WORKERS' COMPENSATION REFORM BILL 2004

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 8: Section 5 amended -

Debate was interrupted after the clause had been partly considered.

Mr B.J. GRYLLS: I refer the minister to page 8 of the Bill and the reference to the Chairman of WorkCover WA. Will there be a transfer of staff from the Workers Compensation and Rehabilitation Commission to the statutory authority? How will those changes take place?

Mr J.C. KOBELKE: We will deal with this later when we get to the part of the Bill that makes the changes. Over the years, reports have been produced on the structure of the commission; that is, the board that administers the WorkCover scheme. There was consensus among members of the board that there were difficulties with the existing model and, without going into the detail that we will come to later, it was decided that we needed to move away from sectorial representation. The model we looked at was the Insurance Commission of Western Australia board. It has people with expertise in a range of areas, not representing stakeholders, and who manage it like a major company in the interests of the shareholders; that is, the employers who fund it and the employees that it seeks to serve. It has a transparent management scheme. We are moving to that model. Based on previous reports, Tony Cooke did a report for the Government and we are seeking to implement that report, although we did not pick up all of Associate Professor Cooke's recommendations. When we come to those specific provisions, I am happy to go through them in detail.

Mrs C.L. EDWARDES: I refer the minister to the definition of "industrial award" on page 9 of the Bill. I have gone through this carefully. I do not think the Government intends limiting this particular section, because it is too important to some of the changes that it is putting in place. However, it would appear that it does not take into account all the relevant and applicable industrial instruments, and that it is far too limited. The types of industrial instruments that could be incorporated may fall outside that definition. For instance, do Australian workplace agreements fall totally within the definition of the Workplace Relations Act? What about those who are not on any form of industrial award; how are they dealt with when assessing weekly earnings? Will the minister outline exactly how this applies to weekly earnings and how it could be expanded even further?

Mr J.C. KOBELKE: This is quite a technical area. The member has asked a very pertinent question and I will make sure that I am accurate when giving my answer.

Subclause (3)(e) will amend section 5(1) by deleting the existing definition of "industrial award" and replacing it with a new definition which: includes an industrial agreement made under statute; deletes the reference to the Public Service Arbitration Act 1996, which has been repealed; updates the short title of the Mining Act relevant to the Coal Industry Tribunal of Western Australia; and, updates the reference to the relevant federal industrial relations legislation. These changes largely reflect the view taken by the Compensation Magistrate in the matter of Anna Bradshaw v Education Department of Western Australia (CM-23/00). The new definition includes an award or order made by the Western Australian Industrial Relations Commission, including an enterprise bargaining agreement but does not include employer-employee agreements or Australian workplace agreements. We can deal with the issue of the minimum conditions of employment later. We do not need the definition of an industrial award for that reason. The industrial award does not include employer-employee agreements or Australian workplace agreements.

Mrs C.L. Edwardes: Why is that the case?

Mr J.C. KOBELKE: They are not industrial awards.

Mrs C.L. Edwardes: Are they picked up later in the definition for weekly earnings?

Mr J.C. KOBELKE: When we come to the definition of "weekly earnings" we can return to that and see how it applies in those circumstances, because there are differences. However, here we are seeking to clarify and update "industrial award". I make it clear now that the definition of "industrial award" does not include employer-employee agreements or Australian workplace agreements. That does have consequences but I am suggesting that, because a lot is involved in that, it is best if we discuss that matter when we talk about the changes to be made to weekly payments.

Mr B.J. GRYLLS: I refer the minister to page 13 of the Blue Bill under the definition of "notional residual entitlement". The second line of paragraph (a) refers to "relevant injury". The word "injury" is the amendment

to which I refer. The bottom of that paragraph does not include the word "relevant"; the amendment includes only "injury". Should the word "relevant" be inserted at the bottom of the paragraph?

Mrs C.L. Edwardes: Or the word "that", so you would be talking about "that injury", which is relevant to the beginning. I think it is a drafting error.

Mr J.C. KOBELKE: I can answer the question in part regarding the changes we are making. If the member wants a definition of how it is applied, that is a more comprehensive question. The issue is that most of this section in the Act will remain unchanged after the amendments in the Bill are made to it. The amendments the Government is seeking to make are simply to replace "disability" with "injury" and that will be done globally throughout the Bill. We have already discussed that matter a little. We will also add at the end of paragraph (a) "or impairment resulting from the injury" because we are moving to impairment. The word "impairment" is used in schedule 2 and is based on the injury.

Mr B.J. Grylls: My question is that the top of paragraph (a) refers to the "relevant injury". The word "relevant" was part of the previous Bill but it is not included in the amendment at the bottom of that paragraph in this Bill.

Mr J.C. KOBELKE: It is not there now.

Mrs C.L. Edwardes: It said "that disability" before. Why is it not "that injury"? You are shifting the balance.

Mr J.C. KOBELKE: I am happy to get legal advice on that matter. It is a fine technical point as to whether the substitution of the definite article for the word "that" will have any significance. To me, it does not. We will make a note of it and find out from the draftsmen whether there is any significance in that change.

Clause put and passed.

[Quorum formed.]

The ACTING SPEAKER (Mr A.D. McRae): Although I am sure that I do not have to remind the Leader of the National Party, while he and other members are in the Chamber I point out that when the bells are rung and members come to the door or the Bar of the House, they are required by the standing orders to continue to enter the Chamber. Members cannot stand on the threshold and decide whether to enter the Chamber. Members on the threshold are inside the Chamber and the standing orders require them to enter the Chamber and remain in the Chamber.

Clause 9 put and passed.

Clause 10: Section 10A replaced -

Mrs C.L. EDWARDES: This is an important clause that requires an amendment as a result of some court cases. The current section 10A refers to the exclusion of certain working directors and states -

> . . . a person is not a worker within the meaning of this Act while the person is -
>
> (a) a director of a company in any share of which the person has a beneficial interest; and
>
> (b) engaged or employed by or working for that company,
>
> if the employer company has not complied with section 160 on the basis that the person is a worker.

The proposed section states -

> . . . a person who is a director of a company is, to the extent that the person executes work for or on behalf of the company, taken not to be a worker within the meaning of this Act.

Therefore, an auditor of a firm of chartered accountants who is a director of that company, to the extent that the person executes work for and on behalf of that company, will not be considered a worker within the meaning of the Act except if -

> (a) a company contracts with another person (in this section referred to as the **"principal"**) for the execution of work by or under the company, being work which is for the purpose of the principal's trade or business; and
>
> (b) a director of the company executes any of that work for or on behalf of the company,
>
> that director is taken for the purposes of this Act to be engaged or employed by, or working for, the principal.

Therefore, if the auditor were contracted by the company to carry out a review or work that was outside the normal audit function that he normally conducted, he would fall within the definition of being a worker for the

purpose of this Act. Apart from the fact that a company that contracts with another person is referred to as the principal in this proposed section, the Government has done nothing to alleviate the confusion that has surrounded section 10A of the current Act. Will the minister highlight what he thinks he is achieving by this? Who is being targeted? Who is being excluded? What are the sorts of circumstances to which it applies? The lawyers say the new section is still not right, because it does not clarify the circumstances that have arisen in the courts.

Mr J.C. KOBELKE: This is a problematic area. I am as confident as I can be that the model that we have now arrived at will fix the problem. During the drafting of the Bill many months ago, we actually came up with a different model, and people picked over that and found holes in it, and we then came up with this model. The Bill went through a lengthy process of consultation and evolved through many stages. The final stage earlier this year was to give the Bill to all the key stakeholders. To my knowledge, the Law Society of Western Australia and other people who have looked at the model have not said that it will not work. The issue of working directors and how people contract out is obviously problematic. I will try to explain the clear intent of this proposed new section, and I will then see whether the member for Kingsley or other members believe that some parts of this proposed new section will not deliver on that intent. Proposed new subsection (1) provides that a working director of a company will no longer be defined as a worker of that company. Proposed new subsection (2) provides that if a company contracts to a principal to perform work for the principal, the principal must cover any director of the company if the work is for the purpose of the principal's trade or business, and the director performs any of the work. Proposed new subsection (3) provides that the obligation under (2) applies regardless of the provisions of section 175. I will try to spell that out a bit. The member alluded to the fact that we have a problem because of the Findlay decision. I understand that case involved a couple who were running a delicatessen or a small store, I think in Guilderton or somewhere in that area, and it was determined that even though they had been paying workers compensation premiums, they were not covered by workers compensation insurance because they had set themselves up as a company and were the working directors of that business. This has been a very problematic area. The potential arises for employers to exploit the system by requiring employees or subcontractors to become working directors and thereby shifting the obligation to obtain insurance cover from the employer, whom we are here calling the principal, to the working director's company. It was found in the Findlay case that even though the directors of a company have paid workers compensation premiums, the insurer can reject liability if the directors cannot establish that a contract of employment exists between them and the company. We are seeking to create certainty by providing that working directors cannot insure themselves. Rather, the principal must insure a working director if he is performing work for the purpose of the principal's trade or business. We are not seeking to catch a situation in which a person who owns a company employs a subcontractor who is a working director of a company to cut his lawn or do some other work that is not for the purpose of the principal's trade or business. However, if a person who owns a company employs a subcontractor who is a working director to perform work that is for the purpose of the principal's trade or business, then the principal must cover that person. That person cannot cover himself.

Mrs C.L. Edwardes: What about the example I gave earlier of the auditor who would normally do an external audit of a company but because there was a special accounting requirement employed someone else to do that external audit for him?

Mr J.C. KOBELKE: In that situation there would be the added difficulty of whether it was a contract of service or a contract for service, so it would be necessary to work through that as well. The issue then is whether the person is an employee. There are many different types of arrangements. The person may be working under a specific contract and not actually be an employee. The person may be filling a position temporarily and therefore will be identified as an employee. The point is that if a director of a company is doing work for the purpose of the principal's trade or business, that person must be covered by the principal.

Mrs C.L. EDWARDES: I suppose the confusion also arises because proposed new subsection (3) states -

> Section 175 does not apply in respect of a director referred to in subsection (2).

Section 175 is found in division 2 of the Act, which is headed "Insurance by principals, contractors and sub-contractors". Section 175 is headed "Principal contractor and sub-contractor deemed employers". That adds to the level of confusion that will still exist in proposed new section 10A. Section 175 is proposed to be amended. I will not deal with that now. I want to deal just with proposed new section 10A(3). That adds to the confusion about who will need to obtain insurance and who will not need to obtain insurance. The minister alluded to the problem that arose in the Findlay case of people who are denied insurance cover even though they have paid the premiums. Another issue that arises is that people in the construction and housing industries typically use contractors and subcontractors to carry out work for the purpose of their business. For example, a major housing company may employ cleaners to clean all the houses that it has built. However, those cleaners may also have

their own business and clean other properties as well. A brickie may be doing work for the purpose of the principal's business, but he may also be the principal of his own company and an employer in his own right because he employs people to work on the building sites of other housing companies. That probably applies in other circumstances as well. I do not know the circumstances that apply to shearers. A farmer may employ contractors to come onto his property for a set period to shear his sheep. Will those shearers then be the principals and main contractors and be required to obtain insurance for themselves, or will the farmer be required to take out that insurance? The legal profession is telling me that this will still lead to a great level of uncertainty, not just in determining under proposed new subsection (2) whether it is a contract of service or a contract for service, but also because of the exclusion that is contained in proposed new subsection (3). It may well be that the answer is to delete subsection (3) totally, because that would give greater clarification to what the minister is trying to achieve in proposed new section 10A.

Mr J.C. KOBELKE: Proposed new subsection (3) provides that the obligation under proposed new subsection (2) applies regardless of the provisions of section 175. This will ensure that an employer - the principal - cannot argue that he is only jointly and severally liable under section 175, rather than solely liable, and that he will not be entitled to indemnity from the contractor. That clarifies the connection to section 175.

Mrs C.L. Edwardes: I am sorry, but what does that mean?

Mr M.W. Trenorden: I do not understand that either.

Mr J.C. KOBELKE: It will ensure that the principal is not able to argue that he is only jointly and severally liable under section 175; that is, that he can share the risk. The principal will be solely liable. The principal will be regarded as the employer; that is what we are saying. An employer now is solely liable. Again, this covers that situation through the connection with section 175 of the Workers' Compensation and Rehabilitation Act.

I can answer the other part of the question on which the member sought some explanation by reference to the way the building industry currently works. The principal of a company who has employees, contractors and a range of subcontracting arrangements does not know whether every person he employs is a director of a company. The principal makes an estimate of remuneration and declares it under a heading "contractors and subcontractors" on the standard form. I have filled in a form for my employees for years, and I sign off on whether any are working directors. That is a standard question on all workers compensation forms. There is an area on the form for an estimate of the remuneration of contractors and subcontractors. The same system applies here. An accounting company that has subcontractors working for it bundles them up under estimated remuneration and reconciles them at the end of the year.

Mrs C.L. Edwardes: How would that improve the case of Findlay? A director could say that the remuneration was bundled up, but under this proposed new section 10A the insurance company would say that was not covered.

Mr J.C. KOBELKE: It addresses Findlay in two ways. If the Findlays are running a business, such as a small store, they do not come under any other principal and, therefore, are simply no longer required to pay workers compensation. They would presumably take out public liability and income protection insurance, but they would not come under the workers compensation scheme. However, the large building company is the principal in the example of the husband and wife who set up a company of directors and clean homes for the building company. The building company would enter them as a contractor in its total wages bill and would cover them for workers compensation. The husband and wife, as directors, are not required to take out a policy, but they will be covered.

Dr J.M. WOOLLARD: Will the minister clarify the issue of working directors? Take the example of a husband and wife who own a chain of supermarkets. They are both working directors of all the supermarkets, they have a marital dispute and the wife remains working in one of those supermarkets. Where does she stand in this proposed new section?

Mr J.C. KOBELKE: The difficulty with this area is that myriad circumstances can change the potential answer. If the husband and wife have a company that runs supermarkets and they work in the supermarkets, they are not working for someone else. They are directors of the company and therefore are not required to take out workers compensation. They would not be covered by workers compensation because they are not working under another principal; they work for themselves. The issue then is that in the current circumstance they may have to pay workers compensation premiums but there is a chance that they would not be able to make a claim. Under the changes we are making, they will not be required to take out workers compensation insurance but they could take out some other form of insurance, such as an income protection policy, which many small business people do. This legislation, therefore, makes it clear for them. The member alluded to the couple separating and therefore being in a different relationship, not only personally but business wise, but they may not have clarified

that relationship. One case was brought to my attention of a constituent who was caught in a situation in which the husband was a director on the books but he regarded himself as an employee of the wife, and he worked as an employee. That became a grey area because they had not formalised their position. The husband may, because of the breakdown of the marriage, work in a different role but may not have changed the legal structure of the marriage; then he would have a difficulty. We can deal only with the legal structures that people put in place.

Mr M.W. TRENORDEN: Following on that example, will there be any liability on the policyholder? Take the example of the domestic circumstances the minister talked about. Those people have only domestic workers compensation insurance. They seek someone to do a task and a person turns up to do the job who is, unknown to them, a subcontractor or a director of a company. Who is liable in those circumstances?

Mr J.C. Kobelke: The job must be for the purpose of the principal's trade or business. Someone coming around to cut the lawn or do housework would not be covered by this clause. A retail store owner who gets the lawn or verge outside his store cut, not for the purpose of trade but more because he is civic-minded, would be excluded. The job must be for the purpose of the principal's trade or business.

Mr M.W. TRENORDEN: Is it clear then that it is not the responsibility of a domestic policyholder?

Mr J.C. Kobelke: This provision will not put any further obligation on people, other than the obligations they might have under the Strata Titles Act and the like.

Mr M.W. TRENORDEN: Is it any different for a small business operator?

Mr J.C. Kobelke: The key issue for small business operators is whether they contract an entity, which is a company of directors, to do something for the purpose of the principal's trade or business.

Mr M.W. TRENORDEN: Take the example of a farm adviser coming onto a farm and giving advice on land care and how to run the farm. The farmer may not know a farm adviser, but he finds someone in the phone book and invites him onto the premises. The farmer would have no idea of the structure of that farm adviser's company.

Mr J.C. KOBELKE: That is a very genuine question. I have loved my time on farms but I have never been in a position of managing them, so the member will correct me if I am wrong. Many farms these days employ labour at seeding, harvest and shearing times. Sometimes they are direct employees, but often they are contractors. They must take out workers compensation insurance for direct labour and in some circumstances also for contract labour, but that is a grey area. They will now be in a position to take out a policy each year. I presume that there are very few farmers who do not have some form of workers compensation; am I right?

Mr M.W. Trenorden: Yes, they are told always to take out workers compensation.

Mr J.C. KOBELKE: When they apply for a policy, they give an estimate of their wages for the following 12 months, and at the end of those 12 months they reconcile the figure and either get a refund or pay extra.

Mr M.W. Trenorden: I am not trying to be difficult but take the example of the farmers, Mr and Mrs Jones, that the minister talked about. They do not normally employ anyone, but they take out a workers compensation policy because it is sensible to do so. During the course of the year they invite a consultant onto their property to talk about land care, or whatever. They have no idea of the consultant's company structure, but the consultant comes onto their property. They lodge the form stating that their wages are nil and they have no working contractors.

Mr J.C. KOBELKE: Clearly there is a range of options. If two or half a dozen people come onto their farm to do very minor jobs and the total wages bill is roughly around $4 000, they would be paying the minimum premium for a policy anyway.

Mr M.W. Trenorden: Correct.

Mr J.C. KOBELKE: So they just take out the minimum policy.

Mr M.W. Trenorden: That is correct; that is what many people do.

Mr J.C. KOBELKE: They would then nominate the contractors the policy would cover as well as direct wages. Is that right?

Mr M.W. Trenorden: Yes.

Mr J.C. KOBELKE: Then they, as working directors, would be covered and anyone coming onto the property would be covered.

Mr M.W. Trenorden: If you have the minimum policy and no dollar penalty in the premium, will there be no responsibility also on the contractor?

Mr J.C. KOBELKE: The issue is that many different circumstances can arise. The current Act is deficient because small businesses that set themselves up as companies appear to be required to take out workers compensation. Unless they show a contract of employment between the company and the directors - this was lacking in the Findlay case - they are not covered and pay money for nothing. The solution proposed is that a working director need not have workers compensation insurance. Potentially, people could set up a company and no-one would be covered. The Government does not want anyone slipping through the workers compensation system or being forced out of the system. Therefore, the principal will be responsible. I imagine that most farmers already take out a minimal policy. The principal will not need to check whether that person is a director or someone working for a larger company with another policy. This may be a fencing company or a shearer who brings a team onto the farm. In terms of wages for which they are responsible, they will be covered. They will protect themselves, and provide protection for someone who works for them with a company structure and as a working director.

Mrs C.L. Edwardes: Does proposed section 10A not require them to provide a list? A general policy can cover any employee.

Mr J.C. KOBELKE: That is how it currently works; it will continue.

Mr B.J. GRYLLS: This is an important part of the consideration in detail stage. I pose a scenario from our business. Back on the farm, our workers compensation policy is larger than the required minimum amount of cover. We pay a large premium. I assume that any additional salaried component will be added to the policy. We pay about five per cent. We pay $10 000 a year to our accountancy firm. Would we add that $10 000 to our salaried list? I refer to the manager of the accounting firm being a working director. I raise that potential because if the manager of the accounting firm were a working director, the principal at the farm would be required to cover him for workers compensation. If the work is for $10 000, do we add that $10 000 to our list of contractors for workers compensation purposes? If we ask him to send an employee, and not a working director, the employee will be covered by the accountancy firm's policy, and we will not be required to pay.

Mr J.C. KOBELKE: The member raises a valid point. I will try to provide a definitive answer.

Mr B.J. Grylls: I do not want to reach the stage at which people direct that the working director not come to do the job: "Please send an employee; otherwise, I will add that contract to my list and pay insurance on the $10 000." If the premium were five per cent, $500 would be added to the contract depending on who comes to do the job.

Mr J.C. KOBELKE: I answered this point earlier when it was raised by the Leader of the National Party. A key requirement is that the company should have a contract with the principal for work that is the principal's trade or business. Is the member clear on that aspect?

Mr B.J. Grylls: Yes.

Mr J.C. KOBELKE: Does that cover an accountant? Under the current Act, workers compensation is required for a worker. A worker is a person engaged for the purpose of the principal's trade or business. "For the purpose of the principal's trade or business" is an existing phrase in the Act and for which case law exists. The same term is picked up. Therefore, we expect it to be interpreted in the same way. As many contractual arrangements can arise, I cannot give the member a definitive answer to his question about an accountant doing certain work. However, the Bill will not change what is in the Act. If an accountant comes out to the farm now, he attends as a worker. The principal is still potentially liable, even though that person may take out workers compensation cover as a director even though it has no effect.

Mr B.J. Grylls: Can the minister see my point about the working director coming to do the job as opposed to his employee? On a $10 000 job, a small matter like that could be a $500 decision.

Mr J.C. KOBELKE: I say to the member, as a small business person and a farmer, and anyone else in that circumstance, that the level of uncertainty the member sees in this Bill is no greater than the current situation. The member must take out a policy.

Mr B.J. Grylls: I am sure no businesses at the moment are paying for their accountant as part of their workers compensation premium. They would say it is an outside person coming in, not an employee. As I read this Bill, if that person comes out as a working director, he would not be covered by the policy. The principal would be required to cover that person. If the person coming to do the job is an employee of the company, he or she will be covered by the firm's workers compensation and the principal will not be required to pay. People will say, "Do not come as a working director because we will have to pay extra."

Mr J.C. KOBELKE: The member is already caught with a level of uncertainty.

Mr B.J. Grylls: This does not fix it.

Mr J.C. KOBELKE: It has fixed the situation with a small company with a working director. People will know where they stand. As the principal who engages such people, the member has a level of uncertainty now because he is required to cover people engaged in work for the purposes of the principal's trade or business.

Mr B.J. Grylls: Many working directors will not get the job any more!

Mr J.C. KOBELKE: That is what we are picking up with this provision.

Dr J.M. WOOLLARD: The minister in his response to my last question said the situation will be different under the new system. I ask him again. People must take out workers compensation insurance under the current system. A wife may be a director working in a supermarket, and her husband may be in charge of salaries and may pay workers compensation premiums for his wife as a worker. If that couple have a chain of supermarkets and a dispute arises, and under the new legislation he does not pay workers compensation premiums for his wife, who is a director of the company, it would seem that she would be left out on a limb if there were an accident. I am concerned about that situation. Will the Government be writing to all businesspeople? I see this very much as a women's issue. It is often women who give up work to raise families, and then go back to work in such situations. They could be caught by the change to the Act. What will the minister do to assist women who might be caught in the new situation?

Mr J.C. KOBELKE: I tried to explain to the member earlier that the change was made because of a case of the nature she raised. In the Findlay case, a woman who had paid workers compensation premiums was injured, but she received no benefits. I explain it again. Under the current system, the woman who was the director was injured and received no benefit. We are trying to fix that situation.

Dr J.M. Woollard: How will you fix it?

Mr J.C. KOBELKE: I have tried to explain this aspect.

Dr J.M. Woollard: Under this legislation she will not pay workers compensation.

Mr J.C. KOBELKE: The difficulty is that it is currently optional for directors to pay workers compensation. However, they are left in limbo because of the Findlay decision and the complexities surrounding it; therefore, they are not sure whether they will get the benefits. We are making it clear that they will get benefits and where they will be derived from. If they are outside the system, as we are allowing them to be, they will be responsible for taking out alternative cover, which most small businesses do already. It is an attempt to clarify the present, very cloudy, area so that people will be better looked after.

Dr J.M. WOOLLARD: Their ability to operate under a new system is a big change. What will the Government do to make sure that when the system changes those people know about it?

Mr J.C. KOBELKE: Clear advertising and educational material will be released. I am sure the insurers will play a part in that. It will be part of their duty to say what their policies cover and to give the options for people who seek to take out insurance policies for workers compensation and a range of other business insurances they go to their brokers for.

Mrs C.L. EDWARDES: I refer to section 160(2a) of the Act, the proposed amendments to which are shown on page 270 of the Blue Bill. That is the section we are seeking to change. I do not understand the drafting, but we will deal with the section before us. Subsection (2a) currently provides -

> Where, under section 10A, an employer that is a company applies to an approved insurance office under subsection (2) -

That refers to the obligations -

> on the basis that any director of the company is a worker, that employer shall, in relation to each such director, furnish to that office, in addition to the information required to be furnished under subsection (2) -
>
> (a) the name of the director; and
>
> (b) in relation to that director in particular, the information . . .

I was talking about that but the minister said it will stay the same. However, it will not stay the same. Will the minister explain how that fits within all the changes he is proposing?

Mr J.C. KOBELKE: Subsection (2a) is being deleted.

Mrs C.L. EDWARDES: Yes, but it relates to section 10A so obviously there is a correlation between sections 160(2a) and 10A, even though the deletion will apply in a different area.

Mr J.C. KOBELKE: Subsection (2a) relates to the optional nature. We are no longer leaving it as an option for a working director to take out workers compensation.

Mrs C.L. EDWARDES: The working director under section 10A will be an employee; that is, he will have a contract of service so he must be covered - he does not have a choice.

Mr J.C. KOBELKE: The issue is that the working director of the company presently has the option of taking out his own policy for workers compensation insurance. We are saying that working directors cannot take out workers compensation insurance to cover themselves. They must look to other forms of insurance for their protection.

Mrs C.L. Edwardes: Such as accident, sickness benefits etc?

Mr J.C. KOBELKE: Yes. The issue then will be that, if they work in their own business, that is the end of it. If they are in a form of business in which they work for other people, the people they work for are referred to as the principals, and the principals will be required to cover them by their workers compensation policy.

Mrs C.L. Edwardes: We are often asked - I think the minister alluded to it earlier - about ordinary household domestic duties that are obviously not part of one's business, such as cleaners, gardeners etc. Therefore, often household insurance policies have an additional component of workers compensation. Complaints have been made to me that people have taken out that insurance and thought they were covered, but the insurance company has said they were not employees - obviously picking up the principals, trade or business clause. Is there any clarification of that?

Mr J.C. KOBELKE: That area of general insurance is problematic and I am not an expert, so I cannot fully address it. I understand that, in part, although the policy might not be fully effective, it is likely that the insurance company will stand behind the policyholder because, at the end of the day, it will come through to the insurance company anyway. As the member will be well aware, if an insurance company is standing behind a person in defence of a claim against that person, he is in a much stronger position than if he were by himself. What we are seeking to do here does not enter into that area at all.

Mr P.D. OMODEI: Obviously, we will discuss this again under clause 160. Between now and then will the minister please do some investigation? It seems that we have opened up a large issue, particularly for farmers, but not so much with other contractors and heavy machinery type people who contract. In the farming sector nowadays a lot of advice is taken from not only a farmer's accountant but also his stock agent or planner. Those people could be working directors and, therefore, not covered by the principal, who would be the farmer. There is a range of issues. An environmental officer or consultant could be doing work on a farmer's property and slip over and twist his knee or fall in a ditch. It seems that this amendment will require farmers to review their workers compensation policies. Who will know how many of those professional people will be employed over 12 months? In many cases, things come out of left field and, because we need advice, we need those sorts of people to work with us on our property. If the minister cannot answer that question up-front, I will accept that because it is a complex issue.

Mr J.C. KOBELKE: I think I have answered it, in that uncertainties already exist and we are not compounding them any further. I will seek further advice and when we come to clause 160 we will try to provide further clarification.

Mr P.D. OMODEI: The information might be the same as that which the minister provided today, but it would be appreciated if he could throw some more light on the matter.

Dr J.M. WOOLLARD: I refer to working directors. I am now thinking of the numerous small husband and wife businesses, with two working directors, and the members of the family who might work with them, within my electorate. They will change their insurance from workers compensation insurance to an accident or some other insurance policy. Does the minister have some idea of the difference in the rate of premiums? Will it cost people more when they make that change?

Mr J.C. Kobelke: Many small businesses currently have workers compensation and other forms of income protection or accident insurance, so they are doubling up. We are making it clearer - there are still areas that are grey - so that insurance coverage is better for all people.

Dr J.M. WOOLLARD: Does the minister have any idea whether the cost will increase from, say, $50 to $100 a week?

Mr J.C. KOBELKE: The cost will reduce for most.

Clause put and passed.

Clause 11: Section 12 amended -

Mrs C.L. EDWARDES: This is probably the first time we have had an opportunity to discuss the change from disability to injury. Section 12(1) of the Act is being amended to delete "disabled" and insert "injured". Obviously we will discuss further clauses in which "disability" and "injury" have been exchanged, but the minister has an opportunity to put his reasons on record. We are not necessarily talking about the method of assessment and the change to the impairment model. We want to know why the minister has moved from disability to injury.

Mr J.C. KOBELKE: The member is quite right in saying that this happens throughout industry. This is perhaps as good a time as any to seek some clarification. Many people have come to me over the past few years - particularly doctors - asking what disability means, because it is very vague. We have tried to include a word with greater certainty that is more clearly recognised, and that is "injury". I am also advised that "injury" is used in every other system except South Australia. We are not leading the way here. As the member knows, disability is different from injury, in that an injury to one part of the body may be the same for two people, but because of lifestyle, occupation and family responsibilities, the disabilities of that person can be totally different. It becomes more complex when we look at disability, because we must look at the effect injury has on people's lives. Years ago we saw a rush of repetitive strain injuries. The clerical job of typing predominantly involved women, and a woman may have got repetitive strain injury from typing. She may not have been an active sportsperson and may not have had family responsibilities; therefore, her disability would be nowhere near as great as that of another woman who may have had a young child at home and, because of the RSI, could not pick up that child. We then need to look at the consequences of that in terms of disability. Disability is a much wider concept and is much more vague. It is therefore more difficult to tie down exactly what it means. When it comes to looking after a worker, disability is a key issue. The courts will always look at disability and effects on people's lives, but if we want something in the Act that can be recognised in a more objective way, the word "injury" is much better. That does not mean that the word "disability" is not important, and we recognise that disability for two people with the same injury could be quite different, but when we are referring to this legislation it is better to deal with an injury.

Dr J.M. WOOLLARD: The minister has been ill-advised about disability, injury and impairment, because he has just described the benefits of disability over injury. He is trying to put it around the other way. At the moment, disability refers to a person's injury and how that injury affects that person at work, at home and during recreation. As I have said previously, there is a big difference, for example, if a surgeon loses two fingers. Under the current Workers' Compensation Reform Bill, disability and the influence that the accident at work will have on someone's life and the damages he is able to claim will be considered. The new impairment measure will consider the effect that the loss of a couple of fingers will have, whether on a manual labourer or someone who uses his fingers as his main tools of occupational expertise. I think the minister has been given the wrong information. The minister is moving away from disability to impairment and injury. During the briefings, I alerted the minister's advisers to the World Health Organisation guidelines on impairment. Those guidelines not only assess what the minister currently has on the checklist from the American Medical Association, but also take into account psychological and physical factors. WorkCover has advised the minister to steer away from these areas because it might lead to depression or stress. Under the current system it may move a person a certain percentage so he or she could go for a common law claim. A nurse at work could slip while moving a heavy patient and damage her hip and possibly end up with a sexual dysfunction that may lead to a marital breakdown or all sorts of problems. Those factors are currently taken into account under the current disability system, but those factors are not looked at when moving to an impairment system. They are basically thrown out the window. If someone suffers from psychological harm or secondary physical harm, that is not factored in. Research that has been done in South Australia shows that this Bill is discriminatory, because it was found that depression was more a factor post-injury, and more prolonged pain was associated with that injury for people from European countries than from some other countries. Moving away from disability in this Bill means we are discriminating against those people who suffer pain and then long-term depression more so than other people. Can the minister explain? The only reason I can see for excluding psychological harm and pain -

Mr J.C. Kobelke: That is not in the section.

Dr J.M. WOOLLARD: That is why WorkCover is moving away from "disabled". That is where the wool is being pulled over the minister's eyes.

Mr J.C. Kobelke: That does not deal with this section.

Clause put and passed.

Clause 12 put and passed.

Clause 13: Section 22 amended -

Dr J.M. WOOLLARD: Why has this amendment been included and what does it mean?

Mr J.C. KOBELKE: This amendment changes "disability" to "injury". The last part of the amendment is consequential to the changes that have already been made.

Dr J.M. WOOLLARD: The clause reads -

> . . . by deleting "disability shall be disallowed unless the disability results in death or serious and permanent disablement." and inserting instead -
>
> "
>
> > injury shall be disallowed unless the injury has serious and permanent effects or results in death.
>
> ".

This refers again to the great division I have with the minister regarding the word "disability" being changed to "injury". Bearing that in mind, this amendment fits in with where the minister is coming from regarding the advice he has received from WorkCover. It is very disappointing.

Mrs C.L. EDWARDES: The new phrase that is being added to section 22 is the -

> injury shall be disallowed unless the injury has serious and permanent effects or results in death.

Will the minister explain what "effects" means?

Mr J.C. KOBELKE: Section 22 currently reads in part -

> any compensation claimed in respect of that disability shall be disallowed unless the disability results in death or serious and permanent disablement.

The amendment will simply change that to read "any compensation claimed in respect of that injury shall be disallowed unless the injury has serious and permanent effects or results in death". Basically it says the same thing.

Mrs C.L. Edwardes: You are changing the way the impairment assessments will be done and the rest of it. With regard to the whole picture, does "effects" take on a different meaning?

Mr J.C. KOBELKE: No.

Clause put and passed.

Clause 14: Heading to Part III Division 2 replaced -

Mrs C.L. EDWARDES: Division 2 of the Act will be amended from "Division 2 - Lump sum payments for specified injuries" to "Division 2 - Discontinued regime for lump sum payments for specified injuries". Why is the Government changing the title in this division?

Mr J.C. KOBELKE: The new heading reflects the fact that this division applies only to an injury that occurs before the amendment date.

Mrs C.L. Edwardes: It applies only to an injury before -

Mr J.C. KOBELKE: The transitional arrangements throughout the Bill are very complex. The Government is putting in place a range of changes that must be integrated. Those changes refer to use of the term "whole body impairment", particularly with regard to its use as a gateway to common law. They are also used as the basis for schedule 2. In the new model, schedule 2 will be enhanced as a compensation balance against the changes in common law. That is the new system. People who are already in the system will have available to them schedule 2 payments as they are now, not as they will be after the changes have been made.

Mrs C.L. Edwardes: What is being discontinued?

Mr J.C. KOBELKE: When the new system is in place, workers whose injuries occur after the date of proclamation will have access to the new schedule 2.

Mrs C.L. Edwardes: Does that include any worker who is injured even today?

Mr J.C. KOBELKE: No. Any worker who is injured after the day of proclamation will potentially have access to the new schedule 2, which will use a different measurement and is enhanced by the provision of better

benefits in some ways. Any injured worker in the system prior to the proclamation date will have access to the schedule 2 benefits under the current statute. We are changing this system. Division 2 is currently headed "Lump sum payments for specified injuries" and refers to the use of schedule 2. This will continue, but only for those workers whose injuries occur before the proclamation date. That is why it must be changed and retitled. It will then become a transitional arrangement.

Clause put and passed.

Clause 15: Section 24 amended -

Mrs C.L. EDWARDES: Clauses 15 to 21 will have a significant effect under the new system that will be in place. The minister referred to the proclamation date. I assume that he was referring to the amendment date that is referred to in this clause.

Mr J.C. Kobelke: I thank the member for picking up on that. If I may, I will correct what I said by way of interjection. I said "proclamation date" but it would have been technically more accurate to use the term "amendment date".

Mrs C.L. EDWARDES: That is the date on which proposed section 21 of this Bill will come into operation. Section 21 of the Act is headed "Compensation from date of incapacity" and states -

> An employer is liable to pay compensation under this Act from the date of incapacity resulting from the -

The next word will be "injury" rather than "disability" after the amendments are made -

> but clause 9 applies in any case.

Clause 15 deals with existing schedule 2, which applies to workers who were injured prior to the amendment date. Section 24 of the Act is headed "Compensation for injuries mentioned in Schedule 2", which the amendments relate to. We have agreed to that.

I will now move to clause 15(2), which also amends section 24. The Bill proposes to amend "Notwithstanding Schedule 1" in the Act. I note that schedule 2 will becomes part 1 of schedule 2. Can the minister explain the amendment -

> (a) by inserting before "Notwithstanding" the subsection designation "(2)";

That will help us understand what subsection 2 will do.

Mr J.C. KOBELKE: There will be two parts to schedule 2, and their application will depend on the date of the injury. The member alluded to, but did not go fully into, the last part of proposed subsection (4) regarding noise induced hearing loss. This provision will apply from the day on which the audiometric test occurs.

Mrs C.L. Edwardes: That might have happened 20 years ago.

Mr J.C. KOBELKE: It is when a person becomes aware of the injury from the test. Generally, this provision will apply from the date of the injury. The current schedule 2 will apply for injuries that occurred up to the amendment day. A new schedule 2 will apply for injuries that occur from the amendment day onwards. Therefore, the schedule has been divided into part 1 and part 2. It will be easier to see them both as part of the schedule. That is the import of the Government's amendments.

Clause put and passed.

Clause 16: Section 24A amended -

Mrs C.L. EDWARDES: This is probably a clarification of the two schedules, with schedule 2 becoming part 1. With the amendment to section 24A, will lump sum compensation for noise-induced hearing loss still be under the new system, not the old system?

Mr J.C. KOBELKE: This amendment is just consequential, indicating part 1 of the table. If that does not answer the member's question, she may wish to interject about it.

Mrs C.L. Edwardes: That is part 1 of the new table, is it not? The schedule 2 as we know it today becomes part 1, but what we are talking about here is the new schedule 2, part 1, not the old.

Mr J.C. KOBELKE: Yes; the existing schedule 2 becomes part 1 of schedule 2, and the new schedule, based on whole body impairment, will be part 2 of schedule 2.

Dr J.M. WOOLLARD: Does this mean, then, that noise-induced hearing loss, even if it occurred prior to this legislation taking effect, will come under the new legislation?

Mr J.C. KOBELKE: There must be very clear rules to know which category people fit into. The date of the injury, in most cases, is reasonably easy to determine. For schedule 2, the date of the injury is classified, so that the date of injury before the amendment date falls into existing schedule 2, and an injury on or after the amendment date falls into the new schedule 2. The date of injury determines which schedule will apply. Noise-induced hearing loss might have happened 10 years ago, so the date of testing is the best indicator. Noise-induced hearing loss often occurs over an extended period. There is no nice clear date to designate which category it would fall into. The fairer and clearer way to do it is at the date at which the person is tested and shows the loss. If a person shows the loss before the amendment date, they are under the existing system. If the test occurred after the amendment date, although the hearing loss clearly happened before, because hearing loss in most cases does not occur in just one event, then the issue is that the person is in the new schedule 2 on the date on which the test which detects the hearing loss is done.

Dr J.M. WOOLLARD: Does the minister have any idea how many cases of hearing loss are current? My concern is that several people may be waiting to have assessments. Is there a queue of people waiting for assessments who will fall into the new system rather than the current system?

Mr J.C. Kobelke: They will not be affected by the change. There is no significant effect.

Mr P.D. OMODEI: Will the minister explain "amendment date"? Is that the day of proclamation of the legislation?

Mr J.C. Kobelke: It is defined as the day on which section 21 of the Act comes into operation.

Clause put and passed.

Clauses 17 and 18 put and passed.

Clause 19: Section 28 amended -

Mrs C.L. EDWARDES: There is probably a very simple explanation for this. Section 28, headed "Limit on compensation of worker electing" is amended by inserting "18A" after "18". For the life of me, I cannot find proposed section 18A. It is not in the blue Bill at page 32, which is where I would presume it to be.

Mr J.C. KOBELKE: The "18A" referred to is on page 422 of the blue Bill, because it is actually proposed clause 18A of the schedule, not proposed section 18A.

Clause put and passed.

Clause 20 put and passed.

Clause 21: Part III Division 2A inserted -

Mrs C.L. EDWARDES: I suggest we might like to stop now, because this clause deals with the new regime for lump sum payments for specified injuries, and will entail quite an extensive debate. It would probably make that debate easier if we were able to do it in continuity.

Mr J.C. KOBELKE: I am happy to accept that suggestion from the member for Kingsley, and seek to adjourn the debate.

Debate adjourned, on motion by Mr J.C. Kobelke (Minister for Consumer and Employment Protection).

Referral to Legislation Committee

MR J.C. KOBELKE (Nollamara - Leader of the House) [4.28 pm]: I move -

> That the Workers' Compensation Reform Bill 2004, as partially agreed to during consideration in detail, be referred to a legislation committee for report to the Legislative Assembly.

I have had discussions with the Opposition and the Independent member and gained their agreement to set up a legislation committee. We have seen in the conduct of the consideration in detail today that members are really interested in getting into the detail. It is a very complex and lengthy Bill, and a legislation committee provides the opportunity for the small number of members who are taking the time and the interest - I thank them for that - to be fully engaged in the debate while the Chamber itself can proceed with other matters. It is the intention that the committee sit for one session next week - again that is by agreement, for which I thank members - and in the next week of sitting we will have budget debates, which is also a good time for members to be able to sit in a legislation committee without disrupting the normal work of the Chamber. That way, we can give a considerable amount of time to this very important Bill without holding up other legislation on the notice paper. I thank members for their support so far for this way of handling the Bill expeditiously, while giving a more than ample amount of time for members to question and debate the Bill in detail.

Question put and passed.

Legislation Committee, Nomination of Members

MRS C.L. EDWARDES (Kingsley) [4.30 pm]: On behalf of the Leader of the Opposition, I nominate the members for Avon, Kingsley and Warren-Blackwood, and, as an Independent, the member for Alfred Cove, to serve on the Legislation Committee. In response to the comments of the Leader of the House, there is provision in this House for complex and technical pieces of legislation to be referred to a Legislation Committee. However, it should not be taken for granted that that will always be the case, because if a large number of members of the House want to participate in the debate on a Bill, they obviously will not able to be accommodated in a Legislation Committee. In the case of the Workers' Compensation Reform Bill, those members of the House who do want to participate in the debate will need to be kept informed about the sittings of the Legislation Committee so that they will be able to attend the hearings on those parts of the Bill in which they have an interest.

MR J.C. KOBELKE (Nollamara - Minister for Consumer and Employment Protection) [4.31 pm]: I nominate the members for Geraldton, Girrawheen, Kimberley and Peel, and obviously also myself, to serve on the Legislation Committee.