

WESTERN AUSTRALIA

No. 10

LEGISLATIVE COUNCIL

MINUTES OF PROCEEDINGS

THIRD SESSION OF THE THIRTY-FIFTH PARLIAMENT

TUESDAY, SEPTEMBER 14, 1999

1. Meeting of Council

The Council assembled at 3.30pm pursuant to order.

The President, Hon George Cash, took the Chair and read prayers.

2. Papers

The following Papers were laid on the Table by —

President

Auditor General —

List of Audit Opinions signed at 31 August 1999, Controls, Compliance & Accountability Audits & Performance Examination Reports since 1992 148

Minister for Transport

Local Law —

Local Government Act 1995 (Collie, Cambridge, Donnybrook/Balingup & Menzies Local Laws G.Gs.3 & 7/9/99) 149

Regulation —

Adoption Act 1994 (Amendment Regs 1999 G.G.3/9/99) 150

Minister for Finance

By-law —

Western Australian Trotting Association Act 1946 (By-laws - Notice of Amendment G.G.3/9/99) 151

Ministerial Approval —

Western Australian Land Authority Act 1992 - Clarkson District Centre Pty Ltd, Bricon Pty Ltd & Oakajee Lots 12, 13, 14, 15 & 16 and Victoria Locations 2249, 2202, 3062 & 538 152

Regulation —

Physiotherapists Act 1950 (Amendment Regs 1999 G.G.7/9/99) 153

Rule —

Western Australian Trotting Association Act 1946 (Rules of Harness Racing 1999 G.G.3/9/99) 154

Report —

Non-Residential Building Program 1999-2000 (CAMS) 155

Attorney General

Letter —

Dept of the Registrar, WA Industrial Relations Commission 1998/99 Annual Report - extension of time to 6 September 1999 156

3. Standing Committee on Constitutional Affairs — Forty-First Report — Overview of Petitions — August 1998 to August 1999

Hon Murray Nixon presented the Forty-First Report of the Standing Committee on Constitutional Affairs in relation to the Overview of Petitions from August 1998 to August 1999. (Table paper 157).

Hon Murray Nixon moved, That the Report do lie upon the Table and be printed.

Question — put and passed.

4. Courts Legislation Amendment Bill

The Attorney General: To move on the next day of sitting,

That a Bill for “An Act to amend the —

- *District Court of Western Australia Act 1969*;
- *Liquor Licensing Act 1988*;
- *Local Courts Act 1904*; and
- *Supreme Court Act 1935*”,

be introduced and read a first time.

5. Constitutional Referendum — Australia Becoming a Republic

Hon John Cowdell: To move on the next day of sitting,

That this House supports Australia becoming a Republic and recommends a “Yes” vote at the Constitutional Referendum to be held on November 6, 1999.

6. Matter of Urgency — Leakage of Arsenic into Cockburn Sound

The President read the following letter —

Dear Mr President

At today’s sitting it is my intention to move an Urgency Motion under SO 72 that the House, at its rising, adjourn until Friday, December 24, 1999 for the purpose of discussing the issues that arise over the State Government’s handling of the recent arsenic leak into Cockburn Sound and related matters.

Yours sincerely

Hon Tom Stephens MLC
Leader of the Opposition in the Legislative Council

September 14, 1999

Four members having risen in support.

Hon Tom Stephens then moved, That the House at its rising adjourn until Friday, December 24, 1999.

Debate ensued.

Interruption of Debate — One hour having elapsed after the time fixed for the meeting of the House, the President announced that leave of the House would be necessary to enable the debate to continue.

Leave denied.

7. Order of Business

Ordered — That Orders of the Day Nos 3 and 4 be taken before Order of the Day No 1 (Leader of the House).

8. Address-In-Reply

The Order of the Day having been read, for the adjourned debate on the further amendment of Hon Bob Thomas as follows —

That the following words be added to the motion —

And further advises His Excellency of the Legislative Council's concern with the failure of the Liberal National Party Coalition Government to properly handle the RFA process and in particular, its failure to meet the needs of timber industry workers, their families and their communities who are adversely affected by the outcome.

Debate resumed.

Leave was granted to Hon Kim Chance to continue his speech at the next sitting of the House.

On the motion of Hon Muriel Patterson the debate was adjourned to the next sitting.

9. Questions Without Notice

Questions without notice were asked by Hons Tom Stephens, Nick Griffiths, Jim Scott, Helen Hodgson, Ken Travers, John Cowdell, Ed Dermer, Giz Watson, Norm Kelly, Ray Halligan, Ljiljanna Ravlich, Kim Chance, Tom Helm and Cheryl Davenport.

The Minister for Finance, by leave, tabled documents regarding the allocation of water from the Yarragadee Aquifer to Moltoni Holdings Pty Ltd in response to a question without notice asked by Hon Kim Chance. (Table paper 158).

The Minister for Finance, by leave, tabled documents regarding a visit by Coalition backbench members to the Eastern States to look at Water Law Reform proposals in response to a question without notice asked by Hon Ken Travers. (Table paper 159).

10. Workers' Compensation and Rehabilitation Amendment Bill

The Order of the Day for the consideration, in Committee, of Message No 139 from the Legislative Assembly having been read,

The Attorney General, pursuant to notice moved —

That it be an instruction to the Committee of the Whole House that it have power to consider and adopt any amendment moved in substitution for Assembly amendment No 3 contained in its Message No 139 if such amendment is otherwise cognate to the matter that is the subject of the Assembly amendment.

Debate ensued.

Point of Order

Hon John Cowdell asked the President whether the motion is an admissible instruction to the Committee.

President's Ruling

The President ruled as follows —

I have considered the motion. It is in order. It is a permissive instruction which, if carried, will enable the Committee to consider amendments of a wider scope than would otherwise be permissible. Any amendment made must still be cognate to the purposes of the Bill.

Question — put and passed.

The President left the Chair.

In Committee

(Hon John Cowdell in the Chair)

The Message was as follows:

Mr President

Message No 139

The Legislative Assembly acquaints the Legislative Council that it has considered the amendments made by the Legislative Council in the *Workers' Compensation and Rehabilitation Amendment Bill 1997*, has disagreed to amendments Nos 1 and 2, and disagreed to amendment No 3 and substituted a new amendment for the reasons set forth in the Schedule annexed.

Legislative Assembly Chamber
Perth, June 25, 1998

George J Strickland
Speaker

Schedule showing the reasons for the Legislative Assembly disagreeing to amendments made by the Legislative Council and substituting a new amendment No 3 in the Workers' Compensation and Rehabilitation Amendment Bill 1997

Amendment No 1

This amendment is disagreed to as entitlement to workers' compensation benefits are determined on the basis of a medical practitioner determining the workers' "incapacity" for work. The issue of "wholly or partially recovered" does not relate to the ability of a worker to return to employment. The words "total or partial capacity for work" protect both the worker from further injury if "recovered" but not fit for work and the employer in employing a worker beyond his capacity.

Amendment No 2

This amendment is disagreed to as the current Act wording provides no discretion for the dispute resolution body on whether a medical dispute is or is not referred to a Medical Panel. Given some medical disputes could be minor in nature this discretion is essential to ensure delays in resolution do not disadvantage either the injured worker or employer. Further, this clause includes an ability for the Medical Panel to determine a workers' "capacity for work" for the same reasons as set out in response to amendment 1.

Amendment No 3

This amendment is disagreed to because of the serious impact currently occurring to the financial viability of the entire workers' compensation system and in so doing the Legislative Assembly has agreed to the substitution of the following —

“ Clause 32

Page 19, lines 20 to 25 and page 20, lines 1 to 7 — To delete the lines and substitute the following lines —

“ **32.** (1) Section 93A of the principal Act is amended by deleting the definition of “future pecuniary loss”.

(2) Section 93D (2) of the principal Act is repealed and the following subsections are substituted —

“ (2) A disability is a serious disability if, and only if, the degree of disability would, if assessed as prescribed in subsection (3), be 30% or more.

(2a) In assessing the degree of disability of a worker under subsection (3), no regard is to be had to any mental ailment, disorder, defect, morbid condition or symptom of the worker that arises, recurs or is aggravated or accelerated as a consequence of, or secondary to, a physical disability of the worker.

”.

(3) Section 93D (3) of the principal Act is amended by deleting “For the purposes of subsection (2) (a)” and substituting the following —

“ Subject to subsection (2a), for the purposes of subsection (2) ”.

(4) Section 93D (5) of the principal Act is amended —

(a) by inserting “or” after paragraph (a);

(b) in paragraph (b) by deleting “; or” and substituting a full stop; and

(c) by deleting paragraph (c). ”

Page 20, line 8 — To delete “(1) and (2)” and substitute the following —

“ (1), (2), (3) and (4) ”.

The clauses remove the current alternative access of workers, who do not meet the serious disability threshold, to Common Law and are essential to save the workers' compensation system in this State from total financial collapse, a situation which would seriously impact on both employers and injured workers for whom the system is designed.

Peter J McHugh
Clerk of the Legislative Assembly

The Attorney General moved —

That the Legislative Council resolve to inform the Legislative Assembly that the proposed following new amendment as alternative to Amendment No 3 —

“ Clauses 32, page 19, line 19 to page 20, line 10 — To delete the Clause and substitute the following Clauses —

“ **Amendments about awarding of damages and related matters (sections 5, 61, 84ZH, 84ZR and 192, Part IV Division 2 and Schedule 1), and saving and transitional provisions**

32. (1) Section 5(1) of the principal Act is amended by deleting the definition of “prescribed amount” and substituting the following definition —

“ **“prescribed amount”** means —

- (a) in relation to the financial year ending on 30 June 2000, \$119 048;

Note: This is the nearest whole number of dollars to the amount obtained by multiplying by 208 the average of the amounts that the Australian Statistician published as the all employees average weekly total earnings in Western Australia for pay periods ending in the months of May, August and November 1998 and February 1999.

- (b) in relation to any subsequent financial year, the nearest whole number of dollars to —

- (i) the amount obtained by varying the prescribed amount for the preceding financial year by the percentage by which the amount that the Australian Statistician published as the Wages Cost Index, ordinary time hourly rates of pay (excluding bonuses) for Western Australia (the “**WCI**”) varied between the second-last December quarter before the financial year commenced and the last December quarter before the financial year commenced; or

- (ii) if the calculation under subparagraph (i) cannot be performed in relation to a financial year because the WCI for a relevant quarter was not published, the amount obtained by varying the prescribed amount for the preceding financial year in accordance with the regulations,

with an amount that is 50 cents more than a whole number of dollars being rounded off to the next highest whole number of dollars; ”.

- (2) Section 61(7) of the principal Act is amended by inserting after paragraph (b) the following —

“ (ba) if section 93E(7) applies to the payment of compensation; or ”.

- (3) Section 93A of the principal Act is amended by deleting the definitions of “Amount A”, “Amount B”, “future pecuniary loss” and “non-pecuniary loss” and inserting, in the appropriate alphabetical positions, the following definitions —

“ **“annual average weekly earnings amount”**
means —

- (a) in relation to the financial year ending on 30 June 2000, \$29 762;

Note: This is the nearest whole number of dollars to the amount obtained by multiplying by 52 the average of the amounts that the Australian Statistician published as the all employees average weekly total earnings in Western Australia for pay periods ending in the months of May, August and November 1998 and February 1999.

- (b) in relation to any subsequent financial year, the nearest whole number of dollars to —

(i) the amount obtained by varying the annual average weekly earnings amount for the preceding financial year by the percentage by which the amount that the Australian Statistician published as the Wages Cost Index, ordinary time hourly rates of pay (excluding bonuses) for Western Australia (the “**WCI**”) varied between the second-last December quarter before the financial year commenced and the last December quarter before the financial year commenced; or

(ii) if the calculation under subparagraph (i) cannot be performed in relation to a financial year because the WCI for a relevant quarter was not published, the amount obtained by varying the annual average weekly earnings amount for the preceding financial year in accordance with the regulations,

with an amount that is 50 cents more than a whole number of dollars being rounded off to the next highest whole number of dollars;

“prescribed level”, in relation to the degree of disability of a worker, means —

- (a) the degree of disability that would, if compensation were to be paid in accordance with Schedule 2, give rise to a payment equal to the annual average weekly earnings amount; or
- (b) if a lesser degree of disability is prescribed by regulations, that lesser degree.

(4) After section 93B(3) of the principal Act the following subsection is inserted —

“ (3a) This Division does not apply to the awarding of damages if the disability results in the death of the worker.

(5) Sections 93D, 93E and 93F of the principal Act are repealed and the following sections are substituted —

“ **Assessment of disability**

93D. (1) In this section —

“relevant level”, in relation to a question as to the degree of disability of the worker, means —

- (a) if the question arises for the purposes of section 93E(3)(a), (8) or (11), a degree of disability of 30%; or
- (b) if the question arises for the purposes of section 93E(4), the prescribed level of disability.

(2) For the purposes of section 93E, the degree of disability of the worker is to be assessed —

- (a) so far as Schedule 2 provides for such a disability, as a percentage equal to —
 - (i) if only one item of that Schedule applies to the disability, the percentage of the prescribed amount provided for by that item, as read with section 25; or

(ii) if 2 or more items of that Schedule apply to the disability, the sum of the percentages of the prescribed amount provided for by those items, as read with section 25;

(b) to the extent, if any, that paragraph (a) does not apply, as the degree of permanent impairment assessed in accordance with the AMA Guides;

(c) to the extent, if any, that neither paragraph (a) nor (b) applies, in accordance with the regulations,

or if more than one of paragraphs (a), (b) and (c) applies, as the cumulative sum of the percentages assessed in accordance with those paragraphs, but no regard is to be had to any mental ailment, disorder, defect, morbid condition or symptom of the worker that arises, recurs or is aggravated or accelerated as a consequence of, or secondary to, a physical defect of the worker.

(3) If section 25 applies, the percentage under subsection (2)(a) is calculated in accordance with the formula —

$$\frac{PD}{100} \times TD$$

Where —

PD is the percentage of the diminution of full efficient use.

TD is the relevant percentage set out in Column 2 of Schedule 2.

Example 1

A worker loses 40% of the full efficient use of one eye. The percentage under subsection (2)(a) is —

$$\frac{40}{100} \times 50 = 20$$

Example 2

A worker loses the little finger of the left hand, 30% of the full efficient use of one eye and 10% of the full efficient use of the right arm below the elbow. The percentage under subsection (2)(a) is —

$$6 + \left[\frac{30}{100} \times 50 \right] + \left[\frac{10}{100} \times 80 \right] = 6 + 15 + 8 = 29$$

- (4) If the worker and the employer cannot agree on whether the degree of disability is not less than the relevant level, the worker may, subject to subsection (5), refer the question to the Director.
- (5) A question can only be referred under subsection (4) if the worker produces to the Director medical evidence from a medical practitioner indicating that, in the medical practitioner's opinion, the degree of disability is not less than the relevant level.
- (6) As soon as practicable after receiving a referral under subsection (4) the Director is to notify the employer in accordance with the regulations.
- (7) If within 21 days after being notified under subsection (6) the employer notifies the Director in accordance with the regulations that the employer considers that the degree of disability is less than the relevant level, a dispute arises for the purposes of Part IIIA.
- (8) The Director is to consider the dispute in consultation with the parties.
- (9) Except in a case to which subsection (10) applies, if the dispute is not resolved by agreement the Director is to refer the question for resolution under the provisions of Part IIIA (other than Division 2).

- (10) If the dispute relates to a disability mentioned in section 33, 34 or 35, the dispute is to be referred to a medical panel for determination as described in section 36 and so far as applicable this Act applies in relation to the reference as if it were a reference under section 36 except that the only question to be considered and determined on the reference is the question that was referred.
- (11) Unless notification is given by the employer under subsection (7), the employer is to be regarded as having agreed that the degree of disability is not less than the relevant level.

Restrictions on awarding of damages and payment of compensation

93E. (1) In this section —

“agreed” means agreed between the worker and the employer, whether under section 93D(8) or otherwise;

“degree of disability” means the degree of disability of the worker assessed in accordance with section 93D(2);

“determined” means determined or decided on a reference under section 93D(9) or (10);

“termination day” means the day that is 6 months after the day on which weekly payments commenced.

- (2) Weekly payments of compensation ordered by a dispute resolution body to commence are to be regarded for the purposes of this section as commencing or having commenced on —
 - (a) the first day of the period in relation to which weekly payments are ordered to be made; or
 - (b) the day that is 5 months (or such shorter period as is prescribed) before the day on which the order is made,

whichever is later.

- (3) Damages can only be awarded if —
- (a) it is agreed or determined that the degree of disability is not less than 30% and that agreement or determination is recorded in accordance with the regulations; or
 - (b) the worker has a significant disability and elects, in the prescribed manner, to retain the right to seek damages and the election is registered in accordance with the regulations.
- (4) For the purposes of subsection (3)(b) the worker has a significant disability if it is agreed or determined that the degree of disability is not less than the prescribed level and that agreement or determination is recorded in accordance with the regulations.
- (5) Subject to subsection (6), if weekly payments of compensation in respect of the disability have commenced an election cannot be made under subsection (3)(b) after the termination day.
- (6) Despite subsection (5), if —
- (a) medical evidence complying with section 93D(5) was produced to the Director not less than 21 days before the termination day; and
 - (b) a dispute arising under section 93D(7) has not been resolved before the termination day,
- an election can be made under subsection (3)(b) within 7 days after the dispute is resolved.
- (7) Subject to subsections (8) and (10), if an election has been made under subsection (3)(b) compensation under this Act is not payable in respect of the disability, or any recurrence, aggravation or acceleration of it, in relation to any period after the day on which the election is registered or any expenses incurred during such a period.

- (8) Subsection (7) ceases to apply if, after the election is made, it is agreed or determined that the degree of disability is 30% or more and that agreement or determination is recorded in accordance with the regulations.
- (9) Subsection (8) relates only to the degree of the original disability, and any recurrence, aggravation or acceleration of it is not to be taken into account.
- (10) If an agreement or determination under subsection (8) is recorded, the worker may apply for any compensation which, but for subsection (7), would have been payable under this Act in relation to a relevant period or expenses incurred during a relevant period.
- (11) In subsection (10) —
“relevant period” means any period —
 - (a) which is after the day on which the election is registered and before the agreement or determination under subsection (8) is recorded; and
 - (b) during which the degree of disability is agreed or determined to have been not less than 30%.
- (12) If the liability for an incapacity resulting from the disability has been redeemed under section 67, damages are not to be awarded in respect of the disability.

Restrictions on awarding and amount of damages if disability less than 30%

- 93F.** (1) Unless an agreement or determination that the degree of disability of the worker is not less than 30% is recorded for the purposes of section 93E —
- (a) the amount of damages to be awarded is to be a proportion, determined according to the severity of the disability, of the maximum amount that may be awarded; and

- (b) the maximum amount of damages that may be awarded is a sum equal to twice the prescribed amount, but the maximum amount may be awarded only in a most extreme case of a disability of less than 30% in degree.
- (2) In assessing the severity of the disability for the purposes of subsection (1), no regard is to be had to any mental ailment, disorder, defect, morbid condition or symptom of the worker that arises, recurs or is aggravated or accelerated as a consequence of, or secondary to, a physical defect of the worker.
- (3) Subsection (1) has effect in respect of the amount of a judgment before the operation of section 92(b).
- (4) No entitlement to damages is created by subsection (1) and that subsection is subject to any other law that prevents or limits the awarding of damages.
- (5) If —
 - (a) section 93E(3) does not allow damages to be awarded in respect of the disability; or
 - (b) damages in respect of the disability have been awarded in accordance with subsection (1), the employer is not liable to make any contribution under the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (the “**Contribution Act**”) in respect of damages awarded against another person in relation to the disability.
- (6) If section 93E(3)(b) allows damages to be awarded in respect of the disability —
 - (a) the contributions that the employer may be liable to make under the Contribution Act in respect of damages awarded against other persons in relation to the disability are not to exceed the damages that could have been awarded in accordance with subsection (1); and

- (b) if the employer has made or been directed to make a contribution under the Contribution Act in respect of damages awarded against another person in relation to the disability, the amount of damages that may be awarded in accordance with subsection (1) is reduced by the amount of that contribution.
- (7) This section applies regardless of whether the damages are awarded against one or several employers.
- (8) An issue as to the amount of damages that may be awarded, is to be determined by reference to the prescribed amount as in effect on the date on which the determination is made.

Regulations

93G. Regulations may provide for —

- (a) the notification to be given to workers of the effect of the provisions of this Division;
 - (b) the form and lodgment of elections under section 93E(3)(b);
 - (c) the registration by the Director of elections under section 93E(3)(b) if an agreement or determination for the purposes of section 93E(4) has been recorded, and the power of the Director to refuse to register an election if not satisfied that the worker has been properly advised of the consequences of the election;
 - (d) the recording by the Director of an agreement or determination under section 93E as to the degree of disability of a worker;
 - (e) the way in which applications under section 93E(10) are to be made and dealt with. ”.
- (6) In subsections (7) and (8) —

“amended provisions” means Part IV Division 2 of the principal Act as amended by this section;

“assent day” means the day on which this Act receives the Royal Assent;

“former provisions” means Part IV Division 2 of the principal Act before it was amended by this section.

(7) The amended provisions do not affect the awarding of damages in proceedings —

(a) commenced before the assent day; or

(b) for the commencement of which the District Court gave leave under the former provisions before the assent day,

and the former provisions continue to apply in relation to those proceedings.

(8) If weekly payments of compensation in respect of a disability —

(a) commenced before the assent day; or

(b) were ordered by a dispute resolution body to commence before the assent day,

and the termination day referred to in section 93E of the amended provisions would be within 3 months after the assent day, the termination day is postponed by this subsection so that it is the day that is 3 months after the assent day.

(9) Section 84ZH(2) of the principal Act is amended by inserting after “that loss” the following —

“ , and as to the degree of disability assessed in accordance with section 93D(2) ”.

(10) Section 84ZR(2) of the principal Act is amended by inserting after “Schedule 2” the following —

“ and as to the degree of disability assessed in accordance with section 93D(2) ”.

(11) Before Part XIII of the principal Act the following section is inserted —

“ **Publication of prescribed amount and average weekly earnings**

193. (1) On or before the 1 July on which a financial year begins the Minister is to

publish a notice in the *Gazette* setting out, in relation to the financial year —

- (a) the prescribed amount;
- (b) the annual average weekly earnings amount for the purposes of section 93A; and
- (c) Amount C for the purposes of Schedule 1 clause 11.

(2) Publication under subsection (1) is for public information only and the operation of this Act is not affected by a failure to publish or a delay or error in publication. ”.

(12) Schedule 1 clause 7(4) to the principal Act is amended by deleting “the items referred to in clause 11(3), (4) and (5)” and substituting the following —

“ overtime or any bonus or allowance ”.

(13) Schedule 1 clauses 11 and 11A to the principal Act are deleted and the following clause is substituted —

“ **Weekly earnings**

11. (1) Subject to clauses 12 to 16, for the purposes of this Schedule “**weekly earnings**” has the meaning given by this clause.

(2) In this Schedule —

“**Amount A**” means the rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation, plus —

- (a) any over award or service payments paid on a regular basis as part of the worker’s earnings;

- (b) overtime; and
- (c) any bonus or allowance;

“Amount Aa” means the rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation, plus any over award or service payments paid on a regular basis as part of the worker’s earnings;

“Amount B” means the worker’s average weekly earnings (including overtime and any bonus or allowance) over the period of one year ending on the day before the disability occurs in the employment that the worker is in when the disability occurs or, if the worker is then in more than one employment at the end of that period, the sum of the average weekly earnings (including overtime and any bonus or allowance) in each employment, but if the worker has been in an employment for a period of less than one year, the worker’s average weekly earnings in that employment are to be determined over that lesser period;

“Amount C” means, during a financial year —

- (a) the amount obtained by multiplying by 1.5 the average of the amounts that the Australian Statistician published as the all employees average weekly total earnings in Western Australia for pay periods ending in the months of May, August, November and February preceding the financial year; or

- (b) if any relevant amount of earnings is not published, the amount obtained by varying Amount C for the preceding financial year in accordance with the regulations;

Note: During the financial year ending on 30 June 2000 Amount C is \$852.52.

“Amount D” means the minimum rate of weekly earnings payable, at the time of the incapacity, for the appropriate classification under the relevant industrial award, or which would have been payable if the relevant industrial award were still in operation;

“Amount E” means the minimum weekly earnings to which the worker would have been entitled, at the time of the incapacity, under the *Minimum Conditions of Employment Act 1993*;

“bonus or allowance” means any bonus or incentive, shift allowance, week-end or public holiday penalty allowance, district allowance, industry allowance, meal allowance, living allowance, clothing allowance, travelling allowance, or other allowance;

“earnings” includes wages, salary and other remuneration;

“overtime” means any payment for the hours in excess of the number of ordinary hours which constitute a week’s work.

- (3) In the case of a worker whose earnings are prescribed by an industrial award when the disability occurs, weekly earnings are —

- (a) for the 1st to the 4th weekly payments: Amount A but not more than Amount C or less than Amount D;
 - (b) for weekly payments after the 4th: Amount Aa, or a lesser amount determined in accordance with the regulations, but not more than Amount C or less than Amount D.
- (4) In the case of a worker to whom subclause (3) does not apply, weekly earnings are —
 - (a) for the 1st to the 4th weekly payments: Amount B but not more than Amount C or less than Amount E;
 - (b) for weekly payments after the 4th: 85% of Amount B, or a lesser amount determined in accordance with the regulations, but not more than Amount C or less than Amount E.
- (5) Subject to subclause (6), the references in the definition of Amount A in subclause (2) to overtime and any bonus or allowance are references to those items averaged over the period of 13 weeks ending at the time of the incapacity.
- (6) If the worker was totally or partially incapacitated from working or for any other reason did not work during any part of the period of 13 weeks mentioned in subclause (5), that part is to be disregarded in calculating the average amount per week that the worker was paid over that period.

- (7) Regulations made for the purposes of subsection (3)(b) or (4)(b) may provide for lesser amounts (but not less than Amount D or E, whichever is applicable) to be determined in respect of weekly payments after the 4th, 12th, 26th or 52nd, or after such other numbers of weekly payments as are prescribed. ”.
- (14) Schedule 1 clause 12 to the principal Act is amended by deleting “11(1) or (2)” and substituting the following —
- “ 11(3) ”.
- (15) Schedule 1 clause 13 to the principal Act is amended by deleting “11(1) or (2)” and substituting the following —
- “ 11(3) ”.
- (16) Schedule 1 clause 13(1) to the principal Act is amended by deleting “or agreement”.
- (17) Schedule 1 clause 13(2) to the principal Act is amended by deleting “the exclusions referred to in clause 11(3) and (4)” and substituting the following —
- “ overtime or any bonus or allowance ”.
- (18) Schedule 1 clause 16(1) to the principal Act is amended by deleting “11(5)” and substituting the following —
- “ 11(4) ”.
- (19) Schedule 1 clauses 12, 13(2) and 16(1) and (2) to the principal Act are amended by deleting “or industrial agreement”.
- (20) In subsection (21) —
- “**amended provisions**” means Schedule 1 to the principal Act as amended by this section;
- “**former provisions**” means Schedule 1 to the principal Act before it was amended by this section.
- (21) If weekly payments commenced before the coming into operation of this section —

- (a) the amended provisions do not apply to the first 4 weekly payments after the coming into operation of this section and the former provisions continue to apply to those weekly payments; and
- (b) for the purposes of the amended provisions the 5th weekly payment after the coming into operation of this section is to be regarded as the 5th weekly payment and so on.

”
”

Debate ensued.

The Attorney General moved, That progress be reported and leave asked to sit again at a later stage of this sitting.

Question — put and passed.

The President resumed the Chair.

The Chairman reported, That the Committee had considered Message No 139 from the Legislative Assembly, made progress, and asked leave to sit again at a later stage of this sitting.

Ordered — That the Committee have leave to sit again.

11. Extension of Sitting Time

The Attorney General moved, That the House continue to sit beyond 10.00pm.

Question — put and passed.

12. Paper

The Attorney General tabled the Report of the Review of the Western Australian Workers' Compensation System (the "Pearson Report"). (Table paper 160).

13. Prisoners (International Transfer) Bill

The Attorney General, pursuant to notice, moved —

That a Bill for "An Act to provide for the international transfer of prisoners to and from Western Australia" be introduced and read a first time.

Question — put and passed.

Bill read a first time.

The Attorney General moved, That the Bill be now read a second time.

On the motion of Hon Bob Thomas the debate was adjourned to the next sitting.

14. Coroners Amendment Bill

The Attorney General, pursuant to notice, moved —

That a Bill for “An Act amend the *Coroners Act 1996*, and for related purposes” be introduced and read a first time.

Question — put and passed.

Bill read a first time.

The Attorney General moved, That the Bill be now read a second time.

On the motion of Hon Bob Thomas the debate was adjourned to the next sitting.

15. Acts Amendment (Fines Enforcement) Bill

The Attorney General, pursuant to notice, moved —

That a Bill for “An Act to amend the —

- *Fines, Penalties and Infringement Notices Enforcement Act 1994*; and
- *Sentencing Act 1995*”,

be introduced and read a first time.

Question — put and passed.

Bill read a first time.

The Attorney General moved, That the Bill be now read a second time.

On the motion of Hon Bob Thomas the debate was adjourned to the next sitting.

16. Acts Amendment (Evidence) Bill

The Attorney General, pursuant to notice, moved —

That a Bill for “An Act to amend —

- the *Evidence Act 1906*;
- the *Justices Act 1902*;
- the *Children’s Court of Western Australia Act 1988*; and
- *The Criminal Code*”,

be introduced and read a first time.

Question — put and passed.

Bill read a first time.

The Attorney General moved, That the Bill be now read a second time.

On the motion of Hon Bob Thomas the debate was adjourned to the next sitting.

17. Acts Amendment (Fixed Odds Betting) Bill

The President reported the receipt of Message No 6 from the Legislative Assembly forwarding the Bill for concurrence.

The Minister for Racing and Gaming moved, That the Bill be now read a first time.

Question — put and passed.

Bill read a first time.

The Minister for Racing and Gaming moved, That the Bill be now read a second time.

On the motion of Hon Bob Thomas the debate was adjourned to the next sitting.

18. Totalisator Agency Board Betting Tax Amendment Bill

The President reported the receipt of Message No 7 from the Legislative Assembly forwarding the Bill for concurrence.

The Minister for Racing and Gaming moved, That the Bill be now read a first time.

Question — put and passed.

Bill read a first time.

The Minister for Racing and Gaming moved, That the Bill be now read a second time.

On the motion of Hon Bob Thomas the debate was adjourned to the next sitting.

19. Criminal Code Amendment Bill

The following Message from the Legislative Assembly was reported:

Mr President

Message No 8

The Legislative Assembly acquaints the Legislative Council that it has agreed to the *Criminal Code Amendment Bill 1999* without amendment.

Legislative Assembly Chamber
Perth, September 14, 1999

R C Bloffwitch
Deputy Speaker

20. Order of Business

Ordered — That Order of the Day No 4 be taken forthwith (Leader of the House).

21. Workers' Compensation and Rehabilitation Amendment Bill

The Order of the Day for the further consideration, in Committee, of Message No 139 from the Legislative Assembly having been read (cf item 10 above),

The President left the Chair.

In Committee

(Hon John Cowdell in the Chair)

Debate resumed on the new amendment as an alternative to Legislative Assembly Amendment No 3.

Question, That Clause 32 be deleted — put and passed.

New Clause 32(1) and (2) substituted.

New Clause 32(3).

Hon Nick Griffiths moved —

Pages 2 and 3 , Section 93A — To delete all words appearing after the words “non-pecuniary loss”.

Debate ensued.

Amendment agreed to.

New Clause 32(3), as amended, substituted.

New Clause 32(4) substituted.

New Clause 32(5)

Assessment of disability

Section 93D(1).

Hon Nick Griffiths moved —

Page 4 — To delete the definition of “**relevant level**” and substitute the following definition —

“ **Relevant level** means a degree of disability of 30% ”.

On the question, That the words to be deleted be deleted.

Question — put.

The Committee divided.

(Ayes 13)

Hon Kim Chance
Hon John Cowdell
Hon Cheryl Davenport
Hon Ed Dermer
Hon Nick Griffiths
Hon Tom Helm
Hon Helen Hodgson

Hon Norm Kelly
Hon Mark Nevill
Hon Ljiljanna Ravlich
Hon Jim Scott
Hon Giz Watson
Hon Bob Thomas (*Teller*)

(Noes 12)

Hon Murray Criddle
Hon Bruce Donaldson
Hon Max Evans
Hon Peter Foss
Hon Ray Halligan
Hon Barry House
Hon Murray Montgomery

Hon N F Moore
Hon Murray Nixon
Hon Greg Smith
Hon Derrick Tomlinson
Hon Muriel Patterson (*Teller*)

Question thus passed.

Question, That the words to be substituted be substituted — put and passed.

Section 93D(1), as amended, substituted.

Section 93D(2).

Hon Nick Griffiths moved —

Page 4 — To delete all the words appearing after the word
“paragraphs” where is last occurs.

Debate ensued.

On the question, That the words to be deleted be deleted.

Question — put.

The Committee divided.

(Ayes 13)

Hon Kim Chance
Hon John Cowdell
Hon Cheryl Davenport
Hon Ed Dermer
Hon Nick Griffiths
Hon Tom Helm
Hon Helen Hodgson

Hon Norm Kelly
Hon Mark Nevill
Hon Ljiljanna Ravlich
Hon Jim Scott
Hon Giz Watson
Hon Bob Thomas (*Teller*)

(Noes 12)

Hon Murray Criddle
Hon Bruce Donaldson
Hon Max Evans
Hon Peter Foss
Hon Ray Halligan
Hon Barry House
Hon Murray Montgomery

Hon N F Moore
Hon Murray Nixon
Hon Greg Smith
Hon Derrick Tomlinson
Hon Muriel Patterson (*Teller*)

Question thus passed.

Section 93D(2), as amended, substituted.

Section 93D(3) to (11) substituted.

Section 93E(1).

Hon Helen Hodgson moved —

Page 6 — In the definition of “**termination day**” — To delete the figure “6” and substitute the following figure —

“ 12 ”

On the question, That the figure to be deleted by deleted.

Question — put.

The Committee divided.

(Ayes 13)

Hon Kim Chance
Hon John Cowdell
Hon Cheryl Davenport
Hon Nick Griffiths
Hon Tom Helm
Hon Helen Hodgson
Hon Norm Kelly

Hon Mark Nevill
Hon Ljiljanna Ravlich
Hon Jim Scott
Hon Ken Travers
Hon Giz Watson
Hon Ed Dermer (*Teller*)

(Noes 12)

Hon Murray Criddle
Hon Bruce Donaldson
Hon Max Evans
Hon Peter Foss
Hon Ray Halligan
Hon Barry House
Hon Murray Montgomery

Hon N F Moore
Hon Murray Nixon
Hon Greg Smith
Hon Derrick Tomlinson
Hon Muriel Patterson (*Teller*)

Question thus passed.

Question, That the figure “12” to be substituted be substituted — put and passed.

Hon Helen Hodgson moved —

Page 6, after the word “commenced” — To insert the following words —

“ or 60 days after the disability has been determined to be sufficiently stable to allow an accurate medical prognosis to be made, whichever period of time is the longer ”.

On the question, That the words to be inserted be inserted.

Question — put.

The Committee divided.

(Ayes 13)

Hon Kim Chance
Hon John Cowdell
Hon Cheryl Davenport
Hon Nick Griffiths
Hon Tom Helm
Hon Helen Hodgson
Hon Norm Kelly

Hon Mark Nevill
Hon Ljiljana Ravlich
Hon Jim Scott
Hon Ken Travers
Hon Giz Watson
Hon Ed Dermer (*Teller*)

(Noes 12)

Hon Murray Criddle
Hon Bruce Donaldson
Hon Max Evans
Hon Peter Foss
Hon Ray Halligan
Hon Barry House
Hon Murray Montgomery

Hon N F Moore
Hon Murray Nixon
Hon Greg Smith
Hon Derrick Tomlinson
Hon Muriel Patterson (*Teller*)

Question thus passed.

Section 93E(1), as amended, substituted.

Section 93E(2).

Hon Helen Hodgson moved —

Page 6 — To delete the subclause.

Proposed subclause — put and negatived

Section 93E(3).

Hon Nick Griffiths moved —

Page 6, in paragraph (b) — To delete the words “has a significant disability and”.

Debate ensued.

Amendment agreed to.

Section 93E(3), as amended, substituted.

Section 93E(4).

Hon Nick Griffiths moved —

To delete the subclause.

Amendment agreed to.

New subclauses 93E(4) to (16).

Hon Nick Griffiths moved —

After 93E(3) — To insert the following new subclauses —

“ 93E(4) In this section —

“**Amount F**” means twice the prescribed amount.

“**Amount G**” means —

(a) for the financial year ending on 30 June 2000, \$10 000;
and

(b) for any subsequent financial year, the amount
recalculated as Amount B,

under subsections (11) and (13);

“**Amount H**” means —

(a) for the financial year ending on 30 June 2000, \$30 000;
and

(b) for any subsequent financial year, the amount
recalculated as Amount H,

under subsections (11) and (13);

“**non-pecuniary loss**” means —

(a) pain and suffering;

- (b) loss of amenities of life;
 - (c) loss of enjoyment of life;
 - (d) curtailment of expectation of life; and
 - (e) bodily or mental harm.
- 93E(5) The amount of damages to be awarded for non-pecuniary loss is to be a proportion, determined according to the severity of the non-pecuniary loss, of the maximum amount that may be awarded.
- 93E(6) The maximum amount of damages that may be awarded for non-pecuniary loss is Amount F, but the maximum amount may be awarded only in a most extreme case.
- 93E(7) If the amount of non-pecuniary loss is assessed to be Amount G or less, no damages are to be awarded for non-pecuniary loss.
- 93E(8) If the amount of non-pecuniary loss is assessed to be more than Amount G but not more than Amount H, the amount of damages to be awarded for non-pecuniary loss is the excess of the amount so assessed over Amount G.
- 93E(9) If the amount of non-pecuniary loss is assessed to be more than Amount H but less than the sum of Amounts G and H, the amount of damages to be awarded for non-pecuniary loss is the excess of the amount so assessed over Amount G - [amount so assessed - Amount H].
- 93E(10) No entitlement to damages is created by this section and this section is subject to any law that prevents or limits the awarding of damages.
- 93E(11) By operation of this subsection and subsection (12) or (13) each of Amounts F, G and H is recalculated for each financial year with effect from 1 July (the recalculation date), commencing on 1 July 2000, by varying the respective amounts for the preceding financial year —
- (a) by the percentage by which the weighted average minimum award rate for adult males under Western Australian State Awards published by the Australian Statistician varies between 1 April in the calendar year preceding the recalculation date and 31 March in the calendar year of the recalculation date; or

(b) if the relevant information is not so published, in accordance with the regulations.

93E(12) If an amount recalculated under subsection (11) as Amount F is not a multiple of \$1 000 it is to be rounded off to the nearest multiple of \$1 000 (with an amount that is \$500 more than a multiple of \$1 000 being rounded off to the next highest multiple of \$1 000).

93E(13) If an amount recalculated under subsection (11) as Amount G or H is not a multiple of \$500 it is to be rounded off to the nearest multiple of \$500 (with an amount that is \$250 more than a multiple of \$500 being rounded off to the next highest multiple of \$500).

93E(14) On or before 1 July in each year the Minister is to publish a notice in the Gazette setting out Amounts F, G and H as they will have effect on and from that 1 July.

93E(15) Failure to publish, or late publication of, a notice under subsection (14) does not affect the operation of subsection (11), (12) or (13).

93E(16) Issues as to whether damages for non-pecuniary loss may be awarded and as to the amount of those damages that may be awarded are to be determined by reference to Amounts F, G and H as in effect on the date on which the determination is made.

”.

Debate ensued.

On the question, That the new subclauses to be inserted be inserted.

Question — put.

The Committee divided.

(Ayes 13)

Hon Kim Chance
Hon John Cowdell
Hon Cheryl Davenport
Hon Nick Griffiths
Hon Tom Helm
Hon Helen Hodgson
Hon Norm Kelly

Hon Mark Nevill
Hon Ljiljanna Ravlich
Hon Jim Scott
Hon Ken Travers
Hon Giz Watson
Hon Ed Dermer (*Teller*)

(Noes 12)

Hon Murray Criddle
Hon Bruce Donaldson
Hon Max Evans
Hon Peter Foss
Hon Ray Halligan
Hon Barry House
Hon Murray Montgomery

Hon N F Moore
Hon Murray Nixon
Hon Greg Smith
Hon Derrick Tomlinson
Hon Muriel Patterson (*Teller*)

Question thus passed.

Section 93E(5) to (12) substituted.

Section 93F(1).

Hon Nick Griffiths moved —

To delete paragraph (a) and in paragraph (b), after the words
“prescribed amount” — To delete the following words —

“ , but the maximum amount may be awarded only in a most
extreme case of a disability of less than 30% in degree ”.

Debate ensued.

Amendments agreed to.

Section 93F(1) as amended, substituted.

Section 93F(2).

Hon Nick Griffiths moved —

To delete the subclause.

Debate ensued.

Proposed subclause — put and negatived.

Section 93F(3) agreed to.

New Section 93F(4).

Hon Helen Hodgson moved —

To insert the following new subclause (4) —

“ (4) Notwithstanding subsection (3), in assessing the total
amount of damages under subsection (1), no regard is to be
had for the matters contained in clauses 9, 11, 17, 18 and 19
of Schedule 1. ”.

Debate ensued.

Amendment agreed to.

Section 93F(4) to (8) substituted.

Section 93G substituted.

New Clause 32(6) and (7) agreed to.

New Clause 32(8).

Hon Helen Hodgson moved —

To insert after the word “if” the following words —

“ liability for ”.

Amendment — put and passed

Hon Helen Hodgson moved —

To delete all the words after the words “assent day” where it first appears and substitute the following words —

“ The provisions of section 93E of the amended provisions apply to a worker to allow him to seek damages and the termination day referred to in section 93E may be a date after the assent day. ”.

On the question, That the words to be deleted be deleted.

Question — put.

The Committee divided.

(Ayes 13)

Hon Kim Chance
Hon John Cowdell
Hon Cheryl Davenport
Hon Nick Griffiths
Hon Tom Helm
Hon Helen Hodgson
Hon Norm Kelly

Hon Mark Nevill
Hon Ljiljanna Ravlich
Hon Jim Scott
Hon Ken Travers
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Hon Max Evans
Hon Peter Foss
Hon Ray Halligan
Hon Barry House
Hon Murray Montgomery

Hon N F Moore
Hon Murray Nixon
Hon Greg Smith
Hon Derrick Tomlinson
Hon Muriel Patterson (*Teller*)

Question thus passed.

On the question, That the words to be substituted be substituted.

Debate ensued.

Question — put and passed.

New Clause 32(8), as amended, substituted.

New Clause 32(9) to (21) substituted.

The Chairman left the Chair at 11.34pm

The Chairman resumed the Chair at 12.00 midnight

The House having continued to sit until 12.00 midnight

WEDNESDAY, SEPTEMBER 15, 1999

The President resumed the Chair.

The Chairman reported, That the Committee had considered Message No 139 from the Legislative Assembly, and had agreed not to insist on Amendment No 1; agreed not to insist on Amendment No 2; and had agreed to a new amendment as an alternative to Amendment No 3.

Ordered — That consideration of the Committee's Report be made an Order of the Day for the next sitting.

22. Adjournment

The Leader of the House moved, That the House do now adjourn.

Question — put and passed.

The House adjourned at 12.03am until Wednesday, September 15, 1999 at 4.00pm.

Members present during the day's proceedings

Attendance: Present, all members except Hons Dexter Davies, John Halden and Christine Sharp.

GEORGE CASH
President

L B MARQUET
Clerk of the Legislative Council