



## Workers Compensation Legislation Amendment (Costs) Bill 2012

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Page: 15105

**Bill introduced, and read a first time and ordered to be printed on motion by Mr David Shoebridge.**

#### Second Reading

**Mr DAVID SHOEBRIDGE** [10.32 a.m.]: I move:

That this bill be now read a second time.

I have introduced the Workers Compensation Legislation Amendment (Costs) Bill 2012 because a little over two months ago this Parliament passed a radical series of changes to workers compensation law. We debated them at length and there was very substantial disagreement amongst members of the House about the substantive cuts to benefits that were put in place as a result of those workers compensation changes. The Greens opposed those dramatic and substantial cuts to benefits payable under the workers compensation scheme and the Opposition opposed those cuts to benefits but they were forced through this House. Those cuts will be put in place over the coming weeks and months and they will be felt across New South Wales and will impact on some of the most vulnerable members of our community—injured workers, many of them very seriously injured, who will have their benefits slashed and in many cases terminated. Those cuts will have a serious ongoing impact and cause gross injustice to some of the most vulnerable members of our community.

In addition to that, in a midnight amendment which was not considered in any way by the committee that reviewed workers compensation, and was not well considered by this House during debate, the Government supported a change to the costs regime that was moved by Reverend the Hon. Fred Nile of the Christian Democratic Party. It provided that injured workers cannot recover the legal costs they incur to run workers compensation claims even if they are successful in the NSW Workers Compensation Commission. Even in circumstances where an injured worker contests in the commission a decision of an insurance company to refuse benefits or cut benefits and is ultimately proved right, as a result of the amendment moved by Reverend the Hon. Fred Nile and voted for by every Government member in this House the worker will not be entitled to recover the legal costs they incur in running the claim.

Of course, if the claim is worth \$20,000, \$30,000 or \$40,000 workers may still be able to run that claim and pay their legal costs out of any sums they receive. With far more modest claims where they are after some medical treatment or a modest increase in wages or they are running a claim for an additional few weeks workers compensation payment the legal costs they will incur to run the case to get their basic entitlements, in the context of extremely complicated legislation with two Acts, a set of regulations and five or six different sets of guidelines established by WorkCover, will in many cases be significantly more than the benefits they are chasing. Insurance companies know this. They know that workers will not be able to afford to run their cases.

This bill seeks to provide some modest comfort to workers to enable at least successful workers to recover legal costs once they have run their case. I put on record at the outset that this bill is by no means a panacea to the great attacks on workers compensation that we have seen from the Government. Even if passed, it will have a modest impact on correcting the unfairness in the system. One of the key areas in which this bill will not assist is in work capacity assessments. It is very likely that the great bulk of workers will have their entitlements removed through work capacity assessments being run by insurance companies. In fact, the real fear I see going forward with this scheme is that most insurance companies will accept liability for claims if there is even a vaguely arguable merit, pay the worker for 13 weeks and then chop them off with a work capacity assessment and make an administrative determination—

**The Hon. Greg Pearce:** Point of order: I hesitate to take a point of order because I think we were generous in allowing the member to move the second reading of his bill today, but he is trespassing on canvassing a decision of this House. He is entitled to move his amendment bill but he is not entitled to canvass the decision of the House in relation to the substantive matters in the WorkCover space. Going into issues such as workplace

fitness testing is completely outside the leave of his bill.

**Mr DAVID SHOEBRIDGE:** To the point of order: It is necessary to explain the limits of this bill, and one of the limits of this bill is that it does not extend to providing legal cost for work capacity assessment. That is relevant to the second reading of the bill and it is relevant to the scope of the bill. It is squarely relevant to the issue before the House.

**The Hon. Greg Pearce:** The member is entitled to speak to his bill; he is not entitled to speak to what his bill is not.

**DEPUTY-PRESIDENT (The Hon. Paul Green):** Order! The member will confine his remarks to the leave of the bill. He may have some information that is relevant to the debate.

**Mr DAVID SHOEBRIDGE:** The bill will not extend to the provision of legal costs for what may be one of the most highly contested parts of the workers compensation scheme going forward, which is a clear limitation in this bill and an ongoing unfairness in the legislation that has been passed. If this bill is supported it will allow low-income workers who have contested a decision by an insurance company under the current law to bring a claim in the Workers Compensation Commission and those who are successful will be entitled to have their costs covered. One hopes that all members of this House will think that is a modest advance with an entirely appropriate outcome.

This situation arose because the Government voted for an amendment, not because Reverend the Hon. Fred Nile put forward an amendment. Crossbench members put forward amendments from time to time but they become law only when they are supported by the majority of the House. This amendment became law because of the support of the Government. The Government has now said that it does not have a majority in the House to fix the problem. We are putting forward this bill to prove there is a fundamental and working majority to fix the problem that was created at midnight on 22 June through an ill-conceived amendment that was adopted by this Chamber.

**The Hon. Greg Pearce:** Point of order: Referring to an "ill-conceived amendment" is clearly canvassing the decision of this Chamber. I have no objection to Mr David Shoebridge moving the second reading to this bill, but he needs to stick to the bill and not to attack a decision of this Chamber.

**DEPUTY-PRESIDENT (The Hon. Paul Green):** Order! I uphold the point of order. Members will respect the decisions of the Chamber and not canvass them.

**Mr DAVID SHOEBRIDGE:** The midnight amendment accepted by this Chamber provides that injured workers can never recover legal costs from insurers. It forces all injured workers to pay for their own legal costs. The change was so remarkable, with limited consideration, that when WorkCover saw the legislation that was finally passed by this Chamber—and WorkCover did not put forward this proposed amendment—it set up a review task force which covered the gamut of the key players in the Workers Compensation System: self-insurers, specialised insurers and legal groups. The task force was convened by WorkCover to assess the workability of the amendment that was supported by the Government.

The final analysis was scathing: WorkCover concluded that the costs amendment was an aberration; it was contrary to longstanding policy that workers should not pay lawyers out of their entitlements to compensation benefits; it was contrary to the longstanding rule that costs should follow the event to indemnify the successful party; it will increase the administration costs of insurers and self-insurers; it will bring the New South Wales workers compensation system into disrepute; it will cause significant cost and bureaucracy to the system; it will lead to a massive increase in litigants representing themselves, resulting in lengthy, costly, unwieldy and inefficient resolution of claims; and it makes the New South Wales Workers compensation system an outlier in Australia, and one which will be observed for its potentially inequitable and chaotic management of disputes.

This is not the conclusion of The Greens; it is the conclusion of the review task force established by the statutory body to oversee the workers compensation scheme. It included lawyers from both sides of the record but it also included the licensed insurers who have to administer the scheme themselves and who are responsible for the legal costs related to their own claims, and it included the self-insurers who have a direct financial interest. The conclusion stands on the public record. It was scathing and damning of the amendment that was supported by the Government, on the advice of the Minister, which has led to this aberrant, unfair, chaotic and inequitable situation in relation to costs in the workers compensation scheme. What has the Government done in response to this widespread unease and concern that is damning of the Government's position on costs? In response to entreaties from lawyers, unions and injured workers asking the Government to see sense and fix the problem, the Hon. Greg Pearce said:

As you are aware the Government does not have a majority in the Legislative Council. The amendments to the cost provisions were introduced by Reverend the Hon. Fred Nile MLC. In seeking to engage further on the issue, I would encourage you to discuss such matters with the Christian Democratic Party and the Shooters and Fishers Party.

This is one of the most extraordinary statements ever made by a Minister of the Crown. It ignores the fact that Reverend the Hon. Fred Nile's amendment only succeeded because the Government voted for it. Despite all its faults over 16 years, the former Labor administration never officially handed over law-making to Reverend the Hon. Fred Nile and two members of the Shooters and Fishers Party as this Government has done in this case. The response ignores the fact that the amendment only became law because the Government supported it. The Government has said that because it does not have a majority in the upper House it cannot fix this problem until the Christian Democratic Party or the Shooters and Fishers Party change their mind. This is simply ridiculous. Save by choice, the Government is not held hostage to the views of those two minor right-wing crossbench parties in this House. Together with the five votes from The Greens or the support of the Opposition the Government can form a comfortable majority in the House and can fix this problem today.

To resolve this impasse The Greens bring forward this legislation that closely follows the legislation as originally proposed by the Government in its bill before it accepted Reverend the Hon. Fred Nile's disastrous amendment on costs. The legislation that is obtained in the tabled copies before this House provides a general rule that costs follow the event in workers compensation. That accords with the unanimous decision of the WorkCover review task force. The Greens are proposing one additional safeguard to prevent cost orders made against unsuccessful injured workers where their claim had arguable merit. Providing that safeguard to injured workers in a scheme that is otherwise stacked in favour of well-resourced, relatively highly skilled insurance companies is a substantial and necessary cost-saver in the scheme. I make it clear that this is not The Greens optimal outcome. The Greens would prefer the cost regime that was in place before the 2012 amending Act whereby injured workers could recover costs if they are successful but are only liable to pay insurance costs if their claim was vexatious or fraudulent.

**The Hon. Greg Pearce:** To keep your practice going, David?

**Mr DAVID SHOEBRIDGE:** I note the interjection from the Minister. He is personalising this matter, which affects some 20,000 to 30,000 seriously injured workers each year. There is a need to have an efficient, comprehensive but fundamentally fair system. The Minister cares little about the chaos caused by the amendments to the scheme. His attitude is quite remarkable.

**The Hon. Greg Pearce:** There is no chaos.

**Mr DAVID SHOEBRIDGE:** I find it remarkable that the Minister is sitting there laughing about his amendments, which have created nothing but chaos.

**The Hon. Greg Pearce:** It is all humming along happily.

**Mr DAVID SHOEBRIDGE:** He says that it is all humming along happily.

**The Hon. Greg Pearce:** It is.

**Mr DAVID SHOEBRIDGE:** That is absolutely extraordinary. The Greens accept that our preferred position, which is the retention of the costs arrangement prior to passage of the amending bill, is not achievable given the numbers in this House. However, we also recognise that for all the reasons cited by the WorkCover review task force the current situation simply cannot continue. More than 30,000 workers are seriously injured each year and they need to be able to access the New South Wales workers compensation system. Thousands more suffer less serious injuries, but they still need support and advice. Given the degree of legal complexity in the system, that support can be provided only if they have adequate access to legal advice. The Greens call on the Government to acknowledge that it made a midnight mistake and to work with the Parliament to fix a problem of its own making.

The Greens have not been acting alone on this issue; there has been strong support from lawyers' groups, Unions NSW and injured workers' networks to come up with a remedy. On the evening of the debate on 22 June, both The Greens and the Opposition pointed out clearly the madness of removing the right to be awarded legal costs. The Government simply ignored that and in the process failed to recognise the chaos it would be feeding into the system in the coming weeks, months and years. We consulted with those stakeholders from July until August in an attempt to find a solution. We indicated that our preference was to go back to the old scheme. Those stakeholders indicated, almost to a person, that that would not be politically achievable and we accepted that. We looked at the review undertaken by the task force and noted the unanimity of the key stakeholders and decided that the appropriate response was to adopt, almost word for word, the Government's original proposed amendment on costs and put it forward as a workable solution—albeit not the best solution.

The Greens gave notice of this bill on 21 August and on 25 August we wrote to the Minister offering to meet with him to come up with a solution. We have had only an informal response from the Minister to date. On 30 August and again on 3 September we communicated with the Minister and provided him and his staff with a copy of the draft bill. I make it clear that the draft bill follows the Government's original proposed legislation word for word. The fact that no worker, even if successful, is able to recover legal costs from the workers compensation system is simply unacceptable. It is an aberration, it will greatly increase the administrative costs incurred by insurers

and self-insurers and it will leave many workers without access to legal advice while navigating a very complicated piece of legislation.

On the other side we have insurance companies with a huge range of resources and enormous capacity to run claimants through the hoops to ensure that they get no entitlements, even the meagre entitlements that survived this Government's amending bill. This legislation is urgent and essential to restore a modicum of justice to the workers compensation system. As I said, the bill has attracted the support of an array of stakeholders. I will read onto the record a joint statement from the Bar Association and the Law Society that was delivered last week. It states:

The Government's silence is creating uncertainty in the legal profession about what the full negative impact of the costs amendment will be on injured workers. There are moral and economic issues for individuals and the community. When the Christian Democratic Party's amendments commence, workers will be forced to meet their own costs whether their action is successful or not. This will have a significant detrimental impact on the rights of injured workers.

The Greens' amendments would provide a more balanced and equitable process for workers seeking compensation under the Act. The amendments in the Greens Bill allow for costs to be awarded to the successful party in proceedings under the Act, while allowing the Workers Compensation Commission power to determine by whom, to whom and to what extent costs are paid.

It is disappointing that after two months of consultation the Government was not prepared to consider this more equitable approach.

This is especially so, as Mr Shoebridge is proposing substantially the same provisions as those that were included by the Government in their original bill.

We need to fix this problem; we cannot live with the current system. If we do thousands and thousands of injured workers will have no access to legal assistance and will be left to fend for themselves against well-heeled insurance companies while dealing with an enormously complicated area of the law. They will suffer significant financial hardship. The inequities in the bill will be greatly increased by this failure to provide legal representation and claimants will not be able to fight on an equal footing with insurance companies. I commend the bill to the House and to the Parliament.

**Debate adjourned on motion by the Hon. Greg Pearce and set down as an order of the day for a future day.**