WORKERS' COMPENSATION (COMMON LAW PROCEEDINGS) BILL 2004

Second Reading

Resumed from 22 June.

MRS C.L. EDWARDES (Kingsley) [12.06 pm]: I oppose in the strongest possible terms the way in which the Government has brought on and rushed through this legislation in the Parliament. Legislation such as this should not be dealt with in this rushed way. Usually if legislation is required to be rushed through the Parliament, it is because it is very important and deals with matters that are of a commercial nature. We on this side of the House have often agreed with the passage of such legislation in that way. However, this legislation will affect the most sensitive and vulnerable individuals in the community; that is, injured workers. There will always be winners and losers in any legislation that provides for the Government to draw a line in the sand on whether an injured worker is entitled to make a claim. That is exactly the case with this legislation before us today. We do not know who will be the winners and who will be the losers in this legislation, as we do not know where that line will be drawn.

The Law Society of WA told me today that it has not had sufficient time to properly examine the legislation and that it will not be able to get back to me with its views before Monday morning. Employers' associations do not know exactly what the data is or what the costs or number of cases are likely to be. If those organisations do not have that information, the Government should not be rushing this legislation through the Parliament. It is a very clear principle that if a Government does not know what it is doing in that it cannot dot the i's and cross the t's on detailed information, as this Government cannot, it should not rush the legislation through this House. It is not good enough for the minister to say that we will have all that information by the time the Bill goes to the Legislative Council. That may very well be the case, but it presumes that the Legislative Council will subsume the role of the Legislative Assembly in making a considered decision on this legislation. From that view the legislation is abhorrent. This Assembly Chamber has the power and the right to determine legislation itself and in a considered way. We simply do not have the information before us to deal with this Bill. Although that information will come forward at some future time, I am not in a position to advise the House or the Government on whether we can support or oppose this legislation because at the end of the day we do not have the information.

The legislation before the Parliament covers two aspects. It covers matters arising from the Dossett and Dutch decisions. I will deal with the Dutch decision first. That case involved an application to the Conciliation and Review Directorate that was knocked out by the court on the basis of insufficient medical evidence. Doctors were signing forms to state that injured workers had a 16 per cent disability without any supporting medical evidence. That was never intended to be the case. There was always supposed to be sufficient medical evidence to support an application before the Conciliation and Review Directorate. To some extent, the workers have been disadvantaged by not having their matters properly determined. Although there have been a number of these cases, the Government has not been able to come back with a proper figure. The Dutch amendments were originally in the reform Bill, and have been slightly changed for this Bill. During consideration in detail on the reform Bill the minister was asked how many cases before the directorate relate to the Dutch decision. He was also asked how many of them were assessed by an actuary. The actuary determined that there were between 200 and 900 cases. The minister said that the Department of Consumer and Employment Protection did not have the exact information when the actuary did his assessment. At the time, I asked the minister to arrange for a complete assessment of the number of cases in which the worker had received some form of restitution and would therefore no longer be eligible to have his matter redetermined by virtue of being able to obtain further medical advice and evidence to support an application before the directorate. I understand that has happened. The figure has come down to just under 500 cases to which the Dutch decision could apply. The issue then is the costs. If the costs are between $26 million and $120 million - which is the actuary's assessment - and there are 500, rather than 200 to 900, cases, this will still cost another $60 million to $70 million. The new amendments provide that the reserve set aside based on the estimates of the insurance companies should cover that figure. The insurance companies have taken that into account and put aside reserves to cover those cases, which they acknowledge they knew about when the cases were originally heard. They knew that the minister made a decision 18 months ago about what he was going to do and they have taken that into account. If that is the case, there should be no impact other than a huge burden on insurance companies, albeit one they have prepared for. The issue is the numbers. That affects the insurance companies and concerns the employer groups because the change the minister has made means the costs resulting from that level of retrospectivity will be made up from the supplementary fund held by WorkCover. As I said in my contribution to the second reading debate, that change was no doubt made at the suggestion of an employer group based on what was happening in Tasmania. Over the past three years employers have been paying an extra levy to the fund to pay for the HIH Insurance cases. Any amount of money over and above the reserve of the insurance companies will have to come from the supplementary fund. As I understand it, the supplementary fund levy on employers is one per cent, which is to

pay for HIH claims. They should be paid for or at least resolved within the next few years. I will ask the minister for full details in his response. If that is the case, for how much longer will the one per cent levy need to remain to pay for any excess over and above the reserve that has been estimated by the insurance companies for the Dutch cases? This Bill states that the applications can be made within three months and have a six-month election time frame, which can be extended to two years. It is very fair to injured workers. On the flip side of the coin, what will it cost employers? We are not talking about insurance companies absorbing all the costs; we are talking about the supplementary fund paying for costs over and above the reserve. If that is the case, what is the number of cases, what is the cost likely to be, and how much longer will the one per cent levy have to be paid to cover those costs? Employers will be paying for this. Under the reform Bill, the insurance companies would have had to absorb the cost because the minister was going to direct that they do so. Now it will be paid for from the supplementary fund. Those reserves have been slowly dwindling away because of HIH. The minister made an announcement about the reduction of the levy because of the HIH claims. He said that the fund would cover the HIH claims. What is the amount that the minister believes should be in the supplementary fund? Does he have a figure below which he will not go? The supplementary fund has become quite large. I do not think it is necessary for such a huge sum of money to sit in a supplementary fund doing absolutely nothing. Therefore, I am not arguing for that. However, we need to know what will be the base that the minister believes ought to be retained in the supplementary fund. After the HIH claims are finalised, how long will the one per cent levy continue to be paid by employers? Over and above the reserves, what is the amount the minister believes will be paid out of the supplementary fund? That is very important because of the amendments resulting from the Dossett decision. The legal costs of certain people will be thrown away as a result of the fact that the minister will determine that they can no longer continue with their case in the District Court, and they will have to be met from the supplementary fund. How many of those cases are there? What is the estimated cost of the fees? Notwithstanding the District Court cases, is the minister including the 30 cases that are being held up based on a determination from the directorate that they are possibly Dossett-type claims? How much will be paid from the supplementary fund for those legal fees? This is very important because the supplementary fund to which employers have contributed a one per cent levy to pay for the HIH claims will, all of a sudden, now be used to contribute to any amount that needs to be paid on the Dutch cases over and above the reserve and to pay for the legal costs that arise from the thrown-away costs of those people the Bill determines no longer have a legal case to pursue. They must now bring their case back into the 1999 scheme. We need a full breakdown of the supplementation fund, because otherwise the employers will pay the one per cent levy for longer. If they are to pay that one per cent levy for longer, they need to know for how long in an endeavour to ensure that a base amount is kept in the supplementation fund to cover HIH Insurance claims, Dutch cases in excess of the reserves, and all the legal costs that will be thrown away as a result of this Bill. At the end of the day it is no cost to the Government. The Government has made a firm decision that employers will wear the cost.

Mr J.C. Kobelke: Except that the Government is a sizeable employer. Therefore, it will meet the costs for its employees.

Mrs C.L. EDWARDES: The Government gets money from taxpayers; it does not go out and earn it. We are talking about employers who must earn money and pay these costs. It does not equate to a Government that expends taxpayer funds. That is a further reason for not rushing the Bill through the Parliament today. We have also said that the Legislative Council should not usurp the power of the Legislative Assembly in being able to make a considered decision on this Bill. The considerations we do not have before us are the details of the number of cases that will be determined by the Dutch decision, the revised actuarial advice on the Dutch cases, and the detail of or facts and figures on the supplementation fund.

I move on to Dossett, which is an interesting case. It provides a lesson for all who aspire to be ministers. I say that because the case reflects very much on the 1999 scheme that I brought into this Parliament. Basically, the Dossett case found that any information I gave - in that case a ministerial statement - to explain the Bill was not to be regarded as intrinsic material for the purposes of interpreting the law. Therefore, the law must stand as it is read. If legislation is to be brought in, the minister must ensure that it addresses the provisions of the Interpretation Act. That did not happen in this instance. We thought we had covered those issues, but the High Court clearly felt differently. Apart from the Bill itself, this case is a good lesson for us as a Parliament, for anyone who is interested in drafting legislation and for anyone who might bring legislation into this Parliament. I will read from Dossett v TKJ Nominees Pty Ltd [2003] HCA 69 (4 December 2003), in which Mr Justice McHugh states -

> It appears from a statement made by the Minister for Labour Relations in the Legislative Assembly that she shared this view.

That is, that the cases that had received leave before the assent date could continue and those that did not fell within the 1999 scheme. He continues -

> Her statement was made, however, 16 days after the *Workers' Compensation and Rehabilitation Amendment Act* received the Royal Assent and is not entitled to any special weight concerning the meaning of the amending legislation. In *Re Bolton; Ex parte Beane*, Mason CJ, Wilson and Dawson JJ pointed out that "[t]he words of a Minister must not be substituted for the text of the law." That *dictum* was expressed and applied in respect of a statement made by a Minister in introducing the Bill that became the Act under consideration in that case. Their Honours refused to give effect to the Minister's opinion concerning the meaning of the Act, notwithstanding that s 15AB of the *Acts Interpretation Act 1901* (Cth) required that consideration should be given to the Second Reading speech. There is no requirement in the law of Western Australia that a court should give any special weight to a Minister's opinion concerning the meaning of legislation that has been enacted by the Legislature.

This is pertinent to announcements made by ministers by way of media release. The presumed intentions of Governments have sometimes been detailed by way of media release and not in the House. I cannot think of a couple of examples now, but I know that that has been the case in the course of my parliamentary career. It is important that Governments and ministers ensure that it has no meaning whatsoever. Justice McHugh continues -

> And it would be contrary to the rule of law, the supremacy of Parliament and the doctrine of the separation of powers to give any special weight to a Minister's opinion as to what an enacted law meant. The meaning of statute law is found in the text of legislation enacted by the Legislature. As Mason CJ, Wilson and Dawson JJ went on to say in *Re Bolton; Ex parte Beane*:
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> > "The function of the Court is to give effect to the will of Parliament as expressed in the law."

Justice McHugh then went into the circumstances of the case -

> Section 32(7) authorises the awarding of damages where proceedings for damages have been commenced and where leave to issue proceedings has been given but no action for damages has commenced. It has nothing to say about whether the right to apply for leave may continue. Nor does it say anything about the effect and operation of s 37(1) of the *Interpretation Act*. But in any event s 37(2) makes it clear that the inclusion in a repealing Act of an express saving provision does not prejudice the operation of s 37 with respect to the effect of the repeal.

The case turned on whether we repealed the sections or just replaced them. That argument was subsequently one of the issues with the one vote, one value case that went before the High Court. Again, it is something for ministers and Governments, indeed members of this Parliament, to keep in mind when legislation comes before this place. Justice McHugh later said -

> Section 32(7) deals with claims for damages that either have been commenced or by the grant of leave may be commenced.

When we get to the consideration in detail stage, the minister will have some problems with the interpretation of "proceedings" and whether it is an originating summons for a section 93D application, a writ or where leave had been granted. Therefore, there are some real concerns with clause 5(3)(a) and (b), or it could be paragraphs (c) and (d), and whether it is sufficiently clear to deal with the sorts of issues raised in the Dossett case. Justice McHugh continues -

> It says nothing whatever about pending *applications* for leave to commence proceedings for damages. Nor does it contain any statement that the two classes of proceedings identified in s 32(7) are the only proceedings to which the former provisions of s 93D continue to apply. Nor does s 32(7) contain any statement that it applies despite anything in any other statute.
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> Accordingly, s 32(7) did not effect an implied repeal of either s 37(1) or s 37(2) of the *Interpretation Act*.
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> It follows that s 37 of the *Interpretation Act* entitled Mr Dossett to proceed with his pending application for leave which continues to be governed by the former provisions of s 93D of the *Workers' Compensation and Rehabilitation Act 1981*. The Full Court of the Supreme Court of Western Australia and the District Court erred in concluding that the District Court had no power to give leave to Mr Dossett to commence proceedings for damages under the repealed s 93D.

The appeal was therefore allowed. I seek the indulgence of the House, because the facts are important not just for the Bill before us but also, as I have said, for the future interpretation and debate of legislation. Justice Kirby goes into greater detail about the ministerial statement and how it was interpreted, and the second reading speech I gave in this Parliament in 1999. He states that exceptions need to have been expressed, and there needs to be exactness, which is very important for the Bill before the House. He states -

> *Express exceptions*: First, there is the fact that Parliament has addressed with exactness "proceedings" of the kind in question at different points in the course of their resolution in the District Court.

That needs to be stated very clearly in clause 3 of the Bill. More importantly, as a result of the Dossett case, it needs to be clear in black and white law. It will not be sufficient for the minister to explain what he thinks is meant by "proceedings"; he will need to have it explained, with exactness, what sort of proceedings he is referring to at different points in the course of their resolution in the District Court. That was the first point Mr Justice Kirby made. He continues -

> Secondly, to demonstrate that this was the "intention" of Parliament in so providing, the respondent tendered an extract from the record of debates in the Legislative Assembly of Western Australia. According to this, the then Minister for Labour Relations (Mrs Edwardes) made a statement to the Assembly which, she said, was designed "to remove any doubts about the transitional provisions contained in sections 32(7) and 32(8) of the [1999 Act]". The Minister explained that, because there had been no opposition to the Bill when originally introduced, "clarification on the transitional provisions was not read into *Hansard*" at that time. She stated that it was "prudent to place on the record a clarification of their meaning" in light of comments that had since been made. She said that the Bill closely reflected a recommendation of a general review of common law actions which had preceded the legislation.

He is referring here to Lord Pearson. The judgment continues -

> In response to a suggestion by lawyers "that if an application were made prior to assent, workers may seek damages under the old common law provisions", the Minister stated that "[c]learly this is not the intent of the amendment Act".

This is what the minister, in the Bill before the House, is trying to clarify. The judgment continues -

> She said that the wording of s 32(7) of the 1999 Act was "clear". She stated that "[t]he new common law provisions do not affect the awarding of damages only if the proceedings have commenced or leave of the District Court was granted before the assent day".
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> Although these remarks are not part of a Second Reading Speech and are not therefore available under the Interpretation Act as extrinsic material to assist in interpretation of the Act, the respondent submitted that the Minister's speech was admissible as "relevant material in any official record of proceedings in either House of Parliament" or under the common law. Accordingly, it should be received to indicate the Minister's understanding of the purpose of Parliament. Certainly, no Member of Parliament took objection at the time the Minister made her statement or thereafter.

He goes on to say that the third aspect that needs to be met is the assent day. The judgment continues -

> *The assent day*: Thirdly, the particularity of the "assent day" was arguably another indication of a purpose of Parliament in introducing, even at the cost of some arbitrariness, an incontestable precondition that would clarify the rights of workers and obligations of employers where the worker was claiming common law damages against an employer at the time the 1999 Act took effect.

Essentially the minister has drawn the line with a set date in this Bill. Very importantly for the statute of limitations, the facts of the Dossett case are that his injury occurred on 2 December 1996. He suffered an injury to his cervical spine and both shoulders as a result of an accident during the course of his employment with the respondent, TKJ Nominees Pty Ltd. That is very important, because the statute of limitations would now preclude him from pursuing a common law action. He lodged an application for leave to lodge a writ in the District Court under section 93D, which meant that he had a disability assessment of between 16 and 30 per cent, and could therefore reach a pecuniary loss amount. Several criteria under section 93D will make it considerably harder for those who do not currently have leave and are before the District Court. Mr Dossett's matter for leave to appear was heard on 8 October 1999, and the assent date was 5 October 1999, so he missed out on the hearing. It is the view of some that his application for leave to be heard would have been granted at that time because one of the problems in 1999 was that the District Court was not strictly adhering to the criteria legislated for, and decided that it would be determined in trial. What anyone would receive in trial was still a matter of conjecture. However, Mr Dossett felt that he did not have the ability to have his matter heard. That is the situation with a number of cases currently before the court. As at June 2004, 42 matters under section 93D are before the court. Of these, 28 applications are pending, nine have had leave granted, three have had leave denied and two are miscellaneous. The figure of 34 was as at the end of May 2004. This does not tell us, however, how many of those are under appeal. I read one case this morning in which leave had been granted but an appeal has been lodged. Where would that case fit within the system of the new Bill? If he has leave, what happens if his leave is knocked out under appeal. Does he then fall in with those who have lodged an application but have not been

granted leave by 23 June, as the minister said, or does he have no further recourse for coming back into the 1999 scheme? Again, we do not have the details on some of those cases.

There is an argument that this amendment should proceed on the basis that it would provide for a level of certainty. I do not disagree with that. With certainty, there would not be the potential for premiums to go up and down in the face of an uncertain number of cases, uncertain levels of costs and the possibility of appeals. While this legislation would give some certainty, we do not know who would win and who would lose out of it. There will be some currently in the system who do not have leave to appear, who the minister says can now be covered by the 1999 scheme, which was intended by the 1999 amendments. However, some of them may not get into the 1999 scheme. We do not know those figures. We also do not know whether there are many more Short-type cases. Short was a case against Major Motors Pty Ltd, case No WC93D 1286/1999. Short's matter was heard on 15 April this year for a section 93D application. The facts of that matter are that Mr Short had already received a settlement of $80 000 by way of a consent judgment based on the current section 93D provisions. That judgment was valid and enforced. However, the plaintiff decided that the settlement he received was not adequate. He was under the mistaken belief that law prior to Dossett governed his claim; that is, if he had not received leave before 5 October, he fell into the 1999 scheme. Therefore, he wished to proceed with a section 93D application. Members must keep in mind that he had already received a settlement of $80 000. He still must prove an increased level of pecuniary loss to be awarded a greater amount under a section 93D application, or he could receive more if he is a very young man. He must either have a very high income or be a young person, in which case he might be able to meet the economic loss requirements that are the subject of section 93D cases. The registrar, before whom the application was listed, granted the plaintiff leave to proceed under the former provisions of section 93D of the Act. He was of the view that at the leave stage he was not bound to consider anything other than the requirements as set out in section 93D(5) of the former provisions. If those provisions were satisfied, leave should be granted even if there was a consent judgment in existence covering that date of disability. The registrar believed that the defendant had the right to later apply to strike out any proceedings commenced against it based on the leave granted. In that way the defendant's rights were not as severely prejudiced as the plaintiff's, who could not proceed with further action if leave was not granted. It must be kept in mind that Deputy Registrar Hewitt was not taking into account that this person already had his case settled according to law and was valid. Deputy Registrar Hewitt considered that the prospect that the plaintiff would set aside the former judgment on the grounds of a mistake as to the law was enough.

Essentially, when talking about the level of certainty, it refers to the fact that there are likely to be other cases that occur in which a settlement has taken place. The issue is that we do not know how many cases it will involve. It is highly unlikely that there would be thousands of such cases. I say that on the basis that the plaintiff would still need to meet the section 93D test with regard to pecuniary loss. As I said, the person would have to be either a high-income earner or a young person. If the plaintiff had already settled the case, the plaintiff would still have to jump over that hurdle. The plaintiff would have to argue that he settled on the basis of a wrong understanding of the law that existed at the time - although it did not until Dossett. Also, the date of injury must have been before or after June 1998. Therefore, if the date of injury was prior to that date, the plaintiff would still fall outside the statute of limitations to go back to the District Court to seek an application for leave. There are some restrictions in that respect. The injured worker might have gotten on with his life and might not wish to proceed any further, having received his compensation.

It appears from the Short case that the compensation amount does not have to be given back. Obviously that would be taken into account in any further damages settlement of the case. If the worker was awarded more than $80 000, the $80 000 would be taken off the future settlement. However, what would happen if the plaintiff received less than $80 000, for example? I do not think that many courts would determine that an injured worker would have to give back money on the basis that he did not have a correct understanding of the law as subsequently determined by Dossett in December 2003. I cannot see many courts doing that. Therefore, not only is the plaintiff getting two bites at the cherry, the plaintiff is also potentially double-dipping with regard to any amount the plaintiff might be able to keep, even though the courts might subsequently determine that the plaintiff should not have received that amount. The arguments for this amendment are on the basis that it will fundamentally create certainty and that there are huge increases in compliance costs for WorkCover, employers and insurers because they do not know which injured workers fall within which system; that is, the 1993 system, the 1999 system or, if the reform Bill passes through the Parliament, the 2004 scheme.

The system will be potentially fair or unfair for workers. I say that because there will be winners and losers. People who currently have cases before the District Court, who are seeking leave and who come back will not be able to come back into the 1999 scheme, in which case we must know how many of those 28 pending cases of leave will not be able to come back into the 1999 scheme because of the statute of limitations. Has the minister addressed that in this Bill? Those people would immediately lose any right to compensation. There will be some losers and some winners. The winners will be those who would not have got over the section 93D bar and/or would not have received as much as they would get under the 1999 scheme. The 1999 scheme benefits

some injured workers. Therefore, some injured workers who are presently before the District Court will win by coming back into the 1999 scheme because they would not have received anything under section 93D.

The Australian Plaintiff Lawyers Association would like an amendment to provide for choice. Those people who are currently before the court could then determine whether they wished to stay before the court or come into the 1999 scheme. The minister might say that that is also having two bites at the cherry. They have already made a choice to go to common law but suddenly they decide that the gravy train might not be as good over there or they might not meet the bar - and Dossett may very well be one of those. Therefore they might choose to go into the 1999 scheme. That means that some people who would lose currently and be stopped from coming back into the 1999 scheme because of the statute of limitations would be given a choice of being able to do so and would be eligible to come back into the 1999 scheme. Given the short time I have had to examine the Bill, if my interpretation is wrong about how the Bill addresses these cases, I am sure, and I hope, that the minister will correct me when he responds.

Another matter is the increase in professional negligence claims against lawyers. Members of the legal profession determine the law according to what is known at the time. If they gave advice until December 2003, that is okay because they determined the law as it was known at the time. It changed in December 2003 with the High Court case. Is it their responsibility to go back over their files to find those people who were injured prior to 5 October 1999 and determine whether they would get more under a section 93D application or whether they are better off under the 1999 scheme? Of course, it means going to each of their files and contacting each of their clients to explain to the client the advantages and/or disadvantages. Issues may arise if that is not done in a considered way.

Debate interrupted, pursuant to standing orders.

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