WORKERS' COMPENSATION (COMMON LAW PROCEEDINGS) BILL 2004

Second Reading

Resumed from an earlier stage of the sitting.

HON JIM SCOTT (South Metropolitan) [5.11 pm]: I came three short of all the signatures required before I had to get to my feet.

The PRESIDENT: The member ought not be confused by doing two things at once.

Hon JIM SCOTT: No, I ought not. However, prior to my long distance signing journey, I was talking about the way in which the Dossett case started out with an injury in 1996. The case then went to the District Court of Western Australia in July 1998 and was listed for hearing on 8 October 1999. However, under the retrospective application of the Act that came into being on 5 October, Mr Dossett lost his right to access common law under the previous legislation. I also pointed out that if this legislation were to pass in its current form, Mr Dossett is one of the people who could no longer access common law, which is quite an irony in itself after all those years of attempting to gain that right. I am not quite sure how many cases have passed through in the interim.

The way in which the Government has chosen to deal with this is outlined in the explanatory memorandum that states -

> After the 2004 Act comes into operation no application for leave to commence proceedings or appeal in relation to such an application can be commenced under the former provisions (clause 7(2)) and courts cannot hear or determine such an application or appeal (clause 7(3)). If a worker has commenced such an application or appeal in the period from 4 December 2003 (date of the Dossett decision) and ending on 22 June 2004 (the date on which it is announced by the Minister that it is intended to pass this law), the worker can recover costs incurred. Cost will be paid from the General Fund.

It has already been pointed out by Hon Ray Halligan that that general fund has been put together with moneys that came from employers as a levy towards fixing the problem with the HIH Insurance collapse some time ago. It is interesting that the HIH collapse neatly dovetails into all this legislation. When members refer back to the figures put out in WorkCover WA's annual report, they can see that the 1993 legislation that was brought into this place came about because of a significant drop in income and, in some cases, even losses by insurance companies for that year. In 1993, compensation payments amounted to $299 million and payouts amounted to $290 million leaving $8.728 million, and that was the low point. It should be pointed out that it was the very practices of businesses like HIH that caused much of this problem. The discounting and so on that went on at that time for a greater market share ended up in significant losses throughout the insurance industry, particularly in picking up after the collapse. However, the initial legislation that put in place a gateway at that time did not work. It did not succeed because of the gateway that was proposed, which was about $189 000; that was not the major problem. One of the major problems was the fact that at that time redemptions were cut out; that is, the ability for people to come to an agreement outside the courts prior to full court action being taken. When that was reinstated with further amendments to the legislation in 1998, a gateway was added that provided that a person needed to have a 30 per cent disability before he could get his case into the courts. That really put the cream on the cake, and we saw a significant upturn in the profitability of insurance companies. It is ironic that the fund from which this money will be paid is the very fund that came about because of the bad practices of HIH which, in turn, caused changes to the legislation. Those changes, through retrospectivity, ended up being challenged in the court.

I want to talk a little about the decision of the High Court of Australia. Although the case went to the District Court and then to the Supreme Court, there was no success for Mr Dossett until he went to the High Court. The High Court decided five-nil that the amendments to the Act in 1999 did not abrogate a fundamental premise upon which the rule of law is based; that is, that a citizen's right will not be retrospectively abolished or interfered with unless there is an inescapable and intractable contrary intention clearly manifest in the base of the amending statute. However, there may be a difference between the commonwealth and the state view partly because the commonwealth Constitution is different from that under which we work. The Western Australian Parliament has the power to retrospectively abolish rights whereas the Commonwealth does not. I would like members to think about that for a while, and why the Commonwealth does not have those rights and the High Court does not like to retrospectively abolish people's rights. The reason is that it is bad law; it creates problems. It is unethical that somebody has his rights taken away on that basis. We would not see that happen in other areas of law, such as criminal law. If new criminal law were introduced retrospectively to catch a number of people for doing something that was not previously regarded as criminal, there would be an outrage. Not so long ago we dealt with the contaminated sites legislation. I raised the issue of retrospectivity for people who knew they were polluting property but the Government in this House decided that retrospectivity was not a reasonable thing to legislate for. It decided that in cases in which there was no law to prevent people from

polluting their own land we should not retrospectively declare that it was illegal. It is interesting that when it comes to an injured worker, retrospectivity goes out the window. It makes me wonder why on earth we regard it as okay with injured workers but not okay in other cases. We are dealing with people who are among the most vulnerable in our community because they have suffered a serious injury. People would not be going to court with a minor injury. It would be very unlikely and they would be very foolish to do so. Such people would need a large amount of money and have a great deal of concern about a major issue that they want righted. People would not conduct such cases for the money. The system deals only with people who have had serious or traumatic injuries. We protect everyone else under law, even criminals, from retrospectivity but, when it comes to injured workers, it is too bad and people will be caught up. They will be caught out. It is true that there are remedies to the extent that, if workers accept a weekly payment that is reduced and eventually cuts out over time, they will receive something for their injury. However, in many cases they will not be fully recompensed for the damage that has been caused. I do not think that retrospective legislation is a good thing. It is something that should be used only in dire emergencies when things have gone seriously wrong and need to be changed because it is in the public interest. I do not believe that this is in the public interest at all.

I understand that, from the management side of this, people do not want a continual trail of claims. I have been told that the Government is concerned about a continual trail of claims coming forward because of the Dossett "gateway" that has been imposed by the High Court. It should be reiterated that the case was based on the Interpretation Act, which tells us that we should not abolish rights retrospectively. The Act protects people from retrospective changes to the law. That is being waived in this case. We are overriding and negating the effect of the Interpretation Act. I think we are going backwards with this legislation in trying to fix up faulty legislation. I do not think this is correct; I have put that position to the Government. I have also spoken to Hon Cheryl Edwardes, who represents the Opposition's position in the other place. There is fairly strong agreement around the place that retrospective legislation causes problems. We have this legislation in front of us because of retrospective legislation. If we had not had retrospective legislation and there had been a clean cut-off at the point of the legislation going through, we would not have this problem. Because of the way the legal fraternity works, people will be looking for ways to get past this. They will be chipping away and trying all sorts of angles to get people back into court. We may end up in the same position in the future by enacting more retrospective legislation. We have got to start making legislation that applies from when it passes this Parliament and gains assent otherwise we will end up with continual dissatisfaction from the community about the laws we pass in this place. I will propose that this legislation be amended to get rid of its retrospectivity. I hope that I will obtain some support from members of this House to do that so that people like Mr Dossett are not unfairly treated.

I was told that there was another possible winner from this change. It concerns an issue I have been dealing with through a constituent, Mr Koljibabic, who came to see me. He suffered a most unfortunate series of events in which he was injured working for an electrician who was working for Western Mining Corporation. Mr Koljibabic was gassed at a mine site. Initially, he went to Western Mining Corporation to seek compensation under the Workers' Compensation and Rehabilitation Act. The company wrote to Mr Koljibabic advising him that he was not an employee of the company and that the company he worked for paid his workers compensation insurance. It stated that the other company was his employer and that he needed to approach it. He was then advised by his legal counsel that his employer had not been negligent in any way but that Western Mining Corporation had been negligent. Rather than pursuing workers compensation, he pursued public liability. He was successful to the point of an appeal in which Western Mining's representative very creatively told the court that the person it had said was not its employee was its employee. He had suddenly gone from not being the company's employee to being its employee. The company was the principal employer as determined under legislation that was established to prevent people missing out on compensation when their employers - contractors or subcontractors - did not cover them. If the electrical company did not cover Mr Koljibabic, the principal employer, Western Mining, would have been responsible and he could have applied for workers compensation directly through that route. After he had gone through the District Court, he landed back in the Supreme Court on appeal, and Western Mining then decided to change its mind and say it was his employer. The Supreme Court then saw fit to determine that because Western Mining was his employer, if he wanted to make a claim he would need to do it under the Workers' Compensation Act. However, he was a very unlucky fellow, because although he had built up significant legal costs during that time, he was unable to claim for his costs under the Workers' Compensation and Rehabilitation Act, because the time had expired, and also he was obliged to pay the costs of Western Mining, which were significant. Therefore, he is now in the situation in which he has a permanent impairment and no hope of ever working again in the sort of job in which he had worked in the past. That is an appalling situation that should never have been allowed to happen.

I am told by the Government that this legislation will make Mr Koljibabic's situation somewhat better. However, his lawyers have a different view. I will quote what they say, because it should be spelt out -

> I understand you recently had meetings with Mr Horsman of the Minister's Office in relation to proposed changes to Section 175.

Just so there is no misunderstanding in relation to this matter, Mr Koljibabic's position in relation to this matter was and remains that he ought not be in any way subject to the restrictions contained in the Workers' Compensation Act. The only way that this may happen is for Section 175 to be amended such that workers in Mr Koljibabic's position are not deemed to fall under this provision for the purpose of Common Law claims.

A view that has been proffered is that as a result of efforts taken by Mr Koljibabic to overcome the restrictions posed in the Workers' Compensation Act he is now in exactly the same position as he would be if the restrictions contained in section 175 are removed.

That is simply not the case. Although Mr Koljibabic has a default 30% determination there are still significant difficulties with that determination. Those difficulties include:

1. Western Mining Corporation assert that Mr Koljibabic has a determination against the wrong entity;

2. A recent decision of the Full Court in the matter of *Re. Monger: ex parte Cooks Construction Pty Ltd* 2004 [WASCA-165], would indicate that the referral lodged by Mr Koljibabic was invalid as there had been no formal attempt to agree to the level of disability prior to the matter having been registered in the Directorate. This decision was handed down on the 9th of August 2004;

3. There is a recent decision of the Compensation Magistrate in the matter of *MacPhilomey* in relation to the question of whether or not a Form 22 procedure was available to Mr Koljibabic in any event. A Review Officer had previously determined that Form 22 relief was not available to a worker injured prior to October 1999. Although the Magistrate has overruled that decision the point has not yet been decided by the Full Court.

In summary, Mr Koljibabic's remedies whilst constrained in any way by the Workers' Compensation Act are severely limited and he faces the prospect of long litigation dealing with various issues. The only clear way for Mr Koljibabic to be able to proceed to litigate his actual dispute, ie to have a court determine the negligence of Western Mining, is for the restrictions contained in Section 175 to be removed insofar as they apply to workers in Mr Koljibabic's position.

The lawyers disagree with the argument that this Bill will do anything to improve Mr Koljibabic's position. The passage of this Bill does not leave us with any hope that we will be able to improve his situation. It will be necessary to make amendments to the reform Bill to do that. However, the Government has chosen not to do that. I am not sure why. This is one of the most unjust cases I have ever come across. It is of great concern that no legal remedy is available to a person who has been permanently impaired and who has had to pay the costs of the employer who caused the impairment, yet the Government is not prepared to fix the problem. Therefore, my support for this legislation is dependent on its providing some remedy for people who are caught up in this type of situation. At the moment I believe the fairest solution would be to leave this whole area alone. However, I understand that there are concerns about the ability of people to access an adequate level of funding. People who have not yet sought to take the path of going through the courts can claim payments under the statutory part of the legislation. I will seek to make amendments to that part of the legislation to which we are able to make amendments. I hope members opposite and the Government will support those amendments.

HON JOHN FISCHER (Mining and Pastoral) [5.37 pm]: I agree with the comments of the two previous speakers on the Workers' Compensation (Common Law Proceedings) Bill 2004. I am not at all happy with this legislation. I have looked into it and have spoken with various people. It has been brought to my attention that the general view is that this is flawed legislation. It is extremely unfortunate that the Government has decided to rush this legislation through. An article headed "Bad news for Aussie workers compensation", a copy of which was faxed to me on 6 September, states -

Despite election promises, the Western Australian (WA) Government is pushing through State Parliament the most draconian workers' compensation Bill in the country, says APLA, the Australian Plaintiff Lawyers Association. "Badly drafted and convoluted, the draft Bill will increase administrative costs for employers, and severely reduces the legal rights of employees, while capping payouts to an all time national low", it adds. "The new legislation will deliver up to a 70 per cent reduction on workers' rights to common law damages. This is a flagrant breach of the policy platform that Labor used to get into government and shows that the Minister will happily substitute his preferred position to the platform outlined by his own party and the Western Australians who voted his government in", said WA lawyer and APLA member, Greg Burgess.

The new Bill will all but completely remove workers' rights to seek common law damages for work related injuries and will cap the total available compensation for loss of earnings. APLA explains that

> this will scarcely cover basic annual costs associated with permanent whole body disability or disease that may see workers lose a lifetime of income needed to support their families.

That is a very stern indictment of this legislation. No doubt all members would either know or have heard of Paul O'Halloran, who is a solicitor and barrister for the "justice for victims" campaign. He said that he found it strange that Minister Kobelke had sat on his hands for years and done nothing to solve problems relating to Supreme Court decisions that were prejudicial to injured workers yet within one week of the Insurance Council of Australia Ltd demanding changes regarding a High Court decision that helps injured workers - the Dossett decision - the dithering Mr Kobelke was somehow able to have a Bill drawn up and debated in Parliament that brazenly flouted the decision of the High Court. Five High Court judges unanimously agreed on that decision. As I said, the people I have talked to, including members of the former Australian Plaintiff Lawyers Association, the Injured Persons Action and Support Association and other organisations, share that general feeling about this legislation.

I refer now to a document titled "The 'Insurance Crisis' or How We Lost Our Common Law Rights", which was prepared by Christian Leavesley for the People's Rights Inc. The People's Rights Inc is a community group that advocates for people whose rights to compensation have been removed by legislation. I will read one or two sections of its report. One example is taken from a publication titled "Industry Profitability: a Brave New World" by P. McCarthy for the Institute of Actuaries of Australia. The document states -

> The Institute of Actuaries of Australia found that the insurance industry, despite being aware of both the insurance cycle and the reserving cycle was not managing its funds appropriately. It was using reserves to prop up short term profit results, rather than to pay out claims as required. Thus the industry was masking the actual state of its business and the need to examine long term viability of premiums. Rather than alleviating the insurance cycle the industry was serving to exaggerate it. Australian insurers were raising and lowering premiums responding to short term profit results, putting business and the public through a cycle of extreme peaks and troughs.
>
> . . .
>
> While fundamentally misunderstanding some of the mechanisms of one's business is not necessarily deliberate, nor rare, it must be seen as a highly unusual reason for Governments to change the law. Unfortunately the IAAust reports on the state of the insurance industry presented to the General Insurance Seminars held in Sanctuary Cove in 1999 and the Sheraton Mirage in 2001 demonstrate that mismanagement of reserves was the very tip of the insurance industry mismanagement iceberg.
>
> . . .
>
> While bad management and unqualified staff has already been cited as reasons for poor profitability, it appears that conduct within the insurance industry reflected a much worse scenario than just bad training. The report found that case estimates were being manipulated by senior management. Among the reasons it gave for senior management manipulating data was for the purposes of hiding the need to increase reserves, and to increase profit results so that executives could receive higher bonuses;
>
> . . .
>
> Presumably, such 'manipulation' might otherwise be called 'fraud.' The report went on to describe the insurance industry's corporate governance culture as one of "cowboys" who lacked discipline and management control;

Through the collapse of HIH Insurance this legislation has been forced upon us. The reasons given for introducing it included the insurance industry's lack of profitability at the end of the twentieth century.

The document continues -

> Even so, the insurance industry had learned from the American experience that, despite such clear evidence that they were themselves to blame for their own troubles, they could use the legal system as a shield against accountability. Attacking the legal system in the American model would achieve a scapegoat for their own mismanagement, while locking in even higher profits over the long term.

Insurance companies have claimed that the only way premiums could be stabilised is by removing the rights that allow people to make claims on policyholders.

I refer to a profit summary of Australia's major insurance companies compiled from the insurers' reports for the year and half year ending 31 December 2003. The full-year result of QBE Insurance Ltd was a worldwide net profit increase of 105 per cent after tax to $572 million. The company's net profit in Australia increased by 75 per cent to $180 million. Insurance Australia Group increased its half-year net profit result by 487 per cent to $302 million. The full-year net profit result for Suncorp Insurance increased by 81 per cent to a record

$281 million and its profit on insurance increased by 199 per cent to $215 million. The full-year results for the Promina Group's insurance arm was a net profit of $298 million, which was a higher than forecast underwriting outcome as a result of a "benign claims environment". It makes me wonder what we are doing getting rid of common law claims. In my opinion we are disadvantaging the very people who we are meant to be looking after.

I refer now to the insurance industry fact sheet. The half-year result for QBE Insurance ending 30 June 2004 was a net profit increase of 33 per cent after tax to $320 million. Its Australian net-earned premium increased by 13 per cent to $767 million. The net profit for the full year for IAG insurance increased by 335 per cent after tax to $665 million and the investment income on shareholder funds increased to $334 million after a $120 million loss. Suncorp Insurance achieved a net profit increase of 61 per cent after tax to a record $618 million and its profit from insurance increased by 100 per cent to $465 million. The Promina Group's half-year insurance results show that its net profit after tax increased by 51 per cent to $204 million and that investment income on shareholders' funds increased from $54 million to $96 million. Mike Wilkins, the chief executive officer of Promina, said that he would prefer to think of these times as the normal times rather than as the good times. One must ask: where is the crisis in the insurance industry? The figures do not show that there is a crisis.

I refer to the summary of the Australian Competition and Consumer Commission's third monitoring report findings, which shows that public liability premiums increased by 17 per cent in 2003. Between 1999 and 2003 average premiums have risen annually by 10 per cent, 19 per cent, 44 per cent and 17 per cent respectively. This equates to a 90 per cent increase in the average public liability premium in the past four years. The frequency of claims declined from 24 559 in 1999 to 15 894 in 2002, a reduction of 35 per cent. The net combined ratio for public liability insurance in the years 2001, 2002 and 2003 was 112 per cent, 85 per cent and 79 per cent respectively. Therefore, for every dollar taken in premiums in 2003, insurers expected to pay out 53c in claims. Once again I ask: where on earth is the insurance crisis?

I refer to a report titled -

> The "insurance crisis" or How We Lost Our Common Law Rights.

The report states -

> In the first half of 2003 alone the Australian insurance industry had recovered from being an industry in "crisis" to one that had recorded $5 billion in premium profits. By the end of 2003 QBE had increased their profit by 105% on the previous year, Suncorp 81% (its insurance profit up 199%), IAG a whopping 48% on the corresponding 6 month period the previous year, while Promina outstripped its prospectus by over 50%.
>
> The ACCC's Second Monitoring Report on public liability and professional indemnity insurance, released in February 2004, completed the picture of the insurance industry's position. IAG chief executive Michael Hawker described their position by saying "the stars have aligned."
>
> . . .
>
> The report found that during the first six months of 2003, *before* changes to legislation to curb damages payments took effect, -

That is, in the eastern States -

> the average size of personal injury and death claims had decreased 14 per cent on the 2002 result.
>
> The report also found that while claims were decreasing public liability premiums continued to rise. From 1999 to the first 6 months of 2003 average premiums have risen year on year 10%, 19%, 44% and 4% respectively.
>
> Insurers told the ACCC they estimated that premiums would rise by 11% on average in 2004. Some insurers indicated rises would continue because "any savings afforded by tort law reform has already been absorbed into prices." . . .
>
> After the announcement of the insurance industry's half year result insurance commentator Mark Westfield wrote in *The Australian*;
>
> > "Insurers have escaped the blowtorch of public criticism levelled at the banks over the past decade or more, but the time is coming when the public and even the politicians will be forced to realise just how much these companies are gouging and exploiting their customers . . .
> >
> > "It is breathtaking that politicians keep giving the industry concessions, but don't seek offsetting undertakings to reduce premiums and stop the gouge."

As I have said, I do not support this legislation. It is driven incorrectly by the insurance industry and the Government has rushed into it to the detriment of claimants. I will conclude by reading an excerpt from the 2003 annual report of the chairman of WorkCover Queensland -

> WorkCover Queensland is not profit driven. The ideal, very simply, is the maintenance of low premiums and best possible benefits for workers. For the fourth consecutive year we maintained the required solvency for full funding of 20%. Our employers continue to enjoy an average net premium rate which is the lowest of any Australian state . . .

Hon Jim Scott interjected.

Hon JOHN FISCHER: Of course we should. It is absolutely ludicrous that we are rushing into this legislation when the wheel has already been invented. Why is this Government rushing into this legislation without thoroughly identifying and looking at the Queensland system?

Hon Jim Scott interjected.

Hon JOHN FISCHER: It has certainly been rushed now and I have seen no evidence that the Government has had a good, solid look at the Queensland situation, which is there for everyone to look at.

Hon Jim Scott: We could have had it earlier. We could have sent it off and examined all those things.

Hon JOHN FISCHER: Absolutely! I agree with Hon Jim Scott. The annual report continues -

> Our employers continue to enjoy an average net premium rate which is the lowest of any Australian state, having reduced from 2.145% at WorkCover Queensland's inception to the current 1.55%.

If we pass this Bill, we will put through Parliament lousy, crook legislation that is a blight on this Government. It is not a novel idea to examine a system that works. Minister Kobelke could take a leaf out of the Queensland book and stop accusing others of holding up or interfering with second-rate legislation, which this most certainly is. One would have to ask: what is actually driving this legislation? Perhaps it is the insurers' profit motive. Western Australian workers' compensation premiums do not compare anywhere near favourably with Queensland's, yet Queensland has far more open access than Western Australia has to common law.

Hon Jim Scott interjected.

Hon JOHN FISCHER: Exactly. As I said, if we followed the Queensland system, employers would be in front and there would be far more access to common law. In fact, there would be no down side; it would be a win-win situation. For the life of me, I cannot understand how unions in this State can accept legislation like this. I do understand, as I do not think they have much ability. They are meant to be looking after workers, but by accepting this legislation, they are accepting second-rate legislation. It has been proved conclusively that Queensland has a far better system than this system that is proposed for Western Australia. The real reason for it may come out, and, as I said, it may be the insurance companies -

Hon Jim Scott: Is that composed or decomposed?

Hon JOHN FISCHER: It is decomposed now! This legislation is absolutely disgraceful. Allowing this Government to put legislation like this through the Parliament indicates the state of the unions in Western Australia. It proves to me conclusively that the unions do not look after the workers and that they are in this for the ball game. I will be voting against this legislation at every opportunity.

Debate adjourned, on motion by Hon Nick Griffiths (Minister for Housing and Works).

Sitting suspended from 6.00 to 7.30 pm