

WORKERS' COMPENSATION REFORM BILL 2004

Second Reading

Resumed from 25 June.

HON RAY HALLIGAN (North Metropolitan) [7.31 pm]: We have been asked to debate the Workers' Compensation Reform Bill 2004. The Government hopes that the legislation will pass through this House before it rises in four weeks. In earlier debate on the Workers' Compensation (Common Law Proceedings) Bill, it was mentioned that many members of this place felt that the Government was trying to push through these Bills with some haste. The Government has had time to look more closely at these Bills and to come forward with legislation that is more acceptable to the stakeholders. Unfortunately, the Government has found itself in a position in which it is reliant upon this House to get the Bills through in the shortest possible time, no doubt so that the Government can go back to any number of people and say that it has been able to fulfil another election promise. The unfortunate part is that the legislation is defective, deficient and will not provide effectively for the workers of this State, who rely on this legislation to protect their rights. Yet again, it is piecemeal legislation. As I said, the majority of stakeholders are unhappy with it. It is something that members on this side of the House also abhor. An article in issue No 2 of July 2004 of *Australian Safety Matters* states on this issue -

The Construction, Forestry, Mining and Energy Union (CFMEU) has perhaps been most vociferous -

Hon Nick Griffiths: A bit like some of the speeches we hear from time to time.

Hon RAY HALLIGAN: Not at all; it is all factual. It continues -

in its opposition to the Bill. Union secretary of the construction division, Kevin Reynolds, is quoted in the on-line publication *Green Left Weekly* as saying that government is attempting to reduce the ability for workers to take common law action - a move the union believes would only be appropriate if there were no cap on the maximum compensation achievable.

It is suggested in the article that -

The main CFMEU opposition to the Bill is that it has not gone far enough to bring financial compensation for work related injury in line with a higher benchmark set by NSW.

The article goes on to say -

While the CFMEU says it's all not enough, Labor has said it's all for now, mainly because of cost. Minister Kobelke said the cost of these proposed reforms will result in the average recommended premium rates remaining within the target range of 2.4% to 2.7% of payroll recommended by the 1999 Pearson report, which was supported at the time by employers as an acceptable range. Labor is savvy to the threats of premiums blowing out. That is why the cap is there.

The article continues -

But, even the WA Chamber of Commerce and Industry has attacked the Bill. In June 2004 CCI director of safety and health, Anne Bellamy, said that employers have reason to be concerned that compensation laws will increase costs. She has however vehemently attacked the Bill because of the amendments therein to the 'Dutch decision' . . .

"The cost of changes proposed together with potential pay outs for claims arising from the 'Dutch decision' could add up to \$234 million in the first year to compensation costs and trigger a rise in employers' insurance premiums of at least 30%.

The article goes on in that vein, but of course it has not stopped the Government from going down this path and suggesting to people that this is the best it can do under the circumstances. I wonder whether the best is good enough and whether what the Government is proposing to do should in fact be done.

This House decided that the Bill should go to a select committee, which has provided an interim report to the House - report No 1 of September 2004. The committee looked into any number of issues that it felt it was able to in the very short time available to it and has provided some information. The committee did not feel that it was in a position to make any recommendations to the House, but purely provided information to the House that might assist with further debate on the Bill. The difficulty is that it is only an interim report. The committee has been asked to continue its deliberations and to look at the issues associated with workers' compensation. A large number of people in this place feel that we should be looking for best practice. It is my belief that the only way we will find best practice is to look at what is happening in the rest of Australia. To that end, we have already heard members talk about the Queensland model. I do not know whether the Government has taken the Queensland model into consideration, or, if it has, whether it has done so seriously, but I believe that it is incumbent upon the select committee, whether in this Parliament or the next, to continue down that path to try to find what is best practice. No-one will deny that this will take some time; it cannot be found overnight or next week. A lot of information has to be gathered and analysed to try to determine what is in the best interests of

everyone concerned and to come up with an equitable and sustainable solution that will provide for the workers, the employers and, with the current system, the insurance companies. Members of the Government continue to use the word “sustainable”, but if an insurance company is not able to make a profit by providing workers’ compensation insurance it will be the first to opt out and the Government may have to step in and fill the breach. I am sure that is not something this Government would care to do. A number of schemes operate in the different States of Australia in which Governments do take a major interest in the administration of workers’ compensation. I understand that in some States there are outstanding liabilities of some \$5 billion, which makes it all the more important that we find out what is in the best interests of Western Australia. This will mean looking at what is happening throughout Australia and what is in the best interests of the people of this State. For that reason what the Government has provided us with could not be considered best practice. I will be interested to hear what the minister says to convince members on this side of the House why we should pass legislation of this type.

It is only a few years since the previous Government conducted a complete overhaul of the entire workers’ compensation system. Without going into all the detail, at least the system was stabilised, costs that had been spiralling and out of control were contained and even reduced, and new injury management procedures concentrating on a team approach with employees, employers and doctors were introduced. It is recognised that workers’ compensation will never be a simple issue and it will always be capable of improvement. However, there are two fundamental principles from which there should be no departure: fair and adequate cover must be provided for injured workers, and costs for employers must be affordable. Of course, the challenge for us all is to find that delicate balance between the two. As I shall demonstrate, the Government’s legislation threatens that foundation.

The actuarial report presented last month has firmly put cost increases at between 30 per cent and 51 per cent in the first 12 months. That will put enormous pressure on premium rates and it heralds a return to the unsustainable increases that applied before the overhaul by the previous Government. The fact is that 60 per cent of injured workers returned to work within 20 days and the average duration of a claim was 58 days. Yet, apart from complicating the process, the Government wants to increase from four weeks to 13 the initial period before the step-down in weekly earnings. Other changes include extending the election period and introducing lawyers into the system, to name just a few. The only possible outcome can be to discourage injured workers from returning to work and to undermine the entire injury management process. If the majority of injured workers want to get back to work, then the system should be geared to accommodate them, not put obstacles in their way. Injured workers want their lives back and do not want to stay in the system. Injured workers do not need a system that is complex, difficult to understand and expensive. They do not need something that will cause greater aggravation and disruption in their lives. Under the Government’s legislation all of the issues that have been helping them are in jeopardy. Increases in premium costs benefit no-one, yet that is what the Government now acknowledges will happen, and so do many of the service providers in the industry. The only point of difference may be the degree of increase. In addition, as well as setting the stage for a massive blow-out in costs, the Government has broken several promises it made before and since the last state election. The Government promised that premiums would not be increased but now admits that they will. The abolition of the premium rates committee was a broken promise. The Government promised a simpler bureaucratic system and proposes the reverse. The Government promised a quicker and fairer reform procedure for resolving disputes and has not delivered. It proposed a more efficient and open administration, and has failed here also. The proposed system is very complicated and not user-friendly, and that is just a sample. Increases in costs spell bad news for jobs and businesses. What is the virtue of changing the entire system if the only outcomes will force businesses to close, result in workers losing their jobs, mean that the unemployed will stay unemployed and see community organisations servicing the frail, aged and disabled being forced to reduce and even abolish their services? We faced this very problem with community organisations five years ago when premium rate increases threatened their existence. The Government’s legislation will put that pressure back on all of those organisations again.

When one appreciates the level of opposition to this Bill, which the Government quaintly calls a reform, one must question why the Government is even pursuing it. As I have said, unions do not like it, nor do the Injured Persons Action and Support Association, the Australian Plaintiff Lawyers Association, the Law Society of Western Australia, rehabilitation providers, the Australian Medical Association, employer groups, small business, injured workers or self-insurers - nor does the Opposition - for all of the reasons put forward by those various groups. The legislation is too complicated and is not user-friendly. Rules will be more legalistic and the reintroduction of lawyers can only increase costs and slow down proceedings. Some of the organisations involved in the industry will have an opportunity to give their verdict on the legislation. As far as some of the others are concerned, I will provide a few examples. The Housing Industry Association has told the Government that it is concerned that the Government’s changes will destabilise the workers’ compensation system that for the past three years has been performing well. The Council of Small Business Organisations of Australia Ltd

thought it was a stakeholder, especially after being invited to comment on earlier reports and attend a meeting with the minister. However, the minister's office later told the council that it was not a stakeholder.

The Self Insurers Association of Western Australia has warned the minister that costs will exceed the minister's forecasts and that increased costs, with no improvement in outcomes, are an issue of great concern to self-insurers. The Chamber of Minerals and Energy of Western Australia has expressed alarm that the reform Bill will be introduced into Parliament without thorough consideration being given to the cost implication of the proposed amendments.

The Australian Plaintiff Lawyers Association has said that medical guides are needed now, and believes that they will demonstrate the extent to which the Gallop Government's proposed change from "disability" to "impairment" will annihilate common law access. Changing the assessment process from disability to impairment involves far more than changing one word. Changing the system will not work unless enough doctors are fully trained to carry out the assessment process. Although there have been preliminary moves towards a course in Western Australia, there is still some distance to go on that side of the equation. The association is a key stakeholder in the industry, and supported the Government on the basis of its original direction statement. However, the Government has moved so far from that original statement that it has even put the association offside.

The Australian Medical Association has said that the patient's doctor is the best person to decide on treatment in consultation with the injured worker, not the Government. It has gone even further, describing the proposed changes as anti-patient.

The Government faces another risk; namely, the potential lack of competition in the workers' compensation system. In the 1990s, 13 companies provided workers' compensation cover. That number is now down to eight. We all remember the collapse of HIH Insurance in 2001. One of the biggest factors in that collapse was identified as the failure to provide properly for future claims; yet the Government proposes a system that will not allow companies to provide for future increases on existing claims, because it wants the legislation to take effect immediately it is proclaimed, and it wants insurance companies to absorb those costs. The impact of that will be to include all existing cases in the new system, without any provision having been made for increases; in other words, retrospectivity. Premiums will not reflect the risk and the risk will not be fully funded. That may well put the number of players in the industry at even greater risk.

The areas in which workers' compensation could be improved are in conciliation, review and service delivery. However, these could be achieved without the upheaval planned by the Government and without the stress and distress it will precipitate. Injured workers need and want a system that will enable them to get back to work and get on with their lives. That is the critical issue. They do not want the hassle that the government system will create. The proposed changes will upset that fine balance for everyone. The upshot will be no benefit to anyone - no real benefit to injured workers and no real benefit to employers. No-one can afford Labor's new workers' compensation system, least of all injured workers and employers. The Government would win general acclaim if it admitted that its legislation is ill-conceived and ill-considered, and drop it in favour of minor refinements that would yield tangible benefits.

One of the other issues that has come forward with this legislation is the fact that regulations that will be an important part of this legislation are to be enacted. Those regulations have not been provided to this House, and my understanding is - the minister will correct me if I am wrong - that they are unlikely to be available before this Bill passes through the Parliament. That is a most unfortunate situation. We have a very complex piece of legislation. It always has been and always will be. I believe it is incumbent upon the Government to provide those regulations so that we can see in this place how this so-called reform will change things for the better. The Bill before us at present does not provide that information. We need the detail. I do not think it is reasonable for the Government to ask this House to pass this legislation and then rely on the Government to gazette regulations that this House will have to deal with later. As we know, regulations become law upon gazettal, and then we have an opportunity to move a disallowance motion. However, in the interim, of course, those regulations have been law. Therefore, we are talking about a possible situation that is not dissimilar to the situation with the previous Bill that we debated. We would again have a situation of uncertainty, and that is most unfortunate. It is a situation that certainly injured workers do not want and should not have. They deserve better. I believe it is important that the Government provide something better than it has provided at this time. From all accounts, the stakeholders that have made their thoughts known to many of us on this side of the Chamber are certainly not happy with what the Government has provided.

The Opposition does not support this Bill in its present form, and I believe it will be exceedingly difficult for the Government to provide sufficient explanation to convince us otherwise.

HON JIM SCOTT (South Metropolitan) [7.57 pm]: Mr President - Mr Deputy President, sorry; I do not want to overdo the adulation.

The DEPUTY PRESIDENT (Hon Simon O'Brien): I am sure there is no danger of that.

Hon JIM SCOTT: No, I suppose not. For me, this legislation has been very disappointing. We came into this term of government under the Labor Party with legislation that I believe was very poor. The existing legislation is causing grief to many people, and it is not on one side or the other. The major problem with the legislation is that it is complex, unwieldy and bureaucratically out of control. Another problem with it is that those persons who have the most serious injuries are in fact, if they go to common law, treated little better than criminals, I believe. Many people have come into my office and complained about the treatment they have received in this system. They have been hassled and followed. Their cases have been stalled and put off. Every sort of procedure in the book has been used to try to prevent their accessing compensation through common law. In fact, there is broad agreement across society that this legislation is appalling. As I have said, employers find it costly and complex and it has uncertain outcomes. We have just dealt with an aspect of this legislation in which people needed to get through gateways. These gateways are the major problem with the legislation. We started out with a situation in which a person had to prove a simple measure to access common law; that is, negligence. That is to change considerably. There has been a concerted campaign in which Governments have joined to some extent, because Governments are beneficiaries of tort law reform that restricts people's access to proper compensation.

I will quote a few lines from a speech made by Hon J.J. Spigelman, AC, the Chief Justice of New South Wales, at a Swiss Re liability conference in Sydney in September this year. In his speech he went through the changes that have occurred in the liability structure in Australia. He referred not just to workers' compensation, but to third party motor vehicle compensation, public liability and so on. One of the areas he referred to was liability. He referred to how it had changed and said that it had been too easy to prove liability at one time but that there had been a complete reversal of that in recent years. He stated -

The issue became highly charged politically. The talk was of "crisis". The concern of governments was motivated in part by the liability of government directly as a major employer, property owner and provider of services, particularly in education, health and transport. This was, however, reinforced by the emergence, over recent years of a role for government as a backstop for private insurers, as the reinsurer of last resort. It took many years for the government role of "lender of last resort" to take the institutional form of the contemporary central bank. We are in the early stages of institutional development of the "reinsurer of last resort" function.

In Australia we have had a range of proposals in different areas for the government to underwrite existing insurers, e.g. for the risks associated with terrorism. Of particular significance is the acceptance that it was politically impossible for the government to stand by and let a major insurer default on its obligations.

We certainly have passed a bundle of legislation in that regard in this State. He went on to state -

The particular focus was the sudden escalation of premiums. Insurance premiums are the result of a multiplicity of factors, however, the cost of claims sets the basic structural parameters within which other forces operate. Those costs have increased considerably over recent decades.

He listed a huge number of examples in which people had been restricted in gaining access to compensation in recent years. It is quite a comprehensive list. It is quite staggering.

Hon Peter Foss: Is this Spigelman?

Hon JIM SCOTT: Yes. However, he also talked about a number of other issues. He stated -

The result of the new regime is to avoid the sense of inequality as a ground for unfairness. It has, however, replaced that ground with others and the debate is actively continuing. In particular, the introduction of caps on recovery and thresholds before recovery - an underwriter driven, not a principled change - has led to considerable controversy. The introduction of a requirement that a person be subject to fifteen percent of whole of body impairment - that percentage is lower in some States - before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive.

He was talking about 15 per cent impairment. What do we have in this legislation? If he thinks that 15 per cent is restrictive for an impairment level, what on earth is 25 per cent impairment? Twenty-five per cent impairment is far beyond that. The really significant change in the common law aspects of this legislation is the change from a disability to an impairment model. I do not know how many members have looked closely at the legislation, because obviously members are busy with their own portfolio areas. For those members who have not looked at the legislation, the simple way to say it is that the disability model takes into account to a much greater extent a person's ability to carry on his job and to keep earning the income he did before the injury than does the new

impairment model, which simply takes into account the person's ability to use his body to its full extent. I will give members a good example that has been put to me. If a politician lost an eye, the politician could go on and do his job -

Hon Peter Foss interjected.

Hon JIM SCOTT: That is right. I think that might have been why a politician was chosen. The one-eyed politician could still carry on and do his job with even more selectivity. However, if a pilot suffered the same injury, it would be the end of his career. That injury would have a significant impact on the employment of one person, and it would be traumatic and upsetting for another but it would not have a great impact on his employment. The impairment model takes no account of that sort of thing. At the same time we have taken away a number of factors that had previously been included under the disability model -

Hon Peter Foss: If a politician lost his tongue, that probably wouldn't be a 15 per cent disability, but it would definitely be a 100 per cent impairment!

Hon JIM SCOTT: It might be a 100 per cent improvement for some!

Hon Nick Griffiths: From the Government's perspective, if members of the Opposition were to lose their tongues, it would be very good indeed!

Hon JIM SCOTT: Getting back to this very serious legislation, the other problem with the impairment model is that it does not take into account pain and suffering. Further, it does not take into account the loss of sexual functions and a number of secondary impacts, such as psychological impacts. For example, a person who is depressed about not being able to go back to his job would be suffering from a secondary impact.

Hon Peter Foss: I am looking forward to leaving.

Hon JIM SCOTT: Yes, but we have not cut off Hon Peter Foss's leg, even though I did see him limping some time last year.

I point out that this is not what a court decides to make a payment on; I am referring to a person's access to court. There is a difference. The added losses that people suffer, such as psychological impacts, pain and suffering and a loss of sexual functions, can be taken into account in the judgment of payments. However, if a person cannot get to court in the first place, he will not get compensation for those losses. It is rather duplicitous to say that people can receive payment if they can get their matter to court, but that we are going to take away certain factors to prevent people getting to court in the first place. That is extremely unfair.

The Chief Justice of New South Wales, Hon James Jacob Spigelman, said that 15 per cent impairment was too hard an obstacle for people to have to surmount before they could access common law to get some sort of settlement and repayment for their losses. However, others have a strong opinion. I refer, for instance, to the Australian Medical Association. Its document, which refers to the access issue, was written by Mr Peter Jennings, and is part of the AMA's submission to the select committee. It reads -

The introduction of thresholds in 1993, fundamentally changed the workers compensation system, resulting in a variety of difficulties and adapted responses. Thresholds, with differential rights eg right of access to Common Law, unfortunately discriminate against those who don't meet the threshold criteria and as a consequence, have lesser rights than those who do. It raises the fundamental point that the degree of physical impairment is an illogical gateway to common law. With an impairment based gateway, there is an implicit discrimination against disability (a much more real representation of the impact on the patient's life). Reducing the threshold increases the ability of the courts to provide an equitable disability based response.

... It is appreciated that the purpose is to seek to retain viability/sustainability of the system and to an extent it is a trade-off between a no fault and Common Law system and Government is desiring to increase Statutory Benefits as a trade off against limited access to Common Law. This is clearly a political/economic decision.

It is rather interesting that there is total agreement between the New South Wales Chief Justice and the AMA. They both believe that this decision is not based on fairness and equity, but that it is a political and economic decision. When the Government responds, I would like to know whether it is its intention to deliberately reduce the ability of injured workers to access common law. Is that the intention of the Government? Clearly there is broad consensus that the impairment guide will make it more difficult for people to access common law than it currently is.

Hon Peter Foss: For some people; for others it will make it easier.

Hon JIM SCOTT: I do not think it will make it easier for many people at all.

Hon Peter Foss: That all depends on what the problem is and whether they have an impairment or a disability.

Hon JIM SCOTT: I am about to go into the way in which the guide is structured. A study was done by Professor Andrew Harper. I do not have it with me. He considered the impairment guide, which was never intended to be used for this purpose. It was simply a medical guide, not a compensation guide. In fact, the American guide states that it is not to be used for that purpose. I do not understand why there been such a push to use this guide for the purpose of providing compensation. It is beyond me, because we are talking about legislation that compensates people for two things: the first is the impairment, and the second is a person's ability to carry out his or her work. An impairment guide does not fairly give that assessment. There will be a lot of losers in this system. The AMA document goes on to state -

It is noted that the Actuaries suggest that the proposed 20% impairment threshold in tandem with no cap 12 months to elective statutory benefits, step down under 30% etc is estimated to increase total annual costs by 4.1%. Given your suggestions it is the intent of Government to actually increase access to Common Law and the other proposals of the Reform Package, the Association has some difficulty identifying in practical terms the basis for the Actuaries conclusion that the current 16, 30% thresholds, based upon arguable disability criteria including psychological overlay and replacing it with a 20% impairment threshold would increase access to Common Law. It needs to be recognised that an impairment based system using, as suggested in the Reform Package, the US Guide as a basis would inevitably result in a lower level of access.

Further it reads -

The Association believes the percentage threshold and the criteria underpinning assessment of the individual's percentage need to be reviewed. Medical input to date suggests that if an impairment based system is to be utilised, a threshold of 16% would be more humane.

The AMA refers to 16 per cent; Hon J.J. Spigelman, the Chief Justice of New South Wales, suggests that 15 per cent is too high; and the Western Australian Labor Party says that 25 per cent will make people better off. It is a nonsense. That has to be changed. A genuine figure must be set so that people can access the common law in the way they do today. Far from increasing people's access to common law, this legislation will decrease it.

Let us compare this legislation with legislation of a State similar to Western Australia - for instance, New South Wales. Its model has significantly reduced the amount of people who can access common law; however, it has also significantly increased the benefits for injured workers. The system most like the Western Australian system has an attached concern. I believe the New South Wales system is the most underfunded of all state funds. It is significantly underfunded. In fact, if it were a private business and not underpinned by the State, it would go broke very quickly.

The House has considered a series of legislative measures that began in 1993 putting in place gateways to common law. What has been the effect of these statutes? It has been to create new areas of contention to be argued by lawyers in courts.

Hon Peter Foss: Absolutely.

Hon JIM SCOTT: Every time another aspect of contention is added, as is the case with this legislation, and previous legislation, legal costs are added to the system. This also draws out the time taken for cases to be resolved, and it extends the periods in which people must go without decent payments. The only people who ultimately benefit are the lawyers who gain lots more work, even though the intention was to create the opposite effect. We would have done much better to produce simplified legislation that the average person could understand. This would have included reducing the gateways placed in front of people. A reduction would have occurred in what can be considered to be wasted money spent chasing up more medical and legal opinions etc to support cases. The process has become a nightmare that people with severe injuries must live through. In fact, the system itself is traumatising people. This legislation will have exactly the same effect as earlier measures; that is, a burgeoning of the bureaucracy of WorkCover. This legislation provides an increasing number of powers that will be taken over by WorkCover; that is, setting fees and setting the level of medical assistance that people can receive. This control applies to every aspect of the system. In fact, one could think that WorkCover's role was to be the medical specialist and lawyer handling the recovery of the worker. This process is adding more costs to the system without money going to the people who need it. It takes money out of the pockets of injured workers and people who pay premiums.

Western Australia has tried to restrict access to common law by a number of gateways and other measures. Incentives are supposed to have been provided by statutory means, but these are rather weak. Western Australia has fared badly when compared to a State like Queensland, which has not tried to restrict common law in this way. Queensland has simplified its legislation and offered employers very much reduced premiums and provided a much better service to injured workers than is the case in this State. The standardised average

premium rates as a proportion of total expenditure for Queensland, Western Australia and New South Wales for 2001-02 are interesting reading: the comparative rate was 3.06 per cent for New South Wales, 4.424 per cent for Western Australia and 1.48 per cent for Queensland. Therefore, Queensland's rate was less than half of that in New South Wales and was significantly lower than Western Australia's rate. The direct compensation paid as a proportion of the total expenditure - that is, the money paid into the pockets of injured workers - was 59.4 per cent in New South Wales, 47.5 in Western Australia and 64.5 per cent in Queensland. The Queensland system pays injured workers more and has significantly lower premiums. Western Australia pays workers the lowest proportion of any of the three States mentioned.

The other aspect we need to consider is how people are treated within the system. I have with me the "National Competition Policy Legislation Review of *WorkCover Queensland Act 1996*".

Hon Nick Griffiths: You're only saying that because Hon Dee Margetts isn't here!

Hon JIM SCOTT: That is right. The outcomes are rather surprising from where I stand as the report relates to national competition policy. A recommendation reads -

That the public monopoly for Queensland workers' compensation system be retained.

A difference in the Queensland system is that the Government is the major insurer and only very large companies have in-house insurance systems, as is the case in Western Australia with large companies like Alcoa. Page 5 of the report reads -

Stakeholder consultations have revealed more interest in the potential benefits arising from the outsourcing of case management than the introduction of private claims management.

It later reads -

Benefits from private claims management are far less clear cut and are accompanied by the possibility of reduced service, reduced variable outcomes and regional employment. In the broader context of other changes arising from the outcome of this Review, the Committee is of the view that the introduction of private claims management would be premature at this stage. While there is support from some stakeholders to increase competitive pressures on WorkCover, recent changes to the definition of workers and Government proposals to review access to damages under common law will impact on the scheme and may affect its financial status. Consequently, the Committee recommends that this issue be reviewed in three years' time . . .

I have not read the part I meant to read. On page 4, the report states -

With the exception of the private insurance industry, some employer groups and employees, all stakeholders supported the retention of public underwriting of the insurance industry, emphasising the good performance of the current scheme and the importance of stability for all stakeholders. While there was some desire for WorkCover to be more exposed to market forces in order to ensure appropriate benchmarking, there was a consensus that this should only be done in areas which would not threaten the stability of the scheme.

The report constantly stresses the importance of a stable scheme under which people know what they are likely to be paying and what they are likely to be paid. The great difference between that and the scheme in Western Australia is the considerable changes that have been made to the scheme time and again. We are now putting band-aids on the band-aids to try to fix the legislation. It will not be fixed until a comprehensive review is undertaken and legislation is passed that is simple, abolishes all the gateways and provides a service to the people who need it, rather than what I see as a giant bureaucracy that seems to be designed to punish people as much as possible.

Hon Peter Foss: I'm getting worried.

Hon JIM SCOTT: Why?

Hon Peter Foss: There is something seriously wrong here: I'm agreeing with the member!

Hon JIM SCOTT: We do agree on some things. I am not happy with this legislation for the reasons I have just outlined. However, some improvements have been included in the statutory scheme in Western Australia. Those improvements benefit mostly people who are able to return to their job and people who need support, such as those on low incomes and who may be very much in need of all the income they were earning before they were injured, which included overtime and so on. The legislation increases payments for training and a number of payments under the statutory scheme.

One area about which I have concern and for which I foreshadow an amendment is the death benefit scheme. I have a coloured graph showing the death benefits for the Australian and New Zealand schemes. In New Zealand

the very lowest death benefit paid to a deceased worker's family is \$4 703. The benefit in New South Wales is \$280 000, and in Queensland it is \$283 000. The lowest benefit paid in Australia is \$130 609 in Western Australia. I understand the Government is in favour of increasing that amount so I will move an amendment to that provision.

Hon Peter Foss: You can't increase it.

Hon JIM SCOTT: I know but I can get agreement from the Government to do that.

As I said, in Western Australia the workplace fatality benefit paid to an injured worker's family is \$130 609, which the Bill increases to \$138 000. However, it needs to be increased significantly more to bring it up to the median level of that in all Australian States. I am pleased that the Government has indicated that it will be prepared to do that. I will be moving amendments to make some other improvements, particularly to the statutory side of the scheme where it is clearly unfair. Changes must be made as quickly as possible to the rate of 25 per cent. To make it equitable we should adopt the sorts of figures referred to by the Australian Medical Association and the Chief Justice of New South Wales. The impairment guide should not have been adopted yet because the method of calculating compensation is sadly underdone. The report I referred to earlier by Andrew Harper indicates that in some areas the impairment guides are complete. A lot of work has been done on them to cover all the disadvantages caused by the injury or illness. However, in other areas of medical expertise people have not carried out such comprehensive assessments and a provision to overcome that has not been incorporated in the Bill. If one type of medical practitioner happens to be looking after a person's injury and bases his assessment according to that area of medicine, he might get a fair deal. However, in other areas the person is likely to be a dreadful loser. I am foreshadowing some amendments to improve that aspect. I hope that I will get support for those amendments from other members of this House. I do not believe that the Government really wants to put its name to legislation that significantly reduces the ability for injured workers who need to get into the statutory system to access benefits. The Government has been suckered into this impairment guide and now it is too late in the season and too close to the next grand final, making it a bit difficult to change its team around. The Government needs to implement measures to prop up that area to ensure that people do not suffer unduly. Under the system proposed by this Government, anyone attempting to make a worker's compensation claim through common law is in for a very rough time indeed. It is important that we maintain the ability for people to access common law. Apart from it being a fundamental human right, it provides certain benefits to the system by putting pressure on people to maintain safe workplaces. Furthermore, there are many people for whom a statutory system does not adequately provide recompense for the types of injuries they have sustained and the situations in which they find themselves. We must have a statutory system, especially for those who are seriously injured and cannot continue with the type of work that they did in the past. This legislation fails to deliver that and will need some improvement before it can get my full support.

HON JOHN FISCHER (Mining and Pastoral) [8.40 pm]: I have made many comments on the proposed workers' compensation legislation and I have certainly not changed my mind at all. It is inferior legislation. I am extremely disappointed with the result of the committee inquiry, and I will go into that shortly. Quite frankly, it seems that boosting insurers' profits is the highest immediate priority of the Gallop Government, even higher than the passage of the 40-odd Bills that I am told the Government wants passed in the final sitting of Parliament. I wonder why we have not waited until the release of the WorkCover 2004 financial report, which will no doubt show the obscene profits insurers are reaping off the backs of our injured workers, before rushing through this retrospective legislation. I am extremely disappointed with it.

The second speech I made in this House on this issue was on Thursday, 16 October 2003, in which I said that to me -

... it is apparent that full common law should be restored in Western Australia. It is proven that the system worked well prior to 1993. Barriers to common law only increase litigation and costs all round.

I mentioned earlier tonight when speaking on the previous Bill that Queensland has full common law and has the lowest premiums in the country; they are approximately half the rate of those in Western Australia. My speech of 16 October 2003 continued -

England has full common law with stable, affordable premiums. Western Australia did have stable, affordable premiums until Graham Kierath and insurance companies told us that we could not afford them. However, official figures prove well and truly otherwise.

In the past 22 years, insurance companies have collected over \$2 billion more in premiums than they have paid out to injured workers. They have achieved a surplus every year, even prior to 1993 when the full common law system was in place. We could afford it then and we can afford it now.

We have been brainwashed by the insurance companies, or the Government has been hoodwinked. What we make of that is up to our individual appreciation of the situation. My speech continued -

We have been brainwashed by the insurance companies and the Government into believing that we cannot afford it. This process has caused untold misery to countless victims and has not reduced premiums by one cent; it has simply enhanced insurance companies' profits. There is no crisis and there never has been.

I refer to *Hansard* of the Legislative Council of Friday, 2 July 2004, when a motion was moved by the Leader of the House. I will not read out the full wording of the motion, because I am sure members are aware of it. Paragraph (4) of the motion states -

For the purposes of its inquiry, the select committee may consider part or all of the Workers' Compensation Reform Bill 2004 and report any findings or recommendations on that Bill during its passage.

I said during that debate that I was not very happy about this and believed that we were moving far too quickly. I moved an amendment to the motion to delete paragraph (4) and insert instead -

The select committee is required to include as part of its inquiries to investigate and make comparisons with the workers compensation scheme that applies in Queensland.

I went on to say -

I first spoke on the workers compensation legislation on 10 September 2002. I have spent quite a lot of time looking at the various workers compensation systems that apply throughout Australia. Queensland currently has the lowest average premium of any Australian State, at 1.55 per cent, and it has done so since 2000. Queensland is the only State in Australia that projects a premium in advance, therefore giving employers the advantage of projecting their budgets accordingly. I believe the system in Queensland is the best system operating in Australia at this time. I want to ensure that the select committee gives full consideration to the way in which the Queensland system operates. If that paragraph is not included in the motion, I will not be satisfied that there has been a thorough investigation of all the opportunities that are available. I believe the existing workers compensation laws are inferior. I believe the proposed legislation is also inferior.

That virtually covers it. However, I went on to quote a critique by the Australian Plaintiff Lawyers Association, which stated -

There is legal authority for the proposition that where a regulation is not passed as part of the legislative scheme, it cannot affect the interpretation of an Act - observance of this principle would probably result in challenges to any subsequent regulations before the Supreme Court and possibly even the High Court. Injured workers and their families are the last persons who need to be drawn into prolonged litigation either to assert their rights/entitlements, or, as unwilling respondents to insurance company appeals.

The Leader of the House responded -

I am delighted that Hon John Fischer has picked up, and generally supports, the reason for this motion.

I must correct the Leader of the House, because I do not think I supported it at all. He continued -

The amendment he has moved is certainly within the spirit of the motion itself. I would prefer, however, that the amendment not be adopted. I will explain, particularly to Hon John Fischer, why I would prefer that to be the case.

It is most certainly the Government's intention that the spirit of Hon John Fischer's amendment be carried. We will certainly consider looking at models on a comparative basis, with inquiry into the Queensland model being one of the objectives of the committee's terms of reference. The terms of reference in the original motion provide ample scope, without having to state it, for a comparison with the State of Queensland. The difficulty is that once a specific jurisdiction is stated, we may limit the committee's capacity to make comparisons with other jurisdictions. The complicated legal Latin terms "sui generis" -

Hon Kim Chance: Ejusdem generis and sui generis.

Hon JOHN FISCHER: That is correct; I am glad the Leader of the House is aware of what I am referring to. He said that those terms covered those issues, and continued -

The more we state the terms of reference of an inquiry, the more we limit those terms of reference. I assure Hon John Fischer that the terms of reference are sufficiently broad to enable a comparison with Queensland and/or any other jurisdiction in not only Australia, but also anywhere in the world.

Quite obviously, that has not been done. I accept that his intent may have been for the committee to do that; however, it has not compared it with the Queensland system. It has not compared it with the system that is the

best in Australia. There was no reason to reinvent the wheel. We are rushing through inferior and bad legislation. I will not use the journalist's name, but I have been informed that in discussions with Minister Kobelke it was apparent that the minister was quite aware that the Queensland system was far superior to what we are doing here. For the life of me, I cannot understand why we are pushing through legislation that will severely impact on injured workers at no benefit to anybody in this State, other than the insurance companies. I believe that has been well and truly proved. We have received advice from individual barristers and solicitors and from organisations such as the Injured Persons Action and Support Association; we have also received expert advice from the Australian Plaintiff Lawyers Association which all tell us the same thing. I am extremely concerned about the reasons for this Government pushing this legislation through. I find it incomprehensible that the union movement in Western Australia would allow this Labor Government to go ahead with this legislation, because it reflects on the very people whom it purports to represent. I think it is an absolute travesty.

I now wish to comment on an article that appeared in the *Sunday Times* on 2 May this year. The article was written by John Flint, a journalist, who has picked up the baton and has done a far better job than one would generally expect from a *Sunday Times* journalist in particular or the media in general in Western Australia, because it has totally ignored this extremely important legislation. It is tragic that the Press allows flawed legislation to go through. As I say, I congratulate John Flint on this article, because I think he has done a good job putting the argument forward. The article states -

INSURANCE companies like to brag to shareholders about their mega profits.

But the same figures are now being used to embarrass them.

They are being held up as proof that sky-rocketing premiums for public indemnity cover were - and still are - unjustified.

...

For example, total premiums received by insurers in 2000-01 exceeded payouts by \$298.6 million.

...

Surpluses were more modest before 1999, but from the 20 years of figures presented, not once did payouts exceed premium income.

The figures did not take into consideration insurance company overheads but neither did they take into account the proceeds of their considerable investments and bank interest.

...

Doctors who get referrals from insurers tend to reduce the percentage, while doctors used by plaintiff lawyers are more inclined to do the opposite.

Disputes go to WorkCover medical assessment panels for a determination but there is strong evidence to suggest the panels are loaded with insurance doctors.

I have asked many questions in this House to ascertain the make-up of those insurance panels. The article continues -

The fact that so few people now qualify for access to common law is being used by the Government to down-play the significance of complaints about this part of the system.

The whole article condemns this legislation. I have yet to read an article that compliments it.

Hon Jim Scott raised the comments made by James Spigelman, Chief Justice of the Supreme Court of New South Wales, in a report by Michael Pelly on 11 October 2004. The article is headed "Harsh personal injury laws deny legitimate claims, says judge" and it states -

NSW's most senior judge has questioned whether the state's personal injury reforms have gone too far, saying insurers had convinced the Government to shut out people with legitimate claims.

The Chief Justice of the Supreme Court, James Spigelman, says the culprit is the rule that says a plaintiff must have lost 15 per cent of their bodily functions to qualify for general damages.

Under our legislation plaintiffs are worse off. It continues -

"It does mean that some people who are quite seriously injured are not able to sue at all," ... "More than any other factor I envisage this restriction will be seen as much too restrictive."

When the Civil Liability Act was introduced in 2002, the chief justice said he had no objection to "principled" negligence reforms. But he has now derided the thresholds as "an underwriter-driven, not a principled, change". His comments reflect growing disquiet over the operation of the act and insurers' reluctance to cut premiums despite record profits.

I have spoken on this issue on several occasions and I do not intend to go over all that information again. I am totally opposed to this legislation. I will oppose it on every opportunity I get. It has been reprehensible of the Government to try to push this legislation through and I hope other members will see their way clear to defeat this very restrictive and, in my view, completely and utterly incorrect legislation. It will be detrimental to the workers of this State. We are totally failing in our duty to the people we are meant to be representing.

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