

the problem, and Governments cannot fix it with money. Until Aboriginal people like Peter Yu and Pat Dodson look at the people whom they represent instead of chasing land and the power that it gives them -

Hon Tom Helm: Do you not think that is part of the answer?

Hon GREG SMITH: I do not believe that land is part of the answer. If land were part of the answer, the 10 million hectares of land that they have now would probably have fixed a few things. It has not; the problem has continued to get worse.

Hon Bob Thomas: The ownership of property is all right for the rest of the community and it makes them secure, safe and economically sound, but you do not think that Aboriginal people should have it.

Hon GREG SMITH: They have as much ability to buy land as anybody else.

Hon Tom Helm: Even when it is their land?

The DEPUTY PRESIDENT: Order!

Debate adjourned, on motion by Hon Peter Foss (Attorney General).

[Resolved, that the House continue to sit beyond 10.00 pm].

WORKERS' COMPENSATION AND REHABILITATION AMENDMENT BILL 1997

Assembly's Message - Suspension of Standing Orders

HON PETER FOSS (East Metropolitan - Attorney General) [8.23 pm]: I move -

That standing orders be suspended so far as will enable me to move the following motion as an instruction to the Committee of the Whole House on Legislative Assembly Message No 139 -

That the Committee's consideration of a counter-proposal to amendment No 3 be in the form that it appears on Supplementary Notice Paper No 9-2 standing in the name of the Attorney General and not otherwise.

The reason I am moving this motion is that a number of amendments have been agreed between the Opposition and the Government which are best carried out by amending the amendment No 3 on Supplementary Notice Paper 9-2 rather than going into what we did yesterday so as to enable us to undo some amendments. Therefore, for the clearer and better appreciation of what has transpired and the degree to which it has been agreed, it seems that it would be clearer for the House if we went back and virtually started again. The intent of the motion is that we go into the consideration in detail stage as if yesterday had not occurred.

Several members interjected.

The PRESIDENT: Order! This is a serious matter which needs to be understood by everyone in the House.

Hon PETER FOSS: The reason for the motion is that, as you are aware, Mr President, a considerable number of amendments were made yesterday. It would be considerably difficult to undo those amendments and it would be easier to start again. The motion is of course to suspend standing orders without notice, and it requires an absolute majority of the House.

Question put and a division taken with the following result -

Ayes (20)

Hon Kim Chance	Hon Peter Foss	Hon Barry House	Hon Ljiljanna Ravlich
Hon J.A. Cowdell	Hon N.D. Griffiths	Hon Norm Kelly	Hon Greg Smith
Hon M.J. Criddle	Hon John Halden	Hon Murray Montgomery	Hon Bob Thomas
Hon Cheryl Davenport	Hon Tom Helm	Hon M.D. Nixon	Hon Derrick Tomlinson
Hon Max Evans	Hon Helen Hodgson	Hon Simon O'Brien	Hon Muriel Patterson (<i>Teller</i>)

Noes (2)

Hon Giz Watson	Hon J.A. Scott (<i>Teller</i>)
----------------	----------------------------------

Question thus passed with an absolute majority.

On motion by Hon Peter Foss (Attorney General), resolved -

That the Committee's consideration of a counter-proposal to amendment No 3 be in the form that it appears on Supplementary Notice Paper No 9-2 standing in the name of the Attorney General and not otherwise.

Assembly's Message

Message from the Assembly notifying that it had disagreed to the Council's amendments Nos 1 and 2, and disagreed to amendment No 3 and substituted a new amendment, further considered.

Committee

Resumed from 14 September. The Chairman of Committees (Hon J.A. Cowdell) in the Chair; Hon Peter Foss (Attorney General) in charge of the Bill.

Hon PETER FOSS: I move -

Amendment No 3

Clause 32, page 19, line 19 to page 20, line 10 - To delete the clause and substitute the following clause -

" **Amendments about awarding of damages and related matters (sections 5, 61, 84ZH, 84ZR and 192, Part IV Division 2 and Schedule 1), and saving and transitional provisions**

32. (1) Section 5(1) of the principal Act is amended by deleting the definition of "prescribed amount" and substituting the following definition —

" **"prescribed amount"** means —

(a) in relation to the financial year ending on 30 June 2000, \$119 048;

Note: This is the nearest whole number of dollars to the amount obtained by multiplying by 208 the average of the amounts that the Australian Statistician published as the all employees average weekly total earnings in Western Australia for pay periods ending in the months of May, August and November 1998 and February 1999.

(b) in relation to any subsequent financial year, the nearest whole number of dollars to —

(i) the amount obtained by varying the prescribed amount for the preceding financial year by the percentage by which the amount that the Australian Statistician published as the Wages Cost Index, ordinary time hourly rates of pay (excluding bonuses) for Western Australia (the "**WCI**") varied between the second-last December quarter before the financial year commenced and the last December quarter before the financial year commenced; or

(ii) if the calculation under subparagraph (i) cannot be performed in relation to a financial year because the WCI for a relevant quarter was not published, the amount obtained by varying the prescribed amount for the preceding financial year in accordance with the regulations,

with an amount that is 50 cents more than a whole number of dollars being rounded off to the next highest whole number of dollars; "

(2) Section 61(7) of the principal Act is amended by inserting after paragraph (b) the following —

" (ba) if section 93E(7) applies to the payment of compensation; or "

(3) Section 93A of the principal Act is amended by deleting the definitions of "Amount A", "Amount B", "future pecuniary loss" and "non-pecuniary loss" and inserting, in the appropriate alphabetical positions, the following definitions —

" **"annual average weekly earnings amount"** means —

(a) in relation to the financial year ending on 30 June 2000, \$29 762;

Note: This is the nearest whole number of dollars to the amount obtained by multiplying by 52 the average of the amounts that the Australian Statistician published as the all employees average weekly total earnings in Western Australia for pay periods ending in the months of May, August and November 1998 and February 1999.

(b) in relation to any subsequent financial year, the nearest whole number of dollars to —

(i) the amount obtained by varying the annual average weekly earnings amount for the preceding financial year by the percentage by which the amount that the Australian Statistician published as the Wages Cost Index, ordinary time hourly rates of pay (excluding bonuses) for Western Australia (the "**WCI**") varied between the second-last December quarter before the financial year commenced and the last December quarter before the financial year commenced; or

- (ii) if the calculation under subparagraph (i) cannot be performed in relation to a financial year because the WCI for a relevant quarter was not published, the amount obtained by varying the annual average weekly earnings amount for the preceding financial year in accordance with the regulations,

with an amount that is 50 cents more than a whole number of dollars being rounded off to the next highest whole number of dollars;

"prescribed level", in relation to the degree of disability of a worker, means —

- (a) the degree of disability that would, if compensation were to be paid in accordance with Schedule 2, give rise to a payment equal to the annual average weekly earnings amount; or
 - (b) if a lesser degree of disability is prescribed by regulations, that lesser degree.
- (4) After section 93B(3) of the principal Act the following subsection is inserted —

" (3a) This Division does not apply to the awarding of damages if the disability results in the death of the worker. "

- (5) Sections 93D, 93E and 93F of the principal Act are repealed and the following sections are substituted —

" **Assessment of disability**

93D. (1) In this section —

"relevant level", in relation to a question as to the degree of disability of the worker, means —

- (a) if the question arises for the purposes of section 93E(3)(a), (8) or (11), a degree of disability of 30%; or
- (b) if the question arises for the purposes of section 93E(4), the prescribed level of disability.

(2) For the purposes of section 93E, the degree of disability of the worker is to be assessed —

- (a) so far as Schedule 2 provides for such a disability, as a percentage equal to —
 - (i) if only one item of that Schedule applies to the disability, the percentage of the prescribed amount provided for by that item, as read with section 25; or
 - (ii) if 2 or more items of that Schedule apply to the disability, the sum of the percentages of the prescribed amount provided for by those items, as read with section 25;
- (b) to the extent, if any, that paragraph (a) does not apply, as the degree of permanent impairment assessed in accordance with the AMA Guides;
- (c) to the extent, if any, that neither paragraph (a) nor (b) applies, in accordance with the regulations,

or if more than one of paragraphs (a), (b) and (c) applies, as the cumulative sum of the percentages assessed in accordance with those paragraphs, but no regard is to be had to any mental ailment, disorder, defect, morbid condition or symptom of the worker that arises, recurs or is aggravated or accelerated as a consequence of, or secondary to, a physical defect of the worker.

(3) If section 25 applies, the percentage under subsection (2)(a) is calculated in accordance with the formula —

$$\frac{PD}{100} \times TD$$

Where —

PD is the percentage of the diminution of full efficient use.

TD is the relevant percentage set out in Column 2 of Schedule 2.

Example 1

A worker loses 40% of the full efficient use of one eye. The percentage under subsection (2)(a) is —

$$\frac{40}{100} \times 50 = 20$$

Example 2

A worker loses the little finger of the left hand, 30% of the full efficient use of one eye and 10% of the full efficient use of the right arm below the elbow. The percentage under subsection (2)(a) is —

$$6 + \left[\frac{30}{100} \times 50 \right] + \left[\frac{10}{100} \times 80 \right] = 6 + 15 + 8 = 29$$

- (4) If the worker and the employer cannot agree on whether the degree of disability is not less than the relevant level, the worker may, subject to subsection (5), refer the question to the Director.
- (5) A question can only be referred under subsection (4) if the worker produces to the Director medical evidence from a medical practitioner indicating that, in the medical practitioner's opinion, the degree of disability is not less than the relevant level.
- (6) As soon as practicable after receiving a referral under subsection (4) the Director is to notify the employer in accordance with the regulations.
- (7) If within 21 days after being notified under subsection (6) the employer notifies the Director in accordance with the regulations that the employer considers that the degree of disability is less than the relevant level, a dispute arises for the purposes of Part IIIA.
- (8) The Director is to consider the dispute in consultation with the parties.
- (9) Except in a case to which subsection (10) applies, if the dispute is not resolved by agreement the Director is to refer the question for resolution under the provisions of Part IIIA (other than Division 2).
- (10) If the dispute relates to a disability mentioned in section 33, 34 or 35, the dispute is to be referred to a medical panel for determination as described in section 36 and so far as applicable this Act applies in relation to the reference as if it were a reference under section 36 except that the only question to be considered and determined on the reference is the question that was referred.
- (11) Unless notification is given by the employer under subsection (7), the employer is to be regarded as having agreed that the degree of disability is not less than the relevant level.

Restrictions on awarding of damages and payment of compensation

93E. (1) In this section —

"agreed" means agreed between the worker and the employer, whether under section 93D(8) or otherwise;

"degree of disability" means the degree of disability of the worker assessed in accordance with section 93D(2);

"determined" means determined or decided on a reference under section 93D(9) or (10);

"termination day" means the day that is 6 months after the day on which weekly payments commenced.

- (2) Weekly payments of compensation ordered by a dispute resolution body to commence are to be regarded for the purposes of this section as commencing or having commenced on —
 - (a) the first day of the period in relation to which weekly payments are ordered to be made; or
 - (b) the day that is 5 months (or such shorter period as is prescribed) before the day on which the order is made, whichever is later.
- (3) Damages can only be awarded if —
 - (a) it is agreed or determined that the degree of disability is not less than 30% and that agreement or determination is recorded in accordance with the regulations; or
 - (b) the worker has a significant disability and elects, in the prescribed manner, to retain the right to seek damages and the election is registered in accordance with the regulations.
- (4) For the purposes of subsection (3)(b) the worker has a significant disability if it is agreed or determined that the degree of disability is not less than the prescribed level and that agreement or determination is recorded in accordance with the regulations.
- (5) Subject to subsection (6), if weekly payments of compensation in respect of the disability have commenced an election cannot be made under subsection (3)(b) after the termination day.
- (6) Despite subsection (5), if —
 - (a) medical evidence complying with section 93D(5) was produced to the Director not less than 21 days before the termination day; and
 - (b) a dispute arising under section 93D(7) has not been resolved before the termination day,
 an election can be made under subsection (3)(b) within 7 days after the dispute is resolved.
- (7) Subject to subsections (8) and (10), if an election has been made under subsection (3)(b) compensation under this Act is not payable in respect of the disability, or any recurrence, aggravation or acceleration of it, in relation to any period after the day on which the election is registered or any expenses incurred during such a period.
- (8) Subsection (7) ceases to apply if, after the election is made, it is agreed or determined that the degree of disability is 30% or more and that agreement or determination is recorded in accordance with the regulations.
- (9) Subsection (8) relates only to the degree of the original disability, and any recurrence, aggravation or acceleration of it is not to be taken into account.
- (10) If an agreement or determination under subsection (8) is recorded, the worker may apply for any compensation which, but for subsection (7), would have been payable under this Act in relation to a relevant period or expenses incurred during a relevant period.
- (11) In subsection (10) —

"relevant period" means any period —

 - (a) which is after the day on which the election is registered and before the agreement or determination under subsection (8) is recorded; and
 - (b) during which the degree of disability is agreed or determined to have been not less than 30%.

- (12) If the liability for an incapacity resulting from the disability has been redeemed under section 67, damages are not to be awarded in respect of the disability.

Restrictions on awarding and amount of damages if disability less than 30%

- 93F.** (1) Unless an agreement or determination that the degree of disability of the worker is not less than 30% is recorded for the purposes of section 93E —
- (a) the amount of damages to be awarded is to be a proportion, determined according to the severity of the disability, of the maximum amount that may be awarded; and
 - (b) the maximum amount of damages that may be awarded is a sum equal to twice the prescribed amount, but the maximum amount may be awarded only in a most extreme case of a disability of less than 30% in degree.
- (2) In assessing the severity of the disability for the purposes of subsection (1), no regard is to be had to any mental ailment, disorder, defect, morbid condition or symptom of the worker that arises, recurs or is aggravated or accelerated as a consequence of, or secondary to, a physical defect of the worker.
- (3) Subsection (1) has effect in respect of the amount of a judgment before the operation of section 92(b).
- (4) No entitlement to damages is created by subsection (1) and that subsection is subject to any other law that prevents or limits the awarding of damages.
- (5) If —
- (a) section 93E(3) does not allow damages to be awarded in respect of the disability; or
 - (b) damages in respect of the disability have been awarded in accordance with subsection (1), the employer is not liable to make any contribution under the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (the "**Contribution Act**") in respect of damages awarded against another person in relation to the disability.
- (6) If section 93E(3)(b) allows damages to be awarded in respect of the disability —
- (a) the contributions that the employer may be liable to make under the Contribution Act in respect of damages awarded against other persons in relation to the disability are not to exceed the damages that could have been awarded in accordance with subsection (1); and
 - (b) if the employer has made or been directed to make a contribution under the Contribution Act in respect of damages awarded against another person in relation to the disability, the amount of damages that may be awarded in accordance with subsection (1) is reduced by the amount of that contribution.
- (7) This section applies regardless of whether the damages are awarded against one or several employers.
- (8) An issue as to the amount of damages that may be awarded, is to be determined by reference to the prescribed amount as in effect on the date on which the determination is made.

Regulations

- 93G.** Regulations may provide for —
- (a) the notification to be given to workers of the effect of the provisions of this Division;
 - (b) the form and lodgment of elections under section 93E(3)(b);
 - (c) the registration by the Director of elections under section 93E(3)(b)

- if an agreement or determination for the purposes of section 93E(4) has been recorded, and the power of the Director to refuse to register an election if not satisfied that the worker has been properly advised of the consequences of the election;
- (d) the recording by the Director of an agreement or determination under section 93E as to the degree of disability of a worker;
- (e) the way in which applications under section 93E(10) are to be made and dealt with. "
- (6) In subsections (7) and (8) —
- "amended provisions"** means Part IV Division 2 of the principal Act as amended by this section;
- "assent day"** means the day on which this Act receives the Royal Assent;
- "former provisions"** means Part IV Division 2 of the principal Act before it was amended by this section.
- (7) The amended provisions do not affect the awarding of damages in proceedings —
- (a) commenced before the assent day; or
- (b) for the commencement of which the District Court gave leave under the former provisions before the assent day,
- and the former provisions continue to apply in relation to those proceedings.
- (8) If weekly payments of compensation in respect of a disability —
- (a) commenced before the assent day; or
- (b) were ordered by a dispute resolution body to commence before the assent day,
- and the termination day referred to in section 93E of the amended provisions would be within 3 months after the assent day, the termination day is postponed by this subsection so that it is the day that is 3 months after the assent day.
- (9) Section 84ZH(2) of the principal Act is inserting after "that loss" the following —
- " , and as to the degree of disability assessed in accordance with section 93D(2) "
- (10) Section 84ZR(2) of the principal Act is inserting after "Schedule 2" the following —
- " and as to the degree of disability assessed in accordance with section 93D(2) "
- (11) Before Part XIII of the principal Act the following section is inserted —
- " **Publication of prescribed amount and average weekly earnings**
- 193.** (1) On or before the 1 July on which a financial year begins the Minister is to publish a notice in the *Gazette* setting out, in relation to the financial year —
- (a) the prescribed amount;
- (b) the annual average weekly earnings amount for the purposes of section 93A; and
- (c) Amount C for the purposes of Schedule 1 clause 11.
- (2) Publication under subsection (1) is for public information only and the operation of this Act is not affected by a failure to publish or a delay or error in publication. "
- (12) Schedule 1 clause 7(4) to the principal Act is amended by deleting "the items referred to in clause 11(3), (4) and (5)" and substituting the following —

" overtime or any bonus or allowance ".

- (13) Schedule 1 clauses 11 and 11A to the principal Act are deleted and the following clause is substituted —

" **Weekly earnings**

11. (1) Subject to clauses 12 to 16, for the purposes of this Schedule "**weekly earnings**" has the meaning given by this clause.

(2) In this Schedule —

"**Amount A**" means the rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation, plus —

- (a) any over award or service payments paid on a regular basis as part of the worker's earnings;
- (b) overtime; and
- (c) any bonus or allowance;

"**Amount Aa**" means the rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation, plus any over award or service payments paid on a regular basis as part of the worker's earnings;

"**Amount B**" means the worker's average weekly earnings (including overtime and any bonus or allowance) over the period of one year ending on the day before the disability occurs in the employment that the worker is in when the disability occurs or, if the worker is then in more than one employment at the end of that period, the sum of the average weekly earnings (including overtime and any bonus or allowance) in each employment, but if the worker has been in an employment for a period of less than one year, the worker's average weekly earnings in that employment are to be determined over that lesser period;

"**Amount C**" means, during a financial year —

- (a) the amount obtained by multiplying by 1.5 the average of the amounts that the Australian Statistician published as the all employees average weekly total earnings in Western Australia for pay periods ending in the months of May, August, November and February preceding the financial year; or
- (b) if any relevant amount of earnings is not published, the amount obtained by varying Amount C for the preceding financial year in accordance with the regulations;

Note: During the financial year ending on 30 June 2000 Amount C is \$852.52.

"**Amount D**" means the minimum rate of weekly

earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation;

"Amount E" means the minimum weekly earnings to which the worker would have been entitled, at the time of the incapacity, under the *Minimum Conditions of Employment Act 1993*;

"bonus or allowance" means any bonus or incentive, shift allowance, week-end or public holiday penalty allowance, district allowance, industry allowance, meal allowance, living allowance, clothing allowance, travelling allowance, or other allowance;

"earnings" includes wages, salary and other remuneration;

"overtime" means any payment for the hours in excess of the number of ordinary hours which constitute a week's work.

- (3) In the case of a worker whose earnings are prescribed by an industrial award when the disability occurs, weekly earnings are —
 - (a) for the 1st to the 4th weekly payments: Amount A but not more than Amount C or less than Amount D;
 - (b) for weekly payments after the 4th: Amount Aa, or a lesser amount determined in accordance with the regulations, but not more than Amount C or less than Amount D.
- (4) In the case of a worker to whom subclause (3) does not apply, weekly earnings are —
 - (a) for the 1st to the 4th weekly payments: Amount B but not more than Amount C or less than Amount E;
 - (b) for weekly payments after the 4th: 85% of Amount B, or a lesser amount determined in accordance with the regulations, but not more than Amount C or less than Amount E.
- (5) Subject to subclause (6), the references in the definition of Amount A in subclause (2) to overtime and any bonus or allowance are references to those items averaged over the period of 13 weeks ending at the time of the incapacity.
- (6) If the worker was totally or partially incapacitated from working or for any other reason did not work during any part of the period of 13 weeks mentioned in subclause (5), that part is to be disregarded in calculating the average amount per week that the worker was paid over that period.
- (7) Regulations made for the purposes of subsection (3)(b) or (4)(b) may provide for lesser amounts (but not less than Amount D or E, whichever is applicable) to be determined in respect of weekly payments after the 4th, 12th, 26th or 52nd, or after such other numbers of weekly payments as are prescribed.

- (14) Schedule 1 clause 12 to the principal Act is amended by deleting "11(1) or (2)" and substituting the following —
" 11(3) ".
- (15) Schedule 1 clause 13 to the principal Act is amended by deleting "11(1) or (2)" and substituting the following —
" 11(3) ".
- (16) Schedule 1 clause 13(1) to the principal Act is amended by deleting "or agreement".
- (17) Schedule 1 clause 13(2) to the principal Act is amended by deleting "the exclusions referred to in clause 11(3) and (4)" and substituting the following —
" overtime or any bonus or allowance ".
- (18) Schedule 1 clause 16(1) to the principal Act is amended by deleting "11(5)" and substituting the following —
" 11(4) ".
- (19) Schedule 1 clauses 12, 13(2) and 16(1) and (2) to the principal Act are amended by deleting "or industrial agreement".
- (20) In subsection (21) —
"amended provisions" means Schedule 1 to the principal Act as amended by this section;
"former provisions" means Schedule 1 to the principal Act before it was amended by this section.
- (21) If weekly payments commenced before the coming into operation of this section —
(a) the amended provisions do not apply to the first 4 weekly payments after the coming into operation of this section and the former provisions continue to apply to those weekly payments; and
(b) for the purposes of the amended provisions the 5th weekly payment after the coming into operation of this section is to be regarded as the 5th weekly payment and so on.
".

The CHAIRMAN: Again I will proceed subclause by subclause and proposed subsection by subsection. The first question is that the words proposed to be deleted be deleted.

Question put and passed.

The CHAIRMAN: The question now is a matter of substitution.

Substitute clause 32(1) and (2) put and passed.

Substitute clause 32(3) -

Hon PETER FOSS: I move -

To delete "and inserting, in the appropriate alphabetical positions, the following definitions -".

To delete the definitions of "annual average weekly earnings amount" and "prescribed level".

Hon N.D. GRIFFITHS: It may be of assistance to know that the amendment is in the same terms that I moved yesterday and it is at the bottom of page 2, and deletes everything after the words "non-pecuniary loss".

Hon Peter Foss: Sounds right. That is what I am moving.

Hon DERRICK TOMLINSON: I am sure the Attorney General and Hon N.D. Griffiths understand what they are talking about, but could we have an indication of what page the motion is contained in the Supplementary Notice Paper?

The CHAIRMAN: A set of amendments will be circulated to members and I will suspend proceedings until members receive that set of proposed amendments. Supplementary Notice Paper 9-2 will be distributed.

Hon PETER FOSS: Mr Chairman, could I ask you to leave the chair until the ringing of the bells until we get everyone with both pieces of paper in their hands?

The CHAIRMAN: I will leave the chair until the ringing of the bells.

Sitting suspended from 8.37 to 8.42 pm.

Hon PETER FOSS: I think everyone now has the amendment I moved which removes from the suggested substituted clause the words at the bottom of page 2 of Supplementary Notice Paper 9-2, from "and inserting" through to the end of the definition at page 3 of "prescribed level".

Amendments put and passed.

Substitute subclause, as amended, put and passed.

Substitute clause 32(4) put and passed.

The CHAIRMAN: The question now is that clause 32(5) be substituted.

Hon PETER FOSS: I move -

In section 93D(1)(b) - To delete "the prescribed level of disability" and substitute "a degree of disability of 16%".

This is a substantial move on the part of the Government to reduce the original degree of disability of 25 per cent to 16 per cent. This is the alteration the Government was prepared to make.

Hon HELEN HODGSON: I note that this amendment refers to a degree of disability of 16 per cent. I acknowledge that is significantly lower from that which was proposed in subsection 93D(2). However, the Democrats cannot accept that proposition, because it still sets too high a hurdle for injured workers to be able to access the election. The alternative model that was put forward yesterday - the deductible model - is the preferable model for dealing with the cost blow-out. An alternative may be proposed on this issue, and, for that reason, the Democrats will not support a degree of disability of 16 per cent. I note for the record that at no stage have I agreed to this clause on behalf of the Democrats, so no agreement is in place between the Democrats and the Government with regard to this clause. I will allow the ALP to speak about whether it has any agreement in place with regard to this clause, but it is not a clause that I can support.

Hon N.D. GRIFFITHS: The Australian Labor Party opposes this amendment. It is an improvement, but we believe our proposal is the better way to go; namely, a regime of deductibility. The Government has moved from what is in effect a 25 per cent disability model to a 16 per cent disability model. We have moved from a deductibility model based on \$10 000 to a deductibility model based on \$20 000. We are confident on the actuarial advice provided to us that our model will provide greater savings than what the Government is proposing and at the same time provide greater fairness in the system.

Hon PETER FOSS: Our actuarial advice differs from that of the Labor Party and is that any benefit that will be derived from what the Labor Party is proposing will erode very quickly and will eventually erode the whole package. The people who may potentially be badly disadvantaged by this measure are in the concert pianist category; and at the most, probably only 50 people will in some way be disadvantaged by this measure. Therefore, in the interests of maintaining the workers compensation system, this change must be sustained; and if it is not sustained, we are concerned that what we are trying to do will be set at nought. That is our actuarial advice, and unfortunately we believe this measure is very important and must be sustained.

Hon HELEN HODGSON: The Attorney General referred to actuarial advice that the Government has received. At no stage has the advice that was discussed yesterday or the advice that has just been raised been tabled. Is the Attorney prepared to table that advice so that everyone can see what these costings are?

Hon PETER FOSS: I do not currently have that advice in the Chamber. We have been making that advice available reasonably freely during the course of this debate. I wish to reserve my position on whether we will table that advice. The concern is about the interpretation of that actuarial advice, and I believe that matter will be best dealt with in the other place.

Hon N.D. GRIFFITHS: I do not want to engage in a protracted debate this evening because the issues were debated yesterday, but this issue needs some comment. Irrespective of the model that is moved to, there is a danger in the benefits being eroded. The Labor Party has upped the ante by doubling the deductibles to make sure the potential erosion has significant protection; that is, we will provide what we trust will be an almost immediate benefit to those paying premiums. In reality, we have gazumped the Government and on the basis of information provided to the Opposition by the Government, we are confident that our proposal will be far more beneficial to the community than the Government's proposal. Those are the only areas of difference that will emerge in the course of the proceedings this evening.

Hon PETER FOSS: The reason for the difference between a deductible and a threshold is fairly well illustrated by what happened with the second gateway. A deductible is almost an invitation to push it up further and compensate for any amount taken off the bottom, whereas a percentage threshold is always present and people must show that particular amount. Whatever happens in the common law system, it continues to move. That is why the actuary believes it will be eroded in the same way the erosion occurred with the second gateway. The Government has illustrated the points and perhaps we can move on.

Amendment put and a division taken with the following result -

Ayes (11)

Hon M.J. Criddle
Hon Max Evans
Hon Peter Foss

Hon Barry House
Hon Murray Montgomery
Hon M.D. Nixon

Hon Simon O'Brien
Hon Greg Smith
Hon W.N. Stretch

Hon Derrick Tomlinson
Hon Muriel Patterson (*Teller*)

Noes (12)

Hon Kim Chance
Hon J.A. Cowdell
Hon Cheryl Davenport

Hon N.D. Griffiths
Hon John Halden
Hon Tom Helm

Hon Helen Hodgson
Hon Norm Kelly
Hon Ljiljana Ravlich

Hon J.A. Scott
Hon Giz Watson
Hon Bob Thomas (*Teller*)

Pairs

Hon B.M. Scott
Hon N.F. Moore
Hon Ray Halligan
Hon Dexter Davies
Hon B.K. Donaldson

Hon Mark Nevill
Hon Ken Travers
Hon E.R.J. Dermer
Hon Tom Stephens
Hon Christine Sharp

Amendment thus negated

The CHAIRMAN: The question is that proposed subsection 93D(1) be agreed to.

Hon N.D. GRIFFITHS: I am not sure whether this amendment is on the Supplementary Notice Paper. The document in front of us is a list of amendments which I signed off on. I seek to move an amendment to proposed subsection 93D(1), to delete in the definition the words "relevant level".

The CHAIRMAN: I am advised that as the Committee has just agreed not to retain the prescribed level of disability, an amendment cannot be entertained that now takes that out.

Hon N.D. GRIFFITHS: Can we deal with this by leave?

The CHAIRMAN: No. Hon Nick Griffiths would have to move the amendment pertaining to proposed subsection 93D(1) on a recommittal. We cannot do a recommittal at this stage. We will proceed.

Proposed subsection, as amended, put and passed.

The CHAIRMAN: The question is that proposed section 93D(2) be agreed to.

Hon PETER FOSS: I move -

To delete the words ", but no regard is to be had to any mental ailment, disorder, defect, morbid condition or symptom of the worker that arises, recurs or is aggravated or accelerated as a consequence of, or secondary to, a physical defect of the worker".

I ask the Opposition to confirm its undertaking that should this prove to be a problem, the Opposition will work with the Government to deal with this matter by future amendment if necessary.

Hon N.D. GRIFFITHS: I am instructed on behalf of the Australian Labor Party to give that undertaking.

Amendment put and passed.**Proposed subsection, as amended, put and passed.****Proposed section 93D(3) to (11) put and passed.**

The CHAIRMAN: The question is that proposed section 93E(1) and (2) be agreed to.

Hon HELEN HODGSON: I moved some amendments to these proposed subsections yesterday. There is a proposal on the paper circulated by the Attorney which, although not achieving exactly the same as that moved yesterday, deals with the same issue which will arise in proposed section 93E(5). I will therefore not move the amendments at this stage but will discuss the matter during the amendment to the proposed subsection.

Question put and passed.

The CHAIRMAN: The question is that proposed section 93E(3) be agreed to.

Hon N.D. GRIFFITHS: I move -

Proposed section 93E(3)(b) - To delete "has a significant disability and".

The proposed section will then read -

the worker elects in the prescribed manner to retain the right to seek damages and the election is registered in accordance with the regulations.

This relates to the 25 per cent disability test. It is part of a number of amendments that relate to that proposed section and I foreshadow recommittal of a clause to deal with that at the appropriate stage.

Hon PETER FOSS: Now that the change we made previously has been made, this is a logical continuation, but we oppose it in the sense that we did not want the first change made anyway.

Amendment put and passed.

Proposed subsection, as amended, put and passed.

The CHAIRMAN: The question is that proposed section 93E(4) be agreed to.

Hon N.D. GRIFFITHS: I move -

To delete proposed subsection 93E(4).

Again, this relates to the significant disability 25 per cent issue.

Hon PETER FOSS: Again, this is a logical continuation of what was done earlier. The Government did not agree to that, nor does it agree to this. Obviously it must agree because the Committee has already made that decision.

Amendment put and passed.

The CHAIRMAN: The question now is that proposed section 93E(5) be agreed to.

Hon N.D. GRIFFITHS: I move -

To insert the following new subclauses following 93E(3) -

- (4) In this section Amount F means twice the prescribed amount
Amount G means -
- (a) for the financial year ending on 30 June 2000, \$20 000; and
 - (b) for any subsequent financial year, the amount recalculated as Amount B under subsections (11) and (13);
- Amount H means -
- (a) for the financial year ending on 30 June 2000, \$60 000; and
 - (b) for any subsequent financial year, the amount recalculated as Amount H under subsections (11) and (13);
- Non-pecuniary loss means -
- (a) pain and suffering;
 - (b) loss of amenities of life;
 - (c) loss of enjoyment of life;
 - (d) curtailment of expectation of life; and
 - (e) bodily or mental harm.
- (5) The amount of damages to be awarded for non-pecuniary loss is to be a proportion, determined according to the severity of the non-pecuniary loss, of the maximum amount that may be awarded.
- (6) The maximum amount of damages that may be awarded for non-pecuniary loss is Amount F, but the maximum amount may be awarded only in a most extreme case.
- (7) If the amount of non-pecuniary loss is assessed to be Amount G or less, no damages are to be awarded for non-pecuniary loss.
- (8) If the amount of non-pecuniary loss is assessed to be more than Amount G but not more than Amount H, the amount of damages to be awarded for non-pecuniary loss is the excess of the amount so assessed over Amount G.
- (9) If the amount of non-pecuniary loss is assessed to be more than Amount H but less than the sum of Amounts G and H, the amount of damages to be awarded for non-pecuniary loss is the excess of the amount so assessed over Amount G [amount so assessed - Amount H].
- (10) No entitlement to damages is created by this section and this section is subject to any law that prevents or limits the awarding of damages.
- (11) By operation of this subsection and subsection (12) or (13) each of Amounts F, G and H is recalculated for each financial year with effect from 1 July - the recalculation date - commencing on 1 July 2000, by varying the respective amounts for the preceding financial year -
- (a) by the percentage by which the weighted average minimum award rate for adult males under Western Australian state awards published by the Australian Statistician varies between 1 April in the calendar year preceding the recalculation date and 31 March in the calendar year of the recalculation date; or
 - (b) if the relevant information is not so published, in accordance with the regulations.
- (12) If an amount recalculated under subsection (11) as Amount F is not a multiple of \$1 000 it is to be rounded off to the nearest multiple of \$1 000 - with an amount that is \$500 more than a multiple of \$1 000 being rounded off to the next highest multiple of \$1 000.

- (13) If an amount recalculated under subsection (11) as Amount G or H is not a multiple of \$500 it is to be rounded off to the nearest multiple of \$500 - with an amount that is \$250 more than a multiple of \$500 being rounded off to the next highest multiple of \$500.
- (14) On or before 1 July in each year the minister is to publish a notice in the Gazette setting out Amounts F, G and H as they will have effect on and from that 1 July.
- (15) Failure to publish, or late publication of, a notice under subsection (14) does not affect the operation of subsections (11), (12) or (13).
- (16) Issues as to whether damages for non-pecuniary loss may be awarded and as to the amount of those damages that may be awarded are to be determined by reference to Amounts F, G and H as in effect on the date on which the determination is made.

The difference between what I moved in respect of this last night and what I am moving now relates to a \$20 000 figure under amount G and a \$60 000 figure under amount H. This is the deductible formula based on what has taken place with respect to motor vehicle third party injury claims. The Opposition has upped the deductible component significantly.

Hon PETER FOSS: My remarks remain the same. The Government believes this is the wrong process. Obviously it is better to have a larger figure, but the process of having a deductible process rather than a threshold is wrong.

Amendment put and passed.

Hon PETER FOSS: I move -

To delete "subsection (6)" and substitute "subsections (6) and (6a)".

Hon HELEN HODGSON: This amendment is consequential on the following amendment, inasmuch as they are linked. The effect of the two taken together will be to deal with the question of an election. It was strongly argued yesterday by me and others that six months is not long enough. This allows a mechanism for that to be extended when the appropriate triggers are in place. I have some reservations about how this clause will work in practice because it depends very heavily on the director. That means that it will be another administrative issue. I would prefer to see an objective rather than a subjective mechanism. Regulations are involved as well, and we will examine them very carefully to ensure the process established is as objective as possible. I find the notion of a director as a gatekeeper to be problematic to say the least. It has come up previously in debate on this Bill. Given those reservations, it is better to agree to the proposal on the Table as it provides for some extension. I understand the minister's argument that most conditions are resolved within five months, which means this will be the exception rather than the rule. However, it is extremely important to allow for that exception. As some provision has now been made for that we will support this amendment.

Hon J.A. SCOTT: The Greens (WA) will not support this amendment for a number of reasons. The first relates to the tone of the amendment, which is to beat workers with a big stick to get them to comply. Rather than put in place incentives to make an election within six months, this will put in place a measure which is designed - like a lot of others in this Bill - to deprive people of their common law rights. People will be frightened off because they may lose access to weekly payments and are likely to opt to be dealt with under a statutory system, which is the reason for this clause.

I do not believe the savings will be as great as the Government expects. Those people who are likely to need a longer time to make up their mind about these issues will be those whose injuries may not be stabilised, and they are more likely to be the more seriously injured people. When they go onto the statutory system they will cost more than the average injured worker because they will be at a higher level of injury. The Government has probably miscalculated there, although it will disagree with me. I understand that the Labor Party and the Australian Democrats are prepared to accept this because of a possible 3.8 per cent saving to the Government from this measure.

Hon Helen Hodgson: That is not correct.

Hon J.A. SCOTT: I was not privy to the same advice as the other parties. However, it will be a significant saving. A system of incentives would have been a much better measure to get people to make an election earlier, rather than use the big stick trick. As Hon Helen Hodgson said, the idea of the director as a gatekeeper may end up in further litigation and will cost even more money - maybe not directly to the insurance system but certainly to people within that system and to the taxpayers. The taxpayer will pick up the tab for the leeway that has been gained by the insurance companies from people who opt to go to common law and who are cut off from statutory benefits and go onto the social security system; that is even if - as has been suggested - social security payments will be taken out of any lump sum further down the track. I understand that would have happened anyway with statutory benefits. That would be no great loss to the statutory benefit system. It is simply a mechanism to keep people out of the common law system, and I oppose it.

Hon PETER FOSS: I want to correct one thing said by Hon Jim Scott. He said there would be a saving to government. There will be no saving to government. We are not talking about savings to government but saving Western Australian employment. I know the Greens (WA) are not usually interested in that. They are against anything that causes employment, or industry or business. It does not surprise me at all that the one concern the Greens do not have in this matter is its effect on employment. That is one of the sad things about this matter. I am pleased that the Opposition will join with the Government to do something about employment, business and industry. That is important for people. There is no point in saying the things that Hon Jim Scott is saying if the person does not have a job. It is about time that the Greens (WA) started looking at that aspect. They are fairly averse to any business that employs people, but it is about time they started to see the consequences of their objections.

Hon J.A. SCOTT: As usual the Attorney General completely misses the points that I made, does not address them and tries to make little insults about matters which have nothing to do with the Bill. If the Attorney General was serious about saving employment and getting the cost of the system down, he would have been putting in place amendments tonight that deal holistically with the problems of the system, such as the range of other costs, which I will not go into because everybody has talked about them already. There is no real measure for getting an accurate assessment of what should be the premium rate because it is based on figures which are 80 per cent estimates, as I understand it, and of course have nothing to do with looking at the medical side because that might bring the Australian Medical Association into the equation. It is cheaper to attack the injured worker who can only get to common law if there has been negligence. The Attorney General is not interested in justice. One can look at other areas in which he has been involved. When he was the Minister for the Environment he said that the idea was not to punish companies that were polluting but to encourage them to clean up their act. That is what he should be doing with the injured workers; he should be encouraging them to make a decision within six months and not taking a big stick to them. The Attorney General does not seem able to understand that.

Hon SIMON O'BRIEN: As we try to focus the Chamber on bringing this stage of the Bill to its conclusion, I will not sit by and let pass some of the allegations made against the minister representing the minister in another place in the terms that the member a moment ago made them. It is absolutely absurd to suggest that the Government is not interested in trying to bring the workers compensation costs down to manageable proportions. To suggest that the minister responsible is not interested in doing that throughout this exhaustive process is an absolute insult. If it is not the member's intention to cast insults about the place, and he is not the sort of gentleman who is given to that sort of behaviour, I take the opportunity to acquaint the Chamber with the fact that the Government, of which this minister is a member, has been bending over backwards for considerably longer than a year to tackle this problem. If people such as the preceding speaker had a bit more understanding of that, perhaps we might have been able to bring this significant problem under control before now. Members of the Government were able to visit my region last year.

The CHAIRMAN: Order! I remind the member that he is addressing why we are deleting subsection (6), and some of his comments should apply to that.

Hon SIMON O'BRIEN: I thank you, Mr Chairman. I simply offer the argument supporting the amendment before the Chair: I have had experience with ministers attempting to deal with the problems of constituents, some of whom are employers who are severely affected by this problem and others who are employees who may suffer from a lack of employment if the problem is not fixed. This amendment before the Chair intends to deal with the problem, and is moved as much in compassion for all those in the system than simple economic grounds. For that reason, I support the amendment before the Chair.

Amendment put and passed.

Proposed subsection, as amended, put and passed.

Proposed section 93E(6) put and passed.

Hon PETER FOSS: I move -

After section 93E(6) - To insert the following -

(6a) Despite subsection (5), the Director may, in such circumstances as are set out in regulations, extend the period within which an election can be made under subsection (3)(b) until a day to be fixed by the Director by notice in writing to the worker.

Amendment put and passed.

Proposed section 93E(7) to (12) put and passed.

The CHAIRMAN: The question is that proposed section 93F(1) be agreed to.

Hon PETER FOSS: I move -

In section 93F(1)(b) - To delete "a sum equal to twice the prescribed amount" and substitute "Amount A".

Hon HELEN HODGSON: This amendment ties in with other proposals on the Supplementary Notice Paper. It requires some explanation from me as I moved an alternative yesterday, with which the Australian Democrats will not proceed if this amendment is accepted. This amendment relates to the impact of taking medical and rehabilitation expenses from the compensation available when the cap is applied. This reduces the amount of genuine compensation available to the worker for pain, suffering and tortious issues. The proposal I made yesterday simply meant that in assessing the amount of total damages, one should not take the amount of rehabilitation costs out of the amount payable under the cap. The proposal is another compromise as it increases the cap by some \$12 000 - rather than applying the solution of removing medical and rehabilitation costs. I question how \$12 000 compares with the amount of medical and rehabilitation costs which are paid on average when a person is severely injured. I have a very strong suspicion that medical and rehabilitation costs generally would be more than \$12 000. However, this amendment goes at least part of the way towards the proposition that the amount made available to a worker for negligence should exclude payments beyond his or her control. I will support the amendment moved by the Attorney General rather than move the amendment I moved yesterday. I hope that this will resolve the issue at least to the point of having a workable compromise.

Amendment put and passed.

Proposed subsection, as amended, put and passed.

The CHAIRMAN: The question is that proposed section 93F(2) be agreed to.

Hon PETER FOSS: I move -

To delete section 93F(2).

Amendment put and passed.**Proposed section 93F(3) to (7) put and passed.**

The CHAIRMAN: The question is that proposed section 93F(8) be agreed to.

Hon PETER FOSS: I move -

To delete "the prescribed amount" and substitute "Amount A".

Amendment put and passed.**Proposed subsection, as amended, put and passed.**

Hon PETER FOSS: I move -

" (9) In this section -

"Amount A" means -

- (a) in relation to the financial year ending on 30 June 2000, \$250 000;
- (b) in relation to any subsequent financial year, the nearest whole number of dollars to -
 - (i) the amount obtained by varying Amount A for the preceding financial year by the percentage by which the amount that the Australian Statistician published as the Wages Cost Index, ordinary time hourly rates of pay (excluding bonuses) for Western Australia (the "WCI") varied between the second-last December quarter before the financial year commenced and the last December quarter before the financial year commenced; or
 - (ii) if the calculation under subparagraph (i) cannot be performed in relation to a financial year because the WCI for a relevant quarter was not published, the amount obtained by varying Amount A for the preceding financial year in accordance with the regulations,

with an amount that is 50 cents more than a whole number of dollars being rounded off to the next highest whole number of dollars. "

Amendment put and passed.**Proposed section 93G put and passed.****Substitute clause 32(6) and (7) put and passed.**

The CHAIRMAN: The question is that clause 32(8) be substituted.

Hon HELEN HODGSON: Clause 32(8) is the transitional clause and I did move amendments to it yesterday because I think there is an element of retrospectivity in it. I will not move amendments again tonight but I want to put my reasons on record. I feel strongly that we should not be prejudicing workers because of the time that they sustained their injury. It is a no-win situation. Whatever we do we will affect the rights of workers and at the same time try to find a way of maintaining the system so that employers can afford to pay the premiums. It is a question of finding the right balance. When we concluded the debate last night, I recall the Attorney General informing us that this would do away with any savings in the system. There are some costings that have come back today which show the impact of removing the retrospectivity is such that it would cause a serious problem and the system would be under intolerable pressure.

While in no way supporting retrospective legislation that impacts on people's rights, I stress that I am prepared to accept that in this case the transition measures put in place at least allow people to have a prolonged termination date to make an election. The last time we considered a clause along these lines, if my memory serves me correctly, it was cut off as at the date the legislation passed the Parliament. That was totally insupportable. In this instance there is a prolongation of the termination date to allow three months in which people can get their affairs in order, so to speak, and to determine whether they will make the election.

On the basis that it is not a total truncation of all their rights, but is a limitation, albeit one that I regret - it is an example of where we must balance the interests of the system as a whole - I will not move the amendment I moved last night.

Substitute subclause put and passed.

Substitute clause 32(9) and (10) put and passed.

The CHAIRMAN: The question is that substitute clause 32(11) be agreed to.

Hon PETER FOSS: I move -

To delete section 193(1)(b) and substitute the following -

(b) Amount A for the purposes of section 93F;

Amendment put and passed.

Substitute subclause, as amended, put and passed.

Substitute clause 32(12) to (21) put and passed.

Resolutions reported.

Recommittal

On motion by Hon Peter Foss (Attorney General), resolved -

That Assembly's Message No 139 be recommitted for the further consideration of clause 32(5).

Committee

The Chairman of Committees (Hon J.A. Cowdell) in the Chair; Hon Peter Foss (Attorney General) in charge of the Bill.

The CHAIRMAN: The question is that clause 32(5) be agreed to.

Hon N.D. GRIFFITHS: I move the following amendment to proposed section 93D(1) -

To delete the definition of "**relevant level**" and replace it with the words -

"**relevant level**" means a degree of disability of 30%.

That relates to the issue of 25 per cent disability that was debated last night.

Amendment put and passed.

Substitute clause, as amended, put and passed.

Report

Further resolution reported, the report adopted, and a message accordingly returned to the Assembly.

PRISONS AMENDMENT BILL

Receipt and First Reading

Bill received from the Assembly; and, on motion by Hon Peter Foss (Attorney General), read a first time.

Second Reading

HON PETER FOSS (East Metropolitan - Attorney General) [9.38 pm]: I move -

That the Bill be now read a second time.

As members are aware, prisons serve a number of purposes. When we send offenders to prison, we do more than protect the community from them through incapacitation. We also create opportunities for offenders to address the causes of their illegal behaviour and thereby reduce the likelihood of reoffending after release. The better the use we make of this opportunity to break the cycle of crime, the greater will be the extent to which our prisons repay the community for its investment in them.

The Government is aiming to develop a prison system that is at least as advanced and effective as any in the world. We are purposefully seeking flexibility, efficiency, innovation, effectiveness and continuous improvement. On the basis of extensive research, one of the strategies that the Government is convinced must be adopted to achieve these outcomes is the introduction of contestability as a means of benchmarking and improving the performance of our public prisons. To that end, the purpose of this Bill is to amend the Prisons Act 1981 to establish a framework which will allow for the provision of prison services under contract and for related matters, and also to amend various other Acts as a consequence.

The Government is not ideologically tied to the concept of private prison services, nor is the Government simply seeking to reduce costs. The provision of these services under contract will be pursued only to the extent that it will transparently improve the overall effectiveness and efficiency of our prison system. To the extent that financial considerations do count, it is in the context of value for money in achieving a prison system that is safe and succeeds in reducing repeat offending.

The core of the Bill is the extension of the statutory powers of the Chief Executive Officer of the Ministry of Justice to enter into service delivery arrangements with the private sector. The chief executive officer will continue to be accountable for the operation of all Western Australian prisons, private as well as public, and will have all the powers necessary to ensure compliance with the Act and to ensure that services meet or exceed the standards set by the ministry. The chief executive officer will also be authorised to delegate sufficient powers to enable operational duties to be performed by a contractor.

Another fundamentally important feature of this Bill is the inclusion of provisions for the establishment of an independent statutory office of the Inspector of Custodial Services. The functions of this office will be to inspect, review, advise and