed section states -

> (1) A person must not by threats or intimidation persuade or attempt to persuade another person to enter into, or not enter into -
>
> (a) an EEA;
>
> (b) an EEA that contains or does not contain particular provisions; or
>
> (c) a cancellation agreement.
>
> (2) A person must not intimidate an employee, or threaten injury or harm to the person or property of an employee, because the employee is or is not a party to -
>
> (a) an EEA;
>
> (b) an EEA that contains or does not contain particular provisions; or
>
> (c) a cancellation agreement.
>
> (3) A person must not intimidate a representative, or threaten injury or harm to the person or property of a representative, because the represented person is or is not a party to - . . .

That is quite broad and extensive and well drafted.

Proposed section 97YE deals with misinformation. I am not sure whether there has been an issue or problem in respect of misinformation. I have not heard it come up before. It states -

> A person must not make or give to another person any misleading statement or information with intent to persuade that other person to enter into, or not to enter into -
>
> (a) an EEA; . . .

I wonder when such a provision would apply. Would information that is being put around about the forthcoming vote by Rio Tinto Ltd employees be covered by this proposed section? It obviously would not apply in that instance, because the vote relates to federal conditions and this proposed section deals specifically with EEAs. Perhaps this proposed section should be more broad-based with regard to how the provisions of an award or

industrial agreement can be interpreted. Should such a provision be inserted elsewhere in the Bill? I do not think it should and I do not think it is included elsewhere. We all know of instances of misinterpretation of sections of awards, industrial agreements, workplace agreements or EEAs. The issue is the intent. It is a different matter if someone makes an honest mistake. This provision clearly describes an intent to persuade a person to either enter into or not enter into an EEA. I do not know whether the minister has perceived any concerns about workplace agreements.

Mr Kobelke: This provision is inserted on the basis of enabling informed decision making. The decision, which we have discussed at considerable length, is an important aspect. The information that forms the basis of that decision is important. We cannot have people deliberately misinform others in order to bias their decision.

Mrs EDWARDES: I recognise the balance there, particularly when dealing with the change provisions in good faith bargaining, when people can still link into an EEA before an industrial agreement is put in place. The union movement may take a more active part in convincing employees not to go down a particular path. I am not sure whether all the information provided to employees by those parties is true and correct. Possibly, the circumstances should be extended further down the track. Proposed section 97YF states that an employer must not dismiss an employee because he has refused to agree to an EEA. Proposed section 97YG deals with an employee's remedy for any breach of proposed section 97YF. It states -

> (1) If under section 83E an industrial magistrate's court determines that an employer has contravened section 97YF in relation to a person who is or was an employee, the court may make an order under this section.
>
> (2) The court may order the employer -
>
> (a) to reinstate the person if he or she was dismissed from employment; or
>
> (b) subject to subsection (5), to pay to the person compensation for any loss or injury suffered as a result of the contravention,
>
> or to do both of those things.

That provision is quite harsh in terms of the cost to the employer. If there has been a breakdown of the relationship, it is not suitable to provide that a dismissed person must be reinstated. We will deal with this again when we discuss unfair dismissal. In the case of unfair dismissals, the philosophy behind reinstatement is to discourage unfair dismissal applications on the basis that it may be a moneymaking exercise. It is a different issue in this instance. Proposed section 97YF deals with dismissal or detriment because of a refusal to make or cancel an EEA. That goes against the philosophy of part 2, and I think it is harsh in respect of the orders a magistrate can make.

Under proposed section 97YG, a magistrate can order reinstatement. However, after that is ordered there will certainly be a breakdown in the employer-employee relationship. As a second alternative, a magistrate can order the payment of compensation, as is outlined in proposed subsection (5). As a third alternative, a magistrate can order both of those things. A person can be reinstated and also have the potential for compensation. Will the minister outline the intent behind this provision and why the penalties are so harsh?

Mr KOBELKE: The member has referred to a number of proposed sections, including the ones that cover misinformation, dismissal or detriment because of refusal to make or cancel an EEA, and the reversal of the burden of proof.

Mrs Edwardes: Which one is that?

Mr KOBELKE: Proposed section 97YH deals with the burden of proof. They all link in and they are all in the Workplace Agreements Act. They were lifted from the existing statute. We have had no complaints about them and they may be more effective in the current legislation. It was implemented by the previous Government, and this Government thought it was an adequate drafting model to follow. We were happy to transfer it to this legislation so that penalties that apply to EEAs will operate in a similar fashion to penalties that applied to workplace agreements.

Mrs EDWARDES: It is times like this that I wish I had checked the debate and read what the minister said on that clause.

Mr Kobelke: I am sure reference to the debate of 1993 will enhance this debate.

Mrs EDWARDES: I did not do that because that debate occurred almost a decade ago. As I outlined earlier, I am sure that every single section was considered in the light of whether it was appropriate in the circumstances. I therefore ask the minister about the intent behind these harsh penalties.

Mr KOBELKE: They are in the Workplace Agreements Act and seek to serve the same or a similar purpose. They have been downgraded from criminal offences in the Workplace Agreements Act to civil offences in this Bill. The reversal of the burden of proof is in the Workplace Agreements Act.

Mrs Edwardes: We haven't reached that proposed section yet; we should deal with this one.

Mr KOBELKE: They all link in. If people do not realise that the offence will be civil and not criminal, that will impact on the importance we place on it. If people do not realise that the burden of proof has been reversed, that too will have significance. They all relate to the fact that we wish to ensure that people are not discriminated against by being coerced or forced to sign or not sign an EEA and to ensure that genuine choice is available. A great deal of coercion was applied and a great many threats made to employees to sign individual contracts because the Workplace Agreements Act was not effective in outlawing that behaviour. It was purported to have provisions such as those we are referring to here that would seek to curb or prevent those things. Clearly, it did not do that.

We have adopted them in this Bill, and by downgrading the seriousness of the offence from a criminal to a civil offence we may be making it easier to prove. The proposed section will therefore be more effective. It seeks to fulfil the stated purpose in workplace agreements that was not delivered on. We hope to deliver on it and ensure that people are able to make a genuine choice without threat or coercion.

Mrs EDWARDES: The minister mentioned the burden of proof under proposed section 97YH. The Workplace Agreement Act is almost a decade old. What is the rationale behind the reversal of the onus of proof? An employee might take action on the basis that he was dismissed because he did not wish to enter into an EEA. The Bill provides that employers must prove that they took the dismissal action - when I say dismissal I am referring to the other provisions that deal with detriment - for some reason other than because the employer or representative refused to enter into an EEA or a cancellation agreement. Obviously, that could lead to the potential for an unfair dismissal application without the other provisions that apply in the unfair dismissal section of the Workplace Agreements Act. What is the rationale behind this reverse onus of proof? It was based on an employee not wishing to enter into an EEA unless it could be proved otherwise.

Given all the other protections that can be written into an EEA, I do not consider that it is necessary for the effective operation of the EEA provisions. A large number of applications could be lodged because it will be easier to do that than go through the unfair dismissal process. Some of those applications might be vexatious. However, the employer will have no choice other than to defend it because of the harsh penalties. As we have seen in unfair dismissal cases, a substantial sum of money will be required to be paid by small businesses to address these issues.

If the minister reads the proposed subsection that provides that the commission can take into consideration whether the employee has been in employment for fewer than three months, this provision, if the commission applied that clause harshly, could be a more popular way of seeking reinstatement and/or compensation at the same time.

Mr KOBELKE: They are valid points. However, I am becoming frustrated that the member, who is very capable, is dragging this out and going over old ground.

Mrs Edwardes: I have not raised this before.

Mr KOBELKE: These provisions were drafted by the coalition Government in 1993 and will apply in this Bill if a person is dismissed or denied promotion on the basis he would not accept an EEA. If people took vexatious action, costs could be awarded against them. That will be an impediment to people misusing the proposed section.

The member for Kingsley suggested it could be misused for unfair dismissals. If that occurred, it would be a very limited aspect of unfair dismissal because the dismissal must relate to the refusal to sign an EEA and not some other matter. Often, only two people are parties or witnesses to the event. Therefore, if a person were dismissed for refusing to sign an EEA, it could be very difficult to show that. A range of other matters could be used as false justification, hence the reversal of the burden of proof will require the employer to show that there were good reasons for the dismissal, other than an employee's refusal to sign an EEA. Those provisions are in the Workplace Agreements Act, in large part, but I am not sure about the cost aspect. There is good reason to repeat those provisions and to try to make them more effective. That is what we have sought to do.

Mrs Edwardes: Where is the cost provision?

Mr KOBELKE: Enforcement is under proposed sections 83E and 83E(12), which allow for costs to be awarded if an unmeritorious or vexatious claim is made.

Mrs EDWARDES: The minister has on occasion mentioned that because a clause is in the Workplace Agreements Act, I am going over old ground. Frankly, I am not. This is a new piece of legislation. It is quite different from the Workplace Agreements Act. The mere fact that particular provisions were lifted from that legislation does not prevent members, and nor should it, from inquiring about the thought processes behind that course of action. Clauses are lifted from all sorts of legislation and inserted into other pieces of legislation.

Mr Kobelke: I accept that. It is appropriate and productive for you to raise the matter, but to go over and over and over it when a reasonable answer has been given and when it has been in the statutes for nearly 10 years is merely delaying the progress of the House.

Mrs EDWARDES: I do not think so, because that was the first time I had raised the burden of proof issue. Perhaps the minister is getting a little tired, because this is unlike him. We have been getting on together well, so we should not stop now.

Mr Kobelke: The three industrial relations Bills of 1993 occupied a total time of 37 hours. By the time we are halfway through tomorrow's sitting we will be less than halfway through this Bill, and will have already spent 37 hours on it.

Mrs EDWARDES: There were fewer amendments in that legislation.

Mr Kobelke: They were more extensive and far-reaching. Of course, so little time was taken because the previous Government used the guillotine. It looks like you are making a good case for us to implement the guillotine.

Mrs EDWARDES: The Government can always make that choice. However, I am sure the minister will recognise that each clause of that legislation was debated. The guillotine might have been used on a particular clause -

Mr Kobelke: On many clauses.

Mrs EDWARDES: It was, but every clause was debated. The debate on the Bill in toto was never cut off. We can debate how many clauses, words, amendments and the like were discussed. I have all the statistics with me just in case the minister raises that at any point. We are progressing through this Bill in an orderly fashion. I am sure that the minister recognises that that is occurring and that it is a complex piece of legislation. This Bill is probably the most complex piece of drafting I have seen in all my years as a member of Parliament or in my years as a solicitor. When I worked for Freehills, part of my job was to deal with legislation.

This is a complex piece of legislation. The minister will find that the drafting of the Bill and the way in which it has been pulled together is complex. I do not know how many draftspersons were employed. The fact that several people had their fingers in the pie shows, because it does not all hang together nicely. That adds to the level of complexity. Other issues need to be taken into account in the debate. However, we digress.

The DEPUTY SPEAKER: Indeed. That is noted by the Chair.

Division, as amended, put and a division taken with the following result -

Ayes (23)

Mr Bowler	Mr Kobelke	Mr McRae	Ms Radisich
Mr Dean	Mr Kucera	Mr Marlborough	Mr Templeman
Mr D'Orazio	Mr Logan	Mrs Martin	Mr Watson
Dr Edwards	Mr McGinty	Mr Murray	Mr Whitely
Mr Hill	Mr McGowan	Mr O'Gorman	Ms Quirk *(Teller)*
Mr Hyde	Ms McHale	Mr Quigley	

Noes (17)

Mr Ainsworth	Mr Edwards	Mr Omodei	Dr Woollard
Mr Barnett	Mr Grylls	Mr Pendal	Mr Bradshaw *(Teller)*
Mr Birney	Ms Hodson-Thomas	Mr Barron-Sullivan	
Dr Constable	Mr Marshall	Mr Sweetman	
Mrs Edwardes	Mr Masters	Ms Sue Walker	

Pairs

Mr Andrews	Mr Johnson
Mr Ripper	Mr McNee
Mr Brown	Mr Board
Mrs Roberts	Mr House
Dr Gallop	Mr Waldron

Division, as amended, thus passed.

Division 11: General -

Mrs EDWARDES: Proposed section 97YI provides for a review of divisions 5, 6 and 7 and schedules 4 and 5. Divisions 5, 6 and 7 deal with the register, the no-disadvantage test and the registration of EEAs. Schedule 4 deals with the registration requirements for EEAs and schedule 5 deals with the powers to obtain information and related provisions. The review will be carried out by the commission in court session, which, if members are not aware, is three commissioners. That does not include the president. Proposed subsection (2) states -

> A review is to be carried out -
>
> (a) as soon as is practicable after the expiry of 12 months beginning with the day on which section 4 of the *Labour Relations Reform Act 2002* comes into operation; and
>
> (b) at such other times as the Minister may in writing request.

I take it that that is probably later than the 12-month provision.

Mr Kobelke: Certainly

Mrs EDWARDES: Members can understand the concern of the community. That has been raised in this House during general debate. A letter from Mr Daley was spoken about on the Paul Murray radio program. I read out the clause during the second reading debate. I will not read out that clause again. Essentially, it provided for a review in 12 months, which was to be completed within 24 months. I can understand the cynicism felt by the community when, all of a sudden, the Labour Relations Reform Bill was introduced and provided that there be such a review. The union movement has said quite openly on a couple of occasions that it regards the opportunity to offer individual agreements as transitory and that it does not support individual agreements. It totally supports the philosophy behind the legislation; that is, the primacy of a union collective agreement. The cynicism felt by the community is due to the fact that the unions are vehemently opposed to it, they had a big argument with the Labor Party when it was in opposition, and they regard the employer-employee agreements on offer as transitory. Obviously, one of the mechanisms that could be used to get rid of EEAs is carrying out a review. They are not popular; they are unworkable; and they are of no value. Using the minister's line on the non-union collective agreements, if people want an individual agreement, they can go over to the federal system and use an Australian workplace agreement. There is a real potential for EEAs to be removed from this proposed section as a result of a review. I do not want to put words in the minister's mouth. Perhaps I should sit down and let the minister say exactly what he thinks about the allegations of the secret deal, the intention behind the EEAs, the review and the unions' belief that they are only transitory.

Mr KOBELKE: The allegation by the member has been made by her on a number of occasions in this place; and every time I have rejected it utterly. It has no foundation in fact at all. This very provision in the Bill is some evidence of the falseness of the claims she has made. If there were a deal to do something about radically changing or doing away with EEAs, we would not give the Western Australian Industrial Relations Commission, as an independent and impartial body, the role to oversee their use; we would set up a body that was more conducive to the so-called union interest and that would provide a report recommending that they be finished. That shows how stupid the continuing repetition of that false claim is. The independent Western Australian Industrial Relations Commission must conduct a review 12 months after proposed section 4, which establishes the EEAs, comes into operation or as soon as practicable after that. Participants in the industrial relations arena - ordinary employers and employees - will have the opportunity to put their point of view to the review. The commission, which has been involved in certain aspects of the functioning of EEAs, will be in a good position to provide a report on the shortcomings of and potential improvements to the legislation, as well as a general overview of the advantages of this instrument. That simply disproves the false accusation being made by the member for Kingsley.

As the member has already alluded to, proposed subsection (2)(b) would allow the minister to follow up on that 12 months or two years later. When the review takes place after one year or 18 months, perhaps the commission could comment with some certainty or specificity on some areas and say that other areas are unfolding. It might be appropriate to follow through at a reasonable time afterwards and again look at either all or part of those provisions. We are very different from the previous Government; we are not driven by blind ideology. We want an industrial relations system that works for employers and employees. By being open about how we assess these issues and by taking on board a fair assessment or evaluation of how things are working and how they can be improved, we can make the system work for all parties. That is our clear intent with this legislation.

Mrs EDWARDES: The cynicism is not necessarily stupid. Although the minister has appointed an independent commission to carry out the review, he still needs all the facts, which would be provided as a result of the review. The minister said that about five per cent of the work force entered into workplace agreements. We believe the figure is higher than that.

Mr Kobelke: At one stage it was just under nine per cent, according to the Australian Bureau of Statistics. The most recent ABS figure is closer to 6.4 per cent of the work force.

Mrs EDWARDES: I am not surprised. The Government got rid of all the public servants in the system.

Mr Kobelke: No, not yet; they are still working their way through.

Mrs EDWARDES: That is true. I think the minister will find that those figures will decrease. I am happy to adopt the minister's figure of five per cent for the purpose of this exercise. If the commission were to say that less than five per cent of the work force had taken up EEAs, that the costs of the administration of the EEAs were far too high for the benefit they were providing, that there had been many complaints by employers about the workability of EEAs and that huge transaction costs had resulted from that, it would not be beyond belief to think that this was obviously not very popular in Western Australia. Also, it might say that many people were going over to the federal system and, as a result, it was costing the State far too much to provide this benefit for such a small number of people. I will use the argument that the minister used for the non-union collective agreement: we will dispense with offering EEAs as a choice in Western Australia for industrial instruments and, if people want them, they can go over to the federal system. The cynicism is not beyond belief. If the commission were to come out with just the facts, which I think will be pretty much along the lines that I have stated, the Government could then make a policy decision, particularly in tight budgetary conditions, that the cost to the commission was far too great to continue to offer that instrument for such a small number of people. That is when I think the cynicism comes in.

We would prefer the minister to say that he supports individual agreements, that a lot of restrictions, safeguards and protections have been put in place to ensure that the concerns that he raised when in opposition do not arise, and that the EEAs are here to stay, so that any employee and/or employer who enters into an EEA will know that not only will the EEA be in existence for the term of that EEA but also it will be around for people to enter into a second, third or fourth EEA. That is what the community would like the minister to say, rather than his saying that the cynicism is stupid and there is no secret deal. They want some confidence that EEAs are here to stay, and that is not what we are getting from him.

Mr KOBELKE: The EEAs are a very genuine offer and therefore must be given time to work. Further, they are an important and intrinsic part of the overall model. The model is very much based on the primacy of the collective agreement and the desire to ensure that the collective agreement works effectively. As I indicated a little earlier, a range of problems and issues with the collective approach need to be worked through. One aspect of how collective arrangements can be improved is to provide an element of competition. If statutory, effective

individual contacts are not available, neither is that level of competition. Other models are then adopted to improve or modernise the award and the collective system. Potentially, the Reith approach, to which I am opposed, may then be adopted. This involves going in legislatively and trying to impose simplifications. That is not what the Government wants to do. That has been made absolutely clear. If competition existed between the individual contracts and the collective agreements, that would put pressure on to ensure that the collective system was modernised and adapted to the needs of both employers and employees. That is a far more important role for the EEAs than the Opposition perhaps is willing to acknowledge or understand. I have spoken to a range of groups and pointed out that that is an integral part of the system. It is not a window-dressing exercise involving putting up the individual contract now, and then doing things to undermine it so that it is stillborn and unable to deliver. If that happens, the Government is left to develop other mechanisms to modernise and update the awards.

Mrs Edwardes: That could be done through industrial agreements.

Mr KOBELKE: The issue I am getting at is that the Government wants the participants to drive that modernisation, rather than the Government's coming in with a heavy-handed administrative approach to try to prune awards and conditions. The Government does not wish to do that. That approach is totally counterproductive. Therefore, another model is needed to drive that modernisation, and the model proposed in this legislation is that, while the Government clearly prefers the collective approach, a very real element of the individual contract will provide a dynamic competition between the two. That will never be perfect - there will be problems with it - but the Government thinks it is a way of ensuring that the collective system moves forward, and is modified and adapted to ensure that it meets the needs both of employers and employees.

Mrs EDWARDES: We are moving towards the end of this part of the Bill. All that remains to consider is the regulation making power to ensure that the purposes of this part are able to be met, and proposed schedules 4 and 5. We touched upon schedules 4 and 5 earlier.

Mr Kobelke: Before proceeding to the proposed schedules, the House will need to vote, because the schedules are in a new clause. Is the member for Kingsley happy to move out of clause 4, which the House has been considering for the past 60 pages?

Mrs EDWARDES: I am happy to take a vote on division 11. If I may explore that a bit further, I do not propose to go through proposed schedules 4 and 5. Although they deal with the registration requirements for the EEA, the powers to obtain information and the regulation power, since there will be no opportunity to vote on the whole of part 2, the division I will call will actually be representative of the Opposition's view of the entire part; that is, it is unworkable, has a very costly bureaucratic process, and is not a very user-friendly instrument.

Mr Kobelke: Procedurally, the Opposition could pick a particular subdivision or clause to make that point or, alternatively, the Government has indicated that parts of clause 4 will have to be recommitted. The Opposition may prefer to vote at that point next week, when the House goes back to fix up a couple of minor things that have been left out, and a couple of things I indicated the Government would consider for amendments. Those amendments will be put for the whole of clause 4, as amended by the recommittal. At that stage, there will be a vote on the whole of clause 4.

Mrs EDWARDES: So the Opposition will also have that opportunity. I am happy to have division 11 put.

Division put and passed.

Clause put and passed.

Clause 5 put and a division taken with the following result -

Ayes (22)

Mr Bowler	Mr Kobelke	Mr Marlborough	Mr Templeman
Mr D'Orazio	Mr Kucera	Mrs Martin	Mr Watson
Dr Edwards	Mr Logan	Mr Murray	Mr Whitely
Ms Guise	Mr McGowan	Mr O'Gorman	Ms Quirk *(Teller)*
Mr Hill	Ms McHale	Mr Quigley	
Mr Hyde	Mr McRae	Ms Radisich	

Noes (17)

Mr Ainsworth	Mr Edwards	Mr Omodei	Dr Woollard
Mr Barnett	Mr Grylls	Mr Pendal	Mr Bradshaw *(Teller)*
Mr Birney	Ms Hodson-Thomas	Mr Barron-Sullivan	
Dr Constable	Mr Marshall	Mr Sweetman	
Mrs Edwardes	Mr Masters	Ms Sue Walker	

Pairs

Mr Andrews	Mr Johnson
Mr Ripper	Mr McNee
Mr Brown	Mr Board
Mrs Roberts	Mr House
Dr Gallop	Mr Waldron

Clause thus passed.

Clause 6 put and passed.

Clause 7: Section 29 amended -

Mrs EDWARDES: What is this amendment designed to do? Section 29 deals with industrial matters that may be referred to the commission and includes a party to the EEA. As I highlighted earlier, that dramatically widens the issues available to the parties under an EEA.

Mr KOBELKE: This is an enabling clause. The member said earlier that the commission will be able to deal with this new instrument. It does not mean it will; there must be other sections and means by which they are referenced. The EEA itself might provide the powers for that reference. This simply enables the commission to deal with them.

Mrs EDWARDES: It deals with the dispute resolution provisions. Proposed section 97WK(2) is the same.

Clause put and passed.

Clause 8: Section 49 amended -

Mrs EDWARDES: Section 49 deals with appeals. The problems raised earlier about there being no appeal of an arbitrator's determination are of major concern.

Mr KOBELKE: I have given an undertaking to look at this issue because it relates to there being no appeal of the arbitrator's determination. The member correctly pointed out that that could create some difficulties.

Clause put and passed.

Clause 9: Section 80E amended -

Mrs EDWARDES: Section 80E deals with the jurisdiction of an arbitrator. It ensures that the arbitrator has jurisdiction as the relevant industrial authority for all those dispute provisions.

Clause put and passed.

Clause 10: Section 80F amended -

Mrs EDWARDES: Section 80F deals with a government officer who is subject to an EEA. Which body resolves disputes for chief executive officers? I thought the Public Sector Management Act provided for dispute resolution. This clause will allow those few people subject to an EEA to go straight to the Industrial Relations Commission. What is the change to their current entitlement?

Mr KOBELKE: I am having difficulty getting advice because this area is not my responsibility.

Mrs Edwardes: This will change their entitlements.

Mr KOBELKE: This section could have an effect in that area. Its scope is broader than CEOs. Although it is not government policy to use EEAs extensively in the public sector, they will be used in some specialised areas; for example, for medical specialists in remote areas.

Mrs Edwardes: Where do they go now? They have contracts.

Mr KOBELKE: They are covered by the Workplace Agreements Act.

Mrs Edwardes: They may not be. If a dispute were to arise, what provision would apply?

Mr KOBELKE: The Public Sector Management Act governs those terms and conditions of employment for CEOs. It specifically precludes them from accessing the Industrial Relations Commission. Because that is specific, this provision will not be applicable to the CEOs while the Public Sector Management Act is in its present form.

Mrs EDWARDES: Are CEOs the only officers prohibited, or are other classes of people also prohibited?

Mr KOBELKE: I am not an expert on the Public Sector Management Act. I cannot give a comprehensive answer about an Act that is not within my area of responsibility. I am reluctant to provide an answer that I do not have the authority to provide.

Mrs Edwardes: I would like that information. Obviously their employment conditions will be affected. That information should be provided to the House and to those people.

Mr KOBELKE: The member has raised a valid point.

Clause put and passed.

Clause 11: Section 80R amended -

Mrs EDWARDES: Like clause 12, this clause deals with the Railways Classification Board. Are there any specific provisions within that board's jurisdiction that should be brought to the attention of the House, as opposed to the powers in sections 28, 29 and 33 of the Industrial Relations Act?

Mr KOBELKE: Clauses 11 and 12 clarify jurisdiction. Reference is made to jurisdictional matters.

Mrs EDWARDES: I understand that. Is there anything in the powers of the Railways Classification Board that is similar to or different from the powers in sections 28, 29 and 33 of the Industrial Relations Act that the minister could or should be bringing to the attention of the House?

Mr KOBELKE: Certainly not that I am aware of.

Clause put and passed.

Clauses 12 put and passed.

Clause 13: Section 81A amended -

Mrs EDWARDES: Clauses 13 and 14 deal with bringing the jurisdiction into an industrial magistrate's court and are pretty simple.

Clause put and passed.

Clause 14 put and passed.

Clause 15: Section 103 amended -

Mrs EDWARDES: Section 103 provides that applications may relate to more than one matter in certain circumstances. Obviously the amendment is again to bring in the jurisdictional clause of the EEA.

Clause put and passed.

Clauses 16 to 21 put and passed.

Clause 22: *Minimum Conditions of Employment Act 1993* amended -

Mrs EDWARDES: We have not yet dealt with the amendments to the Minimum Conditions of Employment Act. However, as I read this clause - I ask the minister to confirm or otherwise - all it is doing is providing that the Minimum Conditions of Employment Act will apply to EEAs. However, it is not merely the fact that the

minimum conditions of employment will apply to EEAs, because under the no-disadvantage test the award will apply in the first instance. Will the minister clarify what is being achieved here?

Mr KOBELKE: I am a little confused by the question. This clause means that the Minimum Conditions of Employment Act will apply to EEAs. The issue of the no-disadvantage test is obviously caught up in that, but that issue does not have any direct relationship to the amendment in clause 22. This merely provides for the recognition in the Minimum Conditions of Employment Act of EEAs.

Clause put and passed.

Clause 23: *Port Authorities Act 1999* amended -

Mr KOBELKE: I move -

Page 81, before line 17 - To insert the following -

(1) Section 16(4)(a)(iv) and (b) of the *Port Authorities Act 1999** are amended by inserting after "99" -

"(1) ".

This is just a drafting matter that needs to be tidied up.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 24 to 26 put and passed.

Clause 27: Inserting reference to "Part VID of the *Industrial Relations Act 1979*" in various Acts -

Mrs EDWARDES: This is a catch-all clause inserting reference to a number of other Acts that the Bill impacts upon.

In closing, I must say there are real objections to EEAs. The first is that an EEA cannot be offered when an industrial agreement is in place. The minister has indicated that he is happy to look at the provision of an appeal in respect of the wide definition of "arbitration". That would go some way to making this more popular. In terms of the process, there is layer upon layer. There is also the issue of how the interpretation of the no-disadvantage test will be met. While there may be some practical application and understanding of the provisions under an Australian workplace agreement, there is still concern about the lack of similarity that applies to the process here. Until we get guidelines as to how the no-disadvantage test will be defined there will continue to be uncertainty. Although the minister cannot direct the commission, we have made it clear that the sooner the guidelines are available to members of the public the better, as it will add to the certainty of what is provided. It could equally add to the uncertainty. It is important to get that out as quickly as possible.

Clause put and passed.

Clause 28 put and passed.

Debate adjourned, on motion by Mr Kobelke (Minister for Consumer and Employment Protection).

House adjourned at 11.38 pm
