

WORKERS' COMPENSATION LEGISLATION AMENDMENT BILL 2005

Second Reading

Resumed from 17 August.

MR T.R. BUSWELL (Vasse) [5.13 pm]: As indicated in the minister's second reading speech, this bill has been introduced to rectify a number of issues that have emerged from the implementation of the government's workers' compensation reform legislation, which passed through this house last year; in particular, the impact on the capacity of working directors to obtain workers' compensation cover under what has been termed the statutory scheme. The opposition will support elements of this bill, but will oppose one significant element - clause 13, which inserts section 175AA in the act.

It is important to acknowledge, as the minister has done, that, in the lead-up to the introduction of the 2004 reform bill, a major issue arose about the coverage of working directors under the statutory workers' compensation scheme in Western Australia. It emerged that a number of insurers were arguing, when claims were being made, that working directors were not classified as workers of a company and, accordingly, were not to be covered by the statutory scheme. This position was unfortunately being supported by an increasing body of legal precedent, and it was quite clear that something needed to be done to address the situation. Thousands of Western Australian small businesses had for many years been paying workers' compensation premiums, expecting to have cover when they called on it. It was unfortunate that, despite paying premiums for many years, the cover they expected was increasingly being denied to them by insurance companies, and that position was being supported by a growing number of legal cases. The response of the government to this situation was quite interesting. It was simply to remove working directors from the statutory scheme. The government proposed to force working directors to seek cover from alternative insurance products, such as income protection insurance.

I was surprised, when reviewing the second reading speeches for the workers' compensation reform package of last year, to discover that this change attracted very little attention and comment. I suspect the reason was that it was a very complex piece of legislation covering a variety of aspects of the workers' compensation arrangements in Western Australia. I was surprised because, as we have had time to consider the changes that were passed last year, it has become obvious that the consequences for working directors, many of whom, I hasten to add, work in small businesses or for themselves, would be quite disastrous. A number of those people, particularly a lot of older workers, found that they had great difficulty in obtaining the alternative insurance cover suggested by the government, and others found that the cover that they were able to obtain was quite expensive. For many people, particularly small contractors, the combination of their age and the costs may be very difficult. In fact there was a situation in Western Australia in which a large number of working directors would be effectively forced to work without any workers' compensation cover.

In reviewing the bill before the house, and the legislative process that led to it, I was forced to ask myself what would have made the government place thousands of Western Australian small business owners, who often are working directors, in a seemingly impossible situation. The answer lies in the fact that, as is often the case with the government's policy directions in industrial relations, a deeper, nastier ideological agenda was driving the changes. This ideology has been widely espoused by the Western Australian union movement for some time, and was acknowledged by the minister in his second reading speech on the previous legislation and is again acknowledged in the second reading speech supporting the bill before the house; that is, there is an objection from the government and the trade union movement, not only in Western Australia but across the Labor-held states of Australia, to workers becoming self-employed private contractors, and effectively moving into a style of labour relations well beyond the sphere of influence of the trade union movement.

Point of Order

Mr J.C. KOBELKE: I do not wish to interrupt the member's argument but, due to an oversight, the house has not declared this bill urgent. Is it appropriate that I now do so?

The ACTING SPEAKER (Mr M.J. Cowper): In essence, this debate is out of order, but I will take the direction of the house on this matter.

Declaration as Urgent

MR J.C. KOBELKE (Balcatta - Minister for Consumer and Employment Protection) [5.19 pm]: I do not wish to delay or further interrupt but, in accordance with standing order 168(2), I move -

That the bill be considered an urgent bill.

The bill would not be due for debate until another day without this motion.

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MR T.R. BUSWELL (Vasse) [5.20 pm]: I seek clarification. I understand the minister's desire to have this bill ruled as urgent. For the public record, I would like to hear the minister explain to the house - it appears he will not - the reason this bill has been introduced into this house at this time and why it is considered urgent. I have my suspicions.

Mr J.C. Kobelke: I will get my opportunity to go through that at the end of the second reading.

Mr T.R. BUSWELL: I seek also clarification pertaining to the decision to move this motion after the debate has commenced.

The ACTING SPEAKER (Mr M.J. Cowper): The member has a valid point. I will hear from the minister about whether to proceed with this bill.

Question put and passed.

Second Reading Resumed

MR T.R. BUSWELL (Vasse) [5.21 pm]: As I indicated, I am interested to understand - if only to have it on the public record - the minister's reasons for declaring the bill urgent. He indicated that he would state his reasons, which I appreciate.

Getting back to where I was before the debate was interrupted, which is where I am going to be, the Minister for Consumer and Employment Protection argued at the time, as he still does, that the rise of what I term the "principal-contractor" working relationship is, in many cases, an attempt by nasty employers to exploit the worker and to transfer their responsibilities - under this act - for workers' compensation cover to a particular worker. That is my understanding of one of the basic drivers for the changes that occurred last year and the changes that are attempting to be rectified this year. The minister and his colleagues in the union movement consider that preventing working directors from accessing workers' compensation and forcing those costs back onto the principal - if I can use that term - would be another barrier in the fight to prevent the dramatic growth in Australia of what I will term, for the sake of simplicity, the "enterprise worker". This represents a classic case of an increasingly irrelevant ideology driving what in this case transpired to be very poor public policy.

I spoke to people to get some background information on this bill. A clause in it has often been referred to as the Austal Ships clause. The minister may be aware of Austal Ships Pty Ltd and the nature of the working relationship it entered into with its employees. Austal Ships altered the nature of the working relationship so that it became very difficult for its workers to become involved in union and trade union activity. I was interested to do research into Austal Ships. The Premier pricked my memory of it last week when he was in the chamber. I take the opportunity to quote from *Hansard* the Premier giving members a history lesson and extolling the virtues of the Western Australian shipbuilding industry, which has emerged in recent years. He said -

In recent times, all these influences have come together to create a magnificent industry that exports all over the world. I was at Austal Ships Pty Ltd recently. It had just finished a magnificent new high-speed ferry that has now been taken on by a Greek shipping company to transport tourists around the Greek Islands. That ship is now playing a role in the Greek tourism industry. The shipbuilding industry is very much an export industry. It also involves a tremendous amount of skilled labour and creates wealth and opportunities for many Western Australians.

The Premier, who at every opportunity ardently opposes the implementation of Australian workplace agreements and direct relationships between employers and employees in the workplace, visited Austal Ships and basked in the reflective glow of its glory. However, in this chamber he will stand time and again and criticise anybody who dares to move out of a collective industrial relations system and engage in direct employer-employee relationships. I wondered whether he lectured Austal when he was there and whether he let it know what he thought of its workplace relations practices. I suspect he did not. John Rothwell was the executive chairman of Austal Ships when he was interviewed by a newspaper about Australian workplace agreements. The article says that, similar to a number of big employers, Austal moved the work out of the state industrial relations system - funny that - and onto federal AWAs after Labor won office in WA in 2001 and scrapped the previous government's individual workplace agreements. Mr Rothwell said that the workplace agreements were working very well for Austal and its employees. He said that the company had great harmony, that morale was sky-high and that the company had never experienced industrial conflicts, let alone strikes. He said also that AWAs gave the company and its employees a high degree of predictability. The employees knew exactly what they could do and exactly what they were entitled to. In the end, if a contract to build a boat were entered into, provided it was managed well, the company did not fear that something it had nothing to do with would cause the boat to be delivered late.

As a further aside regarding AWAs, an interesting letter fell into my hands recently. The letter writer acknowledged that some individual agreements provide employees with above-award terms and conditions,

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particularly in the mining and building and construction industries. I was surprised to learn that that letter was from the minister to the Master Builders Association in Western Australia and that in that letter the minister acknowledged that the very industrial instrument that the Premier rallies against every time he has an opportunity could have positive benefits for employers and employees.

Members may wonder why I am talking about Austal Ships. The point to be made is that legislation that was passed last year and the legislation that is before us this year is driven by ideology. Austal Ships is continually used as a case to prevent certain types of workplace arrangements from proceeding. It is always interesting, when considering the types of changes that the government introduced last year and that we are trying to fix today, to ask what ideological framework drives them. It is interesting to consider the workers' compensation reforms that were introduced last year and to read some of the statements that the Premier and the minister have made. One of the comments I found interesting was made by the Premier, who repeatedly gave commitments that workers' compensation premiums would not rise as a result of the government's reforms. The government has been caught out on that front. We have all read the reports from WorkCover's actuaries that talk about increasing costs and associated premiums increases of about 14 per cent per annum across the workers' compensation system. That figure will be further impacted on in future years by a factor called erosion. Luckily this year, which is the first year of the reforms, the system had adequate capacity to absorb many of those changes. This year the average recommended premium rate will increase by between two and three per cent. Unfortunately for Western Australian businesses, the real impact of this misguided reform agenda will be felt only in years to come. The one and a bit government members who are here can rest assured that the opposition will do all it can to remind the government and the people of Western Australia of what I am sure will prove to be a series of broken promises in this area.

I will consider some aspects of the current bill in detail. As I indicated earlier, it has been introduced into this house to address the significant problems that the government's 2004 reform program produced in the area of workers' compensation cover for working directors. As I indicated in my introductory remarks, the government supports the changes that will enable working directors to be defined as workers for the purposes of statutory cover under the workers' compensation scheme. Quite clearly, the previous system was inadequate. It was completely acceptable for people to think that, from previous experience, as they had been paying their workers' compensation premiums in the expectation that cover would be extended to them, it would be extended to them when they required it. In his second reading speech, the minister stated that there was a growing body of case law that indicated that that was not the case. Insurance companies were claiming that working directors were not workers. The problems were quite significant. This legislation contains safeguards to ensure that, once a premium is accepted for a working director by an insurer, the working director will be deemed to be a worker and cover will be extended accordingly. Measures are in the legislation to ensure that any disputation will be resolved. Of course, there are provisions to prevent a working director from providing misinformation. By and large, the mechanisms that the government is attempting to put in place - which represent the majority of the bill before the house - are something that we support. It is a far better solution than that proposed by the government last year. It is worthwhile to acknowledge that the minister and his department have worked very hard to get this legislation in the house in time to address what had become a glaringly obvious problem with last year's solutions. As I mentioned, last year's solutions were merely to exclude all working directors from the statutory workers' compensation scheme.

As I indicated in my opening remarks, the opposition is opposed to clause 13 of the bill, which, in my opinion and the opinion of others, effectively places barriers in the path of individuals offering their services to a principal on a contract basis as opposed to the traditional employer-employee relationship.

As I mentioned earlier, in his second reading speech to this bill and in his second reading speech to last year's bill, the minister implied that the reason individuals enter into these types of relationships with principals is because employers take advantage of workers and circumvent their traditional responsibilities under the workers' compensation scheme. To my mind, that is a very narrow and simplistic view of modern Australian workplaces. It ignores the dynamics of the modern workplace and the myriad factors that work together to drive workers and principals into the world of the enterprise worker as opposed to the traditional employer-employee relationship. It is quite clear that a lot of benefits flow to individual workers and employers from the enterprise worker-style of arrangement. As I mentioned earlier, at the end of the day, when a person takes the time to trawl through the plethora of industrial relations, workers' compensation and occupational safety and health legislation that is emerging at the state level in Australia, it can be seen that it is a tactic that has been attempted time and again to attempt to place barriers in the way of enterprise workers being encouraged. In a way, it is unfortunate that the minister and his Labor colleagues around Australia seem intent on preserving what has become an increasingly small component of the Australian labour market. In many ways, it has become increasingly irrelevant. It is a fact that we are working within an Australian economy in which the centralised nature of work and the economy is changing. The days of big business, big government and big trade unions are rapidly moving into the pages of

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history books. Despite the minister's best efforts and those of his colleagues in other states, he will not be able to stand in the path of what is an ever-increasing momentum for change. One of the factors driving change in the Australian labour market is the rise of the self-employed. I prefer to refer to them as enterprise workers. I will give an example. In 1998, approximately two million Australian workers were in the trade union movement. At that time, approximately 1.6 million Australians were self-employed: that is, they were enterprise workers. By 2004, the number of self-employed had risen by approximately 14 per cent to almost 1.9 million Australians. The number of trade unionists had dropped by almost 10 per cent to 1.8 million. In other words, out of an Australian working population of approximately 9.6 million people, one in five in the workforce were enterprise workers as self-employed or in a contractor-principal relationship, however a person chooses to define it. The nature of the enterprise worker in the modern Australian economy is very difficult to categorise. The enterprise worker is no longer simply a white-collar worker or IT professional in what was deemed to be the new economy. Enterprise workers in Australia are found across industry and occupational spectrums. One of the growth areas for the enterprise worker concept is in traditional blue-collar industries. Nearly half of all workers in the construction industry are now classified as being self-employed. Similarly, the rise of the enterprise worker has occurred across all Australian Bureau of Statistics occupational categories. As an example, 45 per cent of people classified as managers or administrators, 30 per cent of those classified as tradespeople, 25 per cent of those classified as advanced clerical or service workers and 14 per cent of labourers in the Australian labour market classified themselves as self-employed. It is clear that, in their hundreds of thousands, Australian workers and employers are turning their backs on the tired old system of centralised wage fixing and the tired old workplaces dominated by the trade union movement. In fact, it is of little surprise to learn that, in contemporary private sector employment in Australia, the number of workers in trade unions has dropped to approximately 18 per cent. That figure is heading south with some speed. We have seen the emergence of far more flexible workplaces that have driven tremendous growth in productivity in Australia.

I was going to talk about real wage growth but I saw some figures recently produced that may have countered that argument. It is very interesting that there has been a number -

Mr M.P. Whitely: Did you just admit that you saw some figures that poked a hole in your argument and that, therefore, you would not use them?

Mr T.R. BUSWELL: Not at all. I just decided to not discuss them with the minister because I could not see the point in saying something that I knew he would have to respond to. I do not accept the figures.

Mr M.P. Whitely: You decided not to go there because the new evidence shows that the Howard government's arguments are a nonsense.

Mr T.R. BUSWELL: I did not say that. Unfortunately, the member for parachutes has incorrectly interpreted what I said. I merely indicated that I did not want to discuss real wages because I knew the minister would get up and I did not want to cause him the distress of having to refer to that body of evidence.

Mr J.C. Kobelke: I assure the member that he will not distress me.

Mr T.R. BUSWELL: The outcome of that report is far from supported across the economic spectrum. I do not pretend to be an expert on economics. However, there is little doubt that productivity growth improved in Australia due to the changes that transpired in workplaces during the 1990s. Figures have shown that productivity growth in Australia rose from approximately 1.2 per cent to three per cent as labour markets changed.

Real wage growth aside, it is interesting to logically consider which groups in the traditional Australian economic system would be most threatened by a change in the nature of the Australian workplaces that takes control and influence from those who had it under the old employer-employee relationship. Of course, one of the principal groups is the Australian trade union movement. Through its controlling influence, there is absolutely no doubt that it conferred on them significant political and economic power.

The opposition supports the majority of the bill. It goes some way towards addressing issues that arose from last year's legislative program. However, the opposition does not support clause 13, which, under the guise of attempting to protect employers from employees, imposes barriers on the growth of what has emerged as a legitimate and beneficial form of workplace agreement in Australia. It is unfortunate that the government has fallen into line with the obvious demands from its trade union constituency and has taken the view - a view that is reflected across most of the Australian Labor states - that barriers need to be put in place, wherever possible, to prevent the rise of the enterprise worker. It is an attempt to halt a change. However, the momentum of that change will make that change inevitable. Evidence of the inevitability of that change is all around us, because the statistics indicate the changing nature of the work place.

In conclusion, it is important that the government and the minister understand three things. First, we in opposition will continue to resist these attempts to prevent the further expansion of the principal-contractor

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relationships, in whatever legislative approach the government may choose to take. Secondly, we look forward to the pending federal reforms, which will go some way towards preserving and protecting the rights of individual contractors. Thirdly, we take comfort in the knowledge that despite the best efforts of the minister and his colleagues in other states to interfere in the evolution of the Australian workplace, the Australian people, both workers and employers, will continue to vote with their feet. The rise of the enterprise worker, and the decline of the unionised labour force and associated staff, will continue. With those few words, and being mindful of the minister's desire to bring his advisers to the table, I will conclude my comments, but I hope I have made very clear the opposition's position on this bill.

DR J.M. WOOLLARD (Alfred Cove) [5.40 pm]: I do not think I have ever seen legislation like this come into this house previously. The Workers' Compensation Legislation Amendment Bill is riddled with words like ("W") and ("E"). Is the minister deliberately trying to confuse people? It makes it very difficult to follow the bill. I do not understand why the actual words could not have been put in the bill. It is ludicrous that a person who is reading the bill has to continually put in the actual words.

In principle I agree with this amendment bill. However, I look forward to the consideration in detail stage, because I have some questions about the individual clauses. We discussed this problem last year during consideration in detail on the Workers' Compensation Legislation Bill. I remember raising with the minister the problem that may arise at supermarkets such as Dewsons or Supa Valu if the wife, for example, has an accident at work, but because she is one of the directors she is not covered by the workers' compensation legislation. My understanding of this bill is that it will cover situations such as that.

Mr J.C. Kobelke: You would need to be more specific about the particular situation, but the bill clearly deals with situations such as those in the Findlay case, in which the court found that because the husband and the wife owned the store as directors, they were not workers; therefore, the insurance company did not need to pay them workers' compensation, even though they had a valid claim. The insurance company used that technicality to mount that case. We are trying to ensure that if the working directors of a small business take out workers' compensation insurance, they will receive the benefits if they have a valid claim.

Dr J.M. WOOLLARD: I am pleased the government is coming on board for the workers. It seemed to me last year that the government was very much coming on board for the insurance companies rather than the workers.

Proposed section 10A(1) states -

In this section -

"company" means a company as defined in section 5(1) other than a public company as that term is defined in the *Corporations Act 2001* of the Commonwealth;

What are the public companies in Western Australia? If the minister is proposing that this bill be rushed through tonight, then I will not have much time to do my homework on those companies. However, I could certainly do some more homework and get my comments to someone in the upper house. I would like to be given a list of a few of those public companies so that I can consider who is proposed to be excluded from this legislation.

Proposed section 175AA(1)(b) states -

the arrangement was entered into on or after the coming into operation of section 13 of the *Workers' Compensation Legislation Amendment Act 2005*; and

The minister has said that the purpose of this bill is to give some protection to workers. Does that mean that, up until the time this legislation was introduced in 2005, these directors had been protected by the previous legislation, and they had lost that protection, or is this a new clause that the minister is putting in place for those directors?

Mr J.C. Kobelke: It is to provide protection as a transitional measure. However, those questions are best answered in consideration in detail.

Dr J.M. WOOLLARD: I hope it is not just one or two cases. If those cases were not covered previously, why are we making this retrospective to the coming into operation of section 13? Why does this new proposed subsection need to be in the bill?

Mr J.C. Kobelke: The current model has certain protections and liabilities. We are now bringing in a new model. We are seeking to provide protection during the transitional period from one model to the other. That is what this relates to.

Dr J.M. WOOLLARD: Does that mean that these people were covered under the old model?

Mr J.C. Kobelke: If they were, they will not lose those rights.

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Dr J.M. WOOLLARD: That is fine, so long as they were covered before and this is not just for people who have become directors since that time.

I would like some more clarification of some of these clauses. If the minister is not proposing that we finish this bill tonight, I wonder whether I could be given a copy of the bill without the words ("W") and ("E"), because it would make the bill easier to understand. Does the minister intend to amend the legislation in this form, with the words ("W") and ("E")? Goodness!

I think I will be able to support this legislation. However, I would like some more information during consideration in detail.

MR J.C. KOBELKE (Balcatta - Minister for Consumer and Employment Protection) [5.47 pm]: We certainly will go into consideration in detail to answer some of the questions in detail. However, I need to address three issues in summing up the second reading debate. Firstly, I thank the two members who have spoken for their general support of the bill, although the Liberal opposition has raised some issues about one particular matter. I said I would put on the record why this is an urgent bill. This bill was introduced in the first week of this three-week sitting. Therefore, it has not been before the house for three weeks; it is one week short. The reason it is urgent is that the matter relating to working directors must be implemented by 18 November, otherwise the uncertainty that currently exists may lead to people taking out extra premiums, along with all the costs that go with that. We are trying to provide absolute certainty on the issue of working directors prior to the major reforms that were passed last year and that will be implemented on 18 November. There are a range of reasons that it is 18 November. It was originally proposed to be 1 July. However, the new system will require the training of hundreds of medical practitioners in order to work. Also, because the system is integrated, we cannot do just one bit and not another. From 1 January last year, a lot of statutory benefits have come through from those changes. However, the major package that goes to whole-body impairment, and issues that are tied to that, will come in on 18 November. We have declared this an urgent bill in the hope that it will go through this house this week. It will then go to the Legislative Council. If the Legislative Council can deal with the bill expeditiously, we will then not have a problem in ensuring that, on 18 November, there is absolute certainty about the law as it applies to working directors.

The member for Vasse alluded to Austal Ships Pty Ltd. That is a very successful and internationally respected company that has grown in an astronomical way over the past 20 years. Its industrial relations policies, which the member for Vasse raised, is an issue that we can debate. However, the Premier has not been critical of Austal Ships. The government's policy as an employer has always been to use the collective. We encourage other people to do that, but we have left that choice to employees and employers. To the extent that they comply with the law, it is their right to do so. Many workplace agreements do not comply with the law. That does not reflect on any particular company; it is a fact. The issue raised by the member for Vasse is a very real one; namely, whether changes to workers' compensation premiums for working directors is somehow part of a bigger game of being opposed to people established as small companies when they basically provide a service. The member for Vasse called those people enterprise workers. The member is right in that this matter is caught up in the mix. However, there are very good stand-alone reasons that comprehensive workers' compensation coverage should be available for all people working in the same place. It amounts to the whole approach we take on occupational health and safety. The member for Vasse can make a contrary argument. I am not saying that only one argument can be made on this issue. However, from the government's point of view, if a range of people work in the same workplace all under the same management, it makes good sense for occupational health and safety to be the responsibility of the management. Responsibilities and rights apply to all the people; they must be shared. It is a key responsibility of management to ensure proper occupational health and safety systems are in place for all the people working for a company, even if the workers are set up as individual companies and paid on the basis of being companies. Their occupational health and safety should be managed by the people who control the workplace. Similarly, one of the issues with occupational health and safety for the people who control the workplace is that the premiums relate to how safe the workplace is. The premiums for the workers' compensation system in that workplace should be met by the employer. Regardless of whether those employees are actually employees, as they normally are, or are paid as individual companies, their premiums should all be collected for that workplace because it is an indicator of how safe that workplace is. The vast majority of statistics recorded for occupational health and safety are workers' compensation statistics. That is what we base it on. The two systems sit side by side; they are related. It makes very good sense to ensure that in that workplace workers' compensation is paid by the principal employer, not subcontractors or working directors who work for the principal employer.

The third and final point I make to the member for Alfred Cove is that the definition of an employee is incredibly complicated. Every time I talk to people about this issue, I have great difficulty getting my head around what we are talking about. It has been built up in case law over decades. A range of laws relate to the definition of

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employer and employee. We are referring to "working director" because the courts found in the Findlay case that a husband and wife, who were clearly doing all the work in the store, were not employees and, therefore, no compensation was paid when the wife had an accident. It comes down to fine technical definitions of employer and employee. That is why the letters "W" and "E" have been used instead of the words "worker" and "employer". We are specifically defining in the statute who is an employer and who is a worker. That is why it is written in what seems to be a rather strange fashion.

Dr J.M. Woollard: Why not say "person"?

Mr J.C. KOBELKE: Because we are dealing with the technical definition of an employee for the purposes of workers' compensation. Words such as "person", "employee" or "employer" could be used, but they attract the connotations of their meaning in general usage and in other acts. The definition of who is an employee for the purposes of workers' compensation is being specifically set out in a well-defined and strict way. It makes it perfectly clear.

Dr J.M. Woollard: You have given the definition. You are saying there is a difference between an employee and an employer. Proposed section 175AA(1) provides that a person ("W") executes work for another person ("E").

Mr J.C. KOBELKE: If the member for Alfred Cove reads the rest of the clause, as she obviously has, she will find that a complex set of conditions help define when those terms can be rightly applied for the purposes of workers' compensation. The devices used by parliamentary counsel are the letters "W" and "E" to make their meaning absolutely clear. It might seem strange so some people, but I accept that it is an appropriate device for the purposes of this amending bill to make that clear definition. It is a complex issue.

Dr J.M. Woollard: If it will protect some directors from not being able to make a claim when they get hurt, I will support it, but I have never seen anything as -

Mr J.C. KOBELKE: I have tried to explain the reason for that device, which may appear somewhat novel. I thank members for their contribution and look forward to discussing and explaining the contents of the bill during consideration in detail.

Question put and passed.

Bill read a second time.

Leave denied to proceed forthwith to the third reading.

Sitting suspended from 6.00 to 7.00 pm

Consideration in Detail

Clauses 1 to 8 put and passed.

Clause 9: Section 10A replaced and transitional provision -

Mr T.R. BUSWELL: I raise this matter more by way of clarification. Proposed section 10A proposes obvious modifications to the definition of "working director" etc. However, proposed section 10A(1) states -

"company" means a company as defined in section 5(1) other than a public company . . .

I will be interested to hear an explanation from the minister of why working directors of public companies have intentionally been excluded from the definition of "working director" for the purposes of workers' compensation under the act.

Mr J.C. KOBELKE: It is open to public company directors to obtain alternative policies of insurance, such as professional indemnity or income protection, which they may judge to be more applicable to their insurance requirements. Therefore, we are talking about public company directors rather than the normal working director; that is, someone who has established a company in which he is doing the work hands on.

Mr T.R. Buswell: Let us take the example of a significantly sized non-public company; that is, it does not trade on the stock market and whatever under the definition in the Corporations Act. Some private companies in Australia are of a similar size to public companies, and their directors will, for the purpose of the act, be defined as workers. Why would the government distinguish between the two? I imagine both types of company would have the economic capacity to support income protection and/or indemnity insurance, although I am not exactly sure how indemnity insurance can help with workers' compensation type cover. Why would the government distinguish between the two when there are examples of firms of similar sizes?

Mr J.C. KOBELKE: There is a range of different categories, and it is a matter of judgment about where some of these lines are drawn. We are setting up this scheme to cover an ordinary working director; that is, someone

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who establishes a company in which he and his family, or in which he, his family and a small number of employees, are the company and perform the work. We have that at one end, and at the other are large public companies in which working directors will clearly not be involved with selling product or producing the goods or the services. At that end, we do not think we have a problem, so we are not including them in the scheme whereby they can opt to be covered by our state's statutory workers' compensation scheme. The issue through the middle of that continuum is that of companies, from small to large, in which the working director really has some involvement in the management of the company. That may be strictly at a managerial level, or it may be doing the work that produces the goods or services. We had to draw the line somewhere, so we have drawn the line to allow for that choice for the non-public companies.

Dr J.M. WOOLLARD: Will the minister tell me - he must have some figures because he has excluded these public companies - which are these public companies? How many companies does this apply to in WA?

Mr J.C. Kobelke: Sorry, I cannot give you an answer. We haven't done that sort of work.

Dr J.M. WOOLLARD: Can the minister not tell me any public companies to which this will apply? Why is this provision in the legislation if the minister cannot tell me what it means?

Mr J.C. Kobelke: Directors of public companies are not covered at the moment, so we have not changed the situation for them.

Dr J.M. WOOLLARD: This is new legislation. The government has put it on the table.

Mr J.C. Kobelke: We are bringing in a new model to provide coverage for working directors. Directors of public companies are currently not covered. There has been no suggestion that anyone has a concern with that; therefore, we are not changing the arrangement to cover that part of the field.

Dr J.M. WOOLLARD: In that case, the minister is saying that the government is not changing that arrangement because it does not know which companies they are.

Mr J.C. Kobelke: No; I am simply saying that public companies are being left as they are currently. However, we are trying to look after the working directors who are in small companies and who quite often produce the goods and services themselves, and that is the problematic area as raised by the Findlay case.

Dr J.M. WOOLLARD: I am pleased that directors of companies will be given some support under this workers' compensation legislation. However, as the government is excluding public companies, I thought the minister would be able to give the house a bit more information. A year ago the minister was not willing to consider covering general company directors, and all of a sudden he is now not prepared to cover public company directors. We do not know what effect this legislation will have on them. Will legislation come back to the house later because - I cannot remember the case the minister mentioned earlier - there is another case? A wife in a public company somewhere - again, I am thinking from a female's perspective - might suffer down the track. It is a bit disappointing that the minister has put this legislation on the table but he cannot tell us which companies are involved so that we can see the working environment in those areas.

Mr T.R. BUSWELL: I want to put forward an example and seek the minister's guidance, if he is prepared to offer it, which I am sure he will be. I will use the example of the managing director of, say, Wesfarmers, which is a publicly listed company. I am not sure whether he would be classified as an employee, an employer or a working director. However, if he was employed in that capacity, and he was at the Wesfarmers Premier Coal Ltd site in Collie and a coal truck ran over his foot, he would not be covered, it being a public company. However, if I were the managing director of Hancock Prospecting Pty Ltd, a private company, and I was inspecting one of my mine operations in the north west and my foot was run over, would I be classified as a working director because I am with a private company as opposed to a public company? I ask that out of interest more than anything else.

Mr J.C. KOBELKE: This must be put in the context of what we are seeking to do; that is, to give working directors a choice of whether they wish to take out an employment indemnity insurance policy, which is workers' compensation, and be covered in case something happens. We are giving working directors the choice. They do not have to take out the policy. We are not providing that choice to directors of public companies. They are not currently covered by the system and we are not changing that. The problem is with working directors of small to medium-sized companies. The law was changed in 1993 and again last year. Those changes and court decisions have created considerable uncertainty. People working in their own companies who, in many cases, have paid large premiums have not been able to successfully pursue a claim because of a technicality. We are seeking to remove that problem, so that when a working director takes out workers' compensation insurance - it is his choice; it is not compulsory - he will have the best assurance that we can give that the insurer will deliver on that policy if he makes a rightful claim.

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Dr K.D. HAMES: I apologise, but I have not been following the argument. This is a good chance for me to clarify something, even though the minister might have said something already. During the time that I was out of Parliament, I was one of three directors of an Aboriginal heritage company that had no employees. When we undertook contracts for the state government on the Dampier to Leonora infrastructure corridor - we managed the Aboriginal heritage clearance - we had to take out workers' compensation insurance, even though we had no employees and were told that the insurance did not cover us as directors. I am sure that there are many small companies around, such as those run by husbands and wives in shopping centres, for which one person may be a director. I want to ensure that when a director takes out workers' compensation insurance, as our company had to do for government contracts, the director will be covered by it. For instance, in terms of the company for which I was a director, if I had to travel out in the bush or if one of the directors who did the typing got repetitive strain injury, we should have been covered by the insurance policy.

Mr J.C. Kobelke: That is exactly what it does.

Mr T.R. BUSWELL: I refer to proposed section 10A(4). I have received representations from a group that the minister consulted during the development of the bill; that is, the National Insurance Brokers Association. I discussed this matter with the minister's advisers the other day, who kindly provided me with a briefing note. I am just seeking clarification of a point for the public record. The concern raised by the National Insurance Brokers Association relates to the situation that arises under employer indemnity insurance in which a worker effectively has two methods of recourse in seeking a remedy. The first is under statutory provisions. For example, if a worker loses X per cent of his leg, he will get X dollars. The second is access to common law provisions under the employer's indemnity insurance policy. The concern put to me by the representatives of NIBA was that the definition of "the director is a worker" under proposed subsection (4)(a) could be tightened. NIBA contends that the majority of employer indemnity insurance policies provide common law benefits to persons employed by the company under either a contract of service or an apprenticeship. The concern is that the definition of a working director as a worker under proposed subsection (4)(a) does not specify the matter clearly enough to give working directors an avenue to common law redress, given that common law redress is extended to a person employed by a company under a contract of service or an apprenticeship. NIBA believes that that issue could be addressed under proposed subsection (4)(a) by amending it to read, for example, "the director is a worker under a contract of service". I seek the minister's guidance on that matter. I appreciate that I was provided with a briefing note. Notwithstanding that, I seek some clarification for the public record.

Mr J.C. KOBELKE: Although clause 10 refers only to a section, I understand that it provides that coverage under common law. We sought legal advice on the issue the member raised of trying to cover that matter under this proposed section as a liability or indemnity. However, there is no easy fix. This area of law is complex enough in itself that if we sought to apply a patch - that is, to go down the road the member has suggested - it is feared that this would open up a whole lot of other problems. The advice I have received is that it would be problematic to modify the way in which indemnities and liabilities operate at common law, given that negligence and liability is shared in many circumstances. It is too complex a matter to try to provide a simple patch. The advice I have received is that it would not work. As I have indicated, another clause opens up the common law possibilities.

Mr T.R. Buswell: When you say "shared", is that shared effectively between the principal and the contractor?

Mr J.C. KOBELKE: Yes; and the worker.

Mr T.R. Buswell: It appears from reading some later clauses on contrivance and the like that there is nothing to prevent a principal from seeking an indemnity from a contractor as it relates to his common law obligations. If you accept that the indemnity is not prevented, as it is in the case of the statutory scheme, could it not be argued that the concept of "other", being the principal or the contractor, applies?

Mr J.C. KOBELKE: Lawyers will pick over these fine legal issues to try to open up an advantage. The fundamental issue is that, at common law, a person cannot contract out of a liability. If an arrangement were put in place to simply shift liability, the advice I have received is that it would not work. A smart lawyer might get away with it in a particular case, but as a general principal it cannot be done.

Clause put and passed.

Clauses 10 and 11 put and passed.

Clause 12: Section 160A inserted -

Dr J.M. WOOLLARD: I am a bit concerned that clause 12 is something that insurance companies will again use to avoid paying out more than they have to pay out. I refer particularly to proposed section 160A(2)(a), which states -

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a representation made by the company in respect of the director when applying for the issue of a policy or contract of insurance in respect of that director was false or misleading in a material particular;

Could the minister provide some instances of what he would consider to be false or misleading?

Mr J.C. KOBELKE: This clause and some other clauses restore the ability of working directors to be covered by the statutory scheme, and more directly and clearly address the issue of legal uncertainty created by past court decisions. We have to clear up those matters so that it will work. If a working director decides that he wants to take out workers' compensation insurance, the insurer will accept the premium and an insurance policy will be in place. It cannot then opt out of that on other technicalities, as has occurred in the past. We are trying to close off the technicalities whereby the insurer could simply say, "We don't have to pay up because you're not a worker for the purposes of the act." The issue is that if, in taking out that policy, the working director had misrepresented his case in terms of equity, the insurer should be able to void that policy. For instance, if initially he said that he was working full time and earning \$120 000 a year, and he later submitted a claim and told the insurer it would have to pay him so many thousand dollars a week - the weekly payment up to the maximum - and it turned out that he was working only half a day a week and earning \$20 000, that would be a gross misrepresentation and the insurer would not be liable to pay him according to what he had said when entering into that policy.

Dr J.M. Woollard: What happens if his circumstances changed between when he took up the contract and when the accident occurred? Does it mean he misses out completely?

Mr J.C. KOBELKE: It has nothing to do with circumstances changing; it is about giving false or misleading information.

Dr J.M. Woollard: Provided that at the time they take out -

Mr J.C. KOBELKE: If the circumstances change, the person may have certain requirements in his contract of insurance to inform the insurance company of the change. This clause relates to the contract of insurance and the director being false and misleading in a material particular. It may involve his being false and misleading because the director said that he was not married when in fact he had a de facto relationship, or something like that that is caught. If it is simply a minor issue that is not a material fact to his case or if it is misleading in some way that does not affect his insurance, it is not caught. However, if it is false and misleading in a material particular relating to the insurance contract, the claim can be voided.

Dr J.M. Woollard: If someone at a supermarket states his normal role - for example, he may do the accounts - but one day there is a shortage of staff and he helps with lifting the goods onto the shelves -

Mr J.C. KOBELKE: Surely that is not false and misleading. What would be false and misleading is a working director in a shop who did cleaning and a range of other physical things - for example, packing shelves and moving rubbish bins - that would put him into a higher classification than he has stated in the insurance policy and which would require him to pay a premium of four per cent of what he earns. If he misrepresented that to get a lower premium rate by saying he did only office work, that would be false and misleading. If a director is doing one job and at some stage he changes his duty statement, that is not false and misleading. However, if he signs the policy that says he does clerical work when he knows that 90 per cent of his work is physical labour, he has deliberately misled for the purposes of getting a lower premium. That is false and misleading and if a director does that, the insurer can back out of the claim. It cannot do that if the director had changed his work habits or style of work. That is a different matter.

Dr J.M. Woollard: What happens if that person usually does paperwork?

Mr J.C. KOBELKE: That is not false and misleading.

Dr J.M. Woollard: Would he be able to put in a claim for workers' compensation if the injuries he suffered were from doing work that the insurance policy did not cover? The insurer would say that the claim for a back injury was false and misleading because only office work was stated in the contract. The insurer would use that to not pay out that worker.

Mr J.C. KOBELKE: It would, but it would have to satisfy a court if the matter were contested.

The ACTING SPEAKER (Mr P.B. Watson): The minister will resume his seat. If the member would like to ask another question, she can seek the call.

Dr J.M. WOOLLARD: I would like to hear more of what the minister is saying because I am concerned that the insurance companies never want to pay out more than they have to. They would argue in court that a company director took out an insurance policy at a particular level and it did not cover the activity that caused the injury and he should have taken out insurance to cover everything. Under this clause a company director

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would be disadvantaged if he had an accident in the workplace while perhaps working on the floor one day when several staff were off sick.

Mr J.C. KOBELKE: The words are clear -

... the director was false or misleading in a material particular;

The issue is that if the insurer thought it had been lied to or misled and if the action went to court, it would have to prove that the facts in the insurance contract signed by the working director had been false or misleading.

Dr J.M. Woollard: Will you put on the record, in case this sort of issue does end up in court, that this clause will not apply to someone who has put down as part of his workers' compensation insurance contract that he does office duties; that is, that it will not apply to an occasion when staff have been sick and he has helped out on the floor and had an accident? Will that count as false or misleading as set out in this amendment?

Mr J.C. KOBELKE: No. The words are very clear.

Dr J.M. Woollard: I am asking for yes, it would apply, or no, it would not apply.

Mr J.C. KOBELKE: The member is asking for the impossible. False or misleading goes to what was in the mind of the person when he signed the contract and whether he sought to mislead. That is a judgment made by the court.

Dr J.M. Woollard: Does not the minister think he is misleading this Parliament by not putting the facts on the table?

Mr J.C. KOBELKE: No, I am not.

Dr J.M. WOOLLARD: The minister said that the purpose of this legislation is to give support to directors. We are referring to someone like a director of Supa Valu, Dewsons, mini markets and other such firms who normally does the paperwork but on one particular day helps out in other areas, has an accident and suffers a back injury. Under this clause, the insurance company would say the cover was for office work; therefore, the terms of the contract were false and misleading and he should have taken out much more comprehensive insurance. As he did not do that, it will not meet his claim.

Mr T.R. BUSWELL: I have been sitting in a state of repose listening to the argument. The member for Alfred Cove has raised a significant point; that is, the practicalities of how working directors are often called on to work in their businesses, which often are small businesses, and their duties are not easy to define. Those duties are certainly not easy to define at the beginning of the year when one is filling in the workers' compensation estimates, which is what working directors are required to do. Occasionally, the categories of work that a working director is called on to do are duties he could not reasonably foresee when filling out the form. The concern the member raises is valid; that is, we need to protect working directors from the scenario that could arise when an insurance company turns around and does not accept the claim.

This bill is before us tonight because insurance companies have a tendency to use legal recourse to prevent working directors being defined as workers. The insurance companies could use the fact that the duty a working director was performing when he incurred an injury was not one he defined in the form at the start of the year. It is a reasonable concern. I feel the minister's answer is somewhat wanting in that he is not acknowledging the scenario that has been pointed out. Members on this side of the house would appreciate it if the minister were able to elaborate further on this issue.

Mr J.C. KOBELKE: The situation seems to be pretty black and white. I have a range of insurance policies, as I am sure do both members opposite, and such fine print is found in every policy: if a case is stated that is contrary to the facts, the policy can be voided. This provision has the added protection of an arbiter to determine the matter. As there is an "and" between paragraphs (a) and (b), two paragraphs must be satisfied, and more protection will be afforded with this measure than is the case with my many policies on my home and assets. One must tell the truth to the insurer. Insurance cannot be taken out on the basis of misleading on the insurer's liability - that is a standard requirement in the insurance business. This provision has an added protection in that one must qualify for both (a) and (b), and an arbiter will help to determine the matter.

Dr J.M. WOOLLARD: No doubt the minister brought this bill to the house with good intent. However, the minister had only to state that an exceptional circumstance such as an office worker helping out on the factory floor would not be construed as false or misleading information. As the minister is not willing to make that statement, he will not cover such people. The minister is not protecting company directors.

Mr J.C. Kobelke: I totally reject what you're saying.

Clause put and passed.

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Tony O'Gorman

Clause 13: Section 175AA inserted -

Dr J.M. WOOLLARD: One could read this clause in the following manner -

- (1) For the purposes of this section, a person . . . executes work for another person . . . under an avoidance arrangement if -

- (a) the work is executed under an arrangement that is contrived to enable . . .

Another person -

to have the benefit of . . .

A person's -

services without having liabilities and duties as . . .

A person's -

employer under this Act;

- (b) the arrangement was entered into on or after the coming into operation of section 13 of the *Workers' Compensation Legislation Amendment Act 2005*; and

- (c) while the arrangement is in effect -

- (i) . . .

A person -

executes work principally for . . .

Another person -

on behalf of a company of which . . .

A person -

is an employee or director . . . ; and

- (ii) the work is directly a part or process in the trade or business of . . .

Another person. The provision continues -

- (2) Unless the arrangement is, or is of a class of arrangements, prescribed by the regulations, an arrangement is contrived for the purpose described in subsection (1)(a) if -

- (a) before executing work under the arrangement, . . .

A person -

was . . .

Another person's -

worker and provided substantially similar services; or

- (b) although the circumstances described in paragraph (a) did not exist before . . .

A person -

executes work under the arrangement, . . .

Another person -

intimated, before the arrangement was entered into, that . . .

Another person -

was unwilling to enter into an arrangement for the provision of substantially similar services that would have resulted in . . .

A person -

being . . .

Another person's -

worker.

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I could go through the rest of the provision in that way. Inserting “a person” and “another person” would make sense of this provision, rather than using “W” and “E” to refer to the specific person involved, which would take people ages to work out. If a query were raised in the community, people would need to read the clauses and relate them back to the “W”s and “E”s - it would be very confusing. The minister said “W”s and “E”s were used to make the scheme less confusing; however, it makes it far more confusing. What is the problem with the wording I read to the house? Could the minister understand it? What difference does the insertion of those words make to the “W”s and “E”s, other than being far more understandable?

Mr J.C. KOBELKE: When the member read out the wording of the provision, I followed the wording in the bill. As I inserted the “W”s and “E”s, it made sense. When the “W”s and “E”s are left out, the provision makes no legal sense at all. The legislation is trying to determine when a relationship exists between an employer and a worker. The problem is that the worker in some circumstances is also the employer. That is why it is a complicated matter. The same person might be the employer in one circumstance and a worker in another. We are trying to establish that relationship to make it clear who is responsible in such a relationship so that a person can be deemed a worker for the purposes of workers’ compensation.

Dr J.M. WOOLLARD: Why not have in the clause “and/or”, so that it reads “employee and/or employer”, rather than have the “W”s and “E”s?

Mr J.C. KOBELKE: I am not lawyer, let alone a lawyer with expertise in this area. Previous attempts by me last year and by the previous government before then to achieve a workable scheme were found to have deficiencies. This scheme was thought up. It took WorkCover considerable time and many meetings to look at various models, and this scheme was developed and put to all key stakeholders and a number of top insurance lawyers representing both workers and insurance companies. They picked over this model and recommended some minor grammatical changes. At the end of the day, they said that they thought this wording would work as it provides clarity of the principles that need to be enshrined in legislation. I do not say it is easy. It is not. It is very complex. I am assured by the extensive consultation that has taken place, and by the expertise of the people involved, that this wording will give the legal clarity required. It may not be clear to the member and me, but if such experts tell me it will provide legal clarity, I am happy to accept that view.

Dr J.M. WOOLLARD: Very often bills put on the table in this house, as was the case with the workers’ compensation legislation last year, are almost all taken from legislation found in the eastern states.

Mr J.C. Kobelke: That’s not true at all.

Dr J.M. WOOLLARD: The bill last year was very similar in many areas. As that often is the case, and as the minister has stated that legislators and insurance companies have looked at this measure, are directors covered in the eastern states in the way this bill seeks to cover working directors -

Mr J.C. Kobelke: I think you’re talking about a wrong issue. This is about a person who is deemed to be a worker. It is a different aspect. It is not guaranteeing that they can seek insurance.

Dr J.M. WOOLLARD: The question I was trying to get to was as follows: as we often take legislation from other states, is this a new concept for Western Australia? I have never seen anything like this before in any other legislation in this state.

Mr J.C. Kobelke: My understanding is that this is a home-grown model.

Dr J.M. WOOLLARD: We will probably have a mini-empire in our legislative branch that will give us “W”s, “E”s, “X”s, “Z”s and goodness knows what else.

Mr J.C. Kobelke: It is another example of Western Australia leading Australia!

Dr J.M. WOOLLARD: I do not know about that. We have a long way to go before we do that with such legislation.

Mr D.T. REDMAN: I ask a couple of questions regarding the deeming of workers. This clause refers to conditions that will apply to avoidance arrangements. Rather than seek clarification on the legislation, I ask questions about a couple of circumstances. I had a short chat with the minister prior to the dinner suspension. How would the legislation apply to shearers, and specifically cocky shearers; namely, somebody who shears for a couple of days and then moves to the next farm? Such people are not under contract arrangements, although they are shearing contractors. Would they be deemed workers under an avoidance arrangement? The second circumstance is a small business with regular contracted services such as cleaning; that is, somebody who comes in on a regular basis to provide contracted services to clean a small business. I would like clarification of those two employment circumstances and how this legislation applies to those people.

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Mr J.C. KOBELKE: The backdrop is that we are giving choice to the working director. The issue we are now dealing with is a contrived arrangement to employ someone as an independent contractor or an independent director who is not providing a direct service to that business. The test upon which this will be judged is whether there is a relationship between a person who executes the work for another person - the employer. If someone employs a person as a shearer and that person fulfils a contract to work, he will generally be seen as an employee.

Mr D.T. Redman: As distinct from a shearing contractor?

Mr J.C. KOBELKE: The contractor would then be the employer. We are not dealing with someone who is simply being paid to do a job, because if he does that the person he is working for has a responsibility to cover him for insurance. If that person sets himself up as a working director, or if he is cajoled or forced into setting himself up as a working director to do that work when someone else could have done it as an employee, under this deeming arrangement, if it can be established that he really was a worker for the purpose of the act, the employer will be liable for insurance cover.

Mr D.T. Redman: What about the second example?

Mr J.C. KOBELKE: The people who control the big teams have workers' compensation insurance to cover all their shearers and workers.

Mr D.T. Redman: I accept that. What about the other circumstances involving a regular contractor or a cleaning service with a couple of people running it? They may have their own business and they contract to other small businesses. I guess they are working directors. Is there any obligation on the businesses they are working for with regard to workers' compensation?

Mr J.C. KOBELKE: In the vast majority of cases those people are treated as workers and they are currently covered. That employer would be caught if he tried to set those cleaners up as a company or directors of that company. They would still be doing all the cleaning work as workers, and they would be caught under this legislation as workers. This deeming provision would ensure that they were caught as workers, and the person employing them would be required to cover them for workers' compensation. That employer may be a master contractor or the actual company they are working for. That is not the material issue we are dealing with. The specific issue we are dealing with is whether they were set up as working directors for the purpose of trying to avoid the liability of workers' compensation insurance. If that were the case, they would be captured under this legislation and would be deemed to be workers.

Dr J.M. WOOLLARD: The minister lost me with the example of the shearers. Can we apply this to a supermarket in the metropolitan area. I have worked in a supermarket. To whom would this apply? The member for Stirling referred to cleaners. A large supermarket that employed a cleaner would have to take out insurance for that regular cleaner. If the regular cleaner worked, say, three days a week at the supermarket and three or four days a week somewhere else, he would be paying his own insurance for that other job. Would the insurance companies be able to double-dip under this clause? Does this mean the employee would be paying workers' compensation himself and would also have an amount deducted from his wages when he worked at the supermarket because the supermarket had to pay so much workers' compensation? I would appreciate it if the minister used that scenario to explain the situation.

Mr J.C. KOBELKE: The member for Alfred Cove has raised two different issues. If the people who currently work in supermarkets, whether filling shelves, or in service or checkouts, or cleaning, are employees of the supermarket, clearly the employer is required to have workers' compensation insurance to cover them. Clause 13 deals with a situation in which the manager of a supermarket - the employer - lines up the employees at the back of the store, in the presence of a lawyer or someone else, and tells them to sign a document to establish themselves as companies, so that the cleaner, the checkout lady or man and the shelf-filler become designated companies with themselves as working directors. This legislation provides that they are workers for the purposes of workers' compensation, and the employer - the owner of the grocery store - must cover them for workers' compensation. The employer cannot avoid that on the basis that he has contrived to employ those people as working directors. That is the intent of the clause.

The second part of the member's example refers to part-time employees. That already happens. The employer covers those employees for workers' compensation only for the wages they are paid while they are working for him. Lots of people now work part-time and have two or three jobs because they cannot get the full-time job they wish. I am not talking about people who want part-time work; I am talking about people who want full-time work or more and they have to do two or three part-time jobs. If a person works 20 hours a week in one store and 20 hours a week in another job that is totally unrelated, employer A will pay for insurance cover only for that first 20 hours, and employer B will pay for insurance cover for the other 20 hours. Therefore, there

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should be no double-dipping. There could be by accident, but there should not be by intent. The employer signs an insurance contract at the start of the year stating that his wages bill will be, say, \$50 000 or \$500 000, and that forms the basis for the annual premium. At the end of the year he submits an acquittal, which indicates that the total amount of wages paid was more or less than the amount indicated, and he either gets a refund or he pays extra. That is how workers' compensation insurance premiums are paid. The member is concerned that the insurance may be paid twice, but that does not happen now and this legislation would not change that.

Dr J.M. WOOLLARD: I now appreciate how this applies in a supermarket setting. I had not heard of that before. Can the minister give me some statistics of who, why, how many and where employers are setting up their employees as company directors? There obviously must be some tax benefit, but it is an area with which I am unfamiliar. Does the minister have any statistics to support this legislation, or can he say where it has come from?

Mr J.C. KOBELKE: I do not have statistics, because no-one has done research, of which I am aware, to try to quantify this, but it clearly happens in a range of areas. I had a constituent almost 10 years ago who was cleaning houses for a major building company. He was told that if he wanted to continue cleaning the newly built houses, he would have to set himself up as a partnership or a company and the employer would pay the company. Therefore, this very large builder would not have to pay workers' compensation and, because he was contracting the work, he would not be caught by any minimum wage requirements. It was a way of getting the work done much more cheaply. Clearly we want efficiencies but, when considering what is fair and equitable, there is a point at which those people need to be covered by workers' compensation insurance. A cleaner has very little in the way of tools - perhaps a vacuum cleaner, a broom, a brush and a mop - for cleaning houses, but he would not be covered for workers' compensation if the employer had set him up as a company to avoid workers' compensation premiums. This legislation means the employer cannot do that. The cleaner clearly would be an employee and the employer must cover him. Even if he were a part-time employee, he is doing specific work for the employer and the employer is liable for the workers' compensation insurance cover. If the employer did not take out the policy and that employee was injured, the employee could sue the employer and, under the law as it is set out in this bill, if the facts supported that case the employee would win and the employer would be liable for the costs of that workers' compensation claim.

Dr J.M. WOOLLARD: That sounds very reasonable and I would certainly like to think that those people would be covered. Although the minister has said that he has no statistics, if he believes there is a big market of abuse -

Mr J.C. Kobelke: It is more the fear that it could grow and lead to greater exploitation than we already have. As well as shutting off where it happens, there is concern that there is pressure for more people to be pushed into this form of employment, in which they have no workers' compensation cover.

Dr J.M. WOOLLARD: I was thinking that when this legislation is enacted, the minister could look at how many more people in these areas are being covered, so that he can get some statistics. It is not necessarily previous statistics. The minister's concern is what may happen in the future.

Mr J.C. Kobelke: The bigger issue is to educate the public and employers so that they know their responsibilities.

Mr T.R. BUSWELL: Clause 13 will insert into the act proposed section 175AA. Members could sit in this place all night and ask specific questions about specific matters. Members who have spoken previously have indicated that there is some degree of complexity in this clause for the layperson - albeit the slightly impaired laypeople who occasionally come into this chamber - to interpret. It is a difficult clause to interpret. In fact, I have some legal advice that has been provided to a variety of industry groups by a legal firm called Jarman McKenna Barristers and Solicitors. It concludes by saying that this bill further refines the draft bill, which was circulated for comment in July 2005, and that it deals with most of the problems associated with the working directors, although in a somewhat complicated manner. The minister has indicated - I defend him on this point - that if his intent is to achieve what he wants to achieve, which I do not agree with, it is pretty difficult to do. Some workers' compensation practitioners have suggested to me alternate formats that could have been used in the legislation, but the government has chosen not to use them. I suggest that this is the government's legislation and it will suffer the consequences if it is difficult and unworkable when it comes into practice. It has been put to me that it is a lot better than that which exists currently. I very clearly put on the record that the opposition does not support the implementation and the development of proposed section 175AA. I outlined my reasons for that lack of support in my second reading contribution. I listened to the comments of the minister about the fear of the use of proprietary limited companies, which those nasty employers are forcing on to employees by, as the minister so dramatically put it, lining them up out the back of the supermarket and saying, "Sign up or we're going to shoot you!" It just does not happen like that. There are isolated situations.

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Mr J.C. Kobelke: I agree; it is not a common practice.

Mr T.R. BUSWELL: It is not. Our contention is that this government and Labor governments across Australia, under the encouragement of the trade union movement, have been attempting to prevent the rise of the enterprise worker for a number of years. It has failed to do so and it will continue to fail to do so, because the benefits to individual workers and to employers as a collective group are far greater than just transferring a percentage of the payroll that forms the workers' compensation payments.

Mr J.C. Kobelke: The two are not mutually exclusive. Some unions have been very successful in signing up as members people who are self-employed contractors or companies, because they see the unions representing their interests. The transport industry will be one example.

Mr T.R. BUSWELL: That is a fair point. Notwithstanding that, we on this side of the house believe that people are willing to enter into this style of workplace agreement. Tens of thousands of people are doing it in Australia. One in five Australian workers are employed as an enterprise worker. It is a trend that is here to stay, and I believe it is a trend that will grow. We want to do all we can to encourage that. Benefits flow from it, but, of course, with benefits come responsibilities. I see this as a contrived interference with people's freedom to choose the workplace system that suits them best. We will oppose this clause. I could speak on individual clauses, but I do not think that would be to anyone's benefit. When it comes to the vote, we will oppose this clause and we will oppose it for those reasons. We see this as an attempt to enforce an ideological agenda on to a form of workplace organisation that Australian workers and employers are embracing and from which Australian workers and employers are generating significant benefits. We will observe the minister's endeavours to prevent the rise of the enterprise worker in other areas of his legislative responsibility, and we will oppose those as they arise as well.

Dr J.M. WOOLLARD: I have one final question after listening to the member for Vasse. My main concern with this clause is that it is gobbledegook. Bearing that in mind, the member for Vasse has said that this clause will prevent enterprise workers. The minister has said that this clause will protect workers who are being forced into company agreements. I can see the protection provision, but where is the enforcement provision? Is there an enforcement provision in this clause? Have I missed it?

Mr J.C. Kobelke: The member for Vasse is talking about industrial relations, not workers' compensation. Workers' compensation, because of the cost burden, has industrial relations implications. I think that is fair enough. The member spoke about industrial relations primarily and how workers' compensation changes have an impact on the decisions made in the industrial relations arena. He is not taking issue with what it does to the workers' compensation area, but he sees it as the government putting up another barrier to flexibility and freeing up general workplace arrangements, because now the employer will not be able to shift that responsibility to employees, which some people feel they should be able to do in a freer way.

Dr J.M. WOOLLARD: Does the clause provide flexibility in the workplace for those people who select to set up a company and to work -

Mr J.C. Kobelke: It does not affect that; it just goes to liability for workers' compensation insurance. That is all it deals with.

Dr J.M. WOOLLARD: It just insists that there be workers' compensation for people who are working. The description the minister gave was -

Mr J.C. Kobelke: No, only to the extent that it may shift a cost liability, which has implications for the employment arrangements.

Mr T.R. Buswell: It is a philosophical point of difference.

Dr J.M. WOOLLARD: There is protection and there is no enforcement.

Mr J.C. Kobelke: There is protection, but there is no mechanism in the clause that will directly affect the contract of employment that is taken out.

Dr J.M. WOOLLARD: If people wish to set up their own company to work for people, they can. I wanted to make that clear. Although I do not like the way the clause is worded, I like its intent.

Mr A.P. O'GORMAN: I support the clause. A number of young constituents who primarily work in the beauty therapy trade have approached me over the past 12 to 18 months. It is one of those trades in which this arrangement has been foisted on them. These young girls have to get an Australian business number, which they have to submit because that is the only way they can get paid. On top of that, they must also carry their own workers' compensation insurance and those other issues that would normally be done by a company. These 18,

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20 and 22-year-old girls have been forced into this arrangement. I know that because they come into my office every other week to tell me that this is how they must operate. They are being paid \$12 an hour, which is below the minimum rate of pay. Employers are using this exact arrangement to exploit young people. I know it and the minister knows it. We must stop this before John Howard's industrial relations legislation comes in and young people are exploited even more by being forced into workplace agreements. This clause is absolutely necessary, and I commend the minister for putting it into the legislation.

Mr D.T. REDMAN: I would like a little more clarification because I am still confused. I return to the example of contract cleaners. We have had a business for about five years. We had never employed a cleaner before because our staff had always done the cleaning, but we have got to the point where we employ a cleaner for a few hours a week. As far as the cleaner's business is concerned, I guess it is a company. I do not know what sort of business structure the cleaner has but the cleaner undertakes a number of cleaning jobs around town. We had not previously employed this person and we wanted a cleaner. I guess the question is whether it is avoidance or not. This is not a case of active avoidance because we are not out to avoid anything. We are picking this person out of the marketplace to come in and do the job. Does this legislation mean that if we bring this person in for a few hours a week to do that work, our business will be liable for workers' compensation insurance payments for that person when that person has never previously been an employee?

Mr J.C. KOBELKE: The members' company, to use it as an example, might have a number of employees and might take on an additional employee who does a slightly different job, which is the cleaning job. The member, as the employer, would be liable for workers' compensation insurance for that employee. If that person came along and said that he was a company, he worked for himself and that he was a working director, the employer would still be liable to pay workers' compensation insurance for that person. It gets complicated if the employer did not employ the person but went to ABC Cleaning and contracted ABC Cleaning to provide a cleaner. In such circumstances, ABC Cleaning would be liable and it would factor it in to the hourly rate that it charged the employer.

Mr D.T. Redman: Therefore, it must be removed to that point before we are not liable for the payment.

Mr J.C. KOBELKE: If the member took somebody on as a worker who had simply formed himself into a company, that would not change the member's workers' compensation obligations; the member would still have the same workers' compensation obligations because he would be employing that person, even as a working director of that person's own company.

Dr J.M. WOOLLARD: In the example the minister has just given, workers' compensation insurance would be taken out at the beginning of the year. If six months into the year someone was brought on board as a new worker -

Mr J.C. Kobelke: The way it works is that, at the start of the year, an employer would anticipate that he would have six employees and his total wages bill would be \$300 000. If, during the year, the number of employees increases to seven or eight, the employer would simply report that at the end of the year. The policy allows for that flexibility. The problem is if an employer says he has six employees and he has actually got 20. If there were sudden business growth and the number of employees, for example, were to increase from 20 to 40, that could be explained and there would be no problem, but if it were clearly misrepresentation, there would be a problem.

Dr J.M. WOOLLARD: It is done on the numbers, so providing someone who comes in comes within the six employees, he is covered?

Mr J.C. Kobelke: Even if the number goes up, as long as it is in the ballpark, the adjustment takes place at the end of the year.

Clause put and a division taken with the following result -

Extract from Hansard
[ASSEMBLY - Tuesday, 30 August 2005]
p4770b-4787a

Mr Troy Buswell; Mr John Kobelke; Acting Speaker; Dr Janet Woollard; Dr Kim Hames; Mr Terry Redman; Mr Tony O'Gorman

Ayes (25)

Mr P.W. Andrews
Mr J.J.M. Bowler
Mr A.J. Carpenter
Mr J.B. D'Orazio
(*Teller*)
Dr J.M. Edwards
Mrs D.J. Guise
Mr S.R. Hill

Mrs J. Hughes
Mr J.C. Kobelke
Mr R.C. Kucera
Mr F.M. Logan

Ms A.J.G. MacTiernan
Mr J.A. McGinty
Mr M. McGowan

Ms S.M. McHale
Mr A.D. McRae
Mr N.R. Marlborough
Mr M.P. Murray

Ms M.M. Quirk
Ms J.A. Radisich
Mr E.S. Ripper

Mrs M.H. Roberts
Mr P.B. Watson
Mr M.P. Whitely
Mr D.A. Templeman

Noes (18)

Mr C.J. Barnett
Mr D.F. Barron-Sullivan
Mr M.J. Birney
Mr T.R. Buswell
Mr G.M. Castrilli

Dr E. Constable
Dr K.D. Hames
Ms K. Hodson-Thomas
Mr R.F. Johnson
Mr D.T. Redman

Mr A.J. Simpson
Mr T.R. Sprigg
Dr S.C. Thomas
Mr T.K. Waldron
Ms S.E. Walker

Mr G.A. Woodhams
Dr J.M. Woollard
Dr G.G. Jacobs (*Teller*)

Pairs

Dr G.I. Gallop
Mr T.G. Stephens
Mr J.R. Quigley
Mrs C.A. Martin
Mr J.N. Hyde

Mr P.D. Omodei
Mr B.J. Grylls
Mr G. Snook
Mr J.H.D. Day
Mr M.J. Cowper

Clause thus passed.

Clause 14: Section 303A inserted -

Mr T.R. BUSWELL: I just seek quick guidance.

The ACTING SPEAKER (Mr A.P. O'Gorman): One member is on his feet. I ask members to take their conversations outside so that I may hear him.

Mr T.R. BUSWELL: A very wise observation, Mr Acting Speaker.

The ACTING SPEAKER: Flattery will get you nowhere.

Mr T.R. BUSWELL: I am interested to explore proposed section 303A, which will be inserted into the act. Do I take it to read that if a person executes - I mean employs - a person under an avoidance arrangement -

Mr P.W. Andrews: You would like that.

The ACTING SPEAKER: The member for Southern River is not in his seat.

Mr T.R. BUSWELL: Irrespective of workers' compensation implications and who has liability, is the employer subject to the \$5 000 penalty even if W is paying the compensation in the avoidance arrangement? In other words, my concern is that this clause may prevent contractor-principal relationships, full stop. Will the minister provide some clarification?

Mr J.C. KOBELKE: I understand that the member's question is genuine; however, I do not see how it specifically relates to clause 14. Clause 14 refers to a penalty of \$5 000 for a person who sets up an avoidance arrangement, which is what we alluded to in proposed section 175AA.

Mr T.R. Buswell: If E is paying W's workers' compensation, is that therefore not an avoidance arrangement?

Mr J.C. KOBELKE: It is not an avoidance arrangement.

Dr J.M. WOOLLARD: Given that clause 14 relates to clause 13 and proposed section 175AA, I can advise that there was some confusion when we discussed proposed section 175AA(1)(c). Some members are under the impression that proposed section 175AA means that if a plumber or electrician does work in a supermarket, if someone comes in to lay new floor tiles in a supermarket, he or she would have to be covered by workers' compensation. In our discussions, the minister led me to believe that that was not the case and that a supermarket would only have to pay workers' compensation for its direct employees who work on a regular basis and not those who are called in to do odd jobs. Will the minister clarify that, because if workers' compensation applies to those who perform odd jobs, there will be serious repercussions on small business.

Mr J.C. KOBELKE: I know this refers to the previous clause, but there is a vague connection, so for the sake of clarity I will confirm that what the member for Alfred Cove said is correct. All the conditions in proposed

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section 175AA must be met before people are deemed to be workers. A key part of that, to which the member alluded, is contained in proposed section 175AA(1)(c), which reads -

while the arrangement is in effect -

That is, while the person is set up as a company -

W executes work principally for E on behalf of a company of which W is an employee or director . . .

That is, the person as the company director executes work principally for E and not in a minor or peripheral way. The second conditions reads -

(ii) the work is directly a part or process in the trade or business of E.

Dr J.M. WOOLLARD: Will the minister take out the Ws and Es and put it in simple language? Will the minister use the example of a plumber or electrician?

Mr J.C. KOBELKE: I am coming to that.

Point of Order

Mr T.R. BUSWELL: I am sorry to raise a point of order, but it would appear that we are discussing a clause that, unfortunately, we have already dealt with. I seek your guidance, Mr Acting Speaker.

Dr J.M. WOOLLARD: Clause 14 refers to proposed section 175AA, which is contained in clause 13. Therefore, I am able, under this clause, to seek clarification of the earlier clause.

The ACTING SPEAKER (Mr A.P. O'Gorman): I could not have said it better myself.

Debate Resumed

Mr J.C. KOBELKE: If a plumber does work in someone's house, that plumbing work clearly is not directly a part or process in the trade of the business of E.

Mr D.T. Redman: What about cleaning - is it not the same?

Mr J.C. KOBELKE: No, because if a person runs a business, having the store cleaned is a part of that business. A non-business situation - that is, a domestic situation - does not get caught. If it is something that is not directly a part or process in the trade of business - that is, a tradesperson comes in to fix the hot water system - that is not caught. If, on the other hand, a person sells hot water systems, or if hot water systems are an integral part of a cleaning business, that might be a different situation. Clearly, that is the reason that we have used this definition. There are myriad possibilities. There have been many court cases about this issue and about whether there has been a contract for service or of service. Technically, they are treated quite differently. If a person does something peripheral for a company and that is not principal work or not directly a part or process of the company's trade or business, the company is not liable to cover that person for workers' compensation. If being a sheep farmer provides only a certain percentage of a person's income, that person will have an issue if he employs someone to shear his sheep. If a person owns a hobby farm and gets someone to shear Dolly the lamb, and no money is made from that, clearly the person who does the shearing will not have to be covered by workers' compensation. The definitions given in proposed section 175AA(1)(c) have to be worked out on the facts of each particular case.

Mr D.T. Redman: I suspect that will be a bit of a grey area.

Mr J.C. KOBELKE: That is why there have been so many court cases and determinations in this area in not only workers' compensation legislation but also a range of other statutes. People have sought to find out where the boundaries are between someone providing a contract of service as opposed to providing a contract for service.

Clause put and passed.

Clauses 15 to 29 put and passed.

Clause 30: Section 5 amended and transitional provision -

Dr J.M. WOOLLARD: Will the minister provide a bit more clarification on this clause? Again, was this covered prior to the previous workers' compensation amendment legislation or is this a new amendment?

Mr J.C. KOBELKE: It may look complicated, but it is quite specific. The issue is that the legislation went through last year. From 1 January, a range of improved statute benefits flowed straight on to injured workers. A lot of matters got caught up with whole body impairment, which comes into effect on 14 November. One of the things linked to that was the improved benefits paid to the family or dependants of a worker who is killed. That

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was increased from \$138 000 to \$200 000. Unfortunately, people will have been killed between 1 July and 14 November. We are simply saying, as our intention was on 1 July, that the family or dependants of anyone who died in that period will be eligible for the \$200 000. This provision retrospectively allows a \$200 000 instead of \$138 000 payment for the period 1 July to 14 November.

Dr J.M. WOOLLARD: Are death benefit amendments the only area that slipped through the legislation last time?

Mr J.C. Kobelke: It is the only one we are retrospectively picking up to make available.

Dr J.M. WOOLLARD: Are others being made retrospectively?

Mr J.C. Kobelke: This is the only one.

Clause put and passed.

Clauses 31 and 32 put and passed.

Title -

Mr J.C. KOBELKE: I do not wish to delay the house but I need to make a correction. Much earlier I alluded to the bill coming into effect on 18 November when it is actually 14 November. I have mentioned that date subsequently, but members may find in one place in *Hansard* that I used the incorrect date.

Title put and passed.

Leave granted to proceed forthwith to third reading.

Third Reading

Bill read a third time, on motion by **Mr J.C. Kobelke (Minister for Consumer and Employment Protection)**, and transmitted to the Council.