



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON UNIFORM
LEGISLATION AND GENERAL PURPOSES
IN RELATION TO THE
WORKERS' COMPENSATION AND
REHABILITATION AMENDMENT
(CROSS BORDER) BILL 2004**

Presented by Hon Adele Farina MLC (Chairman)

Report 18
August 2004

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed: April 11 2002

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“7. Uniform Legislation and General Purposes Committee

7.1 *A Uniform Legislation and General Purposes Committee* is established.

7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.

7.3 The functions of the Committee are –

- (a) to consider and report on bills referred under SO 230A;
- (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to consider and report on any matter referred by the House.

7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

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EXECUTIVE SUMMARY FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES

IN RELATION TO THE

WORKERS' COMPENSATION AND REHABILITATION
AMENDMENT (CROSS BORDER) BILL 2004

EXECUTIVE SUMMARY

- 1 On Friday, July 2 2004 the Workers' Compensation and Rehabilitation Amendment (Cross Border) Bill 2004 stood referred to the Uniform Legislation and General Purposes Committee pursuant to standing order 230A.
- 2 The purpose of the Bill is to amend the *Workers' Compensation and Rehabilitation Act 1981* and for related purposes. The Bill includes amendments:
 - a) related to intergovernmental cross border arrangements to ensure national coverage of workers' compensation principles (Part 2 of the Bill); and
 - b) related to the State Government's Workers' Compensation Reform Bill 2004 which provides for references in the *Workers' Compensation and Rehabilitation Act 1981* to be changed from "disability" to "injury" and "the Commission" to "WorkCover WA" to ensure consistent terminology should that bill be passed (Part 3 of the Bill).
- 3 The report focuses on Part 2 of the Bill. The Committee has not made any recommendations although it discusses some clauses to assist informed debate in the House. The Committee draws the attention of the House to the Committee's comments on the status of and type of supporting documentation provided as evidence of the 'agreement' of participating jurisdictions to the cross border arrangements.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES**

IN RELATION TO THE

**WORKERS' COMPENSATION AND REHABILITATION
AMENDMENT (CROSS BORDER) BILL 2004**

1 REFERRAL AND PURPOSE OF THE BILL

1.1 On Friday, July 2 2004 the Workers' Compensation and Rehabilitation Amendment (Cross Border) Bill 2004 (**Bill**) stood referred to the Uniform Legislation and General Purposes Committee (**Committee**) pursuant to standing order 230A. Pursuant to standing order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee.

1.2 Standing order 230A(4) requires that the Committee report to the Legislative Council (**Council** or **House**) within 30 days of referral, being July 31 2004. As this date falls during the winter recess, the Committee is required to report back to the Council on the first sitting day after the winter recess, being August 17 2004.

1.3 The purpose of the Bill, as indicated by the Long Title, is to amend the *Workers' Compensation and Rehabilitation Act 1981* (**Act**) and for related purposes. Broadly the Bill includes amendments:

- a) related to intergovernmental cross border arrangements to ensure national coverage of workers' compensation principles (Part 2 of the Bill). These include amendments to determine:
 - which jurisdiction a worker is connected with for the purpose of workers' compensation;
 - when the test as to which jurisdiction the worker is connected with will apply;
 - in which jurisdiction a common law action can commence; and
- b) related to the State Government's Workers' Compensation Reform Bill 2004 which provides for references in the Act to be changed from "disability" to "injury" and "the Commission" to "WorkCover WA" to ensure consistent terminology should that bill be passed (Part 3 of the Bill).

2 INQUIRY PROCEDURE

2.1 Immediately on referral, on July 2 2004, the Committee wrote to Hon J C Kobelke MLA, Minister for Consumer and Employment Protection (**Minister**), seeking

information about the Bill and documents supporting its implementation. The Committee specifically sought any relevant Memorandum of Understanding, Minutes or Inter-Governmental Agreement. The Minister responded to the Committee's request for information on July 19 2004. Supplementary information was provided to the Committee by WorkCover WA on July 23, 26 and 30 2004.¹

- 2.2 The Committee did not advertise for or invite submissions because of its strict reporting timeframe. Details of the inquiry were placed on the parliamentary website at: www.parliament.wa.gov.au.

3 UNIFORM LEGISLATION

Scrutiny of uniform legislation by the Western Australian Parliament

- 3.1 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991 both the Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of uniform legislation.²
- 3.2 More recently during the Thirty-Sixth Parliament until the appointment of the Committee, the scrutiny of uniform legislation fell within the terms of reference for the Council Standing Committee on Legislation. In November 2001 the relevant Council standing order (standing order 230A) was amended to consolidate matters relevant to uniform legislation and to facilitate automatic referral of such bills to the Committee for inquiry and report within 30 days.

Legislative structures

- 3.3 National legislative schemes of uniform legislation were addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (**1996 Position Paper**). The 1996 Position Paper emphasised that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. However, it does question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.
- 3.4 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that

¹ Facsimiles from B Stone and P Brookes, WorkCover WA dated July 23, 26 and 30 2004.

² For discussion of the history behind the scrutiny of uniform legislation and standing order 230A refer to: Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, August 2002, pp5-6.

consistency with the legislative form agreed among the various executive Governments is a 'given'.³

- 3.5 National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth (refer to standing order 230A(1)(b)), can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability have been identified. The legislative structures are summarised in Appendix 1.⁴
- 3.6 The Bill is 'uniform legislation' within the meaning of standing order 230A by virtue of being pursuant to an intergovernmental agreement to which the Government of the State is a party: standing order 230A(1)(a). The Workplace Relations Ministerial Council (**WRMC**) agreed to the development of a mutual recognition framework for workers' compensation arrangements on May 30 1997. Mutual recognition is mentioned at structure 6 of Appendix 1. It involves jurisdictions recognising the rules and regulations of other jurisdictions as sufficient and satisfactory. The agreement is usually reciprocal and hence 'mutual'. For mutual recognition, regulatory standards in an area are usually identical. In the case of the cross border arrangements, legislative amendments are effected to standardise the approaches of participating jurisdictions.

Scrutiny principles

- 3.7 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:
- does the Bill trespass unduly on personal rights and liberties;⁵ and
 - does the Bill inappropriately delegate legislative powers?⁶

³ For example, refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp7-12 attached as Appendix 1 to Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Position Paper: Scrutiny of National Schemes of Legislation*, October 17 1996.

⁴ Ibid. Also see reports of the former Legislative Assembly of Western Australia Standing Committee on Uniform Legislation and Intergovernmental Agreements.

⁵ For example: strict liability offences; reversal of the onus of proof; abrogation of the privilege against self-incrimination; inappropriate search and seizure powers; decision-making safeguards (that is: written decisions and reasons for decisions); consistency with the principles of natural justice; personal privacy; decisions unduly dependent on administrative decisions; delegation of administrative power only in appropriate cases and to appropriate persons; retrospectively affecting rights and liberties, or imposing obligations; the conferral of immunity from proceeding or prosecution without adequate justification; provision for compulsory acquisition of property only with fair compensation; sufficient regard to Aboriginal tradition and Island custom; and clear, precise and unambiguous drafting.

3.8 In addition, in recent times, the Committee has considered the impact of any proposed legislation on the application of parliamentary privilege.⁷ Although not adopted formally by the Council as part of the Committee's terms of reference, these principles can be applied as a convenient framework for the scrutiny of legislation.

4 BACKGROUND TO THE BILL

4.1 In his second reading speech on the Bill, Hon Kim Chance MLC, Leader of the House, stated that:⁸

For many years there has been concern about the need for employers to take out workers compensation insurance for individual workers in more than one State or Territory, even if the worker is working only temporarily in another jurisdiction.

4.2 Hon Kim Chance MLC noted that:⁹

- a) Attempts had been made during the previous ten years to resolve these cross-border issues, with all States and Territories recognising the need for a legislative solution.
- b) However attempts to prepare a national legislative template were frustrated because the proposed solution became complicated and unworkable.

Intergovernmental agreement

4.3 The Minister advised the Committee that the WRMC 'agreed in principle' to the development of a mutual recognition framework for workers' compensation

⁶ Such question also raises the issue of whether or not a bill has sufficient regard to the institution of Parliament. For example: provisions allowing or authorising the amendment of an Act only by another Act (known as 'Henry VIII clauses'), insufficient parliamentary scrutiny of the exercise of legislative power, the delegation of legislative power only in appropriate cases and to appropriate persons and sufficiently subjecting the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council.

⁷ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, pp7-10; *Report No 11: Higher Education Bill 2004*, September 2003, pp24-34; and *Report No 15: Australian Crime Commission (Western Australia) Bill 2003*, June 2004, pp51-55.

⁸ Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, July 2 2004, p4827.

⁹ Ibid.

arrangements on May 30 1997.¹⁰ The Minister advised the Committee that “*an intergovernmental agreement was minuted at that meeting*”. However the Committee also notes advice by the Minister in the same letter that there is no memorandum of understanding or formal agreement.¹¹

4.4 Draft Minutes for the WRMC meeting of May 30 1997 were provided by the Minister (**WRMC Minutes**). Despite further inquiry by the Committee a final copy of the signed WRMC Minutes was unavailable for sighting by the Committee. WorkCover WA and the Department of Consumer and Employment Protection were only able to provide the Committee with documents to illustrate a chain of events pursuant to which the final form of WRMC Minutes could be deduced.¹²

4.5 Article 4.4 of the WRMC Minutes relevantly provides:¹³

Ministers agreed:

(a) *in principle to the development of a mutual recognition framework for workers’ compensation arrangements in respect of:*

(i) *self-insurance and self-management for national employers; and*

(ii) *coverage for employees operating temporarily in another jurisdiction;*

(b) *to direct DOLAC [Departments of Labour Advisory Committee] members to consult their respective statutory authorities on the implications of mutual recognition of self-insurance and self-management and coverage for employees operating temporarily in another jurisdiction;*

(c) *to direct the Chairman of DOLAC to report to LMC [Labour Ministers’ Council now the WRMC] by 1 December 1997 on*

¹⁰ Letter from the Minister dated July 19 2004. The objective of the WRMC is to provide a forum for Ministers to discuss workplace relations, workers’ compensation and occupational health and safety issues of mutual interest and to make recommendations to Commonwealth, State and Territory Governments: The Department of the Prime Minister and Cabinet, *Ministerial Councils – A Compendium*, Council of Australian Governments, Canberra, July 2002, p82, accessed at: www.coag.gov.au (current at July 22 2004). The Council usually meets twice a year, around May and November. (The Council was formerly known as the Labour Ministers’ Council): <http://www.workplace.gov.au> (current at July 23 2004).

¹¹ See paragraph 7.1 and 7.2 of this report.

¹² Facsimile from P Brookes, WorkCover WA dated July 30 2004 attaching a facsimile from the Department of Consumer and Employment Protection dated July 30 2004.

¹³ Facsimile from P Brookes, WorkCover WA dated July 30 2004.

the policy and technical issues relating to mutual recognition implementation; and

- (d) *to consider that report out-of-session and report to COAG [Council of Australian Governments] by March 1998.*

4.6 The Committee observes that the WRMC Minutes also refer to the endorsement of five key principles underpinning an Interim Report of the Heads of Workers' Compensation Authorities (HWCA).¹⁴ The five key principles are:¹⁵

- *workers, compensation systems must reinforce the primacy of the employer/employee relationship in preventing and managing workplace injuries and ensuring that injured workers are returned to meaningful work;*
- *schemes throughout Australia should be consistent and predictable in terms of employers' liabilities and workers' entitlements;*
- *allocation of the costs of workplace injuries must be equitable in relation to employers, workers and the community;*
- *prevention and return-to-work objectives must be supported by the delivery of high quality claims management, medical, rehabilitation and other services, according to clearly defined criteria designed to promote scheme outcomes; and*
- *inter-jurisdictional competition predicated on service delivery should be maintained, on the basis that this provides the best opportunity for continuous improvement based on best practice benchmarking and, combined with national consistency in important aspects of scheme design, enables regulators to focus on the standards of service necessary to achieve scheme outcomes.*

4.7 National principles were endorsed by HCWA in July 2003. This allowed for Western Australia and other States and Territories to progress cross border related amendments

¹⁴ The Heads of Workers' Compensation Authorities is a group comprising the Chief Executives (or their representatives) of the peak bodies responsible for the regulation of workers' compensation in Australia and New Zealand. This includes Australia's ten workers' compensation authorities (six States, two Territories and two Commonwealth) and the New Zealand Accident Compensation Corporation. One of its objectives is to liaise with other national bodies, such as the Workplace Relations Ministers' Council, the Department of Workplace Relations Standing Committee, and relevant Commonwealth Departments and agencies to progress issues of national significance or priority to Workers' Compensation Authorities: <http://www.hwca.org.au>, (current at July 23 2004).

¹⁵ Extract provided by WorkCover WA by facsimile dated July 26 2004.

to their legislation to ensure national coverage of the cross border workers' compensation principles.¹⁶

4.8 The Committee notes two points with regard to the documentation provided by the Minister and WorkCover WA:

- A copy of the signed final WRMC Minutes was unavailable.
- There is no formal intergovernmental agreement/memorandum of understanding.

Draft WRMC Minutes

4.9 The Committee was originally provided with a copy of the *draft* WRMC Minutes which were later amended. As noted at paragraph 4.4 a final copy of the signed WRMC Minutes was unavailable for sighting by the Committee.

4.10 The Committee was advised that the 'agreement in principle' referred to by the Minister¹⁷ to the development of a mutual recognition framework for workers' compensation arrangements on May 30 1997 could only be evidenced by the provision of documents said to illustrate a 'chain of events' pursuant to which the final form of WRMC Minutes could be deduced.¹⁸ WorkCover WA advised the Committee that according to the Department of Consumer and Employment Protection this was the only version of the WRMC Minutes available.¹⁹

4.11 The Committee observes that although the Council of Australian Governments (COAG) maintains a website which provides extracts of more recent COAG meetings and copies of COAG communiqués and intergovernmental agreements, the minutes of its Ministerial Councils are not as easily accessible.²⁰ The minutes of meetings of working parties appointed by a Ministerial Council might also not be easily accessible.

¹⁶ Workers' Compensation and Rehabilitation Amendment (Cross Border) Bill 2004, Explanatory Memorandum, p1. Facsimile from P Brookes, WorkCover WA dated July 26 2004.

¹⁷ Letter from the Minister dated July 19 2004. The objective of the WRMC is to provide a forum for Ministers to discuss workplace relations, workers' compensation and occupational health and safety issues of mutual interest and to make recommendations to Commonwealth, State and Territory Governments: The Department of the Prime Minister and Cabinet, *Ministerial Councils – A Compendium*, Council of Australian Governments, Canberra, July 2002, p82, accessed at: www.coag.gov.au, (current at July 22 2004). The Council usually meets twice a year, around May and November. The Council was formerly known as the Labour Ministers' Council: <http://www.workplace.gov.au>, (current at July 23 2004).

¹⁸ Facsimile from P Brookes, WorkCover WA dated July 30 2004 attaching a facsimile from the Department of Consumer and Employment Protection dated July 30 2004.

¹⁹ Ibid.

²⁰ COAG website at <http://www.coag.gov.au>.

4.12 The Committee observes that:

- a) when state governments implement an agreement reached with another jurisdiction which affects the people of Western Australia, such agreements might be reduced to a readily identifiable form accessible to the State's public; and
- b) it is highly desirable that Ministers and their departments are in possession of confirmed information evidencing an intergovernmental agreement at a time when the state legislative component is being developed and certainly by the time legislation is introduced into Parliament.

Lack of formal agreement

4.13 The Committee notes that once a Ministerial Council has approved a proposal (in principle) for a scheme, the matter is often referred to a working party for detailed development of the scheme and drafting of the legislation. After consultation the working party makes recommendations to COAG or the Ministerial Council.²¹ In this case the working party appears to have been the HWCA.

4.14 The Committee observes that the WRMC Minutes are very general. To ascertain the detail of the matters ultimately agreed it is also necessary to locate and read various minutes and reports of the HRWC. In addition the Committee observes that the WRMC Minutes evidence that some matters relating to the scheme were to be dealt with "out of session" (refer to paragraph 4.5). The Committee notes that matters dealt with "out of session" are usually done so by means of an exchange of correspondence.²² The Committee observes that such correspondence might not always be publicly available. Accordingly the Committee observes that there is no complete 'stand alone' record of agreed matters.

4.15 The Committee has previously reported its concerns to the House where there is little or no written material that records the original agreement between the Commonwealth, State and Territories when uniform legislation is proposed.²³

4.16 The Committee observes that intergovernmental agreements can take many forms ranging from formal contracts between governments through to the most informal

²¹ Western Australia , Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Report No 19: Ministerial Councils*, June 1997, p5; and *Report No 21: Uniform Legislation*, April 1998, p4.

²² Department of the Prime Minister and Cabinet, *Commonwealth-State Ministerial Councils – A Compendium*, Department of the Prime Minister and Cabinet, Canberra, June 2002: accessed through http://www.coag.gov.au/ministerial_councils.htm, (current at July 23 2004). Note that as at August 16 2004 the compendium is currently being updated by COAG.

²³ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purpose, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p1; *Report No 14: Commonwealth Powers (De Facto Relationships) Bill 2003*, April 2004, pp6-7.

mechanisms. The Committee notes that whilst the WRMC minutes provided by the Minister and WorkCover WA were indicative of the national scheme, it was a matter of concern to the Committee that:

- it has had to rely on an unsigned final copy of the WRMC Minutes; and
- to ascertain the detail of the matters ultimately agreed it was necessary for the Committee to locate and read various minutes and reports of the HRWC,

rather than being able to consider an intergovernmental agreement/memorandum of understanding. The lack of a formal intergovernmental agreement /memorandum of understanding has been a concern in previous Committee reports.²⁴

4.17 In this respect the Committee observes that in several cases where uniform legislation has stood referred, the Committee has not been provided with a copy of an intergovernmental agreement/memorandum of understanding as it was informed that one did not exist.²⁵

4.18 As a preliminary observation the Committee finds this surprising given the stated objectives of the Council of Australian Governments to written agreements:²⁶

Where COAG has directed ministerial councils to carry forward issues on its behalf, there is an expectation that any substantive decisions requiring legislation will be enshrined in intergovernmental agreements. This provides members of COAG with an opportunity to review and scrutinise these ministerial decisions before signing and entering into an agreement at head of government level.

There have been occasions when because of the nature of the issues and the urgency to have legislation in place (recent examples being the legislation to restrict the use of human embryos for medical

²⁴ For example in respect of its inquiry into the Commonwealth Powers (De Facto Relationships) Bill 2003 the Committee was advised by the Attorney General that there was no intergovernmental agreement/memorandum of understanding 'as such' relating to the bill although extracts from the minutes of the relevant Standing Committee of Attorneys General meeting were provided: Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 14: Commonwealth Powers (De Facto Relationships) Bill 2003*, April 2004, pp6-7.

²⁵ The fact that there was no formal intergovernmental agreement/memorandum of understanding in respect of certain bills standing referred to the Committee was noted in: Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 11: Higher Education Bill 2003*, September 2003, pp7-10; *Report No 12: Criminal Code Amendment Bill 2003*, December 2003, pp1-2; and *Report No 15: Australian Crime Commission (Western Australia) Bill 2003*, June 2004, pp4-5.

In the case of two bills the agreement was in a draft form when legislation was introduced into the Parliament: Western Australia, Legislative Council, Uniform Legislation and General Purposes Committee, *Report No 13: Human Reproductive Technology Amendment Bill 2004 and Human Reproductive Technology Amendment (Prohibition of Human Cloning) Bill 2004*, December 2003, pp6-7.

²⁶ COAG website at http://www.coag.gov.au/ministerial_councils.htm, (current at July 23 2004).

research purposes and handgun bans) the political compact forged at the relevant COAG meeting has not been consolidated through an intergovernmental agreement. However, it must be emphasised that this is the exception rather than the rule. COAG level agreements make clear that the outcomes have head of government support and have greater currency and force than ministerial reports and communiqué text which may not always contain detailed policy and/or operational matters. [Committee emphasis]

- 4.19 Based on the Committee's experiences to date it appears that intergovernmental agreement/memorandum of understanding are the exceptions not the rule.

The legislative response of other jurisdictions

- 4.20 All jurisdictions agreed to pursue complementary legislation that establishes a single rule for work-related accidents. New South Wales, Queensland, Victoria and the Australian Capital Territory have already introduced amendments, while the other States and the Northern Territory have yet to introduce their legislation.²⁷
- 4.21 The Minister advised the Committee that in drafting the Bill reference was made to the New South Wales legislation – *Workers' Compensation Legislation Amendment Act 2002* (NSW).²⁸

5 OVERVIEW OF THE BILL

- 5.1 The Bill contains 19 clauses in three Parts.
- 5.2 The Committee's report is focused on Part 2 which implements the intergovernmental cross border arrangements to ensure national coverage of workers' compensation principles.
- 5.3 Part 3 relates to the State Government's Workers' Compensation Reform Bill 2004 which provides for references in the Act to be changed from "disability" to "injury" and "the Commission" to "WorkCover WA" to ensure consistent terminology should that bill be passed.
- 5.4 The Committee observes that the commencement provisions of the Bill (clause 2) are crafted in a manner to enable different dates to be fixed for proclamation of Parts 2 and 3. This reflects the fact that amendments to the Act are also contained in the State Government's Workers' Compensation Reform Bill 2004 and enables Parts 2 and 3 to

²⁷ Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, July 2 2004, p4827. Examples of the legislative response of other jurisdictions include: *Workers' Compensation Legislation Amendment Act 2002* (NSW).

²⁸ Letter from the Minister dated July 19 2004.

be proclaimed together or separately depending on progress of the Bill and the Workers' Compensation Reform Bill 2004.

5.5 The key objectives of the amendments to the Act effected by Part 2 of the Bill are to:²⁹

- eliminate the need for employers to obtain workers' compensation coverage for a worker in more than one jurisdiction and ensure each worker is connected to one jurisdiction;
- ensure workers working temporarily in another State or Territory only have access to the workers' compensation entitlements and common law provisions in their home State or Territory (referred to in the Bill as the 'State of connection');
- provide greater certainty for injured workers as to the State or Territory in which to make a workers' compensation claim and what the associated entitlements are;
- enable employers to determine the jurisdiction in which to insure each of their workers, before the worker commences work; and
- allow a court to determine the 'State of connection' and have that determination recognised by other courts in other jurisdictions, so only one determination is made.

5.6 The Committee observes comments that the commencement date of the cross border arrangements, as agreed by all jurisdictions, is July 1 2004.³⁰ However the Committee notes that the Leader of the House has advised that the amendments to the Act effected by the Bill will apply from the date of proclamation - they will not be retrospective.³¹

5.7 Further the Minister has advised that it is intended to proclaim all provisions immediately.³²

... except those relating to 'choice of law', which must be proclaimed by all jurisdictions at the same time. 'Choice of law' relates to the ability of courts to make a decision over the State of connection test,

²⁹ Workers' Compensation and Rehabilitation Amendment (Cross Border) Bill 2004, Explanatory Memorandum, p1.

³⁰ HCWA, *Comparison of Workers' Compensation Arrangement – Australia and New Zealand*, HCWA, Canberra, October 2003, p19 accessed from: <http://www.hwca.org.au>, (current at July 23 2004).

³¹ Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, July 2 2004, p4827.

³² Letter from the Minister dated July 19 2004. It is assumed that the Minister means insofar as Part 3 may also be proclaimed assuming the passage of the Workers' Compensation Reform Bill 2004.

which will be consistent for all States and Territories. Unfortunately a number of jurisdictions are still progressing the reforms so it is unclear when the provisions relating to 'choice of law' will be proclaimed.

5.8 Based on the Minister's advice the Committee notes that the Explanatory Memorandum for the Bill is incorrect.³³

6 ADVANTAGES AND DISADVANTAGES TO WESTERN AUSTRALIA AS A PARTICIPANT IN THE SCHEME

6.1 In response to the Committee's query, the Minister advised that the advantages to Western Australia as a participant in the scheme include that.³⁴

- it gives employers with workers in different jurisdictions clear guidelines on their workers' compensation responsibilities;
- it provides injured workers with increased certainty about their workers' compensation entitlements and common law rights;
- it reduces the burden currently being placed on Western Australian employers of having to obtain workers' compensation coverage for a worker in more than one jurisdiction;
- Western Australian workers undertaking employment related activities temporarily in another jurisdiction will be covered by Western Australia's workers' compensation scheme for a period of up to six months;
- it clarifies that workers' compensation arrangements for seafarers on ships are to be treated in the same way as other workers. All States and Territories will have the same definition on "ship" and "home State of a ship" to ensure consistency in the tests for 'State of connection'; and
- it will reduce the insurance premium burden experienced by Western Australia employers who are currently required to take out more than one workers' compensation policy to provide coverage for workers who regularly work interstate.

6.2 In relation to disadvantages to Western Australia as a participant in the scheme, the Minister noted that there may be a minor increase in administrative and dispute resolution costs. However he submitted that these will be contained if all workers' compensation authorities work collaboratively to ensure 'State of connection' tests are

³³ The Explanatory Memorandum at p7 states, in relation to clause 10 and 'choice of law' that "*all States and Territories have agreed to pursue a common commencement date of July 1 2004*".

³⁴ Letter from the Minister dated July 19 2004.

applied in a consistent and expedient fashion, thereby avoiding matters having to be resolved through formal dispute resolution processes.³⁵

7 OPTING OUT OF THE SCHEME AND AMENDMENT OF THE SCHEME

7.1 In respect of the Committee's query about whether and by what mechanism the State can opt out of the scheme the Minister advised:³⁶

There is no formally agreed or recorded mechanism for Western Australia to opt out of the scheme but all jurisdictions acknowledge the Heads of Workers' Compensation Authority and the Workplace Relations Ministers' Council would be appropriate forums to review and recommend on such matters.

7.2 In respect of the Committee's query about the mechanism by which the legislation can be amended the Minister advised:³⁷

As there is no memorandum of understanding or formal agreement any future amendments would be handled the Heads of Workers' Compensation Authority and the Workplace Relations Ministers' Council.

7.3 In light of the nature of the scheme – that of mutual recognition – the Committee observes that it would be likely for participating jurisdictions to confer within the forums provided by HWCA and WRMC before legislative amendments were made.

8 COMMENT ON SPECIFIC CLAUSES OF THE BILL

8.1 The Committee has only commented on Part 2 of the Bill which addresses the cross border provisions.

Clause 4

8.2 The Bill clarifies workers' compensation arrangements for seafarers. Clause 4 amends the definition of "ship" to reflect the current and proposed legislation of other

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

jurisdictions to ensure that the legislation is applied and interpreted consistently.³⁸
The Leader of the House stated that:³⁹

Workers on ships are to be treated in the same way as other workers, with the proviso that if no jurisdiction or no specific jurisdiction can be identified by using the State of connection test, a worker's employment, while on a ship, is connected with the jurisdiction in which the ship is registered, or, when the ship is registered in multiple jurisdictions, the jurisdiction in which the ship was most recently registered.

All States and Territories will have the same definitions of "ship" and "home State of a ship" to ensure consistency in the tests for State of connection. The cover provided by the Bill does not extend to employers of seafarers covered by the commonwealth Seafarers Rehabilitation and Compensation Act 1992, except when the workers of such an employer are subject to an exemption from the operation of the seafarers Act. As the legislation applies to Australian States and Territories, individual jurisdictions will continue to determine the extent to which employment overseas would be covered by their legislation.

Clause 7

- 8.3 This clause inserts a new section 20 that, among other things, sets out the tests for establishing the home 'State of connection' to determine whether a worker's employment is connected with Western Australia or another jurisdiction.⁴⁰ As previously noted, compensation under the Act (as amended by the Bill) will only be payable to a worker where the employment is connected with Western Australia (proposed section 20(2)). However, even if a worker is outside Western Australia when an injury occurs, compensation may be payable under the Act as long as the worker's employment can be connected with Western Australia (proposed section 20(3)).

³⁸ Proposed section 20(5) and (6) (to be inserted by clause 7) will apply to establish whether a worker on a ship is connected with Western Australia and entitled to compensation under the Act (refer to paragraph 8.6). Clause 6 will repeal section 16(1) and (1a) of the Act which currently addresses this issue. Clause 13 inserts a schedule to describe the geographical boundaries of each State and Territory and allow interpretation of whether ships are travelling within the geographical boundaries of a State or Territory for the purpose of determining connection with a particular jurisdiction.

³⁹ Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, July 2 2004, p4828.

⁴⁰ Proposed section 20, and section 23 (inserted by clause 8) replace and extend section 15 of the Act which is being repealed by clause 5. Section 15 of the Act currently addresses compensation in relation to workers employed in and out of the State.

- 8.4 The sequential series of tests to determine ‘State of connection’ are set out in proposed section 20(4):
- If a worker “usually works” in a particular State or Territory, then the employment is deemed to be connected with that jurisdiction (proposed section 20(4)(a)).
 - If a single home State or Territory cannot be clearly established, then the ‘State of connection’ will be based on the jurisdiction in which the worker is “*usually based for the purposes of that employment*” (proposed section 20(4)(b)).
 - If no one State or Territory is identified by either of these tests, the ‘State of connection’ will be the State or Territory in which the employer’s principal place of business in Australia is located (proposed section 20(4)(c)).
- 8.5 In circumstances where none of the above three ‘State of connection’ tests apply and the worker is not entitled to compensation for the same matter under the laws of a place outside Australia, the ‘State of connection’ is deemed to be the State or Territory the worker was in when the disability occurred (proposed section 20(6)).
- 8.6 Proposed section 20(5) provides a test to establish ‘State of connection’ for workers on ships. If the tests under proposed section 20(4) do not apply, a worker’s employment, while working on the ship, is connected to the jurisdiction in which the ship is registered. If the ship is registered in more than one State or Territory, the worker is connected to the State or Territory in which the ship most recently became registered.
- 8.7 In deciding whether a worker “usually works” in a State or Territory (as per the first test of connection under section 20(4)(a)), proposed section 20(7) provides that regard must be had to the worker’s work history with the employer over the preceding 12 months and the intentions of the worker and the employer. However it also provides that temporary arrangements under which a worker works in another State or Territory for a period of not longer than six months are to be disregarded. This removes the need for employers to have two workers’ compensation policies for workers working temporarily interstate for up to six months.

Clause 8

- 8.8 Clause 8 repeals section 23 which currently prevents a worker claiming compensation under the Act if a claim had been made under the law of another State or Territory or country, unless the worker declares in writing that compensation has not, or will not be claimed under those other laws. Proposed new section 23:

- specifies that compensation is not payable where compensation has been received under laws outside of Western Australia or a judgment obtained against the employer independently of the Act (proposed section 23(1)); and
- provides that where a person receives compensation under the Act and also receives compensation under laws outside Western Australia or obtains judgment against the employer independently of the Act the person from whom compensation has been received under the Act may sue and recover the amount described in section 23(3) (proposed section 23(2)).

Clause 9

- 8.9 Clause 9 inserts proposed new Part III Division 1a (proposed sections 23A to 23E) which relates to determinations by courts and recognition of those determinations.
- 8.10 The nationally adopted model for choice of law requires the court in which the application is made to determine the ‘State of connection’ and courts in all jurisdictions are to recognise and support a determination made in another jurisdiction.⁴¹
- 8.11 Proposed new Division 1a of Part III outlines the procedures for the courts to determine the State connected with the worker’s employment. This determination is to be recognised by courts in all other jurisdictions, so further determinations cannot be applied for. The Explanatory Memorandum states that this will avoid the need for a claimant to have to litigate the ‘State of connection’ in more than one jurisdiction and the prospect of conflicting decisions from courts in different States and Territories. The District Court in Western Australia has been identified as the designated court for this purpose.⁴²
- 8.12 A determination can, however, be appealed and altered and recognised by the ‘State of connection’.

Clause 10

- 8.13 This clause inserts Part IV Division 1a (proposed sections 93AA to 93AF) which relates to choice of law. The Model adopted by the Australian workers’ compensation jurisdictions for choice of laws to determine ‘State of connection’, requires the court in which the application is made to determine the ‘State of connection’.⁴³

⁴¹ Workers’ Compensation and Rehabilitation Amendment (Cross Border) Bill 2004, Explanatory Memorandum, p6.

⁴² Ibid.

⁴³ Ibid p7.

- 8.14 Proposed new section 93AA(1) provides that if a worker is entitled to compensation under the statutory workers' compensation scheme of a State or Territory, the "substantive law" of the State or Territory governs whether or not a claim for damages can be made and what the determination of the claim is. This ensures that workers can only pursue common law claims in the 'State of connection'. The Explanatory Memorandum to the Bill states that it is intended that this will provide certainty and consistency. The choice of law model also ensures that common law damages claims and statutory compensation claims arising out of a work related injury are both able to be dealt with under the law of the same jurisdiction.⁴⁴
- 8.15 Note that "substantive law" is defined in proposed section 93AE. That section also provides that regulations may declare any provision of a law of another State to be relevant for proposed Division 1a.
- 8.16 The interconnected nature of the national legislative scheme is illustrated by proposed section 93AC which defines "disability", "employer" and "worker" so that they are within the scope of corresponding terms in the statutory workers' compensation scheme of other workers' compensation jurisdictions.

Clause 11

- 8.17 This clause amends section 170 of the Act by inserting proposed new subsections 170(3a), (3b) and (7).
- 8.18 Proposed new section 170(3a) will ensure that if an employer fails to obtain a workers' compensation insurance policy or fails to provide employment details (as required by sections 160(1) and (2) of the Act) the employer has a defence against prosecution if the court is satisfied that the employer believed, on reasonable grounds, that they were not liable because (under the tests in proposed section 20) the worker's employment was not connected with Western Australia.

Clause 12

- 8.19 Clause 12 amends section 174 of the Act by inserting new section 174(5a). This specifies that if the Western Australian Workers' Compensation and Rehabilitation Commission⁴⁵ (**Commission**) is satisfied an employer does not have a current workers' compensation insurance policy because the employer believed on reasonable grounds that the employment was not connected to Western Australia under the 'State of connection' test (in proposed new section 20), the employer is not liable to the

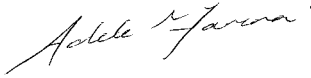
⁴⁴ Ibid p8.

⁴⁵ Part 3 of the Bill contains further amendments that relate to the amendments proposed in the Workers' Compensation Reform Bill 2004. One of those proposed amendments is to change the reference of "Commission" to "WorkCover WA".

Commission for any amount paid out of the General Fund by the Commission under section 174 of the Act.

9 CONCLUSION

- 9.1 The Committee commends this Report to the House for consideration during debate on the Bill.



**Hon Adele Farina MLC
Chairman**

August 17 2004

APPENDIX 1
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

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IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulations of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

Structure 7: *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.

Structure 8: *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.

Structure 9: *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.