LEGISLATIVE COUNCIL

Thursday 7 April 2011

The PRESIDENT (Hon. R.K. Sneath) took the chair at 14:17 and read prayers.

PARKS COMMUNITY CENTRE

The Hon. M. PARNELL: Presented a petition signed by 146 residents of South Australia requesting the council to urge the government to guarantee ongoing funding for the continued provision of services and facilities at the Parks Community Centre site for the enjoyment and wellbeing of residents of the Parks and surrounding communities.

ANSWERS TO QUESTIONS

The PRESIDENT: I direct that the following written answer to a question be distributed and printed in *Hansard*.

RSPCA INVESTIGATION

14 The Hon. J.M.A. LENSINK (22 June 2010). Can the Minister for Environment and Conservation advise:

1. When will the review of the RSPCA's investigation into allegations of animal cruelty by Mr Thomas Brinkworth be completed?

2. Will the findings of the investigation be made public?

The Hon. G.E. GAGO (Minister for Regional Development, Minister for Public Sector Management, Minister for the Status of Women, Minister for Consumer Affairs, Minister for Government Enterprises): The Minister for Environment and Conservation has been advised:

1. It is anticipated that the Solicitor General's review will be completed in May 2011.

2. A summary of the findings of the review will be publicly available.

ROYAL ADELAIDE HOSPITAL

The Hon. G.E. GAGO (Minister for Regional Development, Minister for Public Sector Management, Minister for the Status of Women, Minister for Consumer Affairs, Minister for Government Enterprises) (14:19): I table a copy of a ministerial statement made earlier today in another place by the Hon. John Hill, the Minister for Health, on the topic of the new Royal Adelaide Hospital costs.

Members interjecting:

The PRESIDENT: Order!

QUESTION TIME

ROYAL ADELAIDE HOSPITAL

The Hon. D.W. RIDGWAY (Leader of the Opposition) (14:19): I seek leave to make a brief explanation before asking the minister representing the Minister for Health a question about utilities costs for the new Royal Adelaide Hospital.

Leave granted.

The Hon. D.W. RIDGWAY: In interviews on ABC local radio and on FIVEaa last month the Minister for Health, the Hon. John Hill, was attempting to defend the new hospital's insufficient 4-star energy rating—insufficient, because this rating is lower than the minimum required by the Premier for all new government buildings. Mr Hill claimed, on Ian Henschke's 891 morning radio program, that the consortium, not the taxpayer, will be 'responsible for the electricity side of the operation, so it's in their interest to reduce the amount of electricity being used'.

On Leon Byner's FIVEaa program the minister claimed new energy saving devices would be applied as they came through. He asserted:

> There's a real incentive for the builders to do this because they're responsible through the contract over the 35 years of the contract for the supply of energy, so if it's very energy efficient they'll have to spend less money.

My questions are:

1. How does the government claim stack up against page 38.42 of the key financial management risks and mitigants, contained in the information presentation from Macquarie Bank (a member of the preferred consortium), and point 4.2, which specifically states about the cost of utilities, such as electricity, 'Under the project agreement there is a full pass-through of the costs to the state'?

2. Will the minister now apologise to South Australians for his multimillion dollar mistake?

3. Can he provide to the parliament a full estimate of the expected costs of all utilities, external waste collection services and grocery items which, according to the Macquarie Bank, will be passed on in full to taxpayers?

Members interjecting:

The PRESIDENT: Order! The honourable minister.

The Hon. G.E. GAGO (Minister for Regional Development, Minister for Public Sector Management, Minister for the Status of Women, Minister for Consumer Affairs, Minister for Government Enterprises) (14:21): Thank you, Mr President. I thank the honourable member for his most important question.

Members interjecting:

The PRESIDENT: Order! The honourable minister.

The Hon. G.E. GAGO: Thank you, Mr President. I thank the honourable member for his most important questions. I will refer them to the Minister for Health in another place and bring back a response. However, these are outrageous assertions by the opposition. They come into this place time and time again with incorrect and inaccurate information and alleged documents—and we know they have a track record of referring to dodgy documents. They come into this place and are not prepared to present the document that they are referring to. They are clearly not prepared to refer to this document outside these walls because they cower in this place within the protection of these walls.

They are sleazy cowards. It is nothing short of a disgrace. What we are talking about is the building of a state-of-the-art public health facility that will be something that all South Australians can be proud of. We went to the last election with that promise, and we won that election soundly with a clear mandate for the building of that hospital—it was a clear mandate. We went into that election with a promise of building that hospital to replace the Royal Adelaide. They squeal like stuck pigs.

UNLICENSED BUILDING CONTRACTORS

The Hon. J.M.A. LENSINK (14:24): I seek leave to make a brief explanation before asking the Minister for Consumer Affairs a question about OCBA warning practices for unlicensed building contractors.

Leave granted.

The Hon. J.M.A. LENSINK: OCBA media releases have referred to several cases of unlicensed contractors who have been issued with—

Members interjecting:

The PRESIDENT: Order! The Hon. Ms Lensink, you might want to start again.

The Hon. J.M.A. LENSINK: Okay, I will start again. OCBA media releases have referred to matters that OCBA has taken up with unlicensed building contractors. I refer specifically to a Mr Dean Harper who was issued with a formal warning against operating unlicensed in 2004, in which he was advised that, if he continued to breach the law, then further action would be taken. Subsequently, in this year, the Magistrates Court has found him guilty of contracting for building and plumbing work without appropriate licences.

A Mr Higgins, who repeatedly ignored warnings relating to noncompliant gas fitting work, continued to perform such work without appropriate training and so forth. Subsequently, after repeated offences, the individual was convicted and fined by the Magistrates Court. My questions for the minister are: on what basis does OCBA issue warnings to individuals undertaking activities defined within their occupational licensing statute without a licence, and how many warnings have been issued in the current financial year?

The Hon. G.E. GAGO (Minister for Regional Development, Minister for Public Sector Management, Minister for the Status of Women, Minister for Consumer Affairs, Minister for Government Enterprises) (14:25): I thank the honourable member for her most important question. I have some figures here, which I am happy to share. Indeed, OCBA's primary policy is primary intervention, if you like, and prevention. They do that through education and information to the industry, both in terms of consumers' rights and traders' and businesses' responsibilities. So, that is their first goal, to try to prevent problems beginning in the first place.

They have a range of different powers depending on the different levels of breaches, but OCBA certainly strives to attempt to draw problems to the attention of traders or businesses in the early stages, to use that as an opportunity to inform and make people aware of their responsibilities and give them a chance to improve and change their practices so that they are in full compliance. So, they have a position where they have adopted a policy of warning offenders, particularly in the first instance, and expiating reoffenders where, obviously, there is enough evidence to determine that they are in breach of a provision.

They do their job in a very responsible way, as I said, with the primary focus on trying to ensure that, in the first instance, problems that end up being costly to consumers, costly to businesses and costly to government are avoided. Of course, the government's costs are really the taxpayers' costs, so they focus very strongly on that information, education and early intervention, so to speak.

In terms of building contractors, I have been advised that, in the period 2009-10, there were 688 written warning letters; 136 written undertakings obtained where specific actions, I understand, were agreed to; six assurances given; seven prosecutorial court disciplinary actions; matters with the crown prosecution, 27; and matters under formal investigation, 73.

LOCAL GOVERNMENT ETHICS

The Hon. S.G. WADE (14:29): I seek leave to make a brief explanation before asking a question of the Minister for State/Local Government Relations relating to ethics in local government.

Leave granted.

The Hon. S.G. WADE: Last night, in the debate on the ForestrySA Select Committee, the Minister for State/Local Government Relations accused two South-East mayors of being politically motivated in their criticism of the government's proposed sale of ForestrySA assets in the South-East. He said:

> I have no doubt that a major part of this campaign has been motivated by political interests and, particularly, by people trying to line themselves up for future tilts at MacKillop or Mount Gambier, whether that be as Liberal candidates or as Independents...

Later he said:

> I think ratepayers have a right to ask how much of their money has been put from local governments into this campaign in order to boost the political careers of individuals.

At a public meeting on 3 November 2010, Mark Braes, the then mayor of Wattle Range Council, successfully moved the following five motions; that the meeting:

- record its opposition to the sale;
- record its strident view that any sale will have detrimental and irreversible effects on the local timber industry, associated industry, retail and commercial sectors;
- insist the government not proceed with a forward sale until the proposed regional impact statement has been considered by the local community;
- endorse a deputation of mayors from councils, with Mr Coates added as a union representative; and
- if the state government insists on proceeding with the sale, the public meeting endorses that councils and stakeholders take strategies and actions jointly to stop the forward sale.

On 9 November 2010, the Wattle Range Council resolved to contribute $50,000 towards the Save Our Forest Industry campaign. At the time, the Mayor of Wattle Range Council was Mr Mark Braes. Mr Mark Braes serves as President of Country Labor, part of the South Australian branch of the Australian Labor Party.

Does the minister consider that former mayor Braes is involved in a politically-motivated campaign furthering his own political interests, such that his representation should be ignored, or does the minister intend to run one code of ethics for Labor mayors and one code of ethics for all other mayors?

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (14:31): I thank the Hon. Mr Wade for his question. It is typical of the Liberal opposition to try to mischaracterise the comments that I made. It is typical of the Liberal opposition to try to mischaracterise what I said last night in this house in order to try to make a political point, because they know how thin their opposition to any proposed forward sale and their support for the select committee really are, otherwise they would not have had to have the Hon. Mr Lucas come to their rescue last night and jump up and debate.

Obviously, because the Liberal Party has no confidence in any of the other members in here to make an argument, it has to rely on the Hon. Mr Lucas to stand by and hop up to make the case. As you will recall, Mr President, I indicated to you that I intended to speak on the motion before the debate started.

Members interjecting:

The Hon. B.V. FINNIGAN: Here, again, all honourable members opposite can do is sit there and throw barbs under parliamentary privilege. The Hon. Mr Lucas likes to say, 'Challenge me to go and say this and say that.' He loves to hop up in here and say that I am lying and that I am misleading the house about whether a decision has been made. I am sure he does not go out there and say that I am a liar in public. He is indeed the master of hiding behind parliamentary privilege.

Members interjecting:

The Hon. B.V. FINNIGAN: I did not accuse the mayors of acting corruptly. What I said last night I stand by; that is, political motivations are undoubtedly a part of this campaign. As I acknowledged last night in my contribution, if you read it in full, I said that I accept that people are concerned about this. I acknowledged people's rights to participate in the campaign, to protest here at parliament to make their views known to the government. I acknowledge that absolutely. But to pretend that there is not a single bit of political interest in two former failed Liberal candidates who are mayors running this campaign is, quite frankly, beyond belief.

Are honourable members opposite seriously suggesting that the two people who represented their party in the seat of Mount Gambier at the last two elections have no affiliation, no concern and no interest in the Liberal Party succeeding? Are they seriously saying that they are that weak and disloyal as members of the Liberal Party that they have no interest in the Liberal Party succeeding? They are members of the Liberal Party, as far as I am aware, and they have certainly been Liberal candidates in the past.

To suggest that they have no interest at all in the Liberal Party succeeding in a political campaign on forests is just absurd. It is beyond belief. Let's all act like grown-ups and acknowledge that there is political interest involved when two former Liberal candidates are spearheading a campaign on this issue. As I said last night, if either Mr Perryman or Mr Gandolfi want to publicly pledge that they will not be candidates in a future state election, whether it be Liberal or Independent—

Members interjecting:

The Hon. B.V. FINNIGAN: —if Mr Perryman or Mr Gandolfi want to publically pledge that they will not be candidates in a future state election—

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

The Hon. B.V. FINNIGAN: You see that the Hon. Mr Dawkins and honourable members opposite of course are trying to shout me down on this point because they know that I am perfectly right. They already know. They know that these individuals are either planning to run for the Liberal Party or as independent liberals, either at the next election or even the one after. If Mr Gandolfi and Mr Perryman want to publicly pledge that they will not be candidates at a future state election, as I said last night in my contribution, I will happily apologise to them, but of course honourable members opposite try to shout that down, because they know perfectly well that part of this campaign is undoubtedly to further the political interests of the Liberal Party.

That is why, as I said last night, the Liberal Party and the Liberal opposition are threatening the jobs of the very people they aim to protect and claim to represent. The constant talking down of the South-East and saying that it will have no future if the forward sale of the forests goes ahead; the constant talk that property values will plummet, that 3,000 people will be out of jobs overnight, that constant speculation; that constant talking down the region as if it has no future and has nothing to offer is a great disservice to the people of the South-East.

It is leaving them hanging out to dry to suggest that a government decision, that has not even been taken yet, will ruin their community, and it is already having a serious impact on the morale of people in the South-East and the standing of that community. It is perfectly correct to say that there are political interests at heart in some of the campaigning that has gone on down there, and that has been very clear throughout this whole process.

I do believe that ratepayers have a right to ask how much of their money has been spent on this campaign and how much of their money has been spent on furthering the interests of the Liberal Party. What has this money been used for? Ratepayers have a right to ask what their money has been used for—T-shirts with cartoons of the former Treasurer on them? The so-called community impact statement—all 10 pages of it—with no-one's name and no-one's signature, the community impact statement commissioned by this campaign and assumedly paid for is an absolute joke and embarrassment that it would even be released publicly.

The Hon. J.M.A. Lensink interjecting:

The Hon. B.V. FINNIGAN: You can imagine that if the government tabled a 10-page report on a major investment and economic decision, two pages of which were the contents and title page and one of which was a diagram—with no name on it, no date on it, no signature on it—can you imagine that being taken as a credible document? Of course it would not be.

Even looking at that document, it actually says that an unconstrained, no-holds-barred sell-off of the forest assets, including the company and the land, would not be in the best interests of the South-East. Indeed, a no-holds-barred, unconstrained sell-off would not be in the interests of the South-East, and that is why the government has said that that is not what we are going to do. What we are talking about is the possible forward sale of the harvesting rights on forests.

To suggest that if that decision is taken that will be the end of the world for the South-East is irresponsible, reckless and lets down the very people honourable members opposite claim to represent. What it does is try to—

Members interjecting:

The Hon. B.V. FINNIGAN: Mr President, honourable members opposite are complaining that I am answering their question.

Members interjecting:

The Hon. B.V. FINNIGAN: Well, they asked the question. They are asking me whether I stand by what I said last night—the answer is yes. Let me make it very clear that I believe that the Liberal opposition is acting irresponsibly and recklessly by talking down the South-East and by trying to put fear into the community there about their livelihood and job security, based entirely on their own political interests and their own concerns about those seats being held by Independents and not being able to win them at state elections. That has certainly been the motivator for Liberal members opposite in this chamber and the Liberal opposition.

The Hon. P. Holloway interjecting:

The Hon. B.V. FINNIGAN: As the Hon. Mr Holloway points out, they certainly had no qualms not only about selling ETSA and the TAB and so on, but they actually sold the mills that they are now saying are going to shut because of this government. What extraordinary hypocrisy! What absolute shamefaced hypocrisy that honourable members opposite are complaining about the possible sale of harvesting rights for forests in the context of a government-owned company and the government maintaining ownership of the land. They are saying that is going to be what will shut down mills in the South-East, the very ones they sold off. One of the key reasons people in the South-East are concerned is that they saw what happened when the Liberal Party and the Liberal government hung them out to dry.

There is concern about this in the community, and I have said that I accept and understand that. I certainly welcome citizens making known their point of view. Some of those are members of the Labor Party as well, and they are entitled, of course, to that point of view. As I said last night,

what the government will do is examine the regional impact statement carefully. We will weigh up what is in the best interests of the state, what is in the best interests of the people of the South-East and what is in the best interests of a viable, sustainable forestry industry into the future, which will provide those jobs and that economic activity that is so important. We will weigh up what is in the interests of the state and the South-East and, in particular, what is going to be in the interests of the people of the South-East, and that is the basis on which a decision will be made.

FORESTRYSA

The Hon. R.L. BROKENSHIRE (14:43): I have a supplementary following the minister's answer. As a legislative councillor, does the minister support the forward sale of the forests and, if he does not, what is he doing to oppose it?

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (14:43): I thank the honourable 'leader of the opposition' for his question, and I congratulate him on his elevation to office. It is hardly any wonder, after the Liberal Party, over so many years in this state, has allowed successive members—

The Hon. T.J. Stephens interjecting:

The PRESIDENT: Order! The Hon. Mr Stephens should take the whipping he is getting quietly.

The Hon. B.V. FINNIGAN: Thank you, Mr President. I thank the honourable 'leader of the opposition'. It is no surprise that the Liberal Party is again getting into the same pattern it has had, certainly over the period of this government, which is to allow certain crossbenchers—and good luck to them—to become the de facto leader of the opposition because they are so ineffective at actually prosecuting any sort of case to be the government of the state. What I said—

The Hon. T.J. Stephens interjecting:

The PRESIDENT: Order! The Hon. Mr Stephens will come to order.

An honourable member: Why?

The PRESIDENT: Because he's annoying me. The honourable minister.

The Hon. B.V. FINNIGAN: Thank you, Mr President. Can I say to the Hon. Mr Brokenshire that what I support is making a decision in the best interests of the state and the South-East and the people who live there. So, like every other member of the government, I will wait until I see the regional impact statement. I will consider it carefully, and I will make a decision based on what is in the best interests of the people of the South-East and our state into the future.

INTERNATIONAL WORKERS MEMORIAL DAY

The Hon. I.K. HUNTER (14:44): Will the Minister for Industrial Relations provide the chamber with details of the government's role in the upcoming commemoration of International Workers' Memorial Day?

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (14:45): Honourable members would be aware that 28 April is now recognised worldwide as a day of remembrance of those who have died at work, as well as those who have been severely injured, and to strengthen our resolve on improving safety at work.

Since 1996, the International Trade Union movement has marked the day as one of mourning for all workers killed and seriously injured. More recently, the International Labour Organization has also used the day as one of action and awareness to promote the importance of health and safety at work.

Mr President, I am sure you would be well familiar with the unfortunate rates of workplace injuries in this country. The national body Safe Work Australia estimates that more than 135,000 people are seriously injured at work every year and more than 200 die from work-related injuries, while many more are lost to work-related diseases, such as those connected to asbestos. These incidents of harm—these tragedies—affect family, friends and loved ones emotionally and financially, and often for a lifetime.

In Adelaide on Thursday 28 April this year, the day will be marked with what is now a tradition on our calendar—the annual church service in the city. The service is open to people of all

faiths and beliefs and provides a point of focus and reflection for those families who have lost a loved one through work-related causes.

To the wider community, especially to those of us in government, the labour movement and industry and commerce, the memorial service is a powerful reminder of why safe systems of work are so important. Bereaved families bring pictures of their loved ones as well as personal effects, such as helmets, shirts and work boots, into the church to remind us all of the high human cost of workplace harm.

For the first time as industrial relations minister, I will be attending the service. I acknowledge the work of SA Unions, SafeWork SA and Voice of Industrial Death, who come together each year to jointly contribute to and organise this important commemorative event. In keeping with the dual theme of promoting the importance of health and safety at work, the day is also one of highlighting positive achievements in workplace safety.

The annual Safe Work Awards are presented in Canberra at that time. Winners of the national categories in the state and territory Safe Work Awards in late October are automatically forwarded as finalists. This is an event we will watch with keen interest, given South Australia's outstanding results in past years at both an individual and a collective level. I am sure honourable members will join me in wishing South Australian finalists the very best on the day.

The state government has the reduction of workplace harm as a key target in its strategic plan, and recent national figures show that South Australia leads the way in reducing its injury claims rate, while the fatality rate is under the national average and at the lower end of the national scale. International Workers' Memorial Day reminds us of the importance of continuing our critical work to make all South Australian workplaces safer.

We are putting forward legislation this year—that is in the house now—ranging from the protection of child workers to the nationally harmonised work, health and safety laws (which I will introduce this afternoon), including regulations and codes of practice that will bring all Australian workers under a single health and safety protective framework.

On a daily basis, we will continue the range of information, compliance and enforcement measures undertaken by SafeWork SA inspectors to ensure that we aim for all South Australians to come home safely to their families at the end of their working day. I invite all honourable members and any interested members of the community to attend the memorial service, which will be held on Thursday 28 April from 10:30am at the Pilgrim Uniting Church in Flinders Street.

LOCAL GOVERNMENT BOUNDARY ADJUSTMENTS

The Hon. R.L. BROKENSHIRE (14:49): I seek leave to make a brief explanation before asking the Minister for State/Local Government Relations a question regarding public initiated boundary adjustment proposals in local government.

Leave granted.

The Hon. R.L. BROKENSHIRE: The minister may not have had a chance to see some documentation sent to him, the local member and myself from the Geranium Ratepayers Association. Briefly, the Geranium Ratepayers Association initiated a public submission to the Boundary Adjustment Facilitation Panel. They wrote in a letter to us:

> We believe that Section 28 of the Act does not give sufficient weight to the will of ratepayers in the Affected Area who are in support of the boundary adjustment. In this instance, an overwhelming 90 per cent of ratepayers in the Affected Area are in support of the boundary adjustment proposed within the Public Initiated Submission.

It also states:

> This support was reinforced by the number and content of letters lodged in response to the Panel's 1 May 2010 advertisement calling for public submissions. As Ms Wagstaff states in her report, 55 submissions were received in favour of the proposal, with just 12 actual submissions lodged in opposition (a further 18 were from letters prepared by Council for attendees at a public meeting to sign).

In concluding my explanation, these constituents believe that there was too much focus and opportunity on the council whereby these constituents wanted to move to an adjoining council. Therefore, my questions are:

1. Will the minister look into these concerns by constituents from Geranium and associated areas as a matter of concern, particularly if the allegations are accurate with respect to insufficient scrutiny by the panel?

2. How much money does it cost for this panel to operate, and how many boundary adjustment considerations have they made since the beginning of the act?

3. Does the minister and his government support the principle of public initiated submissions whereby the majority of the people want to shift councils having that opportunity in principle?

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (14:52): The Local Government Act establishes an independent body, the Boundary Adjustment Facilitation Panel, to investigate and make recommendations on proposals for council boundary changes. The panel consists of four members. I am not aware offhand of the cost of the panel. I do not believe that there are a huge number of requests coming through as a general rule, but they certainly do happen from time to time. In relation to the one that the honourable member has raised, is he talking about the Southern Mallee and Coorong matter?

The Hon. R.L. Brokenshire: Yes.

The Hon. B.V. FINNIGAN: That has been finalised by the panel. There were a group of eligible electors who sought to have the council boundary adjusted between the Southern Mallee council and The Coorong District Council. There was an independent consultant's report and the panel reviewed the submissions it had received and concluded that they were not convinced that the affected area was less served than other parts of the Southern Mallee council.

The panel concluded that residents of the area used services and businesses and were involved in recreational activities in the Southern Mallee, Coorong and other surrounding council areas. As such, the panel was not convinced that the affected areas of community interests lay primarily within the Coorong council boundaries.

The panel recognised that three landholdings crossed the boundary of the two councils, but that in itself was not sufficient to warrant a boundary alteration of the scope proposed. The panel resolved not to proceed with a proposal in response to the public initiated submission. As I indicated, the panel is independent. I can request, as minister, that they consider the decision that they have made, but I have not chosen to do that on this occasion. I had a look at the report that the panel had produced and the considerations they made, and I was satisfied that they had acted appropriately in coming to the decision that they did.

I would highlight that it is an independent panel with four members: Margaret Wagstaff, who the honourable member mentioned, who is the chair; Carol Procter; and two LGA nominees in James Maitland and Gillian Aldridge, who are both mayors. The panel is independent, and I was satisfied that the report—

The Hon. T.J. Stephens: Margaret Wagstaff is independent? Give me a break.

The Hon. B.V. FINNIGAN: The Hon. Mr Stephens casts doubt on the integrity of the panel members. I have no reason to believe that they are anything other than independent. I indicate to the honourable member that I am not sure that the government would even have an interest in which council area people reside in. Obviously we want people to be best served by the council appropriate to where they live, so the act sets up this independent panel to make these sorts of judgements. I cannot see why the government would have a position on whether people are in the Southern Mallee or the Coorong council. We want people to be well served by their councils, and the panel is there to make the judgement in relation to a request to change council area.

I am satisfied that the panel followed the correct procedure and came to the judgement it did in all fairness, having honestly and conscientiously considered the submissions put before it. In relation to the honourable member's final point, I certainly do not intend to make any changes to the way people are able to make applications to the panel to consider a boundary adjustment.

DON'T CROSS THE LINE

The Hon. CARMEL ZOLLO (14:55): I seek leave to make a brief explanation before asking the Minister for the Status of Women a question about the Don't Cross the Line community education grants.

Leave granted.

The Hon. CARMEL ZOLLO: The minister has spoken in this place before about the ways that community awareness and education initiatives can help to change community attitudes. Will

the minister inform members of the outcome of the third round of anti-violence community education grants?

The Hon. G.E. GAGO (Minister for Regional Development, Minister for Public Sector Management, Minister for the Status of Women, Minister for Consumer Affairs, Minister for Government Enterprises) (14:56): I thank the honourable member for her important question. I am pleased today to be able to announce the recipients of the third round of the government's Don't Cross the Line community education grants. This third round focuses on young people with disabilities, and a total of $50,000 is being provided.

To date, the grants have been specifically targeted to groups in the community who may not have been able to engage in the mainstream campaign. Previous grant rounds focused on young people in regional and remote communities as well as Aboriginal and Torres Strait Islander communities.

The Don't Cross the Line campaign aims to demonstrate what is and is not acceptable behaviour in relationships, and reduce violence in South Australian families. Organisations eligible for grants include groups such as not-for-profit incorporated foundations, service clubs, schools, sporting bodies, Aboriginal groups, ethnic communities, church groups, youth organisations, local government associations, and other sections of the general community.

Advice from stakeholders, such as Women with Disabilities Australia, indicated that it was important to get an anti-violence message out to people with disabilities, particularly women, who, we are told, can be more vulnerable to abuse than non-disabled women. This particular round of grants targets communities and organisations that will educate young people with a disability about violence against women and respectful relationships.

Successful grant recipients include the Tutti Ensemble, which will raise awareness about sexual assault, rape and domestic violence in South Australia's communities with disabilities. The ensemble's long term success in using the creative arts to promote messages by young people with a disability, for young people with a disability, is a key to their Respect Me, Respect You program.

In Port Lincoln, Yarredi Services will be working with 18 to 25 year olds with a disability to produce a DVD about respectful relationships, and I am very pleased to award Christies Beach High School a grant to develop a project with their senior students with disabilities. The project will provide the students with skills for the future and prepare them for leaving school and a safe independent life.

In addition, young people will develop their knowledge of sexual assault and domestic violence legislation and learn about respectful relationships. The highly successful Expect Respect program, run by the Legal Services Commission, has also been successful in receiving a grant, and I noticed at the Premier's Awards night the other night that they were a nominee for one of the awards. Their work was considered in such high regard as to be worthy of a nomination for an award.

Teaching young people about what is not acceptable is, obviously, a very important part of growing up. This peer education drama-based program is a sexual assault intervention project that was developed in partnership with key organisations with expertise in the arts and cultural work for disabled young people. The programs funded through these grants support the state government's strategy to reduce violence against women through developing respectful attitudes and behaviour.

HEALTH CARE FOR IMMIGRANTS

The Hon. A. BRESSINGTON (15:00): I seek leave to make a brief explanation before asking the minister representing the Minister for Health questions about access to health services by immigrants on work visas.

Leave granted.

The Hon. A. BRESSINGTON: This week I met with a number of constituents who brought to my attention the inequity of our health services for international migrants who do not have access to Medicare and are not required to have and do not have health insurance. While many visas are subject to the visa condition 8501, which requires applicants to have and then maintain adequate health insurance, several temporary visas such as visa 475 and visa 495, which are for workers or graduates possessing skills identified as needed in rural areas (often by the state

government) do not require visa holders to have health insurance. Instead—and I quote the Department of Immigration and Citizenship website:

> Migrants are responsible for all health costs incurred in Australia. For this reason it is highly recommended that you arrange suitable private health insurance.

However, when faced with the comparably high living costs, the difficulties in finding employment to utilise their professional skills and other associated costs in establishing themselves and their families, health insurance somehow finds itself pushed down on their priority list. I am aware of a qualified doctor who is currently working as a storeman while he undertakes further studies.

While many do go on to become permanent residents with health incidences some, unfortunately, develop medical conditions or, as I will go into, become pregnant and find themselves without insurance or access to Medicare that all Australians can otherwise rely on. This places these migrants in the most untenable situation of needing medical care that they simply cannot afford. I am aware of a particular migrant who is gradually repaying a $60,000 debt, for emergency cardiac surgery, to a public hospital because he did not have insurance.

Even the price of giving birth is astonishing, with an uncomplicated delivery being $5,400 in a public hospital, while a caesarean delivery with complications can cost up to $18,000. This is just for the procedure and does not include any hospital stay or the cost of a midwife or necessary pre-natal scans. Just imagine being of limited means, falling pregnant and facing such untenable costs without insurance. Is it any wonder that these women are encouraged and, in fact, feel compelled to use abortion as a way out.

Others find that doctors and even our hospitals are reluctant to see them or, when they do, they receive substandard service. One woman had had a miscarriage and needed a curette but, because she was uninsured and unable to pay for the service prior, was instead sent home with the 'morning-after pill' and no follow-up medical treatment at all. My questions to the minister are:

1. How many full-fee paying abortion procedures were undertaken in South Australia in 2010 and, where possible, how many of these were on women who were on temporary visas or were dependants on temporary visas without health cover?

2. How many people are in South Australia on a temporary visa not subject to direction 8501, and is it possible to track how many do not have health insurance or access to reciprocal cover?

3. Was the minister or the South Australian government consulted by the federal government in relation to the terms and conditions of temporary work visas and whether they would require migrants to have health cover?

4. What can the minister do to encourage his federal counterparts to find a solution to this problem?

5. What has the cost been to the South Australian health system of migrants without health insurance who accumulate huge medical bills and then are unable to pay and return home leaving the debt behind?

The Hon. G.E. GAGO (Minister for Regional Development, Minister for Public Sector Management, Minister for the Status of Women, Minister for Consumer Affairs, Minister for Government Enterprises) (15:04): I thank the honourable member for her questions. I will refer them to the Minister for Health in another place and bring back a response.

PUBLIC SERVICE EMPLOYEES

The Hon. R.I. LUCAS (15:04): I seek leave to make an explanation prior to directing a question to the minister representing the Premier on the verbal abuse, bullying and intimidation of public sector workers.

Leave granted.

The Hon. R.I. LUCAS: On 28 March this year, under a heading 'Foley "Hurts" Labor Brand', *The Advertiser* journalist Greg Kelton wrote:

> The Advertiser has also been told Mr Foley was involved in an incident with a protocol officer from the Premier's Department at the Government's Clipsal suite.
>
> Labor sources said Mr Foley had been upset because several business people had been refused readmission to the suite, and he complained to the female protocol officer who left the suite in tears and went on

stress leave for the remainder of the weekend. Mr Foley did not comment on the matter, except to say: "We all work under a lot of pressure at Clipsal."

In an interview on ABC radio, in discussing Mr Foley's behaviour Mr Kelton said:

> ...but also there was another incident involving a female protocol officer which a lot of MPs are a bit upset about. They just say that...it just continues the perception that Mr Foley is a lightning rod for trouble.

Information provided to the Liberal Party disputes significant parts of the Labor sources' version of the incident. I am informed that a young female employee from the Premier's protocol unit was confronted by Mr Foley at Clipsal, who was trying to bring a group of his friends into the state hospitality suite. When the young female employee pointed out to Mr Foley that his guests did not have credentials or tickets to enter the state suite, and therefore could not enter, Mr Foley became angry, aggressive and verbally abusive.

The young female employee was distressed and burst into tears after this confrontation with Mr Foley and went on stress leave, but not just for the weekend, as claimed by Labor sources quoted in the media report. My questions are:

1. Is it correct that, after an altercation with Mr Foley at Clipsal, a young female employee from the Premier's protocol unit burst into tears and had to be sent home from the event?

2. Has this employee taken stress leave or any other form of leave as a result of this incident and, if so, for what period?

3. Has an inquiry been conducted into the circumstances surrounding this incident, and has Mr Foley been directed to apologise to the young female employee?

4. Has a WorkCover claim or any other claim been lodged in relation to this incident?

5. Has any minister in this government got the courage to tap Mr Foley on the shoulder and warn him that a young female employee in the public sector should not be treated in this way by a senior minister in the government and, if he is not prepared to behave appropriately, ask him to leave the parliament?

The PRESIDENT: I don't know how the honourable minister is going to answer that. He probably doesn't know anything about it. The honourable minister.

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (15:08): Those questions—

Members interjecting:

The PRESIDENT: Order!

Members interjecting:

The PRESIDENT: Order! The questions have been asked, and the honourable minister got to his feet to try to give you some sort of answer—

Members interjecting:

The PRESIDENT: —no, and you don't want to listen to the answer. So, you want to try again, honourable minister?

The Hon. B.V. FINNIGAN: Thank you, Mr President. I am not sure those questions dignify a response, but I will refer them to the honourable Premier in another place.

RURAL PROPERTY ADDRESSES

The Hon. R.P. WORTLEY (15:09): My question is to the Minister for State/Local Government Relations. Will the minister inform the house—

Members interjecting:

The PRESIDENT: Order! The Hon. Mr Wortley should start again.

The Hon. R.P. WORTLEY: My question is to the Minister for State/Local Government Relations. Will he inform the house of what is being done to improve the ability of service providers to find addresses in rural areas? Did you hear that?

An honourable member: I did, thank you.

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (15:10): I thank the Hon. Mr Wortley for his question. Mr President, I am sure you are aware of the long-running battle to address rural property addressing in country areas to try to ensure that there is a consistent system and one that is useful and able to be used by Emergency Services and others. I am sure you are well familiar, from your former travels around the country, with how difficult it can be to locate some country properties.

I am certainly familiar, from my own background in the country, with the sort of directions that you are often given about 'turning right at the green shed', or whatever it might be, so you can find a particular property. The farm next door was well known for having a picture of a blue cow painted on the side of their dairy, known as the 'blue moo', so that became quite a common landmark; you just turned left after the 'blue moo'. We believe it will be good to have a slightly more sophisticated system, rather than relying on people identifying and observing landmarks or other things along the way.

I am pleased to inform the house that a new property addressing system is currently being implemented, as a joint initiative of the state government and local councils across South Australia, to make locating rural properties easier. More than 50,000 properties across country South Australia will receive an official rural address. The new addressing system complies with national Australian standards. It will see every rural property identified by a number, based on the distance of its entrance along the road, the name of the road and the locality and postcode of the property.

The official nationally recognised and locatable address will make it easier for service providers to find properties in rural areas. It will provide certainty of location, which will also enhance safety in potential emergency situations. Many properties are located on previously unnamed roads where Emergency Services personnel and other service providers have relied on local knowledge to find them.

The implementation of rural property addressing will help to improve the safety of rural residents and the efficiency of service delivery. The initiative is strongly supported, I understand, by South Australia Police, the Country Fire Service, ambulance services and Australia Post. The Land Services division of the Department for Transport, Energy and Infrastructure is leading the project and is consulting with local councils and interested parties to generate property addresses.

Council responsibilities include naming roads, communicating with property owners, allocating addresses to residents under provisions of the Local Government Act and encouraging residents to display a standard residential address sign. The state government and councils are officially naming many roads that were previously unnamed or had confused road names. This is being carried out under the Local Government Act and involves public notification and consideration and resolution of any public objections.

The high bushfire risk areas are the priority for road naming and address implementation. Naming state roads for the remainder of the state is well advanced and will be completed and publicly notified in the next few months. The majority of council road-naming issues across the state have been resolved. Councils have recently commenced officially releasing rural addresses. Councils are receiving and resolving feedback from residents to ensure that the official addresses are accurate.

Residents are responsible for address signage. The display of a standard roadside address number at the primary property road entrance is being requested. Residents have been asked to make the sign clearly visible to road traffic. I am advised that some councils have committed to roll out the initial signage for their residents. The LGA has developed a statewide contract through public tender, with several sign producers contracted to provide standard roadside address signs in bulk to councils, at a significantly lower price.

An ongoing rural address recording and maintenance system has been developed. I am advised the program is currently proceeding to schedule and within budget. This initiative will support the Australian Bureau of Statistics for the 2011 census, which will rely on the supply by residents of a nationally recognised residential address to collate regional statistics. It will provide location information for the new computer-aided dispatch system being implemented for the State Emergency Services in 2011 and for the geocoded national address file required by the Public Sector Mapping Authority for national programs and map and street directory providers.

This is an important initiative, and I look forward to updating the house on it. The Hon. Mr Dawkins was interjecting that this has been done before, and indeed there are and have

been a number of initiatives around the state and the nation at various levels to address this over time, whether it be at state or local government level. What we are trying to do here is ensure that we have a nationally consistent system that everyone can use and that covers everybody.

Certainly I recall, when I was growing up on the dairy farm at Eight Mile Creek, at some point being given, with some fanfare, a little tag with six numbers on it, and that was our code that we could use to identify ourselves. When we came to use it to try to bring an ambulance when it was required, the ambulance service was pretty nonplussed and said, 'We don't use those,' so we had to go through the old system; indeed, we probably said, 'Turn left at the blue moo.'

It is an important initiative and, while there have been efforts in the past—and I certainly commend those who have been involved in those—here we are trying to achieve an important nationally consistent system that will be available to emergency services and others and will be of great benefit to rural residents.

OLYMPIC DAM

The Hon. M. PARNELL (15:16): I seek leave to make a brief explanation before asking the Minister for Industrial Relations, representing the Premier, a question about the Olympic Dam expansion.

Leave granted.

The Hon. M. PARNELL: The BHP Billiton response to the 4,000 submissions to its Olympic Dam expansion environmental impact statement was completed and handed to the government many months ago. This is a document known as the supplementary EIS. On Tuesday, the Premier stated that the supplementary EIS will be released in the near future, after which the formal assessment of the project can begin. The Premier also reminded us that this is the most important economic development project South Australia has ever seen.

As members will recall, back in 2009 the Premier was forced, by a pending vote in the Legislative Council, to announce a six-week extension to the public comment period on the original EIS. That document, as members would remember, was the biggest document ever produced in South Australia: it weighs 16 kilograms and runs to many thousands of pages. Yet, despite its size, the EIS was notably deficient in relation to many key issues, not the least of which was the question of electricity supply, tailings management and mine rehabilitation.

The opportunity for members of the public to formally comment on the development approval for this project has now passed. According to the Development Act, it is all over as far as the public is concerned, with the only stage left being government approval—in this case commonwealth, state and Northern Territory government approval. Government agencies, on the other hand, have had months to evaluate BHP Billiton's response to their concerns.

The recent practice of the state government in relation to major projects has been to release the supplementary EIS at the same time that it releases its own assessment report and also on the same day that the Governor grants final approval under the Development Act, and that is the process that was followed in relation to Buckland Park, the Port Stanvac desalination plant, and many others. The decision is made the same day the documents are released. My questions are:

1. Can the Premier assure the people of South Australia that there will not be any state government approval until the community has had time to assess and evaluate BHP Billiton's response to the 4,000 submissions?

2. Will the Premier commit to establishing a formal process whereby interested South Australian businesses, scientists, groups and individuals can provide feedback to the government on the supplementary EIS that will be taken into account before a final decision is made?

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (15:19): I thank the Hon. Mr Parnell for his questions, and I will refer them to the Premier, the minister assisting with Olympic Dam or the Minister for Mineral Resources Development. I will send them to the Premier and I am sure they will be referred, if necessary, to the appropriate person.

It is important to make the point that the proposed Olympic Dam expansion project is one that will have received probably the greatest public scrutiny, with people considering its merits and ensuring that it meets all the appropriate guidelines, environmental standards, and so on; more so than any other project probably in the history of the state. It is certainly, as the honourable member

indicated, and as the Premier said—and I am sure we all acknowledge—an incredibly important project for the economic future of the state.

I think the company has been through a lot of processes, as is appropriate, to ensure that all the standards are met. The environmental standards are certainly an important part of that, and I am sure that health and safety in the work setting and other matters will be considered as well. I think there will be a lot of public scrutiny of this project over time before it does actually get to the final approval stage. I will refer those questions to the Premier in another place.

WORK HEALTH AND SAFETY BILL

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (15:21): Obtained leave and introduced a bill for an act to provide for the health, safety and welfare of persons at work; to make consequential amendments to certain acts; to repeal the Occupational Health, Safety and Welfare Act 1986; and for other purposes. Read a first time.

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (15:22): I move:

That this bill be now read a second time.

The Work Health and Safety Bill 2011 provides the foundation for South Australia's participation in a nationally harmonised system of occupational health and safety. The bill enacts the nationally-agreed model Work Health and Safety Act in this jurisdiction. It will be supplemented by model regulations and model codes of practice, which are currently the subject of public consultation.

National harmonisation of occupational health and safety laws has been on the agenda of successive governments for over 20 years. The bill represents the culmination of many years of multilateral and tripartite engagement and discussion between the commonwealth, state and territory governments, business, union and employer groups. Key South Australian interested parties have been involved with every step in the process, through the SafeWork SA Advisory Committee and through other consultative fora.

Harmonisation of work health and safety laws will bring many benefits to South Australian businesses, employers, workers and unions through the creation of a single nationally-consistent and modernised legislative regime. Research and modelling by Access Economics has identified that the most significant cost to business from the existing occupational health and safety system arises from the duplication required to comply with regulatory differences across multiple jurisdictions. With the implementation of a nationally harmonised system, this duplication will be removed and there will be consistent regulation across the country.

Business will benefit from a national system through reduced complexity and red tape. Employers will also benefit from greater certainty and a simplified system of legislation. Workers will benefit from the enhanced protection provided by modernised laws and rights that are easier to understand and apply. For example, the bill recognises the changing face of the workplace and does not rely on the traditional concepts of employer and employee. This means greater fairness, as all workers will have access to the same rigorous system of workplace health and safety regulation wherever they are in Australia and irrespective of whether they are employees, labour hire workers or contractors.

The new system will improve transferability of permits, licences and training qualifications across state and territory borders. This means that workers' safety-related qualifications and training will be recognised wherever they work in Australia. This will assist in the mobility of individual workers and the Australian workforce as a whole.

The enactment of the bill will further enhance South Australia's efforts in meeting the important objective in the State's Strategic Plan by reducing the rate of workplace injury and fatality as well as national targets for safer workplaces. The bill also contains a number of important policy innovations that will assist governments, businesses and workers to achieve safe, healthy and productive workplaces.

The bill is an example of a mature and cooperative federalism, and demonstrates what can be achieved when all levels of government work together. This legislative approach is also innovative in the OHS area because it creates a national occupational health and safety system while at the same time maintaining the important role of democratic oversight by this parliament.

On 1 February 2008, through the leadership of the federal Labor government and then federal workplace relations minister, Julia Gillard, the Workplace Relations Ministerial Council (WRMC) agreed to a commonwealth proposal to develop model occupational health and safety laws to be enacted in each jurisdiction to create a nationally harmonised system.

In July 2008, South Australia signed, along with other states and territories, the Intergovernmental Agreement for Regulatory Reform in Occupational Health and Safety. Part of what was agreed in the intergovernmental agreement was the establishment of a national OHS body and, in September 2009, Safe Work Australia was formally established by an act of the commonwealth parliament. Safe Work Australia is a national authority with representation from each state and territory, and with employer and employee representatives.

The development of the model laws followed a comprehensive review of Australia's OHS laws by a review panel of independent OHS experts. The National Review into Occupational Health and Safety Laws consulted widely with business, employer and union groups, took submissions from the public, and made a number of detailed recommendations. Following this review, Safe Work Australia commenced the development of the Model Work Health and Safety Act. The resulting national consultation process concluded with the finalisation of the model act, endorsed by the Workplace Relations Ministerial Council on 11 December 2009.

Importantly, the ministerial council resolved that the model laws would come into effect in each jurisdiction by 1 January 2012. This bill enacts the model act in South Australia to meet this agreed timeline. Here in South Australia, local consultation in the development of the bill has also been extensive. Stakeholders contributed to the public consultation on the model act exposure draft through the SafeWork SA Advisory Committee, which is a tripartite body representing business, employer and union groups. Many South Australian business, employer and union groups also made separate submissions to both the national review process and during the public comment period for the model act.

The model act contained a number of jurisdictional notes which allowed jurisdictions to include provisions to ensure its operation within the relevant legal, judicial and other local frameworks. Those parts of the bill that are specific to South Australia have been drafted and developed in close consultation with the Safe Work SA Legislative Development Committee, a tripartite sub-committee of the SafeWork SA Advisory Committee. Organisations directly affected by the jurisdictional notes relating to local administrative and judicial arrangements have also been directly consulted. These include the Industrial Relations Court and Commission of South Australia, the District Court, the Attorney-General's Department and WorkCover SA.

The bill establishes a legal framework based on concepts we are very familiar with in South Australia. These include the establishment of duties of care for individuals and organisations that engage workers, the requirement to consult with workers on matters relating to health and safety, and criminal penalties for conduct which risks health and safety in a workplace. The duties are all based on a standard of what is reasonably practicable with a definition of that term included in the bill.

The bill requires officers of duty-holding organisations to exercise due diligence to ensure that their organisations comply with their duties. This requirement is consistent with the duty of officers under current South Australian OHS and industrial law. Importantly, volunteers are immune from prosecution for offences committed under the bill in their capacity as an officer. This is an important protection for those performing socially valuable work in the community, and enables them to undertake that work in good faith, without fear of prosecution.

Additionally, the bill provides for the election of health and safety representatives. When appropriately trained, health and safety representatives are empowered to take action for the health and safety of those around them by effecting a cessation of unsafe work and issuing provisional improvement notices. Provisional improvement notices will be required to be confirmed by the regulator to ensure greater accountability and oversight.

The bill encourages the productive involvement of workers and employers in ensuring health and safety by the establishment of health and safety committees. The bill also introduces new and innovative approaches to enforcement, and tougher penalties, to allow government to enforce compliance and punish those who threaten the health and safety of others at work. The concept of 'enforceable undertakings' is one such innovation. Enforceable undertakings offer flexibility to the regulator to deal with breaches of the provisions of the bill, without compromising the health and safety of our workplaces.

Enforceable undertakings enable a person conducting a business or undertaking, who is suspected of a breach, to enter into an undertaking with the agreement of the regulator. The undertaking is capable of enforcement in court, and a breach of an undertaking attracts severe penalties. This innovation provides a regulator with an additional tool to enforce compliance without the need for costly and time-consuming litigation.

Enforceable undertakings have been used with positive effect in other jurisdictions such as Queensland. A recent study by a Griffith University research team confirmed the effectiveness of this innovative measure, and their introduction gives our regulator the option of using them here. Serious breaches of the act, involving reckless conduct which risks health and safety, will continue to be prosecuted and punished.

The bill imposes strong penalties for a breach or contravention. Three categories of penalty are introduced based on the degree of culpability, risk and harm. The highest category of offence, involving proven recklessness, attracts a maximum fine of $3 million for bodies corporate, and for individuals a maximum fine of $300,000 or a maximum of five years' imprisonment or both. The penalties are higher than those currently in place in South Australia and demonstrate the government's commitment to punish the very small minority of employers and businesses who disregard the health and safety of their workforce. The severity of the penalties reflects the strength of this legislation as a deterrent to reckless conduct that endangers health and safety.

The bill establishes a primary duty to ensure as far as reasonably practicable the health and safety of workers. The test of reasonable practicability is important as it places that duty in the context of what a reasonable person could have foreseen as a risk to the health and safety of a worker and encompasses reasonable action by a person to mitigate that risk. It allows the duty holder to demonstrate that they did all that could reasonably have been done to avoid any risk to the health and safety of a worker.

The bill defines a worker widely to provide protection to people who may be engaged on a site under the direction of a duty holder but who is not directly engaged by that duty holder. The bill also imposes duties on persons who manage or control workplaces; persons who manage or control fixtures, fittings or plant at workplaces; persons who design, manufacture, import or supply plant, substances or structures; and persons who install, construct or commission plant or structures. In terms of outcome, the bill is consistent with the duties established under current South Australian OHS laws.

In another policy innovation, the bill recognises the changing workplaces of the 21st century by defining the primary duty holder as a person conducting a business or undertaking. Under this more comprehensive definition, a person holding a duty includes a body corporate, an unincorporated body or a partnership. The definition applies to activities whether they are conducted alone or together with others, for profit or not for profit, and with or without the engagement of workers.

The intention of the provision is to cover a broad range of work relationships and business structures. Importantly, it does not extend to a person's private or domestic activities or to volunteer associations as they are defined in the bill. The concept of a person conducting a business or undertaking will provide greater certainty about workplace duties by removing the ambiguity around responsibilities between a principal contractor and subcontractors, for example.

The government is committed to harmonious workplaces built on good communication and consultation. There is no doubt that when workers and employers cooperate they can achieve safer and more productive workplaces. The bill requires a person conducting a business or undertaking to consult with workers so far as is reasonably practicable. Guidance is provided to businesses, workers and employers through a definition of what consultation is as well as how and when it should be undertaken.

The bill provides for a limited right of entry by union officials for the purposes of investigating a suspected contravention. This is new to South Australia; however, the right is consistent with that of the federal Fair Work Act 2009. Indeed, a union official may not be issued with a WHS entry permit unless he or she holds or will hold a Fair Work Act 2009 entry permit or equivalent permit under state industrial relations law.

Processes familiar to South Australia will remain, including a continuing role for industrial magistrates, tripartite review committees, and the important role of the SafeWork SA Advisory Committee. The Industrial Relations Commission of South Australia will be empowered as the authorising authority to issue WHS entry permits. The commission will ensure that only those

officials entitled to a permit are issued with one and will be empowered to suspend or revoke such a permit in the case of abuse by a WHS entry permit holder.

The bill has been drafted to ensure that the local, tripartite consultation processes presently in place in South Australia will continue. These successful, local processes ensure the representation of business, employer and union groups in the development of OHS policy and legislation, and the administration of SafeWork SA's compliance and enforcement activities. The bill also enables the creation of regulations which will deal with risks relevant to specific industries and sectors of the workforce.

The government, through SafeWork SA, will assist businesses, employers and workers to ensure they are ready for this new compliance regime. As well as this, there will be national coordination of operational policies and guidelines amongst state, territory and commonwealth regulators, to ensure that businesses, employers and workers benefit from a fair and consistent approach to implementation across Australia.

The Heads of Workplace Safety Authorities, comprised of the leaders of each state and territory OHS regulator, as well as SafeWork Australia, have established a number of national project groups to coordinate a nationally consistent approach to the implementation of the new laws, and SafeWork SA is actively participating. To support this effort to ensure nationally consistent application of the harmonised laws, SafeWork SA has established an internal Workplace Harmonisation Implementation Group (WHIG) to effectively manage the implementation of the nationally harmonised system in South Australia's inspectorate.

To complement this, SafeWork SA will also deliver an externally focused implementation and communication strategy to inform key parties in South Australia and the community of the impact of the new, nationally harmonised system of laws, regulations and codes of practice. The strategy will make use of new and innovative means of social communication and will incorporate the use of the SafeWork SA web site; media releases and magazine articles in business, industry and union publications; advertisements in the print media; public information fora and other publications and guidance material. The aim is to provide a smooth transition, recognising the specific needs of all of those affected by the changes.

I am proud to introduce this bill. It will ensure less complexity and red tape for business, more certainty for employers and those who engage workers and, through this, provide enhanced protection for workers wherever they work. The bill will ensure greater mobility of the Australian workforce and less duplication of regulation between states and territories. Through the inclusion of many policy innovations, the bill strengthens the capacity of regulators to work with businesses and workers to improve health and safety and reduce the tragedy of workplace death and injury.

The bill will establish South Australia's participation in a nationally consistent system of work health and safety regulation, while at the same time maintain the democratic oversight of this parliament, and the successful model of local, tripartite consultation in this state. The bill is strong, flexible, innovative and fair, and demonstrates what can be achieved through a mature, cooperative federalism. I commend the bill to members and seek leave to have the explanation of clauses inserted into *Hansard* with my reading it.

Leave granted.

Explanation of Clauses

Part 1—Preliminary

Division 1—Introduction

1—Short title

This clause is formal.

2—Commencement

Clause 2 provides for commencement of the measure on a day to be fixed by proclamation.

Division 2—Object

3—Object

Clause 3 sets out the main object of the proposed Act, which is to provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by the means set out in the clause.

Clause 3(2) extends the object of risk management set out in clause 3(1)(a) by applying the overriding principle that workers and other persons should, so far as is reasonably practicable, be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work.

Division 3—Interpretation

Subdivision 1—Definitions

4—Definitions

Clause 4 includes a dictionary of terms used in the proposed Act. Key definitions are explained below in alphabetical order.

The term *authorising authority* is defined to mean the Industrial Relations Commission of South Australia.

The term *compliance powers* is used throughout the proposed Act as a short-hand way of referring to all of the functions and powers of WHS inspectors under the proposed Act.

The *Department* is the administrative unit of the Public Service that is responsible for the administration of the Act.

The term *employee record* takes its meaning from the *Privacy Act 1988* of the Commonwealth.

The term *health* is defined to clarify that it is used in its broadest sense and covers both physical and psychological health. This means that the proposed Act covers psychosocial risks to health like stress, fatigue and bullying.

The term *import* is defined to mean importing into the jurisdiction from outside Australia. This means that interstate movements are excluded from the definition. It is not intended to capture any movement of goods to or from the external territories as defined by the *Acts Interpretation Act 1901* of the Commonwealth.

The *IRC* is the Industrial Relations Court of South Australia.

A *local authority* is a council under the *Local Government Act 1999*;

The term *officer* is defined by reference to the 'officer' definitions in section 9 of the *Corporations Act 2001* of the Commonwealth, but does not include a partner in a partnership. It also includes 'officers' of the Crown within the meaning of clause 247 and 'officers' of public authorities within the meaning of clause 252. All of these 'officers' owe the officers' duty provided for in clause 27, subject to the volunteers' exemption from prosecution in clause 34.

The term *plant* is defined broadly to cover a wide range of items, ranging from complex installations to portable equipment and tools.

The definition includes 'anything fitted or connected', which covers accessories but not other things unconnected with the installation or operation of the plant (e.g. floor or building housing the plant).

The *regulator* is the Executive Director. The *Executive Director* is the person for the time being holding, or acting in, the position of Executive Director of that part of the Department that is directly involved in the administration and enforcement of the Act.

The term *volunteer* is defined to mean a person who acts on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses. Whether an individual is a 'volunteer' for the purposes of the Act is a question of fact that will depend on the circumstances of each case.

'Out-of-pocket expenses' are not defined but should be read to cover expenses an individual incurs directly in carrying out volunteer work (e.g. reimbursement for direct outlays of cash for travel, meals and incidentals) but *not* any loss of remuneration. Any payment over and above this amount would mean that the person was not a volunteer for the purposes of the Act and the volunteers' exemption would not apply. For example, a director of a body corporate that received money in the nature of directors' fees would not be covered by the volunteers' exemption.

Subdivision 2—Other important terms

5—Meaning of *person conducting a business or undertaking*

The principal duty holder under the proposed Act is a 'person conducting a business or undertaking' (PCBU).

Clause 5 provides that a person may be a PCBU whether—

- the person conducts a business or undertaking alone or with others (e.g. as a partner in a partnership or joint venture) (clause 5(1)(a)); or
- the business or undertaking is conducted for profit or gain or not (clause 5(1)(b)).

The term 'person' is defined in the *Acts Interpretation Act 1915* to include bodies corporate.

To ensure consistency, clause 5(2) makes it clear that the term covers partnerships and unincorporated associations.

Clause 5(3) clarifies that PCBU duties and obligations under the Act fall on each partner of a partnership. This means each partner could be prosecuted in his or her capacity as a PCBU and the relevant penalty for individuals would apply.

Who is a PCBU?

The phrase 'business or undertaking' is intended to be read broadly and covers businesses or undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the Crown.

Running a household

The proposed Act will cover householders where there is an employment relationship between the householder and a worker.

However, the following kinds of persons are not intended to be PCBUs:

- individuals who carry out domestic work in and around their own home (e.g. domestic chores etc);
- individual householders who engage persons other than employees for home maintenance and repairs in that capacity (e.g. tradespersons to undertake repairs);
- individual householders who organise one-off events such as dinner parties, garage sales, lemonade stalls etc.

PCBU duties do not apply to workers or 'officers'

Clause 5(4) clarifies that a worker or officer is not, solely in that capacity, a PCBU for the purposes of the Act.

PCBU duties do not apply to elected members of local authorities

Clause 5(5) provides that an elected member of a local authority is not a PCBU in that capacity for the purposes of the Act.

Exclusions

Clause 5(6) allows the regulations to exclude prescribed persons from application of the Act, or part of the Act.

The duties and obligations under the Act are placed on 'persons conducting a business or undertaking'. This is a relatively new concept to work health and safety and is currently only used in two jurisdictions in Australia. An exemption contemplated by clause 5(6) may be required to remove unintended consequences associated with the new concept and to ensure that the scope of the Act does not inappropriately extend beyond work health and safety matters. For example, regulations could be made to exempt—

- prescribed agents from supplier duties under the Act (the duties would instead fall to the principal); and
- prescribed 'strata title' bodies corporate from PCBU duties under the Act.

'Volunteer associations' not covered by Act

Clause 5(7) excludes 'volunteer associations' from PCBU duties and obligations under the Act. Volunteer associations are only excluded if they have one or more community purposes and they do not have any employees (e.g. employed by one or more of the volunteers) carrying out work for the association (clause 5(8)). Hiring a contractor (e.g. to audit accounts, drive a bus on a day trip etc) would not, however, jeopardise exempt status under this provision.

Volunteer associations with one or more employees owe duties and obligations under the Act to those employees and to any volunteers who carry out work for the association.

The term 'community purposes' is not defined in the Act but is intended to cover purposes including—

- philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity, and
- sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations.

6—Meaning of *supply*

Clause 6 defines the term 'supply' broadly to cover both direct and indirect forms of supply, such as the sale, re-sale, transfer, lease or hire of goods in a company that owns the relevant goods. A 'supply' is defined to occur on the passing of possession of a thing from either a principal or agent to the person being supplied.

The term 'possession' is not defined but should be read broadly to cover situations where a person has any degree of control over supply of the thing.

A supply of goods does not include—

- sale of goods by an agent who never takes physical custody or control of the thing (see below)—the principal is the supplier in those circumstances; or
- the return of goods to their owner at the end of a lease or other agreement (clause 6(3)(a)); or
- any other kind of supply excluded by the regulations (clause 6(3)(b)).

Supply involving a 'financier'

Clause 6(4) excludes passive financing arrangements from the definition of 'supply'. This means that the suppliers' duty under the Act would not apply to a financier who, in the course of his or her business as a financier, acquires ownership or some other kind of right in plant, a substance or a structure for or on behalf of a customer. Action not taken on behalf of the customer would however attract the duty (e.g. on selling the specified plant, substance or structure at the conclusion of a financing arrangement).

If the exemption applies, clause 6(5) provides that the suppliers' duty instead applies to the person (other than the financier) who had possession of the goods immediately before the financier's customer.

7—Meaning of *worker*

The Act adopts a broad definition of 'worker' instead of 'employee' to recognise the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers.

Clause 7 defines the term *worker* as a person who carries out work in any capacity for a PCBU, including work in any of the capacities listed in the provision. The examples of workers in the provision are illustrative only and are not intended to be exhaustive. That means that there will be other kinds of workers covered under the Act that are not specifically listed in this clause (e.g. students on clinical placement and bailee taxi drivers).

The term 'work' is not defined in the Act but is intended to include work, for example, that is carried out—

- under a contract of employment, contract of apprenticeship or contract for services; or
- in a leadership role in a religious institution, as part of the duties of a religious vocation or in any other capacity for the purposes of a religious institution; or
- as an officer of a body corporate, member of the committee of management of an unincorporated body or association or member of a partnership; or
- as practical training as part of a course of education or vocational training.

Clause 7(2) is included for the avoidance of doubt only. This subclause clarifies that a police officer is a 'worker' for purposes of the Act, while on duty or lawfully performing duties as a police officer.

Clause 7(3) clarifies that a self-employed person may simultaneously be both a PCBU and a worker for purposes of the Act.

8—Meaning of *workplace*

Clause 8 defines *workplace* broadly to mean a place where work is carried out for a business or undertaking. It includes any place where a worker goes, or is likely to be, while at work (e.g. areas like corridors, lifts, lunchrooms and bathrooms).

This definition is a key definition that in many ways defines the scope of rights, duties and obligations under the Act.

For example, the term 'workplace' is used in the primary duty under the Act and extensively throughout the Act. Parts 9 and 10 of the Act give extensive powers to WHS inspectors to conduct inspections, to require production of documents and answers to questions (clause 171), to seize certain things at workplaces for examination and testing or as evidence (clause 175) and to direct that a workplace not be disturbed (clause 198).

Clause 8(2) is an avoidance of doubt provision that clarifies that a 'place' should be read broadly to include things like vehicles, ships, off-shore units and platforms.

Clause 8(2)(b) clarifies that a place includes any waters and any installation on land, on the bed of any waters or floating on any waters.

No requirement for an immediate temporal connection

A 'workplace' is a place where work is performed from time to time and is treated as such under the Act even if there is no work being carried out at the place at a particular time.

In other words, there is no requirement for an immediate temporal connection between the place or premises and the work to be performed: see *Telstra Corporation Ltd v Smith* [2009] FCAFC 103. That is because the main object of the Act is to secure the health and safety of workers at work as well as others who are in the vicinity of a workplace. A place does not cease being a workplace simply because there is no work being carried out at a particular time.

This means for example that a shearing shed used for shearing only during the few weeks of the shearing season does not cease to be a workplace outside of the shearing season and a department store does not cease to be a workplace when it is closed overnight.

9—Examples and notes

This clause provides that an example or note at the foot of a provision forms part of the Act.

Division 4—Application of Act

10—Act binds the Crown

This Division deals broadly with the application of the Act to the Crown and also beyond the territorial boundaries of the relevant jurisdiction.

This Division also allows for provisions to deal with the relationship between the Act and other Acts.

Clause 10 provides for the Crown to be bound by the Act and clarifies that the Crown is liable for an offence against the Act. This clause makes it clear that the 'Crown shield' that would otherwise provide immunity against prosecution for the Crown does not apply.

11—Extraterritorial application

The Act is intended to apply as broadly as possible but in a way that is consistent with the national work health and safety framework and the legislative power of the State. This means that some provisions will have some extra-territorial application.

For example, it is intended that the Act apply to all PCBUs who operate South Australian registered ships out of the State, subject to Commonwealth maritime work health and safety laws. To the extent that there is overlap between the laws of jurisdictions (e.g. where a South Australian ship is in the coastal waters of another State or the Northern Territory), the principles of double jeopardy would preclude conviction for a criminal offence in respect of conduct for which a person had already been convicted of an offence.

Importantly, inspection powers (Parts 9 and 10) and powers of inquiry (Part 7) would not have any extra-territorial application to workplaces outside the jurisdiction.

12—Scope

Clause 12 provides that the provisions of the Act are in addition to and do not derogate from the provisions of any other Act. The provisions of the Act do not limit or derogate from any civil right or remedy. Compliance with the Act does not necessarily indicate that a common law duty of care has been satisfied.

Application to public health and safety

The primary purpose of the Act is to protect persons from work-related harm. The status of such persons is irrelevant. It does not matter whether they are workers, have some other work-related status or are members of the wider public. They are entitled to that protection. At the same time, the Act is not intended to extend such protection in circumstances that are not related to work. There are other laws, including the common law, that require such protection and provide remedies where it is not supplied.

The duties under the Act are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work.

These elements are reflected in the model Act by the careful drafting of obligations and the terms used in the Act and also by suitably articulated objects.

The intention is that further, nationally consistent guidance about the application of the work health and safety laws to public safety be made available by the regulator.

Part 2—Health and safety duties

Division 1—Introductory

Subdivision 1—Principles that apply to duties

13—Principles that apply to duties

14—Duties not transferrable

15—Person may have more than one duty

16—More than one person can have a duty

This Subdivision sets out the principles that apply to all duties under the Act, including health and safety duties in Part 2, incident notification duties in Part 3 and the duties to consult in Divisions 1 and 2 of Part 5. They also apply to the health and safety duties that apply under the regulations.

These clauses provide that duties under the Act are non-transferable. A person can have more than one duty and more than one person can concurrently have the same duty.

Clause 16(2) provides that each duty holder must comply with that duty to the required standard even if another duty holder has the same duty. If duties are held concurrently, then each person retains responsibility for his or her duty in relation to the matter and must discharge the duty to the extent to which the person has capacity to influence or control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity (clause 16(3)).

In formulating these principles, the Act makes it clear that—

- a person with concurrently held duties retains responsibility for the duty and must ensure that the duty of care is met; and
- the capacity to control applies to both 'actual' or 'practical' control; and
- the capacity to influence connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances; and

- where a duty holder has a very limited capacity, that factor will assist in determining what is 'reasonably practicable' for the person in complying with his or her duty of care.

The provisions of the Act do not permit, directly or indirectly, any duty holders to avoid their health and safety responsibilities.

Proper and effective coordination of activities between duty holders can overcome concerns about duplication of effort or no effort being made.

17—Management of risks

Clause 17 specifies that a duty holder can ensure health and safety by managing risks, which involves—

- eliminating the risks, so far as is reasonably practicable; and
- if not reasonably practicable—to minimise the risks, so far as is reasonably practicable.

Subdivision 2—What is reasonably practicable

18—What is *reasonably practicable* in ensuring health and safety

The standard of 'reasonably practicable' has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions. This qualifier is well known and has been consistently defined and interpreted by the courts.

'Reasonably practicable' represents what can reasonably be done in the circumstances. Clause 18 provides meaning and guidance about what is 'reasonably practicable' when complying with duties to ensure health and safety under the Act, regulations and codes of practice. To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, a person must take into account and weigh up all relevant matters, including—

- the likelihood of the relevant hazard or risk occurring; and
- the degree of harm that might result; and
- what the person knows or ought reasonably to know about the hazard or risk and the ways of eliminating or minimising the risk; and
- the availability and suitability of ways to eliminate or minimise the risk.

After taking into account these matters, only then can the person consider the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

Division 2—Primary duty of care

19—Primary duty of care

This Division specifies the work health and safety duties for the Act. Generally the provisions identify the duty holder, the duty owed by the duty holder and how the duty holder must comply with the duty.

The changing nature of work organisation and relationships means that many who perform work activities do so under the effective direction or influence of someone other than a person employing them under an employment contract. The person carrying out the work—

- may not be in an employment relationship with any person (e.g. share farming or share fishing or as a contractor working under a contract for services); or
- may work under the direction and requirements of a person other than his or her employer (as may be found in some transport arrangements with the requirements of the consignor).

For these reasons, the Act provides a broader scope for the primary duty of care, to require those who control or influence the way work is done to protect the health and safety of those carrying out the work.

Clause 19 sets out the primary work health and safety duty which applies to PCBUs.

The PCBU has a duty to ensure, so far as is reasonably practicable, the health and safety of workers that are—

- directly engaged to carry out work for the PCBU's business or undertaking; or
- placed with another person to carry out work for that person; or
- influenced or directed in carrying out their work activities by the person,

while the workers are at work in the business or undertaking.

Duties of care are imposed on duty holders because they influence one or more of the elements in the performance of work and in doing so may affect the health and safety of themselves or others. Duties of care require duty holders—in the capacity of their role and by their conduct—to ensure, so far as is reasonably practicable, the health and safety of any workers that they have the capacity to influence or direct in carrying out work.

Primary duty of care not limited to physical 'workplaces'

The primary duty of care is tied to the work activities wherever they occur and is not limited to the confines of a physical workplace.

Duty extends to 'others'

Clause 19(2) extends whom the primary duty of care is owed to beyond the PCBU's workers to cover all other persons affected by the carrying out of work. It requires PCBUs to ensure, so far as is reasonably practicable, that the health and safety of all persons is not put at risk from work carried out as part of the business or undertaking.

This wording is different to that used in clause 19(1). Unlike the duty owed to workers in clause 19(1), the duty owed to others is not expressed as a positive duty, as it only requires that persons other than workers 'not [be] put at risk'.

However, the general aim of both clauses 19(1) and (2) is preventative and both require the primary duty of care to be discharged by managing risks (see clause 17).

Specific elements of the primary duty

Clause 19(3) outlines the key things a person must do in order to satisfy the primary duty of care. The list does not limit the scope of the duties in clauses 19(1) and (2).

PCBUs must comply with the primary duty by ensuring, so far as is reasonably practicable, the provision of the specific matters listed in the subclause, or that the relevant steps are taken. This means that compliance activities can be undertaken by someone else, but the PCBU must actively verify that the necessary steps have been taken to meet the duty.

Where there are multiple duty holders in respect of the same activities, a PCBU may comply with the duty of care by ensuring that the relevant matters are attended to.

For example, a PCBU may not have to provide welfare facilities if another PCBU is doing so. However, the PCBU must ensure that the facilities are available, accessible and adequate.

Duty in relation to PCBU-provided accommodation

Clause 19(4) requires workers' accommodation provided by a PCBU to be maintained, so far as is reasonably practicable, so that the worker occupying the premises is not exposed to risks to health and safety. This duty only applies in relation to accommodation that is owned by or under the management or control of the PCBU, in circumstances where the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available.

Self-employed persons

Clause 19(5) deals with the situation where a self-employed person is simultaneously both a PCBU and a worker. In that case, the self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work. The duties owed to others at the workplace would also apply (see clause 19(2)).

Division 3—Further duties of persons conducting businesses or undertakings

20—Duty of persons conducting businesses or undertakings involving management or control of workplaces

This Division sets out the work health and safety duties of a person conducting a business or undertaking who is involved in specific activities that may have a significant effect on work health and safety. These activities include the management or control of workplaces, fixtures, fittings and plant, as well as the design, manufacture, import, supply of plant, substances and structures used for work.

Designers, manufacturers, installers, constructors, importers and suppliers of plant, structures or substances can influence the safety of these products before they are used in the workplace. These people are known as 'upstream' duty holders. Upstream duty holders are required to ensure, so far as is reasonably practicable, that products are made without risks to the health and safety of the people who use them 'downstream' in the product lifecycle. In the early phases of the lifecycle of the product, there may be greater scope to remove foreseeable hazards and incorporate risk control measures.

Clause 20 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves, in whole or in part, the management or control of a workplace. 'Workplace' is defined in clause 8. The duty requires the person with management or control of a workplace to ensure, so far as is reasonably practicable, that the workplace and the means of entering and leaving the workplace are without risks to the health and safety of any person.

Clause 20(1)(a) excludes the application of the duty to an occupier of a residence if that residence is not occupied for the purpose of the conduct of the business or undertaking. The exclusion does not apply if the residence is partially used to conduct the business or undertaking.

The duties of a person who owns and controls a workplace and the duties of a person who occupies and manages that workplace differ. For example, the owner of an office building has a duty as a person who controls the operations of the building, to ensure it is without risks to the health and safety of any person. The owner is required to ensure people can enter and exit the building and that anything arising from the workplace is without risk to others. Concurrently, a tenant who manages an office premises in the building has a duty to ensure people can enter and exit those parts of the premises. For example, this could include entry into facilities for workers. A tenant also

has the duty to ensure that anything arising in that office is without risks to the health and safety of any person. For example, this could include ensuring the safe maintenance of kitchen appliances.

21—Duty of persons conducting businesses or undertakings involving management or control of fixtures, fittings or plant at workplaces

Clause 21 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves the management or control of fixtures, fittings or plant at a workplace. 'Plant' is defined in clause 4 and 'workplace' is defined in clause 8. The duty requires the person with management or control of fixtures, fittings or plant at a workplace to ensure, so far as is reasonably practicable, that those things are without risks to health and safety of any person.

For example, a person who manages or controls workplace fixtures, fittings or plant has a duty to ensure, so far as reasonably practicable, that torn carpets are repaired or replaced in that workplace to eliminate or, if that is not reasonably practicable, minimise the risk of tripping or falling.

Clause 21(1)(a) excludes the application of the duty to an occupier of a residence if that residence is not occupied for the purpose of conducting a business or undertaking. The exclusion does not apply if the residence is partially used to conduct the business or undertaking.

22—Duties of persons conducting businesses or undertakings that design plant, substances or structures

Clause 22 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves designing plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures this duty also applies if these things are used or to be used as a workplace.

For example, the designer of call centre workstations must ensure, so far as reasonably practicable, that the workstations are designed without risks to the health and safety of the persons who use, construct, manufacture, install, assemble, demolish or dispose of the workstations. This would include designing workstations to be adjustable and supportive of ergonomic needs.

Designers of structures have a duty to ensure, as far as is reasonably practicable, that the design does not create health and safety risks for those who construct the structure, as well as those who will later work in it.

The duty is for the designer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in subclause (2)(a) to (f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in subclause (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.

Clause 22(3) to (5) outline further requirements that a designer must comply with in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Clause 22(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in subclause (2)(a) to (f). The type of information that must be provided is limited by clause 22(4).

The duty to provide current relevant information is based on what the designer knows, or ought reasonably to know, at the time of the request in relation to the original design. If another person modifies or changes the original design of the plant or structure, this person then has the responsibility of providing information in relation to the redesign or modification, not the original designer.

23—Duties of persons conducting businesses or undertakings that manufacture plant, substances or structures

Clause 23 sets out the duties for a PCBU who manufactures plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or are to be used as a workplace.

The duty is for the manufacturer to ensure, so far as is reasonably practicable, that the plant, substance or structure is without risks to the health and safety of the persons listed in subclause (2)(a) to (f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in subclause (2)(e), such as assembly, storage, decommissioning, dismantling, demolition or disposal.

For example, a manufacturer of a commercial cleaning substance must ensure, so far as reasonably practicable, that the substance is without risks to the health and safety of the persons who handle, store and use the substance at a workplace. This may involve ensuring the substance is packaged to reduce the risk of spills and that the container is correctly labelled with appropriate warnings and a Safety Data Sheet is prepared for safe use.

Clause 23(3) to (5) outline requirements that a manufacturer must comply with in order to satisfy the duty, including ensuring the carrying out of testing and the provision of information. Clause 23(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in subclause (2)(a) to (f). The type of information that must be provided is limited by clause 23(4).

24—Duties of persons conducting businesses or undertakings that import plant, substances or structures

Clause 24 sets out the duties for a PCBU who imports plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or to be used as a workplace.

The duty is for the importer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in subclause (2)(a) to (f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as in carrying out other reasonably foreseeable activities related to the intended purpose listed in subclause (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.

For example, a person who imports machinery must ensure, so far as reasonably practicable, that the imported product is without risks to the health and safety of the persons who assemble, use, maintain, decommission or dispose of the machinery at a workplace. This would involve ensuring the machinery is designed and manufactured to meet relevant safety standards.

Clauses 24(3) to (5) outline further requirements that an importer must comply with in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Clause 24(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in subclause (2)(a) to (f). The type of information that must be provided is limited by clause 24(4).

25—Duties of persons conducting businesses or undertakings that supply plant, substances or structures

Clause 25 sets out the duties for a PCBU that supplies plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or to be used as a workplace.

The duty is for the supplier to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in subclause (2)(a) to (f).The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in subclause (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.

Clause 25(3) to (5) outline further requirements that a supplier must comply with in order to satisfy the duty, including ensuring the carrying out of testing and the provision of information. Clause 25(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in subclause (2)(a) to (f). The type of information that must be provided is limited by clause 25(4).

For example, a person who supplies chemicals to a workplace must ensure that the chemicals are properly labelled and packaged and that current Safety Data Sheets are provided at the time of supply.

26—Duty of persons conducting businesses or undertakings that install, construct or commission plant or structures

This clause sets out the duty of a PCBU who installs, constructs or commissions plant or substances.

The duty on that person is to ensure, so far as reasonably practicable, that the plant or structure is installed, constructed or commissioned in a way that does not pose a risk to the health and safety of persons listed in subclause (2)(a) to (d).

For example, a person who installs neon business signs must ensure, so far as reasonably practicable, that they are installed without risks to the health and safety of himself or herself as well as people who will use, decommission, dismantle and work within the vicinity of the sign. This would involve ensuring the equipment is correctly installed, connected and grounded.

Division 4—Duty of officers, workers and other persons

27—Duty of officers

This Division sets out the work health and safety duties owed by 'officers' of bodies, workers and other persons at workplaces.

Clause 27 casts a positive duty on officers (as defined in clause 4) of a PCBU to exercise 'due diligence' to ensure that the PCBU complies with any duty or obligation under the Act.

Clause 27(2) applies if officers fail to exercise due diligence to ensure that the PCBU complies with its health and safety duties under Part 2. Maximum penalties for these offences by officers are specified in clauses 31 to 33.

Clause 27(3) sets the maximum penalties if an officer fails to exercise due diligence to ensure the PCBU complies with other duties and obligations under the Act. In that case, the maximum penalty is the penalty that would apply to individuals for failing to comply with the relevant duty or obligation.

Clause 27(4) clarifies that an officer may be convicted or found guilty whether or not the PCBU was convicted or found guilty of an offence under the Act.

These provisions reflect a deliberate policy shift way from applying 'accessorial' or 'attributed' liability to officers, which is an approach currently adopted by several jurisdictions. The positive duty requires officers to be proactive and means that officers owe a continuous duty to ensure compliance with duties and obligations under the Act. There is no need to tie an officer's failure to any failure or breach of the relevant PCBU for the officer to be prosecuted under this clause.

Importantly, this change helps to clarify the steps that an officer must take to comply with the duty under this clause.

Clause 27(5) contains a non-exhaustive list of steps an officer must take to discharge his or her duties under this provision, including acquiring and keeping up-to-date knowledge of work health and safety matters and ensuring the PCBU has, and implements, processes for complying with any duty or obligation the PCBU has under the Act.

An officer must have high, yet attainable, standards of due diligence. These standards should relate to the position and influence of the officer within the PCBU.

What is required of an officer should be directly related to the influential nature of the officer's position. This is because the officer governs the PCBU and makes decisions for management. A high standard requires persistent examination and care, to ensure that the resources and systems of the PCBU are adequate to comply with the duty of care required by the PCBU. This also requires ensuring that they are performing effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

28—Duties of workers

Clause 28 sets out the health and safety duties of workers. Workers have a duty to take reasonable care for their own health and safety while at work and also to take reasonable care so that their acts or omissions do not adversely affect the health and safety of other persons at the workplace.

The duty of care, being subject to a consideration of what is reasonable, is necessarily proportionate to the control a worker is able to exercise over his or her work activities and work environment.

Clause 28(c) makes it clear that workers must comply so far as they are able with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Act and regulations.

Clause 28(d) provides that workers must also cooperate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.

Whether an instruction, policy or procedure is 'reasonable' will be a question of fact in each case. It will depend on all relevant factors, including whether the instruction, policy or procedure is lawful, whether it complies with the Act and regulations, whether it is clear and whether affected workers are able to cooperate.

29—Duties of other persons at the workplace

Clause 29 sets out the health and safety duties applicable to all persons while at a workplace, whether or not those persons have another duty under Part 2 of the Act. This includes customers and visitors to a workplace.

Similar to the duties of workers, all other persons at a workplace must take reasonable care for their own safety at the workplace and take reasonable care that their acts or omissions do not adversely affect the health and safety of others at the workplace.

Other persons at a workplace must also comply, so far as they are reasonably able to, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Act.

Division 5—Offences and penalties

30—Health and safety duty

This Division sets out the offences framework in relation to breaches of health and safety duties under the Act.

Contraventions of the Act and regulations are generally criminal offences, although a civil penalty regime applies in relation to right of entry under Part 7. This generally reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable to a criminal sanction for placing another person's health and safety at risk. Such an approach is also in line with international practice.

The Act provides for three categories of offences against health and safety duties. Category 1 offences are for breach of health and safety duties that involve reckless conduct and carry the highest maximum penalty under the Act.

Penalties under the Act

There is a considerable disparity in the maximum fines and periods of imprisonment that can be imposed under current Australian work health and safety laws.

Penalties and the possibility of imprisonment in the most serious cases are a key part of achieving and maintaining a credible level of deterrence to complement other types of enforcement action, for example, the issuing of infringement notices. The maximum penalties set in the Act reflect the level of seriousness of the offences and have been set at levels high enough to cover the most egregious examples of offence.

31—Reckless conduct—Category 1

Category 1 offences are offences involving recklessness. The highest penalties under the Act apply, including imprisonment for up to five years.

Category 1 offences involve reckless conduct that exposes an individual to a risk of death or serious injury or serious illness without reasonable excuse. The prosecution will be required to prove the fault element of recklessness in addition to proving the physical elements of the offence.

32—Failure to comply with health and safety duty—Category 2

33—Failure to comply with health and safety duty—Category 3

Category 2 and 3 offences involve less culpability than Category 1 offences, as there is no fault element.

In each offence a person is required to comply with a health and safety duty. This is the first element of the offence.

The second element of the offence is that the person commits an offence if the person fails to comply with the health and safety duty.

Category 2 offences have a third element which provides that a person would only commit an offence if the failure to comply with the work health and safety duty exposed an individual to a risk of death or serious injury or serious illness.

Offences without this third element would be prosecuted as Category 3 offences.

Burden of proof

The burden of proof (beyond reasonable doubt) rests entirely upon the prosecution in matters relating to non-compliance with duties imposed by the Act. This includes whether the defendant failed to do what was reasonably practicable to protect the health and safety of the persons to whom the duty was owed.

This reflects the generally accepted principle that in a criminal prosecution, the onus of proof to the standard of beyond reasonable doubt normally rests on the prosecution.

34—Exceptions

Clause 34(1) creates an exception for volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace (see clauses 28 and 29).

Clause 34(2) creates an exception for unincorporated associations. Although unincorporated associations may be PCBUs for the purposes of the Act, their failure to comply with a duty or obligation under the Act does not constitute an offence and cannot attract a civil penalty. Instead, clause 34(3) makes it clear that liability may rest with either an officer of the unincorporated association (other than a volunteer) under clause 27 (subject to the exception above), or a member of the association under clause 28 or 29.

Part 3—Incident notification

35—What is a *notifiable incident*

All Australian work health and safety laws currently require all workplace deaths and certain workplace incidents, injuries and illnesses to be reported to a relevant authority. Most laws also require workplace incident sites to be preserved by the relevant person.

The primary purpose of incident notification is to enable the regulator to investigate serious incidents and potential work health and safety contraventions in a timely manner.

The duty to report incidents in clause 38 is linked to the duty to preserve an incident site until an inspector arrives or otherwise directs so that evidence is not compromised.

Clause 35 defines the kinds of workplace incidents that must be notified to the regulator and that also require the incident site to be preserved. A 'notifiable incident' is an incident involving the death of a person, 'serious injury or illness' of a person or a 'dangerous incident'.

36—What is a *serious injury or illness*

Clause 36 defines a *serious injury or illness* as an injury or illness requiring a person to have treatment of a kind specified in paragraphs (a) to (c), including: immediate treatment as an in-patient in a hospital; immediate treatment for a serious injury of a kind listed in paragraph (b); or medical treatment within 48 hours of exposure to a substance at a workplace. The regulations may prescribe additional injuries or illnesses for this purpose, and may also prescribe exceptions to the list in this clause.

37—What is a *dangerous incident*

Clause 37 defines a 'dangerous incident' in relation to a workplace as one that exposes a person to serious risk to his or her health or safety arising from an immediate or imminent exposure to the matters listed in clause 37(a) to (l). These matters include an uncontrolled escape, spillage or leakage of a substance, an uncontrolled implosion, explosion or fire and an uncontrolled escape of gas or steam.

Clause 37 enables regulations to be made that add events to this list and also exclude incidents from being dangerous incidents.

38—Duty to notify of notifiable incidents

This clause specifies who must notify the regulator of a notifiable incident and when and how this must be done.

Clause 38(1) requires the PCBU to ensure that the regulator is notified immediately after becoming aware that a 'notifiable incident' arising out of the conduct of the business or undertaking has occurred. The requirement for 'immediate' notification would not however prevent a person from assisting an injured person or taking steps that were essential to making the site safe or from minimising the risk of a further notifiable incident (see clause 39(3)).

Failure to notify is an offence.

Clause 38(2) requires the notice to be given by the fastest possible means.

Clause 38(3) requires the notice to be given by telephone or in writing. A legislative note advises that written notice can be given by facsimile, email and other electronic means.

Notification by telephone must include details requested by the regulator and may require the person to notify the regulator in writing within 48 hours (clause 38(4)). If the person notifying the regulator is not required to provide a written notice, the regulator must give the relevant PCBU details of the information received or an acknowledgement of receiving the notice (clause 38(6)).

Written notice must be in a form, or contain the details, approved by the regulator (clause 38(5)).

Clause 38(7) requires the PCBU to keep a record of each notifiable incident for five years from the date that notice is given to the regulator. Failure to do so is an offence.

39—Duty to preserve incident sites

Clause 39(1) requires the person with management or control of a workplace where a notifiable incident has occurred to take reasonable steps to ensure that the incident site is preserved until an inspector arrives or until such earlier time as directed by an inspector. Failure to do so is an offence.

Clause 39(2) clarifies that this requirement may include preserving any plant, substance, structure or thing associated with the incident.

Clause 39(3) sets out the kinds of things that can still be done to ensure work health and safety at the site, including assisting an injured person or securing the site to make it safe.

Clause 39(3)(e) allows inspectors or the regulator to give directions about the things that can be done.

Part 4—Authorisations

40—Meaning of *authorised*

This Part establishes the offences framework for authorisations that will be required under the model WHS Regulations (e.g. licences for high-risk work).

Authorisations such as licences, permits and registrations are a regulatory tool to control activities that are of such high risk as to require demonstrated competency or a specific standard of safety.

Authorisation systems place costs on duty holders as well as on regulators and so the level of authorisation is intended to be proportionate to the risk, with a defined and achievable safety benefit.

Because authorisations are issued to control high risk activities, it is the Act rather than the regulations that includes the relevant offence provisions.

Clause 40 clarifies that the term *authorised* means authorised by a licence, permit, registration or other authority (however described) that is required by regulation.

It is intended to capture all kinds of authorisations that are required—

- before work can be carried out by a person (e.g. high-risk work); or
- for work to be carried out at a particular place (e.g. major hazard facility), or
- before certain plant or substances can be used at a workplace.

It is not intended to cover notifications to the regulator that do not affect whether work can be carried out lawfully. However, the regulations could require such notifications to be made outside the framework provided for under Part 4.

41—Requirements for authorisation of workplaces

The regulations may require certain kinds of workplaces to be authorised (e.g. major hazard facilities).

Clause 41 makes it an offence for a person to conduct a business or undertaking at such a workplace, or allow a worker to carry out work at the workplace, if the workplace is not authorised in accordance with the regulations.

42—Requirements for authorisation of plant or substance

The regulations may require certain kinds of plant or substances or their design to be authorised (e.g. high risk plant).

Clause 42(1) makes it an offence for a person to use such plant or a substance if it is not authorised in accordance with the regulations.

Clause 42(2) makes it an offence for a PCBU to direct or allow a worker to use such plant or a substance if it is not authorised in accordance with the regulations. A PCBU would 'allow' a worker to use plant or substances in this situation if the PCBU did not take steps to prevent what the person knew to be unauthorised use.

The term 'allowed' is not defined but is intended to capture situations where a worker has not been expressly directed or requested to use the relevant plant or substance, but must do so in order to meet the PCBU's requirements (e.g. to carry out a particular task).

43—Requirements for authorisation of work

The regulations may require certain work, or classes of work, to be carried out only by or on behalf of a person who is authorised.

Clause 43(1) makes it an offence for a person to carry out such work at a workplace if the appropriate authorisations are not in place as required under the regulations.

Clause 43(2) makes it an offence for a PCBU to direct or allow a worker to carry out such work if the appropriate authorisations are not in place under the regulations.

44—Requirements for prescribed qualifications or experience

The regulations may require certain kinds of work, or classes of work, to be carried out only by or under the supervision of a person who is appropriately qualified or experienced.

Clause 44(1) makes it an offence for a person to carry out work at a workplace if these requirements are not met under the regulations.

Clause 44(2) makes it an offence for a PCBU to direct or allow a worker to carry out work at a workplace if the relevant requirements are not met under the regulations.

45—Requirement to comply with conditions of authorisation

Clause 45 makes it an offence for a person to contravene any conditions attaching to an authorisation.

Part 5—Consultation, representation and participation

Division 1—Consultation, co-operation and co-ordination between duty holders

46—Duty to consult with other duty holders

This Part establishes the consultation, representation and participation mechanisms that apply under the Act, including the duties to consult and provision for Health and Safety Representatives (HSRs) and Health and Safety Committees. Other arrangements are still a valid option, providing the duties under the Part are complied with.

Part 5 establishes comprehensive duties to consult in relation to specified work health and safety matters under the Act. Division 1 deals with consultation between duty holders, while Division 2 deals with consultation with workers.

Managing work health and safety risks is more effective if duty holders exchange information on how the work should be done so that it is without risk to health and safety. Cooperating with other duty holders and co-ordinating activities is particularly important for workplaces where there are multiple PCBUs.

Clause 46 requires duty holders to consult, cooperate and co-ordinate activities with all other persons who have a work health and safety duty in relation to the same matter. This duty applies 'so far as is reasonably practicable'. The phrase 'so far as is reasonably practicable' is not defined in this context, so its ordinary meaning will apply.

Division 2—Consultation with workers

47—Duty to consult workers

Clause 47 requires PCBUs to, so far as is reasonably practicable, consult with their workers who may be directly affected by matters relating to work health or safety. Consultation must comply with the Act and regulations, and also with any procedures agreed between the PCBU and its workers (clause 47(2)). Agreed procedures must be consistent with requirements about the nature of consultation in clause 48.

Scope of duty to consult

The duty to consult is qualified by the phrase 'so far as is reasonably practicable'. This qualification requires the level of consultation to be proportionate to the circumstances, including the significance of the workplace health or safety issue in question.

What is reasonably practicable will depend on the circumstances surrounding each situation. A PCBU may need to take into account the urgency of the requirement to change the work environment, plant or systems etc., and the availability of workers most directly affected or their representatives.

The extent of consultation that is reasonably practicable must be that which will ensure that the relevant PCBU has all relevant available information, including the views of workers and can therefore make a properly informed decision. More serious health or safety matters will generally attract more extensive consultation requirements.

The consultation should also ensure that the workers are aware of the reasons for decisions made by the PCBU—and even if they do not agree with the decisions—can understand them. This will make compliance with systems of work, including the use of protective devices or equipment provided, more likely to occur and be effective.

48—Nature of consultation

Clause 48(1) establishes the requirements for meaningful consultation. It requires PCBUs to: share relevant information about work health or safety matters (listed in clause 49) with their workers; give workers a reasonable opportunity to express their views; and contribute to the decision processes relating to those matters. It also requires PCBUs to take workers' views into account and advise workers of relevant outcomes in a timely manner.

Clause 48(2) provides that consultation must involve any HSR that represents the workers.

Consulting with HSRs alone may be sufficient to meet the consultation duty, depending on the work health or safety issue in question.

49—When consultation is required

Clause 49 sets out the kinds of work health and safety matters that must be consulted on under this Division, including at each stage of the risk management process. Additional matters requiring consultation under this Division may be prescribed by the regulations.

Division 3—Health and safety representatives

Subdivision 1—Request for election of health and safety representatives

50—Request for election of health and safety representative

There is considerable evidence that the effective participation of workers and the representation of their interests in work health and safety are crucial elements in improving health and safety performance at the workplace. Under the Act this representation occurs in part through HSRs who are elected by workers to represent them in relation to health and safety matters at work.

This Division provides for the election, functions and powers and entitlements of HSRs and their deputies under the Act.

This Subdivision sets out the process for electing HSRs for workers. The number of HSRs to be elected at a workplace is not limited by the Act but is instead determined following discussions between workers who wish to be represented and the PCBU for whom they carry out work.

The process for electing HSRs is initiated by a worker's request.

Clause 50 provides that a worker may ask a PCBU for whom he or she carries out work to facilitate elections for one or more HSRs.

This clause does not require the request to be in any particular form. The worker's request will trigger the PCBU's obligation to facilitate the determination of one or more work groups providing the worker's request is sufficiently clear.

A PCBU is required to facilitate the election of HSRs. Facilitating the election process requires a PCBU to adopt a supportive role during the election process rather than a directive one (see clause 52(1) below for more information).

Subdivision 2—Determination of work groups

51—Determination of work groups

This Subdivision sets out the process for determining work groups under the Act.

Clause 51 establishes the PCBU's obligation to facilitate the determination of one or more work groups, following a request under clause 50.

Clause 51(2) clarifies that the purpose of dividing workers into work groups is to facilitate representation by HSRs in relation to work health and safety matters.

The legislation does not otherwise limit the determination of work groups, although the regulations may prescribe the matters that must be taken into account (clause 52(5)).

Clause 51(3) clarifies that a work group may span one or more physical workplaces.

52—Negotiations for agreement for work group

Clause 52 sets some parameters around negotiations for work groups.

Clause 52(1) provides that work groups are negotiated and agreed between the relevant parties. That is, the PCBU and the workers who are proposed to form the work group or their representatives. A worker's representative could be a union delegate or official, or any other person the worker authorises to represent him or her (see the definition of 'representative' in clause 4).

Clause 52(2) requires the relevant PCBU to take all reasonable steps to commence negotiations to determine work groups within 14 days after a request is made under clause 50.

Clause 52(3) sets out the matters that are to be determined by negotiation, including the number and composition of work groups and the number of HSRs and deputy HSRs (if any) to be elected to represent them.

Clause 52(4) provides that any party involved with determining an agreement for a work group or work groups, can negotiate a variation to that agreement at any time.

Clause 52(5) prohibits the PCBU from, if asked by a worker, refusing to negotiate with the worker's representative or excluding the representative from negotiations. This includes negotiations for a variation of a work group agreement. A breach of these requirements is an offence.

This provision does not require the PCBU to reach agreement but requires the PCBU to genuinely try to negotiate with representatives.

Clause 52(6) allows the regulations to prescribe the matters that must be taken into account in negotiations for and variation of agreements concerning work groups.

53—Notice to workers

Clause 53(1) requires the PCBU to notify workers of the outcome of negotiations and determination of any work groups, as soon as practicable after the negotiations are completed. Failure to notify is an offence.

Clause 53(2) requires a PCBU who is negotiating to vary an agreement for the determination of a work group or work groups to notify workers of the outcome of those negotiations (if any) as soon as it is practicable after negotiations are complete. Failure to notify workers is an offence.

54—Failure of negotiations

Clause 54 sets out the process for determining work groups if negotiations under clause 52 fail.

Negotiations are taken to have failed if, after 14 days of a request being made under clause 50 or if a party to the agreement requests a variation to an agreement, the PCBU has failed to take all reasonable steps to commence negotiations. Negotiations are also considered to have failed if an agreement cannot be reached on a relevant matter or variation to an agreement within a reasonable time after negotiations commence (clause 54(3)).

Clause 54(1) allows any person who is, or would be, a party to the negotiations to ask the regulator to appoint an inspector to decide the matter. This includes negotiations for a variation of a work group agreement.

Clause 54(2) empowers the inspector to decide on the relevant matters (referred to in clause 52(3) or any matter that is the subject of the proposed variation (as the case requires)) or to decide that work groups should not be established or that the agreement should not be varied (as the case requires). In exercising this discretion, the inspector must have regard to the relevant parts of the Act, including the objects of the Part and the Act overall.

Clause 54(4) provides that the inspector's decision is taken to be an agreement under clause 52. This means that the inspector's decision operates for all purposes as if it had been agreed between the relevant parties.

Subdivision 3—Multiple-business work groups

55—Determination of work groups of multiple businesses

This Subdivision provides a process for establishing and varying multiple-business work groups, that is work groups that span the businesses or undertakings of two or more persons. Unlike single-PCBU work groups, multiple-business work groups can only be determined by agreement between the relevant parties.

Clause 55 allows work groups to be determined in relation to two or more PCBUs (multiple-business work groups).

Clause 55(2) requires multiple-business work groups to be determined by negotiation and agreement between the relevant parties (e.g. each of the PCBUs and the workers proposed to be included in the work groups).

Clause 55(3) provides that any party involved with determining an agreement for a work group or work groups, can negotiate a variation to that agreement at any time.

Clause 55(4) clarifies that the determination of multiple-business work groups would not affect pre-existing work groups or prevent the formation of additional work groups under Subdivision 2.

56—Negotiation of agreement for work groups of multiple businesses

Clause 56(1) limits negotiations for multiple-business work groups to the matters listed in paragraphs (a) to (d), including the number and composition of work groups and the number of HSRs and deputy HSRs (if any) for each work group.

Clause 56(2) establishes representation rights for relevant workers, which mirror the rights explained in relation to clause 52(4) above. A breach of these requirements is an offence.

Clause 56(3) allows an inspector to assist negotiations, if agreement cannot be reached on a relevant matter within a reasonable time after negotiations have commenced.

Clause 56(4) allows the regulations to prescribe the matters that must be taken into account in negotiations for (and variations of) agreements.

57—Notice to workers

Clause 57(1) sets out the matters that must be notified upon the completion of negotiations, namely, the outcome of negotiations and determination of any work groups. A breach of these requirements is an offence.

Clause 57(2) requires a PCBU who is negotiating to vary an agreement for the determination of a work group or work groups to notify workers of the outcome of those negotiations and variations (if any) as soon as it is practicable after negotiations are complete. Failure to do so is an offence.

58—Withdrawal from negotiations or agreement involving multiple businesses

Clause 58 establishes a process that allows a party to withdraw from negotiations for multiple-employer work groups and also to withdraw from an agreement made under this Subdivision. This process is necessary as multiple-employer work groups are voluntary and are only available by agreement between all relevant parties.

Withdrawal by one party to an agreement (involving three or more PCBUs) would trigger the need to negotiate a variation to the agreement (in accordance with clause 56), but would not otherwise affect the validity of the agreement for other parties in the meantime (clause 58(2)).

59—Effect of Subdivision on other arrangements

Clause 59 clarifies that alternative representative arrangements can always be made between two or more PCBUs and their workers, provided that the PCBUs comply with this Subdivision.

Subdivision 4—Election of health and safety representatives

60—Eligibility to be elected

This Subdivision sets out the procedures for electing HSRs.

Clause 60 sets out the eligibility rules for HSRs.

Clause 60 provides that a worker is eligible to be elected as HSR for a work group if the person is a member of that work group and is not disqualified under clause 65.

61—Procedure for election of health and safety representatives

Clause 61 sets out the procedure for the election of HSRs.

The procedures for the election of HSRs are determined by the workers in the work group for which elections are being held. The regulations may prescribe minimum requirements for the conduct of elections (clause 61(1) and (2)).

Clause 61(3) allows elections to be conducted with the assistance of a union or other person or organisation, provided that a majority of affected workers agree.

Clause 61(4) requires the relevant PCBU to provide any resources, facilities and assistance that are reasonably necessary or are prescribed by the regulations to enable elections to be conducted. Failure to do so is an offence.

62—Eligibility to vote

Clause 62 provides that the members of a work group are responsible for electing the HSR or HSRs for that work group and are therefore entitled to vote in the elections conducted for that work group.

63—When election not required

Clause 63 sets out the circumstances in which an election is not required.

An election is not required if the number of candidates for HSR equals the number of vacancies for that position and the number of candidates for deputy HSR equals the number of vacancies for that position.

64—Term of office of health and safety representative

Clause 64(1) provides that an HSR holds office for a maximum term of three years, although that may be shortened upon—

- the person's resignation from office in writing to the PCBU (clause 64(2)(a)); or
- the person ceasing to be part of the work group he or she represents (clause 64(2)(b)); or
- the person being disqualified under clause 65 (clause 64(2)(c)); or
- the person being removed from office by a majority of the work group he or she represents in accordance with the regulations (clause 64(2)(d)).

Clause 64(3) clarifies that an HSR is eligible for re-election, unless the person is disqualified under clause 65 (see clause 60(b)).

65—Disqualification of health and safety representatives

Clause 65 sets out a process for disqualifying HSRs from office for—

- performing a function or exercising a power under the Act for an improper purpose; or
- using or disclosing any information acquired as an HSR for a purpose unconnected with the role as a HSR.

The regulator or any person who has been adversely affected by these actions may apply to the Senior Judge of the IRC for a review committee to have the HSR disqualified from office. If a review committee is satisfied that a ground

for disqualification is made out, the review committee may disqualify the health and safety representative for a specified period or indefinitely.

66—Immunity of health and safety representatives

Clause 66 confers immunity on HSRs so they cannot be personally sued for anything done or omitted to be done in good faith while exercising a power or performing a function under the Act, or in the reasonable belief that they were doing so.

67—Deputy health and safety representatives

Clause 67 establishes the procedures for the election of deputy HSRs and establishes their powers and functions under the Act.

Clause 67(1) provides for deputy HSRs to be elected in the same way as HSRs (see the election procedure in clauses 60 to 63).

Deputy HSRs for a work group may only take over the powers and functions of an HSR for the work group if the HSR ceases to hold office or is unable (because of absence or any other reason) to exercise powers or perform functions as HSR under the Act.

Clause 67(2)(b) makes it clear that the Act applies to the deputy HSR accordingly. For example, this means a deputy HSR can exercise the powers and functions of the HSR and the PCBU must comply with the general obligations under clause 70.

Clause 67(3) extends a number of relevant provisions so they apply equally to both HSRs and deputy HSRs. This means that provisions dealing with the term of office, disqualification, immunity and training apply equally to both HSRs and deputy HSRs.

Subdivision 5—Powers and functions of health and safety representatives

68—Powers and functions of health and safety representatives

This Subdivision sets out the powers and functions of HSRs and deputy HSRs. The powers are intended to enable HSRs to most effectively represent the interests of the members of their work group and to contribute to health and safety matters at the workplace.

Clause 68 confers the necessary powers and functions on HSRs to enable them to fulfil their representative role under the Act. Clause 67 sets out the circumstances in which a deputy HSR may take over the powers and functions of the HSR under this clause.

Clause 68(1) sets out HSRs' general powers and functions, while clause 68(2) clarifies the specific powers of HSRs without limiting the general powers in subclause (1).

The primary function of HSRs is to represent workers in their work group in relation to health and safety matters at work (clause 68(1)(a)). As part of that function, HSRs may monitor the PCBU's compliance with the Act in relation to their work group members (clause 68(1)(b)), investigate complaints from work group members about work health and safety matters (clause 68(1)(c)) and inquire into anything that appears to be a risk to the health or safety of work group members, arising from the conduct of the business or undertaking (clause 68(1)(d)).

These powers are generally exercisable in relation to the HSR's work group members, subject to clause 69.

Clause 68(4) makes it clear that nothing in the Act imposes, or should be taken to impose, a duty on HSRs to exercise any of these powers or perform any of these functions at any point in time. The HSR's functions and powers are exercisable entirely at the discretion of the HSR.

Clause 68(2) sets out the specific powers of HSRs, which are intended to reinforce their representative role under the Act.

Clause 68(2)(a) allows HSRs to inspect the place where any work group member carries out work for the relevant PCBU—

- *at any time* after giving reasonable notice to the person conducting the business or undertaking at that workplace; and
- *at any time without notice* in the event of an incident or any situation involving a serious risk to a person's health or safety arising from an immediate or imminent exposure to a hazard.

Clause 68(2)(b) entitles an HSR to accompany an inspector during an inspection of the workplace at which a work group member carries out work.

Clause 68(2)(c) entitles an HSR to be present at an interview concerning work health and safety between a worker who is a work group member and either an inspector, the PCBU at the workplace or the PCBU's representative. This entitlement only applies if the HSR has the consent of the worker being interviewed.

Clause 68(2)(d) entitles an HSR to be present at an interview concerning work health and safety between a group of workers and either an inspector, the PCBU at the workplace or the person's representative. This entitlement only applies if the HSR has the consent of at least one of their members being interviewed and regardless of whether non-work group members are present (or even object to the HSR's involvement).

Clause 68(2)(e) allows HSRs to request the establishment of a health and safety committee.

Clause 68(2)(f) entitles HSRs to receive information about the work health and safety of their work group members. However, there is no entitlement to access any personal or medical information about a worker without the worker's consent, unless the information is in a form that does not identify the worker or that could not reasonably be expected to lead to the identification of the worker (clause 68(3)).

69—Powers and functions generally limited to the particular work group

HSRs' and deputy HSRs' powers and functions under the Act are generally limited to work health and safety matters that affect or may affect their work group members (clause 69(1)).

However, an HSR may exercise powers and functions under the Act in relation to another work group for the relevant PCBU if the HSR (and any deputy HSR) for that work group is found, after reasonable inquiry, to be unavailable and (clause 69(2))—

- there is a serious risk to health or safety emanating from an immediate or imminent exposure to a hazard that affects or may affect a member for the work group; or
- a member of the work group asks for the HSR's assistance.

What constitutes 'reasonable inquiry' will depend on all the circumstances of the case and especially the seriousness of the risk to health or safety in question.

Subdivision 6—Obligations of person conducting business or undertaking to health and safety representatives

70—General obligations of person conducting business or undertaking

This Subdivision sets out the obligations of PCBUs to support HSRs in their representative role, including the obligation to have HSRs trained upon request. The course of training that the HSR will be entitled to attend will be prescribed by the regulations.

Clause 70 sets out the general obligations of PCBUs, many of which reflect the corresponding entitlements in clause 68, which establishes HSRs' powers and functions. These obligations will also apply in relation to deputy HSRs while they exercise the powers of HSRs (see clause 67(2)).

It is an offence for a PCBU to fail to comply or refuse to comply with any of these obligations. PCBUs are required to—

- consult so far as is reasonably practicable with their HSRs on work health and safety matters at the workplace (clause 70(1)(a)); and
- confer with HSRs, whenever reasonably requested by the HSR, for the purpose of ensuring the health and safety of their work group members (clause 70(1)(b)); and
- give HSRs access to the information they are entitled to have, consistent with clause 68(2)(f) and clause 68(3) (clause 70(1)(c)); and
- allow their HSRs to attend the kinds of interviews they are entitled to attend under clause 68(2)(c) (clause 70(1)(d) and (e)); and
- provide their HSRs with any resources, facilities and assistance that are reasonably necessary or prescribed by the regulations to enable the HSR to exercise powers and perform functions under the Act (clause 70(1)(f)); and
- allow persons assisting their HSRs (under clause 68(2)(g)) to have access to the workplace, but only if access is necessary to enable the assistance to be provided. This obligation is subject to the qualifications in clause 71(4). Although no notification requirements are prescribed, a person assisting a HSR would need to meet any of the PCBU's policies or procedures that are applicable to workplace visitors including any work health and safety requirements (clause 70(1)(g)), and
- allow their HSRs to accompany an inspector during an inspection of any part of the workplace where the HSR's work group members work (clause 70(1)(h)).

Clause 70(1)(i) allows the regulations to prescribe further assistance that may be required to enable HSRs to fulfil their representative role.

HSRs must be given such time as is reasonably necessary (e.g. during work hours) to exercise their powers and perform their functions under the Act (clause 70(2)). Any time an HSR spends exercising powers and performing functions at work must be paid time, paid at the rate that the HSR would receive had he or she not been exercising powers or performing functions (clause 70(3)). Any underpayment of wages may be recovered under the applicable industrial laws.

71—Exceptions from obligations under section 70(1)

Clause 71 qualifies some of the PCBU's obligations under clause 70(1).

Clause 71(2) ensures that the personal or medical information HSRs receive under clause 70(1)(c) excludes any information that identifies individual workers, or could reasonably be expected to identify individual workers. It would be an offence for a PCBU to release such information to an HSR.

Clause 71(3) clarifies that PCBUs are not required to provide any financial assistance to help pay for HSRs' assistants that are referred to in clause 70(1)(g).

Clause 71(4) applies in relation to certain assistants to HSRs who are or who have been WHS entry permit holders. PCBUs may refuse access to such a person if the person has had his or her WHS entry permits revoked, or during any period that the person's WHS entry permit is suspended or the assistant is disqualified from holding a WHS permit.

Clause 71(5) allows PCBUs to refuse an HSR's assistant access to a workplace on 'reasonable grounds'. 'Reasonable grounds' are not defined, but it is intended that access could be refused, for example, if the assistant had previously intentionally and unreasonably delayed, hindered or obstructed any person, disrupted any work at a workplace or otherwise acted in an improper matter.

Clause 71(6) allows an inspector to assist in any dispute over an assistant's proposed entry, upon the HSR's request. In this situation, an inspector could provide advice or recommendations in relation to the dispute or exercise his or her compliance powers under the Act. This provision is not intended to limit inspectors' compliance powers in any way.

72—Obligation to train health and safety representatives

Clause 72 sets out PCBUs' obligations to train their HSRs and deputy HSRs (see clause 67(3)). This clause establishes the entitlement to HSR training, which is available to HSRs and deputy HSRs upon request to their PCBU (clause 72(1)).

The entitlement allows the HSR or deputy HSR to attend an HSR training course that has been approved by the regulator (clause 72(1)(a)) and that the HSR is entitled under the regulations to attend (clause 72(1)(b)).

An HSR or deputy HSR is also entitled to attend the course of their choice (e.g. in terms of when and where he or she proposes to attend the course), although the course must be chosen in consultation with the PCBU. If the parties are unable to agree, clause 72(5) to (7) will apply.

Clause 72 requires the PCBU to give the HSR or deputy HSR time off work to attend the agreed course of training as soon as practicable within three months of the request being made. The PCBU is also required to pay the course fees and any other reasonable costs associated with the HSR's or deputy HSR's attendance at the course of training.

Clause 72(3)(b) applies to multi-business work groups and provides that only one of the PCBUs needs to comply with this clause.

Clause 72(4) provides that any time an HSR or deputy HSR is given off work to attend the course of training must be must be paid time, paid at the rate that the HSR or deputy HSR would receive had he or she not been attending the course. Any underpayment of wages may be recovered under the applicable industrial laws.

Clause 72(5) to (7) establish a procedure for resolving a disagreement if an agreement cannot be reached—as soon as practicable within the period of three months—on the course the HSR or deputy HSR is to attend or the reasonable costs of attendance that will be met by the relevant PCBU. In that case, either party may ask the regulator to appoint an inspector to decide matters in dispute. The parties would be bound by the inspector's determination and non-compliance by the PCBU would constitute an offence.

73—Obligation to share costs if multiple businesses or undertakings

Clause 73 applies where HSRs or deputy HSRs represent multiple-business work groups and provides for the sharing of costs between relevant PCBUs. In general, costs of the HSR exercising powers under the Act and training-related costs are shared equally, although the parties may come to alternative arrangements by agreement.

74—List of health and safety representatives

Clause 74 requires PCBUs to prepare and keep up-to-date lists of their HSRs and deputy HSRs (if any).

The lists must be displayed in a prominent place at the PCBU's principal place of business and also any other workplace that is appropriate taking into account the constitution of the work groups. PCBUs should select a prominent place to display the list that is accessible to all workers, which could be the workplace intranet.

Non-compliance with these provisions constitutes an offence.

Up-to-date lists must also be forwarded to the regulator as soon as practicable after being prepared.

Division 4—Health and safety committees

75—Health and safety committees

This Division provides for the establishment of health and safety committees for consultative purposes under the Act. Health and safety committees are consultative bodies that are established for workplaces under the Act, with functions that include assisting to develop work health and safety standards, rules and procedures for the workplace (see clause 77).

Clause 75 sets out when a PCBU must establish a health and safety committee, including on the request of one of their HSRs or five or more workers that carry out work for the PCBU at the workplace. The regulations may also require health and safety committees to be established in prescribed circumstances.

A health and safety committee must be established within two months after the request is made and non-compliance constitutes an offence (clause 75(1)(a)).

A health and safety committee may also be established at any time on a PCBU's own initiative (clause 75(2)).

Health and safety committees will usually be established for a physical workplace at one location. However, the provisions are not intended to be restrictive and it would be possible to establish a committee for workers who carry out work for a PCBU in two or more physical workplaces (e.g. at different locations) or for those who do not have a fixed place of work.

Non-compliance with these provisions constitutes an offence.

76—Constitution of committee

Clause 76 sets out minimum requirements for establishing and running health and safety committees. The relevant PCBU and the workers for whom the committee is being established must negotiate on how the committee will be constituted (clause 76(1)).

Unless they do not wish to participate, HSRs are automatically members of a relevant workplace's committee (clause (76(2)). If there is more than one HSR, the HSRs may agree among themselves as to who will sit on the committee (clause 76(3)).

Clause 76(4) ensures genuine worker representation by requiring at least half of the members of the committee to be workers not nominated by the relevant PCBU (clause 76(4)).

Clause 76(5) to (7) establish a dispute resolution procedure if the constitution of the committee cannot be agreed between all relevant parties. In that case, an inspector may decide the membership of the committee or that the committee should not be established. In exercising this discretion, the inspector must have regard to the relevant parts of the Act including the objects of the Act overall. Any decision on how the committee is to be constituted is then taken to be an agreement between the relevant parties.

77—Functions of committee

Clause 77 establishes the functions of health and safety committees, including facilitating co-operation between the PCBU and the relevant workers in instigating, developing and carrying out measures designed to ensure work health and safety and also assisting in developing the relevant standards, rules and procedures for the workplace. Additional functions may be agreed between the health and safety committee and the PCBU or prescribed by the regulations.

78—Meetings of committee

Clause 78 sets minimum requirements for the frequency of health and safety committees. Under this clause, committees must meet at least once every three months and also at any reasonable time at the request of at least half of the committee members.

79—Duties of person conducting business or undertaking

Clause 79 sets out the general obligations of PCBUs in relation to their health and safety committees.

The PCBU must allow committee members to spend such time at work as is reasonably necessary to attend meetings of the committee or carry out functions as a committee member (clause 79(1)).

Clause 79(2) clarifies that such time must be paid time, paid at the rate that the committee member would have been entitled to receive had he or she not been attending meetings of the committee or exercising powers or performing functions as a committee member. Any underpayment of wages may be recovered under the applicable industrial laws.

Clause 79(3) entitles committee members to access the information the relevant PCBU has relating to hazards and risks at the workplace and the work-related health and safety of workers at the workplace. However, there is no entitlement to access any personal or medical information about a worker without the worker's consent, unless the information is in a form that does not identify the worker or that could not reasonably be expected to lead to the identification of the worker (clause 79(4)).

Failure to provide committee members with the entitlements prescribed under clause 79(1) and (3) constitutes an offence. It is also an offence for a PCBU to provide personal or medical information about a worker contrary to clause 79(4).

Division 5—Issue resolution

80—Parties to an issue

This Division establishes a mandatory process for resolving work health and safety issues. It applies after a work health and safety matter is raised but not resolved to the satisfaction of any party after discussing the matter.

Consultation is an integral part of issue resolution and conversely, issue resolution processes may be required to deal with issues arising during consultation. The provisions for consultation are dealt with separately in Divisions 1 and 2 of this Part.

Clause 80 defines the parties to an issue, who are—

- the PCBU with whom the issue has been raised or the PCBU's representative (e.g. employer organisation); and

- any other PCBU or their representative who is involved in the issue; and
- the HSRs for any of the affected workers or their representative, and
- if there are no HSRs—the affected workers or their representative.

If a PCBU is represented, clause 80(2) requires the PCBU to ensure that the representative has, for purposes of issue resolution, sufficient seniority and competence to act as the person's representative. The subclause also prohibits the PCBU from being represented by an HSR. This latter restriction is necessary because HSRs are essentially workers' representatives and representing both sides would constitute a conflict of interest.

81—Resolution of health and safety issues

Clause 81 establishes a process for the resolution of work health and safety issues.

Clause 81(1) sets out when the issue resolution process applies, that is, after the work health and safety matter remains unresolved after the matter is discussed by parties to the issue. At that point, the matter becomes a work health and safety issue that is subject to the issue resolution process under this Division.

Clause 81(2) requires each party and his or her representative (if any) to make reasonable efforts to achieve a timely, final and effective resolution of the issue using the agreed issue resolution procedure or—if there is not one—the default procedure prescribed by the regulations.

Provision for default procedures in the Act reflects the view that it is preferable that issue resolution procedures be agreed between the parties. Agreed procedures may accommodate the subtleties of the relationship between the parties, the workplace organisation and the types of hazards and risks that are likely to be the subject of issues.

The intention is that issues should be resolved as soon as can reasonably be achieved to avoid further dispute or a recurrence of the issue or a similar issue; that is, an issue should be resolved 'once and for all' to the extent that is possible in the circumstances.

Clause 81(3) entitles each party's representative to enter the workplace for the purpose of attending discussions with a view to resolving the issue.

82—Referral of issue to regulator for resolution by inspector

Clause 82 gives parties to an issue under this Division the right to ask for an inspector's assistance in resolving the issue if it remains unresolved after reasonable efforts have been made. It applies whether all parties have made reasonable efforts or at least one of the parties has made reasonable efforts to have the work health and safety issue resolved. A party's unwillingness to resolve the issue would not prevent operation of this clause.

Clause 82(3) preserves the rights to cease unsafe work, or direct that unsafe work cease, under Division 6 of Part 5 when an inspector has been called in to assist with resolving a work health and safety issue under this clause.

Clause 82(4) clarifies that the inspector's role is to assist in resolving the issue, which could involve the inspector providing advice or recommendations or exercising any of his or her compliance powers under the Act (e.g. to issue a notice). This provision is not intended to limit inspectors' compliance powers in any way.

Division 6—Right to cease or direct cessation of unsafe work

83—Definition of *cease work under this Division*

This Division covers workers' rights to cease unsafe work and establishes HSRs' power to direct that unsafe work cease. These rights have been drafted in a way that maintains consistency with provisions dealing with the cessation of unsafe work under the *Fair Work Act 2009* of the Commonwealth. This is found in the exception to the definition of industrial action in section 19 of that Act.

Clause 83 clarifies that 'ceasing work' includes ceasing or refusing to carry out work.

84—Right of worker to cease unsafe work

Clause 84 sets out the right of workers to cease unsafe work. A worker has the right to cease work if—

- he or she has a reasonable concern that carrying out the work would expose him or her to a serious risk to his or her health or safety; and
- the serious risk emanates from an immediate or imminent exposure to a hazard.

This right is subject to the notification requirements in clause 86 and the worker's obligation to remain available to carry out suitable alternative work under clause 87.

'Serious risk'

The term 'serious risk' is not defined, but captures the recommendations of the National Review into Model Occupational Health and Safety Laws, first report, October 2008 (see paragraph 28.42 – 43 of that report). As the report states, this formulation has the advantage of being effective to deal with risks of diseases of long latency from immediate exposure to a hazard and circumstances of psychological threat or other similar conditions. For the right to cease work to apply, the risk (the likelihood of it occurring and the consequences if it did) would have to be considered 'serious' and emanates from an immediate or imminent exposure to a hazard.

'Reasonable concern'

The requirement for the worker to have a 'reasonable concern' is intended to align with equivalent provisions under the *Fair Work Act 2009* of the Commonwealth.

For this entitlement to apply, it will not be sufficient for a worker to simply assert that his or her action is based on a reasonable concern about a serious and immediate or imminent risk to his or her safety. A 'reasonable concern' for health or safety can only be a concern which is both reasonably held and which provides a reasonable or rational basis for the worker's action. A concern may be reasonable if it is not fanciful, illogical or irrational.

It is not necessary to establish an existing serious health or safety risk to the worker. The question is whether the worker's action was based on a reasonable concern for his or her health or safety arising from a serious and immediate risk, rather than the existence of such a risk.

85—Health and safety representative may direct that unsafe work cease

Clause 85 establishes HSRs' power to direct that unsafe work cease. In general, this power can only be used to direct workers in the HSR's own work group, unless the special circumstances in clause 69 apply. An HSR's deputy could also exercise this power in the circumstances set out in clause 67.

Clause 85(1) sets out the circumstances in which an HSR may direct that unsafe work cease. Similar to clause 84, an HSR may issue the direction under this clause to a work group member if—

- he or she has a reasonable concern that carrying out the work would expose the work group member to a serious risk to the member's health or safety; and
- the serious risk emanates from an immediate or imminent exposure to a hazard.

The term 'serious risk' is explained above in relation to clause 84.

Clause 85(2) requires HSRs to consult with the relevant PCBU and attempt to resolve the work health or safety issue under Division 5 before giving a direction under this clause. However, these steps are not necessary if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction (clause 85(3)). In that case, the consultation must be carried out as soon as possible after the direction is given (clause 85(4)).

Clause 85(5) requires a HSR to inform the PCBU of any direction to cease work that the HSR has given to workers.

Clause 85(6) provides that only an appropriately trained HSR may exercise the powers under this provision, that is, if the HSR has—

- completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU); or
- undertaken equivalent training in another jurisdiction.

86—Worker to notify if ceases work

Clause 86 requires workers who cease work under this Division (otherwise than under a direction from a HSR) to notify the relevant PCBU that they have ceased unsafe work as soon as practicable after doing so. It also requires workers to remain available to carry out 'suitable alternative work'. This would not however require workers to remain at any place that poses a serious risk to their health or safety.

87—Alternative work

Clause 87 allows PCBUs to re-direct workers who have ceased unsafe work under this Division to carry out 'suitable alternative work' at the same or another workplace. The suitable alternative work must be safe and appropriate for the worker to carry out until he or she can resume normal duties.

88—Continuity of engagement of worker

Clause 88 preserves workers' entitlements during any period for which work has ceased under this Division. It does not apply if the worker has failed to carry out suitable alternative work as directed under clause 87.

89—Request to regulator to appoint inspector to assist

Clause 89 clarifies that inspectors may be called on to assist in resolving any issues arising in relation to a cessation of work.

Division 7—Provisional improvement notices

90—Provisional improvement notices

This Division sets HSRs' powers to issue provisional improvement notices under the Act, and related matters. Provisional improvement notices are an important part of the function performed by HSRs.

Clause 90(1) sets out the circumstances when an HSR may issue a provisional improvement notice, that is, if the representative reasonably believes that a person—

- is contravening a provision of the Act; or

- has contravened a provision of the Act in circumstances that make it likely that the contravention will continue or be repeated.

A HSR may only exercise this power at a workplace, in relation to any work health or safety matters that affects, or may affect, workers in the HSR's work group (see clause 69(2)). Clause 69(2) provides that a HSR may also exercise powers and functions under the Act in relation to another work group in some circumstances.

Clause 90(2) sets out the kinds of things a provisional improvement notice may require a person to do (e.g. remedy the contravention or prevent a likely contravention from occurring).

Clause 90(3) requires HSRs to consult with the alleged contravenor or likely contravenor before issuing a provisional improvement notice.

Clause 90(4) provides that only a HSR can exercise the powers under this provision, that is, if the HSR has—

- completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU); or
- undertaken equivalent training in another jurisdiction.

Clause 90(5) relates to the situation where an inspector may have already dealt with a matter by issuing or deciding not to issue an improvement notice or prohibition notice. In that case the HSR would have no power to issue a provisional improvement notice in relation to the matter, unless the circumstances were materially different (e.g. the matter the HSR is proposing to remedy is no longer the same matter dealt with by the inspector).

91—Provisional improvement notice to be in writing

Clause 91 requires provisional improvement notices to be issued in writing.

92—Contents of provisional improvement notice

Clause 92 sets out the kind of information that must be contained in a provisional improvement notice. Importantly, a provisional improvement notice must specify a date for compliance, which must be at least eight days after the notice is issued. The day on which the notice is issued does not count for this purpose.

93—Provisional improvement notice may give directions to remedy contravention

Clause 93 allows provisional improvement notices to specify certain kinds of directions about ways to remedy the contravention, or prevent the likely contravention, that is subject of the notice.

94—Minor changes to provisional improvement notice

Clause 94 enables HSRs to make minor changes to provisional improvement notices (e.g. for clarification or to correct errors or references).

95—Issue of provisional improvement notice

Clause 95 requires provisional improvement notices to be served in the same way as improvement notices issued by inspectors.

96—Health and safety representative may cancel notice

Clause 96 allows HSRs to cancel a provisional improvement notice at any time. This must be done by giving written notice to the person to whom it was issued.

97—Display of provisional improvement notice

Clause 97 establishes the display requirements for provisional improvement notices. It requires a person who is issued with a notice to display it in a prominent place at or near the workplace where work affected by the notice is carried out.

It is an offence for a person to fail to display a notice as required by this clause, or to intentionally remove, destroy, damage or deface the notice while it is in force.

Although not specified, it is intended that there is no requirement to display notices that are stayed under the review proceedings set out in clause 100, as they would not be considered to be 'in force' for the period of the stay.

98—Formal irregularities or defects in notice

Clause 98 ensures that provisional improvement notices are not invalid merely because of a formal defect or an irregularity, so long as this does not cause or is not likely to cause substantial injustice.

99—Offence to contravene a provisional improvement notice

Clause 99 makes it an offence for a person to not comply with a provisional improvement notice, unless an inspector has been called in to review the notice under clause 101. If an inspector reviews the notice, it may be confirmed with or without modifications or cancelled. If it is confirmed it is taken to be an improvement notice and may be enforced as such.

100—Request for review of provisional improvement notice

Clause 100 sets out a procedure for the review of provisional improvement notices by inspectors. Review may be sought within seven days after the notice has been issued by the person issued with the notice or, if that person is a worker, the PCBU for whom the worker carries out the work affected by the notice.

An application under this clause stays the operation of the provisional improvement notice until an inspector makes a decision on the review (clause 100(2)).

101—Regulator to appoint inspector to review notice

Clause 101 sets out the procedure that the regulator and the reviewing inspector must follow after a request for review is made.

The regulator must arrange for a review to be conducted by an inspector at the workplace as soon as practicable after a request is made (clause 101(1)).

The inspector must review the disputed notice and inquire into the subject matter covered by the notice (clause 101(2)). An inspector may review a notice even if the time for compliance with the notice has expired (clause 101(3)).

102—Decision of inspector on review of provisional improvement notice

Clause 102 sets out the kinds of decisions the inspector may make upon review, the persons to whom a copy of the inspector's decision must be given and the effect of the inspector's decision on the notice.

The reviewing inspector must either (clause 102(1))—

- confirm the provisional improvement notice, with or without modifications; or
- cancel the provisional improvement notice.

In some cases the provisional improvement notice under review may have expired before the inspector can make a decision. However, inspectors may still confirm such notices and modify the time for compliance (see clause 101(3)).

Clause 102(2) requires the inspector to give a copy of his or her decision to the applicant for review and the HSR who issued the notice.

Clause 102(3) provides that a notice that has been confirmed (with or without modifications by an inspector) has the status of an improvement notice under the Act.

Division 8—Part not to apply to prisoners

103—Part does not apply to prisoners

Clause 103 provides that Part 5 does not apply to a worker who is a prisoner in custody in a prison or police gaol. This exclusion applies in relation to any work performed by such prisoners, whether inside or outside the prison or police gaol. It would also cover prisoners on weekend detention, during the period of the detention.

This exclusion does not extend to any persons who are not held in custody in a prison or police gaol including persons on community-based orders.

Part 6—Discriminatory, coercive and misleading conduct

Division 1—Prohibition of discriminatory, coercive or misleading conduct

104—Prohibition of discriminatory conduct

Part 6 prohibits discriminatory, coercive and misleading conduct in relation to work health and safety matters. It establishes both criminal and civil causes of action in the event of such conduct.

These provisions complement the remedies contained in Federal and State laws that deal with discrimination including the General Protections in the *Fair Work Act 2009* of the Commonwealth.

The purpose of these provisions is to encourage engagement in work health and safety activities and the proper exercise of roles and powers under the Act by providing protection for those engaged in such roles and activities from being subject to discrimination or other forms of coercion because they are so engaged. They clearly signal that discrimination and other forms of coercion that may have the effect of deterring people from being involved in work health and safety activities or exercising work health and safety rights are unlawful and may attract penalties and other remedies.

Division 1 sets out when conduct or actions will constitute discrimination, coercive or misleading conduct.

Clause 104 provides that it is an offence for a person to engage in discriminatory conduct for a prohibited reason. What is discriminatory conduct is outlined in clause 105 and prohibited reasons are outlined in clause 106.

Clause 104(2) provides that a person will only commit an offence if a reason mentioned in clause 106 was the dominant reason for the discriminatory conduct. The Act contains a rebuttable presumption that once a prohibited reason is proven it will be taken to be the dominant reason (see clause 110(1)).

A note alerts the reader that civil proceedings relating to a breach of clause 104 may be brought under Division 3.

105—What is *discriminatory conduct*

Clause 105(1) sets out what actions will be discriminatory conduct under the Act. The actions include—

- certain actions that may be taken in relation to a worker (e.g. dismissing a worker or detrimentally altering the position of a worker (clause 105(1)(a))); and
- certain actions that may be taken in relation to a prospective worker (e.g. treating one job applicant less favourably than another (clause 105(1)(b)); and
- certain actions relating to commercial arrangements (e.g. refusing to enter or terminating a contract with a supplier of materials to a workplace (clause 105(1)(c) and (d))).

In view of the changing nature of work relationships, this clause is cast in wide terms to protect all those who carry out work, or would do so but for the discriminatory conduct, whether under employment-like arrangements or commercial arrangements.

106—What is a *prohibited reason*

The fact that a person is subjected to a detriment that may amount to discriminatory conduct does not by itself render the conduct unlawful. The conduct is only unlawful under the Act if it is engaged in for a prohibited reason, that is, the person is subjected to a detriment for an improper reason or purpose.

Clause 106 sets out when discriminatory conduct will be engaged in for a prohibited reason. The prohibited reasons include discriminatory conduct engaged in because a worker, prospective worker or other person—

- is involved in, has been involved in, or intends to be involved in work health and safety representation at the workplace by being a HSR or member of a health and safety committee; or
- undertakes, has undertaken, or proposes to undertake another role under the Act; or
- assists, has assisted, or proposes to assist a person exercising a power or performing a function under the Act (e.g. an inspector); or
- gives, has given, or intends to give information to a person exercising a power or performing a function under the Act ; or
- raises, has raised, or proposes to raise an issue or concern about work health and safety; or
- is involved in, has been involved in, or proposes to be involved in resolving a work health and safety issue under the Act; or
- is taking action, has taken action, or proposes to take action to seek compliance with a duty or obligation under the Act.

107—Prohibition of requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct

Clause 107 provides that it is an offence for a person to request, instruct, induce, encourage, authorise or assist another person to engage in discriminatory conduct in contravention of clause 104.

This clause ensures that a person who has organised or encouraged other persons to discriminate against a person cannot avoid being potentially penalised under the Act because the person has not directly engaged in the conduct themselves.

A note alerts the reader that civil proceedings relating to a breach of clause 107 may be brought under Division 3 of Part 6.

108—Prohibition of coercion or inducement

Clause 108 prohibits various forms of coercive conduct taken, or threatened to be taken, intentionally to intimidate, force, or cause a person to act or to fail to act in relation to a work health and safety role.

Clause 108(1) provides that a person must not organise or take, or threaten to organise or take, any action against another person with the intention to coerce or induce that person or another (third) person to do, not do or propose to do the things described in paragraphs 108(1)(a) to (d). These things include to: exercise or not exercise a power under the Act; perform or not perform a function under the Act; exercise or not exercise a power or perform a function in a particular way; and refrain from seeking, or continuing to undertake, a role under the Act.

A note alerts the reader that civil proceedings relating to a breach of clause 108 may be brought under Division 3 of Part 6.

Clause 108(2) clarifies that a reference in the clause to taking action or threatening to take action against a person includes a reference to not taking a particular action or threatening not to take a particular action (e.g. threatening not to promote a person if the person exercises a power under the Act).

Clause 108(3) is an avoidance of doubt provision and ensures that a reasonable direction given by an emergency services worker in an emergency is not an action with intent to coerce or induce a person.

109—Misrepresentation

Clause 109 provides that it is an offence for a person to knowingly or recklessly make a false or misleading representation to another person about the other person's rights or obligations under the Act, his or her ability to initiate or participate in processes under the Act, or his or her ability to make a complaint or enquiry under the Act.

Clause 109(2) provides that clause 109(1) does not apply if the person to whom the representation is made would not be expected to rely on it.

Division 2—Criminal proceedings in relation to discriminatory conduct

110—Proof of discriminatory conduct

This Division sets out the burden of proof on the defendant in criminal proceedings and the orders a court may make if a person is convicted of an offence under this Part.

Clause 110 sets out the way that the onus of proof will work in criminal proceedings for discriminatory conduct.

111—Order for compensation or reinstatement

Clause 111 sets out the kind of orders a court may make in a proceeding where a person is convicted or found guilty of an offence under clause 104 or clause 107. In addition to imposing a penalty, a court may make an order that the offender pay compensation, that the affected person be reinstated or re-employed, or the affected person be employed in the position he or she applied for or in a similar position. A court may make one or more of these orders.

Division 3—Civil proceedings in relation to discriminatory or coercive conduct

112—Civil proceeding in relation to engaging in or inducing discriminatory or coercive conduct

Division 3 enables a person affected by discriminatory or other coercive conduct to seek a range of civil remedies. Civil proceedings under Division 3 are additional to criminal proceedings under Divisions 1 and 2.

Clause 112(1) provides that an eligible person may apply to the IRC for an order provided for in subclause (3). 'Eligible person' is defined in clause 112(6) as a person affected by the contravention or a person authorised to be his or her representative. The person's representative may be any person, including a union representative.

Clause 112(2) outlines the persons against whom a civil order may be sought.

Clause 112(3) sets out the kind of orders that can be made in civil proceedings. These include injunctions, compensation, reinstatement of employment orders and any other order that the IRC considers appropriate.

Clause 112(4) provides that, for the purposes of clause 112, a person may be found to have engaged in discriminatory conduct for a prohibited reason only if the reason mentioned in clause 106 was a substantial reason for the conduct. This is a lower threshold than that applicable to criminal proceedings where the prohibited reason must be the dominant reason.

Clause 112(5) clarifies that nothing in clause 112 limits any other power of the IRC.

113—Procedure for civil actions for discriminatory conduct

Clause 113(1) imposes a time limit on civil proceedings brought under clause 112. A proceeding under clause 112 must be commenced no later than one year after the date on which the applicant knew or ought to have known that the cause of action arose.

Clause 113(2) to (4) clarify the way that the onus of proof works in a civil proceeding under clause 112.

Clause 113(2) provides that if the plaintiff proves a prohibited reason for discriminatory conduct, that reason is presumed to be a substantial reason for that conduct unless the defendant proves otherwise on the balance of probabilities.

Clause 113(3) provides that it is a defence to a civil proceeding in respect of engagement in or encouragement of discriminatory conduct if the defendant proves that the conduct was reasonable in the circumstances and a substantial reason for the conduct was to comply with the requirements of the Act or a corresponding work health and safety law.

Clause 113(2) to (4) reverse the onus of proof applicable to civil proceedings. Generally, the plaintiff is required to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent. However, clause 113(2) provides that once the plaintiff has proven that a person's discriminatory conduct is motivated by a prohibited reason, to avoid civil consequences that person (the defendant) must then establish, on the balance of probabilities, that the prohibited reason was not a substantial reason for the discriminatory conduct. Such a provision is necessary as the intention of the person who engages in discriminatory conduct will be known to that person alone.

Clause 113(4) is an avoidance of doubt provision and provides that the burden of proof on the defendant outlined in clause 113(2) and (3) is a legal, not an evidential, burden of proof. The legal burden of proof means the burden of proving the existence of a matter.

Division 4—General

114—General provisions relating to orders

This Division contains provisions dealing with the interaction between criminal and civil proceedings under Part 6.

Clause 114(1) provides that the making of a civil order in respect of conduct referred to in clause 112(2)(a) and (b) does not prevent the bringing of criminal proceedings under clause 104 or 107 in respect of the same conduct.

Clause 114(2) limits the ability of a court to make an order under clause 111 in criminal proceedings under clause 104 or 107 if the IRC has made an order under clause 112 in civil proceedings in respect of the same conduct (ie, the conduct referred to in clauses112(2)(a) and (b)).

Conversely, clause 114(3) limits the ability of the IRC to make an order under clause 112 in civil proceedings in respect of conduct referred to in clause 112(2)(a) and (b) if a court has made an order under clause 111 in criminal proceedings brought under clause 104 or 107 in respect of the same conduct.

115—Prohibition of multiple actions

Clause 115 ensures that a person may not initiate multiple actions in relation to the same matter under two or more laws. Specifically, a person may not—

- commence a proceeding under Division 3 of Part 6 if the person has commenced a proceeding or made an application or complaint in relation to the same matter under a law of the Commonwealth or a State and the action is still on foot; or
- recover any compensation under Division 3 if the person has received compensation for the matter under a law of the Commonwealth or a State; or
- commence or continue with an application under Division 3 if the person has failed in a proceeding, application or complaint in relation to the same matter under another law. This does not include proceedings, applications or complaints relating to workers' compensation.

Part 7—Workplace entry by WHS entry permit holders

Division 1—Introductory

116—Definitions

Clause 116 contains the key definitions for Part 7.

Official of a union

Official of a union is used in this Part to describe an employee of a union or a person who holds an office in a union.

Relevant person conducting a business or undertaking

A *relevant PCBU* is used throughout Part 7 and is defined to mean a person conducting a business or undertaking in relation to which a WHS entry permit holder is exercising, or proposes to exercise, a right of entry.

There may be more than one *relevant PCBU* at a workplace that a WHS entry permit holder is exercising, or proposes to exercise, a right of entry.

Relevant union

Relevant union is defined in this Part as the union that a WHS entry permit holder represents.

Relevant worker

The term *relevant worker* is used in this Part to describe a worker whose workplace a WHS entry permit holder has a right to enter. A relevant worker is one—

- who is a member, or potential member, of a union that the WHS entry permit holder represents; and
- whose industrial interests the relevant union is entitled to represent, and
- who works at the workplace at which the WHS entry permit holder is exercising, or intending to exercise, a right of entry under this Part.

Division 2—Entry to inquire into suspected contraventions

117—Entry to inquire into suspected contraventions

This Division sets out when the WHS permit holder may enter a workplace to inquire into a suspected contravention of the Act and the rights that the WHS permit holder may exercise while at the workplace for that purpose.

Clause 117 allows a WHS entry permit holder to enter a workplace and exercise any of the rights contained in clause 118 in order to inquire into a suspected contravention of the Act at that workplace.

These rights may only be exercised in relation to suspected contraventions that relate to, or affect, a relevant worker (as defined in clause 116).

Clause 117(2) requires the WHS entry permit holder to reasonably suspect before entering the workplace that the contravention has occurred or is occurring. If this suspicion is disputed by another party, the onus is on the WHS entry permit holder to prove that the suspicion is reasonable.

118—Rights that may be exercised while at workplace

Clause 118 lists the rights that a WHS entry permit holder may exercise upon entering a workplace under clause 117 to inquire into a suspected contravention. A WHS permit holder may do any of the following:

- inspect any thing relevant to the suspected contravention including work systems, plant, substances etc;
- consult with relevant workers or the relevant PCBU about the suspected contravention;
- require the relevant PCBU to allow the WHS entry permit holder to inspect and make copies of any document that is directly relevant to the suspected contravention that is kept at the workplace or accessible from a computer at the workplace, other than an employee record;
- warn any person of a serious risk to his or her health or safety emanating from an immediate or imminent exposure to a hazard that the WHS entry permit holder reasonably believes that person is exposed to.

Clause 118(2) provides that the relevant PCBU must comply with the request to provide documents related to the suspected contravention unless allowing the WHS entry permit holder to access a document would contravene a Commonwealth, State or Territory law.

The approach in clause 118(3) and (4) reverses the onus of proof generally applicable to civil proceedings because only the PCBU is in a position to show whether the reason the PCBU refused or failed to do something was reasonable. It would be too onerous to require the plaintiff in civil proceedings to prove that a refusal or failure to comply with a request of a WHS entry permit holder was unreasonable as he or she may not be privy to the reasons for that refusal or failure to comply.

Subclause (4) clarifies that the burden of proof on the defendant under subclause (3) is an evidential burden.

119—Notice of entry

Clause 119(1) requires a WHS entry permit holder to provide notice, in accordance with the regulations, to the relevant PCBU and the person with management or control of the workplace as soon as is reasonably practicable after entering a workplace under clause 117 to inquire into a suspected contravention. The contents of the notice must comply with the regulations.

However, clause 119(2) provides that a WHS entry permit holder is not required to comply with the notice requirements in clause 119(1), including to provide any or all of the information required by the regulations, if to do so—

- would defeat the purpose of the entry to the workplace; or
- would cause the WHS entry permit holder to be unreasonably delayed in an inquiry in an urgent case, ie, in an emergency situation.

Clause 119(3) provides that the notice requirements in clause 119(1) do not apply to entry to a workplace under clause 120 to inspect or make copies of employee records or records or documents directly relevant to a suspected contravention that are not held by the relevant PCBU.

120—Entry to inspect employee records or information held by another person

Clause 120 authorises a WHS entry permit holder to enter a workplace to inspect, or make copies of, employee records that are directly relevant to a suspected contravention or other documents directly relevant to a suspected contravention that are held by someone other than the relevant PCBU.

Clause 120(3) requires the WHS entry permit holder to provide notice, in accordance with the regulations, of his or her proposed entry to inspect or make copies of these documents to the relevant PCBU and the person who has possession of the documents.

Clauses 120(4) and (5) require the entry notice to comply with particulars prescribed in the regulations and to be given during the normal business hours of the workplace to be entered at least 24 hours, but not more than 14 days, before the proposed entry.

Division 3—Entry to consult and advise workers

121—Entry to consult and advise workers

This Division authorises a WHS entry permit holder to enter a workplace for the purpose of consulting with and providing advice to relevant workers about work health and safety matters and provides the requirements that must be met before that right can be exercised.

Clause 121 authorises a WHS entry permit holder to enter a workplace to consult with and advise relevant workers who wish to participate in discussions about work health and safety matters.

While at a workplace for this purpose, a WHS entry permit holder may warn any person of a serious risk to his or her health or safety that the WHS entry permit holder reasonably believes that person is exposed to.

122—Notice of entry

Clause 122 requires a WHS entry permit holder to give notice, in accordance with the regulations, of the proposed entry under clause 121 to consult with workers to the relevant PCBU during the normal business hours of the workplace at least 24 hours and not more than 14 days, before the proposed entry. The contents of the notice must comply with the regulations.

Division 4—Requirements for WHS entry permit holders

123—Contravening WHS entry permit conditions

This Division sets out the mandatory requirements that WHS permit holders must meet when exercising or proposing to exercise a right under Division 2 and 3 of the Act.

The authorising authority may impose conditions on a WHS entry permit holder at the time of issuing the permit (e.g. to provide a longer period of notice for a specific PCBU than otherwise required under the Act (see clause 135)). Clause 123 requires a permit holder to comply with any such condition.

This clause is a civil penalty provision.

124—WHS entry permit holder must also hold permit under other law

This clause prohibits a WHS entry permit holder from entering a workplace unless he or she also holds an entry permit under the *Fair Work Act 2009* of the Commonwealth or under the *Fair Work Act 1994*. The *Fair Work Act 2009* requires a union official of an organisation (as defined under that Act) seeking to enter premises under a State or Territory OHS law (also as defined under that Act) to hold a Fair Work entry permit. A person who has a right of entry to a workplace under section 140 of the *Fair Work Act 1994* will be taken to hold an entry permit under that Act.

This clause is a civil penalty provision.

125—WHS entry permit to be available for inspection

Clause 125 requires a WHS entry permit holder to produce his or her WHS entry permit and photographic identification, such as a driver's licence, when requested by a person at the workplace.

This clause is a civil penalty provision.

126—When right may be exercised

Clause 126 prohibits the exercise of a right of entry under the Act outside of the usual working hours at the workplace the WHS entry permit holder is entering. This refers to the usual working hours of the workplace the WHS entry permit holder wishes to enter.

This clause is a civil penalty provision.

127—Where the right may be exercised

Clause 127 provides that when exercising a right of entry, a WHS entry permit holder may only enter the area of the workplace where the relevant workers carry out work or any other work area at the workplace that directly affects the health or safety of those workers.

128—Work health and safety requirements

Clause 128 requires a WHS entry permit holder to comply with any reasonable request by the relevant PCBU or the person with management or control of the workplace to comply with a work health and safety requirement, including a legislated requirement that is applicable to the specific type of workplace. Clause 142 would allow the authorising authority to deal with a dispute about whether a request was reasonable.

This clause is a civil penalty provision.

129—Residential premises

Clause 129 prohibits a WHS entry permit holder from entering any part of a workplace that is used only for residential purposes. For example, a WHS entry permit holder could enter a converted garage where work is being conducted but could not enter the living quarters of the residence if no work is undertaken there.

This clause is a civil penalty provision.

130—WHS entry permit holder not required to disclose names of workers

The operation of the definition of 'relevant worker' means that a WHS entry permit holder may only exercise a right of entry at a workplace where there are workers who are members, or eligible to be members, of the relevant union.

Clause 130 protects the identity of workers by providing that a WHS entry permit holder is not required to disclose the names of any workers to the relevant PCBU or the person with management or control of the workplace.

However, a WHS entry permit holder can disclose the names of members with their consent.

Clause 148 deals separately with unauthorised disclosure of information and documents obtained during right of entry in relation to all workers.

Division 5—WHS entry permits

131—Application for WHS entry permit

This Division sets out the processes for the issuing of WHS entry permits. It also details the process of revocation of a WHS entry permit.

Clause 131 allows a union to apply for a WHS entry permit to be issued to an official of the union.

Clause 131(2) lists the matters that must be included in an application including a statutory declaration from the relevant union official declaring that the official meets the eligibility criteria for a WHS entry permit. This clause duplicates the eligibility criteria that are listed in clause 133 of the Act.

132—Consideration of application

Clause 132 lists the matters the authorising authority, when considering whether to issue a WHS entry permit, must take into account when determining an application. This includes the objects of the Act (in clause 3) and the object of enabling unions to enter workplaces for the purposes of ensuring the health and safety of workers.

133—Eligibility criteria

Clause 133 provides that the authorising authority must not issue a WHS entry permit unless satisfied of the matters listed in paragraphs (a) to (c).

The requirement in clause 133(c) that the union official will hold an entry permit issued under another law has been included to deal with situations where a person has applied for such an entry permit and is simply waiting for it to be issued.

134—Issue of WHS entry permit

Clause 134 allows the authorising authority to issue a WHS entry permit if it has taken into account the matters listed in clauses 132 and 133

135—Conditions on WHS entry permit

Clause 135 allows the authorising authority to impose specific conditions on a WHS entry permit when it is issued.

136—Term of WHS entry permit

Clause 136 states that the term of a WHS entry permit is three years.

137—Expiry of WHS entry permit

Clause 137 sets out when a WHS entry permit expires. Clause 137(1) provides that unless it is revoked it will expire when the first of the following occurs:

- three years elapses since it was issued;
- the relevant industrial relations entry permit held by the WHS entry permit holder expires;
- the WHS entry permit holder ceases to be an official of the relevant union;
- the relevant union ceases to be an organisation registered under the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth or the an association of employees or independent contractors, or both, that is registered or recognised as such an association under the *Fair Work Act 1994*.

Clause 137(2) makes it clear that an application for the issue of a subsequent WHS entry permit may be submitted before or after the current permit expires.

138—Application to revoke WHS entry permit

Clause 138 allows the regulator, a relevant PCBU or any other person affected by the exercise or purported exercise of a right of entry of the WHS entry permit holder to apply to the authorising authority for the revocation of the WHS entry holder's permit.

Clause 138(2) provides the grounds for making an application to revoke the WHS entry permit holder's permit. These include—

- the permit holder no longer satisfies the eligibility criteria for a WHS entry permit or for an entry permit under a corresponding work health and safety law, or the *Fair Work Act 2009* of the Commonwealth or the *Workplace Relations Act 1996* of the Commonwealth, or is no longer able to exercise a right of entry under section 140 of the *Fair Work Act 1994*; and
- the permit holder has contravened any condition of the WHS entry permit he or she currently holds; and
- the permit holder has acted, or purported to act, in an improper manner in the exercise of any right under the Act; and
- the permit holder has intentionally hindered or obstructed a person conducting the business or undertaking or workers at a workplace when exercising, or purporting to exercise, a right of entry under Part 7 of the Act.

The applicant is required to give written notice of the application, including the grounds on which it is made, to the WHS entry permit holder to whom it relates and the relevant union.

Both the WHS entry permit holder and the relevant union will be parties to the application for revocation (clause 138(4)).

139—Authorising authority must permit WHS entry permit holder to show cause

Clause 139 provides that if the authorising authority receives an application for revocation of a WHS entry permit and believes that a ground for revocation exists, the authority must give notice to the WHS entry permit holder of this, including details of the application. The authorising authority must also advise the WHS entry permit holder of his or her right to provide reasons (within 21 days) as to why the WHS entry permit should not be revoked.

Clause 139(1)(b) requires the authorising authority to suspend a WHS entry permit while deciding the application for revocation if it considers that suspension is appropriate. The WHS entry permit holder must be notified if this occurs.

140—Determination of application

Clause 140 allows the authorising authority to make an order to revoke a WHS entry permit or an alternative order, such as imposing conditions on or suspending a WHS entry permit if satisfied on the balance of probabilities of the matters listed in clause 138(2). Clause 140(2) lists a number of matters that the authorising authority must take into account when deciding the appropriate action to take.

In addition to revoking a current WHS entry permit, the authorising authority may make an order about the issuing of future WHS entry permits to the person whose WHS entry permit is revoked.

Division 6—Dealing with disputes

141—Application for assistance of inspector to resolve dispute

This Division sets out the powers of an inspector and the authorising authority to deal with a dispute that arises about an exercise or purported exercise of a right of entry.

Clause 141 allows the regulator, on the request of a party to the dispute, to appoint an inspector to assist in resolving a dispute about the exercise or purported exercise of a right of entry.

An inspector may then attend the workplace to assist in resolving the dispute. However, an inspector is not empowered to make any determination about the dispute. This does not prevent the inspector from exercising his or her compliance powers.

142—Authorising authority may deal with a dispute about a right of entry under this Act

Clause 142 allows the authorising authority, on its own initiative or on application, to deal with a dispute about a WHS entry permit holder's exercise, or purported exercise, of a right of entry. Clause 142(1) specifically notes that this would include a dispute about whether a request by the relevant PCBU or the person with management or control of the workplace that a WHS entry permit holder comply with work health and safety requirements is reasonable. It would also include, for example, a dispute about a refusal by a PCBU to allow the WHS permit holder to exercise rights.

Clause 142(2) provides that the authorising authority may deal with the dispute in any manner it thinks appropriate, such as by mediation, conciliation or arbitration.

Clause 142(3) provides the orders available to the authorising authority if it deals with the dispute by arbitration. The authorising authority may make any order it considers appropriate and specifically may make an order revoking or suspending a WHS entry permit or about the future issue of WHS entry permits to one or more persons.

In exercising its power to make an order about the future issue of WHS entry permits to one or more persons under clause 142(3)(d), the authorising authority could, for example, ban the issue of a WHS entry permit to a person for a certain period. This provision is intended to ensure that a permit holder cannot gain a new permit while his or her previous permit is revoked or is still suspended.

However, the authorising authority may not grant any rights to a WHS entry permit holder that are additional to, or inconsistent with, the rights conferred on a WHS entry permit holder under the Act.

143—Contravening order made to deal with dispute

Clause 143 provides that if the authorising authority makes an order following arbitration of a right of entry dispute a person could be liable to a civil penalty if the person contravenes that order.

This clause is a civil penalty provision.

Division 7—Prohibitions

144—Person must not refuse or delay entry of WHS entry permit holder

This Division outlines the type of actions and conduct that are prohibited under the Part. The prohibitions relate to both permit holders and others.

This clause and clause 145 prohibit a person taking certain actions against a WHS entry permit holder who is exercising rights in accordance with this Part.

Clause 144 prohibits a person from unreasonably refusing or delaying entry to a workplace that the WHS entry permit holder is entitled under the Part to enter.

Clause 144(2) provides that if civil proceedings are brought against a person for a contravention of this provision the evidential burden is on the person, the defendant, to show that he or she had a reasonable excuse for refusing or delaying the entry of the WHS entry permit holder. A reasonable excuse in such an instance might be, for

example, that the person reasonably believed that the WHS entry permit holder did not hold the correct entry permits.

This clause is a civil penalty provision.

145—Person must not hinder or obstruct WHS entry permit holder

Clause 145 prohibits a person from intentionally and unreasonably hindering or obstructing a WHS entry permit holder who is exercising a right of entry or any other right conferred on the person under this Part. This would cover behaviour such as making repeated and excessive requests that a WHS entry permit holder show his or her entry permit or failing to provide access to records that the permit holder is entitled to inspect.

This clause is a civil penalty provision.

146—WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace

Clause 146 prohibits a WHS entry permit holder from intentionally and unreasonably delaying, hindering or obstructing any person, or disrupting any work, while at a workplace exercising or seeking to exercise rights conferred on him or her in the Part, or from otherwise acting in an improper manner. Conduct by a permit holder that would hinder or obstruct a person includes action that intentionally and unreasonably prevents or significantly disrupts a worker from carrying out his or her normal duties.

This clause is a civil penalty provision.

147—Misrepresentations about things authorised by this Part

This clause provides that a person must not take action with the intention of giving the impression, or be reckless as to whether he or she gives the impression, that the action is authorised by the Part when it is not the case. An example of this behaviour would include where a person represents himself or herself as a permit holder when he or she does not hold a valid entry permit.

However, clause 147(2) provides that a person has not contravened this clause if, when doing that thing, he or she reasonably believed that it was authorised by the Part. For instance, if a WHS entry permit holder reasonably believed that he or she was exercising a right of entry in an area of the workplace where relevant workers worked or that affected the health and safety of those workers.

This clause is a civil penalty provision.

148—Unauthorised use or disclosure of information or documents

Clause 148 provides that a person must not use or disclose information or documents obtained by a WHS entry permit holder when inquiring into a suspected contravention.

This clause is intended to operate to prevent the use or disclosure of the information or documents for a purpose other than that for which they were acquired. The exceptions at (a) to (e) are the only other authorised reasons for use or disclosure.

Clause 148(a) authorises use or disclosure if the person reasonably believes that it is necessary to lessen or prevent a serious risk to a person's health or safety or a serious threat to public health or safety.

Clause 148(b) authorises use or disclosure as part of an investigation of a suspected unlawful activity or in the reporting of concerns to relevant persons or authorities of concerns of suspected unlawful activity.

Clause 148(c) authorises use or disclosure if it is required or authorised by or under law.

Clause 148(d) authorises use or disclosure if the persons doing so believes it is reasonably necessary for an enforcement body (as defined in the *Privacy Act 1988* of the Commonwealth) to do a number of things such as prevent, detect, investigate, prosecute or punish a criminal offence or breach of a law.

Clause 148(e) provides that disclosure or use is also authorised if it is made or done with the consent of the individual to whom the information relates.

This clause mirrors section 504 of the *Fair Work Act 2009* of the Commonwealth.

This clause is a civil penalty provision.

Division 8—General

149—Return of WHS entry permits

This Division details when WHS entry permits must be returned, the information the relevant union is required to provide to the authorising authority and the authorising authority's obligation to keep a register of WHS entry permit holders.

If a person's WHS entry permit is revoked, suspended or expired, clause 149 requires the person to return it to the authorising authority within 14 days.

Clause 149(2) provides that at the end of a suspension period, the authorising authority must return any WHS entry permit that has not expired to the WHS entry permit holder if the person, or the union he or she represents, applies for its return.

This clause is a civil penalty provision.

150—Union to provide information to authorising authority

Clause 150 requires the relevant union to advise the authorising authority if a WHS entry permit holder leaves the union, has a relevant industrial relations law entry permit suspended or revoked or is no longer eligible to exercise a right of entry under the *Fair Work Act 1994*, or if the union ceases to be registered or recognised under the *Fair Work Act 1994* or the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth.

A civil penalty may be imposed if the union does not comply with this clause.

151—Register of WHS entry permit holders

Clause 151 requires the authorising authority to maintain an up-to-date, publicly accessible register of all WHS entry permit holders in the jurisdiction.

The regulations may provide for the particulars of the register.

Part 8—The regulator

Division 1—Functions of regulator

152—Functions of regulator

This Division sets out the regulator's functions and allows additional functions to be prescribed by regulations. This Division also establishes the regulator's ability to delegate powers and functions under the Act and to obtain information.

Other functions and powers of the regulator are included elsewhere under the Act (e.g. powers and functions in relation to incident notification, inspector notices and WHS undertakings).

Clause 152 lists the broad areas in which the regulator has functions.

Functions set out in clause 152(a) to (d) include advising and making recommendations to the Minister, monitoring and enforcing compliance and providing work health and safety advice and information. Clause 152(e) to (g) describe the functions of the regulator in fostering and promoting work health and safety. Clause 152(h) enables the regulator to conduct and defend legal proceedings under this Act.

Clause 152(i) is a catchall provision that clarifies that the regulator has any other function conferred on it under the Act.

153—Powers of regulator

Clause 153(1) confers a general power on the regulator to do all things necessary or convenient in relation to the regulator's functions.

Clause 153(2) confers on the regulator all the powers and functions that an inspector has under the Act.

154—Delegation by regulator

Clause 154(1) allows the regulator to delegate the regulator's powers and functions under the Act to any person by instrument in writing.

Clause 154(2) clarifies that delegation may be made subject to conditions, is revocable and does not derogate from the regulator's power to act.

A delegated power or function may, if the instrument of delegation so provides, be further delegated.

Division 2—Powers of regulator to obtain information

155—Powers of regulator to obtain information

Powers under this Division are intended to facilitate the regulator's function of monitoring and enforcing compliance with the Act and ensure effective regulatory coverage of work health and safety matters (clause 152(b)). Provisions have been designed to provide robust powers of inquiry and questioning subject to appropriate checks and balances to ensure procedural fairness.

Powers under this Division are only available if the regulator has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the Act or that will assist the regulator to monitor or enforce compliance under the Act. These powers are only exercisable by way of written notice, which must set out the recipient's rights under the Act (e.g. entitlement to legal professional privilege and the 'use immunity').

Additionally, powers to require a person to appear before the regulator to give evidence are only exercisable if the regulator has taken all reasonable steps to obtain the relevant information by other means available under the clause but has been unable to do so. The time and place specified in the notice must be reasonable in the circumstances, including taking into account the circumstances of the person required to appear.

Clause 155 sets out the powers of the regulator to obtain information from a person in circumstances where the regulator has reasonable grounds to believe that the person is capable of—

- giving information; or
- producing documents or records; or

- giving evidence,

in relation to a possible contravention of the Act or that will assist the regulator to monitor or enforce compliance with the Act.

Clause 155(2) requires the regulator to exercise these powers by written notice served on the person.

Clause 155(3) sets out the content requirements for the written notice, which must include statements to the effect that the person—

- is not excused from answering a question on the ground that it may incriminate the person or expose him or her to a penalty; and
- is entitled, if he or she is an individual, to the use immunity provided for in clause 172(2); and
- is entitled to claim legal professional privilege (if applicable); and
- if required to appear—is entitled to attend with a lawyer (clause 155(3)(c)(ii)).

Additional prerequisites apply if the regulator wishes to obtain evidence from a person by requiring the person to appear before a person appointed by the regulator (clause 155(4)). First, the regulator cannot require a person to appear before the nominated person unless the regulator has first taken all reasonable steps to obtain the information by other means (ie, by requiring production of documents or records etc).

Second, if the person is required to appear in person, then the day, time and place nominated by the regulator must be reasonable in all the circumstances (clause 155(2)(c)).

Clause 155(5) prohibits a person from refusing or failing to comply with a requirement under clause 155 without a reasonable excuse. Clause 155(6) clarifies that this places an evidential burden on the accused to show a reasonable excuse.

Clause 155(7) makes it clear that the provisions dealing with self-incrimination, including the use immunity, apply to a requirement made under this clause, with any necessary changes.

Part 9—Securing compliance

Division 1—Appointment of inspectors

156—Appointment of inspectors

This Part establishes the WHS inspectorate and provides inspectors with powers of entry to workplaces and powers of entry to any place under a search warrant issued under the Act. Part 9 also provides inspectors with powers upon entry to workplaces.

The Division sets out the process for appointing, suspending and terminating inspector appointments. It also provides a process for dealing with conflicts of interest that may arise during the exercise of inspectors' compliance powers.

Clause 156 lists the categories of persons who are eligible for appointment as an inspector. Only public servants, holders of a statutory office and WHS inspectors from other jurisdictions may be appointed as inspectors (clause 156(a) to (c)).

Clause 156(d) additionally allows for the appointment of any person who is in a prescribed class of persons. Regulations could be made, for example, to allow for the appointment of specified WHS experts to meet the regulator's short-term, temporary operational requirements.

Restrictions on inspectors' compliance powers are provided for in clauses 161 and 162, which deal with conditions or restrictions attaching to inspectors' appointments and regulator's directions respectively.

Clause 156(2) provides that the following are to be taken to have been appointed as inspectors:

- in relation to mines to which the *Mines and Works Inspection Act 1920* applies—an inspector of mines under that Act;
- in relation to operations to which the *Offshore Minerals Act 2000* applies—an inspector under that Act;
- in relation to operations to which the *Petroleum and Geothermal Energy Act 2000* applies—an authorised officer under that Act;
- in relation to operations to which the *Petroleum (Submerged Lands) Act 1982* applies—an inspector under that Act;
- any other person who may exercise statutory powers under another Act brought within the ambit of the subclause by the regulations.

157—Identity cards

Clause 157 provides for the issue, use and return of inspectors' identity cards.

Inspectors are required to produce their identity card for inspection on request when exercising compliance powers (clause 157(2)). Additional requirements may also apply when exercising certain powers (see clause 173).

158—Accountability of inspectors

Clause 158(1) requires inspectors to report actual or potential conflicts of interest arising out of their functions as an inspector to the regulator.

Clause 158(2) requires the regulator to consider whether the inspector should not deal, or should no longer deal, with an affected matter and direct the inspector accordingly.

159—Suspension and ending of appointment of inspectors

Clause 159(1) provides the regulator with powers to suspend or end inspectors' appointments.

Clause 159(2) clarifies that a person's appointment as an inspector automatically ends upon the person ceasing to be eligible for appointment as an inspector (e.g. the person ceases to be a public servant).

Division 2—Functions and powers of inspectors

160—Functions and powers of inspectors

This Division summarises inspectors' functions and powers under the Act (referred to collectively as 'compliance powers') and specifies the general restrictions on those functions and powers.

Clause 160 lists the functions and powers of inspectors and cross-references a number of important compliance powers which are detailed elsewhere (e.g. the power to issue notices).

However, clause 160(a) is a stand-alone provision that empowers inspectors to provide information and advice about compliance with the Act.

161—Conditions on inspectors' compliance powers

Clause 161 allows conditions to be placed on an inspector's appointment by specifying them (if any) in the person's instrument of appointment. For example, an inspector may be appointed to exercise compliance powers only in relation to a particular geographic area or industry or both.

162—Inspectors subject to regulator's directions

Clause 162(1) provides that inspectors are subject to the regulator's directions, which may be of a general nature or may relate to a specific matter (clause 162(2)). For example, the regulator could direct inspectors to comply with investigation or litigation protocols that would apply to all matters. An inspector must comply with these directions. This ensures a consistent approach to the way that inspectors' compliance powers are exercised.

Division 3—Powers relating to entry

Subdivision 1—General powers of entry

163—Powers of entry

This Division sets out general powers of entry and makes special provision for entry under warrant and entry to residential premises. Inspectors have access to a range of powers to support their compliance and enforcement roles.

Clause 163(1) provides for entry at any time by an inspector into any place that is, or the inspector reasonably suspects is, a workplace.

Clause 163(2) clarifies that such entry may be with or without the consent of the person with management or control of the workplace.

Clause 163(3) requires an inspector to immediately leave a place that turns out not to be a workplace. The note following the clause explains that this requirement would not prevent an inspector from passing through residential premises if this is necessary to gain access to a workplace under clause 170(c).

Clause 163(4) provides for entry by an inspector under a search warrant.

164—Notification of entry

Clause 164(1) clarifies that an inspector is not required to give prior notice of entry under section 163.

Clause 164(2) requires the inspector, as soon as practicable after entering a workplace or suspected workplace, to take all reasonable steps to notify relevant persons of his or her entry and the purpose of entry. Those persons are—

- the relevant PCBU in relation to which the inspector is exercising the power of entry (clause 164(2)(a)); and
- the person with management or control of the workplace (clause 164(2)(b)); and
- any HSR for either of these PCBUs (clause 164(2)(c)).

The requirements in clause 164(2)(a) and (b) address multi-business worksites where the worksite is managed by some sort of management company (e.g. principal contractor on a construction site). In those situations, the management company, as well as any other PCBUs whose operations are proposed to be inspected, are subject to the notification requirements in this provision.

Clause 164(3) provides that notification is not required if it would defeat the purpose for which the place was entered or would cause unreasonable delay (e.g. during an emergency).

Special notification rules apply to entry on warrant (see clause 168).

165—General powers on entry

Clause 165(1) sets out inspectors' general powers on entry. The list of powers reflects a consolidation of powers currently included in work health and safety Acts across Australia.

Clause 165(1)(a) confers a general power on inspectors to inspect, examine and make inquiries at workplaces, which is supported by more specific powers to conduct various tests and analyses in clause 165(1)(b) to (e).

Clause 165(1)(g) allows inspectors to exercise any compliance power or other power that is reasonably necessary to be exercised by the inspector for purposes of the Act. This provision must be read subject to Subdivisions 3 and 4 of Part 9, which place express limitations around the exercise of specific powers (e.g. production of documents).

Requirements for reasonable help

Clause 165(1)(f) allows an inspector to require a person at the workplace to provide reasonable help to exercise the inspector's powers in paragraphs (a) to (e).

This clause provides, in very wide terms, for an inspector to require any person at a workplace to assist him or her in the exercise of his or her compliance powers. Although this could include an individual such as a self-employed person or member of the public at the workplace, the request would have to be reasonable in all the circumstances to fall within the scope of the power.

Limits on what may be required

Inspectors may only require reasonable help to be provided if the required help is—for example—

- connected with or for the purpose of exercising a compliance power; or
- reasonably required to assist in the exercise of the inspector's compliance powers; or
- reasonable in all the circumstances; or
- connected to the workplace where the required assistance is being sought.

Clause 165(2) makes it an offence for a person to refuse to provide reasonable help required by an inspector under this clause without a reasonable excuse.

What will be a reasonable excuse will depend on all of the circumstances. A reasonable excuse for failing to assist an inspector as required may be that the person is physically unable to provide the required help.

Clause 165(3) places the evidentiary burden on the individual to demonstrate that he or she has a reasonable excuse. That is because that party is better placed to point to evidence that he or she had a reasonable excuse for refusing to provide the inspector with the required reasonable help.

166—Persons assisting inspectors

Clause 166(1) provides for inspectors to be assisted by one or other persons if the inspector considers the assistance is necessary in the exercise of his or her compliance powers. For example, an assistant could be an interpreter, WHS expert or information technology specialist.

Clause 166(2) provides that assistants may do anything the relevant inspector reasonably requires them to do to assist in the exercise of his or her compliance powers and must not do anything that the inspector does not have power to do, except as provided under a search warrant (e.g. use of force by an assisting police officer to enter premises). This provision ensures that assistants are always subject to directions from inspectors and the same restrictions that apply to inspectors.

Clause 166(3) provides that anything lawfully done by the assistant under the direction of an inspector is taken for all purposes to have been done by the inspector. This means that the inspector is accountable for the actions of the assistant. This provision is intended to ensure the close supervision of assistants by the responsible inspector.

Subdivision 2—Search warrants

167—Search warrants

This Subdivision provides for search warrants to allow inspectors to search places (whether workplaces or not) for evidence of offences against the Act. This power to apply for and act on a search warrant is additional to inspectors' compliance powers under Subdivisions 1 and 4 of Division 3.

Search warrants would be issued in accordance with each individual jurisdiction's law relating to warrants.

Clause 167 establishes an application process for obtaining search warrants under the Act and establishes the process and requirements for their issue. Under this provision, an inspector may apply to a magistrate for the issue of a search warrant in relation to a place if the inspector believes on reasonable grounds that there is particular evidence of an offence against the Act at the place, or such evidence may be at the place within the next 72 hours.

The search warrant would enable the stated inspector to, with necessary and reasonable help and force, enter the place and exercise the inspector's compliance powers and seize the evidence stated in the search warrant, subject to the limitations specified in the search warrant (clause 167(5)).

Clause 167(6) sets out a procedure for applying to a magistrate for a search warrant by telephone, fax or other prescribed means if the inspector considers the urgency of the situation requires it.

The power to seize evidence is subject to the relevant provisions in the Act (clauses 175 to 181), in addition to any other limitations specified in the warrant.

168—Announcement before entry on warrant

169—Copy of warrant to be given to person with management or control of place

Clauses 168 and 169 set out the notification requirements that apply to entry on warrant.

Subdivision 3—Limitation on entry powers

170—Places used for residential purposes

Clause 170 limits entry to residential premises to hours that are reasonable, having regard to the times at which the inspector believes work is being carried out at the place. It also provides that an inspector may only pass through those parts of the premises that are used only for residential purposes for the sole purpose of accessing a suspected workplace and only if the inspector reasonably believes that there is no reasonable alternative access.

Entry to residential premises is also permitted with the consent of the person with management or control of the place (clause 170(a)) and under a search warrant (clause 170(b)).

Subdivision 4—Specific powers on entry

171—Power to require production of documents and answers to questions

This Subdivision provides for specific information-gathering powers on entry and for seizure and forfeiture of things in certain circumstances. It is intended that inspectors will obtain documents and information under the Act co-operatively, as well as by requiring them under this Subdivision.

Identify who has relevant documents

Clause 171(1)(a) authorises an inspector to require a person at a workplace to tell him or her who has custody of, or access to, a document for compliance-related purposes.

The term 'document' is defined to include a 'record'. It is intended that the term 'document' includes any paper or other material on which there is writing and information stored or recorded by a computer (see for example section 4 of the *Acts Interpretation Act 1915*).

Request documents

Clause 171(1)(b) permits an inspector who has entered a workplace to require a person who has custody of, or access to, a document to produce it to the inspector while the inspector is at that workplace or within a specified period.

Clause 171(2) provides that requirements for the production of documents must be made by written notice unless the circumstances require the inspector to have immediate access to the document.

There is no guidance in the Act as to the time that may be stated for compliance with a notice, but it is intended that the time must be reasonable taking into consideration all of the circumstances giving rise to the request and the actions required by the notice.

The required information must be provided in a form that is capable of being understood by the inspector, particularly in relation to electronically stored documents (see, for example, section 51 of the *Acts Interpretation Act 1915*).

Interview

Clause 171(1)(c) authorises inspectors to require persons at workplaces to answer any questions put by them in the course of exercising their compliance powers.

Clause 171(3) provides that an interview conducted under this provision must be conducted in private if the inspector considers it appropriate or the person being interviewed requests it.

Clause 171(4) clarifies that a private interview would not prevent the presence of the person's representative (e.g. lawyer), or a person assisting the inspector (e.g. interpreter).

Clause 171(5) clarifies that a request for a private interview may be made during an interview.

Offence provision

Clause 171(6) makes it an offence for a person to fail to comply with a requirement under this clause, without having a reasonable excuse. This provision is subject to—

- legal professional privilege, if applicable (see clause 269); and
- the requirements to provide an appropriate warning, as referred to in clause 173(2).

Clause 171(7) clarifies that subclause (6) places an evidential burden on the accused to prove a reasonable excuse for not complying with a requirement under that subclause.

Clause 173 also sets out the steps an inspector must take before requiring a person to produce a document or answer a question under Part 9.

172—Abrogation of privilege against self-incrimination

The Act seeks to ensure—

- that the strongest powers to compel the provision of information currently available to regulators across Australia are available for securing ongoing work health and safety; and
- that the rights of persons under the criminal law are appropriately protected.

Clause 172(1) clarifies that there is no privilege against self-incrimination under the Act, including under clauses 171 (Power to require production of documents and answers to questions) and 155 (Powers of regulator to obtain information).

This means that persons must comply with requirements made under these provisions, even if it means that they may be incriminated or exposed to a penalty in doing so.

These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Act and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.

Clause 172(2) instead provides for a 'use immunity' which means that the answer to a question or information or a document provided by an individual under clause 171 is not admissible as evidence against that individual in civil or criminal proceedings. An exception applies in relation to proceedings arising out of the false or misleading nature of the answer, information or document.

173—Warning to be given

Clause 173 sets out the steps an inspector must take before requiring a person to produce a document or answer a question under Part 9. These steps are not required if documents or information are provided voluntarily.

Under clause 173, an inspector must first identify himself or herself by producing his or her identity card or in some other way and then—

- warn the person that failure to comply with the requirement or to answer the question without reasonable excuse would constitute and offence (clause 173(1)(b)); and
- warn the person about the abrogation of privilege against self-incrimination in clause 172 (clause 173(1)(c)); and
- advise the person about legal professional privilege , which is unaffected by the Act (clause 173(1)(d)).

This ensures that persons are fully aware about the legal rights and obligations involved when responding to an inspector's requirement to produce a document or answer a question.

If requirements to produce documents are made by written notice (see clause 171(2)), the notice must also include the appropriate warnings and advice.

Clause 173(2) provides that it is not an offence for an individual to refuse to answer an inspector's question on grounds of self-incrimination, unless he or she was first given the warning about the abrogation of the privilege against self-incrimination.

Clause 173(3) clarifies that nothing in the clause would prevent the inspector from gathering information provided voluntarily (ie, without requiring the information and without giving the warnings required by clause 173).

174—Powers to copy and retain documents

Clause 174(1) allows inspectors to copy, or take extracts from, documents given to them in accordance with a requirement made under the Act and retain them for the period that the inspector considers necessary.

Clause 174(2) provides for access to such documents at all reasonable times by the persons listed in clause 174(2)(a) to (c).

Separate rules apply to documents that are seized under section 175.

175—Power to seize evidence etc

This clause deals with the seizure of evidence under Part 9.

If the place is a workplace, then the inspector may seize anything (including a document) that the inspector reasonably believes constitutes evidence of an offence against the Act (clause 175(1)(a)). The inspector may also take and remove for examination, analysis or testing a sample of any substance or thing without paying for it (clause 175(1)(b)).

If a place (even if it is not a workplace) has been entered with a search warrant under this Part, then the inspector may seize the evidence for which the warrant was issued (clause 175(2)).

In either case, the inspector may also seize anything else at the place if the inspector reasonably believes the thing is evidence of an offence against the Act, and the seizure is necessary to prevent the thing being hidden, lost, destroyed, or used to continue or repeat the offence (clause 175(3)).

176—Inspector's power to seize dangerous workplaces and things

Clause 176 allows inspectors to seize certain things, including plant, substances and structures, at a workplace or part of the workplace that the inspector reasonably believes is defective or hazardous to a degree likely to cause serious illness or injury or a dangerous incident to occur.

177—Powers supporting seizure

Clause 177 provides that a thing that is seized may be moved, made subject to restricted access or, if the thing is plant or a structure, dismantled.

Clause 177(2) makes it an offence to tamper, or attempt to tamper, with a thing that an inspector has placed under restricted access.

Clause 177(3) to (7) enable inspectors to require certain things to be done to allow a thing to be seized.

Clause 177(3) allows an inspector to require a person with control of the seized thing to take it to a stated place by a certain time, which must be reasonable in all the circumstances.

Cause 177(4) provides that the requirement must be made by written notice unless it is not practicable to do so, in which case the requirement may be made orally and confirmed in writing as soon as practicable.

Clause 177(5) allows the inspector to make further requirements in relation to the same thing if it is necessary and reasonable to do so. For example, a requirement could be made to de-commission or otherwise make plant safe once it has been moved to the required place.

Clause 177(6) makes it an offence for a person to refuse or fail to comply with a requirement made under this clause if he or she does not have a reasonable excuse. The evidentiary burden is on the individual to demonstrate that he or she has a reasonable excuse (clause 177(7)).

178—Receipt for seized things

Clause 178 requires inspectors to give receipts for seized things, as soon as practicable. This includes things seized under a search warrant. The receipt must be given to the person from whom the thing was seized or, if that is not practicable, the receipt must be left in a conspicuous position in a reasonably secure way at the place of seizure (clause 178(2)).

Clause 178(3) sets out the information that must be specified in the receipt.

Clause 178(4) sets out the circumstances in which a receipt is not required.

179—Forfeiture of seized things

Clause 179 provides that a seized thing may be forfeited if, after making reasonable inquiries, the regulator cannot find the 'person entitled' to the thing or, after making reasonable efforts, the thing cannot be returned to that person.

Clause 179(2) and (3) provide that inquiries or efforts to return a seized thing are not necessary if this would be unreasonable in the circumstances (e.g. the person entitled to return of the thing tells the regulator he or she does not want the thing returned to him or her).

Clause 179(1)(c) provides for a seized thing to be forfeited by written notice if the regulator reasonably believes it is necessary to retain the thing to prevent it from being used to commit an offence against the Act (clause 179(4)). However, written notice is not required if the regulator cannot find the 'person entitled' to the thing after making reasonable inquiries or it is impracticable or would be unreasonable to give the notice (clause 179(5)).

Clause 179(6) specifies the matters that must be stated in a notice of forfeiture, including the reasons for the decision and information about the right of review.

Clause 179(7) specifies matters that must be taken into account in taking steps to return a seized thing or give notice about its proposed forfeiture, including the thing's nature, condition and value.

Cause 179(8) allows the State to recover reasonable costs of storing and disposing of a thing that has been seized to prevent it being used to commit an offence against the Act.

Clause 179(9) defines the 'person entitled' to mean the person from whom the thing was seized (which will usually be the person entitled to possess the thing) or if that person is no longer entitled to possession, the owner of the thing.

180—Return of seized things

Clause 180 sets out a process for the return of a seized thing after the end of six months after seizure. Upon application from the person entitled to the thing, the regulator must return the thing to that person, unless the regulator has reasonable grounds to retain the thing (e.g. the thing is evidence in legal proceedings).

The applicant may be the 'person entitled' to the thing, that is, either the person entitled to possess the thing or the owner of the thing (clause 180(4)).

Clause 180(3) allows the regulator to impose conditions on the return of a thing, but only if the regulator considers it appropriate to eliminate or minimise any risk to work health or safety related to the thing.

181—Access to seized things

Clause 181 provides a person from whom a thing was seized, the owner of the thing or an authorised person with certain access rights, including the right of inspection and, if the thing is a document, the right to copy it.

This does not apply if it is impracticable or would be unreasonable to allow inspection or copying (clause 181(2)).

Documents produced to an inspector under clause 171 are subject to the separate access regime under clause 174.

Division 4—Damage and compensation

182—Damage etc to be minimised

Clause 182 requires inspectors to take all reasonable steps to ensure that they and any assistants under their direction cause as little inconvenience, detriment and damage as is practicable.

183—Inspector to give notice of damage

Clause 183 sets out a process for giving written notice to relevant persons of any damage (other than damage that the inspector reasonably believes is trivial) caused by inspectors or their assistants while exercising or purporting to exercise compliance powers.

184—Compensation

Clause 184(1) allows a person to make a claim for compensation if the person incurs a loss or expense because of the exercise or purported exercise of a power under Division 3 of Part 9.

Clause 184(2) specifies the forum and process for claiming compensation.

Clause 184(3) limits the compensation that is recoverable to compensation that is 'just' in all the circumstances of the case. This means that compensation is not recoverable simply because the relevant powers have been exercised or purportedly exercised at a workplace. The intention is to limit the recovery of compensation to those cases where there is a sufficient degree of unreasonableness or unfairness in the exercise or purported exercise of those powers to warrant an award of just compensation. For example, compensation may be awarded if the taking of a sample of a thing by an inspector or forfeiture of a thing resulted in the acquisition of property other than on just terms, or in circumstances where an error by an inspector caused significant detriment.

Clause 184(4) allows the regulations to prescribe the matters that may or must be taken into account by the court when considering whether it is just to make the order for compensation.

Division 5—Other matters

185—Power to require name and address

Clauses 185(1) and (2) allow an inspector to require a person to tell the inspector his or her name and residential address if the inspector—

- finds the person committing an offence against the Act (clause 185(1)(a)); or
- reasonably suspects the person has committed an offence against the Act, based on information given to the inspector, or the circumstances in which the person is found (clause 185(1)(b)); or
- reasonably believes the person may be able to assist in the investigation of an offence against the Act (clause 185(1)(c)).

Before making a requirement under this provision, the inspector must give the person his or her reasons for doing so and also warn the person that failing to respond without reasonable excuse would constitute an offence (clause 185(2)).

If the inspector reasonably believes the person's response to be false, the inspector may further require the person to give evidence of its correctness (clause 184(3)). For example, an inspector could ask to see the person's driver's licence.

Clause 185(4) makes it an offence for a person to refuse or fail to comply with a requirement under this clause if the person does not have a reasonable excuse. Subclause (5) clarifies that there is an evidential burden on the accused to show a reasonable excuse.

186—Inspector may take affidavits

Clause 186 clarifies that an inspector may take affidavits for any compliance-related purpose under the Act.

187—Attendance of inspector at inquiries

This clause of the Model Work Health and Safety Act, which clarifies that an inspector may attend coronial inquests into the cause of death of a worker while the worker was carrying out work and allows inspectors to examine witnesses at the inquest, has been omitted because it is adequately covered by other local laws.

Division 6—Offences in relation to inspectors

188—Offence to hinder or obstruct inspector

This Division establishes offences against inspectors.

Given the importance of the role of the inspector and that the inspector is the most immediate personification at the workplace of the regulatory system, offences in relation to inspectors are considered to be serious and the subject of significant penalties.

Clause 188 makes it an offence to intentionally hinder or obstruct an inspector in exercising compliance powers under the Act, or induce or attempt to induce any other person to do so. This would include unreasonably refusing or delaying entry, as well as behaviour such as intentionally destroying or concealing evidence from an inspection.

Any reasonable action taken by a person to determine his or her legal rights or obligations in relation to a particular requirement (e.g. the scope of legal professional privilege) is not intended to be caught by this provision.

189—Offence to impersonate inspector

Clause 189 makes it an offence for a person who is not an inspector to hold himself or herself out to be an inspector.

190—Offence to assault, threaten or intimidate inspector

Clause 190 makes it an offence to assault, threaten or intimidate, or attempt to do so, an inspector or a person assisting an inspector.

Although this is also an offence at general criminal law, the inclusion of this provision is intended to ensure greater deterrence by giving it more prominence and allowing its prosecution by the regulator.

Part 10—Enforcement measures

Division 1—Improvement notices

191—Issue of improvement notices

Part 10 provides for enforcement measures including notices (ie, improvement notices, prohibition notices and non-disturbance notices), remedial action and court-ordered injunctions.

Many of the decisions that can be made under this Part are subject to review (see Part 12).

This Division provides for inspectors to issue improvement notices. Improvement notices and prohibition notices have for many years been fundamental tools used by inspectors to achieve compliance with work health and safety laws.

Improvement notices may require a person to remedy a contravention, prevent a likely contravention of the Act or take remedial action.

Clause 191 allows an inspector to issue improvement notices if the inspector reasonably believe a person—

- is contravening a provision of the Act; or
- has contravened a provision in circumstances that make it likely that the contravention will continue or be repeated.

Clause 191(2) lists what action an improvement notice may require, including that the person remedy the contravention or take steps to prevent a likely contravention from occurring.

192—Contents of improvement notices

Clause 192(1) sets out the mandatory and optional content for improvement notices. The mandatory content aims to ensure that the person who is issued with the notice understands the grounds for the inspector's decision, including (in brief) how the laws are being or have been contravened. The optional content includes such things as directions about measures to be taken to remedy the contravention or prevent the likely contravention from occurring (clause 192(2)).

Improvement notices must also specify a date for compliance with the notice (clause 192(1)(d)). The day stated for compliance with the improvement notice must be reasonable in all the circumstances. Relevant factors could include the seriousness of the contravention or the likely contravention.

193—Compliance with improvement notice

Clause 193 makes it an offence for a person to fail or refuse to comply with an improvement notice within the time allowed for compliance as stated in the notice, including any extended time for compliance (see clause 194). This is subject to provisions for review of decisions, including stays of decisions to issue notices (see Part 12).

194—Extension of time for compliance with improvement notices

Clause 194 allows inspectors to extend the time for compliance with improvement notices. An extension of time to comply with an improvement notice must be in writing and can only be made if the time for compliance stated in the notice (or as extended) has not expired.

Division 2—Prohibition notices

195—Power to issue prohibition notice

Prohibition notices are designed to stop workplace activity that involves a serious risk to a person's health or safety and are found in the current work health and safety laws of all Australian jurisdictions.

Clause 195 allows inspectors to issue prohibition notices to stop or prevent an activity at a workplace, or modify the way the activity is carried out, if they reasonably believe that—

- if the activity is occurring—it involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; or
- if the activity is not occurring but may occur, and if it does—it will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

Clause 195(2) provides that the notice may be issued to the person who has control over the activity. This would ordinarily be a PCBU.

Pre-requisites for issue of prohibition notices

The use of 'serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard' in clause 195(1) has the advantage of being effective to deal with risks of diseases of long latency from immediate exposure to a hazard and circumstances of psychological threat or other similar conditions. For a prohibition notice to be issued, the risk would have to be considered 'serious' and be associated with an immediate or imminent exposure to a hazard.

Operation of prohibition notices

A prohibition notice takes effect immediately upon being issued and ordinarily continues to operate—subject to the review provisions in Part 12—until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.

There is no requirement for an inspector to visit a workplace to verify that the risks identified in the notice have been remedied. This recognises that an inspector may be satisfied of compliance with a prohibition notice in some circumstances without the need for a workplace visit (e.g. if an independent expert report is provided to the inspector, or independently verified video footage of the affected activity is submitted).

Oral directions

Because prohibition notices are designed as a response to serious risks to work health or safety, directions may be issued orally at first instance, but must be confirmed by a written notice as soon as practicable (clause 195(3)). In general, for such oral directions to be enforceable the inspector must make it clear that the directions are being given under this provision and that it would be an offence for the person not to comply.

196—Contents of prohibition notice

Clause 196 sets out the mandatory and optional content for prohibition notices. The mandatory content requirements are designed to ensure that the person who is issued with the notice understands the inspector's decision, including the basis for the inspector's belief that a notice should be issued and (in brief) the activity the inspector believes involves or will involve a serious risk and the matters that give or will give rise to the risk. It must also cite the provision of the Act or regulations that the inspector believes is being or is likely to be contravened by the activity.

Prohibition notices may also include directions about measures to be taken to remedy the risk, activities to which the notice related, or any contravention or likely contravention mentioned in the notice (clause 196(2)).

Clause 196(3) gives examples of the ways in which a prohibition notice may prohibit the carrying on of an activity, but does not limit the inspector's power to issue prohibition notices in clause 195.

197—Compliance with prohibition notice

Clause 197 provides that it is an offence for a person to fail or refuse to comply with a prohibition notice or a direction issued under subsection 195(2) of the Act. The penalties reflect the consequences that may result from failure to remedy serious risks to health or safety.

Division 3—Non-disturbance notices

198—Issue of non-disturbance notice

199—Contents of non-disturbance notice

This Division provides for non-disturbance notices. Non-disturbance notices are issued by inspectors and designed to ensure non-disturbance of 'notifiable incident' sites and also other sites if an inspector reasonably believes that this is necessary to facilitate the exercise of his or her compliance powers.

Clauses 198 and 199 allow an inspector to issue non-disturbance notices to the person with management or control of a workplace if the inspector reasonably believes that it is necessary to ensure non-disturbance of a site to facilitate the exercise of his or her compliance powers.

A non-disturbance notice may require the person to whom it is issued to preserve the site of a notifiable incident for a specified period or prevent a particular site being disturbed for a specified period. A 'notifiable incident'

occurs where a person dies, suffers a serious injury or illness or where there is a dangerous incident (clause 35). The terms 'serious injury or illness' and 'dangerous incident' are defined in clauses 36 and 37 respectively.

A site includes any plant, substance, structure or thing associated with that site (clause 199(3)).

A non-disturbance notice must specify how long it operates (this cannot be more than seven days), what the person must do to comply with the notice and the penalty for contravening the notice (clause 199(2)).

Clause 199(4) allows certain activities to proceed, despite the non-disturbance notice. These activities generally relate to ensuring health or safety of affected persons, assisting police investigations or activities expressly permitted by an inspector.

200—Compliance with non-disturbance notice

Clause 200 makes it an offence for a person to, without reasonable excuse, fail or refuse to comply with a non-disturbance notice. This is subject to the provisions for review of decisions, including stays of decisions to issue notices (see Part 12).

Clause 200(2) clarifies that the evidential burden of showing a reasonable excuse is on the accused.

201—Issue of subsequent notices

Clause 201 allows inspectors to issue one or more subsequent non-disturbance notices in relation to a site, whether or not the previous notice has expired.

This would be subject to the requirements in clauses 198 and 199, which relate to the issue and contents of non-disturbance notices.

Division 4—General requirements applying to notices

202—Application of Division

This Division co-locates the provisions of a procedural nature that apply to all notices issued under this Part, unless otherwise specified.

203—Notice to be in writing

Clause 203 requires that all notices issued under this Part be given in writing, although enforceable directions may be given orally in advance of a prohibition notice (clause 195).

204—Directions in notices

Improvement and prohibition notices may include directions (see clauses 192(2), 196(2) and 196(3)).

Clause 204 clarifies that a direction included in an improvement or prohibition notice may refer to a Code of Practice and offer the person to whom it is issued a choice of ways to remedy the contravention.

205—Recommendations in notice

Clause 205 clarifies that improvement and prohibition notices may include recommendations. The difference between a direction and recommendation is that it is not an offence to fail to comply with recommendations in a notice (clause 205(2)).

206—Changes to notice by inspector

207—Regulator may vary or cancel notice

Clauses 206 and 207 allow for notices to be varied or cancelled.

Clause 207 provides that a notice issued by an inspector may only be varied or cancelled by the regulator. Clause 207 is subject to clause 206, which empowers an inspector to make minor changes to improvement, prohibition and non-disturbance notices for certain purposes.

Clause 206 allows inspectors to make minor technical changes to a notice to improve clarity and to correct errors or references, including to reflect changes of address or other circumstances.

Clause 206(2) makes it clear that this provision is in addition to the inspector's power to extend the period for compliance with an improvement notice under clause 194.

Clause 207 requires substantive variations to notices to be made by the regulator. It also empowers the regulator to cancel notices issued under this Part.

208—Formal irregularities or defects in notice

Clause 208 makes it clear that formal defects or irregularities in notices issued under this Part do not invalidate the notices, unless this would cause or be likely to cause substantial injustice.

Clause 208(b) clarifies that a failure to use the correct name of the person to whom the notice is issued falls within this provision, if the notice sufficiently identifies the person and has been issued or given to the person in accordance with clause 209.

209—Issue and giving of notice

Clause 209(1) specifies how notices may be served. The regulations may prescribe additional matters such as the manner of issuing or giving a notice and the steps that must be taken to notify all relevant persons that the notice has been issued (clause 209(2)).

'Issuing' and 'giving' notices

The terms 'issued' and 'given' in relation to serving notices have been used differently in current work health and safety laws in Australia.

Under this Part, a notice is 'issued' to a person who is required to comply with it, but may be 'given' to another person (e.g. a manager or officer of a corporation). Those persons who are given the notice need not comply with it, unless they are also the person to whom it was issued.

210—Display of notice

Clause 210(1) requires the person to whom a notice is issued to display a copy of that notice in a prominent place in the workplace at or near the place where work affected by the notice is performed. This must be done as soon as possible.

It is an offence for a person to refuse or fail to display a notice as required by this clause.

It is also an offence for a person to intentionally remove, destroy, damage or deface the notice while it is in force (clause 210(2)).

There is no requirement to display notices that are stayed under review proceedings, as they would not be considered to be 'in force' for the period of the stay.

Division 5—Remedial action

211—When regulator may carry out action

Clause 211 allows the regulator to take remedial action in circumstances where a person issued with a prohibition notice has failed to take reasonable steps to comply with the notice.

The regulator may take any remedial action it believes reasonable to make the workplace or situation safe, but only after giving written notice to the alleged offender of the regulator's intent. The written notice must also state the owner's or person's liability for the costs of that action.

212—Power of the regulator to take other remedial action

Clause 212 allows the regulator to take remedial action if the regulator reasonably believes that—

- a prohibition notice can and should be issued in a particular case; but
- the notice cannot be issued after reasonable steps have been taken because the person with management or control of the workplace cannot be found.

In these circumstances, the regulator may take any remedial action necessary to make the workplace safe. The word 'necessary' is intended to imply that the regulator should take the least interventionist approach possible, while making the workplace safe (e.g. erecting barricades around a site).

213—Costs of remedial or other action

Clause 213 enables the regulator to recover the reasonable costs of remedial action taken under clauses 211 or 212 as a debt due to the regulator.

For costs to be recoverable from a person under clause 211, the person must have been notified of the regulator's intention to take the remedial action and the person's liability for costs.

Division 6—Injunctions

214—Application of Division

This Division allows the IRC to make injunctions to enforce notices issued under this Part (ie, excluding provisional improvement notices, unless confirmed by an inspector). This provides a timely means for the regulator to ensure that contraventions of health and safety duties are addressed, rather than having to wait for the lengthy process of prosecution.

215—Injunctions for noncompliance with notices

Clause 215 allows the regulator to apply to the IRC for an injunction to compel a person to comply with a notice or restrain the person from contravening a notice issued under this Part.

Injunctive relief may be sought in relation to an improvement notice even if any time for complying with the notice has expired (clause 215(2)(b)).

Part 11—Enforceable undertakings

216—Regulator may accept WHS undertakings

Part 11 allows for written, enforceable undertakings to be given by a person as an alternative to prosecuting the person. Such undertakings are voluntary—a person cannot be compelled to make an undertaking and the regulator has discretion whether or not to accept the undertaking.

Clause 216 enables the regulator to accept a WHS undertaking relating to a breach or alleged breach of the Act, with the exception of a breach or alleged breach relating to a Category 1 offence. A Category 1 offence, as defined in clause 31, is the most serious work health and safety offence and involves reckless conduct by a duty holder that exposes an individual to a risk of death or serious illness or injury without reasonable excuse. The use of enforceable undertakings would not be appropriate in such circumstances.

A legislative note following clause 216(1) directs the reader to clause 230(3), which requires the regulator to publish general guidance for the acceptance of WHS undertakings on the regulator's website.

217—Notice of decision and reasons for decision

Clause 217(1) requires the regulator to give the person wanting to make a WHS undertaking a written notice of the regulator's decision to accept or reject the undertaking, along with reasons for that decision.

In the interests of transparency, if the regulator accepts a WHS undertaking the reasons for that decision must be published on the regulator's website (clause 217(2)). However, the decision is not subject to internal review.

218—When a WHS undertaking is enforceable

Clause 218 deals with when an undertaking becomes enforceable. That is, when the regulator's decision to accept is given to the person or at any later date specified by the regulator.

219—Compliance with WHS undertaking

Clause 219 provides that it is an offence to contravene a WHS undertaking.

220—Contravention of WHS undertaking

Clause 220 applies if a person contravenes a WHS undertaking. Where, on an application by the regulator, the Magistrates Court is satisfied that the person has contravened the undertaking it may, in addition to imposing a penalty, direct the person to comply with the undertaking, or discharge the undertaking. The court may also make any other order it considers appropriate in the circumstances, including orders that the person pay the costs of proceedings and orders that the person pay the regulator's costs in monitoring compliance with the WHS undertaking in the future.

Clause 220(4) provides that an application for, or the making of, any orders under the clause will not prevent proceedings being brought for the original contravention or alleged contravention in relation to which the WHS undertaking was made.

221—Withdrawal or variation of WHS undertaking

Clause 221(1) provides that, with the written agreement of the regulator, a person who has made a WHS undertaking may withdraw or vary the undertaking, but only in relation to the contravention or alleged contravention to which the WHS undertaking relates.

Once again, in the interests of transparency and accountability, variations and withdrawals must be published on the regulator's website (clause 221(3)).

222—Proceeding for alleged contravention

Clause 222 prevents a person being prosecuted for a contravention or alleged contravention of the Act to which a WHS undertaking relates if that WHS undertaking is in effect or if the undertaking has been completely discharged.

Clause 222(3) enables the regulator to accept a WHS undertaking while related court proceedings are on foot but before they have been finalised. In such circumstances, the regulator is required to take all reasonable steps to have the proceedings discontinued as soon as possible (clause 222(4)).

Part 12—Review of decisions

Division 1—Reviewable decisions

223—Which decisions are reviewable

Part 12 establishes the procedures for the review of decisions that are made under the Act. In general, reviewable decisions are those that are made by—

- inspectors—these are reviewable by the regulator internally at first instance, and then may go on to external review; and
- the regulator—these go directly to external review.

Clause 223 contains a table that sets out the decisions made under the Act that are reviewable decisions.

The table in clause 223(1) lists the reviewable decisions by reference to the provisions under which they are made and lists who is eligible to apply for review of a reviewable decision.

Item 13 in the table allows the regulations to prescribe further decisions that can be reviewable and who would be eligible to apply for the review of any such decision.

Clause 223(2) states that, unless a contrary intention appears, a reference in Part 12 to a decision includes a reference to a number of actions listed in paragraphs (a) to (g), and includes a refusal to make a decision.

Clause 223(3) defines a person entitled to a thing, for the purposes of a reviewable decision made under clauses 179 or 180.

Division 2—Internal review

224—Application for internal review

Clause 224(1) allows an eligible person to apply for internal review of a reviewable decision within 14 days of the decision first coming to the attention of the eligible person or a longer period as determined by the regulator.

In the case of a decision to issue an improvement notice, an application for internal review must be made within the period allowed for compliance specified in the notice if it is less than 14 days.

An application for internal review cannot be made in relation to a decision of the regulator or a delegate of the regulator (clause 224(1)).

Subclause (2) requires that an application be made in the manner and form required by the regulator.

225—Internal reviewer

Clause 225 provides that the regulator may appoint a body or person to conduct internal reviews applied for under this Division. However, clause 225(2) provides that the regulator cannot appoint the person who made the original decision.

226—Decision of internal reviewer

Clause 226(1) requires an internal reviewer to make a decision as soon as reasonably practicable and within 14 days after receiving the application for internal review.

Clause 226(2) allows the internal reviewer to confirm or vary the reviewable decision, or set aside the reviewable decision and substitute another decision that the internal reviewer considers appropriate.

Clause 226(3) to (5) provide a process for seeking further information from an applicant. If the internal reviewer seeks further information, the 14 day decision making period will cease to run until that information is provided. Clause 226(4) states that the internal reviewer can specify a period of not less than seven days in which additional information must be provided. If the information is not provided within the specified period, clause 226(5) states that the reviewable decision is taken to be confirmed by the internal reviewer.

Clause 226(6) provides that if the internal reviewer does not vary or set aside a decision within 14 days the reviewable decision is taken to have been confirmed.

227—Decision on internal review

Clause 227 requires an internal reviewer to provide to the applicant in writing the decision on internal review and reasons for it as soon as practicable after making that decision.

Division 3—External review

228—Stays of reviewable decisions on internal review

This clause sets out a scheme relating to the operation of reviewable decisions of a decision is subject to internal review proceedings.

229—Application for external review

Clause 229(1) provides that an eligible person may apply to the Senior Judge of the IRC for review of any reviewable decision made by the regulator or a decision made, or taken to have been made, on internal review.

Clause 229(2) provides when an application for external review must be made. An application for external review must be made: within 28 days after an applicant is notified where a decision was to forfeit a thing; within 14 days after an applicant was notified where a decision does not involve forfeiting a thing; or within 14 days if the regulator is required by the external review body to give the eligible person a statement of reasons.

The review is to be conducted by a review committee.

The Senior Judge of the IRC will be able to stay the operation of a reviewable decision pending the outcome of the proceedings (if he or she thinks fit).

Part 13—Legal proceedings

Division 1—General matters

230—Prosecutions

This Part is divided as follows:

- Division 1 deals with the prosecution of offences;
- Division 2 covers sentencing for offences;
- Division 3 provides for infringement notices;
- Division 4 deals with offences committed by bodies corporate;

- Divisions 5 and 6 deal with offences committed by the Crown and public authorities;
- Division 7 provides for WHS civil penalty proceedings;
- Division 8 deals with the effect of the Act on civil liability.

Clause 230(1) provides that proceedings for an offence against the Act can only be brought by the regulator or an inspector authorised in writing (generally or in a particular case) by the regulator.

Clause 230(2) provides that the regulator's authorisation is sufficient to authorise an inspector to continue proceedings in a case where the court amends the charge, warrant or summons.

The transparency and accountability of proceedings for an offence against this Act are facilitated by—

- providing that the regulator must issue and publish on the regulator's website general guidelines about the prosecution of offences against the Act and the acceptance of WHS undertakings under the Act (clause 230(3)); and
- clarifying that nothing in clause 230 affects the ability of the Director of Public Prosecutions (DPP) to bring proceedings for an offence against the Act (clause 230(9)). Therefore, if the regulator does not bring proceedings for an offence against the Act the DPP can.

Clause 230(4) provides that an indictable offence against the Act may be charged on complaint. If this occurs, the offence will be taken to be a summary offence. However, if the court determines that a person found guilty of such an offence should be subject to a fine exceeding $300 000, the court may require that the person appear for sentence in the District Court. An offence constituting a summary offence under subclause (4) is to be taken to be an industrial offence that is to be heard by an industrial magistrate.

Subclause (4) does not apply to—

- a Category 1 offence; or
- a Category 2 offence where the alleged offender is a body corporate; or
- a Category 3 offence where the alleged offender is a body corporate.

A preliminary examination for an indictable offence under the Act is to be conducted by the Magistrates Court constituted by an industrial magistrate. A charge for a minor indictable offence under the Act that is to be dealt with as a charge for a summary offence under the *Summary Procedure Act 1921* will be taken to be an industrial offence under that Act (and dealt with by an industrial magistrate).

231—Procedure if prosecution is not brought

Clause 231 allows for the review by the DPP of a regulator's decision not to prosecute a serious offence, that is, a Category 1 or Category 2 offence.

Clause 231(1) allows a person who reasonably believes that a Category 1 or 2 offence has been committed but no prosecution has been brought to ask the regulator, in writing, to bring a prosecution. The request can be made if no prosecution has been brought between six and 12 months after the occurrence of the act, matter or thing that the person reasonably believed occurred. Clause 231(7) clarifies that an application may be made about the occurrence of, or failure in relation to, an act, matter or thing.

Clause 231(2) sets out how and when the regulator must respond to a request made in clause 231(1). In particular, the regulator must provide a written response to a request within three months and must advise the person whether a prosecution will be brought and, if the decision has been made to not bring a prosecution, the reasons for that decision.

In the interests of transparency and fairness, clause 231(2)(b) requires the regulator to inform the person whom the applicant believes committed the offence of the application and of the regulator's response.

If the regulator advised under clause 231(2) that a prosecution for an offence will not be brought, clause 231(3) provides that the regulator must also inform the applicant that he or she may ask for the matter to be referred to the DPP. If the applicant makes a written request, the regulator must refer the matter to the DPP within one month.

Clause 231(4) requires the DPP to consider the referral and advise the regulator in writing within one month whether the DPP considers that a prosecution should be brought.

Clause 231(5) requires the regulator to ensure that a copy of the DPP advice is given to the applicant and again for transparency, the person whom the applicant believes committed the offence.

Clause 231(6) provides that if the regulator declines to follow the advice of the DPP to bring proceedings, the regulator must give written reasons for the decision to the applicant and the person whom the applicant believes committed the offence.

232—Limitation period for prosecutions

The limitation periods provided in clause 232 balance the need of a duty holder to have proceedings brought and resolved quickly with the public interest in having a matter thoroughly investigated by the regulator so that a sound case can be brought.

Clause 232(1) sets out the limitation periods for when proceedings for an offence may begin. Proceedings must be commenced—

- within two years after the offence first came to the regulator's attention; or
- within one year after a coronial report or inquiry where it appears from the report or proceedings that an offence has been committed against the Act; or
- if a WHS undertaking has been given in relation to the offence, within six months of the undertaking being contravened or when the regulator becomes aware of a contravention or agrees under clause 221 to withdraw the undertaking.

Reflecting the seriousness of Category 1 offences, clause 232(2) enables proceedings for such offences to be brought after the end of the applicable limitation period if fresh evidence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.

233—Multiple contraventions of health and safety duty provision

Clause 233 modifies the criminal law rule against duplicity. This rule means that, ordinarily, a prosecutor cannot charge two or more separate offences relating to the same duty in one count of an indictment, information or complaint.

Unless modified, the rule could complicate the prosecution of work health and safety offences and impede a court's understanding of the nature of the defendant's breach of duty particularly when an offence is ongoing. For example, the duplicity rule might prevent a charge from including all the information about how the defendant had breached his or her duty of care because information about a second breach of the duty could not be provided in the prosecution for a first breach of that duty. Presenting only one aspect of a defendant's failure might deprive the court of the opportunity to appreciate the seriousness of the failure and result in inadequate penalties or orders being made.

Clause 233(1) provides that more than one contravention of one health and safety duty provision by a person in the same factual circumstances may be charged as a single offence or as separate offences.

Clause 233(2) clarifies that the clause does not authorise contraventions of two or more health and safety duty provisions being charged as a single offence.

Clause 233(3) provides that only a single penalty may be imposed when more than one contravention of a health and safety duty provision is charged as a single offence.

Clause 233(4) provides that in the clause a 'health and safety duty provision' means a provision of Division 2, 3 or 4 of Part 2.

Division 2—Sentencing for offences

234—Application of this Division

Contemporary Australian OHS laws provide courts with a variety of sentencing options in addition to the traditional sanctions of fines and custodial sentences. The national review of OHS laws concluded that judicious combinations of orders can enhance deterrence, make meaningful action by an offender more likely, be better targeted and permit a more proportionate response. In these ways, the Act's goals of increased compliance and a reduction in work-related injury and disease will be promoted. A range of sentencing options is provided for the court in Division 2. The court may—

- impose a penalty; or
- make an adverse publicity order; or
- make a restoration order; or
- make a community service order; or
- release the defendant on the giving of a court-ordered WHS undertaking; or
- order an injunction; or
- make a training order.

Clause 234 provides that Division 2 applies if a court convicts a person or finds the person guilty of an offence against the Act.

235—Orders generally

Clause 235(1) provides that one or more orders under Division 2 may be made against an offender. Clause 235(2) provides that orders can be made under the Division in addition to any penalty that may be imposed or other action that may be taken in relation to an offence.

236—Adverse publicity orders

Adverse publicity orders can be an effective deterrent for an organisation that is concerned about its reputation. Such orders can draw public attention to a particular wrongdoing and the measures that are being taken to rectify it.

Clause 236(1) sets out the kinds of adverse publicity orders that a court may make. For instance, the court may order an offender to publicise the offence or notify a specified person or specified class of persons of the offence, or both. The offender must give the regulator evidence of compliance with the order within seven days of the end of the compliance period specified in the order.

Clause 236(2) allows the court to make an adverse publicity order on its own initiative or at the prosecutor's request.

Clause 236(3) to (4) enable action to be taken by the regulator if an offender does not comply with the adverse publicity order or fails to give evidence to the regulator.

Clause 236(5) provides that if action is taken by the regulator under clause 236(3) or (4), the regulator is entitled to recover from the offender reasonable expenses associated with it taking that action.

237—Orders for restoration

Clause 237(1) allows the court to order an offender to take steps within a specified period to remedy any matter caused by the commission of the offence that appears to be within the offender's power to remedy.

Clause 237(2) enables the court to grant an extension of the period to allow for compliance, provided an application for extension is made before the end of the period specified in the original order.

238—Work health and safety project orders

Clause 238(1) allows the court to make an order requiring an offender to undertake a specified project for the general improvement of work health and safety within a certain period.

Clause 238(2) provides that a work health and safety project order may specify conditions that must be complied with in undertaking the project.

239—Release on the giving of a court-ordered WHS undertaking

Clause 239(1) enables a court to adjourn proceedings, with or without recording a conviction, for up to two years and make an order for the release of an offender on the condition that the offender gives an undertaking with specified conditions. This is called a court-ordered WHS undertaking.

Court-ordered WHS undertakings must be distinguished from WHS undertakings. WHS undertakings are given to the regulator and are voluntary in nature.

Clause 239(2) sets out the conditions that must be included in a court-ordered WHS undertaking. The undertaking must require the offender to appear before the court if called on to do so during the period of the adjournment. Furthermore, the offender must not commit any offence against the Act during the period of adjournment and must observe any special conditions imposed by the court.

Clause 239(3) and (4) allow the court to call on an offender to appear before it if the offender is given not less than four days notice of the court order to appear.

Clause 239(5) provides that when an offender appears before the court again, if the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.

240—Injunctions

Clause 240 allows a court to issue an injunction requiring a person to stop contravening the Act if the person has been found guilty of an offence against it. This power can be an effective deterrent where a penalty fails to provide one.

A note to this clause reiterates that an injunction for non-compliance with a non-disturbance notice, improvement notice or prohibition notice may also be obtained under clause 215.

241—Training orders

Training orders enable a court to make an offender take action to develop skills that are necessary to manage work health and safety effectively. Clause 241 allows a court to make an order requiring a person to undertake, or arrange for workers to undertake, a specified course of training.

242—Offence to fail to comply with order

Clause 242(1) makes it an offence for a person to fail to comply with an order made under Division 2 without reasonable excuse.

Clause 242(3) provides that the clause does not apply to an order under clauses 239 or 240. If a person does not comply with a court-ordered undertaking (made under clause 239) the person may be prosecuted for the original offence to which the undertaking related and if a person does not comply with an injunction (issued under clause 240) the person may be prosecuted for the contravention he or she has been ordered to cease. If a person fails to comply with a court ordered sanction the person may be prosecuted and charged with contempt of court.

Division 3—Infringement notices

243—Infringement notices

A reference in the Act to an infringement notice is to be taken to be a reference to an expiation notice issued under the *Expiation of Offences Act 1996*. An expiation notice may be issued with respect to any matter that may be the subject of an infringement notice under the Act.

Division 4—Offences by bodies corporate

244—Imputing conduct to bodies corporate

A body corporate is an artificial entity that can only act and make decisions through individuals. Therefore, clause 244(1) provides that any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate is conduct also engaged in by the body corporate. Importantly, the operation of this rule is limited to actions that are within the actual or apparent scope of a person's employment or within his or her actual or apparent authority.

Clause 244(2) provides that if an offence requires proof or knowledge, intention or recklessness, it is sufficient for an employee, agent or officer of a body corporate to prove he or she had the relevant knowledge, intention or recklessness in proceedings against a body corporate concerning that offence.

Clause 244(3) provides that if for an offence against the Act mistake of fact is relevant to determining whether a person is liable, it is sufficient for an employee, agent or officer of a body corporate to prove he or she made a mistake of fact in proceedings against a body corporate.

Division 5—The Crown

245—Offences and the Crown

Clause 245(1) provides that if the Crown is guilty of an offence against the Act the penalty to be applied is the penalty applicable to a body corporate.

The Crown is also an artificial entity that acts and makes decisions through individuals. Clause 245(2) provides that conduct engaged in on behalf of the Crown by an employee, agent or officer of the Crown is also conduct engaged in by the Crown. The conduct must be within the actual or apparent scope of the person's employment or authority. Clause 247 defines when a person will be an 'officer of the Crown'.

Clause 245(3) provides that in proceedings against the Crown requiring proof of knowledge, intention or recklessness, it is sufficient to prove that the person referred to in clause 245(2) possessed the relevant knowledge, intention or recklessness.

Clause 245(4) provides that if mistake of fact is relevant in determining liability in proceedings against the Crown for an offence against the Act, it is sufficient that the person referred to in clause 245(2) made that mistake of fact.

246—WHS civil penalty provisions and the Crown

Clause 246(1) provides that if the Crown contravenes a WHS civil penalty provision then the monetary penalty to be imposed is the monetary penalty applicable to a body corporate.

Clause 246(2) mirrors clause 245(2). That is, any conduct that is engaged in on behalf of the Crown by an employee, agent or officer acting within the actual or apparent scope of his or her employment or authority is conduct also engaged in by the Crown for the purposes of a WHS civil penalty provision of the Act.

Clause 246(3) mirrors clause 245(3) in providing that if a WHS civil penalty provision requires proof of knowledge, it is sufficient in proceedings against the Crown to prove that the person referred to in clause 246(2) had that knowledge.

247—Officers

Clause 247(1) defines when a person will be an officer of the Crown for the purposes of the Act. A person will be taken to be an officer if the person makes, or participates in making, decisions that affect the whole or a substantial part of the business or undertaking of the Crown.

However, clause 247(2) clarifies that, when acting in an official capacity, a Minister of a State or the Commonwealth is not an officer for the purposes of the Act.

248—Responsible agency for the Crown

Clause 248(1) provides that certain notices for service on the Crown may be given to or served on the relevant responsible agency. The relevant notices are provisional improvement notices, prohibition notices, non-disturbance notices, infringement notices or notices of WHS entry permit holder entry.

Clauses 248(2) and (3) provide, respectively, that if an infringement notice is to be served on the Crown or proceedings are to be brought against the Crown for an offence or contravention of the Act, the responsible agency may be specified in the infringement notice or document initiating or relating to the proceedings.

Clause 248(4) provides that the responsible agency in respect of an offence is entitled to act for the Crown in proceedings against the Crown for the offence. Also, subject to any relevant rules of court, the procedural rights and obligations of the Crown as the accused are conferred or imposed on the responsible agency.

Clause 248(5) allows the prosecutor or the person bringing the proceedings to change the responsible agency during the proceedings with the court's leave.

Clause 248(6) defines the expression 'responsible agency' and includes rules governing what happens if the relevant agency of the Crown has ceased to exist.

Division 6—Public authorities

249—Application to public authorities that are bodies corporate

Clause 249 provides that Division 6 is applicable only to public authorities that are bodies corporate.

250—Proceedings against public authorities

Clause 250(1) provides that proceedings under the Act can be brought against a public authority in its own name. Clause 250(2) clarifies that Division 6 does not affect any privileges that such a public authority may have under the Crown.

251—Imputing conduct to public authorities

Clause 251(1) is an imputation provision that is similar to clause 244 (relating to bodies corporate) and clause 245(2) (relating to the Crown). That is, conduct engaged in on behalf of a public authority by an employee, agent or officer within the actual or apparent scope of his or her employment or authority is conduct also engaged in by the public authority.

Clause 251(2) provides that in proceedings against the public authority requiring proof of knowledge, intention or recklessness, it is sufficient to prove that the person referred to in clause 251(1) possessed the relevant knowledge, intention or recklessness.

Similarly, clause 251(3) provides that where proof of mistake of fact is relevant in proceedings against the public authority for an offence against the Act, it is sufficient if the person referred to in clause 251(1) made that mistake of fact.

252—Officer of public authority

The expression 'officer of a public authority', which is used in clause 251, is defined in clause 252 as a person who makes or participates in making decisions that affect the whole or a substantial part of the business or undertaking of a public authority.

253—Proceedings against successors to public authorities

Clause 253(1) provides that where a public authority has been dissolved, proceedings for an offence committed by that authority that were, or could have been, instituted against it before its dissolution, action can be taken against its successor if the successor is a public authority. A similar rule applies to infringement notices (clause 253(2)).

Clause 253(2) and (3) provide, respectively, that an infringement notice served on a public authority for an offence against the Act or a penalty paid by a public authority in respect of such an infringement notice is taken to be an infringement notice served on, or penalty paid by, its successor if the successor is a public authority.

Division 7—WHS civil penalty provisions

254—When is a provision a WHS civil penalty provision

Clause 254(1) clarifies that a provision in Part 7 is a 'WHS civil penalty provision' if it is identified as such in that Part.

Clause 254(2) clarifies that 'WHS civil penalty provisions' will also be identified as such in regulations made under the Act.

255—Proceedings for contravention of WHS civil penalty provision

Clause 255 provides that, subject to Division 7, court proceedings may be brought against a person for a contravention of a WHS civil penalty provision.

256—Involvement in contravention treated in same way as actual contravention

Clause 256(1) provides that a person who is involved in a contravention of a WHS civil penalty provision is taken to have contravened that provision.

Clause 256(2) clarifies that a person will be involved in a contravention of the civil penalty provision only if the person has been involved in one of the acts listed in paragraphs (a) to (d). For example, if the person has aided and abetted the contravention or conspired in the contravention.

257—Contravening a civil penalty provision is not an offence

Clause 257 clarifies that it is not a criminal offence to contravene a WHS civil penalty provision.

258—Civil proceeding rules and procedure to apply

Clause 258 requires a court to apply the civil proceeding rules of evidence and procedure when hearing proceedings for a contravention of a WHS civil penalty provision.

259—Proceeding for a contravention of a WHS civil penalty provision

Clause 259(1) provides that in a proceeding for a contravention of a WHS civil penalty provision, if the court is satisfied that a person has contravened a WHS civil penalty provision, it may order the person to pay a monetary penalty and make any other order it considers appropriate, including an injunction.

Clause 259(2) provides that a monetary penalty imposed under subclause (1) cannot exceed the maximum specified under Part 7 or the regulations in respect of the WHS civil penalty provision contravened.

260—Proceeding may be brought by the regulator or an inspector

Similar to the bringing of proceedings for an offence against the Act, clause 260 provides that proceedings for a contravention of a WHS civil penalty provision can only be brought by the regulator or an inspector authorised in writing by the regulator. Authorisation may be granted generally or to bring proceedings in a particular case.

261—Limitation period for WHS civil penalty proceedings

The limitation period for bringing proceedings for a contravention of a WHS civil penalty is two years after the contravention first came to the regulator's notice.

262—Recovery of a monetary penalty

Clause 262 provides that a pecuniary penalty is payable to the State, and the State may enforce the order as if it were a judgment of the court.

263—Civil double jeopardy

Clause 263 applies the rule against double jeopardy to civil penalty proceedings under the Act. That is, it disallows a court from making an order against a person under clause 259 if an order has been made against that person under a civil penalty provision of the Commonwealth, a State or a Territory in relation to conduct substantially the same as the conduct constituting the contravention of the Act.

264—Criminal proceedings during civil proceedings

Clause 264(1) provides that proceedings against a person for a contravention of a WHS civil penalty provision are stayed if criminal proceedings commence or are already on foot against the person for an offence constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention of the WHS civil penalty provision.

If the person is not convicted of the criminal offence, clause 264(2) allows the proceedings for the civil contravention to be resumed. If proceedings are not resumed they are taken to be dismissed.

265—Criminal proceedings after civil proceedings

Clause 265 provides that regardless of any court order made under clause 259 for a contravention of a civil penalty provision that a person has found to have made, criminal proceedings may be commenced against the person for conduct that is substantially the same as the conduct constituting the civil contravention.

266—Evidence given in proceedings for contravention of WHS civil penalty provision not admissible in criminal proceedings

Clause 266(1) provides that evidence of information given or documents produced by an individual in proceedings against him or her for contravention of a WHS civil penalty provision is not admissible in criminal proceedings against the individual if conduct alleged to constitute the criminal offence involved substantially the same conduct. This is the case regardless of the outcome of the proceedings.

Clause 266(2) is an exception to clause 266(1). It provides that such evidence is admissible in a criminal prosecution for giving false evidence.

Division 8—Civil liability not affected by this Act

267—Civil liability not affected by this Act

Clause 267 provides that except as provided in Parts 6 and 7 and Division 7 of Part 13, nothing in the Act is to be interpreted as conferring a right of action in civil proceedings because of a contravention of the Act, conferring a defence to a civil action or otherwise affecting a right of action in civil proceedings, or as affecting the extent to which a right of action arises with respect of breaches of duties or obligations imposed by the regulations.

Part 14—General

Division 1—General provisions

268—Offence to give false or misleading information

This Part collates a number of miscellaneous provisions.

Division 1 contains provisions relating to the giving of false or misleading information, legal professional privilege, immunity from liability, confidentiality of information, contracting out and levying workers.

Division 2 deals with codes of practice.

Division 3 sets out regulation making powers.

Clause 268 provides for the offence of giving false or misleading information.

Clause 268(1) prohibits a person from giving information, when complying or purportedly complying with the Act, knowing either that the information is false or misleading in a material particular or that it omits any thing without which the information is false or misleading.

Clause 268(2) prohibits a person from producing a document, when complying or purportedly complying with the Act, knowing that it is false or misleading in a material particular unless the person—

- indicates how the document is false or misleading and, where practicable, provides the correct information; or
- accompanies the document with a written statement indicating that the document is false or misleading in a material particular and setting out or referring to the material particular in which the document is false or misleading.

269—Act does not affect legal professional privilege

This clause provides that nothing in the Act requires a person to produce a document disclosing information or otherwise provide information that is the subject of legal professional privilege.

270—Immunity from liability

Inspectors, in particular, have a crucial role to play in the promotion of work health and safety and in eliminating or minimising serious risks to health and safety. They may be required to exercise judgment, make decisions and exercise powers with limited information and in urgent circumstances.

As a result, it is important that they and others engaged in the administration of the Act are not deterred from exercising their skill and judgment due to fear of personal legal liability.

Clause 270(1) provides that inspectors and others engaged in the administration of the Act are not personally liable for acts or omissions so long as those acts or omissions are done in good faith and in the execution or purported execution of their powers and functions.

Clause 270(2) states that any civil liability that would otherwise attach to the person instead applies to the State.

271—Confidentiality of information

Inspectors are given broad powers and protections under the Act. Clause 271 is one of a number of mechanisms designed to ensure that inspectors are accountable and credible when they perform functions and exercise powers.

Clause 271 applies where a person obtains information or gains access to a document in exercising a power or function under the Act, other than under Part 7. Part 7 deals with workplace entry by WHS permit holders and contains its own provisions dealing with the use or disclosure of information or documents.

Clause 271(2) prohibits the person who has obtained information or a document from doing any of the following:

- disclosing the information or the contents of the document to another person; or
- giving another person access to the document; or
- using the information or document for any purpose, other than in accordance with clause 271(3).

Prohibited disclosures are an offence.

Clause 271(3) provides a list of circumstances in which clause 271(2) does not apply. These include where disclosure is necessary to exercise powers or functions under the Act, certain disclosures by the regulator, or where it is required by law or by a court or tribunal or where it is provided to a Minister. It also enables the sharing of information between inspectors who exercise powers or functions under different Acts. Personal information can be disclosed with the relevant person's consent.

Clause 271(4) prohibits a person from intentionally disclosing to another person the name of an individual who has made a complaint against that other person unless the disclosure is made with the consent of the complainant or is required by law.

272—No contracting out

This clause deems void any term of any agreement or contract that purports to exclude, limit or modify the operation of the Act or any duty owed under the Act, or that purports to transfer to another person any duty owed under the Act. This upholds the principle that duties of care and obligations cannot be delegated; therefore, agreements cannot purport to limit or remove a duty held in relation to work health and safety matters.

273—Person not to levy workers

This clause prohibits a PCBU from charging workers for anything done or provided relating to work health and safety.

Division 2—Codes of practice

274—Approved codes of practice

Codes of practice play an important role in assisting duty holders to meet the required standard of work health and safety. This Division sets out—

- how codes of practice are approved; and
- the role that codes of practice play in assisting duty holders to meet their legislated obligations; and
- how codes of practice may be used in proceedings for an offence against the Act.

Clause 274(1) permits the Minister to approve a code of practice for the purposes of the Act and to revoke or vary such a code.

Clause 274(2) provides that tri-partite consultation between State, Territory and Commonwealth governments, unions and employer organisations is a prerequisite for approving, varying or revoking a code of practice.

Clause 274(3) provides that a code of practice can apply, incorporate or adopt anything in a document, with or without modification as in force at a particular time or from time to time.

Clause 274(4) provides that an approval, variation or revocation of a code of practice takes effect when a notice is published in the Government Gazette or on a later date that is specified.

Clause 274(5) provides that, as soon as practicable after approving, varying or revoking a code of practice, the Minister must ensure that notice is published in the Government Gazette and a newspaper circulating generally throughout the State.

Clause 274(6) provides that a regulator must ensure that members of the public are able to inspect free of charge, at the office of the regulator during normal business hours, a copy of each code of practice that is currently approved and each document applied, adopted or incorporated by a code of practice.

275—Use of codes of practice in proceedings

Currently, provisions about how codes of practice are used vary in two significant ways across the jurisdictions:

- in some jurisdictions non-compliance with approved codes of practice creates a rebuttable presumption of non-compliance with a duty; and
- other jurisdictions provide that compliance with an approved code constitutes 'deemed compliance' with a duty.

The Act does not adopt either approach.

Codes of practice provide practical guidance to assist duty holders to meet the requirements of the Act. A code of practice applies to anyone who has a duty of care in the circumstances described in the code. In most cases, following an approved code of practice would achieve compliance with the health and safety duties in the Act, in relation to the subject matter of the code.

Duty holders can demonstrate compliance with the Act by following a code or by another method which provides an equivalent or higher standard of health and safety than that provided in a code. This allows duty holders to take into account innovation and technological change in meeting their duty and to implement measures most appropriate for their individual workplaces without reducing safety standards.

Clause 275(2) provides that a code of practice is admissible in proceedings as evidence of whether or not a duty or obligation under the Act has been complied with.

Clause 275(3) enables a court to use a code of practice as evidence of what is known about hazards, risk, risk assessment and risk control. A code may also be used to determine what is reasonably practicable in the circumstances to which the code relates.

Clause 275 does not prevent a person introducing evidence of compliance with the Act apart from the code of practice—so long as this provides evidence of compliance at a standard that is equivalent to or higher than the code of practice (clause 275(3)).

Division 3—Regulation-making powers

276—Regulation-making powers

The function of regulations is to specify, in greater detail, what steps are required for compliance with the general duties in relation to particular hazards or risks.

Clause 276(1) contains broad regulation making powers that allow for the making of regulations for or with respect to any matter relating to work health and safety and any matter or thing required or permitted by the Act, or necessary or convenient to give effect to the Act.

Without limiting the broad power in clause 276(1), clause 276(2) contains more specific regulation making power in relation to Schedule 3.

Clause 276(3) makes further provision in relation to the nature of regulations. For instance, regulations may—

- be of general or limited application; or

- leave particular matters to the discretion of the regulator or an inspector; or
- apply, adopt or incorporate matters contained in any document; or
- prescribe exemptions or allow the regulator to make exemptions from compliance with a regulation; or
- prescribe fees; or
- prescribe expiation fees for infringement offences and other penalties for contravention of a regulation.

Schedule 1—Application of Act to dangerous goods and high risk plant

Schedule 1 extends the application of the Act by providing that—

- the term 'carrying out work' refers to the operation and use of high risk plant affecting public safety as well as the storage and handling of dangerous goods; and
- the term 'workplace' refers to places where high risk plant affecting public safety is situated or used as well as where dangerous goods are stored and handled; and
- for the purposes of storage and handling of dangerous goods or the operation or use of high risk plant affecting public safety, the term 'work health and safety' includes a reference to public health and safety.

Schedule 2—Local tripartite consultation arrangements

Part 1—The SafeWork SA Advisory Council

Division 1—Establishment of Advisory Council

1—Establishment of Advisory Council

This clause establishes the SafeWork SA Advisory Council.

Division 2—Membership

2—Composition of the Advisory Council

This clause deals with membership of the Council. Nine members of the Council will be appointed by the Governor, one will be the Executive Director and one will be the Chief Executive of WorkCover. One of the members appointed by the Governor will be the presiding member of the Council. Four members will be persons who, in the Minister's opinion, are suitable to represent the interests of employers, while four will be persons who, in the Minister's opinion, are suitable to represent the interests of employees. The clause requires the Minister to consult before making an appointment.

3—Terms and conditions of office

Clause 3 sets out the terms and conditions of office for a member of the Advisory Council.

4—Allowances and expenses

This clause provides that an appointed member is entitled to fees, allowances and expenses approved by the Governor. The amount of any fees, allowances and expenses is to be recoverable from the Compensation Fund under the *Workers Rehabilitation and Compensation Act 1986* under a scheme established or approved by the Treasurer.

5—Validity of acts

This clause provides that an act or proceeding of the Advisory Council is not invalid by reason only of a vacancy in its membership or a defect in the appointment of a member.

Division 3—Proceedings

6—Proceedings

This clause deals with certain matters relating to the proceedings of the Advisory Council, such as the quorum, telephone and video conferences, resolutions and record keeping.

7—Conflict of interest under Public Sector (Honesty and Accountability) Act

This clause provides that a member of the Advisory Council will not be taken to have a direct or indirect interest in a matter for the purposes of the *Public Sector (Honesty and Accountability) Act 1995* only because the member has an interest in the matter that is shared in common with employers or employees generally or a substantial section of employers or employees.

This clause also provides that a member of the Advisory Council who has made a disclosure of an interest in a matter decided or under consideration by the Council may, if permitted to do so by other members, attend or remain at a meeting where the matter is under consideration. The member must withdraw from the room following the Council's deliberations and cannot take part in any deliberation or vote on the matter.

Division 4—Functions and powers

8—Functions of the Advisory Council

This clause sets out the functions of the Council, which are as follows:

- to keep the administration and enforcement of the Act, and any other legislation relevant to occupational health, safety and welfare, under review, and to make recommendations for change as the Advisory Council thinks fit;
- to advise the Minister (on its own initiative or at the request of the Minister) on—
- legislation, regulations, codes, standards and policies relevant to occupational health, safety and welfare; and
- national and international developments in the field of occupational health, safety and welfare; and
- the establishment of public inquiries and legislative and other reviews concerning issues associated with occupational health, safety and welfare;
- to provide a high level forum for ensuring consultation and co-operation between WorkCover, associations representing the interests of employees or employers, industry associations, Government agencies and other public authorities, and other interested persons or bodies, in relation to occupational health, safety or welfare matters;
- to prepare, adopt, promote or endorse prevention strategies, standards, codes, guidelines or guidance notes, and to recommend practices, to assist people in connection with occupational health, safety and welfare;
- to promote education and training with respect to occupational health, safety and welfare, to develop, support, accredit, approve or promote courses or programmes relating to occupational health, safety or welfare, and to accredit, approve or recognise education providers in the field of occupational health, safety and welfare;
- to keep the provision of services relevant to occupational health, safety and welfare under review;
- to collect, analyse and publish information and statistics relating to occupational health, safety or welfare;
- to commission or sponsor research in relation to any matter relevant to occupational health, safety or welfare;
- to initiate, co-ordinate or support projects and activities that promote public discussion or comment in relation to the development or operation of legislation, codes of practice and other material relevant to occupational health, safety or welfare;
- to promote occupational health, safety or welfare programs, and to make recommendations with respect to the making of grants in support of projects and activities relevant to occupational health, safety or welfare;
- to promote occupational health, safety and welfare within the broader community and to build the capacity and engagement of the community with respect to occupational health, safety and welfare;
- to consult and co-operate with relevant national, State and Territory authorities;
- to report to the Minister on any matter referred to the Advisory Council by the Minister;
- as it thinks fit, to consider any other matter relevant to occupational health, safety or welfare;
- to carry out other functions assigned to the Advisory Council by or under this or any other Act.

Division 5—Use of staff and facilities

9—Use of staff and facilities

This clause authorises the Advisory Council to make use of the services of the staff, equipment or facilities of an administrative unit by agreement with the Minister responsible for the administrative unit. The Council may, by agreement with the relevant agency or instrumentality, make use of the services of the staff, equipment or facilities of any other agency or instrumentality of the Crown.

Division 6—Related matters

10—Confidentiality

This clause prohibits a member of the Advisory Council from divulging, without the approval of the Council, information that the member acquired as a member of the Council if the member knows the information to be of a commercially sensitive, or of a private or confidential, nature, or if the Advisory Council has classified the information as confidential.

11—Annual report

The Advisory Council is required under this clause to report on work of the Council and other matters relevant to the administration of the Act for each financial year. The report must be provided to the Minister on or before 30 September following the year to which it relates.

Part 2—The Mining and Quarrying Occupational Health and Safety Committee

Part 2 of Schedule 2 contains provisions relating to the Mining and Quarrying Occupational Health and Safety Committee. These provisions are carried over from Schedule 3 of the *Occupational Health, Safety and Welfare Act 1986*.

Schedule 3—Regulation-making powers

Schedule 3 details a variety of matters that may be the subject of regulations (see clause 276). These include duties imposed by the Act, the protection of workers, and matters relating to records, hazards, work groups, health and safety committees and WHS entry permits. These more specific regulation-making powers deal with matters that are not expressly identified within the scope or objects of the Act for which regulations may be required. They do not limit the broad regulation making power in clause 276(1).

Schedule 4—Review committees

Schedule 4 contains provisions relating to review committees. These provisions are carried over from Part 7 of the *Occupational Health, Safety and Welfare Act 1986*.

Schedule 5—Provisions of local application

1—Provision of information by WorkCover

This clause, which provides for the provision of certain information by WorkCover to the Advisory Council and the Department to the extent required by a scheme established by the Minister, reenacts section 54A of the *Occupational Health, Safety and Welfare Act 1986*.

The relevant information is as follows:

- information about any work-related injury, or about any specified class of work-related injury, reported to or investigated by WorkCover;
- the steps being taken by any employer, or any employer of a specified class, to protect employees from injury or risks to health, safety or welfare, or to assist in the rehabilitation of employees who have suffered injuries in connection with their work;
- information relating to the cost or frequency of claims involving a particular employer, or class of employers, so as to allow comparisons between employers in a particular industry, or part of an industry;
- the outcome of any investigation, inquiry or other action undertaken by WorkCover;
- other information of a kind prescribed by the regulations.

2—Registration of employers

This clause, which provides for registration under the Act of persons who are required to be registered as employers under the *Workers Rehabilitation and Compensation Act 1986*, reenacts section 67A of the *Occupational Health, Safety and Welfare Act 1986*.

The clause provides that a periodical fee, the amount of which is to be set by WorkCover, is payable in relation to registration under the clause. In setting the fee, WorkCover is to take into account certain prescribed criteria. A prescribed percentage of the prescribed amount for a financial year is to be paid to the Department in accordance with guidelines established by the Treasurer. The prescribed amount for a financial year will be an amount fixed for that financial year by the regulations.

3—Portion of WorkCover levy to be used to improve occupational health and safety

This clause, which is based on section 67B of the *Occupational Health, Safety and Welfare Act 1986*, provides for payment of a portion of the levy paid to WorkCover under Part 5 of the *Workers Rehabilitation and Compensation Act 1986* to the Department. The amount paid is to be applied towards the costs associated with the administration of the Act.

Schedule 6—Consequential amendments, repeal and transitional provisions

Part 1—Related amendments

1—Amendment provisions

This clause is formal.

Part 2—Amendment of *Criminal Law (Sentencing) Act 1988*

2—Amendment of section 19—Limitations on sentencing powers of Magistrates Court

This clause amends section 19 of the *Criminal Law (Sentencing) Act 1988* to replace a reference to the *Occupational Health, Safety and Welfare Act 1986* with a reference to the *Work Health and Safety Act 2011*.

Part 3—Amendment of *Dangerous Substances Act 1979*

3—Amendment of section 14—Offence to keep dangerous substances without a licence

Under section 14, it is an offence for a person to keep a prescribed dangerous substance in any premises unless the person holds a licence under Division 2. Under the section as amended by this clause, there will be an ability to prescribe cases or circumstances by regulation in relation to which Division 2 does not apply.

4—Amendment of section 18—Offence to convey dangerous substances without a licence

Under section 18, it is an offence for a person to convey a prescribed dangerous substance unless the person holds a licence under Division 3. Under the section as amended by this clause, there will be an ability to prescribe cases or circumstances by regulation in relation to which Division 3 does not apply.

Part 4—Amendment of *Environment Protection Act 1993*

5—Amendment of Schedule 1—Prescribed activities of environmental significance

This clause amends Schedule 1 of the *Environment Protection Act 1993* with respect to the status of railways used as amusement devices.

Part 5—Amendment of *Mines and Works Inspection Act 1920*

6—Amendment of section 18—Regulations

This clause amends section 18 of the *Mines and Works Inspection Act 1920* by removing an obsolete reference to codes of practice issued by the South Australian Occupational Health and Safety Commission. In place of this, reference is made to codes of practice approved by the relevant Minister under Part 14 Division 2 of the *Work Health and Safety Act 2011*.

Part 6—Amendment of *Tobacco Products Regulation Act 1997*

7—Amendment of section 4—Interpretation

The current definition of *employee* in section 4 of the *Tobacco Products Regulation Act 1997* refers to the *Occupational Health, Safety and Welfare Act 1986*. This definition is to be replaced with a definition referring to employment under a contract of service or work under a contract of service. A definition of *contract of service* is also to be inserted.

8—Amendment of section 46—Smoking banned in enclosed public places, workplaces and shared areas

This clause amends section 46 of the *Tobacco Products Regulation Act 1997* to replace a reference to the *Occupational Health, Safety and Welfare Act 1986* with a reference to the *Work Health and Safety Act 2011*.

Part 7—Amendment of *Workers Rehabilitation and Compensation Act 1986*

9—Amendment of section 64—Compensation Fund

This clause amends section 64 of the *Workers Rehabilitation and Compensation Act 1986* to replace a reference to the *Occupational Health, Safety and Welfare Act 1986* with a reference to the *Work Health and Safety Act 2011*.

10—Amendment of Schedule 1—Transitional provisions

This clause amends clause 4 of Schedule 1 of the *Workers Rehabilitation and Compensation Act 1986* (relating to the Mining and Quarry Industries Fund) to replace a reference to Schedule 3 of the *Occupational Health, Safety and Welfare Act 1986* with a reference to the Part 2 of Schedule 2 of the *Work Health and Safety Act 2011*.

Part 8—Repeal

11—Repeal of Act

This clause repeals the *Occupational Health, Safety and Welfare Act 1986*.

Part 9—Transitional provisions

This Part deals with transitional issues associated with the repeal of the *Occupational Health, Safety and Welfare Act 1986* and the commencement of the *Work Health and Safety Act 2011*.

Matters covered by the transitional provisions include the following:

- the duties of designers, manufacturers, importers, suppliers and persons who install, construct or commission plant or structures;
- the appointment of persons holding office as inspectors, health and safety representatives or deputy health and safety representatives before the commencement of the new Act;
- processes and procedures relating to the appointment of health and safety representatives and deputy health and safety representatives, or the establishment of health and safety committees, commenced but not completed before the commencement of the new Act;
- recognition of training completed before the commencement of the new Act;
- membership of the SafeWork SA Advisory Council and the Mining and Quarrying Occupational Health and Safety Committee;
- functions and powers of inspectors in relation to matters arising under or relevant to the *Occupational Health, Safety and Welfare Act 1986*;
- the effect of disqualifications under section 30 of the *Occupational Health, Safety and Welfare Act 1986*;

- the ongoing operation of codes of practice under section 63 of the *Occupational Health, Safety and Welfare Act 1986*;
- the ongoing effect of registrations, licences, permits, accreditations and other forms of authorisation under the *Occupational Health, Safety and Welfare Act 1986* or the *Dangerous Substances Act 1979*;
- the ongoing effect of exemptions in force under section 67 of the *Occupational Health, Safety and Welfare Act 1986* immediately before the repeal of that Act;
- the making of additional provisions of a saving or transitional nature by regulation.

Debate adjourned on motion of Hon. S.G. Wade.

CHILD EMPLOYMENT BILL

Adjourned debate on second reading.

(Continued from 5 April 2011.)

The Hon. T.A. FRANKS (15:38): I rise to speak on behalf of the Greens in support of the second reading of this Child Employment Bill 2011. We are pleased to see this bill before us, and are also pleased to see the government taking seriously the issue of the protection of children who are also workers. I will start by thanking the minister for the briefing that his officers provided to the Greens, and specifically Jess Nitschke, Marie Boland and David Brown, who were very generous with their time.

However, I also note that in that briefing a request was made for the submissions that led to the creation of this bill and, while there have been some delays in accessing those submissions, I am very pleased to see that they have finally—several days into the debate on this bill—now been released onto a website. I think this should be standard practice before a bill is brought into this place so that we as parliamentarians are able to see all the voices that were heard and all the views that were put into the formation of any bill. That should be standard practice for this government if it wants healthy, robust and real democracy—

The Hon. S.G. Wade: Any government—even the next Liberal government.

The Hon. T.A. FRANKS: —any government, including the next Liberal one, as the Hon. Stephen Wade says—and I will hold him to that.

This bill aims to fill the gaps between other legislation, and it will ensure, we hope, that young workers under 18 are protected in the workplace. The bill covers approximately 12,000 children aged five to 14 who have performed work in the past year, including in family businesses or on the family farm, but not including domestic chores. It aims to set clear parameters through regulations and codes of practice, making powers that will be subject to ministerial approval and, of course, parliamentary disallowance. These will be developed during further consultation with key stakeholders, and I understand that is to be later this year.

It does not cover, as I say, domestic chores, and it does not cover carers or collectors, although it does retain the flexibility to bring this sector in under its regulations if it is later found necessary to do so. The regulations will also allow different age groups (for example, 16 to 18 year olds) to be treated differently from those under 14. The bill has been subject to a lot of input, and I know that certainly the Young Workers Legal Service, Unions SA, Office for Youth, Business SA and other major employer groups have all had much to say about this. The Young Workers Legal Service will, no doubt, be quite joyful to see that we are progressing the debate here in this place.

The Greens believe that the workplace laws in our state should be fair and protect all workers, regardless of age, from unjust treatment. They should promote industrial harmony, and they should enable us to organise collectively to negotiate fair pay and conditions. We have a longsighted vision of protecting the rights of youth employees and young workers in the workforce who are under 18, as well as those who are classified as young workers but who are under, say, 25. Clearly, these are situations where we are talking about a person's first job in the world of work and paid employment, and it is important to get it right from the start There is sufficient evidence, however, that we are not doing that.

Young workers are open to exploitation in the areas of discrimination in the workplace, unpaid trial work, health and safety concerns and unfair dismissals, and they are often expected to carry out duties, including promotional work, specifically in the fast-food industry, where they are, in fact, paid as little as $5.95 an hour with no overtime and no appropriate conditions. We find that of

concern. As I say, these are often the first jobs that these young people undertake, and they are in a very vulnerable position. We need to have special protections for them.

Many young workers find themselves working additional hours without pay. They do not receive overtime, and they are not often treated with respect in their workplace. This is a tragedy and should be addressed. Obviously, we cannot do everything through legislation and there needs to be cultural change, as well. I hope that, with some of these legislative protections that we are now looking at formalising, we will see that culture change.

We hear stories all the time about young workers who are pressured to work through meal breaks or who are exploited by employers to work on a trial period without pay. I think the Hon. Carmel Zollo mentioned that some of her family members had been subject to trial periods without pay.

The Hon. Carmel Zollo: Continuing trials.

The Hon. T.A. FRANKS: Continuing trials—and certainly my younger family members have had similar experiences. It is often an older and more experienced worker who needs to step in and let them know that it is not acceptable. It is important to note that fast-food outlets and retail industries are, in fact, the largest employers of our most vulnerable young workers in this state. Those young workers also include migrant workers. It is timely that we see in *The Advertiser* today that Fair Work Inspectors, who targeted 87 fast-food outlets, found that 27 of these establishments were not applying current workplace laws.

Contraventions were identified by inspectors relating to pay slip management, lack of registration to trainee and apprenticeship contracts and many other areas. These young workers, while they will not fall under the jurisdiction of this legislation, having some protections under traineeship, were certainly found to be not only vulnerable but also exploited. Again, as I say, I hope that legislation such as this will further strengthen the protection of our young workers.

Our young workers in South Australia do need protection. We have the highest youth unemployment rate of the mainland states, often higher than the Australian average. We have a high youth casual unemployment rate and we have low school retention rates.

We see this bill also protect the rights of young people who often need to work. Secondary school students can be undertaking 10 to 15 hours on top of their school studies. We see that the protection of their education is seen as a high priority here in this bill. I note that there are specific exemptions in the bill for things like harvest time. Many country families would certainly be relaxed and appeased by that, I would hope.

Certainly, young people have a right to have an education to a secondary level; that is a human right that we recognise across the globe and it is something that we should always be taking quite seriously. That education does not necessarily have to be specifically academic. It can certainly be industry and employment-based education that revolves around skilling.

We welcome this bill today. As I say, it is particularly welcome that some of the concerns raised in the past by the union movement, and particularly the Young Workers Legal Service, are being taken seriously by this government. We look forward to the second reading stage of this bill. We have some interest in the questions that have been raised by the Liberal member, the Hon. Rob Lucas, in terms of restrictions around particular age groups for particular types of activities. As it stands, we are highly supportive of this bill, and we imagine it will have a speedy passage through this place. With that, I commend the bill.

Debate adjourned on motion of Hon. J.M. Gazzola.

STAMP DUTIES (INSURANCE) AMENDMENT BILL

Adjourned debate on second reading.

(Continued from 22 March 2011.)

The Hon. R.I. LUCAS (15:47): I rise on behalf of the Liberal Party to support the second reading of the Stamp Duties (Insurance) Amendment Bill. It passed through the House of Assembly in a relatively expeditious manner without proposed amendments and without extensive debate or discussion. Certainly, from the Liberal Party's viewpoint in a brief second reading contribution, I think, one question from me to the government is, at this stage anyway, the extent of our proposed engagement in debate on this particular bill.

It is relatively simple. It seeks to achieve two or three major changes. In the first instance, at the time of the introduction of the goods and services tax around about 10 years ago now, I guess—2001, I think it was—there were explicit provisions inserted in the legislation enabling the GST on general insurance premiums to be calculated on premiums exclusive of stamp duty. The provisions were inserted in that way to avoid a cascading of stamp duty and GST, both of which are applied to insurance premiums.

So, the scheme that had been agreed to was that the GST provisions were intended to clarify that, while GST would be calculated on stamp duty-exclusive premiums, stamp duty under state stamp duty law would be calculated on GST-inclusive premium amounts. The latter part of that sentence is important as well, because members over the years, I am sure, have had complaints about double duty and doubling up; that the state stamp duty is calculated on the GST-inclusive premium amount, and that is the case in relation to state stamp duty.

You might occasionally receive complaints, when someone gets state stamp duty on the purchase of a car or a vehicle or something like that, that you pay your state stamp duty on the GST-inclusive amount for that particular good. I guess, my explanation about that over the years has been that it was ever thus. When we had the wholesale sales tax to the value of the car, the state stamp duty was always calculated on the wholesale sales tax-inclusive price of the car or the good. When the GST was introduced, it was done in exactly the same fashion. There is a valid question of policy as to, 'Aren't you therefore still getting more stamp duty than you would otherwise if you didn't do it that way?' The answer to that is: yes, you are getting more state stamp duty, and that is part of the policy decision and structure of budgets over many decades.

I am not sure exactly when it started but, as I said, it was ever thus. In relation to state stamp duty, budgets have been structured in that way to collect that amount of stamp duty premium. If you change the policy decision to say, 'All right, we won't do it on GST-inclusive for premium,' if state governments wanted to get the same amount of money they would just ratchet up the state stamp duty rate to plough it through the sausage machine and churn out the appropriate rate to still collect the total amount of state stamp duty revenue. It is an issue of policy, but it has been that way.

It has not been entirely clear, and we have not had, or I have not seen, the detailed legal advice that has been made available to the government. The government has obviously had a view put to it at some stage by its own lawyers, I assume, that, because our provisions are drafted somewhat differently from other states, therefore we ought to put this beyond doubt in some way and make some changes to make clear that the current practice will continue or, as the second reading states (and one of parliamentary counsel's favourite phrases), 'It will therefore put this matter beyond any doubt.' That is one of the major reasons for the legislation.

Then there is a grab-bag of smaller changes. The second reading states that the opportunity has been taken to address a number of other issues. I am comforted by the fact that, unlike on some other occasions, the government has advised that these amendments were consistent with representations that had been made to RevenueSA, in the first instance by the Insurance Council of Australia but, in particular, through RevenueSA's state taxes liaison group. As previously debated, this is a group of professionals who provide advice to the government in relation to state tax law, and the government has advised that these changes have gone through this group.

Some of the minor changes are, for example, to the stamp duty rate for general insurance, which will change from being charged at $11 per $100, or fractional part of $100 of premium received, to a fully proportional rate of 11 per cent of premium rate of revenue received. That makes it quite clear that it is a fully proportional 11 per cent; for example, if you just happen to be over the $100 the 11 per cent is only charged on the amount that is above the $100. There are some other changes along those lines as well which, again, the opposition supports.

The final major part of the bill is that, as the second reading states, it 'amends the insurance provisions of the act to make it clear that riders attached to life insurance policies are dutiable at general insurance rate'. I note that the House of Assembly debate does occasionally slip into 'writers' as opposed to 'riders'. That has not been corrected in the *Hansard* by the respective members so, for the benefit of Hansard, we are talking about life insurance riders.

Life insurance riders, as the second reading explanation points out, are other insurance products that cover such risks as trauma, a disabling or incapacitating injury, a sickness, a condition or disease. You might have a life insurance policy, and you would have a rider to that

particular policy for which you would pay an additional premium but for which you would get an additional insurance benefit. So, instead of just a life insurance benefit, you would get a benefit for which you had paid extra for one of these riders or options. I guess the simple explanation would be an additional option in terms of additional insurance product added to it.

As the second reading explanation makes clear, RevenueSA for a long time has always been of the view that life insurance riders are properly characterised as general insurance under the act and are therefore dutiable at the higher general insurance rate. There has always been this policy decision taken—and the minister explained it started in the UK, but certainly in Australian jurisdictions—where we have sought to encourage people to take out life insurance, and the stamp duty on life insurance was at a much lower rate than for general insurance. So, the issue of whether you apply stamp duty at the general insurance rate or the life insurance rate is obviously a significant issue in relation to this particular area.

RevenueSA's view has always been that, and they say they have always operated that particular way. Their argument is that a large proportion of the industry has complied with this view, but some sections of the industry have, over time, disputed this interpretation and asserted that riders should be charged with the lower life insurance rate. One of the questions I asked in the briefing (which I put again on the record and ask the minister to answer on the record—it is answered later in the second reading explanation that four insurance companies have lodged objections) was how many other insurance companies have accepted, grudgingly or not, the RevenueSA view?

What percentage of the number is the four insurance companies? The minister's advisers were able to give us—and I have asked to place it on the record—a ballpark estimate of the relative size of these companies in this particular area; that is, are these four insurance companies likely to be 70 per cent of the market in this area, only 20 per cent, or 10 per cent? Some sort of ballpark figure would give us an indication of the size and significance of these particular four insurance companies.

The second reading explanation states that in 2007 objections were lodged by the four insurance companies against assessments of the Commissioner of State Taxation. The objections were disallowed by the Treasurer and were then appealed to the South Australian Supreme Court. The appeals were heard in April 2010, and on 25 August 2010 the court found in favour of the Commissioner of State Taxation and dismissed all four appeals. The appellants have now appealed to the Full Court of the Supreme Court of South Australia.

I have a question in relation to that: have the costs been awarded against the four insurance companies, or has the decision on costs been reserved at this particular stage? Does the government have a current estimate of the cost of fighting these particular cases thus far in the Supreme Court? In relation to those, because I have not asked those questions in the briefing, if the advisers do not have them I do not propose that we delay the debate. I am happy to accept an assurance from the minister that he is prepared to write to me providing an answer to that after the passage through the house.

The other question I have for the minister's advisers is that, as the appellants have now appealed to the Full Court of the Supreme Court of South Australia, if ultimately the decisions go against the four insurance companies, then there is no particular issue because the government would, assuming this legislation has passed, have confirmed the legality of all that has been and will be done. If, however, the insurance companies are successful in overturning the government's and the commissioner's position, can the minister outline what are the circumstances in that case and what does this bill say will occur?

My understanding—and it might be wrong and I ask for it to be clarified—is that, if the government loses the court case, this bill will obviously handle everything prospectively but in relation to respective provisions would not allow any other insurance company to say, 'Well, you were wrong; we now want a refund of state stamp duty that we have paid.'

So, in essence, the government might be proved to be wrong; the insurance companies win. My understanding of what we are supporting here is that, if that is the case, all the other insurance companies will not be able to retrospectively say, 'Hey, you were wrong. It was unlawful for you to tax us at that particular rate. We want a refund.'

However, my understanding is that the four insurance companies will be successful, I guess. I need to clarify whether they paid the stamp duty, and they will therefore need to be rebated, and what that level will be, or have they refused to pay the higher level of stamp duty? If

they win the case, they therefore would not be required to pay the stamp duty in those circumstances. I am seeking from the government a clear indication of what the circumstances are if the case is won by the four insurance companies and the government was to lose.

With that, I indicate support for the bill. Other than a brief toing and froing in relation to those questions I have just put on the record, I do not propose to go into any detail until consideration of the clauses.

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (16:01): I thank all honourable members for their contribution. I am not aware of anyone else who wants to make a contribution. I thank the Hon. Mr Lucas for his indication of support, and my advisers tell me that they will be able to provide some of the information he is looking for. However, if I may, I would rather deal with that in clause 1 because it is not in a written format at this time. I thank honourable members and I commend the bill to the house.

Bill read a second time.

In committee.

Clause 1.

The Hon. B.V. FINNIGAN: In relation to the question the Hon. Mr Lucas raised about insurance companies that are paying but have not contested, I am advised that there are 19. In relation to the four who have contested or have taken the action, I am advised that it amounts to 10 to 20 per cent of the total. In relation to potential refunds of duty if the court action is successful, I am advised that, indeed, there would need to be a refund of some of the duty paid, which would amount to around $12 million.

The Hon. R.I. LUCAS: Is that $12 million a year, or are we talking about $12 million total?

The Hon. B.V. FINNIGAN: I am advised that it is $12 million for the appeal period, which involves the four companies. If I can just put a rider, if I may use that term, I am obviously relying on the advice that has been provided as a pretty fast response to the Hon. Mr Lucas' query. So, I put on the record that, if further investigation or going through the figures more thoroughly indicates that there is more information or other information, or that the information I have given is not quite accurate then, of course, I undertake to inform the honourable member.

The Hon. R.I. LUCAS: I am happy to accept that assurance from the minister. Just to clarify, I take it from that last answer that the four companies have actually been paying the stamp duty at the rate that the Commissioner of Taxation is insisting on. Their challenge is that they should not have had to pay that, but they have and, if they are successful, the commissioner will have to repay the $12 million.

The Hon. B.V. FINNIGAN: I am advised that the companies did pay during the assessment period. They would have needed to in order to be able to lodge the appeal, but they have not been paying since the appeal was lodged.

The Hon. R.I. LUCAS: If therefore the case goes against the insurance companies, what is the estimate of the budget bonus or benefit if they have not been paying the appropriate rate since they lodged their appeal? They will obviously have to pay that into state tax if they are unsuccessful. What is the one-off budget benefit that those four insurance companies will have to pay?

The Hon. B.V. FINNIGAN: I am advised that we do not know the exact figure, but it is estimated to be between 10 and 20 per cent of the total. So, the maximum it could be, I am advised, is 20 per cent of $18 million per annum.

The Hon. R.I. LUCAS: The maximum amount, the government is saying, is potentially a budget benefit of $3.6 million?

The Hon. B.V. FINNIGAN: I am advised that $3.6 million per annum would be the correct figure if the case were to come down in favour of the government's position.

The Hon. R.I. LUCAS: Just to clarify, that is $3.6 million approximately per year. I understand that these are estimates. This has been going on since 2007-ish. We are into 2011-ish. We probably still have a fair bit to go in terms of this case. Are we talking about four years—four lots of potentially $3.6 million?

The Hon. B.V. FINNIGAN: I am advised that different insurers paid to different points before the appeals were lodged, so it is difficult to quantify what that sum would be.

The Hon. R.I. LUCAS: I would ask if the minister would be prepared to take it on notice to see whether, on advice, we could be given an estimate. In the end, if the letter comes back and says it is all too hard, fine, but it would surprise me if our very competent officers in RevenueSA could not come up with a figure for the government and for the parliament in relation to what the windfall benefit might be if we win the case.

The other question I would ask—which I would not expect the government's advisers to have answers to—that the minister might also take on notice is: what are the costs to the state thus far in terms of fighting this particular case through the courts?

The Hon. B.V. FINNIGAN: In relation to the first point, yes, I will undertake to try to obtain that information for the honourable member. I would caution him that it would be an estimated figure, because it would be difficult to get the precise sum at this time. In relation to the second point, the costs are unknown at this stage. The government is represented by the Crown but, again, I am happy to undertake to seek further information about that and respond to the honourable member. I will just highlight again on the record that we will, of course, review the information I have provided and ensure that it is entirely accurate.

The Hon. R.I. LUCAS: I want to clarify about the position in relation to other insurance companies. If the four insurance companies are successful, what we are doing in this legislation is saying to the other 19 that, if the court finds in favour of the four insurance companies and says that the government and RevenueSA was wrong, we are preventing those 19 companies from going back retrospectively and saying, 'You have levied us stamp duty at the wrong rate; we now want a repayment.'

The Hon. B.V. FINNIGAN: I am advised that the bill is prospective in operation but the way the current refund provisions work, those companies would not be able to recover what they have paid.

The Hon. R.I. LUCAS: I need to clarify that. The minister is saying, 'We are not doing anything in this bill, but the existing legislation already prevents the 19 companies, if there is a successful court decision, from going backwards and gaining benefit from it.' Is that a correct explanation of the position?

The Hon. B.V. FINNIGAN: I am advised that is correct.

Clause passed.

Remaining clauses (2 to 5), schedule and title passed.

Bill reported without amendment.

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (16:12): I move:

That this bill be now read a third time.

Bill read a third time and passed.

RAIL SAFETY (SAFETY COORDINATION) AMENDMENT BILL

Adjourned debate on second reading.

(Continued from 22 March 2011.)

The Hon. D.W. RIDGWAY (Leader of the Opposition) (16:12): I rise on behalf of the opposition to speak to the Rail Safety (Safety Coordination) Amendment Bill 2011 and indicate that the opposition will be supporting this bill. The railway level crossings are the single biggest source of death and injury associated with railway operations. The occurrence of such crashes between road vehicles and trains is a serious area of concern.

The opposition supports this move to align our legislation with the national model, implementing the effective joint management of level crossings by rail infrastructure managers and all levels of road management authorities. This bill will ensure that road and rail authorities work together to reach agreements on their responsibilities, particularly in determining the safety risks, implementing safety risk management strategies, and arrangements for maintenance and upgrade of existing level crossings.

I acknowledge that there has been some recent federal government assistance to the Department for Transport, Energy and Infrastructure in achieving rail crossing upgrades. It must be acknowledged that the agreements to be achieved for this legislation will be largely redundant without financial support to back them.

I echo the concerns of my colleague the member for Stuart in saying that this government must recognise that tragedies arising from rail crossings are not limited to built up and urban areas, and there are some very remote ones we need to focus on, too. I am reminded of a tragedy in my own community. I suggest it would have been in the late 1970s or 1980s. A young man, who had only been married about two years (in fact, he and his wife had a small baby), was driving along parallel with the Mount Gambier railway line in his tractor.

Everybody thinks that he must have been listening to the radio in the tractor. He was somewhat ahead of the Bluebird as it was going back to Mount Gambier and he came straight out in front of it and was tragically killed, leaving his son without a father and, sadly, his wife without a husband. It was one of those country railway crossings, as I am sure you are familiar with, Mr President, where there are no safety precautions whatsoever.

He had probably been over that hundreds of times in his life, but not been there at the same time as a train. Sadly, on this occasion he was. In the minister's second reading explanation he stated that there were approximately 100 crashes between road vehicles and trains in Australia each year and that South Australia averaged about 10 per year. In the past, we have generally had management of level crossings done by government-owned railway authorities, and there are some informal arrangements in place with road authorities for shared management.

With the privatisation of railways throughout the 1990s, many of these informal arrangements have been challenged. Since that time, there have been a number of tragedies, such as the one I spoke of, and also one in 2007 at Kerang, one of the most notable incidents, where 11 people tragically lost their lives when a truck collided with a V/Line train. The scene was disastrous and tragic for that regional community.

Apart from the provision of the interface agreements on level crossings, the bill also appoints a rail safety regulator, which is, if you like, a neutral umpire with the ability to restore an outcome if agreement cannot be reached. The minister will nominate a person if the need arises, and that person will be able to provide an impartial determination. This legislation should be passed swiftly. There are a number of players in the rail operation now, and the mechanisms for safety arrangements must happen quickly. I indicate that the opposition is very happy to support the bill.

The Hon. G.E. GAGO (Minister for Regional Development, Minister for Public Sector Management, Minister for the Status of Women, Minister for Consumer Affairs, Minister for Government Enterprises) (16:16): I understand that second reading contributions have been completed, so on behalf of my ministerial colleagues I would like to thank all honourable members for their contribution to this very important bill. Any outstanding questions or queries will be dealt with during the committee stage. I commend the bill to the council and look forward to the committee stage being dealt with expeditiously.

Bill read a second time.

STATUTES AMENDMENT (TRANSPORT PORTFOLIO—PENALTIES) BILL

Adjourned debate on second reading.

(Continued from 23 March 2011.)

The Hon. D.W. RIDGWAY (Leader of the Opposition) (16:17): I rise on behalf of the opposition to speak to the Statutes Amendment (Transport Portfolio—Penalties) Bill. This bill increases the maximum penalties under three acts: the Road Traffic Act 1961, the Motor Vehicles Act 1959 and the Harbors and Navigation Act 1993. It also amends the maximum level at which expiation fees for a number of offences can be set.

As members would be aware, our current penalty system operates with both expiation notice fees and court-imposed fines. The expiation fees are generally set out in regulations and usually increased annually. They represent a portion of the maximum fine set out in the act. Because a number of fines in these acts have not been amended for some time, there is a diminishing difference between the fines and expiation fees. The penalty set out in the Motor Vehicles Act were determined in the period between 1998 and 2001, and some of the penalties in the Road Traffic Act have not been increased since the early 1990s and, in some cases, the 1980s.

However, the act has had some more recent increases between 2005 and 2009, which were in line with the previously set amounts.

Ideally, it was almost always financially beneficial to pay the fee rather than go to court; however, the diminishing difference between the fine and expiation fees encourages people to have their minor matters dealt with by the court, as there is a possibility that the court may impose a fine that is less than the expiation fee, or they may even be found not guilty.

At this point, I think it is appropriate to add that, outside the Expiation Notice Branch, the court process is the only mechanism for appeal against alleged traffic infringements. However, the associated costs mean that most people will concede to paying a fine despite perhaps having a solid argument against an expiation. Many constituent circumstances have made it very clear to me that, in order to remove any conflict of interest, appeals currently referred to the expiation notice unit should instead be referred for appeal to an existing agency independent of SAPOL.

It was for that reason that the opposition, at the last election, committed to a policy of removing the appeals process from the Expiation Notice Branch within SAPOL and placing it with an existing agency independent of police. The South Australian community is increasingly aggrieved by what appears to be blatant revenue raising with the deployment of speed detection devices and the nature of some of the police blitzes like Operation Rural Focus. I think that blitz exemplified the extent to which SAPOL will go in order to reach targets and budgets. The triviality of a number of the offences was absurd and, in a number of cases, I assert that had the offence been appealed in court, it may not have stood up. However, the reality for most people is that they simply do not have the time or the financial capacity to take matters to court.

South Australia currently has the highest expiations in the country and, in the recent state budget, the standard expiations have again been increased. Evidence surrounding the budget indeed suggests that the state Labor Party views expiations as a revenue-raising opportunity rather than as a matter of road safety. It was interesting to note that the Sustainable Budget Commission—whose brief was to look at financial sustainability and try to help this reckless government to restore its budget to some sort of sensibility—recommended raising the expiation notices. Clearly, their brief was not about road safety; it was about revenue-based issues.

Notwithstanding these concerns, the aim of the bill is to restore the deterrent effect of the penalties and to discourage people from appearing before courts for minor matters. Alleged offenders will retain the right to elect to be prosecuted for an offence and will have their penalty determined by the court. The bill proposes to increase the penalty for some offences by a significant amount. The average increase in penalty is in the range of $400 to $500, but there are some instances where the fines have increased by $1,000 to $2,500. Many of the penalties have been increased from an amount such as $250 to $750 or from $750 to $1,250.

The explanation given for the decision to choose these particular figures is that the amounts are standard amounts that parliamentary counsel uses. This stems back to the Acts Interpretation Act 1915 where divisional penalties were originally outlined. There are also two new fines proposed in the bill. They both relate to the Road Traffic Act and set out the penalty for noncompliance with a police direction to stop the vehicle and submit to a breath analysis and drug screening test or blood test. Currently there is no penalty set out in the act for this offence, so the default fine of $2,500 applies. The new penalty is proposed at $2,900, which is in line with offences of drink or drug-driving. Effectively, this new fine is increasing the current penalty by some $400.

Advice has been received that the court-imposed penalties are not factored into the budget in the way that expiation fees are and which are directed into consolidated revenue. The bill also proposes to increase the maximum expiation fee penalties that can be set under the regulations. In the regulation of acts there are two types of expiation fees that can be set—for offences against the regulations and offences against the act. Currently the expiation fees for offences against the regulations of the Road Traffic Act can be set at a maximum of $2,500, and for the Motor Vehicles Act to a maximum of $1,250. The bill proposes to increase the maximum expiation fee penalty to $5,000 for both. For expiation fees for offences against the act, the maximum fine is currently $750, whereas the bill proposes to increase that amount to some $1,250.

Both the RAA and the Motor Trade Association are reasonably comfortable with the bill. I indicate that the opposition will be supporting the bill, but I am looking forward to the committee stage of the bill where I would like to raise a number of questions in relation to the actual expiation fees and the level of them. With those few comments, I indicate we will be happy to support the second reading of this bill.

The Hon. D.G.E. HOOD (16:24): This bill is a very straightforward one. It contains some 39 operative clauses, each of which amends a particular penalty provision in the Motor Vehicles Act, the Road Traffic Act or the Harbors and Navigation Act. In effect, this bill seeks to increase penalties in those acts to keep pace with inflation and community expectations. Of particular note, financial penalties are increased for offences such as drink-driving (or, in more precise terms, driving with a prescribed concentration of alcohol), failing to produce a licence, certain speeding offences, driver fatigue penalties and so forth. As one example, the amendment to section 47B increases the penalty for a simple category 1 drink-driving offence to $1,100, up from $700.

The government makes the point that the present drink-drive penalties were set in 1991 and have not been adjusted since that time. In a sense, that is absolutely correct for what are now the so-called categories 2 and 3 prescribed concentration of alcohol offences. The category 1 drink-driving offence, the penalty for driving with a blood alcohol reading of between .05 and .08, is relatively recent, of course.

As for the general principle that the penalties within the act need to be increased, given the time elapsed since 1991 Family First supports the government's position. What we are not predisposed to supporting, however, is the notion that the best way to deal with penalties is via a piecemeal and arbitrary approach, such as the one found in the bill before us today.

From a Family First perspective, and I have mentioned this a number of other times in other bills we have debated in this place, it is somewhat disappointing that we are forced to deal with penalty provisions in this way. The penalty I have just described has not, for example, been amended to keep pace with inflation and community expectations in 20 years; hence, that is essentially what we are doing in this bill.

From our perspective, a far better approach would be to use penalty units for each of these offences and, indeed, for the penalties imposed in every act, so that we can update penalties globally and consistently in accordance with annual inflation. Several of our acts use penalty units, or divisional penalties as they may be called, whilst others continue to specify dollar amounts that are not updated for many years.

Other states, such as Victoria and New South Wales, are more wholeheartedly committed to penalty units, and our submission is that South Australia should move down that path. In our opinion, doing so would be a more comprehensive approach that would allow us a clearer comparison of penalties across different acts. It would not require acts to be amended from time to time, as this one is being now, in order merely to increase amounts by the rate of inflation or something near to that.

Some time ago, for example, I pointed out that the Controlled Substances Act imposes a $300 fine for growing a cannabis plant, whereas the commonwealth fine for growing one tobacco plant is up to $55,000. A significant principle of criminal justice is that the deterrents must be seen as fair and proportionate. Marked disparities, when it comes to sentencing outcomes, adversely affect community perceptions of our justice system.

The use of penalty units is certainly one tool that can be used to better ensure parity and fairness in sentencing. It allows a better comparison of penalties across different acts of parliament, while making it simpler to update penalties globally for CPI or other unforeseen economic events or, indeed, even expected economic events, such as a rise in inflation over time.

From our perspective, it is unacceptable that various penalty clauses have not been updated for something like 20 years, even for offences as regularly charged as drink-driving matters. The situation for rarely prosecuted offences is much worse. I will give you a few examples that I think are almost amusing, but I think they make the point.

The penalty for damaging what must be very expensive work done under the Metropolitan Drainage Act is set by regulation and, to quote from the act, must not exceed 'twenty dollars'—truly a harsh penalty, indeed. Perhaps back in 1976, when the penalty was enacted, $20 was indeed a sufficient penalty; in the year 2011, of course, it is not very much at all.

Under the Drugs Act 1908, suppliers selling drugs that are not of the correct nature or quality are again kept in check with the penalty of 'not less than twenty dollars'. This penalty was last amended in 1985. Perhaps most would regard that as insufficient, given the damage that incorrectly marketed drugs can cause. I am sure most would regard that as insufficient.

Under the General Tramways Act 1884, engineering firms are given power to break up a street to build a tram line, but they are required to reinstate the road as far as possible after

building the tram line, which seems very reasonable. I am glad to say that if they are even considering not to live up to that expectation—that is, to repair the road after they have done the work required—the multimillion dollar construction company is kept in check with 'a penalty not exceeding forty dollars, and to a further penalty not exceeding ten dollars for each day during which any such failure continues'. Perhaps the equivalent sum was a significant penalty back in 1884, but certainly now, in the days of multimillion dollar construction companies, figures of $40 or $10 per day provide no disincentive whatsoever.

So, while generally supporting the notion that the particular penalties before us need updating, Family First would have preferred a more consistent and substantial bill that updated a wider range of penalties right across the acts as they stand, whether it be an automatic rise according to CPI that just went up every year or whether penalty units are used so that different offences can be given different penalties and therefore appropriate values that can be changed by regulation from time to time. Having said all that, Family First is certainly willing to support the second reading of this bill, and we would anticipate supporting the bill as a whole, subject to the discussion at the committee stage.

Debate adjourned on motion of Hon. R.P. Wortley.

SAFE DRINKING WATER BILL

Adjourned debate on second reading.

(Continued from 24 March 2011.)

The Hon. J.M.A. LENSINK (16:30): I will speak briefly to this bill. Clearly, the Liberal Party supported the measures in the House of Assembly and, from my reading of the debate there, the topics were canvassed very well. I note that this bill before us has its origins in the Productivity Commission in around 2000, which stated that these sorts of measures were required, and I would like to thank the minister and his officers for providing me with a briefing.

Indeed, there have been problems in other parts of the world. I understand that this particular bill is necessary from a risk management point of view, not because we have had specific incidents here, although people would be very well aware of the Garibaldi incident which was more of a food safety issue. Indeed, water is considered a food. It is obviously something that we consume. This particular bill will transfer some of the broad requirements from the Food Act into this new set of measures. Its primary aim is to protect drinking water safety.

There are several hundred water providers in South Australia, the largest one being SA Water, and a number of other providers who predominantly source their water from bores and rainwater. They include bed and breakfasts, caravan parks, holiday accommodation and also the Marion Bay Desalination Plant.

The Australian Drinking Water Guidelines are very complex, so a number of these smaller providers were seeking some sort of guidance through legislation which would simplify the matter for them to be able to transfer it into their context. So, there are some basic requirements which are outlined in the bill:

- that there be a register of drinking water providers and that there be a number of requirements for each;
- that each have a risk management plan, including monitoring and incident plans, which I understand will be a simpler process for smaller providers;
- a requirement for auditing and inspection, which may be once every two years—annually for SA Water—using the same inspectorate as is currently used for food, which is environmental health officers, largely through local government;
- a requirement to report any results to the Department of Health; and
- a requirement for increased transparency in reporting of incidents.

I understand that the Local Government Association and the Bed and Breakfast Association are happy with the ultimate outcome. They requested that there be some exemptions under certain conditions because they thought that some of these provisions may be too onerous. In the briefing I was advised that the testing processes are not particularly expensive, certainly less than $100, and some local government authorities do not actually charge for those inspections. With those brief remarks, I indicate support for the bill.

Debate adjourned on motion of Mr Wade.

SUMMARY OFFENCES (WEAPONS) AMENDMENT BILL

In committee.

(Continued from 5 April 2011.)

Clause 5.

The Hon. S.G. WADE: When the committee last met we were considering my amendment [Wade-2] 7. The amendment would add to the definitions clause the definition of 'vicinity of licensed premises'. This definition would operate in the context of section 21C(3), which makes it an offence to carry an offensive weapon or dangerous article at night in, or in the vicinity of, licensed premises. The government's bill left 'vicinity' undefined and the opposition believes that this lack of clarity is a risk to both the police and the community.

The amendment I have moved proposes a 50-metre distance from the boundary of licensed premises as a reasonable proximity for 'vicinity' purposes, but the opposition does appreciate that that is somewhat arbitrary. The Hon. Ann Bressington has proposed an alternative which focuses on the areas where people are entering and leaving a licensed premise, and the opposition is attracted to the Hon. Ann Bressington's amendment, which I understand has been filed as [Bressington-3], amendment No.1. As it builds the area into the offence itself, there is no need for a definition, and accordingly I seek leave to withdraw my amendment.

Leave granted; amendment withdrawn.

The Hon. S.G. WADE: I move:

Page 4, after line 23—After section 21A insert:

21AB—Expiry of criminal intelligence provisions

Information may not be classified as criminal intelligence for the purposes of this Part after the day on which the Serious and Organised Crime (Control) Act 2008 expires in accordance with section 39 of that Act.

This amendment is, in my view, consequential on [Wade-2] 1, and I seek the support of the council.

The Hon. B.V. FINNIGAN: This is in relation to criminal intelligence, which we have been over a number of times, so the government is opposed, as we have indicated, but it is, as the honourable member indicates, part of the package, so we do not propose to divide on it.

Amendment carried.

The Hon. A. BRESSINGTON: I move:

Page 5, lines 13 to 16 [clause 5, inserted section 21C(3)]—Delete subsection (3) and substitute:

(3) A person who, without lawful excuse, carries an offensive weapon or dangerous article at night while in, or while apparently attempting to enter or leave—

(a) licensed premises; or

(b) a carparking area specifically or primarily provided for the use of patrons of the licensed premises.

is guilty of an offence.

Maximum penalty: $10,000 or imprisonment for 2 years.

This amendment parallels my later amendment to section 72A, which extends to the police powers to search patrons of licensed venues or declared public events without requiring reasonable suspicion. As I will detail later, I am most uncomfortable with legislating away what has for centuries been considered a fundamental civil liberty: the freedom from arbitrary search. However, in the context of section 21C, which we are currently debating, it is necessary to explain that my amendments to section 72A seek to restrict the search powers strictly to patrons of licensed venues, that is, those within or apparently attempting to enter or exit the venue, or in the venue's car park, and not those simply in the vicinity of, but who may very well have no intention of entering, a licensed venue.

These are extraordinary powers we are being asked to extend to the police. It is my position that, if arbitrary search has the support of this parliament, those powers should at least be narrowly focused on those whom the government seeks to target, and that is patrons of licensed

premises. If those powers were to extend to the loose term of 'vicinity', which I am led to believe could extend as far as 500 metres or even a statutorily defined distance, even those walking past a cafe, restaurant, pub or nightclub, whether it be in Hindley Street or the main street in a country town and whether it be on the same side or the other side of the street, would inadvertently be captured and their otherwise right to freedom from arbitrary search would be extinguished.

This is wrong, and I am hopeful that when I move my amendments to section 72A this committee will concur. I am thankful to those members who have indicated to me their support. This amendment seeks to make section 21C(3), which carries over the existing offence of carrying an offensive weapon or dangerous article into a licensed venue or currently in the vicinity of a licensed venue under section 15(1ba), consistent with my amendments to section 72A by restricting the offence to only those within, or apparently attempting to enter or exit, a licensed venue, or those within a car park primarily provided for a licensed venue.

It will still be an offence to carry an offensive weapon or dangerous article, but only when a person enters a licensed venue will they be liable to the increased penalty which, in the case of an offensive weapon, is four times greater than they would otherwise receive. By restricting the increased penalties to only patrons, the ambiguity of what is and what is not the vicinity is lost, the policy of this parliament in condemning taking offensive weapons or dangerous articles into a pub or other licensed venues becomes clear and we ensure that only those we are intending to target are captured. I commend the amendment to the committee.

The Hon. B.V. FINNIGAN: The aggravated offence now to be included in new section 21C(3) was introduced in response to an election commitment made by the government in 2002. The section makes it an offence for a person to carry an offensive weapon or dangerous article at night or in the vicinity of licensed premises without lawful excuse. The intent of this offence is to prevent the carriage of knives and other weapons in licensed premises or near licensed premises, as the government believes that there is a generally higher risk of violence and antisocial behaviour in the vicinity of licensed premises at night time than in general.

'Vicinity' is used in many South Australian statutes. To some extent, it takes it meaning from the context. Its ordinary meaning as described in the seventh edition of the *Concise Oxford Dictionary* is 'surrounding district, nearness in place to or close relationship to'. Thus, a person who is in the street outside licensed premises is in the vicinity of them. The person who is some distance away in the car park of the hotel would be in the vicinity of the hotel. The government thinks this is a reasonable approach, as an intoxicated person with a weapon can be a dangerous combination, whether they are in the licensed premises, lined up in the queue outside, in the car park of the licensed premises, or standing on the footpath, across the road or down the street from the licensed premises.

Under the current provision, a person caught carrying a weapon in one of these areas could be charged with the aggravated offence. The Hon. Ms Bressington's amendment would not cover all the areas I have just referred to. It would, of course, cover the licensed premises and the car park. It would also cover the queue, as it applies to a person apparently attempting to enter or leave the licensed premise. What it will not cover is a person or persons with a knife or other weapons waiting across the road from the club or pub or lying in wait for someone to leave the licensed premises.

In such a situation, the person could be charged only with the lesser offence of carrying an offensive weapon and not the aggravated offence, which has a maximum penalty four times greater than the lesser offence. This could create anomalies in the application of the legislation. Although the government would prefer that the offence be left alone and that the definition of 'vicinity' be left to interpretation by the courts, it will not oppose the amendment moved by the Hon. Ms Bressington.

The Hon. S.G. WADE: I rise to reiterate what I suggested in an earlier amendment as I withdrew it. We as the opposition are attracted to the Hon. Ann Bressington's amendment. Out of respect for the comments made by the minister, I would respond to them by saying that he talks about intoxicated persons being dangerous near licensed premises, but one has only to take the Adelaide Casino licensed premises, which is very near to the parliament itself, to know that hundreds of people walk past licensed premises every day who are not intoxicated and who have no intention of interacting with the licensed premises at all. They would be caught by the aggravated offence. In terms of anomalies, I am a patron of the Bean Bar coffee shop across the road from the casino, which I think would be deemed to be within the vicinity of the casino. I do not

see why people in neighbourhoods where licensed premises exist should be treated differently to business premises beyond the vicinity of licensed premises.

The Hon. D.G.E. HOOD: Firstly, I am a little bit confused by the government's position. I am not sure if they are opposing the amendment or not. So, perhaps a can just ask that question of the minister.

The Hon. S.G. Wade: They don't like it, but they're not opposing it.

The Hon. D.G.E. HOOD: Okay, I guess I will leave it at that then.

The Hon. B.V. FINNIGAN: Just to clarify it, as I said, while we would prefer that this amendment not be made, we will not be opposing it. In answer to the Hon. Mr Wade, we have said that we are not opposing it, so I am not sure what his problem is.

Amendment carried.

The Hon. S.G. WADE: I move:

Page 5, after line 35 [clause 5, inserted section 21C]—After subsection (6) insert:

(7) A person who, without lawful excuse, has possession of an offensive weapon in a school is guilty of an offence.

Maximum penalty:

(a) for a first offence—$2,500 or imprisonment for six months;

(b) for a subsequent offence—$5,000 or imprisonment for 12 months.

(8) A person who, without lawful excuse—

(a) uses an offensive weapon; or

(b) carries an offensive weapon that is visible, in the presence of any person in a school or public place in a manner that would be likely to cause a person of reasonable firmness present at the scene to fear for his or her personal safety, is guilty of an offence.

Maximum penalty: $10,000 or imprisonment for 2 years.

(9) For the purposes of an offence against subsection (8), no person of reasonable firmness need actually be, or be likely to be, present at the scene.

(10) If on the trial of a person for an offence against subsection (7) or (8), the court is not satisfied that the person is guilty of the offence charged, but is satisfied that the person is guilty of an offence against subsection (1)(a), the court may find the person guilty of the offence against subsection (1)(a).

This amendment is unfortunately deceptively brief because the issues it raises are greater than the number of paragraphs in it. This amendment does four things. One of those things is to consolidate the key weapons offence provisions in one section. By doing so, it brings forward the debate on amendments to provisions that currently sit in proposed section 21E.

In terms of the substantive effect, the amendment does three other things: first, it extends the possession offence to all offensive weapons; secondly, it focuses possession offences on schools; and, thirdly, it extends the fear provision to the display of any offensive weapons at schools and public places.

If it will help the committee, I will summarise the current law in the following way. It is an offence to carry an offensive weapon anywhere without lawful excuse. It is an offence to possess or use a dangerous article anywhere without lawful excuse. It is also an offence to possess or use a prohibited weapon anywhere with or without lawful excuse.

What the government bill primarily wants to do is extend the offences in relation to one particular offensive weapon, that is, a knife. It proposes to make it an offence to possess a knife in the context of schools and public places. The opposition view is that the bill is in some respects too broad and in some respects too narrow, so this amendment both extends and focuses the possession offence.

Firstly, it extends the possession offence beyond knives to include all offensive weapons. We consider that it would be bizarre to not allow possession of a knife in a school but to allow possession of other offensive weapons, such as a rifle, a gun, a pistol, a sword, a club, a bludgeon or a truncheon. Secondly, our amendment would focus the possession offence on schools rather than other public places.

We are concerned that applying the possession offence to public places catches far too much incidental activity for the offence to be reasonable and fair. Under the government's proposal, you could not leave your house with a knife in your car without being ready to defend yourself to a police officer or even a court. Perhaps you have a toolkit with a Stanley knife. Perhaps you have fishing tackle with a knife to gut fish. Perhaps you have with you a picnic set with eating utensils.

I am sure that the minister will reassure us that those are all lawful excuses and that, with or without the assistance of the earlier amendment supported by this committee, lawful excuse would be available. But it does not take long to think of situations where law-abiding citizens would be unwittingly caught by this provision. For example, you might leave your fishing knife in the tackle box in the back of your car even though you are only going fishing every couple of weeks. The prospect of going fishing in a couple of weeks is unlikely to be seen as a lawful excuse, in my view, due to a lack of proximity and time, and a person is liable to be charged with possession of an offensive weapon.

I remind the council that a public place is defined extremely broadly. A public place is defined in section 4 of the Summary Offences Act, and it includes the following:

(a) a place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier of that place;

(b) a place to which the public are admitted on payment of money, the test of admittance being the payment of money only; and

(c) a road, street, footway, court, alley or thoroughfare which the public are allowed to use, notwithstanding that that road, street, footway, court, alley or thoroughfare is on private property;

That would in that context cover a lot of motorsport, recreation and other private properties.

To stress the opposition's position, we accept that a knife possession offence (even an offensive weapon possession offence) is appropriate in the school environment. The school community is more vulnerable and there is less incidental activity. But in our view a possession offence is too broad in relation to public places and risks putting law-abiding South Australians under too much restraint.

Thirdly, this amendment would extend the fear provision to display of all offensive weapons, not just knives at schools and public places. Likewise, the opposition considers that brandishing any offensive weapon, not just a knife, in a way which would induce fear in others should be an offence. This element of the offence does not focus on the form of holding the weapon but rather in the manner in which it is held.

The offence relates to a person who carries or uses an offensive weapon in a manner that would be likely to cause a person of reasonable firmness present at the scene to fear for his or her personal safety. Our view is that the key point is whether the carriage or use would induce fear. We do not see any virtue in using an object other than a knife to induce fear. The amendments, therefore, extend the proposed offence in the bill in terms of the item carried. I commend my amendment to the council.

The Hon. B.V. FINNIGAN: The government opposes the amendment. The proposed section 21E creates two new offences specific to the possession and use of knives in a public place or school. These are deliberately separate to the current offensive weapons offence because the government wishes to specifically target the growing incidence of knife crime and discourage the possession and use of knives in public places and schools.

The proposed amendments will remove these specific knife offences from the bill and instead create two new offences relating to offensive weapons. First, it would be an offence to possess an offensive weapon in a school without lawful excuse. Second, it would be an offence to use an offensive weapon or carry an offensive weapon that is visible in the presence of any person in a school or public place.

One of the key motivators for introducing this bill is to address knife crime and the possession and use of knives in public places and schools. The government view is that these amendments defeat that purpose by unnecessarily extending the application of these offences to all offensive weapons.

The Hon. S.G. WADE: If I could briefly respond, as I mentioned in my second reading speech, as a community, I think we need to be careful about displacement. We have had a significant shift from firearms to knives as we have tightened up the laws there. I expect there will

be displacement with knives. If we make it harder to get knives, people will look for other offensive weapons, and I believe it is therefore appropriate, almost as a preventive move, to block all offensive weapons, not just knives.

The Hon. D.G.E. HOOD: Family First agrees with the Hon. Mr Wade. Why would we limit this to knives? People can do a great deal of damage with other offensive weapons, whether it be in a school or a public place. I share the concerns that, if knives are harder to get, people may just lean to another weapon of choice. Family First will support the amendment.

The Hon. M. PARNELL: The Greens are supporting this amendment.

The Hon. A. BRESSINGTON: I am also supporting the amendment.

The Hon. J.A. DARLEY: I am supporting the amendment.

The Hon. B.V. FINNIGAN: In light of the will of the council, we will not oppose the amendment.

Amendment carried.

The Hon. S.G. WADE: I move:

Page 5, after line 39 [clause 5, inserted section 21D]—After subsection (1) insert:

(1a) Subsection (1) does not apply in relation to the sale of a knife if it is reasonable to infer that the knife was made for the consumption of food.

The new section 21D proposed by the bill is, I understand, significantly related to the sad case of Daniel Awak. On 12 November 2008 this 14-year-old boy of Sudanese background was murdered in Grenfell Street. He died from a stab wound to the heart, and we understand that the knife was bought from a nearby city store very shortly before the murder. When buying the murder weapon prior to a fight amongst a group, the youth who committed the murder told shop staff that he needed a bigger knife 'to kill the black [expletive]'.

Both the murderer and the victim were 14 years of age at the time, I understand. Reportedly the teenager took a pack of smaller bladed steak knives to the counter, but turned back before paying the shop attendants and selected a 15 centimetre knife. The murderer stabbed Daniel, who then pulled the knife from his chest and chased his attacker. When he collapsed an older friend grabbed the knife and stabbed Daniel's attacker repeatedly. Daniel died on the footpath in Grenfell Street.

The older friend received a suspended sentence for attempted murder, given the exceptional circumstances. As I understand it, Daniel's killer received a sentence with a six-year non-parole period. The non-parole period applied was set at less than the 20 year minimum mandatory maximum due to youth, immaturity and the good prospects of rehabilitation.

At least partially in response to this tragedy the government is proposing to introduce a new offence of selling a knife to a minor. In considering whether this measure is necessary we need to consider whether the incidence of knife violence amongst minors justifies an offence of selling knives to minors and whether a ban on sale would have any effect.

In effect, we are looking at the interplay of demand and supply. In terms of demand we can look at how many charges and offences have involved the use of a knife by minors since 1996. In answer to a question at the end of the second reading stage the government kindly provided a significant amount of information, which I greatly appreciate. That information included the fact that between 2000 and 2009 8,282 knife/machete charges were recorded on the police apprehensions report database, and 1,414 of those involved the use or possession of a knife/machete by a minor under the age of 18 years. I stress the fact that we are talking there about under the age of 18 years. As you will note, the bill talks about sale to people under the age of 16 years; in other words, 15 years and below.

The total number of recorded charges in which a knife/machete was listed as a weapon between 2000 and 2009 for each age cohort are as follows:

- for 10 to 14 year olds there were 206 charges, and if I average that out over the ages that is 41 charges per year band;
- for 15 to 19 year olds there were 1,472 charges, which averages out at 294 charges per age year band; and

- for 20 to 24 olds there were 1,260 charges, which averages out at 252 charges per age year band.

Clearly, there is a problem with knife use with children, and with children as young as 10 to 14 years old. There was a rapid escalation in the late teens, so that the average number of offences per age year increases from 41 in the 10 to 14 year age bracket to 294 in the 15 to 19 age bracket. In fact, it peaks in that late teen bracket; however, we do not know whether the escalation is at the age of 15 or at 19. The data is just not available. The fact is that if the escalation is at 16, 17, 18 or 19 then the proposed ban on the sale of knives to people under the age of 16 will have no significant impact.

We do know that knife crime is a particular problem with young people from 15 to 29 and that it does not fall to the 10 to 14 year old level until the 50 to 54 year age bracket—which I can assure the council is a bracket I am now in. The opposition has come to the conclusion that there is demand and that we need to take effective steps to reduce that demand. So, even in spite of the lack of conclusive evidence, we will be supporting this measure; however, I indicate my concern at the narrowness of the government's focus.

At clause 1, I asked the minister if he could put this bill in the context of what else the government was doing to address knife crime. As I said, at that point, of course, he was not the responsible minister and I did not hold him accountable for these programs. However, the response was typical of the government, that is, 'What's this got to do with the bill?' as though the bill was a virtue in itself. Laws do not do anything in and of themselves. They need to be implemented—and implemented with a range of measures. If anything comes from the academic research from around the world, it is that knife legislation achieves little unless it is supported by a range of other measures.

We need to make people feel safe, and we particularly need to work with individuals who have been victims of knife crime because research shows that people are more inclined to carry a knife if they have been the victim of a knife attack themselves. We need to work with groups of young people who might be inclined to use knives. We are very concerned that the government is not giving due regard to demand-side opportunities. It is easy to legislate and have some impact on supply; it is harder to have a real impact on demand, but it may, in fact, pay stronger dividends. That was a reflection on the demand side.

On the supply side, the opposition supports complementing demand-side initiatives with supply-side initiatives. However, in this—as in many other areas—we consider the government is taking a blunt approach that fails to take account of the fact that knives are a common feature of the daily lives of Australians. Limitations on sale may have so little impact on supply that they do not justify the detriment created.

The government has made clear that it will be able, by regulation, to exclude certain classes of knives. The Attorney-General in his second reaching speech on this particular issue said:

> However, specific knives will be able to be exempted from the offence by prescription in the regulations as there are some knives that pose little risk of harm. For example, it is proposed that the regulations will exempt razor blades permanently enclosed in a cartridge and plastic takeaway knives.

The government has also made clear that it does not intend to exclude ordinary eating knives by regulation. The knives discussion paper, released in 2009, states:

> Currently it is only an offence to sell a knife that is a prohibited weapon to a person under the age of 18 years.

The paper continues:

> The new offence will apply to the sale of all knives including fishing knives and knives in cutlery sets.

I will just restate that: the government's discussion paper makes clear that the offence would cover knives in cutlery sets. This opposition amendment excludes from this ban a knife 'where it is reasonable to infer that the knife was made for the consumption of food'. The amendment does require an assessment of what the knife is for. Before the seller stocks the item and sells it, they should consider this: is this knife for more than the consumption of food? If this bill is passed, if it was a knife which it is not reasonable to infer is for anything more than the consumption of food, they would seriously need to consider whether they want to stock that item in the context of the obligations that it would place on them.

In that context, I might digress to reflect on the submission of the Coles supermarket group to the government's consultation on the knives discussion paper. It made the point that this legislation, if passed in the government's form, would put significant burdens on a business in compliance. It does not take long to understand that. At my local supermarket, there are about eight lanes which are staffed by a range of people, who tend to be young people—they might be only 16 themselves. Yet, under this legislation (if passed in its current form) they would be expected to monitor a vast array of items going through their checkout.

I suppose the first thing they do is assure themselves that the person who is at the counter is definitely not 16 or under. Once they have a concern that the person might be young, they have to keep a lookout to make sure that they are not buying a knife. I must admit, I have checked out the supermarket shelves at my local supermarket, and there were more than a dozen items that would be caught by this legislation. It will be even worse for them now, because they are installing electronic scanning stations, and I have got no idea how this legislation expects businesses to implement the legislation in the context of very ordinary devices.

The point we are making here is that the supply of ordinary food consumption knives is so wide that a ban on the sale of those knives is not likely to significantly affect supply. If a 15 year old cannot buy a cutlery knife from a store, they will get one from home, from a workplace or from a school. Knives made for the consumption of food would be carried in 99 per cent of homes.

We appreciate that some knives will be excluded by regulation, but we think that, because the government has indicated it is not inclined to exempt domestic knives such as knives and cutlery sets, and the impact of a ban on this class of knife is so significant, we should take the opportunity to exclude it in the act.

To quote from another stakeholder who made a submission to the government's knife discussion paper, Scouts SA reminded the government that they cater for young South Australians as young as six. They made the point that part of a youth member's inventory for camping is a knife, fork and spoon set. The proposed legislation would obviously mean that parents would need to buy these sets for the age group up to 16 years, while the group aged 16 to 26 could purchase their own.

Now, the opposition does accept that there will be some knives that would meet the definition that are still not in wide supply and their supply should not be encouraged. One knife that we would imagine that the government would take the opportunity to exclude by regulation is the steak knife. They are not heavily supplied in the community and we believe that it would be useful to have supply of that knife reduced. So, with those few words, I commend my amendment to the council.

The Hon. B.V. FINNIGAN: I am glad you only chose to say a few words. It is hard to know where to begin with that contribution. I suppose, on a philosophical point about what the government is doing about an overall strategy about knife-related crime and violence and crime generally, why would I say, 'This is about the bill'? I think the answer to that is fairly straightforward. This is not a public forum about knife-related crime.

I appreciate that the honourable member, I am sure, has sincerely held views, as, I imagine, a number of other honourable members do, about what ought to be done in relation to this. Ultimately, what we are doing here as legislators is talking about the provisions of a bill. So, while I appreciate that he may well have views about what we ought to be doing in relation to a broader strategy, and he is quite entitled to have those views and to advocate them, my simple point, which I reiterate from clause 1, is that we are in the committee stage of a bill. We are looking at the legislation that is before us, not having a more general discussion about policy, which there are ample opportunities to do. I think it is proper that, in the committee stage, we focus on the legislation that is before us.

The honourable member spoke about the tragic death of Mr Awak and the other related cases and so on. Indeed, we are all saddened and mortified to see those things happen, which is one of the reasons why we are putting forward this bill. It is not a direct response, but because we are worried about knife crime more generally, whether it is committed by minors or not.

So, for that reason, we oppose this amendment. What this amendment does is start to try to pluck away at the fabric of the bill and to insert more exemptions and qualifications that make it difficult for the bill to be enacted. The honourable member said, 'What about the people at Coles and Woolies who are staffing the checkouts? They are going to have to try to determine ages and so on.' Well, what the honourable member is doing is adding more complexity to their job by

making them have to make an assessment about what knife is a knife for the consumption of food and what is not.

Retailers have to make judgements all the time about people's age and what they are buying in relation to other very common goods that are probably bought an awful lot more than knives, such as liquor, tobacco and dangerous substances and items. So, while I accept that it may add some complexity to the job of retailers, it is something they have to do in relation to a number of other areas.

That does not mean that we want to complicate what they have to do, which is what would be achieved by passing this amendment. I foresee a lot of problems with cases about how you define and interpret the consumption of food. That is another example of inserting unnecessary words into a statute that make it more likely that there will be outs, or that there will be a lot of dispute about how the act applies.

Certainly, those of us who enjoy a fine piece of cooked beef at a steak restaurant know that some of the steak knives you are handed are pretty mean machines, and I do not think that I would like to be confronted by a group of minors wielding them. To suggest that because they are for the consumption of food we ought to take them out of the bill altogether, I do not think is appropriate. That would also mean that there would be a lot more attempts to apply that definition to other knives, because you could easily claim that many kitchen knives, paring knives and so on, are for the consumption of food, and I do not think it is something we want to have long judicial arguments about.

The intent of new section 21D is to restrict minors' access to all knives and to remove the opportunity for them to purchase knives without the knowledge of their parent, guardian or other responsible adult. Exempting any knives, other than those that pose very little risk of harm, would defeat the purpose of the section. That is why we have decided that only plastic takeaway style knives and razor blades permanently enclosed in a cartridge would be exempted from the offence.

So, the proposed amendment would exempt any knife if it is reasonable to infer that the knife was made for the consumption of food. Of course, that would include steak knives, bread knives, paring knives and cheese knives; a whole range of knives could be described in that way. We certainly do not believe that it is appropriate to limit the effect of the provision and create several exemptions, or create an exemption that could be used to exempt a whole range of knives.

As I said, while retailers will need to deal with the provisions of this bill, I do not think we want to complicate their job even further by making them have to make an assessment about whether or not a knife is for the consumption of food. In relation to scouts or people who enjoy fishing—and I am sure, Mr Acting Chairman, growing up you would have had a pocketknife, as most kids in country areas would—I do not believe that it is going to be a major hardship for the majority of minors. It is not as though we are trying to stop them having one altogether, but they will require parental consent, and it is not likely to be a purchase that is made particularly often.

So, the government opposes the amendment. It goes to the heart of the bill, really. If we are going to keep trying to put in exemptions and outs and bits so that you can pluck away at the fabric of it, then one has to wonder whether you are really opposed to the bill altogether and ought to just say so and oppose it, rather than put in place amendments which, essentially, whittle away at the application of the bill.

The Hon. A. BRESSINGTON: I think these are the problems we face, intricacies in bills like this, when we draw up legislation based on an almost one-off situation and try to cover all the angles on the stabbing that we are talking about of the young Sudanese boy.

In saying that, I do support this particular piece of legislation but, like the Hon. Stephen Wade, I do not know how this is going to be enforced. The minister did not even attempt to address the automatic check-outs that are in almost all supermarkets now, where you go through, you swipe the item and put your card or cash in at the end, and no attendant or check-out person is anywhere near you while you are doing this.

We are talking about whether or not we include knives to consume food: what about scissors, what about screwdrivers and what about all of these things that will still be used and could still be used as offensive weapons that will slip through all of this because we are choosing just to focus on knives and are not really thinking about how this will be policed or implemented or how it will translate out in the community?

I actually resent the fact that we will not exempt knives used for consumption of food, because you buy knife sets for Christmas presents; this is just what we do. If we do not accept the Hon. Stephen Wade's amendment, this will cause so much confusion. I doubt that it will prevent one more stabbing of a young person in our streets at all. We actually have to be sensible about this and how it will translate out there, not how it looks on paper in here. I will support the Hon. Stephen Wade's amendment.

The Hon. S.G. WADE: I was hoping to respond briefly to a couple of points the minister made. In terms of his perception that it would be difficult to apply this provision, I do not agree, because the retailers will consider it at the stocking stage. I suspect Coles will do it at the statewide level. About 80 per cent of our dry grocery products are controlled by the big two, so it only takes one person at supply to read the act.

In terms of the actual wording, New South Wales is one of the pieces of legislation the government wants us to look to. I understand that the UK and New South Wales are the two precedent states in terms of knife legislation, and I draw the attention of the house to the fact that, in the New South Wales Summary Offences Regulations 2010 exempt knives category, it includes plastic knives that are designed for eating purposes. I appreciate that my amendment is not limited to plastic, but it does use the qualification 'that are designed for eating purposes'—very similar to the one I am suggesting for this act.

In terms of the minister's suggestion that it is a rare event, I do not agree. It is amazing how pieces of legislation can make you more aware of your surroundings. I was at a community picnic in the hills recently and went off to get some lunch from the food stall, and the lad in front of me was buying two or three plates; I presume that was not just for himself but was also for members of his family. That festival was using wooden knives and forks. Therefore, they would not be exempt under the minister's plastic knives exemption, and the person who sold it to him would have been guilty of an offence.

The minister talks about unstitching the act. You are unstitching the act when you exempt razor blades and plastic knives. We are making reasonable steps to make legislation useful in the community, and when the community is already flooded with cutlery I do not see any need for this parliament to legislate against it.

The Hon. D.G.E. HOOD: Any reasonable person can see that both the government and the opposition make reasonable points on both sides of the argument. If we look at the particular wording of the amendment, it says that it is reasonable to infer that the knife was made for consumption of food. This will be the key issue for Family First as to whether or not we support the amendment. The difficulty I have with that wording is that I believe you could interpret it to include things like pocket knives for peeling or slicing an apple, or something of that nature. You could consider other sorts of knives, whether they be perhaps paring knives, or whatever they may be, which it could be argued are for the consumption of food. I ask the mover of the amendment whether he would like to respond to that, as for us it is a very important issue.

The Hon. S.G. WADE: I agree with the honourable member. That certainly is an issue; it is an issue of statutory interpretation. In terms of the pocketknife, I would have thought that the courts would not infer that the knife was made for the consumption of food; it was made for general purposes, not for the consumption of food.

I certainly agree with the point (and, in fact, the minister made this point in his initial contribution) that there are knives for the consumption of food that you would not want to include, for example, a paring knife. However, there are certainly a diversity of knives which are designed for the consumption of food which you would want to include. I would suggest that a butter knife would also be one that could remain within the scope of the act. I suspect that the exclusions that might be necessary to make this clause robust will be much less than the schedules that are currently being required to make the whole thing right. So, I do not see it is beyond the wit of parliamentary counsel.

I think the key point is that there is no point having a law that does not have an effect. If I am right (and I think I am) in saying that 99 per cent have knives for the consumption of food, there is little point stopping minors buying them. There is significant inconvenience to both the minors and their parents. Parents are busy enough without having to be dragged into the city to the Scout shop to buy a camping kit because the government thinks that the camping sets are dangerous weapons.

The Hon. B.V. FINNIGAN: I think we are seeing very contradictory lines of argument being presented by honourable members. On one hand, we have had people saying, 'Well, how is this going to work because supermarkets will have to judge how old people are and what kind of knife it is?' Then, at the same time, we are saying, 'Oh, well, they'll be able to work that out with supply chains, so that's not going to be a problem.' In this instance, we have had the honourable member saying that he is not worried about statutory interpretation; he is happy to have the courts decide what this term means because he is pretty confident they will exercise a bit of common sense. Yet the other day, we had this lengthy argument, 'Well, we don't just want to let the courts work out what a lawful excuse is; instead, we should be very prescriptive and lay it all down.'

The honourable member suggests that we are already talking about plastic knives and razors encased in cartridges. I really cannot see a circumstance in which a plastic takeaway knife or a disposable razor blade encased in a cartridge can be considered the same as a steak knife or any knife which could be used for the consumption of food which could be interpreted very broadly. Ultimately, what I think honourable members have to decide is whether or not they support this measure. What we have is a lot of objections being raised, such as 'What if this and what if that' or 'What are the supermarkets going to do?' and 'Will this be enforceable?' or 'Will this be realistic?'

The parliament passes laws about the regulatory framework that exists, and those who choose to sell the things about which the parliament has made laws need to comply with them. So, if you are retailing liquor or tobacco, or you are hiring R-rated videos, whatever it might be, the parliament has determined that, in order to do that, these are the requirements you need to meet. So, they are the requirements you need to meet.

That does not mean that we be nonsensical. We obviously want to take into account what is practicable and reasonable. However, I do not think you can object to a measure on the basis that it is going to be inconvenient for retailers to comply with because, ultimately, the parliament makes the judgement about whether we want knives easily available and whether minors should be able to purchase them and so on. Then it is up to those who choose to sell the items whether or not they comply.

It seems to me that honourable members need to turn their minds to whether or not they really support this concept. If honourable members do not, they are entitled not to. However, there seems to be a lot of arguments being raised that there are already a lot of knives out there or—

The Hon. A. BRESSINGTON: It's a bad bill.

The Hon. B.V. FINNIGAN: Well, the honourable member says that it is a bad bill, in which case she is entitled to vote against it.

The Hon. A. BRESSINGTON: No. We amend it; that's our right.

The Hon. B.V. FINNIGAN: It is honourable members' right to try to amend legislation, and it is their right to oppose legislation if they think that is the right thing to do. What I do not think we should do as legislators is say, 'We don't like this bill. We would actually like to oppose it, but instead we'll just try to weaken it or we'll try to make it unworkable.'

I certainly fear that there is a strong possibility that, if we add a lot of these exemptions, objections and out clauses, we will make the bill meaningless. We have one here about exempting knives that are principally for the consumption of food. We have another one about combat knives being okay if they are marketed for a lawful activity. We constantly have this list of amendments which are designed to weaken the provisions of the bill and essentially provide so many holes in the dike, as it were, as to cause a flood.

So, I think honourable members need to decide whether they really support this or not. If they do not, they need to be forthright and say that they do not support it. That is their right. That is a legitimate position for them to take. The government is not going to accept this bill being turned into a sort of blancmange of exemptions and out clauses that will make it unworkable and not worth putting on the statute books.

The Hon. A. BRESSINGTON: Can the minister be very clear on how this is going to work with supermarkets that sell steak knives and have automatic check-out facilities where no checkout assistants are required? You go through, you swipe, you pay, you pack your own stuff and you get out of the supermarket. How are they going to prevent minors from purchasing steak knives from those supermarkets, and who is going to monitor the age of those who are using those automatic check-out facilities?

The Hon. B.V. FINNIGAN: The honourable member could well ask how we are going to ensure that licensed premises do not let in people who are under 18. How are we going to ensure that cigarettes—

The Hon. A. Bressington: They're staffed.

The ACTING CHAIR (Hon. J.S.L. Dawkins): Order! The minister has the call.

The Hon. B.V. FINNIGAN: You could well ask how will we make sure that underage people do not buy tobacco.

The Hon. A. Bressington interjecting:

The ACTING CHAIR (Hon. J.S.L. Dawkins): We are not having conversations from both sides of the chamber. The minister has the call.

The Hon. B.V. FINNIGAN: Thank you, Mr Acting Chairman. How do we ensure that minors do not have access to cigarette machines? How do we ensure a whole range of things? How do we ensure that people comply with fishing regulations? How do we ensure that people obey the law? Well, it is our job as legislators to put in place what we think are the right statutes and the right regulatory and legal framework for the good order of the state, to protect people's rights and liberties and, in this case, to try to protect them from knife-related crime. It is then up to citizens and businesses to comply with the law.

The government will take steps to ensure that people are educated about what the law is and assist them in complying with the law but, ultimately, can the government ensure that this law will always be obeyed? Well, no, because we cannot ensure that any law will always be obeyed. Regrettably, we know that laws are broken all the time, but what we do is put in place what we think is the best law, the best legal framework and the best statute that is going to best serve the interests of the community and the people living in this state.

We can put in place the mechanisms to ensure that people know about the law, that they are educated about it, and we can assist them to comply with it. We can also make sure that there are mechanisms in place to try to ensure that people who are breaking the law are apprehended (not necessarily physically) or that breaches of the law are detected—I suppose is a better word—and that the appropriate action is taken.

In order to do that, we have the police as well as a whole range of other regulatory officers and officials whose job is to ensure that the very statutes that the state puts in place are complied with. So, how would supermarkets choose to comply with this law? I do not know. I am not the state manager of Woolworths or Coles, but I am sure that they and other businesses would diligently attempt to comply with the statutes that this parliament has judged suitable for the good order of the state. We have laws about tobacco, liquor, spray cans, and about all sorts of things, and those retailers who choose to sell any of those items need to comply. The Hon. Ms Bressington successfully moved a bill about the sale of hydroponic equipment. One could well ask: how are we going to ensure that is complied with?

The Hon. A. Bressington: You're not, are you? It's a law on the statute book that isn't being enforced.

The Hon. B.V. FINNIGAN: The honourable member says that the law is not being enforced. I would suggest that the government invests an awful lot in the police force and in other regulatory agencies to ensure that the law is enforced. In any event, I do not think it is for the legislature to say, 'We are not confident that people will be able to comply with this law. We are not confident that this law will be enforced, and we should abandon the process and not put this law in place.' That is not a sound approach to legislating.

I point out, as I think the Hon. Mr Wade has mentioned, similar laws are in place in other jurisdictions, and national chains such as Coles and Woolworths and their affiliated companies (which I think are probably the only ones I know of that operate self-serve checkouts) would, presumably, have dealt with that matter, and how they choose to do that is a matter for them. But I am sure if they feel that the law cannot be complied with they will make that known to the relevant authorities, probably to my honourable colleague's agency, and discussions may or may not take place. Those sorts of things happen all the time.

When it comes to tobacco retailers and alcohol and all sorts of requirements that we put in place, we do not just put them out there and hope for the best but, ultimately, we certainly assist people to comply with the law, retailers and businesses. Ultimately, it is their obligation to comply

with the laws that this parliament puts in place and that are given assent. When the parliament chooses to make laws and regulations about a particular thing, those who choose to sell them should take steps to ensure that they are in compliance.

Again, I reiterate that my real concern is that, if we keep pulling at the threads (I know I have used a few analogies) of this bill to try to create lots of exemptions and occasions when it will not apply or reasons why the bill would not have to be complied with, I think we weaken fundamentally the entire structure, the entire raison d'être, of the bill itself. So I think honourable members who choose to support this amendment, and a number of others, must really ask themselves whether or not they are supporting the bill, because ultimately the government is not going to enact a bill that has become meaningless by its number of exemptions.

The Hon. S.G. WADE: I would like to respond to the minister's comments by stressing that the opposition's primary concern is not the convenience of retailers. Our focus is about the effectiveness of the law. The key goal of this legislation is to restrict access—to stop minors, young people, getting access to knives. The government's offence of selling a knife to a child—and I should say a cutlery knife because I am focusing on that class of device—and the government's concern that we not sell a cutlery knife to a child, would have more credibility if it was actually taking measures to stop other more likely forms of supply.

If a child wants to get a cutlery knife—if they want a fancy one I know they would need to go to a retailer and we are not proposing to exempt them—I imagine the first place they would go is home. We are putting no restrictions on parents to keep their cutlery secure at night. The second place they might go is the food hall at the Myer Centre. There are cutlery stands at every corner. They could go to school cafeterias and perhaps even the Blue Room in this place. The world is flooded with cutlery knives. We are not going to put our finger in the dyke by telling children that they cannot buy knives from Harris Scarfe. Our concern is access and effective laws, and we do not believe that it is useful for this parliament to pass laws that have no effect on the real level of supply and serve no good purpose.

The Hon. A. BRESSINGTON: I want to make a point to the minister. He said that it is not our job to work out how all this is going to pan out and worry about retailers. I would like to draw a comparison with spray paint. We had a problem with graffiti and young kids accessing spray paint cans and whatever, so retailers were told to put their spray paint cans in a locked cabinet. If they thought that someone who wanted them was not of age, that person had to show ID to be able to purchase the spray paint cans.

If the government is actually serious about these knives—steak knives, bread knives, all the knives that someone can buy from a supermarket—we now have automatic check-outs are not manned. That is my point. The Hon. Gail Gago said, 'Well, they can just go to another check-out.' If these kids are going into Kmart or Target or wherever to buy a knife to go out and stab someone, they are not going to go through a manned check-out; they are going to go through the automatic check-out where there are no staff.

If we are serious about this, then perhaps make a regulation that all these steak knives, all cutlery, and all bread knives in supermarkets, must be kept in a locked cabinet. If people want to purchase them, they have to get an attendant to come and unlock the cabinet and provide it to them; if they are under 16, or there is some doubt about that, they have to show ID.

The Hon. T.A. FRANKS: I have a simple question for the minister. I understand that plastic knives are excluded, but are bamboo knives, which are similar takeaway knives, excluded?

The Hon. B.V. FINNIGAN: They are not exempted at this point. However, it is worth pointing out again that the bill would allow, by regulation, for items to be exempted. If it became clear that there was a particular type of knife, such as a bamboo knife, that was not considered to be at all dangerous, it could be exempted by regulation. I do not believe that is the same as exempting whole classes of knives off the bat before we even implement the law. I point out that sharpened wood can be just as threatening as sharpened metal. You have to use judgement on these things, depending on the circumstances.

The Hon. G.E. GAGO: I want to talk about some of the possibilities. I know that this bill does not require steps to be taken in terms of point of sale, but the honourable member said that it could not possibly work. One way that it could work is the same way that cigarettes are sold at supermarkets, where customers cannot buy cigarettes and take them through an automatic check-out. If they want to purchase cigarettes, they have to go to a separate counter, where there is a human being who can make an assessment about age, etc., and purchase them there.

You could organise the sale of knives in exactly the same way; that is, classified weapons could be sold only from behind that particular counter, or a supermarket chain might decide to put its knives behind that counter along with the cigarettes. That is quite workable, that is how people buy cigarettes. They do not have the choice of taking them through an automatic check-out because they are not on the shelves.

At the supermarket where I shop, there was a time when disposable razor blade replacements, for instance, particularly the large packets, were not available for purchase off the supermarket shelves; no doubt it was because of theft—they were small items and were very expensive. Because people were pinching them, they put the purchase of the razor blade packets on the same counter as cigarettes. People had to actually go up to the counter and purchase them that way, rather than them being sold through the store.

Supermarkets come to all sorts of arrangements in terms of the sales of their goods for a range of different reasons. I reiterate: this bill is not requiring a specific action to be taken, but a range of mechanisms are already in place that make it quite simple and easy for supermarkets to ensure that an assessment of a person's age could be made at the time of purchase.

The Hon. S.G. WADE: Considering that another minister of the Crown has intervened in the debate, I would ask the minister responsible for this legislation whether that is the government's intention, whether—

The Hon. G.E. Gago: I just said—

The Hon. S.G. WADE: No, I am sorry; this is a question to the minister.

The Hon. G.E. Gago interjecting:

The Hon. S.G. WADE: Mr Chairman, I think that I have the call. I would like to ask this minister: is it minister Finnegan's view that this act will require retailers to keep knives in a secure area, as is currently legislated for tobacco?

The Hon. B.V. FINNIGAN: First, could I make the point that any honourable member is entitled to contribute to debate in the committee stage. I do not think there should be any reflection on the fact that the Hon. Ms Gago has chosen to contribute to the debate. That is, of course, the right of any honourable member and much to be encouraged.

As the honourable member would be well aware by reading the bill, there is no requirement on retailers in this bill to have particular sections, or what have you, as they may do for other goods. What the minister, my honourable colleague, was pointing out was that retailers deal with different approaches to different goods. As the honourable minister indicated, there are quite a few supermarkets—

The Hon. A. Bressington interjecting:

The Hon. B.V. FINNIGAN: Well, no; there are quite a few supermarkets which choose to put razor blade cartridges, batteries and films—things that are small and quite valuable, particularly some of these razors which have up to five blades or whatever nowadays; they are items which are fairly small and which can be stolen easily, yet they are quite expensive—in a place where you must have human interaction to obtain the goods. That is a judgment that retailers simply make in their own interests. That is not something that they are required to do.

The point, of course, is that retailers will put in place what measures they think are necessary to ensure that they comply with the law. This bill does not require—and my honourable colleague did not suggest that it did—that there be a separate kiosk or serving area for knives. A retailer may choose that the best way they can comply with the law is to have knives being sold in a particular part of the store, or only by asking for a particular product, particularly for some of the larger butcher knives, or whatever.

A retailer might choose that those particular items be behind a counter, or whatever, just to ensure that they comply in the most optimum way with the bill. Again, that would be a matter for them. Retailers make these sorts of decisions all the time about how they are going to go about complying with the law and how they are going to go about effectively selling their goods.

As we have indicated, this exists in other jurisdictions, and I am not aware that the retail industry there has ground to a halt. These are the sorts of things which retailers need to comply with. Of course, as I said, assistance is normally given to them, and education; and often various

dates will be prescribed so that they have adjustments, and so on. I do not think that retailers have an objection to complying with—

The Hon. S.G. Wade: Yes they do.

The Hon. B.V. FINNIGAN: They may have an objection to the existence of particular laws, but they do not have an objection to the fact that, when parliament makes a decision to enact a particular statute, they will comply with it. I do not believe that any retailer has indicated that they will be conducting a campaign of civil disobedience. Really, I am not sure why this particular debate on this particular matter invites such extraordinary analysis of the minutiae of how it would work. In many instances when we talk about bills, I do not think we normally get into such detail about how it is going to work and ask 'What about self-serve checkouts?'

Ultimately, it is for the parliament to make a judgement about what laws are in the best interests of the state and are going to protect people, and ensure that they are, as much as possible, protected from knife-related crime. So that is what the parliament will do. Of course we want the bill to be workable and sensible, as I indicated before, but none of what honourable members have indicated at all indicates to me that the amendments they are proposing would make things simpler—it would make things more complicated.

Ultimately, again, we come back to the question: do you support this bill or not? If you do not (and you are entitled not to) and you think that you do not want to support measures to try to address knife-related crime on the supply side (as the Hon. Mr Wade would have it), as well as looking at matters of possession and so on, and if honourable members do not believe that this problem is sufficient to warrant a legislative response, that is a judgement they make and they can oppose the bill accordingly. We amend bills all the time and that is part of the normal legislative process, but if the purpose of amendments is simply to punch holes in the bill and to weaken its effect so that it becomes basically a meaningless piece of legislation, then that is not something the government is going to support.

The Hon. M. PARNELL: I might take this opportunity, having listened to the debate, to put the Greens' position on the record. I think the Hon. Stephen Wade made the point in saying that the community is awash in cutlery—I think they were his words. We are, indeed, and we are awash with all manner of things. As the minister pointed out, sticks can be sharpened into weapons. I understand that in gaols (not that I have spent much time in gaols) toothbrushes can be turned into quite dangerous weapons with appropriate treatment.

Where I diverge from what the minister is saying is in the level of detail that it is appropriate for us to try to insert into this bill to attempt to fix its many errors. The minister can certainly say, 'Yes, in the fullness of time the bureaucracy will work on a list of exemptions that will perhaps have plastic knives and the bamboo knives that the Hon. Tammy Franks referred to. It will have a range of things in it and they will be adding'—

The Hon. S.G. Wade: Foreshadowed.

The Hon. M. PARNELL: Yes, foreshadowed regulations—they are not real yet. What we can do as a legislature is to point out at least one small area where we believe the risk is relatively low, notwithstanding that steak knives are, in fact, made for consumption of food and they can be dangerous, and they can also be exempted. However, the vast majority of knives that fall into that category (that is, for the consumption of food) are at the lower end of the risk spectrum. The level of inconvenience that this bill will cause the community, unless we take to it with sensible amendments, I think cannot be underestimated.

I appreciate the fact that my kids have all gone through Scouts and part of the exercise is that they do their own shopping. It is part of growing up and part of the Scout education. I am happy for my under 15s to go off with the Scouts and buy knives because the sort of knives they will be buying to use at their camp are not going to be dangerous. However, I do not think I should have to accompany them or make them jump through hoops in order to do it. Whilst this is only one minor fix up of a bill that is full of problems, I think that it is a reasonable response of this parliament to at least take off the table a range of knives which are overwhelmingly, but not entirely, safe and ought not be banned. The Greens are supporting the amendment.

The Hon. D.G.E. HOOD: I place on the record that Family First certainly supports this bill. There is no ambiguity from our party about that. We have supported a number of the amendments proposed by the Hon. Mr Wade because we feel that they are improvements to the bill. My sense is

that there are the numbers, if you like, in the chamber at the moment to support this amendment so it will carry, anyway.

However, in going back to the specific wording of the bill, I am not satisfied that a clever lawyer could not use the phrase 'reasonable to infer that the knife was made for the consumption of food' and have that more broadly applied than even the Hon. Mr Wade intends—for instance, the examples I gave before for other types of knives. It could be inferred, for example, in my view not unreasonably, that a pocketknife could be used for an apple or something of that nature. For that reason, we will be opposing this particular amendment.

The Hon. J.A. DARLEY: I will be supporting the amendment.

The Hon. B.V. FINNIGAN: The Hon. Mr Parnell said that the regulations did not exist. Draft regulations have been made available to the opposition. If he has not had an opportunity—

The Hon. M. Parnell: No; the point was they are draft. They don't have bamboo in them.

The Hon. B.V. FINNIGAN: Well, the regulations are indeed draft, but I think the government has made available the regulations we propose to promulgate after the passage of this legislation so that people are aware of exactly where we intend to go with it.

The Hon. S.G. WADE: Just very briefly, I would indicate that, as I understand it, most, if not all, members did have access to the regulations. I commend the government. I thought it was a useful part of the process of consideration.

Amendment carried.

Progress reported; committee to sit again.

STATUTES AMENDMENT (PERSONAL PROPERTY SECURITIES) BILL

The House of Assembly agreed to the bill without any amendment.

EVIDENCE (IDENTIFICATION) AMENDMENT BILL

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

The Hon. B.V. FINNIGAN (Minister for Industrial Relations, Minister for State/Local Government Relations, Minister for Gambling) (17:52): I move:

That this bill be now read a second time.

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

Leave granted.

Labor's *Strengthening our Police Service Policy 2010* said:

'Line ups' require substantial police resources often requiring up to 10 police officers and up to 60 hours of police time to arrange. A re-elected Rann Government will amend legislation that will allow identification of a person suspected of committing an offence via photographs or video (including still or moving digital images) in lieu of physical 'line ups'. Police will be able to use technology such as PowerPoint presentations or mobile data terminals located within vehicles to present photographs to victims and witnesses. These changes will increase the efficiency of police investigations; relieve victims of the trauma of having to see the offender again and most importantly free up valuable police resources. Any changes to the legislation and procedures will ensure that the use of identification evidence in criminal proceedings will not be compromised.

A properly conducted identification parade or 'line up' has been traditionally regarded as giving rise to the most confidence in a reliable identification. As was explained by Gibbs J in the leading authority *Alexander* (1981) 145 CLR 395 at 401:

The safest and most satisfactory way of ensuring that a witness makes an accurate identification is by arranging for the witness to pick out from a group the person whom he saw on the occasion relevant to the crime.

Identification by means of a parade or line up is traditionally preferred to other alternatives, such as from photographs, at least when a named suspect is reasonably known to the police (although the High Court accepted in *Alexander* that photographs were unobjectionable and probably unavoidable in the investigative stage when a suspect was not known).

Alexander has been followed in South Australia. In *Deering* (1986) 43 SASR 252, King CJ said:

Where there is a clear and definite suspect or where an arrest has been made the proper procedure to be followed is for the police to arrange an identification parade if the suspect or arrested person is prepared to participate in such a parade. If that procedure is not followed it gives rise to a discretion in the trial judge to exclude the evidence of identification by other means and that discretion will be exercised having regard to all relevant

factors including, of course, the public interest in ensuring that persons who have committed crimes are convicted and punished for those crimes. It may be necessary to present photographs to an alleged victim of a crime at a stage of the investigation at which no person has been arrested and at which there is no definite suspect, in order to provide an opportunity for the victim to pick out the offender.'

The traditional assumption favouring line ups also gives rise to the potential for comment or warning to the jury by the trial judge that the weight of the photographic identification, whilst admissible, is inherently inferior to that of a line up. Such comments are open to criticism as confusing, unnecessary and even wrong.

However, it is clear that, notwithstanding *Alexander*, photographic identification evidence is used at trials in South Australia. The practice of the courts has moved away from *Alexander* and toward the use of photographic identification evidence. It is widely accepted in practice as relevant and admissible evidence.

The traditional assumption that line ups are a superior form of identification was accepted by the Australian Law Reform Commission in the 1980s and incorporated into the *Uniform Evidence Act* which has been enacted in New South Wales, Victoria, the Commonwealth and the Australian Capital Territory (although not on this point in Tasmania). However, the traditional assumption has come under increasing challenge over recent years on account of practical considerations, psychological and academic research, and technological advances. Other jurisdictions, notably Western Australia (by judicial ruling) and England, have explicitly departed from the preferred use of line ups and recognise the benefit of identification by means of photographs or a video.

The West Australian Court of Appeal in 2007 in *Western Australia v Winmar* considered the available research and 'firmly rejected' any suggestion that the identification from a photoboard (which is typically used in South Australia) was 'inherently inferior' to identification from a line up. The court observed:

The court should not, as some past authority may tend to suggest, attempt to discourage the use of the digiboard [the West Australian term for a photoboard] for identification, either by requiring trial judges to warn juries specifically about the dangers of that process as compared to an identification parade, or by requiring trial judges to suggest that the process is inherently flawed, or by suggesting that trial judges should be readier in the exercise of their discretion, to exclude digiboard identification than they might be to exclude evidence of identification by other means.

It can be argued that the practical problems that have arisen with line ups are:

- Victims and witnesses are reluctant to face offenders (especially an issue in dealing with organised crime);
- The major difficulties in securing the attendance of victim(s) and witnesses, suspects and sufficient volunteers of similar appearance to the accused at the same location for what can be a considerable time;
- The increasing multinational and multicultural diversity of South Australia often makes it difficult, if not impossible, to arrange line ups if the suspect comes from a minority group;
- It may be that some accused are of a unique or unusual appearance so that is impossible to organise a fair line up;
- There simply may not be enough volunteers of similar appearance to the suspect to hold a line up—it is increasingly difficult to assemble volunteers to participate in line ups. The days of police going to the local university and finding a ready pool of volunteers appear to be over;
- Suspects can (and often do) sabotage the identification process by failing to arrive at line ups arranged with considerable difficultly, by arbitrarily challenging the suitability of participants, by disrupting the process and by changing their appearance since the commission of the alleged crime;
- Where identification is an issue, it is crucial that the identification of the suspect should be done as soon as possible after the offence—line ups cannot be arranged at short notice which prevents timely identification and weakens the probative value of any subsequent positive identification;
- Line ups are time consuming and relatively expensive to arrange and hold. There are only limited facilities available. Although they may be realistic in serious crimes, they are not a realistic or cost effective solution in dealing with less serious but high volume crime, such as car theft, assaults or break ins. This results in solvable crime going undetected and the culprits going unpunished;
- The difficulties in arranging an identification process are compounded when investigations are conducted in regional or remote locations.

There has also been research, notably by Professor Neil Brewer at Flinders University, that highlights that traditional line ups are not as reliable as was commonly supposed. It has been found that witnesses have a tendency to compare the appearance of each person in the line up to each other. They adopt this strategy as part of a strategy to find the person who most closely resembles the culprit. The process of comparison means that a witness is likely to make an identification, although not necessarily the correct one. A further problem that arises is that the 'simultaneous' format (where the witness views everyone at once) associated with traditional line ups has been found to increase the risk of false identification. Professor Brewer and others have found that a sequential form of identification (where the witness views the images one at a time) produces a substantially reduced rate of wrong identification.

Alexander was decided when black and white photographs were still routinely used. Photographic identification has become more sophisticated and effective in replicating real life. Although photographic

identification is not without its difficulties, it is now arguable that photographic evidence is as reliable (if not even more so) than identification from a line up.

The use of photographs provides a fair and effective means of identification. There are a number of powerful advantages associated with modern photographic or video identification. It may be argued that:

- It enables swift and timely identification which furthers the policy of detecting and identifying an accused at the earliest possible opportunity after a crime;
- Prompt identification processes aid the police investigation of crime and also enable the prompt elimination of innocent suspects;
- Photographs offer great advantage over line ups in the ability to feature persons of similar appearance to the suspect, especially if the accused is of unusual appearance or comes from a minority group;
- Greater fairness to a suspect can be achieved by adjustment to photographs or identifying features to ensure the volunteers most closely resemble the suspect;
- Photographs can be readily distributed to all regions of the State almost immediately;
- Modern photographs are as reliable and accurate a means of identification (if not more so) than traditional line ups;
- Photographs represent a realistic and cost effective means of identification thus enabling proper investigation of a wider range of crimes where identification is an issue.

Identification evidence has long been regarded as inherently problematic by the criminal justice system owing to the well documented risk of a mistaken identification by even honest witnesses leading to the real risk of a wrongful conviction. The difficultly in cross examining confident but wrong identification witnesses has long been recognised. The common assumption is that human memory is an uncomplicated photographic-like process but, as jurists and researchers note, the reality is that identification evidence presents its own real dangers. The potential unreliability is due to the subconscious frailties of observation and memory. To try and alleviate the dangers associated with identification evidence, the courts have long insisted that the jury must be warned as to the dangers of relying on identification evidence, both in general terms and in specific terms appropriate to the facts of the particular case (see *R v Turnbull* [1977] QB 224 and *R v Domican* (1992) 173 CLR 555). It is not proposed to dilute or remove this warning. This warning applies to all forms of identification evidence without discrimination and should remain where there is a real issue in the trial on point.

The form of the proposed amendment is designed to be technologically neutral.

I commend the Bill to Members.

Explanation of Clauses

Part 1—Preliminary

1—Short title

2—Commencement

3—Amendment provisions

These clauses are formal.

Part 2—Amendment of *Evidence Act 1929*

4—Insertion of section 34AB

This clause inserts new section 34AB.

34AB—Identification evidence

The proposed section provides that evidence of the identity of the defendant is not inadmissible merely because it was obtained other than by an identification parade, if the judge is of the opinion that the evidence has sufficient probative value to justify its admission.

Proposed subsections (2) and (3) govern the information to be given to a jury by a judge in a criminal trial where the identity of the defendant is in issue and evidence of the identity of the defendant is admitted.

Debate adjourned on motion of Hon. S.G. Wade.

At 17:53 the council adjourned until Tuesday 3 May 2011 at 14:15.