WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2023

Committee

Resumed from 10 August. The Deputy Chair of Committees (Hon Dr Brian Walker) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

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

Progress was reported after the clause had been partly considered.

Hon MATTHEW SWINBOURN: Last week I indicated to Hon Nick Goiran that the government was giving consideration to an amendment to give effect to the issue that he had identified. I confirm that the government will make an amendment. The amendment has not yet been put on the supplementary notice paper because it is still being drafted, but as soon as it becomes available, we will distribute it. If we get to that part of the bill before the amendment is put on the supplementary notice paper, I will move the amendment from the committee table and will obviously give members an opportunity to have regard to its wording.

Hon MARTIN ALDRIDGE: Welcome back to the second week in committee on the Workers Compensation and Injury Management Bill 2023. I think we had almost done clause 11 last week; if we had had five more minutes, we would have concluded it. There are a couple of minor areas that I want to canvass. Division 4A of the Workers' Compensation and Injury Management Act 1981 is being incorporated into clause 11 of the bill before us. We spoke at some point last week about identifying the material differences between the divisions. I think the only one we identified was that the qualifying period for oesophageal cancer will change. One of the things I have noticed with the benefit of the recess is that we will no longer define the term "non-FES employment". It is currently defined as follows —

> ***non-FES employment***, in relation to a worker, means any period of firefighting employment which is not FES employment;

"FES employment" is defined —

> … in relation to a worker, means any period of firefighting employment during which the worker is engaged as a member or officer of a permanent fire brigade as defined in *Fire Brigades Act 1942* section 4(1);

Given that we will no longer define "non-FES employment" in the bill before us, how might we otherwise deal with the matter in clause 11?

Hon MATTHEW SWINBOURN: I thank the deputy chair and members for their indulgence as we tried to get across this issue. Obviously, work on the bill was done to modernise the language. My advice is that the definition for non-FES work was incorporated by way of an amendment to capture firefighting by parks and wildlife people. However, in effect, there is no longer a drafting need for it in the bill because it will be caught up in the definition of "hazardous firefighting employment", which will be —

> … in relation to a worker, means firefighting employment during which the worker —
>
> (a) is engaged as a member or officer of a permanent fire brigade, as defined in the *Fire Brigades Act 1942* section 4(1); or —

That is effectively the FES work —

> (b) attends hazardous fires at a rate at least equivalent to the rate of 5 hazardous fires per year;

That includes non-FES work. That is how we say it will be captured. I am not sure whether it raises more lines of inquiry for the member, but we are happy to try to work our way through it.

Hon MARTIN ALDRIDGE: As the parliamentary secretary said, section 49A of the act defines "hazardous firefighting employment" as —

> (a) FES employment; and
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> (b) non-FES employment during which the worker attends hazardous fires at a rate at least equivalent to the rate of 5 hazardous fires per year;

It is the same as the volunteer test. Effectively, five hazardous fires a year for five years is the test that both volunteers and non-fire and emergency services employees need to meet, whereas an FES employee simply needs to meet the qualifying period, because it is assumed that throughout the course of their duties they have been exposed to hazardous firefighting.

Hon Matthew Swinbourn: Yes, member.

Hon MARTIN ALDRIDGE: Before we move off clause 11, I want to clarify that in the bill firefighting employment is either one of two things. The first is that workers will be covered by an industrial instrument that applies to

firefighting. We have established that this will effectively provide for our career firefighters in the Fire and Rescue Service and also in the Department of Biodiversity, Conservation and Attractions, as well as a power to prescribe by regulations other firefighting employment, but it will have to be employment by or under the Crown in right of the states. As we explored last week, they will have to be a public sector employee; they could not be outside the public sector. The definition of hazardous firefighting employment in the bill says —

> … in relation to a worker, means firefighting employment during which the worker —
>
> (a) is engaged as a member or officer of a permanent fire brigade, as defined in the *Fire Brigades Act 1942* section 4(1); —

Effectively, career Fire and Rescue Service —

> or
>
> (b) attends hazardous fires at a rate at least equivalent to the rate of 5 hazardous fires per year;

It is either of those two. It is not "and"; it is "or". The second limb would encompass firefighting employment that is not necessarily public sector, and is not necessarily under the Fire Brigades Act 1942. Is it anticipated that this could be somebody in local government employment or somebody in private sector employment? A growing number of businesses offer not only fire mitigation services, but also fire response services. Would this provision encompass both local government and private sector workers?

Hon MATTHEW SWINBOURN: To answer the member directly, no, it would not include those workers. The reason for that is that clause 11(2) essentially creates the class of firefighters who would be entitled to be covered by the presumption. It says —

> An injury by a firefighter disease suffered by a worker is taken to be from firefighting employment …

That then creates the class that is eligible. Subclause (3)(b) is a limb of what qualifies that class. It states —

> the employer is satisfied that when the injury is suffered the worker has been in hazardous firefighting employment for at least a period of, or periods in …

It goes on from there. If someone does not get into the class to begin with, that does not rope them in, because of that other part.

Hon MARTIN ALDRIDGE: Strictly speaking, clause 11 should be read as applying to state public sector workers only; full stop. Is it the case that no-one will sit outside that class?

Hon Matthew Swinbourn: Yes.

Hon MARTIN ALDRIDGE: Okay, good. We are on the same page now. The second limb, paragraph (b) under hazardous firefighting employment, is effectively an additional test for DBCA and non–Fire Brigades Act employees, whether they be DBCA or —

Hon Matthew Swinbourn: Again, yes, member.

Hon MARTIN ALDRIDGE: — in time another government agency, such as corrective services, that sets up a fire division. It seems to have a bit of a need for that of late. Would the corrective service firefighters, assuming that they are public sector employees and not contractors, perhaps fall under that limb?

Hon MATTHEW SWINBOURN: Yes, theoretically, because the regulation-making power will apply only to public sector employees. The member gave an example of corrective services. If an agency set up its own firefighting service and employed firefighters, they would fall within the paragraph (b) limb that we have talked about.

Hon MARTIN ALDRIDGE: I want to also make clear that we are not changing the policy from the current act to the future act in this respect. In 2013, when this was first thought about, it applied exclusively to state public sector workers. Are we deviating from that?

Hon MATTHEW SWINBOURN: No, member, we are not deviating from that. The policy that has been developed up to this point will continue. We are not expanding the scope of those who will be covered by the section.

Hon MARTIN ALDRIDGE: I think we have now worked through the matters of fact. It will not be resolved today, but we need to turn our minds to the very significant anomaly that has existed since 2013, and that is repeated the bill before us. It excludes workers who may still be exposed to hazardous firefighting, in not only the private sector, but also the local government sector. That is more of an issue in the local government sector, because paid firefighters are engaged by local government workers. Strangely, because of the application of the Workers' Compensation and Injury Management Act to the Fire and Emergency Services Act, the volunteers, who are often subordinate to the local government employed firefighters, are covered by these protections, but, in this case, the community emergency service managers, who are often the chief fire control officers for a local government—not always, but often—are excluded. That is a very strange arrangement whereby career firefighters are effectively covered and

volunteers are covered, and then there are these 27 individuals in the middle. Actually, the state has 34 community emergency service managers. Seven of them were employed by DFES, who I think would be covered by clause 11 of the bill, and, simply because they are engaged and paid by local government with a grant from DFES, 27 staff members are excluded. I think that is an anomaly, and would be interested to know whether the government is aware of that and how it might go about addressing that issue.

Hon MATTHEW SWINBOURN: The member has made us very aware of it and he is aware of it. Obviously, it was not a matter of contemplation in the development of the bill. It is not a deliberate decision to exclude them as such. It is not something that has been ventilated in the way that the member has just ventilated it. I cannot make any undertakings as to it being dealt with, but obviously we are now well aware. I would make a small qualifying remark: the member is absolutely right that those LGA firefighters are not covered in their employment, but if they had been, for example, career firefighters before they became LGA firefighters, they would potentially get the benefit of the presumption if they met —

Hon Martin Aldridge: By interjection, in the course of progression, it is not often that somebody would enter the career fire and rescue service and then become a community emergency services manager.

Hon MATTHEW SWINBOURN: I defer to the member's expertise here. He knows much better than I do.

Hon Martin Aldridge: There are examples, but it is not common.

Hon MATTHEW SWINBOURN: I was just giving the example that it would be possible for them to be covered as a consequence. I would not like anyone to think, from reading *Hansard*, that the time or service of someone who was previously a career firefighter and then moved into local government, for whatever reason, does not qualify them for this, but that is a small caveat to what we said before. In their employment with the LGA, they do not qualify. The member has made us aware, and we have discussed it. As the member has said, there is not likely to be an opportunity to take that any further during the course of the debate on this bill. The member can make whatever comments he wants, but I cannot take it any further than that.

Hon MARTIN ALDRIDGE: The parliamentary secretary mentioned that they might have previously served as a public sector worker of a different type. They could equally have been a volunteer. It would probably be more likely, in my experience, that they would be a volunteer, to whom the Fire and Emergency Services Act provisions applied, and then they become a community emergency services manager or local government employed firefighter. Naturally, they then often become engaged by DFES and the state at some point. That is the usual career progression we see.

The only way I can see to remedy this is by an amendment to clause 11, particularly to the definitions in clause 11. I assume the government probably does not have an appetite to fix this today, but is the alternative that this issue could be remedied by regulation, pursuant to clause 10?

Hon MATTHEW SWINBOURN: No, we could not fix it by regulation. I want to extinguish any possibility of pursuing this line in an amendment; I could not agree to any amendment. There would be a range of policy and budgetary considerations to extending the scope of this clause. It is not simply a case of applying that because, obviously, insurance premiums for the local government sector would potentially change. They are obviously a stakeholder in this. I do not think it would be appropriate for us to fix what the member has identified through an amendment on the floor of Parliament without first doing work to find out whether there is a broader issue, whether it needs legislative response, what the views of the stakeholders are and those sorts of things. As previously indicated to the member, it has not been an issue that has been raised with us at all or in any meaningful way that we can account for. We have done no work leading up to this, so we could not and would not agree to it.

Hon MARTIN ALDRIDGE: I accept the parliamentary secretary's latter point that the government, for the various reasons he has outlined, does not have the appetite to pursue the remedies to this problem live on the floor today. I want to challenge the advice the parliamentary secretary gave about clause 10. Clause 10 provides a regulation-making power to specify diseases and prescribe employment for those diseases. Why is it not possible to identify a class of local government employees who were exposed to the hazards of firefighting and then prescribe relevant cancers and diseases in response?

Hon MATTHEW SWINBOURN: If I recall correctly—I would have to check *Hansard*, and I do not propose to do that because I do not think this is that kind of thing—the member asked a question that I answered about an amendment to clause 11 rather than to the act as a whole. In any event, I am advised that what the member proposes, a change to the regulations under clause 10, would theoretically be possible. There is a possibility that, by regulation-making power, that class of employees could be prescribed under clause 10. Again, that would be a policy decision that would be made at a later date, taking into consideration all the things I have mentioned before.

Hon MARTIN ALDRIDGE: That is reassuring, parliamentary secretary. I do not know how often we get to amend the workers compensation and injury management suite of legislation, but at least we have identified that there is

an opportunity, perhaps after consultation with the local government sector and others, for a regulation to be issued by government that could address this anomaly, which currently affects 27 firefighters in Western Australia.

The last question I want to ask on clause 11 is about the regulations the parliamentary secretary has just tabled in the Legislative Council. The Workers' Compensation and Injury Management Amendment Regulations (No. 3) 2023 adds eight cancers to the 12—I should not use the word prescribed—listed in the table and schedule in the current act, and the eight will be incorporated into the table in clause 11 of the bill that is before us. It is an addition to those 12.

One cancer is malignant mesothelioma. I wonder this, given the narrow scope of clause 11: obviously, from a fire and emergency services perspective, many DFES workers are not necessarily employed pursuant to the Fire Brigades Act 1942 because they are, strictly speaking, our career and on-station firefighters. When we think about mesothelioma, there is probably a bunch of workers within DFES, particularly in the State Emergency Service, in the stream of DFES that is often referred to as natural hazards district officers or natural hazards employees of some sort. They would be regularly exposed to this type of hazard due to their role in storm and cyclone recovery—if not more frequently exposed than firefighters. If we think about tropical cyclone Seroja and the impact it had in the midwest, there was significant exposure to asbestos hazards. I wonder: would it be true to say that clause 11 will not provide any comfort to those SES employees of the department, but they could, as another remedy, be addressed through the regulations pursuant to clause 10?

Hon MATTHEW SWINBOURN: The first answer is that these provisions, as the member would know, do not apply outside the firefighting roles that we have identified, so the class of workers that the member has identified do not get that presumptive protection. I think those were the member's words; I think I might have chided him for using those particular words, and now I have used them. In any event, we will move on from that.

Hon Martin Aldridge: It's contagious.

Hon MATTHEW SWINBOURN: It is contagious; that is right. However, they could take some comfort that if their case—I do not want to say were worthy—could be made appropriately for them to be included by regulation under clause 10, which will become section 10 in the future, they could be incorporated.

While we are talking about malignant mesothelioma, I will add that some of these cancers, for the reasons the member has identified, are particularly relevant to firefighters, given their high toxic levels of exposure, and they are completely appropriate. For asbestos exposure, which is where mesothelioma comes from, it is unfortunately not just firefighters or SES people who are affected. As the member knows, I have a background in the construction industry, and I would suggest that the workers who are most inclined to come into contract with asbestos are demolition workers in the construction industry because they are the ones having to deal with it. In fact, workers who are probably the most susceptible are not the demolition workers, because the rules around asbestos are extremely strict, but actually the construction workers who inadvertently come into contact with asbestos, accidentally cut it and inhale it. We had the example of what happened at the Perth Children's Hospital, where asbestos was in some of the panels. Those panels were cut, and the dust was spread throughout the building, so those construction workers now must have a lifetime of surveillance conducted on them because they might develop malignant mesothelioma. The point I am trying to make is that issue with that disease is that it is much wider than the Department of Fire and Emergency Services cohort that the member talked about—that is, the State Emergency Service employees and the firefighters.

Hon MARTIN ALDRIDGE: I accept those views but my initial concern with this clause was that we will effectively discriminate against firefighters who are engaged by the local government sector or, indeed, the private sector. We are excluding those workers and telling them that they were not as important as public sector workers because that is who we are protecting. In fact, it is even narrower than that; we will exclusively protect firefighters who are employed pursuant to the Fire Brigades Act. That is not necessarily a criticism of the government because that provision has existed since 2013, but we have the opportunity to address that now.

On the issue I raised about exposure to asbestos through the course of emergency management, if one thinks about the response to cyclone Seroja and other storm events, effectively there were people across agencies, often from the same department, working alongside each other in the same environment. The Department of Fire and Emergency Services is a very diverse organisation. If I am wearing a fire patch on my shoulder, I am covered; I have greater protection against malignant mesothelioma. If I am wearing an SES badge on my shoulder and I work in the cubicle next to a firefighter, doing the same job at the same event, and we were both exposed to asbestos, my legal protections would be very different. I hope the government will turn its mind to the two issues I have raised about clause 11 and whether they are significant and worthy enough for consideration in regulations pursuant to proposed section 10 of the act. Or, indeed, if it is the case that we will see another reform bill, rather than a modernisation bill, to the Workers' Compensation and Injury Management Act, these issues might be considered by the government, with appropriate consultation, at that time.

Clause put and passed.

Clause 12: Meaning of "worker" and "employer" —

Hon Dr STEVE THOMAS: Clause 12 states —

> (2) An individual is a ***worker*** if —
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> …
>
> (b) the individual —
>
> (i) has entered into a contract …

I am interested in implied contracts. It think it is a continuation of existing legislation, but how will we define an "implied contract" and what are the limitations on that?

Hon MATTHEW SWINBOURN: The member indicated correctly that it is a continuation of what is in the legislation. I think the terms are express or implied. It is a catch-all. In contract law, most contracts are formed when a series of elements are met and therefore a contract is formed. Intent is one of those. However, unique to employment situations is the fact that a contract can be implied. This is unusual because the elements for testing the formation of a contract mostly include an intention to form legal relations, and that usually cannot be done accidentally, if I can put it that way. However, that can be done in employment contracts. For example, a person's fixed-term contract will continue until the end date, and if the parties do not do anything and the worker continues to turn up to work and the employer's expectation is that they continue to turn up, the contract is then implied. The fixed-term contract has come to an end but there is a contract almost at will because the parties have continued the employment relationship.

That is what it really covers. Again, this is not novel or unique language. It is well understood in employment fields what it means. It is to avoid a situation in which a person on a fixed-term contract continues to work after the contract ends and everybody has forgotten that they were on a fixed-term contract. It happens in the public service sector more than it should, because there are people who are on rolling fixed-term contracts, and people are perhaps not as judicious as they should be and forget to enter into a new fixed-term contract. The person keeps turning up to do the job that they have been engaged to do and the employer accepts that service, so the employee is entitled at law to move from a fixed-term arrangement to a permanent one. That is because terminating the contract requires the necessary notice to be given, which exist under the Minimum Conditions of Employment Act and the Fair Work Act, to bring that employment to an end. No surprises here, during my 15 years working for trade unions as an industrial officer and a lawyer, there were multiple situations in which we had fixed-term contracts come to an end and people just continued with them. Somebody in human resources would realise that they had mucked up, that the fixed-term contract had come to an end, and rush off to get the person onto a new fixed-term contract. We would tell the employee that they did not need to sign it and that their employment was ongoing and continuing. As soon as the end date passes, the previous contract ends. There is then an implied contract, the terms of which the parties all agree to and understand. That is where the legislation goes. I thank the member for giving me the opportunity to share my expertise and knowledge. I am not so strong on the firefighting stuff but a bit stronger on this stuff.

Hon Dr STEVE THOMAS: Well, the opposition is here to help, of course, as well as scrutinise legislation, so I am pleased to see it is such a harmonious event today.

I accept that it is a continuation of the existing legislation. I am interested in when a fixed-term contract ends and effectively rolls over into permanent employment. It is a really interesting concept that might not be explored today, but in some other industrial relations forum, it might be a bit of fun to go through. I assume, therefore, that there is not a broader written set of parameters around this. Is the minister saying that during an appeals process it will be determined precisely what an implied contract is or is not and that there is not a defined definition out there somewhere to check against?

Hon MATTHEW SWINBOURN: I do not think one would find a definition. Effectively, courts and tribunals will come to the point at which they find that there is a contract, so that is a thing. They will probably refer to which terms are expressed and which are implied. All the terms of the contract might be implied if nothing has been put into writing and there were no policies or procedures around the normal engagement and that sort of thing, so that is what might come into it. If I were a person who claimed that I was an employee of an employer and went to a court or tribunal to enforce some employment-related right, the finding would be that there is employment and therefore a contract—because one cannot exist without the other, as such—and that the terms of the contract are expressed because they are in a written form, or that there were expressed words between the parties that created the contract, or they are implied because of a range of factors. There are common law legal tests for the implications of terms in contracts, but please do not take me to any of those because that is a different kettle of fish. Yes, as I say, it is not a novel thing in this act; it is a continuation of what existed before.

Hon Dr STEVE THOMAS: No, it is not new. Although I like the concept of something that is implied becoming permanent afterwards, because I have implied many things about the government. It is a new definition that I am going to take on with gusto.

Clause 12(2) is about defining when someone is a worker if they are carrying on some of the work they would normally do in their business. I will start at —

> (c) the individual has contracted with a person for the performance of work by the individual and —
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> (i) the work is not work in the course of or incidental to a trade or business regularly carried on by the individual in the individual's own name or under a business or firm name.

As I understand this clause, if I am contracted to do a particular piece of work, it has to be a piece of work that I would not regularly do in my business. I presume this subclause is attempting to eliminate the subcontractor role. However, is there a circumstance in which someone is effectively a subcontractor but is operating outside their business, doing a job that they would normally be subcontracted to do—for example, a veterinarian employed elsewhere to do a veterinarian job but is effectively operating as a worker?

I presume that the government is trying to use this clause in the example of a contract between an employer and a worker versus a contract between an employer and a subcontractor. Are there circumstances in which somebody who is a regular subcontractor in ABC Mechanics Pty Ltd might actually be outside working as a worker on the weekend? Has that circumstance been examined as a part of what I think the government is trying to do in this clause?

Hon MATTHEW SWINBOURN: The way I see what the member is trying to ask is: Can you be two things at the same time? Can you be an employee and a subcontractor? The answer is yes. In the member's vet example, if a vet runs —

Hon Dr Steve Thomas: ABC Vet Practice.

Hon MATTHEW SWINBOURN: Yes, or James Herriot's Veterinary Service for All Creatures Great and Small.

Hon Dr Steve Thomas: I think his name was actually Patrick Wight, but anyway!

Hon MATTHEW SWINBOURN: Well, we will stick with my thing. So the vet is running his business, perhaps as a sole trader, doing vet work, and, in the course of that engagement, he will work for a multitude of people. He may even be brought in as a subcontractor for another vet clinic, which might pay him the rates that he charges as an independent subcontractor, for want of a better word. However, Jill's Veterinary Horse Clinic has a locum work on Saturday, and it wants to engage James but does not want to pay him his contractor rates; it wants to pay the award wages for a vet, and James agrees to it —

Hon Dr Steve Thomas: Paltry!

Hon MATTHEW SWINBOURN: Yes; that's right—paltry! So James agrees to that engagement and is an "employee" for the purposes of workers compensation system and is covered for that particular thing. In this example, even though James's trade and profession is veterinary science and he can run a business in that same area and be doing that kind of work, the key takeout here is that determining whether that person is a worker for the purposes of the act will always turn on the facts, circumstances and arrangements that are put in place at the particular time. Therefore, there is not a universal answer here, because we will have to look to the individual facts and circumstances.

Obviously, what we are trying to achieve here is that if people who are engaged in an employment-like relationship injure themselves—they are typically being remunerated as an employee and have no capacity to engage their own insurance because they might be getting the equivalent of award wages and they are under the direction and control of their principal such that there is no difference between them and the person they are working next to—they will continue to have an opportunity to be covered by their workers compensation system. This is opposed to those persons who are engaged in a business and get to make decisions and have the opportunity to refuse or accept work, and they charge an agreed rate that includes a proponent that goes towards insurance for themselves and things of that kind. Obviously, once they start to engage or subcontract other people, they are definitely not an employee because employees do not have the right to engage or subcontract other people.

There are particular industries wherein this is much more relevant than others. The member's veterinary industry is probably one of them because there are people who set up businesses in their own name as well as engage in work as an employee so that they can charge a different rate. The construction industry is another one, but we also see this concept being introduced in areas like contract cleaning and security in which the relationships are very rarely truly one other than an employer and a worker. The key here is: this is a scheme that we want to appropriately cover as many people as possible, because when people get injured through the course of their employment, it can be very dire, and we do not want to have people who should be appropriately covered by the system left outside it for coverage reasons. We also do not want employers who should be in the system and paying premiums to not be

in the system and, therefore, causing the costs for other employers to go up because they are not adding their fair share as well.

Hon Dr STEVE THOMAS: Thank you for the comprehensive answer, parliamentary secretary. The wording is the wording, I guess. It has been done by the Parliamentary Counsel's Office. This is not the clearest of clauses, I have to say.

Hon Matthew Swinbourn: This is a problematic area, not just in this bill, but generally.

Hon Dr STEVE THOMAS: I will take the parliamentary secretary at his word that that is precisely what this clause is intended to do, even though it is hard to interpret that from the words that jump out from the page. But I might move on to subclause (2)(c)(iii), which states —

> if the individual employs a worker, the individual performs part of the work personally.

Therefore, an individual is defined as a "worker" if the individual has contracted with a person for the performance of work. They may employ a sub-worker, but the individual has to perform some of that work themselves. Does that mean, therefore, that the individual cannot simply take a contract for a provision of the service and hand the whole thing on to somebody else? Do they actually have to do some of the work themselves? In those circumstances, if that is what the government is intending to hit, who will provide the workers compensation for the worker who is employed by the worker who is employed by the individual? Whose responsibility is it to cover that worker as a part of that process? Again, it is a little bit confusing as to precisely who is responsible for that. I am guessing that that is what the government is trying to do, but it could use an explanation.

Hon MATTHEW SWINBOURN: In all employment law areas, there is not, unfortunately, an easy definition for what forms an employment relationship. Obviously, when it comes to the Workers' Compensation and Injury Management Act 1981, we are not strictly talking about an employer and employee, because it is called the workers compensation act rather than the employee's compensation act. We want to catch other forms of work relationships. What I am advised —

Hon Dr Steve Thomas: Thus the clause with the definition of worker and employee.

Hon MATTHEW SWINBOURN: That is right. I think the policy behind this is to ensure that people who should be appropriately covered by the scheme continue to be covered by the scheme. This is the last limb of those—I want to use a different word, but the rump of those people who might remain where —

Hon Dr Steve Thomas: Not good to call people a rump, but anyway, I know what you mean.

Hon MATTHEW SWINBOURN: The class. We are getting to the fringes here, when somebody might be engaged—for example, they are a brickie, and they have a team of brickies and a contract with a building company. They work with a team of people that they might have organised; a lot of the time they are not operating under a company name. They might have just registered an ABN with a name that they made up. It is not a registered business name or anything like that. Contrary to popular belief, an ABN does not give any legal identity to anything. It does not create a separate legal —

Hon Dr Steve Thomas: A lawyer or accountant just picks one off the top of the internet.

Hon MATTHEW SWINBOURN: That is right. ABNs exist for the benefit of the government, not individuals, but people tend to take the view that if someone has an ABN they are therefore running their own business. It is not entirely true. I am getting distracted here. The point here is that if somebody does engage someone—they are ordinarily a worker with the principal and they engage somebody else to do part of the work. The worker engages someone else to help them with the work that they are doing. So long as they are continuing to do some of that work, they will still be covered under the policy of the principal for workers compensation. That is the circumstance we are trying to capture here.

Hon Dr STEVE THOMAS: Again, it is sometimes hard to work out what the intent is from the words on the page before. An individual is a worker. If the individual has contracted with a person for the performance of the work by the individual, we have got a contractor doing the work, the individual employs a worker and the individual performs part of the work personally. It seems to indicate that everybody has to do a bit of the work. If everybody lays a few bricks, everybody is covered by workers compensation. It is difficult to interpret. I fully accept the explanation, that it is trying to actually make sure that everybody is covered—I do not have a problem with that necessarily—but it makes it complicated. I do not know that we are going to get an easy resolution. I think that if it was easy, there would probably be a simple definition of worker that was two lines and we would not have to worry about the rest of it. However, can I check: one of the submissions to the review of the legislation suggests that the new definition of worker and employer was similar to the definition under the PAYG or pay-as-you-go taxation. Is that the case? Was it the case in prior drafts of that and, if there is a significant difference, what is that significant difference? I think it was either the Chamber of Commerce and Industry of Western Australia or the

Chamber of Minerals and Energy, one of those, whose submission made the reference that they were similar, if that helps.

Hon MATTHEW SWINBOURN: The definition of worker, in the bill before us, is not apposite with the PAYG definition. It was the case that the previous drafts of the bill had a definition that was connected with the definition for PAYG. What I am advised is that once that was proposed, there were a number of issues raised by stakeholders about them being problematic. It would have excluded groups of workers who are currently covered under the scheme and, importantly —

Hon Dr Steve Thomas: Can you give an example?

Hon MATTHEW SWINBOURN: It would have excluded anybody who was earning under the tax-free threshold, which is literally tens of thousands of workers, particularly young workers in hospitality and retail. The government's intention is not to narrow the scope and coverage of the workers compensation scheme. That advice was given to us by stakeholders. We moved to a different definition that is slightly different from the definition under the current act. The first limb, as I understand it, is substantially the same and the second limb is slightly different, but we can get into that as we progress.

Hon Dr STEVE THOMAS: It is the last one on this clause. Is it likely that there are further regulations to be drafted around the definition of "worker"? If so, what are those regulations likely to look like?

Hon MATTHEW SWINBOURN: Further regulations will arise from this. Some will be a bit benign. Some of the regulations will continue the exclusions that exist under the current act. The most obvious example of that is police officers, who have a separate scheme that relates to their injury, so they are excluded by regulation. Some workers will also be deemed who are not currently captured. I do not have any information on who they might be because WorkCover WA is continuing to do the policy work around the regulations and they will be subject to further consultation with stakeholders before they are finalised. Obviously, regulations are not drafted until a bill has passed, but we are in a different situation here in that we are modernising the current workers compensation act. We are not introducing a new scheme; it is just a different act, so there obviously will be a carryover of what currently exists, if that makes sense. It also needs to be understood that the regulation-making power is there as a safeguard, for want of a better word. One scenario that was put to me was of a crazy decision being made by the High Court about these things. As a lawyer, I could not say that any decision of the High Court was crazy; it might perhaps be a paradigm-shifting decision by the High Court on what is and is not a worker or that sort of thing. The bill will allow for that to be addressed through regulations to ensure that the policy intention of this scheme continues, notwithstanding that a decision might have been made. Such a decision might rest outside the act—it might be a decision of the High Court on some New South Wales law that has some implication for our law. I am just hypothesising to a degree. As I said, it will be a safeguard mechanism in the event that that might happen. It might not ever happen and it might never be necessary to use the safeguard of the regulation-making power in that way.

Hon Dr STEVE THOMAS: Once again, the opposition is being asked to debate a bill without knowing what the regulations will ultimately look like. There have been some reasonably obvious examples in recent times of regulations that have been developed after legislation has been passed that have not gone so well. I accept that government always wants the capacity —

Hon Matthew Swinbourn: Regulations are always developed after the bill. We do not make regulations until there is a law of the land to give power to them.

Hon Dr STEVE THOMAS: That is right. It is not necessarily the timing that is the issue; it is what might come in those regulations. I will leave at it this: I am interested in whether the parliamentary secretary has a list of the types of regulations that will be required to be developed under this clause. Is that available?

Hon MATTHEW SWINBOURN: I provided the member with a document last week, if I recall correctly. Just to give some more context, what we anticipate with this particular set of regulations—we keep using the plural—is that a primary set of regulations will apply. That was the structure that we gave to the honourable member. I do not know the tabled paper number of the document, but it is titled "Appendix 1: Indicative structure of workers compensation and injury management regulations". Within that document, we have given the headings of the particular areas but no detail. For example, under part 3, on the front page, it has prescribed workers and employees, section 13; excluded workers, section 13. All that WorkCover has done so far is to create what would be best described as a mud map. Following the passage of the bill, that will be populated with all the necessary parts in consultation with stakeholders—that is the key point.

Hon Dr Steve Thomas: I am happy with that; thank you.

Hon NICK GOIRAN: If there is a clause that is going to end up being judicially considered, I think it is going to be clause 12.

Hon Matthew Swinbourn: Hence my qualification of the crazy comment.

Hon NICK GOIRAN: I think we need to spend time to make sure that we get this right. It appears that the definition of "worker" at subclause (2) is intended to capture three scenarios. I will go through each of them separately. The first is what perhaps could be best described as an individual operating under a contract of service—that is subclause (2)(a). Is that contract of service scenario one and the same as the one that exists at the present time under the definition of "worker" in the current act?

Hon MATTHEW SWINBOURN: I am advised that the intention of the government with this clause is for the provision that the member has identified to be judicially interpreted as being consistent with the current definition relating to a person working under a contract of service. Obviously, the definition of "worker" in the bill is not structured in the same way as it is in the act so it is difficult to say that it is word for word, but the intention is for it to be interpreted in the same way that it is currently interpreted.

Hon NICK GOIRAN: I think it is fair to say that the existing definition—although it has been much the point of litigation—to use an inelegant phrase, is clunky at the very least. Therefore, I can understand the desire to remedy that. I say "desire" rather than "necessity" because I am not sure that it was necessary to do it, but I can understand the desirability of doing it. The point is that the government is saying that individuals who operate under a contract of service are currently captured as a worker for the purposes of our workers compensation scheme and it is intended for that to continue under clause 12(2)(a). I then move to the second scenario. Clause 12(2)(b)(i) and (b)(ii), in essence, seem to capture apprentices and those who are operating under an apprenticeship. Can the parliamentary secretary, again for the record, confirm that the intention is that those who are presently captured as an apprentice or have an apprenticeship with an employer will be captured by virtue of clause 12(2)(b)?

Hon MATTHEW SWINBOURN: Yes, member, that is the government's intention.

Hon NICK GOIRAN: Things start to get complicated at clause 12(2)(c). I thank the Leader of the Opposition for the initial scrutiny that has been provided on this clause. A new phrase at clause 12(2)(c)(i) refers to work that has been undertaken and "carried on by the individual in the individual's own name or under a business or firm name". Is the category or class of person that will be excluded by clause 12(2)(c)(i) captured under the act or will this be a new exclusion?

Hon MATTHEW SWINBOURN: I cannot answer that in a definitive way because there is a change. I can talk to the government's intention. It is not the government's intention that anybody who is currently captured under the definition will not be captured under the future definition. What has driven the change here is the practical difficulty in applying the current definition. My advice is that people who rely on this provision to seek workers compensation payments typically end up in disputation and then it is decided by a tribunal. By making the definition clearer, we are trying to achieve less use of that avenue. Although there is a group of, I imagine, very capable and qualified lawyers out there who could say that they understand exactly what it means, there is probably a much larger group of employers and workers who have no idea what this effectively means. Our goal is to have less disputation over who is covered under this and the intention is not to have anybody excluded as a consequence. We are not thinking of a group of people who we want to exclude here. That is the government's intention.

Hon NICK GOIRAN: That is helpful. In essence, the government is saying that although language used in the definition will change, its purpose is not to exclude people who are currently defined as a worker. Is it fair to say that notwithstanding the change in language here, it is intended that those people who have been subject to that disputation and have ultimately had a finding made in their favour—that is, that WorkCover or perhaps a court on appeal has determined that that person is a worker under the existing scheme—will also be captured moving forward?

Hon MATTHEW SWINBOURN: Yes, that is our intention.

Hon NICK GOIRAN: I do not think I can press that any further other than to get on the record that, as the government will be aware, there is not a consensus amongst stakeholders on this matter. The government has certainly been lobbied about those concerns. Time will tell whether those concerns come to fruition. Should these matters end up being litigated, I encourage those who go down that path to look at the discussion that happened under clause 1 of this bill. Under that discussion, the parliamentary secretary again clarified that it is not the intention of the government to exclude anybody. In actual fact, if anything, it was perhaps intended to capture some where on the edges it might be uncertain about whether they are currently captured.

One of the other points that the parliamentary secretary made in that consideration was to draw our intention, if I recall correctly, to clause 13, the very next clause, and the government's capacity to prescribe that certain workers be included. I will get to the exclusions in a minute, but certainly the provision allows for the government to prescribe that certain workers are included. The parliamentary secretary seemed to indicate, if I recall correctly, in the clause 1 debate that that should provide some comfort that if the government's intention is not fulfilled in due course—if these matters are litigated and it is found that certain workers who are captured now will be excluded—it intends to fall back onto the clause 13 regulation-making power to include those people. At the present time, is it fair to say, though, that the government has no immediate intention to prescribe any workers under clause 13?

Hon MATTHEW SWINBOURN: Regarding contractors, because that is what we were talking about before, no. However, regarding some other workers, it is not intended as being a mandatory thing; it is under consideration. That class of workers are carers who are covered under the National Disability Insurance Scheme and also religious workers—that is, clergy—who are specifically excluded under the current act, and so consideration is being given about whether to include those via regulation-making powers at a later time.

Hon NICK GOIRAN: The parliamentary secretary has given two examples of classes of workers that the government is actively looking to utilise with the proposed power under clause 13.

Hon Matthew Swinbourn: Contemplating would be a better word to use.

Hon NICK GOIRAN: It is contemplating including them, but in either case, it is about including them into the scheme, not excluding them from the scheme.

Hon Matthew Swinbourn: Yes, including them.

Hon NICK GOIRAN: I think the parliamentary secretary mentioned religious clergy as one. He is saying that they are not currently captured by the scheme, so they would be included?

Hon MATTHEW SWINBOURN: My advice is that they are covered by way of ministerial declaration. There is coverage for religious workers by way of that mechanism, but carers, who the member has not asked about but I suspect he will, are not currently covered by way of declaration or otherwise. That is why it is under consideration. Obviously, that is an interaction with what the feds are doing in this space as well, so it is, for want of a better word, a moving feast.

Hon NICK GOIRAN: The first one with regard to the clergy has been explained. I thank the parliamentary secretary for that. For the sake of the record, I would assume that they will be included in the regulations. It seems to me that no case has been made out and I am not aware of any submissions that said there is a problem at the moment and this class of people have been captured by the workers compensation scheme and they should not be into the future. That seems to me an obvious inclusion under the power of clause 13. With regard to carers, it seems that the parliamentary secretary is indicating that they are not currently captured under our workers compensation scheme in Western Australia. What is the position on carers currently performing work under the NDIS if they are not captured by workers compensation in our state and they are injured in the course of their employment or in the course of their duties under the NDIS? Do they have any rights of compensation?

Hon MATTHEW SWINBOURN: Some carers will undoubtedly be covered under the workers compensation system because they have an employment relationship and they are engaged by a service provider. I do not want to use the term "carer"; it is very broad. There are, for want of a better word, professional carers who are engaged as employees, but I am told that the problem is that under the NDIS system there are multiple different ways in which carers can be engaged. That has created some complications, for not just our jurisdiction, but also other jurisdictions. The problem, which I am sure the member will be as unhappy with as I am, is that if they are not currently covered by the workers compensation system, they do not have any coverage at all. The question becomes whether it is appropriate that that particular class or group—if we identify them, which I suspect will come down to subgroups—should be roped into the system by regulation. If one of those carers were performing work and was injured and not covered under the current scheme, they would need to have their own insurance to cover them. Alternatively, and I hazard to say this, they would have to sue the person who has engaged them under tort. I imagine that will potentially be a breach of contract arrangements, which I expect both the member and I think is probably not an acceptable scheme for dealing with a workplace injury, particularly at that level.

Hon NICK GOIRAN: We are conflating clauses 12 and 13 together. I put on the record that it is not my intention to go into any deep analysis at clause 13. The two clauses need to be considered together.

Clause 13(2) specifies that if the government goes down the path of looking to prescribe such workers by way of regulations, it must also identify the employer for that particular purpose. It is no wonder this is a complex area, because I can think of many scenarios whereby a person who qualifies under the NDIS is indeed a minor, and a family member, who is responsible for the managing of the funding that they receive under NDIS, secures the services of a carer who is then remunerated through the NDIS funding scheme. The question then becomes, who is the employer in that particular situation and who will then be paying any premiums that might ultimately result in a person being able to access workers compensation? I certainly encourage the government to continue its consultation and collaborations on that. As the parliamentary secretary said, this issue will not be unique to Western Australia.

Returning to the wording that has been chosen for clause 12 and the definition of "worker", as I indicated earlier we have had a very heavily judicially considered provision in the definition of workers to date in Western Australia. A new definition is to be implemented at clause 12. Has it been expressly modelled on any other jurisdiction? Can the parliamentary secretary provide the chamber some comfort about why this particular form of words has been chosen?

Hon MATTHEW SWINBOURN: I am advised that we are talking about clause 12(2)(c) here, rather than the entire definition of worker, because we have already established that 12(2)(b) is fundamentally the same as what currently exists within our own jurisdiction. From our perspective, the thing that needs to be addressed for greater clarity was subclause (2)(c), the subcontractor subclause. The advice I have is that Queensland, New South Wales and Tasmania have substantially similar provisions to this subcontractor provision. Ours is most like the New South Wales provision. Perhaps I will read out their Workplace Injury Management and Workers Compensation Act 1998, schedule 1, clause 2 —

> (1) Where a contract—
>
> (a) to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name), or
>
> …
>
> is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor.

Then, it has a subclause (3), which provides —

> (3) A person excluded from the definition of ***worker*** in section 4 (1) because of paragraph (d) of that definition is not to be regarded as a worker under this clause.

There is a significant similarity. Obviously, there is a bit of drafting style and context differences, but some of the key provisions have been judicially determined in those states as well. When the drafting was done, I understand that regard was had to the fact that there was judicial authority in relation to these matters. I think that can give anybody assurance that, obviously, we are not forging a completely new path on this. There is guidance for those who will be looking for it.

Hon BEN DAWKINS: I have been listening to the more senior lawyers in the room, Hon Nick Goiran and the parliamentary secretary, and to the contribution by the Leader of the Opposition. I go back to clause 12(2)(c)(i). When I was listening to the Leader of Opposition and the parliamentary secretary, they seemed to be saying that this will include people coming onto the worksite whose principal business was something else. Now that I have listened to Hon Nick Goiran, clause 12(2)(c)(i) is really an exclusionary clause. In my reading of it, anyone who carries on a trade or a business in their own name and comes onto the site will be excluded by this clause.

I have just compared it with the definition of worker in the current act. Like the parliamentary secretary and Hon Nick Goiran, I have some experience in this jurisdiction. In the current act, the definition of worker seems to focus on whether it is substantially the person's own labour that is being contributed as part of that exchange of services, if you like. Unlike what I thought was being said and I thought I was hearing when the parliamentary secretary was talking to the Leader of the Opposition, which was that it would include more people, this is really saying something else, is it not? This is my question to the parliamentary secretary. Essentially, anyone who is a principal in a business or a trade under their own name and comes onto the worksite could be excluded by this clause. I would say that that is more of an exclusion than the present wording in the act. It would appear to be open for insurers to avoid more claims, in my view. I am asking whether that is something we need to come back to. It seems to be quite a big exclusion.

Hon MATTHEW SWINBOURN: I said this to Hon Nick Goiran, and I will say it to the honourable member. It is the government's intention that those who are currently covered by the scope of the present definition will be covered by the scope of the new definition. The purpose of redrafting the definition is not to either increase or decrease that coverage. It is essentially to make it as clear as possible for those who pick up the act and read it for the sake of understanding whether they are covered and whether they need to provide insurance to someone, and to reduce the level of disputation around these provisions. As Hon Nick Goiran put to me in a proposition, if somebody has had a decision—they have gone to the arbitral or judicial body and had a ruling that said that they were covered under the current provisions for contractors in this area—they can take confidence from the fact that it is the government's intention that they continue to be covered under the new definition provided in this act.

I will go to the definition in the current act. The goal is to try to modernise the language. I will read out the current definition of worker in full to get the full effect of how archaic the language is —

> ***worker*** does not include a person whose employment is of a casual nature and is not for the purpose of the employer's trade or business, or except as hereinafter provided in this definition a police officer or Aboriginal police liaison officer appointed under the *Police Act 1892*; but save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer,

> whether by way of manual labour, clerical work, or otherwise and whether the contract is expressed or implied, is oral or in writing;
>
> the term ***worker***, save as hereinbefore provided in this definition, includes a police officer or Aboriginal police liaison officer appointed under the *Police Act 1892*, who suffers an injury and dies as a result of that injury;
>
> the term ***worker*** save as aforesaid, also includes —
>
> (a) any person to whose service any industrial award or industrial agreement applies; and
>
> (b) any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services,
>
> and any reference to a worker who has suffered an injury shall, where the worker is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable.

That is the first full stop in the entire definition, hence my breathing difficulties. I am sure that the honourable member agrees that this act should be as readable as possible to a lay or ordinary worker as well as to an ordinary employer. I can confidently say that the definition as it has been drafted in the act is not in language that any of us would choose to use in this day and age.

Hon BEN DAWKINS: Thank you, parliamentary secretary. It is complicated, and the parliamentary secretary has been very helpful. I wonder about the part he just read out. Clearly, certain workers are excluded in the current definition, but I feel that part (b), the second-last paragraph he read out, ropes a whole cohort of workers back into the act because it talks about substance for their labour. Maybe that type of clause is the difference between the current act and the proposed wording.

Hon MATTHEW SWINBOURN: I have put to the member the government's intention with this clause. I have put to the member what I also put to Hon Nick Goiran about the current and the proposed definitions. It is our intent that it will capture the same group of workers. I am not going to get into a debate with the member about the coulda, shoulda or wouldas with that language. That is our intention and I cannot be any clearer than that.

Hon Dr STEVE THOMAS: I apologise to the parliamentary secretary because we have kind of conflated clauses 12 and 13 a bit now. I choose to blame either Hon Nick Goiran or the parliamentary secretary, so I will blame the parliamentary secretary.

Hon Matthew Swinbourn: I can bear the burden; it's okay.

Hon Dr STEVE THOMAS: During the little debate around that clause, the issue of carers came up. I presume we are talking about paid carers under a contract of some form who will ultimately be under the regulations as they are written. I presume that voluntary carers will be excluded because they are not employees in any way.

Hon MATTHEW SWINBOURN: That is correct if they are voluntary carers. We were trying to refer to that under the National Disability Insurance Scheme, people use their NDIS funding to engage and pay for the services that carers are providing although it could be a family member or someone who is part of their household.

Clause put and passed.

Clause 13: Prescribed workers and excluded workers —

Hon NICK GOIRAN: This appears to be a Henry VIII clause. I draw to the parliamentary secretary's attention clause 13(3), which reads —

> The regulations may provide that an individual of a specified class or description who otherwise would be, or might be, a worker under section 12(2) is not a worker for the purposes of this Act.

In other words, with the stroke of a pen, the government could come along and exclude people, in effect changing the primary act. People will suddenly find themselves no longer considered to be a worker in Western Australia for workers compensation purposes. The explanatory memorandum, which accompanied the bill, provides some explanation for this. I quote —

> There is also provision for regulations to exclude workers of a specified class or description from the operation of the Act. This is intended to apply to those working arrangements that are currently excluded under the Act including serving police officers and professional sporting contestants who are covered under alternative industrial and insurance arrangements.

It seems to me that it would be far more desirable for the Legislative Council to agree on who is to be excluded rather than simply leave it to a Henry VIII clause. That said, I do not expect to receive any satisfaction on this

point any time soon. Rather, the purpose of my question is to clarify, if the parliamentary secretary can at this time, whether anybody else other than serving police officers and professional sporting contestants—the two categories mentioned in the explanatory memorandum—is intended to be excluded by virtue of the power in clause 13(3).

Hon MATTHEW SWINBOURN: I can confirm it is only those two classes that the member referred to and which are referred to in the explanatory memorandum.

Clause put and passed.

Clause 14 put and passed.

Clause 15: Jockeys —

Hon Dr STEVE THOMAS: Is it the case that jockeys have to have their own classification because of the system by which they are paid—potentially for race wins rather than regular employment wages? Why do they need that provision? I presume it is because some form of the tenure of their employment makes it necessary.

Hon MATTHEW SWINBOURN: It is not because they are little, which is what I suggested to the advisers.

Hon Dr Steve Thomas: You thought it was a heightism.

Hon MATTHEW SWINBOURN: Yes, I thought that might have been the reason.

Hon Dr Steve Thomas: Sexism and heightism.

Hon MATTHEW SWINBOURN: This is a distraction and I am probably going to get told off for doing it —

Hon Sue Ellery: Yes.

Hon MATTHEW SWINBOURN: — but I am going to say it anyway. I went to one of the jockey awards a few years ago. One of the apprentice jockeys was over six foot. They are not always short. The poor fellow had to diet in a way that was probably a form of torture to stay under the necessary weight. It is because they are remunerated by results that they need their own special provisions.

Clause put and passed.

Clause 16: Working directors —

Hon Dr STEVE THOMAS: The thorny issue of working directors often comes about because we corporatise businesses these days and people become the director of a business. Rather than being a sole operator, for example, where it is fairly obvious and they are effectively self-insured because they are the owner of the business, in this corporatised model, directors effectively are fulfilling the same role. I presume that is what we are trying to deal with in clause 16. A person has to register to become a working director. Is a director referred to in the clause effectively an owner or shareholder of a business who also works within the business and is it a requirement to be working within the business that they are taking a wage from the business as opposed to taking a profit share to be defined as a worker under the act?

Hon MATTHEW SWINBOURN: Perhaps I can give the member an outline rather than answering the multiple questions he threw at me.

Hon Dr Steve Thomas: I like multiple questions.

Hon MATTHEW SWINBOURN: Yes. It might cover off what the member is trying to get at. It is an opt-in scheme so it is not compulsorily including working directors. They must opt in. On remuneration, they must declare their remuneration once they opt in. It does not have to be wages or salary; it can be other forms of remuneration, however that is made up in the creative ways that such things are made up. The purpose of the declaration of the remuneration is essentially to establish what their compensation would be if they were subject to an injury and therefore had to access the scheme. That is why they need to declare how they are remunerated, not because the government wants to know how they get paid or anything like that, for the sake of it. That is the nature of this sort of thing. If working directors do not opt into the scheme, they will not be covered by the scheme, so it is really up to them. They may wish to put into place other insurance arrangements. I suspect what will happen is that if they opt into the scheme and it is their insurance, and their remuneration is significant within the company, they will hit the caps very quickly, so it might be better that they do not opt in because they would want a private insurance arrangement that can cover them for the losses they might suffer if they were injured in the course of their employment. If they were a working director of a small company and the scheme was attractive to them because the insurance premiums are much more competitive than they might be for a private arrangement, they might decide to come in. It gives them the option to do that.

Hon Dr STEVE THOMAS: That is really interesting. I like the description of an opt-in process for directors, or definition of working directors. Do they only have to have an income? Presumably, the parliamentary secretary is saying that a share of profits could be determined as a director's income for the purposes of the Workers' Compensation and Injury Management Act. I will get the parliamentary secretary to confirm that

when he stands, but it is interesting that working directors of a company can claim that. My follow-up question is: can a sole proprietor seek workers compensation insurance in any way under the Workers' Compensation and Injury Management Act in the same way that a working director can; and, if so, under what circumstances can they do that?

Hon MATTHEW SWINBOURN: I think sole trader is a better term than sole proprietor. They cannot be covered under the act if they are not otherwise a worker, so that does not extend to them. I make the point that because we are trying to modernise the act, we are not extending or reducing—other than the caveats for the small area that we have admitted—the coverage of the act. Currently, working directors are covered. The provisions here are the same provisions that exist, other than the drafting. Under the current act, sole traders are not covered. They will not be covered under the new act. If they were to be covered, that would have to be a policy decision made at a later date, and as I say, it is not covered in this bill.

Hon Dr STEVE THOMAS: Does that mean the owner of a business that is not incorporated—therefore, the owner, whether one or multiple owners, is not a director—has no access to the Workers' Compensation and Injury Management Act to get workers compensation insurance?

Hon Matthew Swinbourn: Not presently.

Hon Dr STEVE THOMAS: Not presently, no; but they will not under the new act either.

Hon Matthew Swinbourn: No, under the new act, they will not.

Hon Dr STEVE THOMAS: If I were Steve Thomas, political consultant, apart from being registered —

Hon Matthew Swinbourn: Who would pay you?

Hon Dr STEVE THOMAS: Who knows? The government will turn desperate in the fullness of time. If I were a sole trader or simply started a business, took a business name, got an ABN and operated, I could not claim workers compensation if I was injured performing my work duties. However, if I incorporated and became Steve Thomas Pty Ltd, and appointed myself as a director, I could access the workers compensation system. I presume I apply to —

Hon Nick Goiran: The company would apply.

Hon Dr STEVE THOMAS: It would be me, but I would be the company, because it is only me, unless I employ Hon Nick Goiran to work with me.

Hon Dan Caddy: As a vet.

Hon Dr STEVE THOMAS: As a vet? No, as a political consultant.

Therefore, as a company director, I could seek coverage under the workers' compensation act, but as any other type of proprietor of a business that is not incorporated, in which I am not officially a director, I would have no access to the workers compensation scheme. Is that how it operates?

Hon MATTHEW SWINBOURN: Largely, yes. However, it must be understood that the company of which the member is a working director pays a premium for the benefit or privilege of accessing the scheme. The point here is we are not providing an entitlement for working directors as a windfall for them. If their company decides that it wants to be a part of the workers compensation scheme, there is a pathway for them to do it, but the company of which they are a director and undoubtedly share in the profits of, will have to bear the expense of the insurance that arises with that. Yes, it is the case that sole traders do not have that similar entitlement to access the scheme. I could get advice on why that might have been the case historically, but again, the task that we are trying to perform with this bill is not to expand or narrow the scope and coverage of the act. Whilst there may be very good reasons to provide access in the future to sole traders, it is not a task that we have given ourselves at this point in time.

Hon Dr STEVE THOMAS: We accept that the government is not trying to expand or contract the area that is captured under the act, I understand that, but I am trying to pin this down. It is interesting that although a sole director of an incorporated company operates in exactly the same manner as someone who has got an ABN, running a business as a sole trader, Steve Thomas Pty Ltd, with a director of Steve Thomas, can apply for coverage under the act, but Steve Thomas, the sole proprietor who is running his own business and taking the same wage or profits under the same circumstances, cannot. In either case, each of those businesses has alternative insurance models that they can get to. For example, if Steve Thomas wants to cover himself by taking income protection insurance or another insurance model, that would probably cover the same areas. As a director, if I am injured, I have access to workers compensation. If I am a sole trader, income protection insurance often covers a similar area.

The parliamentary secretary may not have the answer to this, and I am not sure how I find it, but it is a really interesting area of law. I am interested to know how premiums compare between sole traders taking income protection insurance, for example, versus working directors who are covered under the workers compensation act, accessing insurance through workers compensation, because the parliamentary secretary's comment a few minutes ago was it does not provide a cheaper alternative. Those are not the exact words.

Hon Matthew Swinbourn: I said windfall.

Hon Dr STEVE THOMAS: I am trying to remember what was said, but the information was that, from the government's perspective, it is not designed to provide to incorporated bodies and working directors a cheap alternative to the others, which would include income protection insurance. I think those might have been the parliamentary secretary's words, or something along those lines. I am interested to know whether that statement could be justified or quantified. The parliamentary secretary might well be right, but is there evidence to suggest that one avenue to protect income and entitlement is more or less cost-effective than the other? I fully expect that information might not be available, because it is a very direct question on key aspects. I could ask it on notice, I guess, at some point. Perhaps it might be asked through the minister's office during the week if there is some sort of coverage of how those two premiums compare, and whether there is a cheaper version or not.

Hon MATTHEW SWINBOURN: We do not have the data on what small businesses might pay for an equivalent to workers compensation schemes, because that is an entirely private activity. The information is that there would be a privity for those costs, and it is not declared to WorkCover in any way. We do not collect that data. It is not our bailiwick in the role that the government has. We know about insurance premiums under the workers compensation system. I am absolutely certain that my minister will not have that other information within his portfolio, because if WorkCover does not have it, there is not another part that would have it. As I say, those arrangements are done through insurance brokers, and they are done at a high level. An inquiry to a broker might provide an example.

The other problem is about the size of the operation. Obviously, a sole trader in a small business with a small turnover and small income is not likely to be paying massive premiums. But if a sole trader is making millions of dollars in a high-risk industry and earning an absolute bucket, their insurance will be different as well, so I am not sure that the member will get anything meaningful by a cost comparison of those things. I do not think I used the word "cheaper"; I said that it is not a windfall system for working directors. I might have said that it may not be any cheaper or more expensive.

Hon Dr Steve Thomas: No; I don't want to put words in your mouth.

Hon MATTHEW SWINBOURN: No. That is the point, though. We are not making a windfall scheme here for working directors. As I said, they will decide whether the premiums and entitlements of the workers compensation scheme is more beneficial for them, as opposed to a private arrangement. They are free to choose to do so or not to do so.

Hon Dr STEVE THOMAS: I am not actually doubting the parliamentary secretary's intent.

Hon Matthew Swinbourn: No; I understand that.

Hon Dr STEVE THOMAS: I am just trying to pin down the numbers on this. By the way, we are all looking for a million-dollar job that has low risk, so if the parliamentary secretary could come up with one of those, I am prepared to announce my retirement from Parliament, but we will see how we go! They must exist somewhere.

Hon Matthew Swinbourn: They must! Someone has them.

Hon Dr STEVE THOMAS: They must; I just do not know where they are.

Hon Martin Aldridge: Maybe in the new WA embassy.

Hon Dr STEVE THOMAS: There we go! Where do I send my résumé?

I accept that the parliamentary secretary probably cannot provide a cost comparison. Maybe that is something for me to take to the insurance industry. What the parliamentary secretary might be able to provide, though, either today or later, that may give us some form of indication is the number of working directors there are. Effectively, they have to apply for permission to be covered as a working director. The parliamentary secretary might even be able to tell us how many working directors and companies there are. That might give us an indication of how widely used this continuing process is, because it is not new.

Hon MATTHEW SWINBOURN: We do not have that data at the table. We are not sure that we collect it in a way that we can give to the member in any event, so I think we will have to make further inquiries.

Hon Dr Steve Thomas: Perhaps you could ask the question.

Hon MATTHEW SWINBOURN: I can give an undertaking that we will look at it and we will give the member some answer when we are in a position to. We will provide the member with either the information he has asked for or an explanation as to why we are not able to provide it. As I said, at the table we are not entirely sure that WorkCover WA collects that data in the kind of way that the member has asked for, or in any other way, because the arrangement is essentially with the insurer as such, rather than with WorkCover, so it is whether that information is subsequently fed back from the insurers to WorkCover as a data point. But, as I said, we will get further advice on it. I hope it does not hold up the progress of the clause.

Hon Dr Steve Thomas: No. I'm not about to hold the clause up on that basis. If you can find that, well and good.

Clause put and passed.

Clause 17: Employer liable for compensation —

Hon Dr STEVE THOMAS: This clause basically says that the employer is liable for compensation, which I would have said is the underpinning of the entire bill; otherwise, if the employer was not liable for compensation and did not take out insurance, we would not be here. The penalty is only $10 000, though. It seems like a relatively low penalty, unless it is a very small business. I presume that the majority of the financial impost is actually then providing the compensation as required and this is really just a little bit of icing on the cake. Was any consideration given to whether $10 000 was an appropriate figure, or is it just a continuation of what currently exists?

Hon MATTHEW SWINBOURN: We were just trying to work out what the current fine or penalties are for the equivalent provision, and it was not easy. It is not just one for one in this instance, which is why we were rustling papers! I can tell the member that the penalties were reviewed in the 2014 review. All the penalties in the act were considered to be out of date by, I think, most people who do not have to pay them. I am told that the equivalent penalty under the current act arises under section 57A(8A). It is $2 000, so it has increased. I do not know the time period, but it has been some many years.

The purpose of this particular penalty is to deter employers who have been determined to be liable for compensation payments but who refused to pay them from not refusing to pay them. That is why it is a more significant fine, although the member indicated that for some businesses it would not be very significant at all. However, $10 000 is at the higher level of the fines that are dictated in the scheme of this bill. A worker would hope they would never be in the situation wherein a fine had to be imposed on an employer who had been found to be liable and then still subsequently refused to pay, because it is a pretty horrible situation for a worker to find themselves in when they know they should be receiving payments, but they are not getting any of them.

Hon Dr STEVE THOMAS: I guess the obvious question that lends itself is: have there been employers that have simply refused to pay and been fined $2 000, and what has happened after that? Were they fined $2 000 and that was the end of their obligation? What was the outcome if it has occurred?

Hon MATTHEW SWINBOURN: I do not have any specific advice about whether, under the current act, there have been prosecutions under the provision that I mentioned before. There are a number of penalty provisions under the current act, and WorkCover is primarily focused on prosecuting employers when they do not have insurance. That is a much more serious arrangement than what we are perhaps dealing with here, because typically, and overwhelmingly in this situation, the insurer makes the payments for compensation so that the worker is not left without money. The issue of whether the employer is then pursued is a separate issue, because the insurer would step in, by right, and make the payments. It depends on the arrangements, but it is not a heavily litigated area that I can provide much more insight on. It is obviously there to provide a deterrent against employers not doing the thing that they are required to do under the act.

Clause put and passed.

Clause 18: Forms of compensation —

Hon NICK GOIRAN: Clauses 18 and 46 state that income compensation is payable for an injury if the worker's injury results in total or partial incapacity for work. We can compare and contrast that with section 21 of the current act, which reads —

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

The phrase "resulting from the injury" that follows has a very particular legal meaning and forms part of the assessment of whether a worker has an entitlement to compensation for the injury. In fact, the case law demonstrates that the worker does not have to prove a direct link between injury and incapacity. I note that at clause 18—the same thing happens at clause 46—we have not included the words "results from", which may give rise to a concern. Can the parliamentary secretary confirm whether there is any intention to change the legal test that applies so that test results will be maintained?

Hon MATTHEW SWINBOURN: The government's intention is that will there be no change to the legal test with regard to the things the member referred to.

Hon NICK GOIRAN: That being so, is there any explanation as to why we have changed the language at this point?

Hon MATTHEW SWINBOURN: We have said before that the purpose of changing the language is to improve the clarity of the provision, not to change its intention. It is to make it clear that the entitlement to income compensation arises, practically, from an incapacity to work. I think that is what the current clause provides for, but we think the wording of the new clause will make the reality clearer. The practice as it currently applies gives effect to that and we are trying to make sure the wording is more apposite for the practical application under the current section with the new provision and things of that kind. Like the member, I am conscious of the time.

Hon NICK GOIRAN: To round out this point, and I have no further questions about clause 18, I note that on the linked clause, which is clause 46, the explanatory memorandum says —

> Clause 46 provides for an entitlement to income compensation if the injury results in total or partial incapacity for work, consistent with the current Act.

Again, I think the explanatory memorandum reconfirms that intention by the government.

Clause put and passed.

Clause 19 put and passed.

Committee interrupted, pursuant to standing orders.

[Continued on page 3726.]