LABOUR RELATIONS REFORM BILL 2002

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 4: Part VID inserted -

Division 8: Disputes -

Debate was interrupted after the division had been partly considered.

Mrs EDWARDES: Prior to question time, we were dealing with division 8, which deals with arbitration. From memory, we were dealing with proposed section 97WN and had not yet got to proposed section 97WO. Proposed section 97WN deals with orders and determinations of arbitrators. Sorry, we had not got that far.

Mr Kobelke: I am happy to deal with proposed section 97WN!

Mrs EDWARDES: I will have to go back. We were dealing with proposed section 97WK. That was a good try by the minister! It is a wonder that he did not go 50 pages on. Proposed section 97WK is titled "Referral to relevant industrial authority where delay alleged in dispute resolution." Prior to question time, the minister explained that this proposed section relates only to complaints that arise when time limits are not met. The time limits in question are the ones in the regulations, but may also be further prescribed or defined within the EEA. Some obvious concerns have been raised on that point, particularly by members of the legal profession, who have a great deal of knowledge and experience in the area of arbitration. The concern has been raised that an arbitrator should be able to enforce time limits. This Bill will take away the power of the arbitrator to enforce those time limits. The suggestion is that the only time limit breach that should be referred to the Industrial Relations Commission is the one that applies to the appointment of an arbitrator. The reason for that concern is that if an arbitrator is not given the power to enforce time limits, or a finding is made in favour of the party that is not in default, arbitrators will be discouraged from taking an active role in the enforcement of time limits. Those time limits will extend and extend in an endeavour to maintain the arbitration. Once a referral is made to the Industrial Relations Commission, it stays with the commission if a breach is found. If a breach of a time limit is not found, is it referred back to the original arbitrator?

Mr Kobelke: Yes.

Mrs EDWARDES: Essentially, it appears that once it is referred, it stays with the industrial commission.

Mr Kobelke: Yes.

Mrs EDWARDES: It stays with the commission whether a breach of the time limits has been found or not.

Mr Kobelke: No. It can be considered by the commission only if there has been a breach of the time limit.

Mrs EDWARDES: The authority must satisfy itself that the allegation is proved. What happens if an allegation is not proved?

Mr Kobelke: It is referred back to the arbitrator as if it had never been to the commission. The wording is something of that nature.

Mrs EDWARDES: Proposed section 97WK(6)(a) states -

> the authority must order that the matter be dismissed; and

Proposed paragraph (b) states -

> the EEA dispute provisions have effect as if there had been no referral -

If the relevant authority is not satisfied that a breach has occurred, it goes back. If an alleged breach is referred to the commission, it stays with the commission to determine the dispute.

Mr Kobelke: If the commission first judges that there has been a breach of the required time limits.

Mrs EDWARDES: The power to enforce a time limit will be taken away from an arbitrator by the mere fact that the arbitrator will hold onto a dispute. That will actively encourage arbitrators to allow extensions of time rather than lose an arbitration.

Mr KOBELKE: I presume exactly the opposite effect in the vast majority of cases: that the independent arbitrator would have failed if an arbitration were taken out of his or her hands. Every effort will be made to get the parties to meet time limits so that disputes do not have to go to the Industrial Relations Commission.

Mrs EDWARDES: The minister must recognise that the opposite effect can occur: an arbitrator might not wish to lose an arbitration. If a time limit has not been met, an arbitrator may placate the parties by extending the time in an endeavour to hold onto the arbitration.

Mr Kobelke: My judgment is that the person doing the arbitration would have failed - most members would see it that way - and would be unlikely to get another job.

Mrs EDWARDES: That is the minister's view but it is not the view of all members. Another concern is that the commission must determine the finding that there has been a breach, whatever the state of its list, which would create a potential for delay in the determination of the arbitration. Will a procedure be established in which a referral to the commission is made under this proposed section so that priority can be given to the application and the arbitration determined in a short time?

Mr KOBELKE: That is up to the commission. The commission is required to deal with matters expeditiously.

Mrs EDWARDES: That is why this mechanism could be the subject of abuse. First, if an employer or an employee wanted to delay an arbitration, a tactical application could be made to the authority under proposed section 97WK(2) , thereby effectively staying the proceedings until the application is determined. Secondly, a party might use that provision to shop around for an arbitrator. The proposed section would effectively override the dispute resolution clause in an employer-employee agreement that nominated an arbitrator. There is a potential for abuse of this mechanism.

Mr KOBELKE: There is a provision in proposed section 97UO(2)(a) on page 15 of the Bill. A party who does not genuinely attempt to settle a dispute could be in breach of the EEA and the other party could apply to the Industrial Magistrate's Court to seek enforcement of the procedures contained in the EEA.

Mrs Edwardes: But the parties would be already before the industrial commission.

Mr KOBELKE: Not necessarily. In that situation the commission would obviously consider the facts of the matter and decide how to deal with it. If one party had commenced a matter in the Industrial Magistrate's Court on the basis that there was failure to comply with a provision of the EEA relating to the dispute resolution procedures, it would be up to the commission to make a judgment at that time whether to interfere or hold off.

Mrs Edwardes: I am talking about dispute resolution provisions that have been put into effect and a dispute referred to an arbitrator. During that arbitration one of the parties might use proposed section 97WK for tactical reasons of delay. The party would not be serious about going to an industrial magistrate's court, but that is another avenue that it could use.

Mr KOBELKE: If a delay were so blatant that it indicated a party was not interested in seeking to resolve a dispute, an alternative course would be available to the other party. However, that other party may believe that it is not in its interest to take the matter before the commission but it could use that other avenue to go to the Industrial Magistrate's Court.

Mrs Edwardes: Is there a restriction on the commission hearing the matter if it is before the Industrial Magistrate's Court?

Mr KOBELKE: No.

Mrs Edwardes: Is there a restriction on the Industrial Magistrate's Court hearing the matter if the matter is before the industrial commission or before arbitration?

Mr KOBELKE: No.

Mrs Edwardes: Two matters could therefore run at the same time.

Mr KOBELKE: If the parties judged that those actions were in their interest, it would be open to them to embark on such a course.

Mrs EDWARDES: I thought that the proposed section was complicated as it was, but the minister has complicated it even further. He has said that a genuine attempt would be made to resolve a dispute but people do use, and probably will continue to use, mechanisms to delay proceedings. This proposed section will allow that. First, concerns about delays would be alleviated if the proposed section stated that an arbitrator was the only avenue for referral of a dispute about time. The industrial commission is already heavily overworked and the provisions in the proposed section will only increase the number of applications. Secondly, the use of only an arbitrator will prevent potential abuse. The proposed section could include a provision that the commission, when determining a referral, should either refer the matter back to the arbitrator or appoint an arbitrator of its choice to hear the matter. That would avoid any potential delay in the determination of a dispute and the potential use of delaying tactics and would return the power to the arbitrator to deal with the matter. The minister has created a further layer of bureaucracy and there is a real concern that the arbitration will not resolve

the matter in an expeditious way. Matters may be resolved expeditiously if parties are genuine in their desire to resolve their disputes. They can sit down at a table, take a couple of hours to nut out the matters and everybody can go away happy. However, that is not always the case and legislation must facilitate, not create, mechanisms for potential delays.

Mr KOBELKE: The member's argument has some merit. I undertake to consider whether we can provide extra flexibility in the proposed section so that the commission will have the power to refer the matter back to an arbitrator. If the criteria for a breach of timeliness has been established to the industrial authority's satisfaction, the breach must be dealt with; but the proposed section does not give any room to move. It may be appropriate to refer it back to the arbitrator when delaying tactics are used by a party to an agreement.

Mrs Edwardes: Would that be to one of the commission's arbitrators?

Mr KOBELKE: I do not want to open up a range of possibilities. I accept that the member has said that the situation is restrictive. The intent of the proposed section was that the commission would step in when something went wrong in the design of the EEA. It is not intended to open it up in any major way, but the restrictive nature of current provisions may encourage parties on the odd occasion to simply delay matters for their own purposes. The way the section is currently drafted provides no room to move. A window of opportunity needs to be opened up for the matter to be referred back. The Government will examine that, and by the time the House had finished with the Bill, there will be time to reconsider it.

Mrs EDWARDES: Obviously, this mechanism is not suitable in those cases in which the commission is the arbitrator. Do the rules of the commission provide for tight time limits in the matter of an arbitration brought before it?

Mr KOBELKE: They do, to the extent that the Act already applies to the way the commission conducts its business.

Mrs EDWARDES: Proposed section 97WL is a very practical provision in this legislation. It provides for several disputes to be the subject of arbitration, where two or more employees have a dispute with the same employer, and they agree, as employees, to have those disputes heard together, and the arbitrator agrees that this is appropriate. The safeguards are there to protect any individual employees who might want their own day in court, and to ensure that, whether or not it is the same dispute, it can be determined with the employer. It is not necessarily the same dispute, only the same employer. Sufficient protection exists for all employees who might be caught up by this, with the other protection of the arbitrator. What is the intent behind proposed subsection (4)?

Mr KOBELKE: That makes it clear that the employer cannot object to the arbitration being conducted for more than one dispute as part of the same process.

Mrs Edwardes: So the agreement referred to here is the agreement between the employees?

Mr KOBELKE: Yes.

Mrs EDWARDES: Proposed section 97WM deals with the power of the arbitrator to obtain information. There are a number of concerns about this provision. One is that often the arbitrators are lay people. I do not need to be told that the provisions are the same as those applying to workplace agreements. I am questioning the rewritten version of the same section being incorporated into the EEA. I am sure that the minister himself questioned each of these proposed sections, and I would expect nothing less. The power of the arbitrator to obtain information is contained in proposed schedule 5, which deals with the power to obtain information, and related provisions. Lay people, not necessarily the industrial commissioners, are given very broad powers to obtain information. I know that this is a total lift from the same provision in the Workplace Agreements Act, but knowing that the minister has applied his questioning mind to this proposed section, can he say if each of those provisions is still suitable in 2002, particularly given that the decision of the arbitrator - potentially a lay person - cannot be appealed against, and that his orders are enforceable? Those two key criteria are different from those applying to the arbitration under workplace agreements. In proposed schedule 5, an authorised person who is either the registrar or any person appointed as an arbitrator under the provisions, may inspect any book, document or record produced, or require any person to take an oath, and to answer any question put to him. While legal professional privilege still applies, clause 6 of proposed schedule 5 allows for self-incrimination. A lay arbitrator, whose orders are enforceable and not subject to appeal, can demand that a person answer a question, and produce books or documents, even though they might be incriminating. The definition of incrimination in these circumstances is not limited. It can be incrimination of any form. I wonder why, with the greater powers given to the arbitrator in these circumstances, the minister feels that self-incrimination should be a relevant power to an arbitrator.

Mr KOBELKE: As the member for Kingsley quite rightly pointed out, these provisions are lifted from the Workplace Agreements Act, and because the Government had not heard any complaints of abuse or misuse, they were left as they were. I also have some concerns about the exact nature of the provisions, but if the member can provide the Government with evidence, direct or anecdotal, of abuse or problems, the Government is happy to consider changes. Given that the legislation has been around since 1993, and has been applied in the same way, and has been available for application by untrained people, and the Government had heard no claims about it being abused, the provisions were lifted straight out without change. I am happy to go back and review it, and make changes, if the member will provide me with any evidence or advice that problems had occurred as the provisions operated under the Workplace Agreements Act.

Mrs EDWARDES: I do not have any complaints or knowledge or evidence of any misuse or abuse of the provision of this proposed section. I am concerned, however, that the orders by the arbitrators are not appealable and are enforceable. That may add a different dimension to the provision. The real different dimension, however, is when such provisions are applied, particularly given the concern of some members about the extraordinary powers given to the police in the legislation against organised crime. The Opposition thoroughly and totally supports those provisions, because safeguards have been put into that legislation to protect people's rights once they are required to answer questions and produce documents that may be incriminating. The Parliament must now look at this question. It is not just something that was there before, and therefore can be lifted and put into the present legislation. The fact that no abuse of this provision has occurred that the Parliament has heard of is no good reason to avoid examining whether this proposed section needs to be incorporated today. Does an arbitrator need that provision, and what protection is provided for individuals in these circumstances? This is not about organised crime, but about, in many instances, mums and dads who run workplaces, which could be the local delicatessen, fish and chip shop or manufacturing establishment. I acknowledge and accept that, had they entered into a workplace agreement, they would be subject to these same provisions; but now, in 2002, given the concerns being raised by some members of the community about the extraordinary powers legislation, is this an appropriate section to include in this legislation? If so, what protections are incorporated? Proposed subsection (2) provides that that statement cannot be used in any other civil or criminal proceedings. However, it is very broad and wide ranging as to incrimination. We are really talking about workplace relations and ordinary men and women of Western Australia, not members of organised crime gangs.

Mr KOBELKE: I have responded to the member's question. I am happy to take it further. I simply rise to provide the member with the opportunity to speak again on this or some other matter. We have canvassed the issues on this matter. If the member can provide evidence where there has been abuse I am happy to reconsider any aspect of this. This has been in place since 1993 and no complaints have been drawn to my attention.

Mrs EDWARDES: I thank the minister for his comments, but I would like him to question this himself rather than me provide him with any abuses of the system, as to whether or not a self-incrimination clause ought to be provided in industrial relations legislation against employers -

Mr Kobelke: I will give an undertaking to look at it.

Mrs EDWARDES: That would be appreciated. Proposed section 97WN deals with orders and determinations of arbitrators. We have a number of concerns about the orders and determinations of arbitrators. Proposed subsection (1) provides that this section applies where a dispute has been referred to an arbitrator or a relevant industrial authority.

Under proposed subsection (2), the arbitrator is not empowered to enforce an EEA by making any order or determination that an industrial magistrate's court may make under section 83; or to make an order or determination that is in conflict, or is inconsistent, with the EEA or the contract of employment concerned. Pursuant to section 83, the industrial magistrate is empowered to enforce certain instruments and these will include employer-employee agreements. Section 83 refers to the enforcement of certain instruments. Which powers is the arbitrator excluded from using when making a decision?

Mr KOBELKE: This proposed section ensures that it is absolutely clear to the arbitrators that they do not assume the powers in section 83.

Mrs Edwardes: What are those powers?

Mr KOBELKE: They relate to enforcement. Enforcement must go to the Industrial Magistrate's Court.

Mrs Edwardes: The only power they cannot deal with is that of enforcement?

Mr KOBELKE: Yes, and also their powers do not extend to making a determination that is beyond the matters contained in the EEA.

Mrs Edwardes: That would be covered by proposed subsection (2)(b)?

Mr KOBELKE: That is right.

Mrs EDWARDES: Proposed subsection (2)(a) limits the arbitrator to making the order or determination, and he cannot carry out the enforcement. The enforcement is referred to the industrial magistrate.

Mr Kobelke: That is correct.

Mrs EDWARDES: Proposed subsection (2)(b) states that the arbitrator cannot make an order or determination that is in conflict or is inconsistent with the EEA or the contract of employment concerned. That is referred to and expanded later on. How does proposed subsection (2)(b) interact, for instance, with proposed subsection (5)?

[Quorum formed.]

Mr KOBELKE: Proposed subsection (5) makes it clear that, while proposed subsections (3) and (4) have effect, they cannot be used to override the terms and conditions of the EEA. It is double protection.

Mrs Edwardes: It is restating proposed subsection (2)(b)?

Mr KOBELKE: Yes. The drafting was perhaps influenced by the fact that the earlier draft allowed the arbitrator to vary the terms of the EEA. That was never my intention, but that was how it was drafted originally. That was pointed out to us during consultation, and this provision was reworked. In the light of that concern by interested parties, the double braces and belts were put in proposed subsection (5).

Mrs EDWARDES: I am happy with the minister double-dotting i's and double-crossing t's to put things beyond dispute. My only concern is whether there is potential for an inconsistency between the two proposed subsections. It would be a major problem if that occurred. Proposed subsection (2) indicates the limitations on the powers of the arbitrator. I would have thought the situation in proposed subsections (3) and (4) was covered by proposed subsection (2)(b) and that we did not need proposed subsection (5). Proposed subsection (3)(a) indicates that an arbitrator may make one or more of the orders or determinations described in proposed subsection (4). Proposed subsection (4) indicates that the arbitrator may determine the meaning or the effect of the EEA, which is effectively what an arbitrator can do in the case of workplace agreements. In proposed subsection (4)(b) an arbitrator may order a party to do a specified thing or cease any specified activity and then make any other order or determination that he or she considers necessary or expedient to resolve the dispute. There are two limitations in that proposed subsection. One is that it cannot be in conflict or inconsistent with the provisions of the EEA or the contract of employment, but it could be considered that the referral was vexatious or the subject matter of the dispute was lacking in substance. The concern was raised in the earlier draft as to whether or not any change and/or variation could be made to the EEA by the arbitrator. The arbitrator can make any order or determination as long as it is not in conflict or inconsistent. That means the provisions of an EEA can be varied or added to. The concern is that parties can have no certainty about the operation of an agreement that has been entered into, signed and on which advice has been received, if it is likely to be extended.

Mr Kobelke: An EEA cannot be extended or varied. It is made absolutely clear in proposed subsection (5).

Mrs EDWARDES: I do not think it is that clear.

Mr Kobelke: The parliamentary draftsman received advice on this. Our advice is that the scope and conditions of an EEA cannot be changed.

Mrs EDWARDES: It is not possible to add something new that was not originally considered in the EEA?

Mr Kobelke: The arbitrator cannot.

Mrs EDWARDES: What if the dispute were about shift times? It may have already gone through a no-disadvantage test and an EEA may have varied the shift provisions prescribed under the award. Award hours may be eight hours a day but people may be working 10 or 12 hours a day. If that were an agreement, can the arbitrator make a change to that shift provision?

Mr Kobelke: Not if the shift provision is specified in the EEA. If there are only general guidelines and it stays within the guidelines of the EEA, I think they could.

Mrs EDWARDES: What about a rostering issue that is the subject of dispute and is linked to the shift provisions as provided in the award? Could the arbitrator make a determination on the shift provision?

Mr Kobelke: He probably could do but that is not the point we are discussing. We are discussing whether a decision by the arbitrator goes beyond what is specified in an EEA.

Mrs EDWARDES: The minister is suggesting that it does not.

Mr Kobelke: No.

Mrs EDWARDES: I am suggesting it is one of the concerns of the industry; that it would be regarded as a variation.

Mr KOBELKE: I am not aware of any concerns of industry groups as outlined by the member. I have already mentioned that there were concerns about the preliminary Bill. It was in a different form and it was of real concern to industry. As such, we made sure that the arbitrator could not give a determination that in any way contravened, extended or changed the terms of an EEA. We are dealing with situations in which people want to resolve matters. In the early parts of an arbitration, a resolution may be arrived at that goes beyond the conditions of the EEA on the basis that the employer and employee came to a mutual agreement that was facilitated by the arbitrator. It is not open to the arbitrator to make a decision or determination in any way that locks in the parties to an arrangement that is at variance with the EEA. If something comes out of a pre-mediation process, that is up to the parties. If they are happy with that, they will get on with life.

Mrs Edwardes: They will have to agree on a new EEA.

Mr KOBELKE: Not necessarily.

Mrs Edwardes: That is the debate we had last night.

Mr KOBELKE: The point comes when it is formalised. If it is an argument about taking the day off and the EEA clearly states that an employee cannot have the day off but the boss agrees to the day off provided certain things are done, it is passed and finished. It is not registered and no formal decision is made on it. It is a matter that all employers and employees will resolve to mutual satisfaction from time to time. Those issues are not ones taken up by a decision of the arbitrator even though an arbitrator may be on the scene at the time. When it comes to an arbitrator being involved in matters that are provided for in the statutes, it is not open to the arbitrator to make a determination that varies the provisions of the EEA.

Mrs EDWARDES: I thank the minister for that detailed explanation. Getting back to my earlier example about rostering arrangements being provided for under an EEA, the shift provisions in the award would already have gone through the no-disadvantage test and been approved. The minister suggested that an arbitrator could make a determination in respect of shift provisions because it was not technically an item of the EEA but the provisions in the agreement would be underpinned by that.

Mr KOBELKE: This is becoming a bit circuitous.

Mrs Edwardes: Like the Act!

Mr KOBELKE: We are moving through it, but very slowly. I do not think the example given is appropriate to the matter we are discussing. It may seem appropriate in the member's mind. We can only address the matters before us. What are the EEA provisions on rostering under which the arbitration has to be made? If the provisions of an EEA relating to hours of work and rostering are extremely broad, any determination by an arbitrator that still sits within the parameters laid down is open for an arbitrator to declare. The point comes when we designate the specific provisions in a particular EEA relating to rostering and if there were a solution that meant varying the explicitly stated rostering provisions in the EEA. The arbitrator has no power to do that. Rostering arrangements can be varied as long as they sit within the specified criteria of the EEA.

Mrs EDWARDES: Proposed section 97WO deals with further provisions about orders and determinations of an arbitrator. It states -

> An order or determination of an arbitrator -
>
> (a) must be in writing and accompanied by the reasons for its making;
>
> (b) is final and not subject to appeal; and
>
> (c) must be complied with by the employer and the employee unless they agree in writing not to give effect to it.

Paragraph (b) is a major concern because by providing an order or determination of an arbitrator - who may be many and varied across all workplaces and EEAs - the parties will not have consistency. One arbitrator can have a totally different view and understanding of a provision to another arbitrator. Without a right of appeal, there is no mechanism to ensure consistency in decision making. Parties will be deprived of that benefit. One reason for appeals is to provide consistency among decision makers. That benefit is taken away by this provision. I think they should have the right.

Mr KOBELKE: I fear I am in danger of arguing the employers' position and the member for Kingsley is in danger of arguing the employees' position. I would not like that to happen. We seek to ensure that there is a fair degree of certainty that involves people knowing the potential routes these matters can follow and that the

matters are resolved. That will also feed back into the whole system, because people will be under some pressure to resolve the matter and get agreement. If we put in place all the appeal procedures etc, we will potentially provide an extra level of fairness, which the member is suggesting we do. However, what is the cost involved and what will be the effectiveness and the efficiency of the process?

The main out is in proposed section 97WO(c). We are dealing with human relationships in the workplace. In industrial relations, often what is important is not the provisions in the law that are pursued but the way in which they are used by the various parties to achieve their objectives. If people do not end up with a harmonious situation as a result of the arbitration, matters have not advanced much, because another dispute will arise. Therefore, if there is a gross unfairness, in the vast majority of cases it will be resolved through the processes. Adequate processes are being provided. One would like to have an extra level of fairness, but it is difficult to achieve that. As I said, the out is that the two parties, the employer and the employee, can in writing decide not to give effect to the arbitration if they believe it will not resolve the matter in a way that they can live with.

Mrs EDWARDES: I am sure the minister supports natural justice principles. In fact, he applies some of them later; proposed section 97XJ grants a right to be heard. We will deal with that later. When a decision of an arbitrator is enforceable and not subject to appeal - there is no right of review of that arbitrator's decision - and there is no consistency in whom that arbitrator may be across a broad range of industries, or even within an industry or a workplace, the parties are being deprived of the benefits of a natural justice principle, particularly when the order is enforceable. Even under workplace agreements, when an order was not enforceable there was a limited right of appeal.

Even the Commercial Arbitration Act provides for limited rights of appeal. Under that Act, those limited rights of appeal are on questions of law arising out of an award; but under this proposed section it would be out of an order and determination. The Commercial Arbitration Act even deals with the fact that we do not want frivolous or vexatious referrals to an arbitrator. People must seek leave of the court to appeal. Therefore, it is not just an agreement to go to the court. Under section 38(4)(b) of that Act, people must have leave of the court to proceed. That section deals with the desire to limit frivolous appeals, and could quite easily be inserted into this provision.

The difficulties to which I have alluded are very serious. Serious consequences for both the employer and the employee can arise from an arbitrator's decision. By not providing a right of appeal and allowing the order to be enforceable, the parties are deprived of a basic fundamental right of natural justice, even in limited circumstances. The Supreme Court does not grant leave unless it considers, having regard to all the circumstances, that the determination of the question of law concerned could substantially affect the rights of one or more of the parties - therefore, there must be an effect as a result of the determination - and there is a manifest error of law. We can all get it wrong at some time. However, when a determination will affect and cost parties, it is clearly wrong for the parties to not have a right of appeal.

Mr Kobelke: You have convinced me to have another look at the provision, and I will. I will get back to the member after I have done so.

Mrs EDWARDES: Section 38 of the Commercial Arbitration Act gives good guidance.

Mr KOBELKE: I took the call simply to enable the member for Kingsley to continue her contribution.

Mrs EDWARDES: Proposed section 97WP deals with the enforcement of the orders and determinations to which I have alluded. Any order or determination that is made under the previous sections is enforceable under section 83 of the Act. We referred to that section earlier today. An industrial magistrate has the power to enforce the orders and/or determinations made by the arbitrator. Why did the minister go down this path, rather than allow for a determination of meaning and effect of provisions, given the fact that the dispute provisions are so wide in their meaning and application? As I have indicated, arbitrators will in the main be lay people, and their orders will be enforceable - I would have added "and not be subject to appeal". This adds to the potential for injustices to occur.

Mr Kobelke: I am not sure of the point the member is making.

Mrs EDWARDES: Why did the Government make orders and determinations of an arbitrator enforceable?

Mr Kobelke: Why did we not?

Mrs EDWARDES: No, why did it? Why did the Government go down the path of providing for those orders and determinations to be enforceable? Was there any abuse of that section in workplace agreements under which they were not enforceable?

Mr KOBELKE: The fact is that a right is of no value if it is not enforceable. It may be that that was one of the faults with workplace agreements; that is, that there was a pretence that there were rights that somehow could be upheld by arbitration; but they meant nothing because they could not be enforced. There must be a method of enforcement. I am happy to listen to argument about a better form of enforcement, but there is no point giving

an indication that a person has a right established by arbitration and then saying that if the other party wishes to thumb his nose at it, there is no means of enforcement. It is absolutely crucial that there be enforcement. I see that as a deficiency in the process under workplace agreements.

Mrs EDWARDES: Similar to the minister, I do not know of any abuses of that provision or areas in which problems arose as a result of non-enforceability. Given that this is a new provision for the enforcement of those determinations, I urge the minister to seriously consider a right of appeal from that provision to ensure that natural justice can be applied in those instances. Other parts prevent those provisions being abused.

Proposed section 97WQ provides for an industrial magistrate's court to be not bound by interpretations of employer-employee agreements. In any proceedings under section 83 - the section that deals with the enforcement provisions of an EEA - an industrial magistrate's court is not bound by a determination of the meaning or effect of the provision made by an arbitrator under the EEA dispute provisions. Will the minister please explain that clause?

Mr KOBELKE: The industrial magistrate is responsible for the enforcement of EEAs. This proposed section provides that the court is not bound by a determination of an arbitrator concerning the meaning and effect of an EEA. This is the same situation as under the workplace agreements system. This recognises that the court is the most appropriate body to enforce the EEA. The court's discretion should not be hampered by determinations of arbitrators performing a different function.

Mrs EDWARDES: Is it only in those instances in which they are performing a different function, not the enforcement of an order or the determination of the arbitrator?

Mr Kobelke: Yes.

Division put and passed.

Division 9: EEAs for persons with mental disabilities -

Subdivision 1: Preliminary -

Mrs EDWARDES: This division deals with employer-employee agreements for persons with mental disabilities. We debated earlier when a person with a mental disability should be in a position to sign his or her own EEA. Proposed section 97WR is the definition section, and it provides -

> **"mental disability"** includes -
>
> (a) an intellectual disability;
>
> (b) a psychiatric condition;
>
> (c) an acquired brain injury;
>
> (d) or dementia;

We discussed whether a person who had those disabilities was able to sign documents, and the minister undertook to obtain advice. The issue was whether we were reducing their independence by stating that such people cannot sign a document, even though it might be witnessed.

Mr KOBELKE: The member is trying to create problems where they do not exist. That helps to delay the debate, but it is not productive.

If a person signs any form of contract - hire purchase or whatever - it has effect. If a person's mental ability to make that decision is contested, uncertainty and disputation might follow. The Government is trying to provide for those who clearly have a mental disability which is recognised and which renders them incapable of signing a contract. This provision is designed to help those people. Someone will be able to stand in their stead, go through the process and ensure they are protected, yet still be a party to an EEA. In a borderline case - for example, a person who has a diagnosed psychiatric condition but who can make an appropriate decision - this provision need not come into play.

Mrs Edwardes: My point is not as convoluted as the minister is making it. Do those persons within the definition have the legal capacity to sign a document? If they do not, the concerns I have raised about reducing their independence are irrelevant. If they do, I would like the minister to review that provision.

Mr KOBELKE: We are dealing with two classes of people: first, those who do not have that legal capacity.

Mrs Edwardes: Are those the people to whom this refers?

Mr KOBELKE: Yes.

Mrs Edwardes: Therefore, no person with a mental disability and a legal capacity would be caught.

Mr KOBELKE: It is designed to deal with people whose mental disability means they do not have that legal capacity.

The second class of people is those on the borderline; that is, those whose condition has not been diagnosed but who it is suspected are incapable of making a fully informed decision. It is a grey area. This proposed section allows them to be dealt with and provides certainty to the process. We do not want people saying later that they were tricked or taken advantage of because of some mental incapacity. Legislation cannot cover every scenario. Even if people do not have the mental capacity to make decisions, they might still be alert enough to know that they want to be part of the action. A form providing the opportunity for them to countersign will allow them to be involved and to be appreciated as individuals. It is not an acknowledgment that they have a legal capacity.

Mr OMODEI: This provision almost allows for third-party involvement. I understand how the Guardianship and Administration Board deals with severe intellectual disability, psychiatric conditions, acquired brain injury and even dementia. In many cases, the board affords carer status to the person living with the disabled person. How does the disabled person strike an EEA when the carer is under his or her employ? The carer would have power of attorney. There should be someone looking over the carer's shoulder ensuring that the EEA is structured properly and that the disabled person is being treated fairly. The carer would have the capacity to write the EEA.

Mr KOBELKE: I am sure the member for Warren-Blackwood, who has a real interest and some expertise in this area as the former minister, is aware that in these cases we must rely on a high degree of trust. I am not putting aside his point; it is important. If someone wants to take advantage, he probably will. There must be trust between the parties involved, particularly between the disabled person and the carer.

We must also provide checks and balances to ensure that, on the odd occasion that that trust is not honoured, some form of protection exists. The registrar will have the ability to ask questions, to pursue the matter and to ensure that it is in the interests of the parties involved. Rather than bring in a third party to do the checking, the Government believes that is best done by the registrar in his or her role as laid out in the legislation to ascertain that the EEA serves the interests of the party.

Mrs EDWARDES: Proposed section 97WS provides that, when the Guardianship and Administration Act comes into play, no other person can represent the person with the mental disability. An order cannot be made about the appointment of a representative of the person with a mental disability. That representative cannot enter into the making of an EEA in any way. Even if that has happened and a guardianship order is issued, this provision states that it revokes everything else the representative has done, but does not remove anything. If an EEA has been legally entered into, this proposed section takes over the role of the authorised representative from that point onward. It does not affect what is in the EEA or anything else that has occurred. I would like clarification of that. Essentially this provision takes over the role of the representative from the person already appointed, if one was appointed.

Mr KOBELKE: Yes, that is correct.

Mr OMODEI: Proposed section 97WS(1) states -

> An order cannot be made under section 97WZ or 97XN approving a representative of a person if a guardianship order is in force under which there is appointed - . . .
>
> (b) a limited guardian of the person in whom are vested functions that are conferred on a representative by sections 97UD and 97XD.

Proposed section 97UD refers to the making of an employer-employee agreement by a person with a mental disability and states -

> (1) An EEA may be made for a represented person as an employee by the person's representative.
>
> (2) The EEA is to be made in the name of the represented person as an employee but is to be signed on his or her behalf by the representative.
>
> (3) An EEA so made has effect as if -
>
> (a) it were made by the represented person; and
>
> (b) the represented person were of full legal capacity.

Proposed section 97XD, which we have not discussed yet, refers to the functions, and more specifically under proposed subsection (2) to the appointment of a bargaining agent, a cancellation agreement, and so on.

I will now to return to where I started. The minister talked about trust. I have not seen anywhere in this legislation that the registrar will take note of the agreement made between the carer, who will be one signatory party to the EEA, and the person who has the disability. In my experience I have found that questions have generally been asked about the way in which the carer spends the compensation money that belongs to the person with the disability. For example, a person may have had a car accident and suffer from an acquired brain injury and be affected mentally. That person may then appoint a carer through the Guardianship and Administration Board. Often, there is a question mark about the ability of the person with the disability to keep the carer honest. In the end the carer may have control over large sums of money that belong to that person with the disability. I am concerned that it has not been made clear who will be looking over the shoulder of the carer, who will be a signatory to the EEA. I want that made clear in the legislation .

Mrs EDWARDES: The situation is even worse than what the member for Warren-Blackwood said, because the representative does not have to involve the person with the mental disability in the development and the signing of an EEA.

Mr Omodei: The representative can sign the EEA on behalf of the employer and the employee.

Mrs EDWARDES: Nothing that we have discussed to date, or in the future provisions, will prevent an authorised representative, and possibly a guardian, from doing all of the work on the development of an EEA, or require a representative to reference it back to the person with the mental disability.

Mr KOBELKE: I ask members opposite to put this matter into context. I know these proposed sections are very complex, and my concern was that we had overdone the protection and made it too complex. Perhaps with all of the complexity, members opposite have not realised all of the provisions that are contained in this proposed division. The member for Warren-Blackwood used the word "carer". We need to keep in mind that we are talking about the proposed representative, who may or may not be the carer. The representative may be a guardian under the Guardianship and Administration Act, and not the carer. Proposed section 97WS deals with the hierarchy of potential guardians and people who could act as the proposed representatives. The members are right in that the representative might be the carer, but again we are dealing with a subclass of people who could be the representative. Proposed section 97XI makes a cross-reference to the Guardianship and Administration Board. Therefore, if there is a basis for believing that the carer is not acting in the interests of the representee, the matter can be referred to the Guardianship and Administration Board. That is another area in which there is some protection if the interests of represented persons are not being addressed. The whole process must also be approved for registration by the registrar of the Industrial Relations Commission, which is another check. I am not saying there will never be a situation in which someone is doing something untoward and improper and it is not picked up. However, through the range of measures in the provisions, we are fairly confident that we will pick it up at one stage or another and redress it to make sure that the interests of the person with the mental disability are upheld in an employment contract. It needs to be kept in mind that we are talking about an employment contract and not other matters.

Mrs EDWARDES: Proposed section 97WT states that -

(1) The Registrar must give the Guardianship and Administration Board notice in writing of every -

  (a) application that is made under section 97WV or 97XM; and

  (b) order that is made under section 97WZ or 97XN.

(2) A notice . . . must identify -

  (a) the person with a mental disability . . .

  (b) the proposed representative.

(3) A notice . . . must identify -

  (a) the represented person; and

  (b) the representative,

to whom the order relates.

That is, the order referred to in proposed subsection (1)(a) and (b). The application cannot be dealt with before the registration of the EEA until such time as the Guardianship and Administration Board has given the registrar the information required by proposed section 97WU. Proposed section 97WU requires the registrar to notify the board. What information is required by proposed section 97WU, whether or not a guardianship order is in place, or there are any other concerns? What is the interaction between those two proposed sections? One is obviously a protective provision to ensure that if a guardianship order is in place, another representative person does not

take over the role of the person with the mental disability. I also raise the question of the privacy of this information that is referred to the Guardianship and Administration Board.

Mr KOBELKE: This picks up in more detail the point I made in passing about priority, or the range of people who can be involved in this process. Proposed section 97WT provides recognition that the Guardianship and Administration Board helps to set that priority. We do not, in any way, wish to interfere with that process. More importantly, we do not want another person who does not have the powers to be recognised by the commission for the purposes of registration when it is a matter that is under the control of the Guardianship and Administration Board. The point is that in proposed section 97WT the notice seeks to advise the Guardianship and Administration Board of the application, and proposed section 97WU requires the registrar of the Guardianship and Administration Board to communicate back to the registrar of the commission. Therefore, we are mandating certain provisions within these two clauses so that matters do not come forward for registration which are legally at variance with the requirements of the Guardianship and Administration Act.

Mrs EDWARDES: That is essentially another step in the process. However, I regard it as putting in place a process of protection.

Mr Kobelke: It will provide protection and will make sure that something does not happen under one statute that is at variance with another statute.

Mrs EDWARDES: I do not have an issue with that. I just want to make sure that our understanding of that point is correct. No time frame is in place for notification; that is, there is no time frame requiring the registrar to notify within seven days, which is the standard time frame, or requiring the Guardianship and Administration Board to respond within that time. Does the board itself have to meet on a regular basis or can it be the person who is delegated with that authority? Is that provided for under the Guardianship and Administration Act?

Mr Kobelke: I think it is the registrar of the Guardianship and Administration Board

Mrs EDWARDES: It is definitely the registrar of the commission, but the Bill does not identify whether it is the registrar of the board who receives notice and refers back. The reference is to the board.

Mr Kobelke: I have no knowledge of the Guardianship and Administration Act, but I am advised that the way in which it operates means that the registrar has the power to do that on behalf of the board.

Mrs EDWARDES: The question of privacy comes up again. The minister said that several proposed sections of the Bill were referred for legal advice to determine whether they infringed the Privacy Act. Were proposed sections 97WT and 97WU referred for legal advice? The legislation will essentially provide the Guardianship and Administration Board with the name of and information about a person with a mental disability.

Mr Kobelke: These proposed sections were developed using advice from the Guardianship and Administration Board. We tried to satisfy the board's perception of the need to protect people who have a mental disability. The concern about privacy in this instance does not have any grounding in fact. We are clearly trying to protect people and to ensure the proper functioning of the statutes of this State. Any provision within a statute that requires the provision of information between agencies for the good and proper purpose of protecting people cannot be regarded as contrary to the federal Privacy Act.

Mrs EDWARDES: It may only mean that the registrar at the commission would need to ask the person whether he is happy for the commission to provide that information to the Guardianship and Administration Board.

Mr Kobelke: That would apply only if it were a matter of choice. These matters are mandated to provide protection.

Mrs EDWARDES: I do not think anybody fully understands the implications of the Privacy Act. I do not attempt to understand the Act. My limited knowledge of the Act is that it is far-reaching. I cannot say whether the Privacy Act applies in situations in which information is transferred between agencies, with each agency having a different role and function. I am not sure that the minister's explanation was sufficient to indicate that the Privacy Act does not apply.

Mr Kobelke: There are strict confidentiality requirements between both agencies.

Mrs EDWARDES: If the minister can say that it does not offend that Act, I am happy to accept his word. It might be a simple process.

Mr Kobelke: I can give you the absolute certainty of my bush lawyer degree.

Mr OMODEI: There seems to be some confusion about the representative. The represented person is obviously the person with the disability. The representative could be a carer who has a power of attorney over the represented person and who has been appointed by the Guardianship and Administration Board. There could be some confusion if the representative were preparing and signing his own EEA. He could do the whole lot. A

third person needs to be involved. If the minister can say that the third person is the registrar or the Guardianship and Administration Board, I will be satisfied. However, there seems to be a grey area about who is the representative. If the representative is the carer, and that carer has a power of attorney and powers under the Guardianship and Administration Board, it creates a problem, because a third person is not involved. If the third person is the registrar, I will be satisfied.

Mr Kobelke: There is more to it, but it is covered in the next subdivision.

Subdivision put and passed.

Subdivision 2: Approval of person to act on behalf of person with a mental disability -

Mrs EDWARDES: Subdivision 2 provides for the approval process. Proposed section 97WV states -

(1) This section applies to a person -

(a) who has the prospect of being employed by an employer under an EEA; but

(b) who is in general incapable, because of a mental disability, of making reasonable decisions on matters pertaining to an employer-employee relationship.

(2) An application may be made to the Registrar by or on behalf of a person to whom this section applies for an order approving a person to act on his or her behalf in relation to -

(a) the making of an EEA . . .

(b) the matters referred to . . . in connection with an EEA -

Before an EEA can be signed by the authorised representative of a person with a mental disability, an application must be made to the registrar. I take it that that is a protection provision. However, it also means that there is the potential to delay the employment of that person. We would all be concerned about that. If it is likely that the person is to be a new employee, under the provisions that person can start work irrespective of whether an application has been made. The processes can still be followed. The person with the mental disability can be employed immediately, before the provisions have all been approved and sorted out.

Mr KOBELKE: Yes, but we are also aware that there may be some demand for this as soon as the legislation comes into effect. People go through these procedures for prospective employment. Subdivision 2 outlines the processes by which these people are vetted, if I can use that term loosely, and approved by the registrar of the Industrial Relations Commission. It is a detailed process and it provides protection. That can be done after the person has started the job. These provisions are in place to provide protection for people with mental disabilities when EEAs are signed on their behalf.

Mrs Edwardes: If he is a new employee, can he start work in advance of these protections?

Mr KOBELKE: Yes, but it is more likely that we are talking about trial employment, work experience etc. If a person has a mental disability and cannot sign for himself, the sort of work he can do will obviously be limited.

Mrs Edwardes: Could the employee be classed as an existing employee? If he were paid in some form - if it were not just trial work - and was regarded as an existing employee -

Mr KOBELKE: I gave the example of a person being employed on a trial basis or on work experience. It would be best for the person to first go through the process. A person is not ruled out because he is doing the job. A person in a job might subsequently wish to avail himself of these provisions. In that case he would be considered an existing employee, and those conditions would apply.

Mrs EDWARDES: The circumstance would also apply to somebody who was already an employee, and was then beset by dementia. That presents a further issue, when he or she is an existing employee.

Debate interrupted, pursuant to standing orders.

[Continued on page 8665.]