

LEGISLATION COMMITTEE
on the
WORKERS' COMPENSATION REFORM BILL 2004

The meeting commenced at 4.15 pm.

Advisers: Ms D. Munrowd, Director, WorkCover WA.
Mr R. Monger, Director, Conciliation and Review, WorkCover WA.
Mr P. A. Brookes, Senior Policy Officer, WorkCover WA.
Mr R. Stone, Senior Policy and Legislation Officer, WorkCover WA.

Resumed from 17 June.

Clause 130: Part XI replaced by Parts XI to XVIII -

Debate was adjourned after the clause had been partly considered.

The DEPUTY SPEAKER: We are dealing with the Workers' Compensation Reform Bill 2004, a Bill for an Act to amend the Workers' Compensation Rehabilitation Act of 1981, enact transitional provisions and make consequential amendments to various Acts. The Bill contains 188 clauses and we are currently dealing with clause 130, so the question before the committee is that clause 130 stand as printed. Members will note that a daily *Hansard* is being produced of the committee's deliberations, as for the normal House sitting, except that it will not be available in hard copy until Thursday morning. It will be double spaced, so anyone who speaks during the meeting should please use the daily *Hansard* to make any corrections which should be delivered to the Hansard office by no later than 6.00 pm on Thursday. Members should also have before them some draft amendments, and I note that we have amendments to clause 130 in the minister's name. We will deal with these and others, and we have two postponed clauses that we have noted as well. Does the minister want to deal with his amendment first?

Mr J.C. KOBELKE: Yes, I am happy to do that, thank you, Madam Deputy Speaker. In terms of those procedural matters, other amendments will be circulated on matters that were raised. I said I would look at them and I have had amendments drafted, but we will have to recommit to go back to those particular clauses.

The DEPUTY SPEAKER: Does the minister wish to deal with them?

Mr J.C. KOBELKE: Yes. I move -

Page 167, after line 28 - To insert the following -

- (2) Subsection (1) does not apply in respect of a question that does not relate directly to the treatment, or nature or extent of impairment, or assessment of degree of impairment, of a worker.
- (3) A medical report may be produced by the legal practitioner in compliance with a requirement under this Part with the omission of passages that -
 - (a) do not relate directly to the treatment, or nature or extent of impairment, or assessment of degree of impairment, of a worker; and
 - (b) contain a privileged communication made by or to the legal practitioner in his capacity as a legal practitioner.

The DEPUTY SPEAKER: I understand that there will be a proposed section 205(1) on page 167 of the Bill, and the amendment will be inserted after that. Is that correct?

Mr J.C. KOBELKE: Right, thank you. This amendment provides that medical and other information not relevant or related to the workers compensation claim should be excluded from having to be provided by a legal practitioner under section 205, which as currently drafted excludes legal professional privilege in relation to medical reports. The clear intent is that the dispute resolution process should not be open to legal professional privilege being used simply to hide medical reports that are germane to the actual matter being considered for the injured worker. On the other hand, the way in which it was drafted left it open to criticism as perhaps being a fraction too wide, in that any medical matter that might be in the hands of the lawyer and clearly not in any major way related to the workers compensation claim could be opened up and not protected through legal professional privilege. The rewording is to make it clear that if the matters do relate to the matter being assessed

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for workers compensation purposes, then that medical information has to be made available and cannot be protected through legal professional privilege.

Amendment put and passed.

Mr J.C. KOBELKE: I move -

Page 214, lines 23 to 27 - To delete the lines and insert instead -

- (f) with respect to the implementation by medical practitioners who issue more than one certificate to a worker for the purposes of this Act of the code of practice (injury management) issued under section 155A(1);

The issue is that the whole of injury management, as we have said many times, centres on the relationship between the worker and the employer. The medical practitioner who is treating the injured worker is crucial to that process, and in other places we are imposing obligations on employers, insurers and injured workers to actually engage in the injury management process. Proposed paragraph (f) was seen to give power over medical practitioners which certainly was objected to by various people speaking on behalf of medical practitioners. We nonetheless want to maintain some ability to regulate practitioners who are involved in this area, because otherwise all the obligation is placed on the other parties and a particular doctor may not wish to actually engage at all, which will be a major problem for us. We are not precluding any injured workers from going to their normal treating general practitioner, but if it is an ongoing workers compensation matter - that is, after the first consultation - the requirement is that the medical practitioner be able to be engaged through injury management and be able to use the code of practice for that. This proposed section provides regulation-making powers that can operate to that effect.

Amendment put and passed.

Mr J.C. KOBELKE: I have a further amendment to clause 130 on page 216. I move -

Page 216, after line 18 - To insert the following -

- (5) Without limiting subsection (4), WorkCover WA is not to recommend the making of a regulation under subsection (2)(a)(i) unless it has first negotiated with the Australian Medical Association (WA) incorporated.

This came about through negotiations with the AMA WA. The focus through the changes both to WorkCover and the Dispute Resolution Directorate is to move away from sectorial representation and try to nominate all the key bodies. The current proposed subsection (4) states that WorkCover WA is not to recommend the making of a regulation under subsection (2) or (3) unless it has first negotiated with any body it considers has a relevant interest in the regulations.

That covers medical practitioners, paramedical and other service providers. The issue though is that the AMA feels very strongly that, given its particular position and the importance of medical practitioners to the whole system, it specifically should be recognised for areas covered under (2)(a)(i). That is why we are putting in that amendment to recognise its role and to make sure that it is negotiated with first, prior to any regulation being put in place under that provision.

Amendment put and passed.

Mrs C.L. EDWARDES: I want to start from the beginning. I made my comments with respect to the repeal of the old dispute resolution on the last occasion. Given that the actuary predicts a cost increase rather than a saving on dispute resolution, one could question why the Government is pursuing such a comprehensive change. The New South Wales data shows 18 months of teething problems, during which the costs have increased enormously just for the administration of the system. They have had to bring back their specialised staff - the staff that have had all those years of experience. They have had problems with record keeping, data collection, and their ability to ensure that the system being put in place is working as effectively. That review was carried out by an independent person. Although the registrar or whatever her title is - forgive me for not knowing that - puts on a brave face that everything is on track, they are all on budget and the like, the report does not indicate that.

Mr J.C. KOBELKE: Which report are you alluding to?

Mrs C.L. EDWARDES: It was in the workers compensation report, and I have a copy with me, which I am happy to give to the minister. Essentially, it is saying that the internal review, which was carried out by an independent person, does not give a favourable report on the first 18 months of the New South Wales' dispute resolution system. The minister has complicated the system even further, in some respects, than the New South Wales system. There is no data. Although I have been referring to a report, it is one that the workers

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compensation report is referring to. That report as I understand it has not seen the light of day in the public arena. Other than that report, no data is currently available from New South Wales to assess its process. I have asked employers, lawyers, insurers and self-insurers, who work with the system on a day-by-day basis, to check with their respective counterparts over there. These are all the people who have raised concerns regarding the lack of transparency and the delays in scheduling a case. I know that Judge Sheahan when he was here said, "Well, if the lawyers are not ready then we proceed without them." To some extent, I can understand that it is a new system and everyone is wanting to put on a good face to say everything is working very well, but that does not appear to be happening behind the scenes. If that is happening behind the scenes in NSW, I think that with a much smaller legal profession in WA it would be much harder in any event to ensure that injured workers were represented as fairly and equitably as the minister may have wanted, in including the lawyers in the system. It would appear that because of the scheduling processes and the difficulties, in some instances, because of the approach by the judge, some determinations are being made without the input of the employer as well. I suggest to the minister, as I have suggested to him before, that he is bringing in a huge change in a system that is very sensitive to change. My strong recommendation to him would be to do it by bite-sized chunks. This is a bite-sized chunk that on its own will have an enormous capacity to not only blow out costs, but to have a great impact on people's lives. Although he believes that he has very good intentions, I believe that it would have been far better just to have tinkered at the edges of the issues that need addressing rather than tip up the whole system. Would tight practice rules and procedures within the current system produce a cost saving and be just as effective, rather than providing a whole new system and ensuring that there are going to be additional costs?

Mr J.C. KOBELKE: I think the member is aware of the contributions I have already made. The clear objective of reforming the dispute resolution procedures is to ensure a greater percentage of timely outcomes and that people get through the system more quickly. That has been worked on now for four years. When we were in opposition we started the rough outline of how we would restructure this whole area, then, following the consultation from Rob Guthrie's report, WorkCover itself has done a lot of work. When it was well advanced in that process we became aware that New South Wales had done things that were very similar. We then reviewed these proposals in the light of New South Wales' experience. I have some information from its annual report for 2003, which indicates that in that year in New South Wales, there were 9 282 applications to resolve disputes registered, and 6 069 disputes were resolved, including 28 per cent settled by agreement between parties, 20 per cent subject to determination and 25 per cent discontinued by the applicant. A total of 1 891 medical assessment certificates were issued by independent approved medical specialists, 1.3 per cent of arbitrated determinations were overturned on appeal, 1.2 per cent of medical assessment certificates were revised on appeal, 63 per cent of disputes were resolved within 26 weeks, and 87 per cent of disputes were resolved within 39 weeks. There were 373 applications for interim payment direction registered. There were 356 applications for interim payment directions resolved during 2003, with directions for payment issued in 44 per cent of cases. The service provided by the commission was rated by 82 per cent of workers and 80 per cent of employers as adequate, good, or very good in an independent customer survey. Those last figures, I suppose, may indicate that approximately a quarter did not feel the service was so good, which is a sizable number.

Clearly, there is a quite a large workload there. As it is a bigger State, it is greater than what we would anticipate but, clearly, there is an indication from those figures that things are working. The issue is that we are not copying their system; our system has a lot of similarities, but we are developing our system in light of their experiences and their practices and how we can improve the model we are putting together.

Mrs C.L. EDWARDES: Can the minister tell me which State that report is from?

Mr J.C. KOBELKE: This was the Workers' Compensation Commission annual review for 2003 from New South Wales.

Mrs C.L. EDWARDES: Was that dated 30 June or the end of the year?

Mr J.C. KOBELKE: That was the calendar year, from my understanding.

Mrs C.L. EDWARDES: Madam Chair, I have found the report that I was referring to. It is the Workers Compensation Report of 25 November 2003, issue 481, which states -

In an internal NSW W/Comp Cm'n report obtained exclusively by WCR, it has emerged the cm'n is facing a "perceived inability to meet [its] legislative objectives". The review, by John Hunter Management Services Pty Ltd, details concerns including communication and consultation, work structures, the IT system, staffing levels and the role of dispute assessment managers.

Helen Walker is the registrar - her title is the Workers' Compensation Commission Registrar. The report further states -

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John Hunter found file closure procedures needed improvement, that it was easy to misplace or lose files and that ownership was lacking. It found up to 200 applications were not being resolved each month (of 600 lodged each month about 400 were resolved) and that the “balance of files” continue to increase. There are 3,000 matters that have not been closed and 240 matters awaiting appointments with approved medical specialists.

...

John Hunter found dispute assessment managers, previously employed by the w/comp Resolution Service, are “underutilised” and may be able to ease the cmn’s workload, particularly to “achieve conciliatory resolution of permanent impairment-only disputes”. The report observed the registrar’s and deputy registrar’s caseloads were “unsustainable”, and that senior positions need to be created to deal with training and appraisal of arbitrators and approved medical specialists. Walker said “the cmn provides a comprehensive annual professional development program for its 90 arbitrators, including a range of mandatory and voluntary programs. This program commenced in April 2002.

I think, minister, this report indicates that there are going to be problems, as there are always problems when a new system is started, but do not throw out the baby with the bath water. The minister has a lot of experienced staff, and John Hunter found that there was a great need to actually use some of those experienced staff to ensure that the system had a very smooth transition, which was not initially the case because those staff were not used when the NSW system was introduced.

Mr J.C. KOBELKE: We have looked at what we can learn from New South Wales and where its system is not working and it has problems, clearly we wish to learn from that. However, there is a range of differences; we are not actually copying its system. For example, I cannot remember what the member said about arbitrators, but it is my understanding that New South Wales was using contract arbitrators. We have no intention of doing that; we will be using the current dispute resolution officers. We will require that they have legal training, but the issue is that the skilled people who are there and have been there for some time will be covered by a transitional clause so that they can continue. However, new people employed will be required to have legal qualifications. Therefore, we are very different in that respect; we are drawing on experienced, existing staff to perform that role. Similarly, I am advised that New South Wales had a major problem in that it had to establish its data management system basically from scratch. We do not have to do that. We have a data management system, which we will simply update and modify for the changed processes. Again, in that area we have quite a marked difference from New South Wales.

Mrs C.L. EDWARDES: On page 148, proposed section 177 provides that evidence of communication between a worker and an injury management officer will not be admissible before an arbitrator, unless the worker consents to the evidence being so admitted. Can the minister advise what sort of communication will be precluded, and how that might fit with proposed section 183 which deals with information exchanged between parties and the arbitrator’s powers?

Mr J.C. KOBELKE: To me it is fairly self-explanatory but I am trying to come to the particular point of the member’s question, which I will seek advice on. We are providing that information given by the worker to a WorkCover WA injury management officer cannot be used in proceedings before an arbitrator unless the worker specifically agrees. This is clearly for the purpose of protecting the workers from confidential information being released, which may be prejudicial or irrelevant to their case. That is the clear intent, but the member asked what things we think might need to be released and which the worker could agree to.

Mrs C.L. EDWARDES: Why did the minister put in the protection for the worker? It is quite interesting because in some other proposed sections the minister does not allow for the worker’s consent.

Mr J.C. KOBELKE: I am advised that it is an existing clause.

Mrs C.L. EDWARDES: Therefore, the new clauses are consistent with this process.

Mr J.C. KOBELKE: That one relating to the workers is the one we intend to recommit, with regard to the amendment that we debated a couple of days ago. Proposed section 177 is the same as the present section 84L.

Mrs C.L. EDWARDES: In relation to page 155, I note that the minister has just changed the new section 205 dealing with members of the Law Society or legal practitioners in relation to information. Again, this proposed section deals with information exchanged between parties, but, again, it fails to take into account a situation in which, through no fault of a party seeking to rely upon a witness, that witness is not available to provide a witness statement prior to the hearing. That is one of the big provisions that has been raised with me. How can an injured worker or, indeed, an employer get around that circumstance?

Mr J.C. KOBELKE: I draw the committee’s attention to proposed subsection (7), in which -

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The DRD Rules may provide for exceptions to subsections (4) and (5) and may authorise an arbitrator to permit -

- (a) the admission in a proceeding before the arbitrator in specified circumstances of any document, material or information that would otherwise be not admissible under subsection (4); or
- (b) the appearance in a proceeding before the arbitrator in specified circumstances of a witness who would otherwise not be permitted to appear under subsection (5).

The clear intent of proposed section 183 is to make sure that matters proceed expeditiously, and that a particular party cannot potentially drag up new information or new witnesses, which were not presented at the start and which could just delay the whole proceeding. However, if there is an issue of natural justice, additional information that was not known at the time, or for some reason which is acceptable, could, under the subsection (7) rules, potentially be open to being admitted.

Mrs C.L. EDWARDES: Therefore, the application could just be made if the witness or the documents were not available at the particular time in order to make them available to the other side.

Mr J.C. KOBELKE: The issue is that we do not want to set up procedures by which people can seek to delay the process or put in reserve a whole lot of other actions that they might take through the process. An instance that has just been given to me by the assisting officer is that maybe a person is interstate at a certain stage and therefore needs reasons to be able to get other information to the other States at a later stage. The rules are there to give us that flexibility, rather than being specific.

Mrs C.L. EDWARDES: How does proposed subsection (6) then apply?

Mr J.C. KOBELKE: That is an out if a person is not represented by a legal practitioner or an agent. If it is an inter-person applicant, then people cannot be caught procedurally by the fact that they did not present everything.

Mrs C.L. EDWARDES: If they are represented by a legal practitioner they are still not prevented from being able to make application to the arbitrator if a witness was not told at the time the witness statement was made in advance.

Mr J.C. KOBELKE: Provided they meet the rules in proposed subsection (7).

Mrs C.L. EDWARDES: What does subsection (6) then add?

Mr J.C. KOBELKE: There are two different cases. Proposed subsection (6) does not apply if the party is a worker, unless it is established that the worker was represented by a legal practitioner or agent at the relevant time.

Mrs C.L. EDWARDES: What does subsection (6) mean?

Mr J.C. KOBELKE: Subsection (6) provides where a worker is not represented, the worker is exempt from applying under section 183(2) or from the application of sections 183(4) and (5), which relate to the provision of documents, material information and the nomination of witnesses. This exemption recognised that workers who were not represented may not be aware of the requirements of the Act in all the detail.

Mrs C.L. EDWARDES: Thank you. Obviously there is a difficulty in the way it was drafted, with the double negatives.

The other issue is proposed section 185 on page 157. This is about the arbitrator attempting conciliation. I suppose the issue is the different hats that the arbitrator may wear, and whether it will provide for a balanced and fair decision by an arbitrator to promote a settlement, if he then proceeds to hear and determine the same dispute if settlement is not reached. It has been put on many occasions, even in the industrial arena, that to ensure fairness, if an arbitrator is unable to mediate a settlement dispute, then that arbitrator should not hear and determine the dispute. I suppose on the other side of the coin is the fact that he or she is already fully aware of all of the information. However, sometimes a fresh face and pair of eyes can see matters that may have been presented, but not particularly heard. There are some reservations when an arbitrator is wearing two hats. I know that even in the current situation sometimes there is a delay between the two matters, one dealing with the conciliation and the other one dealing with the hearing. However, that may be at the expense of some level of fairness.

Mr J.C. KOBELKE: The issue is that under our procedures all documents are to be lodged with the application or the response. Therefore, the arbitrator has all the information, and with that information seeks to conciliate.

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That information does not change. Therefore, if conciliation does not achieve the outcome, they can move for arbitration.

Mrs C.L. EDWARDES: But is that with the same arbitrator wearing just a different hat?

Mr J.C. KOBELKE: Yes. That is fairly standard practice at the Industrial Relations Commission.

Mrs C.L. EDWARDES: I know, but that does not stop the questions being raised. As I said, the level of fairness has been raised previously in the industrial area.

Mr J.C. KOBELKE: We are conscious of that, and we are seeking to get a better balance between expedition, which is clearly in the interests of the worker, and ensuring that there is fairness. Part of the structure that makes sure we get the best possible balance, is to have a person of district judge status in charge of this area. That will apply in setting the guidelines and the regulations that will apply, so that we can make sure that he will argue for procedural fairness. However, if procedural fairness is taken to its logical conclusion, it could mean that he will get caught up in such lengthy legal proceedings that it is very much to their detriment, because there is not a quick determination of the issue.

Mrs C.L. EDWARDES: I think it is a point for the minister to keep an eye on. Again, the arbitrator is being given enormous powers. The level of appeals have been reduced and, as such, the system could easily fall into disrepute if fairness is not seen to be achieved in the process.

Mr N.R. MARLBOROUGH: Is the minister considering a retired judge as the sort of person to be an arbitrator?

Mr J.C. KOBELKE: No. The arbitrators will come under the head of the dispute resolution division. It will be district judge status.

Mrs C.L. EDWARDES: Proposed section 187 is dealing with the appeals against the arbitrator's decisions. The intention is that the decisions of arbitrators are final and binding, and not subject to appeal except in very limited circumstances. Therefore, when considering the level of fairness in the arbitrator wearing both hats, it could be seen as quite unfair in what would be regarded as a balanced and fair scheme. All decisions of arbitrators would be able to be appealed to the commissioner. The judge that the member for Peel was referring to and the commissioner would then determine whether the appeal had merit or not. He would make the appropriate orders reflective of the merits of the appeal. Therefore, although this proposed section states that a decision of an arbitrator or anything he does in the process of coming to a decision is not amenable to judicial review and otherwise that is provided for in this Act, the decision is final and binding and not to be, using the member for Peel's favourite word, vitiated. Did the member like the way I said that?

Mr MARLBOROUGH: Fantastic! Has the member learnt what it means in the past few days?

Mrs C.L. EDWARDES: Come on, one step at a time!

Mr KOBELKE: I think the member has reflected on the intent of proposed section 187. That stipulates that the arbitrator's decisions are final and binding on the parties and not subject to appeal or judicial review. Furthermore, proposed subsection (2) provides that an arbitrator's decision cannot be overturned due to any informality or want of form; nor can it be challenged or overturned by any court or tribunal or a proceeding restrained by injunction, prohibition etc. This ensures that matters are not caught up in legal detail and challenges, which have the potential to delay and add costs to the dispute resolution process. Of course, that is to the detriment generally of workers who then get held up in the system.

Mrs C.L. EDWARDES: This flows onto that. Proposed section 188 provides -

- (1) An arbitrator is bound by rules of natural justice except to the extent that this Act authorises, whether expressly or by implication, a departure from those rules.

This is a framework that seeks to reintroduce legal representation. The arbitrator will wear several hats and his decision will be final and binding and not subject to judicial view. This provision is incongruous with the other provisions and what the Government hopes the position of an arbitrator will achieve.

Mr KOBELKE: I draw the member's attention to the fact that this is contained in the Act under section 84ZN. It is not a new provision.

Mrs C.L. EDWARDES: Does the minister mean proposed section 188, "Practices and procedure, generally"?

Mr KOBELKE: Sorry, the member has moved on. I thought we were still talking about proposed section 187. I just made that comment about proposed section 187!

Mrs C.L. EDWARDES: Currently the arbitrator does not fill both positions. My comments flow from my original premise: the Government's system involves one person doing two jobs. That is unfair, and the reason

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can be found in the other provisions I have highlighted. I do not care whether the provisions in proposed section 187 are in the current Act; the legislation does not currently provide for one person doing both jobs. There is a difference.

Mr KOBELKE: I accept there is a difference. We hope this will make a difference and enable the system to work better and to the advantage of injured workers.

Mrs C.L. EDWARDES: Proposed section 188 is incongruous with the rest of the process, particularly as the Government also wants to involve the legal profession.

Mr KOBELKE: Proposed section 188 establishes the practices and procedures to be followed by arbitrators. The practices and procedures outlined are similar to those currently specified for review officers in existing section 84ZA. The proposed section also provides that arbitrators are not bound by rules of natural justice and that the Evidence Act 1906 does not apply to proceedings before an arbitrator. This will help to ensure that matters are dealt with in an efficient and cost-effective manner.

Mrs C.L. EDWARDES: I refer to proposed section 195 on page 162. It provides for representation by a legal practitioner, registered agent, a director or secretary if the party is a body corporate, or a public officer. The proposed section contains a couple of other provisions. Since 1993, the Government has not supported legal representation at the conciliation and review stages because that legal representation before an arbitrator can create an adversarial system and promote an adversarial scheme. Such a move - that is, to legal representation - is not beneficial to ensuring a relationship between the worker and the employer, and it can also be counterproductive. The minister and I can probably name a number of circumstances in which legal representation has been counterproductive to injury management goals. I firmly believe that reintroduction of legal representation will not create a fair and more balanced scheme. That is the reason I did not support the reintroduction of legal representation in the 1999 amendments. In addition, legal representation will increase legal costs for both workers and employers. No benefit will be achieved. Representation by some members of the legal profession who support the reintroduction say that it will be a fairer system. Although not all lawyers in the legal profession support the reintroduction of lawyers at this early stage of the process, those people who want it say that legal representation will allow injured workers to receive at a very early stage proper advice about their claim, and that is reflected in this Bill. Those people also say that if legal representation were reintroduced, matters before conciliation and review or the new dispute resolution process would not have to be adjourned for the seeking of particular advice about matters. Often the parties must go away, use the telephone and come back. However, that system has worked. To some extent the conciliation and review officers have been very good at dealing with those matters when they have come before them and at protecting injured workers. When injured workers have not had representation and have wanted to seek further advice about matters before them, they have been granted the opportunity to leave the meeting, make a telephone call and then return. Their rights are fully protected. I suggest that bringing lawyers back into the system will cost money. I asked the Law Society for the reasons lawyers should be reintroduced and whether the reintroduction could be facilitated at no extra cost to the system. The Law Society clearly said that it could not. It told me that when someone rings a lawyer, it will cost, and that other things will cost. Although the minister has put into this legislation provisions dealing with the cost arrangements, which we will deal with shortly, he will not be able to keep down the costs for clients and their lawyers. Indeed, the actuarial advice clearly spells out that such a system will increase the costs for the system.

Mr J.C. KOBELKE: I have a very different view of fairness and efficiency from that of the member for Kingsley. On the fairness side, there are cases now in which an injured worker may not have representation but an employer, through the insurer, has access to a clerk who deals with those matters every day of the week and is well versed in the law. It is hardly fair that when a matter is being determined, no-one with any real understanding of the Act and how the system works is able to represent the injured worker. We must open up legal representation on the basis of fairness. I refer to the balance between statutory benefits and common law in the whole mixture. If lawyers feel that they can make money only by representing people in the common law system, it could be destructive to the effective functioning of the system. It may be in the best interests of the injured worker to remain in the statutory scheme and seek to get the benefits available to him; however, if a lawyer feels he will not be paid adequately in that arena, there will be an unfortunate negative influence on the whole system, which could mean that the injured worker is encouraged to go into the common law scheme, which might not be to his advantage.

The second point made was that of efficiency. The present position is that, for the majority of matters that come through the Dispute Resolution Directorate, legal involvement occurs in the background. By attending conferences and hearings, lawyers could assist in cutting through to the key issues, particularly the legal matters that are relied on for the determination. That would ensure a more effective and timely resolution of the matter.

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In contrast, the worker who does not know the system could present information in a way that does not line up with the Act.

When we take into account also the way in which legal costs are structured, then we are trying to ensure that the lawyers assist in getting a resolution of the matter and that it is not in the interests of the lawyers to drag the matter out on the basis that they are getting paid according to the amount of time that they spend. In addition, in trying to expedite the whole procedure, we are restricting the ability for the legal representatives to use a range of artificial devices to drag the case out, which would enhance their fees, although it might be on the basis of seeking justice for their clients. When we put all those matters together, it is important that we allow open legal representation. There are some qualifications to that, which are contained in this clause. It will not be a huge cost factor, and it will lead to efficiencies in some areas.

Mrs C.L. EDWARDES: I refer to page 164, proposed new section 198, which provides for electronic hearings and proceedings without hearings. If there is agreement between the parties to do so, that can be an appropriate way in which to proceed. However, proposed subsection (3) provides that if an arbitrator thinks it appropriate, the arbitrator may conduct all or part of a proceeding entirely on the basis of documents without the parties attending or participating in the hearings. That is entirely proper if there is agreement between the parties to do so. However, if there is no agreement, then that is not a fair and proper way to proceed. In an electronic hearing, given that the arbitrator is wearing both hats - conciliation and decision making - the arbitrator is not in a position to observe the conduct and demeanour of the witnesses. In such a sensitive area as this, injured workers like to be able to tell their story. Although this proposed new section might be very good from the cost side of things, it will not necessarily create a framework for providing the best treatment possible for an injured worker. A similar situation will exist with the conducting of proceedings solely on the basis of documentary evidence. If an arbitrator is determined that that is the proper way to proceed, then he or she should get the consent of the parties, particularly when the parties have limited rights of appeal. It is grossly unfair to give such powers to an arbitrator when there are such limited rights of appeal. At least the parties should be given the opportunity to appear before the arbitrator, present evidence and make a submission. In the interests of ensuring expediency, the minister is not ensuring that appropriate treatment is given to the parties who are appearing before the commission.

Mr J.C. KOBELKE: This is an area in which potentially the commissioner would give guidelines if arbitrators were to make decisions based solely on the documents. The issue must be viewed in the context of what the workers compensation system is all about. It is seeking to balance the interests of the workers and the employers in a fair way. One would be concerned if an arbitrator thought that he could resolve a matter if there was a deficiency in the papers or there was some information that had not been covered. This clearly opens up the potential, if it is a clear-cut case on the information available, for the arbitrator to make a decision. If there are doubts in the mind of the arbitrator, or if there is a lack of information in the papers or some conflict between the papers that needs to be resolved by the arbitrator, then he would seek to engage those people. However, in simple cases, when the papers are clear cut, it provides the opportunity for the arbitrator to make a decision. As I said earlier, guidelines can be put in place by the commissioner when proposed subsection (3) is used.

Mrs C.L. EDWARDES: Proposed new section 201(1) on page 166 states -

An arbitrator may refer any technical or specialised matter to an expert and accept that expert's report as evidence.

Is this talking about medical or non-medical issues?

Mr J.C. KOBELKE: This is not medical. This reflects existing section 84ZD. An example that I have just been informed of is where the arbitrator refers a document to a handwriting expert to have it checked.

Mrs C.L. EDWARDES: Therefore, there are precedents for this, and it is well understood that it does not relate to medical issues?

Mr J.C. KOBELKE: That is correct.

Mrs C.L. EDWARDES: I refer to page 167, proposed new section 205. The concern that has been raised about this proposed new section is that it will remove in the case of a legal practitioner the legal professional privilege that a person might have in the case of a doctor. If we link that with proposed new section 183(1), a concern has been raised that a legal practitioner may be compelled to exchange information. Would the minister please explain that again?

Mr J.C. KOBELKE: This whole process started out to try to ensure that if medical evidence is gathered for the purpose of the workers compensation case, the parties cannot pick and choose what information they want to present because they want to hide the information that is least favourable to their case and present only the most

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favourable. The issue then was not to allow legal professional privilege to be used to hide those reports. However, the concern was that perhaps it was intended that other documents of a medical nature, which were in the possession of the lawyer, would therefore have to be produced as well. We sought to narrow it to include only matters that relate to the workers compensation case. We have added subsections (2) and (3), of which the member has a copy, as amendments.

Mrs C.L. EDWARDES: Therefore, anything that would constitute privileged communication to or from the legal practitioner in relation to his client, even though it might be from the treating doctor, does not have to be produced.

Mr J.C. KOBELKE: Yes. The treating doctor may have forwarded a covering letter or other documents, which went to the possession of the lawyer, the nature of which may be that they do not relate to the workers compensation case, but the doctor thinks the lawyer should also be aware that this person has these other conditions that stress might aggravate or whatever. If they did not wish to present those matters, they would not be captured because under the new amendment, subsection (1) does not apply in respect of a question that does not relate directly to the treatment or nature or extent of the impairment or assessment of degree of impairment of a worker.

Mrs C.L. EDWARDES: Therefore, in the event that in the medical report the treating doctor refers to such information that is outside paragraph (a), and it is not mentioned in the covering letter, can that information be deleted?

Mr J.C. KOBELKE: That is in proposed subsection (3). Under that subsection, a medical report may be produced by a legal practitioner in compliance with the requirement of this part, with the omission of passages that do not relate directly to the treatment or nature or extent of impairment or assessment of degree of impairment of a worker and contain a privileged communication made by or to the legal practitioner in his capacity as a legal practitioner.

Mrs C.L. EDWARDES: I want the minister to confirm that the legal practitioner does not have to provide a medical report which discloses any privileged information or anything outside the actual treatment or nature or extent of the impairment.

Mr J.C. KOBELKE: As set out in subsection (2), with subsection (3) allowing a medical report to be produced to meet the requirements of the part with deletions or omissions that meet the criteria in subsection (3).

Mrs C.L. EDWARDES: Members of the legal profession are concerned that under proposed section 183(1) linked with proposed section 205, they appear to be compelled by rules to disclose such information.

Mr J.C. KOBELKE: The issue is that the information is provided by rules. Clearly the rules will have to reflect the amendments we have now made to proposed section 205.

Mrs C.L. EDWARDES: Therefore, the legal practitioner will not be forced to produce any information that could be subject to professional privilege?

Mr J.C. KOBELKE: No, I am not saying that at all. The issue is that the legal professional privilege can be used to capture almost anything. We are saying that the lawyer cannot refuse, under the guise of legal professional privilege, to provide documents, unless they are caught by this section 205. If they are caught by section 205, they have to produce the documents. Proposed subsection (2) states that subsection (1) does not apply in respect of a question that does not relate directly to the treatment or nature or extent of impairment or assessment of degree of impairment of the worker. The double negative perhaps confuses it.

Mrs C.L. EDWARDES: I think the draftspeople do that deliberately to confuse us. I refer the minister to proposed section 208 on page 168. This is dealing with the delegation of the arbitrator's powers, and authorisation for a person to take evidence on behalf of the arbitrator for the purposes of any of the proceedings. The arbitrator may authorise evidence to be taken under this section outside Western Australia but it is not limited, as I understand it, to the taking of evidence outside Western Australia.

Mr J.C. KOBELKE: The clear intent is to provide the best way of getting the evidence that is required from remote witnesses. I do not know whether the member wants anything more specific.

Mrs C.L. EDWARDES: Again, just picking up on the question of fairness and the very limited rights of appeal to both workers and employers, it creates a level of uncertainty as to whom the arbitrator may delegate his powers. The minister has referred to the delegation of powers to obtain evidence from people in remote areas, but it does not matter whether people are in the Kimberley, Halls Creek or Laverton, they should have certainty about the process in this dispute resolution system. As such, I recommend that the authorisation for evidence to be taken or delegated under this section, should apply only to places outside Western Australia. The new dispute

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resolution process should be properly funded and staffed, with sufficient personnel possessing the requisite skills necessary to enable them to carry out the respective functions and roles that have been given to them under this particular Bill. That would create certainty in the scheme, and everybody would know what the process was, no matter where they lived in Western Australia. People should not be discriminated against.

Mr J.C. KOBELKE: I do not see how they are discriminated against. This has the potential to assist people. The member for Kimberley is on the committee. We have the ongoing issue of the people affected by the chemical spraying. Given the difficulties there, it may be that the actual arbitrator would go to that area if there were a reason for it, but it might be that a limited amount of information was required to resolve a case in which there was a dispute with one of those workers. I understand they are likely to fall under the Workers Compensation Act in terms of the benefits available to them. The issue then is that it may be appropriate for someone else to be authorised to seek the evidence that is required, and that may be of benefit to the worker by having the case expedited.

Mrs C.L. EDWARDES: To whom will the arbitrator delegate those powers? How will that be determined? It is not documented in the Bill, and there is a level of unfairness with regard to the person who might be delegated the powers in the Kimberley compared with the person delegated the powers in the south west. The minister could be talking about the forestry workers. At the end of the day there needs to be some level of consistency in the process being provided.

Mr J.C. KOBELKE: The provision is included to help workers, and I think the member is jumping at the potential for an arbitrator to abuse the system. Clearly, that is not what one expects. However, if people feel it is being used too widely and that has the potential to have a negative impact, there can be clear guidance by the commissioner and rules can be laid down under the general rule-making power. It can be guided if there is any suggestion that somehow it is being overused or abused.

I think members can see the positive side, which is the ability to actually go out and assist an injured worker. The member for Ningaloo in his electorate has people living in remote areas, on a station or somewhere, where it takes days to get to them. We are not talking about the whole case, but if an additional piece of information or evidence was required, then this is simply giving the power, in a limited number of cases, to authorise a person to get that evidence.

Mr P.D. OMODEI: The arbitrator is obviously a lawyer and an officer of WorkCover. Who would be the person taking that evidence, minister? Would it be another lawyer or would it be just Joe Blow from down the road or a justice of the peace? In the end, the arbitrator gets this information and he is not subject to any appeal, so he has a great deal of power in finalising a decision. I understand what the minister is saying in relation to assisting the worker by getting extra information, but it seems to me that the legislation should designate that the person whom the arbitrator seconds to take that evidence should be a person who is qualified and that the evidence he gains should be credible evidence. Who is the person and what qualifications does that person have?

Mr J.C. KOBELKE: It is not a provision that one expects to be used very often, but it may be that in a remote area they could call on the clerk of courts or a JP to provide this evidence so that the case could proceed.

Mrs C.L. EDWARDES: Given the fact that the arbitrator makes the final decision, that his decision is binding and that there are very few avenues for appeal in respect to it, then how on earth is one to determine the delegation of a person to take that evidence in a way that can give confidence to the system? I do not think arbitrators are going to abuse it; that is not my point at all. My point is that this provision is to be used by an arbitrator in instances in which he believes he does not have the staff and the resources to actually go and get that evidence. What I am saying is that we shall provide a far fairer system if we ensure that there will be sufficient resources and staff who are properly skilled to actually go and take the evidence themselves.

Mr J.C. KOBELKE: There is no intention to change the way in which the system operates at present, in terms of arbitrators and conciliation officers actually going -

Mrs C.L. EDWARDES: Yes, but there are two fundamental differences.

Mr J.C. KOBELKE: Yes, I am coming to that, but the issue is that this is giving additional powers; we are not including this clause for the purpose of closing down the way things operate currently, with an arbitrator visiting people when that seems to be the best way to do it. However, when the case involves very remote areas and the information sought is fairly clear - in terms of its being contained and this is the evidence one wishes to get - then this simply opens up the opportunity for the arbitrator to use someone else to gather that evidence.

Mrs C.L. EDWARDES: Then it should be subject to appeal, minister.

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Mr R.N. SWEETMAN: In relation to that, would the evidence gathered and relayed back to the arbitrator be done on a confidential basis or could it be scrutinised and perhaps challenged by the other party or parties?

Mr J.C. KOBELKE: That information would then be made available to the other parties.

Mr R.N. SWEETMAN: There is provision for some of it to be challenged?

Mr J.C. KOBELKE: All the evidence that comes to the arbitrator is then presented to both parties.

Mrs C.L. EDWARDES: On page 170, proposed section 213 deals with the form and content of decisions and reasons and it outlines that the arbitrator is to give reasons in writing to a party to a proceeding. It provides that, if the rules state that the decision is to be given in writing to that party, all within 14 days after the arbitrator makes the decision, and the party requests that the decision be given in writing -

An arbitrator's decision in writing is to include information as to appeal rights that may be available to the parties under this Act.

I mean, it is very limited. Why has the minister done that, given the fact that I know that he has a very strong belief that all forms of decision makers ought to provide reasons for decisions and in a very timely fashion?

Mr J.C. KOBELKE: I am having difficulty discerning the real concern of the member, because clearly a requirement is that if the party requests that the decision be given in writing, then they have to do it within 14 days after the arbitrator makes the decision. The reasons listed in proposed subsection (4) reflect what is in the Magistrates Court Bill with regard to the contents of judgment that the magistrate must give. Therefore, it is reflecting that standard.

Mrs C.L. EDWARDES: Under this Bill the arbitrators will be giving very limited reasons for decisions and identifying only the facts and the law, without the need to canvass all the evidence and all the factual and legal arguments, and people cannot appeal. This Bill is envisaging arbitrators playing a pivotal role in the decision making and in the whole of the dispute resolution process. As such, I think it is absolutely imperative that the conduct of proceedings by arbitrators be absolutely transparent and fair. I do not care what is in the Magistrates Court Bill; there are appeal proceedings in that area. If there were appeal proceedings in this case, some of the questions about the level of unfairness would not be raised. I suggest that they need to provide full written reasons for their decisions. That would ensure that people actually feel as though the process has been fair; at least they would feel as if their case had been heard. However, if the arbitrator needs only to identify the facts that he accepted and the law that he used in reaching a decision, bearing in mind that his decision will not be subject to a fair appeal process, there will be some very unhappy campers in the new dispute resolution process.

Mr J.C. KOBELKE: Clearly, people who see themselves as having lost are not usually happy, but if there is a system that looks after them much better and gives them fair determinations, then the whole system will work better to the clear advantage of the vast majority of injured workers. The fact is that there is the requirement, if requested, to give the reasons for the decision and the standard of those is comparable to those in the Magistrates Court.

Mrs C.L. EDWARDES: I refer the minister to page 173. This is the proposed section dealing with the order as to total liability, but it also provides orders when total weekly payments by way of compensation payable have reached the prescribed amounts etc. This is a very important provision. Can the minister outline the orders that the arbitrator will be able to give?

Mr J.C. KOBELKE: I am advised that proposed section 217 reflects existing section 84E. In fact, I think it is identical. We are not opening the potential for new interpretations by varying what is already provided. Currently a flat rate of \$50 000 is provided. We are amending it so that 75 per cent of the prescribed amount will be provided.

Mrs C.L. EDWARDES: Given the other provisions in this Bill that deal with the calculation of weekly payments, it has been suggested that to ensure that the arbitrator is easily able to come up with what he thinks is the 75 per cent figure, the figure should be amended to refer to the weekly payments calculated in accordance with schedule 1 of the Act. Why did you proceed with the percentage figure rather than a much more certain calculation?

Mr J.C. KOBELKE: I am not sure what the member means by certainty. As we well know, throughout the Bill is regular reference to "prescribed amount". The advantage of that is that the prescribed amount is indexed. A fixed sum, such as the \$50 000 that is currently provided by the relevant part, is eaten away through inflation. Fixing the sum at 75 per cent of the prescribed amount simply makes sure there is adjustment for inflation.

Mrs C.L. EDWARDES: I refer the minister to proposed section 220 on page 176, which states -

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Evidence of a statement made in a proceeding before an arbitrator is not admissible in an action brought by a worker for damages independently of this Act -

That is, common law -

unless the person who made the statement agrees to the evidence being admitted.

Why is that? Why will a statement that is on the public record and that has been given to the arbitrator not be admissible in common law proceedings?

Mr J.C. KOBELKE: It relates to the way in which dispute resolution is to work. I have tried to convey why that is important and the advantage we hope to get from it. The reason is that we will require full disclosure. Arbitration is an informal process. When people go to common law through the District Court, issues of discovery are involved. People are not required to provide information that may not advantage their cause unless it is through the process of discovery or they are asked a direct question. It is quite a different approach. With arbitration we are asking for all the information to be provided so that a judgment is made based on fair and, hopefully in many cases, unequivocal facts. In the case that they are disputed, there are processes for parties to put their view of why a matter is disputed so that the arbitrator can determine it. Through that process, information may come out that is not to the advantage of the injured worker; therefore, unless the person agrees, that information cannot be entered into the common law case a worker may bring.

Mrs C.L. EDWARDES: What if a witness subsequently dies? What procedures will there be for that person's evidence to be able to be used?

Mr J.C. KOBELKE: As far as I am aware, that evidence could not be admissible because the person would not be there to give agreement to it.

Mrs C.L. EDWARDES: Is there no other provision in this Bill that would contemplate that situation and allow an application before the commissioner to determine whether that evidence could be subsequently used and tested? Alternatively, the arbitrator could, at the beginning of each arbitration, ask if the parties are happy for all the evidence to be used in a subsequent common law action.

Mr J.C. KOBELKE: My advice is no, there is no other proposed section that would get around this clear provision.

Mrs C.L. EDWARDES: The minister might like to look at that and at a general power for the what-ifs before the Bill reaches the other place. I have thought of that one case. It was brought to me as an instance. Such circumstances would be seriously unfair to a matter before the District Court.

Mr J.C. KOBELKE: I am happy to have officers look at that.

Mrs C.L. EDWARDES: I refer to proposed section 222, "Interest before order for payment". Concern has been raised about who is liable for payment of the interest and to whom the interest is payable.

Mr J.C. KOBELKE: I am advised that this is a provision we have drawn down from the New South Wales regime. Our latest advice is that it has not been utilised in New South Wales, so we cannot say how effective it will be here. Clearly, the proposed section provides a means by which, if there were undue delay by a party in making a payment that was a requirement of an arbitrator's decision, interest could be payable. I will leave it at that. The proposed section provides that interest could be ordered to be paid, but we will have to wait to see how it is used effectively or otherwise.

Mrs C.L. EDWARDES: I refer to the whole procedure dealing with interim orders and minor claims, which is basically the whole of part XII up to proposed section 240. Can the minister give a brief overview of this part? There is quite a deal of concern that it will limit an employer's access to a fair hearing and appeal and that these provisions are unfair to employers. They will impact on the way they are meant to operate.

Mr J.C. KOBELKE: This empowers the arbitrator to give an interim payment for up to 12 weeks of weekly payments or five per cent of other benefits such as medical costs. I understand that this has proved very successful in New South Wales. The issue is that an injured worker who has not been granted weekly payments and is disputing the determination can be left in dire circumstances while the matter is resolved. If the matter drags on for some time, a huge imposition is placed on the injured worker. We are making provision for interim payments for up to 12 weeks. Up to five per cent of the worker's medical entitlements can be awarded as an interim payment. The following provisions lay out how that is to work.

Mr P.D. OMODEI: Is it five per cent of the \$101 000?

Mr J.C. KOBELKE: A full medical is about \$38 000, so five per cent would be about \$1 900.

Mr P.D. OMODEI: What are the statutory -

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Mr J.C. KOBELKE: Sorry, I got that figure wrong; it is five per cent of the prescribed amount, which is currently \$135 531. If the worker is claiming statutory expenses it is five per cent of \$135 531, which is about \$6 700.

Mr P.D. OMODEI: What would be statutory expenses?

Mr J.C. KOBELKE: Balance is achieved. Although the legislation provides for interim payments for injured workers, it also provides for a suspension, which would be of benefit to the employer, if there were very good grounds for believing that the payments were not justified according to the Act. We are also providing the power for a suspension of these interim arrangements.

Mrs C.L. EDWARDES: Where is that?

Mr J.C. KOBELKE: It is proposed section 238 in proposed division 3.

Mrs C.L. EDWARDES: I refer back to proposed section 235. The minister has just pointed out the proposed section providing for an interim suspension or reduction order. Proposed section 236, "Recovery of payments", states that if an arbitrator subsequently determines that a person is not liable to pay compensation by way of the weekly payments or statutory expenses, the worker does not have to refund those payments. At the end of the day the minister is putting the emphasis back on the employer. The liability has not been determined. Weekly payments have not been granted. I agree that some injured workers find themselves in dire straits, and it is admirable to ensure through the provision that workers have some money. However, in the event that the matter does not properly fall within the workers compensation scheme, why must the employer give the worker up to 12 weeks of extra leave? That essentially is what the employer will be paying for. It might as well be in addition to annual leave, sick leave or workers compensation leave.

Mr J.C. KOBELKE: I correct something the member said. The member said there is no requirement for the injured worker to repay that. That is not true.

Mrs C.L. EDWARDES: He is not required to refund the compensation unless the arbitrator orders otherwise, and there are real restrictions.

Mr J.C. KOBELKE: Proposed section 236(b) states -

if the arbitrator is satisfied that the claim for compensation was wholly or partly fraudulent or made without proper justification, the arbitrator may order the worker or other person concerned to refund the whole or a specified part of the compensation;

Mrs C.L. EDWARDES: The minister is consistently putting the emphasis onto the employers to justify that they are right in not making the weekly payment. I agree that at the end of the day injured workers need to be supported. However, some injured workers take the system for a ride. Although a limited number do that, this provision for the recovery of payments should be far stronger, otherwise, all the minister will achieve is the adding of an extra three months paid leave to the workers' industrial agreements.

Mr J.C. KOBELKE: I think that is a total misrepresentation. I refer the member back to proposed section 233(3), which deals with how and when an interim payment order is made and states -

An arbitrator may make an interim payment order for statutory expenses unless it appears to the arbitrator that -

- (a) the claim concerned would have minimal prospects of success under Part XI;
- (b) insufficient evidence is available as to whether or not the expenses claimed are reasonable; or
- (c) circumstances exist that are prescribed by the DRD Rules as circumstances in which such an order is not to be made.

Clearly, if there are minimal prospects of success or if there is insufficient evidence - that is, it is just a claim - the payment is not made in the first place. Further, if it appears that a particular approach which is seeking to bleed money out of the system and which is not well justified is being made, rules may be put in place to protect the proponent of that sort of claim being granted an interim payment.

Mrs C.L. EDWARDES: Proposed section 231(1) states that an application for an order for the payment of weekly payments for total or partial incapacity can be made on an employer if the worker suffering the injury has served the employer with a certificate signed by a medical practitioner. How far down the process of obtaining an interim payment order will the arbitrator require evidence? Otherwise, he may as well hold a hearing.

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Mr J.C. KOBELKE: He needs the evidence right at the start. I have just referred the member to proposed section 233(3). I did not mention that proposed section 237 states that if evidence arises after the event, the arbitrator may revoke the payment.

Mrs C.L. EDWARDES: However, he does not necessarily have to order that the money that has been received be paid back unless there had been fraud or whatever.

Mr J.C. KOBELKE: Yes; if the compensation was wholly or partly fraudulent or made without proper justification.

Mr R.N. SWEETMAN: We are left to assume that when we refer to the employer, we are talking about the employer's insurer. I know there is not much difference at the end of the day, but it means that the employer could get hit twice if these interim payments are drawn down against the employer instead of being claimable through the compensation fund. Is it from the fund?

Mr J.C. KOBELKE: It is from the insurer; the insurer stands in the stead of the employer.

Mrs C.L. EDWARDES: The employer pays it first and he has to get it back from the insurance company.

Mr R.N. SWEETMAN: Can I safely assume that it was covered in the drafting discussions about this legislation that the employer should not be left holding the baby in the event that he is trying to get some of these interim payments back?

Mr J.C. KOBELKE: That would be a matter for the arbitrator based on the evidence that is provided to him.

Mr R.N. SWEETMAN: Yes. I was thinking more about the employer and the company he is insured with.

Mr J.C. KOBELKE: Sorry.

Mr R.N. SWEETMAN: I want to make sure that we are not inadvertently including more fine print in the contract between the employer and the insurance company.

Mr J.C. KOBELKE: The standard practice is that the employer is responsible and the employer is reimbursed by the insurer.

Mr R.N. SWEETMAN: Okay. There may be an argument that only under some conditions will that interim payment -

Mr J.C. KOBELKE: Yes.

Mr R.N. SWEETMAN: Will the arbitrator rule that the payment has to be reimbursed to the employer? I would hate the insurance company to argue the toss with the employer so that the employer is caught after having paid the money. The insurance company might say that it does not think it should have to pay the money to the employer, and all of a sudden a dispute will occur, and there will be potential for litigation between the employer and the insurer.

Mr J.C. KOBELKE: No. The insurer has to meet the obligations of a decision made by an arbitrator under the provisions of the Act.

Mr R.N. SWEETMAN: It is equally binding on the insurer.

Sitting suspended from 6.00 to 7.40 pm

The DEPUTY SPEAKER: I am advised a quorum is present. Member for Kingsley, I understand that before the break you were dealing with page 184.

Mrs C.L. EDWARDES: I had moved from there and was talking about page 183. I refer the minister to the proposed sections we were talking about earlier; in particular, proposed section 236 on page 183, "Recovery of payments". I have made some comments on that. Why did the minister not proceed down the path of using amended section 71 to recover payments that were not lawfully paid to any party?

Mr J.C. KOBELKE: We are dealing here with interim payments, which will be a new division of the Act. Therefore, as there will be procedures by which interim payments can be authorised, it is quite appropriate to include in that division a section on the recovery of payments rather than to allude to another part of the Act. It makes sense that we should have it. I think we have a difference of opinion about what will be the balance of the effect of the sections for recovery. I think the effect is fairly clear when we take into account the criteria for establishing the interim payments and when we look at the fact that there will be the ability to recover those payments if a claim has been wholly or partly fraudulent or made without proper justification. I accept that we have achieved a fair and reasonable balance to look after people who would be left without weekly payments if there were not a structure such as this and also to protect the system from fraudulent or unsubstantiated claims.

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Mrs C.L. EDWARDES: I refer to the whole of this proposed part. I presume that the minister is talking about instances in which weekly payments had not been made. Could that also occur when there has been a recurrence or an aggravation of the injury? Could this part of the legislation also be used in those circumstances? The wording does not make it clear that these claims could not be made. There might be an application by a worker because of a recurrence, exacerbation or aggravation of a condition. That should not be dealt with as a minor claim, but there is no clear provision -

Mr J.C. KOBELKE: I draw the member's attention to proposed section 232, "Orders for interim weekly payments". Proposed subsection (1) states the requirement as follows -

- (a) a period of not less than 21 days has elapsed . . .
 - (b) the worker has not received the first of the weekly payments claimed,
- an arbitrator may order the employer to pay weekly payments to the worker.

Mrs C.L. EDWARDES: Is there a definition of the "first of the weekly payments" in the case of the claim resulting from the recurrence of a condition?

Mr J.C. KOBELKE: We have to say that that issue does not seem to have been fully addressed. The proposed section I have read to the member may be interpreted - I am not a lawyer - as it stands to mean that the worker has never received the first weekly payments claimed, or it could be interpreted in terms of the action to have those payments reinstated.

Mrs C.L. EDWARDES: After the Dossett decision, I am not sure what it will ever mean.

Mr J.C. KOBELKE: Through the provisions that apply to the making of interim payments, we are seeking to give guidelines and protect the system from abuse. However, in a situation such as this, I do not know that it is all that critical whether an injured worker who had finished with the system and who has returned because of a recurrence of the condition should be eligible for this, especially as the likely number of applicants will not be huge. As I indicated to the member outside the committee hearing, in New South Wales over a 12-month period about 300 claims were considered and only 44 per cent of claims - less than 50 per cent - were made. Given the number of claims that are likely to come back for a second go, I do not see that it is a major issue for which we want to tie the whole thing up in great detail.

I confirm that in New South Wales in 2003 there were 356 applications for interim payment and in 44 per cent of those cases, payments were made.

Mrs C.L. EDWARDES: I refer the minister to page 189 and proposed section 243. How does this section link with the other proposed sections we have been talking about, particularly proposed section 236?

Mr J.C. KOBELKE: Proposed section 243 provides that moneys received by a worker for weekly payments and/or medical and related expenses under a minor claims order cannot be ordered to be refunded. This ensures the worker is not disadvantaged by such an order being made by an arbitrator.

Mrs C.L. EDWARDES: How does that link with proposed section 236? That says that the payment is not required to be refunded unless the arbitrator orders.

Mr J.C. KOBELKE: Proposed section 236 is in a different division from proposed section 243. Proposed section 236 is in division 2, "Interim payment orders", and proposed section 243 is in division 4, "Expedited determination of minor claims". I take it that proposed section 243 applies to there being no recovery of compensation under the expedited determination of minor claims.

Mrs C.L. EDWARDES: Can the minister explain why? What is the difference between minor claims and expedited determination of minor claims? Do they not deal with the same issues but in a different kind of process?

Mr J.C. KOBELKE: The issue is about differentiating between expedited claims and minor claims. Proposed section 241(1) states -

An application for an order as to payment of not more than 12 weekly payments in respect of a period prior to the application may be made under this Division by a worker at any time after -

It is envisaged that a minor claim has limits, and in weekly payments the limit is a maximum of 12 weeks. Although interim payments may be for a limited time, they are envisaged to be ongoing. Minor payments are not envisaged to be ongoing.

Mrs C.L. EDWARDES: Under what circumstances would that be?

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Mr J.C. KOBELKE: For example, a doctor may have indicated that a worker needs to take two or three weeks off work. We would work on that basis at the time, rather than on an interim payment which is more open-ended.

Mrs C.L. EDWARDES: I refer the minister to proposed section 247, which severely restricts the scope for appeal. The involvement of the question of law is no longer enough. This proposed section limits the power of the commissioner to grant leave to appeal unless the appeal involves a question of law. Proposed section 247(2) reads -

- (a) in the case of an appeal in which an amount of compensation is at issue -

There may be a question of law; however, it is further limited because proposed section 247 also states -

- (I) at least \$5 000 or such other amount as may be prescribed by the regulations;
and
(II) at least 20% of the amount awarded in the decision appealed against;
or
(ii) a question of law is involved and, in the opinion of the Commissioner, the matter is of such importance that, in the public interest, an appeal should lie;

It has been put to me that the question of monetary value should never really be placed on the parties' right to appeal. The reason for appeal may have far greater consequences for the scheme, and that may be why subparagraph (ii) refers to a matter being in the public interest as a whole rather than the monetary impact to a single claim. In the case of Williamson, the superannuation component is likely to be less than the monetary values placed under proposed section 247(2)(a)(i)(I) and (II). However, the impact of the decision on overall costs of the scheme is far greater. I suggest to the minister that if he limits the appeal to questions of law, he will delete the restrictions of the monetary component. Will he explain to the committee why he has incorporated the monetary component to further restrict the avenue of appeal?

Mr J.C. KOBELKE: In asking the question the member for Kingsley has addressed the issue. Proposed section 247(2)(a)(i) sets monetary limits as a condition for appeal. However subparagraph (ii) reads -

a question of law is involved and, in the opinion of the Commissioner, the matter is of such importance that, in the public interest, an appeal should lie;

We do not want the cost of the proceedings to prove more than the amount in question. If there is a broader public interest issue, even though the amount may be small, the commissioner can open it up under subparagraph (ii).

Mrs C.L. EDWARDES: Who will pay the costs if the matter is one of public interest?

Mr J.C. KOBELKE: My advice is that even under subparagraph (ii) there would be party-party costs.

Mrs C.L. EDWARDES: I still do not understand why the monetary restriction has been included in the Bill. If a person has been advised that he has a good avenue for appeal, he should not be limited by the mere fact that the scope is under \$5 000. If he still has to pay his costs, whether or not it is a matter of public interest, the minister should allow him to proceed.

Mr J.C. KOBELKE: I have given the answer about how one should look at this issue. The member for Kingsley's argument may have some validity, so I will ask my officers to have another look at this issue and to make a final judgment on the effectiveness of those provisions.

Mrs C.L. EDWARDES: I refer the minister to proposed section 253, which deals with the decisions of the commissioner. Proposed subsections (2) and (3) limit the ability of any party to challenge the validity of a commissioner's findings. I reiterate the fact that all parties should have the right to challenge a legally binding decision in a higher court. As such, the Opposition does not support the limitation on the appeal against the commissioner's decision.

Mr J.C. KOBELKE: Against that the member has to take into account proposed section 254. I appreciate that there is limited opportunity, but proceedings may be taken in the Supreme Court.

Mrs C.L. EDWARDES: I refer the minister to proposed section 262, which deals with costs. An order for costs should reflect the outcome of a hearing. In a fair system a successful party would not be required to pay the costs of an unsuccessful party. The provisions relate to a subjective opinion formed by an arbitrator, when the costs unnecessarily incurred will unfairly limit and fetter an employer's development in the presentation of his case. Proposed section 262 essentially regulates the order and costs of parties or their representatives; they are

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not balanced and nor can they be seen to be fair. The other issue is, of course, the new statutory cost committee. There is already a statutory cost committee which regulates lawyers' costs in every other tribunal, and yet the minister will proceed to circumvent that cost committee and recreate a new committee for the regulation of the assessment of costs in this matter. Why is the minister proceeding down that path? When the minister responds, perhaps he can refer the committee to the part of the Bill that will stop lawyers from entering into an agreement with their client about the costs and workers compensation matter before them.

Mr J.C. KOBELKE: There are two parts of the question. The answer to the first is that there has been a huge effort to integrate these provisions, so that the whole package works. I have already said several times that allowing workers into the statutory scheme is part of the balance between statutory and common law, as well as providing protection and support for injured workers. A lot of the things the Government is doing that might seem to limit the potential for legal appeals through the statutory scheme are all about making sure that lawyers are there and available to assist injured workers. However, it is not an area in which seeking to pursue legal interests means that the whole thing is dragged on. This is likely to have an injurious effect on the worker, and result in extra costs. However, we are primarily seeking to overcome the injurious effect on the worker, by getting people through the system quickly. The issue with costs is that we are seeking a cost structure that relates more specifically to the work done rather than the hours that might be required to do it, because we will be allowing legal representation as well as agents. Under the scheme agents would be paid half the legal rate. That is clearly the structure we are seeking to set up under proposed part XV, division 3 "Maximum costs".

The second part of the question was about the issue of lawyers entering into agreements with their clients that seek to subvert or get around that cost structure. Proposed section 275 makes it clear that such agreements are of no validity. That does not mean that some lawyers may not seek to get around these provisions, but in that case their client would be able to rely on proposed section 275 to have such an agreement voided.

Mrs C.L. EDWARDES: Does that refer to the costs agreement, which is well known between lawyers and their clients?

Mr J.C. KOBELKE: The member is a lawyer and I am not, but my reading of proposed section 275 - I am happy to be corrected or advised on this - is that it will give protection to the client of the legal practitioner or the agent, so that if there were a costs agreement outside proposed section 275, it would be contrary to that section and, therefore, void.

Mrs C.L. EDWARDES: In interpreting what are likely to be regarded as legal matters relating to the Bill and the cost structure for matters as against individual action, the lawyers can establish a costs agreement that would separate the workers compensation matters, and charge for anything else that might lead up to or follow the action. In determining the legal cost structure, the Government will need to be very clear about which legal matters are covered under the cost structure. I suggest that the agreement could be reworded according to the cost structure.

Mr J.C. KOBELKE: The cost scale will be established. I will not have any input to that; I do not have the expertise. We have discussed this with a small group of lawyers, and we think it has the potential to work. The biggest issue is getting lawyers to see the advantage of servicing people in the workers compensation system, and doing their professional duty in looking after the interests of their clients. The schedule of fees that will be developed will seek to do that. We also know that, from time to time, lawyers will seek to get around that. We will monitor it and take action when we can to get compliances.

Mr P.D. OMODEI: I refer the minister to proposed section 264(1), which states -

Subject to this Division, costs are in the discretion of the relevant dispute resolution authority.

The explanatory memorandum states that costs are determined at the discretion of an arbitrator, the director or the commissioner. Can the minister provide some examples of how the arbitrator, the director or the commissioner will determine the costs in the relevant sections of the Bill?

Mr J.C. KOBELKE: This already happens under the present provisions of the Act. It will be happening in a different way under this Bill, because there will be a different scale. Currently the situation is that, when costs are awarded and there is dispute over those costs, the arbitrator can actually do the taxing and determine what the costs should be.

Mr P.D. OMODEI: Which cases would the director or the commissioner deal with?

Mr J.C. KOBELKE: Which section is the member referring to?

Mr P.D. OMODEI: I refer to proposed section 264(1). The explanatory memorandum states -

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Under section 264(1), costs are determined at the discretion of an arbitrator, the Director or the Commissioner.

Mr J.C. KOBELKE: In the new structure, these matters will be handled by the arbitrator. The director is the person who has administrative responsibility. The commissioner is the District Court judge, who has oversight and management of this whole process, particularly, as the member for Kingsley has pointed out, because we are not allowing appeal mechanisms in any expanded way. The issue is having a District Court judge to oversee the process, to make sure that there is procedural fairness.

Mrs C.L. EDWARDES: I refer to proposed section 292, which deals with regulations, on page 214. The minister has moved an amendment to this proposed section, obviously in response to concerns raised by the Australian Medical Association and the legal profession. Proposed section 292(1)(f) now states that the Governor may make regulations with respect to the implementation by medical practitioners who issue more than one certificate to a worker for the purposes of this Act or the code of practice (injury management) issued under proposed section 155A(1). My apologies to the committee, but we were still looking for those amendments as the minister was moving them. Would the minister mind again going through what that change means?

Mr J.C. KOBELKE: Proposed section 292 confers the regulation making power. The issues there include the dispute resolutions directorate, and the regulation and operation of medical assessment panels, medical specialist panels and specialised retraining assessment panels. Regulations can be made for the purposes of all those people who play a role.

Under paragraph (d), general ones are available for the prevention and minimisation of occurrences of injury in employment or a place of employment. I am paraphrasing very quickly. Regulations could be made under paragraph (e) to provide for allowances to be paid to witnesses, and the circumstances in which and extent to which they are to be paid from moneys standing to the credit of the general fund. Regulations under paragraph (f) could impose on medical practitioners who issue more than one certificate to a worker obligations relating to medical treatment, management and reporting for the purposes of the legislation. That is what we had in the Bill, but the Australian Medical Association thought that was far too heavy-handed. I had to agree that the regulation-making power would perhaps go beyond what we were seeking to do, which was to ensure that medical practitioners fitted in with the injury management code and accepted it as one of the conditions of participating in the workers compensation system. They are crucial to injury management. We had a situation in which we had placed specific obligations on employers and workers but there was no reference to any obligation on doctors. We have reworded it so that after a doctor issues the first certificate to an injured worker, the doctor is potentially caught by the injury management code, and the compliance and cooperation of the doctor is sought with that code of practice for injury management.

Clause, as amended, put and passed.

Clauses 131 and 132 put and passed.

Clause 133: Section 180A inserted -

Mrs C.L. EDWARDES: Has the minister received confirmation from the Chief Judge of the District Court that the court is happy to comply with this clause?

Mr J.C. KOBELKE: I am not in a position to seek the compliance of the Chief Judge of the District Court.

Mrs C.L. EDWARDES: I am not sure that WorkCover WA will have too much success either, given what is provided in this proposed section.

Mr J.C. KOBELKE: As the member will be well aware, the previous incumbent of that position has now moved on. I had a very good meeting with him to discuss what we were doing, how he saw it, the importance of the work, and the characteristics of the District Court judge who might take on the position of commissioner. He is no longer in that position and I have not had an opportunity to pursue the matter with the new Chief Judge. We will certainly look at doing that when the legislation is passed, because we need someone who has interest and expertise in and a commitment to this area. If a person came to this position with perhaps little understanding of the workers compensation system but was dedicated to it, clearly that person would quickly come up to speed. The issue is that we want someone who understands the importance of the workers compensation system and the very clear philosophy that is embodied in all these changes. It is a matter of having a very efficient system that looks after injured workers. Although they will seek to make sure that procedural fairness is protected so that the interests of all parties are upheld, it will be done in a way that expedites the process so that injured workers do not get stuck in the system. We will be looking for a person of the standing of a District Court judge who would be available and willing to make that commitment to ensure that the legislation worked well. The issue is

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the number of cases. I am sorry, I have answered a different question! I answered the question on the Dispute Resolution Directorate, which we have been dealing with for the past hour or two, and the role of the commissioner under that. We are dealing with a different provision altogether. It is a very important one, because I remember when we were developing it.

Mrs C.L. EDWARDES: That is why I asked you what your relationship was like with the new District Court Chief Judge, as WorkCover would be intruding in matters to do with the District Court.

Mr J.C. KOBELKE: The member may have forgotten that I perhaps criticised her too often when she was minister; or I think it might have been the member's predecessor, Mr Kierath. One of the issues was that although WorkCover collected a huge amount of data, the information available on common law was quite deficient. Decisions were being made on how to put checks and balances on common law without having a really good body of knowledge. WorkCover improved that under the term of the previous Government and since, but we are concerned about collecting full data on common law settlements. For that reason we are inserting this proposed section so that we can seek from the District Court information on not only the number of claims but also the quantum of and conditions on those awards so that we can properly monitor the common law part of the system.

Mr M.W. TRENORDEN: Is the minister saying that it is a request, and that it is no more than that?

Mr J.C. KOBELKE: I presume that that is the appropriate form of drafting when we are dealing with the District Court.

Mr M.W. TRENORDEN: Is there a possibility that it might be refused?

Mr J.C. KOBELKE: I would like, for this limited purpose, to have the power to direct, but we must have the separation between the courts and government. Although WorkCover is an independent agency, it is an arm of government; therefore, it would be inappropriate to include language in the legislation that would mean that the court was being directed.

Mrs C.L. EDWARDES: The limitation on the sort of information required is not clear. The proposed section states -

... with such information concerning actions to which Part IV applies ...

That bit could be quite extensive. Again, I am concerned about the sharing of information between different agencies that have different roles. I suggest that WorkCover has a totally different role from any party that is taking an action to the District Court on a common law claim. That information is to be provided without the party's consent. It is not limited just to data; it could clearly be identifying information.

Mr J.C. KOBELKE: Clearly it is a request. The court will make determinations on what it considers to be appropriate in terms of confidential matters. We really need a good database on what is happening with common law determinations to be able to manage the system and make corrections if there are problems.

Mr R.N. SWEETMAN: This is probably something that could have been asked during the second reading debate, but because it has come up at this stage, I ask: how many common law determinations were made by the courts under the second set of provisions of the previous legislation? The modus operandi of the insurance companies was to settle at all costs to make sure that the matters did not get to court; they capped their losses. They would have been substantial losses in most cases, as far as the fund went. I understand why there is a limited database; it is because very little proceeded to court.

Mr J.C. KOBELKE: This is part of the difficulty. We put some data together on the costs in this area. I actually want some numbers and not amounts. I will give the member the amounts for the purpose of providing a response to his question. We collected data because we were asked to do so by the various divisions when we were debating the provisions for common law. The figures for 2002-03, which is the last full year for which we have figures, show that 16 per cent of the claims were for between 16 per cent and 30 per cent disability. Disability of greater than 30 per cent made up 38 per cent of the claims. Section 93D writs formed 18 per cent - this is in value, not number - and claims raised by the insurer formed 27 per cent, which basically means that the insurer settled as a common law claim but did not put it into a category.

That is part of the issue that relates to how we collect more fulsome data. I gave money amounts, not numbers on those claims. Perhaps those claims indicate poor record keeping or that people make accusations and allocate money in a way that should have gone under a different head of costs. We do not know.

Mr R.N. SWEETMAN: If a legal firm took up a case pro bono under common law on behalf of an injured worker, and each party realised that it would cost \$2 million by the time there was a determination, the reality is that the insurer would offer \$1.2 million to go away -

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Mr J.C. KOBELKE: That is looking at it from a totally different perspective. We are not dealing with that matter here. Insurers generally do not do that. In fact, I know that is the case. Insurers may settle by one means because they see it as a cheaper option than using different means. Issues may arise about whether that is totally appropriate under the Act under consideration. We would not necessarily know the situation if we did not pick up the data. Quite specific data provision requirements are involved. One might say in some respects that they are quite burdensome. However, it does not mean that we get full and accurate data in every sector. An area I have already indicated in which our data could be improved is common law settlements. That provision is designed to pick up more accurate data. Again, it is wide open. We will not ask the District Court for such amounts that it will tell us to get lost. We may change what is required from time to time because someone might make accusations similar to that which the member is making: someone may say that money is blowing out in this area, and ask whether it is according to the Act and being administered properly or whether it is a backdoor way of doing something that is perhaps not so appropriate. Unless we collect the data fully across the system, it may be hard to interrogate and find out what is happening. This is a specific provision to enable us to get the best data we can, as required by WorkCover from time to time, on what is happening through the District Court with common law settlements.

Mr R.N. SWEETMAN: Does that mean that lawyers representing clients at common law will have to agree to have their fees capped? Will they have to work as per the schedule of fees referred to in a previous Bill?

Mr J.C. KOBELKE: That was just for the statutory scheme. When it comes to common law in the District Court, they will be bound by the taxation arrangements that apply.

Mr R.N. SWEETMAN: Will nothing stop them offering their services pro bono, and taking 40 or 50 per cent of the payment?

Mr J.C. KOBELKE: No. Of course, a range of other personal injury cases is heard in the District Court, and lawyers are required for that process. They have their own ways. They follow schedules of fees or fee agreements. It is normal legal practice. When a common law workers compensation case goes to the District Court, it will sit within the rules that apply to such cases.

Clause put and passed.

Clauses 134 to 140 put and passed.

Clause 141: Schedule 1 amended -

Mrs C.L. EDWARDES: A number of existing clauses are within the provisions of schedule 1, yet the Government is moving to replace schedule 1. Can the minister explain the reasons for this change? Is there a rationale for it?

Mr J.C. KOBELKE: There is always a rationale. Part of the difficulty in providing a comprehensive answer is that we are making a range of updates and improvements to existing schedule 1. For that reason, schedule 1 will be repealed and a new schedule 1 will be put in place. We do not have a table that directly links the existing benefits to how they will be updated and improved. However, there are substantial improvements in the schedule 1 benefits.

Mrs C.L. EDWARDES: Is this where the step-down and the like are to apply?

Mr J.C. KOBELKE: Clause 1 of schedule 1 will be repealed. The new provisions seek to rectify inequities in the current entitlements for dependants of deceased workers by enabling certain dependent children or stepchildren in the case of total dependency to elect whether to receive a child's allowance or the full notional residual entitlement of the worker. The provision will apply where a deceased worker does not leave a dependent spouse or de facto who is the parent of the child. The reason for this is that a dependent spouse or de facto who is not the parent of the child cannot necessarily be expected to look after the child's interests. Currently, dependent children are entitled to only the child's allowance. The Government seeks to ensure that the special category of a dependent child is covered. Given the ways that family structures are changing, such cases spring up. It would be unfair to the dependent children if the change were not made.

Mrs C.L. EDWARDES: Can the minister take the committee through the provision that replaces existing clause 1? Clause 141 of the Bill reads -

(1) Schedule 1 clause 1 is repealed and the following clauses are inserted instead -

Where does that provision stop?

Mr J.C. KOBELKE: It is easier to work off the Blue Bill with proposed schedule 1; I refer to page 400.

Mrs C.L. EDWARDES: It deals with dependants' entitlements.

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Mr J.C. KOBELKE: Clause 1 of schedule 1 is currently headed "Death - dependants wholly dependent". That is to be replaced by the heading "Death - dependants wholly dependent - notional residual entitlement". Proposed clause 1A of new schedule 1 is titled "Death - dependants wholly dependent - child's allowance". Proposed clause 1B is headed "Death - dependants wholly dependent - notional residual entitlement or child's allowance". Proposed clause 1C is headed "Determination of entitlement under clause 1B". That is the end of proposed clause 1 of new schedule 1. Proposed clause 2 is about death. It refers to partial dependants who are not children.

Mrs C.L. EDWARDES: The provisions continue until the clause headed "Death - no dependant" and "Death - where not resulting from the injury but weekly payments had been made". That is not proposed clause 1 of new schedule 1.

Mr J.C. KOBELKE: Proposed clauses 1A, 1B and 1C all replace existing subclause (1).

Mrs C.L. EDWARDES: That is clause 141 of the Bill -

Mr J.C. KOBELKE: It runs through to page 228 of the Bill, which are amendments to clause 1 of schedule 1 of the Act. The top of the next page deals with proposed clause 2 of schedule 1. The Blue Bill highlights where some "minor" changes are being made; I use that word advisedly.

Mrs C.L. EDWARDES: I am referring to proposed subclauses (9) to (14), on pages 230 and 231, which will amend clause 11 of schedule 1, dealing with weekly earnings.

Mr J.C. KOBELKE: That is the step-down we are talking about.

Mrs C.L. EDWARDES: Yes. The clause deals with the changes to the step-down. For all the reasons that we have highlighted previously, we are opposed to the changes because we do not believe they will in any way support the injury management process.

Mr J.C. KOBELKE: Clearly we do not accept that. It is a very simplistic view to think that a step-down after four weeks will drive injured workers back to work and, therefore, if they are paid for 13 weeks they will not go back to work. The situation is much more complex than that. That is the way the total system manages the injured worker, and how injury management assists them to get back to work and get on with their lives. In fact, they are likely to counter a small number who might be encouraged to stay on working benefits longer. However, the system will help people to get back to work and not be in a situation in which they do not have a future, do not know where they are heading, and end up in a state of depression with all the problems and costs that go with that.

Mrs C.L. EDWARDES: I refer the minister to page 232, and the amendment to clause 17 of schedule 1. This may not be the right clause, but included in the amendment are the words "not including the cost of any travel, meals, or lodging". It reminded me of a letter that I received in respect of this Bill. The person who wrote the letter travels from the wheatbelt area to Perth for medical treatment, as required. He is not reimbursed for the cost of the travel and for the accommodation and/or meals to the extent that it costs him. I just wonder whether the Government is making any change to ensure that people are properly reimbursed for their travel expenses.

Mr J.C. KOBELKE: I think the member has given us another item that we need to include in our next round of reforms when we seek to enhance the benefits even further. The member has a valid point. I am aware that some insurers pay that, but they do it simply as part of their service of looking after the injured worker. It appears they are not required by the Act to do so.

Mrs C.L. EDWARDES: You could look between now and when the Bill is in the upper House.

Mr J.C. KOBELKE: Yes, but I am sure that the member would then require us to go back and get another actuarial assessment, so that we could quantify the costs, which might delay things even further.

Mrs C.L. EDWARDES: In subclauses (16), (17) and (18), there is continued use of the figure of \$50 000. Can the minister tell us why and what this reference is to?

Mr J.C. KOBELKE: It is just the way it has been reworded and shifted around a bit, but \$50 000 is the current provision for the additional amount for medical expenses. That remains the same. Of course, 30 per cent of the prescribed amount is the standard medical entitlement. That stays as 30 per cent, but of course is indexed by the prescribed amount. The \$50 000 is then the additional sum on top of the 30 per cent that is available. That is currently in the system and we are not changing that, although the rewording means that it appears in a slightly different way.

Mrs C.L. EDWARDES: In subclauses (16) and (17) the figure of \$50 000 is deleted, and yet it is referred to in subclause (18).

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Mr J.C. KOBELKE: This issue has been raised with us and I suspect also raised with the member, because the rewording suggests that there was some change. However, we are not changing the effect of the payment of the additional \$50 000. The advice I have received is that the reference in proposed subclause (1b)(c) to the \$50 000 allowable under subclause (1) or (1a) is appropriate, because the additional sum referred to in subclause (1) or (1a) means the \$50 000 allowable. This is because subclauses (1) and (1a) must be read in conjunction with proposed subclause (1c)(a) which indicates that an arbitrator is not to allow an additional sum exceeding \$50 000.

Mrs C.L. EDWARDES: In clause 18A the prescribed amount means \$250 000. Can the minister tell us, in terms of the actuary's costings, how many cases that is referring to and the likely additional cost?

Mr J.C. KOBELKE: By way of explanation while we try to get those figures, I indicate that the issue again is part of the counterbalancing, through improvements to the statutory benefits against the attraction of common law. A very small number of workers may need an incredible amount of medical treatment. It may involve umpteen operations at great expense, and they may say that common law is the only opportunity for them otherwise they must have that medical treatment under Medicare. There is the potential to offer them a substantial additional amount of money. Only a very small number of people end up going through a huge number of procedures. These would be governed by the normal decisions that are made as to the efficacy of the particular procedure. Difficulties occur when there is a new or experimental procedure which may hold out a particular hope for the injured worker, and a judgment will need to be made as to whether funding will be made available, because it might be judged as really just experimental and not something that the system should be funding. That is the sort of area we are looking at.

The actuary has suggested, perhaps very conservatively, that the maximum number of 60 claims a year would cost approximately \$6.5 million. That is an average of \$140 000 for each claim.

Mrs C.L. EDWARDES: I refer the minister to proposed clause 18B, "Final day for clause 18A(1b) application", on page 237 of the Bill. The Bill provides that the final day on which an injured worker can make an application for weekly compensation payments is five years after the day on which the injured worker made the claim for compensation. I thought the new system would actually hasten people through it to allow them to get on with their lives.

Mr J.C. KOBELKE: That is absolutely right.

Mrs C.L. EDWARDES: Why is there a five-year period?

Mr J.C. KOBELKE: Initially we were looking at having the additional medical sum uncapped for a very small number of people. However, that caused concerns about the cost and how it might work generally. Therefore, we had to fix an amount. The member is aware from our discussions that that amount is \$250 000. Given that we have long-tail insurance and the problems that go with that, we had to consider a reasonable time in which people could claim that money. It is a somewhat arbitrary figure, but five years was thought to be a reasonable time in which a worker who was seriously injured and was involved in a range of medical procedures could claim compensation. After five years, it was considered there would be little likelihood that continuing medical procedures would relate to that trauma, which must have occurred at the workplace, that caused such serious injuries. This provision will give certainty to the cost structure. Five years was thought to be a reasonable time.

Mrs C.L. EDWARDES: I refer the minister to proposed clause 18D, "Interim payment of additional expenses". Given the minor claims component we have just discussed, why has the Bill included a further interim payment of \$2 000 for additional expenses? It is only a very small amount.

Mr J.C. KOBELKE: This is an additional amount for medical expenses. The amount was based on the difficulties some workers have when they have expended 15 per cent of the prescribed amount available for medical expenses. They can then find themselves in a position in which they need another medical procedure, such as a skin graft, and must go back through the system to get approval for it. Many years ago people who were concerned about that issue brought these types of cases to my attention. I was advised also that at least one insurer - a number of them might have done it - was making these types of payments, even though they were unapproved, because it could see the benefit it would have for the worker. The insurance company made the payment even though the injured worker was waiting for approval to get the \$50 000. It was considered that an injured worker who had undergone a range of medical procedures and who needed an extra medical procedure should get the extra payment when the procedure had medical validity because it was recommended by medical practitioners and specialists. In those cases the insurance company simply made the allocation. We have adopted that procedure of one or more insurers to open it up for everyone. A worker who has reached that limit and who then applies for extra funds to pay for more visits to a doctor to get back into the system can be authorised to undertake further procedures to a sum not exceeding \$2 000. The insurer and the employer must

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pick up that cost. In most cases the work will get approval and the injured worker will get the \$2 000, which is just a part of the \$50 000 payment. The fact is that most medical procedures can continue. There might be a small, additional cost because in some cases the extra amount will not be given but the amount by which the worker has gone over the allocated amount will not be more than \$2 000. The medical procedure would not be held up waiting for clearance to approve the additional amount.

Mr M.W. TRENORDEN: Does that mean that the further amount could be \$52 000 or is it capped at \$50 000?

Mr J.C. KOBELKE: The \$2 000 will be taken into account in the maximum additional sum of \$50 000. The \$2 000 is not additional to it. The amount of \$2 000 is for the interim period while the worker is awaiting approval for the \$50 000.

Clause put and passed.

Clause 142: Schedule 2 amended -

Mrs C.L. EDWARDES: Can the minister explain how he calculated the increases in the amounts paid for injuries to a worker's neck and pelvis?

Mr J.C. KOBELKE: This was done by the specialist medical group we got together that looked also at the impairment guides. I will get some details on how the group came up with the figure. It relates particularly to the balance and interplay between the statutory benefits and the common law. I acknowledge that the whole body impairment test is a huge advantage because it is a far more objective test. It is able to be reproduced, so that very much the same assessments will be made by different doctors for the same patient, which does not happen now with the disability assessment. However, the downside is that people who currently go to common law with back, neck or pelvis injuries under the disability assessment may find that they just miss out. If they just get over the boundary for disability, the chances are that they will just miss out when it comes to the whole body impairment test. The issue then is to look after them with improved benefits in a statutory scheme, rather than try to encourage them to go to common law. As I have said many times, a huge number of workers who currently just get into common law are no better off than they would be if they stayed on statutory benefits. It is therefore an attraction to those people to stay on statutory benefits. In fairness we are trying to look after them, because if they are on statutory benefits they should get an additional payment and, therefore, an increase of 15 per cent in that area.

Mr M.W. TRENORDEN: Was an actuarial assessment made of the drop they would get in common law as against increasing the schedule payments?

Mr J.C. KOBELKE: The member can try to interrogate the actuary for that. It is a complex issue. I will seek some advice, but my understanding is that more of a holistic assessment was made. The actuary went into specific areas and sought the best estimate of cost changes in each area. However, he did not necessarily pick out numbers in an interplay between one and the other. With regard to the changes made to common law, and my indication that it will be tougher for people to get through, he costed the system as more expensive even though fewer people are likely to go into it. It was slightly higher in common law, although not much higher. Most of the costs are in the statutory benefits scheme, in which the Government has enhanced the statutory benefits in a range of ways; this is just one of them.

Clause put and passed.

Clauses 143 to 176 put and passed.

Clause 177: Transitional regulations -

Mrs C.L. EDWARDES: This clause is most offensive. It is a proposal to make regulations to cure defects in the Act, which are unknown. Therefore, it leaves it open absolutely and totally in relation to any regulations, without limiting any power. The clause states -

If this Act does not provide sufficiently for a matter or issue of a transitional nature that arises as a result of the amendments effected by this Act, the Governor may make regulations prescribing all matters that are required, necessary or convenient to be prescribed for providing for the matter or issue.

The Assembly has dealt with this issue on a number of occasions, and it has always regarded these sorts of clauses in legislation as offensive. As such, we cannot support a clause with the power to make regulations, without any specific detail on how it will be contained.

Mr J.C. KOBELKE: I can understand that, as a point of legal principle, one might see this as irksome. However, I advise the member that my understanding is that the legislation she supported in 1993, introduced by Minister Graham Kierath, contained a very similar clause. If it had been included in the 1999 legislation, we would have been able to fix the problems we are now trying to fix with the other legislation. Although as a

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matter of pure legal principle, one might have concern that it is perhaps providing for too much regulation making power, it should be borne in mind that regulations are disallowable. If the Government of the day sought to go beyond the powers contained in the clause, or used the regulations in a way that was not acceptable, the regulations could be disallowed. It certainly gives the power, in a system as complex as this, to address the matter if something has been overlooked in the transitional arrangements, or if something arises out of the blue that no-one has previously thought about.

Mrs C.L. EDWARDES: The minister has just answered my question about the reason to not make those regulations. He indicated that if the 1999 amendments had included such a clause, it would have been easier to make the amendments, rather than introduce a new Bill in the House. He is usurping the power of the House, and it is unacceptable.

Clause put and a division taken with the following result -

Ayes (4)

Mr S.R. Hill	Mr J.C. Kobelke	Mr M.P. Whitely	Mrs C.A. Martin
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Noes (3)

Mrs C.L. Edwardes	Mr R.N. Sweetman	Mr M.W. Trenorden
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Clause thus passed.

Clause 178: Power to amend subsidiary regulations -

Mrs C.L. EDWARDES: This is most unusual. It will allow the minister to make subsidiary legislation amending subsidiary legislation made under any Act, again without any framework surrounding those transitional provisions. I oppose the clause.

Mr J.C. KOBELKE: It is good management of a very complex legal system to have some power to do that. Again, if the regulations made are abhorrent to either House of Parliament, they can be disallowed.

Clause put and a division taken with the following result -

Ayes (4)

Mr S.R. Hill	Mr J.C. Kobelke	Mr M.P. Whitely	Mrs C.A. Martin
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Noes (3)

Mrs C.L. Edwardes	Mr R.N. Sweetman	Mr M.W. Trenorden
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Clause thus passed.

Clauses 179 to 186 put and passed.

Clause 187: Deemed eligibility for approval as Director or arbitrator -

Mrs C.L. EDWARDES: This clause deals with the transitional provisions for the employees of WorkCover, some of whom may very well have been public servants in this department and/or directorate for a considerable period. Can the minister give any comfort to conciliation officers who will not fall within this clause and those employees who may not be covered by clause 187(2)?

Mr J.C. KOBELKE: My advice on clause 187 is that subclause (1) enables the director to be able to apply for a new position, subclause (2) enables a review officer to apply for an arbitrator's position and subclause (3) ensures that a review officer under the old system must have been appointed on a permanent basis to be eligible for approval as an arbitrator in the new system.

Mrs C.L. EDWARDES: Does that mean that those current conciliation officers who are not legal practitioners will still be able to apply for those positions?

Mr J.C. KOBELKE: The advice is that a conciliation officer cannot, but if he is a permanent review officer who is not legally qualified, yes, he can. In the transition period, if a person is a permanent review officer and the position that he would take as an arbitrator requires legal qualifications, he is allowed to apply and hold that position even though he is not legally qualified, given his experience in the existing position.

Mrs C.L. EDWARDES: What if the person had been acting as a review officer for four or so years?

Mr J.C. KOBELKE: He has to be permanent.

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Mrs C.L. EDWARDES: If somebody had been acting in that position for four or more years - I do not know how many people would fall within that category - and even though he was permanently appointed, would his career be essentially terminated under subclause (3)?

Mr J.C. KOBELKE: Clearly, the issue is managing those staff and trying to present them with opportunities. Given the changes in 1999, as the then minister would be aware, a huge workload came through. Contract officers were put on to try to clear that workload with the clear intention that they were fixed-term contract officers. Clearly, they would not be eligible. However, there are a fixed number of permanent review officers, some of whom might fall in between, and WorkCover will seek to accommodate them in other positions.

Mrs C.L. EDWARDES: Why would somebody be in an acting position for four years?

Mr J.C. KOBELKE: I do not know if that is true, but if it is it may relate to those contract positions because there was seen to be a huge spike in work from the 1999 changes. That has perhaps drifted on longer than was thought, but it was clearly there to pick up that hump in workload as the changes went through the system.

Mrs C.L. EDWARDES: If a person was in an acting position, as we know it to be under subsection (3), for a lengthy period, would he be given some form of special consideration?

Mr J.C. KOBELKE: As the member would know, in terms of the Public Sector Management Act I do not have power to intervene in individual appointments. However, within the degree to which I can set policy, I am keen to make sure we retain those people with skills and experience within the WorkCover system. Obviously, we would want to retain them in positions that they found to be challenging and rewarding.

Mrs C.L. EDWARDES: Can the minister tell the committee how many conciliation officers there are and how many of those are legally qualified, how many review officers there are and how many of them are permanent and legally qualified, and how many contract staff there are and how many have been in acting positions?

Mr J.C. KOBELKE: That is a bit hard off the top of my head -

Mrs C.L. EDWARDES: As best the minister can.

The ACTING SPEAKER (Mr A.P. O'Gorman): Minister, while your advisers go through that, I have just been advised that a block of clauses were moved. Clause 182 had amendments on the notice paper and we will need to -

Mr J.C. KOBELKE: We are going to recommit, but that is an embarrassment if we have to recommit an extra clause, is that what we have to do?

The ACTING SPEAKER: Clause 182 had amendments on the notice paper and it has been agreed in that block of clauses that were moved. The minister will need to seek to have it reconsidered along with the other clauses.

Mr J.C. KOBELKE: We have to recommit a number of clauses for further amendment, so we will have to add that to the list of recommittals.

I will now answer the member's question. In terms of the directorate, two out of the five permanent review officers are legally qualified, three out of the five acting review officers are legally qualified, and one out of the seven conciliation officers is legally qualified.

Mrs C.L. EDWARDES: Can I confirm that all of the five permanent review officers are eligible, even though they are not all legal practitioners?

Mr J.C. KOBELKE: That is correct.

Mrs C.L. EDWARDES: Out of the five acting review officers, none is eligible -

Mr J.C. KOBELKE: No, three are legally qualified, therefore, they can apply because of their legal qualifications.

Mrs C.L. EDWARDES: Out of the seven -

Mr J.C. KOBELKE: The one who is legally qualified would meet that requirement.

Mrs C.L. EDWARDES: What do you propose with the others?

Mr J.C. KOBELKE: The issue is that we have a range of jobs and things that need to be done in WorkCover, and that is up to the management of WorkCover. It knows it has my full support in seeking to provide challenging and rewarding jobs for those people. That is a matter that management will take on board.

Mrs C.L. EDWARDES: When a person has been acting in a position for such a lengthy period and he goes to work in another position, what will happen to his salary base and his level?

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Mr J.C. KOBELKE: It is not possible to answer that without knowing the details of the person involved such as his qualifications, his level of experience and what opportunities are open to him.

Clause put and passed.

Clause 188 put and passed.

Postponed clause 73: Section 93B amended -

The clause was postponed on 8 June after it had been partly considered.

Mr J.C. KOBELKE: The member for Kingsley raised concerns. This matter goes to the *Hewitt v Benale Pty Ltd* decision and how we are seeking to get around that issue. There is no retrospective application to *Hewitt v Benale*, which was an issue that I will not seek to define for those members who have no idea what it is about. It was to do with who can have action taken against them under common law, particularly with civil liability. A person cannot seek to sue everyone. It turns out that people who would normally be subject to action are counted as a deemed employer. That limits the ability of people to take action against certain people if they have taken action against others who are classed as an employer. We are seeking to address that. The suggestion of the member for Kingsley was that the amendment to proposed section 93B(5) from "In the context of a cause of action arising on or after" to "In the context of a matter arising for determination" should not be followed, because the form and ambiguity of the words wholly defeats Parliament's intention regarding accrued causes of action. Our advice is that there is no problem. Parliamentary counsel advise that it is quite complex and we must take their advice on this matter. They stated that it is correctly drafted and will serve the purpose for which it has been drafted.

Mrs C.L. EDWARDES: That is why we have a legal system; we never agree with each other.

Postponed clause put and passed.

Postponed clause 90: Section 100B inserted -

The clause was postponed on 15 June after it had been partly considered.

Mr J.C. KOBELKE: This clause deals with disclosure of information. The Government made a clear undertaking to ensure that WorkCover data is available to WorkSafe. The drafting enabled WorkCover to disclose information and data to a government department or other public authority of the State, Commonwealth or another State or Territory if WorkCover considers the data or information relevant to the functions of the department or authority. There has been criticism from some members that the provision was far too wide. There were issues of privacy. I am advised that it is not necessary for the normal reporting that occurs between States and Territories, which are of a general statistical nature. As such, the provision is not needed. Given that there is a basis for concern, I move -

Page 84, lines 23 to 29 - To delete the lines.

This will address the concerns expressed by members regarding privacy issues. The amendment removes the proposed provision, which would have enabled WorkCover to disclose information and data to government departments or public authorities in Western Australia, the Commonwealth or other States and Territories if it were considered relevant to the functions of the department or the authority. It will still allow the chief executive officer of the department, principally assisting the minister in the administration of the Occupational Safety and Health Act, to make a written request to WorkCover to disclose information and data relevant to that Act. WorkCover will need to comply with the request. That will allow data that can be used by health and safety organisations to be passed on. The clear intention is that it will relate not just to WorkSafe data on the mining, petroleum or transport industries, which may come under a different agency. Information may be requested by the director general responsible for WorkSafe. It will be applicable to safety matters generally in Western Australia.

Mrs C.L. EDWARDES: I thank the minister for the amendment to proposed subsection (1). I raised it as an issue about identifying personal information being spread far and wide. However, without further amendment to proposed subsection (2), I do not support the release of data with identifying information from WorkCover to WorkSafe. Although I have in the past supported the release and sharing of information and data, it is important that there be no question of such information being used in an inappropriate way.

Amendment put and put and a division taken with the following result -

Deputy Speaker; Mr John Kobelke; Mrs Cheryl Edwardes; Mr Norm Marlborough; Mr Paul Omodei; Mr Rod Sweetman; Mr Max Trenorden; Acting Speaker

Ayes (4)

Mr S.R. Hill

Mr J.C. Kobelke

Mrs C.A. Martin

Mr M.P. Whitely

Noes (3)

Mrs C.L. Edwardes

Mr R.N. Sweetman

Mr M.W. Trenorden

Amendment thus passed.

Postponed clause, as amended, put and passed.

Postponed clause 109: Section 145E amended -

The clause was postponed on 16 June after it had been partly considered.

Mr J.C. KOBELKE: Again, the concerns raised relate to the fact that the Bill, as currently drafted, states that if there are only two members of a medical assessment panel and there is disagreement, the case will be determined by the chairman. That means a panel of one. Given that those decisions are not reviewable, I accept that we should make sure that there is a majority. I move -

Page 93, lines 23 to 28 - To delete the lines.

There may be some confusion because some clauses will have to be recommitted. Others are postponed clauses. Clause 109 is a postponed clause. This amendment removes that aspect of there being only two members of a panel. We will go back through the Bill to indicate that a panel must have three members. There will need to be a subsequent amendment to clause 107.

Mr R.N. SWEETMAN: Did the minister say that the amendment to clause 109 will impact on clause 107?

Mr J.C. KOBELKE: We will delete the reference in clause 109 to there being only two members of a panel, and then we will go back to amend clause 107.

Mrs C.L. EDWARDES: We will have to recommit that.

Mr J.C. KOBELKE: We cannot go backwards without recommitting. I have moved that deletion of clause 109(1). I do not know whether members want any further explanation of that.

Mrs C.L. EDWARDES: No.

Amendment put and passed.

Mr J.C. KOBELKE: Is that all the postponed clauses?

The ACTING SPEAKER: That is all the postponed clauses. We now need to deal with the recommitments. Maybe we can suspend for 15 minutes.

Mr J.C. KOBELKE: I think members are happy to have a 10-minute adjournment and get a drink and then come back to recommit clauses.

Postponed clause, as amended, put and passed.

Title put and passed.

Reconsideration

On motion by Mr J.C. Kobelke (Minister for Consumer and Employment Protection), resolved -

That the Bill be reconsidered for the further consideration of clauses 75, 77, 78, 107, 110, 118 and 124 and new clauses 125, 146, 147, 150, 159, 173 and 182.

Sitting suspended from 9.30 to 10.16 pm

Clause 75: Sections 93CA and 93CB inserted -

Mr J.C. KOBELKE: I move -

Page 56, after line 8 - To insert -

“

93CC. Application of this Subdivision

Deputy Speaker; Mr John Kobelke; Mrs Cheryl Edwardes; Mr Norm Marlborough; Mr Paul Omodei; Mr Rod Sweetman; Mr Max Trenorden; Acting Speaker

This Subdivision applies to a cause of action arising before the day on which section 80 of the *Workers' Compensation Reform Act 2004* comes into operation, regardless of when the cause of action arose and whether proceedings in respect of the cause of action have commenced, unless -

- (a) because of section 32(7) of the *Workers' Compensation and Rehabilitation Amendment Act 1999*, the former provisions as defined in section 32(6) of that Act apply to proceedings in respect of the cause of action; or
- (b) because of Part 2 of the *Workers' Compensation (Common Law Proceedings) Act 2004*, the former provisions as defined in section 4 of that Act apply to proceedings in respect of the cause of action.

”.

Clause 75 clarifies that the provisions of part IV, division 2, subdivision 2, of the 1993 scheme, apply to a cause of action arising before the provisions relating to the 2004 scheme come into operation, regardless of when the cause of action arose or whether proceedings in respect of the cause of action have commenced, unless the former provisions apply. This is the first of nine amendments that are required because of the new Workers' Compensation (Common Law Proceedings) Bill 2004. Therefore, these provisions must be amended or withdrawn from the Bill now before us.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 77: Section 93E amended -

Mr J.C. KOBELKE: I move -

Page 57, lines 8 to 20 - To delete the lines.

This amendment deletes two subclauses that are now in the Workers' Compensation (Common Law Proceedings) Bill 2004. Those lines are not required in this Bill.

Mrs C.L. EDWARDES: Why has the Government decided not to delete subclause (1)?

Mr J.C. KOBELKE: Subclause (1) amends section 93E, which refers to restrictions on awarding of damages and payment of compensation. Section 93E(1) contains the definitions of “degree of disability” and “determined”. Subclause (1) contains an amendment to “determined”, which must still stand, whereas the following subsections of section 93E -

Mrs C.L. EDWARDES: I am sorry, I drew a line in the wrong spot.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 78: Sections 93EA and 93EB inserted -

Mr J.C. KOBELKE: The Government will oppose the clause. This clause deletes the Dutch amendments, which are now in the Workers' Compensation (Common Law Proceedings) Bill 2004.

Clause put and negatived.

Clause 107: Section 145C amended -

Mr J.C. KOBELKE: I move -

Page 93, after line 1 - To insert -

- (1) Section 145C(1) is amended by deleting “2 or”.

This amendment is consequential to an earlier amendment we made to clause 109 because it was a postponed clause. Clause 109 concerns medical assessment panels that have only two members. We deleted “only 2” to replace it with the number to be determined by the Chair. It is proposed to amend the constitution of the panel in section 145C of the Workers' Compensation and Rehabilitation Act, which states -

On a question being referred for determination by a medical assessment panel, the Director is to select 2 or 3 medical practitioners . . .

It is proposed to delete “2” so that a medical panel cannot comprise only two members; it must comprise three. That is the effect of the amendment to clause 107.

Deputy Speaker; Mr John Kobelke; Mrs Cheryl Edwardes; Mr Norm Marlborough; Mr Paul Omodei; Mr Rod Sweetman; Mr Max Trenorden; Acting Speaker

Amendment put and passed.

Clause, as amended, put and passed.

Clause 110: Part VII Divisions 2, 3 and 4 inserted -

Mr J.C. KOBELKE: I move -

Page 103, line 20 - To insert after “may” the phrase “, with the consent of the worker,”.

Page 103, line 21 - To insert after “has” the phrase “, in relation to the worker,”.

Page 103, line 23 - To delete the line.

These proposed amendments to clause 110 also apply to the amendments I have yet to move. They will delete the provisions in proposed new sections 146I(1) and 146K(4). These provisions would have enabled WorkCover WA agents to disclose to an approved medical specialist or approved medical specialist panel any information they may have that is relevant to the impairment assessment. The new wording will require WorkCover to obtain the worker’s consent before it can release the information. A question was asked in an earlier debate about why this information could be released without the worker’s consent. We have accepted that we should give the veto to the worker so that the information, therefore, can be passed on but only with the worker’s consent.

Amendments put and passed.

Mr J.C. KOBELKE: I move -

Page 104, line 15 - To insert after “may” the phrase “, with the consent of the worker,”.

Page 104, line 16 - To insert after “has” the phrase “, in relation to the worker,”.

Page 104, line 18 - To delete the line.

These amendments reflect exactly the same changes that we have just made, but they relate to information from the panel.

Amendments put and passed.

Clause, as amended, put and passed.

Clause 118: Sections 154A and 154AB inserted -

Leave granted for the following amendments to be moved together.

Mr J.C. KOBELKE: I move -

Page 116, line 19 - To delete “matters” and substitute “the matter”.

Page 116, line 19 - To delete “are” and substitute “is”.

Page 116, line 23 to page 117, line 11 - To delete the lines and substitute -

- (2) That matter is the extent to which the cost of paying compensation under this Act as amended by the *Workers’ Compensation Reform Act 2004* in respect of claims made before section 141 of the *Workers’ Compensation Reform Act 2004* commenced would differ from what it would have cost to pay compensation arising out of those claims if section 141 of the *Workers’ Compensation Reform Act 2004* had not commenced.

These are amendments to proposed section 154AB, special directions by the minister. This applied to transitional matters both in terms of improved statutory benefits and opening up the Dutch issues. On both those counts there was the ability for the minister to give direction for the setting of average premium rates relating to those matters only. As the Dutch matter is no longer part of this Bill and has been withdrawn, we have reworded it so that proposed subsection (2) applies only to those parts other than Dutch. That also meant that the first two changes were from the plural to the singular.

Mrs C.L. EDWARDES: Has section 78 been replaced with section 141?

Mr J.C. KOBELKE: I am advised that when going back and making that change there was a double check. That was a drafting error in reference to section 78. That has been fixed and replaced with section 141. Section 141 is the search schedule that contains those changes and improvements to statutory entitlements.

Amendments put and passed.

Deputy Speaker; Mr John Kobelke; Mrs Cheryl Edwardes; Mr Norm Marlborough; Mr Paul Omodei; Mr Rod Sweetman; Mr Max Trenorden; Acting Speaker

Clause, as amended, put and passed.

Clause 124: Section 165 amended -

Leave granted for the following amendments to be moved together.

Mr J.C. KOBELKE: I move -

Page 139, after line 21 - To insert -

- (1) Section 165(2) is amended by deleting “deposited at the Treasury” and inserting instead -
“ given to the State ”.
- (2) Section 165(3)(b) is amended as follows:
 - (a) by deleting “deposit at the Treasury” and inserting instead -
“ give to the State ”;
 - (b) by deleting “deposited” and inserting instead -
“ given ”.
- (3) Section 165(4)(a) is amended by deleting “deposited at the Treasury” in both places where it occurs and inserting instead -
“ given to the State ”.
- (4) Section 165(4)(b)(i) is amended as follows
 - (a) by deleting “deposit at the Treasury” and inserting instead -
“ give to the State ”;
 - (b) by deleting “deposited” and inserting instead -
“ given ”.
- (5) Section 165(4)(b)(ii) is amended as follows
 - (a) by deleting “deposited at the Treasury” and inserting instead -
“ given to the State ”;
 - (b) by deleting “deposit at the Treasury” and inserting instead -
“ give to the State ”.

Page 139, line 25 - To delete “deposit at the Treasury” and substitute -

“ give to the State ”.

Page 139, line 27 - To delete “deposited” and substitute -

“ given ”.

These changes make the wording consistent with section 164(1), which uses the words “given to the State”. Parliamentary counsel has advised that the reference to the Treasury no longer applies. I thank the member for Kingsley for picking up that we made the change in one provision, in keeping with the new respective standard, but had not done that consistently. We have sought to do that consistently.

Amendments put and passed.

Clause, as amended, put and passed.

New clause 125 -

Mr J.C. KOBELKE: I move -

Page 140, after line 5 - To insert the following new clause -

125. Section 168 amended

Section 168(a) is amended by deleting “lodged by it or them with the Treasury” and inserting instead -

“ given by it or them to the State ”.

That again goes to that same issue of terminology in respect of the State.

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New clause put and passed.

Clause 146: References to a disability changed to an injury -

Mr J.C. KOBELKE: I move -

Page 246, in the Table, after the item relating to s. 93D(11) - To insert the following -

s. 93EC(a) (as inserted by the *Workers' Compensation (Common Law Proceedings) Act 2004*)

Section 93EC(a), as inserted in the Workers' Compensation and Rehabilitation Act 1981 by the Workers' Compensation (Common Law Proceedings) Bill 2004, is amended to delete the reference to "a disability" and substitute it with the words "an injury". Again, that matter is consequential to the changes brought about by the introduction of the new common law proceedings Bill.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 147: References to disability changed to injury -

Mr J.C. KOBELKE: I move -

Page 247, in the Table, after the item relating to s. 93E(13) - To insert the following -

s. 93EA(3) (in both places) (as inserted by the *Workers' Compensation (Common Law Proceedings) Act 2004*)

s. 93EA(4)(c) (as inserted by the *Workers' Compensation (Common Law Proceedings) Act 2004*)

s. 93EB(3) (in both places) (as inserted by the *Workers' Compensation (Common Law Proceedings) Act 2004*)

s. 93EB(4)(c) (as inserted by the *Workers' Compensation (Common Law Proceedings) Act 2004*)

s. 93EC (in the 2nd and 3rd places) (as inserted by the *Workers' Compensation (Common Law Proceedings) Act 2004*)

This is similar to the last amendment. These amendments to clause 147 delete various references to "disability" inserted in the Workers' Compensation and Rehabilitation Act 1981 by the Workers' Compensation (Common Law Proceedings) Bill 2004 and reference to "injury" is substituted.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 150: References to Commission changed to WorkCover WA -

Mr J.C. KOBELKE: I move -

Page 250, in the Table, after the item relating to s. 154(2)(a) - To insert the following -

s. 154AC(1), (2) and (4) (as inserted by the *Workers' Compensation (Common Law Proceedings) Act 2004*)

Section 154AC as inserted in the Workers' Compensation and Rehabilitation Act 1981 by the Workers' Compensation (Common Law Proceedings) Bill 2004 is amended to delete various references to the commission and substitute a reference to WorkCover WA.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 159: Employers' Indemnity Supplementation Fund Act 1980 -

Mr J.C. KOBELKE: I move -

Page 257, after line 15 - To insert -

(6) Section 10(fa) is amended by deleting "*Workers' Compensation and Rehabilitation Act 1981*" and inserting instead -

Workers' Compensation and Injury Management Act 2004

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This amendment is again part of the changes due to the new Bill extracting the Dutch amendments. Section 10(fa) of the Employers' Indemnity Supplementation Fund Act 1980, as amended in the Workers' Compensation (Common Law Proceedings) Bill 2004, is further amended to delete the reference to the Workers' Compensation and Rehabilitation Act 1981 and insert a reference to the Workers' Compensation and Injury Management Act 1981.

Amendment put and passed.

Clause, as amended, put and passed.

New clause 173 -

Mr J.C. KOBELKE: - I move

Page 267, after line 18 - To insert the following new clause -

173. *Workers' Compensation (Common Law Proceedings) Act 2004*

- (1) The amendments in this section are to the *Workers' Compensation (Common Law Proceedings) Act 2004**.

[* *Bill currently before Parliament as the Workers' Compensation (Common Law Proceedings) Act 2004.*]

- (2) The Act is amended by deleting "*Workers' Compensation and Rehabilitation Act 1981*" in each place where it occurs that is specified in the Table to this subsection and inserting instead -

" *Workers' Compensation and Injury Management Act 1981* ".

Table

s. 3(b)

s. 6(2)(c)

s. 4(2)

- (3) Section 7(5) is amended by deleting "Executive Director" and inserting instead —

" chief executive officer ".

- (4) Section 7(6) is amended by deleting "Executive Director" in both places where it occurs and inserting instead —

" chief executive officer ".

This clause makes various consequential amendments to the Workers' Compensation (Common Law Proceedings) Bill 2004 that will be necessary as a consequence of the enactment of the Workers' Compensation Reform Bill 2004.

New clause put and passed.

Clause 182: Conciliation and review -

Leave granted for the following amendments to be moved together.

Mr J.C. KOBELKE: I move -

Page 276, line 3 - To delete "or".

Page 276, line 4 - To insert after "Act" the following -

or otherwise referred to a conciliation officer or a review officer for determination under that Act or the subject of an application to a conciliation officer or a review officer under that Act

Page 276, line 8 - To insert after "referral" the words "or application".

This amendment has been suggested by parliamentary counsel to ensure that all matters dealt with outside of part IIIA division 2, conciliation, and part IIIA division 3, review, are covered by the transitional provisions.

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Amendments put and passed.

Clause, as amended, put and passed.

The DEPUTY SPEAKER: The simple question I now have to ask is that I do report proceedings to the House.

Question put and passed.

Committee adjourned at 10.45 pm
