WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2023

Committee

Resumed from 16 August. The Deputy Chair of Committees (Hon Dr Sally Talbot) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

The DEPUTY CHAIR (Hon Dr Sally Talbot): Members, we are in committee considering the Workers Compensation and Injury Management Bill 2023. I draw members' attention to supplementary notice paper 99, issue 3, which contains some amendments to clauses.

Clause 149: Commuting compensation liabilities by settlement agreement —

Progress was reported after the clause had been partly considered.

Hon MATTHEW SWINBOURN: At the conclusion of yesterday, I gave an undertaking to table the WorkCover WA guides for the evaluation of permanent impairment. I have that document and I now table it.

[See paper 2446.]

Hon MATTHEW SWINBOURN: Yesterday, Hon Nick Goiran, during the consideration of clause 149, asked whether the government is constraining the ability of parties to settle claims. Reference was made to clause 153, which prevents a settlement agreement including common-law damages. In responding on this issue, he mentioned that a worker may settle a statutory workers compensation claim and then go on and settle a common-law damages claim under a separate process. This is incorrect. Settlement of a workers compensation claim prevents the awarding or settlement of damages, found in clause 420, which is also the case under the current act. The following explanation is intended to clarify the statutory settlement pathway and what the government has done to provide significant flexibility for settlements to be made.

Statutory settlements referred to in part 2, division 12, relate to an employer's liability to pay compensation under the act for an injury from employment. It does not apply to common-law damages, which are dealt with in part 7. There are barriers in the current act to settle statutory claims, which have driven some parties to use what we would describe as a loophole in the current act to settle statutory claims under the common-law pathway. The 2014 WorkCover WA report recommended that this loophole be closed. In response to stakeholder submissions, the bill will provide greater flexibility for parties to settle statutory claims for compensation compared with the current act and what was proposed in the 2021 consultation draft of the bill. Specifically, there is no requirement for liability to be accepted or determined for a claim or for any time period to have elapsed before a settlement can be made. The result is that there would be no advantage to using a common-law settlement pathway to settle statutory claims because the constraints in the statutory settlement pathway will be removed. The common-law settlement pathway will continue to operate as intended for genuine common-law claims where a worker has at least 15 per cent whole person impairment and made an election to pursue common-law damages.

Hon NICK GOIRAN: I thank the parliamentary secretary for the explanation he provided. At the outset, I indicate that it has heightened my concern regarding this area. At the moment, the parliamentary secretary has indicated that there are purportedly some barriers. Due to the existence of these so-called barriers, people have been incentivised to take a different approach to settling through the District Court inclusive of a common-law claim. What are those barriers that the parliamentary secretary referred to that have created the incentive to use the District Court as a pathway for settlement?

Hon MATTHEW SWINBOURN: As they presently exist under the act, the barriers are that a person cannot settle their statutory claim prior to six months passing.

Hon Nick Goiran: Six months from the date of the accident?

Hon MATTHEW SWINBOURN: I understand that part of the issue is that that is difficult to determine under the current act. We can unpack that a little bit more with some further advice, but from advice that I received yesterday, that is where some of the confusion comes in. Under the current act, it is not clear when the clock starts ticking, and that incentivises people to use the District Court process.

The other barrier is that a claim cannot be settled until liability has been accepted or determined. For their own reasons, some parties do not want liability to be determined. If they file in the District Court, they can avoid the requirement to settle the statutory component of the claim, therefore avoiding that determination. The proposed changes to the act are to remove those barriers, because the practice has been to follow that alternative route to give effect. We are trying to remove that motivation by making the statutory settlement process more flexible to take into account the preferences of the parties.

Hon NICK GOIRAN: I am in agreement that removing those barriers to statutory settlement is a good thing. However, at the same time as removing the barriers, we seem to be shutting down the other alternative because

clause 153 says that a settlement agreement cannot apply to common -aw damages. If we are trying to facilitate this and remove those barriers, why is it then necessary to include clause 153 and stipulate that under no circumstances can the settlement agreement apply to common-law damages?

Hon MATTHEW SWINBOURN: As we said yesterday, we are trying to get to the mischief of this so we can get a common understanding here. We are not trying to make it more difficult for people or to take away avenues that people have legitimately used before. We are trying to understand that under the statutory settlement process, there is essentially a gap in which people cannot settle certain kinds of claims—claims that are not more six months old and claims in which there has not been an acceptance of liability. I guess as a matter of policy, the government accepts that people should now be able to settle those claims without those necessary requirements. That process will come in place, and the effect of it is not to undermine any common-law rights of entitlements that people have; people will still be able to elect to pursue their common-law claims in the usual way. Part of the process that happens is when people settle their statutory claims under the current scheme, they forgo their common-law rights, in any event. That is still the effect under the current act if they settle that. We are not creating a system here in which we will allow people to settle one part that they were previously entitled to settle and pursue another part. Again, it is the same.

The other thing from that point of view is there is obviously another group of workers accessing this, but it is not a significant group, so we do not want to overstate that this is a big mischief that needs resolution. Our understanding is that it is not widespread in the system; however, claims are being lodged whereby there is not a 15 per cent whole-body impairment to access this loophole, as we have described it, that would otherwise, if they were to proceed in the court, be seen as an abuse of process. But then the writ would be thrown out because the claimant could not satisfy the 15 per cent element, but it will have given them the vehicle to achieve what they want to do.

I think what we are trying to say is we are trying to meet them by coming to them. Work was done in the initial stages that did not have the degree of flexibility that we have. The current proposed provisions, and I have said it before, have universal support from those who are working on it. I am told that people are quite happy with what is being proposed. I do not want to use that as a mechanism to douse the member's interest in this, but he often asks me what stakeholders have said and what concerns have they raised. Therefore, in this particular instance, stakeholders have said that they are now happy with the state of these provisions and are happy to go forward with them.

Hon NICK GOIRAN: This mischief that the parliamentary secretary says exists at the moment, as I understand it as he described to the committee, is that some workers are accessing the District Court in circumstances in which the government says is undesirable. Is that the mischief that we are saying exists at the moment?

Hon MATTHEW SWINBOURN: Yes; that is correct, member.

Hon NICK GOIRAN: Of course, accessing the District Court is not anything novel, because heaps of workers are accessing the District Court, but, as I say, a cohort that the government says is undesirable is accessing the District Court. Let us just clarify this undesirability a little bit more. In accessing the District Court, what is it that this cohort has done that we say is undesirable? Are they lodging a writ in the District Court without having a medical practitioner determine a percentage of whole-person impairment of at least 15 per cent?

Hon Matthew Swinbourn: By way of interjection, yes, member, you're right.

Hon NICK GOIRAN: Therefore, the mischief is that they lodge a writ with not a single medical report that says they have at least 15 per cent whole-body impairment, and so that is what is described by the government as "mischief", and is therefore, as a consequence, undesirable that these people are lodging these writs in the District Court.

I take it, though, that the converse to that is the government has no problem with a worker who has at least one medical report that says they have a 15 per cent whole-body impairment from accessing the District Court?

Hon Matthew Swinbourn: Again, by way of interjection, no; we have no problem, member.

Hon NICK GOIRAN: I will just wait for the parliamentary secretary to get any further advice.

Hon MATTHEW SWINBOURN: We have no problem with the 15 per cent element and the election to access the common law, just by way of clarity. In the District Court writ, they are making the election.

Hon NICK GOIRAN: All right. That is an important additional element because, of course, the election triggers certain consequences. If a worker has a medical report saying that they have at least a 15 per cent whole-person impairment and they, to use the parliamentary secretary's word, "elect", how do they communicate that election at the present time, and will that process of election continue under the ongoing scheme?

Hon MATTHEW SWINBOURN: They elect to WorkCover WA, and that process is that they must have the report that we talked about from a medical practitioner about a 15 per cent whole-body impairment. Then there is a prescribed WorkCover form that must be filled out, which will of course be updated following the commencement

of the act, but the substance of it is not changing. That form is then registered with the director of conciliation at WorkCover, which then gives effect to the election once that happens. That process is not changing under the bill, and so it remains the same.

Hon NICK GOIRAN: Thank you for that, parliamentary secretary. But the point is that there is—shall we describe it as—a paper-driven process that will need to be driven by the worker and facilitated by WorkCover. This is what I would describe as phase 1 of this worker choosing to access the District Court and common-law pathway. After that, having been elected, they will then proceed with the District Court, also paperwork-driven, process.

Under this particular regime, it seems to me that what we are doing is shutting down the possibility of a worker having less paperwork and WorkCover having to do less work. Even though we are saying that we are facilitating this so-called loophole because there was a concern around whether liability must be determined and there is some confusion around what I would describe as the six-month rule—that noble gesture is welcomed—it is not clear to me why we then, effectively, funnel people through the District Court process as a result of that.

If a person wants to lodge with WorkCover a settlement agreement—by its very nature, it is an agreement as between the employer and worker, and, obviously, there is an insurer at the back end of all this—and the parties are agreeable that it includes that component for common-law damages and commutes the new liability, I do not understand why we are standing in the way of that. Why would we not just facilitate the easiest pathway through for all that to happen? Therefore, the justification for it is not clear. Perhaps the best way to address this is if the parliamentary secretary could outline this process? I am not anticipating that my respectful submissions this afternoon will change anything from the government's perspective, and I do not mean that in any derogatory way because I acknowledge, for the record, that the government has been cooperative on a number of clauses. Indeed, there are some amendments that we are looking to address in the future, but I do not realistically expect that we will see any change on that this afternoon. But I think, at the very least, what would be helpful at this point is if the parliamentary secretary could articulate for those workers who want to, in agreement with the employer and the employer's insurer, settle everything, including the common-law component—what will be the process for a worker to do that?

The reason I really labour this point is the mere existence of a common-law claim is probably one of the most contentious elements in all this. People can sometimes be agreeable to settling, even though they might agree to disagree and say, "Let's just wrap up this whole case, once and for all, for X amount of dollars, inclusive of everything and all types of liability." I see no problem with that. I do not see that as mischievous. I do not see that as undesirable. In actual fact, I see it as the opposite. I see it as a good outcome, because there has been agreement, presumably on the basis of neutral legal advice, and it has been facilitated and provides finality for that. I do not imagine there is much dispute about that point, but could the parliamentary secretary articulate what the process will be for a once-and-for-all settlement, including any common-law claim, in light of the existence of clause 153? I think that would be good for all the participants and stakeholders because it would set out a blueprint to say that this is how we will have to do it from here on in.

Hon MATTHEW SWINBOURN: Member, I am going to answer this question, first of all, by dealing with it in two parts, if I can put it that way. We think about a cohort of those who do not want to pursue a common-law claim; that could be a person who has greater than a 15 per cent impairment but the advice of their lawyer might be that there is no common-law basis to pursue that claim notwithstanding the level of injury because there may have been no act of negligence on the part of the employer. Also, there are those with less than a 15 per cent impairment who want to settle their claim. That is done under division 12 of the legislation, which contains the clauses we have been talking about; that is the process by which those claims would be settled.

We then think about those who have a 15 per cent and higher whole-body impairment and have a basis for making a common-law claim. That process is, obviously, the election that we talked about and the medical certificate. In our earlier conversation we talked about someone needing a medical report that details the 15 per cent total-body impairment and that they also need to file the WorkCover election form. They would then need to file their writ in the District Court. Following the filing of their writ, parties would enter into whatever negotiation they wish to enter into. If they can reach a position on a global settlement of all elements of the claim, they are able to do that and that would be reduced to a deed. That deed is then executed by the parties. Under clause 433(3) that deed will be required to be lodged with WorkCover. WorkCover will not approve the deed or anything like that. It will be used to ensure that there is no double-dipping at a later date. That would then resolve all elements of that person's claim lodged in the District Court. Obviously, when negotiations do not result in a settlement, it will proceed to a judicial determination of that particular worker's requirements and whether their claim succeeds.

Hon NICK GOIRAN: The process that the parliamentary secretary has outlined is the process that exists at the moment and will continue under the scheme.

Hon Matthew Swinbourn: Yes.

Hon NICK GOIRAN: For the large proportion of workers, nothing will have changed here. If they want to pursue a common-law claim, they can do that. There is a process. Certain hoops and hurdles need to be gone through. Certain paperwork needs to be filed. Ultimately, the jurisdictional body is the District Court. None of that will change. As the parliamentary secretary says, they can reach agreement, finalise a deed and then register that also with WorkCover. Are settlement agreements under the existing scheme being registered with WorkCover that include the discharge of common-law damages claims?

Hon MATTHEW SWINBOURN: I am advised not statutory settlements, only common-law deeds, which is I think what I referred to at the end of my last response to the member.

Hon NICK GOIRAN: The type of statutory settlement agreement that gets registered with WorkCover does not include a discharge of a common-law damages claim and, therefore, the government would say that clause 153, which prevents that from happening into the future, has no material difference because that is not happening at the moment anyway.

Hon Matthew Swinbourn: We agree with what the member has just said.

Sitting suspended from 1.00 to 2.00 pm

Hon NICK GOIRAN: Prior to the luncheon interval the parliamentary secretary was helpfully setting out the arrangements as they sit at the moment for a settlement agreement and what those arrangements will be moving forward. In particular, we were considering the scenario when a settlement agreement, however described or defined, might include a component for discharging any liability arising under the common law. The indications were that at present statutory settlement agreements are not being registered at WorkCover, which include the discharge of common law damages claims, but settlements that do include the discharge of common law claims are being registered at WorkCover through deeds. Those two different scenarios, if you like, or different types of agreements, will continue to exist moving forward. We have been ranging over division 12 through the use of clause 149, but specifically clause 149(5) seems to make clear that a worker who redeems his or her claim will not extinguish a claim for their dependants. That seems pretty clear on the face of the wording in clause 149(5). Is this consistent with the current act?

Hon MATTHEW SWINBOURN: It is consistent with the current act.

Hon NICK GOIRAN: Is that in the sense of a specific provision in the current act or because of an understanding, interpretation or manner of practice under the current act?

Hon MATTHEW SWINBOURN: There is no provision in the current act that is comparable with subclause (5) that makes it that clear, but in practice the settlement does not settle the claims of any dependant. I make reference in the current act to section 72I, "Manner of payment of lump sum compensation", and section 72J, "Manner of payment of child's allowance". Those sections deal with dependants' circumstances and, as it was put to me, they are protected by order of the arbitrator at that time. Under the current regime, a settlement does not resolve a claim of a dependant. It is not as clear as it is in the new bill, but in effect they replicate the same outcome.

Clause put and passed.

Clauses 150 to 162 put and passed.

Clause 163: Duties of worker —

Hon NICK GOIRAN: We are now in part 3, division 2 of the bill, dealing with a return to work and, in particular, the duties of an employer, insurer and a worker. Clause 163 deals specifically with the duties of a worker. It has been put to me that when read in conjunction with clause 164, the consequences of refusal or failure to comply with a proposed section 163 duty, this clause could be described as harsh and unnecessary. Irrespective of one's assessment of the harshness or necessity of the provision, it has been expressly put to me that it will be open to interpretation. For the sake of the record, is the parliamentary secretary in a position to clarify why the government says it is appropriate to place these particular obligations on a worker?

Hon MATTHEW SWINBOURN: I think the member's question was: can we clarify why it is appropriate to place the obligations on the worker? I might try to give the member a more global answer about the two clauses he has referred to. If he needs to unpack what I say further, obviously, we can proceed on that basis. The first thing is that clause 163 will provide almost all the duties that currently arise under the existing act, in addition to the way that the courts or arbitrators have interpreted those duties. We would say that the primary work we are doing here is codifying the workers' duties, rather than creating a new set of obligations that did not previously apply to them, with the caveat that clause 163(5) will provide —

> The worker must comply with any requirement to attend a return to work case conference under section 165 and must participate and cooperate in the conference.

That does not currently exist. This provision was ventilated with stakeholders. I do not know that it would be fair to say that there was a uniform position on it, but we think it is a reasonable imposition in the circumstances if a worker is not complying with their duties. There is that element. As a further clarification, we have given an undertaking

that we will regulate the subject matter of those conferences, so that they do not go into areas that are considered inappropriate or expansive and beyond the issue that gave rise to the need for the conference in the first place.

The other additional caveat is that clause 163(6) will provide a positive duty on a worker to provide the progress certificate to the employer within seven days. Workers have no current time frame to provide their progress medical certificates. I think that the member would probably agree with me that that kind of guidance is helpful because, obviously, that is a reasonably fair thing to do unless some intervening event makes it impossible for a worker to meet that obligation. It is not a penalty provision, and not complying with that will not affect the worker's entitlement to ongoing compensation; it will create a positive duty to do that. The consequences of noncompliance with the duties that will arise from clause 163 are detailed in clause 164(4), and they reflect the current consequences.

In summary, I guess that although we are placing an additional duty on workers to participate in the compulsory case conferences and a duty to provide their medical certificates, we are comfortable with our policy decision to do that in both instances. We are not going beyond what is currently required expressly in the act or has been interpreted as being required by the arbitrators and courts, particularly under the power that has arisen from the current act's section 156B, "Arbitrators' powers as to return to work programs", and the line of authority that has developed and essentially created those duties.

Hon NICK GOIRAN: One of the new provisions is that the worker must give to the employer or the insurer each progress certificate of capacity issued to the worker within seven days after the certificate is given to the worker. I anticipate that that provision will not infrequently fail to be adhered to. I do not think it is necessarily going to happen on a routine basis by any stretch of the imagination, but I can easily foresee circumstances in which there will be some confusion about whether that has happened, in part because of the existence of clause 163(7), which says that we will not need to worry about this if, essentially, the doctor has provided the progress certificate. I can foresee circumstances in which one will think that one has done it and another one will think that they have not and so on. That will just have to be managed in the fullness of time.

Firstly, can the parliamentary secretary confirm that the employer, who would have a right on the eighth day to make an application under clause 164, would not simply be able to cease payments? Secondly, can the parliamentary secretary also confirm that although the employer might make their application very enthusiastically on the eighth day, if at any time between the application being made and the matter coming on before the arbitrator, the worker complies and provides the missing progress certificate, would that —

Hon Matthew Swinbourn: I think you want to say defeat the application.

Hon NICK GOIRAN: Yes—defeat or invalidate the application in any way?

Hon MATTHEW SWINBOURN: The member's first question was about whether the insurer could cease the compensation payments. The answer is no; they will need a substantive application in which to cease compensation payments. Noncompliance on its own will not give rise to an automatic right to cease payments. In the example the member gave in which the employer makes the application on the eighth day and the worker subsequently furnishes them with a medical certificate, it would not have the effect of voiding or defeating the application. The application could still proceed.

However, if the subject matter of the dispute had essentially been resolved, the anticipation is that the conciliator's first comment would be, "What steps have you taken to resolve it?" and the second would be, "The certificate has been furnished to you; why are we here?" Conciliators will have the capacity to dismiss the application on that basis. An employer, or an insurer in their place, could essentially take that dispute to an arbitrator, but given that the subject matter would have been resolved, I imagine that it would be folly to do that and it would be a rare circumstance. There might, however, be legitimate circumstances in which a worker had persistently failed to provide it or did it for improper purposes, and that matter could be subject to genuine attempts to conciliate in the first instance. I think that covers all the questions the member had.

Hon NICK GOIRAN: In any of those scenarios that the parliamentary secretary has helpfully painted, to what extent will there be discretion on the costs of the applications?

Hon MATTHEW SWINBOURN: There will be no application for costs at the conciliation stage. However, if they go to arbitration, there will be capacity for costs. Yes, we could contemplate a situation, because it is not a cost jurisdiction. I suspect that for employers and insurers, there would be a time and resource cost. Obviously, there would also be a time and resource cost for workers, as well as a stress cost, but in terms of party-to-party or legal costs, there will be no capacity at the conciliation stage.

Hon NICK GOIRAN: Clause 163(5) is also said to be a new provision. It stipulates that the worker must comply with any requirement to attend a return to work case conference. Who will be eligible or entitled to attend the work case conference that the worker must attend and participate and cooperate in?

Hon MATTHEW SWINBOURN: Who will be able to attend those conferences is set out in clause 165(1). It states —

> An injured worker who has an incapacity for work may be required to attend a conference (a ***return to work case conference***) arranged by the worker's employer, the employer's insurer, the worker's treating medical practitioner or an approved workplace rehabilitation provider for the purpose of supporting the worker's recovery and enhancing opportunities for the worker's return to work.

Subclause (3) states —

> Regulations may provide for the following —
>
> …
>
> (d) the persons who may attend or participate in a return to work case conference;

I know what question the member is going to ask next.

Hon NICK GOIRAN: The parliamentary secretary has helpfully set out that who will be able to attend these return to work case conferences is very broad. In fact, it could easily be read into this that, in essence, anyone the employer would like to attend the work case conference could attend. The question that then arises is: what protections will be in place in the event that, concurrent with the injured worker making progress with their workers compensation claim and their attempts to return to work, there is an allegation of bullying that the worker is dealing with? The very last thing that they would want is the alleged bully to be in attendance at the work case conference. What protections will be in place to address that scenario?

Hon MATTHEW SWINBOURN: In the circumstances that the member has described in which a bully might be the subject of this —

Hon Nick Goiran: Alleged bully.

Hon MATTHEW SWINBOURN: Yes, an alleged bully. I will first go back to the point that all of this is in the context of employment and working. The Work Health and Safety Act provides an express obligation on employers or persons conducting a business or undertaking not to cause harm or injury to either a worker or other person. When there is a clear stressor that could cause further injury, including a stress-related injury, to a worker, my advice to the worker would be to raise those concerns and have discussions about who was and was not involved because there is an obligation not to cause that harm. That is not an express thing in this particular structure, and a lot of workers perhaps would not have had the benefit of advice before being compelled.

To address some of those potential concerns, we will ensure that the regulations are made to protect workers against the misuse of return to work case conferences by regulating the conduct and frequency of return to work case conferences, who can attend and what can and cannot be discussed. This has not yet been fully settled because it will be subject to further consultation with relevant stakeholders to ensure that those regulations provide the protections to which the member has alerted us as being needed so that workers are not potentially further injured in some way as a consequence of being required to attend.

Hon NICK GOIRAN: That is excellent. In any event, will the worker be entitled to legal representation at a work case conference?

Hon MATTHEW SWINBOURN: I am advised that there is not a capacity for the worker to be legally represented in the case conference because it is not a legal proceeding. I am sure that the member can take issue with some of that, but it is not the intention to legalise the arrangements. They are supposed to be at a lower level than that.

Hon NICK GOIRAN: Further to that, will the worker be entitled to have a support person present with them at a work case conference?

Hon MATTHEW SWINBOURN: I am advised that yes, they will be entitled to have a support person, but I have also been advised that they would not be appearing in a union representative capacity.

Hon Nick Goiran: Sorry, would or would not?

Hon MATTHEW SWINBOURN: It would not include a union representative.

Hon NICK GOIRAN: Honestly, it is so helpful that we go through this. I know that for members this has been a tortuous process. It is a 700-plus clause, monster bill that has been with governments of various persuasions for more than a decade. Here we are now, getting to the end of the process—I say that noting that we are only at clause 163, although we are dealing with clauses 163, 164 and 165 as somewhat of a package. I find it extraordinary that we have a situation in which an injured worker—incidentally, this might interest members who have an interest in workers—is required to attend a case conference. They do not have an option; as a matter of law they must comply and they must attend. In fact, the employer can say to the injured worker, "This will be the time and place. I'll tell you whether you will have to attend in person or by video link, and, by the way, as we are trying to get you to return to work, you must participate." Members should think about that for a moment. If a worker must participate, how is it intended that that be interpreted? But we go beyond that in this legislation. We say that they must not only

participate, but also cooperate in the conference, and, by the way, they are not allowed to have a lawyer representing them at those proceedings. For those who dislike lawyers, that is fine, but maybe some people like union officials. We are saying in here apparently that they will not be able to have a union official represent them at these proceedings, but in all of that, we are saying that it is okay to have a support person present. What could possibly be wrong with an injured worker choosing to have a person sitting by them in what could be a highly stressful case conference, particularly if there are allegations of bullying, which, believe it or not, happen from time to time in the workplace? We are saying to this worker that they can have a support person, but if that person has a law degree or has been admitted as a barrister and solicitor in the Supreme Court of Western Australia, they are an ineligible support person. We would not want them to have that level of support. We also do not want someone who is a union official either, who has presumably given most of their career to representing workers and that is why they are there as a union official looking after the worker in a variety of contexts, including in industrial relations claims and the like. No, we definitely would not want that person to be there, but we want some other innocuous, unspecified person with no particular qualification other than that they are a nice person to maybe hold the hand of the worker and pass them a box of tissues from time to time. I do not understand why we are doing that.

I am not trying to shoot the messenger here. I accept that the parliamentary secretary is here in a representative capacity, but I want to say in the strongest possible terms that I cannot make a case for us restricting who a worker can have present with them. I would not mind so much if we said that a worker cannot bring in with them 15 lawyers and 15 union officials to crowd out the room and make the whole thing unworkable. I can understand there may be some form of limitation there, but I do not understand what the case is for restricting the human being who is standing or sitting next to the worker to provide some level of support in what could be a highly stressful situation. Perhaps the parliamentary secretary can help me.

Hon MATTHEW SWINBOURN: Member, I want to make it clear at the first instance that that is not prescribed in the act or in the bill. It is not the case that it will be excluded; there is a regulation-making power. The member's points are well made. The government will consider what he has said when the regulations are being formulated. I am not suggesting that we are conceding his point and will allow union officials and legal representations under the proposed regulations, but the member has made a strong point. Further stakeholder engagement will be held around what class of people will be included in the conferences. It will be up to, for example, the unions, stakeholders and plaintiff law firms that will be engaged to make the point that the member has made. The only assurance that I can perhaps give the member is that the act does not exclude that. We were just giving an indication about where the government is at in terms of its intentions on the class of people that could be included in regulations.

Hon Dr STEVE THOMAS: I feel that I am in a dangerous situation. I think I have been asked to compare union officials and lawyers, and that might be a place where angels fear to tread.

Hon Nick Goiran: Imagine if the person is both!

Hon Dr STEVE THOMAS: Perhaps it would be safer if we did not go down that path. I indicated to the deputy chair that my clause was 165, which was the substantive clause. I do not have much to add. I was listening to —

Hon Matthew Swinbourn: I am happy to deal with your issue so long as the deputy chair is happy with that.

Hon Dr STEVE THOMAS: It will not take very long.

The DEPUTY CHAIR: I will allow it.

Hon Dr STEVE THOMAS: Clause 165 states that the injured worker who has an incapacity to work "may be required" to attend a return to work case conference. Is it the drafting position that, on occasions, the powers under the regulations would effectively change "may" to "must"? As read directly, I presume that the regulations would enforce attendance. Is it therefore open to the government that because this is a whole new clause and a whole new empowerment that the government might change the regulatory intent and not require attendance at a return to work case conference?

Hon MATTHEW SWINBOURN: I would not interpret the "may" as a "must" in this particular section as a form of statutory interpretation, because that creates the circumstances when this may occur. When there is to be a case conference, clause 163(5) states —

> The worker must comply with any requirement to attend a return to work case conference under section 165.

That is crystallised once the worker's compulsory participation in a case conference has been called on.

Hon Dr STEVE THOMAS: Again, it is probably an issue of legalese. The empowerment clause is clause 165, when it states the worker "may be required". Yes, under clause 163, the duty of the worker is to comply with the obligations under proposed section 165, but the requirement does not necessarily exist, as I read it, until the regulations are potentially written to state that attendance is required, unless "may" is changed to something else, so I am not convinced. It may be that, in practice, it is impossible to get out of, but I suspect the government wants to make sure that the regulations in this particular case are watertight. I support the role of conferencing to get

workers back to work. I think that is good and I think it was widely supported in the submissions. I take on board Hon Nick Goiran's comments around who a worker can attend with, but that will come under the regulations. I do not know how to phrase that differently apart from I am not convinced that without formal recognition of the regulations, there is no authority to require the worker to attend. However, if I am told that it is, I will take the parliamentary secretary at his word. In which case, at what point —

Hon Matthew Swinbourn: By way of interjection, it is definitely there. The language in this clause and the earlier clause provides the imperative for that to happen.

Hon Dr STEVE THOMAS: I take the parliamentary secretary at his word. The only way that gets disproved is through some future court case down the path. At what point do the regulations expect to be in place and at what point do we get some feedback on the regulations to give us that level of detail, because at this stage, as Hon Nick Goiran says, who attends under what circumstances? All of that has to be regulated. We do not know that, so when can we expect to know that?

Hon MATTHEW SWINBOURN: All of the previous points that I made about regulations will apply in these circumstances. I cannot say what month we will get the regulations, because it depends on when this bill is passed. There are amendments to this bill, so it must go back to the Legislative Assembly as well. The regulations will commence when the bill commences, and at this stage, we would like that to be 1 July 2024. That is not locked in because it is dependent on the necessary level of consultation with stakeholders to get the regulations in there. I want to make clear to anybody who is following the debates that a commencement date for this bill of 1 July next year is our aspiration, but it will depend on things such as the finalisation of the regulations and the consultation with the stakeholders progressing to the point at which we can do that.

Clause put and passed.

Clauses 164 and 165 put and passed.

Clause 166: Employer must provide position during incapacity —

Hon NICK GOIRAN: We are now on subdivision 3, employment obligations relating to return to work. I am dealing with clauses 166, 167 and 168 as a package. Can the employer dismiss a worker during the employment obligation periods?

Hon MATTHEW SWINBOURN: The current act is somewhat vexed by this particular provision. I impressed my advisers, as I remembered which section it was because I have had to deal with it on multiple occasions. Section 84AA provides for similar arrangements. Can an employee be terminated during the employment obligation period? Yes, in fact, they can be terminated. However, they cannot be terminated for reasons of injury or illness. There are still some circumstances when an ill or injured worker can be dismissed, so this clause does not provide cover-all protection. Most obviously, if the employee engaged in serious misconduct following their injury—whatever form that might take—the employer still retains its right to terminate the employment relationship. That obviously has flow-on consequences, but this section does not provide a complete protection for workers to do whatever they wish following an injury or an illness that is compensable under the act. However, it does seek to protect them from being dismissed as a consequence of anything arising from that injury or illness.

Hon NICK GOIRAN: Does that protection last for 12 months?

Hon MATTHEW SWINBOURN: Yes. It is 12 months, which is what it is under the current act.

Clause put and passed.

Clauses 167 and 168 put and passed.

Clause 169: Issue of certificate of capacity —

Hon Dr STEVE THOMAS: We are on division 3 entitled "Certificates of capacity". Clause 169(2) will direct who may issue a certificate of capacity. Subclause (2)(a) is obvious—the "worker's treating medical practitioner". However, subclause (2)(b) directs that another health professional may be permitted under the regulations to issue the certificate. What is the government's intent? Will it be the same group of people who may do it under the current act or will this be a change? Who is intended to be the alternative health professional who may sign a certificate?

Hon MATTHEW SWINBOURN: There is no intention at this stage to provide for anyone other than the worker's treating medical practitioner to issue a certificate of capacity. That might then give rise to the question: why include a regulating power to expand that? However, we think that inclusion is important so that the legislation going forward can respond to demands or challenges in the future. I have a good example for Hon Dr Steve Thomas as a regional member: it might be necessary to permit nurse practitioners to issue certificates for minor injuries or for registrars in remote or regional hospitals in circumstances in which a worker cannot be treated by their treating medical practitioner. Unfortunately, I think we would prefer it not to be the case, but access to a medical practitioner is not uniform across the state. Therefore, we contemplate that there might be appropriate and reasonable

circumstances in which it would be beneficial for everybody to increase the scope in those who can issue certificates for minor treatment and medicines that do not last for a very long time. If we were to regulate further, there would be consultation with the health professionals and industry stakeholders prior to any regulations proceeding, but as it currently stands, we do not have any intention to expand it. If I can put it this way, we have tried to futureproof it for what might happen in the future. I guess that is what all futureproofing does.

Hon Dr STEVE THOMAS: Thank you, parliamentary secretary. That is a pretty good response. I appreciate that. The distribution of medical practitioners will get worse, not better, in regional Western Australia over the fullness of time. Medical practitioners, like a few other similar professions, will not put up with the same isolated situation that people did back in my day, if you will. I feel like a dinosaur.

Can the parliamentary secretary confirm that there is no intention at this point of putting allied health professionals onto that list? I could understand the argument for that in some circumstances—a physiotherapist, for example. At this point, is the intent only for nurse practitioners to replace a general practitioner when one is unavailable? The second half of my question is: did the parliamentary secretary consider alternative telehealth options as part of that or is that too difficult to do and the nurse practitioner model is more practical?

Hon MATTHEW SWINBOURN: As to the first part of the member's question, we have no intention at this point to extend this provision to allied health professionals. As for telehealth, I do not know that we had any further consideration of it. The reality is that it would probably be available for injured workers at this point. They can access telehealth with their GP. It would certainly mitigate further need if they have access to telehealth to expand the scope of who can sign a progress medical certificate.

Clause put and passed.

Clause 170 put and passed.

Clause 171: Employer, insurer and agent of insurer must not be present at examination or treatment —

Hon Dr STEVE THOMAS: We have probably ventilated most discussion around this issue in clause 1. For members avidly following, it is a pretty short clause. Clause 171 states —

> **171 Employer, insurer and agent of insurer must not be present at examination or treatment**
>
> A worker's employer, the employer's insurer or an agent of the insurer must not be present while a worker is being physically or clinically examined, or treated, by the worker's treating medical practitioner.

This was the protection the government committed to put in place. From memory, it was an election commitment.

Hon Matthew Swinbourn: Yes. It was.

Hon Dr STEVE THOMAS: Yes—to not have an employer's rep.

I will not spend a long time on this, but let us get to the technical details. As this will be an absolute law, will this apply exclusively within the clinical examination room or within the building, hospital or ambulance, for example? At what point will the employer be breaking this law if they were personally taking an employee for a clinical examination?

Hon MATTHEW SWINBOURN: The first thing to note is that if a worker was in an ambulance following an accident and the employer was also in there, that would be considered the rendering of first aid rather than what is contemplated here, which is physical or clinical examination or being treated. That situation is a response to the immediate circumstances and is not what is being contemplated by this clause. Ambulance officers, or sometimes police officers, would probably be well suited to managing what happens in the back of an ambulance, and an employer getting in the way would probably be dealt with with short shrift—I think is the phrase.

I am not going to be able to explain every scenario, but the wording of the clause states —

> A worker's employer, the employer's insurer or an agent of the insurer must not be present while…

It is a temporal thing —

> a worker is being physically or clinically examined, or treated, by the worker's treating medical practitioner.

One, it is a temporal thing, and, two, it is a proximate thing. It has to be in the space in which the person is being treated. We cannot give a comprehensive view. If, for example, the treatment occurred in a very large room partitioned off by screens, that would not be argued. That would come down to the factual circumstances. The point is when the employer, insurer or agent of them is actually in a position to be a part of the process, if the member wants to think about it in that way. Medical facilities in regional areas are not always just sole rooms. There are other things like that. Essentially, if the employer was in the space, but was not a part of what was happening, could not observe it or interact with it, it would be understood that they were never a part of it.

The other thing to understand here is that it is a temporal thing; therefore, it is only for whilst the actual examination or treatment is being undertaken. For example, a worker might attend the doctor's surgery with their rep because the rep took them there. The employer rep or insurer may sit in the waiting room whilst the worker had their examination, treatment and that sort of thing. A doctor can say when it is over, "Hey, come in. We want to have a chat about how this worker can return to work", and things like that. It is not designed to prevent any interaction between the medical practitioner and the employer or insurer; it is designed to protect the worker's dignity; right to bodily autonomy; privacy about their personal information; and modesty; and to give regard to any cultural practices important to them and to give any gendered considerations and those sorts of things. I hope that gives the member a better understanding of what the government is trying to achieve here.

Hon Dr STEVE THOMAS: I think the parliamentary secretary and I and probably everybody in the chamber are at one in terms of its intent. I do not have a problem with that. However, I am a little concerned that the reading of the legislation and its intent might be slightly different. It will lead to another question in a bit.

I want to clarify what I think I heard the parliamentary secretary say—as my wife keeps telling me, "Repeat back what I said"—to make sure that we are all in the same place.

Hon Matthew Swinbourn: I don't want to be compared to your wife.

Hon Dr STEVE THOMAS: I am just offering you her advice. I think the parliamentary secretary is saying the intent is that an employer can take an injured worker to the hospital, drive them there and sit in the waiting room with them. In most small businesses, your employees are your friends so employers are certainly going to want to take them there and make sure they are okay. I think the parliamentary secretary said if the doctor then invites the employer or an insurance agent or another agent in, that is allowable. Under the act, if any form of examination is occurring, the employer must not be present while a worker is being physically or clinically examined. At that point, using the parliamentary secretary's words—if I have misquoted him, can he please correct me—how does he delineate between them? I take my employee in and I sit in the waiting room, because I am very concerned that they were injured in my workplace. The employee goes in and has their clinical examination, and the medical practitioner of their choice says, "Come in and let's discuss this." The clinical examination does not necessarily require the employee to disrobe and be checked out. It can be as much psychological as anything else. It is probably most pertinent in the psychological examinations. If the treating medical practitioner is doing the psychological stuff, how does the bill therefore delineate at what point the employer finds themselves in breach of clause 171? I say that because, in the first instance, it might be with the best of intent that an employer and employee go to the medical practitioner. The employer sits outside; the employee gets treated. The practitioner calls the employer in, and then six months down the track, when it all turns to mud and everybody is angry with each other, there is suddenly an accusation of a breach of clause 171. How is that point recorded and measured for the protection of both parties?

Hon MATTHEW SWINBOURN: We are not going to get to an iterative point of view in which we have excluded all possibilities. A lot of this will depend on the circumstances of any particular case, which is probably not a satisfactory answer for the member. It is incumbent on the medical practitioner to make that call. The medical practitioner will know whether they are continuing to engage in a clinical examination, or whether they are treating a particular worker. Doctors are generally overwhelmingly pretty smart people, and they will have an understanding of it. Remember, those are the workers' doctors, not somebody else's doctor, so their obligation is to their patient, not the employer. They will be better placed to try to protect the interest of their own patient. They have both ethical and professional obligations to do that. It may give the member some comfort that this clause, whilst it is drafted in a mandatory way and it creates a right something not to happen, is not a penalty provision. An employer or insurer will not later be prosecuted for having not complied with it. It may go to other matters in terms of the settlement of the cases, in the consideration of the reasonableness of the behaviours of the employers if they are in dispute, but is not something an employer will be prosecuted for if it is breached.

The other thing to take into account is that WorkCover will produce guidance around this particular provision, both for the benefit of workers, the benefit of medical practitioners in this situation and employers—probably not so much insurers because they are very large and sophisticated. That information will be available to give guidance about what that means. It will not be buried away in the act and nobody will know about it except when they have to front up to court to be prosecuted. As I say, it is not a penalty provision, it does not provide an avenue for someone to be prosecuted for not complying with it. I do not want to understate its importance as a statutory right and, if it passes the Parliament, about people giving due regard to it, but it is not one for which there is a big stick involved at the end of it.

Hon Dr STEVE THOMAS: The parliamentary secretary is right; I am not entirely satisfied with the answer but I am not opposed to the intent to the point that I have an alternative or oppose the clause. I presume nobody else has that intent either. I think it is a case of me making sure that the concerns are put on the table. I am pleased that there will be guidance from WorkCover, because I think that is critically important. I think it could cause issues. There is not a direct penalty involved, but it does potentially impact on future court cases. It is like most issues I find

in law: the parties often start out with a reasonable intent to work together harmoniously—it is probably nothing like family law—then it all falls apart. Suddenly there are accusations thrown about for things that happened six months ago—or, in family law, six years ago, or 16 years ago. There are a set of circumstances here in which both the medical practitioner and the employer find themselves potentially in breach of the legislation. That does not necessarily mean that there is a financial penalty imposed, but it does potentially have a reputational impact going forward. I think it is critical that we look at and address the circumstances around the involvement of the employer and the representative of the insurance agent—I think it would be more an employer, to be honest. I suspect it would be quite rare that there would be an insurance company and its representative, unless there is conflict around the diagnosis made by a medical practitioner. We will deal with that in a couple of clauses time.

I think there is an issue here that there may inadvertently be a breaking of the law. Can I ask whether consideration was given to slightly changing this clause so that it would be illegal unless the worker involved endorsed and wanted that to happen? If they said, "I want my employer to come in during this examination", was consideration given to those circumstances in which the employee might want the employer in there, and was there an option to make this a voluntary rather than a mandatory and exclusive clause?

Hon MATTHEW SWINBOURN: This was an election commitment on our part, so, obviously, while there was consultation around it, our commitment to give effect to our election commitment was strong. It is already voluntary. Employers can already voluntarily not involve themselves in the clinical treatment and examination of workers by their medical practitioner—that is the current state of affairs. There is not an express right for an employer to come in on those things, but some assert that there is. I think in relation to the member's point—we will probably not agree whether there should be a consent provision—fundamentally, when an employer is insisting or wanting to be involved in someone's medical treatment or examination, there is a power imbalance. There is always a power imbalance between employers and employees, and there is a whole range of complications when we start talking about consent, how informed the consent is, whether there is undue pressure or some unconscionable conduct, particularly when the employer is the person who pays their wages and says, "Oh, I would like to be in there." That is the contemplation.

It is not an excuse or a defence under the act if a worker, for example, has the employer there of their own free will. This is not a strict liability or penalty provision. WorkCover is the prosecuting agency, if we can describe it as that, and it has no power to prosecute this particular provision. We are not going to have a situation in which everybody who, in a good-natured and good-intentioned way, went ahead with this because they are all from the same town and they all went to school together and this mate works for that mate, and that kind of thing. It is not a defence for breaking the law, but we must think about the work we are trying to do here, the mischief that we are trying to attend to, which is those circumstances when workers are pressured into having somebody in the space when they are receiving medical care from their doctor. I think the member has already acknowledged that he agrees with the general principle. He is obviously looking for the circumstances that might sit outside of it. As I said, we committed to this at the election, and we are sticking with it. I am happy to answer further questions, but I am not sure I can take it a lot further.

Hon Dr STEVE THOMAS: That is probably right. Potentially, I think we should agree to disagree on the value of voluntary inclusion. I raised it. I put it on the table. That is my job. I am not talking about an employer who says they want to be present for the medical examination. Personally, I would find that highly inappropriate. I am talking about the employee who says, "I don't want to be alone; I want this person to come with me", potentially because they would be the only person they know during the examination process. There is an option available for that to occur on a voluntary basis. It could have and should have been looked at. I accept that that is not the government's position, and I am not in a position to change it.

I want to finalise my comments on this clause. It relates specifically to a medical practitioner. I think we said earlier that the ambulance officer who attends an emergency will not be caught up in this. I think the parliamentary secretary said earlier that the employer could be present when the ambulance turns up because they are not the medical practitioner.

Hon MATTHEW SWINBOURN: It is the treating medical practitioner. Obviously, in an emergency situation, that person might be one of those specialist doctors who comes in the ambulance, the air ambulance or those sorts of things. That is an emergency first aid response rather than a clinical-type setting. We are not contemplating those circumstances. If someone is involved in a very serious accident and the boss is holding their hand because they need support, nobody is suggesting that is what we are talking about in this circumstance.

Hon Dr STEVE THOMAS: I think the parliamentary secretary pre-empted my question. Therefore, if a medical practitioner attends—it is not as uncommon as people may think; it certainly occurs—they may not be the employee's choice of medical practitioner that would be picked up under clause 171. The employer would say that it is not appropriate for them to be moved aside, but almost any other employee of the business could potentially be considered to be the employee's representative. I might ask the parliamentary secretary to check that. Would the rest of the employees theoretically be the employer's representatives under clause 171?

Hon MATTHEW SWINBOURN: Let me give the member some advice on that. Clause 171 uses the term "treating medical practitioner", which is defined in clause 158 to mean —

> … in relation to a worker, means the medical practitioner who is the worker's treating medical practitioner under section 170.

Clause 170 states —

> (1) An injured worker is entitled to attend a medical practitioner (a ***treating medical practitioner***) of the worker's own choice to perform the functions set out in subsection (3).

It has to be of the worker's choice. If I use the example of an emergency situation, there is not likely to be a choice; even in an emergency department, the worker is not likely to have a choice of medical practitioner because they get what they are given. I will not get into a broader debate about the exercise of free will and all those sorts of things. This is a positive choice made by a worker about their treating practitioner. Most of this stuff does not necessarily relate to the very first incidence of medical treatment; this usually comes into play with the ongoing stuff. There are mechanisms under the act, with compulsory case conferencing for return to work and things like that, that would probably fundamentally reduce the motivation for employers particularly to be involved in those situations in any event.

Hon Dr STEVE THOMAS: That is a good response, although I think the parliamentary secretary opened the door a little when speaking about emergency departments because patients are not necessarily attended to by a doctor of their choice. Does that mean that the emergency department doctor examining a worker immediately after an incident would not be caught up under clause 171 because they are not the worker's chosen doctor?

Hon MATTHEW SWINBOURN: An emergency department situation is not what we are contemplating under this clause. I can be pretty sure that if an employer was trying to push their way into a clinical setting in an emergency department, they would probably be dealt with by security officers and the police because they are very controlled environments; they are not open to any old soul. If the medics are providing emergency treatment, they are not likely to permit someone to be there, firstly, because the person who is receiving that treatment does not want them to be there; and, secondly, the medics would not see any clinical or family reason for them to be present.

Hon Dr STEVE THOMAS: Thank you. That is quite comforting. In summation, the government does not intend to pick up emergency department doctors or any other medical personnel in clause 171. I understand that it is much more focused on appointments down the track as workers go through the process. It is quite comforting, as the parliamentary secretary just said, and will hopefully confirm that clause 171 is not intended to pick up the emergency response people, whether they be emergency department doctors, nurses, ambulance officers et cetera. I think the parliamentary secretary is right that that treatment level would occur. Any employer trying to get into the emergency department just to watch and observe would be given short shrift. I take comfort from that. Hopefully, the parliamentary secretary will confirm that that is the case and we can move on.

Hon MATTHEW SWINBOURN: Essentially, yes, this clause is limited to the worker's treating medical practitioner. That is a defined term, which is further explained in clause 170.

Clause put and passed.

Clause 172: Approval of workplace rehabilitation providers —

Hon BEN DAWKINS: Was any consideration given to including in clause 171 a provision to ensure that an injured worker could have a choice of rehabilitation provider? I understand that is sometimes the case currently but it would make sense given what the parliamentary secretary said about empowering the worker and respecting the worker's rights for such a provision to be included so it is enshrined in law. I am sure the parliamentary secretary is aware that within the jobactive space under the federal government, in the first instance individual employees got to choose which job network or jobactive provider they used, whether it was Forrest Personnel or any other providers. Was consideration given to that?

Hon MATTHEW SWINBOURN: The first thing I note for the member is that the questions he asked do not really relate to this clause or division 4. Although it deals with workplace rehabilitation providers, it only deals with recognition, registration and processes. It does not deal with the worker's workplace rights with respect to worker rehabilitation. For the sake of being helpful, the question was whether workers have a right—I am essentially paraphrasing the member—to choose their own workplace rehabilitation provider. They do have that right under the current legislation and they will continue to have the right to choose their own workplace rehabilitation under this legislation.

Hon BEN DAWKINS: I am not necessarily sure; the parliamentary secretary may well be right. There may be a more appropriate clause at which to raise this point. However, at first glance, it seems that a clause to include such

a provision would be about here. Why would the parliamentary secretary not enshrine that right, as in the preceding clause, clause 171, to take away the doubt about whether an employee has that opportunity?

Hon MATTHEW SWINBOURN: I do not have anything to add.

Hon NICK GOIRAN: I must say, I had the same question at this point as Hon Ben Dawkins, and the parliamentary secretary, helpfully, indicated that that right currently exists under the act and will do into the future. Is there a clause or provision that enshrines that existing right?

Hon MATTHEW SWINBOURN: It is clause 93(3).

Clause put and passed.

Clauses 173 to 179 put and passed.

Clause 180: Power to require medical examination of worker —

Hon Dr STEVE THOMAS: We are at now at part 4, so we are doing remarkably well. We are into the medical assessment component of the bill. Clause 180 reflects the power to require a medical examination, whereby the insurer or self-insurer can effectively require an employee or a worker to undergo what presumably at that point would be another examination and to receive a report of that under clause 180(2). Can I just check that under clause 180(2), all parts of a report that an insurer or self-insurer receives from the medical examiner of their choice will have to be provided to the worker? Effectively, whatever has gone into the paperwork, all of it in its entirety will go to the worker as well as to the insurer or their representative?

Hon MATTHEW SWINBOURN: If we think of the report as a discrete thing, everything that is in the discrete report must be provided. For example, there would be correspondence to and from the insurer's chosen medical practitioner that might relate to costs, or even the instructions that led to the report. If that is not part of the actual discrete report, that is not provided. I do not know whether that is where the member was going; I just want to make that clear. The people who work in this space are overwhelmingly very familiar with what a medical report constitutes. As I say, it will be a discrete document, and whatever is in that document will be furnished to the worker within 14 days.

Hon Dr STEVE THOMAS: I thank the parliamentary secretary; that is exactly what I was looking for. As my final question on clause 180, obviously, again, we will have a set of regulations, hopefully, by 1 July next year, which may provide for lots of things such as the conditions and the conduct et cetera. The regulations may provide for the maximum number of times a worker may be required under this section to undergo an examination. I presume this is for medical conditions that are repeat or chronic et cetera. Is there any indication of how often and over what period this is likely to be set? Again, this happens now; it is not new, so there must be some indication of where the line in the sand is likely to be drawn.

Hon MATTHEW SWINBOURN: It is currently two weeks and it will continue to be two weeks after the commencement of the new —

Hon Dr Steve Thomas: By interjection, every two weeks, potentially?

Hon MATTHEW SWINBOURN: Yes, that is the maximum—every two weeks.

Hon Dr Steve Thomas: Will it be, for example, every two weeks for 26 weeks? Is there a line in the sand?

Hon MATTHEW SWINBOURN: It will go on the period of the person's claim. Once the claim is finalised, the requirement to attend medical appointments disappears, because there is no longer a claim, but there is no outer limit. It will always turn on the individual circumstances of the case, but it will be two weeks.

Clause put and passed.

Clause 181 put and passed.

Clause 182: Assessments to which Division applies —

Hon NICK GOIRAN: Clause 182 is at the start of division 3, "Assessing degree of permanent impairment", in part 4 of the act. Once again, it seems convenient that I address my questions at this first clause in the division, notwithstanding that the division flows through to clause 199. It could arguably also be put when we are dealing with the permanent impairment guidelines at clause 187.

The parliamentary secretary might remember that we took up this issue momentarily at an earlier clause—I think we touched on it during the debate on clauses 97 and 98—and then the parliamentary secretary kindly earlier today tabled the fourth edition of the *WorkCover WA guidelines for the evaluation of permanent impairment*. The date is 17 October 2016 in the *Government Gazette*, notwithstanding that the date at the bottom of the document of the fourth edition is December 2016, for whatever reason, but that is not important at this particular juncture. Suffice

to say, the document that was tabled earlier today is the guide that has been in place since late 2016 until the present day for assessing permanent impairment and the degree of permanent impairment.

The parliamentary secretary might recall that when we discussed this at clauses 97 and 98, I touched on the use of the American guides, and, in particular, the use of the fifth edition of the *AMA Guides to the evaluation of permanent impairment*. Before we embark too heavily upon this, can the parliamentary secretary confirm that Western Australia uses the fifth edition of the *AMA Guides to the evaluation of permanent impairment* for the evaluation of permanent impairment subject to any modifications that are outlined here in the WA guide?

Hon MATTHEW SWINBOURN: Yes, member.

Hon NICK GOIRAN: One of the various elements here is the spine, which is found at page 31 of the current guide. If the parliamentary secretary turns to page 31, he will have it conveniently at his disposal. It says there at the commencement —

> Chapter 15, AMA5 (page 373) —

That is the reference to the American guides —

> applies to the assessment of permanent impairment of the spine, subject to the modifications set out below. Before undertaking an impairment assessment, users of the WorkCover WA Guidelines must be familiar with the following —

It sets out —

- The Introduction in the WorkCover WA Guidelines
- Chapters 1 and 2 of AMA5
- The appropriate chapter/s of the WorkCover WA Guidelines for the body system they are assessing
- The appropriate chapter/s of AMA5 for the body system they are assessing

> The WorkCover WA Guidelines take precedence over AMA5.

This particular provision deals with the spine, which, of course, includes the back. It starts at page 31 of this guide and goes for a number of pages through to page 38. These are the determinative guides for assessing permanent impairment when it comes to the back. I do not suppose the parliamentary secretary has the *AMA5* at his disposal?

Hon MATTHEW SWINBOURN: We do not have it at the table. The member is indicating that is okay, but I want to make it clear that we would not be in a position to table it—he has not asked for that—because there are complicated copyright issues. I understand that parliamentary privilege does not apply to that, but there is obviously a reluctance to potentially have an argument at a later date over those copyright issues.

Hon NICK GOIRAN: That is okay. I am glad the parliamentary secretary put that on the record. It will at least clarify for those who are interested in this particular topic why no such document has been tabled. It is not my intention at this time to request that. I appreciate the reasons that the parliamentary secretary gave.

Nevertheless, in order to press the matter a little further, we do at least have the WorkCover WA guidelines at our disposal. I know that the parliamentary secretary has a copy of it, as he tabled it earlier today. If I could get the parliamentary secretary to turn to page 98 of that guide, it is part of the appendices to this guide. It sets out a number of case studies. This particular case study deals with thoracic pain. It is not necessary this afternoon for us to regurgitate everything that is set out on page 98, but it is a case study of a 28-year-old woman who is a forestry worker. The context is thoracic pain. I should confirm that this is a hypothetical case. It sets out her history and the current symptoms and diagnosis and then it deals with the impairment rating. In particular, it says that the whole-person impairment is assessed using *AMA5* table 15-4 at page 389. This is a page of that document that cannot be tabled, for copyright reasons et cetera. It goes on to say —

> This leads to an assessment of 20–23% WPI. In this case the lower figure of 20% is appropriate due to the good recovery of function of ADL.

The pertinent point here, which we will see if we get to look at this mysterious American guide, is that there is a range. The range is 20 per cent to 23 per cent. In this particular scenario, it is saying that the lower figure is to be used. Can the parliamentary secretary clarify whether it is always the case with these ranges—in this case, the range of 20 to 23 per cent—that the assessment always falls to the lowest figure in the range?

Hon MATTHEW SWINBOURN: It is not always the case and neither should it always be the case, because it should be a matter of clinical judgement about where it sits.

Hon NICK GOIRAN: Excellent. It is the case that there is this range, and one of the options for these assessors, doctors, specialists and experts, with an injured person before them with impairment to their back from a workplace injury, is to assess this person in that range of 20 per cent to 23 per cent. As the parliamentary secretary said, it is

a matter of clinical judgement about whether the person is 20, 21, 22 or 23 per cent. Are there other ranges with the back? There is clearly a range; we know from the WA guide in this hypothetical scenario for the 28-year-old woman, the forestry worker, that there is a range for the back of 20 per cent to 23 per cent whole-person impairment. Are there other ranges?

Hon MATTHEW SWINBOURN: The first thing I have to say is that we do not have any clinical people at the table, so it is not our area of particular expertise. We cannot give a definitive answer to the member's question, but we can reasonably deduce, if that is helpful to the member, that there would be other ranges. If it assists—I am sure the member has seen it—other scenarios are detailed that give different ranges. That would lend to it, but I am sorry that the advice cannot be more precise.

Hon NICK GOIRAN: I thank the parliamentary secretary. That is okay, we can continue to make progress on the basis that there is at least a meeting of minds and other ranges are applicable. One of those ranges, as we have already identified and confirmed with regard to the back, is 20 per cent through to 23 per cent. We have also agreed that it is up to the clinical judgement of the doctor at that point in time that if they have assessed this person as being suitable for that range, they then have to work out what percentage within that range is applicable. The other alternative for the specialist is of course then to say, "No, this person falls under one of the other ranges." Again acknowledging that the parliamentary secretary does not have those ranges in front of him, so perhaps he will have to trust me on this one, one of the ranges apart from 20 to 23 per cent is 25 per cent to 28 per cent. There is this range of 20 to 23 per cent, then the next option for the specialist is to say, "No, actually this person's back injury is more severe than that. They warrant being in the 25 to 28 per cent category." What is the threshold that entitles a person to—if they can, of course, identify negligence on the part of the employer—lodge a common-law claim?

Hon MATTHEW SWINBOURN: It is the notorious 15 per cent whole-body impairment.

Hon NICK GOIRAN: There is the threshold of 15 per cent, but I think there is also a 25 per cent threshold?

Hon MATTHEW SWINBOURN: Yes, 15 per cent to 25 per cent is capped and 25 per cent and above is uncapped.

Hon NICK GOIRAN: Excellent. In those two scenarios that I gave earlier with the range with regard to the back of 20 per cent to 23 per cent, the clinician will make a judgement about where the person fits in that 20 to 23 per cent category, or they will say the back injury is more severe than that and warrants going in the next category, which is 25 per cent to 28 per cent. For the purposes of a common-law claim and access to the unlimited cap, compared with the range of 15 to 25 per cent, which has the capped scenario, the clinician will not be caught in any particular dilemma because, of course, if the person's back injury will fall into that higher range of 25 to 28 per cent, it will not materially matter. The point is that if a person has at least 25 per cent impairment, they will have access to the unlimited common-law gateway. The other threshold is, as the parliamentary secretary has described, the 15 per cent category. I just draw to his attention—again, I acknowledge that he does not have this documentation in front of him—that these guides, which cannot be tabled for the reasons he has identified, have this range of 25 to 28 per cent for the back. They also have the category of 20 to 23 per cent. What the parliamentary secretary might not be aware of is that the category below that is 10 to 13 per cent. Again, the scenario is that the person with the injured back will appear before the clinician, and the clinician will have to work out which of these categories the person fits into. If they say that the person is in the 25 to 28 per cent category, there will be no problem. If they say that the person is in the 20 to 23 per cent category, again there will be no problem, insofar as the person will still be able access their common-law rights because it is more than 15 per cent. But what will happen if the clinician says that the person does not fit into the range of 20 to 23 per cent, but they do fit into the 19, 18, 17, 16 or 15 per cent category? There is not even a provision in the table of American guides for that scenario. The physician will be left in the intolerable situation of having to select the 20 to 23 per cent category for the severity of the back injury or, if it does not meet that, the best that they could do for the person is select the 13 per cent category, which would automatically exclude a worker from the lower threshold for common law.

I am not identifying this as a new issue with the bill specifically. This is a longstanding, unacceptable situation that has ensured that a whole stack of workers have missed out on their common-law rights. It is not the fault of the doctor. The doctor has to choose one of these categories. The doctor cannot unethically manufacture that the person has a 20 per cent impairment of their back. They have been in a situation in which they have had to effectively choose between 13 per cent and 20 per cent, and then the legislators well before our time invented this 15 per cent threshold. It has been an entirely unsatisfactory situation for far too many years than I care to think about.

All of which is to say that I am grateful that the parliamentary secretary has indicated that a new set of guidelines will be published. Is this something that the government will take up to ensure that practitioners and injured workers with a back injury will no longer be left in this untenable situation of trying to access the 15 per cent threshold?

Hon MATTHEW SWINBOURN: As the member can probably tell by the level of discussion at the table, we are taking what he has raised seriously. As he has indicated, it is already the regime and nothing we are doing in the bill proposes to change that. I think he understands that. That is not a point of contention. He has raised what he has raised. The CEO of WorkCover WA is sitting at the table and he has heard what the member has said. A process

will be undertaken, and I have already identified that we will do that when the new bill comes in and these guides are reissued. The best I can do is to say that what the member has put on the parliamentary record will be taken into consideration as we move forward. I cannot give any greater commitment than that because, as has been put to me at the table, it is a very complex thing. There are a lot of medical and legal matters that go into all these things. If I can be so bold as to say it, I think that is the fairest I can do for the member from the table now.

Hon NICK GOIRAN: Thank you for that, parliamentary secretary. It provides some level of comfort and assurance. I am glad that these opportunities get to be presented from time to time. This is my final question. In due course, if the WorkCover WA guides that will be published under the new regime, which will be on or after 1 July next year, prove to be objectionable by any person, including a member of Parliament, will the guides be a disallowable instrument?

Hon MATTHEW SWINBOURN: The member will like this answer. Yes, they will be.

Clause put and passed.

Clauses 183 to 192 put and passed.

Clause 193: Approval of permanent impairment assessors —

Hon NICK GOIRAN: We are now dealing with division 4, "Permanent impairment assessors". Has the language changed here? At the moment is it an "approved medical specialist" but from here on in —

Hon Matthew Swinbourn: By way of interjection, the name has changed.

Hon NICK GOIRAN: Yes, but is there anything else of great substance other than the name change?

Hon Matthew Swinbourn: I am advised no.

Hon NICK GOIRAN: Okay. It is important to compare apples with apples here. Have there been any complaints received by WorkCover WA about approved medical specialists?

Hon MATTHEW SWINBOURN: I am advised we are aware of one case where formal action was taken. It was about 10 years ago.

Hon NICK GOIRAN: There has been only one about 10 years ago. That makes redundant my next question, which was to ascertain whether any had had multiple complaints put in against them.

Hon Matthew Swinbourn: By interjection, no.

Hon NICK GOIRAN: With respect to that one where action was taken 10 years ago, would that person be refused approval under this legislation once it has passed?

Hon MATTHEW SWINBOURN: Obviously we are talking about a single individual. My instructions are that that individual is not currently a —

Hon Nick Goiran: An approved medical specialist.

Hon MATTHEW SWINBOURN: Yes—under the regime. They could make a new application. I cannot prejudice that application by saying it would be refused as a matter of fact because it would still have to be judged on its merits and all the necessary antecedents that go with that. So I do not want to take it any further than that.

Hon NICK GOIRAN: That is understandable. Under clause 193(4) —

> WorkCover WA must make the criteria applying for the time being publicly available on the WorkCover WA website and in any other manner it considers appropriate.

On the criteria that WorkCover will use, will any involve consideration of complaints from stakeholders?

Hon MATTHEW SWINBOURN: The member has not quite defined "stakeholder" so I am not really sure what he might be contemplating because that is a very broad thing. As we know, the Australian Health Practitioner Regulation Agency is the regulator for health practitioners. I can confirm if there are notations on its record, they will certainly be matters taken into consideration. If the member wants to be more specific about the kind of stakeholders he is contemplating, because I do not think AHPRA quite falls into the definition of a stakeholder because it is the regulator, we can go further than that.

Clause put and passed.

Clause 194 put and passed.

Clause 195: Minister may fix scale of fees and charges for permanent impairment assessment —

Hon MATTHEW SWINBOURN: I note the amendment in my name on supplementary notice paper 99, issue 3 at 6/195. I move —

Page 153, lines 25 and 26 — To delete the lines.

I want to give an explanation, which is essentially identical to an explanation given in previous circumstances. The amendment is required due to the commencement of the Legislation Act 2021 on 1 July 2023, which, amongst other things, provides for publication of certain subsidiary legislation on the Western Australia legislation website rather than in the *Government Gazette*. Note 1 currently contained under clause 195(3) refers to the publication of the order fixing scales of fees and charges for permanent impairment assessor services being published in the *Government Gazette*. The Parliamentary Counsel's Office advises it is likely the fee order will be prescribed under the Legislation Regulations 2023 because the fee order is specifically identified as subsidiary legislation. PCO advises that the simplest approach is to delete note 1 to clause 195.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 196 to 201 put and passed.

Clause 202: Requirement for employers to be insured —

Hon NICK GOIRAN: If this were a cricket match, the parliamentary secretary would be entitled to raise the bat to the crowd for the second time having passed 200 now. Clause 202 comes under part 5 of the bill, "Division 2 — Employer obligations", "Subdivision 1 — Insurance requirements for employers". Is any adjustment made to the premium paid by an employer for workers whose remuneration exceeds the capped amount?

Hon MATTHEW SWINBOURN: There is nothing under the statute that requires that to take effect, so the answer is no.

Clause put and passed.

Clauses 203 to 209 put and passed.

Clause 210: Insurer may recover underpaid premiums from employer —

Hon Dr STEVE THOMAS: I am a little intrigued by this provision under which the insurer may recover underpaid premiums from an employer. This is a warning about the employer providing deliberately false and misleading information—that is, if the insurer discovers that the employer has underestimated the cost et cetera and provided incorrect information. If the insurer goes back and seeks full payment, will the insurance remain valid during that period of time?

Hon Matthew Swinbourn: By way of interjection, yes, the insurance remains valid.

Hon Dr STEVE THOMAS: Okay, so an unpaid or partially paid workers compensation insurance bill will not void the insurance to the point at which the worker then has to sue the employer. Is that validity implied or is it explicitly explained in legislation or by information distributed by WorkCover?

Hon MATTHEW SWINBOURN: Insurers can cancel a premium only with the approval of WorkCover. The circumstances the member has identified, in which the employer has either knowingly or unknowingly provided false or—not that the member provided this, but these are the terms—misleading premium information to their insurer, or simply has not paid their bill, do not give the insurer the entitlement to cancel the insurance. The insurer has to go to WorkCover and seek for that to be done. Obviously, WorkCover does not do that willy-nilly, and for good reason, but it would be fair to say that at some point, if an employer is not paying their bills to the insurer, WorkCover will approve cancellation of the policy. That does not leave workers unprotected because there is a default safety mechanism, which is dealt with later in the bill, that will protect them. It certainly gives rise to a number of consequences for employers, because there is a continuing obligation to have workers compensation insurance, and if they do not have that, they can and will be prosecuted.

Hon Dr STEVE THOMAS: Obviously the intention is to make sure that workers are covered, and I understand that. How often do we see this occurring? How often is there an underpayment or a lack of provision of proper insurance, and how often has WorkCover actually allowed the cancellation of workers compensation insurance?

Hon MATTHEW SWINBOURN: I can only be as precise as this: it is not uncommon. We do not have figures here. If the member insists, we can provide him with figures, but we would have to come back to that, and I hope that it would not hold up the clause. The issue of WorkCover cancelling insurance is not dealt with specifically under this provision; I am trying to deal with things in a roundabout way because it is on this topic. It would not normally cancel the insurance premium until new insurance is in place with the employer, so that way there would not necessarily be a gap. The provision is mostly about creating a course of action for insurers to be able to go to court to recover moneys against an employer—that they have insured and continue to have obligations towards—for which they are not being paid the appropriate amounts. That is what we are trying to achieve here. It is largely a commercial consideration. How often this happens is a matter between insurers and employers. It is not data that

WorkCover collects. Insurers might conduct audits of their client's figures and take issue with them and probably put a claim on them for increased amounts. I suspect that on most occasions, the employer will probably meet the additional amount. In other cases, they might be able to commence legal proceedings to recover what they think is a fair amount.

Hon Dr STEVE THOMAS: I was going to follow up on clause 211, because part of that process is that employers are audited. However, the parliamentary secretary probably does not have the numbers on that either, so I will let it go. I might briefly jump to clause 215 before we do a fairly big jump after that.

Clause put and passed.

Clauses 211 to 214 put and passed.

Clause 215: Both principal and contractor taken to be employers —

Hon Dr STEVE THOMAS: Clause 215 has a compensation break up between the principal and contractor. They are both taken to be employers. How is liability proportioned? I presume that the arbitrator or the courts will proportionally attribute liability in those circumstances, but does WorkCover get involved in that? Is it a standardised process or case-by-case?

Hon MATTHEW SWINBOURN: WorkCover does not get involved in determining what happens regarding who is responsible and for how much. This provision is to protect workers from subcontractors principally when the subcontractor does not have insurance or perhaps does not have as much insurance as they should—I suppose it does not really work like that in this system. A contractor either has insurance or does not; it is a binary thing.

The worker is then able to claim against the principal's workers compensation because they are jointly and severally liable. Following that, the worker would not be affected by the claim. What would happen is that they would go to their subcontracting employer, find out that there is no insurance, and then be able to make the claim against the principal. The principal would then be able to go to take whatever legal action it wishes separate from the whole process—it does not concern the worker at all—to say that "The contract I entered into with you provided that you would provide workers compensation. Now I am suing you for that amount". To be honest, it is probably the insurer suing on behalf of the principal rather than the principal themselves, because they are the one making the payouts and those sorts of things. It is a safety net measure for workers so that they are not left uninsured.

Clause put and passed.

Clauses 216 to 290 put and passed.

Clause 291: Limits on claims for declared acts of terrorism —

Hon Dr STEVE THOMAS: We are at part 5, division 9, "Acts of terrorism". We could have dealt with this anywhere, but I picked this clause. I do not think this is a new provision. What is the substantiation for limiting claims? What sorts of limits are we looking at? Why is it for acts of terrorism? Is it simply because the potential liability is so massive? Is compensation available under other mechanisms?

Hon MATTHEW SWINBOURN: The first thing to say is that these provisions are not new. The cap is to ensure that insurers can get insured and reinsured themselves. Otherwise, if there were unlimited liability, given the potential damage from a terrorism claim being almost limitless, it could sink the system. It is probably telling that the provisions came into effect in 2001, for obvious reasons. I think that explains it. To be up-front, in the current act, $25 million is the cap, and it has been that amount since 2001. Under the new act, the limit will be prescribed by regulations so that it can be more appropriately changed. The proposal is to increase the limit when the regulations are issued, from $25 million to $100 million, which is an industry standard retention amount for comparable catastrophic events. That has been flagged to stakeholders and it will not be a surprise to anyone that I have just dropped $100 million on the table, so it is out there. The $25 million is viewed to be woefully inadequate and $100 million is more in posit with comparable standards.

Clause put and passed.

Clauses 292 to 296 put and passed.

Clause 297: Terms used —

Hon NICK GOIRAN: As the parliamentary secretary rapidly moves to his third century under this bill —

Hon Matthew Swinbourn: I need a boundary.

Hon NICK GOIRAN: Yes. This might be the one that gives it to the parliamentary secretary. I have one area to cover under division 11, "Contributions to Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund", which is dealt with at clauses 297 to 302. The current act extinguishes a worker's common-law rights if he or she accesses the extension of $250 000 of medical expenses under clause 18A(1C) of schedule 2 of the Workers' Compensation and Injury Management Act. Will accessing the catastrophic injuries fund have any impact on a worker's common-law rights?

Hon MATTHEW SWINBOURN: No.

Clause put and passed.

Clauses 298 to 347 put and passed.

Clause 348: Decisions generally —

Hon NICK GOIRAN: This clause comes under subdivision 3 of part 6, division 4 of the bill, which deals with arbitration. Currently, an interim payment or suspension order by a conciliation officer cannot be reviewed. Why is it considered necessary to now introduce this review by an arbitrator?

Hon MATTHEW SWINBOURN: We might need some clarification from Hon Nick Goiran. The advice I am getting is that the arbitrator has this power under section 211, "Decisions generally", of the current act. Section 211(2) states —

> An arbitrator may confirm, vary or revoke a direction under section 182K(2) or (4) or 182L(2).

That is dealt with at section 182K, "Weekly payments etc., conciliation officers may direct etc.". Section 182K(2) provides —

> The conciliation officer may direct that weekly payments of compensation be made by the employer to the worker if the conciliation officer considers that it would be reasonable to expect that the resolution or determination of the dispute under this Part would result in weekly payments of compensation becoming payable.

Subsection (4) states —

> The conciliation officer may direct that a payment be made by the employer in respect of a compensation entitlement under clause 17 …

It goes on; I do not want to read it all out. Unless we are not on what the member is on, it is our understanding that we are not changing the current regime.

Hon NICK GOIRAN: To be clear, the government says that under the current act, if a conciliation officer orders an interim payment, that can be reviewed by an arbitrator.

Hon MATTHEW SWINBOURN: Yes, member.

Hon NICK GOIRAN: Equally, if a conciliation officer makes a suspension order, that can also be reviewed by an arbitrator.

Hon MATTHEW SWINBOURN: Yes, member.

Clause put and passed.

Clauses 349 to 357 put and passed.

Clause 358: Interest on sums to be paid —

Hon Dr STEVE THOMAS: Subdivision 4 is headed "Interest", so it does not matter which clause we do this under. Clause 358(2) states —

> Interest payable must be calculated at a rate prescribed by or determined under the regulations.

I presume that an interest rate currently exists. How often is it reviewed, what is it currently sitting at and how is it determined?

Hon MATTHEW SWINBOURN: Members would think this would be straightforward, but, apparently, it has not been amended since 2005, and it is currently six per cent.

Hon Dr Steve Thomas: Luckily the official interest rate has gone up so we can justify it.

Hon MATTHEW SWINBOURN: Yes. It is because it is very archaic, in the sense of the time that it was done. I believe that these sorts of things have a connection to the rates that are often set by the courts in terms of penalty interest and those sorts of things, but I would not want the member to necessarily quote me on that, because obviously it has not been changed since 2005.

Hon Dr STEVE THOMAS: So it does not change very often. Is there a set calculation that the parliamentary secretary is aware of, because the answer sort of indicates that it is a bit arcane? Is there a set calculation?

Hon MATTHEW SWINBOURN: The current act does not prescribe or dictate a methodology for determining that. I do not have the advice at the table on what was used to determine the six per cent figure. Six per cent is a very familiar figure because that is the amount that courts use on judgement debts and those sorts of things. As I say, I do not want to but if I had to guess, I suspect that is how it was benchmarked. I have been advised that we are happy to have a look at the rate going forward when we review the new regulations that will come in. As I say, it is probably not a satisfactory answer, but we just do not have that information here. We could probably, at another

time, dig through and find out for the member, if he is super interested in knowing, but I suspect it is just benchmarked to this figure across government and the courts.

Hon Dr STEVE THOMAS: Okay. Thanks, parliamentary secretary. I suspect we will not quite finish the bill today, but we will not be as far off as people think. Maybe, if that is the case, the parliamentary secretary can come back in the next sitting week, or just behind the chair at some point, and give us some sort of indication. In which case, I am happy to move on to clause 365.

Clause put and passed.

Clauses 359 to 362 put and passed.

Clause 363: Functions conferred by this Division —

Hon NICK GOIRAN: This clause deals specifically with conciliators and arbitrators. Why is it deemed necessary to separate those functions as set out at clause 363(1) and (2)?

Hon MATTHEW SWINBOURN: I am advised that the current act contains separate provisions for arbitrators and conciliators but that in large part they mirror each other. The point of the drafting in this bill was to bring them together under the one division, but to make clear that in other parts it does not import the arbitrators' powers to conciliators and conciliators' powers to arbitrators. It is not creating anything new from the current act other than to amalgamate the provisions.

Hon NICK GOIRAN: In other words, although one person may be a conciliator and an arbitrator, while they are wearing their conciliator's hat, they do not have the powers of an arbitrator at that moment in time?

Hon MATTHEW SWINBOURN: What the member said is correct, but I note that currently there is no-one who is both a conciliator and an arbitrator. We can concede that it is possible that someone could have both those functions but exercise them separately when they have different hats on.

Hon NICK GOIRAN: Are those conciliators and arbitrators statutory officers?

Hon MATTHEW SWINBOURN: Yes, they are.

Hon NICK GOIRAN: By virtue of that, they are not judicial officers?

Hon MATTHEW SWINBOURN: No, they are not.

Clause put and passed.

Clause 364 put and passed.

Committee interrupted, pursuant to standing orders.

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