WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2023

Committee

Resumed from 9 August. The Chair of Committees (Hon Martin Aldridge) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Progress was reported after clause 1 had been agreed to.

Clause 2: Commencement —

Hon MATTHEW SWINBOURN: There were a number of matters raised during the course of the debate yesterday that do not relate to clause 2 in particular. Some of those matters will be, as I understand it, further ventilated in later parts of the bill, including matters that you have raised yourself, chair. It may be worthwhile to make people aware that government is considering those matters that have been raised and that when they are raised further by members, we will be in a position to respond more fully. I can respond to one of the issues that you raised—we are in an unusual situation here in which I am talking directly to you rather than to a member. It was in relation to the cancers issue and the number of presumptive cancer cases that might be outstanding. I am advised that of the presumptive cancers there is only one known claim that exists, and that claim was legally resolved in 2018. There are no current outstanding workers compensation claims that relate to presumptive cancers.

Hon Dr STEVE THOMAS: I think we largely dealt with clause 2 under clause 1, so I do not think we need to go into much detail. I note that it is unparliamentary to draw the chair into debate. We are supposed to refer to them in their presence as if in their absence. I give notice to the house that the first clause that I am interested in debating is clause 4. I do not know if other members have a clause before that.

Clause put and passed.

Clause 3 put and passed.

Clause 4: No contracting out —

Hon Dr STEVE THOMAS: This is the no contracting out clause, and I refer to —

> (1) The application of this Act or any of its provisions cannot be excluded, restricted or modified by contract, agreement or other arrangement, except as provided by this Act.

I tread warily here because I might be seeking a legal opinion, which is a bit awkward, but I am interested to know whether there is a potential conflict with the federal Corporations Act and whether there might be any difficulty between state and federal acts if a contract is put in place under the Corporations Act and might, in theory, conflict with state legislation. Has that been examined? Can it be excluded? Can we have confidence that the Corporations Act—I remember the Corporations Act coming in; from memory, the last version was under the Howard government, and it was a very centralist act that absorbed powers into the commonwealth. I am concerned that this act could potentially get captured under that if we are not certain that it will be excluded.

Hon MATTHEW SWINBOURN: Perhaps if I explain the work that this clause does, it might help to answer the member's question. This clause is essentially the same as it was under the previous act. It does not provide any new arrangements or extinguish any arrangements, but it pertains to the relationship between an employer and a worker. If an employer sought to insert in a contract between it and a worker a provision that attempted to contract out of the workers compensation regime by saying, for example, that the Workers' Compensation and Injury Management Act has no application to the worker's employment or engagement, that would be an offence under this act and, therefore, it would be an unlawful term and it could not be enforced, in any event. That would prevent that from happening. That is the work this is trying to do, right up-front.

If the member's question was whether, under the Constitution and the corporations-making power that the commonwealth has to make laws about trading and financial corporations, the commonwealth could enact its own workers compensation scheme that operated to the exclusion of the state scheme, as a matter of constitutional law, it could. It could in the same way that it did with constitutional corporations and the coverage of the industrial relations system. I do not know whether that was the member's question, but I am not aware of either political party proposing to take over workers compensation with respect to constitutional corporations. But, as I say, the Constitution would provide a mechanism for the commonwealth to do that because of the High Court case in 2005 that related to the legality of the WorkChoices legislation.

Hon Dr STEVE THOMAS: Thank you. I had not jumped to the point of the commonwealth government enacting its own workers compensation program, although one should never trust either side.

Hon Matthew Swinbourn: It does have its own scheme, which is Comcare.

Hon Dr STEVE THOMAS: For commonwealth employees, yes; that is right. I suspect that will come up for debate when we get to emergency service workers. I was going to say in the not-too-distant future, but it is always

hard to tell. I had not actually jumped that far in front. Never trust governments of either side federally because everybody becomes a little bit centralist when they start going to Canberra.

Particularly coming out of 2004—I think I mentioned the Howard government of the time and WorkChoices—I was more interested in the specifics of whether the existing legislation, the Corporations Act in particular, and any other commonwealth acts have been looked at and excluded as being able to influence or override the intent of the bill we are working on and the existing workers compensation act. It might not have been looked at, but it is an issue for us to be aware of. The parliamentary secretary might be in a position at some point to say. I suspect what the parliamentary secretary would say is "It has never happened. We are unaware of it and, therefore, it has never really been tested." I would be interested to know at some point whether it has even been looked at, to be prepared in case it does occur.

Hon MATTHEW SWINBOURN: Some corporations are covered by the Comcare system. John Holland would be the most obvious one that I am aware of. It is able to do that because it took over what was formerly a commonwealth function and, therefore, it was able to get itself into the federal Comcare system. By virtue of the operation of inconsistencies between state and federal laws—I think it is section 107 of the Constitution—it is, in effect, not covered by the state system.

Hon Dr Steve Thomas: It is covered by the federal system.

Hon MATTHEW SWINBOURN: Yes, it is covered by the federal system. For example, if its employees at Perth Children's Hospital were injured on that worksite, they would have been covered under the federal Comcare system, even though the workers of Multiplex, the builder of the Midland Health Campus, were covered under the state system. That arrangement has been in place for some years with John Holland. Whenever there is a conflict with the federal Comcare regime about which someone is lawfully entitled to—be it a corporation or any other kind of entity that has the right to be in there—the commonwealth system prevails over the state system.

Clause put and passed.

Clause 5: Terms used —

Hon NICK GOIRAN: Clause 5 sets out the terms used in the proposed new act, and I wish to draw two terms to the parliamentary secretary's attention. One is the term "disease" and the other is the term "return to work". The first is simpler than the latter.

The parliamentary secretary will see that the definition for the use of the word "disease" reads as follows on page 4 of the bar 1 bill, starting at line 11 —

> ***disease*** includes any ailment, disorder, defect or morbid condition whether physical or mental and whether of sudden or gradual development;

As the parliamentary secretary said, this is intended to be a rewrite of the legislation and the scheme. Part of the purpose of the rewrite is to modernise the scheme and some of the language. Has any consideration been given to using a different word from "disease" for the purpose of capturing a worker's injury?

Hon MATTHEW SWINBOURN: As the member would know, the language is the same as in the current act. It has not been modified. I am advised that consideration was not given to using —

[Emergency evacuation alarm system activated.]

Sitting suspended from 12.40 to 12.57 pm

Hon MATTHEW SWINBOURN: Before we were interrupted, I was finishing off my answer to Hon Nick Goiran's question about the term "disease" and whether contemplation had been given to rewriting or modernising it. I can confirm that it was not considered necessary to rewrite or modernise that matter. It was not an issue raised during the consultations by stakeholders as something that needed to be addressed. We have stuck with that form of words and it would be fair to say that that form of words is very well settled amongst stakeholders and people who use the acts. That is where we are at.

Sitting suspended from 1.00 to 2.00 pm

Hon NICK GOIRAN: Parliamentary secretary, prior to the luncheon adjournment, we were discussing the term "disease" found in clause 5 at line 11 on page 4 of the bill. I thank the parliamentary secretary for the response to that. I make the observation that I move to the next term, which is the "return to work" definition. I take the point that has been made by the parliamentary secretary about the term "disease". It is not something, as I understand it, that has been brought up by stakeholders during the consultation process. I just wonder whether referring to it as a "medical condition" or something like that might be superior to modernise the legislation and the language. But I note that the definition is well settled at law. For reasons that will become apparent in some of the other clauses, I am not that enamoured with changing things that are well settled, but I wanted to check whether it had been given any active consideration. I thank the parliamentary secretary for the response prior to the adjournment.

I move to the other term that has attracted some attention and that is the definition of "return to work". To what extent will the definition of "return to work" be changed by the bill in comparison with the existing scheme?

Hon MATTHEW SWINBOURN: I said in my reply that there will be no material change to the definition of "return to work" compared with the current act. If the member has the current wording before him and the wording proposed in the bill, he will see that some, what I would describe as, gardening has occurred and a bit of moving things around. But we would say that the definition is materially the same and that those changes have just been made for the sake of clarity, rather than with a view for there to be a new interpretation and a new application of "return to work". I do not want to go through which words have been moved to where, but we have noted there has been —

Hon Nick Goiran: That is okay; I will.

Hon MATTHEW SWINBOURN: The member will. Okay. I will leave that to him.

Hon NICK GOIRAN: We see that the new definition includes the words "immediately before becoming incapacitated" at line 10 on page 7. That is different from the current definition, which includes the phrase "before the injury occurred". To be clear, what has brought about that change, which the parliamentary secretary has described as not a material change? Has a particular stakeholder requested it and said this is necessary? Have any of the decision-makers in any of the decisions that have come out suggested that the existing definition is unclear and warrants this change in language?

Hon MATTHEW SWINBOURN: It did not necessarily arise out of any stakeholders raising the issue. The reason is that we think it is superior drafting naturally—I do not mean to use that word in a rhetorical way—compared with where we are now, because it will more accurately represent what can happen in practice. If we look at the current wording, we see that it says "held by the worker immediately before the injury". Someone can be injured, but not incapacitated, whereas this contemplates, and aligns further with how other parts of the scheme work, that a worker can be injured and not be incapacitated by the injury for a period of time and then suffer a period of incapacity to work as a consequence of the original injury. That can go up and down according to the way that that injury is being managed, and probably the more obvious examples of that are psychological injuries whereby some people are okay to work for periods of time and then for whatever reasons they become incapacitated. It might also be in circumstances in which someone has suffered an injury that did not need immediate surgical attention and they were able to continue but then have to have surgery. We think in the context of returning to work, it is more apposite to have the wording there now. It does not fundamentally change the practice.

Hon NICK GOIRAN: I thank the parliamentary secretary for that. Is the government happy to acknowledge at this point as we consider this new definition of "return to work"—how else do we describe it? It is a new definition; it is a new act. It is not the same definition as in the current scheme. First of all, I posit that this is a new definition. That being so, is the government happy to acknowledge that there is a difference. I know the parliamentary secretary has said it is not a material change, but I might quibble with that momentarily because the scenario that he outlined seems to me to be a material one. What is it trying to capture here? Are we looking at a scenario in which a worker held a position in job A and then suffered an injury but they were not, to use the parliamentary secretary's words, incapacitated at that time; the incapacitation happened a little while later? In the intervening period, they had job B. Is it the case that we are trying to capture that scenario and that the return to work threshold is intended to be job B, not job A? Has concern arisen around this dispute or this lack of clarity that perhaps justifies this new definition?

Hon MATTHEW SWINBOURN: The government's position is that the new definition, whilst accepting that it is new because it is different, will have the same effect as the old definition. We are not seeking to move the practical outcome of that definition under the current regime to something happening differently. Neither are we trying to address any example given by the member. We have not identified any problem in practice between what we think should happen and what is supposed to happen. We are trying to catch up the definition in the new act with what is effectively the practice that already occurs to make it more consistent with the overall scheme of the act. From the discussion I had with the advisers, we are not trying to address any mischief; we are just seeking to make the language of this definition clearer and more consistent with the broader scheme of the act.

Hon NICK GOIRAN: Is it the government's position that the existing "return to work" definition, which includes the phrase "before the injury occurred" is presently, in practice, being interpreted as "immediately before becoming incapacitated"?

Hon MATTHEW SWINBOURN: Yes, member.

Clause put and passed.

Clause 6: Injury —

Hon Dr STEVE THOMAS: Clause 6(3)(b) states —

> the employment contributed to a significant degree to the contraction of the disease, or the recurrence, aggravation or acceleration of the pre-existing disease.

Can the parliamentary secretary confirm that the definition of "significant degree" is exactly the same as the definition in the existing act? Perhaps he could give us that reassurance and advise whether there is a further explanation of the determination, and what is the level of "significant", because what I think is significant is different from what the next person thinks.

Hon MATTHEW SWINBOURN: It is the same as in the current act. There is no definition of "significant degree" because it is a factual issue. Whether or not it is significant depends on the particular circumstances of the individual case. It is not an objective scale. Those who make decisions and settle disputes will have to make a subjective judgement, in effect, taking into account all the circumstances of the particular cases before them. It does not provide clarity.

Hon Dr Steve Thomas: I accept that it is a subjective measurement as such. My memory is that it is the same wording as in the original act.

Hon MATTHEW SWINBOURN: That is correct. So there is no change.

Hon NICK GOIRAN: I refer to the definition of "injury" in clause 6. To what extent will it change the definition of "injury" under the existing scheme?

Hon MATTHEW SWINBOURN: It look a little while to get to the bottom of it. The member asked to what extent is it changing. There are drafting changes, but there is no meaningful change in the sense of what "injury" means. I will go through it for the sake of *Hansard.* The term "injury" is defined in section 5 in the preliminary part of the act. It does not have a standalone section. Once the bill is passed, it will be elevated—if I can call it that—to its own section. It is also a combination of the current "injury" term in section 5 of the act and the additional part in section 5(5). We have brought those things together. As defined in the Workers' Compensation and Injury Management Act 1981 —

> ***injury*** means —
>
> (a) a personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions; or
>
> (b) a disease because of which an injury occurs under section 32 or 33; or
>
> (c) a disease contracted by a worker in the course of his employment at or away from his place of employment and to which the employment was a contributing factor and contributed to a significant degree; or
>
> (d) the recurrence, aggravation, or acceleration of any pre-existing disease where the employment was a contributing factor to that recurrence, aggravation, or acceleration and contributed to a significant degree; or
>
> (e) a loss of function that occurs in the circumstances mentioned in section 49,
>
> but does not include a disease caused by stress if the stress wholly or predominantly arises from a matter mentioned in subsection (4) unless the matter is mentioned in paragraph (a) or (b) of that subsection and is unreasonable and harsh on the part of the employer;

Section 5(5) incorporates the parts that are dealt with, and reads —

> In determining whether the employment contributed, or contributed to a significant degree, to the contraction, recurrence, aggravation or acceleration of a disease for purposes of the definitions of ***injury*** and ***relevant employment***, the following shall be taken into account —
>
> (a) the duration of the employment; and
>
> (b) the nature of, and particular tasks involved in, the employment; and
>
> (c) the likelihood of the contraction, recurrence, aggravation or acceleration of the disease occurring despite the employment; and
>
> (d) the existence of any hereditary factors in relation to the contraction, recurrence, aggravation or acceleration of the disease; and
>
> (e) matters affecting the worker's health generally; and
>
> (f) activities of the worker not related to the employment.

My paper runs out so I presume there is no paragraph (g). Those things have been amalgamated into a single proposed section in the bill. I am advised that there is no material difference from the definition of "injury".

Hon NICK GOIRAN: No material difference, and perhaps the government may go as far as to say that there is no intended difference?

Hon Matthew Swinbourn: Yes.

Hon NICK GOIRAN: I refer to the introduction of the phrase "from employment" at line 12 on page 9 of the bill. Subclause (2) states —

> A personal injury by accident is an injury from employment …

What is the genesis of the introduction of the phrase "from employment"?

Hon MATTHEW SWINBOURN: The member asked what its genesis was. I can confirm that it has not come from a stakeholder issue or court decision. It has come through the process of trying to increase the clarity of the drafting and to be more consistent with the way that the term is used throughout the act. We are not trying to attend to a particular problem or mischief; it is simply about drafting clarity. It will not change the overall meaning of "injury" and is consistent with what is in the act.

Hon NICK GOIRAN: The point I make is that if the words "from employment" serve no special purpose, we would be better off without them. It is nice that the Parliamentary Counsel's Office does the difficult legal work in drafting this and other legislation, but when, from the comfort of its office, it provides advice to government and Parliament in good faith about what the drafting ought to be, it does not have to deal with any repercussions, unlike an injured worker who suddenly finds themselves on the receiving end of an application from a rich insurer, who then gets to brief counsel and pursues a line of attack about the new definition. That is what I would like to avoid. I am not sure that we can take this any further at this time, but I want to get on the record my reservations about this. If changes are made to language and definitions, it is highly desirable that there is a compelling need to do so. Perhaps a decision has been made to, as was said earlier, incorporate a definition that has been used in practice. Perhaps important points have been raised by stakeholders, and the government, after considering the competing rights, has actively made a decision. If it is really nothing more than good faith and best determination by parliamentary counsel about a form of words that are, in their view, more desirable, I hope that they realise some of these things can open a Pandora's box. I am at least pleased that the parliamentary secretary has confirmed here, as we are considering clause 6, that it is not the government's intention—in due course hopefully if this clause is passed unamended—and it is not the intention of Parliament that the definition of "injury" should be interpreted any differently from how it is interpreted at the present time.

Hon MATTHEW SWINBOURN: For the sake of the record, regarding those last comments the member made, I confirm that that is the government's intention in respect of this clause.

Clause put and passed.

Clause 7: Exclusion of injury: reasonable administrative action —

Hon Dr STEVE THOMAS: This is an interesting part of the bill, compared with the current act, and we might need to spend a small amount of time exploring the differences and components of it. We are a broad church and I suspect Hon Nick Goiran and I will come at this from different angles, as we sometimes do—legal versus economic. That is a fairly healthy thing for the Parliament, so I do not mind that, and I think it is interesting.

Clause 7 was one of the clauses featured in many of the submissions that came through, and raised some questions, depending on whether one took the view that employers were equally invested in the process almost to the point of being a little villainous in their intent, as to whether this was seen as a positive or negative change to the legislation.

From my perspective, the government has largely hit the right balance. As we go through this bit of the debate, I want to put it out there at the start that I am not arguing that the government should change its intent around this; I think it has hit the mark fairly well. As I always say, in legislation, if everyone is a little bit unhappy, we are probably pretty close to the mark.

Hon Matthew Swinbourn: I remember another piece of legislation you said something very similar about as well.

Hon Dr STEVE THOMAS: I know; I got quoted in the newspaper for it as well, not that I much care about that either, so there you go.

This clause deals with reasonable administrative action—that is, the normal administrative roles an employer or manager would undertake. I am now looking at the second version of the bill, not the first, so I should get the numbers right. Clause 7 states —

> (1) …
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> ***administrative action*** includes any of the following actions —
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> (a) an appraisal of the worker's performance;

(b) suspension action;

(c) disciplinary action;

(d) anything done in connection with an action described in paragraph (a), (b) or (c);

(e) anything done in connection with the worker's demotion, dismissal or retrenchment, or the worker's failure to obtain a promotion, reclassification, transfer or other benefit, or to retain any benefit, in connection with the worker's employment.

(2) A psychological or psychiatric disorder … is not an injury from employment if it results … from —

One of those administrative actions.

I might start with this because it will take a little bit of time to work through. Subclause (1) defines "administrative action". Subclause (2) effectively states that an injury is not a workplace injury if it results predominantly from an administrative action. It states —

(a) … not being administrative action that is unreasonable and harsh on the part of the employer; or

(b) the worker's expectation of administrative action or of a decision by the employer in relation to administrative action.

Therefore, it is not an injury if it comes from the administrative action. Can the parliamentary secretary explain to me, in the first instance, the wording around clause 7(2)(a) and "unreasonable and harsh on the part of the employer"? How will that impact on the exclusion of a psychological injury from a workplace injury?

Hon MATTHEW SWINBOURN: The first thing to note is that this clause has not changed from the previous act—or the current act; sorry. I will not talk about previous acts. I think there was a 1912 act, so I do not want to talk too much about previous acts in relation to this matter.

The member is talking about the exclusion for actions that are unreasonable and harsh. What we are doing here is not novel. There is an established understanding about what that means, and we are not interrupting that. The rationale for it and the reason to continue with it is that, obviously, within any employment relationship or engagement that falls within the confines of this legislation, there will be times when the employer will need to take action that relates to an employee's discipline and performance management, which are administrative actions. The theory behind it is that when an employer takes those actions in a reasonable way that is not harsh, there should be no injury of a psychological or psychiatric nature to the worker.

If in the course of an employer having a justification to take those actions, they act in a manner that is harsh—I will try to give a very obvious example of what might be harsh—such as if they are abusive or they use words that are offensive to an ordinary person or particular person if the words are of a cultural meaning, or if they deliberately inflict shame on a person by making everybody in the workplace aware of their actions, that could be potentially considered to be harsh or unreasonable. They are acts that go beyond what the employer needs to do to deal with the particular issue, and the ordinary person might very well suffer a psychiatric or psychological injury as a consequence of that. Therefore, we want to provide the space for employers to employ and manage their employees appropriately and reasonably and not have the burden of having someone who is not doing the job very well but who gets dealt with in that way make a workers compensation claim as a consequence. This will exclude those situations when somebody engages in behaviour that is capricious, malicious or just designed to hurt someone—I think they might all mean the same thing. Notwithstanding that, the employer might have a justification for taking that administrative action in the first place.

Hon Dr STEVE THOMAS: I think that "capricious" might have a different definition —

Hon Matthew Swinbourn: From "malicious"?

Hon Dr STEVE THOMAS: — from "malicious", yes. "Capricious" is a bit more unknowing than "malicious" is. Anyway, we do not have to bog down in etymology. It is an interesting part of the legislation and the debate. As I said in my second reading contribution, one of the most difficult parts of running a business is having to employ people, and the most difficult part of that is not actually hiring people—that is the easy, fun part; everybody loves that bit—but disciplining and firing people is far harder and more complicated to do. I think that is why this clause is particularly important. I appreciate the parliamentary secretary's description of that. I think we are all approaching this from a basis of goodwill. It is difficult for an employer to maintain that level of self-control, because, speaking as someone who has had to do it, sometimes an employer has to build themselves up and steel themselves to engage in even just the instruction component of the process and say, "Unfortunately, parliamentary secretary, your performance of your work in your workplace is not adequate, and I require you to do these things." It is not easy to have the capacity to do that. For that very small group of people who like hurting other people, it probably is, but for the vast majority of employers, they have to build themselves up and steel themselves for that.

It is an unpleasant process. I speak as someone who has done it. There are probably not too many people in the Parliament these days who have had to go through that process, but it is not easy and it is not simple. Sometimes I wonder whether the psychological damage that is caused in those circumstances is as damaging to the manager or employer as it is to the person who is managed or employed. It is a complex process, and we are going to try to handle this as gently as we can.

I might start with this, as we progress. The parliamentary secretary might have to provide supplementary information again. What proportion of overall workplace injuries do psychological injuries currently account for? Then the parliamentary secretary might be able to find me the number of complaints that come through that would have been considered psychological injury except for the section in the existing legislation that is the equivalent to this clause. I am interested to see what the number of overall psychological claims is, and then the claims that have not been proceeded with on the basis that they would be normal activity; then we will start to look at what the difference might be under the new legislation.

Hon MATTHEW SWINBOURN: It is interesting to note that the most significant proportion of claims in this area are actually made in the public sector.

Hon Dr Steve Thomas: Which is something we will come to in a bit, yes.

Hon MATTHEW SWINBOURN: Yes. Not all of them, obviously. Most of the time, when we talk about the small business example, it is actually the public sector, which is the largest employer—the government—that this relates to. The proportion of claims that are psychological or psychiatric claims make up four per cent of workers compensation claims but 20 per cent of the overall cost of claims. There is obviously a disproportionate connection. The other part of the member's question is probably not something we can answer. There is a known and an unknown. We know that there are potential claims that are never made, but we just cannot know how many of those claims there might be. We cannot necessarily break it down into specifics such as what proportion of the four per cent of claims that are made would be excluded by the change between the definition that currently exists and the one in the bill that we acknowledge will make a change. We could not break that down in its entirety either. We know that it will be a proportion, but we do not think it will be a large one. Of course, the reason is that these things are complex factual matrix cases, so it is not likely to be just one thing; it is likely to fall into a number of categories. It will overlay with existing exclusions. It is not likely to be that one new thing that we have talked about that drives the claim.

Hon Dr STEVE THOMAS: I thank the parliamentary secretary; I think that is right. I will read a couple of interesting submissions that dealt with this and perhaps get some responses to those. I will come back to the public service —

Hon Matthew Swinbourn: Sector.

Hon Dr STEVE THOMAS: Public sector, sorry. You are lucky I do not call it the civil service these days!

Hon Matthew Swinbourn: If you say "public service", it excludes our firefighters.

Hon Martin Aldridge: They are public servants.

Hon Matthew Swinbourn: They are not public servants; they are public sector employees.

Hon Dr STEVE THOMAS: We will have to debate who comes under the Public Sector Management Act.

Hon Martin Aldridge: Let's go back to the definitions; let's recommit clause 5!

Hon Dr STEVE THOMAS: Hang on, we will have to recommit clause 5 to work out who comes under the Public Sector Management Act and who does not!

Perhaps I might move on, deputy chair, before I am instructed. I will read the submission that the government received from the Chamber of Commerce and Industry of Western Australia on reasonable administrative action, because I think it is important. Apologies; it will take a couple of minutes. The submission states —

> 9. Core to the employment relationship is the ability for an employer to manage the performance and conduct of their employees and to take reasonable steps to achieve this without the potential for a workers' compensation claim.
>
> 10. The existing exemption for stress related diseases arising from reasonable management action is an important element of the existing Act and should be updated to reflect ongoing developments.
>
> 11. One of these … developments is our understanding of mental health disorders, which has progressed from the simple notion of stress. The Bill addresses this to include any psychological or psychiatric disorder, which better reflects the broad nature of psychosocial claims that may be made through the workers' compensation system.

12. Likewise, the Bill also recognises that reasonable administrative action undertaken as part of the performance management process is not limited to disciplinary action. We welcome the inclusion of other administrative action, such as performance appraisals and counselling. These are valid administrative actions that are focused on preserving the employment relationship. The narrow definition currently contained in the Act can act as a disincentive for employers to consider these options in preference for a formal disciplinary process that often results in the termination of employment.

13. However, it is important to note that the current list is not comprehensive and other administrative action, such as mediation or access to developmental opportunities, is not clearly captured. Given ongoing developments in how performance management may be undertaken, we recommend that s7(1) be amended to provide that "*administrative action includes, **but is not limited to**, any of the following actions …"*.

I have not actually put any amendment. The bill before the house—I now have the bar 2 bill, so I know I am up to date—includes the words "administrative action includes any of the following actions" but not the words "but is not limited to". Did the government consider inserting "but is not limited to" as part of its discussion on this bill, which I think makes a valid point, or is it the position of the government that all other administrative actions are somehow captured under what is written in the bill today? Does the government disagree with the Chamber of Commerce and Industry and take the view that the words "but is not limited to" are unnecessary?

Hon MATTHEW SWINBOURN: We are trying to work out what our idiom would be. The member asked about the Chamber of Commerce and Industry of Western Australia's position. It was contemplated but it was a bridge too far for us, if I can put it that way. We have advanced this clause by making it more favourable to employers than exists under the current act, and that is by the addition of the provision at clause (7)(1)(a), which is the inclusion of "an appraisal of the worker's performance". To go to the extent of opening it up to the degree that the Chamber of Commerce and Industry wanted with the "not limited to", essentially means a list of things would be provided that, by argument, would potentially include other things. That is actually not clear because that does not provide a "four walls" kind of thing and people will test how far they can push the administrative action exclusions. That was something the government was not prepared to do. There were certain stakeholders who were vehemently against and certain stakeholders who were not happy with the inclusion of paragraph (a) in this particular clause.

Hon Dr STEVE THOMAS: I may have a conflict with that response. I think the parliamentary secretary started to say that the government felt uncomfortable opening it up to other administrative actions, and then he shifted. I will have to check *Hansard* so I apologise profusely if I am misquoting. I am doing it from memory, which is not what it used to be. I think he shifted from opening it up to "other" administrative actions to "all" administrative actions. I am not convinced that including the expression "but not limited to" opens it up to all administrative actions. Is it the government's position that that becomes a very unlimited definition and if the government is not prepared to do it within the bill, is there another way that the government might extend those definitions to other administrative actions like conferences around employment et cetera?

Hon MATTHEW SWINBOURN: I think the issue with the proposal of the CCI, and it relates to statutory interpretation, is that when a phrase like "but not limited to" and a list of things that is, therefore, not exhaustive, it leaves it open for courts and tribunals is to determine what is included in that administrative action definition. That might change over time as the composition of a court or tribunal changes. Although it would still have to be consistent and could not do violence to the overall wording, there is no clarity with that. It is not our policy position, for example, to go beyond what the existing clause provided for, in terms of the exclusion, other than the provision of the additional material provided at paragraph (a), which is an appraisal of a worker's performance. People will argue—the CCI has argued this and the member might be arguing for this—that the administrative action exclusions should be a broader definition; it should include a range of other things that relate to employment, but that is not the government's position and we do not propose to move from that position. As I say, we have copped a bit of criticism from stakeholders for the fact that we have included the addition of paragraph (a).

Hon Dr STEVE THOMAS: I remain unconvinced, but I might sit on that for a little while and see how that sits with me for a little bit. The other thing I want to bring up is the issue that the parliamentary secretary raised in relation to this. It was nicely encapsulated in the 2021 submission by the Insurance Commission of Western Australia—I think it has had a name change.

Hon Matthew Swinbourn: Government Insurance division.

Hon Dr STEVE THOMAS: It was ICWA back then. It was the only bit effectively that was putting money into the government's debt reduction fund for a number of years, but I do not have time to go through a full budgetary examination of the process. It put in a submission to the review, which I thought was both good and very interesting. Under the heading "Reasonable administrative actions for psychological injuries" on page 3, it reads —

> As you know, mental stress claims remain enormously overrepresented in the WA Government. Despite the public sector representing only 8.5% of the State's workforce, its workers lodged 51% of the total mental stress claims in WA during 2020. Mental stress claims have increased 16% since 2015–16.
>
> These mental stress claim statistics are more concerning as first responders to traumatic accidents such as police and ambulance officers are (currently) not covered by the broader State Government workers' compensation arrangements.
>
> Any change to bring these workers into the broader Government workers compensation scheme can be expected to significantly increase the cost of workers compensation to the State.
>
> The definition of an administrative action makes it unclear whether 'dismissal' is included and whether 'disciplinary action' covers efforts to improve performance or correct an employee's behaviour and the termination of employment.
>
> It may be worthwhile to include a definition of 'disciplinary action' within the context of the new framework, similar to the definition under s 80A of the *Public Sector Management Act 1994* as it includes dismissal.
>
> We recommend that the new phrase 'whether formal or informal' be applied to all administrative actions listed in the provision.
>
> The Insurance Commission is aware of stress claims when employers address employee performance issues, such as implementing performance improvement plans or requiring them to work standard hours. As these do trigger workers compensation claims in the current regime, the definition could prudently be enhanced to capture these reasonable management and administrative actions.

I ask the parliamentary secretary to respond to ICWA's submission about this particular clause. I call it ICWA because that is what it was when it came through. We might just start with that.

Hon MATTHEW SWINBOURN: Obviously, the Government Insurance division of ICWA is a part of the government, but it has provided its own particular view. It would be fair to say that the elected government did not agree with its assessment about whether where the cut-off was should change. It was a policy decision about whether the groups of workers we are talking about were covered to the point at which we have covered them. Naturally, if we narrow the scope, it is less expensive because a lower range of insurance responses have to be provided to particular actions, and it is not this government's intention to narrow that down. ICWA is obviously looking at it from its point of view and looking at its books, I imagine, rather than looking at whether it is worthwhile from a public policy or social perspective and those sorts of things. As a government, we went as far as we were comfortable going. As I said to the member before, others would go further, and others would change it very much differently, particularly in a no-fault-based system. In a no-fault-based system, it might very well be the case that when a worker gets injured in other aspects, and it could be that the worker was responsible because of their own actions, they are still largely covered by the scheme. It is only when it comes to psychological and psychiatric injuries that we have this particular exclusion.

We might also add that there are lies, damned lies and statistics. Yes, 8.5 per cent has been indicated for the public sector—I think that is the rough coverage of it—but we have to remember who makes up that cohort of workers. It is people who work in the health system, which we all acknowledge is a difficult area to work in. They will face issues of psychological and psychiatric claims. The education system also faces a series of challenges that might not be faced in other workplaces. The composition of the workforce is different from other parts of the workforce, so the claim profile is different because of that. Obviously, in both health and education, the workforce is predominantly female, and a range of different issues would come with a different cohort, such as the issues that might come in construction, which has an overwhelmingly male workforce. There are those sorts of things. The nature of workers' engagement is very different. Workers are usually long-term employees and, therefore, their performance can be managed and administrative actions can be taken over longer periods than might be possible in other workplaces that have a significant degree of turnover. Other workplaces are, therefore, not having to deal with the informal and formal counselling processes because workers come in and out. Hospitality might be a good example in which the average time of employment is not years but probably months. There are a range of different factors. As I say, there are lies, damned lies and statistics. I do not want to suggest that it is 50 per cent of claims.

I might also add that the public sector, the government, tends to have much stronger structures for performance management and those sorts of things than smaller, private employers might have because the trade union movement, the Community and Public Sector Union–Civil Service Association of WA, is a much stronger presence in the public sector. The State School Teachers' Union of WA is also a much stronger presence. The WA Prison Officers' Union has a presence, and corrections is also an area that has a significantly different claims profile. There are things of that kind as well, and there is an interaction between those things.

I come back to my point: the decision made here is not about better drafting. It is a policy decision that we have made, and we have gone as far as we are comfortable going. As I say, we have copped criticism from some of our

traditional friends and stakeholders as a consequence of that, and we have persisted with the position, but we are not going further than that.

Hon Dr STEVE THOMAS: I thank the parliamentary secretary for that. I think we will come to a little bit of a parting of the ways on this, but that was always going to be the case. We will manage that as smoothly as we can. I was going to ask a little bit more about the public service, and the parliamentary secretary has partially answered that. I will come back to that, probably in a bit more detail, in a minute.

I have not put amendments on the notice paper to give notice of this because I was not sure whether the amendments would be necessary. My perspective is that I think the amendments proposed in those two submissions are good. I accept that the government will not go any further, to use the parliamentary secretary's words. Rather than move an amendment, have a division and lose, I might just deal with it this way because then we can progress and other members can have a crack at this. I will do it this way.

If I were to move an amendment to clause 7(1), to add the words "but is not limited to" after the word "includes" at line 17 of the bill introduced into this house, would the government support or oppose that amendment?

Hon MATTHEW SWINBOURN: No, we would not, for the reasons that I have identified to the member before. It is a bridge too far for the government on this particular thing. There would be serious changes that would affect the rights of existing workers, and we are not willing to go down that path.

Hon Dr STEVE THOMAS: My personal position is to disagree, but there seems to be little point in moving an amendment, debating an amendment that we have already effectively debated, calling a division and losing. I propose not to do that. I will simply register that my view is that I would have included that in the bill.

Can I also suggest an addition to clause 7(1), at the end of line 17, "includes any of the following actions"? If I were to move to insert "whether formal or informal"—I think they would be useful words—would the government support or oppose that amendment?

Hon MATTHEW SWINBOURN: Again, we would not support it, and one of the reasons is that there was a form of wording in an earlier consultation draft of the bill that included the words "whether formal or informal" after counselling at paragraph (b) and after—sorry; that is a different thing. It included "counselling action, whether formal or informal", and then after paragraph (c) "disciplinary action", it included "whether formal or informal". When that draft was released, we got significant opposition from a number of stakeholders. The member can probably guess who they were. It was not uniform, of course. Other stakeholders, including the Chamber of Commerce and Industry of Western Australia, did not have an issue with that drafting. I think I am correct in that statement. Yes. We would not propose to reimport that into the bill, as the member has informally proposed at the table. We would not be supportive of an amendment of that kind.

Hon Dr STEVE THOMAS: Well, that is immensely disappointing. I am supportive of both proposals.

Hon Matthew Swinbourn: The thing that you propose—you are supportive of it.

Hon Dr STEVE THOMAS: Yes, I am supportive of the thing I propose. It may surprise the parliamentary secretary to learn that I am not wishy-washy, just in case there was any doubt. I am very much in support of the things that I propose.

Hon Matthew Swinbourn: At least you are not prevaricating.

Hon Dr STEVE THOMAS: No, I do not prevaricate. I think we have missed an opportunity to support employers and managers as part of the process. I was prepared to move it, but I do not need to waste further time.

I want to come back to the reasons that the public service represents 51 per cent of mental stress claims in Western Australia despite representing 8.5 per cent of the state's workforce. I accept the things that the parliamentary secretary said about a difference in the public sector. I think that is the case. I was a little intrigued that there was some suggestion there might be a gender difference. I am not sure about that, but I am not going to make a thing of it. I want to know whether there is a culture difference in the public sector whereby entitlement is more strongly promoted and more strongly reinforced than in the private sector. I guess as a component of that, I absolutely agree with the parliamentary secretary that the public sector is much more unionised than most of the rest of the workforce in Western Australia. I do not have any figures about union representatives in the public sector versus the private sector. Generally, when I ask about it in questions, the government says that I have to ask the unions, so I suspect that the same applies here.

Ultimately, is there a workplace culture in the public sector of Western Australia that makes mental health care claims far more prevalent than in the private sector? I will work out a number in a bit based on 51 per cent coming from 8.5 per cent. It is a massive difference. I applaud the government for the steps it has taken to try to get a handle on this and to allow for normal administrative actions. I understand that the government has gone further than the unions would have it go and I suspect it has caused the government a bit of grief, particularly at the left end of the

union spectrum. I saw some uncomfortable conversations being had around that. But is there a culture in the public service and is it something that we need to address given the outcome is that 51 per cent of mental health care claims are coming from 8.5 per cent of the working population?

Hon MATTHEW SWINBOURN: I am not going to agree with the member's assessment about an entitlement mentality or that entitlement is promoted or part of a culture in the public service. I think it comes back to the nature of the work that is undertaken by the public sector. Many workers are forward facing and have direct interaction with the community; therefore, a range of stressors exist as a consequence. If we go to an emergency department in a major hospital on a Saturday night, we will see a range of factors that forward-facing public sector workers have to face that perhaps are not faced in a range of other workplaces. Workers are exposed to family and domestic violence, people affected by drugs and alcohol and people with traumatic injuries. These groups of people are likely to be, understandably, in a position in which their psychological and psychiatric health is affected by the work they do. We are talking about the claims that the member has identified. I think, again, the Insurance Commission of Western Australia has done a disservice to the people they have done a service to by suggesting that they could significantly narrow down that 50 per cent share by narrowing administrative action because I do not know what proportion of those ones relate to just administrative actions that do not fall within the exclusions and make up the psychiatric and psychological claims. As I said, we need to sort of understand that.

Construction and manufacturing industries would be significantly over-represented in crushing injuries figures. It is similar to asking what they are doing that makes them so over-represented in crushing injuries and saying that we should narrow the definition of "injury" so that we get fewer claims as a consequence and, therefore, we will reduce the cost of the systems and it will be fairer to employers and insurers, and workers will just have to be more careful at work. The reason those industries would be over-represented in those injury categories is because of the nature of the work that they do. When we deal with the laws of physics, they sometimes work against us and we cannot break them, so we end up being stuck between two heavy objects and have to make a claim of that kind.

I do not think we have a particular problem in the Western Australian public sector because these figures are on par with other jurisdictions. We are not particularly affected by it. The other jurisdictions, including the commonwealth, have a similar profile with these kinds of claims. As I said, I think if we dig deeper into what the figures relate to, I would say we would find that a proportion of them relate to disciplinary administrative actions but a lot of them deal with the stressors that are located with the jobs. Again, I bring the member back to the kind of work that is being done. The government is in the child protection space. A number of workers work in that space. It is not a job that I think either the member or I would want to do, and they are faced with a range of stressors that affect their mental health psychologically and psychiatrically. As I said, I do not want to be in a position in which I am part of narrowing that down and that might exclude them from being able to make a successful workers compensation claim.

Hon Dr STEVE THOMAS: It probably comes as no surprise that I am not going to agree with the parliamentary secretary but we will not change the legislation based on that disagreement. I think the parliamentary secretary underestimates the stress involved in the private sector. Yes, I understand that some sections of the public service are forward facing and deal with sections of the community. I think it underestimates the general stress involved in dealing with the public. I think the private sector is not that far behind in terms of the stress with dealing with the private sector. I know in my business life expectations could be enormous. I was a veterinarian and everybody wanted something. Everyone wanted a perfect fix for next to nothing. The pressures on the public service are not generally more excessive than those. There are exceptions to that. Police officers and prison officers in particular, I think, face some far worse situations but police officers are exempted under the act as it exists—from some of those things anyway. They have a different system. It was in the ICWA submission that I read in earlier that they have a different system.

Outside of that, it does not include police officers, for example. Oftentimes, workers in the public sector, including police and prison officers, face the most difficult situations compared with the rest of the community. I think there is an issue in the culture of the public service. To suggest that it is tougher in the public sector than it is in the private sector and that is why there are more psychological claims dramatically underestimates the role of workers dealing with the community compared with those in the private sector. This would be worth looking at and examining at some point.

I think the culture in the public sector lends itself much more to making use of the present system down this path whereas many in the private sector would simply say, "Well, this is a normal part of life and I'm just going to move on from it." I think there is a difference. I do not know how we measure it, quantify it or change it. I urge the parliamentary secretary to be cautious about suggesting that the pressures of the public sector are worse than the pressures of the private sector because I do not believe that, outside of a few exceptions. I think it diminishes the argument a bit if we go down that path. It is a shame that the government will not look at those amendments. I accept that it will not, so there is no point moving them. The parliamentary secretary does not even need to respond. I am firmly of the view that these amendments would further narrow the risk and the exposure relating to workers

compensation. I am saddened that we do not do it but I accept the government's position. The only way to change it, ultimately, is electorally. I disagree with where we have ended up but there is no point making a huge fuss about it. I want it on the record that I disagree, and I have done that. We should move on because other members want to discuss this clause.

Hon NICK GOIRAN: During consideration of the clause we just passed, clause 6, dealing with injury, the parliamentary secretary confirmed that there is no intention to change the definition of "injury" as it currently stands. There is an exclusion to that definition in clause 7. I want to acknowledge at this very early stage of considering clause 7 the remarks that the parliamentary secretary already made not only in his second reading reply, but also during the exchange we had in clause 1 dealing with this issue. The government has been transparent in the fact that it is an intended inclusion with respect to psychiatric injury or psychological disorder arising from what is known in this clause as "reasonable administrative action". There is no surprise about what the government has done here. It ought to be placed on the record that this is a material change to the existing scheme.

One of the matters that I raised yesterday related to the transitional arrangements. If a worker has an application before WorkCover but a determination on liability is not made until after this new scheme comes into effect, which is intended to be 1 July next year, what would be the scenario? The parliamentary secretary indicated that presently, under the bill before us, it would be open for an insurer to argue after 1 July 2024 that this new provision effectively defeats the application being pended. Is the parliamentary secretary in a position to update the house on any consideration by the government about that transitional arrangement?

Hon MATTHEW SWINBOURN: We have considered the matters raised by the member yesterday. I have discussed them with the minister. It would be fair to say that we are still considering our response to the issues raised by the member. I think I am also authorised to say that we agree in spirit with what the member brought to our attention. We are deciding whether it can be addressed under the transitional provisions or whether an amendment needs to be made to the bill so we can protect those pended claims until the commencement of the act so it does not undermine people's existing rights to a claim relating to administrative action that would subsequently be excluded once the act formally commences.

Hon NICK GOIRAN: I thank the parliamentary secretary for that clarification and his encouraging remarks. We will see what happens when we get to the transitional provisions later. I simply make the point that I know there will be strong views across the field of stakeholders in workers compensation. As the parliamentary secretary indicated, even with the draft consultation and the use of words like "formal", "informal" and the like, at the end of the day there is a law in Western Australia at the moment relating to workers compensation. In my view, it is plainly unfair that a worker, having been injured under the current law and having had their employer pay premiums on the basis of the existing law, would suddenly find themselves caught short and stranded midway through an application with a dispute that need never have arisen had the insurer accepted the application in the first place. I certainly do not want to condone any delay tactics on the part of insurers and the like. I think this is just a matter of basic fairness, irrespective of where people land on the broader issue of exclusion.

Hon Matthew Swinbourn: We agree with you.

Hon NICK GOIRAN: I appreciate that the government is just working through how best that might be done.

To cover off on this point, there has been a bit of discussion—obviously in the debate today—in the lead-in to this and, as the parliamentary secretary pointed out, in the consultation draft about the use of the words "formal" and "informal". In the end, after consultation, the government made a decision to remove those words in certain places. I think the parliamentary secretary might have mentioned that one of those examples related to disciplinary action.

Hon Matthew Swinbourn: That is correct.

Hon NICK GOIRAN: The consultation draft used the words "informal" and "formal", and they no longer appear. How is it intended that we interpret this provision of disciplinary action in the absence of those words? Is it intended that both scenarios will be captured or only one scenario?

Hon MATTHEW SWINBOURN: It is currently understood to mean "formal" and it is our position that it will continue to mean only formal action in relation to those things. For the benefit of everybody, I will attempt to get the wording correct about what was in the proposed draft. It was "disciplinary action (whether formal or informal)". That would have extended the meaning to "informal" because obviously it already applied to "formal". The government stepped back from its position after stakeholder engagement, so the meaning will be restricted to formal actions.

Hon NICK GOIRAN: I thank the parliamentary secretary for that clarification. Is it the government's position that it is unnecessary to use the word "formal" here? The only purpose of the bracketed clause in the consultation draft was to put beyond doubt that "informal" was to be captured. That no longer being the policy position and the intention of the government, it dispensed with that phrase. Is the intention therefore clear and it is not necessary to include "formal"?

Hon Matthew Swinbourn: Yes, member.

Hon NICK GOIRAN: Does the same principle therefore apply to clause 7(1)(a) with regard to appraisals?

Hon MATTHEW SWINBOURN: Yes, member.

Hon NICK GOIRAN: I will conclude on this point, for those who are seeking to interpret the new scheme. Should they be under no illusion that an informal appraisal, suspension, action, disciplinary action or anything of that sort will be captured because it is simply not captured and it is not the intention of the government that it will be captured? Further, those words will not be in clause 7. Therefore, should no person, no arbitrator at WorkCover and no other person who, in due course, might be asked to make a decision on this, interpret this to refer to informality, and is it expressly the point that it will not be captured?

Hon MATTHEW SWINBOURN: Yes. Informality is not captured.

Clause put and passed.

Clause 8 put and passed.

Clause 9: Journeys —

Hon Dr STEVE THOMAS: This clause deals with journeys, which is obviously travel. Is what is proposed in this bill for journeys any different compared with what is in the act? In particular, I refer to travelling to and from work. There is some variation in that from industry to industry. What arrangement currently exists and will there be any changes?

Hon MATTHEW SWINBOURN: There is no material difference. No rights will be expanded or contracted as a consequence of any changes to the wording in this clause. In general, journeys to and from work are not covered. However, journeys that occur during the course of work—not coming to work or going from work, but because people have to go between place A and B as a consequence of their employment—will be covered. There are no changes. For anyone listening to this or who reads *Hansard*, it is not intended to change the way it is applied currently once the act commences.

Hon Dr STEVE THOMAS: I always get nervous when someone says "material change", as opposed to "change".

Hon Matthew Swinbourn: That is why I further qualified it to make it as clear as possible.

Hon Dr STEVE THOMAS: Yes. There are some circumstances when travelling to and from work is covered. For example, if the transport was organised by the employer. It is probably too much to ask about all the specific circumstances in which it will be covered, but I guess I am looking for reinforcement that it will not change at all from the current legislation.

Hon MATTHEW SWINBOURN: To give the member an assurance, if it is currently covered—without having to go through an exhaustive list—it will remain covered. If it is not covered, as a consequence of the passage of the bill, it will not suddenly become covered.

Clause put and passed.

Clause 10: Prescribed diseases taken to be from certain employment —

Hon MARTIN ALDRIDGE: This clause relates to prescribed diseases. The explanatory memorandum reminds me that this is not necessarily a 1912 provision because it says —

> The clause replaces, but is consistent with, section 49F of the current Act that was inserted by the *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020*.

Before I ask other questions about the application of that section, can the minister confirm that it did not exist in a different form prior to that date?

Hon MATTHEW SWINBOURN: This provision did not exist before. It is a new provision consequential to what the member referred to as the COVID provisions that were made in 2020.

Hon MARTIN ALDRIDGE: Thanks. My understanding is that initially the purpose of the creation of this provision was to provide a new cover for COVID-19 and for particular types of employment. I am stretching my memory, but I think they were healthcare workers but it could have included others who fall outside of that definition. This clause was created as part of the COVID-19 provisions so that if a nurse contracted COVID-19, it was presumed that that was a workplace injury because of his or her exposure as a healthcare worker in the course of their work. I am just wondering whether this provision has been used for any other purpose.

Hon MATTHEW SWINBOURN: I think the first point to note is that this provision was always going to be included but that COVID-19 brought it forward. It was part of the rewrite process in any event. Obviously, the pandemic created a set of other imperatives and it was introduced. The member is quite right that at that time it related solely to those forward-facing healthcare workers, but as the member might be aware, it has since been used in prescribing

another disease, that being post-traumatic stress disorder for firefighters, ambulance workers and call centre people. I think that covered the group it was extended to.

Hon MARTIN ALDRIDGE: Does the parliamentary secretary have any information available about the claims history or the use of the protections provided by the current section 49F provisions, or do we not have visibility on that level of detail?

Hon MATTHEW SWINBOURN: I cannot provide specific figures that relate to section 49F because that data is not specifically collected. It is not like someone lodges their claim and ticks the box to say that they rely on the presumption. I confirm that to date, WorkCover has dealt with and accepted 129 COVID-19 claims and all have been paid without prejudice. Those claims came from a broad range of industries, including 48 from the healthcare and social assistance industry. One can presume—this is not precise—that some of those 48 would have had the benefit of the presumption that was provided under section 49F. I cannot provide what proportion of those claims did because that data, as I said, is not disclosed or collected by WorkCover. We think people have had the benefit of it. I do not know whether I can take it any further than that.

Hon MARTIN ALDRIDGE: The parliamentary secretary provided some COVID-19 data. Is there any PTSD data? Cover for ambulance workers began on 1 February 2022 and cover for firefighters began in May this year, so those are fairly new. Is there any data on ambulance cover?

Hon MATTHEW SWINBOURN: We do not have specific data about those who have relied on the presumption. I am told that since the commencement of those provisions, ambos and firefighters have lodged claims relating to PTSD. Of course, many claims were lodged before the presumption existed to their benefit and I am told that the overwhelming majority of them were accepted in any event. We do not have a separate dataset to indicate what the benefit of the presumption has been for the cohort that lodged claims since it came into effect.

Hon MARTIN ALDRIDGE: Is the presumption that arises from the application of section 49F and what is provided for in clause 10 rebuttable?

Hon Matthew Swinbourn: Yes.

Hon MARTIN ALDRIDGE: What gives rise to that? Is it the way in which the regulations are constructed or is there a provision in the clause that provides for that to be the case?

Hon MATTHEW SWINBOURN: Clause 10(2) states —

> If a worker suffers an injury by a prescribed disease and the employment in which the worker works at the time of suffering the injury, or in which the worker worked at any time before suffering the injury, is prescribed employment for the disease, the injury is taken to be injury from that employment —

These are the key words —

> unless the employer proves that the injury was not from that employment.

The first part creates the presumption and the second part makes it rebuttable. The note that follows reads —

> Section 6 determines whether an injury by a disease is from employment. An employer can prove that the injury was not from employment by proving that —
>
> (a) it was not suffered in the course of the employment; or
>
> (b) the employment did not contribute to a significant degree to the injury.

I think that answers the member's question.

Hon MARTIN ALDRIDGE: COVID-19 and PTSD are the two diseases currently provided for by regulation. Given the definition of "disease", there is scope for almost anything to be included in the future. Do the two that we have experience with have dates on which, or after, diagnosis had to have occurred? Are they a function of the regulations or are they for all time?

Hon MATTHEW SWINBOURN: They are dealt with in the regulations. I am told that the commencement for COVID-19 was from the emergency declaration of the COVID-19 pandemic. In cases of PTSD, it is the date of the diagnosis, so it must be post the commencement of the provision. It can take into account facts that occurred before the commencement of the presumption. For example, if the trauma happened before then but the diagnosis occurred and the claim was lodged after the commencement, a person would get the benefit of the presumption. However, if a person's diagnosis and claim occurred before the commencement of the presumption, they will not get the benefit of the presumption for that particular claim. There is a commencement date; we must draw the line somewhere.

Hon MARTIN ALDRIDGE: That certainly clears things up, and it does not give rise to the issue that we talked about yesterday, which we will come back to when we debate clause 11, of what impact providing cover retrospectively

will have on settled claims. The parliamentary secretary provided some information about that today, but we will look at it again when we reach clause 11.

Is there any material difference between section 49F in the act and clause 10?

Hon Matthew Swinbourn: No.

Hon MARTIN ALDRIDGE: No; okay. Given the information that I got earlier about the numbers, the parliamentary secretary probably does not have the level of detail that I want. My question was going to be: how are claimants being treated differently between those who have a presumptive protection and those who do not? Is there any experience on that, or is it too early to reflect on that? COVID-19 is a little bit different, but I refer to the mental injury of post-traumatic stress disorder. Are we seeing more claims approved? Are we seeing shorter claim-decision periods, or is it simply too early to draw some of those conclusions?

Hon MATTHEW SWINBOURN: It is too early to tell whether there is any meaningful difference in relation to that. Part of the problem with the dataset going forward, particularly with firefighters, is that the vast majority of PTSD claims, and I have said this before, were previously accepted quite quickly. We might not see a material difference because of the presumption of it. It will not change the legal hurdle in one sense; it will just shift the locus of burden from being on the employee to establish the claim to being on the employer to rebut it, and then the claim will be determined. Rebuttal and presumptions are in other parts of the law; there is nothing unique about what is in this bill that is different from other parts of the act.

In my experience as an employment lawyer, there are rebuttable presumptions in discrimination claims and unlawful termination claims. People often think that that is a reversal of the burden of proof, but it is not really. They still have to be able to sustain a claim on the facts of their case. Of course, all that work happens even with the rebuttable presumptions. Somebody cannot just rock up and say, "Hey, I've got PTSD; approve my workers comp claim." They still have to substantiate their claim and provide their employer with the materials necessary to assess the claim. The manner in which the case proceeds if the claim goes to dispute may change because the employer then has to make the rebuttal in the case, which then has to be determined on its merits. I think the member used the term "protective rebuttal". It is not a protection as such; it is just a change of where the locus of the burden sits when a proceeding starts. It may very well be the case that the employer, in any situation, effectively establishes the rebuttal of the presumption, but then the case is determined on its other merits. The burden is then on the individual to do that. Sometimes these presumptions can appear more helpful—I say this from my experience of running non–workers compensation cases—and one thinks they are onto a winner because they can just rock up and make a claim, but if it is disputed, they will still be put to task.

I turn to the member's original point. It is too early to say whether there has been an impact on the number of claims or the speed with which they have been dealt with. It will be difficult for us to assess that because there is already a very high success rate for PTSD claims and they are dealt with quite quickly by the insurer, so it will be difficult to see them narrowing down that time even with that rebuttable presumption.

Hon MARTIN ALDRIDGE: I guess we will see how this plays out in the data, but WorkCover WA was not particularly excited about rebuttable presumptions because of the case history with the Department of Fire and Emergency Services' firefighters; I think it is something in the order of 97 per cent of claims.

Hon Matthew Swinbourn: Member, it wouldn't be WorkCover that would get excited; it would be the Government Insurance division that would have the bigger issue because WorkCover doesn't actually process any of the claims. They're not claims against WorkCover; they're against the insurers.

Hon MARTIN ALDRIDGE: Okay.

Hon Matthew Swinbourn: Yes. If the insurer got excited about it, then there would be more to see here, I think.

Hon MARTIN ALDRIDGE: Okay. I do not have those particular files with me. I may be mistaken; it might be whatever the Insurance Commission of Western Australia is now called.

Hon Matthew Swinbourn: The Government Insurance division.

Hon MARTIN ALDRIDGE: The Government Insurance division, or GID. It almost sounds like something from *Men in Black*.

I recall a briefing note that the Fire and Emergency Services Commissioner sent to the Minister for Emergency Services that said WorkCover did not support the extension of a rebuttable presumption for PTSD cover. I will go back and check my records, but it is not particularly relevant to the passage of this clause, one way or the other.

If I recall the regulations correctly, for PTSD, current section 49F effectively requires a clinical diagnosis to a particular clinical standard. It requires somebody to have an official diagnosis to DSM–5 clinical standards.

Hon Matthew Swinbourn: By way of interjection, that is correct; yes.

Hon MARTIN ALDRIDGE: Therefore, we would assume that an appropriately qualified clinician would be assessing the worker, and that assessment would then accompany the claim. Assuming that person meets the qualifications of the regulations, whatever they may be, is that claim then either approved or rebutted? Is that effectively the two decisions that the employing agency or the employer has?

Hon MATTHEW SWINBOURN: The member pointed out that the employee would go to a clinician. For PTSD, they would see a psychiatrist to get the clinical diagnosis of post-traumatic stress disorder. They would then lodge the claim with their employer—the Department of Fire and Emergency Services being the area the member is most interested in. DFES would send that claim to its insurer, being the Government Insurance division. The Government Insurance division would then make the assessment. If all the necessary elements were satisfied from its point of view, it would make a decision to accept or deny the claim. If the claim were denied, the locus would shift back to the worker to say, "I don't agree with that," and they would institute the dispute settling procedures under the act—they would dispute the decision. When the matter went to that dispute settlement procedure, it would be on the employer, via its insurer and usually the lawyers, to then prove that the injury was not in fact from the worker's employment, as opposed to the normal situation, which is that the worker would have to establish that it was. A worker—for example, a teacher—who does not have the benefit of this presumption and has their claim for post-traumatic stress disorder denied would have to prove that their PTSD was a consequence of their employment, as opposed to in the initial stages the employer, via its agents, having to establish that it was not caused by the employment itself. All things being equal, of course, there must be a sufficient clinical diagnosis. There might be other grounds for disputing the claim—for example, whether the diagnosis was correct in the first place. In that instance, usually one goes to battle stations with the medical specialists. The dispute settling body would have to make a determination as to whether there was a clinical diagnosis in that particular instance of PTSD. The presumption would not apply to that, because that is the clinical decision based on the medical evidence that is brought before them. But as to the causation issue, that is the presumption. The advantage of the presumption is that it was caused by a person's employment, and that would be resolved through that dispute settling procedure.

Hon MARTIN ALDRIDGE: Thanks for that, parliamentary secretary; that was quite helpful. One of the things that the government has contended with respect to the importance of this is that it will make the claims process easier for the worker and avoid unnecessary re-traumatisation of the worker by having to relive experiences and triggering events. Obviously, a clinical diagnosis will occur, and to some extent that may still occur, but in a clinical environment. But if the claim is disputed, it may not necessarily avoid all those circumstances, I suspect. Thinking about this from experience, for somebody who has been in that employment for a long time, it would be near on impossible for an employer to dispute the fact unless it was something really obvious. For example, an employer has just hired a former member of the Defence Force who has done 30 years of service including multiple tours of Afghanistan. If that person has just completed three weeks in the fire service and has not been to a critical incident, maybe there would be grounds to dispute whether that injury was caused from that employment, but I suspect it would be very rare for a case like that to occur. I certainly have used the same arguments that the government has around trying to avoid the re-traumatisation of workers, but would it be correct to say that it could still occur in circumstances in which a claim is disputed?

Hon MATTHEW SWINBOURN: Yes, member, I think that is fair to say. The example that the member gave, which might be a legitimate basis upon which the employer might dispute a claim, is an obvious example in which that could happen. The real benefit is that during the decision-making process of the employer and its agents, they have to come up with a positive case against the claim. That means that more claims will be likely to be disputed on that basis. Again, it will be hard to measure that because we will not have access to their entire decision—we will not be able to get inside the minds of those decision-makers. But I can tell the member that from any point of view, when a person is thinking about the case that they have to make, whether it is a hard case or an easy one, that will be given consideration. Those circumstances will tend to favour the worker not just a little bit but significantly and will mostly avoid re-traumatisation, but there will be legitimate circumstances in which employers will dispute that PTSD has been caused by a person's employment.

Hon MARTIN ALDRIDGE: My last question on clause 10 is: who will make the decision to dispute the claim? Will it be the Government Insurance division or the employing agency?

Hon MATTHEW SWINBOURN: The GID will effectively have the power to do that as the insurer. It is the same, for example, when a person has a car accident and they are insured; they do not get to decide whether or not they are liable. The insurer decides that because the person has an arrangement in which the insurer assumes that person's right. It is perverse because the name on any legal case is not the insurer's name, of course; it is always the employer's name so that they get the ignominy of whatever case goes forth. Often, insurers still have to take on board the employer's particular views and the evidence and it is highly influential, but it is ultimately the insurer's decision.

Clause put and passed.

Clause 11: Diseases of firefighters taken to be from employment —

Hon MARTIN ALDRIDGE: I have a number of questions at clause 11. Yesterday we had a conversation in which the parliamentary secretary answered my question about retrospectivity. The eight cancers were added literally this week and gazetted on 9 August, with effect from today. Today is the birthday of the eight cancers. Those regulations have not yet been tabled. I thought that they might have been tabled today.

Hon Matthew Swinbourn: I didn't table them. I am not sure where we are at with them.

Hon MARTIN ALDRIDGE: It is a job for next week.

Hon Matthew Swinbourn: Yes.

Hon MARTIN ALDRIDGE: My concern is the legal position of claims in respect of the eight cancers that have effect from today. I found the savings provisions, after the parliamentary secretary alerted me to them, in clause 552. They will apply retrospectively back to 13 November 2013. The parliamentary secretary gave some information at the start of today's session that one claim was, I think, properly legally finalised in 2018. The number of claims is small, but I was hoping that there would have been no claims so that this would not even be an issue. I am mindful that I want to ask for detail that could potentially identify that claim. I think if we were to even identify which cancer to which it related, it could potentially go to that point. If that claim was legally finalised and denied, that gives me cause for concern, and I do not know whether the parliamentary secretary can allay this concern, because if the rebuttable presumption had existed in 2018, that person's legal process would have been somewhat different. I think the parliamentary secretary said yesterday that there may be limited opportunity to represent a claim, but he did not think the courts would be very happy with that and it was something that he might need to take some legal advice on. Is there anything that can allow us to move on from this point or, if it is an issue, can that legal advice be made available?

Hon MATTHEW SWINBOURN: I will come back to the one claim. I think what the member said to me was correct. We have data that identifies only one potential declined claim for a firefighter in 2018 that related to the additional eight cancers now prescribed. We do not know why it was denied and we do not know whether or not the presumption would have helped in that particular instance because it may not have been denied on the grounds that it could not be established that it was from the employment. It could have been denied on a number of other grounds. Again, I think the member quite rightly and cautiously pointed out that if we start to talk about the details of the case, it is possible that it might be identified, and we certainly do not have the permission to do that from the individual concerned, not that we are in contact with that person.

Additional advice we have had from the State Solicitor's Office overnight confirms that a firefighter can rely on the presumption for the additional eight cancers, so long as the cancer was diagnosed after 13 November 2013; however, to rely on the presumption, a claim must be made after 10 August 2023 when the additional presumptive cancers took effect. A firefighter cannot rely upon the presumption for the additional eight cancers if they have already made a claim. Neither the current act nor the bill retrospectively effect or revive a liability for any cancer claim made or determined before 10 August 2023. This reflects legal principles that prevent re-litigating or determining previous claims. We understand this is also consistent with the application of the Comcare legislation.

Hon MARTIN ALDRIDGE: If we were dealing with a claim number that was more significant than one, I would probably suggest there could be a legislative solution that we could consider that would allow a fresh claim, with regard to those who have been denied. Given that the number is one, and I do not want to know any more than I already know about that claim for obvious reasons, what avenues can that person pursue? Is a new claim not viable at all?

Hon Matthew Swinbourn: By way of interjection, member, no, it is not. My head does not rattle loud enough for Hansard to pick it up.

Hon MARTIN ALDRIDGE: Could it be open to that person to see ex gratia payment from the state on the basis that they would have ordinarily have been covered if the law had applied to them at the time, or if their claim had occurred after 10 August 2023?

Hon MATTHEW SWINBOURN: The ex gratia option is in the realm of things that could possibly happen, so there is nothing to stop a person writing to the minister and the government therefore seeking it, but they would have to put forward the grounds on which that happens. The very nature of ex gratia payments of course is that they are rare and require special circumstances. I would not like to give false hope to anybody to suggest that it is similar to the orderly way in which one can make a workers compensation claim. There is an extremely high bar to satisfy for the government to reach into its pocket and make a payment. I cannot suggest that that is not an available line of inquiry that that particular person might be able to pursue. Their circumstances might be sufficiently special to justify it, but I just do not know any more than that and I cannot take it any further than that.

Hon MARTIN ALDRIDGE: I have been assisting some firefighters of late who have contracted cancers and the diagnoses were prior to the November 2013 date. In making their claim, obviously, the rebuttable presumption cannot apply to them, because the savings provision sets that date in concrete, but it strengthens their claim that if it was not for that date, they would have been covered for the particular cancer that they contracted because in every other way they qualified because of their employment, their exposure to hazardous fires and the qualifying

period. The only thing that they have not been able to check the box on is that their diagnoses were on 1 November rather than on 12 November 2013.

Hon MATTHEW SWINBOURN: I do not want to speculate on what grounds may or may not be successful, because it is a black box when it comes to ex gratia payments, because there is not a prescribed list of things that need to be satisfied in order to receive an ex gratia payment.

Hon Martin Aldridge: My point was not about ex gratia payments; it was about making a claim but the diagnosis was prior to the commencement date.

Hon MATTHEW SWINBOURN: I will get some more advice, because I misunderstood what the member was saying.

I do not know the circumstances, relevant factual data and such things of the two matters that the member is referring to. I am being advised that, in theory, nothing prevents them from making a claim if they have not previously made a claim that has been determined. They could make that claim and then it would be assessed on its merits and whether it satisfies the necessary elements of being received. They just would not be entitled to the benefit of the presumption, because their diagnoses were prior to the commencement of the presumption. As I said, I do not know all the circumstances, but if, for example, they were continuing in their employment and it went past their diagnoses and all those sorts of things, it would not prevent them from making a claim. The state of the law as it existed prior to 13 November 2013 means it would be sans the benefit of the presumption.

Hon MARTIN ALDRIDGE: They could make a claim, but they cannot rely on the proposed section 11 protection. I know the parliamentary secretary does not like me using that word.

Hon Matthew Swinbourn: The beneficiary provisions.

Hon MARTIN ALDRIDGE: Yes. Is it even possible to imagine that substantiating a claim of occupational exposure resulting in a cancer is possible to achieve? Prior to these presumptive protections, were claims actually agreed to for firefighter cancers?

Hon MATTHEW SWINBOURN: It is possible, and it has been successful for people who have contracted cancers, to make a workers compensation claim and then satisfy the necessary elements to establish that their employment was a significant contributing factor to the development of their cancer, and therefore successfully receive compensation as a consequence. It is not a folly to just make the claim; any claim is assessed on its merits and dependent on its own factual circumstances, but it is not the case that none have been ever accepted.

Hon MARTIN ALDRIDGE: That is good to know. The definition of firefighting employment in clause 11(1) reads —

> … means employment by or under the Crown in right of the State a substantial part of the duties of which consists of …

It goes on. I focus on "under the Crown in right of the State". What does that mean?

Hon MATTHEW SWINBOURN: It essentially means that they are employees of the public sector. When we were getting rid of other archaic language, I posed to the advisers: why not get rid of this archaic language? I understand some efforts were made, but our friends in the place that we do not like to name and Hon Nick Goiran were insistent that this wording remain.

Hon MARTIN ALDRIDGE: This provision effectively provides a subset of firefighters. It will restrict it effectively to firefighters employed by the state government in some form or another. It restricts it even further; it says that not only does someone have to be state firefighter, but also they have to be —

> (a) covered by an industrial instrument, as defined in section 57(1) …

Or —

> (b) prescribed by the regulations to be firefighting employment;

Hon Matthew Swinbourn: Sorry. I missed the last bit.

Hon MARTIN ALDRIDGE: I want to confirm this point. Clause 11 will effectively apply only to state firefighters or those employed by the state government, which is effectively public sector workers employed by the state. They also need to meet one of the two limbs in that they are —

> (a) covered by an industrial instrument … that applies to firefighting or by an agreement that wholly or partly regulates the terms or conditions of employment as a firefighter; or
>
> (b) prescribed by the regulations to be firefighting employment.

Even with the second limb, they still have to be a state public sector firefighter.

Hon MATTHEW SWINBOURN: Yes, I think the member is right in his characterisation of it. Clause 11(1)(a) is probably not contemplating the DFES firefighters because they are firefighters for 100 per cent of the time. It is probably for the DBCA firefighters who do seasonal work. They are often engaged in other activities outside that time, so that is why it is an industrial instrument that applies to them to make sure that they are all roped in.

Hon MARTIN ALDRIDGE: Would DBCA firefighters fall under clause 11(1)(b)? Would they be prescribed by regulations or do they have an industrial instrument?

Hon Matthew Swinbourn: They fall under clause 11(1)(a) because they have an industrial instrument.

Hon MARTIN ALDRIDGE: Okay. Have we ever prescribed by regulations any other type of firefighting employment?

Hon Matthew Swinbourn: No, we have not.

Hon MARTIN ALDRIDGE: Do firefighters engaged by the Kings Park botanical board, I think it is called, have a firefighting industrial agreement in accordance with (1)(a)?

Hon MATTHEW SWINBOURN: I am advised that they are still employed by DBCA, so they are picked up by it.

Hon MARTIN ALDRIDGE: Would local government firefighters be excluded from this definition?

Hon MATTHEW SWINBOURN: I am advised that they cannot be picked up under this provision. The regulations do not extend far enough to capture them.

Hon MARTIN ALDRIDGE: Can we turn now to the qualifying periods? I might start by asking this: does clause 11 differ materially from section 10 in the existing act? I think it is section 10, but the number is not relevant. Does clause 11 differ materially and in what way does it differ?

Hon MATTHEW SWINBOURN: I am advised that it is materially the same except for the table. For item 12 in the table, primary site oesophageal cancer, the qualifying period has been reduced from the current 25 years to 15 years to bring it in line with the commonwealth approach.

Hon MARTIN ALDRIDGE: Clause 11(3)(b) gives effect to the qualifying periods as one of the factors that qualifies a worker to be eligible for this provision. It says —

> (b) the employer is satisfied that when the injury is suffered the worker has been in hazardous firefighting employment for at least a period of, or periods in aggregate amounting to, the lesser of the following —
>
> (i) 5 years;
>
> (ii) the qualifying period for the disease.

Am I correct in reading that, that we cannot have a qualifying period, by regulations or otherwise, less than five years?

Hon MATTHEW SWINBOURN: I am advised that the member is correct.

Hon MARTIN ALDRIDGE: What would occur if we found ourselves in a position in which scientific evidence was growing about a particularly acute form of cancer, and the suggested trend or advice was that it is prevalent at four years? Keep in mind that we already have two cancers at five years—primary site brain cancer and primary leukaemia. I am not sure about the additional eight that came into effect today and whether any of those were five years. I printed them off and see none of them is five years. If there were circumstances of growing evidence that it should be four years instead of five years, is there no way to change that apart from coming back to Parliament and seeking an amendment?

Hon MATTHEW SWINBOURN: That is correct.

Hon MARTIN ALDRIDGE: I mentioned in my second reading contribution earlier this week comments from the independent scientific report commissioned by the Attorney-General's Department. I think Dr Driscoll authored the scientific component of that report, and he found no scientific evidence to justify qualifying periods nor any evidence of how Australia and now Western Australia arrived at these qualifying periods. On what basis are we continuing with qualifying periods as a primary factor in qualifying a firefighter for a cancer protection?

Hon MATTHEW SWINBOURN: From the point of view of Western Australia, we have sought to be consistent with the commonwealth, other external jurisdictions and what has been asked of us by stakeholders who advocated for these things. These are the qualifying periods they asked us to include for these diseases, as I understand it. I cannot get into a scientific debate with Dr Driscoll because I am absolutely certain that he or she out-qualifies me considerably.

Committee interrupted, pursuant to standing orders.

[Continued on page 3637.]