

WORKERS' COMPENSATION REFORM BILL 2004

Third Reading

The PRESIDENT: The question is that the Bill be read a third time.

HON RAY HALLIGAN (North Metropolitan) [10.06 am]: In view of our opposition to the Bill, those reading the debate in *Hansard* may well be looking for a greater argument in this place during the Bill's committee stage. There are two reasons for the reduced argument against what the Opposition believes to be a complex issue and a Bill that only adds to that complexity. We believe that this legislation will not provide injured workers and employers with what it is that they require.

Firstly, the Legislative Assembly partially considered the detail of the Bill through its Legislation Committee. I understand that that committee met for five days and recommended 39 amendments. In essence, the other place undertook a process that tends to be left to the Legislative Council; therefore, those who wish to read the complete debate on this legislation should read the in-depth consideration of Hon Cheryl Edwardes and others, who have put on record opposition arguments relating to the Bill before us. Secondly, it was obvious that the Greens (WA), through Hon Jim Scott, were going to support the Labor Government, notwithstanding that Hon Jim Scott has said that this Bill is some of the worst legislation he has seen. I understand now that -

Hon Simon O'Brien interjected.

Hon RAY HALLIGAN: Certainly, Hon Jim Scott has seen some very bad legislation, a lot of which has had to be amended in this place. I understand that Hon Jim Scott has now received some assurances - I will not call them promises - that this Government will go down a particular path that he believes may enhance this Bill. However, I would still suggest that they do not improve the total outcome for which the majority of the stakeholders were looking.

A considerable number of changes have been made to the legislation. Although the rules are more legalistic, the right to appeal a number of decisions has been removed. It is of enormous significance that there is no appeal to a decision of an arbitrator who may wear the hats of both conciliation officer and decision maker. A number of clauses in the Bill refer to the arbitrator's decision being final and binding. Such a provision in legislation is always of concern. Although the Government wants to limit the number of appeals, it will take away the right of individuals to appeal in that only one person wearing both hats will make the decision.

The retrospective issues that we dealt with in the Dutch and Dossett cases are of concern in that there is no information on the number of cases on which this legislation will impact. There is this new concept of specialised retraining. I believe the cost as identified in the actuary's assessment will not be contained. The lawyers have a responsibility and duty to their clients, and the money will be used as leverage for more redemption of injured workers in the range of 10 to 15 per cent disability. It is a very expensive system. A worker who has been in the field for 20 or 25 years will not find it very easy to go back to formal learning, whether it be in an educational institution or a training institution. As such, specialised retraining will not be for everyone. Of course, the assessment process also will be quite critical. In addition, legal representation will increase costs. I do not think there is any doubt about that; any lawyer would agree with that.

Another area that is still of some concern is doctor choice by workers. When the new impairment assessment model comes into existence, not many doctors will be accredited under that system, so there is a likelihood of challenges. The community service organisations are also concerned about the prospect of increases in workers' compensation premiums, and no doubt there will be increases in those premiums.

We have before us a piece of legislation under which the Government promised that premiums would not be increased, but it now admits that they will. The abolition of the Premium Rates Committee is a broken promise of this Government. It promised a simpler bureaucratic system and in fact has proposed the reverse. It 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 in that area also. I mentioned that I believe that the Greens (WA) have done a deal with the Government to ensure the passage of this Bill. The Greens have repeatedly used the excuse that when they have agreed with certain legislation that has gone through this place, the Government has in fact listened to their wishes, and therefore the Government will make the changes at some time in the future.

Hon Jim Scott interjected.

Hon RAY HALLIGAN: Those changes need to be further changed, and Hon Jim Scott is totally aware of that. Before us is a Bill that will be supported by both the Government and the Greens, which will ensure its passage through the Parliament. We will end up with an Act that the greater majority of stakeholders do not want.

Hon Jim Scott: They do not want the current one either.

Hon RAY HALLIGAN: However, they do not want what is before us. I admit that they want something else, but not what the Government and the Greens will give them. What do we have here? Do we have a backhand deal? Only the Government and the Greens can explain to the stakeholders exactly what it is they are doing and why. I suggest that we have a scenario of an imminent state election and an old election promise - no doubt to try to appease the unions. Look how anxious the Government is at this point in the parliamentary calendar to get this legislation through this House. Under this scenario, will preferences be swapped should the circumstances be right or manufactured? With all this in the offing, are injured workers' needs really being addressed and are employers being given a sustainable system that will provide equity for the majority? I think not. The system is too complicated, it is not user friendly and the language used in the legislation is quite difficult. Although the minister in the other place wants to ensure that workers get back to work as soon as possible, some aspects of this legislation will work against that. Also, the time frame is too tight and we will find that extensions will be granted just for the purpose of natural justice.

The Government has tried to appease the Greens, who wished for the legislation to be scrutinised by a committee. Because the Government was obliged by its election promise to have legislation in place before Christmas, this deal has been done with the Greens. It must be placed on record that Hon Jim Scott watered down his original request to one in which the select committee would provide an interim report to this House. With the time limitations, it was obvious from the start that little of substance could be obtained, evaluated and reported. In fact, the committee's conclusion reads -

- 6.1 The Committee has been unable to consider many of the issues raised in the submissions so far as they relate to the content of the Bill. They will be given consideration as the wider inquiry progresses.

Whenever that might be -

- 6.2 The Bill is a textbook example of the difficulties experienced when policy has to be translated into statutory language. Although the concepts are easy to comprehend, their expression in the Bill is a complicated exercise if ambiguity and imprecision are to be avoided. The complexity is amplified by the form of the Bill, which is to make substantial amendments to the text of the parent Act, and the absence of a draft of the regulations that are an essential element of the introduction and administration of the statutory scheme that is intended to supplant current arrangements.
- 6.3 Many of the submissions from persons and bodies deal with aspects of the Bill, and matters of interpretation, that may take some time to "bed down" before their application is delimited. Undoubtedly, further amendments will be required as and when the parliamentary intent parts company with the legislative effect of the enactment as interpreted by the judiciary.
- 6.4 There is a body of opinion, collated from the submissions received, to the effect that the policy changes will exacerbate the inequities said to exist in the 1981 Act
- 6.5 The Committee has avoided embroiling itself in argument on matters of policy that are properly determined by the House. This report is intended to assist members' understanding of the major implications of the proposals by reference to the content of submissions received without attaching findings or recommendations that, as a result of the Committee's further inquiry, may be unsustainable.
- 6.6 The Bill's passage will be completed well before the Committee is in a position to report on the desirable principles on which any no-fault statutory scheme for workers' compensation should be established. Once these changes are put in place, it becomes difficult to persuade any government to revisit the scheme so soon after making substantial alterations. Nonetheless, it is to be hoped that the results of this Committee's inquiries will be given proper consideration when the next review of the 1981 Act is commenced.

Those conclusions say it all. The Government is being aided and abetted by the Greens (WA) on this Bill. The Greens say that they disagree with much of what is contained in this legislation. However, they are willing to allow it to move forward.

Those conclusions of the committee tell us everything about this piece of legislation. The Opposition strongly supports injury management. It is the only way in which injured workers can get back to work. However, the program needs to be well managed. The change to the title of the Act to include the term "injury management" will not in itself ensure that workers return to work as soon as is possible. The Government needs to ensure that the mechanisms are in place and work for the benefit of all concerned. The Government appears to be one of the few bodies that has confidence in this legislation. It has been mentioned repeatedly that the regulations will be

an integral part of the operation of this legislation. However, it appears that no-one, including the minister in the other place, has any idea of what will be in the regulations. Therefore, we are being asked to pass this legislation in this place when we do not know the likely outcome. Many of the stakeholders have expressed concern about the legislation, certainly to us on this side of the Chamber, and I am sure also to the Government and the Greens (WA). When one takes into account the level of opposition to this Bill - which I might add the Government quaintly calls a reform - one certainly needs to question why the Government is even pursuing it.

I suggest, as I said earlier, that this Bill is an election promise. The quality of the Bill matters not. The fact that many stakeholders are very concerned about the result of this legislation and what it will do to not only employers but also employees, and to a lot of small businesses, also matters not. What is important to the Government is that it can hold up its hand and say it has put this piece of legislation through the Parliament.

Hon Peter Foss: It is a shoddy piece of window-dressing.

Hon RAY HALLIGAN: Yes. I hope the Greens will at least make the effort and tell the stakeholders why they are supporting the Government on a piece of legislation that initially they did not agree with. I think members will gather from what I have said that the Opposition does not support the Bill.

HON JIM SCOTT (South Metropolitan) [10.24 am]: It was interesting to listen to Hon Ray Halligan, for a number of reasons. One of them is that a number of the things he said are incorrect. I agree that we are dealing with a piece of legislation that even now as amended is far from perfect. However, Hon Ray Halligan failed to mention that the underlying problem in this legislation has arisen from the legislation that is already in place. The legislation that is in place is a shoddy piece of legislation. Many attempts have been made to fix that legislation. The Greens (WA) are not happy about the fact that what we are doing in this Bill is simply applying a bandaid to that legislation. However, we need to make decisions about whether we can make sufficient improvements to that legislation so that when it leaves this place it will be better than it was when it first came into this place and so that the people in the workers' compensation system will be better off. We have proposed a number of amendments that have been accepted, and we have proposed a number of amendments that have not been accepted. We have also had further discussions with the Government about our principal concerns about the Bill. The whole Bill needs to be replaced by something better. However, the Greens (WA) do not have the power to do that by themselves. In order to get a completely new piece of legislation through the Parliament we will need the cooperation of both the Government and the Opposition, both before and after the election. It will be interesting to see how cooperative the Opposition would be if we sought to do that.

The Government told the Greens that as part of the process of putting this legislation through the Parliament it would agree to the setting up of a select committee. I agree that it was stupid to set up the committee so close to the end of the year, because it has not provided us with sufficient time to try to make amendments to the Bill. However, as Hon Ray Halligan knows, the select committee had a double role. Its first role was to comment on the Bill. However, that was impossible to do in the short time that was available to the committee. Its second and most important role, which is the one that I was seeking, was to look at the legislation in other jurisdictions not just in Australia but other countries so that we could replace the cumbersome, tired and amended bureaucratic mess that is before us. That is the only way in which we can have a good outcome. Although it would certainly be very nice in the short term to say no to this Bill and make the Government come back with something else, I can tell Hon Ray Halligan that, having seen his side of politics put through the Act that we are now trying to fix, I do not have full confidence that his side of politics will be able to do it. I have the feeling that it will be more inclined to do what happened last time. When the Opposition was in government it put through a piece of legislation that was based on lowering premiums. That system created a more cumbersome and bureaucratic system, and removed the rights of injured workers. It did not create a more efficient system. This Bill is no better in that regard.

The Bill that we are currently debating in the third reading can be split into two parts. The first relates to the statutory system, which the Bill improves to a certain degree. However, it does not improve it to the degree of improvement achieved in other jurisdictions that are using a similar system because it looks at impairment rather than disability. The Bill does not give the balance that is needed in the statutory system to compensate people who have suffered a serious injury. It is fine for people who have a low level of injury, but it does not properly provide for people who have serious injuries. That is why I sought an agreement with the Government to put in place certain measures. Before voting yes on this Bill, I want the Government to agree to put in place measures that will track the ability of seriously injured workers to access common law settlements of their claim and to make such adjustments so that there will be no loss of ability to gain the access that currently exists.

Hon Ray Halligan: But they will not be part of this Bill.

Hon JIM SCOTT: Hon Ray Halligan should wait to hear what those measures are. If the Government agrees to the measures when it responds to the third reading, they will put in place a certain process that will put the onus

on the Government to ensure that there will be no loss of ability to access common law. I recognise that we cannot put a figure on how many people access common law and that we have to look at the ability of injured workers to access common law. People want the ability to access common law in court if they are seriously injured or to choose another path. We are about real choice, not one that is forced on people. In the past, the Liberal Party has stated that it is a party that offers choice. Unfortunately, the legislation that was provided by the Liberal Party did not give workers a real choice at all. In this legislation we have sought to make sure that those people on the common law side do not lose out. The way the Bill is structured now, they will certainly lose out. There is no doubt in my mind that the impairment guide will, for many workers, in an uneven sort of way, cause detriment to their ability to access common law beyond their current access. However, the measure that I have proposed - I am waiting to see whether it will be accepted by the Government - will fix that. That is not to say that this Bill fixes workers' compensation legislation. There are still many problems with the Bill. The only way to fix it would be to get rid of it. That is our ultimate aim, and that is why we suggested that the select committee give it greater review. We will continue to push very hard on this issue, no matter what side of politics is in government after the election, to ensure that we create a new system. The system proposed by the Bill is not good for anybody, except those wanting to see the growth of the bureaucracy. It will provide for more lawyers than was originally intended by Graham Kierath when he introduced the legislation that underpins this Bill. He intended, or so he said, to reduce the amount of work done by lawyers in the system. He was concerned that some people who were using lawyers would have been better off using the statutory system, not common law. I do not believe that his legislation struck the right balance. It was punitive and did not provide sufficient additional benefits to the other side of the scheme. It was full of holes that allowed a huge increase in the amount of work that had to be done by lawyers. I do not believe for one minute that this Government, like the previous Government, has taken the right direction.

I do not believe that access to common law adds huge costs to the system. We know of an example in Australia in which that access continues to be used.

Hon John Fischer: Why don't you have a look at it?

Hon JIM SCOTT: I am having a look at it.

Hon John Fischer: What, after you've passed this legislation?

Hon JIM SCOTT: That is right, but only if the Government agrees with my measures so that we do not lose any impairment at this point. Hon John Fischer is so sceptical. We will get immediate improvements for people and further improvements in the future. It would be very easy for me to say, "We'll just chuck out this Bill and go back to the totally imperfect system that everyone was complaining about before." Where would that get us?

Hon John Fischer: You already said that. You said the only way to fix it is to get rid of it.

Hon JIM SCOTT: It is the only way to fix it. However, Hon John Fischer does not seem to understand that if we reject this Bill we will not get rid of imperfect legislation because we will keep the current system in place. That seems to be misunderstood by many members. Some members who are concerned about what the Greens (WA) are doing in trying to change the Bill so that it is a better piece of legislation when it leaves this House are trying to pretend that we are moving away from a perfect system. The same people who made those complaints have been the biggest complainers about the current system. The responsible thing to do is to make the Bill a bit better and to continue to try to force the changes that must be made. We should not go back to the rag-tag system that gave us Dossett, Dutch and Koljibabic, the other problems of retrospectivity and the hundreds of different areas that can be challenged at law. Cases can drag on for years and years and put the injured worker and his or her family in a most vulnerable position.

Hon Ray Halligan: You have made a silk purse out of a sow's ear.

Hon JIM SCOTT: No, I have not made a silk purse out of a sow's ear.

Hon Ray Halligan: You are saying that you have overcome all of the problems of Dutch and Dossett.

Hon JIM SCOTT: I am not saying that all those problems have been overcome. Some of those problems will be overcome. I have also sought some improvements of the Koljibabic case, which is reflected by the Supreme Court decision in *Hewitt v Benale Pty Ltd*. That is another area on which I am in agreement with the Government. However, there have been other improvements at the instigation of the Greens (WA). The Bill increases access to additional medical and retraining funding. When the Bill was first drafted, it required that people be 25 per cent impaired before they could access that funding. Under the old provision, it would equate to 50 per cent impairment for some people who would have been practically unable to stand on their own feet. The percentage of impairment has been reduced to 15 per cent, which I still think is too high and should come down further; however, it is certainly an improvement. The Bill proposes an increase in death benefits, which are the lowest in Australia, from \$138 000 to \$200 000. The most important provision in the Bill for me though

is the continuation of access to common law at a level that will enable access for people who really need it. Quite frankly, I want to see the whole bar on common law taken away. This legislation fails grossly in that regard. However, when the minister responds to this contribution to the third reading I hope to hear him read out the implementation of measures that will ameliorate the impacts of legislation. That will depend, not so much on me and my goodwill, but to some extent on the Government and its goodwill, because it can change things afterwards -

Hon John Fischer interjected.

Hon JIM SCOTT: We do not know whether after the election the legislation will be implemented by a coalition Government. I have equal confidence in both sides. Members can read that how they may. However, the pathway hopefully will be put in place. Although the legislation will continue to require amendment, in the interim I hope it will make people in the statutory system across the board better off and not make those in the common law system worse off. Those are the important aspects of this legislation. Although I am critical of the legislation, the Government has in some ways improved access to common law. For instance, people will not now be required to go through a doctor-hunting exercise. They can get a medical opinion from one doctor, and that will be the only opinion required. They will not be required to go through the competing-doctor farce that currently exists, which has added significantly to the trauma of injured workers and the cost of the system. Quite a few small changes to the statutory system have been made by the Government and should be acknowledged. However, in all, I do not believe that workers will end up a lot better off with this legislation. I think that down the track there will be all sorts of legal problems if we allow this legislation to remain in place; we must go back. I believe it is a duty not only of the Greens, but also of the Opposition and the Government, to make sure that we pursue the objective of establishing new legislation that is simple and easy to understand by people who are impacted by it. This legislation certainly is not. Simple and easy to understand legislation would result in a more efficient and humane system of compensation that I believe can be achieved at a lower cost than is currently provided for. As I said, my support for the legislation depends on the Government's agreement to the changes I have proposed, and I wait to hear whether the minister will agree to them. If the Government will agree to those changes, the Greens will support the legislation; if not, we will not support it.

HON JOHN FISCHER (Mining and Pastoral) [10.45 am]: I will make my contribution to the third reading debate very short. I have been speaking about this legislation since April 2002. I think I have made it very clear where I stand on it. I will look very closely and with interest to the amendments proposed by the minister in his third reading speech. I hope those amendments are very broad because listening to the Greens put forward their position made me think of a person standing in a bucket and trying to lift himself up by the handle. The Greens made no sense at all. I do not understand how they can go along with this legislation when they openly say that the only way to fix it is to get rid of it. For the Greens to then try to manipulate it through the system -

Hon Jim Scott interjected.

Hon JOHN FISCHER: Hon Jim Scott is right, I am very cynical about this legislation. You, Mr President, may recall that I moved a motion that a select committee examine the Queensland system, which it has been proved works. We do not need to reinvent the wheel. Western Australia could have copied that system and been a fair way in front on behalf of employees and employers. The Queensland system has open access to common law. The common law system in Western Australia worked well before 1993 and will work well again now. I can only presume that this Government is subjugating better legislation merely at the will of the insurance industry. It is absolutely disgraceful and I will vote against it.

HON NICK GRIFFITHS (East Metropolitan - Minister for Housing and Works) [10.47 am]: I thank honourable members who have spoken. I regret that the Opposition will not support the proposed improvements to a system which does not work well but which was introduced fundamentally by the Opposition when it was in government. This Bill is designed to make the system work better. I thought that Hon John Fischer in his comments, both in the third reading and when he reflected on the Bill at earlier stages, was really saying that he does not like the current system. If he does not like the current system, he should engage in a process that will at least change it, because that is a fundamental job that we in this place are obliged to do. Hon Jim Scott spoke very well in that regard when he made his observations.

It is important to recall what this Bill actually does and why the Bill should be read a third time. It essentially does four things by way of improvement. It seeks to streamline dispute resolution to allow workers to be legally represented in the statutory system and to reduce delays in the process of dispute resolution. What on earth is wrong with that? It seeks to improve statutory benefits, which will significantly benefit many workers, particularly by ensuring that injured workers receive their normal wage for up to 13 weeks, rather than four weeks as at present. What is wrong with that? I suppose what is wrong with it is that people may wish it did more. However, it is an improvement. It seeks to enhance industry management and it provides common law improvements to simplify access to the system and provide greater certainty.

Hon Jim Scott has raised some concerns, which will be addressed in this way: the Government recognises that common law settlements are a valuable part of the workers' compensation system and the Government has no intention of reducing the right of seriously injured workers to access common law. The minister will take action to ensure that injured workers will not be disadvantaged by the change from "disability assessment" to "impairment assessment" in the total benefits available to them. The Government recognises the role of the medical advisory committee, which will have specialised medical knowledge and which will be established under the legislation. However, the medical aspect is only one part of the whole system of access to common law. The Government sees a need for a broader reference group to assess the impact of the reforms on common law access. The Government gives an undertaking that an advisory committee will be established consisting of medical representatives, employer representatives, worker representatives and specialist advisers, as appropriate, to carry out this undertaking. This committee will be established within 12 months of the proclamation of that part of the reform Bill that amends part 4 of the Workers' Compensation and Rehabilitation Act 1981. This committee will take into consideration the work of the medical advisory committee established under proposed section 100A(7) of the Workers' Compensation and Rehabilitation Act 1981. The terms of reference of the advisory group will be, firstly, to consider the effectiveness of the impairment guides in assessing injuries or disease suffered by workers as a result of their employment; secondly, to monitor the impact of the revised common law access regime for injured workers, including the impairment guides as well as any other matters that affect common law access; thirdly, to assess the balance between the benefits available under the reformed common law system and those available under the reformed statutory system; fourthly, to assess any further legislative amendments necessary to ensure that injured workers receive benefits under the reformed workers' compensation system that are at least comparable to, if not better than, those under the current system; and, fifthly, report to the WorkCover board and the minister with recommendations arising from this review, with the report to be tabled by the minister in both Houses of Parliament.

In the course of dealing with the Bill, Hon Jim Scott raised a number of issues involved in the workers' compensation case of Mr Koljibabic. The Government is concerned that Mr Koljibabic has access to a fair process in pursuing his workers' compensation claim. The Workers' Compensation (Common Law Proceedings) Act 2004 protects his current writ from being struck out on the grounds that Mr Koljibabic should be using the former provisions. In the event that Mr Koljibabic decides to initiate new proceedings and these proceedings involve dispute resolution within WorkCover, the agency will do everything necessary to expedite these proceedings. In the event that Mr Koljibabic's writ is struck out, the Government will be available for further consultation with Mr and Mrs Koljibabic and their legal representatives on the options available to them. The situation Mr Koljibabic finds himself in will be a specified matter in the review of the legislation already committed to, which would be conducted by a re-elected Gallop Government.

That brings me to a further point. This Bill is a reform Bill; it seeks to change the legislation for the better. It seeks to improve a system that many consider to be flawed. Some of the opponents of this Bill - notably Hon John Fischer - seek to oppose the Bill because they do not like the current system. This Bill improves the current system. The most telling remark made in this debate, other than the positive contribution by Hon Jim Scott, was an interjection by Hon Peter Foss, who I think clarified for the benefit of the House and the community of Western Australia the true contrast between the Labor Party and the coalition. Are we to continue to improve the workers' compensation system by the re-election of the Gallop Government, or are we to return to the days of Hon Graham Kierath? If members vote against this Bill, they are voting for a return to the days of Hon Graham Kierath. As Hon Peter Foss so eloquently put it in his interjection, "We are going to get Graham Kierath back."

Question put and a division taken with the following result -

Extract from *Hansard*
[COUNCIL - Wednesday, 27 October 2004]
p7319d-7325a

President; Hon Ray Halligan; Hon Jim Scott; Hon John Fischer; Hon Nick Griffiths

Ayes (14)

Hon Robin Chapple	Hon Jon Ford	Hon Dee Margetts	Hon Giz Watson
Hon Kate Doust	Hon Graham Giffard	Hon Louise Pratt	Hon Ed Dermer (<i>Teller</i>)
Hon Sue Ellery	Hon Nick Griffiths	Hon Jim Scott	
Hon Adele Farina	Hon Kevin Leahy	Hon Christine Sharp	

Noes (12)

Hon Alan Cadby	Hon Paddy Embry	Hon Ray Halligan	Hon Norman Moore
Hon George Cash	Hon John Fischer	Hon Frank Hough	Hon Derrick Tomlinson
Hon Murray Criddle	Hon Peter Foss	Hon Barry House	Hon Bill Stretch (<i>Teller</i>)

Pairs

Hon Kim Chance	Hon Barbara Scott
Hon Ljiljana Ravlich	Hon Simon O'Brien
Hon Ken Travers	Hon Bruce Donaldson

Question thus passed.

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