

WORKERS' COMPENSATION AND INJURY MANAGEMENT AMENDMENT BILL 2011

Second Reading

Resumed from 23 June.

HON JON FORD (Mining and Pastoral) [7.33 pm]: The opposition supports this bill, and in fact welcomes it, and is very keen for it to pass and be proclaimed. For every day that it is delayed, unfortunately, there is the potential for workers out there to miss out on the benefits of this bill and the amendments contained within. The Workers' Compensation and Injury Management Amendment Bill 2011 has been developed to implement certain recommendations arising from the WorkCover WA 2009 legislative review. In response to this review, the government approved a two-stage program of reform to workers' compensation laws. This amendment bill implements 34 of 66 review recommendations and there are four broad elements of the bill. The first is the implementation of the policy decision to remove age-based limits of workers' compensation entitlements, which is a fantastic review and, because of the way the workforce has developed in regards to age, is a timely amendment. The second is the establishment of a common law safety net that will enable workers employed by uninsured employers to receive their lawful common law entitlements. That is a great protection for workers because if they have an injury and their employer is uninsured, they can still receive the benefits without going through a common law pursuit, which could be beyond workers' resources, and even if they have resources, it could put the claim away for years.

We welcome as well the restructuring of the dispute resolution framework and general amendments that address a number of unrelated legislative anomalies and efficiencies, which most bills do.

On top of that, as a result of listening to concerns in the other place, the government has seen fit to address the issue of pleural plaques and the complications around people who are afflicted with these diseases getting access to compensation. There is a particular level of pleural plaque which for the life of me I can never remember the name of. I am sure that the minister knows the name of the upper end of pleural plaques. He has even mentioned it to me.

Hon Alison Xamon: Do you mean diffuse pleural fibrosis?

Hon JON FORD: Yes, that is it. Diffuse pleural fibrosis is at the upper end of a range of lung afflictions that are attributed to industrial exposure to asbestos. The great thing about its inclusion in the bill is that it is a walk-up start to compensation, as I understand it. Somebody merely needs to be diagnosed with that disease and they have access to compensation. The same provisions relating to levels of proof and onus of proof apply to pleural plaques in general but that is a great step forward. Many people I have spoken to, even though I have trouble pronouncing the disease, are very pleased with the outcome of those negotiations and the government's inclusion of that into this bill.

As I said, we are very, very keen for this bill to come through the house and be proclaimed quickly. With that in mind, there are two amendments on the supplementary notice paper. I have not had the opportunity to discuss with Hon Nick Goiran why he wants to move his amendment on the notice paper. Does he still intend to move it?

Hon Nick Goiran: Yes.

Hon JON FORD: We will not be supporting it. We do not like to agree to amendments on the run unless a very strong case is put to us. As I said, we are keen to have the bill proclaimed. The other amendment on the supplementary notice paper is Hon Alison Xamon's, which relates to a review after three years. We think that the bill has been delayed long enough. Even another day of an amendment being considered in the other place is a day too many. We will be quite happy if the minister gives us an assurance that a review will take place in the house in due course. After 2013, when the Labor government is in power, we would give the commitment to carry out that review as well.

With those very brief comments, I urge the house to support the rapid progress of this bill through this house.

HON MAX TRENORDEN (Agricultural) [7.39 pm]: I also will be brief, but I wish to make a couple of points about the Workers' Compensation and Injury Management Amendment Bill 2011. I will not raise the issues that were previously raised, but we asked questions about the changes to age entitlements and premiums. It is very good to hear the history because we were told that there are only 11 claims in this age group. The reason we asked about the effect on premiums is that we are very aware that many people in the community are doing it tough at the moment, not only individuals but also small businesses. We were pleased to hear that the changes to the age entitlements, plus the commonwealth safety net, will have a very small effect on premiums. That was surprising, especially given the commonwealth safety net, but these are fantastic provisions in the bill.

I am speaking on behalf of the National Party and we are pleased with the way that workers' compensation has worked over recent years. I have been a member of Parliament since 1986, and there was a time, Hon Alison Xamon, when workers' compensation bills were introduced in the chamber yearly. In recent times, the argument about employees' benefits and employers' premiums have substantially receded. There were hot debates in years gone by. Members who were employers were quite rightly concerned about the cost of workers' compensation and employees were quite rightly concerned about their benefits and conditions. Those debates have vanished and we should thank the agencies and the people working within those circles for that very good outcome. At one stage in my career, I was asked by the minister of the day to review workers' compensation, and it was one of those times when people from both sides of the house came to see me because they were very concerned. I do not say that lightly. Workers' compensation as no-fault insurance is running as well now or probably better than it has in the history of this state, and all of us in this house should be very appreciative of that.

However, I will say one thing about workers' compensation; that is, it is actually no-fault insurance. We in the National Party have a view that lawyers should not be involved until people are at the stage that they need an assessment of disability. Lawyers are bad news in the workers' compensation scene; they consume funds that they should not be consuming. The right of the individual at the time of the assessment of disability is important and people should be represented in law, but there is no evidence that involving lawyers in the early part of the assessment benefits workers. In fact, the history of workers' compensation over the years is that the best practitioners for injured workers is in fact the union movement, but the union movement has moved out of the sphere of workers' compensation because we have made it too complicated. The early assessment process before people get to the serious part of arguing about disability should be about a no-fault program. It is not about employers versus employees because once the employer pays their premium, that is the end of their contribution. It is then the injured worker against the insurance company or against the system, which has got better and better.

Therefore, when we look at the resolution process, we are strong supporters of involving dispute resolution. We would like to increase that process; we like to think that the next part of the review of workers' compensation will make it so that when individuals are impacted by workers' compensation, they have the least amount of pain possible. When we think about it, members, it is not a good time in someone's life if they have been injured; they have to face doctors and are worried about their income and their family. Therefore, the impact of the workers' compensation system has to be as free of aggro as possible. That is why dispute resolution is by far the best outcome until we get to the serious part of workers' compensation at which an assessment has to be made whether a person makes the 15 per cent margin of disability.

I have to say this—I will waste the chamber's time for a little while—and you might appreciate this, Mr Deputy President (Hon Brian Ellis), but there has been a dispute for 353 years about whether a person who is the manager of his own company is entitled to workers' compensation. This has been an argument in rural areas predominantly, because a lot of farms are run under trust companies. The question has always been that a person who is a director of his own company has not been able to include himself in workers' compensation. Now, lo and behold, it is not even in the second reading speech, and it is not actually in the notes that I have just been reading, but this bill will allow managers of family companies to include themselves in workers' compensation, or take themselves out. That is a really important thing, because if these people are able to include themselves in workers' compensation, and if they pay the appropriate premium to be covered by workers' compensation, there will be a corresponding level of drawings that they insure themselves for. I am pleased to see, minister, that this thorny issue, which has been running for many, many years, has been resolved in this bill.

The National Party supports the bill. I have to say to Hon Alison Xamon that, very shortly, we are going to see the second part of this process. The second part of this process is when we will, or we will not—I am not making the decision, obviously, minister—be talking about whether there should be a review period. It is not in this bill. Therefore, we will not be supporting the member's amendment, not because we are against the amendment in principle—we would argue that a review clause is a reasonable provision in any piece of legislation—but because this legislation is about some finite, precise activities in workers' compensation. We agree with Hon Jon Ford that we should pass the bill; and let us talk about a review process when the second part of this process comes in. I will not put the sharp stick out and prod any lawyers any more. We will not be supporting the member's amendment, because we do perceive that there is a legal inference in that amendment.

HON ALISON XAMON (East Metropolitan) [7.47 pm]: I will be speaking on the Workers' Compensation and Injury Management Amendment Bill for a little bit longer, because this is the first opportunity that the Greens (WA) have had to speak to this bill. But I certainly rise tonight to indicate that the Greens will be supporting this bill.

I note that the proposed amendments in this bill have come out of WorkCover's 2009 review of the current act and will have some significant, and I would argue welcome, implications for all stakeholders. I also am aware

that WorkCover has advised that the reform process will take place in two stages, and that the bill that we are dealing with tonight effectively is dealing with amendments to address current legislative anomalies, as well as some agreed policy issues. I note at this point that the second stage will involve the development of an easier to read, plain English statute. It is still unclear what, if anything, will also be part of that second tier. But I would like to put on the record that as part of the second stage of review, I would be keen to see, for example, such changes as the reintroduction of journey cover. I am aware that some workers do have journey cover at the moment as one of the many conditions that they enjoy as members of their union. But if people are not a member of that union, or they happen to be covered by a union that does not provide that benefit as a condition of membership, they ostensibly are not able to have that particular protection.

I also want to ensure that we will have a revision of the caps to bring them to a more realistic figure, and, of course, a revision of the ongoing issue of the removal of step-down provisions. I also know that there are a number of other areas for ongoing reform including issues about access to common law entitlements. I will be very interested to see what will be part of the second range of reform.

Overall, this is a sound bill that we are debating. It contains some very welcome reform, much of which has been pushed for by workers' advocates, whether they be unions or lawyers who have worked in the field of workers' compensation for some time. Obviously the big-ticket item of reform is that an entitlement to compensation will no longer be limited by age, and workers' entitlements to weekly payments will no longer cease on account of age. This is clearly a very welcome reform; a reform which is long overdue. It is timely, and particularly important as we start to see the baby-boomer demographic move through. We are seeing a larger cohort of workers aged over 65 years wanting to stay in the workforce. I contend that there is a business demographic of people who we would want to stay in the workforce because of the inherent value they bring to the workforce in expertise and experience, and also because overall it is good for the economy. We are also seeing a generation of some baby boomers who are required to stay in the workforce for longer because they have had different superannuation arrangements throughout the course of their life. Of course the other thing is we are seeing differences in life expectancy and we are seeing improvements overall in the general health of the population. It has been a bit of a nonsense to suggest that people should be treated differently once they hit the age of 65. It is good; that is a very welcome reform.

I certainly take on board the concerns about delay made by Hon Jon Ford. I assure members that my speech tonight—as I am limited by time—will ensure that that delay does not occur any longer than it needs to. It has meant that some workers, particularly that cohort who have experienced injury, will miss out. I again note that the proposed amendments to sections 56 and 57 of the Workers' Compensation and Injury Management Act are not retrospective and will apply only to injuries incurred after the date of proclamation. That lack of retrospectivity is unfortunate for those people. I put to the government that it would be a good initiative if some consideration could be given to an *ex gratia* payment for that cohort of people who otherwise may have been subject to some sort of workers' compensation.

Of course another welcome change is to the way weekly payments will now be calculated. Average weekly earnings will now be calculated over a 12-month period prior to the injury rather than over 13 weeks, which is what it has been. This is a much more sensible and fairer arrangement, particularly for workers who are very reliant on overtime and penalty rates to supplement what can be quite meagre award entitlements. I am thinking particularly of hospitality workers and night-shift nurses. When I was working in the nurses union, this was a huge problem for night-shift nurses, who were often very reliant on penalty rates to make sure they had an appropriate level of income. They often found when they experienced injury and applied for workers' compensation that they were captured by these provisions. This is a really good and sensible reform. It is much more reflective of the way people's work cycles operate and the way wages are reflected. This will increasingly become an issue for people working in the mines, who, while they may not be at the lower end of the income scale, often have made quite serious life changes to have their one-off shot and work in the mines. This will be much more reflective of the way people's annual income is usually calculated.

In relation to the common law safety net, the bill provides for the payment of damages awarded to a worker from the general fund when an employer is uninsured for common law liability. Again, I note that this will apply only after the proclamation and will cover settlements by way of consent to judgement but not a deed between the parties, although I note that working directors are specifically excluded from the common law safety provisions. This is a really important reform, because it is absolutely critical that workers are not penalised because their employers have not done the right thing and kept up with their premiums. There have been terrible cases of workers who have suffered quite profound and sometimes lifelong injuries and who have found that, through no fault of their own, they cannot receive an appropriate level of compensation because their employer was irresponsible and did not do the right thing by ensuring that they were adequately insured. This can also be the case for companies that decide to fold, effectively overnight. It also means that any opportunity that these workers have to pursue damages is effectively gone. I think everybody in this place would agree that that is a

despicable situation for any worker to find themselves in. This is a very important reform. Basically, it will ensure that workers will not be penalised for the wrongdoing of their employers. That is very important because, as I say, it should never be up to employees to ensure that their employers are insured. Also, employees can never even know whether their employer is insured. An employer might assure them, if an employee even thinks to ask about this, that it is all okay and it is all paid up, but the employees have no proof of that. Employees should not be subject to penalty if they happen to lose the lottery with irresponsible employers.

I note—related to this—that with the introduction of a common law safety net under amended section 160, employers will now be obliged to obtain insurance against potential common law liability, as well as workers' compensation. My understanding is that this reflects what already happens in practice, given that common law coverage comes with standard wording. I understand that this will close a potential loophole. I am aware that there was concern that perhaps some employers were opting out of these provisions and were effectively not ensuring that they were fully insured. I do not know whether that was the case, but considering that that was never the intent of what employers were supposed to do, this is quite important in ensuring that that is absolutely clear. I note that that cannot happen.

I also take this opportunity to make the point—this is perhaps in contradiction to the comments of Hon Max Trenorden—that there is a concern that current premium levels are too low; some would say that they are very, very low. I note that the Pearson report stated that, ideally, premiums should be about 2.4 to 2.7 per cent of wages and that currently we are running at about 1.5 per cent. That is too low. Although I understand that some people are certainly of the opinion that employers are doing it tough, we need to remember that it is really important that we do not inadvertently leave injured workers without adequate levels of protection. I did want to make that point. I note that throughout the HIH Insurance collapse and the global financial crisis, Western Australia maintained reductions in premium rates.

Of course, the very big issue that forms part of this legislation are the changes to the dispute resolution system. The dispute resolution system for workers' compensation has been through many incarnations; I understand that this is about the fourth. Certainly, I think, on paper, it is a big improvement and, hopefully, this time we have got it right. Workers' compensation is a notoriously difficult area to conciliate due to the difference in the power relationships of the people involved. It is different from industrial disputes and occupational health and safety disputes, whereby often the union attempts to match the power of the employer, and at least there is some capacity to have something approaching a more equal power base.

The nature of workers' compensation is that individual workers come up against insurance lawyers when they are injured and usually feeling very vulnerable, and are often having difficulties even with managing what is happening in their lives, let alone feeling as though they can represent themselves. The nature of the power relationship and the nature of the dispute means that, effectively, there is no incentive for an insurance company to settle swiftly. In fact, it could even be argued—I have seen this before—that there is sometimes every motivation for some insurance companies to drag out a dispute. In my time working in the union movement, I have seen many, many examples of this happening. On the other side of the coin, there are workers who are sometimes without wages and incurring massive medical bills. Like I say, they are injured and desperate; they need to get resolution and they could not be more vulnerable. I have seen cases in which workers have effectively been almost starved into settling claims that in no way reflect either the costs already incurred, let alone the medical costs that are yet to come.

I note that section 177 of the Workers' Compensation and Injury Management Act, regarding the objects of the dispute resolution system, is to be replaced. The Workers' Compensation and Injury Management Amendment Bill talks about the new system focusing on fair and cost-effective dispute resolution that is timely, accessible, approachable and professional, and the minimisation of costs to parties. It is also provided that decision makers must consider these objects when performing their functions. I note that this is the standard language that is applied to good dispute resolution regimes. One of the ways that this is happening is by clearly separating the conciliation and arbitration functions. As far as I am concerned, one would think that is commonsense, but we have not had it before, so that is a very important reform.

The bill also replaces section 181 of the current act and will provide for the establishment of the conciliation service that will be administered by the director and facilitated by conciliation officers. I note that that is like the pre-November 2005 CRD system. Conciliation officers have to act independently of the CEO and director in terms of any decision to be made or discretion to be exercised in relation to a particular dispute. Throughout the conciliation process, the conciliation officers need to make all reasonable efforts to bring the parties to an agreement that is equally acceptable and to act fairly, economically, informally and quickly, having regard to the substantial merits of the case, without regard to technicalities and legal forms.

Having said that, when applying for conciliation, applicants have to go through the process whether they are simply applying for an interim fortnight's wages or facing a future suffering from catastrophic injuries. Under

the new system it will potentially be harder for minor matters; I am aware that part 11 currently allows a different process for big disputes, and part 12 allows interim payments and payment of bills for smaller disputes. I know that it is a balancing act; we are never going to have something that will ensure that, in all circumstances at all times, there will be a process that will fit everything. There is a limit on the conciliation period of eight weeks and again, I understand the need for that eight-week limitation and appreciate that this is a difficult area to legislate for. There is no one time frame that is perfect, but as I say, there is the concern that it may be too long for very simple matters and too short for matters in which the full extent of the injury is yet to be determined. At the same time, I acknowledge that we have to have some sort of time limit to ensure that unnecessary delays and obfuscation can be minimised. I think that an attempt at that legislative balance has been made.

To initiate the conciliation process, a party must apply to the director in accordance with the act and the conciliation rules, and the minister can make rules for conciliation and arbitration. Stakeholders must be aware that participation in the conciliation process will be a mandatory prerequisite to apply for arbitration of a dispute unless, of course, a director issues a certificate when the director believes that the dispute is not suitable for conciliation and would not benefit the parties. I suspect that those types of certificates will be utilised in stress claims, for example, particularly if the stress claims pertain to allegations of bullying. The party applying for conciliation under proposed section 182F must demonstrate to the director that the matter relates to a dispute under section 176 of the Workers' Compensation and Injury Management Act and that all reasonable attempts have been made to resolve the dispute. During the conciliation process the conciliation officer may request one or more parties to a dispute to attend a meeting. Conciliation conferences are held to answer questions, produce documents or consent to another person who has relevant documents producing them to the conciliation officer. It is an inquisitorial approach to the way the matter is attempted to be conciliated.

Hon Max Trenorden: The other option is legal.

Hon ALISON XAMON: That comes later when they go into arbitration.

Hon Max Trenorden: Under the current system it does not come later. Some lawyers get involved five seconds after an accident.

Hon ALISON XAMON: I do not believe that the new conciliation process is problematic. I think it is important and—if I can finish—I applaud the need for the conciliation process to be genuinely inquisitorial. I believe it is important to empower our conciliation officers, as has been described in the Workers' Compensation and Injury Management Bill, to gather as much information as they can without having to be mindful of the rules of evidence and all the usual legalistic approaches to try to bring a matter to a genuine conciliation. I do not believe that the member and I are at odds on that. It is very important.

Hon Max Trenorden: I just want to make the point —

Hon ALISON XAMON: I have limited time in which to speak. I am one of the only members in this place who does, so if the member does not mind, I will not take his interjections.

Of significance to insurers and employers, proposed section 182K empowers conciliation officers to direct an employer to pay a worker weekly payments and/or statutory benefits when they consider it reasonable to expect that the resolution or determination of the dispute will result in compensation becoming payable. Weekly payments cannot exceed 12 weeks or five per cent of this prescribed amount for statutory benefits. I note that under the current system such interim orders can be suspended, reduced or revoked. It is good that this power has been incorporated for conciliation officers. However, I express some concern about the way in which the interim orders may be made, particularly because they do not have to be made in writing, which means they could be difficult to review. However, I understand that the intent of the orders would ordinarily be issued only when, in the opinion of the conciliator, it is likely that future payments would be either stopped or reduced.

With the consent of the parties to a dispute, a conciliation officer can make finalising orders setting out the matters that have been agreed to during conciliation. I note that the officer has to be satisfied that the consent has been given freely and that the terms of the orders were understood by all parties involved. The conciliation process is complete when the parties have reached agreement on all matters in dispute, when the conciliation officer believes that there is minimal chance of an agreement being reached or when the time limit for conciliation under the rules has expired. The parties are unable to appeal the conciliation officer's decision, although a decision can be varied or revoked by an arbitrator as part of the arbitration process. Just like arbitrators in the current system, conciliation officers are not bound by the rules of evidence, as I have already said, and they can use any means they think fit to be informed by that matter. They are being given wide discretion to conduct all or part of the conciliation process.

In regard to the amendments to the arbitration process, in a perfect world arbitration would never be needed and conciliation would always resolve the dispute. It is certainly anticipated that conciliation will resolve the majority of matters that come to WorkCover. But the Workers' Compensation and Injury Management

Amendment Bill seeks to ensure that where that does not happen, the conciliation and arbitration arms of the dispute resolution system will be very much separate and distinct. I think this is a significant improvement. Section 185 of the act will be amended to include the words —

The arbitrator is not to attempt to resolve any matter in dispute by conciliation.

This applies even when there has been no conciliation because the director will have already issued a certificate under section 182H and, effectively cut that process short or even out. As I say, it is a very important reform. It distinguishes between the informal nature of the conciliation process as opposed to the judicial nature of arbitration, and removes the risk that issues raised or concessions given in good faith throughout the conciliation process can potentially prejudice the arbitration process. Clause 12 of the bill deletes part XII of the act, thereby removing the process of applying for interim and minor orders for payments or benefits from the arbitration system. This power will now rest with conciliation officers. The arbitration service will consist of a registrar, who must be a legal practitioner; arbitrators, who are legal practitioners; and officers of WorkCover WA. Once an application for arbitration has been accepted, the registrar will allocate the matter to an arbitrator for determination. Amendments will provide arbitrators with the discretion to allow matters not included in an application or claim to be raised and considered during arbitration. Arbitrators can limit matters raised in this way with a view to preserving the principles of natural justice and procedural fairness. They can also vary or revoke a decision previously made or make further decisions when new information becomes available, which in their opinion justifies reconsideration of the matter. I note that, generally, the decisions of arbitrators are not subject to appeal and such a decision or anything done by an arbitrator under the act in coming to a decision is not subject to judicial review. However, section 247 will be amended to allow appeals to the District Court from a decision of arbitrators involving questions of law only.

I will mention my amendment here. I have an amendment to this bill on the supplementary notice paper. My amendment does not seek a review of the entire bill; it seeks to only review the new dispute resolution processes within the bill. It is an amendment to incorporate a statutory review after three years of the new conciliation and arbitration processes. I chose three years because, realistically, with a new regime such as this we need a good amount of time to bed down the processes and get a very clear picture of how well the new processes are working.

I note that there seems to be a shared understanding of what people hope to achieve with this new dispute resolution process. People want to ensure that decisions are timely and are fair and are not overly legalistic and hence expensive, particularly early in the process. People want to make sure that the processes can operate according to the principles of natural justice and the like. It seems that there is a shared understanding of that, but, as I said when I began speaking, this is about the fourth time we have tried to get this right. Dispute resolution has been a notoriously difficult area to get right. I hope that we will have a very serious review of how this provision operates, particularly to ensure that what we are intending and hoping will happen with the dispute resolution process, is happening in practice. That is the nature of my amendment. It does not seek to review the entire bill; it seeks to review the particular provisions around the new dispute resolution process because it is new, because it is important and because it is a big deal and in three years' time it will ensure that there is a statutory review to see that it is operating the way I think we all hope it will operate.

There are also some other changes. There are changes to the claims procedure for insured employers. Regardless of whether indemnity will be granted, the amending provision extends the time within which the employer must lodge a claim with its insurer from three to five working days. I note that a \$1 000 fine will be introduced for breaches of this provision. There has been some concern about the extension of time from three to five days. However, there is also an acknowledgement that the introduction of a fine means that it is probably a fair trade-off overall. I make the point that fines are useful only if they are enforced. WorkCover does not have a terrific record of enforcing and pursuing fines. I hope that it is noted that extending this time frame from three to five days is a trade-off with a fine, but it needs to be enforced if this is breached.

The words “as soon as practicable” will be removed from section 57A(7) to provide workers with more certainty about when they will receive the first of their weekly payments. Instead, employers will have to make the first of the weekly payments within 14 days following receipt of notification from the insurer that a claim has been accepted or an order of the arbitrator for the commencement of payments. A fine of \$2 000 will be introduced for noncompliance with the new time frame. The same obligation will also extend to self-insured employees. Again, this is a very important provision for workers and, again, I hope that it means that if there is a breach, those fines will be pursued.

I turn to redemption agreements. Amendments to section 67 make it clear that a worker's entitlement to compensation ceases on the date an order is made by an arbitrator or an agreement to redeem the claim is entered into under this section. Under new section 67(7), payments to be made by the employer to the worker under a redemption agreement must be made within 14 days of the registration of the agreement and a \$2 000 fine will

be imposed for failing to make payments within the required time. Again, that is an important improvement because it is important that we do not have any unnecessary delays for people who need to pay mortgages, bills and medical costs and be able to afford to eat.

Under the proposed amendments, unless the claim for compensation was fraudulent or made without proper justification, a worker who receives payments of compensation or expenses in accordance with the order of an arbitrator but was not lawfully entitled to do so is no longer liable to refund such payments. I think that is a fair arrangement. People who are fraudulent with the system are increasingly rare. It is a very difficult system to navigate and not one that people would ordinarily take lightly. I am not a fan of people who decide to fraudulently claim workers' compensation, because that serves to undermine the legitimate claims of workers who are injured. I am not a fan of people who decide to try to abuse the system.

With the commencement of common law proceedings under the amendments, a worker's right to commence common law proceedings would be subject only to the three-year limitation period for personal injury actions under the Limitation Act and workers are still required to register an election to pursue common law damages with the director in accordance with the current provision.

With certificates of impairment, amendments will enable a valid certificate of degree of impairment to be used for any purposes under the act—for example, schedule 2 assessments or common law proceedings. In its current form, section 178 requires a worker who has not lodged a claim within 12 months from the date of occurrence of the injury to demonstrate that the employer has not been prejudiced for the first 12 months, but only when the actual delay may well exceed 12 months. The amendments will correct this anomaly by making the entire period of delay relevant to the question of whether the employer has suffered prejudice.

There is a new definition of "worker".

I also want to make some comments about the pleural plaques issue. There was quite a considerable discussion about the issue of pleural plaques versus diffuse pleural fibrosis. I understand that pleural plaques can be, but are not always, debilitating and that when they are found to be debilitating, the symptoms can be captured by other measures, whereas we know that diffuse pleural fibrosis is always debilitating. I am not a medical practitioner, but, following the issue, it does appear that a more accurate definition has been put into the Workers' Compensation and Injury Management Amendment Bill 2011, so it sounds like that was satisfactorily resolved. However, I think it is important that during the second round it would be useful to reassess other asbestos-based pleural diseases. Again, I would be interested to know from the minister whether it is likely that this is something that will be picked up in the second round of reform.

I note there was also a concern raised in the other place about noise-induced hearing loss, and particularly how that was going to affect workers of a certain age. I share those concerns and note that that goes to the heart of the concerns about a lack of retrospectivity with the bill. The system needs a complete overhaul in relation to declared noisy places. This is not a problem for workers' compensation; I understand it is an issue of occupational safety and health. There are big problems with the way we allow workplaces to assess basic hearing standards, and that is another issue that I am probably going to pick up on at a later date. In conclusion, I am aware, from talking to the minister, that he believes this is a big and important reform. I know that there was a concern that members would have thought that such an important bill as this would be subject to almost extensive debate in committee or the like. But I suppose my comments to the minister would be that this is a bill I have been waiting for, for quite some time. I have actually consulted very widely—it is an area I have some knowledge on—and I would like to reassure the minister that even if there is not extensive debate in the committee system, I think it is probably reflective that this has already gone through extensive consultation.

Hon Simon O'Brien: You're right; this is the sort of thing where you do the work outside the chamber. I think it is generally recognised that that is where you do it all.

Hon ALISON XAMON: Yes, that is right, and that is always the best way to actually put together legislation, particularly when we are talking about an area that I do not think any of us are keen to politicise. We are talking about workers' safety, and I think it is something that we would all agree that we would like to see best practice in. It is a good bill. I share Hon Jon Ford's concerns that we do need to move it, and so I will be sitting down very soon. I am looking forward to what will be in the second stage of reform, and I hope that is undertaken in the same collaborative manner because still a lot needs to be undertaken that would be really welcome and really important.

On that note, I have said pretty much everything I need to say. Again, we will be supporting this legislation, and I am hoping it can go through fairly quickly.

HON NICK GOIRAN (South Metropolitan) [8.23 pm]: I rise this evening to support the second reading of the Workers' Compensation and Injury Management Amendment Bill 2011. In doing so, I note the interesting comments of the members who have spoken previously. In particular, I note the concise comments of Hon Jon

Ford, and the support of the Labor Party for this bill. I have to say that I have some sympathy for his comments, in particular in relation to the need for the bill to progress quickly; in fact, I will probably go a bit further than that and say that the bill is overdue. However, having said that, I do not propose to make my comments quite as concisely as he did, because I think there are a number of matters that need to be raised. I also hold a view, perhaps not held by others in this place, that the majority of the things this bill achieves ought to have been done in 2005 when the major law reform was done. So if, now, some six years later, we take a little bit more time to unpack some of the issues, I hope members will understand that.

As regards the comments by Hon Max Trenorden on behalf of the National Party, I find myself, probably for one of the first times, agreeing with Hon Alison Xamon. I think she quite constructively responded to the, I think, unhelpful and inaccurate statement that lawyers are bad news in workers' compensation. I do not propose to take that issue any further because I think that Hon Alison Xamon's contribution was dead-on in that particular respect. I also think that Hon Alison Xamon helpfully unpacked the issue about why conciliation and arbitration ought to have been separated. To this day I am still somewhat bewildered why in 2005 the decision was made for them not to be separated; it was in fact an amalgamation in the sense that one and the same person can act as a conciliator and the arbitrator. I thought those comments were helpful. Lastly, before I launch into my comments this evening, I have a lot of respect for Hon Max Trenorden, but I am not too sure when the review he referred to, that he was asked to do by the minister, took place. I suspect by the nature of his comments that it was quite some time ago. In his comments he referred —

Hon Max Trenorden: It was before the Boer War!

Hon NICK GOIRAN: That could quite possibly be the case, because Hon Max Trenorden's comments were about the need for lawyers to be involved in workers' compensation only when things get serious, and he said that would be when we dispute the percentage of disability. Of course, the disability regime concluded in 2005, and in the last six years we have not dealt with the disability regime; we now deal with quite a different regime, which is the impairment regime. Since 2005 it would no longer be fair to say that there is serious dispute about the percentage of impairment. In fact, since 2005 the system has been made very concise and straightforward and there is in fact limited opportunity for dispute in that particular area. When we talk about lawyers being involved in workers' compensation, percentage of impairment is the least of the issues that ought to be of concern.

Having said that, let me make a few remarks this evening, as I support the second reading of this bill. In doing so I want to make some remarks about areas for future law reform, because, as the minister will be aware, there is a commitment by the current government to enact phase 2 of this law reform process; therefore, tonight is a good opportunity to get some of my remarks on the record about what that future reform might look like or at the very least what ought to be considered. I think it is necessary to understand the current workings of the Workers' Compensation and Injury Management Act. I do not propose to repeat any of the comprehensive comments of Hon Alison Xamon, but I think we need to consider the matter in some historical context. Before I give the minister a heart attack with my introductory comments, let me say that they will be brief.

According to my notes, workers' compensation schemes commenced around 1900, the first being in South Australia and then in Western Australia, and they were modelled at the time on legislation in the United Kingdom. Initially, this compensation scheme covered a confined group of workers in industries that were considered dangerous. Over time, Australian legislation generally has been broadened in both its coverage and the benefits it provides. As we search for the ideal scheme, one suitable or perhaps more appropriately acceptable to all stakeholders, there is an ongoing attempt to balance those competing interests of social responsibility to compensate injured workers and the costs of the scheme to the community. In Western Australia, as some members have made note of this evening, we have seen substantial change to workers' compensation legislation over the last 30 years. That has left us arriving at the scheme we have operating today. Perhaps the most significant change has been the level of restrictions placed on the common law rights of workers without any significant corresponding increase in statutory benefits. At this time I am reminded of a key fundamental principle that we ought to bear in mind when we consider this legislation. It is best enunciated by the High Court of Australia in *Bird v The Commonwealth* (1988) 165 Commonwealth Law Reports 1, and more recently repeated by Justice Miller of the Supreme Court of Western Australia in *Re Monger; Ex Parte Ivey* (1999) Western Australian Supreme Court 250. The comments by His Honour were, according to my notes, as follows —

As was pointed out by counsel for the applicant, workers compensation legislation is remedial in its character and should be construed beneficially. I respectfully adopt the passage of Deane and Gaudron JJ.

In November 2005 the changes that were implemented were said to be shaped on the New South Wales model. In my view, they have had mixed success, prompting the need for a further review of the legislation by the

present government, which is being undertaken as I speak. We must keep the abovementioned principles foremost in our mind during this review.

In 2007, as you would be aware, Mr Deputy President, the then Minister for Commerce, Hon Troy Buswell, commissioned a review of the workers' compensation legislation and a stakeholders group was formed to perform this task. Its report to Minister Buswell consisted of 66 recommendations. In April 2010 Minister Buswell announced that all recommendations, with some slight variations, would be adopted but that their implementation would be in a two-stage process. The first stage would see the following recommendations implemented: firstly, the age limit of 65 years would be abolished; secondly, the general fund would provide for common law damages claims for injured workers of uninsured employers; and, thirdly, there would be provision for WorkCover WA to implement a streamlined conciliation and arbitration scheme. The second stage was, as I understand it, to involve a more comprehensive redrafting of the legislation, taking into consideration the remaining recommendations. No doubt the minister will correct me if I am wrong. A further matter that has since been added to the above is the abolition of the 30-day period a worker has to commence common law proceedings after electing to do so, leaving the worker the balance of the three years provided by the Limitation Act 2005. I propose to address this matter a little later.

In my view, the age limit of 65 represents a barrier to workers choosing to work beyond that age as they currently do not receive appropriate insurance cover. Its abolition by this government is really long overdue and an obvious change, and I congratulate the government for it. Any injured worker not appropriately compensated is, again in my view, a lamentable situation. I am pleased to see that the coverage by the general fund will be extended to include common law damages. Again, I congratulate the government for this overdue amendment.

I will not comment further at this time on the role of WorkCover WA, suffice to say that I welcome any changes to the legislation that will see the scheme function more efficiently and effectively. The change to the limitation period in the Workers' Compensation and Injury Management Act 1981 simply allows injured workers the same period—that is, three years—to claim common law damages as provided to those people injured in road accidents and public places and through medical negligence. These four amendments that I have referred to are to be commended but they are only a start at best. I applaud the current minister and his two predecessors for these changes.

At this point and also to try to save some time later during the committee stage, I want to make some observations about section 93K(4)(c). The relevant clause in the bill is clause 96. In many respects, this aspect of the bill is to be applauded. It is a significant improvement on what currently exists. For members who might be interested, the current provision, section 93K(4), states —

Damages in respect of an injury can only be awarded if —

...

(c) court proceedings seeking the damages are commenced within —

(i) the period of 30 days after the Director gives the worker written notice that the Director has registered the election ...

The problem with the current act is that it creates a significant injustice for workers. Essentially, once a worker has received a certificate of impairment of not less than 15 per cent, they are in the position that they can register it at WorkCover. Once that has occurred, they receive a notice from the director of WorkCover and, under the current provisions of the act, the worker must within that period of 30 days issue their writs in the District Court if they want to seek common law damages in circumstances whereby the employer has been negligent. Members might ask: what is the problem with that? The problem is that if the worker misses that 30-day period, not only are they unable to claim their common law damages, but also under the provisions of the act their statutory entitlements are made invalid. Therefore, having already elected to proceed with a common law claim because they have a percentage of impairment greater than 15 per cent but less than 25 per cent, their statutory entitlements immediately cease. Having missed this artificial 30-day period, they find themselves in a situation in which they are entitled to nothing—not one cent of workers' compensation—despite the fact that they have on the face of it a level of disability greater than 15 per cent and they allege at least that there has been negligence by the employer. Therefore, this particular section really has had no basis and no merit since the day it was enacted. Having said that, it is very pleasing that the government has decided to make an amendment, if we like, through this bill to ensure that that is no longer the case.

I refer to the explanatory memorandum. Although this might be something that we discuss a little further with the minister, it might give him an opportunity to respond to this matter when he sums up. The explanatory memorandum with respect to clause 96, "Section 93K amended", states —

This clause abolishes the period of 30 days that a worker has to commence court proceedings after the Director gives to a worker notice of the registration of the worker's election to pursue common law damages.

In my view, so far so good; however, the following sentence causes me great concern and will ultimately lead me in due course to move the amendment that I have put on the supplementary notice paper. The explanatory memorandum continues —

The only limit that will now apply to the commencement of common law proceedings is that stipulated by the *Limitations Act 2005*.

On any reading, that would suggest that the period is three years. As I mentioned earlier, that would be consistent with someone who is injured in a motor vehicle accident or as a result of negligence by a doctor, or who has some other negligence claim. In other words, all negligence claims would have a three-year limitation period as per the 2005 act. However, the wording proposed in clause 96 of the bill will not achieve that. The wording as it currently stands would not give a genuine three-year period. Again, members might ask: why is that? That is the case because of the proviso in the wording at the moment that there must be receipt by the worker of a written notice from the director that their election has been registered. What if the worker has not received that written notice from the director? In other words, what if there is some delay at WorkCover, the agency that is responsible for administering this act? Would that still give the worker a three-year period in which to commence common law proceedings? As I said, the explanatory memorandum states that that is the only limit that will apply. Clearly, if the worker has not received that notice from WorkCover, it cannot be the only limit. That creates, in my view, an injustice. I have mentioned this to the minister on more than one occasion, but I believe that although the current wording in the bill is a significant, welcomed and much improved situation than the one that currently exists—the intolerable situation that currently exists—nevertheless, if we want to get this right, there needs to be an amendment to the bill. As I say, we might explore that a little further at a later stage, but I think that it is helpful to get those comments on the record for the benefit of the minister.

As I mentioned earlier, one of the opportunities afforded by this evening's debate is to get on the record some comments on what the future law reform might look like, or at least the aspects that ought to be considered. Members might be aware that the act has been amended to such an extent over time that a complete overhaul is now warranted and necessary. If there was any doubt about that, perhaps the 66 recommendations to which I referred earlier are a clear indication. It has been widely acknowledged by the stakeholders that the legislative reforms since 1981—of course some 30 years ago—have seen the act grow to a complex and rather unworkable size. I have a copy of the blue bill, and it is fairly monstrous in size to say the least. When the legislation first came into place, it was some 175 sections, or 155 pages—quite large in and of itself. However, the present document consists of 375 sections and 419 pages. So at the very least I would agree with the comment of Hon Max Trenorden earlier this evening that the system has become very complex indeed.

Hon Max Trenorden: It is nice that you agree with something I have said!

Hon NICK GOIRAN: It is my understanding that the second stage of this law reform process is not intended to be a complete revision of the legislation. But, as I see it, this is an opportunity for our government to implement effective workers' compensation law reform that no previous government has managed to achieve.

As I mentioned earlier, New South Wales was chosen as the model for our current scheme. In my view, that begs the question: why was the Queensland scheme not chosen as the model? It is my understanding that the Queensland scheme has been a success story for quite some time, with Queensland boasting that it is the only state in which premiums have been the lowest, the fund is the healthiest, and a worker retains the unrestricted right to pursue common law damages. Of course one notable, fundamental difference between our scheme and Queensland's scheme is that our scheme includes private insurers, and Queensland's scheme has only one insurer, the government insurer. The absence of profit margins and the additional expenses of having multiple insurers I suspect might have a bearing on the viability of our scheme. So that people do not take my comments out of context, I am not necessarily supporting a change to the Queensland model. But what I do say is that we should look very carefully at all the schemes in Australia and endeavour to import the best from each of them to form our own scheme, with the aim of making our scheme the benchmark scheme in Australia.

When looking at some of the specific areas that need addressing with our current legislation, the following four areas come to mind: firstly, the amount of weekly payments available to a worker; secondly, the amount of statutory benefits available to a worker; thirdly, vocational rehabilitation; and, lastly, specialised retraining programs. In the time I have remaining, I will just touch on those four areas. Firstly, with respect to weekly payments, the Western Australian scheme has available \$190 701, being the current prescribed amount, and this is able to be extended by a further \$143 025.75, if an injured worker is unable to return to the workforce in any capacity, when those initial moneys are exhausted. Applying the current maximum weekly rate of compensation,

which members may be aware is \$2 156.60, we can see that the prescribed amount would be exhausted in less than two years. Of course, a worker who is able to obtain that further extension that I have referred to, on the basis that they will never be able to work again, would exhaust the amount in just over three years. Accordingly, workers earning well in excess of \$2 156.60 a week—I think members would agree that many workers are in that category—are severely penalised by the current scheme. There is a need to increase both the prescribed amount and the maximum weekly rate to properly compensate workers.

Moving to the second area, statutory benefits, I note that the scheme provides the initial amount of \$55 210, with extensions available of \$50 000 and a further \$250 000. However, the second extension automatically extinguishes the common law rights of a worker. Although I have no concern about the amounts available for statutory benefits, as they appear adequate, it would be simpler to increase the initial amount by \$50 000 and require only one extension. Further, given that the most seriously injured are likely to require the extension of the statutory benefits, it follows that they may be the most likely to have a claim for common law damages. Extinguishing their common law rights in such circumstances, in my view, is unacceptable and should be abolished.

Moving to the third area, vocational rehabilitation, I note the following: under the scheme there is a prescribed amount of \$13 349, which is made available to the registered provider appointed to the injured worker's case. There is no provision for an extension once this amount is exhausted, whether or not the worker has returned to work. I would like to see this money being paid from the prescribed amount for statutory allowances, as they are simply registered providers' fees and have nothing to do with the reskilling and retraining of the injured worker. Just to digress for a moment, if Hon Max Trenorden is concerned about any stakeholder taking too much out of the system that they might not be entitled to, I would suggest that the first place to look is those in charge of vocational rehabilitation.

I move to the fourth area. Specialised retraining programs were introduced, interestingly, in November 2005. Much fanfare, I would say, was made of that at the time. The scheme currently provides \$143 026 as the prescribed amount. In theory, of course, I am sure members would agree, this specialised retraining program sounds like and should be the ideal program for getting an injured worker retrained for an alternative occupation should he or she be unable to return to his or her pre-accident employment. However, in practice it just does not happen, as the hurdles to qualify are largely insurmountable. In brief, to qualify, a worker must do the following: firstly, agree or have determined that his or her degree of permanent whole-person impairment is between 10 and 14 per cent; and, secondly, agree or have determined that he or she satisfies the retraining criteria. One might ask: what are the retraining criteria? It means that the worker's return-to-work program has been unsuccessful; the worker has the capacity for retraining and it is a viable option; technical or tertiary study or training appears to be the only course that will enable the worker to return to work; and it is reasonable to expect that it will be successful having regard to the worker's existing qualifications, experience and the labour market.

It may be of interest to note it has been my experience that no worker qualifies for the specialised retraining program. The obvious impediment, in my view, is the whole-person impairment level. I believe this should be removed so that any worker who does not elect for common law damages may qualify for a specialised retraining program if they satisfy the retraining criteria.

In making some final comments, I want to make some comments about the restriction of common law damages. At present, generally a worker is subject to a time line of 12 months from the date he or she submits a claim to his or her employer. This is known as the termination date. If the worker does not obtain an assessment of at least 15 per cent whole-person impairment or apply for an extension of the termination date, the worker's common law rights are extinguished, notwithstanding that there is a year or two remaining before the three-year limitation period expires. A worker whose impairment level is between 15 and 24 per cent and who elects for common law sees their statutory allowances cease immediately and their weekly payments scaled down and cease after six months. The current cap on common law damages for these workers is \$400 475, and this includes all compensation paid by the insurer up to the time of election. A worker whose impairment level is above 25 per cent is entitled to continue to receive their full workers' compensation entitlements, as well as uncapped common law damages.

When the scheme changed from disability to impairment in 2005, which was a critical and significant change, it adopted the fifth edition of the American *Guides to the Evaluation of Permanent Impairment*, which are known as "the guides", and, at the same time, excluded the worker from including in his or her whole-person impairment secondary injuries such as psychological and/or sexual dysfunction. The reason for this was clear: these secondary injuries were often the difference in workers reaching the necessary level of disability to qualify for a common law claim in the previous scheme. By removing them, it was intended that very few workers would qualify under the impairment scheme, which I understand has been the case.

At this stage, I think it is worth noting two important paragraphs contained in the guides. According to my notes, the first reads as follows —

*The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities common to most people. Work is **not** included in the clinical judgment for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is highly individualized making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with such other factors as the worker's age, education, and prior work experience to determine the extent of work disability.*

The second paragraph reads as follows —

*As a result, impairment ratings are **not** intended for use as direct determinations of work disability. When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment.*

Probably the most common work injury is the back injury—injury involving the lumbar spine. It is of significance to me that the table I have referred to in the guides for the lumbar spine has no assessment criteria for whole-person impairment between 14 and 19 per cent. This effectively means that workers with lumbar spine injuries simply cannot achieve the 15 per cent level. Their entry level is 19 per cent, so the majority of workers with such injuries would be excluded from having any common law claim. Interestingly, Mr Deputy President, you may be aware of a recent Federal Court decision in *Comcare v Broadhurst* [2011] FCAFC 39. It is on point in that the Comcare guide was found to be defective, containing assessments for the spine of eight per cent and 13 per cent but nothing for 10 per cent, which is the minimum level at which compensation for the permanent impairment of a worker is paid in that jurisdiction. The court found that the table could not be used. I believe that the principles of that case are applicable to the guides used in our scheme for lumbar spine injuries and are open to challenge. It is unsatisfactory to have adopted these guides for our workers' compensation legislation when the very document does not, by its own admission, consider work when assessing impairment and states that it is not to be used directly for that purpose. In my view, it is reprehensible to use the guides' assessment tables to determine a worker's common law right when they are blatantly flawed for such purpose.

In summary, we must consider whether, in the pursuit of common law restrictions, we have simply gone too far. A return to the basics is required, whereby the injured worker must be able to demonstrate to the satisfaction of the court the negligence of his or her employer before any common law damages can be awarded. Once awarded, the damages are to be reduced by any workers' compensation paid by the insurer. If there are to be restrictions applied, these can be in the form of caps on the damages awarded, as is done with motor vehicle accident claims.

In 2002, Mr Robert Guthrie, who is now one of the assessors for the criminal injury compensation scheme, spoke at the Australian Plaintiff Lawyers Association Western Australian state conference. According to my notes, he stated —

Western Australia is possibly the only state in Australia which has a declining costs picture. This shows the effectiveness of the common law thresholds currently in place. It also suggests that the thresholds have been overly effective and the declining costs of the system represent real reductions in workers rights.

Nine years on, I suspect that the position is similar, particularly in respect of workers' rights.

To conclude, I want to talk about the rehabilitation of workers. It is helpful to consider section 3 of the Workers' Compensation and Injury Management Act, the purposes of the act, which states in paragraph (b) —

to make provision for the management of worker's injuries in a manner that is directed at enabling injured workers to return to work; ...

Section 3(ba) reads, in part —

to make provision for specialised retraining programs for certain injured workers; ...

Statistically, the most successful rehabilitation occurs in returning an injured worker back to work with their pre-accident employer. It is the remaining workers who require our focus. The current scheme offers very little practical support in reskilling and retraining a worker for an alternative vocational pathway. As previously mentioned, the act currently provides a prescribed amount of \$13 349 for vocational rehabilitation for each injured worker; but, upon closer analysis, those moneys are provided for the fees of the registered vocational provider, and nothing goes towards the worker's retraining or reskilling.

Upon recent inquiry with WorkCover WA as to the number of workers who have managed to access one of the specialised retraining programs since their inception in 2005, I understand that not one worker has qualified in the six years to date. Having practised in this area of law for some time, I am familiar with the prejudice and bias that often silently confronts injured or disabled people in our community when they are seeking suitable employment. I am also acutely aware of the limited number of employers who will freely participate in return-to-work programs to enable an injured or disabled worker to test his or her work capacity when their normal career path is no longer an option.

I believe the solution lies in formulating legislation that makes the provision of certain placements of injured or disabled workers compulsory. In other words, an employer with a certain level of workforce would be obliged to provide a placement or several placements. The placements would initially be probationary and convert to full or part-time employment upon successful completion. The workers' compensation insurer would fund the probationary period so that the host employer has an incentive and is not burdened with the initial cost.

This, coupled with a fully accessible specialised retraining program, would go a long way towards achieving the desired goal of meaningful rehabilitation of injured or disabled workers. It should be borne in mind that a failure to adequately compensate and/or rehabilitate an injured worker means that the legislation has failed, and this ultimately burdens taxpayers when that worker is left to rely on Centrelink and Medicare for support.

As I say, I support the second reading of this bill. I leave members with a quote from the American philosopher John Dewey who, according to my notes, said —

To find out what one is fitted to do, and to secure an opportunity to do it, is the key to happiness.

HON SIMON O'BRIEN (South Metropolitan — Minister for Commerce) [9.00 pm] — in reply: I thank members for their contributions to the debate on the very important Workers' Compensation and Injury Management Amendment Bill 2011. I note that all members who have spoken have indicated their support for the bill. They will be happy to know that I too support it. Hopefully that will make it unanimous! I have listened very carefully to what was said in the chamber and outside this place. In addition, I have had numerous discussions about and read voluminous quantities of the available literature on not only this review, but also other aspects of workers' compensation and matters relating to this bill. I agree with the members who observed that these are important matters that are in a constant state of evolution and impact very closely and personally on people's lives. For all those reasons and more it is incumbent on us to apply ourselves diligently to scrutinising the rules and systems that apply to workers' compensation in Western Australia, to not be scared to consider new ideas, to challenge our own established norms and to be prepared to improve the system when we can. That is certainly the case with the bill before us now.

I am rather proud to be the minister with carriage of this bill. It gives me a great deal of satisfaction that I was able to take it to cabinet, my party room and ultimately to Parliament. I am keenly anticipating this bill becoming a statute of Western Australia. I am very confident that the benefits that will flow from it will add greatly to the quality of life of Western Australians now and in the future. I agree with the sentiments Hon Jon Ford raised when he indicated the Australian Labor Party's support for the bill. He said that he wants to see it proceed quickly, and so do I. There is a great deal of work to be done beyond our proceedings today—I hope we finish this today—and beyond getting royal assent for the bill. Contained in this bill is a large body of administrative machinery that must be set up. It will take some time to do that, and until we do that we will not see the benefits of the legislation that we have all been welcoming in our remarks tonight. I want to progress this legislation and will have to balance my desire to expedite this bill with the need to also acknowledge the very serious contributions that have been made. I thank Hon Jon Ford for his very firm support for the bill. I support his observations that the pleural plaques issue has been dealt with and, for now, resolved satisfactorily. I observed proceedings in the other place, as one does, with varying emotions from a certain level of horror to uncertainty and everything in between! I thought that the participants in that debate actually did a good job of examining this issue. I authorised some amendments to be moved in that place, which I believe made this bill a better bill from the moment it came before this chamber. That is part of the process that I referred to earlier in my remarks and also by interjection to Hon Alison Xamon on the good work that was done essentially before the bill got to the chamber. We are here to make sure that it is properly carried into law.

Hon Alison Xamon: That is unusual. Usually the best work occurs in this place.

Hon SIMON O'BRIEN: That is it. Members of the other place have overachieved on this occasion, and good on them for doing that! Joking aside, I observed the contributions made by a number of Assembly members—generally very experienced members—as they worked through some of the difficult issues, and noted that it was always done with the proposition of getting it right and getting a quality product. I think we have that; I think the product we now have, which includes placing the condition of diffuse pleural fibrosis into section 33 of the principal act, is a very significant achievement, particularly for people who are suffering that disease due to a

work-related cause. I think it is a very big improvement on what was previously done by the insertion into schedule 3 of the same condition but known by another name. That is an improvement and I hope everyone welcomes that progress.

I also indicate—I am straying now into responding to some of the comments advanced by Hon Alison Xamon—that, yes, there is a need now to do a little more work on some similar diseases that may accompany the presence of pleural plaques, which were identified in another place. The homework still has to be done on that; we cannot do that sort of thing on the floor of the house. It is not the sort of thing that should prevail because of how many votes we have; it is a very significant thing for a condition to be inserted into section 33 of the act. We are sure that diffuse pleural fibrosis should be there, and that is what we are doing. But we will examine a number of other conditions and I give the undertaking that that will happen because, happily, we intend to bring a second bill before the house in due course and that will obviously give us an opportunity to develop those themes. A number of others have been raised in the course of this debate and I will touch on those in concluding the second reading debate.

I thank Hon Jon Ford and the Australian Labor Party for their support for this bill. I thank Hon Max Trenorden, who gave his support for the bill and also a perspective that was valuable from a historical context. We need the benefit of corporate memory in the Parliament and Hon Max Trenorden was able to remind us with a few cases about some of the things that have happened before. I think the annual bunfight over workers' compensation rates and so on might have been news to a number of members. He also made the observation that we have come a long way. We have made positive, worthwhile progress since then and we want to continue to progress in the right direction as our system for workers' compensation continues to mature and serve Western Australia better.

Hon Max Trenorden went back to the start and I think referred to the relief of Mafeking! He certainly went back in history a bit and I thank him for that. I agree with his general observations that the system is running well and that, while we always need to improve, we do not want to upset it. I will leave it for others to comment on his comments about lawyers.

I again thank Hon Alison Xamon for her contribution and for her support for the bill. She made some very pertinent comments about age restrictions and baby boomers—a funny thing to call them at this stage of life—and about life expectancy at this time and so on. Things have changed whereby the current law says that when we hit 64 years old, the maximum we can get is a year's worth of workers' compensation. We do not need that sort of law any more. That does not meet our needs and that is why we are changing it. We are not mucking around with it; we are getting rid of that constraint. There might have been a reason for that constraint in the past. We can all tell stories about an older generation and how our dads used to work until they were 65, compulsorily retire and then die before they were 66 or 67. It was a different thing. Some did not quite make that. Today is 17 August 2011. My father died on 17 August 1971, 40 years ago today, in his sixty-fifth year. He did not get to retirement age. I can tell members that he was worn out and he was tired, and obviously he was sick when he passed away. That shows members that times have changed in terms of life expectancies and work expectations, because that is a pattern that has now rather changed.

Hon Robyn McSweeney: Seniors are very appreciative of the change.

Hon SIMON O'BRIEN: Indeed. We have different perspectives about what age and different ages mean. In all things we, as a society, promote our value of life for everybody in all its stages.

Hon Alison Xamon: My mother is 64 years old and if I called her a senior, I think she would be very unhappy.

Hon SIMON O'BRIEN: It is a matter of perspective, but I suggest that Hon Alison Xamon does not call her mother a senior, because I know that for a lot of members—although not for me—64 years old does not sound very old at all.

Hon Robyn McSweeney: Are you looking at me?

Hon SIMON O'BRIEN: I was not looking at anybody, and certainly not at Hon Robyn McSweeney!

Hon Alison Xamon made reference to a number of things. We have touched on pleural plaques. The member indicated that there might be some opportunity to revisit some outstanding issues in the second bill. We are not simply starting the second bill and doing another complete review of workers' comp, but it is fortunate that we have another bill in the pipeline that seeks to rewrite our legislation, and that will provide us with a ready-made opportunity to do some more finetuning. I indicate to members that the question of finetuning or further refinement of the legislation is something that is very much alive and a work-in-progress; it always is. I do not want to go into too much now because the bill before us deals with the matters that are pertinent for tonight, but I give Hon Alison Xamon that undertaking. I will give the member another undertaking soon about the sorts of things that I am proposing to do in the near future.

Hon Nick Goiran gave us the benefit of some very significant experience and knowledge of this legislation. One of the benefits of this Parliament is that we are not all from one type of background. It is important that Parliament reflects the wider experience of society. We need our butchers, bakers and candlestick makers, and farmers and trade union officials and others. Like Hon Alison Xamon, who gave us the benefit of her extensive experience in these matters, Hon Nick Goiran also provided a memorable speech about the history of workers' compensation. His speech was very knowledgeable and I appreciated hearing it. Hon Nick Goiran emphasised some areas that he is particularly interested in and indicated where he will be able to take a proactive role in future considerations about questions on the balance between statutory and common law matters in workers' compensation, for example. He also referred to the need for future reforms and for our system to be dynamic. Among other things, he made a plea for us to consider importing some of the best features of other states' systems. I agree that we should never be shy about looking beyond what we do and practise for better ways to do the tasks that we undertake.

At the same time, I think there are some other jurisdictions that can learn a bit from us. Just now I indicated that I was very pleased to be the minister in charge of this process of reform at this time as the Workers' Compensation and Injury Management Amendment Bill 2011 comes before the house, and I am. I am also very pleased with WorkCover WA, which is one of the many agencies I have the privilege to work with in my portfolios. I have seen a lot of agencies now as a minister, and I am very impressed with the way WorkCover goes about it. There are all sorts of agencies, but there are certain characteristics that tell us when one is working right. It is not only about the volume of correspondence or complaints, or absence thereof, it gets, but also about the way that it handles all those matters. It is about the mood that is apparent when I go and visit the staff in an agency and integrate with them. It is about the nature of the relationship, in this case of WorkCover, with the board, and with its senior and line management. I have found all of those things in its management, with Michelle Reynolds, who does a great job, as the chief executive officer there, and Greg Joyce, who many members would know, as the chairman of the board. Again, it is a very proactive and a very competent board. I am very pleased with this agency and the work it does, and I am sure that the expectations that have been voiced by members in discussing, at various lengths, the Western Australian workers' compensation system, can all be greatly reassured about the people we have delivering these services on our behalf in accordance with the statutes produced in this place. I want to pay that public compliment.

There are a couple of amendments on the supplementary notice paper; therefore, we will, I think, be going into the committee stage, so I will refer to those only briefly. I indicate that the government will not be supporting the amendments, and I will explain why if the amendments are moved.

In relation to a review period, though, I want to make it absolutely clear—I give this undertaking to the house—that we will be reviewing this matter. Hon Alison Xamon was stressing, I think, that she wanted the review to apply not to the whole act, but to the dispute resolution process. Let me tell the member that I will be at the head of the queue, as will my board and my agency, to make sure that this legislation is kept under constant review. There will be the most vigorous of review with the involvement of a range of stakeholders; however, I do not think it is necessary for that to be enshrined in statute. I give the member the undertaking that that will be happening anyway. Indeed, Hon Jon Ford, to make it bipartisan, has also indicated that such a review would be conducted by a future Labor government. I think the expression he used was “after 2013”, and I am glad he did not specify how long after 2013! All governments come and go, but there is a bipartisan undertaking, and so the review will occur without the need for an amendment.

From the remarks of Hon Nick Goiran, I am not sure whether he wishes to proceed with his amendment; if he does, I will deal with that in the committee stage. For now I commend the second reading to the house, and I thank members for their support.

Question put and passed.

Bill read a second time.

Committee

The Chairman of Committees (Hon Matt Benson-Lidholm) in the chair; Hon Simon O'Brien (Minister for Commerce) in charge of the bill.

Clause 1: Short title —

Hon NICK GOIRAN: I just have a couple of questions, because I do not want to delay things. Depending on the answer that I get, I have only two questions to ask at this point. One of the fundamental principles of our workers' compensation system is that when fit, whether partly or fully, a worker is obligated to endeavour to return to their pre-accident employment and an employer is obligated to facilitate that return. Is there anything in the bill that would dilute this fundamental aspect?

Hon SIMON O'BRIEN: No.

Hon NICK GOIRAN: My second question then is: does the minister agree that this is a fundamental principle that is at the heart of our system?

Hon SIMON O'BRIEN: I will not risk the Chairman's displeasure by straying into the area of offering opinion, but I point out to the house that in section 3 of the act we have the purposes of the act. The honourable member referred to these basic principles in his contribution to the second reading debate. A re-wording of section 3 is proposed in the bill, but specifically, one of the purposes of this legislation is stated under proposed section 3(a) —

to establish a workers' compensation scheme for Western Australia dealing with —

...

- (ii) the management of workers' injuries in a manner directed at enabling injured workers to return to work;

I hope that that reassures the member that that principle is intact.

Clause put and passed.

Clauses 2 to 95 put and passed.

Clause 96: Section 93K amended —

Hon NICK GOIRAN: I have just a few questions, obviously, about this clause, as I foreshadowed in my contribution earlier this evening. The explanatory memorandum that supports this clause, includes the following words —

The only limit that will now apply to the commencement of common law proceedings is that stipulated by the *Limitations Act 2005*.

Does the minister agree that this clause will achieve the outcome stated in the explanatory memorandum?

Hon SIMON O'BRIEN: I have reviewed the text in the explanatory memorandum that relates to clause 96, in particular the second sentence of a two-sentence explanation about the amendment to section 93K. That second sentence that is concerning the honourable member states —

The only limit that will apply to the commencement of common law proceedings is that stipulated by the *Limitations Act 2005*.

I believe that that is technically correct. I do not think it gives rise to any misunderstanding. I think it is clear. The effect of amending section 93K, as set out in this clause, is to get rid of the requirement that an injured worker or their representative must commence court proceedings within 30 days of election of registration. It has already been explained that the review wanted to make the 30-day period a 45-day period and this government said, "No, we are just going to get rid of the period because it is an artificial constraint." When we get rid of that period of 30 days in this case so that there is no period within which people, having achieved registration, have to commence court proceedings, it will mean that the ultimate period that is available to a person is not infinity but the period set out under the *Limitations Act 2005*, which is three years. Even though we are not referring to three years in this bill, we will not refer to it in the act and it is not referred to in the EM, the default limitation in this situation is that which applies under the *Limitations Act 2005*; that is, three years. The three years commences from the time of the injury occurring. It does not mean three years from whenever a registration is made. It could be close to three years, I suppose, but it does not mean that long. It is not the only time frame that works for different parts of this system, either. Just looking at this in isolation, I do not think the EM is misleading and I do not think that any flaw has been introduced into this section by virtue of the proposed amendment.

Hon NICK GOIRAN: The minister mentioned that the purpose of this clause was to remove any artificial constraint. Does he accept that the way the clause is currently worded retains an artificial constraint in the sense that it still requires a worker to receive a written notice from the director of WorkCover confirming that the registration has been received? Does he accept that that is an artificial constraint, which therefore ensures that it is not the case that three years is the only limit that will now apply?

Hon SIMON O'BRIEN: I make it clear to members, particularly those who are weighing this matter in the balance, that I described the 30 days—I am speaking colloquially here; I think people know what we are talking about—as an artificial constraint. I think in conversation I have described it as a pointless exercise. Why not 25 days or 40 days? It is almost arbitrary. There does not seem to be any point. I think it is tragic that someone can be registered and then for some silly reason cannot commence court proceedings inside 30 days. That should not defeat the process. Therefore, we are all in agreement that we should get rid of the 30-day period, and that is what we are going to do. The member's question was: is there not another artificial constraint in section 93K, which the member described? That is not an artificial constraint or a pointless exercise; it is the whole point of

some very significant changes made to this system around 2004. The system was made better about that time and it is working well. That aspect is to introduce the factor of having to make an election and register that election before someone can exercise the option to commence common law court action. That is the whole point. Therefore, it is not a superfluous little detail; it is the whole point of how we have been operating and it is an important point. Although I acknowledge the points that have been made about other reasons why we might seek to amend this particular section, it is such a fundamental part of the current system that I am not prepared to entertain doing away with that aspect of election and registration before taking court action. I hope that I have clarified a number of things starting with the central question that the member asked.

Hon NICK GOIRAN: I acknowledge that the minister says that the registration process is a fundamental aspect that must be retained. Given that the registration process is a fundamental aspect, is it not the case that it is not correct for this place to say that the only limit that will apply is the three-year period? Is it not the case that actually two limits will apply? The first is the requirement to register an election; in fact, the requirement is to not only register an election, but also to receive from the director of WorkCover a notice that registration has been received. That is the first limit. The second limit is to ensure that the person has issued their writ in the District Court within a three-year period. Is it not the case, minister, that there are in fact two limits, not one?

Hon SIMON O'BRIEN: The member is right in the sense that, as I said in my previous remarks, there are a number of time frames for different aspects of our workers' compensation system. There is no doubt about that. The member is asking me to say that it is not quite right to say that we have three years available from the time of registration to starting court action. Yes, the member is right, and that has not been asserted, I do not think, anywhere. It certainly is not contained in the bill and I am not asserting it now. It would be in practice a variable time. It is certainly a lot more generous than what is currently available. It will deal with, I think, just about every conceivable circumstance certainly better than it does now. I do not think that the question the member is pursuing about whether the three-year period is right or wrong or is absolute is the germane question. The point is whether people have to elect and register before they take common law court action. That is a very big change that is contemplated in the amendment and that is the actual question that we have to confront.

Hon NICK GOIRAN: Perhaps just to conclude on this point, would the minister agree with me that, to avoid any confusion whatsoever for any member of this place or any person elsewhere, the second sentence of the explanatory memorandum's reference to clause 96 that we have been discussing might better be expressed with the addition of words so that it would read "Other than the requirement to receive a written notice of registration from the director, the only limit that will now apply to the commencement of common law proceedings is that stipulated by the Limitations Act 2005"? Would that be a better way to express that in the explanatory memorandum?

Hon SIMON O'BRIEN: The member obviously thinks it would be, and it is now on the public record, via *Hansard*. I do not know that there is much more to be gained by further discussion of the nuances of this EM. The EM itself stands. Yes, we could rewrite it in other ways, and people might prefer to rewrite this or any other sentence in the EM differently if they wished. But I do not think that is something that we need turn ourselves to. The question before the chamber is that clause 96 do stand as printed, and perhaps we ought to restrict ourselves to that question, unless, of course, the honourable member wishes to move an amendment, in which case we will deal with that.

Hon NICK GOIRAN: In which case, I will move the amendment standing in my name. I do not propose to speak further to it; I think the discussion has already been full and frank in that respect. I move —

Page 70, lines 19 to 24 — To delete the lines and insert —

Delete section 93K(4)(c) and "and" after it.

Hon SIMON O'BRIEN: I hear where the member is coming from, and respectfully offer the counterpoint that if we accept, as the member outlined earlier, in a hypothetical case, that there might be some minor benefit to be obtained by this amendment—it is highly debatable—we have to balance that against the massive counter argument that by the simple deletion of this paragraph and the word "and", we will actually fundamentally change the system that was put in place in 2004. That is something that has not been reviewed, has not been recommended and has not been consulted about; it turns everything on its head; and it is too much of a leap in the dark. Therefore, with the greatest of respect, and for that reason—not because I am disagreeing with the good work that the member is trying to advocate—I indicate that the government will be opposing this amendment.

Amendment put and negatived.

Clause put and passed.

Clauses 97 to 125 put and passed.

New clause 78A —

Hon ALISON XAMON: I move —

Page 58, after line 15 — To insert —

78A. Review of Part

- (1) The Minister is to carry out a review of the operation and effectiveness of this Part as soon as practicable after the expiry of 3 years from the day on which this Act receives the Royal Assent.
- (2) The Minister is to prepare a report based on the review and, as soon as is practicable, is to cause it to be laid before each House of Parliament.

I have spoken about this in the second reading debate. I am aware that time is of the essence, and I would prefer the inclusion of this amendment.

Hon MAX TRENORDEN: I heard the explanation the minister made earlier but it does not change our view. We will have an opportunity to pursue those sorts of arguments in a corresponding bill.

New clause put and negatived.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Simon O'Brien (Minister for Commerce)**, and passed.