

WORKERS' COMPENSATION AND REHABILITATION (ACTS OF TERRORISM) BILL 2001

Second Reading

Resumed from 18 December.

Point of Order

Hon N.F. MOORE: I want to clarify in my mind the sessional order under which we are operating. I gather it means that the House at 6.00 pm will adjourn to the next sitting of the House, which I think is next Tuesday. I wonder if any action is to be taken to avoid that happening in the event that this Bill is being considered at 6.00 pm.

The PRESIDENT: Does the Leader of the House seek leave to make a statement?

Hon KIM CHANCE: I was about to speak to the Leader of the Opposition to seek his consent for a motion to sit beyond 6.00 pm.

[Resolved, that the House continue to sit beyond 6.00 pm.]

HON PETER FOSS (East Metropolitan) [5.24 pm]: I thank the House for giving me a greater opportunity to speak upon this Bill. The Opposition supports the Bill. The Bill achieves something which on the face of it it does not appear to achieve. The need for the Bill arises out of the format for how workers compensation operates. Workers compensation works by imposing an absolute liability on an employer for certain injuries caused to employees. In order that compensation may be assured to be paid the employer is required to have insurance. It is an offence under the Workers' Compensation Act not to have that insurance. The problem is that since the 11 September happenings, all insurance, whether workers compensation insurance or otherwise, now carries a terrorism exclusion. The problem is that it means that a person who takes out a policy of insurance, supposedly to comply with the Workers' Compensation Act, cannot do so because it will exclude terrorism. Therefore, there are two consequences: first, the employer is not insured and, secondly, it is not insured in accordance with the Act and therefore has committed an offence. This sets up a mechanism by which that problem can be avoided. It is not completely avoided, because, in the end, somebody has to miss out or somebody has to pay. To some extent the worker might miss out, because under the terms of the Bill, a worker who would otherwise be entitled to indemnity is obliged to give notice of any injury that would otherwise be compensable within a period after the occurrence of an act of terrorism. Clause 8 states -

- (1) If in the circumstances it is appropriate to do so, the Minister may, by order published in the *Gazette* -
 - (a) state that the Minister believes that an act of terrorism has occurred, identifying the act sufficiently to enable a person to know that the person's claim might be affected by the order;

It is an executive decision. It continues -

- (b) specify the day on which the act of terrorism is to be treated, for the purposes of this Act, as having occurred; and
- (c) state that, despite anything in the *Workers' Compensation and Rehabilitation Act 1981*, a claim for compensation for a disability attributable to the act identified in paragraph (a) is barred unless it is made within a period of 90 days after the day on which the act of terrorism occurred.

I do not think that is an unfair thing to do, because an act of terrorism is a fairly obvious occurrence and people should be able to tell that what happened to them happened as a result of that act of terrorism. They must get in fairly quickly. The only problem with that is that there would need to be a degree of publicity on the part of the Government at the time to let people know that there is a 90-day limit, because people might think that they do not have to do it. I am not quite certain what a person who is in a coma for 90 days will do. It is quite possible that a person could be in a coma for 90 days after an act of terrorism and not emerge from it until afterwards. Other measures might need to be taken to ensure that somebody acts on behalf of a worker who is in coma for 90 days and cannot give notice, because this bar is absolute.

After that 90 days, the commission then will be in a position to work out - we hope - the amount of claims that will be made. It is probably a little optimistic. Clause 8 also states -

... the Commission is required to determine, on the advice of an actuary -

- (a) the total amount that would, if subsection (4) did not apply, be expected to be payable by all participating employers . . .

That will be interesting. Very perspicacious actuaries will be working this out; nonetheless, that is what they will be doing. If they find that the amount is in excess of \$25 million, they will work out a reduction factor by which that amount would need to be multiplied to limit it to \$25 million. The idea is that it will work a little like a Totalisator Agency Board operates. It is very appropriate that the minister is handling this Bill; he can explain how the dividend system will work. The end result of that is to apply the reduction factor. The only problem I have with that is that it may well be that the amount that comes out at the other end is quite different. Clause 9 states -

- (1) To the extent that a participating employer's liability to a worker is attributable to an act of terrorism that occurs during the period commencing on 1 January 2002 and ending on the final day, the employer may make a claim against the Insurance Commission for payment or reimbursement, as the case requires, of any claim arising from that liability.

The person would make the claim against the Insurance Commission of Western Australia as opposed to his own employer, as he normally would do. It continues -

- (2) The claim is to be dealt with as a claim under the *Employers' Indemnity Supplementation Fund Act 1980* and, as far as possible, that Act applies accordingly.

It goes on to work out a mechanism for not only people who are insured but also people who are self-insured, because that is another concept that is inherent in the Act. The Employers' Indemnity Supplementation Fund Act establishes the supplementation fund and provides for payments from people who are obliged to pay under the Workers Compensation Act and also from the Treasurer. Perhaps the minister can assist me with this. Part of the supplementation fund is raised by a surcharge of employers' policies, so they pay for it anyway. The question is where else will the money come from? There does not seem to be much point in circulating the money through the supplementation fund if the employers must pay the fund anyway. If the fund pays the compensation to the people who pay the fund, I do not understand where we are. How will this operate? How will the mechanism take effect? My understanding of the order of events is that an act of terrorism occurs, a declaration is made, people have 90 days in which to lodge an application and the actuary then works out the cost of the damage. The actuary may arrive at the figure of \$90 million; that would exceed the \$25 million cap by \$65 million, which would have to be made up. A reduction factor would then be applied - I can hear somebody's mobile phone ringing. At that stage, the employer would be entitled to apply to the Insurance Commission for funds to be paid out of the supplementation fund. Where would the money come from? Would it come from the same people who put the money in? Do the employers have to contribute? Do the employers' insurers or the Government contribute the money? Which group would be able to raise \$65 million if that is the cost of the damage done? It must be taken into account that when claims are made for the act of terrorism, a huge quantity of other claims could be made for personal injury or property damage that would be subject to the same exclusion of liability attributable to an act of terrorism. It would be a total disaster. I suspect that in such a circumstance, the only organisation with a deep enough pocket to pay for that would be the Commonwealth Government.

If an act of terrorism occurred in Western Australia that caused hundreds of millions of dollars worth of property damage and personal injury claims, Western Australia would be declared a disaster area. One would expect the Commonwealth Government to find the money to give relief to the affected people even if it had to make a special levy to do so. That is my understanding of what would happen. I would like to know how this mechanism works because money cannot be invented from nowhere.

Hon N.D. Griffiths: It is capped.

Hon PETER FOSS: I know it is capped at \$25 million. It seems to me that either the worker or the employer must suffer the cap, or the insurers or the Government must supplement the cap.

[Quorum formed.]

Hon PETER FOSS: Clause 9 states -

For the purpose of this section -

- (a) if the participating employer holds a policy of insurance and the employer's liability to the worker is to any extent excluded from the policy by an exclusion permitted under section 4, the extent to which the employer's liability is attributable to an act of terrorism is to be regarded as being the same as the extent to which the employer's liability is excluded as permitted under section 4;

That is, excluding from their liability to insure because the exclusion that is allowed under section 4 is the exclusion of cover. It excludes the employees from insuring for liability attributable to an act of terrorism. Clause 4 states -

The Commission may give an approved insurance office permission in writing to exclude certain liability from the liability for which it insures employers but the exclusion of liability attributable to an act occurring after the final day is not permitted.

Clause 4 deals with exclusions to the policy, not exclusions to the liability of an employer. They are two different things. That is why I said the employer has liability to the employee; the employer has an obligation to insure; and, if an insurance policy is granted, the insurer has an obligation to indemnify. However, once an exclusion beyond \$25 million occurs someone will miss out. Will the employee, the employer or the Government miss out? Somewhere along the line, one of those three will miss out. It is not clear from reading this exactly how that will operate. I understand the \$25 million will be available in the usual way. However, it is not obvious how anything over \$25 million will be paid. If the total amount of the liability is determined to be \$90 million, who will bear the \$65 million above that? Will it be the employee, the employer, or the supplementation fund? If so, where will the money come from to be paid into the supplementation fund?

Let us assume the \$25 million cap is in place and the reduction factor has been calculated. If the final claims turn out to amount to not \$90 million but \$190 million due to a slight misunderstanding about the degree of disability, as often occurs during a claim, who will pick up the \$100 million above the \$90 million? Will it be the insurer, the insured or the worker? I do not have any problem with having a regime, but we must know who will pay. We cannot say that people are insured against terrorism because the insurers will not insure them. If we do not allow this exclusion of terrorism, we will have no insurance. It would be stupid to have no insurance for workers compensation because of the rather remote possibility of a terrorism claim. Plainly, we must address the problem that arises from the insurance industry deciding as a whole not to cover terrorism. When we do that we must inform the people, particularly the workers and employers of Western Australia who will pay, and how they will pay. If the money is not available someone will miss out.

The Opposition supports the Bill because something must be done, but we have some query about it. I am interested in the fact that it is a limited operation Bill. What does the Government think will happen in 2003 that will put this matter beyond doubt? Is it purely that we are doing this for the time being in the hope that the industry will offer an alternative or is it that something is in the pipeline and the Government knows it will be implemented by that date?

HON FRANK HOUGH (Agricultural Region) [5.38 pm]: One Nation supports the Bill. The maximum limit is \$25 million. The actuaries have worked out that if a terrorism attack were to cause a payout of more than \$25 million, it would be amortised over the number of people with \$25 million to be the principal sum. I stand to be corrected, but I understand that no other funding is available above that amount. The number of claimants will be divided into \$25 million whether it be 500 people or five people. The principal sum of \$25 million has been worked out accordingly. The Bill is very good and innovative. No other State has provided workers compensation for acts of terrorism. Whether people think it is good, bad or indifferent, the Government has been innovative in introducing this legislation to look after workers in the short term.

The Bill contains a two-year sunset clause over which period insurers should have brought themselves back into the real world and should be able to assess the situation. In the very short term it is important that the working public of Western Australia is protected. One Nation, therefore, wholeheartedly supports the Bill.

HON J.A. SCOTT (South Metropolitan) [5.40 pm]: I share the sentiments of the last member who spoke and like Hon Peter Foss I believe that there is a possibility of some level of shortfall. Acts of terrorism are generally the responsibility of the federal Government. As such, I understand it will put in place a fund to deal with this issue. The Bill before the House is really an interim arrangement. It is a good arrangement and I commend the department and the Government for putting it in place. The only query I have concerns the definition of "terrorism". It is interesting, because it seems to cover just about anything. Because we already have a body in place that is responsible for dealing with workers compensation-type issues, the application of this legislation will be carefully carried out. I support the Bill.

HON N.D. GRIFFITHS (East Metropolitan - Minister for Racing and Gaming) [5.42 pm]: I thank members for their support. Hon Peter Foss asked about the procedure and he was right insofar as he went. The insurers will contribute to a fund as part of their agreement with the commission. In accordance with that agreement, the amount needed will be paid and the capped amount will be \$25 million. If the amount required is more than \$25 million, the employees will miss out. However, this is a substantial measure. Twenty-five million dollars covers quite a lot of compensation over a period. If there were a real disaster, one would expect - as Hon Peter Foss rightly pointed out - that Australia would work together and come up with a solution. Members have asked why there is provision for a one-year sunset clause. It is hoped that the insurance industry will deal with this

Extract from *Hansard*
[COUNCIL - Thursday, 20 December 2001]
p7408c-7411a

Hon Norman Moore; Hon Kim Chance; Hon Peter Foss; Hon Frank Hough; Hon Jim Scott; Hon Nick Griffiths

problem within that time. If it does not, it is anticipated that the Commonwealth and State Governments will get together to resolve the problem. It is an urgent problem and it must be rectified today.

Question put and passed.

Bill read a second time, proceeded through remaining stages without debate, and passed.