WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2023

Committee

Resumed from an earlier stage of the sitting. The Deputy Chair of Committees (Hon Stephen Pratt) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Committee was interrupted after clause 19 had been agreed to.

Clause 20: Compensation excluded: serious and wilful misconduct —

Hon Dr STEVE THOMAS: Before we were so rudely interrupted by question time, we were just about to ask a couple of quick questions around clause 20 before we get onto the claims process. Clause 20(2) states —

> An employer is not liable for compensation if it is proved before an arbitrator that the worker's injury is attributable to —
>
> (a) voluntary consumption by the worker of alcoholic liquor or of a drug of addiction, or both …

I am resisting the urge to ask a question about cannabis, for the sake of the house. It continues —

> (b) the worker's failure to use protective equipment, clothing …
>
> (c) other serious and wilful misconduct …

I presume that paragraphs (b) and (c) of that definition are based on the assumption that the worker has been instructed to use protective equipment et cetera or directed to follow an instruction, but paragraph (a) refers to the consumption of alcoholic liquor or a drug of addiction. Is there a question mark as to whether the injury can be attributed to the substance or is it merely the fact that the presence of the substance is an exclusion? For example, the driving alcohol limit might be 0.5, but when operating a piece of equipment on a mine site, for example, the exclusion is usually zero. How is the definition of "attributable" measured in the act? I presume it does not change from what currently exists, but will any alcohol or any prohibited drug in the system be sufficient for an assumption of attribution, or will it have to be debated with the arbiter about whether it was causative or not?

Hon MATTHEW SWINBOURN: The mere presence of alcoholic liquor or a drug of addiction does not mean that a person is not entitled to compensation under the scheme. There has to be a causative connection between—I do not want to say illicit because alcoholic liquor is not illicit—the alcoholic liquor or a drug of addiction and the injury that a person has suffered. It is not a strict liability provision, if I can put it that way. Also, the onus is on the employer to establish a causative connection. It is not on the worker to disprove it. An example is someone who had a few drinks on a Friday night. They were work drinks, which were sanctioned by the employer, but the worker subsequently fell down the stairs. They would not have fallen down the stairs other than through the presence of alcohol in their system, or something like that. It is a really rough example. I do not want to be specific because other factors could be involved. For example, if someone had alcohol in their system and they slipped down the stairs because the stairs were covered in detergent, the mere presence of alcohol in their system would have no bearing on the fact that the stairs were not safe and it was a work-related injury. Fundamentally, this provision deals with the fact that the workers compensation scheme is largely a no-fault scheme. Ordinarily when workers contribute to their injuries, they are not precluded from that, but under this section they are excluded for some very specific reasons, including an "alcoholic liquor" or "drug of addiction" that impairs the proper functioning of the workers' faculties.

Hon Dr STEVE THOMAS: It is an interesting concept. A workplace can establish —

Hon Matthew Swinbourn: I don't know whether I said this but there's no difference between the current and the proposed acts.

Hon Dr STEVE THOMAS: No, the parliamentary secretary did not, but I said I thought it was the same. It is still worth exploring a little bit.

Hon Matthew Swinbourn: I'm always happy to talk about your drinking, member.

Hon Dr STEVE THOMAS: The making of legislation under the influence might be questionable.

Hon Matthew Swinbourn: I'm not suggesting anything.

Hon Dr STEVE THOMAS: I am only arguing legislation. I have not actually made any so we need to breath-test you, not me! That is a whole other argument that might have to be introduced in the fullness of time. I suggest we do not go down that path for the moment, parliamentary secretary. I know he is very moderate in his habits.

Back to the point; an employer can establish an alcohol-free workplace. It is interesting that the term is —

Hon Matthew Swinbourn: By way of interjection, it is "alcoholic liquor".

Hon Dr STEVE THOMAS: I would be interested to know the definition because my definition of liquor is probably more of a spirit than other alcohols. Might other alcohols be precluded? I am not sure about the definition.

Hon Darren West: You're wandering into dangerous territory, member.

Hon Dr STEVE THOMAS: Yes, probably. An employer can have a zero-alcohol workplace policy. It is certainly the case that a lot of larger employers apply both drug and alcohol testing to their workforce. They will have a three-strike rule or whatever they have for various roles; I am particularly thinking of the mining industry. There are workplaces where there is an intolerance of alcohol or drugs within a person's system. We could potentially be in a position in which company X has zero tolerance to alcohol in a person's system. It could be a mining company and one of its machine operators has a .07 blood alcohol reading following an accident when they have been driving. It would then be up to the employer to prove that .07 reading was a causative factor in the injury sustained by the worker. Workers compensation could then still apply. I understand that the parliamentary secretary is saying it is a no-fault workers compensation system but, in this case, penalties ultimately apply to an employer because their reputation gets worse and if their payouts are more significant, their insurance premium goes up. Is it the case that it therefore would be possible, and has it happened that employees who have breached their own workplace regulations by having alcohol or prohibited drugs in their system have still been able to claim workers compensation because the employer has not been able to prove it was a causative factor?

Hon MATTHEW SWINBOURN: Before when I mentioned the member's drinking, I was not suggesting he had any issues. I want to make it clear I was not imputing anything on his part.

Hon Dr Steve Thomas: No offence was taken.

Hon MATTHEW SWINBOURN: The key to understanding this provision is that the test is not for the presence of it but whether its presence "impairs the proper functioning of the worker's faculties", which is the phrase used. On whether a worker has made a successful workers compensation claim while having either drugs or alcohol in their system, I do not know the number. Undoubtedly, we could say yes they have when the employer has chosen to not argue against a claim on the basis that they understood that the injury was not as a consequence of the impairment of the proper functioning of the worker's faculties, either as a matter of fact or as a matter of opinion. Alternatively, it would be if they could not satisfy the onus that they would have to satisfy for that to occur. I do not think there is a direct connection in the scheme between a worker on drugs and alcohol and their entitlement to claim. A workplace could have a zero alcohol and drug policy but the existence of such a policy would not impact on the operation of this scheme. For example, it is not the case that if a worker was in breach of that policy, which of course lots of employers and workplaces have, they would be precluded from making a claim because they were in breach of the policy. That might affect their employer's entitlement to discontinue their employment for their misconduct but it would not affect their capacity to make a workers compensation claim because the test is the connection between intoxicating substances and the worker's ability to perform their proper duties.

Hon Dr STEVE THOMAS: I do not think we are that far apart in the discussion. Yes, it is probably the case that workers compensation has occurred. I am interested in the capacity to demonstrate on both sides—from the employer's and the employee's perspective—that what was in their system did or did not contribute to their workplace accident. Is the parliamentary secretary in a position to give us any test cases in which this has been tested? Perhaps the parliamentary secretary might be able to give a commitment to ask the minister's office whether they are aware of any test cases we could examine to see the history of this provision.

Hon MATTHEW SWINBOURN: We do not have access to a test case or leading authority in this particular area. There is not one that stands out. There is case law that goes to onus on the insurer, in place of the employer, to satisfy evidence requirements. Just to give the member some assurance about what might happen in this situation, obviously if someone were under the influence of drugs or alcohol, some injuries would be more affected by that and therefore more indicative that the person was under the influence. Obviously, there are some industries in which that is much more prevalent than others. For example, if a person is working in an office situation and they suffer a psychological or psychiatric injury as a consequence of abuse from patients, the worker's use of drugs or alcohol is not likely to be contemplated or come into it at all because there is no connection between those two things.

Hon Dr Steve Thomas: It might make it easier to deal with.

Hon MATTHEW SWINBOURN: In some workplaces, particularly where people operate heavy plant and machinery—or if they are driving; those sorts of things—obviously those factors can come into it because the ability for drugs and alcohol to impair the worker's ability to perform the job is much greater, and it might be a relevant factor. An example of the process is a worker operating a forklift has a crash that results in them suffering a broken leg; the worker submits a claim and then the insurer typically conducts its own investigation to establish the factual circumstances. The insurer might ask the worker's colleagues: What were the activities of the particular worker? Had they just come back from a long lunch? Were they slurring their words? The insurer might ask about other things that might be indicative of drug and alcohol use. It might be a case that the injury was the result of a traffic accident and the police had collected information, but most of the time employers do not necessarily have the capacity to force workers to submit to drug and alcohol testing in the same way that the police do, so evidence is not always available to say that the worker did have it in their system. Obviously, most places that do drug and

alcohol testing do it at the site as people come on, and require it as a condition to commence their shift and those sorts of things.

Hon Dr Steve Thomas: But it's often random, so it's not comprehensive.

Hon MATTHEW SWINBOURN: It is not always everybody and not all the time, depending on the size of the operation and risk factors involved. There is that sort of thing. But if drug or alcohol use is clearly a factor in a particular situation, the key is to be able to marry up the accident—the actual injury-causing mechanism—and whether drugs and alcohol were in the worker's system and whether the two had a relationship. I do not want to mention cannabis specifically, but, obviously, the presence of tetrahydrocannabinol in someone's system does not necessarily mean that they are impaired because it stays in a person's system for a long time.

Insurers, particularly, make their own judgements on whether it is in their interest to pursue this particular line of inquiry, so a lot of their decision-making is an internal process about how they gather information and whether, by their own standards, it reaches a level of surety that they are prepared to rely on to go to WorkCover WA and say that they are denying a claim on this particular basis. Remember that under the provision at paragraphs (a), (b) and (c), the onus will be on the employer to take the matter to WorkCover to argue their case, so these are exceptions. We are not talking about this becoming a factor for the vast majority of claims, and I think that is appropriate. If we step away from the blame game here, we end up with a seriously injured worker who was excluded from coverage under this system, and somebody who will have to take responsibility for their care. It might be their family. It might be the broader society. They might end up in a range of things. If we think about why we have workers compensation and what we are trying to achieve through the workers compensation system, which is a safety net for workers who are injured at work, rather than as a reward for anything, we want to make the exceptions exceptional, if I can put it that way.

Hon Dr STEVE THOMAS: We are not disagreeing that that is the case. I might just say that if we listen to question time and members' statements in the Legislative Council, we might think that the presence of THC was so beneficial that we could probably leap over mountains and put out fires, but, anyway, that is a whole other argument.

Hon Darren West: Only if you inhale!

Hon Dr STEVE THOMAS: I am not even going to ask Hon Darren West that question, and I certainly will not ask it of the parliamentary secretary with carriage of the bill.

I do not think I have a further question. I just want to make the comment, though, that I accept the position that the government is looking for extraordinary circumstances, but I think that there is potentially a penalty for employers. No-fault insurance for workers injured in the workplace is the intent of what we are trying to put together, but it is not no-fault ultimately if an employer is due to pay compensation, as per the golden clause debated earlier today, through no fault of their own but potentially through the actions of an employee. I suspect it is a very rare event. The parliamentary secretary may not be able to find out how often that occurs, but I think it probably is a relatively rare event. I have been through the circumstance of having an employee who drank regularly on the job, so it is certainly not unknown. It does exist. It potentially has an impact, and I accept our intent, but I think that perhaps this is one of those clauses that in trying to do the best by the greatest number of people, some people will be unfortunately disadvantaged. I think it is incumbent upon the Legislative Council to make sure that we have discussed it and that employers are potentially aware, as opposed to unaware, of that circumstance. I think that that is as far as I need to go with this particular clause.

Clause put and passed.

Clauses 21 to 24 put and passed.

Clause 25: Making claim for compensation —

Hon Dr STEVE THOMAS: We are flying now, parliamentary secretary.

I am just going to ask for a little bit of leeway, parliamentary secretary. Clauses 25 to 35 are about the claims process, so is the parliamentary secretary happy to deal with the claims process together for a bit? I apologise if I brush over a little bit where clauses interact.

Hon Matthew Swinbourn: I'm happy to do that. I think that is subdivision 2. But it is actually for the deputy chair. You'll have to seek his indulgence.

Hon Dr STEVE THOMAS: The deputy chair is a fine fellow, and I am sure he will give us the leeway required to make sure we get the best outcome for the people of Western Australia. In saying so, I have probably cruelled his preselection. I have been working on the parliamentary secretary's chances for a couple of years now, so we will see how we go.

This clause is about the claims process itself. I do not want to bog us down for too long. Let us start with a really simple question: is there a difference between the claims process under the current act and in this bill; and, if there is a difference, can the parliamentary secretary tell us what it is?

Hon MATTHEW SWINBOURN: Fundamentally, it is the same for most parts, except for the new requirement regarding provisional payments.

Hon Dr Steve Thomas: We can come to that in a bit, because that is clause 36 and onwards.

Hon MATTHEW SWINBOURN: Yes. That is in clause 36, but that is part of the claims process. The Leader of the Opposition was asking a global question, so I am happy to leave that part there, but that is part of the claims process, other than the requirements on insurers to make provisional payments when they have pended a claim. I do not think that is the technical term, but I think it is the term that is commonly used. The rest of it is the same scheme that currently exists.

Hon Dr STEVE THOMAS: I am focused on subdivision 2, "Claim process", not subdivision 3, "Provisional payments". We will get to that, but I wish to focus on the claim payments component. I think what the parliamentary secretary has just told us is that the claim process is the same as the existing process, and there is no significant difference. If the parliamentary secretary could confirm that is what he is telling me. Obviously, yes, provisional payments —

Hon Matthew Swinbourn: By way of interjection, yes, member.

Hon Dr STEVE THOMAS: I have a couple of questions before we move on to clause 36. The time frame remains 12 months to make a claim. We are now dealing with clause 25(5), which states —

> A failure to make a claim for compensation within the period required by subsection (1) or a defect or inaccuracy in the claim … does not invalidate the claim if —
>
> (a) the failure, defect or inaccuracy results from mistake, absence from the State or another reasonable cause; …

I presume there has to be some degree of flexibility in the system despite the fact that clause 1 states there is no flexibility in the system. Subclause (5) basically allows for error—the failure, defect or inaccuracy results from the state or another reasonable cause. Absence from the state is fair enough. A claim can be made after 12 months. Paragraph (b) states —

> the failure, defect or inaccuracy would not prejudice the employer's defence in proceedings that might arise out of the claim.

In effect, this is the out clause to when it says it has to be within 12 months. However, if it is not impacting on the defence of the employer, and the arbiter assumes that the reason that it was not lodged within 12 months is reasonable, it can occur. I imagine most people want their compensation moved on far more rapidly than that—we will deal with employees who do not do it properly in a little bit—but how often do post–12-month claims come in? How often is subclause (5), or whatever the equivalent section of the previous act is, used? Is it the arbiter who makes a decision about whether it is reasonable to use, because I am not necessarily opposed to it? However, it provides significant flexibility for a hard and fast rule.

Hon MATTHEW SWINBOURN: I cannot tell the member how many claims are lodged after 12 months. He will understand why when I explain the process. If I were a worker who had an injury and it was more than 12 months since the date of the injury—for example, 13 months—the process would be for me to make an ordinary claim for workers compensation and file the materials with my employer. The employer passes the claim on to the insurer, and then the insurer makes a determination as to whether or not they will accept liability, pend liability or deny liability. This is the known unknown, because we would not know how many claims the insurers would be receiving—but surely some of them—and then making its own decision to accept that claim. The insurer would be familiar with the circumstances of the worker and accept that there were grounds to justify the late lodging of the claim. The insurer would use its own discretion in those circumstances. That is why it is a known unknown. We know that it is happening, but we do not know how many.

We also do not have figures to show how many are disputed, because it is not a ground for which we keep specific figures as to the bases of disputes. Disputes are often multi-factored in any event because the insurer might be denying the claim, not only because of the length of time, but also that the employment caused the injury, or any other of those factors. After the worker has lodged the claim, given it to their employer, the employer has passed it on to the insurer, and the insurer has denied the claim, it is then incumbent on the worker to activate the dispute-settling procedures or arbitration, challenge it on that basis, and go forward from there. However, workers do not need to make a special application to file a claim. They can get a claim form, fill out the necessary details, provide the first medical certificate with the claim form, and that kicks off the process.

Hon Dr STEVE THOMAS: That is a good explanation. Is there an ultimate time frame in which the statute of limitations expires? If the worker is lodging at 13 months, just outside the time frame, is there a limitation in which the medical certificate—which will be relied on in evidence—should have been taken, or is that left entirely to the arbiter when the worker seeks a review of their case? Is it all done on a case-by-case basis?

Hon MATTHEW SWINBOURN: It is really a case-by-case basis. There is no outer limit. Obviously, the longer the time between the event that caused the injury and the claim, the less prospect I imagine there is for the worker to succeed. Intuitively, most people would understand that. There is, for example, no six-year statute of limitations. Each case will be determined on its own merits.

Clause put and passed.

Clause 26 put and passed.

Clause 27: Worker may give claim to insurer if employer defaults —

Hon Dr STEVE THOMAS: This should be quick. This clause refers to when the worker can go directly to the insurer if the employer refuses to. Will the employer be required to provide the insurer's details to the employee? If so, under which legislation or part of the act is that requirement established?

Hon MATTHEW SWINBOURN: No specific provision will obligate an employer to provide the details of the insurer. If I take a step back, the obligation will be on the employer to provide the worker's claim to the insurer; that is the step. If an employer had failed to do that, it would be somewhat nonsensical to put an obligation on them to provide the details of the insurer. There is a fix for this situation. WorkCover has this information; it knows which insurer the employer uses. Typically, a worker in this situation would contact WorkCover and WorkCover would disclose who the insurer was. That way, the worker could deal with the insurer. Believe me, an insurer would be pretty upset if an employer did not pass on the information.

Hon Dr STEVE THOMAS: I am sure that is the case, parliamentary secretary. So WorkCover has the power to pass on that information?

Hon Matthew Swinbourn: Yes, it can do that.

Hon Dr STEVE THOMAS: All right.

Clause put and passed.

Clause 28 put and passed.

Clause 29: Requirements when decision on liability deferred —

Hon Dr STEVE THOMAS: I have given the parliamentary secretary a bit of a holiday on clause 28, although clause 28 impacts what happens in clause 29. The insurer can make a decision under clause 28(2)(a) to accept that the employer is liable; under paragraph (b), to accept that the employer is or may be liable, so further work is required; or, under paragraph (c), to not accept that the employer is liable, all of which the employee can dispute when they get further down the track. I am interested in how clause 29 effectively relates back to clause 28(2)(b) in that the insurer must provide a liability decision notice that says that the employer may or may not be liable. Clause 29(1) states —

> If an insurer or self-insurer gives a deferred decision notice for a worker's claim, the insurer or self-insurer must give a liability decision notice for the claim as soon as practicable and in any event before the day prescribed by the regulations for the purposes of this section …

This is one of those ones for which regulations presumably will be written sometime down the track. The government must have some idea of the time frame to get that bit of information out. Is there any suggestion of how quickly we are likely to see that information released in the form of a liability decision?

Hon MATTHEW SWINBOURN: I am advised that, during the development of the bill, 28 days was foreshadowed. That is probably what is being contemplated, but it is subject to further consultation with stakeholders. I am advised that the foreshadowed 28-day period had general support. Not everybody supported it; some wanted more and some wanted less, but that is life. That is the ballpark figure at this stage. I do not want to say that that is what it will be. That was foreshadowed, but as I said, it will be subject to further consultation and decision.

Hon Dr STEVE THOMAS: As I always say, if everybody is unhappy, that is okay.

This clause refers to the time frame in which the insurer must give a liability decision. Are we talking about, for example, 28 days from the lodgement of the claim to the final decision, or will it be 28 days from the release of the decision that it is a deferred decision as further time is required to examine the claim in more detail? Ultimately, we would get to the arbiter's component of that, which we will deal with under clause 30, and the time frame that an arbiter might take to give an arbitrated decision to all parties.

Hon MATTHEW SWINBOURN: It is not as complicated as the time that it took to receive advice would make it seem. I want to give the member a fuller picture about the history of a claim, because I think that will probably address some of the issues. I need to make a correction. I said 28 days before. That is in relation to the time that we anticipate the obligation to make provisional payments under clause 36 will come into effect. The foreshadowed time for the deemed liability acceptance day is 90 days.

Hon Dr Steve Thomas: That will be set by regulation, though, won't it?

Hon MATTHEW SWINBOURN: That is right.

Hon Dr Steve Thomas: But we are assuming 90 days?

Hon MATTHEW SWINBOURN: Roughly, yes. That is what we are working with, but, again, it will be subject to further consultation with stakeholders and, obviously, us settling on that time. The question the member should be asking me is: when does the time start to tick in the process?

Hon Dr Steve Thomas: I will ask that.

Hon MATTHEW SWINBOURN: I will tell the honourable member now, because I am going to give an answer. Let us say that a worker gets injured and at some point they make a claim. The employer will then have seven days to pass that claim on to their insurer. The clock will start ticking from the day that it is passed on to the insurer; most employers will be quite judicious and pass on the claim immediately. The insurer will have 14 days from the time that it receives the claim to do what is identified at clause 28(2)(a), (b) and (c)—that is, to accept, pend or deny the claim. The 28 days and 90 days that we have been talking about will come into effect only when the claim has been pended.

Hon Dr Steve Thomas: Would that be a deferred decision?

Hon MATTHEW SWINBOURN: A deferred decision—yes, that is right. If the decision is deferred, we will go to this other realm, but the clock will still be ticking because the insurer will have had the claim for up to 14 days at that point.

Hon Dr Steve Thomas: Will it have to give the deferred decision response within 14 days? Will it have to notify within 14 days that it has been deferred?

Hon MATTHEW SWINBOURN: The insurer will have to give notice that it has deferred the decision. The 28 days will start from the time that the insurer receives the claim from the employer. At the end of the 28 days, if the insurer has still not made a decision on liability, it will be obliged to make the provisional payments that will arise under clause 36. Again, those time frames—the 28 days and the 90 days—are only indicative for the purposes of the debate. They could change.

Hon Dr Steve Thomas: That is because they will all be set by regulations.

Hon MATTHEW SWINBOURN: That is right. It is not the 14 days but the 28 days. That is set out in another part of the bill. At the 28-day point, for our indicative purposes, the obligation would be to then pay provisional payments. The reason for that is that under the current regime—this is where there is a difference and an enhancement for workers—there is no obligation when they defer making a decision on liability and it leaves it open-ended until the worker takes the matter to dispute and forces an arbitrated decision. In those circumstances, it can be quite difficult because workers then have to crystallise their claim and prove that they are entitled, rather than have a final decision. Provisional payments will mean that workers will get some support—compensation—from the system, and we will get to that when we get to clause 36. The indicative 90 days we are talking about relates to the deemed liability acceptance day, and again that will be set by regulations. That is what we were talking about before. If the insurer fails to make a decision after the indicative 90 days, liability will be deemed. I would have thought three months would be long enough, but, again, it could be something a little bit different—a little bit more, a little bit less. That is subject to further work.

Hon Dr Steve Thomas: Ultimately, there will be an appeals process after that.

Hon MATTHEW SWINBOURN: Yes. I hope that gives the member an understanding of the journey a claim will make through this process.

Hon Dr Steve Thomas: That has been good, thank you.

Clause put and passed.

Clauses 30 to 32 put and passed.

Clause 33: Incapacity after claim made —

Hon Dr STEVE THOMAS: This is my last contribution on the clauses on claims before we get to provisional payments. Clause 33 is entitled "Incapacity after claim made" and states —

> The regulations may make provision for or with respect to the following in connection with a claim for compensation if a certificate of capacity …

Then there are four paragraphs about the amendment of the claim to enable the claim to be properly dealt with. Simply, it will be another set of regulations in this category that will come after the fact. We will first check whether there is any difference from the current system, but I do not think there is. When do we expect to see those regulations? The regulations under clause 33 will be fairly important to the functioning of the legislation. When are we expecting to see them come out?

Hon MATTHEW SWINBOURN: This can apply to further parts of the debate. It is the government's intention to release all the regulations as a single package. They will all be released together. There will be only one set of regulations to begin with—that is listed in the document referred to earlier in today's debate. Rather than have multiple sets of regulations, although that can happen, the goal is to have a principal set of regulations that will apply to the Workers Compensation and Injury Management Act 2023 once it passes through Parliament. To give the member some understanding, it is the government's hope—it has not yet passed Parliament—that the new act will commence on 1 July 2024. Following successful passage of the bill through Parliament, work on the regulations will be one of our priority areas, and we will be getting out and about to stakeholders for consultation. There will be considerable and detailed consultation. I think I have said previously that the stakeholders in this area are very grown-up and very mature. They have the resources and the capacity to engage with this process, whether that is the insurers, employer groups, plaintiff lawyers, associations or unions. They all have the capacity to work with the government and to have a longstanding relationship about the operation of this bill. I think we can give some comfort that that process will be well managed and will have good outcomes.

Hon Dr STEVE THOMAS: Finally, and it might be a stretch to put this at clause 33, but around the regulations that were debated, was the provision of a standardised consent authority for employees, for the workers they hold, discussed at all around the department? If it was discussed, where did it get to?

Hon MATTHEW SWINBOURN: I am advised that an earlier draft of the bill had some requirements to make consent mandatory, but people were not happy with that particular provision. Therefore, after this act commences and is in force, it will be, I am told, identical to what is on the current claim form. The settled position of the government is that the future claim form will be identical to what we have now.

Sitting suspended from 6.00 to 7.00 pm

Hon Dr STEVE THOMAS: Just before we went out to celebrate the independence of India from colonial rule, and I partook of some rather spicy but very nice foods. I hope that the parliamentary secretary's advisers were adequately compensated with some reasonable dinner during the interim. They are not allowed to speak outside of Committee of the Whole, but they are nodding. They probably have to.

We were dealing with a consent authority. WorkCover WA referenced this in the consultation process. Hopefully, at some point, I might even get the opportunity to get the Council chamber printer working and connect it to my computer in a way that can actually the deliver the outcomes—we shall see. I might have to find another way to do it. WorkCover released information sheet 10 about the Workers Compensation and Injury Management Bill 2023. Unfortunately, because I cannot print it at this point, I cannot table it. The only option for me is to read it in.

Hon Matthew Swinbourn: I have it.

Hon Dr STEVE THOMAS: The parliamentary secretary has it, so I might not have to read it in. I will read this, however —

> … the Bill provides for the approved claim form to include an authority for a worker to give consent to the collection and disclosure of the worker's medical, health and personal information relevant to:
>
> - the worker's injury
> - the worker's claim for compensation or entitlement to compensation
> - injury management for the worker's injury.

Did it work, or was it printed separately? Thank you very much. The staff here are very good, deputy chair. Well done, parliamentary secretary! He has been successful whilst the printer provided by the Parliament was not. It is a DCP printer, is it? Okay. Do not get me started on the performance of the Department of the Premier and Cabinet or we will be here all night! I might need a multitude of 10-minute contributions to talk about the performance of the Department of the Premier and Cabinet.

Thankfully, the minister has provided—sorry; it is all the bonhomie coming from our Indian friends over there—the parliamentary secretary has graciously provided us with information sheet 10. I will read it into *Hansard*, and I might seek leave at the end of my speech to table this so other members can have a copy of it. Did the parliamentary secretary table it? No, he just passed it on.

Key points include —

- To make liability decisions and manage claims, insurers and self-insurers require access to a worker's medical and personal information relevant to the injury or claim. Treating medical practitioners may also need to discuss a worker's medical condition with the worker's employer, their insurer, or other medical and health providers.
- Similar to the current Act, the Bill provides for the approved claim form to include an authority for a worker to give consent to the collection and disclosure of the worker's medical, health and personal information relevant to:
    - the worker's injury
    - the worker's claim for compensation or entitlement to compensation
    - injury management for the worker's injury.

Before we were interrupted by the break, I think we got to the parliamentary secretary saying that the consent authority will no longer exist, or exist only as a part of the form. Can he bring us to the ultimate part of this, which is the role the consent authority will play going forward? As he said before the break, there was a range of opinions during the consultation, including those submissions that were opposed to the use. Let us run it this way: has the consent authority changed from the original proposal in previous incarnations of the bill—pretty useful in an Indian setting—to where we are currently with the bill before the house? What role will the consent authority play going forward?

Hon MATTHEW SWINBOURN: Early iterations of the draft bill provided that the provision of this information be mandatory. Under the current act it is not mandatory; when a person gets the form to make the claim, that part of the form says that they can voluntarily—those may not be the precise words—choose to fill in that particular part to provide that additional medical information. The earlier drafts proposed to make that provision mandatory, then through consultation there were serious objections to that, so what we have done in the current bill is to revert to the position that currently exists, which is that workers will have to opt in to the consent authority. The wording that will persist on the new forms when they are issued will be the same wording that exists on the current equivalent form. Therefore, nothing is changing, though earlier there had been proposed changes. As I said, the consultation resulted in us reverting to provisions that apply under the current act.

Hon Dr STEVE THOMAS: Did the submissions that were opposed to the changes proposed in the draft bill come from a particular group? Were they union submissions?

Hon MATTHEW SWINBOURN: It was primarily unions and plaintiff law groups that saw it as a privacy issue for workers as to whether they wished to disclose that amount of information, or be required to disclose that amount of information. Obviously, it is in a worker's interest to disclose enough information about their situation so a determination can be made by their employer via the insurer, however. It does not mean that all the information that relates to a person and their medical history is relevant to the determination of a claim; therefore, it is a choice that people will make. In some situations, people will be very willing to give that information, and in other situations people will have their own reasons as to why they want to limit the information provided to only those matters that would be relevant to the determination of the claim.

Hon Dr STEVE THOMAS: I take on board what the parliamentary secretary has said. I imagine that the union movement and employee advocates would like to limit the information that was mandatorily forthcoming, and perhaps employer groups took the opposite view in their submissions. I am not sure that we have hit the right balance; ultimately, however, I suspect it would have been a brave decision to maintain the original line. As *Yes, Minister* has proven, a brave decision is always difficult to maintain.

Hon Martin Pritchard: Member, I think it's courageous.

Hon Dr STEVE THOMAS: Courageous is it? It would be very courageous. I thought it was brave—a very brave minister.

However, I think employer groups would have thought that full disclosure was reasonable. I understand that those advocating on behalf of employees would think that discretion and disclosure are the best outcomes.

I accept that we will not change the outcome on this, so I will not take this any further. I accept, generally, the goodwill of the government in terms of the legislation before us. I think this is something that the government might perhaps have shown a little more courage on, but I understand the politics of why it may not have done. I am happy to leave clause 33 to progress.

Clause put and passed.

Clauses 34 and 35 put and passed.

Clause 36: Requirement for provisional payments —

Hon Dr STEVE THOMAS: Subdivision 3 is "Provisional payments". I fully understand the government's intent in this because as it goes along this perhaps somewhat protracted decision-making process and wants to start paying people, it will have to start making provisional payments. Although employer groups have some concerns, I think there is general agreement that the principle is reasonable as long as the accountability is okay.

I will roll clauses 36 to 44 into the one discussion and just let them all roll through.

Can the parliamentary secretary give us a bit of an outline, then, about provisional payments? Will provisional payments start when there is a deferred decision notice? As nobody can effectively make a decision until more information is provided, the government will start to provide support to the person whilst that decision is being made. That is a reasonable outcome.

If the decision made is that, ultimately, the employer was not responsible, what will be the process to go back? I do not expect that there will be too many circumstances in which provisional payments will start to be made and then suddenly the decision will be reversed. I think that would be pretty unlikely or pretty unusual. But what is the process when a provisional payment system is put in place and, ultimately, there is a reversal? How does that work, and what is the government's intent under those circumstances?

Hon MATTHEW SWINBOURN: I will just paint the picture for the member to begin with. The insurer has not made the decision—I would say "pend", because that is the old language. Essentially, the insurer has deferred its decision. After 14 days, it would have received the claim from the employer, and the provisional payments would not kick in. They would kick in on the provisional payment day, which will be provided for in the regulations. The obligation to continue paying those amounts would go on until the insurer made a decision to accept liability. Effectively, that would mean that the liability would be from the time that the provisional payments had been made at least. If liability was denied, those payments would then cease and it would be up to the employee to decide whether to dispute the denied liability of their claim, and then they would have to use the dispute resolution provisions.

Hon Dr Steve Thomas interjected.

Hon MATTHEW SWINBOURN: That is right. The provisional payments would cease. I am sure that this question will probably come. There will be no capacity for the insurer or the employer to recover payments made prior to the denial. The incentive is for insurers to make their decisions expeditiously, without any undue or unnecessary delay. The provisional payments will allow them to, by their own choice, create a space in which they can continue to make their determination while the worker is not prejudiced by their longer decision-making process. There may be some circumstances in which insurers decide to deny claims at an earlier stage, which would also be to the worker's benefit, but not ultimately, of course, in one sense because they would have to dispute it. However, it would give them the opportunity to use the dispute-settling procedures at an earlier opportunity. That is what it is about.

As the member can imagine, if a worker were incapacitated, the employer would have a week to pass on their claim, and the insurer would then have 14 days from that point to make a decision about its liability. That would be 21 days without income support. We are anticipating that it could be up to 28 days from the time the insurer receives it, so the worker could be without an income for up to 35 days. Obviously, it would then start to become quite difficult for people, particularly those who live hand to mouth. If they were the only person in the household with an income, they would not have an income for well over a month. The insurance company would be in a much better position to bear the cost of that than they would be.

As I say, there is general support for this. Some people do not support it, of course, but it is not one that I think people have gone to the barricades on. I hope that deals with the questions that the member asked.

Hon Dr STEVE THOMAS: I think that is a reasonable response. Ultimately, the insurance providers will become the risk takers and risk assessors as part of that process, as long as we are all up-front and understand what is going on. It is possible that a set of provisional payments could start to be made and new information could come to light. It could be pointed out, for example, that the employee contributed to their own injury through blah, blah, blah. The provisional payments that had been made would not be recoupable, but an employer in those circumstances probably would not be culpable because the insurance company would deal with those processes. I understand and accept the position that this will pressure them to get to that advanced point. I suspect that there will be cases in which the information was not adequate at the time, and things may change in time.

I hope that it will not be a huge number of people, but I think the fact that we have ventilated and made people aware of the possibility of it is a reasonable outcome with the provisional payments. I think that is the critical component in the argument about provisional payments. The principle of paying money to injured workers before they get to the final decision is a reasonable one. I potentially would have done the review of that in a slightly different way, but I think we can accept that the intent of the government is to make sure that money flows during that period. I am happy to progress and move beyond the provisional payment component. I have raised my concerns.

Clause put and passed.

Clauses 37 to 45 put and passed.

Clause 46: Entitlement to income compensation for incapacity for work —

Hon NICK GOIRAN: This is not for the purpose of asking a question of the parliamentary secretary but more to confirm the interaction that happened earlier at clause 18. For the purposes of the record, I draw to the attention of the chamber the words of the explanatory memorandum on clause 46 —

> Clause 46 provides for an entitlement to income compensation if the injury results in total or partial incapacity for work, consistent with the current Act.

I add that the authors of the explanatory memorandum very helpfully reconciled not only this particular clause but also the entirety of the explanatory memorandum with the provisions of the current act. I note under clause 46 the reference to section 21 and schedule 1, clause 7 of the 1981 act. This confirms what the government said earlier at clause 18—that is, the intention is that the existing scheme will continue. If someone is found to be totally or partially incapacitated for work under the current scheme, the same will apply under this provision at both clause 18 and clause 46.

Hon MATTHEW SWINBOURN: The government endorses what the member just summarised.

Clause put and passed.

Clause 47 put and passed.

Clause 48: Total or partial incapacity for work —

Hon NICK GOIRAN: According to the explanatory memorandum, this clause will replace schedule 1, clause 7(1) and (2) of the existing act. I note that the explanatory memorandum states —

> Clause 48 provides how the amount of income compensation is to be calculated for total incapacity for work and partial incapacity for work.

Can the parliamentary secretary confirm that it is the government's intention to retain the same definition of total and partial incapacity, as we have discussed at clauses 18 and 46, and that the bill will not alter the legal test that is applied when determining a claim for weekly payments of income compensation benefits?

Hon MATTHEW SWINBOURN: I can confirm that that is the government's intention.

Clause put and passed.

Clause 49: Worker not to be prejudiced by resuming work —

Hon Dr STEVE THOMAS: This clause is entitled "Worker not to be prejudiced by resuming work". If the worker thinks they can come back to work, they try but may be unable to do so. Who ultimately assesses that the worker is unable to return to work? Is it the worker or is a process gone through? Is it by agreement? Is it the insurance assessor's view? Who makes the decision, and what are the parameters by which it is made?

Hon MATTHEW SWINBOURN: The worker's treating clinician will make the decision because the worker will furnish a progress medical certificate—I think there still called that—as a consequence. For example, the worker has made an attempt to return to work but has found they are unable to for whatever reason. They then return to their medical practitioner and discuss that, and the medical practitioner either certifies that they are unfit for work or places work restrictions based on medical advice. That progress medical certificate is then furnished to the employer and the insurer. If the insurer wants a different view, they are of course entitled to require the worker to undertake a compulsory medical examination, and there is a process for dealing with that. Ordinarily through the course of these things workers usually attempt to return to work with their rehabilitation provider's assistance, but for whatever reason, depending on the injury, they might not be able to sustain that. It is a fluid situation and it is very common, particularly for more serious and debilitating injuries.

Clause put and passed.

Clause 50: Order that worker is taken to be totally incapacitated —

Hon Dr STEVE THOMAS: Clause 50 is entitled "Order that worker is taken to be totally incapacitated". Subclause (1) states —

> A worker who has a partial incapacity for work and has been unable to obtain suitable employment …

An arbitrator can decide that they are permanently incapacitated—it does not say "permanently", it says "totally incapacitated". "Permanently" might be a better word than "totally".

Hon Matthew Swinbourn: I think they are two different things. A permanent capacity means exactly that, permanent, but you can be totally incapacitated for a time and then become capacitated, if that is a word.

Hon Dr STEVE THOMAS: Okay. My question really was: Is there a limitation on that time? Is there a time frame attached or is it just sometime in the future?

Hon MATTHEW SWINBOURN: It will be up to the arbitrator to determine the period of incapacity, or the total incapacity, if I can put it that way. As I said by interjection, a permanent incapacity is just that—the worker is permanently incapacitated. In this instance, a total incapacity is a temporal thing. It hopefully does not lead to permanent; it could lead to permanent. As I say, the time will depend on the factual circumstances and the medical evidence that relates to that worker, and the arbitrator will decide what that is at the time.

Hon Dr STEVE THOMAS: I should have explained my question a bit more clearly. Clause 50(1) states —

> A worker who has a partial incapacity for work and has been unable to obtain suitable employment may apply for an arbitrator to order that the worker is taken to be totally incapacitated for work.

Is there a time frame in which the worker has to be unable to obtain suitable employment before they can apply to be classified as totally incapacitated?

Hon MATTHEW SWINBOURN: There is no time frame, but I refer the member to clause 50(4), which provides the elements of which the arbitrator must be satisfied. They are —

> (a) The worker has taken all reasonable steps to obtain, and has failed to obtain, suitable employment; and
>
> (b) the failure to obtain suitable employment is wholly or mainly a result of the injury.

The arbitrator would have to be satisfied of those elements before they could find that a worker was totally incapacitated.

Clause put and passed.

Clauses 51 and 52 put and passed.

Clause 53: Terms used —

Hon NICK GOIRAN: We move now to part 2, division 3 of the bill. Under subdivision 3, "Calculation of income compensation", we see the term "maximum weekly rate of income compensation". According to my notes, I touched on this earlier and we may have also touched on it in the second reading debate. The parliamentary secretary would be aware that many workers are paid in excess of the maximum rate prescribed. I understand that at the moment it is $3 020 a week, which is the equivalent of $157 000.40 per annum, particularly in cases in which board and lodging is provided. It means that those workers have only 83.7 weeks of payments, as the maximum prescribed amount is $252 724. I may have touched on this earlier in the debate but it seems to be overdue for us, as a community, to look at that maximum weekly rate of payment because the maximum prescribed amount should better reflect coverage for those workers. This is also always in the context that my understanding is that the full wage of those particular workers is used to calculate the premium. The insurer, if you like, gets the benefit of utilising the worker's full wages but of course the worker gets the benefit of up to the maximum amount only. Does the government have any plans to address this issue?

Hon MATTHEW SWINBOURN: To answer the member as directly as possible, not at this stage. We are not contemplating that at this stage. I think to suggest that we were doing that would be disingenuous. I probably said it in my second reading speech and certainly I said in my reply that the government's goal here is to modernise the wording of the act and to give effect to its 2021 election commitments, and that was not one of the commitments we made. It does not mean that what the member is saying is not meritorious. A range of economic and philosophical arguments go towards what the member is not as such proposing but alluding to, and so it is certainly not without merit. But at this stage there would have to be a degree of consultation with stakeholders. The member gave an example of the premiums being paid on the basis of the maximum weekly payments. I would not necessarily agree with the member entirely because I think the premium amounts take into consideration that they are capped. If we were to change the bill in the way that the member—I do not want to say the member has suggested because the member has not quite suggested it—is talking about, there would be a cost implication somewhere along the line because someone has to pay. Those discussions would need to be had with all the groups concerned and we have not done that work. As I said, I wanted to answer the member as directly as possible to say that at this stage it is not something we are looking at.

Clause put and passed.

Clause 54 put and passed.

Clause 55: Amount of income compensation —

Hon Dr STEVE THOMAS: Clause 55 is the provision under which the government will deliver its election commitment to extend the step-down period from 13 weeks to 26 weeks, from three months to six months, to maintain the income compensation at 85 per cent of the pre-injury weekly rate, with a couple of exceptions that we may or may not come to later. Obviously, more money will go to those injured workers. I guess the argument from industry on occasions is that three months is an incentive to get workers back into the workforce more rapidly. Let us start with the very basics. What is the expected cost to industry, particularly in terms of insurance premiums, for the shift to 26 weeks as opposed to 13 weeks for the step down at 85 per cent?

Hon MATTHEW SWINBOURN: The change will have a modest cost impact on employers in terms of higher workers compensation insurance premiums. The scheme actuary, PricewaterhouseCoopers Actuarial, has actuarially assessed the bill and estimated a 0.92 per cent increase in premium rates resulting from extending the step-down point from 13 weeks to 26 weeks. Although adjustments to the step-down provisions involve only a modest cost increase, it is difficult to quantify the incentive effects on return to work outcomes arriving from maintaining the level of pre-injury earnings for longer periods of incapacity. Workers are obligated to make reasonable attempts to return to work and must participate in return to work programs when incapacitated. It is likely that better management of the return to work processes will be far more effective in achieving a timely return to work than bluntly reducing a worker's income compensation after 13 weeks.

Hon Dr STEVE THOMAS: I think those calculations were in the economic analysis that the parliamentary secretary gave us during the second reading debate.

Hon Matthew Swinbourn: That is correct.

Hon Dr STEVE THOMAS: Ultimately, we will have to test whether that is the case. Perhaps it might be argued that the greater risk is held by the government insurer, ultimately by the insurance companies, managing the workers compensation insurance process. I want to get the parliamentary secretary on the record about the potential cost of this. It was obviously supported very strongly by the union movement in their submissions. Some concerns have been raised by industry, but not sufficiently for the opposition to oppose the clause. We need to keep a fairly careful eye on the potential impact and cost of this. The government should expect some questions every six months or so on the potential impact and cost of insurance premiums in relation to this provision.

Hon NICK GOIRAN: It is important that we read clause 55 in conjunction with clause 57. Particularly for those who will potentially be litigating these clauses at a later stage, I draw members' attention to the record and the exchange we had on clause 1 last week—on Wednesday, 9 August 2023—when I ended with the following question to the parliamentary secretary —

> Will those workers who are immune from the step down continue to be immune from the step down at 26 weeks?

The parliamentary secretary's response was —

> Yes. To use the member's language, those workers will remain immune from the step down after 26 weeks.

I take it that those workers who are on an award rate currently do not have a step down to the 85 per cent, and, because of clause 57, that will continue to be the case.

Hon MATTHEW SWINBOURN: Yes, member, that is correct.

Hon NICK GOIRAN: One further question is we have talked a little bit about the government insurer, formerly RiskCover. I imagine that it would cover quite a few workers that would be under the award, possibly even the entirety of its workers, or would only a proportion of them be covered by an award?

Hon MATTHEW SWINBOURN: I was trying to nod and shake to the member, but I think it is important that we get it on the record. Overwhelmingly, yes, because public sector employees are mostly covered by industrial instruments that fall within the definition of an award. However, if we are talking about, for example, senior public servants, I do not know from which level, but in all likelihood, senior executive service employees are unlikely to be covered by an award, and there are other groups of very highly paid government officials that do not necessarily have that coverage. I could not give the member a comprehensive list, but we can contemplate the kind of people that that would include.

Hon Nick Goiran: By way of interjection, would it be fair to say that that class would be in the minority?

Hon MATTHEW SWINBOURN: Yes, I think that is fair. They would be in the minority, yes.

Clause put and passed.

Clauses 56 to 58 put and passed.

Clause 59: Working directors —

Hon Dr STEVE THOMAS: We are looking at working directors again; I find them a very interesting group of people. In this clause, "declared remuneration" means the amount of remuneration stated as actually paid or payable, or, at clause 59(1)(b), if that statement is not provided, the amount of remuneration in an estimate. In what form will that statement or estimate come? Will that come in the form of a company statement? Will the reference document be a taxation document, for example, and is there a comparison between a taxation document and whatever form the statement comes in?

Hon MATTHEW SWINBOURN: I think the first thing to make clear is that there is no prescribed form within the bill or the regulations that would apply to that. An individual insurer might have its own form that it requires

the working director or the company to fill out. That estimate would be a global amount, and it might be that if there was a claim later, the insurer would ask for more substantiation of that, but it is a matter that is essentially, if I can put it this way, between the insurer and the company to be satisfied of the amount. I think the premium would have some relationship to the amount, particularly if it were significant, but that is a matter that is primarily not between WorkCover and the company, but between the insurer and the company.

Hon Dr STEVE THOMAS: It would be interesting to compare some of those to tax records, because I find that there is sometimes a variation in directorships between claims of income and tax record claims of income. That applies to a number of professions. Perhaps lawyers might be better at it than most, but there are plenty of other good examples. It is not a requirement I will ask of government, but I make the point that it is often interesting in these circumstances to compare corporate tax records and corporate claims of income to get some sort of indication of real income values. Perhaps one day we might have a parliamentary inquiry and look at that.

Clause put and passed.

Clauses 60 to 62 put and passed.

Clause 63: Reducing or discontinuing income compensation on basis of worker's return to work —

Hon NICK GOIRAN: Under the current act, once liability is accepted for a claim, an employer or insurer cannot cease payments except in limited circumstances. Indeed, the existing wording in section 61 of the current act, as interpreted on more than one occasion by the Supreme Court, makes it extremely difficult, if not impossible, for insurers to unilaterally cease compensation payments. It could be argued that this protection is fundamental to injured workers under the current legislation. Both existing sections 61 and 62 provide a clear safeguard to those workers, preventing the cessation of weekly payments until such time as an order is obtained by the employer or insurer from an arbitrator. Is the parliamentary secretary in a position to confirm that by operation of clauses 62 through to 64, in part 2, division 3, subdivision 4, the protections that are currently contained in the act will be maintained and an insurer will be unable to unilaterally cease the payments of the injured worker?

Hon MATTHEW SWINBOURN: The current protections will be retained, except for a small qualifier, which is not an exception as such, that the arrangements identified in clause 63, which is the clause we are currently on, clarify the arrangements on which the return to work happens and the process. I am advised that the reason we are going down this path is that the act is not very clear about these provisions and how they work. The attempt here is not to change the existing rights and protections, but to put in place a clearer process for understanding what ought to happen when a worker returns to work on a partial basis so that there is no confusion about it.

Clause 63(1) sets out the elements —

> (a) the basis for the reduction or discontinuance with reference to the position to which the worker has returned; and
>
> (b) the amount, if any, of income compensation that will be paid to the worker for any partial incapacity for work.

The goal is not to affect existing rights and protections, but to make it much clearer for workers in particular to understand what proportion of their income will come from the employer and what proportion will come from the insurer as such when they return to work in a partial capacity. If there is a dispute, it will give them the means to clearly dispute that through the system because the employer and insurer have to provide them with this documentation.

Hon NICK GOIRAN: On the basis that to some extent clause 63 seeks to clarify things and might in itself be subject to future litigation, let us take a moment to examine it more closely. Again, helpfully, the authors of the explanatory memorandum have reconciled clause 63 with section 61 of the act. Clause 63(1) appears to extend the operation of section 61 of the act. It reads as follows —

> An employer must not reduce or discontinue income compensation payments to a worker on the basis of the worker's return to work unless the employer has informed the worker in accordance with the regulations of —
>
> (a) the basis for the reduction or discontinuance with reference to the position to which the worker has returned; and
>
> (b) the amount, if any, of income compensation that will be paid to the worker for any partial incapacity for work.

Reading that, it appears that this new provision expands on existing section 61 and may allow an insurer to reduce or discontinue weekly compensation benefits if, in their view, the worker is able to return to work. Can the

parliamentary secretary clarify the government's intention in respect of this provision and confirm whether this will allow an insurer to cease a worker's payments without making an application of their own to an arbitrator?

Hon MATTHEW SWINBOURN: No, member, they will not be able to cease them.

Hon NICK GOIRAN: It will not be up to the worker to launch an application; rather, it will be up to the employer/insurer to make an application to cease the payments.

Hon MATTHEW SWINBOURN: We are just trying to get it right because it is important to understand here what, in fact, has happened. If a worker has in fact returned to work, then, of course, the payments stop. That will happen in conjunction with a medical certificate that says that the worker is able to return to work. In the workers compensation system, probably hundreds of times a day, a worker has had an injury—perhaps cut a finger—could not do the typing, needed time for it to recover and has now been signed off by their doctor to return to work. The worker no longer has any incapacity because everybody, including the worker, agrees that the worker can go back to the job. I do not think that is the situation we are contemplating.

That is opposed to a situation in which the insurer believes the worker should be going back to work and, therefore, ceases the worker's payments. The worker is not back at work or has a different capacity from what the doctor has agreed to, such as a partial capacity. It is not the state of mind of the insurer to say, "We think you should be back at work and, therefore, we can cease your payments." That is not what this provides for and not what we are about because in that situation, it would remain, as I indicated, a matter that the insurer would need to take to the arbitrator to get a determination. The onus is on them to do that.

The ordinary course of workers compensation claims is that, one, there is no disputation and, two, workers return to work and payments cease without having to go through this process. There is a medical certificate from the worker's own doctor that certifies them as fully fit to return to work. They are no longer incapacitated or in need of weekly workers compensation payments. I hope that has given the member some clarity. Of course, we can keep working on it further, but I am trying to get to that.

Hon NICK GOIRAN: Is the first starting point for clause 63 to be invoked or enlivened that the worker must have returned to work?

Hon Matthew Swinbourn: Yes.

Hon NICK GOIRAN: Hence, if they have not returned to work, the employer must not reduce the compensation payments, as specified in clause 63(1). If they did, plainly, it would be in contravention of the statute, and that is when an arbitrator might make a ruling, under clause 63(2), particularly 63(2)(a), to determine whether a worker has, in fact, returned to work.

Hon Matthew Swinbourn: Yes.

Hon NICK GOIRAN: I thank the parliamentary secretary for that. I move on to a different area of this provision. Clause 63 does not specify that an employer must give the worker 21 days' notice of its intention to reduce or discontinue payments. Rather, it will allow the employer to cease payments immediately if it "has informed the worker in accordance with the regulations". That is the language used on lines 13 and 14 of page 59 of the bill. Can the parliamentary secretary confirm for the record whether the intention is that there will be no need for the employer to give the worker 21 days' notice of such intention?

Hon MATTHEW SWINBOURN: The member is correct. Employers will not need to give 21 days' notice under the provisions we are dealing with in the bill here.

Hon NICK GOIRAN: Again, the rationale for that is because, as a matter of fact, the worker has returned to work. This is distinct from the other scenario the parliamentary secretary painted in which an insurer might say that the worker should return to work, but that is, in fact, yet to happen.

Hon Matthew Swinbourn: That is correct. Yes.

Clause put and passed.

Clause 64: Reducing or discontinuing income compensation on basis of medical evidence —

Hon NICK GOIRAN: If we return to the explanatory memorandum, it again reconciles clause 64 with section 61 of the current act. This is presumably another provision that has been included for the purposes of rewriting a provision that could usefully be improved. I use the word "improved" rather than "changed" quite purposefully. Importantly, existing section 61 currently provides that an employer must serve on the worker a form 5 notice, which includes a report of a medical practitioner who has certified that the worker has total or partial capacity for work or that the incapacity is no longer a result of the injury. The proposed wording at clause 64 appears to be quite broad. In particular, I note the phrase contained at clause 64(1)(b), which reads —

> the extent to which the worker's incapacity for work is a result of the worker's injury.

It would seem that this would empower an employer to serve a notice in a wide range of circumstances. Is the parliamentary secretary in a position to confirm the government's intention with the interpretation of this provision and whether it intends to retain the protections that are currently provided by section 61 of the act, to which I referred in the explanatory memorandum?

Hon MATTHEW SWINBOURN: I can confirm that it is the government's intention that it retains all the protections under the current act.

Clause put and passed.

Clauses 65 to 67 put and passed.

Clause 68: Power of arbitrator to review disputed income compensation payments —

Hon Dr STEVE THOMAS: I am interested whether there is a time frame attached to the arbitrator. It is a fairly simple three-part clause. Subclause (1) states —

> An arbitrator may review the payment of income compensation to a worker on the application of the worker or the employer.

They can also make an order under the second stages. Is there a time frame in which that occurs? Is it likely to be set by regulation going forward?

Hon MATTHEW SWINBOURN: There is no specified time frame and it will not be specified by regulations. Arbitrators exercise power in an administrative jurisdiction, so in the event they were to not issue their decision in a manner consistent with their obligations, they could seek a prerogative writ to do that. It would be an extreme thing to do, of course, in the circumstances, but a writ of mandamus would require them to perform their statutory function. It would not be expected to be the case. Arbitrators will have a set of time frames in which they would seek to issue decisions. As I say, it is not mandated by the act or the regulations.

Hon Dr Steve Thomas: So you will not be doing it by regulation?

Hon MATTHEW SWINBOURN: No, I do not think there is a regulating power to do it but it is not unusual for that to happen in these kind of dispute settlement cases and to dictate to that level of detail when a decision might need to be issued. Sometimes it is important for other reasons but it will all depend on the workload of the arbitrator on a given week and all those sorts of things, including how complex the case was and what evidence might need to come before them. We would not dictate that.

Clause put and passed.

Clause 69: Terms used —

Hon Dr STEVE THOMAS: Division 4 relates to compensation for medical and health expenses. The government proposes to expand the medical and health expenses general limit amount to an amount that is 60 per cent or greater, as prescribed by the regulations, of the general maximum amount. We might be on this one for a little bit. Obviously, there is potentially a regulation-generating power that might change that percentage. Is there any intent to alter that percentage by regulation? If not, why is that particular line in the bill?

Hon MATTHEW SWINBOURN: The government has no intention to increase it at this particular point in time. The reason for the regulation-making power is in the event that a future government, as a matter of policy, decides that it is desirable to increase the amount. The very legitimate reason for why that might be the case is that the costs of medical services and expenses may increase. The proposed level is 60 per cent, but that may justify having it at 70 or 80 per cent—that kind of thing—depending on where those things sit. Obviously, there is a relationship in which the percentage needs to be set at a rate that means that workers can have their medical needs attended to. However, the scheme does not control the availability and cost of medical treatments. That is a possible circumstance in which a future government might decide to change the rate. It might go up by 60.5 per cent, for example. It could go to 60 or 70—it could go anywhere, up to 100 per cent, of course.

Hon Dr STEVE THOMAS: The parliamentary secretary talks about going from 60 per cent to 60.5 per cent, but as I understand it, in the current circumstances, we are going from 30 per cent to 60 per cent. That is not half a per cent; that is a doubling—a 100 per cent increase. In terms of medical expenses, what does that mean in dollar terms?

Hon MATTHEW SWINBOURN: The current medical and hospital expenses amount, at 30 per cent, is $75 817. Obviously, we would double that amount, and, my maths is not great, but I would say that makes it $151 000 plus change.

Hon Dr STEVE THOMAS: So in terms of general medical expenses, the amount is significantly higher. When was the last time that went up, and, at that point, how much did it go up by?

Hon MATTHEW SWINBOURN: We do not know precisely when the 30 per cent was inserted into the scheme. It has been there for as long as anybody at the table can remember, so for a long period. If the member remembers rightly, the genesis of the scheme was in 1912, I think. We do not have access to that particular act, and I am not suggesting that it was 30 per cent in 1912; it would have been in pounds, shillings and, I suspect, pence, back in those days, but the 30 per cent has been a longstanding figure. It was one of our election commitments to increase it to 60 per cent—that is the foundation for doing it. The fundamental basis for doing that is that we do not think it is fair for a worker who has suffered catastrophic injuries that take them to that expenses cap to then have to go, cap in hand, to an insurer and to WorkCover WA to ask for an extension for injuries that they have suffered at work. It is usually those who are most seriously injured who are getting to where that cap currently is; for example, if a worker requires multiple hospital stay days, that cap can get chewed up very quickly, so that is where it sits. Obviously, there is a cost associated with it, but we also think that the benefit for workers would be that they could have more comfort from it.

Hon Dr STEVE THOMAS: So that is a percentage of the general maximum amount. How has the general maximum amount changed over time?

Hon MATTHEW SWINBOURN: It is indexed every year, and the indexation is connected to the movements in the wage price index, so a formula is used to increase it. The nature of the way that this has worked out is in relation to the maximum weekly payments, which is the cap that Hon Nick Goiran talked about. That sets the benchmark, and then the percentages are derived from that. Therefore, in terms of moving that benchmark, because it is related to the income support, the wage price index is the most appropriate indexing mechanism that one can use to match it to where wages are going across the economy.

Hon Dr STEVE THOMAS: An indexation is related to the general maximum amount and the medical and health expense limit is attached to a percentage of that.

Hon Matthew Swinbourn: Yes.

Hon Dr STEVE THOMAS: The medical and expense limit will shift. At 30 per cent, it was approximately $75 000, and at 60 per cent, it will move up to around $150 000. I will work out the percentage of the general maximum amount in a moment. Can the parliamentary secretary give us an indication in numerical terms of what that has gone to? Does he have a 2000 level of the general maximum amount to compare with the 2020 level, for example? The best he has for us is a link to the wage price index. Can he give it to us in absolute figures in any way, shape or form?

Hon MATTHEW SWINBOURN: I do not have anything at the table for 2000, but it is actually a mathematical measure. The wage price index is not set by WorkCover WA; it is a figure that is generated by the Australian Bureau of Statistics. Depending on the growth of wages in the economy, sometimes it might be only one per cent or 1.5 per cent, as it was a few years ago when there was a bit of stagnation in wage growth, but at other times when there has been significant wage growth, it has been more significant. It is an appropriate mechanism for determining maximum weekly compensation payments because this is a workers compensation system related to people's earnings. Although the wage price index is not perfect, it is the most apposite for that amount, which would have originally been set at some point as relevant so that it would keep its real value over time.

Hon Dr STEVE THOMAS: I am not disagreeing with that. At the moment, the 100 per cent value of the maximum general amount would be about $250 000.

Hon Matthew Swinbourn: It is $252 724.

Hon Dr STEVE THOMAS: I was not too far off.

Hon Matthew Swinbourn: You were close.

Hon Dr STEVE THOMAS: Generally closer than Treasury gets on a budget surplus!

The figure of $250 000 is indexed according to the wage price index, which has been relatively low in more recent years, but in other years it has been a reasonable number. When the government talks about increasing the medical cap from 30 per cent to 60 per cent, because it has been 30 per cent for a long time, we have to remember that inflationary growth does not apply to the 30 per cent figure, but to the total general maximum amount, which, according to what the parliamentary secretary is now telling us, has been growing at an indexation rate related to the wages index. Would it be fair to say, therefore, that the concern of employer groups is that the indexation system that currently exists applies to the overall general maximum amount and the 30 per cent cap on that grows each year because it is 30 per cent of a growing figure? When the government suddenly says that it is going to jump this up from 30 per cent to 60 per cent, it is not that it has been set at 30 per cent of a fixed figure for 50 years. It has not been 30 per cent of $100 000 for a fixed period and now the government is saying that it is going to be generous because it has $6 billion surpluses and money coming out of its ears from iron ore so it can afford to be more generous. In fact, insurance companies will be paying for it anyway; it will not be coming out of the government's

coffers. The fact is that there will be more money in the cap. The annual increase is linked to the wage price index, but the cap is jumping from 30 per cent to 60 per cent, so there will be an annual indexation plus, suddenly, this massive jump. I do not necessarily object to a significant increase in compensation payments to injured workers as long as industry can afford it. We may need to suck that and see a little bit. Can I just confirm that an annual indexation process occurs for the general maximum amount—it goes up every year—and we then come to the medical expenses cap, which was originally a 30 per cent cap and will be doubled to a 60 per cent cap? We will deal with that before I start on who will get the benefit from that.

Hon MATTHEW SWINBOURN: Yes, it is a cap of that amount. It is currently 30 per cent and it is going to go to 60 per cent on the commencement of the legislation, hopefully in July next year. I think it is important to remember that that does not mean each and every worker who makes a workers compensation claim is going to have medical expenses that will reach the limit of the cap. Overwhelmingly, most claims are well below the current cap and are well covered. It tends to be those workers who are catastrophically injured who eat up the current cap. There is a provision in the current act, and I believe also in the bill, that provides for a worker's entitlement to apply for an amount beyond the cap to meet their medical needs. It is not an automatic process. They do not make an application and automatically get it; there must be justifiable grounds on which to receive that additional money. It is not simply the case that because the maximum cap will go from 30 per cent to 60 per cent that employers and insurers will bear that additional cost, because it is all related to the nature of the injuries and the cost it takes for the care and clinical stuff that happens in relation to those injuries. The economics of it are not simply that we are doubling the cost for employers because that is not how it works.

Hon Dr STEVE THOMAS: I accept that, parliamentary secretary. It will not just be an automatic doubling of costs. I will ask about the impact on employers at some point. The economic costing figures that the parliamentary secretary gave us during his second reading speech indicated that it would be a modest increase, according to the modelling. I am happy for various groups to analyse and disagree with that, but it was a reasonably modest figure. It was interesting that the parliamentary secretary said—I think he is absolutely right—that the issue around the cap is very much about catastrophic injuries. It is at the higher end of the injury scale that those caps are likely to be reached. Interestingly, that also concerns the higher end of the specialist market of medical professionals. I think there is an interesting—I nearly said "paradox". I have been around the Australian Medical Association long enough to know that the high level of remuneration for specialists in the medical profession is not really a paradox; that is just situation normal. The raising of the cap will not mean that more money will be going to the injured worker; the money will go to the medical profession in potentially increased costs. I agree with the parliamentary secretary that the person who sprains their wrist is not going to reach the $75 000 cap, let alone the $150 000 cap, but at the high end, orthopaedic specialists et cetera are an industry group that will do remarkably well. There will no doubt be an opportunity for them to do even better under the proposal that has been put forward by the government today. I suspect that it will not be the average general practitioner; they do not do all that badly, particularly if they are good at working the Medicare system, but they are not the people who are generally going to make $75 000 out of a particular patient. The specialist surgeon might just reach that cap. I think the practical outcome of what the government is proposing is likely to be that those more difficult cases suddenly hit that cap of $75 000 and go beyond. None of that money will ultimately go to the worker; it will go to the anaesthetist, the surgeon and follow-up people. What monitoring will the government put in place, if any, to keep an eye on what charges occur through the workers compensation system? I think the medical profession probably charges workers compensation cases significantly higher than general cases, and surgical cases in particular. Perhaps there is concern about risk. How will that be monitored? How will the government monitor things so that the increase of the cap does not simply drive up the average price of significant surgery, anaesthesia et cetera in these cases? There is a genuine risk that the people most affected, the workers, may not be the greatest beneficiaries of the legislation we are debating.

Hon MATTHEW SWINBOURN: I do not think that we will monitor the cost. There is a power under the current legislation, and there will be a power under the new act. Under clause 73, "Medical and health expenses order", the minister will have the power to issue an order fixing the maximum amount of compensation payable for a medical and health service. The minister through WorkCover currently does that. There is a maximum fee scale and that scale is developed in consultation with the doctors' groups, who Hon Dr Steve Thomas has accused of many things, but I shall remain silent!

Hon Dr Steve Thomas: I only made observations.

Hon MATTHEW SWINBOURN: Yes, they were observations!

The bill will provide protection so there will be maximum amounts payable for medical expenses; workers are entitled not to be overcharged. The increase is not meant as an encouragement for the profession to say it has more money to play with and therefore it can hike up all its fees and charges for these things and claw into that. I do not think that is a realistic prospect. The way the providers decide how they charge for medical services is complex. There is obviously interaction with the Medicare system and private health insurers. Insurers pay a lot of attention to what

doctors are charging for their services. There is a lot of interaction in this space and a lot of debate. It is not simply the case that workers will be price-takers for the medical expenses that they incur as a result of a workplace injury.

Hon Dr STEVE THOMAS: I absolutely accept that insurance companies pay very close attention to charges. It is a little bit hard to jump from clause 69 to 73 then back again, so I will just throw this out there and the parliamentary secretary might tell me to wait until we get to clause 73. Clause 72 says that medical and health expenses should be "reasonable", but does not define that. Clause 73 is ultimately where the power making is, which is in the expenses order. Will a renewed expenses order be developed? I think it is an annual update.

Hon Matthew Swinbourn: Yes.

Hon Dr STEVE THOMAS: Is there a commitment from the government to leave those figures roughly where they are? I am looking for an indication that those numbers will stay approximately the same as they are now, give or take a couple of per cent, or is there likely to be a significant review? I apologise; we are jumping from clause 69 to clause 73, but we cannot do one without the other. I am looking for a justification that the numbers will not change so it genuinely picks up, not an increase in charging, but those genuinely tough cases.

Hon MATTHEW SWINBOURN: I have a sense of déjà vu about a Hansard reporter coughing at this time of night! Anyway, I digress.

Currently, the regulations on fees pick up only about 30 per cent of what doctors charge in the system, and so under the new arrangement we are looking to pick up significantly more. The maximum fees will have a much broader coverage that is more consistent with the AMA's rates for private patients and aligned more appropriately with the guidance that is issued by the AMA. I mean, that is not it, but my understanding is that that is helping to guide, and will guide, where we will be at with that. But there will be consultation with all the people who pay for these sorts of things, the insurers, the doctors who charge for it and their representatives and, I suspect, with the unions as well, though I am not sure they get quite as involved at this level or on this side of things as much as they do in some of the other parts.

Hon Dr STEVE THOMAS: That is very interesting. I will have to go back to *Hansard* and read that answer through a bit more carefully, but I think what the parliamentary secretary said was that there will be a significant change because the government is looking to —

Hon Matthew Swinbourn: An expansion, would be a better way, of the number of fees that are covered by the maximum fee thing that will be done under clause 73.

Hon Dr STEVE THOMAS: Using as guidance the recommended fees of the AMA?

Hon MATTHEW SWINBOURN: I indicated that we will be guided—it will not be determinative—by what the AMA puts out for private practice fees currently, but that is the subject of further consultation and work with stakeholders. It is perhaps a starting point, but not the finishing point. I do not want to overemphasise that. We are not just doing what the AMA has told us. That benchmark is used in the medical fraternity for charging private patients. Obviously, Medicare has its own structures and limitations.

Hon Dr Steve Thomas: The two are very different.

Hon MATTHEW SWINBOURN: Yes, and private insurers have their own scale of fees that they have prepared.

Hon Dr Steve Thomas: They are likely to be lower than Medicare, probably.

Hon MATTHEW SWINBOURN: Probably! There is obviously a range out there. As I understand it, the Australian Medical Association's guidance on prices has been used in the past and obviously will be helpful going forward.

Hon Dr STEVE THOMAS: How does the AMA's guidance compare with the maximums that will be put in place by the government under clauses 72 and, more particularly, 73? Again, I apologise for jumping around. How do they compare? Are we likely to get significantly closer to the AMA's guidance following the passing of this legislation? I am interested to know precisely what the financial impact is likely to be. I am not sure that the answer the parliamentary secretary has given, with all due respect to his very strong legislative powers, has made clear exactly what the financial impact will be for a particular surgery, such as a significant orthopaedic piece of work with a tricky anaesthesia, for example. By increasing the maximum allowed and implementing the changes to the regulatory process it seems will be made, is it likely there will be any significant increase in the cost of procedures, and will that be limited by the provisions at clauses 72 and 73?

Hon MATTHEW SWINBOURN: I appreciate the member's concern that going forward there might be, for want of a better word, gouging by doctors who see that there is a larger cap. We think that it will have the opposite effect. Currently, 70 per cent of medical procedures are not covered by the maximum cap. It is our goal to have an almost comprehensive maximum cap. Presently, some orthopaedic surgeons are charging rates well beyond the AMA recommended private practice rates. As I say, we will probably end up somewhere around that AMA rate for our own—what do we call it?

Hon Dr Steve Thomas: The health expenses order under clause 73?

Hon MATTHEW SWINBOURN: Yes, it is clause 73, "Medical and health expenses order". That cap will be provided for a whole range of procedures that are currently happening under a laissez faire approach, for want of a better word, and workers are getting charged far more than they would if they were a private patient with private medical insurance. The member's concern is that we will see a blowout in costs; we actually think it will help to moderate the cost for the medical side of things because we will be putting in place that mechanism for a maximum cap. The principle here is that if an orthopaedic surgeon is doing a workers compensation insurance operation, it is no different in practice from when they are doing it for a private patient who has had an accident in their backyard. There is no justification for a higher rate; therefore, that is what we are trying to even out.

Hon Dr STEVE THOMAS: I think we agree. We are talking about the same concerns—that the process is not taken advantage of, if you will. I heard the parliamentary secretary confirm that in many cases the price of procedures under a workers compensation claim—I will have to look up his exact words—significantly exceeds the cost that would be incurred if a private patient were injured. If someone injures themselves playing tennis, their elbow reconstruction might cost $30 000. If they injured it under workers compensation, it might be significantly higher. I think that is what the parliamentary secretary is telling the house.

Hon Matthew Swinbourn: In some cases, there can be a significant difference in cost.

Hon Dr STEVE THOMAS: We have the same concerns. Hopefully, the benefit of the surgery will go to the worker but the benefit of the money that is being spent will go to the medical professionals. We have to be careful to ensure that ultimately the benefit is aimed at the worker as part of this process. It is a shame that Hon Dr Brian Walker is not here because I do not mind stirring up the doctor profession. We like to think of them as the second tier of medicine. I would love to see the human medical profession survive purely on putting bills out rather than being subsidised under the public purse. That would be a shock to their system. However, we will not get to that stage, and all of that is done at the federal level anyway.

I am interested and concerned to ensure that the workers compensation system is targeted at workers who are injured rather than being a good avenue for professional income. I am not 100 per cent convinced. I think the parliamentary secretary is telling us that already occurs. He said that the expansion of the scheme to other medical procedures is very good. I encourage the government to look at all those and go as wide as it possibly can with those procedures. I assume that the same applies to complementary medicines and all the rest of it to ensure that these things occur at a reasonable price. The wider we go, the better, and more power to the government under those circumstances.

Before I move on to a couple of questions about special payments, I am looking for a commitment to keep an eye on this because I think there is a risk. Currently, the cost of some procedures is significantly higher for workers compensation injuries. The risk is that when the cap is raised, it becomes more attractive. That is not to say that great parts of the medical profession will not take advantage of it, as I am sure there are great servants of the wider community amongst them, but the temptation is there. It is incumbent upon the government to ensure that it monitors the temptation at the very least. I might be looking at the odd repetitive question, perhaps not to the PFAS level but some others where we are looking at regular updates on the potential costs. That is an important process. I do not need the parliamentary secretary to respond to that; I think my message is reasonably clear.

The question around special expenses and special increases, which results in a higher special limit amount, is all part of clause 69. The special increase limit is an amount that is 190 per cent, or a greater percentage, if any, prescribed by the regulations, of the medical and health expenses general limit amount. As we have determined, that amount is about $250 000, which means the legislative special increase limit amount, without any other regulations—that is 190 per cent—is about $478 800. There are potentially regulations that make that even higher again. We have been talking about the incentive to make sure that the charges are relatively high. I always find human nature and the 80–20 rule of life occurs, so if 80 per cent of people are doing the right thing, 20 per cent of people will be looking to take advantage of that higher cap. Let us have a very quick examination of that. How often has a special expense resulted in a special increase, to date? Does that occur regularly, and to what extent does it occur? It would seem to be an alternative option for the government to raise the limit from 30 per cent to 60 per cent. If it can go up to 190 per cent upon application and special circumstances, that is obviously significantly higher than the rise to 60 per cent. Is it the case that the 190 per cent special circumstances are not being used, or very rarely being used? I am interested to know why there is a need to have a potential double process going on. The government has the capacity to increase it. Perhaps the parliamentary secretary can tell us whether the special amount existed previously. I did not think this was a new clause, but he might tell us that this has been put in place, as well as a new part. Maybe the parliamentary secretary could start with that bit.

Hon MATTHEW SWINBOURN: If I could put it this way and paint it for the member, there is currently a 60 per cent cap for medical expenses.

Hon Dr Steve Thomas: The cap is currently at 30 per cent.

Hon MATTHEW SWINBOURN: Sorry, 30 per cent; I was talking about the bill. Under the current act, it is 30 per cent, and under the current act there is provision for what is called additional amounts. There are two steps in that. This is not new; it is reflective of the current act. The 60 per cent is the difference here, and we are using different wording. First of all, instead of saying "additional amount", we have in front of us at clause 69 a "standard increase". A standard increase is 40 per cent of the prescribed amount. Then there is the "special increase", which will be capped at 190 per cent of the amount. It steps up, obviously.

Hon Dr Steve Thomas: The standard increase will be from 30 per cent to 60 per cent?

Hon MATTHEW SWINBOURN: No, not a standard increase. The prescribed amount for medical expenses will be at 60 per cent. When a worker hits that particular cap, they can then make an application for a standard increase, which is an amount equal to 40 per cent of the cap as the additional amount. If they reach that cap, they will then be in a position in which they can make an application for the special increase, and the limit on that is 190 per cent. Those are the very exceptional cases. The more common ones might relate to the kind of cancers that the chair referred to, for which treatments are long and expensive. We could be talking about some pretty expensive medical procedures, such as CyberKnife–type treatments on tumours, which cost between $10 000 and $12 000 for a single round. Those things can increase quite quickly over time. Expenses go up quite quickly when intensive care and multiple surgeries are involved. I do not have with me at the table the number of cases in which an application has been made for an increase. If that is important to Hon Dr Steve Thomas, we can give an undertaken to see whether we have that information.

Hon Dr Steve Thomas: I would be interested, if you could. I don't care if it comes in two weeks' time. I have developed an interest in the area.

Hon MATTHEW SWINBOURN: To satisfy the member's piqued interest, we will see whether we can get those figures.

Hon Dr Steve Thomas: If you told me to put it on notice, I would put it on notice, but you'd still have to come back with it in the fullness of time.

The DEPUTY CHAIR (Hon Sandra Carr): Leader of the Opposition.

Hon Dr STEVE THOMAS: Thank you, Acting Chair. Pardon the back and forth across the table; it is all the parliamentary secretary's fault.

Unfortunately, we are still jumping around the bill because the standard increase is contained in clause 77 and we are still dealing clause 69. We have had to jump around a bit, which is a problem with the bill. The truth is that the bill is better than the previous bill in that at least we are dealing with clauses within a few clauses of each other, as opposed to the previous bill, which was an absolute rotten thing to read and get through.

Hon Matthew Swinbourn: You're making our case for us.

Hon Dr STEVE THOMAS: We support the bill; it will make improvements, but that does not mean that we will let it pass without proper examination. The bill makes improvements and the opposition supports it. Can the parliamentary secretary imagine the grief I would be giving him if we opposed the bill; we would still be on clause 1.

I thank the parliamentary secretary for his answer. I do not remember the standard increase being set at 40 per cent in clause 71.

Hon Matthew Swinbourn: If you're on page 65 of the bill, turn over to page 66 where it says the standard increase limit amount means the amount that is 40 per cent.

Hon Dr STEVE THOMAS: That brings us back to my point and potential question. The parliamentary secretary said that it is important to raise general medical costs from 30 per cent to 60 per cent on an amount that is indexed anyway. The growth has been in the total amount, and that is where the indexation sits. On top of that—this previously existed—there is extension capacity for significant issues—that is, the standard increase and the special increase, which go up to 190 per cent. That was also in the previous bill but in a fairly cluttered way. There has always been the capacity to go significantly above the 30 per cent cap to 190 per cent, even under the previous bill, when it is needed. The beneficiary is the medical profession. It is a highly unionised organisation through the Australian Medical Association, but it is not necessarily aligned to the Labor Party—I do not think.

Hon Matthew Swinbourn: It is not aligned at all.

Hon Dr STEVE THOMAS: There are other options to increase that but the government has chosen to, at the same time, raise the standard limit from 30 per cent to 60 per cent. As the parliamentary secretary said, only those more complex cases reach those limits and there are other ways to increase the medical costs. In raising the standard limit from 30 per cent to 60 per cent—whether we think that is a good thing or a bad thing, and I am not opposing the clause or what the government is doing—I think it just reinforces that we have alternatives. Raising the limit

from 30 per cent to 60 per cent potentially provides an incentive for price rises. I will finish this section because I have kind of rolled about five clauses into one, for which I apologise. I think there is an incentive to increase the costs inherently built into the increase from 30 per cent to 60 per cent, despite all the other options that the medical profession and workers have to seek higher levels, so I reinforce the message that it is important that the government monitors the average cost of these things.

The government has the opportunity to prove me wrong; there might be no general increase in those costs, but I think it is a significant risk of the legislation. I would like to see us making sure that, going forward, we monitor that to make sure that that will not be the case. Ultimately, whether we are left wing, right wing or somewhere in the middle, we are all sitting here saying that the beneficiaries of this act need to be injured workers. If we maintain that focus, we will get somewhere we need to be.

I think I will let it go. I do not think there is much further to go with it. I think I have made my point, and I hope that the parliamentary secretary will take that on board and reflect that back to the minister, and his office will keep an eye on it to make sure that we are monitoring that the outcome is the one we are actually trying to get to.

Clause put and passed.

Clauses 70 to 71 put and passed.

Clause 72: Requirement that medical and health expenses be reasonable —

Hon NICK GOIRAN: There has already been some discussion about compensation for medical and health expenses. We are here at part 2, division 4 of the bill, specifically at clause 72. There is, I guess, a twofold test of reasonableness: the reasonable necessity of the medical service and the reasonableness of the quantum of the service. There has been quite an exchange between the parliamentary secretary and the Leader of the Opposition about these matters. Can a medical and health service provider charge a worker a fee in excess of the expense that has been set out in this division?

Hon MATTHEW SWINBOURN: Perhaps due to what I said earlier to Hon Dr Steve Thomas about maximum rates and given the question the member asked, this requires some clarification because I think I might have indicated that those were the maximum amounts that could be charged rather than the maximum amounts that the scheme was prepared to pay. To answer the member's question directly, which is whether a medical practitioner can charge more than those maximum amounts, the answer is yes they could. The scheme will pay only up to the maximum amount and, if there is a gap, it would need to be covered by any additional insurance the worker might have themselves, if they were lucky enough to have that, or they will have to pay the additional amount out of their own pocket. It is possible. We are trying to move away from that system by aligning the fee structure more with what the Australian Medical Association is prescribing for private amounts. Any worker in that situation should decide beforehand whether they will proceed when they are provided with what the costs of their surgery or procedure might be. I am not going to pretend that workers sometimes proceed without any understanding that that is going to be the case. The system prescribes the maximum amounts as the maximum that the scheme will pay. Again, I did not mean to mislead the house, but my answers may have been a little bit misleading in the sense that I gave the impression that medical practitioners would be able to charge only the maximum amounts.

Hon NICK GOIRAN: I think this goes to the point of the honourable Leader of the Opposition's questions, and I heard the term "gouging" used. I think there is some merit in us being alert to the possibility of this occurring, but equally to holding that intention with the fact that there is a finite supply of these service providers. At the end of the day, if a worker needs some form of medical or health assistance, not only for their own benefit but in order to return to work, then we want to be able to try to facilitate that. Otherwise, it is very easy for the specialists to say, "Look, I'm just not taking on this case. I'm going to go and deal with another case." I know that at the moment, for example, if a Western Australian wants to try to see a neurologist, even as a private patient—good luck. They will be waiting a very long time. That is a simple outcome of supply and demand.

Hon Dr Steve Thomas: If I could interject, member, it would help if the specialist fields were more dedicated to training others in the specialist fields rather than limiting the numbers in it.

Hon NICK GOIRAN: That is right, and the colleges allowing more and more of these people to be able to be suitably qualified. Parliamentary secretary, this is all a debate for another day, but the concern here is that with those prevailing factors, guess who bears the burden at the end of the day? It is the injured worker who presumably is making their best endeavours to return to work. This notion of capping fees has my support in principle, but I acknowledge the difficulty in the well-meaning nature of trying to cap these fees to avoid the gouging that we are all concerned about; equally, we do not want the outcome to be that suddenly the workers have even fewer specialists and people to be able to see. The parliamentary secretary has confirmed for the record, in essence, that there is nothing unlawful in a medical practitioner charging in excess of the fees allowed under the scheme. Whether the worker ultimately pays the so-called gap is a matter for the medical practitioner to chase in accordance with the usual commercial provisions. The employer and the insurer will have no obligation beyond that cap.

Hon MATTHEW SWINBOURN: Yes, that is correct.

Clause put and passed.

Clause 73: Medical and health expenses order —

Hon MATTHEW SWINBOURN: Members might note the amendment in my name on supplementary notice paper 99, issue 2 at 4/73. It is on page 70, to delete lines 10 and 11. By way of explanation, Parliamentary Counsel's Office has prepared these amendments. They are very minor. They do not represent a substantive change to the bill. The amendments are required due to the commencement of the Legislation Act 2021 on 1 July 2023, which, among other things, provides for publication of certain subsidiarity legislation on the WA legislation website, rather than the *Government Gazette*. The amendments in committee must be given—oh, that is just further instructions. I should not just read what is put in front of me; I should check it beforehand. That is the explanation for the extent of the amendment. I think we are happy to answer any additional questions. I note that there are further amendments relating to the same principle on the notice paper. As I said, it is simply as a consequence of the passing of the Legislation Act on 1 July.

Hon Dr STEVE THOMAS: Can I confirm that the parliamentary secretary is saying that he will remove note 1 under "Notes for this subsection"? Is that what he is deleting?

Hon Matthew Swinbourn: By way of interjection, yes.

Hon Dr STEVE THOMAS: That might be the simple way to explain it.

Hon MATTHEW SWINBOURN: I was trying to give a broader explanation, but if you sit down I will actually seek the call. Deputy Chair, I move —

Page 70, lines 10 and 11 — To delete the lines.

Hon NICK GOIRAN: In principle, I have no problem with the deletion for the reasons the parliamentary secretary already enunciated, including the commencement of the Legislation Act that the parliamentary secretary indicated commenced on 1 July this year. One of the ways in which subsidiarity legislation can now be published is on the government website, I think.

Hon Matthew Swinbourn: That is correct, yes.

Hon NICK GOIRAN: At the moment the note at page 70, at lines 10 and 11, indicates that subsidiary legislation must be published in the *Gazette*. Has consideration been given to simply expanding note 1 rather than deleting it?

Hon MATTHEW SWINBOURN: I cannot actually answer that question, because in the process of having these amendments put to us, PCO identified that there needed to be changes as a consequence of the commencement of the Legislation Act. It then provided us with the amendments, and we have dutifully proceeded to follow their instructions, for want of a better word. As I said, it is not substantive. Unfortunately, I cannot take what PCO might have contemplated about these amendments any further, because I do not have PCO advisers at the table.

Hon NICK GOIRAN: I want to put this on the record for future reference because this situation does occur from time to time. For those who might be watching this debate or otherwise showing interest from that office that is often mentioned but never present —

Hon Matthew Swinbourn: It was present during the legislation bill itself, if you remember.

Hon NICK GOIRAN: Indeed, but in these bills there seems to be a continuing absence, particularly when it has identified an issue like this. I think it would certainly be of assistance to members, and presumably to the government, if some form of a briefing note was prepared and circulated. Dare I say it, the ideal or "gold standard" would be for such advisers to be present for the purposes of the debate. That said, given that this is merely a note and it does not actually change the substantive law in any event, it ought to be supported.

Amendment put and passed.

Clause, as amended, put and passed.

Clauses 74 to 80 put and passed.

Clause 81: Term used: miscellaneous expense —

Hon Dr STEVE THOMAS: Parliamentary secretary, I am going to do my regular trick of trying to fit all of division 5 into one debate, just to try to advance proceedings. We have moved rapidly today through this bill, and so we can take a little bit of time to check this out. Can I start with this, then, in division 5? Division 5 is "Compensation for miscellaneous expenses". Can the parliamentary secretary confirm that this is a new section and that it is not in the current act? Can we start with that, please?

Hon MATTHEW SWINBOURN: It is not new; it just has a new label. Currently, the types of entitlements that are encapsulated in this now miscellaneous expenses division 5 are already in the existing act, and so it will not provide for any new entitlements; it just groups them together because they do not neatly fit under any of the other ones, and that is why they are called "miscellaneous" obviously. But I will bring the member's attention to the provisions at clause 85, "First aid and emergency transport". Under the current act, they are included under medical expenses, but we have now moved them as a separate thing because we do not characterise them as a medical expense. We can explore that further if the member wishes, but we think that they are more appropriately included under miscellaneous provisions rather than the specific medical expense provision.

Hon Dr STEVE THOMAS: I was going to get to the first aid changes. Clause 83 lists all the things and then they all have a clause each after that, which I think is a funny way to do it. I will come back to clause 85, but clause 86 is "Wheelchair", clause 87 is "Surgical appliance or artificial limb", damaged clothing is at clause 88, artificial aid is at clause 89, clause 90 is "Travel" and permanent impairment is, ultimately, at clause 91, which I think we will get to in a separate bit anyway. All those things were individually listed but in separate parts of the current act. Is that what we are saying?

Hon Matthew Swinbourn: By interjection, yes; that is correct.

Hon Dr STEVE THOMAS: What is the intent of shifting first aid and emergency transfer expenses out of medical expenses? Is there a reason why that is the case?

Hon MATTHEW SWINBOURN: Obviously, under the current regime, as part of a medical expense it comes out of the current 30 per cent. The policy decision that has been made is that first aid and transport expenses are not strictly medical expenses and therefore it is more appropriate that they are provided for separately. I think the member can understand that one of the reasons in relation to transport is that if the person lives regionally and requires a medical air lift to the city, a significant proportion of their medical expenses would be dedicated to the cost of that transport, which somebody in the metropolitan area, for example, would not particularly face. I live in the eastern suburbs and if I needed to be transported to Fiona Stanley Hospital for medical care, it would be an ambulance trip, but if I lived in Meekatharra and needed to come down to Perth, the cost of transport, which would probably be via air ambulance, would be significantly higher. It is for equitable reasons that we are pushing those expenses out of medical expenses into the miscellaneous ones; they are not technically medical expenses because it is for transportation.

Hon Dr STEVE THOMAS: I have a couple of questions about that, so I suggest that we put clauses 81 to 84 and go to clause 85 specifically.

Clause put and passed.

Clauses 82 to 84 put and passed.

Clause 85: First aid and emergency transport —

Hon Dr STEVE THOMAS: With first aid and emergency transport in relation to workers compensation, are we talking about the inclusion of the initial response to the injury or are we talking about workers compensation further down the track? I imagine that the emergency response to the initial injury would largely be covered under the health system. First aid treatment for workers in most large companies in the mining sector is done by the company, and most of them have a transport deal for the person's transport in an emergency.

Good catch, member! Just as an aside, the parliamentary secretary will be pleased to know that if I need a drink, I could walk out into almost any corridor in Parliament and fill my water jug up from the roof leaks occurring at the moment. He might want to talk to government about investing in the maintenance of Parliament—as the rain comes tumbling down.

Are we talking about the initial emergency response?

Hon Matthew Swinbourn: Yes, member.

Hon Dr STEVE THOMAS: Is that also included under miscellaneous expenses?

Hon Matthew Swinbourn: Yes.

Hon Dr STEVE THOMAS: That is interesting. I would have thought that in many cases that would be covered outside the workers compensation process. The parliamentary secretary may not be in a position to let us know how often workers compensation insurance payments are made for the initial first aid and an ambulance to get to an emergency centre. How often is that charged to the workers compensation system after a workplace accident versus being paid for under the health system?

Hon MATTHEW SWINBOURN: This is not a new entitlement that we are dealing with; it will just be in a new part of the legislation. The other new thing is it is not covered in the medical expenses as a medical expense. To

get to the member's point, it is typically the first response to the accident. I am advised that those charges—for example, for an ambulance or any other kind of first aid that is delivered by somebody who might charge for that kind of thing—are not always charged to the workers comp system. It is more common when someone relies on the Royal Flying Doctor Service, because that expense is more significant. What happens, of course, is that a person who has an accident and requires access to that service is picked up and brought to the medical care that they need, and a bill is subsequently issued that needs to be paid. Sometimes, a person's own private health insurance might pay that bill, but the insurer might then seek recovery of that cost from the workers compensation insurer. Therefore, the bill makes provision for that kind of thing, as the act currently does.

Hon Dr STEVE THOMAS: That is probably a reasonable cost, although the insurance industry might argue that placing it under the cap will slightly limit their exposure.

Hon Matthew Swinbourn: Somebody is paying at the end of the day.

Hon Dr STEVE THOMAS: I suspect that the insurance company will probably pay either way in most cases, but it is a matter of which box it will go under for the most part. I imagine that the insurance company will pick up the cost of the emergency response, so it is probably simply a matter of being a bit less under the cap. As we discussed before, there is plenty of room in the cap. It is not something to argue over, so I am happy to let it go.

Clause put and passed.

Clauses 86 to 89 put and passed.

Clause 90: Travel —

Hon Dr STEVE THOMAS: Subclause (4) states —

> The regulations may specify the rates at which expenses referred to in this section are taken to be reasonable.

Again, we have this regulation-making power. A reasonable price for transport and travel will be set later down the track. Can the parliamentary secretary give any indication of where that is likely to land? Are we looking at public service travel rates, which are pretty generous? Certainly when I compare those rates with the cost of running around as a member of Parliament, I think they do all right. There must be some vague indication. What are those travel rates and how are they likely to vary?

Hon MATTHEW SWINBOURN: We currently prescribe rates for the equivalent of this under the current act. We have a rate per day for meals and lodging of $139, and we have a rate for vehicle running expenses of 55¢ per kilometre. The intention once the act is operational is simply to re-regulate those rates with any additional indexation, and the consumer price index is used to index those amounts.

Clause put and passed.

Clauses 91 and 92 put and passed.

Clause 93: Compensation for workplace rehabilitation expenses —

Hon NICK GOIRAN: We move now to division 6 of part 2 of the bill, "Compensation for workplace rehabilitation expenses". In 2004 specialised retraining programs were introduced as part of the amendments made to the act. There is no mention of specialised retraining programs in the bill under the new scheme. Why were specialised retraining programs included in 2004?

Hon MATTHEW SWINBOURN: I do not know whether I have a satisfactory answer for the member—this is 19 years ago—but the best advice I can get is that there was concern that common law caps might disadvantage workers so the specialised retraining was introduced as an alternative. I cannot provide any more context than that. I can say that since 2004 there has not been a single application.

Hon NICK GOIRAN: I am happy to confirm that, parliamentary secretary. My understanding is the same as his. That is exactly right. After these common-law restrictions were put in—keeping in mind someone needed to be an injured worker to the tune of 15 per cent whole-person impairment to access their common-law rights that had been restricted by this statute—as a sweetener to those reforms in 2004, this invention of a specialised restraining program was inserted. The trick was that the worker needed to be whole-person impaired between 10 per cent and 15 per cent. If someone is more than 15 per cent, they have the capacity to elect for a common-law claim, but, presumably, the legislators of the time and the government of the day—interestingly at the time, a Labor government—said that they wanted to make sure workers in the cohort of between 10 and 15 per cent were still looked after, so they included the specialised retraining program. Here we are 19 years later and, as the parliamentary secretary has kindly pointed out, not one single worker has accessed the specialised retraining program in that time. That is an abomination.

In 2004, 19 years ago, lawmakers said they would restrict workers' rights. I might add, it is beyond me why it is left to a Liberal member of Parliament to make these points about workers' rights, but that is what happened. In 2004, a Labor government came in and restricted Western Australian workers' common-law rights, and it told

them not to worry because if they are 10 to 15 per cent whole-person impaired, it would help them out with a specialised training program. Now here we are saying 19 years later saying that it has been such an abject failure that not one Western Australian worker has accessed a specialised retraining program. What is our solution? Under the new Labor government here we will remove the whole thing. I have a major problem with that, because workers' common-law rights were restricted in 2004. That was conceded across the chamber at the time. If the sweetener for the people who were whole-person impaired at 10 per cent has not worked out, the solution was not to remove it and deliver nothing. An alternative needs to be looked at. Why do we not look at the barriers to the access to specialised retraining programs? If it applies only to this cohort of workers who are between 10 and 15 per cent impaired, why do we not remove that? That is one option available to government. Why not have an alternative?

I note what WorkCover WA's final report at paragraph 626 says about the views of stakeholders —

> The majority of submissions support the removal of the regime, given the entitlement has never been accessed.

With all due respect to the authors of the final report, that is no basis on which to deliver a recommendation that we are going to remove it. We need to understand the heart and the spirit of the stakeholders at the time. The majority of stakeholders were saying that they agree with WorkCover and the government. I might add in fairness to the parliamentary secretary that when the final report was prepared, it was a Liberal government that initiated it. But the stakeholders said to whomever was on the Treasury bench at the time that they agreed with them that the specialised retraining program has been a complete failure. It is an absolute farce. No-one is able to access it. No-one has accessed it, so they agree with the government that the entitlement should be removed. But to then take the quantum leap and say that we will remove it and give the injured workers nothing in return is also a failure. I note that at paragraph 627, the final report states —

> Three stakeholders do not support the discontinuation of specialised retraining programs and suggest the access thresholds be removed.

Then it says at paragraph 628 —

> Various submissions suggest alternatives to support retraining, including:
>
> - quarantining part of the workplace rehabilitation entitlement for retraining purposes;
> - development of an employer incentive program to facilitate redeployment of injured workers.

The ultimate recommendation made at the time by the authors of the final report at WorkCover WA was that the specialised retraining program regime be discontinued and that is, in fact, what will happen. I ask the parliamentary secretary whether the current government—I understand that it has inherited the final report from the previous government—has given consideration to adjusting the access thresholds rather than discontinuing the specialised retraining programs?

Hon MATTHEW SWINBOURN: To be blunt, member, consideration was not given to retaining the specialised retraining programs in a fashion and removing the thresholds. As the member has indicated, the 2014 report made that recommendation. We have released iterations of the draft of the bill in which we have been up-front that we were going to give effect to that recommendation. Since that time, for better or worse, stakeholders have not made a case for us to do what the member has suggested—I am not going to reflect on whether that is a good, bad or indifferent thing—and so we have proceeded on the basis that there is no objection from those stakeholders for this provision to be removed and for the other provisions that relate to rehabilitation to meet the outcomes-based approach of the other parts of rehabilitation. I do not think we are going to have a meeting of minds on this particular point, so it is a question for the member how far he pushes it.

The member does himself a disservice by saying that he is making this point as a Liberal member. It is the member who is making a case for this. Obviously, he is still a Liberal member of Parliament, but he does himself a disservice to suggest that he is not also at times an advocate for workers' rights.

Hon NICK GOIRAN: I thank the parliamentary secretary; that is kind of him to say. With this scheme, if it has not been considered to retain the specialised retraining program but change the access thresholds, has consideration been given instead to reducing the common-law threshold? Remember that the common-law threshold kicks in at 15 per cent whole-person impairment. If the impairment is less than 15 per cent, the worker has no access to their common-law rights. This cohort that was intended to benefit from these specialised training programs, but has never benefited from them, kicks in at 10 per cent whole-person impairment. Has consideration been given to reducing the threshold for common law to 10 per cent instead of 15 per cent?

Hon MATTHEW SWINBOURN: Again, to put it directly, no, that was not considered. If we think about the task that we set ourselves with this bill, it is a modernisation of the existing bill as a result of our election commitments. We did not make an election commitment to reduce the common-law threshold from 15 per cent to some other

amount. I will add that any decision of that nature would require significant consultation with stakeholders. I am sure many of them would have a particular view. Some of them would be wholeheartedly supportive of that; others will scream from their rooftops that it will make the system collapse under its own weight. The member knows those arguments as well as I do.

Hon NICK GOIRAN: I agree but, again, the point needs to be made that the workers with between 10 per cent and 15 per cent whole-person impairment have been severely shafted by the system. That is a 19-year shafting. In 2004, they were told, "Don't worry about it; we're looking after you with this specialised retraining program." Here we are, nearly two decades later, realising that it has been an abject failure. Someone needs to do something for those people. I put that to the government. I accept that nothing will happen in this round of reforms. As we have seen with these reforms, this takes such an enormous amount of time. For us to be dealing with the final report from WorkCover itself, if it were not so serious, it would be laughable. I hope that whoever is giving consideration to what the next round looks like looks at those workers who have a whole-person impairment of at least 10 per cent.

I turn to my next question on this issue. Is there any indicative figure of how much money has been saved by insurers who have never had to spend a cent on specialised retraining programs over the last 19 years?

Hon MATTHEW SWINBOURN: We do not have figures of the kind the member just illustrated. Insurance is complex in terms of its total amount. I do not think anyone, except for the most talented actuaries, could work out what proportion of premiums would specifically relate to that. We have not done that work.

Clause put and passed.

Progress reported and leave granted to sit again, pursuant to standing orders.