LABOUR RELATIONS REFORM BILL 2002

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 49: Section 39 amended -

Debate was interrupted after the clause had been partly considered.

Mrs EDWARDES: Section 39 of the Workplace Agreements Act deals with the issue of confidentiality. Earlier, I asked a question about the confidentiality of the register. I wanted to know whether that confidentiality would be retained and that the register would not be open for public access when the register of workplace agreements was transferred. Section 39 ensures that the agreements that have been registered and are in existence, whatever the dates may be, prior to the designated day are not open for inspection by any person except a party to it or a person authorised in writing by such a party. Earlier I asked the minister whether under section 39(2)(c) the Government has removed the Industrial Relations Commission clause, which provided exception to who could access the register. I believe the Government will delete that subsection because the register will be under the authority of the Industrial Relations Commission; therefore, that subsection could not be left in there.

Mr KOBELKE: Currently, workplace agreements cannot be referenced to the Industrial Relations Commission. However, on expiry, certain matters will be; for example, if all the records go across to the registrar of the commission. Therefore, we must make sure that workplace agreements after that date are referenced and officers can disclose that information to the commission.

Mrs EDWARDES: On the matter of the confidentiality of the register, I am reminded that when the position of the Commissioner of Workplace Agreements was terminated, the Government appointed the current director of labour relations to the position of Acting Commissioner of Workplace Agreements. Does that delegation of power require anything specific to be taken into account? I am conscious that the workplace commission is interconnected with the Department of Productivity and Labour Relations, which does not allow for the commission to be independent. That is why the previous Government maintained a level of separation. Although some complaints were investigated by DOPLAR, it had no access to that information. Has that caused any issues to arise? How has that been handled?

Mr KOBELKE: I have complete confidence in Mr Radisich's ability to divorce his responsibilities with the Department of Consumer and Employment Protection from his role as the Acting Commissioner of Workplace Agreements. The current situation exists because we are in a period of transition. We must consider how staff can be relocated or moved across; some will move to the registrar of the Industrial Relations Commission. Management issues are involved in shutting down that office in due course, but those matters are being considered.

Mrs Edwardes: Do all the documents and transactions still operate from the same premises?

Mr KOBELKE: That is my understanding. It is in transition and it was judged that that was best done by appointing the officer who has responsibility for labour relations. Also, for the past two years, there had been an ongoing issue about what part of the budget would go to labour relations for advertising for the range of support services that would be required and what part would go to the Industrial Relations Commission, as well as staffing.

Mrs Edwardes: I am not questioning the appointment, I have the highest regard for Mr Jeff Radisich's work. Why was it not considered appropriate to appoint the deputy or somebody from the workplace commission to be in that temporary acting position until the Act expires?

Mr KOBELKE: There was a range of issues that I cannot deal with here. They were matters of which I was informed, but I did not have a say in them. I had a say in approving the appointment of the acting commissioner. There were discussions with staff about who wished to move on quickly because they thought they had good prospects, and who was willing to remain and help the registrar retain the necessary expertise. A range of management issues was raised, and it was judged at the time that it would be better to appoint someone with an overview of the whole system, rather than have different units. Although I am sure such units would have been able to work cooperatively together, it was still judged better to have someone who could exercise an overview by performing both positions.

Mrs EDWARDES: Will the minister explain what clause 49(4) is meant to achieve?

Mr KOBELKE: It simply reflects that the position of the Commissioner of Workplace Agreements is to be abolished, and that the functions that continue, through continuing workplace agreements, will be transferred to the registrar or deputy registrar of the commission.

I move -

> Page 97, line 5 - To insert after "4" the passage "or under section 40F or 40I".

This amendment corrects a drafting oversight.

Mrs Edwardes: Will the minister explain sections 40F and 40I, so that I do not have to look them up?

Mr KOBELKE: The reason for the amendment is that line 5 on page 97 of the Bill ends with the words "Part 2 Division 4", which refers to workplace agreements, but part 2A on collective agreements was omitted.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 50: Section 40 amended -

Mr MARLBOROUGH: I move -

> Page 97, line 27 - To insert after "4" the passage "or under section 40F or 40I".

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 51 to 55 put and passed.

Clause 56: Section 49 amended -

Mrs EDWARDES: Will the parliamentary secretary explain the reason for this definition? Clause 56 amends section 49 of the Act, which is the definition section, by adding a new definition.

[Quorum formed.]

Mr MARLBOROUGH: My understanding of the need for the amendment is to make sure that those workplace agreements that are in the process of being signed, but are not yet registered, can proceed as though they were registered. Once this new legislation comes into force, the registration of workplace agreements in the old form will no longer take place. This clause is an attempt to recognise that if something has been started, it needs to reach conclusion as though it were being registered under the old regime.

Mrs EDWARDES: I thank the parliamentary secretary for his answer.

Clause put and passed.

Clause 57: Section 50 amended -

Mrs EDWARDES: Clause 57 amends section 50 of the Act, by repealing section 50(2), which reads -

> Where an employer or employee who is a party to a workplace agreement claims that there has been a breach by an organization of an undertaking under section 11, the employer or employee may bring an action in an industrial magistrate's court against that organization.

Section 11 is about to be repealed as well, on the expiry of this Act. Under that section, the undertaking is given that the union will conduct its affairs in a way that is consistent with the observance of the agreement; and so as not to incite or encourage any breach of the agreement. For 12 months after the expiry of the Act, when sections 11 and 50(2) are repealed, any union that was a party to a collective agreement would be permitted to do whatever it wanted, because there will be no recourse for the period in which that agreement still exists.

Is that the Government's intention, or is it an oversight? The Government is preserving other provisions that impose obligations on the employer, including that the employer must provide copies of the agreement to the employee, to which a penalty is attached. If the Government is preserving those obligations on the employer after the expiry of the workplace agreement, why is it deleting provisions that require a union that is a party to an agreement to observe the conditions in the workplace agreement?

Mr MARLBOROUGH: Rightly or wrongly, it is expedient to do it that way. The shadow minister will appreciate that the Government is in the process of winding down the roles of workplace agreements and replacing them with an opportunity to create an employer-employee agreement. As the shadow minister correctly indicates, the Government is repealing section 11 of the Workplace Agreements Act, which binds a union that is party to a workplace agreement by certain rules. Under section 11, unions could not be seen to be disrupting the conditions of that workplace agreement within the time frame of the workplace agreement. As the shadow minister will know in the seven or eight years the Workplace Agreements Act has been in place, only very few unions were parties to workplace agreements.

Mrs Edwardes: Are some unions parties to a collective agreement?

Mr MARLBOROUGH: I understand that there are not even half a dozen instances. We are in a wind-down situation. The Government believes that almost overnight we will see a new approach to industrial relations through EEAs, collective agreements and awards. The Government does not see that there will be an atmosphere in which it would be necessary for unions to take untoward action against existing workplace agreements. Penalties have been kept in place so that companies that do not abide by those agreements can be prosecuted. It may be that, as a result of the shadow minister raising this issue, the Government needs to revisit those clauses. I do not think it is the Government's intention to have one set of rules about workplace agreements applying to the employer and another set applying to the employee. This clause is a recognition by the Government that we are moving out of the workplace agreements system. I am not aware of any prosecutions under the old regime, and less than a handful of unions are involved. The Government does not envisage that changing dramatically.

Mrs EDWARDES: The parliamentary secretary has confirmed that some unions are parties to workplace agreements - the exact number is irrelevant. Will the Government undertake not to proceed with this clause, so that any rights and obligations under the agreement will still exist during that 12-month phasing out period?

Mr MARLBOROUGH: I tried to indicate to the shadow minister that the Government is happy to take on board her comments. She has raised a valid point. It is not the Government's intention, in phasing out workplace agreements, to attach a penalty to employers at the same time as it is removing penalties from employee organisations. To the degree that those anomalies may exist, rather than put something that is being phased out back into the Bill, the Government will look at those areas to ensure an even balance between the two. It may be that away from the Table the minister and the member for Kingsley can work through those issues and pursue them accordingly.

Clause put and a division taken with the following result -

Ayes (26)

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

Noes (16)

Mr Barnett	Mr Day	Mr House	Mr Pendal
Mr Birney	Mrs Edwardes	Mr Johnson	Mr Waldron
Mr Board	Mr Edwards	Mr McNee	Dr Woollard
Dr Constable	Ms Hodson-Thomas	Mr Marshall	Mr Bradshaw *(Teller)*

Pairs

Mr Andrews	Mr Grylls
Mr Brown	Mr Ainsworth
Mr Ripper	Mr Sweetman
Mr Dean	Mr Barron-Sullivan

Clause thus passed.

Clause 58: Section 51 replaced -

Mrs EDWARDES: This clause will repeal section 51 of the Workplace Agreements Act and insert a new section on unfair dismissals. Earlier, when we debated unfair dismissal issues, I assumed from the minister's answer that people with an unfair dismissal claim arising from a workplace agreement would have access to the new provisions in the Labour Relations Reform Bill. How is this proposed section incorporated? What is the link? I have attempted to work through it.

Mr KOBELKE: The member has alluded to the fact that the principles of unfair dismissal in the Industrial Relations Act are amended by the Bill. We need to ensure coverage for continuing workplace agreements in the interim after the termination process has started. This proposed section picks up any unfair dismissals arising from workplace agreements. Does that answer the question? Does the member want me to go through the procedure of how it will work?

Mrs Edwardes: How does this differ? Is the only difference the jurisdiction?

Mr KOBELKE: This creates access to the commission. When they go before the commission, people will have the same entitlements as those of anyone else who takes an unfair dismissal case.

Mrs EDWARDES: That did not quite answer the question. Apart from the jurisdiction, when the new provisions come into force what other changes will be made to entitlements that currently exist under workplace agreements?

Mr KOBELKE: That is when we deal with unfair dismissals in the principal Act. This simply gives the head of power for classes of agreements - ongoing workplace agreements - so that they can access those provisions.

Mrs EDWARDES: They did not previously go through the Western Australian Industrial Relations Commission, they went through an industrial magistrate's court.

Mr Kobelke: They used to go before an industrial magistrate.

Mrs EDWARDES: They did not use the provisions in the Industrial Relations Act to do that. The power was in the Workplace Agreements Act.

Mr Kobelke: That is correct.

Mrs EDWARDES: When changing the head of power, it is more appropriate to discuss the differential for those on workplace agreements, irrespective of everyone else.

Mr KOBELKE: Employees will now take their claims for unfair dismissal to the industrial relations commission instead of to an industrial magistrate's court. The member has already indicated that. It will place all employees in Western Australia on an equal footing. Section 29(1)(b)(i) of the Industrial Relations Act will apply to these applications if a person was not employed on a workplace agreement. Proposed subsection (3) confirms that the meaning and scope of an unfair dismissal under the Workplace Agreements Act is identical to that under the Industrial Relations Act.

Clause put and passed.

Clause 59: Section 52 repealed -

Mrs EDWARDES: This clause repeals section 52, which deals with the recovery of money due under sections 27or 33. Is it linked to the enforcement of an unfair dismissal application when an order or a determination has been made by an industrial magistrate's court? If so, where is the power for people to recover money?

Mr KOBELKE: Section 52 had a role under the Workplace Agreements Act. It does not relate to unfair dismissal in any way. It relates to the recovery of money after workplace agreements are gone. Access to new workplace agreements has been closed off. There seems to be no further need for the provision.

Mrs Edwardes: Does it not have any other benefits?

Mr KOBELKE: It covers an agreement that has been made, but which has not come into effect. It covers an agreement that was signed, but not registered, and there was a claim for unpaid money. It is no longer applicable once we get past the determination date.

Mrs EDWARDES: Will the minister take me to the sections that link it to those that relate to unregistered agreements and that help people recover money?

Mr KOBELKE: I do not want to waste any more time. There are more important parts.

Mrs Edwardes: I am not wasting time.

Mr KOBELKE: The member is wasting time. I will give the member an answer and, when I do, she will understand why this is a sheer waste of time. We are getting rid of workplace agreements. We therefore no longer need section 52. Section 52 relates to signed but unregistered workplace agreements and where there is a claim for unpaid money. After the determination date no-one can enter into a workplace agreement. If there were a claim, the default is to the award conditions. That applies when someone is employed without a registered workplace agreement. As such, a person should be paid award conditions. A claim would go to the commission and would be picked up by existing provisions. There is no need to have the specialised conditions

that apply to a workplace agreement, and which excluded people from access to the commission. It is obsolete. There is no need for it. Therefore, it is repealed.

Mrs EDWARDES: If that is correct - and I do not doubt it - I would accept that that is all section 52 does and that it is obsolete. However, unless the minister can point out another section that deals with unregistered agreements, it remains the only section dealing with the recovery of money. It does not deal just with unregistered agreements. Which section refers to section 52?

Mr KOBELKE: Section 52 of the Workplace Agreements Act is entitled "Recovery of amounts due under section 27 or 33", and states -

> A person who is entitled to recover from another person an amount under section 27 or 33 may bring an action for that purpose against the person in an industrial magistrate's court.

Section 27 is already repealed. It is entitled "Position if individual workplace agreements etc. not lodged for registration". That is what I have been trying to explain. Section 33 of the Workplace Agreements Act relates to an agreement that is refused registration. When a person has sought to go through a workplace agreement process and has been refused registration, there is a basis for a claim for back payment or underpayment, which, as section 52 of the Act states, previously went to an industrial magistrate's court. That is no longer applicable as we have repealed that section. However, even if it were applicable because there was a default in those cases, a claim could be made to the Industrial Relations Commission based on the award. There is, therefore, absolutely no need for the section.

Mrs EDWARDES: I apologise to the minister. I was looking at the wrong sections 27 and 33.

Clause put and passed.

Clauses 60 to 62 put and passed.

Clause 63: Section 58 replaced -

Mrs EDWARDES: Clause 63 amends section 58 of the Workplace Agreements Act. I am conscious of the last time that I sought direction from the minister about this clause, and I gently ask him to explain what the clause relates to and why a matter would be referred to an industrial magistrate's court.

Mr KOBELKE: This clause relates to the fact that the jurisdiction for workplace agreements rests with the industrial magistrate's court, and under section 58 a monetary limit is placed on the jurisdiction of that court in dealing with a claim for compensation for loss or injury. Those matters will now go to the commission, and the monetary cap for compensation for loss or injury will be retained when the matters go to the commission. Clause 62 amended part of section 57, which deals with the orders that can be made by that court, and this amendment is connected to that.

Mrs EDWARDES: The industrial magistrate's court continues to have jurisdiction in some areas. This clause does not deal with only the Industrial Relations Commission. Is the prescribed amount of $5 000 the same as the monetary limit in the Industrial Relations Commission so that there is equality? Is that what the minister is seeking to achieve?

Mr KOBELKE: I need to correct something I said before. If I inferred that a cap is being applied to the commission, that is not true. The cap is being applied to an industrial magistrate's court. The clause is basically a housekeeping clause in light of the amendment in clause 58 dealing with unfair dismissal. As the member correctly pointed out, a number of matters need to go only to an industrial magistrate's court, to which the cap is being applied. The cap is already $5 000, and this clause simply reinstates that. It does not change the amount of the cap but reinforces the monetary limitation on it, because unfair dismissal claims now go to the commission and other matters go to an industrial magistrate's court.

Clause put and passed.

Clauses 64 to 72 put and passed.

Clause 73: Definitions -

Mr BRADSHAW: Are unregistered workplace agreements legal or illegal; in other words, do they have any status? If people do not want to be part of a collective workplace agreement, do they have the right to say they want to be on an award or some other system?

Mr Kobelke: Is the member referring to a particular section of the Act or is he hunting for the section to ask the question?

Mr BRADSHAW: It is really clause 76 that I am talking about.

Mr Kobelke: Is the member seeking an explanation of clause 76 or is there a broader issue?

Mr BRADSHAW: What status does an unregistered collective agreement have if there is an individual agreement between an employee and an employer?

Mr Kobelke: An unregistered collective workplace agreement will die on the designated day. The designated day is a key point in the process of getting rid of workplace agreements. That day is defined earlier in the Bill. A number of steps are involved in getting rid of workplace agreements. The designated day is the day on which no more workplace agreements can be registered, and a range of processes must be gone through both before and after that day. We are now dealing with the processes following the designated day. If the workplace agreement is unregistered, it will die on the designated day, and the employee will revert to the award.

Mr BRADSHAW: Did unregistered agreements previously have a status?

Mr Kobelke: An agreement cannot take effect until it is registered.

Mr BRADSHAW: That is what I thought. How can the agreement not be registered? I guess it would not have any status.

Mr Kobelke: The relationship is between the employer and the employee. If both are happy and the arrangement is going okay, it would not be a problem if the agreement were not registered. The problems arise if one party is not happy or the employee later realises he did not get all he wanted. He might then be able to say that his entitlements were based on the award, and they could be substantially greater than those prescribed by the unregistered workplace agreement. That would put the employer in jeopardy because he could be hit with a huge bill. Those problems might arise if the employer does not seek proper registration and a falling-out occurs or there is a difference between a party's expectations and the agreement. If people are happy with the situation and do not seek to take advantage of something, they will be able to get on with life.

Mr BRADSHAW: If this Bill becomes an Act, will unregistered collective workplace agreements be in place?

Mr Kobelke: The point of these provisions is to try to take account of every eventuality that might be afoot when the axe falls and we move into the new system. We must cater for those eventualities at key points in the process. The member is asking what would happen to an unregistered workplace agreement on the designated day, which is the day on which the old world ends and the new system starts.

Mr BRADSHAW: Will there be a place for unregistered collective workplace agreements when the new Act comes into being?

Mr Kobelke: No. We are putting in place a system called employer-employee agreements.

Clause put and passed.

Clauses 74 to 77 put and passed.

Clause 78: Registrar to take possession of register, documents and records -

Mrs EDWARDES: This clause requires the registrar to take possession of the registered documents and records etc and to keep them in accordance with section 28 of the Act. Subclause (2) is unusual -

> A person in possession or control of any thing referred to in subsection (1), or premises on which it is kept, must comply with any reasonable request that the Registrar makes for the purpose of carrying out that subsection.

Subclause (1) relates only to keeping information. Why was it necessary to include this clause? It is most unusual.

Mr KOBELKE: Many of these clauses are enabling devices. The member says that this clause is curious. I am not sure whether she means that the wording is odd or that she does not understand why it is needed. The member has a very good understanding of the legislation, and she might ask why it is needed. It is always useful to have a power specifically stated in case something goes wrong or someone questions the law. The Office of Commissioner of Workplace Agreements will disappear and certain responsibilities will flow to the registrar. This clause is simply ensuring, in very clear language, that that is able to happen. It is an enabling provision.

Mrs EDWARDES: Is there a concern about the transfer of the information in the register or documentation from the workplace commissioner's office to the registrar? Does the Government think that might present a difficulty?

Mr Kobelke: Someone might challenge whether he should do something or whether the registrar has the power to do something. This clause will enable that power.

Mrs EDWARDES: The registrar clearly has the powers. They have been provided throughout the Bill.

Mr Kobelke: We may have a difference of opinion about the efficacy of this drafting approach. The earlier provisions gave the registrar the power to do certain things. This clause ensures that the registrar can take possession of documents to do those things.

Mrs EDWARDES: I thank the minister.

Clause put and passed.

Clauses 79 to 81 put and passed.

Clause 82: Appeal under section 35 discontinued -

Mrs EDWARDES: This clause will clearly have no relevance once the workplace agreements have expired. It deals with an appeal against a refusal to register an agreement. The interim time frame would have expired. There is no issue about the need to keep the provision in place, because no-one will need to register a workplace agreement.

Mr Kobelke: Section 35 of the Act relates to an appeal to the Supreme Court.

Mrs EDWARDES: Would any gap open if the section were totally repealed? It does not need to be left in place because there will be no need for a registration process for workplace agreements.

Mr Kobelke: The section relates to an appeal over registration. The other provisions of this Bill mean there will be no further registrations. A party could otherwise spend the money going to the Supreme Court, and get a decision that could not be fulfilled because the registration process has been shut off.

Mrs EDWARDES: Will all the rights available to either the employer or the employee for any actions they can take within the transitional time after the expiration of the workplace agreements remain in place? I do not mean the example I gave to the parliamentary secretary and will give to the minister.

Mr KOBELKE: I understand, unless I am advised differently by my officials, that section 35 relates to appeals to the Supreme Court over the refusal to register a workplace agreement. Once the designated date has passed, there will no longer be any mechanism for registration. It will have all been taken away. What would be the point of continuing an appeal before the Supreme Court? This clause simply ends that.

Clause put and passed.

Clauses 83 to 92 put and passed.

Clause 93: Offender may be punished despite repeal of section 25 -

Mrs EDWARDES: Section 25 of the Workplace Agreements Act 1993 deals with employees being given copies. In the minister's absence I raised this particular section as a comparison with the removal of section 11, and the ability to take action against any breach of section 11 upon the designated date. That then means that if unions that are party to a collective workplace agreement infringe the conditions under section 11, an employer cannot take action against that union. That would mean a hiatus of up to 12 months before the rest of the collective workplace agreements expired. The language used to deal with an employer being punished is most unusual. How many people drafted this legislation?

Mr Kobelke: Most of the drafting was done by parliamentary counsel. I am not sure how many were involved.

Mrs EDWARDES: The language used is most unusual for parliamentary draftspersons.

Unlike with unions, action will be taken against the employer. Such action demands that employees who are a party to the agreement be given a copy of the agreement as soon as is practical, or after the agreement has been entered into. This is a simple clause, and although we are winding down the expiration of workplace agreements, and there will be a date beyond which this clause will no longer apply, a person may still be punished for this offence. I do not have a problem with that. If an offence has been committed, the section ought still to be in existence. Until the expiration of the workplace agreement, the ability to take action against a breach of section 11 ought to be retained.

Mr KOBELKE: When the parliamentary secretary stood in for me, he commented on a similar matter that the member raised, and told her that it would be considered. I have some sympathy for what the member is saying. We will look at this, and come back to Parliament to look at the list of points that continues to grow. However, if removing this is possible without adverse consequences, we will consider it.

Mrs EDWARDES: I am asking for the removal of the clause that prohibited the taking of action against a union that was in breach of section 11. I want that reinstated.

Mr KOBELKE: I will consider having both in or both out.

Clause put and passed.

Clause 94: Tribunal's arbitration function under repealed section 40E(b) -

Mrs EDWARDES: Section 40E(b) deals with collective workplace agreements for federal award employees. I take it that this section keeps that agreement in place to allow for any disputes to be determined by the appropriate tribunal. It is my understanding that the tribunal formally comprised the Commissioner for Workplace Agreements. How will this section be implemented in a real sense?

Mr KOBELKE: The proposed section relates to workplace agreements that continue during the interim period. Currently, a dispute goes to the tribunal - which comprises the Commissioner for Workplace Agreements - but that position has been abolished. Therefore, we must find someone to fulfil the role of the tribunal. While handling many of the roles, it was judged that the registrar should not handle that form of arbitration, and that a commissioner should take on the role of the tribunal in the event that a case arises.

Clause put and passed.

Clauses 95 and 96 put and passed.

Clause 97: Powers in relation to transitional provisions -

Mrs EDWARDES: Proposed section 97(2) provides that -

> If in the opinion of the Minister an anomaly arises in the carrying of any provision -
>
> (a) of this Division; or
>
> (b) of the *Interpretation Act 1984* as it applies to the amendments made by this Part,
>
> the Governor may by order publish in the Gazette -

Therefore, through Executive Council the minister can modify the provision to remove the anomaly and -

> (d) make such provision as is necessary or expedient to carry out the intention of that provision.

This breaches the role of the Parliament. It is an extraordinary provision, because if an anomaly is found in the Act, as it is put into practice, the minister can just whip down to the Governor and amend it. Is that the case?

Mr KOBELKE: The purpose of clause 97 is to make an allowance if we find that an anomaly or deficit exists in the transitional provisions. It does not relate to the system that will be up and running once the workplace agreements are dead and gone over the 12-month period. It will not have an on-going application. However, it is needed because of the complexity of the system, and in the interests of looking after people and in making the system work. It is exceptional because it gives power to put in additional provisions by an order in Executive Council - which is open to disallowance by the Parliament - to cover the transitional period. It has application only to this division, and relates only to transitional provisions.

Mrs EDWARDES: I accept that the minister wanted this incorporated purely on the basis of expediency. If a problem arises during the transitional period, let us fix it. Normally, if a problem arose, the minister would quickly introduce a Bill, and chat with the Opposition. Some Bills have been passed in a matter of days. I know of a Bill that went through both Houses in one day, because its passage was absolutely vital. This is clearly ultra vires. It would give an extraordinary power to a minister. He would have the power to make an amendment to correct an Act that had been passed by both Houses of Parliament, purely because an anomaly had arisen. What is the definition of an anomaly? How broad, wide-ranging or limiting can an anomaly be?

[Quorum formed.]

Ms SUE WALKER: I was waiting for the minister to respond to the member for Kingsley before asking him about the provision, but I am happy to go first. I will take up a point raised by the member for Kingsley on clause 97(2). It appears that the clause would allow the minister to delegate to the Governor legislation-making powers in relation to the Interpretation Act. If that were correct - that is what I understand the subclause provides - it would be highly unusual. Subclause (2) states -

> If in the opinion of the Minister an anomaly arises in the carrying out of any provision -

That is, if the legislation is found wanting -

> . . . the Governor may by order published in the *Gazette* -
>
> (c) modify that provision -

He would change the law. Is it not a function of the Parliament and not the minister to make changes to laws? The subclause refers to the Interpretation Act. It seems clear, on reading that provision, that that is what the minister is trying to do.

Mr KOBELKE: The questions being raised are quite reasonable. This is not a normal statutory provision. We are trying to provide certainty and a smooth transition from one system to another. As we have seen, there is a lengthy range of provisions. This division is titled "Transitional provisions for amendments to the Workplace Agreements Act 1993 made by Division 1". The division extends from page 103 to page 111 and encompasses clauses 73 to 97. A large number of clauses relate to transitional matters. How should we fix any problem that arises from those transitional matters? The member for Kingsley suggested that they should come back to Parliament. That is the normal process when legislation is ongoing and the Parliament has time in which to deal with the matter. However, this provision deals with a limited period during which the transition applies to a range of employers and employees. If a problem were to arise in late December when Parliament was not sitting, should we wait until February or March - two or three months - before fixing the problem, by which time it might no longer be needed?

Mr Johnson: You called us back early this year.

Mr KOBELKE: Regulations are there to deal with those matters. That is what we are doing here. We are saying that if an anomaly does arise - I will get to the member for Kingsley's question about the definition of an anomaly - it can be rectified. The Parliament will have the power to disallow the remedy if it is not happy. The member for Kingsley asked what is an anomaly. There are two classes of anomalies. An anomaly could occur if something arose that could not have been foreseen during the drafting of the legislation. We might not know how to handle that anomaly, apart from perhaps seeking clarification from the courts. By the time that came back from the courts, the anomaly might be beyond the point at which a remedy could be provided. These matters need to be expedited. Another class of anomaly could occur if a conflict arose between the transitional provisions. Again, that could be sorted out by the regulation giving prominence to one provision over another. The requirement for this is fairly evident.

Because this provision is a bit unusual, members might say that they do not think the Government should include that requirement. If we want to continue with the rhetoric that we want to make sure that we look after people, have a smooth transition process, and give the greatest degree of certainty possible, this clause is the way to go. I have a fair degree of certainty that the provisions prior to it will work. However, the Government wants this double opportunity to make sure that if an anomaly does occur that will be a problem for companies during the transition phase - they will be the main ones that will have to cope with it - we will have an ability to promptly respond.

Ms SUE WALKER: I accept the intent behind the provision. However, the clause talks about the minister making necessary or expedient provisions to carry out the intent of the provision. Is the minister saying that he has the ability to change the effect of a provision of, for example, the Interpretation Act? Is the minister suggesting that he will change the Interpretation Act without bringing it to Parliament?

Mr Kobelke: No, definitely not. The minister does not do that. The minister originates the move, but it must be done through the Executive Council. This provision will not make any change to the Interpretation Act, but to how it might be applied by this part.

Ms SUE WALKER: I will use by way of example a section of the Interpretation Act that deals with retrospectivity. What would happen if, during the transition period, the retrospectivity provisions of the Interpretation Act did not allow the proper transition of this division? Is the minister suggesting that the Governor publish an amendment to the Interpretation Act to enable the transition?

Mr Kobelke: Not to the division. We are talking about a provision in the division.

Ms SUE WALKER: On the same point, is the minister suggesting -

Mr Kobelke: Subclause (4) alludes to the issue of retrospectivity.

Ms SUE WALKER: What does it say? How is the minister clarifying that position? If he wants to make something retrospective and the Interpretation Act stops that being done, and given that the minister wants to enable the Governor to make an order to prevent any anomalies, he will have to change something in the Interpretation Act.

Mr Kobelke: Does the member mean the way the Interpretation Act is applied to this division?

Ms SUE WALKER: Yes. What happens if it does not work? If the Interpretation Act is not applicable to the intent behind division 2, what will the minister do with the Interpretation Act? Will he bring the Bill back to Parliament?

Mr Kobelke: Changes can be made by regulation, which Parliament can then disallow.

Ms SUE WALKER: The minister would have to change the Interpretation Act to allow changes to be made retrospectively. That is a big step and it usurps the function of Parliament.

Mr KOBELKE: The member for Nedlands asked me whether the application of clause 97 would change the Interpretation Act. To that, the answer is no. The application of the Interpretation Act to this division can be changed by this clause.

Ms Sue Walker: If the Interpretation Act did not allow a change to be made to this division, would the minister have to change the Interpretation Act? How would he get around that without usurping the function of Parliament?

Mr KOBELKE: I will attempt to answer the member's question. I am not a lawyer, so I must seek advice. Clause 97(5) defines a transitional matter and states -

> **"transitional matter"** means a matter or thing necessary or convenient to give effect to the transition from the principal Act, as in force before the commencement of any provision of this Part, to the principal Act as in force after that commencement.

We are dealing with only the Workplace Agreements Act, which is being abolished, not with any other divisions in the Industrial Relations Act or any other Acts. The Workplace Agreements Act will be phased out and amendments will be made to that Act to allow for a smooth and fair transition. That is all it applies to.

I refer to the Interpretation Act. Clause 97(2) states -

> the Governor may by order published in the *Gazette* -
>
> (c) modify that provision to remove the anomaly; and
>
> (d) make such provision as is necessary or expedient to carry out the intention of that provision.

In that sense, the order may set aside the application of the Interpretation Act to some part of the transitional arrangements for the workplace agreements.

Mrs Edwardes: Who is the minister responsible for the Interpretation Act?

Mr KOBELKE: The Attorney General.

Mr HOUSE: When I read this clause, I am not satisfied that we are talking about a regulation. I am not convinced that the minister might not be referring to a ministerial direction. A ministerial direction, which is also published in the *Government Gazette*, is not subject to parliamentary disallowance and needs no direction other than that of the minister. We are talking about 200 pages of legislation that took the best part of 12 months to put together. Obviously, it will take more than two or three weeks of debate in this Parliament to fully comprehend it.

The minister is trying to convince us that he can go to the Governor and change the legislation on a whim. The minister has not enlightened the Parliament by providing a single example that might be pertinent to this point. I would like the minister to give us an example that would allow us to have some peace of mind when giving a minister that sort of power. This provision takes ministerial direction and ministerial decision making to a new level; it is powerful legislation. I would like the minister to give me his view of why he believes the words in the clause indicate that this will be a regulation, not a ministerial direction. I would like him to provide us with some comfort that that is the case because they are two very different levels in the ministerial decision making process. One allows Parliament to have a say, albeit at a later date, and the other cannot be questioned through the processes of Parliament. Will the minister give me an assurance that this will be done by regulation, not ministerial direction? Will the minister give members an example that would be pertinent to allow this process to be taken outside the power of Parliament?

Mr KOBELKE: Under clause 97(2) the minister must express an opinion to initiate the process, which must be governed by an order published in the *Government Gazette*, which I understand from counsel means that Cabinet would have to tick off any changes and they would be disallowable by Parliament.

Mr House: Not necessarily. I am loath to mention the example of the previous Government's antismoking legislation that did not go through that process.

Mr KOBELKE: It did not go to Cabinet, but it went to the Executive Council. A number of matters that go to the Governor do not go through Cabinet.

Mr Barnett: Generally they are the less contentious ones.

Mr KOBELKE: Yes. We cannot give an example. If we had an example, we would have fixed it. We have legislated for all the examples we could come up with in the provisions. This is a protective catch-all provision. Let us keep in mind what it will do -

Mr House: Put that aside for a minute and assure me that you are talking about a regulation, not a ministerial direction. That is the first important point that must be resolved.

Mr KOBELKE: I make it absolutely clear that this cannot be done by a ministerial direction; it must be done by regulation, which I will ensure is brought before Parliament.

Mr House: That is if you are still a minister. You will be the minister for only a certain period.

Mr KOBELKE: If we had an example, we would have fixed it and we could no longer use it as an example. This clause gives protection. We must make sure we understand what it covers because the power it gives people should be carefully considered. We are dealing with the transitional period for workplace agreements that will apply to the Workplace Agreements Act only after the process has been started in Parliament to repeal workplace agreements.

For some time the member for Kingsley has been very ably raising all the potential problems that might arise when trying to protect the interests of employers and employees. One set of provisions may not sit with another or they may be in conflict with one another and must be resolved. We need a means to resolve them promptly because people want to get on with their jobs. They want to get paid and they want to know what their conditions are. They do not want to wait for a month or two and miss a couple of pay days before they know whether they should work particular shifts or whether they are receiving the appropriate rate of pay. Those are the types of problems that could arise during the transition. We think we have covered them in all these pages of provisions. If something arises that is not covered or is ambiguous and it has created a contest as to what should happen, we want to be able to clarify it. Clause 97(4) offers good protection. It reads -

> To the extent that a provision of any such order has effect on a day that is earlier than the day of its publication in the *Gazett*e, the provision does not operate so as -
>
> (a) to affect, in a manner prejudicial to any person (other than the State), the rights of that person existing before the day of publication; or
>
> (b) to impose liabilities on any person (other than the State) in respect of anything done or omitted to be done before the day of publication.

If anything is done that has an adverse impact, then the people on whom that impact falls have a clear provision for seeking restitution or remedy. There is no power to take any action that would adversely affect anyone except the State, under those proposals. That is a good safeguard, to make sure that this is to be used in only exceptional circumstances. I acknowledge that it is an exceptional provision but it is dealing with an Act that is disappearing, and smoothing the transition to the new system. The Government hopes it will never be used, because it is fairly confident that the other provisions will achieve everything that is required. If, however, the Government has got it wrong, or something arises that was simply not thought of, it can be fixed in a timely manner, so that there is no detriment to either employers or employees caught in that situation. It cannot be fixed in such a way that this adversely affects either party. If that does happen, there is a way of coming back, through subclause (4).

Ms SUE WALKER: By referring to clause 97(4) the minister is putting the boot on the other foot. The person who is affected then can go through a legal process, which the minister calls a safeguard. However, the person whose rights are affected must go through a long process to put the matter right. Clause 97(2) reads, in part -

> If in the opinion of the Minister an anomaly arises in the carrying out of any provision -

The minister can order the Governor to make such provision as is necessary or expedient to carry out the intention of that provision. The intention is the subjective intention of the minister, at his whim, depending on his interpretation. The minister can make law and change it, which could have profound effects on a group of people, but the minister says that is okay, because there is a safeguard in clause 97(4). I would like to hear the view of the minister on this, but it seems it would take a long time for a collective group to rectify a problem. It is all back to front. The minister is saying that the Government does not want any problems in getting this legislation through, so it will take the legislative process and hand it to the minister, and if there is a problem, then the person whose rights are affected can come back. Why is that not done with other legislation, such as the

Criminal Code? Every time we add an offence to the Criminal Code, we could say that if the minister thinks the intent is not behind the legislation, he can then just change it. A person who is imprisoned for 18 years, then must come back to have the situation corrected. It is back to front, in my view. I would like the opinion of the minister on those points.

Mr PENDAL: Can the minister direct the attention of the House to the last occasion on which some similar provision for the alleged removal of anomalies was made?

Mr KOBELKE: I would certainly like to. The chief parliamentary counsel is not here. Someone has gone to ring him to attempt to get that advice.

Mr PENDAL: That may be a good reason for the House to report progress. I certainly would not be comfortable about dealing with something that seems to set a precedent that I have never heard of in a long time in this place or the other Chamber. It takes the making of regulations to a new height, or a new depth. The minister obviously cannot recall when a similar provision was entered into a piece of legislation. If he does not know, we may need to wait until the chief parliamentary counsel returns. Why is it not possible to report progress and return to this matter when better advice is available?

Mr KOBELKE: I move -

That further consideration of clause 97 be postponed.

Mr PENDAL: For how long is the chief parliamentary counsel expected to be unavailable?

Mr Kobelke: Postponed means that consideration of this clause is deferred until the remainder have been dealt with, which will be some time next week.

Mr PENDAL: Will the minister give an undertaking that the chief parliamentary counsel will be in the Chamber to advise the minister, or at least that the minister will have the benefit of the advice by then?

Mr Kobelke: He will be back today, and I hope to have an appropriate answer for the member.

Mr PENDAL: I would be interested in knowing when something like this was last done in this form and how many times it has been done in the past 25 years. It is certainly something that is new to me. I am disturbed even by the use of the word "anomaly". Many different constructions could be applied to that word, and therefore I want some pretty watertight advice from the parliamentary counsel and to have it placed on the record by the minister because of the way in which that word could be interpreted. It is a very good idea to postpone the clause.

Ms SUE WALKER: Further to the member for South Perth's request, I would also be interested to know, from the Crown Solicitor's Office, whether such a clause has been enacted before and whether there is any case law in relation to that clause.

Mrs EDWARDES: That would then answer the questions I raised about the breadth of the word "anomaly". Obviously the point made by the member for Nedlands about any potential change to the Interpretation Act, even in a short space of time, would be a major concern, given that that Act affects a large amount of legislation. A common law and standard would be excluded purely for the sake of this clause. As the minister rightly pointed out, clause 97(4) recognises that there may be rights and liabilities that would be affected. As such, it is quite a serious clause, which would give unprecedented power to the minister. The mere fact of using the word "certainty" should not be at the expense of the parliamentary process.

Question put and passed; **further consideration of the clause thus postponed.**

Clauses 98 and 99 put and passed.

Clause 100: Offences under expired Act -

Mrs EDWARDES: Section 37(1)(e) of the Interpretation Act refers to section 11 of the Criminal Code, and section 10 of the Sentencing Act. This affects any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against expired Acts. What is this clause doing?

Mr KOBELKE: This will ensure that section 37 of the Interpretation Act, which relates to the repeal and expiry of Acts, shall apply. That section serves to ensure that no unintended consequences occur as a result of the repeal of an Act, such as the springing back of right or entitlement. It also ensures that everything that is done pursuant to the Act retains its legal validity.

Mrs Edwardes: What does that mean in plain English?

Mr KOBELKE: The use of the relevant parts of section 37 of the Interpretation Act avoids any unintended consequences due to the repeal of an Act - in this case the Workplace Agreements Act. For example, someone may say that a pre-existing right is reinstated. It also applies to things that have been done and have largely run their course, but are not covered by any of the provisions in the Bill. It takes into account people who have claimed they have somehow been disadvantaged because of the repeal of the Act. The Interpretation Act takes into account anything that was done pursuant to the Act when it was in place. A classic example would be for someone to try it on and say that he was disadvantaged under a workplace agreement because his wages were $50 a week less than they would have been under the award. The Interpretation Act makes it clear that people cannot do that.

Mrs EDWARDES: I think the minister's plain English explanation has misinterpreted the clause.

Mr Kobelke: I used an example of an offence that would not be appropriate.

Mrs EDWARDES: Would someone who had not taken the action prior to the expiration of the Workplace Agreements Act still have the right to take action?

Mr Kobelke: Yes.

Clause put and passed.

Clause 101: Application of enforcement provisions -

Mrs EDWARDES: On the expiry of the Workplace Agreements Act, part 5 division 1 is expected to continue in force to the extent that is necessary for an industrial magistrate's court to deal with rights, entitlements and remedies and hear appeals. This clause will protect those rights. Proposed section 101(2) reads -

> The continued jurisdiction of an industrial magistrate's court under subsection (1) is to be treated as general jurisdiction of the court for the purposes of section 81CA of the *Industrial Relations Act 1979*.

As we have not transferred the jurisdiction of the industrial magistrate's court in all areas that arise under the Workplace Agreements Act, what does this clause relate to?

Mr KOBELKE: This is a restatement of the current position; that is, matters arising from workplace agreements currently go to an industrial magistrate's court. Under this clause, those matters can still go to an industrial magistrate's court when the Workplace Agreements Act is changed.

Mrs EDWARDES: Subclause (3) also preserves the right of appeal.

Mr Kobelke: Yes.

Clause put and passed.

Clause 102: Keeping of records -

Mrs EDWARDES: This clause provides that, after the expiry of the Workplace Agreements Act, the employer must keep all records required under section 47 of that Act for seven years. We talked earlier about the records that must be kept by the registrar. We made the assumption that the State Records Act will apply, and that a seven year time frame would be put in place. It is critical that the department or the registrar undertake an education and awareness program so that employers are aware that, although the Act has expired and workplace agreements no longer exist, they must keep those records. They may do that if they have a good record keeping system and in accordance with their tax provisions. However, I suggest the clause and the penalty associated with it needs to be highlighted.

Ms SUE WALKER: I note section 47 of the Workplace Agreements Act. Has an addition been made in clause 102 to the manner in which the records are kept? Will the minister explain whether that is a new provision or whether section 47(2)(e) of the Workplace Agreements Act which says "other matters prescribed by the regulations" prescribes how records are kept?

Mr KOBELKE: The effect is that all those records that are required to be kept at a time immediately prior to the expiration of the Act are required by this clause to be kept for seven years. The member referred to "other matters prescribed by regulations" in section 47(2)(e). I am not sure of the import of what the member is asking. I am advised that no other matters have been prescribed by regulation. If we are correct, there is nothing it actually applies to. That is our knowledge here at the Table. I cannot vouch that it is exactly the fact.

Ms SUE WALKER: Are additional provisions being imposed on employers by asking them to keep records in electronic form, or was that already provided for in the regulations under section 47?

Mr Kobelke: It gives a choice. Employers can do whatever is most cost-effective.

Ms SUE WALKER: Nothing in section 47 stipulates the form in which records will be kept.

Mr Kobelke: Our legislation is far more thorough than that of the previous Government.

Ms SUE WALKER: I think we were a bit easier.

Clause put and passed.

New clause 103 -

Mr KOBELKE: I move -

Page 113, after line 24 - To insert the following -

103. Access to records

(1) A person who is required to keep records under section 102 relating to a former employee must, on request in writing by a relevant person -

(a) produce the records to the relevant person; and

(b) let him or her inspect them.

Penalty: $5 000.

(2) Relevant persons are -

(a) the former employee concerned;

(b) a person authorized in writing by the former employee; and

(c) an officer of the Commission authorized in writing by the Registrar.

(3) The duty under subsection (1) -

(a) continues so long as the records concerned are required to be kept under section 102; and

(b) includes the further duties to let the relevant person -

(i) for the purpose of inspecting the records, enter premises of the person who is required to keep them; and

(ii) take copies of or extracts from the records;

and

(c) must be complied with not later than 14 days after the request for inspection is received.

Mrs EDWARDES: Why has the minister brought this in at such a late stage? The term "relevant persons" includes a person authorised in writing by the registrar. In what circumstances is this anticipated? A relevant person is allowed to enter premises to examine records and take copies or extracts from the records. The duty to provide access to records must be complied with within 14 days. There is no notification period for an employer, nor any safeguards. I understand the role of an industrial inspector, which is to examine time and wages records. I understand that this is something the Government would like to include. Workplace agreements expire at a certain point, and records must be kept for seven years after that time. We do not have a problem with the examination of records of former employees. The term "former employee" should be substituted with the word "party". The language is very loose. Proposed new subclause (1) states -

> A person who is required to keep records under section 102 relating to a former employee must, on request in writing by a relevant person -
>
> (a) produce the records to the relevant person;

Although that gets to the meaning of what we are discussing, I am not sure it is as tight as it could be. The provision provides a right of entry and access to records without the safeguards that are currently provided in the Industrial Relations Act.

Distinguished Visitors

The ACTING SPEAKER (Mr McRae): Before we continue, I would like the Chamber to acknowledge that the Minister for Education is meeting with a Chinese delegation from the Ji'Nan City education commission. I welcome the delegation to the Legislative Assembly of the Parliament of Western Australia.

[Applause.]

Debate Resumed

Mr KOBELKE: The proposed new clause I seek to insert is identical to the section that is already in the Workplace Agreements Act. When the Bill was drafted, this proposed new clause was overlooked; perhaps it was thought it was unnecessary. It is necessary because the keeping of records does not ensure access to them. There may be other means by which the commission can gain access, but I am not clear on that. During the transitional arrangements people will need to have access to their records from the time when they were on a workplace agreement. We need to ensure - as we have in clause 102 - not only that records are kept but also that there is a ready means of access to those records. For that purpose we have adopted the provisions that exist in the Workplace Agreement Act.

Ms SUE WALKER: Does new clause 103 allow any relevant person, such as a union official or his delegate, to enter a workplace and look at the records of any employee for a period of up to seven years, regardless of whether the employee was a member of any union?

Mr KOBELKE: The clause is clear. New subclause (1) states -

> A person who is required to keep records under section 102 relating to a former employee must, on request in writing by a relevant person -
>
> (a) produce the records to the relevant person; and
>
> (b) let him or her inspect them.

The term "relevant persons" includes former employees. Therefore, it obviously relates to former employees.. A person could not request information about another employee, because he would not be a relevant person. Only a relevant person or an employee seeking his own records can access records. The only way that a person could seek access to numerous documents would be if he had obtained written authorisation from each of the individuals concerned. That would make such a person a relevant person for each of the former employees.

Ms SUE WALKER: Where is the definition of "relevant persons"?

Mr Kobelke: Subclause (2).

Ms SUE WALKER: Does that mean that a person who has never been a member of a union will never be the subject of a search of his records by a union official under proposed new clause 103?

Mr KOBELKE: The criteria put by the member are not the key ones that have effect. The relevant person has to be the former employee or a person authorised in writing by the former employee. That could be his mother or father or a union official. If someone wished to use a union official, he could do so. An officer of the commission is also a relevant person, and he does not need to be authorised by the former employee but must have written authorisation from the registrar.

Mrs EDWARDES: I need clarification about the amendments to the Act. Some sections will be repealed, and that will take effect on set dates. Some sections have been amended, and they will stay in existence until the expiration of the workplace agreement. Some sections deal with rights and obligations that go beyond the expiration of the Workplace Agreements Act.

Section 48 of the Workplace Agreements Act obviously deals with the records of an employee. Is the minister concerned that the section does not adequately identify the documents that must be kept after the expiration of a workplace agreement? Was he therefore referring to a former employee? Why has the minister proposed a new clause instead of amending section 48? Section 48 has been amended already to ensure that an officer of the commission authorised in writing by the registrar is a relevant person who can access the records. This new clause is an unusual way of dealing with this matter.

Mr KOBELKE: We are dealing with division 3 at the top of page 112, which relates to transitional provisions after expiry of the Act. We previously dealt with transitional provisions for amendments to the Act.

Mrs Edwardes: Do all of the provisions that have not been amended or repealed, except for this provision, expire when the Workplace Agreements Act expires?

Mr KOBELKE: That is correct.

Mrs Edwardes: Therefore, the rest of the division deals with the transition period and protects rights after expiration of the Act.

Mr KOBELKE: That is correct.

Ms SUE WALKER: Subclauses (1) and (3)(c) of proposed new clause 103, read together, apply a penalty of $5 000 to a person for non-compliance 14 days after receipt of a request for inspection of records. What happens when a person who employs three people goes on holiday and does not receive that request in writing? The new clause implies that the provisions are mandatory. Where is that mechanism in the Bill and how does an employer get around it?

Mr KOBELKE: First, I may have asked the same question back in 1993 when the last Government inserted those provisions in the Act, because they are identical. I have not checked *Hansard* to see whether I asked that question; however, I do not believe that any problems have arisen with this provision in the past eight or nine years, so I do not anticipate any problems with it. Secondly, the outcome of an event such as the member suggested would be based on case law and for the courts to judge. I am sure they would have plenty of examples of that sort of situation. The member would know that the penalty for a first offence would be nowhere near $5 000 and in extenuating circumstances most likely there would be little or no penalty. If a person were clearly not in a position to comply within 14 days, any action taken would simply lead to enforcement, in which case I doubt that any penalty would apply.

Ms SUE WALKER: There appears to be no provision to that effect in the Bill. Often penalties are imposed unless a reasonable excuse can be offered. A mandatory penalty imposed for failing to comply within 14 days, as it is in this new clause, should be qualified by words such as "must be complied with not later than 14 days after the request for inspection is received unless a reasonable excuse is proffered". Those are probably not the correct words. However, I did not ask the minister about the case law. I asked: where is the mechanism in the new clause for an employer to circumvent that penalty?

Mrs EDWARDES: We are waiting for the minister to provide a response. It is most unlike him not to.

Mr Kobelke: I answered it before.

Mrs EDWARDES: The member for Nedlands was asking for a specific provision that provides it, not the case law.

Mr KOBELKE: I was trying to resist the opportunity so that we could get on with the Bill. I would like to see a statute if the member for Nedlands could give me an example. She suggested: "This is the penalty unless a reasonable excuse can be given." I am not aware of a statute that applies a penalty of $5 000 unless a good excuse is offered. I do not think we write law in that way.

Ms SUE WALKER: Before the minister guffaws too much, I ask him about the Government's legislation on organised crime, which was copied from the National Crime Authority, and which states that a person will be penalised unless that person offers a reasonable excuse for not turning up with documents. Can I guffaw now, minister?

New clause put and passed.

Clause 103: Consequential amendment of other laws -

Mrs EDWARDES: We have just debated clause 97, which is of like nature but not the same as clause 103. Clause 104 is similar and we may seek to postpone that clause. I seek clarification from the minister before I make a similar request for clause 103. Clause 103(1) states that the Governor may make regulations dealing with amendments. Subclause (2) states -

> An amendment under subsection (1) may -
>
> (a) delete from a written law a provision that relates solely to the Act; and
>
> (b) make changes to a provision to ensure that the omission of provisions relating to the Act does not result in an anomaly in the grammar or formal expression of the provision.

Can the minister outline what that provision will achieve?

Mr KOBELKE: As the member is aware, often attached to a Bill that repeals an Act is a schedule containing the consequential amendments to be made. Clause 103 aims to achieve those consequential amendments in a shorthand way so that the Governor can amend any written law on the expiry of the Act. Therefore, any law that refers to the Workplace Agreements Act after its expiry will have no effect and the law will have that reference deleted. It allows for consequential amendments that no longer have any effect, other than the effect of a tidying

up nature, to be deleted by the Governor through regulations. Those regulations will be disallowable by the Parliament. This course was taken instead of attaching what might have been a lengthy schedule of laws that needed to be tidied up, running the risk that a lot of work would have gone into a schedule of amendments that may not have been accurate. This is a shorthand way of achieving that end.

[Quorum formed.]

Ms SUE WALKER: I agree with the member for Kingsley. This clause is titled "Consequential amendment of other laws". It is the same type of provision as that in clause 97, which was postponed. The clause will allow the Governor to make regulations to amend a written law, thereby usurping the function of Parliament. I support the member for Kingsley's position and ask that this clause also be postponed.

The SPEAKER: Before I give the call, I announce that as we are sitting later tonight, we will break for dinner between 6.00 and 7.00 pm.

Mr KOBELKE: I ask the member for Kingsley to repeat her comments.

Mrs EDWARDES: Although the wording of this clause is different from the previous clause, it is still too broad.

Mr Kobelke: If you have a concern, I will postpone it.

Mrs EDWARDES: I would like this and clause 104 to be postponed. Are there are any other clauses of a similar nature?

Mr KOBELKE: I am sure you will draw our attention to them if there are.

Further consideration of clause postponed, on motion by Mr Kobelke (Minister for Consumer and Employment Protection).

Clause 104 postponed, on motion by Mr Kobelke (Minister for Consumer and Employment Protection).

Clauses 105 to 108 put and passed.

Clause 109: *Industrial Relations Act 1979* amended -

Mrs EDWARDES: Clause 109 seeks to amend parts of the Industrial Relations Act to recognise that workplace agreements will expire. Subclause (6) will repeal section 26A, which states -

> **Workplace agreements not to be taken into account**
>
> In the exercise of its jurisdiction the Commission shall not -
>
> (a) receive in evidence or inform itself of any workplace agreement or any provision of a workplace agreement; or
>
> (b) award particular conditions of employment to employees who are not parties to a workplace agreement merely because those conditions apply to any other employees who are parties to a workplace agreement.

I understand that the Industrial Relations Commission may in some instances have a role in the transitional provisions that will follow the expiration of workplace agreements. Could the minister explain what removing this section will permit?

Mr KOBELKE: As the member will know, the Workplace Agreements Act does not allow the commission to reference a workplace agreement. Although we will abolish the agreements, there could still be ongoing matters relating to a workplace agreement that may be handled by the commission. It would need to be able to reference that workplace agreement. The repeal of section 26A is part of the mechanisms that will allow the commission to reference a workplace agreement.

Mrs EDWARDES: I had assumed that to be the case. In what circumstances would the commission receive evidence about or inform itself of any workplace agreement or any provision of a workplace agreement; or award conditions of employment to employees who are not parties to a workplace agreement merely because those conditions apply to other employees who are parties to a workplace agreement? It is hard when something is being removed to see what will be provided. The repeal of section 26A will allow the commission to use its ordinary powers when dealing with workplace agreements. Will the confidentiality provisions protecting people who have entered into an agreement still apply?

Mr Kobelke: I seek clarification from the member.

Mrs EDWARDES: In what circumstances will we allow the commission to inform itself? Receiving evidence is a different matter, as it relates to the commission's jurisdiction and a matter being referred to it. The section

refers to the commission informing itself. If that is removed, the commission will be able to use all the powers it has at its fingertips when dealing with workplace agreements. Will the protection of confidentiality provided in the agreements be maintained, despite the fact that it has been removed by virtue of the registrar's being in possession of the workplace agreements register?

Mr KOBELKE: Yes, confidentiality of the record will be maintained. The repeal of section 26A will allow the commission to access those records. It is possible that, through the normal processes of the commission, a record may become public, or at least become available to other parties to an action before the commission. The commission will have powers to place restrictions on publication if it thinks it appropriate.

Clause put and passed.

Clauses 110 and 111 put and passed.

Mr KOBELKE: On a procedural matter, we have made quite good progress this afternoon and the member for Kingsley is making a superhuman effort. We are now moving to a new part in the Bill and we would like to get some more papers ready. Mr Speaker, would it be appropriate to have a 10 minute break? I seek your guidance as to how we could achieve that.

Sitting suspended from 5.11 to 5.24 pm

Clause 112: Section 6 amended -

Mrs EDWARDES: This section is very small but it plays an important part in the award system. Given the role that awards will play in the no-disadvantage test for employer-employee agreements, it will be critical for employers to have immediate and updated information as quickly as possible. We have identified that awards in most instances have become dinosaurs and there are probably a number that no longer have any relevance whatsoever.

Mr Kobelke: Does that make me a palaeontologist?

Mrs EDWARDES: I have known some wonderful palaeontologists, particularly when I worked at the Western Australian Museum.

I will highlight some concerns: the power to make an interim award, the reverse onus of proof in respect of an award, and the leapfrogging effect. The leapfrogging effect occurs when an industrial agreement provides for increases in wages, conditions and the like that are appropriate for that body. Within that process are enterprise orders, the awards, and the minimum conditions of employment. I have said to the minister on a number of occasions that the drafting of this legislation is very complex. People cannot always go to a particular section in the legislation and know with absolute certainty that they have everything that is relevant to that section, or the related amendments, because when the page is turned, or the next division comes up, there is another series of amendments that will also impact on that particular section. Given the importance of awards, and their relevance to industrial relations workplace arrangements, will the minister identify the concerns related to the leapfrogging effect before we discuss the amendments to the sections? How will awards be seen within the bigger picture of the industrial relations scene; how will that scene be impacted upon; and how will the awards be amended? We have talked about the word "obsolete". What will that mean? What is happening at the moment and how shall we ensure that there will be immediacy in the information?

I highlighted before the example of the Council of Small Business Organisations Association downloading information from the web site of the Western Australian Industrial Relations Commission. That information related to the restaurant, tearoom and catering workers' award and was clearly out-of-date. Perhaps the web site of the Department of Consumer and Employment Protection has up-to-date information but, again, that information base may not necessarily be one that small businesses fully understand.

Employers who must work with the awards find them difficult to interpret. The awards have not been kept up to date and have become largely irrelevant to a number of small business organisations. As an example, I raised a question with the minister about the state research stations and agricultural schools. The issue was being dealt with between the Department of Consumer and Employment Protection and the Department of Education. However, there are a small number of people at the state research stations and agricultural schools. They were awarded a pay rise on 1 August 2001.

[Quorum formed.]

Mrs EDWARDES: There were only 80 workers and one very specific award; yet it took from 1 August until the end of December to pay that award rate. The advice was that although it was in the interests of both the departments and the employees to have wage increases processed promptly, the need to ensure any such

adjustments were accurate and in accordance with formal advice precluded absolute guarantees to meet very tight time frames. That highlights the potential problem for employers in the private sector as well.

Mr KOBELKE: The member has asked a very important question relating to the modernisation of awards. A range of factors will help drive this. It will also be the policy of government to drive the updating and modernisation of awards. I will quickly go through those key components, because we do not have the ability for a general debate while we are dealing with clause 112. However, it relates to the objects of the Act, and that is what I will be speaking to. A key element, which I have already mentioned, is that the establishment of a form of statutory individual contract, which we call the employer-employee agreement, alongside our preference for the collective agreement, is a real driving competitive force to get people who wish to use the awards to ensure they are relevant, up to date and applicable to the interests of industry as well as fair to employees.

Secondly, a range of provisions in the amending Bill will help to expedite and improve the processes by which awards can be updated. I refer the member to the new object of the Act in proposed paragraph (af), which is not the one we are dealing with at the moment; we are dealing with proposed paragraph (ca). Proposed paragraph (af) states -

> to facilitate the efficient organization and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;

Issues such as equity and fairness have been raised already. We are making it very clear for the first time that the commission needs to take full consideration of the efficient organisation and performance of work according to the needs of an industry and enterprises within it. That then brings us to the restrictive practices in awards. It can be argued that they are counter to that object of the Act and on that basis we can modernise awards. We are driving it through that section of the Act and in other places.

Thirdly, a very important component is that the parties have to work through these issues and resolve them through the avenue of the commission and, hopefully, with its assistance. It is not for us to dictate what will be the outcomes that are of direct benefit to particular enterprises or industries. We might see those in general terms and be a party that puts a point of view from time to time, but that matter must be driven by the key parties - the employers and the unions representing the employees. I mentioned those three factors briefly because I do not think it appropriate or proper to have a general debate. However, as we are relating to the start of the section on awards, matters relating to those other factors will be reflected in the provisions under this part, not the EEA competition because we dealt with that in an earlier clause.

Mrs EDWARDES: Clause 112 will amend section 6 of the Act by inserting -

> (ca) to provide a system of fair wages and conditions of employment;

Two amendments standing in my name seek to amend the object of the Act. I thank the minister for his comments, particularly when he referred to proposed paragraph (af), because it was missing in the draft that went out to the community. It was one of the issues that had been highlighted in terms of a lack of balance. I move -

> Page 119, line 5 - To insert after "fair" the words "minimum safety net of".

The reason I am suggesting that we insert those words is to emphasise that the role of the commission must continue to be to set only minimums and not actual wages and conditions. That has been its primary role, although overseeing the Minimum Conditions of Employment Act is a new role that it will undertake. The community believes that this is very important. It takes away nothing from the clause put forward by the minister, which will provide a system of fair wages and conditions of employment. Essentially, it emphasises the role of the commission as seen by the community. This amendment will mean that the object will be to provide a fair minimum safety net of wages and conditions of employment.

Mr KOBELKE: The amendment is not acceptable to the Government because the award system is a part of our system which is being brought in with these amendments. It has more than one role. The amendment being moved by the member for Kingsley restricts awards to the limited role of being a minimum wage, a safety net. That is a very important role for awards, but it is not the only role; the amendment would restrict them to that role. Awards will also be used in some areas to reflect what is a fair industry standard in a particular group of enterprises. Under the current system, industrial agreements are left to play that role, and that is part of the reason awards have languished and have not been kept up to date. A reassessment of the relative roles, strengths and the use of awards and industrial agreements will also develop out of this. It may be that the award becomes a standard that is used for an industry or a section of industry and leaves no need for industrial agreements. It may be that the key industry players - both the business and the employees represented by the unions - in the area of, say, information technology, decide that they will use an award. It might be well above the general safety net that is applied in most other industries. The award might build in the flexibility and the productivity

that the industry needs and also provide levels of remuneration. We are not restricting the role of awards to just the safety net. We clearly recognise that that is an extremely important and fundamental role of awards in general, but awards may develop other uses through this process. The acceptance of that amendment would preclude awards playing that additional role, as well as being a general vehicle for minimum standards.

Mrs EDWARDES: I accept what the minister is saying. That is the real concern of the community. An industrial agreement generally goes across an industry, and while the Bill limits enterprise orders to single employers, industrial agreements are not so limiting. An industrial agreement can go quite easily across an industry. The issue is that an industrial agreement could increase wages, salaries and conditions and take in flexibilities and the like, but might cover an industry that is different enterprise by enterprise. Accordingly, if provisions were picked out of an industrial agreement and put into an award, a leapfrogging effect would occur. If an industrial agreement amends the award and takes in the breadth of employers in an industry, there will also be enterprise orders. The Industrial Relations Commission could pick out what is good in an enterprise order and insert that into an award. The Minimum Conditions of Employment Act could also be changed and those changes could be inserted into an award. The employer-employee agreements, which are subject to a no-disadvantage test, would add to this constant spiral. It might require continual jumping up to the next rung of the ladder. If these continual increases in conditions, wages and the like mean that it keeps going up the ladder, at some point it will reach the top and they will all fall off. The concern is that this will create huge pressure to produce a consistent roll on effect across the board. I can find nothing that restricts the commission's powers to do that. It is a major concern.

If this amendment were passed, it would ensure that the commission has a role in modernisation. That is one thing we would clearly ask for if a no-disadvantage test were applied. However, this ability to continually increase the terms, conditions and wages provisions of awards, according to industry agreements and the like, will create a huge flow-on effect that will impact right across industries which involve different enterprises. These words should be inserted to emphasise that the commission should get on with the job of modernisation. The key factor is that the award presents a minimum safety net. The award can take into account the needs of the industry and from time to time can also recognise individual enterprises, as has occurred before. An award is still in place that deals with Bairds department store, and another was established in the old days for David Jones. I am not sure that current David Jones employees want to be paid according to that award. There is a real problem with how to overcome the common rule. That is a critical issue.

If the philosophy of the Government is that it does not have a problem with the awards continually being part of the spiral of picking up the best parts of industrial agreements, there is nothing I can say to convince members opposite otherwise. The community firmly believes that awards act as a safety net, yet they do not provide the minimum conditions. We are not saying that award conditions should be kept at the minimum, but that they act as a minimum safety net. The Minimum Conditions of Employment Act underpins it even further, although in some instances the way in which the Act can be amended and the like will often drive changes in the awards as well. There will be a constant leapfrogging effect, which is of major concern.

Ms Sue Walker: Mr Speaker, I draw your attention to the state of the House.

The SPEAKER: Unfortunately, the required time between calls for quorums has not yet expired. There is another minute to go.

Mr KOBELKE: I do not accept what the member for Kingsley has said about the spiral. I know that some people have that fear. I do not think it is a likely outcome. If incentives are not allowed in terms of a trade off such as greater efficiencies and more flexibility in awards, which are reflected in other advantages to employees such as remuneration, there will not be a drive to modernise and update. It will be a much more dynamic and vital process in which both parties will play their roles. There is a balance in the objectives of the legislation. Through the guidance and role the commission will play, the parties must agree to it. Although awards will primarily be a safety net, that updating needs to leave open the ability of awards to perhaps develop in other ways. I do not see that as leading to a spiral in wages, but as a way to ensure that awards better suit the needs of industry. Employers and employees will consider trade-offs to achieve much better terms and conditions.

[Quorum formed.]

Amendment put and a division taken with the following result -

Ayes (18)

Mr Barnett	Mrs Edwardes	Mr Marshall	Ms Sue Walker
Mr Birney	Mr Edwards	Mr Pendal	Dr Woollard
Mr Board	Ms Hodson-Thomas	Mr Barron-Sullivan	Mr Bradshaw *(Teller)*
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	

Noes (26)

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

Pairs

Mr Ainsworth	Mr Ripper
Mr Grylls	Mr Dean
Mr House	Mr Brown

Amendment thus negatived.

Mrs EDWARDES: I move -

Page 119, after line 6 - To insert the following -

(2) After section 6(ca) the following paragraph is inserted -

(cb) to support enterprise bargaining;

The aim of the amendment is to strengthen the objects of section 6. It would add a new object to the clause to include enterprise bargaining. Enterprise is the actual business operation in a workplace and can comprise the whole of the operation or part of an operation. In the majority of cases, it would refer to a single employer. On the other hand, an industry deals with a number of employers. For example, in retailing there are a number of enterprises within that industry, including Myer, David Jones Limited, Retravision, the local fish and chip shop, Dewsons Supermarkets and local supermarkets and delicatessens.

An industry can comprise a very broad range of enterprises and employers. An industrial agreement applied broadly across an industry would cause major problems, particularly if awards covered the whole industry. The minister has said he is very comfortable with that because it helps with the modernisation of awards and provides some flexibility, albeit at different levels, that we have both talked about. The Opposition has a problem with the awards and the leapfrogging effect of conditions, benefits, wages and allowances that they create at the highest levels of the industrial agreements. We hope the commission will ensure that is not done. We hope also that the commission endeavours to encourage enterprises to take into account those leapfrogging effects when it considers the awards.

My amendment supports enterprise bargaining. It is an attempt to wave a flag at the commission so that when it considers changes to awards, it supports enterprises as opposed to industries. I highlight the concerns of the community and hope that the commission takes the whole industry into account. Industrial agreements are an effective and economical way for unions to ensure that they can cover an industry. It is also an economical use of their resources by going to the commission and ensuring that the best of the workplace agreements and orders are used in the awards. I have no doubt that unions will seek to use the industrial agreement provisions, which we will refer to shortly, in the broadest way because it will be a far more efficient use of their resources. We will highlight those problems when we get to them. Flow-on effects of industrial agreements down to awards cause major concerns across industries.

Mr KOBELKE: I fully support the intent of the amendment but I do not think it is needed. I draw the member's attention to the new object in clause 125(2)(ag), which states -

> to encourage employers, employees and organizations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises;

That is a definition of enterprise bargaining. It does not need to be given a title in the object if it is already fully and appropriately described in the legislation. If we add this amendment based on our current understanding of enterprise bargaining, it would limit and capture the intent by only the current meaning of the words. Clause 125(2)(ag) describes enterprise bargaining as an object of the Act. The Government's and the Opposition's intentions are at one; however, we do not gain much by adding those words when proposed paragraph (ag) clearly indicates that the object of the Act should be to encourage enterprise bargaining. It is a fuller description rather than using just the title.

Mrs EDWARDES: I wonder whether the minister would put on the record his views of the objects of the Act when the commission refers to the legislation when it amends awards.

Mr Kobelke: It is appropriate to do that when we refer to the objects to which I drew the member's attention. We will deal with the amendments to the objects of the Act later.

Mrs EDWARDES: Would it not be nice if they were all in the same amendment? We are dealing with the objects under awards now. I am happy to discuss them later; however, I thought it would be more appropriate to deal with them now. The impact that will flow on to awards will be great. Therefore, some concerns have been raised about how the provisions will apply in the industrial agreement section and how they will apply to multiple employers and the potential they will have on pattern bargaining. The issue becomes even worse when it relates to the provisions being picked up and placed in awards. At this stage, when the commission considers modernising those awards, it should deal with industrial agreements against enterprise agreements.

Suspended from 6.00 to 7.00 pm

[Quorum formed.]

Mr KOBELKE: I had tried to point out that although the Government accepts that it would be worthwhile to have this paragraph in the objects, it is already there; therefore, we do not need to include it. The member asked me to try to explain the importance of enterprise agreements.

Mrs Edwardes: In terms of award making.

Mr KOBELKE: Award making?

Mrs Edwardes: We were talking about industrial agreements relating to enterprises and how they should apply in awards.

Mr KOBELKE: The use of enterprise agreements has led to considerable improvements in productivity in industry. It was driven by Labor Governments at a federal and state level through the late 1980s and into the 1990s. I do not think it is appropriate to go into a lengthy discussion of how they worked and their provisions, other than to say that they led to the replacement of awards as the basis for employment in many workplaces. The productivity that flowed from them, with pay increases being tied to productivity improvements at the time, was very beneficial. However, in many industries it is no longer viable to have pay increases tied to productivity increases, or changes in the workplace that produce productivity increases. Obviously, in some areas that system will continue and be beneficial. However, in many areas there cannot be such a direct relationship between increases in wages and salaries and changes to work practices to increase productivity. That will always be an ongoing issue. Now we must consider where the awards fit into this. Some awards have considerable flexibility.

The Government is very aware that many awards have simply languished, and have not had their levels of pay increased to what would be considered reasonable community standards. Some awards are very restrictive because of the range of conditions they contain. It is a real issue to make sure that awards are updated and modernised. Through that process, an overlap may be found between the use of industrial agreements and the use of awards. The fear expressed by the member is that somehow that will lead to a leapfrogging situation, where increases in wages get out of control because of one increase being placed on top of another increase. That is always a potential threat, although it is not a particularly real one, given the system that is in place, and the change in the object of the Act, which not only looks for fairness but also considers the needs of enterprises and industry. It is a balancing act, as industrial relations always are, and putting a fairer and more balanced system in place gives some certainty that there will not be a real threat from spiralling wage increases, through the leapfrogging of awards over each other.

Amendment put and a division taken with the following result -

Ayes (17)

Mr Barnett	Mr Edwards	Mr Pendal	Dr Woollard
Mr Birney	Ms Hodson-Thomas	Mr Barron-Sullivan	Mr Bradshaw *(Teller)*
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	
Mrs Edwardes	Mr Marshall	Ms Sue Walker	

Noes (24)

Mr Bowler	Mr Hyde	Mr McGowan	Mr Quigley
Mr Carpenter	Mr Kobelke	Mr McRae	Ms Radisich
Dr Edwards	Mr Kucera	Mr Marlborough	Mrs Roberts
Dr Gallop	Mr Logan	Mrs Martin	Mr Watson
Ms Guise	Ms MacTiernan	Mr Murray	Mr Whitely
Mr Hill	Mr McGinty	Mr O'Gorman	Ms Quirk *(Teller)*

Pairs

Mr Ainsworth	Mr Ripper
Mr Grylls	Mr Dean
Mr House	Mr Brown

Amendment thus negatived.

Clause put and passed.

Clause 113: Section 29A amended -

Mrs EDWARDES: This clause provides that -

> **"area and scope provisions"** means the parts of an award or industrial agreement that relate to the area of operation and scope of the award or industrial agreement.

Section 29A provides -

> (1) Where an industrial matter has been referred to the Commission pursuant to section 29, the claimant or applicant shall specify the nature of the relief sought.

Subclause (1) will extend the scope of the section by including a new area and scope and paragraph (b) extends it further.

Subclause (2) deletes a series of words. The subsection provides -

> (2) Subject to any direction given under subsection (2a), if the reference of an industrial matter to the Commission seeks the issuance of an award . . .

This subclause seeks to delete -

> . . . , or the variation of the area of operation or the scope of an award or industrial agreement, or the registration of an industrial agreement, the Commission shall not hear the claim or application until those parts of the proposed award, variation or industrial agreement that relate to area of operation or scope have been published in the *Industrial Gazette* . . .

Unless they are published in the *Industrial Gazette* the provisions are invalid. The words proposed to be substituted are essentially the same -

> . . . the Commission shall not hear the claim or application until the area and scope provisions of the proposed award or industrial agreement have, or the proposed variation has, been published in the required manner

What is the difference?

Mr KOBELKE: It is simply a tidying up of the language. There is no material change.

Mrs Edwardes: Is it because of the way these provisions have been published? That issue will come up later. That is the effect of the change.

Mr KOBELKE: Yes.

Mrs Edwardes: Will the minister explain the addition in the area and scope provisions in proposed section 29A(1a)?

Mr KOBELKE: That formalises what we previously talked about. The award will use the standard phrase "area and scope provisions". It is a simplification of the wording and the changes have no material effect.

Mrs EDWARDES: Under proposed section 29A(2c) the area and scope of an award may be amended under section 40A without the proposed variation being published in the required manner. Proposed section 40A deals with industrial agreement provisions being incorporated into awards by consent, so why not publish them?

Mr KOBELKE: An industrial agreement can be incorporated into an award only if the parties agree. If all parties agree there is no need to advertise, because they already know.

Mrs EDWARDES: The EEAs need to satisfy a no-disadvantage test that is linked to an award. I would have thought the more information the Government gave to the public the better this system will work.

Mr KOBELKE: The industrial agreements that are inserted into the award apply only to the parties to the agreement and do not have universal application.

Mrs Edwardes: The award does not have universal application?

Mr KOBELKE: The provisions that will be inserted into the award have application only to the parties who have agreed to them. They do not have wider application.

Mrs Edwardes: Let us suppose that Hamersley Iron Pty Ltd has a single agreement, and there is also a metal workers award, which is universal. Would this pick up some of the sections that relate to Hamersley Iron and put them in the metal workers award, but would apply them only to employees of Hamersley Iron?

Mr KOBELKE: We are leaving that open for employers who wish to do that, in which case there is no need to advertise that that has taken place.

Mrs Edwardes: The Government must have a reason for doing that. If an employer has an agreement, why would that employer want sections of the agreement, or the whole agreement, inserted into an award? I take it that the award does not stand on its own.

Mr KOBELKE: This is one of the many elements that relate to modernising awards.

Mrs Edwardes: It applies only to parties to the agreement. Why insert it into an award?

Mr KOBELKE: They seek to do that as a mechanism to modernise and create flexibility for their enterprise.

[Quorum formed.]

Mrs EDWARDES: Even though these proposed subsections deal with variations to awards, I propose to move an amendment. The minister has said that the insertion into an award is relevant only to the parties to the agreement and has no relevance to any other person. The amendment to insert a new subsection (2c), which provides that the area and scope provisions of an award may be amended without having been published in the required manner, will ensure that anybody who may wish to be informed and is interested and/or involved in an EEA, and for whom the amendment may have some relevance, will not be informed. Therefore, I move -

> Page 120, lines 26 to 31 - To delete the lines.

Amendment put and negatived.

Clause put and passed.

Clause 114: Part II Division 2A heading and section 36A inserted -

Mrs EDWARDES: The Opposition has two major concerns about this clause. One concern is that it reverses the onus of proof. At the moment the relevant section deals with the making of an award for non-award employees.

Mr Kobelke: That is correct.

Mrs EDWARDES: Proposed subsection (1) reads -

> In any proceedings in which the Commission is considering the making of an award (**"the new award"**) that extends to employees to whom no award currently extends (**"the employees"**), the onus is on any party opposing the making of the new award to show that it would not be in the public interest.

That is an amazing reversal of the onus of proof. The second concern relates to proposed subsections (2) and (3), which deal with the making of an interim award. I will deal with that shortly.

I want to refer to a case between Hamersley Iron Pty Ltd, the appellant, and the Association of Draughting, Supervisory and Technical Employees, Western Australian Branch, the respondent. That case was an appeal from a decision of the Full Court of the then Western Australian Industrial Commission, and it was heard by the presiding judge, Mr Justice Brinsden, and Mr Justice Kennedy and Mr Justice Olney, sitting as the Western Australian Industrial Appeal Court.

Mr Kobelke: When was that?

Mrs EDWARDES: It was 1984. The reference is 64 WAIG. 852. I think the minister would accept that those three judges are eminent both in their own right and by virtue of the work they have done. In the first instance the commission held that there was a prima facie right for a union to have an award. That was a novel approach. On appeal, Mr Justice Brinsden said -

> I do not think it proper to erect as a proposition of law previous rulings that a union is *prima facie* entitled to an award. In all cases it will be necessary to reach the decision in the light of the provisions of section 26 and it would seem the union which desires an award would have the burden of establishing that on the substantial merits of the case an award should be made. In this particular case the Commissioner clearly formed the view the substantial merits did not justify making the award . . .

In other words, there is no prima facie right for a union to have an award.

Mr Justice Brinsden then quotes the senior commissioner - I am not able to say who was the senior commissioner - as saying -

> "In some respects at least the claim was in terms no different from the agreement but in my view the central issue is whether the employees concerned were entitled to have the protection of an award of the Commission rather than any provided by their contract of employment or the agreement".

Mr Justice Brinsden continues -

> I agree that that was the central issue but the question is not to be answered simply on the basis of some supposed entitlement but rather on whether the Union has satisfied the Commissioner on the substantial merits it should have the protection of an award, taking into account what was urged to the contrary.

The proposed section reverses totally the onus of proof that has been laid down in law that there is no prima facie right for a union to have an award.

Mr KOBELKE: I will respond to that as the member is getting up a bit of speed and wants to continue. I will not break her train of thought for long. The member is quoting a judgment that is very relevant, but it is not the position of the Government. I am not familiar with the judgment, but what the member has read out so far is interesting. The judgment refers to a union not having an entitlement of itself.

Mrs Edwardes: A prima facie one.

Mr KOBELKE: I accept and do not have a problem with that. However, under the section 26 provisions, it will be on the basis of whether there is a public interest in the making of an award; and it should be easy to establish that. It is not based on what is clearly part of the counterargument in that decision of nearly 20 years ago about why in that case an award should not be made. We would like to have awards updated and award coverage extended. We want to make awards more readily available. It is on the basis of the conditions in section 26, one of them being that it is in the public interest to have an award. I am simply saying that this proposed section is to more easily allow the establishment of awards. If anyone can put a case that an award would not be in the public interest based on the other requirements under section 26, it will not be established. We should not make it so difficult to establish an award that those who seek to oppose it, in their own valid interest, gain the upper hand in the process. We would rather people who wished to establish an award have the first opportunity and an advantage in the process. However, if, as that full and proper process is followed, it can be clearly ascertained that the establishment of an award would not be in the public interest, it will not be established.

Mrs EDWARDES: Clearly the legislation will change the balance.

Mr Kobelke: Absolutely; I accept that.

Mrs EDWARDES: The minister has referred to the power belonging to only one side of the equation. This Bill will reverse it and, as the minister said, make it easier to establish awards. That might not provide the balance; it might be shifted.

The minister referred to the public interest. I was in Victoria when two unions were having a demarcation dispute over call centres. Call centres represent a brand new industry and an award was not in place at that time. The two unions decided that they wanted the membership of the call centre employees. Both unions separately visited the call centres and gave the employees the good oil about themselves and indicated their desire to represent them. The employees told them to go away; they did not wish to be represented because they were very happy with their terms and conditions. Both unions went down to the commission and, despite the wishes of the employer and employees, fought between themselves about who would cover the call centre employees. I do not remember what provisions of the legislation were related. However, at the end of the day, the reverse onus of proof as proposed in the legislation will not provide a balanced approach to awards. The other side will not be heard. It will be much harder for the other side to say that the establishment of an award would not be in the public interest.

In a similar scenario in Western Australia the two unions would present their credentials and identify to the Industrial Relations Commission how they would like to represent the employees at the call centre. Where would the real parties, the employers and employees, be? The employer would have to return to the commission and say that the establishment of that award was not in the public interest. The onus of proof in this case would be an absolute nonsense and would not provide a balance. It is nonsense to impose the onus of proof on any party opposing the application, which is most likely to be the employers, to show that the establishment of an award would not be in the public interest. It will disadvantage employers.

Essentially, it will set up a class war. The minister and the Premier have referred to a class war. Many of these proposed sections, especially this one, will develop the class war by distinguishing people who might want an award - in the call centre example, the employees did not want an award - from an employer who would oppose an award. The public interest test is a very high bar, particularly in instances such as this. The Opposition strongly opposes this proposed section. I do not think the minister has made a case for it. If he wants the establishment of an award to be in the public interest, why has the onus of proof been reversed? It is a travesty.

Mr Kobelke: It is our policy to establish award coverage where appropriate and we wish to facilitate that coverage.

Mrs EDWARDES: Absolutely. The Government will make it easier to get awards. Awards have been around for nearly 100 years, if not longer. They are not a new phenomenon. If the parties involved get their act into gear, the awards will possibly continue to be around, but it is a travesty of justice for the Government to allow new awards to be made for non-award employees and to reverse the onus of proof so that an employer must prove that it is in the public interest to oppose the making of a new award. The Opposition does not support the proposed section.

Ms SUE WALKER: I would like to hear further what the member for Kingsley has to say on this matter.

Mrs EDWARDES: Proposed section 36A(2) provides for the commission to make an interim award. If an employer opposes the making of that new award, he will have to prove that it is not in the public interest. However, in the meantime an interim award may be extended to the employees, pending the making of a new award. An employer would then be behind the eight ball before he had a chance to make an application to the commission. Proposed subsection (3) reads -

> An interim award may be made if the Commission considers -
>
> (a) that it would provide a fair basis for the application of the no-disadvantage test . . .

What happens to the non-award employees who are about to get an award? If they want an employer-employee agreement, the employer must provide an interim award so that the EEA can be tested against it. An interim award is not provided for the sake of providing it; it gives guidelines. However, in this proposed section it will be called an award, which is a much more formal document. Proposed subsection (3) continues -

> (b) that it would protect the existing wages and conditions of employment of the employees until the new award is made; or
>
> (c) that it would be appropriate for any other reason.

Can the commission currently make an interim award; in what instances does it make interim awards; and what is the procedure for making an interim award?

Mr KOBELKE: The Industrial Relations Act currently does not have an explicit provision relating to interim awards.

Mrs Edwardes: So this is the first time explicit powers have been given?

Mr KOBELKE: I said that it did not have an explicit provision. A reputable body of opinion says it can make interim awards but they are not explicitly available and referenced as interim awards. It is new in that respect but it is not new in Australian legislation. The federal Act contains a similar provision for interim awards and its wording is the basis for proposed subsection (3)(b). Proposed subsections (2) and (3)(b) reflect the intent of the federal Act. The South Australian Act also has provision for the making of interim awards.

Mrs EDWARDES: What process will be implemented in this State for respondents to interim awards? In other words, what do employers have to do?

Mr KOBELKE: That matter will be in the hands of the commission, which will make interim awards and will therefore follow through on the other provisions that hang off that interim award.

Mrs EDWARDES: We are dealing with a new award for non-award employees. The employer must prove that it is not in the public interest to make such an award. The clause will give the commission a new power to make an interim award. That will put the employer at a huge disadvantage because no other protections or balances will be put in place. The employer already spends much time and money responding to many of these issues. There will be a large number of award applications, which will mean the expenditure of huge costs and time for the employers. Further, by reversing the onus of proof, the Government will place greater responsibility on the employer and less on the applicant. The Government intends to do that at the same time it introduces the novel concept of an interim award. In the past, the applicant had to prove why an award was required. The Government is introducing two new concepts for non-award employees. That is clearly wrong and we are totally opposed to this clause.

What will be the scope of an interim award, and what will be the consequences of enforcing it?

Mr Kobelke: It will be similar to the status of an order, and will be able to be applied as an order can be applied.

Mrs EDWARDES: I do not know why the Government has included this clause, except that it supports awards. It believes that if no state award pertains to an industry in which people are entering into employer-employee agreements, a federal award can be applied. Obviously, we are talking about new industries and services, such as the example I gave. However, it is clearly wrong to reverse 100 years of industrial relation practices - the proof of the pudding. We are absolutely and totally opposed to the provisions that will reverse the onus of proof and allow the making of the interim award.

Clause put and a division taken with the following result -

Ayes (25)

Mr Bowler	Mr Kobelke	Mr McRae	Mrs Roberts
Mr Carpenter	Mr Kucera	Mr Marlborough	Mr Watson
Dr Edwards	Mr Logan	Mrs Martin	Mr Whitely
Dr Gallop	Ms MacTiernan	Mr Murray	Ms Quirk *(Teller)*
Ms Guise	Mr McGinty	Mr O'Gorman	
Mr Hill	Mr McGowan	Mr Quigley	
Mr Hyde	Ms McHale	Ms Radisich	

Noes (17)

Mr Barnett	Mrs Edwardes	Mr Marshall	Ms Sue Walker
Mr Birney	Mr Edwards	Mr Pendal	Mr Bradshaw *(Teller)*
Mr Board	Ms Hodson-Thomas	Mr Barron-Sullivan	
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	

Pairs

Mr Ripper	Mr Ainsworth
Mr Dean	Mr Grylls
Mr Brown	Mr House

Clause thus passed.

Clause 115: Section 38 amended and a savings provision -

Mrs EDWARDES: This clause was inserted after the draft was released for public consultation. Will the minister explain what it will achieve?

Mr KOBELKE: Clause 115 allows for an extension of the scope of the award. Two mechanisms are generally available. The first is to attach to the award the name of every single business or respondent. The second is to name the class of business which is covered by the award, and that can be achieved within the individual award. This enables the scope of the award to be extended to cover a particular industry in which there is an expanse of new business. For example, a particular award may cover video shops. However, some businesses might be set up as digital video disk libraries. Such libraries would basically cover the same area of business as a video shop, but there would be a definitional issue. In such a case, the award covering video shops can be extended to DVD libraries. We must ensure a ready way to incorporate into the award those businesses that have a different nomination or are new to the industry. This clause enables the award to be extended without having to name every business that is in a particular industry grouping.

Mrs EDWARDES: I did not think that that had to be done under common law. What will this proposed section achieve that is different?

Mr KOBELKE: I alluded to that and said that it can be done within the award. The award can have these types of provisions. Where an award currently is of the style that every business needs to be nominated, this allows us to extend or incorporate without having to go back through the process and name every other business. They can be added to the award by nominating the style of business by definition rather than by nomination of each individual one.

What I said then was not technically correct, but the intent was. One form of award must name all the respondents. We are here extending the ability - and I instanced the video library - to pick up businesses that call themselves DVD libraries. They are not specified by definition as DVD businesses. The award picks up as a respondent one DVD library and that extends to all DVD libraries.

Mrs Edwardes: That is a neat trick.

Mr KOBELKE: My outline of the mechanism was not accurate.

Mrs EDWARDES: I knew there was something tricky about this clause, but I could not put my finger on it.

The SPEAKER: A new, invigorated member for Kingsley!

Mrs EDWARDES: Yes, Mr Speaker. A party can be added to an award involving a new industry, that is, engaged in an industry to which the award did not previously apply, and then common rule applies to the remainder of that industry. Where are the employers in all of this? It is certainly efficient.

Mr Kobelke: We publish to advise all the respondents to the current award; we specifically communicate to all the companies that would be picked up. No, that is not right.

Point of Order

Ms SUE WALKER: Mr Speaker, the member for Kingsley has said that this is quite complex legislation. I am trying to listen to what the minister has to say but a variety of conversations are going on at the same time.

The SPEAKER: It is not really a point of order. Members for Collie, Innaloo and Albany, every conversation you have means that the minister has to speak a bit louder or not be heard. The member for Nedlands wishes to listen to the minister.

Debate Resumed

Mr KOBELKE: There is a need to notify the existing parties, the section 50 parties and the particular party that is nominated for the extension.

Mrs Edwardes: But not those to whom -

Mr KOBELKE: We do not know who they are. One might be here today and gone tomorrow. By way of example, I had a DVD shop next to my electorate office for a while and now it has gone. A lot of these new industries are very mobile; they set up and close down quickly. This means that they can be incorporated by this mechanism for those awards that are currently used for the listing process. If an award already had the style that enabled an extension, it already has these sorts of provisions in it. It is not a new provision. It just enables the older-style award that required the nomination of all respondents to use the other method. That could be done by going back and changing the structure of the award and then powers would be available anyway. We are trying to move the modernisation along quickly and not have everyone go back through the gates that are already there. It is a way of speeding things up to get the modernisation to occur.

Ms SUE WALKER: Was I correct when I heard the minister say there was a need to notify the group of parties in relation to this section?

Mr Kobelke: Yes.

Ms SUE WALKER: Where are the provisions that spell out how the parties are supposed to be notified?

Mr KOBELKE: We are dealing with a change of scope and therefore the provisions of the Act that relate to a change of scope and have those requirements in them are picked up.

Ms SUE WALKER: Which provisions are they?

Mr Kobelke: They are contained in proposed section 29A.

Mrs EDWARDES: Perhaps we should not use the businesses that sell digital video disks as an example because all of a sudden we might get media coverage and the newsflash might be "DVD industry about to be covered by a new award." It will be a surprise for the industry because that is exactly what will happen. All of a sudden an employer starts up a new industry, the industry is then attached to the award by adding that employer and everybody else who can be incorporated into the scope of that industry is again caught up in the process. I know the Government is intent and keen on union involvement and the like but this is ridiculous. This is doing the union's work for it in a short and succinct way and making it very economical for the union movement's resources. I find it amazing every time I read this legislation. I knew the legislation was bad when we first received it. The minister has kept reading and re-reading sections and comparing them with other sections and then a brand new clause comes in and a person thinks, "There is something about this but I cannot quite put my finger on it." However, the nose tells all and I now know what the nose was telling me; this is bad legislation.

Clause put and a division taken with the following result -

Ayes (25)

Mr Bowler	Mr Kobelke	Mr McRae	Mrs Roberts
Mr Carpenter	Mr Kucera	Mr Marlborough	Mr Watson
Dr Edwards	Mr Logan	Mrs Martin	Mr Whitely
Dr Gallop	Ms MacTiernan	Mr Murray	Ms Quirk *(Teller)*
Ms Guise	Mr McGinty	Mr O'Gorman	
Mr Hill	Mr McGowan	Mr Quigley	
Mr Hyde	Ms McHale	Ms Radisich	

Noes (18)

Mr Barnett	Mrs Edwardes	Mr Marshall	Ms Sue Walker
Mr Birney	Mr Edwards	Mr Pendal	Dr Woollard
Mr Board	Ms Hodson-Thomas	Mr Barron-Sullivan	Mr Bradshaw *(Teller)*
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	

Clause thus passed.

Clause 116: Sections 40A and 40B inserted -

Mrs EDWARDES: Some of the concerns I have raised about this part can be seen in this clause. It provides for the incorporation of industrial agreement provisions into awards by consent. Not everybody gets a chance to consent to what they will be covered by under an award.

Point of Order

Ms SUE WALKER: There are a lot of conversations going on and I am trying to hear the member.

The SPEAKER: It is not a point of order. If members wish to have a conversation, they should hold it outside.

Debate Resumed

Mrs EDWARDES: Clause 116 allows for the commission to incorporate industrial agreements into awards if the parties consent. The variation appears to be limited to those parties. Those terms will then be used for the no-disadvantage test for the employer-employee agreement for the affected employers. Are they the ones who have agreed, or will any employer who wants to enter into an EEA then be caught by that award, and therefore those new provisions, as a result of the industrial agreement?

Mr KOBELKE: I hope I understand the question asked by the member. If the industrial agreement is incorporated into the award, it is by the consent of the parties. Therefore, it could be used as a no-disadvantage test for an employee of those parties, but not another employer.

Mrs Edwardes: But if an industrial agreement applies, you cannot have an employer-employee agreement in any event.

Mr KOBELKE: No, this is where the industrial agreement has been subsumed into an award. Presumably, the industrial agreement is no longer current. The award is set up some time later. That has been confirmed by my advisers.

Mrs Edwardes: Could you tell me that again?

Mr KOBELKE: We are dealing with a situation in which an industrial agreement is incorporated into an award. It is clear from the title to proposed section 40A that that can be done only by consent. That means that if the award had wider coverage, as it could, it could not be used for the no-disadvantage test, other than for those employers who agreed to the incorporation. The other issue the member for Kingsley rightly raised was that this would of course be of no value or effect if the industrial agreement were in place, because the no-disadvantage test could not be applied to an EEA. However, the employer and employee representatives who consent to the incorporation of the industrial agreement into the award may do so because the industrial agreement has not been maintained or has lapsed. A set of provisions remains within the award for those parties. In that case, it would potentially be open to them to seek to register an EEA for those employers only; that is, an employee of those employers who agreed to the incorporation. The no-disadvantage test would take into account what had previously been in the industrial agreement and was now incorporated in the award.

Mrs EDWARDES: The minister said that the employees would agree to the incorporation of an industrial agreement into an award, but he probably meant that the employers would agree. Employees do not have to agree.

Mr Kobelke: Their representatives - the unions - would have to agree.

Mrs EDWARDES: The unions would have to agree because they had been a party to the agreement. What the minister is contemplating, but which the proposed section does not make clear, is that an award can incorporate an industrial agreement but that the industrial agreement might still apply, or that the provisions of the industrial agreement could be incorporated into an existing award. The industrial agreement would still apply. However, if an award were varied, that variation would still apply only to the parties to the industrial agreement. Therefore, it is not to be used for the purpose of an EEA. A number of clauses have been included in the Bill to put things beyond doubt. Does the minister need to reflect upon that between now and when the Bill is recommitted, just to put it beyond doubt? References to "industrial agreement" have been taken out of all EEA clauses. By incorporating those provisions into the award -

Mr Kobelke: If you look at the last part of proposed section 40A(1), does it not make that -

Mrs EDWARDES: Proposed section 40A(1) states -

> . . . the variation shall be expressly limited to the employees and employers to whom the agreement extends.

It could involve a situation in which an EEA is about to be registered. The registrar has looked all over the place for a suitable award but cannot find one. He is able to look nationally, but he might still not be able to find one. In that case, an industrial agreement would be incorporated into an award and it would fit the Bill. What would the registrar do in that case? Would he not refer to it?

Mr KOBELKE: As the member pointed out, in that case, for the purpose of the registration and the use of the no-disadvantage test for the employer-employee agreement, reference would be made to the award. The registrar could not reference those provisions within the award that had been placed there by consent from the industrial agreement. The rest of the award would be the basis of a no-disadvantage test.

Mrs Edwardes: Would he not be able to reject the EEA on the basis that it did not meet any of the variations incorporated into the award by virtue of the industrial agreement?

Mr KOBELKE: That is correct.

Mrs EDWARDES: I am labouring this point because a couple of issues must be dealt with. Awards are very complex and confusing documents now in any event, without added variations that do not apply to all employers bound by the law. This is a complex way of doing it. If an employer and an employee wanted to incorporate an industrial agreement into an award, why could they not incorporate the industrial agreement into its own award rather than try to vary it to another award? It is not even part of the modernisation process of awards. If it did

not apply to other employers, unless it will be used to create pressure for a flow-on of those consent variations to all employers bound by that award, it would make sense for the minister to go down this path again. It might also create an industry standard that would add extra pressure to it. How can anybody argue against the new fair wages and conditions of employment object that we just incorporated? These respective variations to the agreement are almost being established as an industry standard. In the first instance, those variations might have applied to only the parties that agreed. However, it could be used as a tool to put pressure on all those employers who are party to that award.

Mr KOBELKE: The central question the member asked related to why we needed this power to vary an award by incorporating the industrial agreements of consenting parties. We are trying to give people the flexibility to develop the instruments that suit their purposes as we go down the road of modernisation. If it means that parties come to an agreement in addition to what is in an award and they wish to use that option to give certainty for enforcement later, they can do that within the award. One employer might employ some people on an award and others on an industrial agreement. In negotiations for their next round of employment conditions they might decide that what they want is close to the award. They would then have to decide whether to replicate the award with some variations or adopt the award with some variations. We are providing that flexibility. If the parties agree, they will be able to use that slightly different vehicle to incorporate those matters from the industrial agreement in the award.

Mrs EDWARDES: The question I was going to ask when the minister started to speak was, what is the benefit of the incorporation of those variations of the agreement into the award as against the actual industrial agreement? However, by the time the minister finished speaking, he had explained that. Although some people will opt for the industrial agreement, it will not necessarily apply to all the employees of the employer.

Mr Kobelke: That is possible.

Mrs EDWARDES: Incorporating the variations into the award will perhaps shift all the flexible things that have been achieved. All of a sudden, those employees who want to stay on an award will be subject to the variations of the agreement, without their consent. Therefore, the choice for employees, about which the minister spoke earlier, will have gone down the drain again.

Mr Kobelke: I am not sure if what the member said is correct. When the agreement is incorporated into the award, those provisions will cover only the people who are on the agreement. They will not extend to other people, even those in the same enterprise who work under the award. The key point is that it will be by agreement.

Mrs EDWARDES: What is the value of incorporating the industrial agreement into the award? Why would people go down this path? I do not quite understand that.

Mr KOBELKE: It will give certainty to the employees. If it suits the employees to have the industrial agreement put into the award, it will give the employees certainty.

Mrs Edwardes: Why haven't they got that under the industrial agreement?

Mr KOBELKE: Over-award payments are common for workers who are particularly skilled, for example. There are incentive schemes under which workers receive above-award payments. Generally, they have been incorporated into industrial agreements. That is generally how they have been formalised; but they are not always formalised. An enterprise may have basically used the award. It may have used an industrial agreement for part of its work force at some time. It may have a package that appeals because it provides incentive payments or some flexibility that is wanted. That enterprise may want to formalise that arrangement by putting it into the award, because it may not want to go through the process of negotiating an industrial agreement every three years. The arrangement with the industrial agreement may have worked for the enterprise for the past three years, and the enterprise may believe that it will work in the future. Therefore, instead of having the mixture of an award and an industrial agreement as two instruments, we are saying that even though we are not seeking to have the new instrument of the award with the industrial agreement providing total coverage, it is a way of giving certainty; and if an issue of enforcement arises, there is no problem with it.

Mrs EDWARDES: I understand the explanation of why the employers would regard it as important in the context of the continuous negotiations, and I accept that. However, I am still opposed to this clause because of the pressure that is likely to flow on to other employers within the industry, because it will be seen as an industry standard that has been created. That may not happen in the first year or the second year, but, once it has been in operation for some time, there will be real pressure on other employers to be bound by that award. Despite the fact that the incorporation in the first instance was by agreement, the flow-on effect of that consent provision to other employers in the industry is a real one. As such, the Opposition has major problems with this clause and will be opposing it. I move -

Page 123, lines 1 to 23 - To delete the lines and substitute the following -

116. Section 40B inserted

After section 40 the following section is inserted -

Amendment put and a division taken with the following result -

Ayes (18)

Mr Barnett	Mrs Edwardes	Mr Marshall	Ms Sue Walker
Mr Birney	Mr Edwards	Mr Pendal	Mrs Woollard
Mr Board	Ms Hodson-Thomas	Mr Barron-Sullivan	Mr Bradshaw *(Teller)*
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	

Noes (24)

Mr Bowler	Mr Hyde	Mr McGowan	Mr Quigley
Mr Carpenter	Mr Kobelke	Ms McHale	Ms Radisich
Dr Edwards	Mr Kucera	Mr Marlborough	Mrs Roberts
Dr Gallop	Mr Logan	Mrs Martin	Mr Watson
Ms Guise	Ms MacTiernan	Mr Murray	Mr Whitely
Mr Hill	Mr McGinty	Mr O'Gorman	Ms Quirk *(Teller)*

Amendment thus negatived.

Mrs EDWARDES: Proposed section 40B deals with the power to vary awards to reflect statutory requirements to promote efficiency and to facilitate implementation. It provides -

(1) The Commission, of its own motion, may by order at any time vary an award for any one or more of the following purposes -

(a) to ensure that the award does not contain wages that are less than the minimum award wage as ordered by the Commission under section 51;

That is a standard clause. The system can be set up in such a way that it will require only the pressing of a button. However, a number of awards refer to different ages at which a proportion of the adult wage will be applied. Does the award covering clerks still stipulate 25 as the age at which an employee should be paid an adult age? Other awards refer to 21, 23 and so on, although 21 is the norm. I do not know how many awards have been amended to stipulate 18 as the age at which the adult wage will be paid. I imagine very few, if any, have been so amended.

I referred to pressing a button to incorporate and update the minimum award rate. It probably will not be that simple. Obviously, percentage rates must be applied for wages under the adult award rate. That must be dealt with carefully.

Mr KOBELKE: I doubt that awards still stipulate 25 as the age at which an adult wage will be paid. Other provisions in the Act allow the commission to take into account special needs. This does not tie the commission. It is a matter of judgment for the commission, and it will be able to handle those issues according to the provisions that we provide.

Mrs Edwardes: The commission will be guided by the philosophy that underpins this Bill, and it demands immediacy to ensure that the award reflects at least the minimum award wage.

Mr KOBELKE: At any time the commission may by order vary the award for a number of specified purposes. The clause gives the commission the ability to embark on this aspect of award modernisation. This is not dictating that these matters must be taken up at once or cannot be set aside if there are good arguments or delays in implementation. It is at the commission's discretion.

Mrs EDWARDES: In the no-disadvantage test, I understand that the award applies first and then the Minimum Conditions of Employment Act. If the minimum conditions of employment are greater than those in the award, does the greater of the two apply?

Mr KOBELKE: Yes, that applies to the no-disadvantage test. However, we are not dealing with that.

Mrs EDWARDES: No, but it will have an impact.

Mr KOBELKE: It has implications, but this is about award modernisation.

Mrs EDWARDES: It will have an impact. One of the reasons that the Government is progressing with award modernisation is the no-disadvantage test, which will require those awards to be up to date.

Mr Kobelke: It also relates to the objects of the Bill and the needs of industries and enterprises.

Mrs EDWARDES: Proposed new section 40B(1)(b) provides that conditions of employment are not less favourable than those provided by the Minimum Conditions of Employment Act. That will be a simple process, because the commission has the power to change the minimum conditions of employment without coming back to this Parliament. It is a simple process to seek an order and then to apply it across the board to all the awards.

Under proposed new subsection (1)(c) the award must not contain provisions that discriminate against an employee under the Equal Opportunity Act. Under proposed new subsection (1)(d) the award must not contain provisions which are obsolete or which need updating. What is meant by "obsolete"? Is the meaning of "obsolete" derived from jargon, general community standards or an industrial basis?

Mr KOBELKE: The commission has considerable flexibility to go through these provisions. If an award still requires that a certain amount of time or money is paid to the employee to "feed the horses", we can generally say that it is obsolete and need not remain in the award.

Mrs Edwardes: It is important to gauge some legal understanding of how obsolete will be determined. In some instances we can quickly seize on what is obsolete, but in others we might be dealing with what is regarded as an industry or a general community standard. How will the commission determine what is obsolete?

Mr KOBELKE: It will come down to the submissions from the parties, who will refer themselves to the objects in the Bill. The Government has said many times that this is about award modernisation. That has two key aspects. One is to ensure that minimum standards are reasonable, and if some awards have languished they need to be brought up to community standards. The second is the needs of industry and particular enterprises in which the general conditions of employment have changed through the use of industrial agreements, and the awards have not kept up with that. It does not mean that suddenly all these things will change, but it does mean that an engine will be driving the direction of change, and it will be done with the parties able to make representation. The Bill later provides that parties must be advised and must have the opportunity to present a case on the changes that may be put forward. Through that process I hope that we shall see quite radical change that will serve the interests of all parties.

Mrs EDWARDES: In proposed subsection (1), paragraphs (d) and (e) are additions to the document that went out for consultation. Paragraph (e) was obviously a direct result of many submissions.

Mr Kobelke: We have emphasised the need for the commission by putting the objects of the Act in section 6 and also in the award modernisation provisions. It is made absolutely clear that the interests of enterprise and industry are a factor when looking to changes.

Mrs EDWARDES: The words "less favourable" are used in paragraph (b) when dealing with conditions. It is a very loose term. It may very difficult to assess "less favourable" conditions. It would be easy to pick up what is less favourable when dealing with a casual loading of 20, 23 or 25 per cent. However, there may be other conditions of employment are more difficult to assess. I move -

> Page 124, line 3 - To insert after "than" the word "or conflict with".

Proposed paragraph (b) would read -

> to ensure that the award does not contain conditions of employment that are less favourable than or conflict with those provided by the MCE Act;

I believe the inclusion of those words would give a greater level of certainty.

Mr KOBELKE: I am happy to give some thought to this and when the Bill is recommitted, if I have advice to that effect, I will consider it. My first thought is that the amendment complicates the provision. The whole idea is that the award does not contain conditions of employment that are less favourable than those provided by the Minimum Conditions of Employment Act. That wording is much simpler for people to work on. I am not sure that the words "or conflict with" do not add ambiguity.

Mrs Edwardes: If the minister reflects on the wording, he might think of such wording as "other than" or "inconsistent with". He might think that "inconsistent with" is far better than "in conflict with" and it might be easier for determination.

Mr KOBELKE: If the words "inconsistent with" were used, because they are not as strong as the words "in conflict with", one aspect of the award might have to be brought down to a level at which it would satisfy the

other. If the minimum conditions moved up to a bar above the award, the award must move up to that bar. If the award is already above the minimum conditions, there is no difficulty. If the words used are "in conflict with", there may be pressure to bring down the bar of the award because there is a conflict. I would rather work on the basis that the minimum conditions are a bar that the award must rise above. In the very rare circumstance that there is a conflict, let us leave it for the commission to work out and not further corral it or condition it by saying that the commission must look for conflicts.

We are looking at the minimum standards and I think a simple, straightforward gauge such as that is likely to be more effective than incorporating the member's suggested change, although I have some understanding of the benefits she is trying to derive from it. It concerns me that it may confuse things rather than simplify them.

Amendment put and negatived.

Mrs EDWARDES: I move -

> Page 124, line 21 - To insert after "them" the following -
>
> > , and any employer bound by the award that gives notice to the Commission of a desire to be heard,

I raised earlier with the minister that the section 50 parties may not represent all the representative organisations. As such, reference to those employer organisations denies the parties that have an interest in it although the named parties to the award are identified. They, rightly so, should be entitled to be heard. If an award exists where an employer is bound by common rule, the employer is not a named party to the award. How will such an employer have an opportunity to also be heard on any change or variation to an award? I could have made my amendment wider in its reach, but, by including those words, the mechanism for informing people of variations should be left to the discretion of the commission. While there is an issue about consulting section 50 parties, it is clear to a number of organisations that those parties do not represent all employers or all industries. Consideration should be given to allowing a broader range. As indicated previously, the Government will do that in the future, possibly in the next round of industrial relations amendments. I wish to have recognised the parties who want to be heard by the commission as they will be bound by the award.

Mr KOBELKE: The point made by the member is valid. There are many parties to the award. I get many complaints about the Western Australian Chamber of Commerce and Industry. Many people would like to represent themselves.

Mrs Edwardes: The CCI does a good job.

Mr KOBELKE: I am sure many employers would not pay good money if they felt they were not getting a good service. Section 27(1)(k) of the Act provides for an employer, who is not a named party to an award but who has sufficient interest in the matter, to be heard. Such an employer has to be aware of the proceedings, which is a major obstacle. If he is aware, he can seek to be a party and intervene. The provision exists.

Mrs Edwardes: It is not in this section.

Mr KOBELKE: It is in the Act.

Mrs Edwardes: Why incorporate the notification to the existing parties if you do not pick them up? The others are in there anyway.

Mr KOBELKE: These people are not notified anyway. The member's amendment is not changing the notification. Notification is an issue, but, leaving that aside, because that is not what the member is addressing -

Mrs Edwardes: No; I am addressing the right to be heard.

Mr KOBELKE: The right to be heard is already covered under section 27(1)(k) of the Industrial Relations Act. The difference between section 27(1)(k) and the member's amendment is that under section 27(1)(k) a person must apply to be heard. The member's amendment states in part that the person "gives notice to the Commission of a desire to be heard". In that way, the person can simply notify the commission and walk straight into a hearing. That may create problems, because there is no test as to whether that person has a genuine interest. However, under section 27(1)(k), the person simply has to establish that he has an interest and it is then open to the commission to admit him.

Mrs Edwardes: The test in the amendment is contained in the words "and any employer bound by the award that gives notice to the Commission of a desire to be heard". The person must meet that requirement to be heard by the commission.

Mr KOBELKE: Section 27(1)(k) is broader, because it does not require that the person be bound by the award. If the person is bound by the award, I cannot see how he would not be allowed into a hearing, because he is

involved, has an interest and is a party; therefore, he should be admitted. Section 27(1)(k) is even broader than that, because even if someone has an indirect interest, the commission still has the power to admit him to a hearing. However, it is in the hands of the commission to make that decision, and it is not restricted to anyone "bound by the award", as stated in the member's amendment.

Mrs Edwardes: Why should a person not have that right?

Mr KOBELKE: A person who has a genuine interest is already allowed to do that under section 27(1)(k) of the Industrial Relations Act.

Mrs Edwardes: But he must then go through the process of making an application.

Mr KOBELKE: The making of an application just allows for the proper running of the commission. I do not see any problem with that. If a person is going to take the time and trouble to front up and have something to say, there is no impediment to his making an application.

Mrs Edwardes: Why put up another barrier?

Mr KOBELKE: It is not a barrier; it just allows for proper proceedings. Under the member's amendment, if a group of employers had a different point of view from the Chamber of Commerce and Industry and decided that they wanted to make a protest in the commission, 20 or 30 of them could roll up and demand the right. That would not be conducive to good functioning of the commission. Under this proposed section, they must give notice if they are bound by the award, and clearly they would then have a sufficient interest and on that basis would be admitted to make a presentation.

Mrs EDWARDES: The minister did really well with his explanation, but, in the instance of modernising the award, he has not convinced me that they should not have the right to be heard. The test is that the employer must be bound by the award; and, as such, he would have a right to be heard.

Amendment put and a division taken with the following result -

Ayes (18)

Mr Barnett	Mrs Edwardes	Mr Marshall	Ms Sue Walker
Mr Birney	Mr Edwards	Mr Pendal	Dr Woollard
Mr Board	Ms Hodson-Thomas	Mr Barron-Sullivan	Mr Bradshaw *(Teller)*
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	

Noes (24)

Mr Bowler	Mr Hyde	Mr McGowan	Mr Quigley
Mr Carpenter	Mr Kobelke	Ms McHale	Ms Radisich
Dr Edwards	Mr Kucera	Mr Marlborough	Mrs Roberts
Dr Gallop	Mr Logan	Mrs Martin	Mr Watson
Ms Guise	Ms MacTiernan	Mr Murray	Mr Whitely
Mr Hill	Mr McGinty	Mr O'Gorman	Ms Quirk *(Teller)*

Amendment thus negatived.

Mrs EDWARDES: I have outlined some of the issues and concerns that the Opposition has raised about this clause. I hope the minister reflects on them because my amendments were intended to assist the Government in the delivery of its policy.

Clause put and passed.

Clauses 117 to 119 put and passed.

Clause 120: Section 27 amended -

Mrs EDWARDES: Clause 120 deals with amendments to section 27(1), powers of the commission. This part deals with the Industrial Relations Commission and the Industrial Appeal Court and the general good running and operation of those bodies. This clause is attempting to give the commission extra powers so that reasonably expeditious determinations can be made. I think that is the sole aim. Proposed paragraph (ha) states -

> determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties to the proceedings and require that the cases be presented within the respective periods;

I can understand the need for that, particularly in light of a previous commissioner who both the minister and I would agree did not observe what ordinarily would have been regarded as timeliness. Proposed paragraph (hb) states -

> require evidence or argument to be presented in writing, and decide the matters on which it will hear oral evidence or argument;

I will deal first with the determination of the periods. The concern is that this might result in what could be regarded as unnecessary directions for the conduct of a hearing by the commission. Although it could result in expediency and a general flow-on of the matters, a later clause of the Bill will appoint the chief commissioner as the person who can, in consultation with other commissioners, make the determination on the exercise of those powers. The rules of the Supreme Court that relate the running of the court and expeditious proceedings do not allow the chief justice to be the sole person, in consultation with other judges, to make those decisions. Although I can understand the reason for the proposed paragraph, the community believes that it will allow the commission to make unnecessary directions about the conduct of a hearing.

Proposed paragraph (hb) could also curtail parties' rights. I think it has much more serious implications than the first proposed paragraph. I understand the reasoning behind proposed paragraph (ha), particularly in light of past practices and experiences, although I do not know that that bad practice is widespread among other commissioners. Proposed paragraph (hb) will mean that the commission can consider the evidence or argument presented in writing and then decide what oral argument will be heard. That will curtail the parties' rights.

Without fully understanding how that will be applied, we will oppose this clause.

Mr KOBELKE: I am nonplussed, because the member said she would oppose the clause. I cannot understand why.

Mrs Edwardes: I am opposing it because of proposed paragraph (hb), not proposed paragraph (ha).

Mr KOBELKE: The amendments are to section 27 of the Industrial Relations Act, which empowers the commission. The amended section would state -

> (1) Except as otherwise provided in this Act, the Commission may -

I emphasise "may" -

> in relation to any matter before it -
>
> . . .
>
> determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases . . .

We are including in the Act the power for the commission to determine time limits. The commission already requires timeliness, but we will make it absolutely explicit that it has that power. We would expect that to be normal practice, but it is being emphasised by making it one of the commission's powers. Similarly, in appropriate cases, one would expect that evidence would be required in writing. The commission may require the evidence in writing; however, it does not have to have that evidence in writing.

Mrs Edwardes: Is that done now?

Mr KOBELKE: Generally, yes. The member's complaint about the abuse of the process by untrained advocates - one that was previously raised - is valid, because when such advocates appear before the commission, they waste the commission's time. With this head of power, it will be appropriate for a commissioner to require that a matter be put in writing, especially if the commissioner has previously dealt with an unimpressive advocate. The powers of the commission will be clearly stated, and this will prevent a person standing on his digs wanting to know what power requires him to present a submission in writing. Proposed paragraphs (ha) and (hb) deal with matters that are already part of the normal process of the commission.

There is an advantage in making explicit the fact that the commission has such powers if it so wishes to use them. The commission is not mandated to use these powers. However, these paragraphs will explicitly define the commission's powers in the area of timeliness, and in its requirement that evidence or argument be presented in writing.

Ms SUE WALKER: I support the member for Kingsley in her stand on proposed paragraphs (ha) and (hb). Having appeared in courts over many years, it is clear that these paragraphs will work towards a sense of injustice, because -

The ACTING SPEAKER (Mr McRae): I draw to the attention of the member for Kalgoorlie Standing Order No 38, which requires that when members enter and leave the Chamber they must acknowledge the Chair. I remind the member that he must do that.

Ms SUE WALKER: There is a tendency for people to appear before the court to present their own matters. I am not familiar with the Industrial Relations Commission, nor do I know the number of people who appear before the court who are not advocates or solicitors. If a person is required by the commissioner to put evidence in writing and does not have the wherewithal to do so, does the Act contain a provision -

Mr Kobelke: There are discretionary powers.

Ms SUE WALKER: Is there a provision that would allow a person appearing before the court to appeal to the court on the basis that he has been denied justice?

Mr KOBELKE: I assume that the member's question was asked on the basis of these paragraphs being included, and where a person believes that an unfair imposition has been placed on him because he must conform to a time prescription, or a requirement to provide evidence or argument in writing. Appeal provisions exist, and such a person can appeal to the full bench. However, they would get short shrift in most cases. Only if a commissioner made an onerous request with regard to proposed paragraphs (ha) and (hb) would a person have any chance of an appeal being heard in a meaningful way. This is an ordinary and proper procedure, and one that is already applied by most commissioners.

Ms Sue Walker interjected.

Mr KOBELKE: We are putting this into section 27. In the last part of section 27 there is the power already "to give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of the matter".

Ms SUE WALKER: Where did these two provisions come from? Is this peculiar only to the Western Australian jurisdiction or does it come from other jurisdictions?

Mr Kobelke: The advocates have asked for it.

Ms SUE WALKER: Are there jurisdictions in other States in which these two provisions appear?

Mr KOBELKE: The Australian Industrial Relations Commission, which no longer exists, had similar requirements.

Ms SUE WALKER: I have had experience of a few judges, who have been in the commission too long, getting a bit crabby and brusque and cutting people off. Have these provisions appeared only in the federal commission?

Mr Kobelke: No. I have given you one example. I am not aware of every court or commission in the other States.

Ms SUE WALKER: So, the minister cannot tell me?

Mr Kobelke: No.

Clause put and passed.

Clause 121: Section 32A inserted -

Mrs EDWARDES: This proposed section calls for the conciliation and arbitration functions of the commission to be unlimited. The commission can determine matters by arbitration and they may be performed at any time and from time to time as and when their performance is necessary or expedient, and are not limited by any other provisions of this legislation. Proposed subsection (2) states -

> . . . nothing in this Act prevents the performance of conciliation functions merely because arbitration functions are being or have been performed.

This is an extensive and wide power for the commission to do everything and anything whenever it wishes, with no limitations whatsoever. Will the minister explain the rationale behind this proposed section?

Mr Kobelke: For expediency, to remove technical hitches, to move things along and to get a resolution as quickly as possible.

Mrs EDWARDES: Can the minister tell us why? It is an extraordinary power for the functions of the commission in conciliation and arbitration to be unlimited. In which section of the Industrial Relations Act are the functions of the commission to be found?

Mr Kobelke: Sections 32 and 34.

Mrs EDWARDES: Section 32 deals with the reference of industrial matters for conciliation. It is extensive and relates to directions, orders and strike matters. I will return to that section later. Section 44 of the Industrial Relations Act refers to compulsory conference provisions. Those clauses are extraordinary. I would appreciate an explanation from the minister. It is more than just for expediency, because the commission has extensive powers in any event, essentially with no limitation.

Ms SUE WALKER: I will expand on that in support of the member for Kingsley. Can the minister tell me what the words "at any time" mean? Do they mean day or night, or Saturday or Sunday?

Mr KOBELKE: The intent of proposed section 32A is to enable flexibility so that there is expediency in the commission. The words "at any time" mean at any time during the proceedings. Under the current system, which controls how people step through the process, people who find that conciliation does not work then move on to arbitration. When the parties are confronted with arbitration, they find a new will to resolve the matter; however, they cannot go back to conciliation. It is more complex than that.

[Quorum formed.]

Mr KOBELKE: There is already a requirement in section 32(7) of the Act, which states -

> Where a matter is decided by arbitration the Commission shall endeavour to ensure that the matter is resolved on terms that could reasonably have been agreed between the parties in the first instance or by conciliation.

However, that leaves the commission to decide those terms. It is better to let the parties go back to conciliation to resolve the matter, and that happens already in various ways. We are freeing up that provision so that what has sometimes been seen to be a restriction in the system does not arise and people do not feel they cannot go back to conciliation because they are already in arbitration. Although there is some flexibility in the system, and there are examples of people going back to conciliation after they have reached arbitration -

Mrs Edwardes: Do they just change their hat?

Mr KOBELKE: In effect, yes. The stage of the process that has been reached must be signalled. We wish to open up that process. My advice - I am not experienced in this jurisdiction - is that it is a much better and quicker way to achieve happier outcomes with which people can live. If they are better decisions, that is good for the relationships in the workplace, and that is what we want.

Mrs Edwardes: Does that happen in the federal sphere? Can people go back and forth like that?

Mr KOBELKE: The federal sphere does not contain this exact provision. By including this provision, we are trying to move closer to the federal form of functioning, which allows for swapping between conciliation and arbitration. I am talking only about certain areas, because they are constrained by the complexities of the system.

Mrs Edwardes: I thought that people were restricted from swapping between conciliation and arbitration and that notices etc were required to be given, so that people could not have a hearing and then change hats to change the function.

Mr KOBELKE: It depends on which division of the federal Act and which set of processes people are covered by.

Ms SUE WALKER: When a person moves from conciliation to arbitration, is there a process under the Act that must be followed?

Mr KOBELKE: Yes, but it depends on the division. The process moves forward in different ways.

Ms Sue Walker: How many?

Mr KOBELKE: There are quite a few.

Ms Sue Walker: Are there 10, five, 15?

Mr KOBELKE: No, not that many. I cannot give the member for Nedlands an answer at the moment. There is a clear stage at which the conciliation is terminated and the move to arbitration signalled when the matter to be arbitrated must be clearly defined.

Ms SUE WALKER: I have one concern about parties who are in arbitration. How do they shift back to conciliation? I cannot find anything in the Bill that sets that out - perhaps the minister can point it out to me. Can one party do it or must two parties agree to it? Does the judge do it?

Mr Kobelke: The commissioner controls the process.

Ms SUE WALKER: So, he decides?

Mr Kobelke: The commissioner is more likely to be a she after last week.

Ms SUE WALKER: That is a good thing. I refer back to section 32 of the Act. How does the commissioner do that? Where is his power to do that? I know it is in the Act, but how does he refer it back? Can that be done through an order?

Mr Kobelke: The commissioner has a discretionary power.

Ms SUE WALKER: Sure, but what is the process if one of the parties does not like the decision? Can that party appeal?

Mr KOBELKE: We are dealing with clause 121, which is a specific provision. We have tried to link that into the system. It is not appropriate to try to define the whole of the conciliation and arbitration system that surrounds it. The process is in place to resolve disputes and hopefully to lead to better relationships in the workplace. The process has a structure so that people know the rules and how the game is played. However, we want flexibility. The clear role of the commissioner is to resolve disputes and to get people out of the commission and back to work on a sustainable basis that leads to good relations in the workplace. To achieve that outcome, the commissioner can exercise a range of provisions as well as his individual judgment and talents.

Ms SUE WALKER: I understand that those people have skills and talents. I have said that about judges for a while. My concern is that when the commissioner makes a decision, there is no criteria against which to measure that decision.

Mr Kobelke: Not in this clause, because we are not dealing with that. It is in the whole of the legislation.

Ms SUE WALKER: I am asking the minister to tell me the criteria. What would happen if an employer and an employee went to the commission and everything was ticking along nicely but the commissioner suddenly made a unilateral decision to send the parties back to conciliation and the employer or employee wanted to appeal? I can find no criteria against which that decision would be measured. Therefore, how can an appeal court judge whether the decision was just. Is this provision in any other industrial relations legislation in Australia? I asked the minister for a response.

Mr Kobelke: I have adequately answered the question.

Mrs EDWARDES: I will ask the same question. Do any other jurisdictions provide similar provisions? The minister referred to similar practices in jurisdictions and certain areas within those jurisdictions -

Mr Kobelke: We have not lifted this provision out of any other jurisdiction. I am not aware of a similar clause.

Clause put and a division taken with the following result -

Ayes (24)

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

Noes (18)

Mr Barnett	Mrs Edwardes	Mr Marshall	Ms Sue Walker
Mr Birney	Mr Edwards	Mr Pendal	Dr Woollard
Mr Board	Ms Hodson-Thomas	Mr Barron-Sullivan	Mr Bradshaw *(Teller)*
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	

Clause thus passed.

Clause 122: Section 34 amended -

Mrs EDWARDES: This is one of the first clauses that removes rights of appeal. Section 34 of the Industrial Relations Act, to be amended by this clause, states -

(1) The decision of the Commission shall be in the form of an award, order, or declaration . . . shall be signed and delivered . . .

(2) When the members of the Commission in Court Session are divided in opinion on a question, the question shall be decided . . .

Section 34(3) of the Act, as amended, will read -

Proceedings before the President, the Full Bench, or the Commission shall not be impeached or held bad for want of form nor shall they be removable to any court by *certiorari* or otherwise -

(a) on any ground relating to jurisdiction; or

(b) on any other ground.

Section 34(4), as amended, will read -

Except as provided by this Act, no award, order, declaration, finding, or proceeding of the President, the Full Bench, or the Commission shall be liable to be challenged, appealed against, reviewed, quashed, or called in question by any court -

(a) on any ground relating to jurisdiction; or

(b) on any other ground.

That is of concern in the context of what it will achieve.

Mr Kobelke: It is just clarification, because "otherwise" is very broad. The meaning of "otherwise" is being clarified by inserting -

(a) on any ground relating to jurisdiction; or

(b) on any other ground.

Mrs EDWARDES: The legal profession believes that this will prevent prerogative relief being sought on jurisdictional grounds. Prerogative writs operate as an essential check and balance in Western Australia, and have so operated for some time. They ensure that certain types of decisions are subject to review. The view of the Law Society of WA is that by taking away this right -

Mr Kobelke: The Law Society believes that this removes that right?

Mrs EDWARDES: Yes. To take away the right to seek a prerogative writ will not enhance the system, and will more than likely reduce its effectiveness.

Mr Kobelke: That is not our advice. If the member can give us the Law Society's advice, I am happy to have this matter reconsidered.

Mrs EDWARDES: In fact, the advice I have from the Law Society is a copy of the advice that was sent to the minister. Will the minister look at that matter, because that is the Law Society's concern? If that has been corrected, or the minister has legal advice to the contrary, perhaps the person who provided that legal advice could ring the President of the Law Society to clarify that matter so that the Law Society understands the situation. However, that is the advice that we have received from the Law Society; and that advice was provided to the minister. One must ask how many prerogative writs were made last year. I believe they could be counted on one hand. Before recommittal, it would be appreciated if the minister could clarify that position.

Mr KOBELKE: As I indicated by interjection, my advice is that we are not changing the Act in that way. It is just a more specific definition of what is already in the Act. I will check the Law Society's advice and seek further advice on whether this is a substantive change that will further limit the use of prerogative writs.

Mrs EDWARDES: It is not only the Law Society that has come to that view. However, one would obviously take the Law Society's legal interpretation views seriously, because in its submission to the minister it did not enter into the politics or the philosophy of the changes; it dealt with the issue purely from the point of view of a workable document.

The changes to the section will remove the provision for supervision of the commission by the Supreme Court. We will come to another section shortly that deals with appeals. Until the Government changes the provision that deals with the arbitrator - under the Act there is no right of appeal - the central concern is that the right of the court to supervise the commission's decisions will be removed. That would be a serious failure in any system. Those are the concerns. It would be appreciated if, before the recommittal stage, the minister would discuss this matter with the legal profession, particularly the Law Society, and then advise the House.

Clause put and passed.

Clause 123: Section 49 amended -

Mrs EDWARDES: This clause is also of major concern, because it appears to be an unnecessary limitation on the discretion of the full bench to remit matters to the commission, at the first instance, to correct errors found on appeal. The clause adds, after section 49(6), proposed new subsection (6a), which reads -

> The Full Bench is not to remit a case to the Commission under subsection (5)(c) unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or for other good reason.

Will the minister explain the rationale for such a limitation?

Mr KOBELKE: The change is, again, to make the commission work more effectively and expeditiously. Currently, an appeal from a decision of the commission to the full court can often be handled by the full court, but that court simply remits the case back to the commission. This proposed subsection is to give guidance to the full bench not to remit the case but to seek to determine it, unless it considers that it is unable to make its own decision on the merits of the case because of lack of evidence or other good reason. If it does not have the evidence before it in the appeal papers, or for any other good reason, it can remit the case to the commission. Otherwise, instead of the case going backwards and forwards like a yoyo, the full court should decide the matter if it has accepted the appeal and has all the evidence before it. If there is a good reason it cannot do so, it can remit the case to the commission. The amendment aims to speed up the process.

Mrs EDWARDES: I have referred to some dicta in the Hamersley case in a different matter; that is, the existence of no prima facie entitlement by a union to have an award. That case is also a source of some understanding of the operations of the commission, the full bench and the Industrial Appeal Court, and whether a matter should be sent back. I cannot readily pick up the section at the moment, because I did not intend to refer again to this case. It is one in which the Industrial Appeal Court and, I have no doubt, the full bench have taken the time to consider whether the matter should be referred back for correction, on matters found on appeal. In this instance, the court decided not to send the matter back. Why is this provision being brought in, because it appears to be a well-established principle and practice? The judges who constitute the bench, whether it be the Industrial Appeal Court or the full bench, are able to make decisions as to their powers in particular matters. This is a restriction on the operation of those appeals. It is an insult and shows, to some extent, a lack of understanding of the operation of the commission. Perhaps this is one of the Derek Schapper clauses that have been inserted. The Opposition would like a full explanation. It is not simply for expedition. We cannot change law and well-established practices to achieve expedition. Will the minister please explain?

Mr KOBELKE: Surely the Parliament can change the law to make something work more effectively and efficiently! Many groups have strongly criticised the commission for not producing results, dragging things out and, although it is a low-cost jurisdiction, still being costly. The Government wants to remedy that, and it is committed to doing so. It is part of the process to achieve the goal of giving priority to the collective, in which case the commission will play a more central role. The commission must be expeditious and efficient in its determinations.

Perhaps a majority of appeals are determined by the full bench. However, far too often cases are remitted and the parties have no understanding of the good reasons that the full bench could not determine the matter. It could go backwards and forwards several times, causing delays and added expense to the parties. This provision is eminently reasonable. The onus should be on the full bench to determine the matter, unless it considers for good reason that it cannot; that is, because of a lack of evidence to decide the merits of the case or some other good reason. In that circumstance, it will clearly remit the case back to the commission. The Government believes it can achieve better results if it lifts the percentage of cases - which is already extremely high - that the full bench determines and if the full bench remits cases only for good reason.

Clause put and a division taken with the following result -

Ayes (24)

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

Noes (17)

Mr Barnett	Mr Edwards	Mr Pendal	Dr Woollard
Mr Board	Ms Hodson-Thomas	Mr Barron-Sullivan	Mr Bradshaw *(Teller)*
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	
Mrs Edwardes	Mr Marshall	Ms Sue Walker	

Clause thus passed.

Clause 124: Section 90 amended -

Mrs EDWARDES: This is another clause that will severely limit people's right of appeal. It is strongly opposed by members on this side of the House. Is there any evidence of abuse under the current Act? I have asked around and found no evidence to suggest that appeal rights are presently the subject of abuse. In the light of that, I ask the Government to present a substantial argument for taking away these appeal rights. Does the Government have a substantial argument to support its case?

Mr KOBELKE: All appellate courts have restrictions on them. The Government is enhancing the role of the commission so that it can expedite matters and deal with them efficiently. The system becomes tied down and delays are caused when people wishing to drag out a matter can appeal matters to a higher court. The Government wants to get resolution in an earlier time frame. People still have appeal rights, but they will be limited by these amendments. The Industrial Appeal Court is at the top of the appellate structure and accordingly the right to appeal to this court must be regulated. The current provision is being tightened so that the right to appeal is limited to three narrow grounds.

Mrs Edwardes: That says it all: people's rights will be "limited" and based on "narrow grounds". Does the Government have a substantial argument to support its case?

Mr KOBELKE: I think I have outlined that briefly. An appeal will now be on the basis of an error of law or jurisdiction. The denial of the right to be heard is a new ground of appeal. This is necessary to prevent an injustice that can be caused by improper procedures.

Ms SUE WALKER: Section 90 contains a time limit of 21 days under which an appeal can be brought. Why has that been eliminated, given that the minister wants to streamline proceedings and make everything work quickly? There appear to be no time constraints. Does this mean that someone can bring an appeal in 10 or 20 years?

Mr Kobelke: The 21-day time limit in section 90 has not been altered by these amendments.

Ms SUE WALKER: Proposed section 90(1) reads -

> Subject to this section, an appeal lies to the Court in the manner prescribed . . .

Where is that prescribed in the Bill?

Mr KOBELKE: All we are changing are the prescriptions that are set out in proposed paragraphs (a), (b) and (c).

Ms SUE WALKER: Proposed paragraph (b) refers to a decision that is erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against. This restriction focuses only on the construction and interpretation of statutes or industrial instruments; it does not permit appeals if errors have been made in the application of the facts of those constructions. How many successful appeals in the past 10 or so years have been made on this ground alone?

Mr KOBELKE: The member for Nedlands has asked me a question that is impossible to answer. I understand that the number of appeals has been quite limited. The member for Kingsley has indicated that the number per year can be counted on one hand. It might be only one or two a year.

Mrs Edwardes: I was referring to prerogative writs.

Mr KOBELKE: There might be a dozen or so a year. The question asked how many of those were on a certain basis. I cannot provide that sort of information. I do not know what were the bases for appeals over the past few years.

Mrs EDWARDES: The change to section 90 will ensure that a number of cases will never get up again. I bring to the attention of the Chamber the case of Burswood Resort (Management) Ltd v Australian Liquor, Hospitality and Miscellaneous Workers Union (WA). The case was heard in the Supreme Court of Western Australia Industrial Appeal Court, and the case number is IAC 3 of 2000. The case was about the union's wanting employees to wear badges. Burswood Resort (Management) Ltd had a policy about badges, and some of it was based on security reasons.

Ms Sue Walker interjected.

The DEPUTY SPEAKER: If the member for Nedlands wants to interject, she must give me the opportunity of identifying her. We are currently experiencing problems with the audio.

Mrs EDWARDES: The member for Nedlands asked what sort of badge was involved. The type of badge proposed by the union would have clearly identified union members at Burswood International Resort Casino and distinguished them from non-union members. However, that was not really an issue. In the reasons for decision, the senior commissioner defined the claim as a claim for -

> a declaration that [the Union's] members be allowed to wear the badges whilst performing their work notwithstanding anything to the contrary in either their contract of employment or the industrial award or enterprise agreement regulating their employment.

The judgment of the Industrial Appeal Court states -

> There is no dispute that this claim and the employer's opposition to it was an industrial matter which the Commission was empowered to resolve by conciliation and, if necessary, by arbitration.

In other words, the matter was clearly within the terms and definitions a matter for the commission to determine. The judgment states also that the Burswood International Resort Casino Employees Industrial Agreement 1997 -

> . . .contained provisions which furnished the employer with the authority to give a coercive instruction to employees not to wear badges of any kind on their uniforms.

Therefore, it was a term of the contract of employment of all casino employees that they observe all policies, procedures, rules and regulations. The judgment states also -

> In these circumstances, the union had to accept in the arbitration proceedings that the grooming regulation prohibiting the wearing of unauthorised badges was a condition of the contract of employment and a term of the relevant industrial agreement.

The union was not arguing against that. It accepted that it was a condition. However, it still claimed that if employees wished to wear union badges, they should be allowed to do so. The senior commissioner had decided that it was perfectly reasonable for an employer to have enforceable standards. Therefore, as the judgment states, the union appealed that decision to the full bench on four grounds, two of which were upheld. The judgment states that the grounds that were upheld were pleaded as follows -

> The Senior Commissioner erred in finding that the respondent's policy prohibiting the wearing of Union badges is not an unreasonable infringement on employees right to freedom of speech and or expression.
>
> The Senior Commissioner gave insufficient weight to the uncontradicted evidence that the Union badge did not interfere with visional impact made by employees uniforms to the public."

Ms SUE WALKER: I am interested in what the member for Kingsley has to say, particularly about what appears to be union badges, and ask that she have an extension of time.

Mrs EDWARDES: The exercise of the discretion was a function entrusted by the Act to the commissioner, to whom the industrial matter was referred for arbitration. The judgment sets out the settled principles on which an appeal against an exercise of discretion shall be determined. It is a valuable case to refer to in relation to the changed appeal rights that this legislation will provide. The Industrial Appeal Court on that occasion considered that -

> . . . the Full Bench fell into error in seeking to balance rights vested in the employer as a consequence of the contractual arrangements as against "the reasons advanced by the employees for wearing the badge". The reasons for wearing the badge are not of the same contractual or normative order as the rights of the employer to determine what is required by way of grooming. Accordingly, in my view, for these reasons, and for the reasons given by Anderson J, the ruling of the Full Bench was "erroneous in law" and the appeal should be allowed.

In the legislation, the grounds have been narrowed, even in proposed new section 90(1)(b), which makes reference to -

> erroneous in law in that there has been an error in the construction or interpretation of any Act, regulation, award, industrial agreement or order in the course of making the decision appealed against;

Such a case would not be heard. The minister might think that it would, but practitioners in this field have told me that it would not be heard. It is clear that the minister wants to severely restrict the grounds of appeal to the Industrial Appeal Court.

There are a number of avenues for appeals. In certain circumstances, an appeal can be made to the full bench on, I think, the decision of a single commissioner. The full bench comprises three commissioners, one of whom is the president. Under the changes, the full bench will become the final arbiter. It is also possible to appeal to the Industrial Appeal Court, which comprises three judges of the Supreme Court. An appeal is not a light exercise. An appeal is made only in serious matters because it is a very expensive exercise. It does not happen often. However, I remind the minister that the appeals process works for both unions and employers. When such a small number is involved, which will not affect one party or the other, these provisions - namely, "in excess of jurisdiction", "erroneous in law" and "the appellant has been denied the right to be heard, but upon no other ground" - will severely limit the powers, particularly those identified under natural justice, misinterpretation and no jurisdiction, even if a decision were clearly wrong.

Another avenue of appeal is through a single commissioner to the Commission in Court Session. The commission, under with the powers given to it, generally deals with matters of importance and principle. It appears that no change will take place in that area and those matters will continue to be heard by the Commission in Court Session. The President of the Industrial Relations Commission is not a party to matters heard in the Commission in Court Session. The provisions in this clause are very unjust, and that will place severe restrictions on appeals. The minister has not adequately explained the reason for these provisions.

Ms SUE WALKER: I would like to hear more of what the member for Kingsley has to say on this matter.

Mrs EDWARDES: The minister has not supplied substantial reasons for limiting the grounds of appeal. He recognised in his explanation that the jurisdiction to hear an appeal and the grounds of appeal will be narrowed under this legislation. The minister suggested that those rights have been abused in the past. However, he provided no evidence of that abuse. If those rights have not been abused in the past, why is the minister limiting them, when that means an injustice may be done to a party and that injustice remains untested?

By limiting an appeal to the ground that a decision was in excess of jurisdiction relating to the meaning of the words "industrial matter", there is a clear opportunity for errors of jurisdiction that do not relate to that one issue. By limiting the general power of the Industrial Appeal Court to correcting errors of law and the interpretation of written laws in industrial instruments, there is again scope for the commission to make errors of law that do not fall into that category. The most obvious error relates to the principles of contract law. I suggest that is an area of potential impact on people's rights and responsibilities.

The Bill appears to say that errors of law, other than those specified in the proposed amendments to section 90, do not warrant correction by the court. I cannot understand the basis for that view. An error of law would not necessarily require the interpretation of a statute to have significant effects on parties and on the conduct of other cases in the commission. That is a very important issue. The question of precedents in courts, tribunals and the like is important for getting consistency in decision making. Everybody has a right to have that consistency when errors are made by decision makers. There is also a likelihood that limiting the grounds of appeal in the context of this clause and in the context of appeals from an arbitrator will encourage parties to bypass the commission and go straight to the courts. That may be something that the minister wishes to achieve.

Mr Kobelke: Not at all.

Mrs EDWARDES: That view has already been aired by some practitioners. That is a serious matter. The example I have been given is that if the commission departs, or appears likely to depart, from generally accepted principles of contract law, a party may make a pre-emptive application to the Supreme Court for a declaration on the proper interpretation of a contract of employment. That party may then return to the commission or the

arbitrator with that declaration. The supervisory function of the court will not be a great burden. The minister has identified that only a small number of matters will need attention. Therefore, it will not be a great burden on the resources of the Supreme Court judiciary or the parties to commission proceedings. I am told that in the past three years, an average of only 10 appeals a year have been heard by the Industrial Appeal Court. The experience of all who participated in that process was that the court dealt effectively with appeals that had no merit. Reducing the rights of appeal will not enhance the status of the commission in the eyes of potential users, and it is bad law.

Ms SUE WALKER: I want to query the minister about proposed new section 90(1)(c). Am I right in saying that an employee or employer can appear before the full bench or the commission?

Mr Kobelke: Yes.

Ms SUE WALKER: I would like to consider the position of the workers. The minister says that they are the people who have been most affected by the current legislation and that this legislation will make life easier for them. Proposed paragraph (c) is an extra provision. There does not appear to be an equivalent provision in section 90(1), which is to be repealed, that will allow the appellant to appeal because he has been denied the right to be heard. Does the minister know how many workers appear for themselves before the president, the full bench or the commission?

Mr Kobelke: I do not, but I do not see the relevance.

Ms SUE WALKER: I am getting to the relevance. I am asking whether the minister knows. I presume the minister has included the proposed paragraph because he wants people who appear on their own behalf and who feel they have not been heard to be heard on appeal. Is that correct?

Mr Kobelke: I am trying to make sense of your question.

Ms SUE WALKER: Does this provision not cover a person who appears before the president, the full bench or the commission? I asked if a worker could appear before the president, the full bench or the commission, and the minister said that under the proposed subsection, that person would have a right of appeal. That is what I am asking.

Mr Kobelke: The appellant may be a party or an individual, although it is more likely to be a party.

Ms SUE WALKER: The appellant can appeal if he feels he has not been heard?

Mr Kobelke: Yes.

Ms SUE WALKER: What does "denied the right to be heard" mean?

Mrs EDWARDES: The minister's amendment will change the rights of appeal by removing the right of natural justice. Denial of the right to be heard -

Mr Kobelke: Where is the right of natural justice?

Mrs EDWARDES: I do not have that section at the moment. The sections the minister has limited -

Mr Kobelke: Do you mean that they are elsewhere in the Bill and not related to this?

Mrs EDWARDES: They are in this part. The minister is limiting the rights of appeal to the Industrial Appeal Court - that is, the Supreme Court. Matters that will not be able to be used to secure an appeal include the denial of natural justice. That is not the same as the right to be heard. The right to be heard might indicate bias, but it does not extend to natural justice having been denied.

Mr Kobelke: I understand that you are putting an interpretation on this. I am trying to follow that interpretation through the words that are to be changed.

Mrs EDWARDES: I have spoken to many practitioners who operate in not only the commission but also the Supreme Court. They have told me that the narrow grounds provided will limit the appeal rights on errors of law that are outside those limited to the interpretation of the Act, awards, orders etc. I put forward the issue of contracts. Therefore, if evidence has been wrongly admitted, if a contractual benefit has been wrongly interpreted, or if there has been abuse of power or bias, their right to be heard is not the same. It even extends as far as natural justice. The grounds will not all be appealable.

Mr KOBELKE: That is the member's construction of natural justice. I have acknowledged that there has been a narrowing of the grounds on which an appeal can be made. However, an additional ground has been put in that was not there before; and that is the one to which the member for Nedlands was referring. The commission is given the power to try to deal with these matters in a way that will bring the parties together and achieve outcomes, and to go back to conciliation rather than have to arbitrate. Under that system we do not want appeals

to interfere with the process. We are leaving the grounds for appeal. They are somewhat narrower, but they are still there. That will advance the functioning of the whole system. The member has a different point of view and is putting the connotation of the removal of natural justice. I do not accept that and it does not exist currently as a ground for appeal.

Ms SUE WALKER: I want to put something to the minister about how this legislation will operate for a worker who goes before the commission. Proposed new section 27(1)(hb) at page 127 states -

> require evidence or argument to be presented in writing, and decide the matters on which it will hear oral evidence or argument;

Is the minister saying that if a worker goes to the commission and is asked to put his evidence in writing and he disagrees and feels he is not being heard, he can take that on appeal under proposed new section 90?

Mr Kobelke: The worker may construct that argument. I do not know whether it will amount to much.

Ms SUE WALKER: They can. Theoretically, under these provisions that is what the worker will have to do. Is that right?

Mr Kobelke: The member is suggesting there is a potential for that to occur. I acknowledge there is, but it seems to be very narrow.

Ms SUE WALKER: It seems plain that the minister has included a provision that will make it harder for a worker to advance an argument, because under proposed section 27(1)(hb) the minister has given the commission power to reduce a worker's capacity to appear and put his own argument. I am asking the minister whether he agrees with this, because that is how I see it. However, under proposed new section 90, that worker will then have the power to appeal the fact that the commission has denied him the right to be heard.

Mr Kobelke: He would first have to go to the full bench and be denied a hearing by the full bench. He could then appeal on the ground that he was denied the right to be heard.

Ms SUE WALKER: Does the minister know how many of the people who appear nowadays in courts cannot afford representation and appear on their own? The minister says he wants to make the Act better for the workers. However, this legislation will make the Act much harder for the workers. The minister should not shake his head at me. It is simple to understand. If ordinary workers who do not understand legal proceedings go in and try to argue their case, the commissioner will cut them off at the knees because under this legislation he has been given all this power. The workers must then go through all these processes to appeal and have their case heard. That is the outcome of this legislation.

Mrs EDWARDES: The minister asked me where natural justice is incorporated into this matter. I always try not to give a lecture on law, so I will not give a lecture on natural justice. However, the grounds that have been deleted are that the decision is erroneous in law - I have highlighted where there will be errors of law other than those to which the minister has limited the jurisdiction - or is in excess of jurisdiction. In excess of jurisdiction would be a part of natural justice. It is not the only aspect of natural justice, but it would be clearly regarded as in excess of jurisdiction. Those areas that I said were not appealable, such as the abuse of power, bias and natural justice denied in excess of jurisdiction, are the already limited rights of appeal, which will now be limited even further. The minister has not yet provided a substantive reason for going down this path.

Mr Kobelke: I believe I have, but not to your satisfaction.

Mrs EDWARDES: I do not think the minister has provided a substantive reason. He has provided expediency. Over the past three years, there has been an average of only 10 appeals a year. This will not provide expediency. This will provide injustice. The mere fact that the minister did not know that natural justice was being denied as an appealable right causes us even further concern. It is quite a serious issue when he does not have a complete understanding of what will occur under this clause.

Another element of proposed new section 90 is also bad law, for a number of reasons. Proposed new section 90(3)(3a) provides that if there is an appeal to the Industrial Appeal Court on those limited, narrow grounds, and any ground of that appeal is made out but the court is satisfied that no injustice has been suffered by the appellant or a person who is a member of or represented by the appellant, the court shall confirm the decision the subject of appeal unless it considers that there is good reason not to do so. This is saying to the court that even though the decision is wrong, because no injustice has been suffered the court shall confirm that wrong decision. What sort of basis for law is that? What sort of basis for good precedent and practice is confirming wrong decisions? If a case is won on appeal, it is actually lost in this instance. However, the worst aspect is that it will be creating the body of precedent that will be available to the commission. That is a serious area in which injustices can occur. The minister talks about no injustice, but this proposed new subsection will provide a great deal of injustice.

Again, I do not understand the rationale for this approach. If the court has found that the decision is wrong, it follows that the respondent will not suffer injustice if the decision is reversed. Whose injustice are we talking about? This will have the effect of keeping wrong decisions on the books.

Ms SUE WALKER: I place this point on the record because I would like to speak on behalf of employees. In his second reading speech, the minister states -

> The Bill sets the scene for a new era in labour relations in this State.

It certainly does. Workers might like to look at these appeal provisions. The speech continues -

> This Government is determined to re-establish a more just and balanced system and to provide a fairer go for all parties involved in the workplaces of Western Australia. Although the majority of employers abide by the law and recognise their rights and obligations, some employers do not. This second group of employers represents a problem for their employees -

Yet this Bill will place a time restraint on a person who goes before the commission to argue his case. That does not occur under the current legislation. Time and again I have seen how difficult it is for people to articulate their arguments in quasi-judicial or judicial proceedings. Members do not understand how difficult it is for people to do that. The amendment to section 27 of the Act will give the commission the power to cut people off. It will also take away their right to verbally articulate their views.

Ms Quirk interjected.

Ms SUE WALKER: I am not speaking to the member for Girrawheen.

I suspect that the minister did not know that this Bill would do that to the ordinary worker. It is probably a bit of a surprise to him to find that out. The ordinary workers will have to spend time and effort to appeal those decisions. I do not know how the minister can possibly say that this provision will provide justice for workers. I want that on the record, so that when workers have problems with this legislation, I can refer back to *Hansard*.

Mr KOBELKE: The member for Kingsley spoke about the second part of the clause. I do not see the cause of her concern. The proposed subsection to be inserted by clause 124(2) states -

> If any ground of the appeal is made out but the Court is satisfied that no injustice has been suffered by the appellant or a person who is a member of or represented by the appellant, the Court shall confirm the decision the subject of appeal unless it considers that there is a good reason not to do so.

The aim is to derive justice. There is no injustice. I know that two lawyers are carrying the case for the Opposition. Perhaps the concept of legalism and being overly legalistic does not occur to them. We wish to keep a legalistic approach out of this legislation. That is in part why we are embarking on these changes. If there were no injustice and it was a procedural matter that was correctly brought to the appeal court, why continue with the matter? The member for Kingsley rightly alluded to the fact that the proposed subsection to be inserted by subclause (2) provides that a point of principle might need to go on the record. That can be done if there is a good reason for doing so. However, we do not want instances to occur in which a technicality is raised in an attempt to stuff people around and delay the system. Clearly, we are about achieving justice. If a court agrees that a legal technicality has arisen but there is no injustice, it should be left at that, unless there is a principle of law or some other reason upon which a decision should be made for the public good. We are trying to get rid of legalism. Proper process is important; it must be provided so that people can present their case and have justice done. We want to achieve good industrial relations and justice for the people involved. We do not want legalism to get in the way of good and simple outcomes.

Mrs EDWARDES: This is not a question of legalism. This is about the injustices that will flow from this decision. Those injustices will be broad and wide and will go beyond a particular appellant or respondent. A wrong decision may be confirmed and kept on the books. That is an absolutely abhorrent principle. The minister says that he does not want people to stuff up the appeal process by arguing on the grounds of a technicality. How can the minister say that when for the past three years on average only 10 cases a year have involved that type of case? Practitioners tell me that the court has been very quick to deal with cases that have no merit. People will not use technicalities purely to stuff up the system, because an appeal costs too much money. It is not a cheap exercise to appeal to the Supreme Court. People will not use the Supreme Court for delaying tactics or to stuff people around. It does not happen that way because of the prohibitive cost. The number of limited appeals has reduced, and the minister wants to reduce it further.

To confirm a wrong decision is absolutely abhorrent. It is wrong in law to keep in place a set of precedents that affirms wrong decisions. The minister has not substantively addressed this provision. He has not explained why he wants to curtail people's rights, limit the grounds of appeal and allow the confirmation of wrong decisions.

That will mean that a deal of injustice will occur for not only the respondent and appellant to whom the member referred, but also many others who will go before the commission. How can certainty be provided to people who want to appeal to the Supreme Court? How will they determine whether an injustice might be carried out?

It costs a lot of money to go to the Supreme Court. Yesterday I mentioned a case involving some cleaners who paid nearly $200 000 of hard-earned cash to make an appeal to the Supreme Court. It is not easy to come up with that sum of money. For the minister to say that the provision is there to prevent the system from being abused by people appealing to the Supreme Court on technicalities to stuff up the system shows his total ignorance of how this process has operated in the past. The minister has been given the wrong end of the stick. He is not a practitioner and does not understand the general principles behind the appeal provisions.

The Government must seriously consider this area. This area has been identified as another Derek Schapper clause. The minister has been given the wrong end of the stick and has not provided a substantive answer to the questions we have asked on either of the relevant subsections. When the minister talks to the Law Society on the other matter, I urge him to include this matter in his discussions and get some legal advice to determine why he is doing this. It has nothing to do with resources. The minister refers to expediency and stuffing up the system, yet he has not presented a case for this move. I suggest the minister take that on board and deal with the issue seriously.

Ms SUE WALKER: There is some irony in this. I would like to know who cobbled together this legislation for the minister and whether there is any other legislation of this type in any of the other States. The minister has not answered that before - or perhaps only once. The irony is that the Government has restricted the grounds of appeal but has given the ordinary person more grounds on which to appeal, because of its amendments to section 27 of the Industrial Relations Act. If the minister cannot understand that, he should, as the member for Kingsley said, take a bit of time-out to examine those provisions. If there have been only 10 appeals a year over the past three years, that is lucky. I reckon there will be more appeals as a result of this legislation. The amendments to section 27 will restrict the way in which the commissioner can allow an ordinary person to present evidence. Therefore, the minister will find that there will be more appeals. I support the member for Kingsley's view that the minister should take legal advice on whether he should proceed with these provisions.

Mrs EDWARDES: The Bill deals with many of the other sections, and the public interest test has been added. There will be no public benefit whatsoever as a result of the amendments to these sections. Therefore, the minister should seriously consider these provisions, because he has not received the best advice on them.

Ms SUE WALKER: Who assisted in the preparation of this Bill?

Clause put and a division taken with the following result -

Ayes (24)

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

Noes (17)

Mr Barnett	Mr Edwards	Mr Pendal	Dr Woollard
Mr Board	Ms Hodson-Thomas	Mr Barron-Sullivan	Mr Bradshaw *(Teller)*
Dr Constable	Mr Johnson	Mr Trenorden	
Mr Day	Mr McNee	Mr Waldron	
Mrs Edwardes	Mr Marshall	Ms Sue Walker	

Clause thus passed.

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