

WORKERS' COMPENSATION (COMMON LAW PROCEEDINGS) BILL 2004

Returned

Bill returned from the Council with amendments.

Leave granted for the Council's amendments to be considered in detail forthwith.

Council's Amendments - Consideration in Detail

The amendments made by the Council were as follows -

No 1

Clause 5, page 4, line 15 - To delete "before 23 June 2004" and insert instead -
on or before the day on which this Act receives the Royal Assent

No 2

Clause 5, page 4, line 18 - To delete "before 23 June 2004" and insert instead -
on or before the day on which this Act receives the Royal Assent

No 3

Clause 7, page 5, line 25 - To insert at the end of the line -
or

No 4

Clause 7, page 5, lines 28 to 30 - To delete the lines.

No 5

Clause 7, page 6, line 8 - To delete "22 June 2004" and insert instead -
the day on which this Act receives the Royal Assent

No 6

Clause 10, page 10, lines 20 and 21 - To delete the lines and insert instead -
(a) before the coming into operation of section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004*,

No 7

Clause 10, page 10, line 24 - To insert before "on" -
on or after 4 December 2003,

No 8

Clause 10, page 12, line 26 - To delete "93EB" and insert instead -
93EC

No 9

Clause 11, page 13, line 26 to page 14, line 6 - To delete the lines and insert instead -
damages to which Part IV Division 2 applies in a case in which a question as to the worker's degree of disability was referred under section 93EA(3) to the extent, if any, to which the cost exceeds the amount ascertained in accordance with regulations made for the purposes of this section.

Leave granted for all amendments to be treated as one question.

Mr J.C. KOBELKE: I move -

That amendments Nos 1 to 9 made by the Council be agreed to.

I will put on the record some explanation for these amendments. The first two amendments are to clause 5, which provides that proceedings can continue in respect of the former provision only if leave to commence proceedings was given or proceedings had commenced before 23 June 2004. That date is the day after the second reading speech for this Bill was given in the Legislative Assembly. The date was to provide certainty about the cut-off period for workers seeking to commence proceedings under the former provisions, as a result of the Dossett et al decisions, to inform parties that the law would change as a matter of priority, and to dissuade any

applications to the District Court from being made after 23 June 2004. When I made that statement in here on 22 June, we were hopeful that the Bill would be enacted in the last sitting period of Parliament and leave would not have to be given for any impending cases in the District Court in the period between 23 June 2004 and the day on which this Bill was enacted. Clearly, that did not happen. The Bill was not passed in the previous sitting, and during the period in which the Parliament was in recess the District Court has continued to deal with applications, and in some cases has granted leave, after 23 June 2004. It is proposed that the date 23 June 2004 be deleted and replaced with the words “on or before the day on which this Act receives the Royal Assent”. This will allow the small number of workers for whom leave has been granted between 23 June 2004 and the date on which this Bill is enacted to commence proceedings under the former provisions.

I will continue speaking to the amendments unless the member for Kingsley wants to interrupt there.

Mrs C.L. Edwardes: I will make my comments after you.

Mr J.C. KOBELKE: I will move to amendments Nos 3 and 4. These amendments are to clause 7, and will delete clause 7(1)(e). This is consequential to the amendment to clause 5, as the amendment will allow a worker to continue proceedings under the former provisions if leave was given on or before the day on which this Bill receives the royal assent. Therefore, clause 7(1)(e) is redundant. Amendment No 5 also refers to clause 7, and extends the final day of the period during which legal expenses incurred can be reimbursed from 22 June 2004 to the day on which the Bill receives royal assent. This is an equitable solution, given that workers have incurred legal costs in commencing or continuing matters under the former provisions since 22 June 2004 and will not be able to proceed once this Bill is enacted. That looks after the costs side.

Amendments Nos 6 and 7 relate to clause 10, proposed section 93EB, “Referring questions in certain other cases”. The category of people that proposed section 93EB is intended to assist are those who sought to refer a question to the director in accordance with section 93D(5) under the provisions as amended in 1999. As a result of the High Court action of Dossett delivered on 4 December 2003 and subsequent District Court decisions - for example, Henderson and Mokta - review officers, when considering the question after 4 December 2003, did not deal with the substance of the question; that is, they did not make a finding on whether the degree of disability was not less than the relevant level that is required for the claim to proceed, or they might have adjourned or dismissed the matter because they were acting in light of those court decisions. In other words, these workers would have been dealt with under the previous provisions as amended in 1999 but for the Dossett and related decisions.

The proposed amendment is to delete lines 20 and 21 on page 10, which state -

- (a) during the period commencing on 4 December 2003 and ending on 22 June 2004,

Inserted instead are the words -

- (a) before the coming into operation of section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004*,

Further, amendment No 7, to line 24 on page 10, inserts before “on the basis” the words “on or after 4 December 2003,”. These amendments are required to ensure that proposed section 93EB has application to workers who had referred a question of their degree of disability to the director before clause 10 of the Workers' Compensation (Common Law Proceedings) Bill comes into operation. The current wording in proposed section 93EB(1)(a) provides that the worker sought to refer a question to the director under section 93D(5) during the period commencing on 4 December 2003 and ending on 22 June 2004.

[Leave granted for the minister's time to be extended.]

Mr J.C. KOBELKE: As there are cases in which the worker sought to refer the question before 4 December 2003, the reference to “during the period commencing on 4 December 2003 and ending on 22 June 2004” in proposed section 93EB(1)(a) has been deleted. Inserted instead are the words “before the coming into operation of section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004*,”. This will allow cases referred before 4 December 2003 to qualify under this provision. The date 4 December 2003 is the date of the Dossett decision and has been inserted in proposed subsection (1)(b) because the provision deals with the circumstance in which the review officer did not deal with the substance of the question or a court set aside or quashed a decision of a review officer that dealt with the substance of the question in response to the uncertainty created by the Dossett and subsequent decisions. This occurred only after the Dossett decision was determined on 4 December 2003.

Amendment No 8 corrects a printing clerical error.

I now refer to amendment No 9. Currently, subsection (1) of proposed section 154AC in clause 11 of the Bill reads in part -

... damages to which Part IV Division 2 applies to the extent that the cost may be regarded as attributable to the effect of certain judicial decisions made before the commencement of section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004* . . .

This is incorrect, as the judicial decision that is referred to in this proposed subsection - that is, the Dutch decision - effectively prevented awards of damages from being given because the action was struck out on a legal technicality. In other words, the costs are not attributable to the judicial decision but to the coming into operation of proposed section 93EA, which offers a remedy to workers affected by the Dutch decision and enables them to recommence an action for damages. Therefore, proposed subsection (1) has been redrafted on this basis to provide -

The regulations may authorise the Commission to approve an application by an employer for reimbursement of the cost of paying an award of damages to which Part IV Division 2 applies in a case in which a question as to the worker's degree of disability was referred under section 93EA(3) to the extent, if any, to which the cost exceeds the amount ascertained in accordance with regulations made for the purposes of this section.

That is how the redrafted proposed subsection (1) will read. I explained in this House, when debating this Bill previously, that the cost impact of the Dutch amendments will be met from the employers' indemnity supplementation fund, but only if the amount paid is greater than the current estimated costs that the insurers have put aside. WorkCover has frozen the estimates of all claims in the system as at 22 June 2004. If any damages are awarded arising out of the Dutch decision, which relate to a referral made pursuant to proposed section 93EA(3), the commission can identify on a case-by-case basis whether the amount of damages exceeds the insurer's or self-insurer's estimate of the claim, and, therefore, whether reimbursement from the fund will be required and to what extent. The regulations referred to in this amendment will deal with the details that might arise in determining a matter.

The deletion of proposed subsections (2) and (3) are consequential amendments arising from the redrafting of proposed subsection (1). With regard to the deletion of proposed subsection (2), it is evident in proposed section 93EA, which is referred to in proposed subsection (1) of this amendment, that the claim would have been made before clause 10 of this Bill came into operation. Proposed subsection (3) has been deleted because the regulation-making power has been incorporated into the redrafted proposed subsection, which I have just read.

Of course, this is quite complex, but I have put it on the record so that hopefully people can understand the clear effect of these amendments. The primary effect was to simply make sure that we had the date of assent as the cut-off date instead of 23 June. We then had the technical issue that the award of damages would go to a court decision when in fact it was not a court decision, but people going back to court because of the changes being made to the legislation; therefore, technically that had to be changed.

Mrs C.L. EDWARDES: I would like some clarification by way of interjection from the minister, which may assist with understanding the message. When the legislation came to this Parliament with a cut-off date of 23 June, some information was not able to be given to the Opposition until well after the legislation had been passed by this House. The then director of WorkCover, Harry Neesham, and I sat in the corridors of Parliament until after seven o'clock in the evening in an endeavour to get that information. That information was clearly about which workers' compensation victims had made application to the District Court, how many had received leave of the court and how many of them had been through the current system and then, in good faith, applied to the District Court for a Dossett decision. That information was able to be given to us only at seven o'clock or thereabouts that night, and we required more information, such as how the Dutch payments were to be made. I put that on record because it showed quite clearly that the legislation had been drafted quickly and brought into this House. We had accommodated the Government's endeavour to get it through to the Legislative Council. However, on that occasion we were not very happy with the lack of information being provided to us to enable us to support or otherwise make a clear decision on the legislation. That was why we opposed the legislation on that occasion. They were clearly identifiable people; there were 42 of them. They were people who, in good faith and prior to 23 June, made a Dossett application. I do not know how many of those people will have their claim approved. I do not know how many of the people currently before the District Court will have their claim proved. However, given what the minister is bringing forward today, only those who have received leave at the date of assent will be able to proceed. There will still be a handful of identifiable people who, again in good faith, have made application and who may or may not have been through the system who will miss out. There are already some people who will miss out in any event. Yes, I was the minister who brought in the 1999 legislation. However, I wish I had an identifiable group to deal with. We were talking about thousands. The minister is talking about tens. An identifiable group will miss out. Some of those people have had leave refused. They are now appealing. I take it that their appeals will no longer be valid. Is that correct?

Mr J.C. Kobelke: That will depend on whether they have been granted leave.

Mrs C.L. EDWARDES: They are appealing the fact that they have not been granted leave. Where do they fit within the system?

Mr J.C. Kobelke: My understanding is that they will not be able to proceed, but that is also why we picked up the legal costs in the amendments.

Mrs C.L. EDWARDES: If the appeal court grants them leave after the date of assent, all of that will be wasted.

Mr J.C. Kobelke: That is my understanding.

Mrs C.L. EDWARDES: Some people who legitimately feel that they have a right will be very unhappy. We are not judge and jury. We are not deciding whether they have a legitimate case that will lead to compensation. Some of them quite clearly will not have leave. However, they have a right to it.

Mr M.W. TRENORDEN: I rise to allow the member to finish her contribution.

Mrs C.L. EDWARDES: Although I appreciate that the change of date will take into account those who have been granted leave, I am very disappointed that the Government is not giving those workers who have made application, leave granted or not, the freedom to choose between whether they stay within that system or go back to the current system. That is what the minister needed to do. That was the point I made to the minister's officers. When there is a small identifiable group - some of them will get through the system and some of them will not - the proper thing would be to give them the choice of staying in the pre-1999 Dossett-style system or the current system. The minister is making a grave mistake with this, particularly because there is such an identifiable group. When he is presented with the facts of some individual cases, the minister will wish that he had done things differently. If we had known Dossett four days later from the date we chose as a cut-off and could make a different decision in terms of cutting off someone like that, we would have done so. We are not heartless in this place. We would want to have that. An identifiable group was not available to me at the time.

I have not had sufficient time to clarify in a proper legal sense the potential loophole of Mokta. I am pleased that the minister has attempted to fix it. I hope that that potential loophole has been closed.

I also raised with the minister's officers that there was no outstanding issue with *Re Cook's Construction*. Although I understand that at the time this was a common law proceeding, the unintended consequence of *Re Cook's Construction* - the reference is *Re Monger; Ex Parte Cook's Construction Pty Ltd* [2004] WASCA 165 - is that it was really a statutory issue, not a common law construction. As such, it would have been difficult to make the amendment in this Bill. I accept that. It is something that will need to be addressed at some point. Again, it has been an unintended consequence. However, I understand that it is on appeal for special leave to the High Court. As such, it may very well have rectified itself. It is interesting that since 22 June - the date that this legislation came before the Parliament - some of the issues we thought would be of concern before various courts have been resolved by the courts themselves. It is one of the reasons I believe the Government has failed to take an opportunity in giving workers the freedom to choose between the old regime and the present regime. The courts have resolved the issue and the Government will find that there are some very unhappy people whom the Government is allowing only through to the date of assent. I am referring to workers who have been given leave.

Mr J.C. KOBELKE: I thank the member for Kingsley and the Opposition for helping the Government to expedite this legislation. I also thank the good offices of the member for Kingsley in assisting members in the other place to expedite the legislation.

I will comment briefly on what the member for Kingsley has just said. The key issue is to provide certainty. When the line is drawn in the sand to create certainty, some people will feel advantaged and some will feel disadvantaged. The system as a whole is advantaged by having a clear cut-off point. Lawyers were not clear on how to advise their clients. The member asked whether we could look at giving people the choice to remain in the post-1999 system or use the pre-1999 system. That is not done as easily as the member suggests. I was told that the drafting would have taken some weeks because they are not the same types of cases. There are myriad different types of cases. To encapsulate that in this very complex legislation would take a fair degree of consultation with different people involved in the cases in order to do that. It was not something that could be easily done. As we needed to pass this legislation quickly, we could not embark on that. It was a genuine suggestion by the member for Kingsley; I accept that. It was not as easy as was suggested, in both making sure we knew how to do it and getting the complex legislation done in time. I am most appreciative of members in this House and the other Chamber for assisting the Government in getting this legislation through in fairly good time even though it did not meet our earlier request. This will provide certainty, which is clearly to the benefit of injured workers even though a very small number may feel that the Government should have drawn the line somewhere else in order to provide some advantage to them.

Question put and passed; the Council's amendments agreed to.

The Council acquainted accordingly.

House adjourned at 7.23 pm
