LEGISLATIVE COUNCIL

Monday 28 February 2005

The PRESIDENT (Hon. R.R. Roberts) took the chair at 2.15 p.m. and read prayers.

CORRECTIONAL SERVICES (MISCELLANEOUS) AMENDMENT BILL

His Excellency the Governor's Deputy, by message, assented to the bill.

INTEREST RATES

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I table a copy of a ministerial statement relating to interest rates made today by the Premier.

DIRECTOR OF PUBLIC PROSECUTIONS

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I table a copy of a ministerial statement relating to the appointment of the new Director of Public Prosecutions made today by the Attorney-General.

TRADE, OVERSEAS

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I seek leave to make a ministerial statement.

Leave granted.

The Hon. P. HOLLOWAY: I am pleased to inform the council that the government has developed a new model for overseas trade and investment representation, which will provide a more cost-effective and flexible network. This model will involve the government working closely with Austrade and negotiating representation in key markets through the Austrade office network. The government will be moving quickly over the next few weeks to establish, through Austrade, representation in both India and Hong Kong. This will involve engaging a person within the Austrade office network who is dedicated to servicing South Australia's interests and representing South Australia in these markets.

The new representation in India is part of the state government's strategy to boost South Australia's trade and investment opportunities in key emerging regional overseas markets. The principal role of the India representative will be to take advantage of the rapidly growing relationship between our two countries. An industry mission to India last October identified many opportunities for South Australian companies. After that trip, the Premier, who accompanied the mission, rightly described India as a waking giant in the Asian region, with the second highest growth market after China.

The state government is keen to build on the already substantial trade between India and Australia, which is already worth billions of dollars to Australian exporters and about $100 million annually to South Australian exporters. To achieve the state's target of trebling exports to $25 billion by 2013, South Australia needs to be proactive in positioning itself at the forefront of those regions that offer us the greatest potential for trade expansion. The new arrangements in Hong Kong with Austrade will replace the existing South Australian government office in that market and will offer more cost-effective representation, by working closely with Austrade and the commonwealth government. A recent review of the state's overseas office network highlighted the need to ensure overseas representation for the state is strategic and market based, outcomes driven and cost effective.

The collocation of overseas offices with the federal government's Austrade agency follows a recommendation from the Economic Development Board that the state government investigate the most appropriate and cost-effective means of delivering in-market support services of most benefit to local exporters. Currently, South Australia's trade offices comprise six locations in four countries: Shanghai, Jinan and Hong Kong in China; Dubai in the United Arab Emirates; Singapore; and the satellite office in Kuala Lumpur, Malaysia. The state also has a trade officer in the Agent-General's office in London. Consequently, in line with collocation policy, the India office, which is likely to be based in the city of Chennai, will be shared with Austrade. It should be remembered that India has a population of 1.4 billion people.

Compared with a network of stand-alone offices, collocation has been projected to deliver several advantages to South Australia's overseas goals including greater cost effectiveness, a broader geographical spread of activities and greater flexibility in responding to changing demand and supply issues. For these reasons, the state government is also consolidating its Malaysian activities to our Singapore office. All the changes will be funded from within the budget of the government's Office of Trade.

All our overseas offices also help to promote and secure skilled and business migration to South Australia. Exports are vital to the state's economic development but, so too, is migration. South Australia's future depends on both increased exports and a successful program of migration. Fewer than 2 per cent of South Australian businesses are exporting and just as the state government is working in partnership with Austrade to double that level in two years, the state is also working towards achieving a state population of 2 million by 2050. A network of strategically placed trade representatives, leveraging off Austrade's activities, is aimed at helping us to achieve both of these critical goals for the state.

OLYMPIC DAM

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I lay on the table a copy of a ministerial statement about an agreement with Western Mining Corporation to investigate the disposal of radioactive waste at Olympic Dam made earlier today in another place by the Hon. John Hill, Minister for Environment and Conservation.

PRISONER SEX CLAIMS

The Hon. T.G. ROBERTS (Minister for Correctional Services): I seek leave to make a ministerial statement.

Leave granted.

The Hon. T.G. ROBERTS: I rise to advise the parliament that I have sought an urgent investigation by the Department of Correctional Services into allegations promoted by a current affairs television program over the weekend that a prisoner, formerly of Port Lincoln Prison, engaged in sexual activity with a female visitor. I have ordered a comprehensive report to be provided to me this week. While it is important not to pre-empt the outcome of

the investigation, the Department of Correctional Services has advised that its consideration of the matter so far has not obtained any material to substantiate the allegations of sexual activity. I look forward to receiving an urgent comprehensive report by the end of the week.

QUESTION TIME

TRADE OFFICES

The Hon. R.I. LUCAS (Leader of the Opposition): I seek leave to make an explanation before asking the Leader of the Government questions about trade offices.

Leave granted.

The Hon. R.I. LUCAS: The minister has just given a ministerial statement highlighting changes to overseas trade offices and, in that, he indicates that there will still be a trade office in Hong Kong in China. He also claims that there will be a satellite trade office in Kuala Lumpur in Malaysia. He has also indicated that—

The Hon. P. Holloway interjecting:

The Hon. R.I. LUCAS: I beg your pardon?

The Hon. P. Holloway interjecting:

The Hon. R.I. LUCAS: You did not say that?

The Hon. P. Holloway interjecting:

The Hon. R.I. LUCAS: Mr President, I stand corrected. The minister is indicating by way of interjection that that is not an indication of the new arrangements: that is an indication of the old arrangements. If that is the case, as I understand it, the minister is indicating that the new trade offices will be in Shanghai, Jinan, Dubai, Singapore and, now, India.

The Hon. P. Holloway interjecting:

The Hon. R.I. LUCAS: Indeed, that is part of the question that I want to put to the minister. As I understand the government's latest position, there will be two offices in China, one in Dubai, one in Singapore, and now one in India. Mr President, as you will know, a significant number of offices have been closed in Japan, the United States of America, and I think two in Indonesia, together with the changes that were made on the weekend. Can the minister outline the current staffing and cost arrangements of the Hong Kong office and, under the new arrangements he has announced today, what will those changes be and can he confirm (as I think he has by way of interjection) that there will be no presence at all in Malaysia under the new arrangements?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): In relation to the latter part of the question, the honourable member would be well aware that the office in Kuala Lumpur was a satellite office operated out of the considerable presence the state has in its office in Singapore. Other markets in that region were also served by the Singapore office—in particular, Thailand—where the trade representative we have had for many years in Singapore, Mr Tay, is well known throughout the region, and those arrangements will continue.

The Hon. A.J. Redford interjecting:

The Hon. P. HOLLOWAY: He does an excellent job for this state. That will continue, but the state believes that the cost of having a separate office essentially served out of Kuala Lumpur could not be justified. We can achieve everything we need in trade terms directly through our Singapore representative. In relation to Hong Kong and India, there will be arrangements with Austrade. There have been some discussions with Austrade on how we might go about this. I understand that other states have tried similar arrangements. Western Australia has a similar arrangement in relation to Thailand and other places through Austrade. It means that a representative serving South Australia's interest can be collocated in that Austrade office with significant savings in overheads, but the advantage is that that office can have access to the full Austrade network, which is a much larger network than one state could possibly maintain.

They are the arrangements we will be adopting in future in Hong Kong. As a result, the cost of that stand-alone office, which was just under $1 million a year, can be approximately halved, and we believe that we can still have more effective representation in that market. The savings in relation to that will be used to provide additional resources in India, a country of 1.4 billion people, which is perhaps the fastest growing market in the world and is very significant. This government believes we should have a presence in that market, and that is what we will be able to do through these arrangements with Austrade.

The Hon. R.I. Lucas: How many staff in Hong Kong?

The Hon. P. HOLLOWAY: There will be a representative working with Austrade, dedicated to South Australia, but they will have the capacity to have access—

The Hon. R.I. Lucas: Just one?

The Hon. P. HOLLOWAY: Yes, one staff. They will have access to the Austrade network under the arrangements we will be finalising with Austrade shortly, and that has been tried recently by at least one other state. We are keen to see this form of representation succeed because we believe that it will give a much greater spread and better value for money in terms of our overseas representation.

The Hon. R.I. LUCAS: By way of supplementary question, given that the most recent export figures indicate that South Australia's exports have grown at the slowest rate of all states of Australia, how does the Minister for Industry and Trade believe that the reduction in the number of overseas trade offices will assist exports of small and medium sized South Australian companies?

The Hon. P. HOLLOWAY: I do not see how the honourable member can say there is a reduction when in fact we are opening representation through the Austrade network in India. India is bigger than China, with 1.4 billion people. It is one of the most significantly growing markets in the world. Surely that is a recognition by this government of the importance of expanding trade opportunities, and that is where we need to look. We need to look at those huge markets that are growing most rapidly.

In relation to growth in exports recently, I think it is no surprise (and I read just last week) that coal prices, for example, have gone up by 30 per cent. It is unfortunate that this state does not have large resources of coal and iron ore, the prices of which have been growing by 20 per cent or 30 per cent in recent years. If a third of a state's exports are coal, such as in New South Wales or Queensland, for example, and it goes up by 30 per cent, then you have a 10 per cent increase in your export values without doing anything because of the market conditions at the time. So it is all very well for honourable members to make comparisons with those markets at this particular time—

The Hon. J.S.L. Dawkins interjecting:

The Hon. P. HOLLOWAY: I am not touchy about it. I am just explaining to the council the significant reasons why there has been—

The Hon. R.I. Lucas interjecting:

The Hon. P. HOLLOWAY: That is just not the case, Mr President. The honourable member is well aware of the situation. He has asked this question on numerous occasions. What would a Liberal government do if, by some misfortune, it won the next election? Would it suddenly discover coal that goes up by 30 per cent?

I also point out that the export figures that have come out are essentially commodity figures. I will repeat the point that I have made here numerous times previously that South Australia's future potential in the export sector in my view resides very much in the services of exports—in particular, agricultural services, but also in the electronics and software industries which are measured under those things rather than raw commodities.

As I say, unfortunately, we do not have the huge deposits of raw materials that other states such as Western Australia have. However, through this government's PACE program, we are doing our best to find them, and I have been pleased to announce in this chamber during the past three years some of the results of that increased exploration. Hopefully we can discover some of the resources that have been going up by 30 per cent or 40 per cent, as have coal and iron ore, because certainly that would be tremendous for our state. But, until we have those discoveries, we will be working on our services industry.

The Hon. R.I. Lucas interjecting:

The Hon. P. HOLLOWAY: Well, as I said, we are rationalising. Presumably, the leader is saying that we should spend almost $1 million in a city of 7 million people. It is changing. China has now joined the World Trade Organisation. As the honourable member would be aware if he has followed trade access through Hong Kong for some of our seafood was recently closed off. Increasingly, China is trying to direct trade through its other ports such as Shanghai. We have been boosting our presence in mainland China but, also, we are boosting this other huge market in India with 1.4 billion people. It just makes sense because that is the way that it is going. From time to time in trade you have to change offices and move them to where the opportunities lie, and that is what this government is doing.

CROWN SOLICITOR'S TRUST ACCOUNT

The Hon. R.D. LAWSON: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation a question about stashed cash.

Leave granted.

The Hon. R.D. LAWSON: An official government document shows that within the Department of Justice there were cost pressures arising from a proposal to purchase artworks for the Minister for Aboriginal Affairs, and $30 000 was sought for that purpose. My questions to the minister are:

1. Was any request made by him, or any person on his behalf, to the former CEO (Kate Lennon) for $30 000 to purchase artworks for his office?

2. Was he aware of any such request at the time it was made? If not, has he subsequently learned of that request?

3. Is there any program under which artworks are purchased for the minister's office?

4. Has any (and, if so, how much) funding been applied for this purpose during the past three years?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): During my rounds of communities, it was quite obvious that one of the ways in which some communities could be helped was to have a program where, if government offices were to be adorned with any artworks, it would make sense that South Australian Aboriginal art would be of some value. I promoted that view to other ministers at a personal level, just suggesting that they look at it as a way of assisting those communities with some economic support through their artworks. In the Aboriginal lands, four communities have joined together to form a cooperative. They are quite professional in the way in which they approach the way in which they not only put their artwork into the marketplace but also have galleries to promote it. I have opened a number of art exhibitions in South Australia, particularly in Adelaide, that have been showcases for Aboriginal artists in South Australia. I have done as much as I can, if only in a modest way, to promote the artwork presentation within government purchases.

I did approach Kate Lennon when we were first in government, probably in the first six months. My office was adorned with Robert Brokenshire's preferred decorations and they were not my tastes. Unfortunately, they still hang there, because, although I did issue what I thought was an instruction or invitation to Kate Lennon to make purchases on my behalf through those communities, it did not happen. My office still has volunteers working in various forms throughout the state that were put on the walls by Robert Brokenshire; and it is good to see volunteers being promoted. I also have a work presented to me by the opposition when it was promoting the saving of the lighthouse at Kingston. I was presented with a framed photograph; it is an excellent photograph and it hangs in a corridor.

In relation to Aboriginal works of art, I have two Aboriginal works of art which are on loan. They have not been purchased, as far as I am aware. The request I made was not followed up. Certainly, the $30 000 was not spent, as far as I know, on any artworks for my own office. They may be adorning someone else's office.

The Hon. R.D. LAWSON: I have a supplementary question. Does the minister confirm that he did request Kate Lennon to seek $30 000 in funding for the purpose he just mentioned.

The Hon. T.G. ROBERTS: I think the request I made did not have a particular value on it. The intention was to purchase artworks that were suitable for my office from the Aboriginal communities that were promoting arts through their own programs. Port Lincoln was one community which I visited and which had excellent artworks, but they had nowhere to present them. I offered the use of my office, if they wanted it, to place artworks within my office on the basis that people who passed through the office may be interested in purchasing them. That was something I thought the government might be able to do, and even this council might be able to do, but I have not followed it up with any gusto. I left that in abeyance and, as to the artworks that I suggested may be able to be bought for my office, I did ask on a couple of occasions follow-up questions as to the progress that was being made and there was no completion of the transaction.

The Hon. J.F. STEFANI: I have a supplementary question arising from the answer. Can the minister advise whether his request was in writing or verbal and, if it was in writing, can the minister table that request together with the date that that request was made?

The Hon. T.G. ROBERTS: It was a verbal request.

CORRECTIONAL SERVICES ACT

The Hon. A.J. REDFORD: I seek leave to make an explanation before asking the Minister for Correctional Services a question on the Correctional Services Act.

Leave granted.

The Hon. A.J. REDFORD: Can I say how delighted we are on this side to see the good health that the Minister for Correctional Services appears to be in. Members may be aware that, in June 2003, I raised an issue concerning the treatment of women in the City Watch-house and breaches of section 22(3) of the Correctional Services Act. Indeed, in June last year, in response to a question seeking a guarantee that his department will not again engage in illegal conduct, the minister said, 'I cannot give any such guarantee.'

Further failures to comply with the Correctional Services Act have now come to my attention. Last January, I sought access to minutes of all meetings of the Correctional Services Advisory Council since May 2004. The council's functions are set out in section 15 of the act and include a function of monitoring and evaluating the administration of the act and reporting to the minister, and, pursuant to section 16 of the act, they are obliged to lodge an annual report which is to be tabled in this parliament as soon as possible. One could describe that as a very important function.

The committee is also required to undertake other functions as outlined throughout the act. To my stunned surprise, the freedom of information officer, a senior policy officer within Correctional Services, said this in response to my freedom of information application:

> I have been advised that, due to a number of Correctional Services Advisory Council members deciding not to renew their membership, the council has not had sufficient members to constitute a quorum as required by section 14(2) of the Correctional Services Act.

So there we have it; no meeting for nearly nine months because the minister, under the act, has not complied with his or her statutory obligations. In light of that, my questions are:

1. Will the minister apologise for failing to comply with the Correctional Services Act?

2. Who are currently members of the Correctional Services Advisory Council?

3. Which members decided not to renew their membership of the council, and did they give the minister any reason as to why they did not renew their membership of the council?

4. Has the minister advertised the positions and, if so, when?

5. Are there any other examples of the department and the minister operating contrary to the act?

The Hon. T.G. ROBERTS (Minister for Correctional Services): In answer to the last question first, I am certainly not aware of any statutory obligations or breaches of the act that are occurring under my brief, in terms of Correctional Services. In relation to the advisory council, I am aware that members have resigned. I will endeavour to get the names of the people who have given an indication but may not have resigned. Others have considered their positions and are doing other things, but I will try to get an update for the honourable member in relation to the names. We are seeking replacements and the role of the advisory council is being looked at. I understand poor health has been cited by one member, but I will not mention that person's name.

Members interjecting:

The Hon. T.G. ROBERTS: No; in my view the advisory council has served a good role. One of the problems that it does have in terms of its own statutory requirements is what briefs it wants to take on. I met with the council some time ago to put to it my views about some of the things the advisory council may want to look at, but it is nothing that falls within my province. It has its own act and its own methods and ways of dealing with issues. I will bring back a full report to the council and answer the honourable member's questions in that report.

The Hon. A.J. REDFORD: As a supplementary question: given that the minister just indicated that the government is currently seeking replacements, what steps is it taking to seek those replacements and, in particular, has the minister advertised any of the positions?

The Hon. T.G. ROBERTS: I will seek out information about the methods being used and include it in that report.

The Hon. J.F. STEFANI: As a supplementary question: will the minister advise the term of appointment and the date of expiry of the remaining members of the council and the date of resignation of each of the other members who have resigned?

The Hon. T.G. ROBERTS: I will include that in the report.

MINERAL EXPLORATION CENTRE

The Hon. CARMEL ZOLLO: I seek leave to make a brief explanation before asking the Minister for Mineral Resources Development a question about research into exploration for ore bodies that are deep underground.

Leave granted.

The Hon. CARMEL ZOLLO: Whilst pursuing the engineering and mining section of Career 1 in *The Weekend Australian*—

The Hon. Sandra Kanck: As one does.

The Hon. CARMEL ZOLLO: As one does; I do have an interest—I noticed an advertisement for a chair of mineral exploration and director of the centre for mineral exploration under cover.

Members interjecting:

The Hon. CARMEL ZOLLO: Listen and you may learn. In the body of the ad it said that the new director and professor will have responsibility for developing a world class research and teaching centre, utilising $1.2 million of initial funding and focusing on applying the science and technology for effective techniques for mineral exploration under cover. Will the minister provide more information, for the members opposite in particular, about this position?

The Hon. P. HOLLOWAY (Minister for Mineral Resources Development): I thank the honourable member for her question and her interest in this matter. South Australia's mining industry will benefit from a new, world-class centre to be set up in Adelaide to research and develop specialised deep mining techniques. Our goal is for graduates of this school to become the best mineral explorers in the world. The Centre for Mineral Exploration Under Cover will be established at the University of Adelaide, with $1.2 million funding over four years from the state government's plan for accelerating exploration—the PACE program.

The centre will concentrate on developing new methods for exploring new mineral deposits at depth. These methodologies will have a very South Australian focus, although

they will be applicable to mining in many parts of the world. One of the problems facing mineral exploration in South Australia is the very deep cover of dirt and rocks over potential ore deposits. The state government and the University of Adelaide are working with the exploration industry and tackling this problem head-on through the establishment of this centre.

International advertising for a professor, who will be the Chair of Mineral Exploration and Director of the Centre for Mineral Exploration Under Cover, is now under way. The position will be in the School of Earth and Environmental Sciences, discipline of geology and geophysics, which already forms part of South Australia's major centre of geophysical excellence. I am confident that this initiative will attract a number of world-class researchers once it is operational.

The primary outcomes of the initiative will be to attract a leading researcher to Adelaide, the creation of a world-class research centre, the development of an industry focus method for exploring through cover, and strong collaborative links with other minerals focused research centres. This is an important step towards achieving a major boost in mineral exploration in South Australia. We have a target of increasing mineral exploration to $100 million a year by 2007, with mineral production targets of $4 billion by 2020. Developing new, locally based under cover exploration techniques will play a crucial role in achieving these targets.

The Vice Chancellor of the University of Adelaide (Prof. James McWha) has said that the new centre will build on the university's existing world-class expertise in geological science and petroleum engineering and management. I look forward to the appointment to that chair in the near future. I believe that it will be a big step forward in achieving our goals for mineral development in this state and will also greatly improve the climate for exploration not only here but throughout the world.

SCHOOLS, HEARING IMPAIRMENT SERVICES

The Hon. KATE REYNOLDS: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Education and Children's Services, a question about hearing impairment services in schools.

Leave granted.

The Hon. KATE REYNOLDS: My office has been contacted by constituents from the Eyre education district about the reduction of the full-time equivalent for a coordinator of hearing impaired services for 2005 to 0.6. These constituents are concerned about the department's unrealistic and, in their view, unfair expectation that a .6 hearing impairment coordinator can service the Eyre District, given that that person has vast distances to travel and that the number of hearing impaired students is quite significant. The district has been allocated a .6 full-time equivalent coordinator for 92 hearing impaired students, while the metropolitan area has 3.4 coordinators for 131 such students. Another near metropolitan area has one coordinator for 21 students, and a different country area has one coordinator for 37 students. Therefore, students in the metropolitan area receive approximately three times the service of those in the Eyre District. To make matters worse, many of the sites within the Eyre District require a drive of between two and five hours from the district office. In fact, I believe that one-third of the district's hearing impaired students attend schools more than three hours' drive from Port Lincoln.

Mr President, you might be interested to know that a full-time coordinator is eligible for only four overnight stays per term but, in the Eyre District, of course, a .6 coordinator is able to access fewer than that. Clearly, that is an unworkable situation. I believe that a number of students have been identified as hearing impaired but have never seen an audiologist, and parents have expressed their concern to me that other students have not yet been identified because the specialist service is not available in their area. There is a separate service for early intervention in the metropolitan area, yet currently in the Eyre District at least three young children, who are not yet in the school system, cannot access any early intervention service. This includes a girl of nearly two years of age with profound hearing loss as a result of meningitis who has a cochlear implant. She and her family will require intensive and ongoing support, particularly in the next few years, yet there is no extra provision for staffing to meet her specific learning needs during these formative years. I understand that, in November last year, these concerns were raised with very senior departmental officers from Flinders Street, but no action has been taken. My questions to the minister are:

1. What is the formula for allocating hearing impairment services?

2. When and why was the decision made to reduce the Eyre District's allocation to .6?

3. Why are Eyre District hearing impaired students listed on a separate database, unlike other schools where they are listed on the 'students with disabilities' database?

4. Will the minister ensure that students in the Eyre District are provided with audiology services?

5. Will the minister act to have the coordinator's position increased to at least the equivalent of that in the metropolitan area and give a realistic allocation of additional time for travelling and overnight stays?

6. Will the minister fund, as a matter of urgency, an early intervention service in the Eyre District?

7. Most importantly, will the minister advise why students in the Eyre District are receiving a vastly inferior service compared with metropolitan students and other country regions?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will refer those important questions to the minister in another place and bring back a reply.

HOUSING TRUST, TENANTS

The Hon. A.L. EVANS: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Housing, a question about the South Australian Housing Trust.

Leave granted.

The Hon. A.L. EVANS: On 9 February 2005, I asked a question about disruptive trust tenants. I asked the minister to advise the number of workplace incident reports submitted by Housing Trust managers in relation to workplace safety. It was reported in an article that appeared in *The Advertiser* of 21 February 2005 that recently a public servant had allegedly been threatened with a kitchen knife and that the Public Service Association had been raising concerns with the government about security in the workplace over the past two years. My questions are:

1. Will the minister advise when the most recent audit of workplace safety was undertaken by the South Australian Housing Trust in relation to workplace safety?

2. Will the minister advise of the measures in place to ensure workplace safety for Housing Trust managers, including potential life threatening scenarios?

3. Will the minister provide a summary of the policy of workplace safety for Housing Trust contractors?

4. Will the minister provide statistics on the number of workplace incident reports submitted by contractors in relation to verbal and physical threats levelled at them by Housing Trust tenants?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will refer those important questions to the Minister for Housing in another place and bring back a reply.

DOMICILIARY CARE

The Hon. CAROLINE SCHAEFER: I seek leave to make an explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Health, a question about domiciliary care in the Lower North Health region.

Leave granted.

The Hon. CAROLINE SCHAEFER: Two weeks ago, in another place, the Hon. Dean Brown raised with the Minister for Health the case of a woman in Balaklava whose home health services had been cut. As a result, the local newspaper, the *Northern Argus*, ran an article highlighting the plight of yet another woman who had also contacted me. That woman suffers from emphysema, high blood pressure and diabetes and currently receives subsidised domiciliary care for 1½ hours per fortnight. As a result, I asked for other people who may be in the same situation to contact me to see whether a pattern was developing of non-funding these needy people. Sure enough, I have been contacted by a number of people: for example, a 90-year-old woman who is legally blind and who receives the princely sum of two hours domiciliary care a fortnight; another woman who has arthritis so badly that she can walk only with the assistance of a frame; and there is a number of others. They have all received a letter from the Home Care Program Manager, which states, in part:

> Nursing and home help come from the same 'bucket of money', and as the demand for nursing services is increasing, the home help dollars are decreasing. . . .Unfortunately we have to halve your hours now, and cease them altogether in July 2005.

I am sure members would agree that cases such as this will, in fact, soon need nursing care if they cannot get some basic cleaning done. The subsidy cost for this service is $16.50 an hour and, as far as I can ascertain, the average cost to the government for this service to these people is about $33 per fortnight. As a result of the article in the *Northern Argus*, the minister replied that she was having the case reviewed. My questions are:

1. Will the minister now re-examine all cases such as this?

2. Will the minister provide sufficient funding so that these services can be properly maintained?

3. Does the minister agree that, if such services cannot be maintained, we will have a far more expensive case of nursing care being necessary which flies completely in the face of the government's expressed view that it will keep people out of hospital and provide health care?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): It is certainly the government's policy to maintain people in their own homes as long as possible. If—

The Hon. Kate Reynolds: Is that maintain or abandon?

The Hon. T.G. ROBERTS: No; maintain. If the honourable member would like to forward the other cases that she has in her care to the minister, and have them reviewed, I am sure that would be picked up by the minister and looked at. Certainly, in the case of the promise for the reviewed case, I will refer the question to the minister in another place and bring back a reply.

The Hon. CAROLINE SCHAEFER: I have a supplementary question. Does that mean that anyone who has had their services cut must now object in order to have their case reviewed or, in fact, will the minister review what is clearly underfunding of the Lower North health region?

The Hon. T.G. ROBERTS: That is an administrative detail that would be worked out within the region based on priorities, spending and funding programs. If there is general discord in relation to how the programs are run, I am sure that those regional administrators can take that up with the minister and, hopefully, address the sometimes anomalous situations that occur from time to time and have them corrected.

OLYMPIC DAM

The Hon. J.F. STEFANI: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Environment and Conservation, questions about the proposal to store South Australia's low-level radioactive waste.

Leave granted.

The Hon. J.F. STEFANI: I refer to an article published in the *Sunday Mail* regarding the Rann Labor government's proposal to establish a low-level radioactive waste dump to store the material presently located at various sites throughout South Australia. Following the announcement by the state government in July last year claiming that agreement had been reached with Western Mining Corporation to act as consultants for the management of the low-level waste held in numerous repositories, it now appears that the government has not made any further contact with WMC. In fact, according to the *Sunday Mail*'s article, the environment minister (Hon. John Hill) has confirmed that the WMC arrangement collapsed shortly after it was announced.

In the meantime, low-level radioactive waste is stored at various locations including the Royal Adelaide Hospital, Adelaide University, the South Australian Health Commission building in Adelaide, Flinders University, the Mawson Lakes campus of the University of South Australia, the Transport SA depot at Walkerville, the Primary Industries and Resources building in the city and the RAAF base at Edinburgh, even though the Rann Labor government promised the people of South Australia that it would look after its own waste by establishing an appropriate repository. In view of the commitment made by the Premier and his government regarding this issue, my questions are:

1. When will the minister finalise the arrangements to relocate all the low-level radioactive waste material in a central repository as promised by the government?

2. Will the minister make public the study which the government has authorised in order to identify the best

location to establish a storage facility for our low-level radioactive waste material?

3. Will the minister advise the names of all the agencies and the companies involved in identifying the site and the costs so far incurred by the state government in this exercise?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will read the statement made by the minister in another place, which perhaps will answer many of the questions asked by the honourable member. The statement by the Minister for Environment and Conservation reads as follows:

> In July last year I announced that the government had reached agreement with Western Mining Corporation to investigate disposal of radioactive waste at Olympic Dam. WMC had already contracted a consultant from ANSTO to review its own disposal of radioactive mining waste at the site and it was thought that this contract could be extended to include investigating this option. At around the same time the EPA called for tenders to conduct the interim store feasibility study (a different but related exercise). ANSTO was among the tenderers for this contract, however in September URS Australia was selected by the EPA as the preferred consultant and the contract was signed in November 2004.
>
> As the scope of the interim store feasibility study and the low level radioactive waste study contain similar criteria, the EPA proposed to extend the contract with URS to include this study. WMC were advised of this proposal and were consulted on the scope of the low level radioactive waste disposal study in late November 2004. The scope of the study also includes an investigation of Radium Hill to obtain independent advice about the suitability of this site, although the EPA's audit of radioactive material in South Australia recommended against this option based on the current engineering of the site.
>
> In summary, the EPA has engaged URS to undertake an interim store for feasibility study, which was signed in November, as well as the low level radioactive waste study, which I can inform the house will be signed in March. Mr Speaker, the agreement reached with WMC—

The Hon. A.J. REDFORD: On a point of order, Mr President, I like everybody else would prefer the minister to address you as 'Mr President' and not as 'Mr Speaker'. We would like you to be upheld in the very high traditions of this place.

The PRESIDENT: It is a serious matter, minister. You must pay closer attention.

The Hon. T.G. ROBERTS: I apologise if I have offended anyone, Mr President, but I did say that I was reading from a ministerial statement made by the Hon. John Hill in another place. The statement continues:

> . . . as well as the low level radioactive waste study, which I can inform the house will be signed in March. The agreement reached with WMC to look at Olympic Dam as an option for storing South Australia's radioactive waste stands and the investigation of this proposal is on track.

ABORIGINES, HEALTH

The Hon. G.E. GAGO: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation a question about Aboriginal maternal and child health.

Leave granted.

The Hon. G.E. GAGO: The health and nutrition of pregnant women and mothers has a bearing on the long-term health and well-being of their children. Will the minister inform the council of the government's initiatives that address the impact of poor health and nutrition on indigenous pregnant women, mothers and children?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I thank the honourable member for this important question and draw her attention to the initiatives being taken with the FAS (Foetal Alcohol Syndrome) program being conducted at the moment in a broad sense throughout the community. It will be directed to Aboriginal women as well as across South Australia. The healthy ways program, an education/health partnership initiative to improve Aboriginal maternal and child health, also runs separate from that program.

In response to the need to address the poor health of pregnant women—mums, babies and children—in remote Aboriginal communities, a partnership was formed between the now Department of Health and the now Department of Education and Children's Services. The healthy ways project is a joint approach that looks at improving health and learning outcomes through community initiated responses that aim to enhance mothers' confidence in child rearing as well as focusing education around nutrition and, in particular, the use or abuse of tobacco within communities.

The project focuses on the education of young women as a key strategy to achieve sustainable health and wellbeing benefits for families and communities. It is predicated on established community development processes that lead to individuals and communities having the confidence to determine their own directions and futures. All Healthy Ways community programs are community-identified priorities and are driven by senior women within the community. The four objectives of the Healthy Ways program are:

1. Mums-to-be—understanding pregnancy and looking after yourself and infant health.

2. Growing little kids up—increasing women's confidence in supporting their infants' and children's growth and development.

3. Kids and young mums learning—safe space and private time for kids and mums learning together.

4. The school building bridges—peer education and support in and out of school around Healthy Ways objectives.

Communities participating in the Healthy Ways project are: Coober Pedy; Marree; Oodnadatta; Whyalla; Yalata; Oak Valley; and the APY lands communities of Pukatja, Amata, Kalka and Watarru. The program outcomes include:

1. Women will have increased their understanding of how to be healthy during pregnancy and have a healthy baby (who is born at a healthy weight).

2. Women will have increased confidence in themselves and in how to support their infants' and young children's (aged 0—5 years) learning.

3. Progress will be made in improving the development potential of Aboriginal infants and young children (aged 0—5 years).

4. Learning opportunities for Aboriginal women, especially younger women, will be identified and supported and, where possible, implemented.

5. Training needs will be identified which help girls and young women to keep up their education and build career pathways, which will help sustain the project.

Young Aboriginal women in regional and remote areas come from well behind what would be regarded as a normal starting point in dealing with pregnancy and birth, and we have the added problems in remote communities of not only poor nutrition, alcohol, tobacco and drug abuse but also many other issues that face young women that are being addressed in broader programs: but these are specific programs that are directed at young women. Where they are being run in conjunction with education centres, schools or medical clinics, a bond is being built between young Aboriginal women and mothers, and that continues. So it is not just the

introduction of the program to the women in those communities: it is also an introduction to whole-of-life health programs and, hopefully, those education programs in the long term will bring about a whole range of health benefits to those communities and families.

RED-EARED SLIDERS

The Hon. SANDRA KANCK: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Environment and Conservation, a question about the environmental threat posed by red-eared sliders.

Leave granted.

The Hon. SANDRA KANCK: Red-eared sliders are a species of turtle originating in the United States and they have been nominated as among 100 of the world's worst invaders by the World Conservation Union. The experts tell us that sliders are a major threat to biodiversity. They can outcompete native species for food and space in waterways and lake systems. Large sliders can inflict a painful bite and could carry new diseases and pathogens lethal to native turtles and other aquatic wildlife. They are being compared to the cane toad in terms of their potential as a pest species. Sadly for our environment, they are prolific breeders and after a single mating a female turtle can lay up to 70 eggs per year for each of five years.

In the past two years there have been reports of sliders found in Victoria, the ACT and Queensland. In 2003, 80 red-eared slider turtles were found in the Pine Rivers Shire, north of Brisbane. The sliders were detected after members of the public reported unusual tortoises walking around. In December last year a single slider was discovered in the backyard of a home in Belconnen in Canberra. That discovery prompted a public education campaign by Environment ACT. These discoveries have even prompted public education campaigns as far away as Perth, but I am not aware of any such campaigns in South Australia. My questions are:

1. Have any red-eared sliders been detected in South Australian waterways?

2. What pest status do red-eared sliders have in South Australia?

3. Are they allowed to be kept as pets in South Australia and, if so, what is the estimate of their numbers?

4. What steps has the minister taken to alert South Australians to the dangers posed in the environment, in particular the Murray-Darling Basin, by red-eared sliders?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I thank the honourable member for her question and for bringing to the attention of the South Australian public the problem with red-eared sliders. In relation to anything as bad as the Queensland cane toad, we need to take immediate action to find out whether it is a problem in this state. I will pass the questions on to the minister in another place and bring back a reply.

The Hon. J.F. STEFANI: I have a supplementary question. Will the minister advise whether he has been in touch with the Murray-Darling Basin Commission regarding this problem?

The Hon. T.G. ROBERTS: I will refer that question to the minister in another place and bring back a reply.

GAMBLERS REHABILITATION FUND

The Hon. NICK XENOPHON: I seek leave to make a brief explanation before asking the Minister for Aboriginal Affairs and Reconciliation, representing the Minister for Families and Communities, questions about the Gamblers Rehabilitation Fund.

Leave granted.

The Hon. NICK XENOPHON: On 17 February I put a series of questions to the minister about the promised additional taxpayer funding of $2 million a year to the Gamblers Rehabilitation Fund and that such additional funding of $850 000 would be provided pro rata from 1 February 2005 for this financial year as promised in the statement by the Premier on 1 February 2005. I note that the Premier in his statement of 1 February 2005 said:

> From today the state government's extra $2 million payment to the Gamblers Rehabilitation Fund kicks in.

The information I have from gambling counsellors from the BreakEven network is that as at 17 February there had been virtually no consultation about this additional funding and that it was not even on the agenda for the Gamblers Rehabilitation Fund committee; but that changed by 18 February 2005.

When I raised this matter again publicly on 22 February, the government response was reported in a number of media outlets as 'the minister's office says the money is there and will be made available when a review of rehabilitation services is completed'. The government is obviously referring to a review of the GRF, moved as an amendment by the Hon. Mr Redford to last year's gaming machines legislation, which I and others strongly supported but which was not supported by the government. That review by the Independent Gambling Authority has a deadline for reporting of 9 June this year. At no time did the government, the Premier or the minister, when the additional funding for the GRF was trumpeted, link the extra funding with the IGA review. Given the urgent and, in many cases, desperate need to reduce waiting times and improve resources for gambling counselling immediately, my questions are:

1. Is the minister in direct contradiction with the Premier over the additional funding, given that the Premier said that this additional funding had kicked in on 1 February, but the minister on 22 February said that the extra money will not be available until after the review?

2. Will the minister issue a public statement immediately to clarify for gambling counselling agencies and problem gamblers who they should believe: the Premier or the minister—or neither?

3. Will the minister clarify when the promised extra $750 000 per annum from the industry will kick in?

4. Will the minister apologise for the disruption caused by the delay in this additional funding to problem gamblers and their families?

The Hon. T.G. ROBERTS (Minister for Aboriginal Affairs and Reconciliation): I will refer those questions to the minister in another place and bring back a reply.

The Hon. J.F. STEFANI: I have a supplementary question. Does the minister agree with the public comment made by the member for Norwood when describing the $1 million as 'when is enough ever enough'?

The Hon. T.G. ROBERTS: I will refer that question to the minister in another place and bring back a reply.

CREDIT CARDS

The Hon. J.M.A. LENSINK: I seek leave to make a brief explanation before asking the Minister for Industry and Trade, representing the Minister for Consumer Affairs, a question on credit cards.

Leave granted.

The Hon. J.M.A. LENSINK: I have received a review document from an organisation called PPB, located at 26 Flinders Street, Adelaide, which publishes regular legal information and, in that document, the following comments are made in relation to credit cards. The briefing issues a warning to Australia in relation to its credit card policy and makes comparisons with the UK in which there are more credit cards than people. It is the only country in the European Union that is in that situation. It makes comparisons with Australia, in terms of the number of credit cards, that we are edging towards that ratio and states that the number of Australians bankrupted by credit card debt has doubled in the past five years to reach more than 4 300.

The document states that, in an interesting exercise, a reporter from *The Sunday Telegraph* in Sydney applied for and acquired in one afternoon a Coles-Myer credit card with a $4 000 limit, granted on the spot; a $1 000 line of credit from David Jones; approval from Harvey Norman for $6 000 credit towards a flat-screen television set; and from Buyers Edge a credit with a $2 000 limit, interest rate 27.5 per cent.

Debt counsellors are discovering that Australia's low-income earners typically carry about eight credit cards. The briefing then goes on to note that the Australian Capital Territory is the only state or territory where it is illegal to offer new credit cards to people or to increase their credit limits without first checking their capacity to properly service the new lines of credit. My questions are:

1. Has the minister considered any changes to South Australian legislation in this area and in comparison to how the legislation operates in the ACT?

2. How many bankruptcies have occurred in South Australia as a result of credit card debt?

3. Can the minister provide these bankruptcy figures on a per annum basis for each of the last 10 years?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I will refer that question to the Minister for Consumer Affairs and bring back a reply.

ONE MILLION TREES PROJECT

The Hon. D.W. RIDGWAY: I seek leave to make a brief explanation before asking the Minister for Industry and Trade, representing the Premier, a question on the One Million Trees Program.

Leave granted.

The Hon. D.W. RIDGWAY: I read with interest on the back page of yesterday's *Independent Weekly* feature an advertisement stating:

> Growing a great future. South Australia's urban forest Million Trees Program. Breathing easy. It's a big ask for our cities but Premier Mike Rann's Million Trees Program is making it more possible. The native trees, bushes, ground covers and grasses will not just be the lungs of the city. They will also improve the air we breathe. They will make us greener and cleaner. They will prevent countless tonnes of greenhouse gas emissions from reaching the atmosphere. Water and air quality will be improved. Local wildlife will make their new homes. We will be able to enjoy the scenery too. Youth employment programs and community activities will also be supported. Overall planting of up to 2 000 hectares of native vegetation through the Million Trees Program promises a better quality of life for everyone.

It goes on and states a number of government initiatives with the Premier's photograph—and a very fresh, youthful photograph of the Premier—next to some of the points. My questions are:

1. How many of the trees that have already been planted have survived?

2. I have also been informed that the cost per tree will be close to $10 per tree; will the Premier confirm that cost?

3. Will the Premier confirm that the advertising is designed to mislead South Australians when it refers to the one million trees program but when in actual fact native trees, bushes, ground covers and grasses will be planted? I would hardly call a grass a tree.

4. What is the cost of this PPP—the Premier's personal promotion?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I understand the honourable member has just come back from Western Australia. He obviously has not learnt very much from what his party was doing over there. I thank the honourable member for drawing my attention to the article that was in the back of the *Independent Weekly*. There was another interesting article in there a few weeks ago. I am surprised that the honourable member should have a go at these trees they call shrubs and so on. I understand from an article a few weeks ago that the honourable member himself is a significant grower of gladioli.

Members interjecting:

The Hon. P. HOLLOWAY: No, they are not trees, but they are important. I congratulate the honourable member on his enterprise in that area.

Members interjecting:

The Hon. P. HOLLOWAY: Indeed, and I congratulate him on doing that. How petty to try—

Members interjecting:

The Hon. P. HOLLOWAY: It states that under the million trees program the state government has pledged to expand the program to plant 3 million local native trees, shrubs and understorey plants. The pettiness of those opposite in relation to these things almost defies belief, if the best they can do is to attack these programs. I would have thought the honourable member knew that this state has cleared more of its landscape than any other part of this country and probably many other places on Earth. I would have thought that, given all the increasing concerns about land salinisation and climate change, CO_2 and so on, everyone in our community would applaud the steps this government has taken in restoring some of the vegetation in the state. I do not think the honourable member's question deserves any more of a reply than that. If the best he can say is that our planting local native trees, shrubs and understorey plants is somehow misleading, I think he is wasting his time.

The PRESIDENT: I draw honourable members' attention once more to the tendency for a whole range of opinion to be creeping into explanations of questions. Some members think their task for the day is to be humorous and impute improper motives to other members of parliament. I ask all honourable members to pay attention to their responsibilities in respect of these matters.

CRIMINAL LAW CONSOLIDATION (CRIMINAL NEGLECT) AMENDMENT BILL

Adjourned debate on the question:

That this bill be now read a second time,

which the Hon. R.D. Lawson had moved to amend by leaving out all words after 'That' and inserting the words:

the bill be withdrawn and referred to the Legislative Review Committee for its report and recommendations.

(Continued from 17 February. Page 1160.)

The Hon. P. HOLLOWAY (Minister for Industry and Trade): Members of the council will recall that when we were debating the Criminal Law Consolidation (Criminal Neglect) Amendment Bill last week I provided a lengthy response to some of the matters that had been raised in the second reading debate by various members. I sought leave to conclude my remarks at the end of that debate to provide those members, particularly the Independent members, time to consider the comments I had made so they could make an informed decision on the amendment before us and decide whether or not the bill should be referred to the Legislative Review Committee.

I would hope that, as a consequence of having read that detailed explanation, those members would support the government in rejecting this move to refer the bill to the Legislative Review Committee and that we could get on and debate this important measure. The Premier has made some comments on this in the paper this morning. The government believes it is urgent that we should deal with this matter, so I ask all members of the council to reject the amendment moved by the Hon. Robert Lawson and to support the second reading of the bill.

The council divided on the amendment:

AYES (10)

Dawkins, J. S. L.	Evans, A.L.
Lawson, R. D. (teller)	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Ridgway, D. W.	Schaefer, C. V.
Stefani, J. F.	Stephens, T. J.

NOES (11)

Cameron, T. G.	Gago, G. E.
Gazzola, J.	Gilfillan, I.
Holloway, P. (teller)	Kanck, S. M.
Reynolds, K.	Roberts, T. G.
Sneath, R. K.	Xenophon, N.
Zollo, C.	

Majority of 1 for the noes.

Amendment thus negatived.

Bill read a second time.

CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) (TYPES OF CLASSIFICATIONS) AMENDMENT BILL

Adjourned debate on second reading.

(Continued from 15 February. Page 1041.)

The Hon. R.D. LAWSON: I rise to indicate that the Liberal opposition will be supporting the passage of this bill, which amends the Classification (Publications, Films and Computer Games) Act 1995. This bill has two effects. First, it changes the categories and symbols of classification which apply to computer games; they will now be the same as those that apply to films. Secondly, it seeks to simplify the classification of letters and symbols (that is, the well known PG, R, M, etc.) to make it easier for parents to identify particular classifications.

The bill follows similar legislation passed earlier this year by the commonwealth parliament, and all censorship ministers have agreed to adopt this new system. Information provided by the government suggests that the commonwealth bill will come into operation on 26 May this year. Accordingly, it is desired that the bill pass through this parliament expeditiously, and we are happy to comply. We believe that a national censorship system is appropriate. There are a number of reservations—sometimes, serious reservations—expressed about the current system. In fact, some of the recent decisions in relation to the classification of movies by the Classification Review Board have been described as outrageous by the Festival of Light. Those decisions include the R rating for the film *Nine Songs* and the MA rating for the film *Birth*.

It is not surprising that from time to time the South Australian Attorney-General expresses his disagreement with classification matters. However, he rarely appears to exercise the power which he has to seek a review of classifications. Mrs Ros Phillips, the research officer for the Festival of Light, has indicated to me her dismay at the 2003 rewrite of the classification guidelines for films and computer games. In her view, recent classification decisions have shifted in a more permissive direction despite a written assurance from the Office of Film and Literature Classification to the effect that classification standards would remain unchanged after those new guidelines came into operation.

Notwithstanding the reservations that Mrs Phillips and others have expressed, we believe that the current system, with all its imperfections, is working satisfactorily. The fact that some ministers choose to express reservations about particular decisions of the classification board, but then refuse to take the steps open to them to have those reviewed, is really a comment on the commitment of a particular minister rather than an adverse comment on the system itself. One reason advanced for these changes is the fact that research by the Office of Film and Literature Classification has shown that the existing classifications for computer games are not well understood by parents. I certainly agree with that research.

My understanding is not based upon any research or examination of research but my own experience of trying to discern classifications. The new classifications for film will be G for general, PG for parental guidance, M for mature, MA15+ to indicate mature as well as the fact that the viewer should be accompanied by an adult, R18+ is restricted, X18+ is also restricted, and RC is refused classification. The classifications for computer games will be G for general, PG for parental guidance, M for mature, MA15+ for mature accompanied, and RC for refused classification. There will be no X-rated or R-rated computer games. Any system which provides parents with easily accessible and understood guidelines is to be welcomed. We will support the passage of the bill without amendment.

The Hon. CARMEL ZOLLO secured the adjournment of the debate.

ADELAIDE DOLPHIN SANCTUARY BILL

Adjourned debate on second reading.

(Continued from 8 February. Page 941.)

The Hon. J.M.A. LENSINK: My contribution to this bill on behalf of Liberal members will be brief. There has been an amount of discussion by members on both sides in the House of Assembly on the matter. The bill establishes a sanctuary in the Port Adelaide River and Barker Inlet, the boundaries of which are set out in schedule 1 and they may be changed only by regulation. The bill also establishes an 11-member advisory board and a fund, which can receive grants, sponsorship, bequests and the like, to support the sanctuary activities. There will be a management plan, which will be proclaimed within a year.

The government has made the claim that there is only one new power in this bill, which is a general duty of care. Many aspects of the bill are already within the Environment Protection Act and the National Parks and Wildlife Act. There is also an increase in the penalties for harming, taking or illegally possessing protected marine mammals, which will increase from $30 000 to $100 000. The Liberal Party does not believe in legislation for legislation's sake. We will not oppose the bill, but we believe it is window-dressing, which will give the government another headline through which it can say that it is assisting various things about which people feel rather emotional. Clearly, anybody who abuses an animal, whether a dolphin or any other sort of animal, is a dysfunctional human being and I am not sure that they will pay much attention to whether or not the penalties have increased. So in some ways increasing the penalties is again window-dressing.

There may be some impact on increasing awareness and obligations to these creatures, which would be a good thing, but by and large the measures in this bill are already covered by existing legislation and therefore are unnecessary and will just provide the government with another headline.

The Hon. CARMEL ZOLLO secured the adjournment of the debate.

STATUTES AMENDMENT (DRINK DRIVING) BILL

Adjourned debate on second reading.

(Continued from 9 February. Page 985.)

The Hon. SANDRA KANCK: I rise to indicate that the Democrats oppose the two principal components of this bill. In respect of the extension of mobile random breath testing, we believe the current regime is working well and, as a consequence, there is no need to increase the powers of the police to stop and test motorists. Our position is based on the need to carefully weigh any increase in police powers with the potential benefits that will flow to the community as a consequence of the change. It is crucial that we get this right because, in the absence of a bill of rights, parliament is the ultimate guardian of our society's liberties. The right to lawfully go about one's business without hindrance from authority is a core liberty. It is often expressed as freedom of movement. Unrestricted breath testing is a dramatic increase in the powers of police that directly impacts upon that right.

As a society, we have accepted random breath testing because it has reduced death and injury on our roads. I, too, support stationary random breath testing because of its beneficial effects, but also because it is genuinely random. You do not get stopped because you have an old car; you do not get stopped because of your age; and you do not get stopped due to the colour of your skin. You get stopped and your breath is analysed because you are driving along a piece of road at a particular time. There is no other qualification. So-called unrestricted mobile random breath testing, despite the name, will not be random.

Consciously or unconsciously, police officers will gravitate towards the usual suspects when deciding whom to pull over. But it is not against the law to have an old car; it is not against the law to be young; and it is not against the law to be black. People should not be stopped by the authorities for these reasons. This is particularly pertinent because the police already have the power to pull over and test the blood alcohol content of a driver breaking the road rules. This latest extension of police powers is unnecessary.

The other component of this bill the Democrats object to is the immediate licence suspension upon a motorist's returning a blood alcohol content above .08. This government is obsessed with putting the cart before the horse. It has little respect for longstanding legal conventions designed to protect the individual from the undue power of the state. So let it be stated again: the police are not the courts. The police are responsible for apprehending and charging people they believe have broken our laws.

Our system requires the evidence of the alleged offence to be tested in court and that the court adjudicate on guilt or innocence. It is known as 'innocent until proven guilty' and it is a bulwark of our individual rights. This bill does away with that safeguard and, in so doing, will also certainly lead to injustice. What if the breath-testing equipment is wrong? What if a person has been slipped a mickey? What if a person is thousands of kilometres from home? What if the person had one drink too many because they had just discovered their wife was gravely ill and would need to be driven thousands of kilometres for treatment in Adelaide the next day? Leaving it for the court to decide guilt and punishment reduces the likelihood of injustice.

The minister claims, in part, that we need to overturn our longstanding legal safeguards because 'certainty of punishment and the speed with which the judicial system can process drink driving convictions influences the effectiveness of the sanction in reducing drink driving recidivism'. Under the logic of that argument we should immediately imprison anyone accused of an indictable offence. This is the real danger here. As a society we discard the principle of 'innocent until proven guilty'. I am opposed to that. What we need is certainty of guilt before the reality of punishment. There is no doubt that our courts are too slow in processing the cases, but that is an administrative issue and the government can put money into courts to make sure that it is sped up. We should not undermine the substantive law to resolve problems with the administration of law.

The Hon. CARMEL ZOLLO secured the adjournment of the debate.

ACTS INTERPRETATION (GENDER BALANCE) AMENDMENT BILL

Adjourned debate on second reading.

(Continued from 15 February. Page 1065.)

The Hon. SANDRA KANCK: Mr President, I am someone that I think you would expect to be strongly supportive of legislation such as this, which endeavours to

ensure better gender balance on many boards and statutory authorities. In ensuring better gender balance, in most cases that will mean an increase in the number of women rather than men holding positions. In principle, I think it is a very good idea. Over the 11 years I have been in parliament I have supported and, at times, moved an amendment that many of us came to know as the Levy amendment, so-called after the Hon. Anne Levy who, predictably, would put in any bill that was setting up a board or amending board structures an amendment that provided that 'at least one member of the board shall be a woman and at least one member shall be a man'. When Anne Levy left the parliament I continued to move the same amendment. I even remember on one occasion—I cannot remember what the legislation was, but with the previous government—it was amended so it was 'at least two members shall be men and two members shall be women'. I remember the Hon. Diana Laidlaw saying that she would have difficulty finding the two men for the particular board she was considering at that time.

Given the government's commitment to an action such as this of creating equality for women on boards, it is interesting that in relation to the various appointments that the government has made in the past six months—and I have not got my folder with me so I cannot give the examples—certainly with a number of them, including the Natural Resources Management Council, clearly there has been no determination at all by the government to ensure gender balance. That particular council was set up well and truly after the government had made the announcement that this was its intention. I suggest the reason that those somewhat recent appointments by government have not achieved gender neutrality or equality is that it is not always easy to do so.

I refer to my personal experience when I was an employee of the Conservation Council. One of my jobs was to find people who were prepared to serve on various boards, committees and so on, and part of that was always to present to the minister for the environment a list of three names. This was not a question of gender at all; it was simply a list of three names so that the minister could choose one. I am going back 15 or so years ago when in country areas it was not a good thing to be seen as an environmentalist. When I was trying to find people to serve on a committee that was rurally based, I had great difficulty finding people in those areas who were prepared to be nominated. In fact, I would say that probably 50 per cent of the time I would provide only one name to the minister. I received messages back from her that she was not very happy with that, and I had to explain that there was only one nomination.

I know that this legislation is, in a sense, symbolic. No-one will have their hand smacked as a consequence of not being able to provide a woman in these nominations. Nevertheless, I suspect that, because of that type of experience that I had when I worked at the Conservation Council, there will be other groups who will similarly have difficulty. I do not say this in any way to provide excuses for groups to not make that effort to find a woman, but I do think the government just needs to take into account that for a lot of organisations, particularly voluntary organisations, it is not an easy thing to find exactly what it is that the government is looking for so that it can choose the right people.

I indicate that the Democrats will support this legislation because it is, effectively, advisory and symbolic, but I do believe that the government might have to look at some other methodology if it intends to go further down the path some time in the future and make it compulsory. It might mean that the government in different parts of the state will have to set up some sorts of training programs for people who might consider themselves suitable to serve on some of these committees. However, as things stand, when so much of it is voluntary, it will be difficult and the government needs to recognise that.

The Hon. CARMEL ZOLLO secured the adjournment of the debate.

PODIATRY PRACTICE BILL

Adjourned debate on second reading.

(Continued from 16 February. Page 1112.)

The Hon. SANDRA KANCK: This bill in its passage through from the House of Assembly to its present position on our *Notice Paper* has been in the parliament for five to six months. I have had no lobbying from anyone in that time, either for or against it. One assumes that it is therefore not controversial. I see that it is based on a similar model to that which was used with the Medical Practice Bill that we passed last year. It is also similar to the physiotherapists bill that has been introduced in the House of Assembly, which is very sensible.

One of the reasons that we need to update this legislation is that the act that this will replace is so old that it refers to podiatrists as chiropodists. I would think it has been two decades since the name was changed from chiropodist to podiatrist. So, I think this is timely legislation, and I indicate the Democrats will support the second reading, while still being open to further consideration if for some reason anyone decides that there are any controversial elements in it, although I doubt that.

The Hon. NICK XENOPHON secured the adjournment of the debate.

INDUSTRIAL LAW REFORM (ENTERPRISE AND ECONOMIC DEVELOPMENT—LABOUR MARKET RELATIONS) BILL

In committee.

(Continued from 17 February. Page 1168.)

Clause 46.

The Hon. P. HOLLOWAY: On behalf of my colleague the Minister for Aboriginal Affairs and Reconciliation, I move:

Page 25, line 24—
After 'the relevant work', first occurring, insert:
(other than (if relevant) as a purchaser at the point of sale by retail)

The amendment simply makes clear that a person will not be taken to be a responsible contractor to an outworker if they initiate an order for relevant work as a purchaser at the point of sale. For example, if a purchaser orders a pair of shoes or other apparel from a shop, the purchaser will not be taken to be a responsible contractor to an outworker. The amendment is made in response to concerns raised by the member for Davenport in another place. The amendment should clarify that matter. We will deal with the second amendment separately.

The Hon. NICK XENOPHON: First, will the government confirm that what it is proposing is modelled on legislation in New South Wales and Victoria? Secondly, I

have had discussions with a representative from the Textile Clothing and Footwear Union of Australia, Mr Stephen Brennan. On making inquiries of the New South Wales branch he found that it was not aware of any actions taken by a worker against a principal contractor in the past four years. Can the government indicate whether there has been an action? It seems to be something that is rarely, if ever, used as a sanction, and I know it has been an area of concern for those who have opposed this clause. Those are my two primary concerns.

The Hon. P. HOLLOWAY: The answer to the first question is: yes; this legislation is based on that in New South Wales and Victoria. The answer to the second question is: yes; to the best of our knowledge. Nevertheless, we see it as important to have this legislation here in order to promote good conduct within the industry.

The Hon. R.D. LAWSON: Can the minister indicate what particular evil the government seeks to address by the insertion, after the expression 'relevant work', of the qualification, 'other than as a purchaser at the point of sale by retail'? **The Hon. P. HOLLOWAY:** As I thought I just indicated, it is to clarify the situation following some concerns raised by the member for Davenport in another place and to clarify the fact that a retail customer will not be taken to be a responsible contractor to an outworker. I am not sure whether that would have been the case without the amendment. However, this will make it absolutely clear that it is not.

The Hon. IAN GILFILLAN: For a moment I thought I was slower on the uptake than the Hon. Robert Lawson, but he has assured me that he also found that explanation a little hard to follow. Will the minister go through it again?

The Hon. P. HOLLOWAY: I will read what I said when I moved the amendment a few minutes ago. The amendment comes in response to a concern raised by the member for Davenport when the bill was debated in the lower house. The proposed amendment simply makes it clear that a person will not be taken to be a responsible contractor to an outworker if they initiate an order for relevant work as a purchaser at the point of sale. I gave this example: if a purchaser orders a pair of shoes or other apparel from a shop, the purchaser will not be taken to be a responsible contractor to an outworker. This amendment clarifies that this clause does not apply in such cases.

The Hon. R.D. LAWSON: Would it apply if a customer went to the house of the outworker and offered to buy goods at that place?

The Hon. P. HOLLOWAY: My advice is that it relates to how the item is being sold. If a person was going there to buy as a wholesaler and to sell the goods on, obviously that conduct would be caught by the bill. We are simply making it clear that, if it is a purchase at point of sale by retail, this provision does not apply.

The Hon. R.D. LAWSON: If a housewife, say, were to telephone somebody who is running a sewing shop, using outworkers as defined, and ordered a set of curtains, would that housewife be at risk of being deemed a responsible contractor, either under the original bill or under this amendment?

The Hon. P. HOLLOWAY: I do not believe so.

The Hon. IAN GILFILLAN: I indicate that the Democrats will support the amendment.

The Hon. R.D. LAWSON: Did the government receive any representations from any organisation or group in relation to this amendment?

The Hon. P. HOLLOWAY: My advice is that, to the best of our knowledge, is was done purely because of matters raised by the member for Davenport when the issue was debated in the other place. I assume that the minister, being the good-natured person he is, looked at the issue, and this is the result.

The Hon. R.D. LAWSON: I should have indicated at the outset that the Liberal opposition opposes the whole of clause 46, the provisions dealing with outworkers. We will not divide on the amendment, the necessity of which we doubt.

Amendment carried.

The Hon. P. HOLLOWAY: On behalf of my colleague the Minister for Aboriginal Affairs and Reconciliation, I move:

Page 25, line 31—After 'sale of clothing' insert '(and associated items)'

New section 99B(3) proposes that a person whose sole business is the sale of clothing by retail will not be taken to be a responsible contractor. The amendment proposed to the bill simply makes it clear that a person will not be taken to be a responsible contractor if their sole business is the sale of clothing and associated items by retail. The amendment is again made in response to concerns raised by the member for Davenport in the other place about whether persons selling accessories or associated items are covered by this exemption. This amendment should make it clear.

The Hon. NICK XENOPHON: Can the minister clarify what would be the impact if a person's business was to sell clothing, associated items and other non-clothing related items; in other words, if they sell things other than clothing and associated items?

The Hon. P. HOLLOWAY: My advice is that at the moment this clause would apply only to outworkers in the clothing trades, as defined under the act.

The Hon. A.J. REDFORD: I may well be on the wrong clause, but, having listened to what the Hon. Robert Lawson said in relation to an earlier clause, this is relevant. Anyway, I will do my best. I am interested to know how it operates under the existing act in relation to outworkers. Under the existing act, the definition of 'outworkers' refers to a contract of service. Under the definition in the existing act, a 'contract of service' is a contract, arrangement or understanding where one person works for another in prescribed work or work of a prescribed class.

Regulation 5 of the Workers Rehabilitation Compensation Claims Registration Regulations, which is part of the existing definition, refers to a person who performs work as an outworker, and any aspect of that work is governed by an award or an industrial agreement, or expressed to apply to outworkers, and that work is prescribed work for the purposes of the definition of contract of service in section 3 of the Industrial Relations Act. It seems to me that, under the current legislation, if we want to extend the definition, we can do it by way of regulation. I wonder whether we have, first, sought to do that, or has there been any attempt to do that; and, secondly, if not—and I cannot find any—why not?

The Hon. P. HOLLOWAY: The honourable member appears to be referring to the Workers Rehabilitation and Compensation Act.

The Hon. A.J. Redford: Yes.

The Hon. P. HOLLOWAY: My advice is that each act stands alone. So, the matter covered in that act stands alone.

The Hon. IAN GILFILLAN: I have a question in relation to the legislation and how it integrates. In the bill, we

have 'Division 1—Preliminary, 99A—Interpretation' and it carries on with the text we have before us in the bill. In the act, we have 'Division 2—Review of Awards'. Obviously, I am not finding the right geographical place in the act where this goes. I wonder whether the minister could enlighten me.

The Hon. P. HOLLOWAY: This new part is inserted after section 99—Triennial Review of Awards in Division 2 of the current act. This creates a new part, part 3A, which will lie between section 99 and section 100, which is part 4. So, it will be a new part.

The Hon. IAN GILFILLAN: I do not follow the logic. If I go to the act, Division 2—Review of Awards is the title of chapter 3, part 3. I may be in a totally wrong area of the act.

The Hon. P. HOLLOWAY: The divisions fall within the parts, and this is a new part of the act. I am advised that a part is perhaps more significant than a division in terms of how these bills are categorised.

The Hon. IAN GILFILLAN: In relation to 'responsible contractor', can the minister indicate where there is reference, if any, to that in the current act?

The Hon. P. HOLLOWAY: No; it is not mentioned. This is a new provision.

The Hon. IAN GILFILLAN: That being the case—and I indicate that the Democrats support the clause; we do not have any issue with the principle—I make the observation that, if this is the only material that is going into the act describing the nature and responsibility of responsible contractors, it is pretty thin.

The Hon. A.J. REDFORD: I understand the minister's puzzlement at my last series of questions, but I will just explain the relevance. Under the Workers Rehabilitation and Compensation Act the definition of employee is a person engaged in a contract of service; it then goes on to say that that contract of service includes prescribed work or work of a prescribed class. If one looks at the Workers Rehabilitation and Compensation (Claims and Registration) Regulations, it includes the definition of outworker as having the meaning given by the Industrial and Employee Relations Act 1994. It seems to me that, if we expand the coverage of outworker in this piece of legislation, it will have an impact on the WorkCover legislation as it will expand the coverage that is required under the WorkCover legislation because the definitions are mutually dependent on each other. In that context, my questions are:

1. Is the government aware of that? If not, does it have any plans to change the interpretation in the Workers Rehabilitation and Compensation Regulations in relation to the definition of outworker?

2. Has the government considered what, if any, the financial impact might be in relation to WorkCover and its current substantial unfunded liability and the rumoured blowout in the unfunded liability?

The Hon. P. HOLLOWAY: My advice is that this clause does not expand the definition of outworker. In plenty of times in the past other bits of legislation have referred to outworkers but, given that the clause itself does not expand the definition of outworker, we do not really see that it should impact on the other legislation.

The Hon. A.J. REDFORD: Does that mean that, from the government's perspective, there will be no impact at all on WorkCover because of any change to the definition of WorkCover within this legislation?

The Hon. P. HOLLOWAY: All I can do is repeat that this clause does not expand the definition of outworker.

The Hon. A.J. Redford: What about any part of this legislation?

The Hon. P. HOLLOWAY: Not in relation to this clause; but I am advised that there were some very small changes to the definition. We dealt with that earlier in clause 5 some days ago, but this clause is not really relevant to that issue.

The Hon. R.D. LAWSON: Can the minister indicate why a specific exclusion is afforded to those whose sole business is in connection with the clothing industry and is the sale of clothing by retail? Why was that class of activity excluded? Who made representations that the sale of clothing by retail be excluded?

The Hon. P. HOLLOWAY: My advice is that in relation to these clauses we have already discussed how this was based on interstate legislation and, as I understand it, that legislation was pitched towards those who were involved in organising the production of clothing. That is what this is all about. That is what the bill is aimed at.

The Hon. R.D. LAWSON: Did the government receive representations from any of the major clothing retailers expressing concern about the particular operations of the provision as drafted? Did the clothing retailers seek exclusion from this government?

The Hon. P. HOLLOWAY: To the best of my adviser's ability, the answer is no. We have not received representations from them.

The Hon. A.J. REDFORD: If you look at new section 99D, as I understand it, it enables an outworker to initiate a claim against a responsible contractor. New section 99B(1) talks about a person taken to be a responsible contractor in relation to an outworker under a contract of employment with someone else if a person initiates an order for relevant work. What happens if the contractor or a sub-contractor has paid the amount due in full to a contractor—can the outworker still proceed against that person?

The Hon. P. HOLLOWAY: My advice is that unless the outworker has been paid, yes. However, in relation to a contractor, they may refer it on to a contractor who is closer to the work than them.

The Hon. A.J. REDFORD: Am I to understand that, if I am a contractor and I pay another contractor in full for the work, I still might be liable to a claim by an outworker in respect of an unpaid amount due by that other contractor, notwithstanding the fact that I have paid in full?

The Hon. P. HOLLOWAY: Potentially that is the case, but section 99E specifically refers to that and I refer the honourable member to that new clause.

The Hon. R.D. LAWSON: Returning to the question of the exclusion of clothing retailers, the minister assured the committee that this was not as a result of any representations made by clothing retailers. Can he explain why this sector has been chosen for exemption? We have heard a lot of information about the clothing trade as being one in which outworkers are used and misused. In this section a particular sector or link in the chain of business, the retail part, is excluded, but similar business chains in respect of other activities not related to clothing are not excluded. Retailing generally is not excluded. Why is it that the clothing retail sector of all the sectors involved in outworking should be excluded and no other sector or link in a business chain is excluded?

The Hon. P. HOLLOWAY: I thought I had answered that question earlier, but I will repeat some of the points. This legislation is based on an interstate model. It is aimed at the

people involved in the production of clothes and not simply the retail of clothes. This is where the most notorious issues have come up and it is what interstate legislation has been aimed at. It is where the legislation is being pitched. In answer to an earlier question by the Hon. Nick Xenophon, at this stage outworkers in the clothing industry are the only ones currently defined for the purposes of the act. Outworkers as defined are in the clothing trades, so it is not surprising that these clauses should have such significant reference to them.

The Hon. R.D. LAWSON: Will the minister indicate which particular interstate legislation this model is based upon?

The Hon. P. HOLLOWAY: Victoria and New South Wales.

The Hon. R.D. LAWSON: Will the minister indicate how it came about that these provisions, not included in the draft bill that went out for consultation, surfaced in this version of the bill?

The Hon. P. HOLLOWAY: My advice is that these provisions were circulated separately because, at the time the original bill was circulated, the drafting had not been completed.

The committee divided on the amendment:

AYES (11)

Evans, A. L.	Gago, G. E.
Gazzola, J.	Gilfillan, I.
Holloway, P. (teller)	Kanck, S. M.
Reynolds, K.	Roberts, T. G.
Sneath, R. K.	Xenophon, N.
Zollo, C.	

NOES (10)

Cameron, T.G. (teller)	Dawkins, J. S. L.
Lawson, R. D.	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Ridgway, D. W.	Schaefer, C. V.
Stefani, J. F.	Stephens, T. J.

Majority of 1 for the ayes.

Amendment thus carried.

The Hon. IAN GILFILLAN: I move:

Page 26, line 3—Delete 'The Minister may publish' and substitute:

The Governor may, by regulation, establish

We have a pretty simple approach to this, and that is that the code of practice is an important set of criteria in the implementation of this legislation and we are not as content with a minister arbitrarily publishing a code as compared to the government's needing to do it by regulation. As honourable members are well aware, if any regulation is introduced, it does have to run the gauntlet of being disallowed in either chamber. Quite simply, the amendment ratchets up the significance that the Democrats put on the code of practice so that it must go through the more deliberative process of being a regulation rather than just a pronouncement by the minister.

The Hon. P. HOLLOWAY: I indicate that the government will accept amendments Nos 8, 9 and 10 of the Hon. Ian Gilfillan. The bill proposes that the minister have a capacity to publish a code of practice for the purpose of ensuring that outworkers are treated fairly. This amendment and the related amendments Nos 9 and 10 have the effect that the Governor has the capacity to publish a code of practice rather than the minister. We see no particular problem with that and are happy to support this series of amendments.

The Hon. NICK XENOPHON: I support the amendment moved by the Hon. Mr Gilfillan for the reasons he set out.

The Hon. R.D. LAWSON: I indicate that the Liberal opposition supports these amendments which will enhance parliamentary scrutiny of codes of practice for the reasons stated by the Hon. Ian Gilfillan. I emphasise, however, that, notwithstanding our support for this slight improvement, we remain steadfastly opposed to these new outworker provisions.

Amendment carried.

The Hon. IAN GILFILLAN: I move:

Page 26—
Lines 12 to 18—
Delete subsections (4) and (5)
Line 32—
Delete 'the Minister' and substitute:
the Governor

Amendments carried.

The Hon. P. HOLLOWAY: On behalf of my colleague the Minister for Aboriginal Affairs and Reconciliation, I move:

Page 27, Line 6—After 'believes' insert:
on reasonable grounds

The bill proposes the insertion of section 99D(1) into the act. It provides:

An outworker may initiate a claim for unpaid remuneration. . . against a person identified by the outworker as the person who the outworker believes to be a responsible contractor. . .

The amendment proposes the insertion of the phrase 'on reasonable grounds', so the section will read 'against a person identified by the outworker as the person who the outworker believes on reasonable grounds to be a responsible contractor'. This introduces an objective element. In other words, not only does the outworker need to genuinely believe the person in question is a responsible contractor but he or she also must have objective reasons for holding that belief. The amendment was proposed in light of concerns raised by the member for Davenport in the other place.

The Hon. IAN GILFILLAN: I indicate Democrat support for the amendment.

The Hon. R.D. LAWSON: I indicate that we do not support this amendment. It is true that in another place the shadow minister highlighted a number of weaknesses and areas of vagueness in this whole scheme, and he highlighted the uncertain breadth and application of these provisions. The government has sought to pretend to allay those concerns by introducing amendments of this kind—for example, 'believes on reasonable grounds'—in an attempt to say that the deficiencies in this clause have been somehow remedied, but they have not.

We do not believe that this is a significant improvement. This remains a highly uncertain test. It is all very well to say 'because the worker believes on reasonable grounds that some objective test is introduced'. Whilst it is true that there is a certain degree of objectivity in the concept of 'reasonable grounds', it still remains a very uncertain test. It will still expose some businesses to claims being made by outworkers in circumstances where the person or business really has no relationship whatsoever with the outworker and the person who engaged the outworker.

The Hon. NICK XENOPHON: I indicate my support for this amendment. I see it as a sensible amendment that clarifies the scope of the legislation. I note the concerns of the Hon. Mr Lawson. I can indicate that, when I spoke to a representative from the textile workers' union earlier today,

he made inquiries with his New South Wales counterparts as to whether there had been any actions of this type initiated against the principal contractor. It has acted as a deterrent in terms of the conduct of fly-by-night operators, so the principal contractors are more cautious in their dealings. If there is any information to the contrary from the opposition, or indeed anyone else, I would like to hear it, but my understanding is that it is something which has not been used in New South Wales within the last four years.

The Hon. R.D. LAWSON: I think the comment of the Hon. Nick Xenophon highlights one of the deficiencies. He says, on the one hand, that to enact legislation of this kind has a deterrent effect, but that no-one has sought to exercise the powers that are conferred by the new act. It is unnecessary. It is window-dressing that is unnecessary. The only effective deterrent for these people, whom the government describes and those who are proposing the outworker provisions believe are most nefarious and exploitative, is actual prosecution. Yet there have been none. The only deterrent is claims being made by outworkers against so-called responsible contractors. As the Hon. Nick Xenophon has informed the committee, as a result of information from the union, there have been no such claims.

Amendment carried.

The Hon. R.D. LAWSON: I indicate in more detail the subject of our opposition to these provisions. I have already hinted in previous contributions, in relation to some of the amendments to proposed part 3A dealing with outworkers, that we are opposed to these because we do not see any clear limits to the application of these provisions. The notion of apparent responsible contractor is a very wide one, and, notwithstanding the fact that the minister has suggested that the definition of outworker has been amended only in a very minor way, we believe the reach of these provisions is now much greater. Its significance is much greater. It will have adverse employment effects on many South Australian workers, many of whom are low paid workers.

As the Hon. Terry Cameron highlighted in an impassioned contribution on an earlier clause, this is an attack upon a very vulnerable section of the work force—an attack under the guise of protecting them. It is a false guise. These provisions will involve an additional considerable exposure for a number of businesses. If a primary contractor does not meet the obligations of a particular contract, for example through financial difficulty, an end client can finish up picking up a bill for which they have had no responsibility, no control, no contemplation, never agreed to meet or even budgeted for.

I take the case of a clerical outworker performing work from home. A client may go to a responsible entity, a reputable business, and ask for the provision of typing services. The entity may organise for the typing work to be done from remote locations, being various employees from their homes. If that entity were to refuse to pay the outworker, the client—who may have no knowledge of how the work was carried out, where it was carried out and by whom it was carried out—could find themselves with an unexpected and significant liability. The same result could transpire if the entity in the example I have just given were to become insolvent and could not pay the outworker. This takes protection of workers' entitlements in the cases of insolvency beyond even some of the more extravagant proposals of the federal Labor Party in terms of liability between related corporations.

Whilst the section has been in some measure improved by the requirement now that the proposed code of practice be a disallowable instrument, that is really inadequate protection. It is a fairly ineffective and cumbersome mechanism for the examination of subordinate legislation of this kind. It is for these reasons, the adverse effect on business generally and on employment and its adverse effect on many low-paid workers, that we are opposing this provision.

The Hon. P. HOLLOWAY: I will just say a few words in support of clause 46 as we have amended it. The Hon. Robert Lawson seeks to delete this clause, which would insert provisions to assist outworkers in recovering money owed to them and to allow the minister to establish a code of practice in relation to outworkers. Protection for outworkers under the existing act is inadequate, and South Australia has fallen behind other states in terms of protecting these vulnerable members of the work force.

One of the major problems in this area relates to the chain of contractors engaging outworkers. A principal contractor may let work out to agents who then enter into arrangements with a variety of subcontractors. The person who engages the outworkers—the employer—can fail to pay the outworker even though they have been paid themselves. They often then disappear without paying the outworker, and there is no capacity for the outworker to recover payments from other contractors who have gained the benefit of their work and are more readily identifiable. Recovery provisions propose to deal with the issue by encouraging the bigger players in the industry to deal only with reputable contractors who pay outworkers the remuneration they are entitled to.

So the capacity, as it now is in the amended form under regulation, to publish a code of practice for the purpose of ensuring that outworkers are treated fairly is proposed in the bill. These measures bring South Australia into line with legislative developments regarding outworkers implemented in Victoria and New South Wales. I am advised that, whilst they did move amendments, the Liberal opposition in New South Wales and Victoria did not oppose provisions of this nature. I think it is also worth putting on record that even the Howard government has put in place minimum pay rates for outworkers in Victoria. That is why we obviously oppose the opposition's amendment to delete clause 46. We support the retention of this clause.

The Hon. R.D. LAWSON: I should indicate briefly in response to what the minister said that there are two elements to this. One is the code of practice. If the government wished to introduce statutory protection for outworkers, in addition to the protection which is already available under the existing legislation, we believe it would have been more appropriate to bring in legislation embodying that code of practice and thereby enabling the parliament to have a full debate and to determine clause by clause what are the appropriate practices to be followed and what sanction would apply to breaches of any particular practice. So we are opposed to that particular legislative mechanism that the government has imposed. We are opposed to the statutory provisions because of their uncertainty and their reach.

The committee divided on the clause as amended:

AYES (12)

Cameron, T. G.	Evans, A. L.
Gago, G. E.	Gazzola, J.
Gilfillan, I.	Holloway, P. (teller)
Kanck, S. M.	Reynolds, K.
Roberts, T. G.	Sneath, R. K.
Xenophon, N.	Zollo, C.

NOES (9)

Dawkins, J. S. L.	Lawson, R. D. (teller)

NOES (cont.)

Lensink, J. M. A.	Lucas, R. I.
Redford, A. J.	Ridgway, D. W.
Schaefer, C. V.	Stefani, J. F.
Stephens, T. J.	

Majority of 3 for the ayes.

Clause as amended thus passed.

Clause 47.

The Hon. R.D. LAWSON: I move:

Page 29, line 37—
Delete 'A declaration' and substitute:
Subject to subsection (6), a declaration
Page 30, after line 8—
Insert:
(6) A declaration under subsection (3)(a) or (b) may only be made as part of a State Wage Case.

A new subsection (3) of section 100 is to be inserted. I will summarise its provisions. It will provide that a declaration under section 100 may be made on the basis that it is to apply in relation to awards generally other than a specific award or awards. However, we seek to ensure by the second of the two amendments that a declaration made under subsection (3)(a) or (3)(b) can be made only as part of a state wage case. We believe that it is appropriate that the annual state wage case be the forum for the making of declarations of this kind.

The Hon. P. HOLLOWAY: The government opposes the Hon. Robert Lawson's amendments. The amendments seek to restrict the more efficient flow-on procedures proposed in this bill to state wage case decisions only. I would make the point that, while test cases other than state wage cases are infrequent, they can be important. If the Full Commission thinks they should be flowed on across the award system, with the right for parties to object and put their argument, the government would argue that that should be able to occur. This is a more efficient process. By improving procedures for flowing on test cases, as proposed in the bill, there will be resource savings for the commission, employer groups and unions, because fewer hearings could be required, so we oppose the amendment.

The Hon. IAN GILFILLAN: The Democrats do not have any problem with the wording that is currently in the bill. We will therefore be opposing the amendments.

Amendments negatived; clause passed.

Clause 48 passed.

Clause 49.

The Hon. IAN GILFILLAN: I move:

Page 31, lines 27 and 28—Delete ', or any other premises where records are kept or work is performed'

We believe that the words in the bill are far too open-ended and, in the wrong hands, could be subject to quite disconcerting abuse. The fact of access to workplace is sufficient. 'Workplace' embraces the definition of an area where people are working, and that may be adjacent to or part of what one would otherwise call the home. But the general wording of 'any other premises where records are kept or work is performed' is unacceptably wide. Therefore, I urge support for our amendment.

The Hon. P. HOLLOWAY: I indicate that the government opposes the amendment. Clause 49 proposes that inspectors have the power to enter any workplace or premises where records are kept or work is performed. The amendment proposes that the phrase 'or any other premises where records are kept or work is performed' be deleted from the section. The amendment seeks to limit the power of inspectors so as to prevent them from gaining access to premises where work is performed or records are kept, other than where such places fall within the definition of 'workplace'. This has the effect that, if work is performed at an employer's place of habitation, or records are stored there, they are effectively beyond the reach of the inspectorate, which is charged with upholding the law. The proposed powers go beyond the workplace if there is a genuine need to access employment records that are kept elsewhere. The government argues that inspectors should be able to do so.

This also seeks to rectify the circumstances in which an employer could constructively create a barrier to obtaining documents or refuse to produce them and also when it may be necessary for an inspector to observe the performance of work, or the circumstances in which it is performed, in order to assess whether legal requirements have been complied with, such as under which classification in an award a person ought to be paid, or whether a particular penalty or allowance is applicable. If an issue arises about the conduct of an inspector, Workplace Services has a well-established internal procedure for dealing with any such complaints. In addition, matters relating to the conduct of a public servant can be dealt with under the Public Sector Management Act. Therefore, we oppose the amendment but recognise that we do not have the numbers. We will not divide, but I place on record that we oppose it.

The Hon. R.D. LAWSON: I indicate that the Liberal opposition, which has an amendment standing on file in my name to the same effect, will certainly support this proposal. The inspectorate has ample powers under existing legislation (and certainly as that legislation will be amended by this bill), and it is entirely appropriate that the power of entry be limited and that inspectors may not enter dwellings for the purpose of pursuing records or engaging in fishing expeditions. We certainly support the amendment.

The Hon. IAN GILFILLAN: It probably would have been sensible for me to indicate that my next amendment reassures those who believe that there could be secreting of documents, but we will come to that in due course. That amendment is deliberately aimed at ensuring that inspectors will have access to material to which they are properly entitled.

Amendment carried.

The Hon. IAN GILFILLAN: I move:

Page 31, after line 32—Insert:

(3) Section 104—delete subsection (4) and substitute:

(4) In addition to the powers set out in subsections (1) and (3), if an inspector has reason to believe that a document required to be kept by an employer under this Act or any other Act is not accessible during an inspection under subsection (3), the inspector may, by notice in writing to an employer, require the employer to produce the document to the inspector within a reasonable period (of at least 24 hours) specified by the inspector.

(4a) A document produced under subsection (3) or (4) may be retained by the inspector for examination and copying (and, accordingly, the inspector may take it away), subject to the qualification that the inspector must then return the document within 7 days.

(4) Section 104(5)(a)—delete 'take away a' and substitute: retain an original

(5) Section 104(5)(b)—delete paragraph (b) and substitute:

(b) the inspector may not retain the original or a document that is required for the day-to-day operations of the employer (but the inspector may copy it at the time of its production).

Section 104(4) of the act provides:

(4) A document produced under subsection (3) may be taken away by the Inspector for examination and copying, and the inspector may retain possession of it for not more than 7 days.

This amendment provides a fuller subsection (4), and subsections (4) and (5) are further clarification of the text of the act. I think it is clear that this measure does not allow an employer to hide away material that he or she ought, through the act, make available to an inspector. However, it ensures that that material will be produced, but without the threat of invasion of an inspector into areas where the inspector should not be.

The Hon. P. HOLLOWAY: Section 102 of the act deals with the manner in which records are to be kept. Compliance by the employer with section 102 aligns itself with a reasonable request for the production of records. Section 102(4) provides:

An employer must—

(b) at the reasonable request of an inspector, produce a record relating to a specified employee or former employee kept under this section and permit the inspector to make copies of, or take extract from, the record.

We say that section 104(5) of the act adequately protects documents required for the day-to-day operations of the employer and provides:

(a) the inspector may not take away a document if the employer supplies a copy of it to the inspector for the inspector's own use; and

(b) the inspector may not take away the original of a document that is required for the day-to-day operations of the employer.

It is therefore clear that under the existing law the employer is afforded the type of protection that this amendment, in part, seeks to introduce. The proposed amendment also seeks to require an inspector to make a written request to access records not available at the time of an inspection. The current provision allows for flexibility in the manner in which an inspector may negotiate with an employer to have the records made available. This amendment would remove the inspector's discretion to negotiate with employers for the production of records within a reasonable time, which, potentially, could be less than 24 hours, where the employer is willing and able to do so.

As the law currently stands, the employer is not compelled to comply with a request for the production of records within a specified time frame, where they can demonstrate that it was unreasonable to do so. I am advised that requiring an inspector to issue a written notice to access unavailable documents will unnecessarily hamper inspections, and we have heard this from inspectors. It is not always the case that an employer has immediate access to copying facilities. Therefore, in these cases, it may be less onerous for the employer if the inspector, by agreement, copied and then returned the original documents to the employer promptly. If the Hon. Ian Gilfillan has examples where he believes the existing law has fallen short, perhaps he could provide those to us. The government believes the proposed amendment is unnecessary, and we therefore oppose it.

The Hon. R.D. LAWSON: I indicate that the Liberal opposition supports this amendment, which is designed to ensure that such documents as the inspectorate needs for the purposes of fulfilling its statutory functions will be available with minimal, unnecessary disruption to business.

The Hon. P. HOLLOWAY: We obviously do not have the numbers on this side of the chamber, so we will not divide. However, I again record the government's opposition to the amendment.

Amendment carried.

The Hon. P. HOLLOWAY: I move the amendment standing in the name of my colleague the Minister for Aboriginal Affairs and Reconciliation:

Page 31, after line 32—Insert:

(3) Section 104—after subsection (7) insert:

(7a) An inspector may, to such extent as may be reasonably necessary in the circumstances, use reasonable force to enter and inspect any place in order to exercise effectively a power conferred under subsection (1).

(7b) However, an inspector must not use force to enter residential premises under subsection (7a) unless—

(a)—

(i) the inspector has no reasonable alternative but to seek access to the relevant premises; and

(ii) the inspector has taken reasonable steps to obtain access without using force but has been unsuccessful; and

(iii) the inspector is accompanied by a police officer; or

(b) the inspector has reasonable grounds to believe that immediate action must be taken under this paragraph rather than under paragraph (a)

The government's proposed amendment seeks to address concerns raised by the honourable member for Fisher in another place. These amendments will provide additional safeguards to ensure an inspector will use forced entry only as a last resort and will need to be accompanied by a police officer. We are satisfied that this amendment further clarifies the inspector's powers of entry, whilst still allowing them to properly perform their functions.

The Hon. R.D. LAWSON: We remain to be convinced that this amendment is appropriate. Indeed, we are not entirely sure of the effect of this amendment. In our view, the fact that the inspector is to be accompanied by a police officer is a rather bizarre notion. Can the minister indicate whether, under the provisions of any other comparable legislation, industrial inspectors are given powers which they can exercise only in the company of a police officer?

The Hon. P. HOLLOWAY: Although it is not required in the legislation, I understand that the practice is that, under the Explosives Act, the police would generally accompany—

The Hon. Nick Xenophon interjecting:

The Hon. P. HOLLOWAY: Under the Explosives Act. I am advised that, although it is not required under the act, it is nonetheless the practice that police officers accompany inspectors in those situations.

The Hon. Nick Xenophon: Probably for good reason.

The Hon. P. HOLLOWAY: Indeed; probably for good reason.

The Hon. R.D. LAWSON: Surely, minister, that is in relation to occupational health and safety issues. Very often, the illicit possession or use of explosives has some criminal or police element. However, in relation to purely industrial legislation, rather than occupational health and safety, or dangerous goods or other type of legislation, is the minister able to indicate where industrial inspectors are accompanied by police officers?

The Hon. P. HOLLOWAY: Again, we are not aware of any situations. As I have said, this matter was raised by the member for Fisher. We do not see any particular problems with it.

The Hon. R.D. LAWSON: I indicate that we oppose this provision. Although it is expressed in the negative, it is actually a positive provision. It enables inspectors to use force to enter residential premises provided they are accompanied by a police officer. We do not believe that a sufficient case has been made out to confer on inspectors the right to

use force to enter residential premises. Proposed subsection (7b) indicates that that power will be available.

The Hon. NICK XENOPHON: I have some reservations about the way this clause would work. Could the government elaborate whether codes or manuals are in place with respect to the proposed use of such power? If these manuals, codes or directives are being formulated, will the minister undertake to have them tabled so that we at least have some transparency in the way that these powers will be used? Further, in what circumstances does the minister say that there is no reasonable alternative for the inspector? What would have had to occur for the inspector to reach the conclusion that there is no reasonable alternative and that the inspector had attained reasonable steps? I understand the mischief that this amendment tries to deal with where you have a recalcitrant employer, a fly-by-night operator, who is not doing the right thing, and it seeks to remedy that. However, I think those employers who are doing the right thing would be reassured if they knew the circumstances in which such powers, in broad terms, would be exercised.

The Hon. P. HOLLOWAY: I think this matter was raised when we last debated this bill a week and a half ago, and I think I indicated then that we could make them available. However, I also indicated that we could make that conduct manual available except it is likely to be revised as a result of the passage of the bill anyway. I also gave an undertaking on behalf of the government that we would consult in relation to the preparation of those; so, I repeat those undertakings.

The Hon. IAN GILFILLAN: I think it is relevant to point out that we just successfully amended the powers of the inspectors to only enter a workplace if they are denied access to a workplace which is adjacent to or, arguably, part of domestic premises. This right of forced entry is going to be pretty dramatically prescribed by the amendment which was successful earlier. Under those circumstances, I do not feel uneasy about it, and I believe that the government's amendment is worthy of support.

The Hon. J.F. STEFANI: What occurs if a position evolves that the inspector is confronted with violence? Are the police going to be called in to assist the inspector to use reasonable force to enter the premises? This is just becoming a confrontation.

The Hon. P. HOLLOWAY: The point to make to the honourable member is that, if there is likely to be any violence involved, we would be pleased a police officer is there. It is their principal role to keep the peace, so it is appropriate that they should be there, if there is a threat of violence.

The Hon. NICK XENOPHON: I am trying to pick up on what the Hon. Mr Stefani was asking. Whilst subsection (7b) indicates that for residential premises you must have a police officer present, I take it that under subsection (7a), if it is non-residential premises, it is not necessary to have a police officer present in terms of using reasonable force. In other words, is there a distinction between residential and non-residential premises for the exercise of the powers contemplated?

The Hon. P. HOLLOWAY: The honourable member is correct. There is a distinction as the clause says between residential and non-residential, but, as the Hon. Ian Gilfillan just pointed out, the committee has amended, although not with the government's support, the legislation to somewhat curtail that power in relation to residential premises in any event.

The Hon. J.F. STEFANI: I just want the minister to clarify if an employer refuses entry to the inspector and the gate is locked at the front, is the inspector going to get a bulldozer, boltcutters, or whatever, to belt down the gate and come inside and inspect the premises? That is the issue. What are we talking about?

The Hon. P. HOLLOWAY: We hope inspectors are sensible people (and we take steps to employ sensible people), and they take all reasonable steps to get the records through the most convenient means possible. If the occasion arises where there is no alternative but to enforce the law, then I guess they are in the same position as police officers and can use whatever steps they can to enforce the law. That is only as a last resort.

The Hon. R.D. LAWSON: We are not really placated by the assurances of the government that procedure manuals and the like will be made available for perusal. The Hon. Nick Xenophon pursued that question here today and earlier in committee. We are not reassured by the fact that those documents may be made available for inspection as those documents are usually quite general in their application, full of motherhood statements and may be a repetition of what is in the legislation about what is reasonable (and there may be some case examples and the like), but so far as parliament is concerned we believe that the appropriate thing is to have these things incorporated in the legislation or regulation and that the existence of policy manuals, whilst maybe reassuring to some, is no real protection against inappropriate exercise of powers by inspectors and the inspectorate. I am disappointed that the Hon. Ian Gilfillan has seen fit to indicate support for a provision that will allow the use of force to enter into residential premises in particular circumstances.

The Hon. R.K. Sneath: Well, your scare tactics don't work with him.

The Hon. IAN GILFILLAN: I may be losing some friends here and possibly making others. I am concerned about the wording of the amendment as it does not take into account the successful earlier amendment of severely restricting the residential premises which may be accessible by an inspector in any case. On closer scrutiny (and I apologise, because I should have looked at it before) I had not realised the 'or', which gives subsection (7b)(b) the power for the inspector to do whatever he or she likes, regardless of having a police officer present. I indicate to the government that, for the time being, I will reverse our earlier indication of support for the amendment.

On closer scrutiny I feel that the wording is inappropriate in light of the earlier amendment. Secondly, I have concern about the option of paragraph (b), which virtually negates the need to have a police officer because an inspector can say that he believes immediate action is necessary, so in he is going. As with other matters in this sort of legislation, if the government sees fit to recommit at a later stage with an appropriately worded amendment, the Democrats will look at it again.

The Hon. NICK XENOPHON: There seems to be a dichotomy between residential and non-residential premises. I acknowledge circumstances where it is necessary to get urgent access, particularly in circumstances where the employer is recalcitrant and is arguably about to destroy documents, but as I read it it does not quite make sense. There is a dichotomy between the two and, given the amendment passed earlier about residential premises severely limiting the right of inspectors with respect to residential premises, I am wondering what work this would do. I urge

the government, as it seems the clause will be defeated, to come up with an alternative proposal as it does have merit. There is some confusion with its current drafting, given what transpired earlier on an amendment with respect to residential premises. I cannot see how it will work in the scheme of things.

The Hon. P. HOLLOWAY: We will not divide on the clause. We would not have moved the amendment if we did not believe in it, but we will not divide on it and I will take on board the comments made by other members.

Amendment negatived; clause as amended passed.

Clause 50.

The Hon. R.D. LAWSON: I indicate opposition to this clause. It will empower an inspector to issue a compliance notice. Failure to comply can give rise to a prosecution. A notice may be given in respect of failure to comply with a provision of the act, an award or enterprise agreement. Moreover, failure to comply with a code of practice made under the act, for example, a code which either the minister can make in respect of outworkers, can give rise to a compliance notice and subsequently to prosecution. Whilst it is true that an employer can seek to review a notice, there is no ability for the operation of the compliance notice to be stayed pending the outcome of such a review.

The minister effectively will have power to create a code which can give rise to prosecutions without parliamentary or community discussion. Certainly, amendments have been made which allow a code of practice to be disallowed by either house of parliament, but the fact is that neither house of parliament can amend a code of practice. The government can immediately remake a code of practice that is disallowed—something which we deplore and will be seeking to change, but that is the current situation. So, at present, there is very little capacity for parliament to intervene in codes of practice, and we think it is wrong in principle to enable ministers by executive action to draft a code which will create the possibility of a business being prosecuted.

Inspectors may issue notices in relation to alleged underpayments or matters of construction concerning awards or enterprise agreement entitlements. This gives the inspectors new and very significant powers and, of course, the issuing of compliance notices will provide leverage in relation to underpayment and interpretation issues. Once issued, any business may face prosecution or the expense of going to court to challenge a compliance notice. The time and inconvenience of doing so may significantly exceed the amount actually in issue.

Moreover, compliance notices will be available only in respect of state awards or state enterprise agreements. These notices are not available in respect of federal awards or federal enterprise agreements and, to the extent that compliance notices will concern employers, the federal system becomes a more attractive, less bureaucratic system for employers to operate in. The likely consequence of that is that businesses will depart the state system, thereby lessening its viability. We believe that we should have a vibrant state system. We do not believe we should be encouraging businesses to exit the state system by making it less attractive. One way of making it less attractive is to have this rather bureaucratic compliance notice regime.

Of course, we acknowledge that compliance notices do apply in the occupational health and safety area where somewhat different considerations apply. It is reasonable for an inspector in the occupational health and safety area to notice that there is a guard missing or some item of machinery that should be protected in some way and for a simple notice to be given, and that is the system we support. But, in relation to industrial matters, underpayment of wages and the interpretation of enterprise agreements and awards, the giving of a compliance notice is an action that we do not believe is appropriate.

The Hon. P. HOLLOWAY: Clearly, the government supports this clause. If you have a law, we believe that people should comply with that law, and it is extraordinary that the deputy leader and shadow attorney-general should be basically arguing for some weakening in compliance measures. But I will not take up any further time of the committee.

The Hon. NICK XENOPHON: I am afraid that I cannot agree with the reasoning of the Hon. Mr Lawson. I would have thought that, if it involves an issue such as the interpretation of an award, surely that would not be something for which a compliance notice could be easily issued. I would have thought this was for fairly straightforward issues and that an inspector would not issue a notice unless it was a fairly black and white issue similar to the occupational health and safety legislation with respect to whether or not there is a guard or if there is clear evidence of underpayment.

Could the government indicate what other jurisdictions have compliance notices? I understand there might be some others that have similar notices. I support this clause, but it would assist me to know whether other jurisdictions have similar notices in effect.

The Hon. P. HOLLOWAY: We are not sure about other jurisdictions and we will see what we can find out. We are certainly aware that they apply under the Occupational Health, Safety and Welfare Act and also the Shop Trading Hours Act. It appears there are similar measures, not precisely the same, in New South Wales and Queensland. They have expiation notices in Queensland and penalty notices in New South Wales.

The committee divided on the clause:

AYES (11)

Cameron, T. G.	Evans, A. L.
Gago, G. E.	Gazzola, J.
Gilfillan, I.	Holloway, P. (teller)
Kanck, S. M.	Reynolds, K.
Roberts, T. G.	Sneath, R. K.
Zollo, C.	

NOES (8)

Dawkins, J. S. L.	Lawson, R. D. (teller)
Lensink, J. M. A.	Redford, A. J.
Ridgway, D. W.	Schaefer, C. V.
Stefani, J. F.	Stephens, T. J.

PAIR

Xenophon, N.	Lucas, R. I.

Majority of 3 for the ayes.

Clause thus passed.

[Sitting suspended from 6 to 7.45 p.m.]

Clause 51.

The Hon. R.D. LAWSON: I indicate that the Liberal opposition will oppose clause 51, which introduces for the first time in this bill the notion of a host employer. It is important to understand the concept of a host employer. The concept relates to labour hire employees, and we regard this clause as part of the government's assault upon the labour hire industry. Proposed section 105(2) provides:

> . . . a person will be taken to be a host employer of an employee engaged (or previously engaged) under a contract of employment with someone else if—
> (a) the employee has—
> (i) performed work for the person for a continuous period of 6 months or more; or
> (ii) performed work for the person for 2 or more periods which, when considered together, total a period of 6 months or more over a period of 9 months; and
> (b) the employee has been, in the performance of the work, wholly or substantially subject to the control of the person.

The effect of this concept will be, with the subsequent provisions, that a host employer can be subject to an unfair dismissal claim if the employee has performed work for the periods I have just mentioned. So, this notion of host employer will give rise to remedies and redress. This will also mean that, when the remedy of unfair dismissal is available against a host employer, the host employer could, for example, be required to re-employ a person who was actually never employed in law or in fact by the so-called host employer in the first place.

We do not believe that any substantial case for this proposal has been made out, and the potential disadvantages of this scheme outweigh any potential benefits for workers. We consider that it is inappropriate and bad law to create the notion that one person (that is, a labour hire employee) can have simultaneously two employers, namely, his actual employer (that is, the company or person who engaged the employee) and, in addition, the deemed employer, namely, the host employer. In our view, this creates considerable business uncertainty. A host employer (let us say it is a business which employs a labour hire firm to provide a particular service, whether it is maintenance, plumbing, an electrician or the like) would not necessarily know the length of service of particular employees on site and may not necessarily know the identities of persons provided by a labour hire organisation, yet that employer or company which has engaged a labour hire firm to undertake certain tasks could find itself subjected to obligations over and above those for which it has contracted.

A labour hire company has control over its labour hire work force; however, the host employer does not exercise similar control. For example, the so-called host employer may not have any control over the labour hire firm's internal disciplinary policy. A business engaging a labour hire firm will not necessarily know whether the labour hire company can provide the worker with alternative work, for example. As I mentioned, as we see it, this is a significant attack upon the labour hire industry—an industry to which this government and the trade union movement is antipathetic.

I mentioned one other matter of potential wider operation of this clause; for example, a large building site or mining project where, on such a site or workplace, a principal company may engage numerous contractors to carry out work. The principal company may find itself the subject of litigation and obligations concerning the labour hire firm's employees. This will be one additional reason why the federal system may become more attractive to labour hire organisations, and for any business concerned about the potential impact of the host employer provisions. For those reasons, we oppose clause 51 and all the subsequent clauses which are consequential upon the introduction of this notion of host employer.

The Hon. J.F. STEFANI: I find this provision somewhat intriguing, because the definition of 'host employer' in this measure refers to a person. A person cannot be a company. I ask the minister whether it excludes a company because, in the way this section has been drafted, the wording is that, for the purpose of this part, a person will be taken to be a host employer and, again, section 105(2)(a)(ii) concerns where the work is performed for a person. Section 105(2)(b) refers to the employee having been in the performance of the work wholly and substantially subject to the control of the person, not the company. It does not talk about an entity and, certainly, a company is not a person. I would like the minister to clarify for me whether this provision applies only to a single operator—a self-employed contractor who is a person operating in his or her own trade—acquiring the services of another employee through a hire company.

The Hon. P. HOLLOWAY: My advice is that 'a person' would include a company, which is a legal person, so the use of the word 'person' in this clause should be taken to include a company. Obviously the government supports the clause and will oppose the Hon. Robert Lawson's amendment. Generally speaking, when labour hire workers are sent to work for a client at the labour hire company, the labour hire company effectively delegates its powers of control and direction in a practical day-to-day sense to its client, the host employer. It is common for labour hire workers to have relatively long-term engagements—sometimes for years—at a particular host employer, where the role of the labour hire company in a practical day-to-day sense is simply as pay master. It is the host employer, the client of the labour hire company, who is performing what we have always recognised as a fundamental part of the employer's role—day-to-day control and direction of the worker in their employment.

However, if the host employer does something unfair that results in the dismissal of the worker, there is no capacity for that to be addressed under the existing provisions. For labour hire workers that means that, if the person who is their employer for all practical purposes, except in the role of paymaster, has them sacked unfairly, they have no rights. Their rights have been taken away from them by the structure of the labour hire arrangement, where the powers of control and direction—fundamental elements of the concept of employment—have been separated from the direct contractual relationship with the worker which, generally speaking, can be said to be between the worker and whoever pays them. That means that the person who on a day to day basis directs and controls the worker gets off scott free if they transgress basic standards of fairness, for example, sacking someone because they are pregnant or for raising safety concerns. Labour hire workers should not be disadvantaged in this way.

Under the proposal in the bill labour hire workers would have the capacity to involve host employers in unfair dismissal applications where: they have worked for the host employer for six months (or for two or more periods that make up six months in a nine month period); and, in the performance of the relevant work, they have been wholly or substantially subject to the control of the host employer. This is about making sure labour hire workers have in practice and not just in theory the same rights as other workers. Therefore we oppose the amendment and support clause 51.

The Hon. R.D. LAWSON: In his explanation the minister suggested that some labour hire workers work on the same work site for years, and that may or may not be the case. However, this provision refers to a continuous period of six months. If in fact it is to cover the situation where a worker might be working on the same site or project for years, how has the government selected the period of six

months as the appropriate duration of employment to impose this obligation on the so called host employer?

The Hon. IAN GILFILLAN: The Democrats have serious concerns about the whole concept of a so-called host employer. It is a new philosophy, which we find hard to grapple with. We do not find it hard to grapple with a situation of a deliberate deception, where an employer/employee relationship is camouflaged by some subterfuge. That being a target, this appears to have a much wider impact. We are not convinced of the risk of having a wider use of contract employment in the case of people being in hire companies, if it goes over the six months or six months in a nine-month period, but we are yet to be persuaded that that is a dreadful hazard for the work force.

If there is a grievance between the employee employed by a hire firm company, they have an employer with whom they can sort out their problems. This is almost like a ghost employer type structure, which is very hard to get a feel for, sympathetic though we are if there is blatant abuse of it. We have not been convinced that it is widespread, if it exists at all in South Australia. Unless the minister has a more substantial argument to put to the committee, we are more inclined to not support this concept of the host employer in this legislation.

The Hon. P. HOLLOWAY: First I will address the issue raised by the Hon. Robert Lawson. I refer to regulation 10 of the industrial employee regulations 1994, in relation to casual employees and unfair dismissal. These are the exclusions from the ambit, and it talks about casual employees except where the employee has been engaged by the employer on a regular and systematic basis for sequence of periods of employment during the period of at least six months. In other words, in the existing regulations as they apply to casual employees the period of six months is the threshold, if I can use that term, and that is what has been adopted here.

In relation to the points raised by the Hon. Ian Gilfillan, the reality is that there are jobs where you effectively have two employers where labour hire is concerned. That is the reality out there every day. Host employers who treat labour hire workers fairly have nothing to be concerned about. Host employers will not be responsible for the actions of the labour hire company, and the proposal makes this clear. There is nothing wrong with a host employer telling a labour hire company that they need fewer labour hire workers and the labour hire company acting on that. This is about the host employer acting unfairly. The proposal really reflects the reality of labour hire. To suggest that the law should not reflect that reality is, we would argue, nonsense.

The reality is that if someone is working for a labour hire company and they go out working for a period with a host employer and are dismissed (suppose it is a woman who falls pregnant, for example), they do not have a comeback. It is all very well to say they have some comeback against the labour hire company, but the labour hire company will simply say, 'Because the host company does not want you and will not take you, we cannot employ you.' So there is this situation with the two employers, effectively, where rights can disappear. I think that should give the Hon. Ian Gilfillan an example of one of the cases where that might happen.

The Hon. NICK XENOPHON: I share many of the concerns of the Hon. Mr Gilfillan with respect to this clause. I do not accept the argument of the opposition, for instance, with respect to outworkers that it will cost jobs, because those provisions were quite distinct in relation to methods of enforcement for workers affected by fly-by-night operators and contractors that were not doing the right thing. The fact that similar legislation was operating in other states, apparently quite successfully, I think deals with many of the arguments that the opposition had. However, in this case we are dealing with something that is quite different and unique compared with any other Australian jurisdiction. That in itself is not a reason not to support it, but it seems that the reality of the labour market in Australia is that labour hire companies have been used increasingly; and there are some people who choose to go down the path of working for a labour hire company because the benefits are generally better than being directly employed by a firm. There is a real concern that, if this proposed amendment to section 105 is passed, South Australia will be very much out on a limb.

It would be a real disincentive for labour hire companies and for employers who use the services of labour hire companies because of the flexibility that it provides. They would not want to be involved in South Australia with a proposal that is relatively unique compared with any other jurisdiction. Unlike the outworker provisions, which I do not believe will have any detrimental effect on the job market, given the nature of that particular industry and what those particular amendments are seeking to do, this amendment could well be very detrimental to South Australian jobs. For that reason I cannot accept it.

Even if it were a case of tinkering around with the period of work, a continuous period of six months or even a longer period, I think there would be an inherent difficulty with that, in that I think some employers would be so paranoid about falling over whatever threshold has been placed on the legislation—whether it is six months or a greater period—that they could act accordingly to have an even more spasmodic approach to workers in a particular industry. I can understand the rationale of the government introducing this, but I am concerned the negative effects would outweigh any positive effects.

The Hon. P. HOLLOWAY: I emphasise the point that we have a situation in the casual work force, under the current regulations, where if someone is a casual worker and has been in the work force for six months they have rights under the unfair dismissal provisions. Why should we treat someone with a hire labour company, who has been working for six months, differently from the way in which we treat casual workers—and have for some years?

The Hon. J.F. STEFANI: Will the minister advise how many nurses the government is employing through agency provisions or arrangements? Has the government sacked any nurse who has conducted himself or herself in an inappropriate manner or has committed some act of subordination without first going to the agency to advise that the nurse needs to be removed?

The Hon. P. HOLLOWAY: I do not think we have those statistics on the numbers, but, obviously, a number of agency nurses are employed in government. Labour hire companies are used by government where it is appropriate, and, in some situations, agency nurses. I would argue that the government has not capriciously or undeservedly dismissed them. What the government does is irrelevant. We are talking here about the rights of those employees. That is what we are talking about. If they are dismissed (by whoever it is) should they have the same rights as casual workers? The government does use agency nurses, but I am not sure how many of them would work for six months or more. This is not an argument about labour hire. The honourable member seems to be suggesting that there is some problem with using labour hire.

Well, there is. We are talking about the rights of those employers. It is true the government does on some occasions use hire labour. So what? We are talking here about the rights of individuals.

The Hon. R.D. LAWSON: The minister gave an example, which I believe is hypothetical of an employee whose employment is terminated because she is pregnant. Is the minister able to give specific examples of this occurrence? Is this a hypothetical example made up by the minister for the purpose of scaring the chamber?

The Hon. P. HOLLOWAY: I believe that there was a case of this in New South Wales.

The Hon. R.D. LAWSON: The Hon. Julian Stefani raised the issue about whether a person in this context can include a company or business organisation. For the benefit of that honourable member, I think that it can. The Acts Interpretation Act allows the expression 'person' to cover a corporation or any other form of business except where excluded by the context. It might be argued that the context here suggests that 'person' does not include company, but I do not think that has any sustainability. It is pretty clear here that corporations are included. What is the intended effect of proposed subsection (4), which provides:

> The fact that a person is to be taken to be a host employer under this part does not affect any obligation of another person as an employer under a contract of employment.

The Hon. P. HOLLOWAY: It simply means that the obligations of the labour hire company are not removed because there is found to be a host employer. It simply has that effect.

The Hon. R.D. LAWSON: So that the employee or worker has the same redress against more than one—maybe several—employers?

The Hon. P. HOLLOWAY: Action can be taken against either but only in respect of the individual faults. There must be a breach against which the individual can claim.

The Hon. IAN GILFILLAN: Proposed subsection (4) talks about a contract of employment. Will the minister enlighten me as to where contracts of employment will exist? I am assuming that there will be a contract of employment between the labour hire company and the person who is employed through that arrangement. I assume that there is a contract between either the hire company and the person referred to as a host employer. In either case I find it somewhat confusing. Where does the contract lie?

The Hon. P. HOLLOWAY: The contract between the labour hire company and the host employer is not an employment contract, but the employment contract is between the worker and the labour hire company.

The Hon. IAN GILFILLAN: Surely that is where the responsibility rests?

The Hon. P. HOLLOWAY: The reality is that you can have host employers who are dealing day-to-day with the control of that employee. The labour hire company simply pays the person. Labour hire companies, as I have said, may have some benefit—if you want to call it that—in terms of supplying labour in particular situations. That is not the argument here. We are saying that when you have these arrangements it should not be an excuse to remove the rights of that individual worker.

The question is whether we want the law to keep up with what is happening in the marketplace. Otherwise, if we are not careful, an anomaly will develop whereby, increasingly, workers' rights will disappear. As I said, casual workers have the rights to take action against unfair dismissal after six months. If we were to reject this clause, we would create a situation where people who may have worked for six months or more for a host company could, effectively, lose those rights because they would fall between the cracks created by this new system of labour hire.

The Hon. J.F. STEFANI: Given that this legislation will take some time to pass both houses, although I do not expect the minister to have this information, I ask: how many nurses have been employed by the government through an agency arrangement and fall into the categories provided in paragraphs (a)(i) and (a)(ii)?

The Hon. P. HOLLOWAY: I will try to obtain that information, although it is obviously a completely different portfolio from the one with which we are dealing in this legislation. I do not know what happens in the Health Commission but, presumably, individual health units would engage them. I am not sure whether those figures are available centrally, or whether we have to go to the units. I will try to obtain that information, although I argue that it is not strictly relevant to the issue here. Does it really matter how many agency nurses are in government and how long they have worked? The issue is whether they should have the right to take unfair dismissal action if they are, in fact, unfairly dismissed.

The Hon. R.K. SNEATH: Obviously, the opposition cannot grasp this, or just do not care anyway. This creates an enormous problem if those who work for labour hire firms, or who are casual employees, do not get some of the protection afforded to others. We have talked about permanency in the workplace and how important it is in relation to home loans, whitegoods and other things that keep the family going. It is important that we encourage full-time employment and do not add to the casual list, which has grown over the past few years, and the statistics have shown us that. How many more people are employed now as casuals than there were 10 or 20 years ago? If they do not get the protection afforded to those who are in full-time employment, people will be encouraged to employ through labour hire firms and employ casuals, because they will be employed under a different set of conditions. Not only is it unfair to those employed that way but it will also encourage more casual and labour hire employment.

We have already said that there will always be a place for casuals, and this is not about getting rid of those positions, as heaps of jobs require casuals and many people prefer to work in that way. However, nine times out of 10, people with families want job security and permanency in the workplace, but that will not be encouraged if a group of people have no protection under wrongful dismissal laws. On the contrary, it will increase casual and labour hire employment, and there will be no job security for those employed in that way. It will give no rights that other workers in the work force have in terms of wrongful dismissals, and that would be a disgrace.

The Hon. R.D. LAWSON: The minister has constantly said that this is a provision designed to reflect the reality of the situation; but it is not. The reality of the situation is that there are people who choose to be casual employees and people who choose to be employed by a labour hire company, in either a casual or a permanent situation. They have an employee-employer relationship with the labour hire company. They understand full well that their relationship is not with the company on whose site or project they might be employed. This is not a provision designed to reflect reality: it is a provision designed to deem someone to be an employ-

er, called a host employer, when they are not in law or in fact the employer.

The Hon. P. HOLLOWAY: In the case that we are talking about, for the six months or more that those workers have been turning up at their workplace, the host employers have been telling them what to do and they have been doing the work for six months or more. What is the difference between that and the same worker having been on their books for six months? In what way are they different, other than that they have this labour hire company that actually pays them? They are essentially doing the same work at the same time.

The Hon. R.D. LAWSON: And what does the minister suggest is intended to be the meaning of the words in subsection (2)(b), namely that the employee is 'substantially subject to the control' of a person? What is intended to be the meaning of 'substantially subject to the control' of someone? What tests will apply? Does the minister not agree that that will create uncertainty about the legal status of relationships?

The Hon. P. HOLLOWAY: It does say 'wholly or substantially subject to the control'. As an example, if you have a plumber who comes to do particular work, they have the capacity to do what they want to do in relation to a particular task. In relation to the labour hire employee, they are at the direction of the host employer, and I think it is fairly self-evident what 'wholly or substantially subject to the control of the person' means.

The Hon. R.K. SNEATH: I will give the example of a small country town like Port Pirie—your town, Mr Chairman—which has one major industry, a huge industry. We have already heard the argument against the transmission of business. If there is a difference between the way you can employ people and reap some benefits from it, such as no wrongful dismissal laws applying, then if the people who own the smelters at Port Pirie find difficulties and sell the business and we have no transmission of those provisions, what is to stop them looking at the conditions that apply by employing a labour hire firm to come in and supply all the labour, knowing that they are then not responsible for the same provisions that they were responsible for when they had full-time employment?

Imagine what that would do to a town like Port Pirie or some of the smaller towns with major industries, like Tarpeena (which just has a mill), Nangwarry and those places. If they were provided with some access to an employee who did not have the same conditions as a full-time employee, if there was a takeover of those places it would encourage new employers to employ under those provisions, which would be a disaster.

The Hon. IAN GILFILLAN: We are not persuaded that the concept of host employer is viable in the concept of industrial law. There is a contract of employer-employee between the employee and the labour hire company. Whether or not it is a preferable way of using labour in our emerging system, I do not pretend to be in a position to say on balance whether it is a good or bad thing. The fact is that it does exist. I cannot predict whether having this rather nebulous concept of a host employer will be a panacea to fix the ills, or whether it will be the move which will strangle labour hire company operations. What we are saying is that in this legislation, as it is presented to us, it is unclear, and it confuses the concept of who or what is an employer and what is a contract of employment. It is for that reason alone that the Democrats oppose the clause.

The committee divided on the clause:

AYES (2)

Holloway, P. (teller)	Sneath, R. K.

NOES (11)

Dawkins, J. S. L.	Evans, A. L.
Gilfillan, I.	Kanck, S. M.
Lawson, R. D. (teller)	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Stefani, J. F.	Stephens, T. J.
Xenophon, N.	

PAIR(S)

Roberts, T. G.	Ridgway, D. W.
Gago, G. E.	Reynolds, K.
Gazzola, J.	Schaefer, C. V.

Majority of 9 for the noes.

Clause thus negatived.

Clause 52.

The Hon. R.D. LAWSON: I move:

Page 33, after line 4—

Insert:

(1) Section 105A—after subsection (1) insert:

(1a) This Part does not apply to an employee who—

(a) was, at the relevant time, employed in a small business; and

(b) has, at the relevant time, been employed in the business on a regular and systematic basis for less than 12 months.

The relevant time is, if notice of dismissal is given, the time the notice is given and, if not, the time the dismissal takes effect.

A small business is the business of an employer who, at the relevant time, employs less than 20 employees in the business (disregarding casual employees who are not employed on a regular and systematic basis). However, if an employer or a group of associated employers divide a business in which 20 or more employees are employed into a number of separate businesses, a business resulting from the division is not to be regarded as a small business even though less than 20 employees are employed in the business.

This amendment seeks to include in the act a provision whereby, loosely described, a small business is exempt from the unfair dismissal provisions of this bill. Of course, this debate has been going on in the Australian community for quite some time. Members will be aware that in the federal parliament this proposal has been advanced and cogently argued time and again by coalition ministers.

The Hon. R.K. Sneath interjecting:

The Hon. R.D. LAWSON: It might have been lost 42 times up to the present but, later this year, there is no doubt that it will be passed federally. However, whether or not it is passed federally, it is an important issue of principle. Time and again, employers, especially small employers, have said that the greatest disincentive to employment—that is, to the battlers getting a job in the first place—is the existence of unfair dismissal provisions. So, when those opposite say that they are standing up for the battlers, it is the battlers who are not getting a job under the current system because of the disincentive.

Members interjecting:

The Hon. R.D. LAWSON: I am glad to see that my arguments are hitting home with some of those opposite, and we can expect some support from them shortly. Under this provision a small business is defined as having less than 20 employees. If an employer or a group of associated employers divide a business in which 20 or more employees are employed into a number of separate businesses—that is, for the purpose of evading the intention of this provision—one will not take that into regard. The argument is so well

canvassed that I think it is probably unnecessary to enlarge upon it.

The Hon. P. HOLLOWAY: The government obviously opposes the amendment. This is part of a series of amendments that the opposition will move which are aimed at removing the rights of small business employees to be treated fairly in their first year of employment. The government does not support this proposal to take away people's rights, to be treated fairly based on the size of their employer. The bill includes provisions that have regard for the size of the relevant business and, of course, opportunities exist for employees to be engaged on a casual or probationary basis which means that, for a period of time, there is no capacity for an unfair dismissal claim to be made. That means that a business, small or large, can try out employees without the possibility of an unfair dismissal claim. Those provisions exist but, really, the opposition's amendment boils down to something quite simple. Do you think that employers should have less rights because they work for a small company relative to a large company? The proposal is unnecessary, it is undesirable and it is inconsistent with the notion of fairness and equity.

The Hon. NICK XENOPHON: I will not be supporting this amendment for a number of reasons, as follows: I can understand the rationale for the opposition's amendment, that small businesses, I think, are often daunted by the prospect of being subject to unjust dismissal laws, but from the employee's perspective a job is just as precious if it is for a small business or a larger enterprise of more than 20 employees. I think that one of the difficulties has been that small businesses are daunted by the requirements with respect to disciplining an employee, daunted by the requirements of going through the appropriate system of warnings, and that is something that I think employer organisations should be able to deal with.

I would have much more sympathy for this amendment had it been essentially a codification of the existing common law position. My understanding is that, if in the first three months, which is a reasonable probationary period, small businesses were exempt from the paperwork, that if a line were drawn in the sand of a three-month period, which is essentially the position with respect to probationary periods anyway in the work force, that would give some comfort to small businesses to know that they would not have any red tape for that initial limited period. That reflects, effectively, the common law position, and I would have some sympathy for that, but 12 months goes way beyond that, and for that reason I cannot support it. Again, if it were for a period of three months, that would have simply been a codification of the existing common law and I would have seen no harm in supporting a provision along those lines.

The Hon. R.D. LAWSON: I should point out to the committee, as I think members would have well understood, that of course we are not abolishing the right of employees of a small business to obtain redress for unfair dismissal. This provision will not permit such claims to be made within the first 12 months of employment. It is interesting to note that, of the 67 500 businesses that were surveyed by the opposition in relation to the government's fair work proposals, to which there were thousands of responses, the vast majority who responded—well over 90 per cent—indicated that the removal of unfair dismissal provisions during the first 12 months of employment for small business was strongly supported. That is consistent with surveys that have been conducted over quite some years.

The great disincentive to employment is the fact, now well reported, that the cost of being involved in a wrongful dismissal application is considerable. The cost of obtaining advice, lost time in attending conferences and providing instructions for legal advisers or industrial advocates, is not insignificant and, for small businesses, these imposts are very considerable. As I indicated at the beginning, they are the single, greatest disincentive to small business employing new people, especially young people.

The Hon. IAN GILFILLAN: We do not support unfair dismissal. If we take seriously the phrase 'unfair dismissal' then clearly there is something unacceptable in the dismissal. I am curious about and sympathetic in part to the observation by the Hon. Nick Xenophon that a time frame of 12 months is—I am not sure whether he actually said so but he implied that it was possibly—too long. However, in the act, Application of Part 105A, Unfair Dismissal, subsection (2) provides:

> The regulations may exclude from the operation of this Part or specified provisions of this Part—
>
> employees serving a period of probation or a qualifying period providing that the period—
>
> (i) is determined in advance; and
>
> (ii) is reasonable having regard to the nature and circumstances of the employment; and
>
> (iii) does not exceed 12 months;

So, the actual time period is already identified, albeit in a different context, but it has been recognised in the legislation prior to this. I am interested, while we are discussing this amendment (and the time frame appears to be a point of concern to the Hon. Nick Xenophon), whether we could get an explanation of whether 12 months is an arbitrary figure or one that has been deliberated on.

The Hon. R.D. LAWSON: In that context I indicate to the honourable member that the 12 months referred to in existing section 105A(2) relates to employees serving a period of probation, which must be a bona fide period of probation. The six months is a cumulative requirement because not only must it be determined in advance but it must 'be reasonable, having regard to the nature and circumstances of the employment'. That creates a very real uncertainty as to whether or not a 12-month probation period is reasonable and creates uncertainty for any employer who might choose to say that one is employed on a 12-month probation period, because the commission can take the view that that is an unreasonable provision. It is not a bona fide probation period at all but simply a device to avoid unfair dismissal provisions, and that would mean that the employer does not get the protection sought. It would mean that the uncertainty that prevents people from employing others is not relieved but exacerbated.

The Hon. R.K. SNEATH: What is unreasonable about the Hon. Mr Lawson's amendment is that it seeks to treat some employees differently from others. Scare tactics have been used in the federal parliament since 1996 and have been defeated on 41 or 42 occasions because they have been recognised as scare tactics. The excuse is used that it is costing jobs and that people will not employ. I hope some members who are voting on this have gone down to the Industrial Relations Commission and looked at the figures for the past few years, because they show that there were just over 1 000 unfair dismissal claims per year for the past 12 months and for the previous 12 months. The majority of them have been resolved by conciliation. I would guess that farmers, for instance, would not have made up 2 per cent of those dismissals in the Industrial Relations Commission, and

small business would not make up a high percentage either. Mainly they are from larger businesses.

There is already in place a period that the employer is allowed with an employee to seek out whether they are compatible. They can work for a trial period set out in the conditions, and that should be sufficient to know whether or not the person is suitable for the job. As I said in my contribution, people who work in small business are very vulnerable, especially if there is only one employee there. I give the example of sexual harassment and bullying. When people did not give in to those sorts of tactics by the boss they were sacked. That certainly will take place in the first 12 months. We are saying that that person has no avenue to the Industrial Relations Commission after being sacked for not giving in to the boss.

If we decide here that workers should be treated differently from others on the basis of where they work, I would probably understand the opposition more if it was trying to abolish wrongful dismissal claims right across the board. We should not abolish them for one group of employees and not others or have people in the workplace treated differently; I certainly would want any of my children who were working for a small business to be protected by the same rights as for those who might be working for large businesses. I think it is discriminatory against those who work for small business, and it does not give those most vulnerable any protection whatsoever. The number of wrongful dismissal cases involving small business that are taken to the Industrial Relations Commission is minor. We should not be falling for the scare tactics used.

The Hon. IAN GILFILLAN: I think that the committee is in quite a productive discussion mode and that it is appropriate to revisit the time factor involved in this amendment. In response to the contribution by the Hon. Bob Sneath, small business is also vulnerable. As for the stability of the employment structure, if you are a small business employing two or three people, you do not have the capacity to make mistakes. There are risks which people will not take if they are going to get lumbered, and that is actually a deterrent for employment. As I said, unfair dismissal provisions are an important part of our industrial structure. I do not want to see them abolished, but I feel that, where they act as a clear deterrent and can be addressed in a modified form, that is the way we should go. However, I believe that the 12-month period that is there in the wording of the amendment before us is too long.

The Hon. NICK XENOPHON: Further to the sentiments of the Hon. Mr Gilfillan, I move to amend the Hon. Mr Lawson's amendment as follows:

Page 33, after line 4—
Proposed new subsection(1)(a)(b)—
Delete '12 months' and substitute:
'3 months'

The Hon. IAN GILFILLAN: Under those circumstances, I indicate Democrat support for the amendment to the amendment and, if it is successful, we would support the amendment as amended.

The Hon. R.D. LAWSON: While three months sounds better than nothing, it is obviously not as satisfactory as 12 months. That superficial attraction may not withstand real scrutiny. I would want to consider that in some detail and to understand its full ramifications and implications before supporting it. I am not rejecting it out of hand. The idea that three months is an appropriate time when we believe that not more than 12 months is better is acknowledged in the legislation as it is—a 12 month period in relation to probation. I believe that it is also in the regulations. I am not convinced that an amendment on the run of that kind would be beneficial. I urge the committee, if it is minded to support small business, to support this amendment. Perhaps that issue could be sorted out between the houses if there is room for compromise, but we are strongly of the view that 12 months is the appropriate period.

The Hon. P. HOLLOWAY: The Hon. Nick Xenophon's amendment, to use the words that the Hon. Robert Lawson has used frequently in this debate, in our view makes a bad clause less bad. We oppose the amendment but, if it is a choice between the Lawson amendment and the Xenophon amendment, we would obviously choose the Xenophon amendment, but they are both bad from our point of view.

The Hon. NICK XENOPHON: The amendment that I have just moved seeks to strike a balance between the concerns of small businesses and the legitimate concerns of employees. I would have thought the concepts are relatively straightforward and that the current common law position (and I stand to be corrected by the Hon. Mr Lawson or others in the chamber) is that effectively three months is not an unreasonable period of probation, in which time unfair dismissal laws would not apply. One of the fears small businesses have is that there is a degree of uncertainty about facing an unjust dismissal action. At least small businesses that do not have the same human resources facilities that a large employer has could have some degree of certainty in knowing that the first three months is a genuine trial period—a probationary period, if you like—and they will not be dragged before the Industrial Commission on an unjust dismissal application.

I indicate to the Hon. Mr Lawson that I will not support his amendment for a period of 12 months. I think that goes way beyond what would be reasonable taking into account the rights of employees in a small business. I would have thought this at least gives a reasonable balance between the interests of both employers and employees in small businesses.

The Hon. R.D. LAWSON: I think a further reason why it would be inappropriate in the current circumstance to introduce a period of three months is that those opposite confirmed at the very beginning of this discussion that it is inevitable that in July of this year the federal scheme will provide an exemption for small business in the first 12 months. That has been the proposal that has been before the federal parliament on 42 occasions. It would be undesirable for this state, whenever this law comes into operation, to adopt a three month period, whereas under the federal system it is almost assured to be 12 months, which would be further reason for businesses to seek to leave the South Australian industrial relations system and flee to the federal system.

The Hon. J.M.A. LENSINK: I would like to make a plea to the crossbench MPs. I am not sure how many of them have been in a position of hiring and firing people, but I certainly have. Particularly when you are in a small organisation, after three months it is often difficult to know whether somebody is grasping the rudimentaries of their job or whether, in fact, there are so many elements that are complex that they still need more time. I think, realistically, a number of people in any position, unless it is very basic, unskilled work, require at least six months, if not 12 months, to really settle into the job and understand the workings of it. I think after three months people are really only beginning to grasp their role

and how they fit in. So I urge all honourable members to consider that.

The Hon. T.J. STEPHENS: I would like to make a small contribution as well. I have had this discussion with honourable members opposite. They seem to forget the point that in a small business the last thing you want to do is turn over your staff. You spend a lot of time and effort trying to keep the business afloat. If you can get people on board who want to head in the same direction that you want to head, it is an absolute luxury. One of the problems with small business is normally there is a smaller margin for error. If you do not get your team pulling in the same direction, it is not just a case of making it difficult to part with an employee—it means that your business could go under.

Members opposite say, 'Where is our evidence that this will boost employment?' I must say that I do know many small business people and, over the years, they have told me that they will not take the chance of putting on a person when there was maybe a slight opportunity to get someone into that operation and crank the business up, because the counter-productive situation arises when someone becomes disruptive within a small team and the next thing you know you do not have a business. That is basically where we are coming from. This is not about our wanting to get rid of people at every opportunity. Members have to remember that small business people want to run their business and they want to survive, and to employ someone on the way through and to have a good relationship is fantastic, but the last thing you want to do is lose your business.

The Hon. IAN GILFILLAN: There are procedures in place whereby small businesses—and I also have contact with them—know that, if an employee is not fitting in and is not suitable, there is a proper process of written notification and, if those conditions are complied with by the employer, they are virtually immune from any action of unfair dismissal. It is not as if anyone who is employed in a small business will be able to sue the employer willy-nilly for unfair dismissal. It will have to be a case which will stand up.

It is a very foolish employer, whether he or she be small or large, who does not follow the requirements which are already spelt out and which would in fact give them the comfort of security that they were not vulnerable to an unfair dismissal claim. If they are guilty of an unfair dismissal, let them be pinged. Certainly what we are preparing to support is a three month period, recognising that smaller businesses do have particular idiosyncrasies and that three months is reasonable. That is why I have indicated that we are prepared to support the amendment to the amendment and, if that is successful, support the amendment. However, if it is not successful, we will not support the amendment in its present form.

The Hon. R.D. LAWSON: I think that the Hon. Ian Gilfillan has highlighted one of the difficulties about the proposed three month period. The fact is that it is very difficult now and virtually impossible to go through all the processes of giving warnings and instructions in the period of three months. Most people are immune from dismissal—

Members interjecting:

The CHAIRMAN: Order! The Hon. Mr Lawson is trying to be fair.

The Hon. R.D. LAWSON: There seems to be some sort of very superficial appeal in saying, 'Well, what we will do is compromise by making it three months.' The fact is that small business has consistently said that it is the possibility of an unfair dismissal claim in the first year of employment after they have trained someone and they have made the investment which they fear, and to throw them the crumb of saying, 'Well you are only exempt in the first three months' is not something for which they would be particularly grateful. There is also a flaw in introducing an amendment of this kind in the way in which the Hon. Nick Xenophon has done. There has been vast debate about this issue. Statistics would ordinarily be available to the committee to examine what number of dismissals occur in the first three months and the like, and a great deal of material has been published. We will certainly not jettison a proposal which we have had for quite some time and which is strongly supported by small business by simply saying, 'We will be grateful for this crumb, because this is the price we pay for the support of the Hon. Nick Xenophon and the Australian Democrats.'

I think I said that 12 months was mentioned in the regulations. I have looked at that, and that is not actually the case, but the period of 12 months is already embodied in the legislation. So, we do not support the Hon. Nick Xenophon's amendment, and we urge the committee to support my amendment as moved.

Amendment to amendment negatived.

The committee divided on the amendment:

AYES (6)

Dawkins, J. S. L.	Lawson, R. D. (teller)
Lensink, J. M. A.	Lucas, R. I.
Stefani, J. F.	Stephens, T. J.

NOES (9)

Evans, A. L.	Gago, G. E.
Gazzola, J.	Gilfillan, I.
Holloway, P. (teller)	Kanck, S. M.
Sneath, R. K.	Xenophon, N.
Zollo, C.	

PAIR(S)

Ridgway, D. W.	Roberts, T. G.
Schaefer, C. V.	Reynolds, K.
Redford, A. J.	Cameron, T. G.

Majority of 3 for the noes.

Amendment thus negatived.

The Hon. R.D. LAWSON: I move:

Page 33, lines 5 to 7—Leave out all words in these lines

This is a proposed amendment to section 105A, which deals with the topic of unfair dismissal. Section 105A(4) provides:

> If a contract provides for employment for a specified period or for a specified task, this part does not apply to the termination of the employment at the end of the specified period, or on completion of the specified task.

We seek to have added to that provision the words 'unless the employee has, on the basis of the employer's conduct, a reasonable expectation of continuing employment by the employer'. The Hon. Ian Gilfillan has an amendment in relation to this, which I believe he should move. We are opposed to the whole clause. If he moves his amendment, I will not be putting my amendment.

The CHAIRMAN: He is raring to go, but he is waiting for you to conclude.

The Hon. IAN GILFILLAN: 'Raring' is not quite the word that I would use to describe my approach to this legislation at this stage. However, for the sake of expedition, I was prepared to fill in the gap. I move:

> Page 33, line 7—Delete 'reasonable' and substitute:
> clear

The words that are specified in the bill between lines 5 and 7 read 'unless the employee has, on the basis of the employ-

er's conduct, a reasonable expectation of continuing employment by the employer'. My amendment is to delete 'reasonable' and substitute 'clear'. I am advised that the word 'clear' has quite a rigorous requirement in legislation, and I think that is appropriate, because the subsection in the act that the Hon. Robert Lawson identified makes it quite clear that, as far as the text of the act is concerned, if a contract provides for employment for a specified period or a specified task, on the termination of either of those factors it is reasonable that the employment is terminated.

However, I have first-hand information that employees who have been initially engaged under these circumstances have been vigorously encouraged to expect that the employment will continue. They have changed their life plans on that expectation. Under those circumstances, we believe it is unfair for the employee who suffers that termination at the end of that with that expectation. It is a relatively unfair dismissal.

However, we do not believe that the wording in the bill of 'reasonable' is prescriptive, and it is not as effective as what we believe is the right approach. That is why we are moving the amendment. 'Clear expectation' leaves it in no doubt that the employee has been given a clear expectation of continuing employment and, if the employer terminates in spite of that undertaking, there are grounds for an unfair dismissal case.

The Hon. P. HOLLOWAY: At present, irrespective of the circumstances, if employment ceases at the end of a fixed term or task contract, the worker is excluded from making an application for unfair dismissal. This is the case irrespective of what representations may have been made to the worker by the employer. An example of the sorts of circumstances that the government is trying to address is where a worker is on a fixed term contract of six months. At the four month point, the worker says to the employer, 'I have been offered another job. I really like working here, but I need some security. What should I do?' The employer says, 'Don't worry about the other job. You'll be right. We'll look after you. There is plenty of work coming up.' At the conclusion of the six month period, the employer's position is that the contract has run its course and that is the end of the matter. The words on the part of the employer would create a reasonable expectation of continuing employment. It is worth bearing in mind that courts and commissions constantly deal with questions of reasonableness. In the industrial context the definition of 'unfair dismissal' is harsh, unjust or unreasonable, and it has long been the common law that directions to employees must be both lawful and reasonable.

However, the Hon. Mr Gilfillan's amendment proposes to substitute 'clear' for 'reasonable'. This will exclude circumstances such as those I described earlier. It will lead to a situation where only an unequivocal promise of continuing employment will then be liable to the provision. I am advised that, when interpreting 'clear', the courts have gone back to *Webster's* definition; that is, 'in a clear manner without entanglement or confusion, without uncertainty'. That would prevent the purpose of the government's proposal, which is to allow workers who have been led on by employers and have been disadvantaged as a result, to have the ability for the fairness of the circumstances to be tested. It is important to note that in circumstances where the proposed exception was applicable there still will need to be an examination of fairness to all parties. It is by no means a foregone conclusion that there will be a finding of fairness. We therefore oppose the amendment.

The Hon. R.D. LAWSON: Whilst I have the greatest respect for the Hon. Ian Gilfillan, we are not convinced that the removal of the expression 'reasonable' and its substitution with the word 'clear' would in fact make the operation of the provision clearer. Accordingly, we will not be supporting the honourable member's amendment. I also indicate that we will be opposing this clause in its entirety.

The Hon. NICK XENOPHON: I indicate my support for the Hon. Mr Gilfillan's amendment. I thought it preferable to 'reasonable expectation'; a 'clear expectation' would strike the appropriate balance. I take issue with respect to the minister's giving his example of telling someone, 'You'll be right; don't worry about getting another job; you'll be right with us.' I thought that would be fairly clear. It seems that, along with the Hon. Mr Gilfillan, I am very much in the minority with respect to this amendment.

The Hon. IAN GILFILLAN: I hope that some constructive deliberation can take place on this. Certainly, the Democrats are not prepared to accept the wording as it appears in the bill. However, I would also expect that the government—as we do—recognises that it can be and has been abused. It is reasonable that it is a pretty tight gate to get through to get an unfair dismissal ruling on the basis that you have been given a false expectation. In the case of the example given by the minister, if there were witnesses to such a statement it is our belief that that would be clear. Once the pattern of the legislation was well known, a concerned employee in these circumstances would take the trouble to say, 'Well, look, if you want me to be relaxed and not to worry about another job, give me that undertaking in writing.' If we are unsuccessful with respect to this amendment, I inform the government that we will oppose the clause. We are not prepared to leave it in such a fluid and uncertain fashion.

The Hon. P. HOLLOWAY: It may be that we need to revisit this. In those circumstances we really have no option but to accept the honourable member's amendment, and we will consider that. We can always have the opportunity of revisiting it later. It is important that some part of clause 52 remain. For that reason, we will vote accordingly.

The committee divided on the Hon. Ian Gilfillan's amendment:

AYES (9)

Evans, A. L.	Gago, G. E.
Gazzola, J.	Gilfillan, I. (teller)
Holloway, P.	Kanck, S. M.
Sneath, R. K.	Xenophon, N.
Zollo, C.	

NOES (6)

Lawson, R. D. (teller)	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Stefani, J. F.	Stephens, T. J.

PAIR(S)

Roberts, T. G.	Ridgway, D. W.
Cameron, T. G.	Schaefer, C. V.
Reynolds, K.	Dawkins, J. S. L.

Majority of 3 for the ayes.

Amendment thus carried.

The committee divided on the clause as amended:

AYES (9)

Evans, A. L.	Gago, G. E.
Gazzola, J.	Gilfillan, I.
Holloway, P. (teller)	Kanck, S. M.
Sneath, R. K.	Xenophon, N.
Zollo, C.	

NOES (6)

Lawson, R. D. (teller)	Lensink, J. M. A.
Lucas, R. I.	Redford, A. J.
Stefani, J. F.	Stephens, T. J.

PAIR(S)

Roberts, T. G.	Ridgway, D. W.
Reynolds, K.	Schaefer, C. V.
Cameron, T. G.	Dawkins, J. S. L.

Majority of 3 for the ayes.

Clause as amended thus passed.

Clause 53.

The Hon. R.D. LAWSON: I move:

Page 34, lines 1 to 7—Delete subsections (5) and (6)

This is a consequential amendment arising from the earlier deletion of provisions relating to the concept of host employers. As the committee has not accepted the government's bill on host employers, I urge it to remove proposed subsections (5) and (6), which specifically relate to that concept.

The Hon. P. HOLLOWAY: The government accepts that these are consequential amendments so we will not oppose them, even though we regret that the concept was lost earlier.

Amendment carried; clause as amended passed.

Clause 54.

The Hon. R.D. LAWSON: We oppose the clause. This clause is really in aid of an amendment of which I have given notice, namely, to delete clause 64, which provides for a new division for dealing with conciliation conferences. It will enable conciliation conferences to be convened in certain circumstances, and we are opposed to this government provision. However, we are not opposed to the existing provision, which the government is seeking to remove from the act.

Clause 54 removes the existing conciliation provisions in relation to unfair dismissal, because the government intends, in clause 64, to have new conciliation provisions. So, this is, in a sense, a consequential amendment which is moved in advance of the substantial opposition we will be expressing. I indicate the reason for the amendment foreshadowed, namely, the deletion of clause 64. Clause 64 prescribes conciliation conferences prior to hearings in respect of a broader range of proceedings before either the court or the commission. However, it is unclear whether these increased conciliation requirements will result in a greater number of vexatious applicants withdrawing their applications during or soon after conciliation, or whether it will lead to increased applications with a view to extracting a settlement payment at conciliation.

Whilst we are generally in favour of conciliation, it can be used as an oppressive measure. We do not believe that the government has made out the case for changing the existing conciliation conference provisions. We are quite happy with the existing conciliation provisions—they work well, as the Hon. Bob Sneath has continually reminded the committee—and accordingly, if the committee is in favour of our foreshadowed amendments for the deletion of clause 64, I seek support for my amendment No. 37 to oppose the clause.

The Hon. P. HOLLOWAY: As the Deputy Leader of the Opposition has pointed out, clause 54 of the bill, together with clause 64 (which we will consider later), proposes to expand compulsory conciliation beyond the unfair dismissal area into underpayment of wages disputes and potentially to other areas by way of rules of court or commission or by regulation. Compulsory conciliation has been very successful in the unfair dismissal area, and we believe underpayment of wages disputes would benefit greatly from adopting the same process. We believe it would save the court and parties time and money, and this must be a good thing. We ask the committee to vote to retain clause 54 and, later on, clause 64.

The Hon. IAN GILFILLAN: The Democrats will oppose the amendment and support clause 64 when we eventually get to it.

The Hon. NICK XENOPHON: I cannot support the amendment. I would have thought it would be a good thing, particularly for small businesses, to have conciliation for issues such as underpayment of wages rather than having much more costly court proceedings being instituted and, principally for that reason, I cannot support the amendment.

The Hon. A.J. REDFORD: Proposed section 155A states that a division applies to proceedings founded on any other proceedings to which it is extended by regulation or by rule of the court or the commission. Does the minister have any idea what sorts of things the government, or indeed the court or commission, might have in mind to which this might be extended?

The Hon. P. HOLLOWAY: The government has no plans at the moment in relation to that. As I have just indicated, we are looking at the underpayment of wages. In any case, if there was a move by any future government to extend the capacity of what it would deal with it would come through the parliament in one way or another.

Clause passed.

Clause 55.

The Hon. P. HOLLOWAY: I move:

Page 34, after line 18—insert:

(da) whether the employer has failed to comply with an obligation under section 58B or 58C of the Workers Rehabilitation and Compensation Act 1986; and

The government amendments which deal with clause 55 mean that the commission takes account of breaches of sections 58B and 58C of the Workers Rehabilitation and Compensation Act. If there have been breaches of laws that relate to employment, that should be taken into account. Section 58B is about providing injured workers with suitable employment where it is reasonably practicable to do so. That is, the existing law and breaches of the law should not be ignored.

Section 58C is about providing the injured worker and WorkCover with notice of a proposed dismissal so that an assessment can be made about whether it is reasonably practicable to provide suitable employment. It is the existing law, and it should be observed. Losing employment for an injured worker is devastating. It is extremely hard for injured workers to find new employment. Surely, if we are genuine about seeing our laws upheld, breaches of those laws should not be ignored.

Finally, we have only recently introduced this amendment; it was the result of some discussions. It is the government's position that the bill in its original form was preferable, but we are realistic in relation to getting this through. Given the chance of having this clause passed, we are prepared to compromise, and that is what we have done here with this amendment.

The Hon. R.D. LAWSON: Is the minister indicating that the government will not be proceeding with the proposed amendment which relates to subclause (2) of clause 55?

The Hon. P. HOLLOWAY: If the honourable member has a look at what we have just circulated, the second part of that amendment is to delete subclause (2).

The Hon. IAN GILFILLAN: In formal discussions, we indicated to the government that we were not prepared to accept the implication of subclause (2) that, just through the failure to comply with sections 58B or 58C of the Workers Rehabilitation and Compensation Act 1986, the dismissal is harsh, unjust or unreasonable without question. So, to its credit, the government has amended it so that, in fact, rather than that being an automatic consequence, this amendment means that the commission is required to take it into consideration in assessing the question to be determined. Under those circumstances, we are prepared to accept it with its consequential amendment to delete subclause (2) entirely.

The Hon. A.J. REDFORD: This is a significant amendment to have put on us at this stage. Be that as it may, it is a slight improvement on what is there, but it is still not sufficient. The sanctions for the failure on the part of an enterprise to comply with section 58B and section 58C of the Workers Rehabilitation and Compensation Act are severe. If I have had one constituent come into my office, I have probably had 30 from small business who are small employers who have had tremendous sanctions imposed upon them in relation to a failure to comply with section 58B and section 58C of the workers compensation act.

One might have thought that would have been sufficient but, not happy with that anti-employer approach, this government now also wants to impose another sanction on employers. It is hard enough for small employers to cope with workplace injury as it is. It is very difficult if one has two, three or four employees, and, if one is injured, to actually comply with the duty to provide work as it is.

I will give you an example. Often WorkCover comes back and says, 'That person is capable of doing a little bit of work: 20 per cent, 30 per cent or 40 per cent.' The employer then says, 'I have already got someone else who has replaced this injured worker.' This injured worker has not been in the workplace, in some cases, for four or five years, and the employer is faced with the situation of getting rid of someone out of their workplace and having this person forced upon them. At the moment the sanction against an employer who behaves in that fashion is pretty clear and severe, that is, increased levies, and they are not insignificant increases. They are quite severe, and these are provisions that generally had the support of this side in the last parliament.

However, to have these sanctions and then to turn around and say to a small employer in those circumstances, 'Not only do you have to pay these penalties but you also have to take this person back,' when, I suspect, the employer is not in a position to sack or get rid of the person who has been there, in some cases, for two, three or four years, puts the employer in an untenable situation. There is no clearer anti-business attitude and no greater evidence of a lack of understanding of small business on the part of government than the insertion of these provisions.

The Hon. P. HOLLOWAY: I remind the honourable member that, under the Workers Rehabilitation and Compensation Act, clause 58B provides:

> (2) Subsection (1) does not apply if—
>
> (e) the employer currently employs less than 10 employees and the period that has elapsed since the worker became incapacitated for work is more than 1 year.

When WorkCover attempts to enforce compliance, all it can do, as the honourable member said, is impose a levy penalty, but the levy penalty does not help the injured worker who is without employment because of an illegal dismissal. Obviously, finding employment as an injured worker can be very difficult, and I think we need to bear that in mind as well.

The Hon. A.J. REDFORD: What is insufficient about the sanctions that currently prevail in the Workers Rehabilitation and Compensation Act? Why is it that, notwithstanding those provisions, you want to force a further provision on an employer, who will suffer a dramatic increase in levy, sometimes as much as 50 per cent? Why then do we need this additional provision?

The Hon. P. HOLLOWAY: The levy penalty does not help the injured worker; that is the point.

The Hon. R.D. LAWSON: For the benefit of the committee, whilst the government's proposal is better than that originally inserted, it is still deficient. I remind the committee that existing section 108 provides that, at the hearing of an application for unfair dismissal and in deciding whether a dismissal was harsh, unjust or unreasonable, the commission must have regard to the Termination of Employment Convention and the rules and procedures for the termination of employment which are already prescribed under schedule 8. Therefore, the act already provides certain considerations which the commission must have regard to. In the bill those conditions are enlarged by the insertion of (c), dealing with the degree to which the size of the undertaking is impacted on the procedures followed in effecting the dismissal and (d), dealing with the degree to which the absence of dedicated human resource management specialists or expertise in the relevant undertaking, establishment or business impacted on the procedures followed.

Now the government wants to insert that the commission must have regard to whether the employer has failed to comply with an obligation under two sections of the Workers Rehabilitation Compensation Act, and existing paragraph (e) will provide any other factor considered by the commission to be relevant to the particular circumstances of the dismissal.

The difficulty about inserting proposed paragraph (da) concerning the Workers Rehabilitation and Compensation Act is that there is no necessary connection between the dismissal and the alleged failure to comply with an obligation under the Workers Rehabilitation and Compensation Act. All the other matters to which the commission must have regard relate to the termination or dismissal. To introduce another notion, which is not necessarily related to the dismissal at all but simply 'must have regard to' whether or not there has been a compliance with a particular provision, is illogical and wrong in principle. The provision might as well say whether or not the employer has complied with the Dog and Cat Management Act, even though compliance or non-compliance may have no relationship to the termination at all.

What is wrong with allowing proposed paragraph (e), 'any other factor considered by the commission to be relevant to the particular circumstances'? If the commission considers that failure to comply with the Workers Rehabilitation and Compensation Act is something that was relevant to the dismissal, the commission can and should take it into account, but to impose an obligation to examine whether or not there has been compliance with something that may or may not be relevant is illogical and unfair.

Here the government started out with an ideological position that any employer who failed to comply with certain provisions of the Workers Rehabilitation and Compensation Act, and if the worker was subsequently terminated, that termination would be deemed to be harsh, unjust and unreasonable. It started out with a hard line position, but now, realising the entirely appropriate objections of others, it has

come up with a compromise that sounds reasonable but is actually illogical. Moreover, the section does not say what the commission is required to do if in fact there has been non-compliance. It says 'must take account of it'. How does it take account of it? Where does it put it in the scales if it does not deem it to be relevant? It is not something that should necessarily be taken into account; it should be taken into account only with a range of provisions encompassed by the phrase 'any other factor considered to be relevant'.

We are opposed to this provision. We were more opposed to the original provision, which was highly offensive, but the need for this section, other than the fact that the government may have reached a compromise with certain members with whom it was having discussions, is simply not convincing to us. I therefore move:

Page 34, lines 21 to 24—
Delete subclause (2) and substitute:
(2) Section 108—after subsection (2) insert:
(2a) In addition, in deciding whether a dismissal was harsh, unjust or unreasonable, the Commission may have regard to the fact that the WorkCover Corporation of South Australia, or a review authority acting under the Workers Rehabilitation and Compensation Act 1986, has found that the employer has failed to comply with an obligation under section 58B or 58C of the Workers Rehabilitation and Compensation Act 1986 (if relevant).

This amendment inserts a new subclause (2) in lieu of both of the government's proposals. By that amendment we seek to give a discretion to the commission, and also to insert into it the notion that the WorkCover Corporation or a review authority must be the determinant of whether or not there has been a failure to comply with 58B or 58C. We believe that it is offensive to leave it up to the Industrial Relations Commission to determine whether or not there has been compliance or non-compliance with sections 58B or 58C. It would be productive of error if the commission goes off on a fishing expedition or a side trial to determine whether or not there has been compliance with the Workers Rehabilitation and Compensation Act.

The Hon. P. HOLLOWAY: I move:

Page 34, lines 21 to 24—Delete subclause (2)

The Hon. IAN GILFILLAN: Mr Chairman, I am sure that you noticed that I have had that exact amendment on file for some time but, as the government has moved it, I will not need to. It is interesting to reflect on the amendment moved by the Hon. Robert Lawson. In a lot more words, it actually embraces the very factor which we feel is acceptable in the government's amendment. To translate the words that are in the government amendment as some dictatorial injunction that the commission must then act in a certain way is not only an inaccurate interpretation, it is also belittling the independence and sagacity of the commission.

It is some comfort to us to realise that, in fact, the opposition's amendment, to a large extent, embraces the same intention of the amendment which came out from constructive discussions between the Democrats and the government, and in far fewer words is clearly there in the amendment that the minister moved. We have no discomfort at all in continuing with what I indicated earlier. We will support the government's amendment and also the deletion of subclause (2).

The Hon. R.D. LAWSON: I should indicate in response to the Hon. Ian Gilfillan's last contribution that there are two significant differences between the government's proposal and the amendment proposed by us. The first is that, under the government's proposal, the section will provide that the commission 'must' have regard to certain matters, only some of which are necessarily relevant to a dismissal. Our proposed measure (2a) provides that the commission 'may' have regard. The difference between the fact that they 'must' have regard to the factors that relate to a termination and that they 'may' have regard to other factors is important. That will leave the discretion to the good sense and wisdom of the commission.

The second element is where some additional words are inserted; it is not unnecessary duplication or surplusage. We are insisting that the commission have regard to the fact that the WorkCover Corporation or a review authority made a determination about compliance or non-compliance with sections 58B or 58C. We believe it is important that WorkCover or the review authority perform its appropriate function in relation to that task, and it is not up to the Industrial Relations Commission to make determinations about whether or not there has been compliance with other legislation; they are not experts; they do not necessarily understand the full implications. We believe that it is an appropriate role for WorkCover or a review authority, and it would be inappropriate for the commission to usurp the function. I apologise for the fact that it has meant a few more words, but they are not irrelevant. They are actually central to the purpose.

The Hon. NICK XENOPHON: Can the minister indicate what work proposed paragraph (da) would do when you consider proposed paragraph (e), 'any other factor considered by the commission to be relevant to the particular circumstances of the dismissal'? Clearly, the minister's amendment and the Hon. Mr Gilfillan's proposed amendment are preferable, particularly the deletion of subclause (2). But if you have a catch-all provision, what work does the minister say the insertion of paragraph (da) will have in the operation of this proposed section?

The Hon. P. HOLLOWAY: The government believes that unlawful dismissals should not be seen to be fair, and we think that is important. Breaking relevant laws should be taken into account, and that specifically puts it in as part of the clause. In relation to the catch-all clause, paragraph (e), there may be other factors. You only have to work as a member of parliament, particularly in the lower house as I was for a few years, to see the unusual cases that come through your office. You think you have seen it all and then something comes along the next day that starts it all again. There are all sorts of situations that can come in. Other jurisdictions have such catch-all clauses to enable the commission to take into account any other relevant factors. But we think that 58B and 58C are particularly important and attention should be drawn to them. So, you can perhaps argue whether that would be done, but we think it is important to spell it out because it really is a crucial issue.

The Hon. NICK XENOPHON: With some reservation I am inclined to support the amendment that has been proposed by the government and by the Hon. Mr Gilfillan. Looking at section 58B of the Workers Rehabilitation and Compensation Act, subsection (2) in some respects tempers the scope of what is being proposed, even the reduced scope of this current amendment. For instance, section 58B(2)(a) says that subsection (1) does not apply if 'it is not reasonably practicable to provide employment in accordance with that subsection', and it goes on to say 'the onus of establishing that lies in any legal proceedings on the employer'. But, nonetheless, the question of reasonable practicality of any employment is referred to. In section 58B(2)(e) reference is made to 'the employer currently employs less than 10

employees, and the period that has elapsed since the worker became incapacitated for work is more than one year'.

I think there are some safeguards inherent in section 58B as it stands and, while the commission must have consideration to section 58B, the commission must also have consideration to any other factor relevant to the particular circumstances of dismissal, and it also refers to the size of the relevant undertaking and the degree of dedicated human resources, management, specialists or expertise in the relevant undertaking and the procedures followed. So I would have thought that there are some safeguards there, and the fact that the government is now backing down on its proposal with respect to automatically saying that a failure to comply with sections 58B or 58C is automatically harsh, unjust or unreasonable I think tempers the proposal significantly.

The Hon. R.D. LAWSON: There is a difficulty about this one. The Hon. Mr Cameron indicated before the dinner adjournment that he was not supporting the government's proposal in relation to the original amendments, and I am not sure that he indicated a position in relation to—

The Hon. P. Holloway interjecting:

The Hon. R.D. LAWSON: Could the minister indicate whether he suggests that the Hon. Mr Cameron has indicated support for the government's latest amendment?

The Hon. P. HOLLOWAY: I do not know whether he saw it word for word, but he certainly expressed support for the direction in which we were moving. We said that—

The Hon. A.J. Redford: Did he support it or did he not?

The Hon. P. HOLLOWAY: Yes, he did.

The Hon. A.J. Redford: Or you do not know.

The Hon. P. HOLLOWAY: No, we do know. As I said, we indicated what we were going to do and he said, yes, he would support that.

The Hon. R.D. LAWSON: I must say my note is alongside the government's original proposal, and the Hon. Mr Cameron indicated that he was not supporting the government's original proposal. I do not believe—

The Hon. P. Holloway interjecting:

The Hon. R.D. LAWSON: He was not saying, 'I am not supporting the government's original proposal,' because in our discussions there was only one proposal.

The Hon. A.L. EVANS: Just to confuse matters, I will support the Liberals.

The Hon. P. HOLLOWAY: We will resolve the issue tomorrow, but I would like to think that we could have the vote early in the peace and not go over the whole debate again. As I said, my understanding was that the Hon. Mr Cameron clearly agreed with the direction in which we were going but he did not see the specific words of the amendment. Let us clarify it tomorrow.

Progress reported; committee to sit again.

PITJANTJATJARA LAND RIGHTS (REGULATED SUBSTANCES) AMENDMENT BILL

The House of Assembly agreed to the bill with the amendments indicated by the following schedule, to which amendments the House of Assembly desires the concurrence of the Legislative Council:

No. 1. Clause 5—delete the clause.

No. 2. Page 3, lines 17 to 40 and page 4 lines 1 to 21 (clause 7)—Delete all words in these lines.

No. 3. Clause 9—delete the clause.

CRIMINAL ASSETS CONFISCATION BILL

Received from the House of Assembly and read a first time.

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I move:

That this bill be now read a second time.

I seek leave to have the second reading explanation inserted in *Hansard* without my reading it.

Leave granted.

At the last election, the Labor Party promised "new laws to allow the seizure of assets gained using the proceeds from crime.

The Rann Government's Strategic Plan, under Objective 2—Improving Well-Being—Priority Actions states:

> Legislate to target organised crime and outlaw motorcycle gangs, and to extend the powers to strip convicted criminals of their criminal profits and assets. The proceeds will be made available to victims through the Criminal Injuries Compensation Fund.

This Bill fulfils those promises.

It proposes the enactment of a comprehensive and extensive set of new powers targeting the assets and profits of criminals. It proposes to do so by measures corresponding to the Commonwealth *Proceeds of Crime Act 2002* so as to promote consistency between State and Commonwealth provisions. In so doing it has taken advantage of the experience in the Commonwealth jurisdiction, and includes innovations that practice has suggested are both necessary and desirable.

I seek leave to have the rest of this speech incorporated in Hansard without my reading it.

History

The first Australian criminal assets confiscation scheme was introduced through an amendment to the Commonwealth *Customs Act 1901* in 1977. This amendment provided for the forfeiture, upon conviction, of money used in or in connection with drug related conduct found in the possession or control of a person. General proceeds of crime legislation grew out of the scandals uncovered by the Royal Commissions of the late 1970s and early 1980s into organised crime and illicit drug trading. Interest in the legislation also grew after consideration had been given to the American legislation of the 1970s, most famously RICO—the *Racketeer Influenced and Corrupt Organizations Act, 1970*. Bureaucratically, legislation was triggered by the Australian Police Ministers' Council (A.P.M.C.) in 1983 and, with the help of the Standing Committee of Attorneys General (SCAG), was taken to the Special Premier's Conference on Drugs in 1985, where it was endorsed. Thereafter, largely driven by the Commonwealth, a Model Bill was developed by Parliamentary Counsel's Committee and each jurisdiction introduced its own version at its own time. The South Australian version, the *Crimes (Confiscation of Profits) Act, 1986*, was different from the model legislation, at least in form.

At the time, the general idea of legislating in this area was seen as a new cure for organised crime. The then Attorney-General of the Commonwealth, Lionel Bowen, said of the aims of the legislation in introducing the Commonwealth version:

> ". . . strike at the heart of major organised crime by depriving persons involved of the profits and instrumentalities of their crimes. By so doing, it will suppress criminal activity by attacking the primary motive—profit—and prevent the reinvestment of that profit in further activity".

This, of course, remains the aim of criminal assets confiscation legislation.

Elements of the Existing Model

In very general terms, the model embraced in the 1980s contained four basic elements—more accurately five, depending on how one counts. They (inclusively) are:

- *restraining orders*—these provisions authorise a court on the application of a prosecuting authority to freeze part or all of the property of an accused in anticipation of forfeiture but in any event pending the determination of final proceedings;
- *forfeiture orders*—these provisions empower a court, upon conviction, or proof beyond reasonable doubt of criminal activity, to order the forfeiture to the State of "tainted property". Tainted property generally takes two forms—first, the profits of criminal activity and second, the

objects, instruments or things used to commit the criminal offence.

· *pecuniary penalty orders*—these provisions provide an alternative to forfeiture orders. In essence, a court is empowered to order the offender to pay a sum to the State equivalent to any benefit that the offender derived from the offence.

· *police powers* to require evidence and the production of documents—these provisions contain extensive information-gathering powers by way of search warrants, production orders, monitoring orders and powers to examine the offender personally; and

· *money-laundering offences*—these provisions create criminal offences aimed at making it a criminal offence to engage in dealing in any way with the proceeds of crime. In general terms, there were two levels of seriousness in the national model—a serious offence of doing so knowingly or intentionally, and a less serious offence of merely dealing in property reasonably suspected of being the proceeds of crime.

This is a necessarily brief summary of a complicated and very detailed area of statutory law. In South Australia, the relevant State law is contained in the *Criminal Assets Confiscation Act, 1996*, with one exception. That exception is money laundering offences, which are now contained in the *Criminal Law Consolidation Act*. They are not within the scope of this Bill. It is generally accepted the confiscation legislation, in the broad sense described above, is a necessary and appropriate part of the law enforcement arsenal against crime, particularly serious crime and profit-driven crime. The question is what form the law should take. Professor Freiberg, a noted expert in the area, has summarised the aim as follows:

> "[T]o incapacitate, by depriving a person of the physical or financial ability, power or opportunity to continue to engage in proscribed conduct, to prevent offenders from unjustly enriching themselves, by eliminating the advantages and benefits which the offender has gained through his or her illegality, to deter the offender and others from crime by undermining the ultimate profitability of the venture and to protect the community by curbing the circulation of prohibited items.

Reform is Suggested

Law enforcement authorities have been of the opinion since the 1990s that the original form of the legislation was not working. In December, 1997, the then Commonwealth Attorney-General commissioned the Australian Law Reform Commission (A.L.R.C.) to review the whole area of the law on the confiscation of the proceeds of crime. The A.L.R.C. Report, released in June, 1999, concluded that the current conviction-based proceeds of crime legislation was "largely ineffective". Among the more important of its recommendations were:

· a non-conviction based confiscation regime;

· amendments to ensure the profits of unlawful conduct are not consumed in legal expenses;

· increased protection for the property rights of innocent third parties and secured creditors;

· increased police powers to track the proceeds of crime; and

· new provisions to expand the scope of money-laundering offences.

Of these, the first is the most important by far. The second and fifth of these objectives have already been met in South Australia, although the Government is examining the money-laundering offence as a result of the COAG agreement on Terrorism and Multi-jurisdictional crime.

Civil Confiscation

An important feature of the current South Australian Act is that forfeiture is "conviction based". This means that for confiscation of criminal assets to take place, it must be proved to the criminal standard that the holder of the assets at the relevant time committed the relevant criminal offence. By contrast, "civil confiscation" is, in general terms, confiscation of the proceeds of crime without proof beyond reasonable doubt that a crime has been committed. The A.L.R.C. Report said of the principle involved:

> "2.64 If the conclusion is reached that the justification for confiscation of profits springs from conviction for a criminal offence, the establishment of a complementary civil regime under which confiscation would follow from a civil finding of unlawful conduct on the balance of probabilities could be seen to give rise to civil liberties concerns. Specifically, the question might be raised whether what was seen as in essence a remedy ancillary to a finding of proven criminality beyond a reasonable doubt could now be brought to bear on a defendant without such a finding, i.e. by the discharge of the lower civil burden of proof.
>
> 2.65 If, on the other hand, the better analysis is that the denial of profits is to be regarded as rooted in a broader concept that no person should be entitled to be unjustly enriched from any unlawful conduct, criminal or otherwise, conviction of a criminal offence could properly be seen as but one circumstance justifying forfeiture rather than as the single precipitating circumstance for recovery of unjust enrichment.
>
> 2.66 It is the Commission's considered opinion that the latter analysis is to be preferred. Its assessment is based on public policy considerations, taking into account a clear pattern of developing judicial and legislative recognition of a general principle that the law should not countenance the retention by any person, whether at the expense of another individual or society at large, of the profits of unlawful conduct.

The Commonwealth has enacted the recommended civil confiscation scheme in the *Proceeds of Crime Act 2002*. N.S.W. has a similar scheme in its *Criminal Assets Recovery Act 1990*. W.A. has enacted a *Criminal Property Confiscation Act 2000* in reaction to so-called "outlaw motor cycle gangs" and, in particular, the supposed assassination by one (or more) of them of a retired senior police officer. This represents the enactment of the most draconian criminal-assets confiscation scheme in analogous jurisdictions. The W.A. model was considered and rejected by the Commonwealth Government and the Senate Constitutional and Legal Affairs Committee in enacting the Commonwealth legislation in 2001-2002. It is proposed in this Bill that South Australia follow the Commonwealth model as well, thus bringing itself into line with the Commonwealth and N.S.W. There are obvious inter-jurisdictional benefits in this—as well as the benefit of applying consistent law in S.A. to State and Commonwealth offences. Victoria enacted similar legislation in December, 2003.

The Elements of the Scheme

The core elements of the Commonwealth model resemble the elements of the original SCAG regime. They are:

· restraining orders;

· forfeiture orders;

· pecuniary penalty orders;

· literary proceeds orders; and

· information gathering (including examinations, production orders, notices to financial organisations, search and seizure and monitoring orders).

Restraining Orders

A restraining order is designed, as its name suggests, to stop specified property being dealt with until further order. This is a measure used to ensure that assets that may be liable to forfeiture or confiscation are not dissipated, or find some other way to disappear, before the authorities can get hold of them. It is an order made by a court on the application of the DPP and the court *must* grant the order if the pre-conditions are met. There are several innovations in this Bill when compared with existing law. For example, it is provided that the court must make a restraining order, even if it cannot be demonstrated that there is a risk that the property will be disposed of or otherwise dealt with; the Bill introduces the concept of restraining property under the effective control of the defendant; and, most notably, the Bill incorporates a feature from the Victorian legislation known as a 'freezing order' which is a short-term restraint that may be put upon financial assets by police before the making of an application of a restraining order.

The Bill contains a complete code of provisions dealing with the making of the application, allowing for reasonable expenses out of the property restrained, excluding property from the restraining order and the rights of innocent third parties, registration of an interest where the property is registrable (for example, real property), offences of contravening the restraining order, ancillary orders and the role of the Administrator and the duration and cessation of restraining orders.

Forfeiture

The Bill contains, as one might expect, comprehensive provisions on the forfeiture of tainted property. It is fundamental that proceeds of crime are dealt with differently than instruments of crime. If the court is satisfied that the asset is the proceeds of crime, then forfeiture is mandatory, assuming certain pre-conditions are met. On the other hand, forfeiture of the instruments of crime is discretionary and criteria are provided for to guide the courts' discretion. The pre-conditions for forfeiture are similar in both cases. They are:

1 a person has been convicted of a serious offence and the property relates to that offence; or

2 the property has been the subject of a restraining order in force for six months and the court is satisfied that the property relates to a serious offence committed by the person the subject of the restraining order; or

3 the property has been the subject of a restraining order in force for six months and the court is satisfied that the property relates to a serious offence and no application has been made by an innocent third party to claim it and the DPP has taken reasonable steps to find any innocent claimant.

Classes 2 and 3 are sometimes known as "automatic forfeiture". It is clear that the fact that a person has been acquitted of an offence or there is reasonable doubt about the offence does not affect the ability to forfeit property under those two heads of power; the onus is a civil one—hence civil forfeiture. Further, if a forfeiture takes place under the conviction head, and the conviction is later quashed, forfeiture can still take place on the civil basis if the DPP applies successfully for what the Bill calls a confirmation order. There is also a less formal procedure provided for automatic forfeiture if a conviction for a serious criminal offence stands.

Again, the Bill provides a complete code for all of these forms of forfeiture, including the protection of the rights of innocent third parties, the protection of dependants from hardship and so on. One novel feature bears highlighting. That is the inclusion of instrument substitution declarations. The reason for them is that canny crooks may use rented cars or houses (for example) as instruments of crime rather than their own in an attempt to forestall the forfeiture process. The rented property is owned by an innocent third party who cannot justly be made subject to forfeiture. An instrument substitution declaration permits a court to substitute equivalent property owned by the perpetrator for the property used as an instrument of crime but not owned by that perpetrator.

Pecuniary Penalty Orders

Although pecuniary penalty orders are not new to the general scheme of confiscation laws, they are new to South Australia. They are a kind of combination of forfeiture and fine. Instead of attacking tainted property specifically through the forfeiture of it, the DPP may seek forfeiture of a sum of money that represents, or is equivalent to, the value of the property that was used as an instrument of crime or which was proceeds of crime. As with forfeiture, it is proposed that this order may be made on application to a court on the basis of the civil burden of proof. In addition, there are strong and definite presumptive rules about the assessment of the benefits that a defendant has received from the commission of a serious offence, including an assessment of the total value of his or her assets before and after the commission of the offence. In effect, an onus is placed upon the defendant to provide a lawful explanation for increased wealth.

Literary Proceeds Orders

By contrast, literary proceeds orders are not new to South Australia. What is new about the proposals in the Bill is the comprehensive treatment of these orders and, of course, the transformation from criminal to civil onus for establishing the foundation offence. Literary proceeds orders are designed to confiscate the proceeds of the commercial exploitation of a person's notoriety obtained by the commission of a serious offence. These orders have not proved controversial in South Australia, but there was recent controversy in N.S.W. about a case in which a person to be charged for a shooting was paid a sum of money for an interview by a current affairs television show. That money was frozen on charge. The same result might well be obtained here.

Information Gathering

The Bill proposes extensive investigative and information gathering powers. None are new in concept, but the Bill is more detailed and extensive than current provisions. In general terms, the powers are (a) examination orders; (b) production orders; (c) notices to financial institutions; (d) monitoring orders; and (e) search warrants. *Examination orders* are orders made by a court permitting the DPP to conduct an examination of a suspect or a person related to the suspect (principally by traced assets) with the objective of identifying assets that may be subject to confiscation. *Production orders* are made by a magistrate on the application of an authorised officer and require the production by the subject of the order of what the Bill calls "property-tracking documents", which are exactly what they sound like. There is an extensive statutory definition of "property-tracking documents". *Notices to financial institutions* are orders made by a police officer of or above the rank of Superintendent to a financial institution to provide information to the police about details of accounts held at that financial institution by any specified person. *Monitoring orders* are orders made by a judge of the District Court that require a financial institution to provide information about transactions in an account or accounts held by a specific person over a specified period. *Search warrants* are the familiar specific search warrants issued by a magistrate for property reasonably suspected of being property liable to be confiscated. A novel feature of these provisions is a power to require the owner of a computer to disclose the key to data encrypted or hidden in some other way on that computer. There is also an emergency power to search and seize without warrant.

Miscellaneous

The Bill proposes a range of miscellaneous provisions dealing with the appointment powers and duties of an Administrator, how and in what circumstances legal costs will be borne by restrained property, charges on property and, of course, requiring the chief beneficiary of confiscation to be the Victims of Crime Fund. It should also be noted that existing orders of a kind recognised by the Bill will be translated into orders under the provisions of this Bill when it comes into force, so that there are not two confiscation systems running together for an indeterminate period of time.

Conclusion

This Bill represents a major plank in the Government's overall platform to strengthen the criminal law and associated legislation to make life even harder for criminals, particularly organised criminals. It brings the confiscation legislation in this State into line with that of most jurisdictions in Australia.

I commend the Bill to Members.

EXPLANATION OF CLAUSES

Part 1—Preliminary

1—Short title

2—Commencement

These clauses are formal.

3—Interpretation

This clause defines terms used in the Bill.

4—Meaning of abscond

This clause defines the meaning of ***abscond*** for the purposes of the Bill. A person will be taken to abscond in connection with an offence if an information or complaint has been laid in relation to the offence against the person, a warrant issued for the person's arrest and (at the end of 6 months) either the person cannot be found or is not amenable to justice and, if they are outside of Australia, extradition proceedings are either not on foot or have been terminated without an order for extradition having been made.

5—Meaning of convicted of an offence

This clause defines the meaning of ***convicted*** of an offence for the purposes of the Bill. There are 6 ways a person can be taken to have been convicted of an offence:

- the person is convicted, whether summarily or on indictment, of the offence; or
- the person is charged with, and found guilty of, the offence but is discharged without conviction; or
- a court, with the consent of the person, takes the offence, of which the person has not been found guilty, into account in passing sentence on the person for another offence; or
- the person absconds in connection with the offence; or
- a court has, under Part 8A Division 2 of the *Criminal Law Consolidation Act 1935*, recorded findings that the person is mentally incompetent to commit the offence and also that the objective elements of the offence are established; or
- a court has, under Part 8A Division 3 of the *Criminal Law Consolidation Act 1935*, recorded findings that the person is mentally unfit to stand trial on a charge of the offence and also that the objective elements of the offence are established.

The clause also defines the day on which such a conviction is taken to have occurred in relation to each type of deemed conviction.

6—Meaning of effective control

This clause sets out a number of principles which apply in determining whether property is subject to the effective control of a person. The principles are as follows:

- property may be subject to the effective control of a person whether or not the person has an interest in the property;

· property that is held on trust for the ultimate benefit of a person is taken to be under the effective control of the person;

· if a person is one of 2 or more beneficiaries under a discretionary trust, the undivided proportion of the trust property taken to be under the effective control of the person is 1 divided by the number of beneficiaries;

· if property is initially owned by a person and, within 6 years (whether before or after) of an application for a restraining order or a confiscation order being made, is disposed of to another person without sufficient consideration, then the property is taken still to be under the effective control of the first person;

· property may be subject to the effective control of a person even if one or more other persons have joint control of the property.

The clause also provides that regard may be had to a number of factors when making such a determination, such as shareholdings in a company that has an interest in the property, any relevant trusts and family and other relationships between certain persons and companies.

7—Meaning of proceeds and instrument of an offence

This clause sets out a number of rules which apply in determining whether property is proceeds or an instrument of an offence. Those rules are:

· property is ***proceeds*** of an offence if it is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence, whether the property is situated within or outside the State;

· property is an ***instrument*** of an offence if it is used in or in connection with, or intended to be used in or in connection with, the commission of an offence, whether the property is situated within or outside the State;

· property becomes proceeds of an offence or an instrument of an offence (as the case requires) if it is wholly or partly derived or realised from the disposal of, or other dealing with, proceeds of the offence or an instrument of the offence, or is wholly or partly acquired using proceeds of the offence or an instrument of the offence;

· property remains proceeds of an offence or an instrument of an offence even if it is credited to an account or disposed of or otherwise dealt with;

· property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence.

The clause also sets out when property ceases to be proceeds of or an instrument of an offence, including when:

· it is acquired by a third party for sufficient consideration without the third party knowing, and in circumstances that would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence (as the case requires);

· it vests in a person from the distribution of the estate of a deceased person, having been previously vested in a person from the distribution of the estate of another deceased person while the property was still proceeds of an offence or an instrument of an offence (as the case requires);

· it has been distributed in accordance with either an order in proceedings under the *Family Law Act 1975* of the Commonwealth with respect to the property of the parties to a marriage or either of them, or a financial agreement within the meaning of that Act, and 6 years have elapsed since that distribution (other than where, despite the distribution, the property is still subject to the effective control of a person who has been convicted of, charged with or is proposed to be charged with, or has committed or is suspected of having committed the offence in question—see subclause (4));

· it has been distributed in accordance with an order in proceedings under the *De Facto Relationships Act 1996* with respect to the division of property of de facto partners and 6 years have elapsed since that distribution;

· it is acquired by a person as payment for reasonable legal expenses incurred in connection with an application under this Act or defending a criminal charge;

· a forfeiture order in respect of the property is satisfied;

· a recognised Australian restraining order or a recognised Australian forfeiture order is satisfied in respect of the property;

· it is otherwise sold or disposed of under this Act;

· in any other circumstances specified in the regulations.

Subclause (3) provides that, if a person once owned property that was proceeds of an offence or an instrument of an offence and then ceased to be the owner of the property and (at that time or a later time) the property stopped being proceeds of an offence or an instrument of the offence under subclause (2) (other than because a forfeiture order is satisfied) and the person subsequently acquires the property again, then the property again becomes proceeds of an offence or an instrument of the offence.

8—Meaning of quashing a conviction

This clause sets out the circumstances in which a person's conviction of an offence will be taken to be quashed, namely:

· if the person is taken to have been convicted of the offence because of clause 5(1)(a)—the conviction is quashed or set aside;

· if the person is taken to have been convicted of the offence because of clause 5(1)(b)—the finding of guilt is quashed or set aside;

· if the person is taken to have been convicted of the offence because of clause 5(1)(c)—either the person's conviction of the other offence referred to in that paragraph is quashed or set aside, or the decision of the court to take the offence into account in passing sentence for that other offence is quashed or set aside;

· if the person is taken to have been convicted of the offence because of clause 5(1)(d)—after the person is brought before a court in respect of the offence, the person is discharged in respect of the offence or a conviction of the person for the offence is quashed or set aside;

· if the person is taken to have been convicted of the offence because of clause 5(1)(e) or (f)—the finding that the objective elements of the serious offence have been established is set aside or reversed.

9—Act binds Crown

The Crown is bound by this measure.

10—Application of Act

This clause provides that the measure applies to property within or outside the State to a serious offence committed at any time (whether the offence occurred before or after the commencement of this measure and whether or not a person is convicted of the offence) and to a person's conviction of a serious offence (whether the conviction occurred before or after the commencement of this measure).

11—Interaction with other Acts

This measure does not limit or derogate from, the provisions of any other Act.

12—Corresponding laws

This clause provides that the Governor may, by proclamation, declare certain other laws to be corresponding laws for the purposes of this Bill. This Governor may also vary or revoke such a proclamation.

13—Delegation

This clause provides that the DPP or the Administrator may, by instrument in writing, delegate a power or function under this Act.

14—Jurisdiction of Magistrates Court

This clause provides that the Magistrates Court has jurisdiction to hear and determine any application that may be made to a court under this Bill unless the application involves property with a value exceeding $300 000.

The clause also provides that, if the Magistrates Court makes an order under this Bill requiring a person to pay to any other person, or to the Crown, a monetary amount exceeding the amount specified under the *Magistrates Court Act 1991* as the monetary limit on the Court's civil jurisdiction in relation to actions to recover a debt, the Principal Registrar of the Magistrates Court must issue a certificate containing the particulars specified in the regulations in relation to the order. Such a certificate may be registered, in accordance with the regulations, in the District Court and, on registration, is

enforceable in all respects as a final judgment of the District Court.

Part 2—Freezing orders

15—Interpretation

This clause defines ***authorised police officer*** for the purposes of the Bill.

16—Commissioner may authorise police officers for purposes of Part

This clause provides that the Commissioner of Police may authorise a police officer, or a specified class of police officers, for the purposes of this Part of the Bill.

17—Authorised police officer may apply for freezing order

This clause provides that, if satisfied that one of the circumstances specified in the clause exists, a magistrate may, on an application by an authorised police officer, make a ***freezing order***. Such an order requires that a specified financial institution must not allow any person to make transfers or withdrawals from a specified account, except in the manner and circumstances, if any, specified in the order. The Magistrate must have regard to the amount of money to be frozen, whether more than one person owns the account, and any hardship that is likely to be caused by the order. Evidence in the form of an affidavit must be submitted in support of the application.

18—Urgent applications

This clause provides that an application for a freezing order may be made by telephone if, in the opinion of the applicant, the order is urgently required and there is not enough time to make the application personally. The clause further sets out the requirements for obtaining such an order.

19—Notice of freezing order to be given to financial institution

This clause provides that a freezing order issued in relation to an account at a financial institution takes effect on the date and at the time that notice of the order is given to the financial institution. The clause sets out the requirements relating to the giving of such notice, including providing that an order is of no force or effect if notice is not given within 72 hours after the order was made.

20—Effect of freezing order

This clause provides that it is irrelevant whether or not money is deposited into the account in relation to which the freezing order was made after the order takes effect. The clause also provides that a freezing order does not prevent a financial institution from making withdrawals from an account for the purpose of meeting a liability imposed on the financial institution in connection with that account by any law of the State or the Commonwealth.

21—Duration of freezing order

This clause provides that a freezing order ceases to be in force on the making of a restraining order in respect of the money in the account, or on the expiration of 72 hours after the time at which the freezing order took effect, whichever occurs first. The clause also provides that an authorised police officer may apply to a magistrate for an extension of the duration of a freezing order, and sets out what must happen for such an extension to be made, and the requirements relating to such an extension.

22—Failure to comply with freezing order

This clause provides that a financial institution that has been given notice of a freezing order must not, without reasonable excuse, fail to comply with the order. The maximum penalty for an offence under the clause is a $20 000 fine.

23—Offence to disclose existence of freezing order

This clause provides that a financial institution that has been given notice of a freezing order made in relation to an account must not, while the order is in force, disclose the existence or operation of the order except to persons specified in subclause (1). The maximum penalty for an offence under the clause is a $20 000 fine.

Subclause (2) further provides that if the existence of a freezing order is disclosed to a person in accordance with subclause (1) in the course of the person performing duties as a police officer, an officer or agent of a financial institution or a legal practitioner, the person must not, while the order is in force, disclose the existence or operation of the order except for the purposes specified in the subclause. The maximum penalty for an offence under the clause is a $5 000 fine.

Part 3—Restraining orders

Division 1—Restraining orders

24—Restraining orders

This clause provides that a court must, on application by the DPP and if satisfied that one of the circumstances specified in subclause (1) exists, make a ***restraining order***. Such an order prevents specified property from being disposed of or otherwise dealt with by any person (except in the manner and circumstances, if any, specified in the order).

An application for an order under this clause must specify the property to which the application relates, the DPP may submit evidence in support of the application in the form of an affidavit, and subject to certain limitations, the court must specify in the restraining order all property specified in the application for the order.

However, the court may only specify property in a restraining order made under subclause (1)(a) or (b) if satisfied that there are reasonable grounds to suspect that the property is property of the suspect, or property of another person (whether or not that other person's identity is known) that is subject to the effective control of the suspect, or is proceeds of, or is an instrument of, the serious offence. The court may only specify property in a restraining order made under subclause (1)(d) if satisfied that there are reasonable grounds to suspect that the property is property of the suspect, or property of another person (whether or not that other person's identity is known) that is subject to the effective control of the suspect.

The court must make a restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

The court may specify that a restraining order covers property that is acquired by the suspect after the court makes the order, and a restraining order may be made subject to conditions.

25—Notice of application

This clause provides that the DPP must give written notice of an application for a restraining order covering property to the owner of the property, along with any other person the DPP reasonably believes may have an interest in the property.

A court must not (except on the application of the DPP)hear an application unless it is satisfied that the owner of the property to which the application relates has received reasonable notice of the application. The clause also provides that the DPP must give notices to other persons under specified circumstances.

The clause also provides that a person who claims an interest in property may appear and adduce evidence at the hearing of the application, and that such a person is not required to answer a question or produce a document if the court is satisfied that the answer or document may prejudice the investigation of, or the prosecution of a person for, an offence.

26—Refusal to make an order for failure to give undertaking

This clause provides that a court may refuse to make a restraining order if the Crown refuses or fails to give the court an appropriate undertaking with respect to the payment of damages or costs, or both, for the making and operation of the order

27—Order allowing expenses to be paid out of restrained property

This clause provides that a court that has made a restraining order may (when the restraining order is made or at a later time) order that one or more of the following may be met out of property, or a specified part of property, covered by the restraining order:

- the reasonable living expenses of the person whose property is restrained;
- the reasonable living expenses of any of the dependants of that person;
- the reasonable business expenses of that person;
- a specified debt incurred in good faith by that person.

However, the court may only make such an order if:

- the person whose property is restrained has applied for the order; and
- the person has notified the DPP, in writing, of the application and the grounds for the application; and

· the person has disclosed all of his or her interests in property, and his or her liabilities, in a statement on oath that has been filed in the court; and

· the court is satisfied that the expense or debt does not, or will not, relate to legal costs that the person has incurred, or will incur, in connection with proceedings under this Act or proceedings for an offence against a law of the Commonwealth, a State or a Territory; and

· the court is satisfied that the person cannot meet the expense or debt out of property that is not covered by specified restraining orders.

The clause also provides that property that is covered by specified restraining orders is taken, for the purposes of subclause (2)(e), not to be covered by the order if it would not be reasonably practicable for the Administrator to take custody and control of the property.

28—Excluding property from or revoking restraining orders in certain cases when expenses are not allowed

This clause provides that the court may exclude certain property from a restraining order, or, if the property is the only property covered by the restraining order, revoke the restraining order. This may only happen if, because of the operation of clause 27(3), property that is covered by a restraining order is taken for the purposes of clause 27(2)(e) not to be covered by the order and, as a result, and for no other reason, the court refuses an application to make an order under clause 27(1). However, the court must not exclude the property or revoke the order unless satisfied that the property is needed to meet one or more of the following:

· the reasonable living expenses of the person whose property is restrained;

· the reasonable living expenses of any of the dependants of that person;

· the reasonable business expenses of that person;

· a specified debt incurred in good faith by that person.

The clause also provides that, if the court excludes the property from, or revokes, the restraining order, the DPP must give written notice of the exclusion or revocation to the owner of the property (if the owner is known) and any other person the DPP reasonably believes may have an interest in the property. However, the DPP need not give notice to the applicant for the order.

Division 2—Giving effect to restraining orders

29—Notice of a restraining order

This clause provides that, if a court makes a restraining order covering property, the DPP must give written notice of the order to the owner of the property. The DPP must, if the documents have not already been given to the owner, include with the notice a copy of the application and a copy of any affidavit supporting the application. However, the clause also provides that the court may (if the court considers it appropriate in order to protect the integrity of any investigation or prosecution), at the request of the DPP, order that all or part of the application or affidavit is not to be given to the owner, or that the DPP delay giving the notice (and any documents required to be included with the notice) for a specified period.

30—Registering restraining orders

This clause provides that a registration authority that keeps a register of property of a particular kind must, on the application of the DPP, record in the register particulars of a restraining order covering property of that kind.

The clause further provides that, if particulars of a restraining order covering property are recorded in a register in accordance with this clause, each person who subsequently deals with the property is, in the absence of evidence to the contrary, taken not to be acting in good faith for the purposes of clause 32, and taken to have notice of the restraining order for the purposes of clause 33.

31—Notifying registration authorities of exclusions from or variations to restraining orders

This clause provides that if the DPP has made an application to a registration authority under clause 30 in relation to particular property, the DPP must notify the registration authority if certain events occur. The registration authority must then vary the record of the restraining order accordingly.

32—Court may set aside a disposition contravening a restraining order

This clause provides that the DPP may apply to the court to set aside a disposition or dealing with property that contravenes a restraining order if it was not for sufficient consideration, or not in favour of a person who acted in good faith. The DPP must give, to each party to the disposition or dealing, written notice of both the application and the grounds on which it seeks the setting aside of the disposition or dealing.

33—Contravening restraining orders

Subclause (1) of this clause creates an offence where a person disposes of, or otherwise deals with, property covered by a restraining order. The person must know or be reckless as to the fact that the property is covered by a restraining order and that the disposition or dealing contravenes the order. The maximum penalty for an offence is a fine of $20 000 or imprisonment for 4 years.

Subclause (2) also creates a strict liability offence where a person disposes of, or otherwise deals with, property covered by a restraining order, where the disposition or dealing contravenes the order (whether or not the person knows or is reckless as to that fact) and where the person was either given notice of the order or particulars of the order were recorded in a register. The maximum penalty for an offence is a fine of $10 000 or imprisonment for 2 years.

Division 3—Excluding property from restraining orders

34—Court may exclude property from a restraining order

This clause provides that the court to which an application for a restraining order under clause 24 was made may, when the order is made or at a later time, exclude specified property from the order if an application is made under clause 35 or 36 and if the court is satisfied that the property is neither proceeds nor an instrument of unlawful activity, that the owner's interest in the property was lawfully acquired and that it would not be contrary to the public interest for the property to be excluded from the order.

However, the court must not exclude certain property from a restraining order to which clause 24(1)(a) or (b) applies unless satisfied that neither a pecuniary penalty order nor a literary proceeds order could be made against the persons referred to subclause (2)(a), and (if clause 24(1)(a) applies to the property) that the property could not be subject to an instrument substitution declaration if the suspect were convicted of the offence.

35—Application to exclude property from a restraining order after notice of the application for the order

This clause enables a person whose property would be covered by a restraining order to apply to the court to exclude specified property from the restraining order within 14 days after being notified of the application for the order.

36—Application to exclude property from a restraining order after notice of the order

This clause provides that a person may apply to the court to exclude specified property from a restraining order at any time after being notified of the order. However, unless the court gives leave, a person cannot apply if the person appeared at the hearing of the application for the restraining order, or was notified of the application for the restraining order, but did not appear at the hearing of the application. The court may only give leave in the certain circumstances.

37—Application not to be heard unless DPP has had reasonable opportunity to conduct an examination

This clause provides that the court must not hear an application to exclude specified property from the restraining order if the restraining order is in force and the DPP has not been given a reasonable opportunity to conduct examinations under this measure.

38—Giving security etc to exclude property from a restraining order

This clause provides that a court may exclude specified property from a restraining order that covers property of the suspect if the suspect applies to the court to exclude the property, gives written notice of the application to the DPP and gives security that is satisfactory to the court to meet any liability that may be imposed on the suspect under this measure.

The clause also provides that a court may exclude specified property from a restraining order that covers property of a person who is not the suspect if the person applies to the court

to exclude the property, gives written notice of the application to the DPP and gives an undertaking that is satisfactory to the court.

Division 4—Further orders

39—Court may order Administrator to take custody and control of property

This clause provides that the court that made a restraining order, or any other court that could have made the restraining order, may order the Administrator to take custody and control of property covered by a restraining order if the court is satisfied that this is required.

40—Ancillary orders

This clause provides that the court that made a restraining order, or any other court that could have made the restraining order, may make any ancillary orders that the court considers appropriate.

41—Contravening ancillary orders relating to foreign property

This clause creates an offence of knowingly or recklessly contravening an order requiring a person whose property is covered by a restraining order to do anything necessary or convenient to bring the property within the State. The maximum penalty for an offence under the clause is a fine of $20 000 or imprisonment for 4 years.

Division 5—Duration of restraining orders

42—When a restraining order comes into force

This clause provides that a restraining order is in force from the time it is made.

43—Application to revoke a restraining order

This clause provides that a person who was not notified of the application for a restraining order may apply to the court that made the order to revoke the order. The court may revoke the restraining order if satisfied there are no grounds on which to make the restraining order at the time of considering such an application.

44—Giving security etc to revoke a restraining order

This clause provides that a court may revoke a restraining order that covers property of the suspect if the suspect applies to the court to exclude the property, gives written notice of the application to the DPP and gives security that is satisfactory to the court to meet any liability that may be imposed on the suspect under this measure.

The clause also provides that a court may revoke a restraining order that covers property of a person who is not the suspect if the person applies to the court to exclude the property, gives written notice of the application to the DPP and gives an undertaking that is satisfactory to the court.

45—Notice of revocation of a restraining order

This clause provides that if a restraining order is revoked under clause 43 or 44, the DPP must give written notice of the revocation to the owner of any property covered by the restraining order (if the owner is known) and any other person the DPP reasonably believes may have an interest in the property, although the DPP need not give notice to the applicant for the order.

46—Cessation of restraining orders

This clause provides that a restraining order that relates to one or more serious offences ceases to be in force 28 days after:

- all charges that relate to the restraining order are withdrawn; or
- the suspect is acquitted of all serious offences with which the suspect was charged; or
- the convictions for the serious offences of which the suspect was convicted are quashed,

unless—

- there is a confiscation order that relates to the serious offences; or
- there is an application for a confiscation order that relates to the serious offences before the court; or
- there is an application under clause 64, 83 or 125 for confirmation of a forfeiture, or a confiscation order, that relates to the serious offences; or
- the suspect is charged with a related offence.

Subclause (2) further provides that a restraining order relating to property ceases to be in force if, not more than 28 days after the order was made, the suspect has not been convicted of, or charged with, the serious offence, or at least one serious offence, to which the restraining order relates and there is no confiscation order or application for a confiscation order that relates to the property.

Subclause (3) further provides that a restraining order ceases to be in force in respect of property covered by the restraining order if one of a number of prescribed events occurs, or has yet occur.

Subclause (4) provides that a restraining order ceases to be in force to the extent that property that it covers vests absolutely in the Crown under proposed Part 4 Division 2 or Division 3.

Subclause (5) provides that a restraining order that relates to one or more serious offences ceases to be in force in respect of property covered by the restraining order if a pecuniary penalty order or a literary proceeds order relates to the offence or offences, and one or more of the following occurs:

- the pecuniary penalty order or the literary proceeds order is satisfied;
- the property is sold or disposed of to satisfy the pecuniary penalty order or literary proceeds order;
- the pecuniary penalty order or the literary proceeds order is discharged or ceases to have effect.

Subclause (6) provides that, despite subclause (1), if:

- a restraining order covers property of a person who is not a suspect; and
- the property is an instrument of, but is not proceeds of, a serious offence to which the order relates; and
- the property is not subject to the effective control of another person who is a suspect in relation to the order,

then the restraining order ceases to be in force in respect of that property if the suspect has not been charged with the serious offence or a related offence within 28 days after the restraining order is made.

Part 4—Forfeiture

Division 1—Forfeiture orders

Subdivision 1—Forfeiture orders

47—Forfeiture orders

This clause provides that a court must, on application by the DPP, make an order that property specified in the order is forfeited to the Crown if:

- a person has been convicted of one or more serious offences and the court is satisfied that the property to be specified in the order is proceeds of one or more of those offences; or
- the property to be specified in the order is covered by a restraining order made under clause 24 that has been in force for at least 6 months and the court is satisfied that the property is proceeds of one or more serious offences committed by the person whose conduct (or suspected conduct) formed the basis of the restraining order; or
- the property to be specified in the order is covered by a restraining order made under clause 24(1)(c) that has been in force for at least 6 months and the court is satisfied of the matters referred to in that paragraph.

Subclause (3) provides that a court may, on application by the DPP, make an order that property specified in the order is forfeited to the Crown, if:

- a person has been convicted of one or more serious offences the court is satisfied that the property is an instrument of one or more of the offences or is subject to an instrument substitution declaration under clause 48; or
- the property to be specified in the order is covered by a restraining order made under clause 24(1)(b) that has been in force for at least 6 months and the court is satisfied that the property is an instrument of one or more serious offences committed by the person whose conduct (or suspected conduct) formed the basis of the restraining order; or
- the property to be specified in the order is covered by a restraining order made under clause 24(1)(c) that has been in force for at least 6 months and the court is satisfied of the matters referred to in that paragraph.

Subclause (4) sets out matters that the court may have regard to when considering whether it is appropriate to make a forfeiture order under subclause (3) in respect of particular property.

Subclause (5) provides that, if evidence is given, at the hearing of an application for a forfeiture order under this section that relates to a person's conviction for a serious offence, that property was in the possession of a person at the

time at which, or immediately after, the person committed a serious offence to which the application relates then:

- if no evidence is given that tends to show that the property was not used in, or in connection with, the commission of the offence—the court must presume that the property was used in, or in connection with, the commission of the offence; or
- in any other case—the court must not make a forfeiture order against the property unless it is satisfied that the property was used or intended to be used in, or in connection with, the commission of the offence.

Subclause (6) provides that an application for a forfeiture order under this section that relates to a person's conviction for a serious offence must be made before the end of the period of 6 months after the conviction day.

Subclause (7) provides that if a person is taken been convicted of a serious offence because the person has absconded, a court must not make a forfeiture order relating to the person's conviction unless the court is satisfied, on the balance of probabilities, that the person has absconded, and that either the person has been committed for trial for the offence, or that a reasonable jury, properly instructed, or the Magistrates Court (as the case requires) could lawfully find the person guilty of the offence.

48—Instrument substitution declarations

This clause provides that a court determining an application for a forfeiture order relating to a person's conviction of a serious offence may, on the application of the DPP, declare property to be subject to an ***instrument substitution declaration*** if satisfied of the following:

- the convicted person had, at the time of the offence, an interest in the property;
- the property is of the same nature or description as property that was an instrument of the offence (whether or not the property is of the same value);
- the property that was an instrument of the offence is not available for forfeiture or is not able to be made the subject of an order for forfeiture.

49—Additional application for a forfeiture order

This clause provides that the DPP cannot, unless the court gives leave, apply for a forfeiture order under clause 47 in relation to a serious offence if an application has previously been made under that section for the forfeiture of the property in relation to the offence and that application has been finally determined on the merits.

However, the DPP may apply for a forfeiture order against property in relation to a serious offence even though an application has previously been made for a pecuniary penalty order or a literary proceeds order in relation to the offence.

50—Notice of application

This clause requires the DPP to give written notice of an application for a forfeiture order to the people specified in the clause, although a court may dispense with the requirement to give such notice to a person if the court is satisfied that the person has absconded. The court may also direct the DPP to give or publish notice of the application to a specified person or class of persons.

51—Procedure on application

This clause sets out the procedure in relation to an application for a forfeiture order, and provides that the court may make a forfeiture order if a person entitled to be given notice of the relevant application fails to appear at the hearing of the application.

52—Amending an application

This clause provides that the court hearing an application for a forfeiture order may, on the application or with the consent of the DPP, amend the application.

However, the court must not amend the application to include additional property in the application unless:

- satisfied that the property was not reasonably capable of identification when the application was originally made, or necessary evidence became available only after the application was originally made; or
- the forfeiture order applied for is an order to which clause 47(1)(b) or (c), or clause 47(3)(b) or (c), applies and the court is satisfied that including the additional property in the application for the order might have prejudiced the investigation of, or the prosecution of a person for, an offence, or it is for any other reason appropriate to grant the application to amend.

The clause also sets out procedures relevant to such an application.

53—Forfeiture orders can extend to other interests in property

This clause provides that court may, in specifying an interest in property in a forfeiture order, specify any other interests in the property (regardless of whose they are) if the amount received from disposing of the combined interests would be likely to be greater than the amount received from disposing of each of the interests separately, or if disposing of the interests separately would be impracticable or significantly more difficult than disposing of the combined interests.

The court may then make such ancillary orders as it thinks fit for the protection of a person having one or more of those other interests.

54—Forfeiture orders must specify the value of forfeited property

This clause provides that a court must specify the amount it considers to be the value, at the time the order is made, of the property (other than money) specified in the forfeiture order.

55—Declaration by court in relation to buying back interests in forfeited property

This clause provides that a court that makes a forfeiture order may make a declaration in relation to a person's interest in property subject to a forfeiture order, and may declare that the interest may be excluded under clause 72 from the operation of the forfeiture order.

Such declarations may only be made if the court is satisfied that it would not be contrary to the public interest for a person's interest in the property to be transferred to the person, and that there is no other reason why the person's interest should not be transferred to the person.

56—Court may make supporting directions

This clause provides that a court that makes a forfeiture order may give any directions that are necessary or convenient for giving effect to the order.

Subdivision 2—Reducing the effect of forfeiture orders

57—Relieving certain dependants from hardship

This clause provides that a court making a forfeiture order specifying a person's property must make an order directing the Crown to pay a specified amount to a specified dependant, or dependants, of the person.

The court must be satisfied that:

- the forfeiture order would cause hardship to the dependant; and
- the specified amount would relieve that hardship; and
- if the dependant is aged at least 18 years—the dependant had no knowledge (at the time of the conduct) of the person's conduct that is the subject of the forfeiture order.

The clause also limits the amount that can be paid under the clause.

58—Making exclusion orders before forfeiture order made

This clause requires a court that is hearing, or is to hear, an application for a forfeiture order, to make an order excluding property from forfeiture in certain circumstances, and sets out requirements in relation to making such an order.

59—Making exclusion orders after forfeiture

This clause requires a court that made a forfeiture order to make an order excluding property from forfeiture in certain circumstances, and sets out requirements in relation to making such an order.

60—Applying for exclusion orders

This clause provides that a person may apply for an exclusion order if a forfeiture order that could specify the person's property has been applied for, but is yet to be made. However, a person cannot, except with leave of the court, apply for an exclusion order after a forfeiture order specifying the person's property has been made if:

- the person appeared at the hearing of that application, or was given notice of the application for the forfeiture order, but did not appear at the hearing of that application; or
- 6 months have elapsed since the forfeiture order was made.

The clause also limits when such leave may be given by the court.

61—Making compensation orders

This clause provides that a court that made a forfeiture order must make an order (called a compensation order) if a person has applied for the order, if the forfeiture order specifies the applicant's property as proceeds of a serious offence to which the forfeiture order relates, and if the court is satisfied that, when the property first became proceeds of the serious offence, a proportion of the value of the property was not acquired using the proceeds of any unlawful activity.

Such an order must specify the proportion of the value of the property not acquired using the proceeds of any offence referred to in subclause (1)(c)and must direct the Crown to (if the property has not been disposed of) dispose of the property and pay the applicant an amount equal to that proportion of the difference between the amount received from disposing of the property and the total of any costs of administering this Act (of a kind referred to in clause 209(1)) in connection with the forfeiture order.

The clause also sets out procedures in relation to the making of such an order.

62—Applying for compensation orders

This clause sets out who may apply for a compensation order and limits when such an application may be made.

Subdivision 3—The effect of acquittals and quashing of convictions

63—Certain forfeiture orders unaffected by acquittal or quashing of conviction

This clause provides that a forfeiture order made under clause 47(1)(b) or (c), or (3)(b) or (c), against a person in relation to a serious offence is not affected if, having been charged with the offence, the person is acquitted, nor is such an order affected if the person is convicted of the offence and the conviction is subsequently quashed.

64—Discharge of conviction based forfeiture order on quashing of conviction

This clause provides that a forfeiture order made under clause 47(1)(a) or (3)(a) in relation to a person's conviction of a serious offence is discharged if:

- the person's conviction of the offence is subsequently quashed (whether or not the order relates to the person's conviction of other offences that have not been quashed); and
- the DPP does not, within 14 days after the conviction is quashed, apply to the court that made the order for the order to be confirmed.

The clause also provides that, unless a court decides otherwise on an application under subclause (1), such quashing does not affect the forfeiture order for 14 days after the conviction is quashed, nor if the DPP makes an application under subclause (1).

65—Notice of application for confirmation of forfeiture order

This clause requires the DPP to give written notice of an application for confirmation of the forfeiture order to certain people. The clause also provides that the court may direct the DPP to give or publish notice of the application to a specified person or class of persons.

66—Procedure on application for confirmation of forfeiture order

This clause sets out procedures in relation to an application for confirmation of a forfeiture order.

67—Court may confirm forfeiture order

This clause provides that a court may confirm a forfeiture order made under clause 47(1)(a) or (3)(a) if satisfied that the court could, at the time it made that order, have instead made a forfeiture order under some other provision of clause 47 (if the DPP had applied for an order under that other provision).

68—Effect of court's decision on confirmation of forfeiture order

This clause provides that, if a court confirms a forfeiture order under clause 67, the order is taken not to be affected by the quashing of the person's conviction of the serious offence.

The clause also provides that if the court decides not to confirm the forfeiture order, the order is discharged.

69—Administrator must not deal with forfeited property before the court decides on confirmation of forfeiture order

This clause provides that the Administrator must not, during the period starting on the day after the person's conviction of the serious offence was quashed and ending when the court confirms, or decides not to confirm, the forfeiture order, do any of the things required under clause 93 in relation to property covered by the order, or amounts received from the disposal of the property.

70—Giving notice if a forfeiture order is discharged on appeal or by quashing of a conviction

This clause provides that the DPP must give written notice to certain persons if a forfeiture order that covered particular property is discharged by a court hearing an appeal against the making of the order, or is discharged under clause 64 or clause 68(2).

The clause also sets out requirements in relation to such a notice.

71—Returning property etc following the discharge of a forfeiture order

This clause provides that the Minister must, if certain property is vested in the Crown, cause an interest in the property equivalent to the interest held by the person immediately before the order was made to be transferred to the person, or, if the property is no longer vested in the Crown, cause an amount equal to the value of the interest held by the person immediately before the order was made in the property to be paid to the person.

Such action must happen if a forfeiture order has been discharged in relation to property specified in the order by a court hearing an appeal against the making of the order, or under clause 64 or 68, and a person who had an interest in the property immediately before the order was made applies in writing to the Minister for the transfer of the interest to the person.

Subdivision 4—Buying back interests in forfeited property etc

72—A person may buy back interest in forfeited property

This clause provides that the payment to the Crown, while the property is still vested in the Crown, of an amount declared under clause 55(c) to be the value of the person's interest, discharges the forfeiture order to the extent to which it relates to the interest and the Minister must then cause the interest to be transferred to the person in whom it was vested immediately before the property was forfeited.

73—A person may buy out another person's interest in forfeited property

This clause provides that the Minister must cause an interest in property to be transferred to a person if:

- the property is forfeited to the Crown under this proposed Division 1; and
- the interest is required to be transferred to the person under clause 71(1) or 72(1), or under a direction under clause 59(2)(c); and
- the person's interest in the property, immediately before the forfeiture, was not the only interest in the property; and
- the person gives the prescribed written notice to each other person who had an interest in the property immediately before the forfeiture; and
- no person served with a notice under paragraph (d) in relation to the interest lodges a written objection under that paragraph; and
- the person pays to the Crown, while the property is still vested in the Crown, an amount equal to the value of the interest.

Division 2—Forfeiture on conviction of a serious offence

Subdivision 1—Forfeiture on conviction of a serious offence

74—Forfeiting restrained property without a forfeiture order if a person has been convicted of a serious offence

This clause provides for automatic forfeiture of certain property in the following circumstances:

- a person is convicted of a serious offence; and
- either at the end of the relevant period, the property is covered by a restraining order that relates to the offence, or the property was covered by a restraining order that relates to the offence but the property was

excluded, or the order revoked, under clause 38 or 44 (the clauses relating to the giving of security etc to exclude property from, or to revoke, a restraining order respectively); and

· the property is not subject to an order under clause 76 excluding the property from forfeiture under this proposed Division 2.

However, this section does not apply if the person is taken to have been convicted under clause 5(1)(d).

In the case of property excluded from a restraining order under clause 38, or where a restraining order that covered particular property is revoked under clause 44, and if the relevant security given in connection with the exclusion or revocation is still in force, then the security is taken, for the purposes of this clause, to be the property referred to in subclause (1).

Relevant period is defined in subclause (6) to mean the 6 month period starting on the day of the conviction, or, if an extension order is in force at the end of that period, the extended period relating to the extension order.

75—Making an extension order extending the period before property is forfeited

This clause provides that the court that made the restraining order referred to in clause 74(1)(b) may make an order specifying an extended period for the purposes of that section.

The clause sets out the requirements for making such an order, and also the conditions that attach to it.

76—Excluding property from forfeiture under this Division

This clause provides that the court that made the restraining order referred to in clause 74(1)(b) may make an order excluding particular property from forfeiture under this proposed Division if the prescribed conditions are met.

An order under this section cannot be made in relation to property if the property has already been forfeited under this proposed Division.

77—Court may declare that property has been forfeited under this Division

This clause provides that the court that made the restraining order referred to in clause 74(1)(b) may make a declaration that particular property has been forfeited under this proposed Division.

Subdivision 2—Recovery of forfeited property

78—Court may make orders relating to transfer of forfeited property etc

This clause provides that, if property is forfeited to the Crown under clause 74, the court that made the restraining order referred to in clause 74(1)(b) may, if a person who claims an interest in the property applies under clause 80 and if satisfied of certain matters, by order, declare the nature, extent and value of the applicant's interest in the property. The court may then, if the interest is still vested in the Crown, direct the Crown to transfer the interest to the applicant. Alternatively, the court may declare that there is payable by the Crown to the applicant an amount equal to the value declared under paragraph (d).

79—Court may make orders relating to buying back forfeited property

This clause provides that, if property is forfeited to the Crown under clause 74, the court that made the restraining order referred to in clause 74(1)(b) may, on the application under clause 80 by a person who claims an interest in the property and if satisfied of certain matters, declare the nature, extent and value (as at the time when the order is made) of the interest and declare that the forfeiture ceases to operate in relation to the person's interest if payment is made under clause 72.

80—Applying for orders under sections 78 and 79

This clause sets out requirements and procedure for applying for an order under clause 78 or 79.

81—A person may buy back interest in forfeited property

This clause provides that the Administrator must cause an interest to be transferred to the person in whom it was vested immediately before specified property was forfeited to the Crown if:

· the property is forfeited to the Crown under clause 74; and

· a court makes an order under clause 79 in respect of an interest in the property; and

· the amount specified in the order as the value of the interest is, while the interest is still vested in the Crown, paid to the Crown.

82—A person may buy out another person's interest in forfeited property

This clause provides that the Administrator must cause an interest in property to be transferred to a person if:

· the property is forfeited to the Crown under clause 74; and

· the interest is required to be transferred to the person under this proposed Division; and

· the person's interest in the property, immediately before the forfeiture, was not the only interest in the property; and

· the person gives the required written notice to each other person who had an interest in the property immediately before the forfeiture; and

· no person served with notice under paragraph (d) in relation to the interest lodges a written objection under that paragraph; and

· the purchaser pays to the Crown, while the interest is still vested in the Crown, an amount equal to the value of the interest.

Subdivision 3—The effect of acquittals and quashing of convictions

83—The effect on forfeiture of convictions being quashed

This clause sets out what must happen to property forfeited under clause 74 in relation to a person's conviction of a serious offence when that conviction is quashed.

The clause also provides that the DPP may, within 14 days after the conviction is quashed, apply to the court that made the restraining order referred to in clause 74(1)(b) for the forfeiture to be confirmed, and sets out what must happen if such an application is unsuccessful.

84—Notice of application for confirmation of forfeiture

This clause requires the DPP to give written notice of an application for confirmation of a forfeiture to certain people.

The clause also provides that the court may direct the DPP to give or publish notice of the application to a specified person or class of persons.

85—Procedure on application for confirmation of forfeiture

This clause sets out procedures in relation to an application for confirmation of a forfeiture.

86—Court may confirm forfeiture

This clause provides that the court may confirm the forfeiture if satisfied that it could make a forfeiture order under clause 47 in relation to the serious offence in relation to which the person's conviction was quashed if the DPP were to apply for an order under that clause.

87—Effect of court's decision on confirmation of forfeiture

This clause provides that, if a court confirms a forfeiture under clause 86, the forfeiture is taken not to be affected by the quashing of the person's conviction of the serious offence.

88—Administrator must not deal with forfeited property before the court decides on confirmation of forfeiture

This clause provides that the Administrator must not, during the period starting on the day after the person's conviction of the serious offence was quashed and ending when the court confirms, or decides not to confirm, the forfeiture, do any of the things required under clause 93 in relation to the forfeited property, or amounts received from the disposal of the property.

89—Giving notice if forfeiture ceases to have effect on quashing of a conviction

This clause provides that the DPP must, if property was forfeited under clause 74 but clause 83(1) or (2) applies to the forfeiture, give written notice of the cessation to any person the DPP reasonably believes may have had an interest in that property immediately before the forfeiture. The clause also provides that the court may require the DPP to give or publish notice of the cessation to a specified person or class of persons.

Division 3—Forfeited property

90—What property is forfeited and when

This clause sets out the principles as to when property specified in a forfeiture order, and forfeited property, vests in the Crown.

91—When the Crown can begin dealing with property specified in a forfeiture order

This clause provides that the Crown may only dispose of, or otherwise deal with, property specified in a forfeiture order:

- after, and only if the order is still in force, if an appeal has not been lodged within the period provided for lodging an appeal against the order, the end of that period. If an appeal against the order has been lodged within the period provided for lodging an appeal against the order, the Crown may only dispose of, or otherwise deal with, the property after the appeal lapses or is finally determined.
- if the order was made in relation to a person's conviction of a serious offence and an appeal has not been lodged within the period provided for lodging an appeal against the conviction, after the end of the period. If an appeal against the conviction has been lodged, the Crown may only dispose of, or otherwise deal with the appeal lapses or is finally determined.

Subclause (2) provides, however, that the Crown may dispose of, or otherwise deal with, property specified in a forfeiture order at an earlier time with the leave of, and in accordance with any directions of, the court.

92—When the Crown can begin dealing with property forfeited under section 74

This clause provides that the Crown may only dispose of, or otherwise deal with, property forfeited under clause 74 in relation to a person's conviction of a serious offence if the period applying under clause 74(6) has come to an end, and the conviction has not been quashed by that time.

Subclause (2) provides that, for the purposes of subclause (1), the Crown may dispose of or otherwise deal with the property at the times specified.

Subclause (3) provides, however, that the Crown may dispose of, or otherwise deal with, property specified in a forfeiture order at an earlier time with the leave of, and in accordance with any directions of, the court.

93—How forfeited property must be dealt with

This clause provides that the Administrator must, if the relevant forfeiture order is still in force, or after the relevant period in the case of forfeiture under clause 74, dispose of the relevant forfeited property (other than money). Any amounts received from the disposal of property in accordance with this clause must, along with any monetary amounts specified in the forfeiture order or forfeited under clause 74, then be dealt with in accordance with clause 209.

94—Dealings with forfeited property

This clause establishes an offence for a person who knows that a forfeiture order has been made in respect of registrable property to dispose of, or otherwise deal with, the property before the Crown's interest has been registered on the appropriate register (whether or not the person knows the Crown's interest has not yet been registered) if the forfeiture order has not been discharged. The maximum penalty for an offence under the clause is a fine of $20 000 or imprisonment for 4 years.

Part 5—Other confiscation orders

Division 1—Pecuniary penalty orders

Subdivision 1—Pecuniary penalty orders

95—Making pecuniary penalty orders

This clause provides that a court must, on application by the DPP, make a pecuniary penalty order, requiring a specified person to pay an amount determined under proposed Subdivision 2 to the Crown if satisfied that the person has been convicted of, or has committed, a serious offence and either the person has derived benefits from the commission of the offence, or an instrument of the offence is owned by the person or is under his or her effective control.

The clause also sets out procedures in relation to applying for such an order and restrictions on when such an order can be made.

96—Additional application for a pecuniary penalty order

This clause provides that he DPP cannot, unless the court gives leave, apply for a pecuniary penalty order against a person in respect of benefits derived from the commission of a serious offence or an instrument of the offence if an application has previously been made for a pecuniary penalty under this proposed Division in respect of the benefits or instrument, and that application has been finally determined on the merits. The clause also provides restrictions on when the court may give such leave.

97—Pecuniary penalty orders made in relation to serious offence convictions

This clause sets out when, in terms of timing, a court can make a pecuniary penalty order. A court must not (except in the case of a person taken to have been convicted of the serious offence because of clause 5(1)(d)) make a pecuniary penalty order in relation to a person's conviction of a serious offence until after the end of the period of 6 months commencing on the conviction day. However, the court may make a pecuniary penalty order in relation to the person's conviction when it passes sentence on the person.

98—Making of pecuniary penalty order if person has absconded

This clause provides that, if a person is taken under clause 5(1)(d) to have been convicted of a serious offence, a court must not make a pecuniary penalty order relating to the person's conviction unless satisfied (to the civil standard) that the person has absconded, and either the person has been committed for trial for the offence, or the court is satisfied, having regard to all the evidence before the court, that a reasonable jury, properly instructed, or the Magistrates Court (as the case requires) could lawfully find the person guilty of the offence.

Subdivision 2—Pecuniary penalty order amounts

99—Determining penalty amounts

This clause provides a mechanism for determining the amount that a person is ordered to pay under a pecuniary penalty order. This is called the penalty amount.

In the case of an application relating to benefits derived from the commission of a serious offence, the amount is determined by assessing under this proposed Subdivision the total value of the benefits the person derived from the commission of the serious offence along with the commission of any other offence that constitutes unlawful activity; and then subtracting from the total value the sum of the reductions (if any) in the penalty amount under clauses 107 and 108.

In the case of an application relating to an instrument of a serious offence, the amount is determined by assessing the value of the instrument (as at the time of assessment) and subtracting from the value the sum of the reductions (if any) in the penalty amount under clauses 107 and 108.

100—Evidence the court is to consider in assessing the value of benefits

This clause sets out evidence that the court must have regard to in assessing the value of benefits that a person has derived from the commission of a serious offence or serious offences.

101—Value of benefits derived

This clause provides that, if an application is made for a pecuniary penalty order against a person in relation to a serious offence or serious offences and, at the hearing of the application, evidence is given that the value of the person's property during or after the commission of the offence or offences, or any other unlawful activity that the person has engaged in, exceeded the value of the person's property before the commission of the offence or offences, then the court is to treat the value of the benefits derived by the person from the commission of the offence or offences as being not less than the amount of the greatest excess.

However, the amount treated as the value of the benefits under this clause is reduced to the extent (if any) that the court is satisfied that the excess was due to causes unrelated to the commission of the serious offence or serious offences or any other unlawful activity that the person has engaged in.

Subclause (3) provides that if, at the hearing of the application, evidence is given of the person's expenditure during or after the commission of the serious offence or serious offences, or any other unlawful activity that the person has engaged in, the amount of the expenditure is presumed, unless the contrary is proved, to be the value of a benefit that was provided to the person in connection with the commission of the serious offence or serious offences. However, this subclause does not apply to expenditure to the extent that it resulted in the acquisition of property that is taken into account under subclause (1).

102—Value of benefits may be as at time of assessment
This clause provides that a court may treat as the value of the benefit the value that the benefit would have had if derived at the time the court makes its assessment of the value of benefits.
103—Matters that do not reduce the value of benefits
This clause sets out amounts that must not be subtracted when assessing the value of benefits that a person has derived from the commission of a serious offence or serious offences.
104—Benefits already the subject of pecuniary penalty
This clause provides that a benefit (including a literary proceeds amount) is not to be taken into account for the purposes of this proposed Subdivision if a pecuniary penalty has been imposed in respect of the benefit under this measure or any other law.
105—Property under a person's effective control
This clause provides that, for the purposes of determining the value of benefits derived, the court may treat as property of the person any property that is, in the court's opinion, subject to the person's effective control.
106—Effect of property vesting in an insolvency trustee
This clause provides that, for the purposes of determining the value of benefits derived, property of a person is taken to continue to be the person's property despite vesting in one of the prescribed persons or bodies.
107—Reducing penalty amounts to take account of forfeiture and proposed forfeiture
This clause provides that, if a pecuniary penalty order relates to benefits derived from the commission of a serious offence, the penalty amount under the order is reduced by an amount equal to the value, at the time of the making of the order, of any property that is proceeds of the serious offence if the property has been forfeited, under this measure or any other law, in relation to the offence to which the order relates, or if an application has been made for a forfeiture order that would cover the property.
108—Reducing penalty amounts to take account of fines etc
This clause provides that a court may, if it considers it appropriate, reduce the penalty amount under a pecuniary penalty order against a person relating to benefits derived from the commission of a serious offence by an amount equal to a monetary sum payable by the person in relation to a serious offence to which the order relates. A monetary amount means a monetary amount paid by way of fine, restitution, compensation or damages.
109—Varying pecuniary penalty orders to increase penalty amounts
This clause provides that court may, on the application of the DPP, vary a pecuniary penalty order against a person if the penalty amount was reduced under clause 107 to take account of a forfeiture of property or a proposed forfeiture order against property and an appeal against the forfeiture or forfeiture order is allowed, or the proceedings for the proposed forfeiture order terminate without the proposed forfeiture order being made. The variation is an increase in the penalty amount by an amount equal to the value of such property.
Such a variation may also be made if the penalty amount was reduced under clause 107 to take account of an amount of tax paid by the person and an amount is repaid or refunded to the person in respect of that tax. In that case, the variation is an increase in the penalty amount by an amount equal to the amount repaid or refunded.
Division 2—Literary proceeds orders
Subdivision 1—Literary proceeds orders
110—Meaning of literary proceeds
This clause defines the meaning of literary proceeds, namely any benefit a person derives from the commercial exploitation of the person's notoriety resulting from the person committing a serious offence, or that of another person involved in the commission of the serious offence resulting from the first-mentioned person committing the offence. The clause also provides that, in determining whether a person has derived literary proceeds or the value of literary proceeds derived, a court may treat as property of the person any property that, in the court's opinion, is subject to the person's effective control, or was not received by the person, but was transferred to, or (in the case of money) paid to, another person at the person's direction.
111—Making literary proceeds orders
This clause provides that a court must, on application by the DPP, make a literary proceeds order, requiring a specified person to pay an amount to the Crown if satisfied that the person has committed a serious offence (whether or not the person has been convicted of the offence) and has derived literary proceeds in relation to the offence. Such literary proceeds must have been derived after the commencement of this measure. The clause also sets out procedural matters in relation to making such orders.
112—Matters taken into account in deciding whether to make literary proceeds orders
This clause provides that the court, in determining whether to make a literary proceeds order, may take into account any matter it thinks fit, and further sets out matters the court must take into account.
Subdivision 2—Literary proceeds amounts
113—Determining literary proceeds amounts
This clause provides that he amount that a person is ordered to pay under a literary proceeds order is the amount that the court thinks appropriate. This amount is called the literary proceeds amount. The clause also sets out limitations on the amount, and provides that the court may take into account any matter it thinks fit in determining the amount.
114—Deductions from literary proceeds amounts
This clause provides that, in determining the amount to be paid under a literary proceeds order against a person, the court must deduct, to the extent that the property is literary proceeds:

- any expenses and outgoings that the person incurred in deriving the literary proceeds; and
- the value of any property of the person forfeited under this measure, a recognised Australian forfeiture order, or a foreign forfeiture order, relating to the serious offence to which the literary proceeds order relates; and
- an amount payable by the person under a pecuniary penalty order, a recognised Australian pecuniary penalty order, or a foreign pecuniary penalty order, relating to the serious offence to which the literary proceeds order relates; and
- the amount of any previous literary proceeds order made against the person in relation to the same exploitation of the person's notoriety resulting from the person committing the serious offence in question.

115—Varying literary proceeds orders to increase literary proceeds amounts
This clause provides that a court may, on the application of the DPP, vary a literary proceeds order against a person to increase the literary proceeds amount to take into account specified events.
Subdivision 3—Literary proceeds amounts may cover future literary proceeds
116—Literary proceeds orders can cover future literary proceeds
This clause provides that court may, on the application of the DPP, include in a literary proceeds order one or more amounts in relation to benefits that the person who is the subject of the order may derive in the future if the court is satisfied that the person will derive the benefits, and that, if the person derives the benefits, they will be literary proceeds in relation to the serious offence to which the order relates. The clause also sets out a requirement in relation to determining such an amount.
117—Enforcement of literary proceeds orders in relation to future literary proceeds
This clause provides that, if an amount is included in a literary proceeds order in relation to benefits that the person who is the subject of the order may derive in the future and the person subsequently derives the benefits, then from the time the person derives the benefits, proposed Part 5 Division 3 Subdivision 4 applies to the amount as if it were a literary proceeds amount.
Division 3—Matters generally applicable to orders under this Part
Subdivision 1—Applications for confiscation orders under this Part
118—Notice of application

This clause provides that the DPP must give written notice of an application for a confiscation order, along with a copy of the application and any affidavit supporting the application, to the person who would be subject to the order if it were made. However, the DPP in certain circumstances may delay giving a copy of an affidavit to the person.

119—Amending an application

This clause provides a procedure for amending an application for a confiscation order.

Subdivision 2—Ancillary orders

120—Ancillary orders

This clause provides that the court that made a confiscation order under this proposed Part, or any other court that could have made the confiscation order, may make any ancillary orders that the court considers appropriate.

Subdivision 3—Reducing pecuniary penalty amount or literary proceeds amount

121—Reducing penalty amounts and literary proceeds amounts to take account of tax paid

This clause provides that the court must reduce the penalty amount or literary proceeds amount under a confiscation order (other than a pecuniary penalty order that relates to an instrument of a serious offence) under this proposed Part against a person by an amount that, in the court's opinion, represents the extent to which tax that the person has paid is attributable to the benefits or literary proceeds (as the case requires) to which the order relates.

Subdivision 4—Enforcement

122—Enforcement of confiscation orders under this Part

This clause provides that a confiscation order under this proposed Part is enforceable under the *Enforcement of Judgments Act 1991*.

However, subclause (2) provides that if a pecuniary penalty order was made under clause 97(2) when sentence was being passed on the person for the serious offence to which the order relates, the order cannot be enforced against the person within the period of 6 months commencing on the day the order was made.

123—Property subject to a person's effective control

This clause provides that the court may, in the prescribed circumstances, make an order declaring that the whole, or a specified part, of particular property subject to the effective control of a person is available to satisfy a confiscation order to which the person is subject.

The clause also sets out procedural matters related to such a declaration.

Subdivision 5—Effect of acquittals and quashing of convictions

124—Acquittals do not affect confiscation orders under this Part

This clause provides that the fact that a person has been acquitted of a serious offence does not affect the court's power to make a confiscation order under this proposed Part in relation to the offence.

125—Discharge of confiscation order under this Part if made in relation to a conviction

This clause provides that a confiscation order under this proposed Part made in relation to a person's conviction of a serious offence is discharged if:

- the person's conviction of the offence is subsequently quashed (whether or not the order relates to the person's conviction of other offences that have not been quashed); and
- the DPP does not, within 14 days after the conviction is quashed, apply to the court that made the order for the order to be confirmed.

The clause also provides that, unless a court decides otherwise on an application under the clause, such quashing does not affect the forfeiture order for 14 days after the conviction is quashed, nor if the DPP makes an application under subclause (1).

126—Confiscation order under this Part unaffected if not made in relation to a conviction

This clause provides that a confiscation order under this proposed Part made in relation to a serious offence, but not in relation to a person's conviction of the offence, is not affected if the person is convicted of the offence and the conviction is subsequently quashed.

127—Notice of application for confirmation of confiscation order under this Part

This clause provides that the DPP must give written notice of an application for confirmation of a confiscation order under this proposed Part to the person who is the subject of the order.

128—Procedure on application for confirmation of confiscation order under this Part

This clause sets out procedures for the confirmation of a confiscation order under this proposed Part.

129—Court may confirm confiscation order under this Part

This clause provides that a court may confirm a confiscation order under this Part if satisfied that, when the DPP applied for the order, the court could have made the order:

- in the case of a pecuniary penalty order—on the ground that the person had committed the serious offence or some other serious offence; or
- in the case of a literary proceeds order—on the ground that the person had committed the serious offence in relation to which the person's conviction was quashed or some other serious offence; or
- in any case—without relying on the person's conviction of the serious offence.

The clause also provides that a court that confirms a confiscation order under this Part may vary the order or make ancillary orders.

130—Effect of court's decision on confirmation of confiscation order under this Part

This clause provides that, if a court confirms a forfeiture order under this proposed Part, the order is taken not to be affected by the quashing of the person's conviction of the serious offence.

The clause also provides that if the court decides not to confirm the confiscation order, the order is discharged.

Part 6—Information gathering

Division 1—Examinations

Subdivision 1—Examination orders

131—Examination orders relating to restraining orders

This clause provides that, if an application for a restraining order has been made or a restraining order is in force, a relevant court may, on the application of the DPP, make an order for the examination of any person about the affairs (including the nature and location of any property) of a specified person. The ***relevant court*** is, if an application for a restraining order has been made, the court to whom the application has been made, or, if a restraining order is in force, the court that made the restraining order or any other court that could have made the restraining order. The clause also provides for the cessation of such an order.

132—Examination orders relating to applications for confirmation of forfeiture

This clause provides that, if an application under certain clauses relating to the quashing of a person's conviction of a serious offence is made, the court to which the application is made may, on the application of the DPP, make an order for the examination of any person about the affairs (including the nature and location of any property) of a specified person. The clause also provides for the cessation of such an order.

Subdivision 2—Examination notices

133—Examination notices

This clause provides that the DPP may give to a person who is the subject of an examination order a written notice (an ***examination notice***) for the examination of the person. The clause also provides that such a notice may not be given in certain circumstances.

134—Form and content of examination notices

This clause sets out requirements in relation to the form and content of an examination notice.

Subdivision 3—Conducting examinations

135—Time and place of examination

This clause provides that the examination of a person subject to an examination order must be conducted at the time and place specified in the examination notice, or at such other time and place as the DPP decides on the request of the examinee, the lawyer of the examinee or a person who is entitled to be present during an examination because of a direction under clause 137(2).

The clause also provides that, if an examinee refuses or fails to attend the examination at the time and place required the DPP may apply to the Magistrates Court for the issue of a warrant to have the person arrested and brought before the DPP for the purpose of conducting the examination.

This clause also sets out procedural matters relating to examinations.

136—Requirements made of person examined

This clause sets out requirements in relation to an examinee, including that:

- the person subject to an examination order may be examined on oath by the DPP;
- the DPP may, for that purpose, require the person to take an oath and administer an oath to the person;
- the oath to be taken by the person for the purposes of the examination is an oath that the statements that the person will make will be true; and
- an examination must not relate to a person's affairs in certain circumstances; and
- the DPP may require the person to answer certain questions.

137—Examination to take place in private

This clause requires that an examination take place in private, and provides that the DPP may give directions about who may be present during an examination.

The clause also provides that the following persons are entitled to be present:

- the person being examined, and the legal practitioner representing the person;
- the DPP;
- any other person who is entitled to be present because of a direction under subclause (2).

138—Role of the examinee's legal practitioner during examination

This clause sets out the role of the examinee's legal practitioner in relation to an examination.

139—Record of examination

This clause provides that the DPP may, and in some cases must, cause a record to be made of statements made at an examination. A copy of such a record, if it is in, or is reduced to, writing, must, if the examinee makes a request in writing, be provided to the examinee without charge.

140—Questions of law

This clause provides that the DPP may refer a question of law arising at an examination to the court that made the examination order.

141—DPP may restrict publication of certain material

This clause provides that the DPP may give directions preventing or restricting disclosure to the public of certain matters or records. The clause also provides that the DPP must have regard to certain matters before so directing.

142—Protection of DPP etc

This clause provides that the various participants in an examination have certain protections.

Subdivision 4—Offences

143—Failing to attend an examination

This clause provides that it is an offence for a person required to attend an examination to refuse or fail to attend the examination at the time and place specified in the notice. The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

144—Offences relating to appearance at an examination

This clause provides that it is an offence for a person attending an examination in order to answer questions or produce documents to:

- refuse or fail to be sworn;
- refuse or fail to answer a question that the DPP requires the person to answer;
- refuse or fail to produce at the examination a document specified in the examination notice that required the person's attendance;
- leave the examination before being excused by the DPP.

The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

145—Self-incrimination

This clause provides a qualified exclusion of the privilege against self-incrimination.

146—Unauthorised presence at an examination

This clause provides that it is an offence for a person who is not entitled to be present at an examination to be present. The maximum penalty for an offence under the clause is a $2 500 fine.

147—Breaching conditions on which records of statements are provided

This clause provides that it is an offence for a person who breaches a condition imposed under clause 141(1)(d) relating to a record given to the person under clause 139. The maximum penalty for an offence under the clause is a $2 500 fine.

148—Breaching directions preventing or restricting publication

This clause provides that it is an offence for a person to publish certain material in contravention of a direction given under clause 141 by the DPP who conducted the examination. The maximum penalty for an offence under the clause is a $2 500 fine.

The clause also provides that subclause (1) does not apply in the case of disclosure of a matter to obtain legal advice or legal representation in relation to the order, or for the purposes of, or in the course of, legal proceedings.

Division 2—Production orders

149—Interpretation

This clause defines what a property-tracking document is.

150—Making production orders

This clause provides that a magistrate may, on the application of an authorised officer, make an order requiring a person to produce one or more property-tracking documents, or make one or more property-tracking documents available, to an authorised officer for inspection.

However, a magistrate must not make a production order unless the magistrate is satisfied by information on oath that the person is reasonably suspected of having possession or control of the documents.

151—Contents of production orders

This clause sets out the requirements related to the form and content of a production order, along with procedural matters related to making such an order.

152—Powers under production orders

This clause provides that an authorised officer may inspect, take extracts from, or make copies of, a document produced or made available under a production order.

153—Retaining produced documents

This clause provides that an authorised officer may retain a document produced under a production order for as long as is necessary for the purposes of this measure. The clause also provides that a person to whom a production order is given may require the authorised officer to certify in writing a copy of the document retained to be a true copy and give the person the copy, or allow the person to inspect, take extracts from and make copies of the document.

154—Self-incrimination

This clause provides a qualified exclusion of the privilege against self-incrimination.

155—Varying production orders

This clause provides that a magistrate who made a production order requiring a person to produce a document to an authorised officer under the production order may vary the order so that it instead requires the person to make the document available for inspection.

156—Making false statements in applications

This clause provides that it is an offence to make a false or misleading statement in, or in connection with, an application for a production order or an application for a variation of a production order. The maximum penalty for an offence under the clause is a fine of $5 000 or imprisonment for 1 year.

157—Disclosing existence or nature of production orders

This clause provides that disclosure of the existence of certain production orders, or of information from which another person could infer the existence or nature of the order, is an offence, the penalty for which is a fine of $10 000 or imprisonment for 2 years.

The clause also provides exceptions to the above.

158—Failing to comply with a production order

This clause provides that it is an offence for a person given a production order in relation to a property-tracking document to fail to comply with the order unless the person has been excused from complying under subclause (2).

159—Destroying etc a document subject to a production order

This clause provides that it is an offence for a person to destroy, deface or otherwise interfere with a property-tracking document knowing, or recklessly indifferent to the fact, that a production order is in force requiring the document to be produced or made available to an authorised officer. The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

Division 3—Notices to financial institutions

160—Giving notices to financial institutions

This clause provides for the giving of notices by a police officer of or above the rank of Superintendent to a financial institution requiring the institution to provide to an authorised officer certain information or documents.

The clause also sets out requirements as to the form and content of such a notice, along with limiting the circumstances in which such a notice may be given to where the officer reasonably believes that giving the notice is required to determine whether to take any action under this Act, or in relation to proceedings under this Act.

161—Immunity from liability

This clause limits the liability of a financial institution, or an officer, employee or agent of the institution, in relation to any action taken by the institution or person under a notice under clause 160 or in the mistaken belief that action was required under the notice.

162—Making false statements in notices

This clause provides that it is an offence to make a false or misleading statement in, or in connection with, a notice under clause 160. The maximum penalty for an offence under the clause is a fine of $5 000 or imprisonment for 1 year.

163—Disclosing existence or nature of notice

This clause provides that disclosure of the existence of certain notices under clause 160, or of information from which another person could infer the existence or nature of the notice, is an offence, the penalty for which is a fine of $10 000 or imprisonment for 2 years.

The clause also provides exceptions to the above.

164—Failing to comply with a notice

This clause provides that it is an offence for a person given a notice under clause 160 to fail to comply with the notice. The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

Division 4—Monitoring orders

165—Making monitoring orders

This clause provides that a judge of the District Court may, on the application of an authorised officer, make an order that a financial institution provide information about transactions conducted during a specified period (including a future period) through an account held by a specified person with the institution.

The clause also limits when such an order can be made.

166—Contents of monitoring orders

This clause sets out requirements relating to the form and content of a monitoring order, along with procedural matters related to making such an order.

167—Immunity from liability

This clause limits the liability of a financial institution, or an officer, employee or agent of the institution, in relation to any action taken by the institution or person in complying with a monitoring order or in the mistaken belief that action was required under the order.

168—Making false statements in applications

This clause provides that it is an offence to make a false or misleading statement in, or in connection with, an application for a monitoring order. The maximum penalty for an offence under the clause is a fine of $10 000 or imprisonment for 2 years.

169—Disclosing existence or operation of monitoring order

This clause provides that disclosure of the existence or operation of a monitoring order to a person other than a specified person, or of information from which another person could infer the existence or operation of an order, is an offence.

It is also an offence for a person who receives information relating to a monitoring order in accordance with subclause (4), and then ceases to be a person to whom information could be disclosed in accordance with that subclause, to make a record of, or disclose, the existence or the operation of the order.

The penalty for an offence under the clause is a fine of $20 000 or imprisonment for 4 years.

Subclause (4) specifies persons to whom such disclosure can be made.

170—Failing to comply with monitoring order

This clause provides that it is an offence for a person given a monitoring order to fail to comply with the notice. The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

Division 5—Search and seizure

Subdivision 1—Preliminary

171—Interpretation

This clause provides a definition of ***material liable to seizure under this Act***.

Subdivision 2—Search warrants

172—Warrants authorising seizure of property

This clause provides that a magistrate may, if reasonable grounds exist and on application by an authorised officer, issue a warrant authorising the seizure of material liable to seizure under this measure, or the search of a particular person, or particular premises, and the seizure of material liable to seizure under this measure found in the course of the search.

173—Applications for warrants

This clause sets out the procedure for an application for a warrant.

174—Powers conferred by warrant

This clause sets out the powers that are conferred on an authorised officer by a warrant, and the limitations on exercising such powers.

175—Hindering execution of warrant

This clause provides that it is an offence to, without lawful excuse, hinder an authorised officer, or a person assisting an authorised officer, in the execution of a warrant. The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

176—Person with knowledge of a computer or a computer system to assist access etc

This clause provides that an authorised responsible for executing a warrant may apply to a magistrate for an order requiring a specified person to provide information or assistance in relation to accessing and dealing with certain data held in or accessible from a computer that is on the premises specified in the warrant.

The clause sets out when such an order can be made.

The clause also provides that it is an offence for the specified person to fail to comply with such an order, the penalty for which is a fine of $2 500 or imprisonment for 6 months.

177—Providing documents after execution of a search warrant

This clause provides that, if documents were on, or accessible from, the premises of a financial institution at the time when a search warrant relating to those premises was executed, and those documents were not able to be located at that time, and the financial institution provides them to the authorised officer who executed the warrant as soon as practicable after the execution of the warrant, then the documents are taken to have been seized under the warrant.

Subdivision 3—Seizure without warrant

178—Seizure without warrant allowed in certain circumstances

This clause provides that an authorised officer may seize material if the officer suspects on reasonable grounds that the material is liable to seizure under this Act and the person in possession of the material consents to the seizure, or the material is found in the course of a search conducted under another law and the officer suspects on reasonable grounds that the material is liable to seizure under this measure.

179—Stopping and searching vehicles

This clause provides that, if an authorised officer suspects on reasonable grounds that material liable to seizure under this measure is in or on a vehicle, and that it is necessary to exercise a power under this clause in order to prevent the material from being concealed, destroyed, lost or altered, and, because the circumstances are serious and urgent, it is necessary to exercise the power without the authority of a

search warrant, then the authorised officer may, with such assistants as he or she considers necessary, do the following things:

- stop and detain the vehicle; and
- search the vehicle and any container in or on the vehicle, for the material; and
- seize the material if he or she finds it there.

The clause also sets out requirements for dealing with other material liable to seizure under this measure found during a search, along with requirements relating to the conduct of such a search.

Subdivision 4—Dealing with material liable to seizure under this Act

180—Receipts for material seized under warrant

This clause provides that the authorised officer who executes a warrant, or a person assisting the authorised officer, must provide a receipt for material liable to seizure under this Act that is seized.

181—Responsibility for material seized

This clause provides that the responsible custodian must arrange for material seized to be kept until it is dealt with in accordance with this measure, and must ensure that all reasonable steps are taken to preserve the material while it is kept.

182—Effect of obtaining forfeiture orders

This clause provides that the responsible custodian must deal with seized material that has, since being seized and whilst in the possession of the responsible custodian, become subject to a forfeiture order as required by the order.

183—Returning seized material

This clause provides that, if material is seized on the ground that it is evidence relating to property in respect of which action has been or could be taken under this measure, benefits derived from the commission of a serious offence, or literary proceeds, and either the reason for the material's seizure no longer exists or it is decided that the material is not to be used in evidence, or (if the material was seized under proposed Subdivision 3) the period of 60 days after the material's seizure has ended, the authorised officer who executed the warrant, or who seized the material under proposed Subdivision 3, (as the case requires) must take reasonable steps to return the material to the person from whom it was seized or to the owner if that person is not entitled to possess it.

However, subclause (2) provides certain exceptions to the above.

184—Magistrate may order that material be retained

This clause provides that, if an authorised officer has seized material liable to seizure under this measure under this proposed Division, and proceedings in respect of which the material might afford evidence have not commenced before the end of 60 days after the seizure, or a period previously specified in an order of a magistrate under this clause, the authorised officer may apply for, and a magistrate grant, an order that the authorised officer may retain the material for a further period.

185—Return of seized material to third parties

This clause provides that person who claims an interest in material seized on the ground that it is suspected of being tainted property may apply to a court for an order that the material be returned to the person, and a court must order the responsible custodian of the material to return the material to the applicant if the court is satisfied of the prescribed matters.

186—Return of seized material if applications are not made for restraining orders or forfeiture orders

This clause provides that if material has been seized on the ground that a person believes on reasonable grounds that it is tainted property, and at the time when the material was seized an application had not been made for a restraining order or a forfeiture order that would cover the material, such an application is not made during the period of 25 days after the day on which the material was seized, the responsible custodian of the material must arrange for the material to be returned to the person from whose possession it was seized as soon as practicable after the end of that period. However, this clause does not apply to material to which clause 187 applies.

187—Effect of obtaining restraining orders

This clause provides that, if material has been seized on the ground that a person believes on reasonable grounds that it is tainted property and, but for this subclause, the responsible custodian of the material would be required to arrange for the material to be returned to a person as soon as practicable after the end of a particular period, and before the end of that period, a restraining order is made covering the material, then:

- if the restraining order directs the Administrator to take custody and control of the material—the responsible custodian must arrange for the material to be given to the Administrator in accordance with the restraining order; or
- if the court that made the restraining order has made an order under subclause (3) in relation to the material—the responsible custodian must arrange for the material to be kept until it is dealt with in accordance with another provision of this measure.

The clause also provides that in certain circumstances the Administrator may apply to the court that made the restraining order for an order that the responsible custodian retain possession of the material, and sets out procedures in relation to such applications.

188—Effect of refusing applications for restraining orders or forfeiture orders

This clause provides that, if material has been seized on the ground that a person believes on reasonable grounds that it is tainted property, and an application is made refused for a restraining order or a forfeiture order that would cover the material, and at the time of the refusal the material is in the possession of the responsible custodian, then the responsible custodian must arrange for the material to be returned to the person from whose possession it was seized as soon as practicable after the refusal.

Subdivision 5—Miscellaneous

189—Making false statements in applications

This clause provides that it is an offence to make a false or misleading statement in, or in connection with, an application for a search warrant. The maximum penalty for an offence under the clause is a fine of $10 000 or imprisonment for 2 years.

Part 7—Administration

Division 1—Powers and duties of the Administrator

Subdivision 1—Preliminary

190—Appointment of Administrator

This clause provides that the Minister may appoint a person, or a person for the time being holding or acting in a particular office or position, as the Administrator under this Bill.

191—Property to which the Administrator's powers and duties under this Division apply

This clause provides that the Administrator must perform a duty imposed by, and may exercise a power conferred by, this proposed Division in relation to controlled property. The clause also provides that the Administrator must perform a duty imposed, and may exercise a power conferred, by proposed Subdivision 4 in relation to property that is the subject of a restraining order, whether or not the property is controlled property.

Subdivision 2—Obtaining information about controlled property

192—Access to documents

This clause provides that the Administrator, or another person authorised in writing by the Administrator, may, by notice in writing, require the suspect in relation to a restraining order covering the controlled property, or any other person entitled to, or claiming an interest in, the controlled property, to produce specified documents in the possession of the person.

The clause also sets out what the Administrator, or person making the requirement, can do in relation to the documents, and sets out procedural matters in relation to what happens if the documents are not produced.

The clause also provides that it is an offence to refuse or fail to comply with a requirement under this clause, and to obstruct or hinder a person in the exercise of a power under this clause. The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

193—Suspect to assist Administrator

This clause provides that a suspect in relation to a restraining order covering controlled property must not, unless excused by the Administrator or with a reasonable excuse, refuse or fail to do certain things. The clause also provides that it is an

offence to obstruct or hinder the Administrator in the exercise of a power under subclause (1), the maximum penalty for which is a fine of $2 500 or imprisonment for 6 months.

194—Power to obtain information and evidence

This clause provides that the Administrator may require a person to give to the Administrator such information as the Administrator may require, and to attend before the Administrator, or a person authorised in writing by the Administrator, and give evidence and produce all documents in the possession of the person notified, relating to the exercise of the Administrator's powers or the performance of the Administrator's duties under this proposed Division. The clause also provides procedural matters, and an offence of refusing or failing to comply with a requirement under this section, the maximum penalty for which is a fine of $2 500 or imprisonment for 6 months.

195—Self-incrimination

This clause provides a qualified exclusion of the privilege against self-incrimination.

196—Failure of person to attend

This clause provides that it is an offence for a person who, being required to attend before the Administrator, or a person authorised in writing by the Administrator, to fail to attend as required. The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

197—Refusal to be sworn or give evidence etc

This clause provides that person who, being required to attend before the Administrator or a person authorised in writing by the Administrator, attends but refuses or fails to be sworn, or to answer a question that the person is required to answer, or to produce any documents that the person is required to produce, is guilty of an offence. The maximum penalty for an offence under the clause is a fine of $2 500 or imprisonment for 6 months.

Subdivision 3—Dealings relating to controlled property

198—Preserving controlled property

This clause provides that the Administrator may do anything that is reasonably necessary for the purpose of preserving the controlled property.

199—Rights attaching to shares

This clause provides that the Administrator may exercise the rights attaching to any of the controlled property that is shares as if the Administrator were the registered holder of the shares and to the exclusion of the registered holder.

200—Destroying or disposing of property

This clause provides that the Administrator may destroy controlled property in certain circumstances. The clause also provides that he Administrator may dispose of controlled property, by sale or other means in certain circumstances.

201—Objection to proposed destruction or disposal

This clause provides that a person who has been notified under clause 200(3) of a proposed destruction or sale under that section may object in writing to the Administrator within 14 days of receiving the notice.

202—Procedure if person objects to proposed destruction or disposal

This clause provides that, if an objection to a proposed destruction or disposal of controlled property has been made, the Administrator may apply to the court that made the restraining order covering the controlled property for an order that the Administrator may destroy or dispose of the property. The clause also provides that the court may make such an order if it is in the public interest to do so, or it is required for the health or safety of the public.

The clause also provides that the court may make an order to dispose of the controlled property if, in the court's opinion the property is likely to lose value, or if the cost of controlling the property until it is finally dealt with by the Administrator is likely to exceed, or represent a significant proportion of, the value of the property when it is finally dealt with. The court may also order that a specified person bear the costs of controlling the controlled property until it is finally dealt with by the Administrator, or that a specified person bear the costs of an objection to a proposed destruction or disposal of the property.

203—Proceeds from sale of property

This clause clarifies the status of amounts realised from a sale of controlled property under clause 200.

Subdivision 4—Discharging pecuniary penalty orders and literary proceeds orders

204—Direction by a court to the Administrator

This clause provides that a court that makes a pecuniary penalty order or literary proceeds order may, in the order, direct the Administrator to pay the Crown, out of property that is subject to a restraining order, an amount equal to, the penalty amount under a pecuniary penalty order or the amount to be paid under a literary proceeds order in certain circumstances.

The clause provides a similar provision relating to restraining orders.

Subclause (3) provides that court that made a pecuniary penalty order, a literary proceeds order or a restraining order may, on the application of the DPP, direct the Administrator to pay the Crown, out of property that is subject to a restraining order, an amount equal to, the penalty amount under a pecuniary penalty order or the amount to be paid under a literary proceeds order in certain circumstances.

The clause also provides that a court may, in the order in which the direction is given or by a subsequent order, direct the Administrator to sell or otherwise dispose of such of the property that is subject to the restraining order as the court specifies, and appoint an officer of the court or any other person to execute any deed or instrument in the name of a person who owns or has an interest in the property.

205—Administrator not to carry out directions during appeal periods

This clause sets out when the Administrator, if he or she is given a direction under clause 204 in relation to property, may take any action to comply with the direction.

206—Discharge of pecuniary penalty orders and literary proceeds orders by credits to the Victims of Crime Fund

This clause provides that, if the Administrator pays the Crown, in accordance with a direction under this proposed Subdivision, an amount of money equal to the penalty amount under a pecuniary penalty order, or the amount to be paid under a literary proceeds order, made against a person, then that money must be dealt with as required by clause 209 and the person's liability under a pecuniary penalty order or literary proceeds order (as the case requires) is discharged.

Division 2—Legal assistance

207—Payments to Legal Services Commission for representing suspects and other persons

This clause provides that the Administrator may pay to the Legal Services Commission, out of the property of a suspect that is covered by a restraining order, legal assistance costs for representing the suspect in criminal proceedings, and for representing the suspect in proceedings under this measure.

The clause also provides that the Administrator may pay to the Legal Services Commission, out of the property of a person other than the suspect that is covered by a restraining order, legal assistance costs for representing the person in proceedings under this measure.

The clause also sets out conditions relating to the payment of such costs.

208—Disclosure of information to Legal Services Commission

This clause provides that the DPP or the Administrator may, for the purpose of the Legal Services Commission determining whether a person should receive legal assistance under this proposed Division, disclose to the Commission information obtained under this measure that is relevant to making that determination.

Division 3—Victims of Crime Fund

209—Credits to the Victims of Crime Fund

This clause provides that proceeds of confiscated assets and any money deriving from the enforcement in the State of an order under a corresponding law must be applied towards the costs of administering this measure and the balance must be paid into the Victims of Crime Fund. The clause also provides that certain other money received by Crown under the equitable sharing program, or paid by the Commonwealth to the Crown following its receipt under a treaty or arrangement providing for mutual assistance in criminal matters, must be paid into the Victims of Crime Fund.

The clause also defines certain terms used in the clause.

Division 4—Charges on property

Subdivision 1—Charge to secure certain amounts payable to the Crown

210—Charge on property subject to restraining order

This clause provides that, if a confiscation order is made against a person in relation to a serious offence, and a restraining order relating to the offence or a related offence is, or has been, made against the person's property, or another person's property in relation to which an order under clause 123(1) is, or has been, made, then upon the making of the later of the orders, there is created, by force of this section, a charge on the property to secure the payment to the Crown of the penalty amount or the literary proceeds amount (as the case requires). The clause also provides for when such a charge ceases to have effect.

Subdivision 2—Charge to secure certain amounts payable to Legal Services Commission

211—Legal Services Commission charges

This clause provides that, if the Legal Services Commission is to be paid an amount out of property that is covered by a restraining order, and either the court revokes the restraining order or the order ceases to be in force under clause 46, there is created by force of this clause a charge on the property to secure the payment of the amount to the Legal Services Commission. The clause also provides that such a charge may be registered, and provides for when such a charge ceases to have effect.

Subdivision 3—Registering and priority of charges

212—Charges may be registered

This clause provides that the Administrator or the DPP may cause a charge created by this measure on property of a particular kind, to be registered under the provisions of an Act providing for the registration of title to, or charges over, property of that kind.

The clause also provides that, for the purposes of clause 210(2)(e), a person who purchases or otherwise acquires an interest in the property after registration of the charge is taken to have notice of the charge at the time of the purchase or acquisition.

213—Priority of charges

This clause provides that a charge created by this measure is subject to every encumbrance on the property that came into existence before the charge and that would otherwise have priority, has priority over all other encumbrances and, subject to this measure, is not affected by a change of ownership of the property.

Part 8—Miscellaneous

214—Authorised officers to be issued identity cards

This clause requires that an authorised officer (other than the DPP or a police officer) must be issued with an identity card. The clause sets out information such a card must contain.

The clause also provides that an authorised officer (other than the DPP) must, at the request of a person in relation to whom the authorised officer intends to exercise any powers under this measure, produce for the inspection of the person his or her warrant card (in the case of an authorised officer who is a police officer) or identity card (in any other case).

215—Immunity from civil liability

This clause limits the liability of the Administrator, the DPP, an authorised officer or any other person engaged in the administration of this measure, in relation to an honest act or omission in the exercise, or purported exercise, of a power, function or duty under this measure.

216—Manner of giving notices etc

This clause provides procedural requirements in relation to a notice, order or other document required or authorised by this measure to be given to or served on a person.

217—Registration of orders made under corresponding laws

This clause provides that an order under a corresponding law may be registered, on application by the Administrator, in the Supreme Court, and further provides for the effect of such registration.

218—Certain proceedings to be civil

This clause provides that proceedings on an application for a freezing order, a restraining order or a confiscation order are civil proceedings.

219—Consent orders

This clause provides that a court may make an order in a proceeding under proposed Part 3, 4 or 5 with the consent of the applicant in the proceeding, and each person that the court has reason to believe has an interest in property the subject of the proceeding. The clause also sets out procedural matters in relation to such an order.

220—Onus and standard of proof

This clause provides that the applicant in any proceedings under this measure bears the onus of proving the matters necessary to establish the grounds for making the order applied for. The clause also provides that, subject to clause 47(7) and clause 98, any question of fact to be decided by a court on an application under this measure is to be decided on the balance of probabilities.

221—Applications to certain courts

This clause provides that where the DPP applies for an order under this measure relating to a serious offence during the course of criminal proceedings in respect of the offence, the court must deal with the application during the course of those proceedings unless satisfied by the defendant that to do so would not be appropriate in the circumstances, along with procedural matters relating to such an application.

222—Proof of certain matters

This clause establishes a number of evidentiary presumptions.

223—Stay of proceedings

This clause provides that the fact that criminal proceedings have been instituted or have commenced (whether or not under this measure) is not a ground on which a court may stay proceedings under this measure that are not criminal proceedings.

224—Effect of the confiscation scheme on sentencing

This clause provides that a court passing sentence on a person in respect of the person's conviction of a serious offence:

- may have regard to any cooperation by the person in resolving any action taken against the person under this Act; and
- must not have regard to any forfeiture order that relates to the offence, to the extent that the order forfeits proceeds of the offence; and
- must have regard to the forfeiture order to the extent that the order forfeits any other property; and
- must not have regard to any pecuniary penalty order, or any literary proceeds order, that relates to the offence.

225—Deferral of sentencing pending determination of confiscation order

This clause provides that a court may, if satisfied that it is reasonable to do so in all the circumstances, defer passing sentence until it has determined the application for the confiscation order in certain circumstances.

226—Appeals

This clause provides for a right of appeal for a person against whom a confiscation order is made, or who has an interest in property against which a forfeiture order is made, or who has an interest in property that is declared in an order under clause 123 to be available to satisfy a pecuniary penalty order or literary proceeds order. The DPP has the same right of appeal, and may also appeal against a refusal by a court to make an order as if such an order had been made and the DPP was appealing against that order.

The clause also sets out procedural matters relating to such an appeal.

227—Costs

This clause provides for the awarding of certain costs in favour of a person successfully bringing, or appearing at, proceedings to prevent a forfeiture order or restraining order from being made against property of the person, or to have property of the person excluded from a forfeiture order or restraining order. However, the person must not have been involved in any way in the commission of the serious offence in respect of which the forfeiture order or restraining order was sought or made.

228—Interest

This clause provides for the payment of interest to a person if money of the person is seized or forfeited under this measure, and not less than one month after the seizure or forfeiture, the money (or an equal amount of money) is required under this measure to be paid back to the person or the person is required to be compensated by the Crown under this measure in respect of the seizure or forfeiture.

However, except as provided by this clause, no interest is payable by the Crown in respect of property seized or forfeited under this measure.

229—Effect of a person's death

This clause sets out procedural matters relating to how proceedings under the measure are affected by the death of a person.

230—Regulations

This clause provides that the Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this measure.

Schedule 1—Related amendments, repeals and transitional provisions

This proposed Schedule repeals the *Criminal Assets Confiscation Act 1996*, and makes consequential amendments to the *Controlled Substances Act 1984*, the *Criminal Law Consolidation Act 1935*, the *Financial Transaction Reports (State Provisions) Act 1992* and the *Legal Services Commission Act 1977*.

The proposed Schedule also provides a transitional provision that an order in force under the *Criminal Assets Confiscation Act 1996* immediately before the commencement of this measure continues in force, subject to this measure, as if this measure had been in force when the order was made and the order had been made under this measure.

The Hon. R.D. LAWSON secured the adjournment of the debate.

ADJOURNMENT

At 10.21 p.m. the council adjourned until Tuesday 1 March at 2.15 p.m.