

WORKERS' COMPENSATION (COMMON LAW PROCEEDINGS) BILL 2004

Second Reading

Resumed from 19 October.

HON NICK GRIFFITHS (East Metropolitan - Minister for Housing and Works) [10.11 am]: I thank Hon Ray Halligan, Hon Jim Scott and Hon John Fischer for their contributions to this debate. Hon Ray Halligan regrettably commenced his remarks by stating his opposition to the Bill, in the strongest possible terms, if I recall correctly. He will forgive me for saying so, but although he gave a very learned exposition of the case law that has provided the genesis for the Bill, I suggest that, in setting out the judgments of their honours dealing with the genesis of the Bill, he has very lucidly laid the foundation of the case for this House supporting the second reading of the Bill.

A number of specific issues about the impact of the legislation were raised, and I intend to deal with those shortly, but before I do so, I will make reference to a gentleman referred to by Hon Jim Scott in his comments. I think the man is a constituent of Hon Jim Scott - Mr Koljibabic. Without commenting on the merits or otherwise of Mr Koljibabic's case, I am advised that he has a writ before the District Court, and there is a potential for that writ to be struck out on the grounds that the basis of the claim should be the pre-1999 provisions, instead of the current provisions. If this Bill is passed, it should prevent such an application from being proceeded with, in the event that it is brought. That is without making any comment one way or the other on the merits of the gentleman's claim. There is a potential benefit for him in this Bill.

Hon Ray Halligan was concerned to know what the impacts of the Bill would be, firstly in respect of the Dutch decision and the likely number of workers affected. I am advised that, based on actuarial estimates, the cost of addressing the Dutch decision would fall within a cost range - this is a large range, which I will explain in a moment - between \$59.5 million and \$20.3 million. The likely figure within that range turns on whether the persons affected decide to pursue common law claims. The figure of \$20.3 million is based on an assessment of 107 hard cases - if I can put it that way - that are considered to be fairly certain common law claims. The figure of \$59.5 million would apply if the maximum number of those affected - 314 - pursued common law claims. I have given the numbers of cases, ranging from 107 to 314, and the cost, ranging from \$20.3 million to \$59.5 million. There was a provision for the costs to be paid from WorkCover WA's employers' indemnity supplementation fund. This will occur only if any amount of damages awarded is greater than the estimated cost provided by insurers and self-insurers, as recorded by WorkCover. The insurers and self-insurers, I am advised, had an amount in reserve for an award of damages, and provided an estimate for WorkCover. The cost to the supplementation fund is estimated to be minimal, as the money has already been allocated to cover the costs and the reserves have been collected from the premiums paid by employers. Only in exceptional circumstances, in which the estimates are out of kilter with the reserves, will there be a draw on the supplementation fund.

Hon Ray Halligan was also concerned about the cost impact of the Dossett decision and related decisions, and the likely number of workers affected; that is, the cost impact of what the Bill proposes to do about those affected persons. I am advised that it is difficult to estimate the number or cost of claims directly affected by the Dossett decision because of the mess we find ourselves in with the operation of the law, as was ably pointed out by Hon Ray Halligan in his observations. The Dossett decision arguably means that any worker with a disability acquired between October 1998 and 5 October 1999 could potentially pursue or reopen a claim. I emphasise the word "potentially" there. I will provide some up-to-date statistics to put people's behaviour into context. At the time this Bill was introduced to the Legislative Assembly, there were 42 applications before the District Court, of which nine had been granted leave to proceed with an action under the pre-October 1999 common law system. As at 18 October 2004 - Monday of this week - 91 applications have been made, of which 33 have been granted leave. Frankly, it is impossible to determine the behaviour of people, but if the Bill is second read, the cost to the system will turn on how we deal with the cut-offs in committee. I suppose some people have higher legal costs than others. These are matters that will be assessed. In that event, it is incumbent on us to treat people fairly.

Hon Ray Halligan: As long as we can provide clarity and certainty.

Hon NICK GRIFFITHS: It is our job to do our best. I note that, at the end of the day, although we endeavour to do our best as a House, we are human beings and we do not always get it right. Nevertheless, I trust we will succeed. I know we will try our best.

A question was posed about whether workers should be given the choice of pursuing a common law action under either the former provisions or the current provisions rather than, if we like, drawing a line in the sand. The difficulty is that we are dealing with the intent of the 1999 amendments the meaning of which, as Hon Ray Halligan pointed out in his observations - without quoting him - was despatched to the boundary by the High Court. In the light of Dossett and subsequent court decisions so many variations and complexities have emerged that we find ourselves in a legal quagmire. I suggest to the House that this Bill is in the interests of creating

certainty. The best way to create certainty in these circumstances is to honour the intent of the 1999 amendments. If we draw that so-called line in the sand - an interesting turn of phrase because I have always thought a line in the sand was very temporary - it is the hope and expectation that, when passed, this legislation will provide certainty. One of the great difficulties in this or any area of law - I think Hon Peter Foss has commented on this from time to time - is that when people litigate they want a fair idea of where they stand. Law is expensive and, regrettably, on most occasions, often beyond the reach of most people in our community. It is even further beyond the reach of people if there is uncertainty. At the moment, dreadful uncertainty surrounds workers' compensation claims. I suggest that this legislation will go a long way towards fixing that. Under those circumstances, I commend the Bill to the House.

Question put and passed.

Bill read a second time.

Committee

The Chairman of Committees (Hon George Cash) in the Chair; Hon Nick Griffiths (Minister for Housing and Works), in charge of the Bill.

Hon NICK GRIFFITHS: I propose introducing further amendments. I have just had a discussion with Hon Ray Halligan. The purpose of these amendments is to provide a further benefit and to change an aspect of retrospectivity. Hon Ray Halligan wishes to give the matter some consideration and therefore, Mr Chairman, I ask that you leave the Chair until the ringing of the Bells.

The CHAIRMAN: The minister has invited me to leave the Chair until the ringing of the Bells to enable that discussion between certain members and the minister. If there is no objection I will leave the Chair until the ringing of the Bells.

Sitting suspended from 10.26 to 10.44 am

The CHAIRMAN: During that short suspension, additional amendments were circulated in the name of the minister.

Clause 1: Short title -

Hon RAY HALLIGAN: I thank the minister for bringing forward these further amendments. I have checked with our shadow minister, who is in concurrence with them. One may very well ask why, and I suggest to the Chamber that these are exactly the same issues that were raised by Hon Cheryl Edwardes in the other place about what was required by way of amendment. That is one reason we on this side of the Chamber, up to this point, have not been supportive of the Bill; there were far too many unanswered questions. It is pleasing to see now that the minister has brought forward these amendments that will allay the fears of the Opposition.

Hon JIM SCOTT: This Bill is now to be significantly improved by this draft of last-minute amendments. Like Hon Cheryl Edwardes, I have been seeking this type of change to the Bill to prevent us getting into some of the difficulties that brought about this Bill in the first place, and to produce better outcomes for people. The amendments have certainly answered most of my concerns, and I am very pleased with the way in which these changes will shape the outcome of this Bill.

Clause put and passed.

Clauses 2 to 4 put and passed.

Clause 5: Provisions applying to awarding of damages -

Hon NICK GRIFFITHS: I move -

Page 4, line 15 - To delete "before 23 June 2004" and insert instead -

on or before the day on which this Act receives the Royal Assent

Page 4, line 18 - To delete "before 23 June 2004" and insert instead -

on or before the day on which this Act receives the Royal Assent

These amendments will enable those who have advanced their cases to receive payment for their legal fees, and it gets rid of that element of retrospectivity that was of concern.

Hon JIM SCOTT: This change takes away the retrospective nature that would have been brought about by the use of the date of 23 June 2004. This will mean that all persons who commence proceedings before the date of royal assent will have better outcomes under this legislation.

Hon NICK GRIFFITHS: These amendments will also allow that small number of workers who have been granted leave between the 23 June and the day that the Bill receives royal assent the capacity to commence proceedings under what will be the former provisions. That is a matter about which Hon Jim Scott was very concerned.

Amendments put and passed.

Clause, as amended, put and passed.

Clause 6 put and passed.

Clause 7: Jurisdiction removed and workers' costs indemnified -

Hon NICK GRIFFITHS: I move, with the goodwill of the committee -

Page 5, line 25 - To insert at the end of the line "or".

Page 5, lines 28 to 30 - To delete the lines.

Page 6, line 8 - To delete "22 June 2004" and insert instead -
the day on which this Act receives the Royal Assent

Essentially, these amendments tidy up the retrospectivity issue for the benefit of those who would otherwise be affected.

Hon JIM SCOTT: I particularly thank the minister and the advisers who have worked with him on this issue for making this change, because retrospectivity is a significant issue. It ensures, at least in this case, that the changes come into effect on the date on which the Bill receives royal assent. There is no retrospectivity. Retrospectivity is unfair when it takes away pre-existing rights. There is a provision for that in the Interpretation Act. The Commonwealth Constitution also does not allow the federal Parliament to make changes retrospective, because retrospectivity is considered to be, or that it could be, unfair and unjust. I am very pleased that we have maintained that line through this change. This change will enable people, and particularly Mr Dossett, who has been before the courts for a very long time, to have an opportunity to proceed. It would have been very unjust if he had not been able to do that.

Amendments put and passed.

Clause, as amended, put and passed.

Clauses 8 and 9 put and passed.

Clause 10: Sections 93EA, 93EB, and 93EC inserted -

Hon NICK GRIFFITHS: If I may, I will move the amendments and speak to them en bloc, so that those who read *Hansard* will at least be aware of what I am proposing to do. I move -

Page 10, lines 20 and 21 - To delete the lines and insert instead -

(a) before the coming into operation of section 10 of the *Workers' Compensation (Common Law Proceedings) Act 2004*,

Page 10, line 24 - To insert before "on" -

on or after 4 December 2003,

Page 12, line 26 - To delete "93EB" and insert instead "93EC".

Proposed section 93EB is intended to assist those who have sought to refer a question to the director in accordance with section 93D(5) under the provisions as amended in 1999. However, as a result of a number of decisions, review officers, when considering the question after 4 December 2003, did not deal with the substance of the question; that is, they did not make a finding on whether the degree of disability was not less than the relevant level and, therefore, may have adjourned or dismissed the matter. Those workers would have been dealt with under the provisions as amended in 1999 but for those decisions that Hon Ray Halligan referred to in his speech. I have moved three amendments to clause 10 en bloc. The first two are required to ensure that proposed section 93EB has application to workers who referred a question of their degree of disability to the director before clause 10 of this Bill comes into operation. The current wording of proposed section 93EB(1)(a) provides that the worker sought to refer a question to the director under section 93D(5) during the period commencing 4 December 2003 and ending 22 June 2004. As there are cases in which workers sought to refer the question before 4 December 2003, the reference to "during the period commencing on 4 December 2003 and ending on 22 June 2004" in proposed section 93EB(1)(a) is proposed to be deleted and certain words inserted, namely, "before the coming into operation of section 10" and so on. That will allow cases that were referred before 4

December 2003 to qualify under these provisions. The date of 4 December 2003 is the date of the Dossett decision.

Amendments put and passed.

Clause, as amended, put and passed.

Clause 11: Section 154AC inserted -

Hon NICK GRIFFITHS: I move -

Page 13, line 26 to page 14, line 6 - To delete the lines and insert instead -

damages to which Part IV Division 2 applies in a case in which a question as to the worker's degree of disability was referred under section 93EA(3) to the extent, if any, to which the cost exceeds the amount ascertained in accordance with regulations made for the purposes of this section.

Amendment put and passed.

Clause, as amended, put and passed.

Clause 12 put and passed.

Title put and passed.

Bill reported, with amendments.

Leave granted to proceed forthwith through remaining stages.

Report

HON NICK GRIFFITHS (East Metropolitan - Minister for Housing and Works) [11.03 am]: I move -

That the report be adopted.

Question put and a division taken with the following result -

Ayes (24)

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|---------------------|--------------------|---------------------|---------------------------------|
| Hon George Cash | Hon Sue Ellery | Hon Kevin Leahy | Hon Christine Sharp |
| Hon Kim Chance | Hon Adele Farina | Hon Robyn McSweeney | Hon Bill Stretch |
| Hon Robin Chapple | Hon Peter Foss | Hon Dee Margetts | Hon Derrick Tomlinson |
| Hon Murray Criddle | Hon Graham Giffard | Hon Norman Moore | Hon Ken Travers |
| Hon Bruce Donaldson | Hon Nick Griffiths | Hon Barbara Scott | Hon Giz Watson |
| Hon Kate Doust | Hon Ray Halligan | Hon Jim Scott | Hon Ed Dermer (<i>Teller</i>) |

Noes (4)

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| Hon Alan Cadby | Hon Paddy Embry | Hon John Fischer | Hon Frank Hough (<i>Teller</i>) |
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Question thus passed.

Third Reading

HON NICK GRIFFITHS (East Metropolitan - Minister for Housing and Works) [11.07 am]: I move -

That the Bill be now read a third time.

HON RAY HALLIGAN (North Metropolitan) [11.08 am]: The Bill before us is one that was to create certainty for injured employees. Of course, the Government was well aware of that, as were we. It is most unfortunate that the minister in the other place, Hon John Kobelke, issued a media statement on 1 July this year that suggested that the Liberal Party was delaying this legislation. The Government has a tendency to point the finger at others, particularly the Liberal Party, for its own shortcomings. I will relate to the House some of the things that Hon Cheryl Edwardes wrote to the minister, Hon John Kobelke, on 2 July this year. She stated -

I refer to the above Bill, and your subsequent criticism of the Opposition not being prepared to pass it, in haste in the Legislative Council. Haste with out proper consideration by yourself has already required you to do an amendment in an endeavour to protect an injured workers' rights. The Opposition acknowledges that certainty, in light of the number of legal challenges is necessary. However, clarity of that certainty evolving from your amendments is critical. Any criticism should be directed at yourself, when you bring in legislation without all the answers.

During the second reading debate I related to the House how Hon Cheryl Edwardes had asked many questions that remained unanswered at that time. This morning the minister in charge of the Bill in this place brought

forward amendments that answer some of those questions that were asked of Hon John Kobelke months ago. The Government should have a very close look at itself before it starts pointing the finger at others and saying to all and sundry, particularly injured workers, that the Government has not fallen down on the job and that any delays are the fault of other parties. All members of the Government should have a very close look at themselves in the mirror every morning and ask whether they are up to the task.

HON JIM SCOTT (South Metropolitan) [11.11 am]: Mr Deputy President, I have to get used to my switch of roles. This Bill is significantly improved and will provide those people who have leave of the court with the opportunity to proceed with their claims. As Hon Ray Halligan has said, there has been quite a bit of criticism in the other place about this House not passing legislation etc, but today members of the Opposition and those on the crossbenches were able to get changes made to the legislation and improve the lot of injured workers who are before the courts pursuant to the opening allowed them following the Dossett decision in 1999. That shows that we get better outcomes in this House than in the other place, where legislation is rammed through on the will of the Executive without a lot of the problems being challenged. It is pleasing to that extent. I would have preferred that all persons who wanted to go to the courts would have been able to do so, but this is a compromise and it is one that ensures that those people who have had claims for a while and have been given leave will be able to proceed if they wish. That has been a great improvement to this Bill.

HON JOHN FISCHER (Mining and Pastoral) [11.13 am]: I have opposed this legislation since it was first introduced and I continue to do so. The compromise that was reached during the committee stage of the Bill has to some extent improved the opportunity for injured workers to continue their claim applications. I do not think it goes far enough and I certainly will not support what I believe is inferior legislation.

HON NICK GRIFFITHS (East Metropolitan - Minister for Housing and Works) [11.14 am]: It is rare that we have third reading debates in this House, but I thank members and in particular the Opposition and the Greens (WA) for assisting the House and improving this Bill.

Question put and a division taken with the following result -

Ayes (23)

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|---------------------|--------------------|---------------------|---------------------------------|
| Hon George Cash | Hon Sue Ellery | Hon Kevin Leahy | Hon Christine Sharp |
| Hon Kim Chance | Hon Adele Farina | Hon Robyn McSweeney | Hon Bill Stretch |
| Hon Robin Chapple | Hon Peter Foss | Hon Dee Margetts | Hon Ken Travers |
| Hon Murray Criddle | Hon Graham Giffard | Hon Norman Moore | Hon Giz Watson |
| Hon Bruce Donaldson | Hon Nick Griffiths | Hon Barbara Scott | Hon Ed Dermer (<i>Teller</i>) |
| Hon Kate Doust | Hon Ray Halligan | Hon Jim Scott | |

Noes (4)

| | | | |
|----------------|-----------------|------------------|-----------------------------------|
| Hon Alan Cadby | Hon Paddy Embry | Hon John Fischer | Hon Frank Hough (<i>Teller</i>) |
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Question thus passed.

Bill read a third time and returned to the Assembly with amendments.