WORKERS' COMPENSATION (COMMON LAW PROCEEDINGS) BILL 2004

Second Reading

Resumed from 25 June.

HON RAY HALLIGAN (North Metropolitan) [3.29 pm]: The Opposition opposes in the strongest terms possible the way in which this Government is attempting to rush this legislation through the Parliament. It was brought into the other place and rushed through all stages, and the Government wishes to do the same in this place despite the fact that none of the questions raised by Hon Cheryl Edwardes in discussions, briefing sessions and debate has been answered.

The legislation before the House covers two aspects arising from the Dossett and Dutch decisions. I will deal with the Dutch decision first. That case involved an application to the Conciliation and Review Directorate of WorkCover WA, which was knocked out by the court on the basis of insufficient medical evidence. Doctors were signing forms stating that injured workers had a 16 per cent disability without any supporting medical evidence. That was never intended to be the case. It was always intended that sufficient medical evidence would support an application to the Conciliation and Review Directorate. To some extent, workers have been disadvantaged by not having their matters properly determined. Although there are a number of these cases, the Government has not come back with a proper figure. Amendments relating to the Dutch decision were originally included in the Workers' Compensation Reform Bill and have been slightly changed in this Bill. During consideration in detail in the other place on the reform Bill, the minister was asked how many cases before the directorate related to the Dutch decision and how many had been assessed by an actuary. The actuary had determined that there were between 200 and 900 cases. The minister said that the Department of Consumer and Employment Protection did not have the exact information when the actuary made his assessment.

At that time Hon Cheryl Edwardes asked the minister to arrange for a complete assessment of the number of cases in which a worker had received some form of restitution and would, therefore, no longer be eligible to have his or her matter re-determined by obtaining further medical advice and evidence to support an application before the directorate. I understand that assessment has been made and the figure has come down to just under 500 cases to which the Dutch decision could apply. The issue then is costs. If the costs are between $26 million and $120 million, which is the actuary's assessment, and there are 500 rather than between 200 and 900 cases, it will still cost between $60 million and $70 million. The new amendments provide that the reserve set aside, based on an estimate of the insurance companies, should cover that figure. The insurance companies have put aside a reserve to cover those cases, which they acknowledge they knew about when the cases were originally heard. They knew that the minister had decided 18 months ago what he would do and they have taken that into account. If that is the case, there should be no impact on insurance companies, other than a huge burden, albeit one for which they have prepared. The issue is the number of cases. That will affect insurance companies and concern employer groups, because the change made by the minister will result in the costs relating to that level of retrospectivity being made up from the supplementary fund held by WorkCover.

In the past three years employers have been paying an extra levy to the fund to pay for the HIH Insurance cases. An amount of money over and above the reserve of the insurance companies for the Dutch decision will have to come from the supplementary fund. As I understand it, the supplementary fund levy on employers is one per cent, which is to pay for HIH claims. These should be paid for, or at least resolved, within the next few years. If that is the case, for how much longer will the one per cent levy remain to pay for any excess over and above the reserve that has been estimated by the insurance companies for the cases affected by the Dutch decision?

This Bill states that applications can be made within three months and will have a six-month election time frame, which can be extended to two years. It is very fair to injured workers. On the flip side of the coin, what will it cost employers? I am not talking about insurance companies absorbing all the costs; I am talking about the supplementary fund paying for costs over and above the reserve. If that is the case, what is the number of cases; what is the cost likely to be; and how much longer will the one per cent levy have to be paid to cover those costs? Employers will be paying for these costs. Under the reform Bill, the insurance companies will have to absorb the cost, because the minister intended to direct that they do so. Now, under the common law Bill, it will be paid for from the supplementary fund. That fund has been slowly dwindling away because of HIH. The minister announced a reduction in the levy due to the HIH claims. He said that the fund would cover those claims. What amount does the minister believe should remain in the supplementary fund? After the HIH claims are finalised, how long will the one per cent levy continue to be paid by employers? Over and above the reserve, what amount does the minister believe will be paid out of the supplementary fund?

Those are very important questions because of the amendments resulting from the Dossett decision. The legal costs of some people will be thrown away because the minister will determine that they can no longer continue with their case in the District Court, and those costs will have to be met from the general fund. How many of those cases are there? What is the estimated cost of the legal fees? Notwithstanding the District Court cases, has

the minister included the 30 cases that have been held up based on a determination from the directorate that they are possibly Dossett-type claims? How much will be paid from the general fund for those legal fees? This is very important, as employers pay for the general fund from their workers' compensation premiums. The general fund will now be used to pay for the legal costs that arise from the thrown away costs of those people who the Bill determines no longer have a legal case to pursue and who must now bring their case under the 1999 scheme. At the end of the day there will be no cost to the Government. The Government has made a firm decision that employers will wear the cost. I am talking about employers who must earn money to pay these costs. That is a further reason for not rushing the Bill through the Parliament. We do not have before us details on the number of cases held up both in the District Court and in the directorate that will be determined by the Dossett decision; the revised actuarial advice on the cases affected by the Dutch decision; and the facts and figures on the supplementary fund.

I move on to Dossett, which is an interesting case as it reflects on a loophole in the 1999 amendments. In Dossett v TKJ Nominees Pty Ltd (2003) HCA 69 of 4 December 2003 Mr Justice McHugh stated -

> It appears from a statement made by the Minister for Labour Relations in the Legislative Assembly that she shared this view.

That is, that the cases that had received leave before the assent date could continue, and those that did not fall within the 1999 scheme. He continues -

> Her statement was made, however, 16 days after the *Workers' Compensation and Rehabilitation Amendment Act* received the Royal Assent and is not entitled to any special weight concerning the meaning of the amending legislation. In *Re Bolton; Ex parte Beane*, Mason CJ, Wilson and Dawson JJ pointed out that "[t]he words of a Minister must not be substituted for the text of the law." That *dictum* was expressed and applied in respect of a statement made by a Minister in introducing the Bill that became the Act under consideration in that case. Their Honours refused to give effect to the Minister's opinion concerning the meaning of the Act, notwithstanding that s 15AB of the *Acts Interpretation Act 1901* (Cth) required that consideration should be given to the Second Reading speech.

There is no requirement in the law of Western Australia that a court should give any special weight to a minister's opinion concerning the meaning of legislation that has been enacted by the Legislature. Justice McHugh continues -

> And it would be contrary to the rule of law, the supremacy of Parliament and the doctrine of the separation of powers to give any special weight to a Minister's opinion as to what an enacted law meant. The meaning of statute law is found in the text of legislation enacted by the Legislature. As Mason CJ, Wilson and Dawson JJ went on to say in *Re Bolton; Ex parte Beane*:
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> > "The function of the Court is to give effect to the will of Parliament as expressed in the law."

Justice McHugh then went into the circumstances of the case as follows -

> Section 32(7) authorises the awarding of damages where proceedings for damages have been commenced and where leave to issue proceedings has been given but no action for damages has commenced. It has nothing to say about whether the right to apply for leave may continue. Nor does it say anything about the effect and operation of s 37(1) of the *Interpretation Act*. But in any event s 37(2) makes it clear that the inclusion in a repealing Act of an express saving provision does not prejudice the operation of s 37 with respect to the effect of the repeal.

The case turned on whether we repealed the sections or just replaced them. That argument was subsequently one of the issues with the one vote, one value case that went before the High Court. Again, it is something for ministers and Governments, indeed members of this Parliament, to keep in mind when legislation comes before this place. Justice McHugh later said -

> Section 32(7) deals with claims for damages that either have been commenced or by the grant of leave may be commenced.

Further, this Government will have some problems with the interpretation of "proceeding" and whether it is an originating summons for a section 93D application or a writ or where leave had been granted. Therefore, there are some real concerns with clause 5(3)(a) and (b), or it could be paragraphs (c) and (d), and whether it is sufficiently clear to deal with the sorts of issues raised in the Dossett case. Justice McHugh continues -

> It says nothing whatever about pending *applications* for leave to commence proceedings for damages. Nor does it contain any statement that the two classes of proceedings identified in s 32(7) are the only proceedings to which the former provisions of s 93D continue to apply. Nor does s 32(7) contain any statement that it applies despite anything in any other statute.

> Accordingly, s 32(7) did not effect an implied repeal of either s 37(1) or s 37(2) of the *Interpretation Act*.
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> It follows that s 37 of the *Interpretation Act* entitled Mr Dossett to proceed with his pending application for leave which continues to be governed by the former provisions of s 93D of the *Workers' Compensation and Rehabilitation Act 1981*. The Full Court of the Supreme Court of Western Australia and the District Court erred in concluding that the District Court had no power to give leave to Mr Dossett to commence proceedings for damages under the repealed s 93D.

The appeal was therefore allowed. The facts are important, not just for the Bill before us but also for the future interpretation and debate of legislation. Justice Kirby goes into greater detail about the ministerial statement and how it was interpreted, and the second reading speech the then minister gave in this Parliament in 1999. He states that exceptions need to have been expressed, and there needs to be exactness, which is very important for the Bill before the House. He states -

> *Express exceptions*: First, there is the fact that Parliament has addressed with exactness "proceedings" of the kind in question at different points in the course of their resolution in the District Court.

That needs to be stated very clearly in clause 3 of the Bill. More importantly, as a result of the Dossett case, it needs to be clear in black and white law. It will not be sufficient for the minister to explain what he thinks is meant by "proceedings"; he will need to have it explained, with exactness, what sort of proceedings he is referring to at different points in the course of their resolution in the District Court. That was the first point Mr Justice Kirby made. He continues -

> Secondly, to demonstrate that this was the "intention" of Parliament in so providing, the respondent tendered an extract from the record of debates in the Legislative Assembly of Western Australia. According to this, the then Minister for Labour Relations (Mrs Edwardes) made a statement to the Assembly which, she said, was designed "to remove any doubts about the transitional provisions contained in sections 32(7) and 32(8) of the [1999 Act]". The Minister explained that, because there had been no opposition to the Bill when originally introduced, "clarification on the transitional provisions was not read into *Hansard*" at that time. She stated that it was "prudent to place on the record a clarification of their meaning" in light of comments that had since been made. She said that the Bill closely reflected a recommendation of a general review of common law actions which had preceded the legislation.

He is referring here to Lord Pearson. The judgment continues -

> In response to a suggestion by lawyers "that if an application were made prior to assent, workers may seek damages under the old common law provisions", the Minister stated that "[c]learly this is not the intent of the amendment Act".

This is what the minister, in the Bill before the House, is trying to clarify. The judgment continues -

> She said that the wording of s 32(7) of the 1999 Act was "clear". She stated that "[t]he new common law provisions do not affect the awarding of damages only if the proceedings have commenced or leave of the District Court was granted before the assent day".
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> Although these remarks are not part of a Second Reading Speech and are not therefore available under the Interpretation Act as extrinsic material to assist in interpretation of the Act, the respondent submitted that the Minister's speech was admissible as "relevant material in any official record of proceedings in either House of Parliament" or under the common law. Accordingly, it should be received to indicate the Minister's understanding of the purpose of Parliament. Certainly, no Member of Parliament took objection at the time the Minister made her statement or thereafter.

He goes on to say that the third aspect that needs to be met is the assent day. The judgment continues -

> *The assent day*: Thirdly, the particularity of the "assent day" was arguably another indication of a purpose of Parliament in introducing, even at the cost of some arbitrariness, an incontestable precondition that would clarify the rights of workers and obligations of employers where the worker was claiming common law damages against an employer at the time the 1999 Act took effect.

Essentially the Government has drawn the line with a set date in this Bill. Very importantly for the statute of limitations, the facts of the Dossett case are that his injury occurred on 2 December 1996. He suffered an injury to his cervical spine and both shoulders as a result of an accident during his employment with the respondent, TKJ Nominees Pty Ltd. That is very important, because the statute of limitations would now preclude him from pursuing a common law action. He lodged an application for leave to lodge a writ in the District Court under section 93D, which meant that he had a disability assessment of between 16 and 30 per cent, and could therefore reach a pecuniary loss amount. Several criteria under section 93D will make it considerably harder for those

who do not currently have leave and are before the District Court. Mr Dossett's matter for leave to appear was heard on 8 October 1999, and the assent date was 5 October 1999, so he missed out on the hearing. It is the view of some that his application for leave to be heard would have been granted at that time because one of the problems in 1999 was that the District Court was not strictly adhering to the criteria legislated for, and decided that it would be determined in trial. What anyone would receive in trial was still a matter of conjecture. However, Mr Dossett felt that he did not have the ability to have his matter heard. That is the situation with a number of cases currently before the court. As at June 2004, 42 matters under section 93D are before the court. Of these, 28 applications are pending, nine have had leave granted, three have had leave denied and two are miscellaneous. The figure of 34 was as at the end of May 2004. This does not tell us, however, how many of those are under appeal. I read one case this morning in which leave had been granted but an appeal has been lodged. Where would that case fit within the system of the new Bill? If he has leave, what happens if his leave is knocked out under appeal. Does he then fall in with those who have lodged an application but have not been granted leave by 23 June, as the minister said, or does he have no further recourse for coming back into the 1999 scheme? Again, we do not have the details on some of those cases. The Government has still not provided full details despite repeated requests.

There is an argument that this amendment should proceed on the basis that it would provide for a level of certainty. I do not agree with that. With certainty, there would not be the potential for premiums to go up and down in the face of an uncertain number of cases, uncertain levels of costs and the possibility of appeals. While this legislation would give some certainty, we do not know who would win and who would lose out of it. There will be some currently in the system who do not have leave to appear, who the minister says can now be covered by the 1999 scheme, which was intended by the 1999 amendments. However, some of them may not get into the 1999 scheme. We do not know those figures. We also do not know whether there are many more Short-type cases. Short was a case against Major Motors Pty Ltd, case No WC93D 1286/1999. Short's matter was heard on 15 April this year for a section 93D application. The facts of that matter are that Mr Short had already received a settlement of $80 000 by way of a consent judgment based on the current section 93D provisions. That judgment was valid and enforced. However, the plaintiff decided that the settlement he received was not adequate. He was under the mistaken belief that law prior to Dossett governed his claim; that is, if he had not received leave before 5 October, he fell into the 1999 scheme. Therefore, he wished to proceed with a section 93D application. Members must keep in mind that he had already received a settlement of $80 000. He still must prove an increased level of pecuniary loss to be awarded a greater amount under a section 93D application, or he could receive more if he is a very young man. He must either have a very high income or be a young person, in which case he might be able to meet the economic loss requirements that are the subject of section 93D cases. The registrar, before whom the application was listed, granted the plaintiff leave to proceed under the former provisions of section 93D of the Act. He was of the view that at the leave stage he was not bound to consider anything other than the requirements as set out in section 93D(5) of the former provisions. If those provisions were satisfied, leave should be granted even if there was a consent judgment in existence covering that date of disability. The registrar believed that the defendant had the right to later apply to strike out any proceedings commenced against it based on the leave granted. In that way the defendant's rights were not as severely prejudiced as the plaintiff's, who could not proceed with further action if leave was not granted. It must be kept in mind that Deputy Registrar Hewitt was not taking into account that this person already had his case settled according to law and was valid. Deputy Registrar Hewitt considered that the prospect that the plaintiff would set aside the former judgment on the grounds of a mistake as to the law was enough.

Essentially, when talking about the level of certainty, it refers to the fact that there are likely to be other cases that occur in which a settlement has taken place. The issue is that we do not know how many cases it will involve. It is highly unlikely that there would be thousands of such cases. I say that on the basis that the plaintiff would still need to meet the section 93D test with regard to pecuniary loss. As I said, the person would have to be either a high-income earner or a young person. If the plaintiff had already settled the case, the plaintiff would still have to jump over that hurdle. The plaintiff would have to argue that he settled on the basis of a wrong understanding of the law that existed at the time - although it did not until Dossett. Also, the date of injury must have been before or after June 1998. Therefore, if the date of injury was prior to that date, the plaintiff would still fall outside the statute of limitations to go back to the District Court to seek an application for leave. There are some restrictions in that respect. The injured worker might have gotten on with his life and might not wish to proceed any further, having received his compensation.

It appears from the Short case that the compensation amount does not have to be given back. Obviously that would be taken into account in any further damages settlement of the case. If the worker was awarded more than $80 000, the $80 000 would be taken off the future settlement. However, what would happen if the plaintiff received less than $80 000, for example? I do not think that many courts would determine that an injured worker would have to give back money on the basis that he did not have a correct understanding of the law as subsequently determined by Dossett in December 2003. I cannot see many courts doing that. Therefore, not

only is the plaintiff getting two bites at the cherry, but also the plaintiff is potentially double-dipping with regard to any amount the plaintiff might be able to keep, even though the courts might subsequently determine that the plaintiff should not have received that amount. The arguments for this amendment are on the basis that it will fundamentally create certainty and that there are huge increases in compliance costs for WorkCover, employers and insurers because they do not know which injured workers fall within which system; that is, the 1993 system, the 1999 system or, if the reform Bill passes through the Parliament, the 2004 scheme.

The system will be potentially fair or unfair for workers. I say that because there will be winners and losers. People who currently have cases before the District Court, who are seeking leave and who come back will not be able to come back into the 1999 scheme, in which case we must know how many of those 28 pending cases of leave will not be able to come back into the 1999 scheme because of the statute of limitations. Has the minister addressed that in this Bill? Those people would immediately lose any right to compensation. There will be some losers and some winners. The winners will be those who would not have got over the section 93D bar and/or would not have received as much as they would get under the 1999 scheme. The 1999 scheme benefits some injured workers. Therefore, some injured workers who are presently before the District Court will win by coming back into the 1999 scheme because they would not have received anything under section 93D.

The Australian Plaintiff Lawyers Association would like an amendment to provide for choice. Those people who are currently before the court could then determine whether they wished to stay before the court or come into the 1999 scheme. The minister might say that that is also having two bites at the cherry. They have already made a choice to go to common law but suddenly they decide that common law might not be as good or they might not meet the bar - and Dossett may very well be one of those. Therefore they might choose to go into the 1999 scheme. That means that some people who would lose currently and be stopped from coming back into the 1999 scheme because of the statute of limitations would be given a choice of being able to do so and would be eligible to come back into the 1999 scheme.

Another matter is the increase in professional negligence claims against lawyers who determine the law according to what is known at the time. If they gave advice until December 2003, that is okay because they determined the law as it was known at the time. It changed in December 2003 with the High Court Dossett case. Is it their responsibility to go back over their files to find those people who were injured prior to 5 October 1999 and determine whether they would get more under a section 93D application or whether they are better off under the 1999 scheme? Of course, it means going to each of their files and contacting each of their clients to explain to the client the advantages and/or disadvantages. Issues may arise if that is not done in a considered way.

I refer to the case of Henderson v KCut Pty Ltd & WMC Resources [2004] WADC 13, which also gives rise to some concern. The decision allows any worker who was injured prior to 5 October 1999 and whose claim falls within the six-year statute of limitations period to pursue a common law claim as if the pre-1999 legislation were in effect. In the case of Henderson, Judge Macknay held that a worker injured prior to 5 October 1999 could file a fresh originating summons for leave to proceed under the former future pecuniary loss provisions of section 93D of the Workers' Compensation and Rehabilitation Act. In reaching that conclusion, Judge Macknay relied upon and extended the High Court decision of Dossett v TKJ Nominees, which we have spoken about. The High Court decision was extended in that the judge also held that even if a worker had not lodged an originating summons seeking leave before 5 October 1999, the worker had the right to seek leave to proceed under those provisions. Accordingly, the judge held that the October 1999 amendments did not affect the worker's claim. He further held that it was irrelevant that the worker had lodged such an application prior to 5 October 1999 and had agreed to its dismissal after that date. Nothing prevented a worker from lodging multiple applications for leave under section 93D. This is one of the reasons that, in seeking to provide certainty within the workers compensation system, we are debating this Bill.

There is uncertainty because the decision means that employers, deemed employers and their workers compensation insurers will need to revisit their exposure to and, of course, their estimates for unfinalised claims for accidents that occurred after 30 January 1998 - the six-year limitation period - and before 5 October. Workers injured during that period who have not satisfied the 30 per cent threshold will be the biggest beneficiaries of that decision. The window of opportunity that was opened by the Dossett decision has been opened wider by the Henderson decision, as it extends a worker's ability to use the section 93D system.

The Conciliation and Review Directorate has provided some further information about the Henderson decision. The note states -

> The situation in relation to the *Henderson* decision has been brought to the attention of review officers in a number of matters, in particular, the matter AP 549/02. This particular matter was heard by a review officer and he dismissed the worker's Form 22 referral. The broad reasons for this dismissal are contained in the following paragraphs:

> . . . The worker's situation prior to 5 October 1999 was that he had the right and/or the capacity under the provisions of the then s.93D of the Act to seek the leave of the District Court by way or originating summons. His situation answered the terms of one or more of paragraphs (b), (c) and (f) of s.37(1) of the Interpretation Act. The worker's legal position, therefore, was that notwithstanding the purported repeal of the pre-October 1999 version of s.93D by the 1999 Act his right, power and capacity to institute a legal proceeding or a remedy which would enable him to pursue a claim for damages against his employer survived the purported repeal effected by the 1999 Act. Not only did it survive the introduction of the amending or repealing legislation, the effect of its survival was to restore the situation to what it had been immediately prior to the giving of the Royal Assent to the 1999 Act. So the worker found himself in the position he would have been in *"as if the repealing written law had not been passed or made"*: That such is the correct interpretation is, I believe, confirmed by the Decision of Macknay DCJ in the *Henderson* Decision.

For those reasons the review officer dismissed the form 22 referral. That decision has been appealed and is listed for hearing by the Compensation Magistrate's Court on 4 August 2004. Some 30 cases before the directorate fall within this type of scenario. Again, we do not know how many of those will, once that appeal has been heard, have the opportunity of going through the section 93D system or staying within the 1999 scheme. Of course, once this Bill is passed, all the cases will fall within the 1999 scheme and the appeal will have no relevance whatsoever.

Forty-two future pecuniary loss applications have been lodged in the District Court. Prior to the Bill coming into this House, a question was asked about whether workers in those cases could also access the 1999 regime. According to the decision in the case of Mokta v Metro Meat International Limited [2004] WADC 78, delivered on 4 May 2004 by District Court Judge Nisbet, the answer is no; the workers have no access to the 1999 scheme. Judge Nisbet referred in his judgment to the fact that the plaintiff could not simply take herself out the operation of the Workers' Compensation and Rehabilitation Act by refusing or failing to have the defendant's liability determined in accordance with the Act's provisions. He stated -

> Once this point is reached all that remains to be determined is what is to become of the action. Until the High Court ruled that the former provisions of the Act applied in circumstances where no leave had been obtained as required by the (former) s 93D(4) and the cause of action (if any) had arisen before the amendments wrought by Act 34 of 1999, the *Workers' Compensation and Rehabilitation Act 1999*, proclaimed 5 October 1999, came into effect, it was thought the former provisions only had a continuing application where leave to institute proceedings had been given: ***Dossett v TKJ Nominees Pty Ltd*** [2001] WASCA 179. But the High Court has now explained the true position, namely that s 37(2) of the *Interpretation Act 1984* applies to save the former provisions: . . . This being so, leave to institute these proceedings was required. It wasn't and hence HH Jackson DCJ had no power to stay the proceedings pending a determination of incapacity and should have either struck them out or stayed them permanently. As this is not a case like **Thomas v Arimco Mining Pty Ltd & Anor** [2000] WADC 151, the choice between permanent stay and striking out here is somewhat academic. His Honour's order, being interlocutory, can be reviewed by the court at any time: **Turner v Bulletin Newspaper Co Pty Ltd & Others** (1974) 3 ALR 491 per Jacobs J at 513. As no useful purpose can be served by staying the action permanently, as opposed to striking it out, and the stay previously ordered having been made without power, I will recall the order for the stay, discharge it and strike out the action.

District Court Judge Nisbet again highlights the level of uncertainty that is now coming into the system. The question the Government faced was whether to allow the judiciary to sort out the issue or bring forward the legislation and claim that it is providing some level of certainty. However, the difficulty is that there will be advantages and disadvantages on both sides. Some people will gain under the proposed changes. However, some people will be disadvantaged, because they will miss out. Some people will not get the 30 per cent, and some people will be out of time for the 16 per cent. Some people who sought leave to commence proceedings under section 93D only to have had their matter adjourned for a return date will no longer have that right. The reason we are concerned about this legislation being rushed through the House is that it will affect people's rights. This is not the first time this has happened. Hon Cheryl Edwardes suggested that it happened in 1999. We are now dealing with those cases that we believed would fall under the 1999 scheme and would not have the right to continue under section 93D. Those cases have now been channelled down to a smaller number. The minister should be able to tell us where those cases are in the system, and who will miss out and who will be advantaged. We were of the belief that these claims had effectively been struck out by the 1999 amendments, and that it was not intended that those workers would be entitled to come under the transitional provisions. However, the High Court created the window of opportunity to take action under section 93D, by virtue of

Dossett. That has now been extended further by Short and Henderson. Mokta was then thrown in, and that has created an even greater level of uncertainty.

I emphasise to the Government that when it rushes legislation through this House, there are a number of consequences. The first is that unless the Government has personally identified who is in the District Court system and where they are within that system and who will miss out and who will be advantaged, it can have no confidence in what this legislation will or will not achieve. The Government will need to advise the House how many people have cases that are on appeal in the District Court, and where they fall into the definition of "proceedings". Even in this new Bill there is still some uncertainty and lack of clarity in the definition of "proceedings" by virtue of what Mr Justice Kirby said in Dossett. Further, we do not know how many injured workers will fall under either Dutch or Dossett and be eligible to have their legal costs, which will now be thrown away, reimbursed. We also need some information on the impact of this Bill on the supplementation fund and how much the employers will need to pay over and above the reserves to ensure that not only the HIH claims but also the Dutch cases are covered, as well as costs out of the general fund to reimburse the legal costs that will now be thrown away.

At this stage, there is no way that we can determine our support or opposition for this legislation, because we have not been able to receive sufficient information from the Government, and there is a lack of knowledge and information among the respective stakeholders. The employers will be required to pay for the changes that are proposed in this Bill. That will impose an additional burden on them that perhaps was not recognised in trying to address the Dossett and Dutch cases. Some injured workers will lose their right to compensation because of the speed at which this Bill is going through this Parliament. However, other workers will be advantaged by this Bill, because they would not have been able to achieve the bar that the section 93D provisions laid down in order to receive adequate compensation through the District Court. The real concern is that some people in the system who have already received compensation may now be led to believe that they can gain more compensation by going back into the common law system, and that creates a level of uncertainty for injured workers, who really just want to get on with their lives.

HON JIM SCOTT (South Metropolitan) [4.20 pm]: I want to deal with some of the concerns about the Workers' Compensation (Common Law Proceedings) Bill 2004 that have been outlined by Hon Ray Halligan. It is ironic that this legislation picks up a problem that was created by the introduction of legislation that had a retrospective effect. In saying that, I am talking about legislation that sought to reach into the past and affect cases that were before the courts, in particular the Dossett case. As Hon Ray Halligan has pointed out, the legal fees in that case will be paid from the fund that was set up by employers to pay for the collapse of HIH Insurance. I was not aware that that fund had been wound down to the extent that Hon Ray Halligan outlined. It will be interesting to know just how much will need to come out of that fund to pay for those court costs. The other people who will pay will be those who had a good chance of winning their case but who will no longer be able to proceed down the path of common law. I find it interesting the winners out off this will be, once again, the insurance companies, because they will not need to defend cases in the courts, and any costs that they may incur will be picked up by the fund and not by them.

The other matter that we should consider is that the changes that were made in 1998-99, when a second lot of amendments were brought in to change the system from one in which the loss of a particular amount of money provided the gateway to common law to one in which people were required to prove a degree of disability, have ramped up the profits of the insurance companies significantly. It would have been more appropriate had the Government found a method by which the people who will gain a huge advantage out of this legislation will be the ones who will pay rather than the people who will lose their rights. The wrong people are being targeted once again.

Hon Ray Halligan drew attention to the way in which this Bill has outpaced its two friends - the Workers' Compensation Reform Bill and the Workers' Compensation and Rehabilitation Amendment (Cross Border) Bill. I was first offered a briefing on the Workers' Compensation Reform Bill a couple of years ago. The Bill then disappeared for a while. However, it has now come on for debate at a time when the Government will find it very difficult to get it through the Parliament before the end of this term of government. One needs to ask why this Bill has been brought on so quickly, and it would seem without a lot of consultation with some of the key stakeholders. This Bill has sprung up like a mushroom overnight, just waiting to be picked and eaten, whereas the reform Bill has been hidden away in a dark room and has been in gestation for a long time. I wonder whether this Bill has been brought in as a bit of a trade-off between Dossett and Dutch, because in the one case people will have their rights reduced, and in the other case people will have their rights enhanced, so Dossett will help pay for Dutch.

Although many people are not entirely enthusiastic about any of this legislation, those people who do support it are very concerned that the common law Bill will pass through the Parliament, but the reform Bill, with the small

improvements that it will offer in some areas, will not pass through the Parliament. I hope the government spokesperson will give me some assurance that the third readings of both these Bills, if we reach that point, will be reasonably close together, and that the common law Bill will not be proclaimed until the reform Bill has been completed, so that all three of these Bills, if we include the Workers' Compensation and Rehabilitation Amendment (Cross Border) Bill, will pass through the Parliament.

I have been talking about the historical irony of this legislation. Hon Ray Halligan has referred to the Dossett case. Members should remember that we are going back some time when looking at the Dossett case. Although the case might not have been around for a tremendous amount of time, Mr Dossett suffered an injury way back in 1996. He applied for leave of the District Court of Western Australia to commence proceedings of common law. In July 1998 he filed a summons in the District Court seeking leave, and the summons was listed for hearing on 8 October 1999. However, by 5 October the Workers' Compensation and Rehabilitation Act 1999 received royal assent, which retrospectively cut off Dossett's right to continue his common law claim.

Another irony is that should this legislation pass through this House in its current form, Mr Dossett will again be cut off, because it is my understanding that Dossett's lawyer has been required to provide further medical evidence for his client to proceed.

Debate interrupted, pursuant to standing orders.

[Continued on page 6751.]