## LABOUR RELATIONS REFORM BILL 2002

*Consideration in Detail*

Resumed from an earlier stage of the sitting.

Debate was adjourned after part 6 had been agreed to.

**Part 7: Amendments about unfair dismissal and employment issues -**

Mrs EDWARDES: This part will make a number of key amendments to unfair dismissal laws. I can understand the rationale for some but am having difficulty understanding the rationale for others. The amendments reflect a move away from ordering compensation in cases of unfair dismissal to ordering reinstatement. Essentially, three options will be available: reinstatement; re-employment; or, when it is an action that has been taken by a union pursuant to the compulsory conference procedures of section 44 of the Industrial Relations Act, interim reinstatement. It is envisaged by some that the move away from a system of compensation to one of reinstatement will deter a number of people from making claims on the basis that they are not serious about unfair dismissal and being reinstated to their positions but are more concerned about getting some money. Industrial Relations Commissioners have mentioned to me that some people see it as a money-making venture.

As the Government will require the Western Australian Industrial Relations Commission to deal with matters expeditiously, will there be a need for it to give reinstatement primacy over compensation? There is some concern about reinstatement being regarded as the primary remedy for unfair dismissal. It is obvious that in cases in which there has been a breakdown in the relationship between the employer and the employee, the employee will in most instances not want to return to the employer, and the employer will not want the employee back. An employee may be dismissed for a number of reasons. As we deal with some of the provisions in this part, I will point out some of the concerns. Assault or theft allegations or a number of other serious matters might lead to a so-called unfair dismissal. In those cases, it would be very hard to order reinstatement as the primary remedy because it would not work. If an unfair dismissal claim involves issues of theft and/or assault and criminal charges have been laid, when should the commission deal with the case? Those issues need to be resolved.

The minister is on the record as saying that these amendments will do away with claims involving a probationary period or employment of less than three months. That will not be the case. When we deal with that provision, I will show the House that it will be no different from what is happening in the Western Australian Industrial Relations Commission at the moment. This is unlike the federal laws, which state clearly that no claims relating to employment of less three months will be considered.

The extension of the 28-day time limit in which to make an application will cause major concerns and uncertainty for employers. An increase in uncertainty will result in an increase in costs. Later I will refer to a case in which a commissioner's discretion extended an unfair dismissal case to five years. That might be an exceptional case, and those who read the facts might regard it as exceptional; however, members should picture themselves in the shoes of an employer who must deal with an unfair dismissal case that is not resolved for five years after the event. That provision raises some major issues.

Third party interference is another issue. It is a most unusual provision, and the Opposition would like to explore parts of that. Dismissal laws play an important role as a safety net for employees; however, they must be fair for both employers and employees. As such, I do not believe that these amendments will ease the burden that those claims impose on employers.

Mr KOBELKE: I will attempt to respond to some of the range of points the member covered. That will give her an opportunity to continue her contribution and tell me which areas I did not cover. Unless I misheard, the member suggested that speeding up the unfair dismissal claims process through the Western Australian Industrial Relations Commission would be counter to the idea of giving primacy to reinstatement in cases of unfair dismissal. I think that requiring the commission to speed up determinations of unfair dismissal cases will be conducive to and fully supportive of a greater emphasis on reinstatement. If the commission took an unduly long time to make a decision, reinstatement would be impossible. The classic Parks decision was handed down six and a quarter years after the lodgment of the unfair dismissal claim. Commissioner Parks found that the person had been unfairly dismissed, but the extensive passage of time meant that no remedy was available. That case is in the absolute extreme. Nonetheless, if the commission took six months to determine a case, it would be difficult to order reinstatement because the employer would most likely have put someone else on and gotten on with his business during that time. Speeding up the working of the commission in this area and obtaining determinations much more quickly, by a range of means, is supportive of giving a greater emphasis on reinstatement.

The three-month probation provision will not stop someone within that probation period lodging a claim for unfair dismissal. However, I have stated very clearly in this debate that very few people who are in the first three months of a probationary period will have any luck in obtaining an unfair dismissal decision. This exception was put in to allow for professional and semi-professional people who are in a good job but who are offered a better job and relocate to another city or town, disrupting their families, only to find that they are dismissed within the first three months. The Government wants people to know at the time they take a jobs whether it has a three-month probationary period. If a worker is on a three-month probationary period, he does not have the basis for a successful unfair dismissal case. If a professional person is headhunted, he may say that he does not want a probationary period, and refuse to "jump ship" if a probationary period is provided for in a contract. That is a very important protection, but the clear intent is that anyone who is taken on as a new employee, and has a probationary period put into the contract, would not normally have a basis for unfair dismissal.

The extension of the time limit beyond 28 days was a recommendation of the Fielding report, in the time of the previous Government. It is also very close to the provision in the federal legislation. Again, the Government thinks that is a very workable proposal. It is available only on the basis that it would be unfair not to give that extension of time. The threshold of unfairness needs to be met to gain the extension.

Mrs EDWARDES: I draw the attention of the minister to clause 135, which amends section 23. Essentially, this provision, in conjunction with a later provision, allows for discrimination in that only union employees can ask for interim reinstatement. Though the Opposition has concerns about interim reinstatement, which I will deal with separately, the mere fact that discrimination exists between union and non-union employees in their access to a section 44 interim reinstatement order during an unfair dismissal application hearing is unacceptable. This is one of the provisions that offends the freedom of association provisions. The Opposition will oppose this clause. As we are voting on the Bill part by part, this opposition will not be shown through a division, but I make it very clear that the Opposition totally and absolutely opposes this clause. There should be no discrimination between union and non-union employees.

The Opposition is also of the view that interim reinstatement is unworkable in practice, and would prefer that adequate resources were provided to the commission to allow for claims to be considered with the expediency expected of it. If that were the case, as the minister was saying a moment ago, there would be no need for interim reinstatement. If an incentive were provided to settle claims quickly instead of focusing all the effort on interim reinstatement, the matter would be dealt with completely, rather than through a two-stage process. There is no reason for an interim reinstatement if the matter is dealt with in an efficient way. The Opposition totally opposes this clause, and I make this point since we will be unable to vote on this specific clause.

Does section 44 permit union members to avoid the 28-day limit by allowing the commission to issue interim reinstatement orders? A section 44 compulsory conference takes the claim out of the unfair dismissal process. Although this might give a bonus to union members, it is clear discrimination, and I suggest that it totally breaches the freedom of association provisions.

Mr KOBELKE: My understanding of the last point the member for Kingsley made is that section 44 is already available for unfair dismissal proceedings, even though it is not the front door that people should go through. The Government is not changing that.

Mrs Edwardes: You are, however, providing for a specific matter under this section to go through the section 44 procedures, and later on to have an interim order.

Mr KOBELKE: That is what the member was talking about on the first point, but the last point she made about section 44 is not being changed by this legislation.

Mrs Edwardes: No, but it does allow for union members to defeat the 28-day time limit for the lodgment of an unfair dismissal application, and get an order for interim reinstatement.

Mr KOBELKE: The point I am making is that that provision is already there. The Government is not changing that.

Section 44 interim orders are not made available or have not been used, but there is certainly an argument that they are available. The Government is making it explicit that interim orders can be made through this provision.

Mrs Edwardes: Is the minister saying that interim reinstatement can already be ordered through section 44?

Mr KOBELKE: That is a legal argument, but I am not sure whether it has been successfully upheld. The Government is making that legal argument clear by explicitly ensuring that it is available.

Mrs Edwardes: Why are you discriminating between union and non-union employees?

Mr KOBELKE: The fact that section 44 is to be made available through this section means that the full range of powers will be available to the commission, rather than only technical arguments about the limitation of the application to this area. The Government is saying that interim reinstatement orders are available. They can certainly help in areas in which unfair dismissal may be caught up with other matters before the commission. This would allow section 44 to be applied to the range of matters that may be brought before the commission, because there are connections between them.

Mrs Edwardes: Why have you specifically provided for interim reinstatement orders for union employees through section 44 when all other employees must go through the other process, under section 29?

Mr KOBELKE: In the event that there may be other matters, there will be no limit on the remedies available. An interim order may be available in another area related to the dispute, but not to the unfair dismissal. Rather than continue with the technical argument about whether interim reinstatement orders can be extended to the unfair dismissal claim, the Government is explicitly providing the commission with the full range of powers for cases in which a group of issues surrounds the same individual.

Mr BOARD: When does the minister expect an interim order to be given for a person to take up a position from which he had been dismissed? How would such a situation come about? Would the minister foresee that in the situation of a relatively small employer, in which case dismissal is an adversarial and obviously very emotive process? Exactly how does the minister see those orders taking place when an employee may be face to face with the public? I can understand that in a large organisation, the person may be able to be accommodated in some way, but in a small enterprise, particularly where the person is an integral part of the face-to-face business, how would it operate in practice?

Mr KOBELKE: My expectation is that an interim order would be used very rarely. It is part of a whole range of options available to the commission for obtaining a speedier resolution. There are not many examples, but a potential one would be when a mineworker lived in a closed town with his family and got dismissed, which meant that he and his family had to leave town. He could get to the commission quickly and say that on the face of it, the unfair dismissal did not seem to have too much substance to it, and that without reinstatement or some other order to enable him to support himself and his family, they would have three days to get out of town. He could then say that if he were reinstated in three months, his kids would have started at a new school in another town. If the commission judged it appropriate, it could make an interim order for reinstatement until the matter is heard.

Mr BOARD: The application that the minister has mentioned sounds appropriate. What guidelines would the commission operate under when considering unfair dismissal or an interim order?

Mr Kobelke: That is at the discretion of the commission. It would look at equity and good conscience. When trying to resolve the dispute, it must take account of the interests of both parties.

Mr BOARD: Would the goodwill of the business and the damage that an employee might make to the reputation of the business be taken into account?

Mr Kobelke: That is where we rely on the commission. The employee may have slugged his superior. If very clear evidence exists that he did, assault charges may be preferred and the commission might come down very heavily on the side of the employer and not give much credence to the claim of unfair dismissal. On the other hand, if the question of who pushed whom first is questionable and no-one got hurt, the commission might say that the question will take a while to sort out and clearly the employee cannot work with that supervisor but that the employer has other areas in the workplace to which the employee can move away from that supervisor. Because of all those matters, the commission might say that on an interim basis, the employee should be reinstated in a different position under a different supervisor while the commission sorts the matter out over the following few weeks.

Mr BOARD: I take it that the minister does not expect the power he is giving the commission to make interim orders to result in an increase in the number of applications for interim orders or people seeking to be reinstated as a result of unfair dismissal.

Mr Kobelke: There is a basis on which there can be an argument for an interim order, but such cases are extremely rare. I am not aware of one being issued in recent years. The provision makes it explicit that they can be issued, but I would not expect interim orders to be common. It would be in quite exceptional circumstances that an interim order would be given.

Mrs EDWARDES: Proposed section 23A in clause 136 refers to the powers of the commission to deal with claims of unfair dismissal when it determines that the dismissal of an employee is harsh, oppressive or unfair. Proposed subsection (2) states that the commission shall have regard to whether the employee at the time of the

dismissal was employed for a period of probation agreed between the employer and employee in writing or otherwise, and had been so employed for a period of less than three months. The minister when referring to this clause at various forums and in writing has basically said that the cases of probationary employees employed for three months or less will not be heard. When we were debating earlier the number of applications that would go to the commission, the minister indicated that he believed the number of unfair dismissal cases would be reduced by about 25 per cent. I dispute that. It will probably not be too different from what is occurring at the moment. The commission currently has regard for probationary employment. There are sufficient current state dismissal law precedents for probationary employees that show that the employer must demonstrate that an employee was subject to a probationary period and that any decision to terminate the employment under the probation was not harshly or oppressively exercised by the employer. Therefore, the proposal put forward offers very little or no change. We would obviously prefer that if the minister is planning to make any change in this area, he follow the federal law. I understand that a similar provision exists in Queensland and New South Wales.

A recent case brought to my attention involved a claim of unfair dismissal. The employee had signed a letter of employment, which included a three-month probationary period and a review of workplace performance at the end of that probationary period. Due to the employee's poor work attitude, the employment was ended at the conclusion of the probationary period. The employee nevertheless claimed to have been unfairly dismissed and claimed that there was no probationary period despite the letter of employment of the employer which the employee had signed at the commencement of the probationary period. Why do employers have to incur the costs of having to defend themselves against a claim which presumably the commission must have regard to when there is no result? Essentially, it still allows employees to file an unfair dismissal case, which can force the employer to settle the matter rather than incur the greater level of costs at a hearing. We have all heard of similar cases, whether they involved a probationary period or not.

Essentially, this proposed section will not change the status quo of probationary employment in Western Australia. Who receives the claim and who makes the decision to reject the claim on the basis of three months' probation? Must the claim still go to the commission? The commission has indicated that during the probationary period, the employer still must go through the three warnings process. That is already the precedent, and this clause will not change that. Legal advice will be that it will not make a change. The impact the minister is expecting of a reduction of a quarter of unfair dismissal cases will not occur. If the minister were really serious about it, he would have put in place similar provisions to those in the federal, Queensland and New South Wales legislation.

What about casual workers, particularly those who are employed for less than three months? Has the minister applied his mind to that question?

Mr KOBELKE: We are codifying the mediation process. That has implications for how it will run and the notice that people will take of it. The expectation is that in a small number of these cases in which people are on probation during the first three months of employment, as required under proposed subsection (2), they will simply be told that they do not have a case for unfair dismissal. The message will soon be conveyed through the early stage of that mediation process that employees do not have a claim that can succeed, which will prevent them making an application. They can, of course, make an application and pay the fee. An increase in the fee is also envisaged.

Mrs Edwardes: It will therefore still go to a hearing. What will happen after an application is made?

Mr KOBELKE: It will go to conciliation in the first instance and if it is clear that an employee is on probation and in the first three months of employment - there is a body of case law on that - the picture will be clear that there will be no chance of success.

Mrs Edwardes: On my reading of the case law in the commission, I do not think that is correct.

Mr KOBELKE: Proposed section 23A(2) does not exist under the current case law.

Mrs Edwardes: What if there were letters that indicated an employee was employed on probation for three months and at the end of that time there was a work performance review that indicated the employee was unsatisfactory, yet the commissioner said that the employer did not go through all the proper warning processes and the like and therefore the employee was unfairly dismissed?

Mr KOBELKE: That could happen under the current Act but that Act does not have proposed section 23A(2). I make it clear that we do not expect any case of harsh or unfair dismissal when a person is on probation in the first three months of employment.

Mrs Edwardes: You said that you were codifying the legislation.

Mr KOBELKE: No, that is with respect to the mediation procedure.

Mrs Edwardes: Yes, in respect of a claim of unfair dismissal when an employee is on probation for three months or less.

Mr KOBELKE: No, that applies in general to all cases. Employees who are on probation in their first three months of employment will have it made clear to them early on that if they persist with a claim, in light of the case law and the interpretation of proposed section 23A(2), they will have very little chance of success.

Mrs EDWARDES: I move -

> Page 148, line 28 to page 149, line 4 - To delete the lines and substitute the following -
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> > not consider an application from an employee who has been employed for a period of probation of less than 3 months or for such other period of probation agreed between the employer and employee in writing or otherwise.

Essentially, this amendment states that the application will not proceed. The employer therefore does not have to pay the costs of appearing at the commission and proving that the employee was on probation. It will not put the employer in a position where the employee could use proposed section 23A(2) in an endeavour to get what is referred to commonly as greenmail; in other words, an employer who is prepared to pay a couple of thousand dollars to an employee to settle a matter because the costs of appearing before the commission are much greater.

Employers think seriously about the principle. If they believe that the principle is wrong, they will fight it until they find out the time and costs involved in appearing before the commission just to defend that principle. Ultimately, many employers are too busy working and trying to pay wages at the end of a week to follow through on their commitment to that principle. What the minister said is not necessarily true. A number of applications will continue to be made. Whether they go through to conciliation and/or a final hearing will obviously depend on the speed of the process. The quicker the process, the quicker these matters will be got rid of and the cheaper it will be for all concerned. However, I do not believe it will achieve a 25 per cent reduction in unfair dismissal cases. How many cases of three months and less are currently before the commission?

Mr Kobelke: I have only historical figures, I do not have the current figures. The 25 per cent referred to the last financial year. It was in the financial report.

Mrs EDWARDES: Is the minister referring to a reduction of 25 per cent?

Mr Kobelke: The figures - which I understand but cannot confirm are likely to be from the last annual report - suggest that 25 per cent of all claims were lodged by people who had not been with their employer for more than three months.

Mr GRYLLS: The National Party supports the amendment. Unfair dismissal is a huge issue in rural employment. We do not want to place more impediments in the way of employment. I look forward to further clarification from the minister.

Mr KOBELKE: Unfair dismissal is always a difficult issue. We must achieve a balance. If we do not allow redress for an employee who is clearly unfairly dismissed, that will have repercussions for all employment. On the other hand, we have all heard stories about employers who have been taken advantage of in unfair dismissal cases. If we do not provide protection for employers, we will create a disincentive to take on new employees. It is a matter of finding a balance between the two sides, and this Government is seeking to achieve that balance. We should never swing from one extreme to the other; we should find the middle ground. This process must be monitored and assessed. It might not work exactly as it is expected to work, and some people might find loopholes. That always happens with laws that involve a degree of disputation and when people seek to gain advantage by pushing the limits. This legislation tries to achieve fairness between the interests of the employers and employees.

A small number of employees initiate vexatious claims or try to set up the employer, believing that he will give in even though there is no justifiable claim because the cost of mounting the defence is such that it will not be worth pursuing. Two points will allay any fears about that. First, the cost of the application will be increased from $5 to $50. When this legislation is enacted, it will cost a substantial amount for a person on a low salary to initiate a vexatious claim to get money unfairly from an employer.

Second, the employer can now show that the claim is vexatious and costs can be awarded or penalties imposed. That provision is difficult to use and is used very rarely. This legislation provides for the probationary period to be considered and for mediation. That process would strengthen the employer's hand if he asked for a claim to be deemed vexatious. The claimant may have been through the mediation process and been told that the claim had very little chance of success. Of itself, that would not mean that the claim was necessarily vexatious. However, the defendant's claim for costs would be strengthened if it were pointed out that he had incurred

enormous costs and that the determination clearly stated that the claimant did not have a claim that was likely to succeed. The claim for costs would be strong if it were found that the case had no foundation and could be viewed as vexatious.

Amendment put and a division taken with the following result -

Ayes (21)

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| Mr Ainsworth | Mr Grylls | Mr Masters | Mr Waldron |
| Mr Barnett | Ms Hodson-Thomas | Mr Omodei | Ms Sue Walker |
| Mr Board | Mr House | Mr Pendal | Mr Bradshaw *(Teller)* |
| Dr Constable | Mr Johnson | Mr Barron-Sullivan | |
| Mrs Edwardes | Mr McNee | Mr Sweetman | |
| Mr Edwards | Mr Marshall | Mr Trenorden | |

Noes (27)

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

**Amendment thus negatived.**

Mrs EDWARDES: Proposed section 23A(3) deals with an order to reinstate. As I said earlier, there are mixed views on how this provision will operate. I will put to the minister a number of issues. One is that the employee is to be reinstated on conditions at least as favourable as the ones he was on immediately preceding his dismissal. A number of issues apply to that. How much time is likely to be spent considering alternative positions if the original position is no longer available? Of course, if the commission takes over the issue of considering alternative positions on conditions that are at least as favourable, it would be far better to have the case presented and finally dealt with. Some people say that if reinstatement has primacy, a number of applications will not be received because a lot of employees - I should not say "a lot" because that is generalising more than I know to be the case - prefer compensation rather than reinstatement.

Another issue relates to cases involving assault or theft. They are serious issues. Of course, there will be criminal proceedings. At what time should someone be reinstated? Criminal proceedings sometimes take a couple of years to be heard. Even if it were the case, as the minister said, that the supervisor got bopped and was therefore put in another position, it would appear to be an unsatisfactory solution for everybody all round. It appears that the interests of justice would be better served if the commission were provided with adequate resources to deal with all claims expeditiously. Therefore, if there were any change in circumstances, it would be dealt with fairly quickly after the dismissal, at the time of the hearing of the matter. Therefore, it appears that reinstatement will not always be a practical solution.

When reinstatement is impracticable, the next proposed subsection deals with what the commission can do. In that instance, the commission can order the employer to re-employ the employee. Therefore, if the employee had been working on the fifth floor, he could be re-employed on the third floor; if he had been working at Midland, he could be re-employed at Cannington. That is not necessarily a practicable solution either. Also, what evidence does the commission need to determine that it knows the business of the company? How will it determine that the employer has a position available, that it is suitable for the employee, and that reinstatement in another position will be readily available and suitable?

The concern is that more time will be spent on reinstatement and re-employment than on the business of determining the case. We must remember that the case is an unfair dismissal case; that is, whether the person's dismissal was harsh, oppressive or unfair. I contend that all these other considerations will take away from the debate. The commission will focus on whether reinstatement and/or re-employment will be the best form of order as against whether the person was unfairly dismissed in the terms that proposed section 23A outlines.

There are serious concerns about the feasibility of this provision. It is believed that the interests of justice would be far better served by getting on and determining the case, rather than focusing on some of these other issues.

Some cases about which I have heard but which I have not been able to put my finger on give examples of the stupidity of re-employment. When I locate them, I will make sure that I bring them to the attention of the House.

Mr KOBELKE: The provisions in the Bill for reinstatement are already in the federal legislation. The federal commission has been applying that sort of approach for some time. Therefore, it is known that it can and does work. Proposed section 23A(3) makes it clear that the commission may order the employer to reinstate the employee. Obviously, the commission will look to all the circumstances of the case, and it may order reinstatement.

The argument that the member for Kingsley seemed to be running was that a person could not be reinstated, so he should be paid a lot of money. It is much better for all concerned if the commissioner acts as an independent umpire and actually gets the person back into a job. That is not possible in some cases. All this is predicated on the point that the cases involve an aspect of unfair dismissal. Where an employer had an appropriate basis upon which to dismiss the person, none of this applies. Having determined that there is a basis for unfair dismissal, and a remedy is sought, there is general agreement. It was certainly put by the previous Government in its rhetoric, if not in its legislation, that in cases of unfair dismissal one should first seek to have the employee reinstated. That is clearly what this clause is trying to do. It would give the commissioner the flexibility and the power to make that decision. As I indicated, it currently works in the federal legislation. The Government thinks it will work in this legislation.

Mr BOARD: The answers the minister gave did not quite match the issues the member for Kingsley raised. The member for Kingsley tried to indicate that the employee could be in a favoured position in his employment. It could perhaps be a position of trust or one that provides access to information, or it could be a question of overtime for a person who has been acting in a higher position. Employees can find themselves in a range of scenarios as a result of direct relationships in the workplace with their employers, many of which go beyond the original work contract. As a result of those conditions, they may find themselves in favourable positions. Proposed section 23A(3) states -

> The Commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable -

Who will determine what those favourable conditions were? The member for Kingsley asked what was the basis upon or information from which the commission could make that decision. How is the commissioner empowered to make an informed decision? A commissioner might be able to make a just decision, but where does the information come from for him to base a decision on favourable conditions of employment? When does that apply? Those issues were raised by the member for Kingsley and have not been answered by the minister.

Mr KOBELKE: I answered the issues raised by the member for Kingsley by indicating that it is covered in the federal legislation. It has been working and functioning reasonably well. Section 170CH(3) of the Workplace Relations Act states -

> . . . the Commission may make an order . . . appointing the employee to another position on terms and conditions no less favourable than those on which the employee was employed immediately before the termination.

It is in the federal legislation. While it does not mean that every case will have an outcome that parties to it think is fair and reasonable, it is workable.

Mr Board: What does "favourable" mean? Is it in the context of remuneration, conditions, trust or access?

Mr KOBELKE: The commission decides. The point is that a person who was the manager of a section could not be put back in another section and be made to clean and sweep the floor and be paid on a much lower level. That would not be practical. Perhaps a person who was a manager in one section could be transferred to a smaller section where the duties and pay were less. If that is the best the employer could do, even though the employee was disadvantaged to some extent, the commission might consider it.

However, the commission must try to ensure some equity between the position the employee was in and the new position he will be put in. Therefore, "at least as favourable" means that, on balance, it should be on par with what the employee was doing. We could not expect the person to be given a promotion upon reinstatement.

Mr Board: No. However, access to information sensitive to a business, such as intellectual property, is important for the maintenance of the propriety of the business. The access to that in terms of favourable conditions may put that business in a vulnerable state.

Mr KOBELKE: I think the member is confusing two different issues. Important confidential information has commercial advantage. That is a key issue. The fact we are dealing with at the moment is simply finding for the person another position that is of a comparable nature. Again, I remind the member that this is only after the person has been found to have been unfairly dismissed.

Mr Board: It does not say "at least comparable"; it says "at least as favourable". The term "favourable" may mean in terms of the overall conditions under which that person was employed, such as access and equity.

Mr KOBELKE: The member is asking me to give an explanation and that is why I used different words. When we do that, obviously we move away from the strict interpretation. I told the member that it is already in the federal Act. There are case law examples of what has happened. I cannot give the member in just a few words the whole body of the judgment and the wisdom that is distilled in case law. It is there, and it will be applied in the decision that is made to use that provision under the state legislation.

Mrs EDWARDES: Proposed section 23A(3) deals with reinstatement. We have mentioned cases involving assault and the minister mentioned the mining town situation. The commission often says, "Give the bloke another chance" and uses the reinstatement provision. The position may well be that it is not practicable. Often the commission's decisions are not agreed with, particularly when it is dealing with mining companies. I move -

Page 149, lines 10 to 15 - To delete the lines.

This will delete the proposed subsection that deals with re-employment. If reinstatement is clearly impracticable, re-employment is absolutely impracticable.

**Amendment put and negatived.**

Mrs EDWARDES: Can the minister outline what proposed section 23A(5) means? When, as part of the process, is it considered appropriate to make an order to maintain the continuity of the employee's employment or an order to the employer to pay to the employee the remuneration lost or likely to have been lost because of the dismissal? We already have the compensation provision in proposed subsection (6).

Mr KOBELKE: In the recent decision in the Cooling case, the person was reinstated because he was found to have been unfairly dismissed. However, the commission said that it did not have the ability to make an order for lost wages between dismissal and reinstatement. We are saying that if the person is found to have been unfairly dismissed and the remedy is reinstatement, it will be open to the commission to order also that the person be paid the money that he would have been paid if he had been employed in that period. It also may go to issues such as that period counting towards annual leave and long service leave. Those types of issues can be picked up only on the basis that the person was found to have been unfairly dismissed and reinstatement has been ordered.

Mrs EDWARDES: It still does not make sense. Why has proposed subsection (5) been included when proposed subsections (6) and (7) deal, in an orderly fashion, with the issue of compensation?

Mr Kobelke: Proposed subsection (6) relates to a situation in which it is impracticable to reinstate someone. Proposed subsection (5) applies to proposed subsections (3) and (4), which refer to reinstatement.

Mrs EDWARDES: When will it be necessary to order the employer to maintain continuity of the employee's employment?

Mr Kobelke: When there is reinstatement.

Mrs EDWARDES: Why would the commission make an order when reinstating somebody that the employer must retain continuity of the employee's employment?

Mr Kobelke: I explained that. In the Cooling decision, the commission found that the Act did not give it the power, when ordering that an employee be reinstated - which might not be a contested issue because the employer may agree with it - to also order that the employer should pay the employee what he had lost during the period in which he was away from the job because of the dismissal.

Mrs EDWARDES: What about "maintain the continuity"?

Mr Kobelke: That is for the purpose of accruing long service leave and annual leave.

Mrs EDWARDES: Is the minister sure that this proposed subsection will do that?

Mr Kobelke: That is the clear intent, and that is my advice.

Mrs EDWARDES: We will see what happens when it gets to the commission.

Proposed subsection (6) states -

> If . . . the Commission considers reinstatement or re-employment would be impracticable, the Commission may, subject to subsections (7) and (8), order the employer to pay to the employee an amount of compensation for loss or injury caused by the dismissal.

Proposed subsection (7) outlines the factors for which the commission must have regard when deciding the amount of compensation. The first is the mitigation of the loss suffered by the employee as a result of the dismissal. I find the issue of mitigation interesting in the light of the fact that an order to reinstate and/or re-employ is on the books. What is the issue relating to mitigation? In other areas, the full court of the commission has said that even when misconduct is the cause of the dismissal, that cannot be taken into account when determining compensation. Could the minister outline what "to mitigate" means?

Mr KOBELKE: The contributions of members opposite have the tone that somehow these people do not deserve compensation because they were in the wrong in the first place. These provisions will apply only if the person has been able to substantiate that he was unfairly dismissed. That must be dealt with first. I am not talking about a situation in which the employer gives in because he does not think the fight is worth it. These provisions will apply only in situations in which both parties make their case to the commission. The commission will then consider the points of view of both parties. If it determines that the employee was unfairly dismissed, it must look for a remedy that is workable given the constraints on the employer and what is feasible for the employee. Proposed subsection (6) relates to a situation in which reinstatement is impracticable. The commission may decide that reinstatement is not possible, and order the employer to pay the employee an amount of compensation for the loss or injury caused by the dismissal. The terms of that compensation must be subject to proposed subsections (7) and (8). The commission would be required to consider things that would mitigate the loss suffered by the employee. An employee may realise that there has been a total breakdown in the relationship and still seek unfair dismissal. It would be clear to the commission that reinstatement was not an option. Only if that were the case would the commission be required to consider this proposed subsection. The employee may have found alternative employment in the interim. It would not be fair if he were able to double-dip and be compensated for the period he was away from his previous employment as well as be paid for the new job he has taken on. That circumstance would mitigate the award against the employer who unfairly dismissed the person. The commission would deduct some or all of the earnings the employee had received from the new employer from what must be paid by the previous employer. We are talking about someone who has been found to have been unfairly dismissed. A situation in which someone went without work for two months would be very different from one in which someone went without work for five months.

Therefore, what the former employer had to pay would possibly require a different amount of money. Factors such as that would mitigate the determination by the commission on what should be paid.

Mrs EDWARDES: I refer the minister to the codification of the mediation process. We talked about proposed section 23A and the small number of cases with which that would deal. We talked also about the three-month probation period. At that time, the minister referred to the mediation process. Where does unfair dismissal fit into that? The minister keeps referring to the fact that these provisions will come into effect only after someone has been found to be unfairly dismissed by the time they get to the other orders. Will the minister outline the process that is involved? I would have thought that in the process of mediation, a person has not necessarily been unfairly dismissed.

Mr KOBELKE: When a claim is lodged, it is referred to the registrar for mediation. If it is settled at mediation, a determination is made. If it is not settled at mediation, it is referred to the commission for conciliation. It may be settled at conciliation, in which case, that would be the end of it. If it has not been settled as conciliation, it would go to arbitration. If the arbitration makes a finding of unfair dismissal, that is the end of the matter and a determination would be made. If there is no finding of unfair dismissal, that is the end of it. If there is a finding of unfair dismissal, it is a matter of whether reinstatement is practical. If that were the case, an order for reinstatement would be made. If not, we would consider whether the person could be re-employed in some other position. If that were not possible, an order would be made for compensation.

Mrs EDWARDES: Are all of those options available as a result of mediation and conciliation without a finding of unfair dismissal?

Mr KOBELKE: At mediation and conciliation, the parties might come to agreement before going to some form of arbitration. That also conditions the parties to understand what happens further down the track if they continue with the process. They get feedback; it is an educative role so that parties hopefully will be more practical about the likely outcomes. That will also help to ensure that we do not have highly unrealistic expectations that lead people to push things well beyond the basis of their case.

Mrs EDWARDES: We did not get to the issue because the minister, when dealing with all these questions, has said what happens only after a finding has been made, which is not always the case, and mediation and conciliation are reached by agreement. However, the reality is that mediation and conciliation cost money and time. I am sure the minister has heard about the frustration from small businesses in particular that do not have the same level of resources as some of the larger organisations.

I move -

Page 150, after line 6 - To insert the following -

(b) any amount paid to the employee by, or for, the employer on the dismissal;

This amendment takes into account any money already paid. I know that is the intention of the minister, but this amendment will put it beyond doubt. As the minister indicated, many of the amendments in this legislation are intended to put issues beyond doubt, and this amendment will achieve exactly the same effect.

Mr KOBELKE: I am not clear about what the member is trying to achieve by this amendment. I will give her another opportunity to explain it.

Mrs Edwardes: It takes into account any compensation that has been paid by the employer on the dismissal of the employee. Any money that has been received by the employee is to be taken into account in deciding an amount of compensation. Previously, the minister was talking about double dipping with another employer. This removes a potential for double dipping from the same employer.

Mr KOBELKE: Clause 136(7)(a) already covers that, in taking account of what is mitigation of the loss suffered by the employee as the result of the dismissal.

Mrs Edwardes: That is not the case at all.

Mr KOBELKE: If the Government took up the member for Kingsley's amendment, it would require the commission to consider legitimate statutory employment entitlements upon termination, such as long service leave, termination pay, pay in lieu of notice, redundancy pay and so on. I do not think that is really a workable proposal, and that is why I asked for clarification.

Mrs Edwardes: The question, as I understand it, that has been put to the minister by employer organisations is what is in the legislation to require the commission to take into account money that has already been paid to the employee. I understood that the minister certainly does not support double dipping in this instance.

Mr KOBELKE: Already, under clause 136(7)(a), the commission is required to take account of things which mitigate against the loss suffered by the employee. Under clause 136(7)(c), any other matter the commissioner considers relevant can be brought in. If, in terms of equity and fair treatment, the commission believes that other matters need to be taken into account, it has the power to do so.

Mrs Edwardes: Will the minister please clarify again, for the purposes of *Hansard* and future readings by commissioners and others, that he believe that those two paragraphs would ensure that money paid to employees by the employer would be taken into account?

Mr KOBELKE: The matter is clearly one in which the commission has discretion. I have already put on the record, and I will repeat it, that, under paragraph (a), the commission would take account of factors mitigating the loss suffered by the employee. If particular payments have been made, or if the employee has gained other employment in the interim, it is not expected that there would be an extra penalty on the employer if the employee had made good some of the lost wages as a result of picking up another job.

Mr BOARD: I will not hold up the minister, but I would like some clarification, particularly on clause 136(7)(c) - "any other matters the commission considers relevant".

Mr KOBELKE: It will ensure that the commission can deal with a wide range of matters and have the power to take into account things that the parties have omitted to include in the agreement. For instance, during the process the employer and employee did not come to an agreement through mediation or conciliation, but when they get to this stage they are happy to accept such and such. If there has been a breakdown in the negotiations and they do not trust each other, they might want the commission to determine the matter. It is a bit like the Family Law Court. Sometimes it is better to settle matters outside the court, but at other times the parties may come to an agreement but still want the determination of the court to give finality of settlement. In this case, the parties may not be able to come to agreement by conciliation or mediation and there has to be an arbitration, but there has been a willingness to compromise before the commission and they come to a deal. In that way the employee does not pick up some extra payment that, perhaps, he was arguing for and the employer gets something else. The commission might consider those matters relevant and would put them into the determination.

Mr Board: I am talking about issues that would normally be outside the work contract between the employer and the employee, such as third party issues, consideration of what the wage may have been used for, or compensation claims for loss as a result of unfair dismissal. In other words, an employee might have lost his car, which was under a hire purchase agreement, been faced with eviction in a rental situation, or defaulted on a contract with Foxtel - the list goes on. I am asking the minister what issues will be considered relevant to the commission for compensation?

Mr KOBELKE: My advice is that proposed section 23A(7)(c) is predominantly employer initiated. If the employer wants to put something else on the table for determination, the commission could consider it relevant. I will not put the emphasis on "relevant" in terms of initiating the action; it is some other matter that the employer wishes to bring to the final determination. The fact is that the commission may endorse that and incorporate it in the determination on the basis that it is relevant and helps put together the total package they sign off on. The relevance is to the total package, which is based on fairness to the parties involved. If proposed paragraphs (a) and (b) were the only considerations, there would be no flexibility if there were a further offer from one of the parties that the other party wished to incorporate.

Mr BOARD: Proposed section 23A(7) reads -

> In deciding an amount of compensation for the purposes of making an order under subsection (6), the Commission is to have regard to -

I will not read out paragraphs (a) and (b), but (c) reads -

> any other matter that the Commission considers relevant.

That gives the commission incredible power to impose upon an employer an order for compensation that may not normally be within the realms of the employment contract. The minister has given a loose interpretation.

Mr Kobelke: Proposed subsection (8) imposes a cap.

Mr BOARD: We have not dealt with proposed subsection (8).

The ACTING SPEAKER (Mr McRae): I remind the member for Murdoch that the question before the Chair is a motion moved by the member for Kingsley to insert a new subsection (6).

Mr BOARD: I appreciate your ruling, Mr Acting Speaker, but in referring to proposed subsection (7)(c), I am exploring the amendment moved by the member for Kingsley. I am seeking clarification on issues that come under the same umbrella. The minister has said that proposed subsection (8) will put a cap on proposed subsection (7)(c).

Regardless of what the commission considered relevant, the total package would be no greater than the equivalent of six months remuneration, whether it be through another mechanism or wage remuneration.

Mr Kobelke: We are dealing with proposed subsection (6), which states that the commission may, subject to proposed subsections (7) and (8). The amendment is to proposed subsection (7). Proposed subsection (8) states that any order to be paid under proposed subsection (6) is not to exceed six months remuneration of the employee. That is the total cap. Regardless of whatever component goes into the package according to proposed paragraphs (a), (b) and (c) or, if approved, according to the amendment moved by the member for Kingsley, the total remuneration cannot exceed that cap.

Mr BOARD: If the relevant period for dismissal were two months, is the minister saying that the employee could have six months remuneration even though the remuneration lost might be a far lesser amount?

Mr Kobelke: In order to keep costs down there must be a cap. Whatever model is used, there always seems to be some unfairness. Many people argue that six months is not enough. We have stuck to that amount because it is used in various jurisdictions across Australia. The current loss and prospective loss are taken into account. An employee might argue that his chance of getting a job after dismissal is very low; in fact, he might be unemployed for nine or 12 months, in which case remuneration for six months would not compensate him. On the other hand, somebody who had lost two months remuneration and received the equivalent of five months remuneration and was back in a job in a month would obviously score a bit of a win. There are winners and losers.

**Amendment put and negatived.**

Mrs EDWARDES: Proposed subsection (8) deals with the amount to which the member for Murdoch and the minister have been referring; that is, the six months remuneration of the employee. Proposed subsection (6) deals with the fact that if the commission considers reinstatement or re-employment will be impracticable, the

commission may order the employer to pay to the employee an amount of compensation that is not to be more than six months remuneration. The minister said that the person may not find a job for a period of time. Why can proposed subsection (8) not be linked to proposed subsection (5)? Why is it restricted to proposed subsection (6)?

Mr KOBELKE: Proposed subsection (5) covers reinstatement.

Mrs Edwardes: Proposed subsection (5)(b) refers to an order to the employer to pay to the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal. Is the timing of that likely to be less or more than six months?

Mr KOBELKE: I expect that in the vast majority of cases it will be less than six months, because we want to speed up the whole process. There may be the odd case in which things get dragged out. Perhaps the person is off for seven months and is reinstated. In all probability he will get seven months payment of wages.

Mrs Edwardes: Proposed subsection (8) provides a limit of six months remuneration for the employee. If reinstatement and re-employment are not a possibility, under proposed subsection (6) the compensation will not exceed six months remuneration.

Mr KOBELKE: That is correct.

Mrs Edwardes: There is a clear difference in the amount of remuneration received by an employee who is reinstated and/or re-employed up to the date of reinstatement and/or re-employment and an employee to which that remuneration is impracticable. An employee under proposed subsections (6) and (8) would get a maximum of six months remuneration whereas an employee who is reinstated and/or re-employed, and therefore has a job and getting paid, has no limit to his remuneration; it could be for eight, nine or 12 months.

Mr KOBELKE: Yes, but extreme cases did not form the basis on which we formulated the provisions in the Bill. People may be reinstated and when the process is working efficiently and quickly, the average payment may be considerably less because they will be back on the job well within six months and will therefore be covered for only that period of time; whereas there may be a preponderance of cases that go for the full six months because a determination cannot be made about how long people will take to return to work, depending on the weight placed on their claims of inability to gain employment. Those people may have been unemployed or dismissed three months earlier and a claim whether that person can get a job at a commensurate salary would be hard to judge. People may be pushed to six months, although in a small number of cases reinstatement compensation may be extended beyond six months. However, reinstatement will be quantified by the period that a person has been out of work; whereas the six months will be more open-ended when there has been no reinstatement and compensation has been paid to a person who could not be reinstated. Six months may often be judged to be very much the lower limit simply because a person is left to his or her own devices to try to find employment.

Mrs EDWARDES: It may be that a case took longer than six months, which was not the fault of the employee, and that employee would therefore be at a clear disadvantage compared with people who were reinstated or re-employed. The minister referred to a case going past the date of compensation, whereas I am talking about a time prior to that before an order is made. What is the longest time taken for an unfair dismissal case to be determined by the commission?

Mr Kobelke: The member might recall the Parks case some years ago that took six and a quarter years.

Mrs EDWARDES: That was an aberration.

Mr Kobelke: Unfortunately, Commissioner Parks had some cases that took two to three years.

Mrs EDWARDES: Putting him aside, I am talking about the current commission.

Mr Kobelke: I do not have any hard figures on that but I expect the average period is three months or less.

Mrs EDWARDES: Will the minister provide those figures by the time we get to the third reading of the Bill? I believe there is a discrimination in favour of those who not only get reinstatement and/or re-employment but also in the amount of money they are likely to receive compared with those who are unfairly dismissed whose compensation is capped at six months. I am not grizzling about the cap and where the cap falls; however, there is a clear potential for discrimination in that in those instances the case may take more than six months. I will not move the amendments on the Notice Paper in my name in respect of that, other than to put the point of view that there is a clear discrimination.

Mr BOARD: A number of these clauses deal with the commission's ability to make orders against employers when it is deemed that a dismissal has been unfair. No reference is made to the employers' right to representation. Some of these provisions are new and increase support for employees who are deemed to be unfairly dismissed. Will employers who believe that the commission's rulings are wrong have any right to request that those rulings be re-examined on appeal?

Mrs EDWARDES: Proposed section 23B was not presented for consultation with stakeholders. What is this proposed section designed to achieve? What is an order issued to a third party to refrain from preventing, hindering or interfering with, or doing anything that would have the effect of preventing, hindering or interfering and so on?

Mr KOBELKE: This provision was designed to ensure that employees still have the rights of employees despite some attempt to place them as a third party using employment through another agent. Companies have put in place complex arrangements whereby people are explicitly working for them but are employed by another company. The primary controller of the site - the employer at that level - might decide that he does not want a particular employee, but that employee was engaged by another company. At present, that employee has no remedy if he is unfairly dismissed because the entity dismissing is not judged to be the employer. People should not be able to use that sort of device to avoid a claim for unfair dismissal. Clearly that person was employed for the benefit of the major employer, was working in the operation of that employer but an employment company was the vehicle for the employment. More cases of that kind have been cropping up. It is an artificial device.

This provision will not affect bona fide subcontractors, such as those in the residential building industry. It does not seek to interfere with that arrangement in any way. This method of using another company to employ people might be applied to a company such as Patrick, although I am not sure. Patrick is an example in which there was a contrivance as to who was the employer. Employees were still working on the same site and the controlling company was the same but another company was used as an intermediary for the purpose of removing the rights of the employees. There are a few cases in which the employment of people through another legal entity does not remove the fact that they are employees of the primary company. In cases such as that, they should have the right to bring a case for unfair dismissal.

Mrs EDWARDES: If the minister is talking about Chinese Walls that supposedly separate companies that are an employer from others, this clause will go far beyond employers that are separated by so-called Chinese Walls. What about the situation of a labour hire company? Labour hire companies are a growth industry. Such a company may contract with a mining company. The mining company may have a safety policy and a clear policy on alcohol and drugs. An employee of the labour hire company, when going onto a site, will have to sign a contract agreeing to all the safety provisions. If the employee breaches the safety provisions, the mining company will want him removed from the site. The mining company will tell the labour hire company that the employee is not wanted on the site. The mining company has the right to decide who can go onto the site. This clause will unfairly affect this type of situation. It will interfere with the operations of two companies in dealing with a very serious matter.

Mr TRENORDEN: The minister has not explained the position very well. I would like the minister to explain again how someone can have his employment terminated by someone who is not the person's employer. I do not understand the process. Even if there is a Chinese Wall between companies, how can employment be terminated by someone who is not the employer?

Mr KOBELKE: It is not common, but it does happen. It can involve a sham arrangement between companies.

Mr Trenorden: Would there not be other mechanisms? In respect of unfair dismissal, surely it is not legal for someone who is not the employer to terminate employment?

Mr KOBELKE: That is what we are trying to cover through this provision. We do not believe it should be.

Mr Trenorden: Why is such an elaborate clause needed? Why is it not unfair dismissal if someone who was not my employer terminated my employment ?

Mr KOBELKE: It is not common, but examples come up in which an employer decides that he does not want to give any certainty to his employees. The employer sets up another company that employs the employees. For example, company A employs people in a certain establishment. I am not talking about labour hire firms. Company A sets up company B. Company B hires employees that work exclusively for company A. As a method of dismissing people, company A sends a note to company B stating that employee Bill Jones is no longer acceptable to the company. If there is a basis for doing that, such as non-performance of work, the employee can be dismissed and there is no basis for unfair dismissal. If the company decides that the employee is to no longer come on to company property and no reasons are given, as things stand the person cannot lodge a claim for unfair dismissal because he is not employed by company A; he is employed by company B. It is a

pretty remote situation. However, a couple of cases have come up and been brought to our attention. That is why we thought we should cover that situation.

Mr Trenorden: You haven't convinced me, minister.

Mr KOBELKE: It is pretty rare, but I am aware that it has happened. Therefore, people should not be able to use that device simply to remove any responsibility for unfair dismissal.

Mr Trenorden: But a person should not be able to be terminated by someone who is not his employer.

Mr KOBELKE: Exactly. That is why this provision is in the legislation. The point is that the person for whom the employee is working is the one who says he does not want the employee any more. However, the nominal employer under the company structure is someone else. Therefore, these people do not have the basis for an unfair dismissal claim without a provision such as proposed section 23B.

Mr Trenorden: I just hope that there are no unintentional consequences as a result of this.

Mr KOBELKE: I hope so, too. It is not intended that there should be.

Mrs EDWARDES: There is clearly an unintentional consequence or, I suggest, an absolute direct consequence; that is, for the labour hire companies, which the minister did not address. Labour hire is a growing industry on the eastern seaboard and in Western Australia. Labour hire companies employ people and contract them to various sites. In those instances, this proposed section will have an impact. For example, when an employee of a labour hire company breaches the safety policy on a mine site - it could be the alcohol and drug policy or one of the other safety policies - the mining company will be prevented from saying that that employee of the labour hire company is no longer wanted on its premises. That mining company has a right to say that. It is the occupier of the property and has a duty of care to its employees who are currently on the site. A labour hire company provides contractors to the mining company. This clause will deliberately, I suggest, impact on that mining company.

Mr KOBELKE: I do not think the member for Kingsley's example is practical and realistic. If the behaviour of the employee is unacceptable because of non-performance of duties or contravening the drug policy etc, there is a basis for unfair dismissal, and that will go through the normal process about which we have been talking. However, that is not the issue. The issue is that when a person is dismissed without any reasons, or in circumstances in which it is clearly seen to be unfair, that person should have the right to make a claim.

Mrs Edwardes: Yes, but is the third party in my example the mining company?

Mr KOBELKE: I will take the mining company example. One situation that would fit the bill is that a number of mining companies may have contracted out quite a large, specific part of their operation, and a contract mining company may carry out that operation. A person may be employed by, say, Elton as a mining contractor. His job may be to work at a certain mine, and he may have a specific contract of employment. If the mine owner said that Joe Bloggs was no longer acceptable on its site, and did not want to give any reasons, under the current situation, if the person were dismissed, he would not necessarily be able to bring an unfair dismissal case because -

Mrs Edwardes: He is still employed by Elton.

Mr KOBELKE: Yes, but if Elton had only the one contract and had nowhere else to send the person, there would be a real difficulty as to who is the employer.

Mrs Edwardes: There is a real difficulty with your interfering with people's operations, quite frankly. You are getting out of the employer-employee relationship.

Mr KOBELKE: Not when that person is specifically working in that enterprise. I am not talking about casual, short-term employment but a clear contract of employment to work at a site for an operation. We are finding that because of the complexity of company arrangements, the employees do not have a basis upon which to make a claim.

Mrs Edwardes: That is not what you said in the beginning. You said that you were talking about sham exercises. That is not a sham exercise.

Mr KOBELKE: There are many examples. There are sham ones. There may also be ones in which that actually happens; for example, an existing company that contracts another company to do its work. The other issue we were talking about in terms of the labour hire companies -

Mrs Edwardes: It will affect everybody in subcontracting.

Mr KOBELKE: No, it does not.

Mrs Edwardes: Yes, it will. You just gave a clear example of Elton contracting to a mining company. What will stop this clause from affecting all subcontractors and extending the occupier?

Mr KOBELKE: If the subcontractor sacks the employee, as in the case of Elton, the employee has a claim for unfair dismissal. That is not a problem.

Mrs Edwardes: It is a different issue. We are talking about third parties.

Mr KOBELKE: That comes into play only if an employee does not have a claim against a company such as Elton. If a company is structured in such a way that the employee cannot pursue an unfair dismissal case against it - it has found a way to back out and says that it is not the employer - it enables the commission to bring the third party into consideration to resolve the matter.

Mrs Edwardes: And order it to pay compensation?

Mr KOBELKE: It would still be against the employer. The commission might be able to make a determination for re-employment, if another job can be found. Reinstatement to another position is allowed under the Bill.

Mrs EDWARDES: The minister clearly does not understand the implication of this clause. He has given many different answers and scenarios. We thought this issue was complex, but the minister has made it much more complex. He clearly lacks an understanding of the impact of this clause.

Mr TRENORDEN: In a situation such as the one involving Elton - a subcontractor to a mining company - there is no way that the subcontractor would work without a major agreement being in place to cover all arrangements. The minister has actually been explaining why this clause should not be in the Bill. Somebody who is not an employer cannot terminate an employee. If the mining company does not want an employee on the site for some reason, the contract between the subcontractor and the miner will deal with it. If it does not deal with it, it should deal with it. The minister should fix that problem, instead of bringing in some convoluted situation that can be misconstrued all over the place. Clauses like this cause people pain. The minister has not explained why this clause is necessary. He should go back to what I just said. An employee cannot be terminated by anybody but his employer. That is a basic element of employment. If a person is a subcontractor and is carrying out the conditions of his contract, the contractor can interfere, but that is part of the legal contract.

Mr KOBELKE: I ask members to carefully read proposed section 23B(2), which states -

> The Commission may, if it considers it necessary to do so in the interests of equity, good conscience and the substantial merits of an employment claim, order a third party to refrain from preventing, hindering or interfering with, or doing anything that would have the effect of preventing, hindering or interfering with -
>
> (a) the employment of the affected person;

It continues.

Mrs Edwardes: Read what it says.

Mr KOBELKE: The member for Kingsley should let me finish. The issue is that this seems to become a problem in only a small number of cases. Some instances have come to light.

Mr Trenorden: How can somebody who does not employ a person terminate that person?

Mr KOBELKE: It is not that the company terminates the employee; it is that the decisions that it makes impact on the person's ability to be employed in the job that he is doing there because of the complex nature of how companies are set up and how other people are employed. If that is the case, it would -

Mr Trenorden: Give us one example.

Mr KOBELKE: There are the opportunities of sham companies -

Mr Trenorden: Give us one real life example.

Mr KOBELKE: For instance, an operation lets a major contract for its core work to another company, and a particular employee turns up to work for the company that is doing the work, and the primary employer says that the person is not acceptable and therefore the company that is employing him dismisses him. When that person takes up an unfair dismissal case, the fact that the other party would not accept him on the site needs to be explained. There may be a blank wall of silence because the actual employer says that it was not given any reasons that the person could not work at the site. The employer says that the person is a competent employee and has a good record with the company, but for some reason the primary employer did not like the colour of his hair, or whatever, and the employer was given no reason. This provision allows the commission to seek

information from the other employer about the basis for the dismissal. It may be that when we get to reinstatement, the commission will want the company for which the work was being done to say, "Give us the reasons. If you have good reasons, clearly that person can be dismissed and there is no unfairness in that." However, it may be that the employer simply refuses to respond, and the contractor refuses to provide any substantiation or uses the excuse that the company for which it was doing the work would not give it any reasons for not accepting that person on the site. If the person has a previous bad record, or there is a range of other reasons, the reasons should be provided. However, when the employer totally refuses to provide those reasons, there is no way reinstatement can be considered. It may be that the merits of the case cannot even be considered, other than that the person is not allowed to do the job and no reasons were given.

Mr TRENORDEN: There are more than 97 clauses in this Bill. Is the minister clearly saying to me on the record that no other clause in this Bill impacts on the situation that he has just outlined? I do not think he can say that. This is a complex Bill. I do not believe the minister is in a position to say that this clause is necessary for the outcome that he has just described.

Mrs EDWARDES: I have read this clause not once, twice or three times, but many times to get an understanding of what the minister meant. I thought that the example I gave about the mining company and the breach of safety provisions was a practical example that has been taken to the commission on previous occasions. However, it goes further than that. It goes to the company that essentially provides cleaners to the minister's office. What is to stop him from preventing that cleaner coming into his office? The cleaner might have broken a vase or perhaps the minister does not like the way some of the fluff is left behind around the edges. There might be no absolute reason. What is to stop that? This provision provides that the third party - the host company of the employment by a labour hire company - can be ordered to reinstate that person at the particular place or site. Proposed section 23B(2)(b) provides that the commission may order the third party not to interfere, prevent or hinder the employment or transfer of the employee to work at a particular place or site. That particular site would be the host company's place. The host company would have said that the worker is no longer wanted on site, and it probably had very good reasons for that. The minister had said that this provision would allow the commission to call upon that company to give its good reasons. The proposed section will set up a system that will allow the Government to interfere with companies' operations and the employment contracts that are in place between labour hire companies and their employees and between labour hire companies and the host companies for which the employees of labour hire companies work. The minister will interfere in those companies' operations to provide an avenue for the employees of such companies to make a claim for unfair dismissal because he says that otherwise they would have no case against their employers. He is trying to find someone else against whom action can be taken, and to do that he simply asks, "Where have you been working today?" Nothing in the Bill stipulates whether it must be a long-term or short-term contract. Nothing in the Bill restricts the third party or defines the relationship, time or contract. The contract would not have to last any longer than a day. This is an outrageous provision. I do not think there is any precedent for it. Can the minister tell me of another jurisdiction that has a similar provision?

Mr Kobelke: There are other matters that would relate to contracts. However, we are not aware of any other similar provisions.

Mrs EDWARDES: It is most unusual. The legal profession tells me that this is another Derek Schapper clause. We are finding that unusual provisions are being inserted into the Act that will affect people's rights and obligations. That is unacceptable. There is no precedent for it. I move -

> Page 151, line 1 to Page 152, line 9 - To delete the lines.

That would delete proposed section 23B.

Mr TRENORDEN: The minister did not answer my question. The member for Kingsley has moved to delete the proposed section, and I will support that. The minister has not confirmed that this proposed section is necessary because none of the other provisions in the Bill covers this situation. The minister will have to argue very hard to convince me that is correct. I find it to be an incredible position. The minister should have a good, hard look at this proposed section because I cannot see any reason for its inclusion.

Mr KOBELKE: This relates to a particular set of circumstances of unfair dismissal. It is not currently covered elsewhere. That is why we see a need for it. It relates to a situation in which the interference of a third party leads to a dismissal about which a claim for unfair dismissal is made. I think the member nodded when I earlier put what I saw as the need. It should be the case that a third party cannot interfere with a person's employment without substantiating the reasons. The matter will still come back to the unfair dismissal provisions; that is, it will still be a matter of establishing whether there were fair reasons for the person's dismissal. That would not be interfered with. If the person clearly did not perform the job or did something that was inappropriate and improper that was the basis for dismissal and it was handled correctly, the person would be dismissed; that is not

an issue. The issue would arise if a third party interfered and used the fact that he was at arms-length to thwart the ability to get the information. That is what the clause deals with. The commission can get the information. In its determination, although a person is employed by a particular employer, the commission can take account of a third party who has been directly involved in interfering with that position of employment.

Mr Trenorden: I do not believe that this clause is needed.

Mr KOBELKE: Currently, there is no way of dealing with a very small number of cases that come under that category.

Mrs EDWARDES: The minister cannot tell us how many cases we are talking about, who we are talking about or who the host companies are. If he cannot identify who are the host companies - it is far broader and wider than the couple of examples of labour companies to which I have referred - this will extend further than what the minister thought, even in his limited understanding of what the clause is meant to do. The minister keeps saying that it is an information gathering exercise. It is not. Nowhere in this legislation do I see provision for the commission to pull a person in and seek information from him. Proposed section 23B states -

> The Commissioner may . . . order a third party to refrain from preventing, hindering or interfering with, or doing anything that would have the effect of preventing, hindering or interfering with -
>
> (a) the employment of the affected person;
>
> (b) the employment or transfer of the employee to work at a particular place or site; or
>
> (c) the reinstatement or re-employment of the employee.
>
> (3) Subsection (2) is not to be taken as limiting the persons in respect of whom the Commission can make other orders under this Act.

It does not limit the persons. This is a most unusual clause that interferes in the operations of companies. It is appalling that owners of property have no rights to say who can or cannot come onto their site. We will see similar situations under the right of entry provisions. Owners of property have no rights under this legislation. This provision takes away those rights.

Mr TRENORDEN: The minister has struggled to explain this proposed section. However, I will take it on face value that he has attempted to put it in for good effect. If the member reads *Hansard*, he will see that he has struggled to explain it. On the other side of the ledger, this proposed section is open to interpretation, and Lord knows how it will be used. That is totally unacceptable. We are supposed to be able to read the explanatory memorandum to understand this process. However, in its absence, it is the minister's job to explain this to us. He has not explained it. I see in it a great downside of unforeseen consequences; therefore, it cannot be supported.

Mr BOARD: I support the member for Kingsley's amendment. I will ask the minister a question about everyday situations that will arise. The minister says that the situations for which this proposed section is designed will be unusual. However, from the explanations that have been given, I believe that they will be everyday occurrences. For example, a principal of a school that hires contract cleaners might, for whatever reasons, find the particular circumstances of a cleaner unacceptable to that school. He might find the cleaner's behaviour with children is unacceptable, or there may be a number of other reasons peculiar to that school. The principal might say that he does not want the contract cleaner under any circumstances to be contracted to the school's cleaning contract.

Mrs Edwardes: That cleaner works only at that school and nowhere else.

Mr BOARD: That is correct. As a result, the contractor says to the employee that he can no longer be employed because he is no longer acceptable to the principal of that school and, as a result, the cleaner's employment is terminated. Under the provisions the Government is bringing in, that becomes the responsibility of the principal of the school, and the employee has redress for unfair dismissal against the principal as a result of the decision he made. Hundreds of these situations will arise as a result of the Government's legislation. The minister is stirring up a hornet's nest of third-party liability for situations beyond the control of those parties, and in many ways is obfuscating what he is trying to do in the first place - to protect employees against unfair dismissal. In this instance, it would be the employer doing the dismissing, and not the third party, because the employer has a right to determine who comes onto a property and in what manner a subcontractor or an employee of another organisation goes about his or her work. I would like the minister to address this issue.

Mr KOBELKE: I thank the member for Murdoch for a more concrete example I can use, that of a cleaner employed in a school. If that cleaner was employed by the principal and he found some aspect of the work unsatisfactory and dismissed the employee, who then thought he had been treated unfairly, that employee would

have the right to take an unfair dismissal case against the principal. The case would be tested on its merits; namely, whether that employee fulfilled the requirements of a dutiful and productive employee, or contravened some standard that made it unacceptable for that employer to keep that person on. That is clear-cut.

If, however, a contractor is doing the cleaning, other issues may arise. In most cases - and this will drive home the reasons the Government believes it is dealing with a minority of cases here - if the principal is not happy with the cleaner he will tell the contractor that this cleaner is not acceptable for stated reasons and that he no longer wants that person to work at the school. The contract cleaner, as the employer, will then have a number of options. He may dismiss the employee, repeating the reasons provided by the principal. Alternatively, the contractor may say that the principal has made certain allegations about the performance of the cleaner, although the contractor believes the employee is an excellent worker. The contractor may then give the employee a job somewhere else. The employee will retain the job with the contract cleaner, and there will be no case for unfair dismissal

Mrs Edwardes: What if the contractor does not have a contract anywhere else?

Mr KOBELKE: I am coming to that. Most cleaners would manage such an issue in the way I have described, if they really thought the employee was a good worker. In an adjustment to that scenario, the contractor may also be of the opinion that this employee is not a good cleaner, but there is no basis for dismissal, because a fair process has not been gone through. The contractor may shift the employee to another job. That is not a problem, because the employer has dealt with it. A problem arises when the principal says that the cleaner is not acceptable at the school, and does not want that employee back. The contractor, as the employer, then tells the cleaner that he cannot work at the school any more, because although the contractor thinks he is a very good cleaner and a good employee, the principal is not willing to have him in the school.

Mr Board: What if the employer, the contract cleaner, has no other avenue of redress? What if all the positions at other locations are filled?

Mr KOBELKE: I am coming to that. This scenario deals only with that narrow class of cases in which the contract cleaner says that the employee is a good employee but cannot be kept in the job because of the principal's views. In such a case, if the principal is not willing to give the reasons, an impasse is arrived at and there will be real difficulty in mounting an unfair dismissal case. Therefore, this provision allows for the principal, as the third party, to be called upon to give the reasons; and if the reasons do not stack up, a decision can be made to require the person to continue working in the school. It shifts the case back to the same situation that would exist if the cleaner were an employee of the principal. If the principal has a basis for saying that this person is not acceptable as an employee, and states those reasons, it is fixed.

A difficulty arises when another company is involved, because people can lose their jobs without the reason being given and without the ability for redress because they are a third party. This allows the commission to deal with those matters.

Mrs EDWARDES: That highlights the problem, and why this clause is inappropriate. If no other position is available with that company, and the principal has said he does not want the person on site, for whatever reason, that principal can be taken to the commission and the commissioner can order that that employee be reinstated.

Mr Kobelke: That is because they have no good reason for getting rid of the person.

Mrs EDWARDES: This highlights that it is not about a small number of cases. In the initial debate the minister referred to the clause covering sham companies. It was then extended to cover labour hire companies, which are everywhere. It was then extended to contractors in the mining and resources industries. We now see that it could apply to school cleaners or to cleaners anywhere. I used the example of the contract cleaner in the minister's building, and the person who cleans the minister's office. It has a far wider scope than the minister envisaged.

Dr Woollard: It could apply to agency nurses.

Mrs EDWARDES: The member for Alfred Cove has knowledge of agency nurses. This clause has far wider application than the minister understood when we first started debating the clause. It does not affect only a small number of cases, which is what the minister was led to believe. I suggest that the minister would be wise to accept my amendment.

Amendment put and a division taken with the following result -

Ayes (21)

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

Noes (25)

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

**Amendment thus negatived.**

Mrs EDWARDES: The next clause, clause 137, deals with section 29, which deals with a number of matters, not the least of which is the ability for the commission to extend the period of a referral of an application for unfair dismissal past 28 days. In doing so the commission must take into account that it would be unfair not to do so. The minister said previously that this provision was similar to a federal provision. I suggest that the process as outlined would mean that the application would have to be received and then go to mediation. The registrar would then discuss it to see whether it was unfair to accept it. The application might then go on to conciliation and arbitration. Who determines that the application is out of time and that it would be unfair for the commission not to consider it?

I mentioned earlier that I found a case in which that discretion was extended up to five years. The level of uncertainty and increased costs that such a case involves are enormous, particularly for small businesses. Small businesses are concerned about vexatious or frivolous applications. They regard 28 days as ample time. If the minister asked what would happen if somebody were on holiday in Bunbury, as happened in a particular case, he might say that it would be unfair in those circumstances. One might think that the minister would suggest putting a maximum time limit on the referral of an application. Some people have suggested 42 days and others have suggested 60 days. If it were only a question of people being on holiday, one would expect them to be able to make an application if it were not out of time. However, when an employee goes well and truly beyond that limit, it does not give certainty to the employer.

We do not know the tests to be considered by the commission and whether it would be unfair not to grant an extension of time. Some of the federal commission's tests include whether a case has already been contested; that the case must have been challenged from day one; what was the length of delay; what was the prospect of success; and what was the prejudice to the other party and so on. All of these situations can occur, yet even with all of those tests, an application can still be allowed to proceed five years after it commenced. I would have thought that those tests were tight and that few cases would get past the 28 days in which it would be unfair to extend the time limit. That is clearly not the case. The commission should not be given an absolute discretion to accept or reject an out-of-time claim. There must be a limit, otherwise the discretion will be exploited, as has happened in other jurisdictions. If the limit of 28 days has resulted in unfairness to a party, that matter should be addressed and not the extension to well and truly past 28 days, as in other jurisdictions.

Mr GRYLLS: Before I move the amendment standing in my name on the Notice Paper, I refer the minister to his second reading speech in which he stated -

> The present 28-day time limit for lodging claims is considered too inflexible and has denied just outcomes in cases of genuine need in the past.

Will the minister explain those cases? The National Party obviously has concerns about extending the 28-day limit.

Mr KOBELKE: Commissioner Fielding - who gave his report in 1995 to the last Government and whose recommendations for legislative changes were not acted on - made it clear that there was a need to open up the possibility of claims beyond the 28-day limit in a limited number of cases in which a clear injustice would be done to a person who could not make a claim outside that time limit. We have put that in the Bill, in keeping

with almost identical wording in the commonwealth Act. The situation will be clearly left to the judgment of the commission, based on the fact that it would be unfair not to allow an application outside the time limit; otherwise a person who has gone beyond the 28 days does not have an opportunity to make a claim. However, if an employee had gone beyond the 28-day time limit and showed on that entry level test that there would be unfairness in not being allowed to make a claim, that employee would be allowed to have a case of unfair dismissal heard.

Mr TRENORDEN: The concern of the National Party is primarily about this rule on people, although we obviously have a concern about the whole of the Bill. We have a problem if employees cannot work out within 28 days that they have been unfairly dismissed. In the realms of small business, if people are to be replaced, they are replaced well and truly within 28 days. Our view is that employees should have a clear understanding within 28 days whether they have been unfairly dismissed. Even if people are ill, or whatever, they can always get a lawyer to act on their behalf within 28 days. It is not acceptable for small business to have to go beyond 28 days. The National Party does not support any extension of time beyond 28 days.

Mrs Edwardes: I ask the minister what will be achieved by the amendment in proposed subsection (1)?

Mr KOBELKE: This is designed to achieve consistency across the legislation. The Act has been amended many times. The old term was a "contract of service"; it is now generally referred to as a "contract of employment". It has the same meaning, but this amendment is designed to standardise the provision and to provide consistency throughout the legislation.

Mrs EDWARDES: The member for Merredin's amendment will remove the commission's discretion. That discretion -

Several members interjected.

The DEPUTY SPEAKER: The member for Kingsley is the only member in the Chamber who has the call. The chatter is unparliamentary and I want it to cease.

Mrs EDWARDES: The commission's discretion clearly increases the opportunity for employees to lodge unfair dismissal claims and removes certainty for employers. The minister did not respond to my earlier question about the process. What process will be established for the commission to determine whether it would be unfair not to accept a claim out of time? In going through that process, the employer will have to pay money and spend time defending a case, even at that early stage. Vexatious or frivolous applications for extensions of time will cost the employer. I am not sure the minister understands that.

Mr GRYLLS: In an effort to provide greater flexibility for employees, the Government has created greater inflexibility for employers. The National Party believes that 28 days is long enough. Why would anyone need more than 28 days?

Mr KOBELKE: The Government appreciates the problem for small businesses, but there are also workers in rural areas. They would be disadvantaged by the 28-day limit. It might take several weeks to obtain advice and even longer to file a claim. We do not have industrial relations commissions in rural towns in Western Australia.

Mr Trenorden: Does the claim have to be submitted in writing?

Mr KOBELKE: Yes. The employee must obtain an application form, fill it in and submit it.

Mr Trenorden: Is a fax acceptable?

Mr KOBELKE: Yes. An employee might be working in an area that does not have the full range of services -

Mr Trenorden: The Minister for Electoral Affairs said that everyone in rural Western Australia has access to those services. You cannot have it both ways.

Mr KOBELKE: The Leader of the National Party is barking up a familiar tree. An employee might want to seek advice from, for example, a family member who is difficult to contact. By the time he obtains that advice and the form, and then fills it in and posts or faxes it, 30 or 31 days might have elapsed. On that basis, the claim should be considered.

The member for Kingsley asked about the procedure. If a claim is out of time, it will be considered by a commissioner before it is deemed acceptable. It will be subjected to that threshold test. The commissioner must first determine that it would be unfair not to allow the claim to proceed.

Mrs Edwardes: Will the parties attend before the commissioner?

Mr KOBELKE: They are not required to, but they may.

Mrs Edwardes: How else could the commissioner determine that it would be unfair not to accept the application?

Mr KOBELKE: The claim must be submitted.

Mrs Edwardes: Therefore, it will be a submission, not just an application form.

Mr KOBELKE: The form would require that people not only put the claim but that they also put the reasons why it is out of time and why it would be unfair not to allow it to be admitted.

Mrs Edwardes: Therefore, the commissioner could make a decision.

Mr KOBELKE: In terms of what is fair, the commissioner may be able to determine up front or admit the claim and the matter could proceed through the process of determination.

Mr TRENORDEN: Where does it say that the mail must be received by a certain point? I cannot see it anywhere. In many instances, once something has been posted, that is acceptable. Where does it say that if it is not in someone's hands within 28 days it is not acceptable?

Mr GRYLLS: I move -

> Page 152, lines 21 to 24 - To delete the lines.

**Amendment put and negatived.**

Mrs EDWARDES: Proposed section 29AA deals with "Certain claims not to be determined". I bring the attention of the minister to proposed subsections (3) and (4). Proposed subsection (3) states -

> The Commission must not determine a claim of harsh, oppressive or unfair dismissal from employment if -
>
> (a) an industrial instrument does not apply to the employment of the employee; and
>
> (b) the employee's contract of employment provides for a salary exceeding the prescribed amount.

That is, if there is no industrial agreement and the contract of employment exceeds $90 000. Proposed subsection (4) states -

> The Commission must not determine a claim that an employee has not been allowed by his or her employer a benefit to which the employee is entitled under a contract of employment if -
>
> (a) an industrial instrument does not apply to the employment of the employee; and
>
> (b) the employee's contract of employment provides for a salary exceeding the prescribed amount.

If a person is on an industrial agreement and his remuneration and/or benefits are more than $90 000 he has an action. People not on an industrial agreement and whose remuneration and/or benefits are more than $90 000 are not able to have a claim determined. Why is there a difference? What about someone on an industrial agreement who earns much more than $90 000? Why are others excluded while such a person is included?

Mr KOBELKE: The Industrial Relations Commission is a low-cost jurisdiction in which we wish to expedite a range of matters and keep down costs to parties. It is intended to be available to people who are employed and not those in managerial or contract positions who have very high salaries. There was recently a case in Western Australia that lasted two to three weeks. It involved QCs and cost a huge amount of money for the claimants. However, that is not our issue; it cost a huge amount of money for the Government. It involved a senior executive taking on a company over his employment contract. A person on a salary of several hundred thousand dollars a year who has a contractual argument can have the issue dealt with in a civil jurisdiction. That is what this provision is meant to do. It is meant to exclude people on high incomes who occupy managerial positions. It is not designed to exclude people who are classed as employees. If a person, such as a miner, who might be on $100 000 a year, is employed on any of those industrial instruments - the member for Kingsley talked about industrial agreements, I think - that are listed on page 154, it is okay for that person to make a claim. However, if a person earns $100 000 a year on a management contract, and is not employed on any of those industrial instruments, that person will not be able to make a claim. We are clearly trying to target high-income people, who are largely in managerial positions. We are saying that they should settle their disputes through the civil jurisdiction, and they will not have access to the Western Australian Industrial Relations Commission. However, we do not wish to exclude people who clearly are employees. An underground miner, with all the extra penalties, might be on $120 000 a year. Nonetheless, he is an employee - a miner - and should have the opportunity to make a claim through the commission. The $90 000, which is the figure under the prescribed amount, can be indexed. However, if a person is employed on one of those industrial instruments, he can make a

claim for both unfair dismissal and contractual benefits through the Industrial Relations Commission. The federal legislation contains a similar provision.

Mrs EDWARDES: The definition of "industrial instrument" mentions awards, orders, industrial agreements, employer-employee agreements or workplace agreements. When EEAs expire and nothing else is put in place, and no award applies, a contract of employment is relied upon. Therefore, clearly those people will be excluded. They are not necessarily on a high salary, as against anybody on an industrial instrument. They were on an industrial instrument.

Mr Kobelke: If they earn under $90 000, they will still be included.

Mrs EDWARDES: The Government is discriminating against somebody who earns more than $90 000 and who is on an industrial instrument - for instance, an EEA - that has not expired, as opposed to someone whose EEA has expired and no award is in place. That person will convert to a contract of employment, and under this legislation he will be excluded. There is clear discrimination between those two people who may very well have been working together at the same place. One has a right and the other does not.

Mr KOBELKE: We will just renew his EEA. I will allow the member to continue her remarks.

Mrs EDWARDES: That has been the minister's answer whenever he does not have an answer to matters in the legislation that have been raised. He has said, "We will just renew the agreement - put in place an industrial agreement. We will get an interim award - no problems at all. We will just pull out something from the box." He has said that that will overcome his problem as a result of some of the deficiencies in the legislation. Quite clearly, there is discrimination between those two provisions and the individuals who are likely to apply.

Again, the $90 000 appears to be a figure that has been plucked from the air and is inconsistent with, for instance, the federal legislation. The minister chose $90 000. Is that because there is some data about the contractual benefits and partnership arrangements for which people have tried to use the commission - shares not issued and so on? Has the minister attempted to get that figure from the data of the commission?

Mr Kobelke: No, we looked for a figure, and we thought that roughly twice average weekly earnings was a fair figure. That is not inconsistent with the commonwealth legislation, under which the figure is $70 000, I think.

Mrs EDWARDES: How many cases have involved amounts above $90 000? What is likely to be the reduction in the number of matters that go to the commission?

Mr KOBELKE: I understand that the figures we have show that between four and six per cent of the claims that go through the commission are above that $90 000 figure. It is not so much that it is only a small percentage but that people who have brought claims for large amounts of money have generally engaged teams of lawyers, and it has taken a huge amount of the commission's time to deal with only one single case for a person who clearly has the money to go through the civil jurisdiction.

If the person can pay a team of lawyers or QCs to represent him, he can clearly afford to carry the matter through the civil jurisdiction. The taxpayer should not be subsidising that matter in what should be a low-cost jurisdiction.

Mrs EDWARDES: I do not propose to proceed with the amendment standing in my name to add a paragraph (c) to proposed section 29AA(3).

I will continue to highlight some of my concerns about this clause. The commission cannot determine claims for denial of contractual benefits if an employee earns more than the amount prescribed in the regulations. However, no cap is in place for other applicants to whom we have referred who make an unfair dismissal application. Therefore, there will be clear discrimination and some very unhappy employees. I am not talking about the cases to which the minister referred, whereby partnerships break up and the like and there are clearly claims for contractual benefits, for which action can be taken in the Supreme Court. I am talking about genuine workers who have been dismissed and who have not received their contractual entitlements. The lawyers around town have suggested that if an employee who is paid above the cap is dismissed and does not receive his contractual benefit, that employee can perhaps commence two sets of proceedings involving substantially the same facts in order to obtain his full entitlements. I suggest there is a potential to create duplication in litigation, with a consequential waste of judicial and commission resources and time, and of the money of the parties concerned. I suggest that the issue is one of clear discrimination. It might reduce some of the five or six per cent and it might not. A person might make a claim to the limit of the cap and then seek the rest of the benefit through the Supreme Court.

Mr KOBELKE: I will clarify the point raised by the member for Kingsley. The cap is based on total remuneration. A person cannot split his income and say that he is making a claim for up to $90 000 but will also make another claim. A person simply will not be within the jurisdiction of the commission if his remuneration is $90 000 and he is not covered by a contract of employment that comes under the definition of industrial instrument.

Mrs EDWARDES: Clause 139 deals with an amendment to section 44 of the Industrial Relations Act. When we started debating part 7 of the Bill, I raised the issue about section 44 of the Act and the fact that two classes of employees could make a claim for unfair dismissal and seek an interim order. The minister has confirmed that there are essentially two avenues for unfair dismissal claims; namely, through either section 29 or section 44 of the Act. An unfair dismissal claim made through section 29 has a 28-day limit, with discretion for it to be extended. In the case of a claim made under section 44 there is no such discretion. Through the compulsory conference process, section 44 can include a range of issues as well as the claim for harsh, oppressive or unfair dismissal. The amendment to section 44 that is proposed by this Bill will ensure that the commission can make an order for unfair dismissal. That was linked to the earlier clause. In doing so, the commission is given a clear power to make any interim order that it thinks appropriate in the circumstances, pending the resolution of the claim. Section 44 should not be just an opportunity for union members to claim unfair dismissal through avenues that are not available to non-union members. That is a clear area of discrimination. Employees bound by a federal award with a remedy under the federal Act should not jurisdiction shop before filing their claims.

Another issue is inadequate notice. The commission has held that inadequate redundancies and notification equates to an unfair dismissal application. Obviously, there are contractual benefits within the federal jurisdiction. I suggest that they would be similar in this case and should not be connected to a claim of unfair dismissal. They do not relate to the claim of whether the dismissal was harsh, oppressive or unfair. There is a real likelihood with section 44 being brought into play that in the consideration of the unfair dismissal application, not only will matters be raised that the minister might have thought about using to surround the employment of the employee, but also other considerations might be raised that clearly should not be taken into account in this area.

The DEPUTY SPEAKER: Before we continue, can the member clarify whether she intends to move the other amendment appearing in her name on the Notice Paper?

Mrs Edwardes: Yes, I do.

The DEPUTY SPEAKER: I advise the member that it comes before clause 139.

Mr KOBELKE: The issues that have been raised by the member about section 44 are not being changed. Those powers were there under the previous Government's legislation, and we are not interfering with that other door to unfair dismissal applications.

Mrs EDWARDES: I thank you, Madam Deputy Speaker, for pointing out that issue for me. I move -

> Page 154, after line 3 - To insert the following -
>
> (5) A claim for harsh, oppressive or unfair dismissal cannot be made through s.44.
>
> (6) The Commission must not determine a claim of harsh, oppressive or unfair dismissal if the employee's employment was subject to an Award, Order, Certified Agreement of Australian Workplace Agreement made under the *Workplace Relations Act 1996 (Cwth).*
>
> (7) The Commission must not determine a claim of harsh, oppressive, or unfair dismissal based on the ground of an inadequate redundancy or notice payment.

This amendment quite appropriately comes under the clause to insert proposed section 29AA, certain claims not to be determined, and links to the section 44 amendment. In addressing what was available under section 44, those points have been made and referred to. Can the minister respond to the points I have made?

Mr KOBELKE: In part the member is trying to say that if an employee has federal coverage, he cannot make a claim under the state jurisdiction. That argument runs into all sorts of difficulties. We have accepted a larger load in unfair dismissals, because the changes to the federal jurisdiction meant that more people sought justice through the state jurisdiction for what they thought were unfair dismissals. We do not wish to close that avenue. We wish to reduce the number of claims, and we will do that by a range of means that have already been discussed. However, we do not want to use jurisdictional limitation as a way of stopping people making a claim for unfair dismissal. We do not support the amendment.

Mrs EDWARDES: Could the minister refer to proposed subsection (7), which deals with inadequate redundancies or notice payments?

Mr KOBELKE: Again, this is another provision that seeks to curtail the ability of the commission to hear the merits of a case and make a determination. I do not think there is any basis for that.

Amendment put and a division taken with the following result -

Ayes (20)

| | | | |
|---|---|---|---|
| Mr Ainsworth | Mr Edwards | Mr McNee | Mr Sweetman |
| Mr Barnett | Mr Grylls | Mr Marshall | Mr Trenorden |
| Mr Board | Ms Hodson-Thomas | Mr Masters | Ms Sue Walker |
| Dr Constable | Mr House | Mr Omodei | Dr Woollard |
| Mrs Edwardes | Mr Johnson | Mr Barron-Sullivan | Mr Bradshaw *(Teller)* |

Noes (25)

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

**Amendment thus negatived.**

Mrs EDWARDES: I move -

Page 154 after line 22 - To insert the following -

**139. Section 29AB inserted -**

After section 29 the following section is inserted -

**29AB. Unmeritorious or Speculative Proceedings**

(1) In this Section -

**"adviser"** means:

(a) a person engaged for fee or reward to represent an applicant or a respondent in an unfair dismissal application; or

(b) a person who is an employee, official or agent of a registered organisation of employees and who represents an applicant or respondent in an unfair dismissal application in that capacity;

**"encourage, in relation to a course of action"**, means the promotion of that course of action as distinct from a failure to dissuade from that course of action;

**"unfair dismissal application"** means an application for relief under section 23A by an employee whose employment has been terminated, on the ground, or on the grounds that include the ground, that the termination was harsh, oppressive or unfair.

(2) (a) An adviser must not encourage an employee to make or pursue an unfair dismissal application if, on the facts that have been disclosed or that ought reasonably to have been apparent to the adviser, the adviser should have been, or should have become, aware that there was no reasonable prospect of success in respect of the application;

(b) an adviser must not encourage an employer to continue to oppose an unfair dismissal application if, on the facts that have been disclosed or that ought reasonably to have been apparent to the adviser, the adviser should have been, or should have become, aware that there was no reasonable prospect of the respondent defending the action.

Penalty: $10 000.

(3) (a) An application may be made to the Industrial Magistrate's Court for an order in respect of a contravention of section 29AB(2);

(b) the application may be made by -

(i) the applicant in respect of an unfair dismissal application; or

(ii) a respondent to such an application; or

(iii) the Minister; or

(iv) the Registrar; or

(v) an organisation of employees or employers that represented a party in proceedings at first instance of the unfair dismissal application;

(c) an application under this section for an order in respect of a contravention of section 29AB(2) may only be made after the relevant unfair termination application has been determined, dismissed or discontinued;

(d) nothing in this Section implies that, for the purposes of an application under this section, the law relating to legal professional privilege is abrogated, or in any way affected.

(4) In any proceedings for an order in respect of a contravention of section 29AB(2) in respect of an unfair dismissal application, the Court must not determine that there was no reasonable prospect of success in respect of the application or no reasonable prospect of the respondent defending the action unless it has had regard to the outcome of the application before the Commission.

My amendment is similar to the federal provision. I have raised some concerns before in this House about industrial agents and the like. This amendment will place a duty on those persons who have been engaged for a fee or reward to represent an applicant or respondent in an unfair dismissal application. That duty will mean that advisers cannot just promote a course of action and will have to ensure that they receive proper advice on any application that has been referred to them.

A case was raised with me in which an employee went to an adviser and received advice on how to set up an unfair dismissal case. The employee proceeded to set up that unfair dismissal case as outlined by the adviser, and the adviser then represented that employee in an unfair dismissal application before the commission. The case went to the commission three times. On the first occasion, the employer outlined exactly what had happened. Some technical argument occurred and the case had to go back for a second hearing. It costs money to go to the commission every time. The employer attended the second hearing with a friend who knew a little about the law but was not a lawyer. That person did a great deal of research and represented the employer on the technicality of the second part of the hearing. A third hearing was required to resolve the matter once the technicality had been sorted out. However, by that time the employee had whipped back to the United States, from where he had come. If the employer had settled for the $2 000 or $3 000 that the employee had agreed to, a travesty of justice would have occurred. That case was not an unfair dismissal application. The employee no longer wanted to work there. He wanted to get some easy cash. The adviser in that instance should have made sure that the employee was not encouraged to pursue an unfair dismissal application that reasonably should not have been pursued. In this instance, the adviser went even further and outlined the steps in order to set up an unfair dismissal application. That matter was referred to the commission as a very poor example of what had occurred.

This amendment provides for a penalty for those cases in which an adviser is in that situation. Because the unfair dismissal application is made before the commission, the matter can be taken to the Industrial Appeal Court. Anybody can take such an application, including the applicant, the respondent, the minister or the registrar, or an organisation of employees or employers. However, such an application cannot be made until such time as the unfair dismissal application has been determined, dismissed or discontinued; keeping in mind that this amendment deals with an application against the adviser. I am sure that the minister would be horrified

at those circumstances, as I was. I have just given a thumbnail sketch of what happened. It was an appalling abuse and should not have happened. In those instances where it does, the adviser should pay for those actions.

Mr KOBELKE: I agree with the intentions of the member for Kingsley. This has been a problem for some years and needs to be fixed. I have had discussions with various players, who agree that a more effective form of regulation is needed for industrial advocates. I am not convinced, however, that the proposal put forward by the member is the best one. I am happy for some penalties to apply. In the next legislation to be brought before the House I have given an undertaking to put forward a proposal, after discussions with the key players, and seeking a role for the commission both in the registration and deregistration of industrial advocates and in the imposition of penalties. This proposal is fairly specific and defined within the Act. A better arrangement would be possible if certain specific arrangements were put in place, while leaving the commission, by regulation, to tighten up some of the details. While I appreciate that the member has sought to address a real issue, I am not convinced that this is the best way. I have also given undertakings to consult various players prior to bringing the next lot of legislation into the Parliament. I will bring forward a proposal and take note of the suggestions being made by the member for one model that could be looked at.

**Amendment put and negatived.**

Mr KOBELKE: I move -

Page 155, line 1 - To delete "(b)" and substitute "(ba)".

This amendment corrects a typographical error.

**Amendment put and passed.**

Mrs EDWARDES: I move -

Page 155, after line 11 - To insert the following -

(3) Subject to section 90, an appeal lies to the Court in the manner prescribed from any decision of the Full Bench, pursuant to sections 23, 23A, 23B, 29 and 29AA, on the ground that the decision is erroneous in law or is in excess of jurisdiction but upon no other ground.

I have brought this amendment forward to demonstrate clearly to the minister the cases that will not be heard in the future. It deals with an absolute travesty, because of the many unfair dismissal applications that show the impact of the lack of ability to appeal to the Industrial Appeal Court from a purely discretionary decision of the commission. I will list a number of cases, so that the minister can seek advice and reach an understanding before this legislation passes through both Houses of this Parliament, of the impact of the legislation and the limitations of appeal. The cases I refer to are the Attorney General v Western Australian Prison Officers Union of Workers, 75 WAIG 3166; RRIA v AWU, 67 WAIG 320 - that is a very compelling case - and Gromark Packaging v FMWU, 73 WAIG 220. Those are cases that went to the Industrial Appeal Court with some success. More recent, though without success, are the cases of Nydegger v Tredways, 77 WAIG 1381; and AMWU v Damper Salt, 80 WAIG 4.

I want the minister to understand that the limitation on appeals will reduce the capacity for employees to appeal in unfair dismissal matters. These matters usually turn on the discretionary judgment of the commissioner, so it is highly unlikely that the majority of the contentious cases in the commission will ever go to the Industrial Appeal Court. The Government is reducing dramatically that opportunity for those workers. These cases involve a major cross-section of workplaces, and the Government will limit those people's ability to appeal to the IAC. The Government would do a great service for those workers if it reconsidered these appeal provisions so that they were not quite so narrow. The Government should retain the existing provision. Although it is limited, it is much wider than that which the minister has proposed. This affects only 10 people a year, and the greatest impact will be in the unfair dismissal area.

Mr KOBELKE: Currently, unfair dismissal actions may be resolved through mediation or conciliation. They then go to a single commissioner and an appeal on that decision can be made to the full bench. This amendment seeks to provide a further level of appeal to the Industrial Appeal Court. We have already debated at some length that these appeals will continue, but they have been restricted. The Government is not convinced of the need for that extra level of appeal. On that basis the Government will not support the amendment.

**Amendment put and negatived.**

Mr GRYLLS: Could the minister specify where the Bill provides for the commission to reinstate an employee while a case is pending? The problem the National Party has, especially in regional areas, concerns an employer

who dismisses an employee and takes on a new employee to do that person's job. A new set of problems will be created if the employer has to reinstate the first employee due to an unfair dismissal claim.

Mr KOBELKE: I refer the member to clause 139 on pages 154 and 155, which must be seen in the context of the amendment. By itself it may be hard to see the full intent of that clause. However, the intent is that interim reinstatement orders will be used in a small number of cases. Their use will be up to the discretion of the commission. If they were used extensively or improperly, it would create a problem. However, that is not the Government's intent. We think that the good judgment of the commission will see that they are applied in an equitable way that does not place an unreasonable burden on the employer.

Mr Grylls: What will happen to the new employee if the employer must reinstate the sacked employee?

Mr KOBELKE: We already have that problem; it will not change under this Bill.

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

Ayes (25)

| | | | |
|---|---|---|---|
| Mr Bowler | Mr Kobelke | Mr McRae | Mr Templeman |
| Mr Carpenter | Mr Kucera | Mr Marlborough | Mr Watson |
| Mr D'Orazio | Mr Logan | Mrs Martin | Mr Whitely |
| Dr Edwards | Ms MacTiernan | Mr Murray | Ms Quirk *(Teller)* |
| Ms Guise | Mr McGinty | Mr Quigley | |
| Mr Hill | Mr McGowan | Ms Radisich | |
| Mr Hyde | Ms McHale | Mr Ripper | |

Noes (20)

| | | | |
|---|---|---|---|
| Mr Ainsworth | Mr Edwards | Mr McNee | Mr Sweetman |
| Mr Barnett | Mr Grylls | Mr Marshall | Mr Trenorden |
| Mr Board | Ms Hodson-Thomas | Mr Masters | Ms Sue Walker |
| Dr Constable | Mr House | Mr Omodei | Dr Woollard |
| Mrs Edwardes | Mr Johnson | Mr Barron-Sullivan | Mr Bradshaw *(Teller)* |

**Part, as amended, thus passed.**

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

*House adjourned at 1.34 am (Wednesday)*