

WORKERS' COMPENSATION REFORM BILL 2004

Introduction and First Reading

Bill introduced, on motion by Mr J.C. Kobelke (Minister for Consumer and Employment Protection), and read a first time.

Explanatory memorandum presented by the minister.

Second Reading

MR J.C. KOBELKE (Nollamara - Minister for Consumer and Employment Protection) [12.19 pm]: I move -

That the Bill be now read a second time.

The Workers' Compensation Reform Bill 2004 establishes a new direction for workers compensation in this State by helping to restore fairness, balance and certainty to the system. Workers will be more adequately compensated and provided with assistance to return to work and employers will benefit from more stable premiums. The legislation is based upon the recommendations of a comprehensive review undertaken for the Government by Dr Robert Guthrie on the implementation of the Labor Party's direction statement in relation to workers compensation. This review was released for public comment in October 2001. Thirty-five submissions were received from interested parties, culminating in the development of a position paper that built upon the recommendations of Dr Guthrie. These recommendations were actuarially costed and provided to stakeholders. A process of refinement followed with input received from major stakeholder groups. Throughout this process, the positive and committed involvement of unions and their representatives, working constructively with government, ensured the proposed reforms would result in a fairer deal for injured workers. A draft Bill was then provided to stakeholders to elicit further comment on the technical details of drafting before the Bill was finalised. A review of the Workers' Compensation and Rehabilitation Commission was undertaken by Associate Professor Tony Cooke. The majority of the recommendations contained within Professor Cooke's report have been included in the Bill and will provide the administrative structure necessary to underpin, direct and support the implementation of the new system.

The Bill will restore public confidence in a revitalised workers compensation system, encouraging competitive market forces within the privately underwritten system and minimising the social and financial impact of injury and disease. The reforms will deliver \$130 million worth of additional benefits to injured workers in the first year with ongoing increased benefits of \$60 million per annum. This represents the most significant increase in benefits to injured workers in Western Australia in more than 20 years and delivers on all the legislative commitments made in the Labor Party's direction statement on workers compensation issued in 2000. The cost of the reforms will result in the average recommended premium rates remaining within the target range of 2.4 per cent to 2.7 per cent of payroll recommended by the Pearson report in 1999. This Pearson report recommendation was supported by employers as an acceptable range that would be sustainable and provide adequate support for injured workers. The Chamber of Commerce and Industry of Western Australia was represented on the Pearson review group and accepted this recommendation. The Government requires the insurance industry to absorb the costs associated with the transition to the new benefit structure and measures to address the Supreme Court decision in *Re Monger; ex parte Dutch & Ors* (2001) WASAC 220 - the "Dutch decision". Insurers have experienced high profit levels over the past three years with profit margins above the eight per cent benchmark established by the Premium Rates Committee. It is therefore reasonable to expect that this windfall should be taken into consideration in covering costs associated with claims incurred in previous years.

I will now go to the major features of the Bill.

Statutory Entitlements: The improvements to statutory workers compensation benefits are designed to provide a better balance between the statutory and common law parts of the system. The majority of improved statutory benefits will be retrospective in that they will apply not only to injuries occurring on or after the date of proclamation, but also to those that occurred before that day, unless a common law election has been registered or the claims settled by agreement or otherwise prior to that day. There will, however, be an exception to this principle as changes to schedule 2 will operate prospectively. Currently many workers on statutory weekly payments are affected by the "cap" that limits those payments to 1.5 times the Australian Bureau of Statistics average weekly earnings figure. This cap will be increased to twice AWE - an increase from \$1 021 to \$1 362 per week at the current rate. That will benefit many middle income workers. The period before a step down in weekly payments occurs will also be increased from four to 13 weeks which will mean that the vast majority of workers in the statutory workers compensation system will not experience a step down. The new limit on maximum weekly payments will apply immediately to all workers on weekly payments at the time of proclamation. From week 14, the weekly payments step down amount payable for award workers will be amended to include allowances paid on a regular basis as part of a worker's earnings, which are related to the

number or pattern of hours worked. There will also be power to prescribe other allowances that should be included. For non-award workers, from week 14 weekly payments step down, as currently, to 85 percent of the rate applicable before the step down. Although the new limits on maximum weekly payments and the new step down formula will apply to existing claims there will be no back payments for workers whose weekly payments have already stepped down at the date of proclamation.

The definition of “industrial award” is revised to ensure consistency with the Industrial Relations Act 1979 and includes enterprise bargaining agreements and enterprise orders. To ensure that injured workers with a permanent total incapacity are adequately compensated for the seriousness of their incapacity, a significant increase in the maximum entitlement of up to an additional 75 per cent of the prescribed amount has been included. Clause 17 will allow for reasonable medical and other expenses likely to be incurred, prior to those expenses actually being incurred. The Bill replaces the definition of “disability” in section 5 with “injury”. It should be noted that the wording under the new definition of injury substantially reflects the existing wording and will not change the coverage of what was formerly defined as disability.

Evaluations under schedule 2 of the Workers’ Compensation and Rehabilitation Act 1981, in relation to injuries that occurred on or after the amendment day, will be made on the basis of an impairment methodology. Evaluations will be made in accordance with the WorkCover WA guides relating to the assessment of impairment. An appendix in the guides will specifically cover evaluation of impairment in relation to schedule 2 entitlement. To reflect this transitional arrangement, the schedule 2 table has been separated into two parts. Although changes have been made to the wording in the items under part II to reflect or to enable an impairment-based methodology to be applied, there will be no reduction in the lump sum payable for each of the items. Evaluation of impairment will also form the basis for the threshold requirement to pursue damages at common law, part of the eligibility criteria for the additional medical expenses under clause 18A and access to the specialised retraining program. Impairment will be evaluated by trained medical experts using appropriate guides that provide step-by-step instructions for the evaluation process. This approach is utilised in evaluating impairment and determining access to the common law system and to many lump sum statutory entitlements in the majority of Australian workers compensation jurisdictions. In the current system there is no certainty for injured workers due to the wide variation in the findings of disability assessments undertaken by medical practitioners. The impairment methodology will provide a more consistent assessment method. To ensure evaluations of an impairment are appropriately undertaken, specially trained medical practitioners - to be known as approved medical specialists - will be available to provide these assessments. So as not to exclude any medical practitioner from participating in this process, any medical practitioner may become an AMS if they have undergone training in the impairment evaluation methodology and meet certain criteria. WorkCover WA will confirm medical practitioners who have the appropriate qualifications to be approved medical specialists for the purpose of evaluating the degree of a worker’s whole-of-person impairment. The WorkCover WA guides will be based on the WorkCover New South Wales guides for the evaluation of permanent impairment which are largely based on the fifth edition of the *American Medical Association’s Guides to the Evaluation of Permanent Impairment*, and are the most up-to-date basis for evaluating the degree of impairment. These guides will have the status of subsidiary legislation and provide direction as to the evaluation of impairment. The impairment methodology for evaluating impairment under schedule 2 will apply only prospectively to an impairment arising from a compensable personal injury by accident that occurs on or after the amendment day. To enable this, transitional provisions divide part III, division 2 of the Workers’ Compensation and Rehabilitation Act 1981 into a discontinued regime - division 2, which applies to an injury occurring before the amendment day - and the new regime in division 2A that applies to an injury occurring on or after the amendment day.

The term “injury” to describe the permanent loss of use of or permanent loss of the efficient use of a body part or faculty listed in schedule 2 that results from a personal injury by accident will be replaced by the term “impairment”. This aligns terminology within the workers compensation legislation with recognised medical terminology. In determining entitlements to statutory benefits when a worker and employer cannot agree on the worker’s degree of permanent impairment and the worker has an AMS assessment indicating the degree of impairment, the worker may apply to an arbitrator to determine the question. The arbitrator may determine the degree of impairment or refer the question to an approved medical specialist panel for a binding assessment. An AMS panel may request additional information from another medical practitioner or dentist who may have expertise relating to the condition that the AMS does not possess.

For the purposes of part III division 2A of the Act, acquired immune deficiency syndrome will be deemed to be a personal injury by accident, rather than a disease, and it will be included as an impairment arising out of a personal injury by accident - the infection of a worker by human immunodeficiency virus. This entitlement will only apply if both the personal injury by accident, for which the HIV was acquired, and the diagnosis of AIDS occur on or after the amendment day.

To ensure injured workers who have exhausted their prescribed medical entitlement have access to appropriate and timely medical treatment to assist their recovery, an important new provision will enable them to be

indemnified to exceed the medical entitlement by up to \$2 000 while applying for an additional sum. Insurers in future will be required to notify a worker when 60 per cent of his or her medical expenses referred to in clause 17(1) has been reached, not 75 per cent as is currently the case.

A new entitlement will be created under clause 18A whereby an arbitrator will be empowered to allow a further additional sum of up to \$250 000 beyond the additional \$50 000 for reasonable medical and other expenses if the worker meets certain prescribed exceptional circumstances. These will include evidence that indicates that operative intervention will result in further improvement. A limitation period of five years for making such a claim will apply. The final day for the limitation period may be extended in certain circumstances. To access this new entitlement, workers must have an agreed or determined whole-person impairment of not less than 25 per cent. For workers who access this entitlement, damages cannot be awarded at common law. This entitlement will give workers real choice between the improved statutory and common law systems.

The amount for funeral expenses will increase from the current inadequate amount of \$4 693 to \$7 000, with further increases to be prescribed by regulation.

The Bill also rectifies an inequity in the current entitlements for dependants of deceased workers by enabling certain dependent children or stepchildren, in the case of total dependency, to be entitled to elect whether to receive the child's allowance or receive the full notional residual entitlement of the worker. The provision will apply when a deceased worker does not leave a dependant spouse or de facto who is the parent of the child.

Working directors: Although a working director may opt to hold a workers compensation policy under the current provisions of section 10A of the Workers' Compensation and Rehabilitation Act, there have been instances when claims against a policy were declined by the insurer on the basis that the director did not meet the definition of "worker" under the Act. Court decisions have added to this uncertainty. For example, the compensation magistrate's decision in *Alana Holdings Pty Ltd v Findlay, Debra Sue* (Cm-87/99) determined that the director of a family company was not a "worker" for that company, as the director failed to establish that a contract of employment existed between herself, as a director, and the company.

A further problem regarding working directors is the practice of employers in certain industries of exploiting the provisions of section 10A by requiring workers to form their own company. This effectively shifts the employer-worker relationship from the real employer onto the worker's company. The amendments provide that a working or non-working director is not a worker for his or her own company. As an alternative to covering themselves for workers compensation, working directors may take out alternative disability income protection insurance outside the statutory workers compensation system. Secondly, the amendments will preclude employers from avoiding their obligation to insure workers by providing that when a company contracts with another person - called the "principal" - to perform work that is for the purpose of the principal's trade or business and the director performs any of that work, the principal must insure that director for workers compensation. This obligation applies regardless of whether the principal purports to contract the work to the company or directly engages or employs the director. When this obligation applies, the provisions of section 175 of the Act have no effect on the director. This means the principal will be solely liable to insure the director and is not entitled to indemnity from the director or his or her company under that section regarding liability for that director. The obligation to cover working directors will not apply if the work is not for the purpose of the principal's trade or business. An example of this would be a gardener who contracts with a householder to cut the lawn of the family home, and the gardener is a director of his own family company.

Dispute resolution: The new dispute resolution structure seeks to address concerns relating to the timeliness and responsiveness of the existing arrangements and the inequities for injured workers associated with the exclusion of legal practitioners. Included in the changes is the repositioning of the common law process in the District Court for injuries occurring on or after the proclamation day. The new entity responsible for the handling of disputes related to statutory entitlements will be the Dispute Resolution Directorate combining the existing functions of conciliation and review into a seamless process of conciliation and arbitration. Arbitrators who are legally qualified will hear disputes, and if conciliation is not successful they will continue with an arbitration process. This will significantly reduce the problems associated with the current system when cases are adjourned numerous times in conciliation only to result in further delays when the matter is referred to a review officer for a review hearing to be arranged.

The new streamlined process incorporates a unified first tier of arbitrators, with a compensation commissioner to hear certain appeals on matters of law. The Bill will ensure the authority of the decision-making powers of arbitrators, and the commissioner will limit the capacity for appeals on technical grounds. Any appeal to a superior jurisdiction will be only by way of leave from the commissioner. In terms of matters already in the system, appropriate transitional provisions are included to enable all existing disputes to be progressed using the new procedures. In terms of process, conferences will continue to be conducted on an informal basis. A head of power will provide for practice directions and rules to establish clear guidelines for conciliation and arbitration.

These will include requirements for filing of applications, content for written determinations and other procedural matters. This will ensure that all parties are prepared and information necessary to support the case is submitted and available to all parties at the commencement of the proceedings. Unfortunately, in the current system cases are often protracted because a party submits late evidence or is unprepared, thus delaying the process. There will also be enforced timelines and mechanisms for the effective disposal of minor claims. Due to the problems in the current system when parties withhold crucial medical evidence, under the reforms no legal professional privilege will be able to be claimed for medical reports.

Since 1993, legal representation in respect of compensation matters has been restricted and many workers have been disadvantaged by not having access to professional legal assistance. To ensure fairness and equal access to the dispute resolution system, the participation of legal practitioners and registered agents at all levels will be reintroduced, subject to a fixed service and fee schedule. This schedule will be structured to achieve an early resolution of disputes. The fee structure will affect all parties, including legal practitioners and registered agents, such as advocates and union representatives. Any agreement in excess of the scale will be void. Workers who are not legally represented will be allowed disbursement costs.

Medical assessment panels will continue to operate in the statutory system only to determine questions on the nature and extent of a worker's injury and his or her capacity for work. Medical assessment panels will continue to determine questions on referral from an arbitrator for injuries sustained prior to the amendment day in relation to the discontinued schedule 2 regime and prior to the date of proclamation in relation to the assessment of disability under the existing common law scheme.

To address concerns raised by parties about the operation of medical assessment panels, the Dispute Resolution Directorate will ensure an objective process for the selection and participation of medical practitioners. These panels will also have protocols developed for the consideration of video evidence and the constitution of panels when female workers are examined. Section 66 of the Act will be amended to clarify the maximum number of referrals of workers by insurance companies to medical practitioners for medical opinions, which is the number prescribed in the regulations. To ensure that a high quality service is provided to parties in the system, complaints against a legal practitioner or registered agent will be managed by the director, either by referring the matter to an appropriate body if the complaint is against a legal practitioner, or by being actioned by the director if the complaint is against a registered agent.

Injury management: Assisting the worker to return to work is a fundamental objective of our workers compensation system. The purposes of the Act have been amended to include reference to "return to work" and "management of worker's injuries". These terms introduce to the legislation the concept of "injury management", the main premise of which is a return to work philosophy. This replaces the current definition of "rehabilitation", in which the outcome is defined as restoring a worker's capacity for gainful employment.

The legislation will define injury management, which is recognised Australia-wide as those management processes with a workplace focus that are aimed at returning injured workers to work and includes, where appropriate, vocational rehabilitation. This change is important because there is now a clear focus on return to work as an outcome. Secondly, the emphasis on injury management means that all activities undertaken by an employer from day one in managing the injury in conjunction with the treating medical practitioner are recognised as an important part of the process to achieve return to work outcomes.

The functions of WorkCover WA will be amended to shift the emphasis from the promotion of rehabilitation to the broader injury management concept. New functions will enable WorkCover WA to provide an injury management mediation service for parties in the workers compensation system, as well as information to arbitrators on injury management questions. A head of power will be introduced for injury management regulations to be made. From time to time WorkCover WA will be able to publish an injury management code of practice, including injury management guidelines, in the *Government Gazette*. The code will have the status of subsidiary legislation. The intent of the code is to make provisions for the principles underpinning injury management that must be followed, and includes guidelines that provide guidance on the establishment, content and implementation of injury management systems and return to work programs. It is not intended to be prescriptive as it is recognised that many employers have developed successful intervention programs. The legislation will provide that, in response to medical evidence from a worker's treating medical practitioner, the employer will be required to establish a return to work program in accordance with the code. If requested to do so by an employer, the employer's insurer will be required to discharge the employer's obligation to establish an injury management system and/or return to work program in accordance with the code or to assist the employer to do these things.

Mechanisms to facilitate early identification of the need for intervention form an important part of the legislation. The amendments will require WorkCover WA to review the status of all injured workers at four weeks to determine whether there is a need for the employer to review the need for injury management

intervention, which may also include the need for a referral for vocational rehabilitation. Section 84AA will be amended to require any employer who intends to terminate the employment of a worker referred to in section 84AA(1) to notify the worker and WorkCover WA of that intention no fewer than 28 days before the day on which it is intended that the termination take place. The notification will not, however, in any way affect employers' requirements under any other legislation.

The name of the Act will be changed to the Workers' Compensation and Injury Management Act 1981 to reflect the shift in focus from rehabilitation to injury management.

Common law: The Bill addresses the current absence of real choice and certainty for workers and the pressure on them to make an election to pursue common law damages within six months of injury when in many cases their condition has not stabilised. It also deals with the problem of delays and uncertainty in determining whether a worker meets the threshold for access to common law. The introduction of a threshold system based on impairment rather than disability will ensure greater consistency in decisions, and will bring Western Australia into line with other Australian jurisdictions.

The new process for accessing the common law system will require an election before the termination day, which has been extended to 12 months from the date a claim for weekly payments is made by a worker on his or her employer. This date is easily able to be identified and will reduce any confusion about when the 12-month period should start. The existing wording has led to disputes over the meaning of commencement of weekly payments. The new mechanism for calculating the termination day is intended to ensure that workers are not denied access to the common law system because of technical disputes about the date from which the termination day is calculated. Any worker who does not elect within the 12-month period will remain eligible to receive the benefits of the statutory compensation system to which he or she is entitled, but will automatically forgo any common law entitlement. In order to ensure that workers are aware of the election requirements, an employer will be required to notify each worker about six months before the termination day. Election to pursue common law damages will continue to be irrevocable.

The election period has been increased to 12 months to help ensure that a worker's condition has stabilised before requiring a decision to pursue common law damages. An extension of the time to elect for up to a one-year period may be granted to the small number of severely injured workers who have evidence from an approved medical specialist that their condition has not stabilised. Extensions also may be given if the director is satisfied that the employer failed to notify the worker in accordance with the Act of the date and importance of the termination day six months before the termination day, or an AMS requires more time before being able to assess the worker or the worker has requested an assessment but the AMS has not produced the certificate in the prescribed time frame.

Access to the common law system initially will require either a worker and employer reaching agreement that the worker's degree of whole of person impairment, or WPI, is at least 15 per cent, or the worker obtaining an assessment from an AMS of the worker's choice that indicates that degree of impairment. Such agreement or assessment will be recorded by the director only if the worker requests in writing that the director do so. The election must be made in accordance with the time frames set out in the legislation and cannot occur unless the director has, at the written request of the worker, recorded the agreement or assessment mentioned above. The provisions clearly state that the worker has to choose whether to have the director record a particular agreement or assessment. The worker may choose to have recorded a second assessment obtained by the worker, rather than a first assessment.

The current 16 per cent disability threshold has been reduced to a primary WPI threshold of at least 15 per cent WPI. The enhanced statutory framework will give workers who do not reach the 15 per cent threshold a more attractive option for pursuing a lump sum payment or remaining on weekly and other benefits up to the prescribed amount, which may be extended by up to 75 per cent when the worker has suffered a permanent and total incapacity. As mentioned earlier, the benefits of the statutory system have been significantly enhanced to ensure a better balance between the statutory and common law systems. As a result, it is anticipated that more workers will remain in the statutory system, which is focused on helping them return to work and get on with their lives.

Workers with an AMS impairment assessment or an agreement that they have at least 15 per cent, but less than 25 per cent, WPI who elect to pursue common law will have their weekly payments stepped down after the election registration day to 70 per cent for the first three months, and 50 per cent for the following three months. Under the existing system, weekly payments cease once the worker makes an election, when the degree of disability is not less than 16 per cent but is less than 30 per cent. The step-down provision is calculated as a percentage of the amount of weekly payments to which the worker is entitled, which may vary after election if there is a change in the worker's entitlement to weekly payments. If the worker had no entitlement to weekly payments at election, no further benefit would be paid. Workers with a WPI of at least 25 per cent who elect

will continue to receive all statutory benefits to which they are entitled, which reflects the current situation that applies to workers with a degree of disability of not less than 30 per cent.

Common law cases will be repositioned within the District Court system, thereby providing a well-established legal framework to hear disputes on negligence. Appropriate transitional provisions will enable the Dispute Resolution Directorate to hear disputes about the degree of disability under the existing common law scheme; however, they will be subject to the dispute process included in the Bill.

Upon the worker receiving notification of the registration of the election, he or she will be required to lodge a writ within 30 days or in accordance with the District Court rules. An employer may not dispute the worker's assessment until the matter is dealt with in the District Court. When no agreement is reached between the parties in the District Court on the degree of WPI, employers may require a worker to attend an examination by an AMS for the purposes of obtaining an assessment. When this is the case, the assessment may be obtained only from a specialist on the register of approved medical specialists.

There will be a cap on the amount of damages that can be awarded when the WPI is less than 25 per cent. The existing cap applies to a degree of disability of more than 16 per cent but less than 30 per cent. The amount will continue to be a proportion, determined according to the severity of the injury or injuries, of the maximum amount that can be awarded. There will not be a cap on the amount of damages that can be awarded when the WPI is 25 per cent or more.

The new common law provisions will apply to any cause of action that arises on or after the day on which the new common law amendments come into operation. Any cause of action that occurs before this time will fall within the existing common law scheme. The evaluation of a worker's degree of permanent whole of person impairment will be based on the injury or injuries arising out of a single event as defined in section 5 of the Act. This is to ensure that injuries that do not result from a single event are not combined in the evaluation of whole of person impairment. This reverses the decision of *Girrawheen Tavern v Joseph* [2003] WASCA 244, in which the Supreme Court found that a worker who had received distinct injuries on different days with the one employer could aggregate those injuries in assessing the worker's degree of disability for common law purposes.

Secondary psychological, psychiatric and sexual conditions that may arise as a consequence of an injury will not be included in the assessment of impairment, but may be taken into account in an award of damages. The assessment of these conditions is contentious and subjective on the degree of impairment that may be attributed to the work-related injury. The assessment will not preclude such conditions when these conditions are a primary consequence of a work-related accident. An example is a stress condition experienced by a bank teller as a result of a hold-up. The preclusion of a secondary condition being taken into account will not apply to a schedule 2 impairment evaluation.

A special evaluation may be undertaken for common law purposes if an approved medical specialist has certified that a worker's condition has not stabilised and the worker has already obtained two extensions to the termination day. This will enable the worker to make an election to pursue damages at common law before the extended termination day has expired, therefore enabling the worker to commence court proceedings. A special evaluation must also be made for the purposes of applying for a further additional sum under clause 18A. Such an evaluation will be necessary for this purpose due to the fact that one of the exceptional circumstances will be that operative intervention will result in further improvement of the worker.

An evaluation of impairment certificate provided by an approved medical specialist or approved medical specialist panel will be relevant only for the purpose for which it is given. For instance, a certificate given for the purposes of accessing the common law system cannot be given or used for the purposes of applying for the additional medical expenses under clause 18A. There are several reasons for this preclusion: firstly, special evaluations may be made for common law purposes to enable the worker to make an election before the extended termination day expires, but only under certain circumstances and subject to certain time frames. By contrast, although an evaluation for the purposes of clause 18A will be a special evaluation, this is due to the unique nature of the exceptional circumstances criteria, which must be met for that entitlement and is not subject to the other circumstances and time frames, which will apply to a special evaluation for common law purposes.

Secondly, evaluations made by an individual approved medical specialist will not be binding, whereas an evaluation made by an approved medical specialist panel will. Approved medical specialist panels will be used in the statutory system to assist in resolving disputes by making final and binding decisions about a worker's degree of impairment. However, the panels are not used for common law purposes, as all disputes will be handled in the District Court. Therefore, it would not be appropriate for an evaluation made by an approved medical specialist panel for statutory purposes to be binding for the purposes of part IV subdivision 3. Thirdly, any secondary condition is to be disregarded in any impairment evaluation for the purposes of part IV division 2 subdivision 3, part IXA or clause 18A, whereas it is not disregarded in an evaluation for the purposes of part III division 2A.

Specialised retraining program: A new entitlement will be created of an amount equal to 75 per cent of the prescribed amount for a specialised retraining program for certain workers in relation to whom it is agreed or determined that the worker has a whole-of-person impairment of at least 10 per cent but less than 15 per cent; and the worker meets all the retraining criteria. This entitlement is intended to assist the small number of workers who would not meet the proposed 15 per cent impairment threshold but would meet the above requirements. The retraining criteria will be rigorous and will include the prior completion of a return to work program that has not been successful and a high expectation that the training program will provide the worker with the skills that will be successful in returning them to work. If there is no agreement between an employer and a worker that the worker satisfies all the criteria, a specialised retraining assessment panel must be convened. The decision of the panel is final and binding on all courts. The entitlement will enable a worker to undertake formal vocational training and/or study through technical or tertiary institutions or training courses of no longer than three years duration. The entitlement will include a weekly retraining allowance, and reasonable course fees.

Subject to the weekly retraining amount not exceeding a worker's pre-injury earnings, the regulations may prescribe how these funds are to be apportioned and when they should be paid, including the rate of the weekly retraining allowance. To participate, the worker must sign an agreement with WorkCover WA. The ongoing payment of entitlements will be at the discretion of WorkCover WA, based on the worker's demonstrated performance in the specialised retraining program in three-monthly reviews. Should the worker settle the claim through payment of a statutory lump sum, the worker's further entitlement under the SRP will cease.

Dutch decision: Decisions of the Supreme Court, including *Re Monger*; *ex parte Dutch and Ors* [2001] WASCA 220 and *Re Monger*; *ex parte WMC Resources and Anor* [2002] WASCA 129 ("WMC resources decision") have set precedents with unintended consequences for the operation of the current provisions of section 93D of the Workers' Compensation and Rehabilitation Act 1981 - "the Act". These decisions overturned determinations by the director of the Conciliation and Review Directorate to accept certain medical evidence as satisfying the requirements of section 93D(6) of the Act. The collective effect of the Dutch and WMC Resources decisions is that some injured workers who are claiming they have a disability and who sought to refer a question under section 93D(5) may be unable to progress their referral due to the Full Court's interpretation of the requirements of the director in regard to "medical evidence". The purpose of the amendments is to allow certain workers who have become or may become disadvantaged as a result of the Dutch decision and others by having the referral dismissed by a review officer or overturned by a superior jurisdiction, to be able to progress their referral subject to them referring a new referral of the same question and producing fresh medical evidence that complies with the requirements of section 93D within certain time limits.

This will enable such workers who subsequently obtain a determination or agreement that their degree of disability is not less than 16 per cent to make an election pursuant to section 93E(6). Such workers who subsequently obtain a determination - or agreement - that their degree of disability is not less than 30 per cent will be able to pursue common law damages. One of the criteria workers will need to meet for lodging a new referral will be that the worker originally sought to refer the same question on or before 30 September 2001. Referrals lodged up to this time, which was two months after the Dutch decision was issued, may also have been supported by medical evidence that failed to meet the medical evidence requirements of section 93D(6). It is considered that after this time, workers and medical practitioners should have become sufficiently aware of those requirements in light of the Dutch decision. A new referral and supporting fresh medical evidence - if not already lodged - must be lodged with the director within three months after the day on which the part of the Bill commences or, if a superior jurisdiction overturns a decision of a review officer that dealt with the substance of the question, within three months from the date of the decision overturning the review officer's determination. The retrospective application of these amendments will enable certain affected workers to progress referrals of questions, seeking a determination or agreement on their degree of disability for the purpose of pursuing damages at common law.

Hewitt v Benale decision: Another court case with unintended consequences is the Supreme Court decision of *Hewitt v Benale*. The Government will address the problems arising out of the Supreme Court's interpretation regarding the application of section 175. The court found the provisions of section 175 deeming certain persons to be an employer extend to all provisions of the Act, including the requirements on seeking damages at common law. It is not intended that the common law restrictions on an employer be extended to a deemed employer; namely, the principal, under section 175. It has long been understood that the provisions of section 175 are confined to the statutory system to protect workers employed by a contractor in the event the contractor is not insured for workers compensation by making the principal jointly and severally liable for the contractor's workers.

Amendments will be made to provide that a worker will not be constrained from seeking common law action against a principal and the provisions of part IV, division 2 do not apply to the principal, even though they could

be deemed an employer under section 175 of the Act. This will operate prospectively only if the injury or cause of action arises on or after the day on which the new common law changes come into operation.

Restructure of commission: To ensure the efficient operation of the workers compensation system, amendments based on the Cooke report are introduced to restructure the Workers' Compensation and Rehabilitation Commission. These will provide for greater administrative responsibility and accountability of the new governing body and ensure independent advice is provided to the Government on matters relating to workers compensation. In addition, the governing body will ensure diligence and discipline among service providers to achieve greater efficiencies. Functions will include responsibility for premium setting with an emphasis on a mechanism that balances the interests of employers and insurers on issues relating to loadings, notification and appeal processes.

Due to the significant reduction in workers compensation benefits introduced by the previous Government in 1999, over the past three years profits in excess of the range set by the premium rates committee were achieved by insurers. The Government considers some element of these profits should be applied to meet the impact upon claims costs of statutory entitlement increases contained in the Workers' Compensation Reform Bill 2004 applying retrospectively to claims in the workers compensation system at the time of proclamation of that part of the Bill.

The Government has determined the Bill will have a transitional provision enabling the minister to direct the WorkCover WA governing body to exclude any cost or provision directly related to claims affected by the Dutch decision and the transitional costs associated with retrospective increases in statutory entitlements in the Bill for claims in the workers compensation system at the time of proclamation in the future fixing of the recommended premium rates.

Administrative changes: A number of administrative processes have also been reviewed to ensure the effective administration of the system and to include the definition of "chiropractor" being amended to remove the requirement for the Workers' Compensation and Rehabilitation Commission to approve chiropractors. This is no longer necessary as the Chiropractors Registration Board now ensures suitably qualified chiropractors are registered in this State. A head of power will be introduced to ensure medical practitioners who issue more than one medical certificate comply with regulations governing the operation of the workers compensation system; for example, the requirements of an injury management code of practice. The Bill provides a general offence provision within the Act and head of power for WorkCover WA to influence insurer and self-insurer performance through fines and penalties. WorkCover WA will have an option to issue infringement notices against insurers and self-insurers with a modified penalty dollar amount prescribed in regulation.

Summary: This Government firmly believes a workers compensation system must be fair and must balance the rights of injured workers against the need for competitive, stable and affordable premiums for employers. Our reforms will help re-establish a fair balance between these interests and will also establish a better balance between the statutory benefits and common law parts of the workers compensation system. Amendments that improve the flow of statistical information between WorkCover WA and the WorkSafe division of the Department of Consumer and Employment Protection will also assist in improving occupational safety and health in Western Australia.

The Workers' Compensation Reform Bill reflects the Labor Government's commitment to the establishment of a fair, efficient and sustainable workers compensation system in which injured workers are more adequately compensated and assisted to return to work and employers have affordable and stable workers compensation premiums. I commend the Bill to the House.

Debate adjourned, on motion by Mr W.J. McNee.