LEGISLATIVE COUNCIL

Thursday 16 February 2012

The PRESIDENT (Hon. R.K. Sneath) took the chair at 14:18 and read prayers.

JAYDEN'S LAW

The Hon. R.L. BROKENSHIRE: Presented a petition signed by 1,568 residents of South Australia, requesting the council to—

1. Support an initiative called Jayden's Law to give mothers and fathers of these much wanted and loved babies the right to obtain a birth certificate for a child who is delivered as a live baby would be, but the delivery has occurred between 12 to 20 weeks' gestation;

2. Ensure that no financial benefit shall arise from the use of that right, nor should the right arise in terminations; and

3. Give parents who love and treasure their babies from conception this right as a means to recognise the child's birth, respect parents' beliefs and bring closure and healing to the family.

BUDDHIST TEMPLE

The Hon. D.G.E. HOOD: Presented a petition signed by 695 residents of South Australia requesting the council to urge the Minister for Urban Development to reject the proposed Buddhist temple development at Sellicks Beach.

URBAN RENEWAL AUTHORITY

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (14:22): I table a copy of a ministerial statement relating to the Urban Renewal Authority made by the Premier, the Hon. Jay Weatherill.

QUESTION TIME

FORESTRYSA

The Hon. D.W. RIDGWAY (Leader of the Opposition) (14:22): I seek leave to make a brief explanation before asking the Minister for Forests a question about rotation length.

Leave granted.

The Hon. D.W. RIDGWAY: On Tuesday of this week, the Minister for Forests told the parliament that she did not know what rotation length had been agreed to in the forward sale of the South-East forests. For the benefit of the Adelaide-centric Labor members opposite who have never seen a forest because of the trees, the rotation length is not measured in length but in years. It is the time between cutting down a pine crop from one crop and the time the next crop is ready to be harvested.

The minister said she thought the rotation was about 30 years but she would check. Later that day, she came back with an answer: under the privatisation and forward sale the rotation length will be, and I quote, '25 to 30 years'. The timber industry is shocked by this admission made for the first time by any government minister. Neither the Premier nor the Treasurer nor the sell-out, Rory McEwen, had ever let that number slip before. I have a copy of an email from Mr Islay Robinson, Chief Executive of ForestrySA. I quote from the email:

> Last year's area weighted rotation length was 38 years. For the current rotation the average clearfall age will drop to and stay between 32-35 years.

With the forward sale, by the minister's account, that will drop not just to 35 years, or 32, or even just 30 years, but could be as low as 25 years. My questions are:

1. Does the new quick rotation mean the new owners will be able to rip out the profits early and quickly at the expense of sustainable, high-profit mature products with rotations on a 38-year average?

2. If it is not being done for a quick buck, is this being done and driven by Treasury for simple extra revenue?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (14:24): That was a nice try from the opposition. The opposition leader is being most misleading in this matter. Members will be aware that no specification of the appropriate rotation length or term of the sale has been released publicly.

The Hon. D.W. Ridgway: Until you let it slip on Tuesday.

The Hon. G.E. GAGO: Not at all. This is subject to negotiations, and no rotation length has been given—

Members interjecting:

The PRESIDENT: Order!

The Hon. G.E. GAGO: —and that has been quite clear. The government has been quite clear about that.

An honourable member interjecting:

The PRESIDENT: Order!

The Hon. G.E. GAGO: The honourable member indicated at one time during interjections that I did not know the length of a forest rotation. What I indicated to the honourable member was that I in fact did, and my statement was that the average length of a pine forest rotation is around 30 years I thought. That information is quite true. The average length of a forest plantation rotation is around 30 years. That was in response to the indication that I did not know the length of a forest rotation. I do. I gave the answer, and it is that there is some variation but I was right that it is, roughly, 30 years—

Members interjecting:

The Hon. G.E. GAGO: Sorry, 25 years; the honourable member is quite right that I originally said 25 years, or 25 to 30 years. That is the answer I was advised when I double-checked. I said I was not absolutely sure and I needed to go away, and the advice I received was that on average it was between 25 to 30 years. So, that indicated that my original answer was correct.

The honourable member is being deliberately mischievous. This government has not indicated the specification in the sale of the South-East forests; we have never indicated what the rotation length would be because it is under negotiation. It will go through a tender process. That information has never been released, nor are we going to release it at this point in time.

In terms of me knowing the average length of a pine forest plantation rotation, my answer was quite within the realms of correctness. On average, it is somewhere between 25 and 30 years. However, that was not the answer in relation to the contract, so the member is being quite misleading and mischievous here today—as usual. Instead of being constructive in assisting the state to go forward we see these games being played here. It is absolute mischief and downright misleading.

FORESTRYSA

The Hon. D.W. RIDGWAY (Leader of the Opposition) (14:28): I have a supplementary question. Does the minister dispute her Chief Executive's email, where it says that the current rotation length is 38 years and the average clear fall age will drop and stay between 32 and 35 years? There is no mention of 25 to 30 years.

An honourable member interjecting:

The PRESIDENT: Order!

The Hon. D.W. RIDGWAY: Does the minister stand by her statements or does she support her Chief Executive?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (14:28): I was given advice, and the advice I received was that the average length was between 25 and 30 years. I do understand that there is a considerable degree of variation in that. The Chief Executive is giving the figures he has been advised, and I have given the figures I have been advised.

What sticks in the craw of the opposition leader is that I do, in fact, know something about this. I came into this place and actually did know what I was talking about, and he can't stand it, he simply can't stand it. It sticks in his craw, so he sits here today bobbing up and down and making an absolute fool of himself. He can do that. He can go right ahead and do that.

I had indicated that, on average, that is in the rough vicinity but, like I said, it sticks in his craw that I come into this place and know something about it. It sticks in his craw that I actually know something about it. So, he can bob up and down until he is blue in the face but, as I said, he is clearly here misleading this place and he is clearly trying to be mischievous.

FORESTRYSA

The Hon. R.L. BROKENSHIRE (14:30): As a supplementary to the minister's answers, can the minister therefore rule out that any privatisation would allow the successful person or corporation to sell rotations under 30 years?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (14:30): I have given a clear indication in this place already that we will not specify the rotation lengths at this point in time. These matters are currently being negotiated. There is a round table—

Members interjecting:

The PRESIDENT: Order! You might learn something if you listen.

Members interjecting:

The PRESIDENT: You might learn something if you listen. The honourable minister.

The Hon. G.E. GAGO: —and I gave a clear outline on Tuesday in this place about the responsibilities that have been given to the round table that is made up of a series of leaders and stakeholders across the industry. There is union representation and sawmill representation as well. It is a high-calibre group. Most of them are local people who serve on this round table, and they have been asked to provide some input into the sorts of conditions, or to consider the sorts of conditions, that might apply to the contract to ensure that the local jobs are protected and also that the long-term industry security is also maintained.

This government clearly has a great interest in ensuring the long-term viability of the forestry industry in the South-East. We have a long-term commitment to this—a long-term commitment—and we continue that commitment, and we have articulated that commitment over and over again. It is not in the government's interests or anyone else's interests to do anything that is going to damage the South-East and its forestry interests. So, we have put a number of measures in place to ensure that we listen to the concerns of the locals—

Members interjecting:

The PRESIDENT: Order!

The Hon. G.E. GAGO: —to ensure that we understand the intricacies of a range of matters that are likely to impact. That is why we have got key industry leaders and stakeholders participating in our round table. They are looking at a number of different matters to ensure job security and industry security in that region, and that includes the rate that forests are able to be cleared, to ensure that an operator can't come in and simply fell everything overnight and walk away with our forests. Those matters are being discussed and considered, and the round table will put forward ideas and strategies to incorporate—

The Hon. D.W. Ridgway: You've got sawdust in your ears. You are not listening to them.

The PRESIDENT: Order!

The Hon. G.E. GAGO: —as measures that we will include in our contracts to protect both jobs and the long-term forestry industry interests.

FORESTRYSA

The Hon. D.W. RIDGWAY (Leader of the Opposition) (14:34): I have a further supplementary. Does the minister support the forestry round table's rotation length recommendations for the sale?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (14:34): Those negotiations have not been completed.

The Hon. D.W. Ridgway: No, the forestry round table—

The PRESIDENT: Order!

The Hon. D.W. Ridgway: —not negotiations.

The PRESIDENT: The minister will answer the question in any way she thinks fit.

The Hon. G.E. GAGO: The negotiations have not been completed. Obviously the Treasurer is lead minister involved in those negotiations and consultations and collecting and considering a wide range of inputs into the final considerations that will form the contract in relation to the forward sale of the forests in the South-East.

FAMILIES SA

The Hon. J.M.A. LENSINK (14:35): I seek leave to make an explanation before directing a question to the Minister for Communities and Social Inclusion on the subject of the axing of financial counsellors.

Leave granted.

The Hon. J.M.A. LENSINK: Honourable members may be aware how angry South Australians are after learning their heartless government, which is supposed to act in their interests, has cut 44 financial counsellor positions from Families SA. These positions have been cut at precisely the time they are most in demand. There has been a 60 per cent increase in South Australians seeking counselling from the government since November 2010.

Just as we have seen with the Residential Tenancies Tribunal, where this government dumped its crisis management services onto the non-government sector, organisations in counselling such as UnitingCare Wesley and the Salvation Army have seen calls for help skyrocket. Indeed, Anglicare recorded an astonishing increase in demand of 373 per cent. In an extraordinary display of arrogance yesterday, the Premier brushed off a question, saying that he believes financial counselling is 'not core government business'. My questions are:

1. Is it core government business to stand by and watch as South Australians face an average increase in utility bills of $450 a year?

2. How many more basic frontline services will this government have to cut in order to balance its budget?

3. Does the minister think it is fair for the government to abandon its constituents at a time when South Australia is not only the highest taxed state in Australia but has the lowest growth, when Adelaide is now one of the most expensive cities in the world, and when it is the government that is solely to blame for this mess?

The PRESIDENT: The honourable minister can disregard all the opinion in the question.

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (14:36): Thank you, Mr President. If I were to disregard all the opinion in the question there would be nothing to answer, but let me attempt some sort of response that might mollify the confected outrage of the opposition today on this issue.

The 2010-11 state budget required Families SA to restructure the anti-poverty program. Within the Families SA anti-poverty program, 44 FTE positions were identified to be abolished. The primary focus of this program is to work with children, young people and families who have contact with Families SA's care and protection. The Families SA data identified that approximately 1,800 episodes of general financial counselling to non-Families clients occurred over a 12-month period. The equivalent amount of emergency financial assistance funding used over the previous year for non-Families clients was required across the state to maintain these existing service levels.

Since 1 July 2011 emergency financial assistance funds have been available to non-Families clients across the state through non-government organisations. Families SA retains responsibility for distributing these funds in Victor Harbor and Coober Pedy, as appropriate NGOs were not identified at the time.

The Department of Communities and Social Inclusion distributes a range of other funds for poverty alleviation across the state, including $1.1 million in low income support programs, which includes 4.4 full-time equivalent financial counselling and emergency electricity payment scheme staff. The department is also preparing a trial new model to ease financial hardship for low income earners, which includes the working poor, over the next four months. This program has a particular focus on improving the resilience of households experiencing financial hardship.

I also take the opportunity to advise the chamber that the member for Morialta put out a press release yesterday which, like Leader of the Opposition in the other place, is distinctly misleading. It is misleading and a cheap trick to actually use a quote of mine but replace a comma with a full stop. In his press release, the member for Morialta said:

> Mr Hunter said on morning radio, 'We're talking to the sector and we're saying to them, look, if you really are of the view that you haven't got the resources and the demand is going up then give us that information and we'll have a look at it.'

That is not what I said. What I said is:

> We're talking to the sector and we're saying to them, look, if you really are of a view that you haven't got the resources and that the demand is going up then give us that information and we'll have a look at it—

comma—

but at this stage we believe that we've given them adequate resources to pick up those extra episodes of counselling that are required.

The government has provided to the sector a further 3.5 full-time equivalents for financial counselling. Feigned outrage from the chamber—

Members interjecting:

The PRESIDENT: Order!

The Hon. I.K. HUNTER: —that the member for Morialta would stoop to such a low tactic of changing my quote and putting a full stop where the comma should be, conveniently leaving out the essence of the quote!

We in fact have provided a further 3.5 full-time equivalent financial councillors to the sector. And if you just assume that those 3.5 full-time equivalents could manage four counselling episodes a day—that is about 14 episodes a day across all of those—that is approximately 70 episodes a week. If those councillors only work for 40 weeks a year, they will be supplying well over 2,800 episodes of counselling to the sector, more than enough to meet the needs by which SACOSS and presumably their affiliates are saying to us the demand has gone up.

The PRESIDENT: The Hon. Ms Lensink has a supplementary.

FAMILIES SA

The Hon. J.M.A. LENSINK (14:40): Can the minister clarify exactly what he means by 'look at it'? Does he mean there is funding available if the figures should demonstrate that it is required?

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (14:41): I thank the honourable member for her supplementary question. What it means to 'look at it' is to invite the sector to provide us with new information and the government will consider it.

CLARE VALLEY RESPITE SERVICES

The Hon. S.G. WADE (14:41): I seek leave to make a brief explanation before asking the Minister for Disabilities a question about respite services in the Clare Valley.

Leave granted.

The Hon. S.G. WADE: I seek to raise the case of a person with a disability and their family. In doing so, I make clear that I am acting with their consent, so the minister should not, as he did yesterday in response to a question from the Hon. Kelly Vincent, use so-called privacy issues to avoid accountability of his officers, his department and his government.

Members interjecting:

The PRESIDENT: Order!

The Hon. S.G. WADE: The member for Stuart, Mr Dan van Holst Pellekaan, is advocating for constituents—a man with a severe disability and his parents who are his primary carers. The man receives a disability pension and he is supported with a day program, transport to SCOSA each week and the costs of medication and incontinence aids.

The family accesses respite services for two to three hours on weeknights and weekends. The family also accessed four weekends of respite in 2011 at Grevillea House in Clare, which is managed by the Country North Community Services. When the family called to make their bookings this year, they were advised that there were no spaces left for 2012 due to the high level of demand for the service. Grevillea House is a well-run operation and, whilst it has capacity to provide more respite, there is insufficient funding to meet the operating costs required to offer more services.

Grevillea House is open for only one respite episode per month for carers of adults with a disability and one respite episode per month for families with children with a disability, to be shared over 40 families in the Clare region. My question is: can the minister advise the council what the government is doing to address this gap in services so that families can access the respite they need and to which they are entitled?

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (14:43): Let me make it quite plain to honourable members what my approach will be in this chamber when members raise concerns around particular clients of one of my agencies. They may feel they have—and they may have—the consent of those persons to raise those topics in this house, and it is perfectly legitimate for them to do so, especially when they are trying to address issues perhaps of systemic failure in the system.

I myself will not comment on those issues relating to those people as I do not have their consent, and as minister I am privy to information that goes beyond what honourable members may have. It would be wrong of me, even though it will be very tempting sometimes, to actually explain to honourable members in this place the concerns around some of these cases, but I will not do so. If honourable members wish to raise any of these particular cases about their clients with me privately, I will have my department investigate those issues very quickly and respond to them as soon as I can.

In relation to the case the honourable member has raised, let me say this: I am advised that my department has been in contact with that service and has asked them to talk to us about their service delivery. We are ensuring people with high needs are having them met as per those service contracts.

SOUTH AUSTRALIAN RURAL WOMEN'S AWARD

The Hon. CARMEL ZOLLO (14:44): I seek leave to make a brief explanation before asking the Minister for the Status of Women a question about the 2012 RIRDC Rural Women's Award for South Australia.

Leave granted.

The Hon. CARMEL ZOLLO: I understand that the RIRDC Rural Women's Award for South Australia was presented by the minister this morning at the Adelaide Pavilion. Can the minister inform the chamber about this morning's event?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (14:44): I thank the honourable member for her most important question. It was with great pleasure that I was able to attend the 2012 RIRDC Rural Women's Award for South Australia this morning. It is the 13th year that this award has been running, and it was very pleasing to see the Hon. Jing Lee in attendance at that award ceremony as well.

I would like to put on the record my admiration for Krysteen McElroy and Mary Retallack, who were the two finalists this year. They are amazing women; it was wonderful to have the opportunity to meet them both. My sincere congratulations go out to both women, but particularly Mary Retallack, who was named the winner of this year's award.

Krysteen, who was the runner-up, comes from Padthaway in the South-East. She and her husband are mixed farmers, and I am told that Krysteen's focus is in sustainability, specifically high-value and water-efficient crops. Mary, today's winner, grew up in the Riverland and is a

viticulturist. I understand that she is passionate about women working together, sharing information and knowledge so that they can reach their full potential. I am sure that there are many members in this chamber who, like myself, deeply admire and respect the very pivotal role that women play in rural South Australia.

The award that I presented this morning is important because it highlights roles of women, particularly in primary industries in rural communities and certainly in relation to natural resource management. The successful recipient of the award was presented with a place in the RIRDC Institute of Company Directors Course, which will allow her to take on that next developmental step in their leadership journey. I understand that both finalists are awarded with the entitlement to attend that course. The Rural Industries Research and Development Corporation provides a $10,000 bursary to the winner, allowing her to enhance her skills.

I am advised that many past winners have used this award as a launching pad for brilliant careers in boardrooms and in decision-making forums around this country. For instance, the 2010 national winner, Sue Middleton, has recently been appointed to the to WA Royalties for Regions Advisory Trust Board, and many other state and national winners are taking their rightful place in leading boards and committees.

As I mentioned, today's award also gives a $10,000 bursary for the winner to implement her award vision, and I am sure that members are keen to learn about Mary Retallack's vision. As I said, Mary is a third generation viticulturist, and she is going on to develop a women in wine website. The website will connect women in the wine industry, providing a place to share information and opportunities.

Both finalists will have an opportunity to attend the company directors course in Canberra but, obviously, only the winner will be given the opportunity to see the project through with the $10,000 bursary. Both finalists will attend a dinner at Parliament House in Canberra in September when the Australian Rural Women's Award 2012 national winner will be announced.

I just want to make sure that I put on the record my personal appreciation to all rural women and all women who have been involved in this award—winners, finalists and applicants—over the last 12 years. I would also like to acknowledge and show my appreciation to the sponsors and the organisers of this marvellous event. A lot of work goes into the success of these events, and many people volunteer a lot of their personal time to make these events very special and successful.

SOLAR FEED-IN TARIFFS

The Hon. M. PARNELL (14:49): I seek leave to make a brief explanation before asking the Leader of the Government, representing the Minister for Mineral Resources and Energy, a question about the solar feed-in scheme.

Leave granted.

The Hon. M. PARNELL: My office has been contacted by a large number of South Australians with concerns about how ETSA Utilities is implementing the changes to the South Australian solar feed-in scheme passed by this parliament last year. Members will be aware that concerns were raised at the time of the debate about the potential for households and businesses to install solar panels for the dominant purpose of generating a profit. Whilst I have no problem with solar power owners earning money from their investment, the parliament did choose to pass changes that would deal with this issue by restricting the amount of electricity that would attract the higher solar feed-in rate to a maximum of 45 kilowatt hours per day. This was consistent with the changes that were foreshadowed by the then premier Mike Rann in August 2010.

Subsequently, after much delay, parliament passed legislation to put effect to this in the middle of last year. However, after the legislation was passed, separate rules were developed in a completely internal process between the private corporation ETSA Utilities and the energy department without any consultation with consumers or industry. Those rules were that there was a further restriction on eligible households, which was based on an arbitrary figure of 3.04 kilowatts as the size of a system and where those systems were installed on meters that use less than 400 kilowatt hours per year of electricity.

Since this restriction has been retrospectively applied to households and to businesses—and that retrospectivity was up to six to eight months before the rules were published—my office understands that up to 150 households have been targeted by ETSA. Many of these are farmers who put panels on their farming equipment sheds to offset their power use. These South

Australians are quite rightly outraged that the goalposts have shifted and they now potentially risk being thrown off the scheme retrospectively, and that will cost them many tens of thousands of dollars and they have no right of appeal.

Another concern that has been raised from a small number of households, again mostly in the country, who through no fault of their own only managed to have their panels installed after the arbitrary cut-off date. They fulfilled all their obligations, but through delays that were outside their control, such as poor weather or slow installation by solar installers, they now face being ineligible for the scheme. My questions are:

1. Why has ETSA Utilities introduced an arbitrary 400 kilowatt hours per year annual minimum electricity use cut-off when the 45 kilowatt hours per day restriction that was passed by this parliament is sufficient to deal with the issue of commercial operations so-called profiteering from the solar scheme, and why do both rules exist when only one will achieve the aims of the legislation?

2. What process is there for households to appeal any rulings by ETSA Utilities?

3. Considering the government is so concerned about sovereign risk with mining companies—and we note the $5 million payment to Marathon—why isn't it equally concerned about sovereign risk for South Australians, who, in good faith and following the rules laid down at the time, have invested in solar energy and now face retrospective changes?

4. Considering the enormous impact on the relatively small number of people affected, what will the government do to ensure that these people will not be artificially punished for trying to do the right thing by investing in solar energy?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (14:53): I thank the honourable member for his important questions and will refer them to the Minister for Mineral Resources and Energy in the other place and bring back a response.

WORKPLACE SAFETY

The Hon. G.A. KANDELAARS (14:53): My question is to the Minister for Industrial Relations. Can the minister provide the house with details of the workplace safety television campaign 'Homecomings'?

The Hon. R.P. WORTLEY (Minister for Industrial Relations, Minister for State/Local Government Relations) (14:54): I thank the honourable member for his very important question and note the many years the honourable member has served working people as a union official. As part of our ongoing efforts to keep South Australian workplaces safe and productive, the government is currently conducting a television advertising campaign called 'Homecomings'. This television campaign highlights the impact that workplace harm can have on families. The advertisement focuses on that dreaded moment a family faces when a loved one fails to come home because of an incident at their workplace.

'Homecomings' is designed to remind us that the most important reason for workplace safety is not work at all but rather those we leave behind each day when we head off to work. These incidents of harm, both emotionally and financially, affect family, friends and other loved ones, often for a lifetime.

The 'Homecomings' campaign is designed to show what is at stake for South Australians if workplace safety standards are not maintained. It tells a compelling human story of a situation no worker would ever want their family to go through. 'Homecomings' originated in Victoria, but it has been used with great success in New South Wales, Queensland and Western Australia.

This government is doing its part for workplace safety by establishing a strong regulatory foundation and framework, through new and improved laws and the compliance efforts of the regulator, SafeWork SA. However, the appropriate level of safety is ultimately determined by decisions made every day at tens of thousands of workplaces where hazardous tasks are performed.

What we expect from 'Homecomings' is a higher level of awareness of the consequences of letting safety standards slip and, through that awareness, we encourage that safety be factored into every workplace task before it begins, not after the event, when often it is too late.

WORKPLACE SAFETY

The Hon. R.I. LUCAS (14:55): I have a supplementary question. Can the minister advise what is the total cost of the advertising campaign?

The Hon. R.P. WORTLEY (Minister for Industrial Relations, Minister for State/Local Government Relations) (14:56): It has been budgeted as $552,000.

WORKING HOURS

The Hon. D.G.E. HOOD (14:56): I seek leave to make a brief explanation before asking the Minister for Industrial Relations a question regarding employment conditions for the public and private sector in South Australia.

Leave granted.

The Hon. D.G.E. HOOD: It has come to the attention of Family First, through some information garnered from a number of constituents and other sources, that there are some people in our state working up to 19½ hours continually, in one single block if you like. These are typically people who work under what is called 'call-back arrangements'; that is, they have a particular shift, and they may be called back to work, or it is extended with very short notice. They are often not aware that they are going to be expected to work that sort of time—as I have said, in one particular example, up to 19½ hours consecutively.

Obviously, they do have meal breaks, and that is included in that time. Nonetheless, I am sure members would agree that it is a very, very long time for anyone to work. I raise that question to bring the matter to the minister's attention, but I also ask whether the minister would like to comment on his attitude to that.

The Hon. R.P. WORTLEY (Minister for Industrial Relations, Minister for State/Local Government Relations) (14:57): I thank the honourable member for his important question. First of all, the information the honourable member has given me is quite scant. I understand the context of what he is saying, but I will seek to find out whether that occurs in the public sector.

In relation to my views on it, naturally, my views are that working a 19-hour stint is far too long. But, once again, I need to know the circumstances behind all of this, so I will try to check the details, but there are many agencies. Can the honourable member let me know the agency where this happened?

The Hon. D.G.E. HOOD: Yes, I can.

The Hon. R.P. WORTLEY: Great.

SAFEWORK SA

The Hon. R.I. LUCAS (14:58): I seek leave to make an explanation before asking the Minister for Industrial Relations a question about SafeWork SA.

Leave granted.

The Hon. R.I. LUCAS: Just prior to Christmas, the Australian Hotels Association President, Mr Peter Hurley, addressed a lunchtime gathering, which included Premier Weatherill, a number of ministers, members of parliament and others. Amongst the range of issues that he raised at that lunchtime function was a complaint that he had in relation to a visit from SafeWork SA to one of his hotels. He indicated that he and his business had been told by SafeWork SA staff that the drive-in bottle shop staff had to wear high-visibility vests, under the current occupational health and safety act and regulations. My questions are:

1. Can the minister indicate how many cases there have been where driveway staff in hotels have been injured by cars whilst working in the driveways of hotels?

2. Is it correct that SafeWork SA staff did advise Mr Hurley's business that driveway staff at his hotel had to wear high-visibility safety vests, under current legislation and regulations?

3. Is it current government policy, supported by the minister, that, under the current legislation and regulations, all driveway staff in all hotels in South Australia have to wear high-visibility safety vests during their working hours?

The Hon. R.P. WORTLEY (Minister for Industrial Relations, Minister for State/Local Government Relations) (15:00): I thank the honourable member for his question. I was at that

luncheon when Peter Hurley gave his one-hour long speech. A lot of it was off the cuff and was done in fun, poking fun at SafeWork SA. Given the fact that South Australia is one of the only states that is actually achieving its health and safety targets of significant reduction in injuries and death in the workplace, I thought it was a bit unfortunate that such important work by SafeWork had to be poked fun at, at a Christmas function where the vast majority of people there—except for myself, of course—had quite a few drinks and a good, fun day was had by all.

I am not aware of how many staff in these driveways have been injured; I will find out. The whole objective of this is to make sure that there are no injuries. We seem to want death and carnage in the workplace before SafeWork gets out there and does something. I know myself, and many members around here would probably know, when I go to a driveway to get something and I get out of the car to move somewhere it is quite dangerous with the cars going through.

Members interjecting:

The Hon. R.P. WORTLEY: I find that quite staggering.

Members interjecting:

The Hon. R.P. WORTLEY: It is quite dangerous when they have a busy driveway and you are trying to walk through. It is quite dangerous.

Members interjecting:

The Hon. R.P. WORTLEY: I would probably need one to protect me in those driveways.

Members interjecting:

The PRESIDENT: Order!

The Hon. R.P. WORTLEY: Judging by the nature of the speech by Mr Hurley—as I said, it was very light-hearted and fun—I could not tell whether he was serious or not as to whether staff had been advised. In saying that, I will find out. If there is a perceived danger there, I prefer SafeWork SA to do their job prior to someone getting killed or injured, rather than waiting for a death to occur.

SAFEWORK SA

The Hon. R.I. LUCAS (15:02): As a supplementary question arising from the answer, is the minister indicating to this house that having attended that lunch and heard that evidence from the head of the AHA he has not requested from SafeWork SA any information as to whether or not the claim by Mr Hurley was accurate, that is, that SafeWork SA staff had advised him that driveway staff had to wear high-vis safety vests?

The Hon. R.P. WORTLEY (Minister for Industrial Relations, Minister for State/Local Government Relations) (15:03): Many members here were at that luncheon. Mind you, if there was a concern, I don't take seriously comments made out of good fun and jest at a Christmas function. If Mr Hurley had a legitimate problem he should write to me and I would make sure the appropriate response was given.

The PRESIDENT: The honourable minister should name the members of parliament who were there.

DUKE OF EDINBURGH'S AWARD

The Hon. CARMEL ZOLLO (15:03): My question is to the Minister for Youth. Would the minister inform us about the appointment of the new chair to the Duke of Edinburgh Award's state award committee and the elevation of Mr Robert Gerard to the position of co-patron of the award?

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (15:04): I thank the honourable member for her very important question and acknowledge her ongoing interest in the area of youth affairs. The Duke of Edinburgh Award is an international youth development program for young people between the ages of 14 and 25. The award encourages participants to challenge themselves to succeed on a number of levels.

The award creates opportunities for participants to make new friends, develop new skills and increase their job readiness and job opportunities with a focus on local communities and volunteering. There are three levels of the award—the bronze, the silver and the gold—which require different levels of commitment, different levels of time, and quite different levels of effort.

Young people can start at the level that best suits them. The government's commitment to the youth of the state through *youth*connect, South Australia's Youth Strategy 2010-14, has a target to double the number of new participants in the award by 2014.

Mr Robert Gerard has chaired the committee for over 10 years and during that time has been a very fine ambassador for the award. His significant personal and financial support are to be highly commended. In light of Mr Gerard's great contribution and high profile, I have appointed him to the position of co-patron alongside His Excellency the Governor. In this capacity, Mr Gerard will continue his involvement with the award and continue to support South Australia's involvement in this, the 50th anniversary year of the award.

I can also advise you, sir, and the chamber that I have appointed Ms Judy Potter to the position of chair of the state award committee. Ms Potter has a long history of holding senior positions in South Australia and has served on boards at a state and national level. As chief executive of both SA Great and Carclew Youth Arts Centre, she successfully restructured both organisations and developed new partnerships and initiatives for the benefit of all stakeholders. I have great confidence that the appointment of Ms Potter will greatly assist the state award committee and the Office for Youth achieve greater participation in the Duke of Edinburgh Award in the coming years.

SCHOOL PLACEMENTS

The Hon. A. BRESSINGTON (15:06): I seek leave to make a brief explanation before asking the minister representing the Minister for Education and Child Development a question on school placements in the north.

Leave granted.

The Hon. A. BRESSINGTON: During the Christmas break I was approached by a number of parents from new developments out in the northern suburbs, around my area, who are finding it impossible to enrol their children in school. From kindergarten into early high school, there seem to be no placements available for these children, and I was told there are children out there who are seven years old who have not yet attended school because there is nowhere for them to go.

In two different Messenger articles, one dated 12 October 2011, it was stated that the Mark Oliphant high school had a waiting list and that about 230 students had applied for year 8 with only 180 places available, and also that the John Hartley primary school, as of 9 March 2011, had put a freeze on taking more students into years 1 to 10. Apparently—and this is the information I was given by parents—even the other primary schools are having to cope with the overflow of the number of new families who have gone out there and purchased homes in these new developments. There are no placements available in the other existing schools, either. My questions are:

1. What analysis was done prior to the super schools project to ensure adequate school placements would be available after the implementation of the super schools?

2. Prior to the two super schools, how many placements were available in all the schools that were zoned out in the northern suburbs, and how many placements are available now?

3. How many high school placements were available at the beginning of this school year at Elizabeth Fremont and Craigmore, given that they were the two schools that were told they would have to pick up the slack?

4. What plans, if any, exist to expand education facilities in the north to adequately cope with the demand?

5. How many kindergarten placements are available in the northern area, and are there waiting lists?

6. What are the waiting list numbers for John Hartley primary school?

7. How many schools are zoned for the new developments in the north for, in their own words, families that have been 'deliberately lured' into those new developments as young families and now find themselves without the services they need?

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (15:09): I thank the honourable member for her very important question on the enrolment of children into

schools and kindergartens in the northern suburbs. I undertake to take those questions to the minister in another place and bring back a response.

APY LANDS, FOOD SECURITY

The Hon. T.J. STEPHENS (15:09): I seek leave to make a brief explanation before asking the Minister for Communities and Social Inclusion representing the Minister for Aboriginal Affairs questions about the Watarru community.

Leave granted.

The Hon. T.J. STEPHENS: In August of last year, former minister for Aboriginal affairs, the now newly promoted Minister for Education and Child Development, announced a garden project at Watarru to give people in the APY lands food security. Government expenditure for this and another garden was reported to be $800,000. A few weeks later, it was shown that a similar project some years ago at Amata had failed and was a wasteland with no-one in the community looking after it.

It was widely reported in September that children on the lands were going hungry, and the minister admitted that whilst trumpeting the gardens and the government's APY food security plan as a solution to the problem. This is a policy that respected Indigenous leaders like Noel Pearson have come out against and said will not work.

The community store at Watarru closed on 5 December and since then 83 percent of the population has left, leaving only 13 people in the community. The Aboriginal Affairs and Reconciliation Division of the Department of the Premier and Cabinet have dispatched officers to feed the community's dogs and presumably look after the garden. My questions to the minister are:

1. Does the exodus of 83 percent of the community's population and the dispatch of government officers confirm the failure of the garden project at Watarru?

2. Does this affair, coupled with the failure of the Amata project, highlight the wider failure of the community garden project and the government's APY food security plan?

3. Can the minister rule out the rebuilding of any new gardens and the wasting of more taxpayer dollars on this failed scheme?

4. Will the minister now divert the necessary funds from the failed implementation of the APY food security plan to a much-needed transport subsidy to deliver fresh food to the lands as per the wishes of the community and the Mai Wiru food group?

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (15:11): I thank the honourable member for his important questions about the Watarru community. I will take those four questions to the Minister for Aboriginal Affairs and Reconciliation in another place and bring back a response.

SCIENCE APPOINTMENTS

The Hon. J.M. GAZZOLA (15:11): I seek leave to make a brief explanation before asking the Minister for Agriculture, Food and Fisheries a question about scientific expertise in South Australia.

Leave granted.

The Hon. J.M. GAZZOLA: As those of us with an interest in science, like yourself, are aware, the road from benchtop to application may not be an easy one. My question, minister, is: will you tell the council about new appointments made to strengthen our scientific workforce?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (15:12): I thank the honourable member for his most important question. Members would be aware that the South—

The PRESIDENT: Order! I remind that cameraman that that camera is only to be trained on people on their feet. If I see you doing anything else, I will have you removed. Minister.

The Hon. G.E. GAGO: Members would be aware that the South Australian Research and Development Institute (SARDI) has been a longstanding contributor to research and development in primary industries in South Australia and, indeed, an important national player also.

For example, last year, Dr Mark Sosnowski, a SARDI senior researcher, led a team of Australian researchers from the National Plant Biosecurity Cooperative Research Centre and American plant biosecurity colleagues who undertook an offshore trial in which they proved that it was possible to exterminate a dangerous grapevine disease in the vineyard without the need to rip out and burn vines. This is an example of how the important work undertaken by SARDI is supporting industry and maintaining South Australia's position at the cutting edge of scientific research—research that is leveraged off the significant skills of SARDI researchers.

I am very proud to announce that we recently boosted the areas of animal welfare and sustainable fisheries development with two new high-level appointments in SARDI. The first of these is Professor Alan Tilbrook, who joins SARDI from the Department of Physiology at Monash University—my old stomping ground—as the new SARDI Research Chief of Livestock and Farming Systems, based at Roseworthy. The second appointment sees leading sustainable fisheries scientist, Dr Gavin Begg, appointed as SARDI's Research Chief of Aquatic Sciences, based at West Beach.

These appointments reinforce South Australia's commitment to take primary industries research to new levels. Professor Tilbrook's strong background in animal reproductive technologies and welfare science and Dr Begg's focus on advancing sustainable fishing practices will be of immense value to South Australia's industry and the community generally.

Professor Tilbrook, who has also worked with the Animal Research Institute, Victorian Institute of Animal Science, Werribee, as a senior research scientist and head of the reproductive technology section, is a founding member and Deputy Director of the Animal Welfare Science Centre. His appointment repositions South Australia and provides us with the opportunity to lead animal welfare science in the national framework.

South Australia already has a central research role for intensive agriculture, most notably in pigs and poultry, with the Pig and Poultry Production Institute, and the CRC for an Internationally Competitive Australian Pork Industry, hosted by SARDI at the University of Adelaide's Roseworthy campus. These intensive industries recognise absolutely the imperative of animal welfare and the need to fund science to improve animal welfare as well as productivity measures. The two outcomes go hand in hand. Healthy animals produce more for less, and SARDI has the scientific expertise and research facilities to become an innovator in this area.

Another of South Australia's great strengths is its fisheries and aquaculture industries, whether it is sustainable fisheries, such as the South Australian Spencer Gulf king prawns, or world-first aquaculture research from the aquaculture industry in Port Lincoln. Dr Begg, who has led the development of science strategy and fostered effective and stable research collaborations at the state, national and international level for over 20 years, will build on SARDI's enviable reputation for strong research.

Dr Begg was a senior manager for research and co-management at the Australian Fisheries Management Authority and has held international research positions at the Marine Research Institute in Iceland and the National Marine Fisheries Centre in Woods Hole, USA, where he worked on the population dynamics and stock structure of groundfish stocks in the North Atlantic. In recent years, he has led the ABARES Fisheries and Quantitative Sciences Branch at the Department of Agriculture, Fisheries and Forestry, where he was head of the Australian science delegation to the Commission for the Conservation of Southern Bluefin Tuna.

I am very pleased to welcome these two extremely distinguished scientists to South Australia and look forward to their contribution in future to South Australia's research, development and application efforts.

SCIENCE APPOINTMENTS

The Hon. R.L. BROKENSHIRE (15:17): I have a supplementary question arising from the answer. I ask my supplementary wearing my historical SARDI tie. Given the minister's answers and praise for SARDI and the research officers, can the minister now rule out further cuts and merges to SARDI and the relationship the government is trying to nurture with Adelaide University?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (15:18): Absolutely not. I would not do that. Indeed, I have stated in this place before that we are actively pursuing negotiations with the university to look at amalgamation potential. That would create one of the largest and probably one of the most prestigious research and

development centres in the Southern Hemisphere, and it would also open up enormous potential to provide greater leverage in relation to commonwealth funds.

This is something that we have publicly announced, that we are pursuing those negotiations, and it would absolutely be in the interests of primary industries if we were able to be successful in these negotiations. If the honourable member wanted to do something really useful and constructive, he would be assisting and supporting these negotiations, which, as I said, will hopefully bring about a state-of-the-art and one of the largest and potentially most prestigious research and development centres in the Southern Hemisphere.

APY LANDS

The Hon. T.A. FRANKS (15:19): I seek leave to make a brief explanation before asking a question to the Minister for Social Housing on the topic of the new Housing SA rental formula for APY lands.

Leave granted.

The Hon. T.A. FRANKS: As the minister is no doubt aware, Housing SA is standardising the way community housing is managed and maintained in remote Aboriginal communities, and I understand that as a part of this process a new formula has been developed for calculating household rent for new and upgraded housing. Under this new formula the rent for each adult residing in a property is calculated separately. On the APY lands each adult living in one of the new or refurbished houses is charged a flat rate of $20 per week for the first 12 months. It then rises to 15 per cent of the adult's assessable income, and after another 12 months to 20 per cent of their assessable income.

Housing SA's rent policy includes elements designed to encourage and support workforce participation. Specifically it does not require household members who are employed to contribute more in rent than they would be required to pay if they were unemployed or in receipt of a Newstart allowance, as the rent of each working adult is capped at 20 per cent of the allowance he or she would have received if unemployed.

Unfortunately, the formula has created the following anomaly: after the first 12 months people on disability support pensions and aged pensions are paying more rent than working adults. My questions to the minister are:

1. Can the minister confirm that the formula introduced to calculate weekly rent for adults living in properties managed by Housing SA on the APY lands has seen aged and disabled adult tenants being charged more in weekly rent than working adults?

2. Can the minister explain how and when this anomaly will be addressed?

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (15:21): I thank the honourable member for her very important question, and I acknowledge her ongoing interest in those very important matters up on the APY lands. I am aware of the new rates, which the honourable member very beautifully explained to the chamber, and it has not necessitated my repeating those remarks. I am not, however, aware of any alleged anomaly between the rates of rents for housing of people on different benefits compared with those who are working and in receipt of wages, but I undertake to check on these issues with my department and bring back a response.

NATIVE FOREST RESERVES

The Hon. J.S.L. DAWKINS (15:22): I seek leave to make a brief explanation before asking the Minister for Forests a question regarding the native forest reserves.

Leave granted.

The Hon. J.S.L. DAWKINS: The area of forest owned by ForestrySA includes more than 25,000 hectares of native forest reserve. A great majority of this area is located in the South-East and actually exceeds the amount of native vegetation held within national parks in that region. My question is: what management and fire control strategy will be implemented for this huge area of native forest once the sale of the forward rotations of the adjacent plantations is finalised?

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (15:23): I think the honourable member is asking about the non South-East forests.

The Hon. J.S.L. Dawkins: No, I am asking about the native forest reserves that are adjacent to the plantations that are going to be sold.

The Hon. G.E. GAGO: But owned by ForestrySA?

The Hon. J.S.L. Dawkins: Yes, absolutely.

The Hon. G.E. GAGO: Well, I will take that question on notice and will be happy to bring back a response.

ADDRESS IN REPLY

Adjourned debate on motion for adoption.

(Continued from 15 February 2012.)

The Hon. D.W. RIDGWAY (Leader of the Opposition) (15:24): I rise to speak on behalf of the opposition to the Address in Reply to the opening of the second session of the 52nd Parliament. As members would be aware, it was done with the usual fanfare and ceremony on Tuesday, and I take this opportunity to thank the Governor, Kevin Scarce, and his wife for the great way they discharge their duties. I think he is a very popular choice for Governor and is well liked around the state. The Hon. Carmel Zollo indicated how pleased she was that his tenure had been extended by a couple of years. I certainly think I speak on behalf of all of my colleagues when I say that we enjoy working with him and his wife, and to do so for another two years will be an absolute pleasure.

I thought the Governor did a very good job reading one of the most uninspiring speeches I have heard since I was elected to this parliament some 10 years ago. Maybe post being the Governor he might get a job as a newsreader, because he did a great job with a pretty un-interesting story.

On Tuesday we heard the government, led by Premier Jay Weatherill, apologise to South Australia. It was not wrapped up as an apology: it was wrapped up as a gift. The Premier's program for South Australia will deliver less and will cost more. The government has identified seven primary areas of focus for attention. These can be summarised under the following headings: the clean green food industry; the mining boom, its benefits and the future fund; advanced manufacturing; a vibrant city; safe and active neighbourhoods; affordable living; and early childhood.

The opposition recognises that these fields of failure do not include every mistake in the life of the government or every area of government incompetence. The government has made choices; these choices are strategic. They are to hold on to metropolitan seats without a fundamental change of direction while condemning rural and regional South Australia to an assured economic contraction.

I would like to address my comments in relation to those seven areas and then, when I eventually get to my closing, I will just comment on some of the remarks made by the Hon. Carmel Zollo and the Hon. Gerry Kandelaars and also perhaps address the by-elections we had just last weekend.

In relation to the clean green food industry, as the world's population grows, so does its demand for food. Our state has missed an opportunity to meet this demand by condemning valuable productive agricultural land to housing, such as Mount Barker and Seaford. I think the Seaford area had been rezoned some 30 years ago, yet the Liberal governments led by the Hon. Dean Brown and the Hon. John Olsen, and the Hon. Diana Laidlaw, who served in this place as planning minister, chose not to sell that land. It was government owned and they chose not to sell it for very good reasons.

However, over the last 10 years, this government under the stewardship of firstly the Hon. Jay Weatherill as planning minister, I think the Hon. Trish White and then the Hon. Paul Holloway, this land was sold. So, it was this government that condemned that land to go under bricks and mortar. Buckland Park is also an area of farming land that this government has decided to rezone for residential development. This government has really proven that it has learnt nothing from the past.

The government is trying to present this clean and green image. It has talked about the Barossa Valley and McLaren Vale and trying to protect those iconic areas—and I think we all recognise that they are very important areas—from urban sprawl; however, it is under the 10 years

of this government that those areas have come under threat from urban sprawl. They were not under threat prior to that. As I said, a Liberal government chose not to sell the land at Seaford, yet this government did.

However, the former premier, the Hon. Mike Rann—who, incidentally, I think was tweeting vigorously again yesterday; surely he must be suffering some sort of deprivation syndrome or relevance deprivation—now wants to re-engage. It is always interesting when a former premier wants to re-engage in public debate. It will be interesting to see—

The Hon. J.M.A. Lensink: I don't think the public wants to re-engage with him.

The Hon. D.W. RIDGWAY: As my colleague the Hon. Michelle Lensink interjects, the public probably does not want to engage with him. The decision made by former premier Rann and planning minister Rau to guarantee to protect McLaren Vale and the Barossa Valley was really a decision made, I suspect, driven by polling, research and focus groups but not really with any understanding of how that may be achieved. It was a very simplistic approach and not practical, and full of unintended consequences.

We have seen outrage in those communities, by and large, with everyone wanting to have some sort of continuation of the amenities that they enjoy, but when the draft ministerial DPA was put in place, we found that developments such as shops in shopping precincts were non-complying, industrial buildings in industrial precincts were non-complying, and in fact development in McLaren Vale and the Barossa Valley had almost ground to a halt in the six months since that ministerial DPA had been in place.

I think that they have now admitted that they got it wrong. My understanding is that minister Rau is going to do another ministerial DPA and come back with some new draft legislation. I think we have had a significant amount of community consultation, but that is all for nothing because my understanding is that there will be a new DPA, new legislation and another round of consultation.

I am not really sure about this clean green image and why the Barossa Valley and McLaren Vale need to be protected. They only need to be protected from the Labor Party, not the Liberal Party, and probably not from any other party that is represented in this parliament. The easiest way to protect those areas is to have a change of government at the next election.

One of the other areas the Governor focused on in his speech on behalf of the government was the mining boom, its benefits and the future fund. A future fund is rather interesting. I am sure members would be aware—and I think the Hon. Iain Evans did some media straight after the Governor's speech—that a future fund has been proposed; that is, we should put some of the state's wealth into a fund to support future generations.

It is interesting to note that, on the day premier Rann resigned, the Hon. Iain Evans moved that the Economic and Finance Committee investigate a sovereign wealth fund for South Australia. It was not rejected at that point. The Labor Party representative said that they would have to take it to caucus. Of course, in the next week or so, we then have the Hon. Jay Weatherill and his new team installed. It went before caucus and they rejected it. They decided it was not important enough. I think the minutes of 11 November show that it was rejected and voted down by the Economic and Finance Committee. It is rather bemusing to think: where has this thought come from?

We also see a government that is selling the forests, although we have a minister who, as we saw today in question time, does not really understand much at all about that particular industry. She has obviously gone running to her office now hanging her head in shame that she does not understand the industry that she is paid very, very well to represent. That is a future fund in itself. It has been there for in excess of 100 years. It has been building up; it is something the state government has invested in. It is, if you like, a future fund. It is an asset in which we have invested and from which we get a dividend—

The Hon. G.A. Kandelaars interjecting:

The Hon. D.W. RIDGWAY: I didn't hear the interjection from the Hon. Gerry Kandelaars, so he might like to speak louder next time so that I can hear it. The Premier talked about—

The Hon. G.A. Kandelaars: Like ETSA.

The Hon. D.W. RIDGWAY: At the end of the day, the sovereign wealth fund or future fund which the Premier is talking about is like having an income earning asset. We have an income earning asset with the forests, so I do not understand why, on the one hand, we would want to sell

a future fund which we have developed and supported over the best part of a century, yet, on the other hand, say that we are going to establish a future fund.

It is also interesting to note that one of the major investors in that is the federal government's Future Fund. The federal government considers investing in forests a sensible investment for its sovereign wealth fund, yet we think it is a sensible thing to sell. It really makes a mockery of this government's financial credibility when it thinks it can sell a forest to pay for its reckless financial management.

I think the very genuine concern is that the minister who is in charge of the forests has no idea of the length of rotations. People might think that there does not seem to be much difference between 25, 30, 32 or 35 years. But in the end, that is all about the diameter of the logs and the yield of cubic metres of timber per hectare, and those last few years certainly make the forest much more sustainable. So, I would be very, very concerned and alarmed if any rotation less than 32 years is agreed to when that particular asset is sold.

I want to pay tribute to and congratulate the Hon. Gerry Kandelaars, because he is the first member of parliament I have heard in this place pay a compliment to the Liberal Party. When he talked about the PACE program, he spoke about the fact that, over the last 20 years, we have had a program to get companies to invest in exploration. So, he is the first one to actually acknowledge that. I think—

The Hon. S.G. Wade: He is a fair man.

The Hon. D.W. RIDGWAY: Yes, I was pleased yesterday. He made some other mistakes, but that is one that he did not make. So, when we talk about mining, there has been a long-term bipartisan approach to that sector. We had a program called Targeted Exploration Initiative (TEISA). Of course, when the government came to office, it scrapped that program, renamed it PACE and relaunched it—

The Hon. T.J. Stephens: And called it their own.

The Hon. D.W. RIDGWAY: —and called it their own—and that is one of the standard things that you do in government; that is, when you win office—

An honourable member interjecting:

The Hon. D.W. RIDGWAY: Well, it was working prior—you scrap it all. Then you let the dust settle, and then you choose the things that are working, rename them and relaunch them and claim them as your own. But he did pay tribute to the fact that a program had been in place for about 20 years, albeit called different things at different times, and it has served the state well, and it will continue to serve the state well.

He also talked about the fact that it is not just luck that we have this mining industry that is set to boom and that it is because of all the hard work of the Labor Party. Well, I do not think it is due to all the hard work of the Labor Party. I know you are nodding your head, Mr President, but you were probably still busy in the shearing sheds of the South-East when your former parliamentary colleagues opposed the first indenture to establish the Olympic Dam mine.

The Labor Party is a latecomer to mining at Olympic Dam. Really, at the end of the day, we all know that will be the jewel in our crown. In fact, it will be the crown, I suspect, and all the other mines will be the jewels around it. But it was not just luck; it was a lot of hard work and effort put in by the industry 30 years ago by a Liberal government—

The Hon. S.G. Wade: Normie Foster.

The Hon. D.W. RIDGWAY: Normie Foster and also David Tonkin and his team. On opening day, I asked the Hon. Russell Wortley a couple of questions in relation to planning approvals. It is a bit typical of the government. We have this mining boom, and we think, 'Fantastic. BHP has passed the indenture.' Everybody has their fingers crossed that the green button is going to be pressed and away we go on the mining boom.

But when I visited those areas in the outback, the areas of Roxby Downs, Andamooka, Marree, Copley, Lyndhurst and Leigh Creek have a real concern. They are desperate to get their share of the mining boom. BHP is going to build its own village and do its own thing. There is all the ancillary development that happens around that area, and they cannot get development approvals. There are insufficient personnel and insufficient resources being made available in that area. It is

outside of council areas, so it is not a council responsibility. All of the planning decisions are made by Planning SA and development approvals are done here.

I raised the matter as a question to the Hon. Russell Wortley, and I have mentioned it to him privately. I have also raised it with minister Koutsantonis and minister Rau to say, 'Let's not play politics with this. This is something we need to make sure that those people have the resources there so that they can get on and build their developments and capture their little slice of the mining boom.' The development I mentioned, which was in Andamooka, I think I did quote the figure of a $7 million investment. I have now been told that it is closer to a $13 million investment. Any profit from that—every cent of it—will stay in the Andamooka community or in the South Australian community.

With BHP, as wonderful an organisation as it is, there will be a lot of fly in and fly out. The shareholders who get dividends are all around the world, yet these little developments that cluster around the big mining areas are the ones where the genuine local wealth will be created. I think the government has an obligation to make sure that all government departments—planning is just one I came across—are well enough resourced so they can assist the locals to capture their share of the action.

When I called in to Hawker it was raised with me that they still struggle with poor quality water and water supplies, so it is great to talk about the mining boom, but we must never forget about all the other communities that have been there working hard, paying their taxes and providing support for our outback enterprises. We have to make sure that they are supported and not forgotten in this mining boom, otherwise we will have paid them a great disservice.

Advanced manufacturing was the next area to be covered. It is very easy to say, 'We are going to have advanced manufacturing.' It is very easy for Labor to talk about the type of manufacturing we are going to have. First, they have to have an advanced and sophisticated economy, a modern, understanding government, and a taxation regime that promotes competitiveness and efficiency.

Members would be aware of some recent discussion about General Motors-Holden's. During that time, a small South Australian company called Custom Coaches came to light. The South Australian Premier has given a significant automotive contract to an Asian company. Seventeen people have lost their jobs from that particular company which, incidentally, is located in the Premier's electorate. Of course, he was the minister for education when he signed off on this particular order.

It is easy for the government to talk big about providing support for Holden's and the big manufacturers, but it is the little businesses like Custom Coaches that suffer under this government. The big boys can say, 'We are in big trouble. We need to bring a new model out,' and, while some concerns are raised, by and large the community accepts that it is a lot of money but, provided there is an adequate business plan attached to it, it is probably something the government should do.

This government neglects the little businesses. Custom Coaches has been in the Hon. Jay Weatherill's electorate since 1975, so it has been there for approaching 40 years. It is interesting to note that when the government sought expressions of interest to build a new fleet of more than 50 large and medium school buses they settled on Malaysian school buses. I raised this, and minister Conlon responded by saying, 'Well, we can't just give contracts willy-nilly to South Australian companies, it wouldn't be prudent. We need to respect the South Australian taxpayers' money and get the best value for money. We have to have a competitive tender process.'

How can it be fair when our businesses are the highest taxed businesses in the nation then to say to them, 'Oh, well, we have to have a competitive tender'? These people are not necessarily competing against other Australian companies (where we are the highest taxed): they are competing against overseas companies. Mr President, it is a bit like shearing a pen of crossbred lambs versus a pen of merino lambs: to the uneducated, they are both lambs, but you know yourself that one is a lot easier to do than the other. It is a bit like fighting with one hand tied behind your back or a horse running with lead in its saddlebags. It is really, really difficult for these small businesses.

That is the key that this government has missed. They talk about advanced manufacturing, but all of those companies with employees will have payroll tax and stamp duty, and there will be a whole range of government taxes and charges that will affect small businesses and that continues to affect them. There was nothing—absolutely nothing—in the Governor's speech that said, 'Yes,

we recognise that we have got it wrong; our economy is in a mess and we are really killing small business with an uncompetitive tax regime.' There was no mention at all about any preparedness to look at how they might resolve that issue.

One of the other areas that was looked at was a vibrant city. The government has been dragged kicking and screaming to this particular issue. Of course, we saw the 30-year plan—and I might refer to it later on—but that was all about TODs, development along transport corridors and growth areas. The Hon. Paul Holloway was never able to explain why those growth areas were chosen and others rejected. In fact, on a number of occasions I asked him to table a list of sites that were looked at and rejected because they were unsuitable for growth areas, because we ended up with half a dozen or so growth areas that we saw in the 30-year plan. He was never able to do that, and I suspect that they did not do it.

It was all about the city rim, infill in some of the suburbs, transport-oriented developments, and a shift from the 30 per cent in the city and 70 per cent on the fringe to a swap with the other. But the city was always neglected, so it was the Liberals who raised the city as the number one TOD, as the number one area we should look at. I started talking about it, and Isobel Redmond made some commitments about the city about 12 months ago in relation to stamp duty, land tax and open space levies, to try to say that in government the Liberal Party would actually do something to try to attract investment, to get developments that were more affordable to get people living back in the city. This government has just talked about making it more vibrant; it has not actually put its money where its mouth is. It has done none of that.

We also need to look at some the other developments that the Governor spoke about in relation to a vibrant city. There was the riverside, or riverbank, development. It is interesting that, at the time the Liberals proposed a new inner city stadium, people like Jack Snelling, Mike Rann and others who have lower house seats wrote letters to their constituents saying that their focus was on law and order, schools, health and education. There was a PS across the bottom: 'We will not be spending any of your taxes on football stadiums for the elite in the city.' How things have changed! They have now committed us to who knows how many hundreds of millions of dollars—535, 635; who knows exactly what it will be?

Again, the riverside development was not something on the government's agenda. It was brought screaming and kicking to it, and I am not sure it is quite right. We still do not know where the footbridge is likely to go. Do we need a footbridge? Maybe we don't; maybe we can just close King William Street and people can walk down there. I am not sure that we need a footbridge; we have not seen the business case for it. We do not really quite know how all that will work.

Of course, one of the key components was the redevelopment or expansion of the Casino. I think it was yesterday that we saw artists' impressions of what the new Casino might look like. It had a rooftop pool, lots of glass; it looks pretty spectacular. However, if you read the fine print I do not believe that SkyCity is going to spend a cent unless it gets the government to look at a more level playing field when it comes to its taxation regime compared to other states. SkyCity is a big company with a board and shareholders, and the board has to be responsible to the shareholders. Why would it invest money here if it can get a better return on its investment somewhere else?

I am sure Adelaide Oval will go ahead—I think preliminary work has already started—but I am not sure about the rest of this whole riverside precinct: the bridge, the location, where it is going to land, whether the Casino will do its expansion. My understanding is that at the moment Intercontinental will only do its expansion if the Casino goes ahead with its expansion, and there has been no talk about any extra concession. In fact, Treasurer Jack Snelling said that the Casino would be dreaming if it got an extra concession on its gaming tax. So, regarding the vibrant city, I am not sure that the government is in control of anything much at all.

We have seen artists' impressions of all sorts of buildings behind Parliament House, on top of the car park, on North Terrace in front of the Intercontinental, but they are all just pipe dreams at this stage. None of it has any substance yet, and my understanding is that the government has gone out to some sort of a competition at this point, trying to come up with the final designs.

Of course, we had the announcement of a new City of Adelaide act. I hope it is a little bit better prepared than the Barossa Valley and McLaren Vale protection bills, because they clearly failed. I am not quite sure what will be in the City of Adelaide act. I did note that the Lord Mayor was up in the gallery during the Governor's speech. Maybe he has some understanding of what the government is proposing, but it is a bit like the urban renewal authority that minister Conlon announced late last year, and Premier Weatherill spoke about it last week at an industry luncheon.

As a shadow minister who has been affected, I have written numerous emails to minister Conlon's office requesting a briefing; nothing has been forthcoming.

I suspect it is a little bit like, 'Let's talk about something and hope to hell nobody asks any questions about it and we can sort of make it look like we know what we are doing,' but in actual fact, I think they are really struggling. Let's see how the new City of Adelaide act unfolds, but I will be interested to know when it will be introduced, when we will see a draft, what its effect will be and what we are trying to achieve from it. I will be interested to see.

The next area the government talked about was public safety. I think the Hon. Iain Evans in the other place said, 'What modern government wouldn't talk about public safety?' But hang on, that's right; this is the government that has been saying for 10 years they are tough on law and order and tough on bikies. In fact, premier Rann had a drugs summit in the first half of 2002. I do not believe drug use or abuse have declined at all in our state over that time. It is a real admission that this government has failed. There have been 10 years of talk but no action.

We saw yesterday the lady and her children who were in the photograph in *The Advertiser*. I cannot recall the name and, even if I could, I would not bother to name her, but she is saying, 'What we just really want is to be able to be safe in our communities.' Well, we have had a government claiming record numbers of police, with more than 4,400 to be on the beat, and 'We have the highest investment ever in the history of this state in policing,' yet we have people who do not feel safe in their communities.

I think it was the Hon. Carmel Zollo who said she was proud of the fact that she had been part of a government that, since 2002, had been tough on law and order. Then she said that in recent months she has been pretty disappointed that the community now is very scared about this turf war that has erupted between the bikies, and that the community could well be in harm's way because of it.

I was shadow minister for police for five years, and our policing model is sort of based around intelligence-led policing, but I am no longer police shadow. We have these individuals like Mr Focarelli and all of the others of his ilk who associate and operate the way they do, which is outside the law. I just cannot understand how this government can hold their head high after 10 years when this sort of behaviour is still going on in our community. Of course, they throw back, 'But you Liberals blocked our legislation in the Legislative Council.'

The Hon. G.A. Kandelaars: You have.

The Hon. D.W. RIDGWAY: Mr Kandelaars, I thought you were smarter than that. Can you not count? There are only seven of us. If the Greens, Ann Bressington, John Darley, Family First, Kelly Vincent—our honourable colleagues—thought that it was good, sensible legislation, you would have your bill. You blame the Liberals. We are but a third of the 21 members who are in here. You have an opportunity to get the others—

The Hon. G.A. Kandelaars: Did you vote against it?

The PRESIDENT: Order!

The Hon. G.A. Kandelaars: Come on, tell us: did you vote against it?

The Hon. D.W. RIDGWAY: It doesn't matter if we voted against it.

Members interjecting:

The Hon. D.W. RIDGWAY: It doesn't. It is like the Hon. Paul Holloway whingeing that he could not get his significant tree legislation through. I said, 'You have got everybody else. If they agree it's a good idea, you've got your bill.' You blame us when you do not have the capacity to convince the rest of the group of the strength of your argument; that is your failure. Ten years on—

Members interjecting:

The PRESIDENT: Order! It is not a debate.

The Hon. D.W. RIDGWAY: —all you do is blame the fact you cannot convince the seven other members of the Legislative Council. You only need four of them; you do not need them all, only four—less than the fingers on one hand: four fingers. Four people is all you need, and you have been unable to do it because of the weakness of your legislation and the weakness of your debate. So, we now have a government that, after 10 years, has failed on law and order. Speeding fine revenue has gone through the roof. We have blitzes out in our country communities where

people are fined for having mud on their numberplates. We have blitzes on jaywalking. We have changing speed limits.

I had the example recently of a young couple—I do not know what nationality, but they were of northern European extraction—across the street on Hindley Street. The traffic lights were green, the traffic was moving up and down King William Street, but the pedestrian light was red. They wandered across and there were some police officers there. I did not loiter around, but they were quite bemused as to why they would receive a fine for doing something you can pretty much do in any other capital city in the world.

I am told, 'Oh, but the police advise the community we are having a blitz on jaywalking and not obeying the pedestrian rules' but these people had just flown in from some other part of the world. I do not suppose they were advised on the plane when it landed, 'Make sure you put your fruit in the quarantine bins, and by the way, you have to be careful because we have a police blitz this week on jaywalking.'

That is where I think this whole law and order debate has failed the people of South Australia. It has been focused on areas that I do not believe make the community safer, and now we see, of course, with this recent outbreak of bikie-related type behaviour that the community, rightly, is quite concerned.

Affordable living was another of the areas that this government spoke about, and the high cost of living. The government will exacerbate the burden of living costs on working families by increasing taxes and charges without an increase in services. Electricity charges have doubled under Labor. Gas charges are up 79 per cent, and now Adelaide has the highest capital city water charges in the nation. It is a bit rich to say we are now going to focus on the cost of living and making our living a bit more affordable, when it has been this government that has imposed all these extra taxes and charges on hardworking South Australian families. It just does not make sense.

The government likes to quote the figures of the number of police in 2002, the number of crimes in 2002, and how we have more police and crime has gone down. What they do not quote is the cost of electricity, the cost of water, and the cost of gas, the things that every South Australian has to pay. If you do not break the law, you do not get a fine, but everybody needs water, power, gas; they are things that we just have to have. South Australia is the highest taxing state, pinching money from every household budget, contributing to the nation's worst economic growth and business confidence.

I now quickly move to the seventh priority which the government has identified, that of early childhood. This may be honourable, but the government seems to ignore the general predisposition young children have to get older. They go to school, perhaps university or TAFE, and then what? Instead of investing in our children and making them the highest priority for any lasting improvements in social justice and prosperity, the government is still condemning them to the almost inevitable: the move interstate to find work in other states whose premiers and treasurers run their economy better than South Australia.

More people are moving from South Australia interstate than arriving. They are going to Victoria, Queensland, New South Wales. The bureau of statistics says that South Australia had a net loss of 3,000 people in the 12 months to June last year. South Australia experienced the second highest net loss across the states and territories. The 25 to 29 year old age group had a net loss of some 700 people—that is about two people a day packing their bags and belongings and driving over the border. The 20 to 24 year old age group was a little better, with a net loss of about 500 people, but that is still nearly 1.5 a day. So much for opportunity, so much for caring for the young. Almost one in three young South Australian full-time job seekers are unable to find work.

Now I would like to turn my attention just briefly to a couple of the comments that the Hon. Carmel Zollo made in relation to the great work that the government had done building the desal plant, which I suspect is one of the main reasons that we are now seeing water prices go through the roof. She claimed that the opposition is opposed to it. You are dead right we are opposed to it; you are dead right we are opposed to a 100-gigalitre plant.

We were the people who initiated the debate on the 50-gigalitre plant. We thought that was a reasonable size, given the size of our population and the demands that would be placed on us over the next 20 years with the Hills, the Murray (even though it was in severe drought)—all the best advice we could get. A number of us travelled to a number of destinations in Australia and around the world, talking to desalination companies, and found that a 50-gigalitre plant was all we

needed. We could get it at the time for around $400 million, and it could be much quicker than the one we have got.

In fact, the Hon. Malcolm Turnbull was the federal member responsible for the environment at the time. I do not know whether he was meant to tell me this, but I am sure he will not mind my repeating it: he said that he had had a discussion with premier Rann and premier Rann had said, 'But, Malcolm, what if it rains and we don't need it—I'll look like a fool. We'll spend all that money and we won't need it. I really don't know what we should do.' The federal government was suggesting that every state should have—we can compare it with a base load of electricity generation—a base load supply of water. The federal government was supportive; premier Rann said no.

Eventually, as we know, after about 18 months to two years' delay, they decided that, yes, we will build a desalination plant and that it would be a 50-gigalitre plant. What is new? We called for that almost two years prior. Out of the blue, the decision is made to double it. Some of the work, we would acknowledge, needs to be done in preparation for the city growing over the next 30 or 40 years. Maybe with the tunnels that go out to the gulf, while we have the specialised equipment here to do that, that needed to be done when a 50-gigalitre plant was being built.

The Hon. Carmel Zollo referred to the $1.8 billion desalination plant. That is one of the major factors driving up household water prices, for something we do not need. The thing I would love to see—and I know that this government, secretive as it is, will never, ever release it—is the advice. Who gave them the advice they needed to double it? Where did that come from? Nowhere in the world for a population of one million or thereabouts that we have here, with the other sources of water—the Hills, the Murray and stormwater, as has been done in Salisbury—do they need a 100-gigalitre plant. The $64-million question—or the $1.8-billion question—is: where did that advice come from? Why was that decision made? It locks future generations into paying for a big bit of equipment they probably do not need.

Sure, I suspect that at some point in the next 30, 40 or 50 years we would possibly need a bigger desalination plant, but why spend that money up-front? Where did the advice come from? I am not a hydraulics expert, nor are any of my colleagues and nor is anyone in the government. We come from a diverse range of backgrounds, but it is specialised advice. I would love to know where that advice came from. I do not know whether it is appropriate in the Address in Reply debate to ask the Leader of the Government to reply when she sums up, but she may like to take that one question on notice as to where the advice came from and, if possible, table it so that we can actually see who gave the government that advice, because that is one of the dumbest decisions of the last 10 years.

The Hon. Carmel Zollo also talked about the new RAH and what a wonderful project it is. With the cost of living and pressures on our community, $1.1 million a day for the next 30 years after 2016 will be a burden. Sadly, some of us will probably have departed this place here and also this earth before it is paid for. I would like to think none of us will, but sadly I am sure that some of us will have by then—maybe more than some. Already we have seen that the laboratories are smaller than in the existing facility.

We are spending this incredible amount of money to replace the old hospital, but it will not be adequate to do the job. I suspect what we have seen from the government in the past, where it has talked about giving that area back to the Parklands or the Botanic Gardens, that we will see two campuses of the Royal Adelaide Hospital—the new one down here and all the bits they cannot fit in back at the old RAH. Parts of it will be knocked down, and I am sure little bits will go back to the Parklands or the Botanic Gardens. I would hope that, if the South Australian community sees fit to endorse the Liberal Party at the 2014 election, it will be us having to make those decisions. However, I suspect that the new hospital will not have the capacity to provide all the services that it should and the only overflow place would be to leave them at the old site.

The Hon. Carmel Zollo brags about those things, but those two decisions—the RAH and the desalination plant, decisions made in the last 10 years of this government—will directly impact on the cost of living in this state for generations to come.

I will quickly touch on the by-elections. The Address in Reply is not normally a time to touch on by-elections, but both you, Mr Acting President, and the Hon. Carmel Zollo mentioned Mrs Close and Ms Bettison in your Address in Reply. You opened the door, so I thought this would be an opportunity for me to discuss that.

I think the Labor Party was genuinely worried in the seat of Port Adelaide; less so in the seat of Ramsay. I know there will always be criticism that the Liberal Party did not run a candidate. Well, the Labor Party did not run one in the federal seat of Mayo. Premier Weatherill said the other day, 'I give you a commitment to run candidates in every seat; we will always contest'. That is right; they contested in the seat of Mount Gambier.

Kyam Maher was the state secretary of the Labor Party. He is not the state secretary any more. I know his mother and father; I have met them. Notwithstanding our political differences—his dad is on the council—I actually get on very well with them, and I know them quite well. Kyam Maher's mother was the candidate for Mount Gambier, which was announced about two minutes before the nominations closed. Premier Weatherill says, 'We always run candidates,' but, in some seats, they run them very low-key, almost running dead. So, I do not think any criticism could be levelled at the Liberal Party for not running a candidate.

My criticism of that whole process comes when a government of the day does dodgy deals. There are two that spring to mind. One is the decision to cancel the Newport Quays development, spending at least $5 million. I am on the select committee, with the Hon. Mark Parnell, which is looking into the Lefevre Peninsula development. We have seen a copy of the affidavit. Newport Quays and its consortia believe that they have been denied significant opportunities to make some profit. There will be significant legal battles over that. This is a decision that the government knew it was in trouble with. The people of Port Adelaide did not like it, so, straight away, they will spend $5 million of taxpayers' money to try to buy the election.

The other thing is when—and it is a desperate act—a cabinet makes a decision during a by-election to do a preference deal with another party, and that is with the Green Party. Cabinet made a decision on the Torrens Island Conservation Park. I have been to Torrens Island—

The Hon. G.E. Gago: What's this got to do with the Address in Reply?

The Hon. D.W. RIDGWAY: The Hon. Gerry Kandelaars and the Hon. Carmel Zollo spoke about the two new candidates coming to the parliament. I was not going to talk about it until they raised it.

The Hon. G.E. Gago: What's this got to do with the Address in Reply?

The Hon. D.W. RIDGWAY: They raised it. Did you interject on them and say, 'What's that got to do with it'? No.

The Hon. G.E. Gago: Did the Governor raise it?

The Hon. D.W. RIDGWAY: They raised it.

The Hon. G.E. Gago: Get on with it.

The Hon. D.W. RIDGWAY: You just do not like it because you know that it was a dodgy deal. They did a deal with the Greens. As I said, I have been to Torrens Island. I have been to the quarantine station; I have had a look at it. It is probably a sensible thing to do. Why was it not done six months ago or in six months' time? No, it is done right in the middle of an election. It is interesting to note that they have the Greens' preferences—

The Hon. T.A. Franks: It's on the website—a nine point plan, including financial counselling services, which you seem to be advocating for. What's your problem?

The Hon. D.W. RIDGWAY: At the end of the day, when the Greens preference the government of the day—which they did at the last election, and they have again—let us just remind them of some things, because this was a test. As we all know, this was a test. We knew that the government would not change, no matter who was elected.

This was a test for the Greens to say, 'Actually, we don't like what you've done in government. We don't like the fact that you are selling the forests. We don't like Mount Barker; we don't like Buckland Park. We don't like the sort of economic management that you have undertaken. We do not like seeing our businesses uncompetitive, bus contracts going to Malaysian companies.'

Another favourite one was when the Hon. Mark Parnell talked about desalinated water as bottled electricity. They had a chance to say, 'We don't like the fact that you have spent $1.8 billion bottling electricity', but no, they just sat there and preferenced the Labor Party. I am not saying that this government is without vision but that this government spends most of its time naval gazing. It

refuses to see the inevitable. This is a government without a future, ashamed of its past and very, very timid about the present.

The Hon. J.M.A. LENSINK (16:10): I would like to acknowledge the hardworking Governor, Rear Admiral Kevin Scarce AO, CSC, RANR and his wife, Liz Scarce, and congratulate him on his reappointment for an additional two years. I would like to acknowledge the great commitment that this couple have to South Australia in performance of their civic duties. They attend a great number of events in their roles. I note that Mrs Scarce is the Patron in Chief of the National Council of Women of South Australia and I had the pleasure of her company on Australia Day at their event at which I was a guest speaker.

I wonder what sort of change in landscape we have had since the last Address in Reply was delivered in this place. I think 'not much' would be the simple answer. We have had a new Premier who, following the deposition of Mr Rann, promised a different form of government. However, it is worth noting that Premier Weatherill started on day one of his new job in the parliament as a Rann cabinet minister, so he has been a part of every single bad decision that has been made.

The Hon. D.W. Ridgway: They have all got their fingers over it.

The Hon. J.M.A. LENSINK: They do indeed have all their sticky little fingers in all of them. For him to try to portray himself as somehow new Labor, Labor 2.0, I think is very high farce. Because we were going into the period with the upcoming by-elections, we saw some pretty amazing backflips, notably the Newport Quays, which my leader has referred to as well. I think it is a great shame that in all of that the boatsheds had to be lost.

It is very unfortunate that this government did not listen to the wisdom of the Legislative Council in asking for a stay of execution to retain those heritage properties, which, unfortunately, were not listed and which are gone forever, and any future development will be the less for not having them. We also had the backflip on the marine parks and a number of other things as the government sought to clean up its mess before it had to face the polls.

In terms of the content of the address, I also wish to congratulate the Governor on his delivery of what was a fairly uninspiring speech. A number of us, I think, were waiting for some sort of thunderbolt, some sort of grand announcement that would be a signal to what would be the new direction for this government and were left sadly disappointed. It was a great big yawn.

There were seven priorities, and I had to laugh at number one being the clean green food industry. There seems to be a sort of latter day Damascene conversion on that one, although I am sure that the rhetoric will not be met with any sort of genuine commitment. The irony is that food is largely produced in regional South Australia which is an area that is neglected—to provide a kind assessment to this government.

I think regional South Australia just does not feature on the agenda of this government. Agriculture makes the most significant contribution to our state's GSP, yet, at the same time, country people are facing cuts to hospital funding, roads and services, massive cuts in PIRSA. When you ask why, I think the answer was provided to us by the Minister for Agriculture in this place recently that 'these are not our punters', which is something we have always known.

There was also a reference in the speech to bikie laws. Again one has to ask what genuine commitment there is, given that this is a government that has had 10 years. I wonder how that promise to tear down all those bikie fortresses is going—not one. In relation to cost of living, water charges alone are up by some 200 per cent and rising.

We also had the call to all members to maintain proper standards. I would say to the Premier that, if he wants to call for that, he needs to look in his own backyard first. He may be lucky that Messrs Foley and Rann have just left the building. However, minister Wortley used very unparliamentary language to my leader this week, which unfortunately has not made it into *Hansard*. All members in this chamber are regularly abused by government members during question time for asking for a straight answer to a straight question, such as, 'How much does such-and-such a program cost?' So, I look forward to seeing that code of conduct.

The new Premier was at such pains to push some strange concept he has developed, that this is a decade of definition, that he sent a missive to everyone on the SAGEMS email list, which is everybody who has a Public Service email address. I am sure that they were all delighted to read the product of this government's spin machine.

We have had 10 years of hard Labor. It has recently celebrated its 10-year anniversary, although there were not too many champagne corks popped on that occasion. It has just been a litany of lost opportunities. As usual with a Labor government, they cannot help their spending habits, and they have squandered a hard-fought surplus, which was brought back into the black by our honourable colleague Rob Lucas as treasurer and Mr Stephen Baker before him. We have had unexpected rivers of gold from GST and property taxes, which propped up the government's budget in the early years, but we have reached the point where the government is running out of cash.

There have been expensive exercises in vanity, such as the new Royal Adelaide; the Adelaide Oval; the too-large desal plant, which we do not need at that capacity; and Puglia. Just today, the $1.5 million for the *Resistance* children's program, which was to tempt the producers to produce it in South Australia, may have gone down the drain; Lance Armstrong's undisclosed temptation fund; and even the proroguing of parliament has been an exercise in vanity. I am told that Mr Rann's hush deal, which was to send him on his way, now sees him being provided with an office and a driver. Mr Rann is located on the 16th floor in the State Admin Centre. So, now that he is located above the new Premier, I guess he gets to be on top all over again.

We are back to a state debt of $11 billion, which is some $2 million per day in interest, which could fund all kinds of projects, not least of which could be hospitals in Keith, Ardrossan and Moonta. As mentioned, this budget is getting very, very short on cash, so the fire sale is to take place, with the forward sale of the South-East forests and penny-pinching from such programs as the State Herbarium.

The rot is well and truly setting in, with the factional bickering and paranoia on the Labor side, with the member for Croydon FOI-ing his colleagues ministers Portolesi and Rau and now openly criticising the latter's role in the McGee case.

As my leader, Isobel Redmond, said in her speech yesterday, South Australia now has the highest taxes in Australia, the worst economic growth, the biggest decline in job vacancies, the worst building approvals, and an appalling performing workers compensation scheme which, from an unfunded liability of $59 million, has blown out again to over $1 billion.

It is no wonder that we have seen such significant swings in Labor heartland seats in the recent by-elections. Every time this government receives a rebuke, it promises to listen, so much so that it is just like a broken record. They might need an ear trumpet! I might get them one for Christmas, or one for the whole lot of them. The seat of Port Adelaide certainly had a lot of issues brewing, including Newport Quays, which has been such a balls-up. The Premier and his infrastructure minister were dishonest in their recent interviews about how much they had embraced this project. I still recall all those shots on the news of beaming ALP identities at Labor fundraisers at that site, and now they deny that they were ever in favour of it at all.

The preference deal was very disappointing, although I do not know whether the word 'disappointing' really cuts it. Time after time in this place, the Liberal Party has had more common ground with the Greens than the Labor Party, whether it is agreeing to motions, amendments to bills, or referring things for investigation. Those issues include, among others, significant trees; the EPA's secretive practices; the closure of pubs and clubs from 4 to 7am; school closures; native vegetation; waste and landfill; the Mount Barker, Glenside and St Clair developments; population; and desalination.

You have to wonder whether the Greens are fair dinkum about preferencing on merits or whether they are just into doing deals. No doubt we will hear on talkback radio all sorts of complaints about what rogues this government is on this and all sorts of issues, including Torrens Island. It is like watching someone in a bad relationship. Even when the Labor Party tries to humiliate and embarrass the Greens they still go back to them and preference them every time, so in our minds a vote for the Greens is a vote for Labor.

They also had the opportunity to preference a local candidate in there, Gary Johanson. The Greens espouse that they support grassroots politics and frequently on the Environment, Resources and Development Committee the Greens are very supportive of the local government position which is probably many times for good reason but, again, they could not help preferencing the Labor Party. So, a vote for the Greens really is a vote for Labor, and a vote for Labor is a vote for botch-ups, spending like drunken sailors and never having to say you are sorry and mean it.

Debate adjourned on motion of Hon. J.M. Gazzola.

SUMMARY OFFENCES (WEAPONS) AMENDMENT BILL

Third reading.

The PRESIDENT: I certify that this fair print is in accordance with the bill as agreed to in committee and reported with amendments, recommitted and reported with a further amendment.

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (16:22): I move:

That this bill be now read a third time.

The Hon. S.G. WADE (16:23): My understanding in relation to section 57 of the Constitution Act is that the state the bill left the Legislative Council in is the last recognised stage under the Constitution Act, so therefore the opposition is happy for the third reading to proceed.

Bill read a third time and passed.

CORRECTIONAL SERVICES (MISCELLANEOUS) AMENDMENT BILL

The PRESIDENT: I certify that this fair print is in accordance with the bill as agreed to in committee and reported with amendments.

The Hon. G.E. GAGO (Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women) (16:24): I move:

That this bill be now read a third time.

Bill read a third time and passed.

WORK HEALTH AND SAFETY BILL

The Hon. R.P. WORTLEY (Minister for Industrial Relations, Minister for State/Local Government Relations) (16:24): I move:

That this bill be now read a second time.

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

Leave granted.

The *Model Work Health and Safety Bill 2011* provides the foundation for South Australia's participation in the 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 stakeholders have been involved at every step in the process through the SafeWork SA Advisory Committee, and through other consultative forums.

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 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 of 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 co-operative 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 (the IGA). Part of what was agreed in the IGA 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 Model Act). The resulting national consultation process concluded with the finalisation of the Model Act, endorsed by the WRMC on 11 December 2009.

Importantly, the WRMC 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 to 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 (HSRs). 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 the 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 Model 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, because 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 a 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 person's private or domestic activities, or to volunteer associations as they are defined in the Model Act.

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 Safe Work 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 co-ordination 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 Safe Work Australia, have established a number of national project groups to co-ordinate 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-focussed implementation and communication strategy, to inform South Australian stakeholders 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 communications, 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 forums 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, co-operative federalism.

I commend the Bill to Members.

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 (eg, 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 (eg, 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 (eg, 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 (eg, domestic chores etc);
- individual householders who engage persons other than employees for home maintenance and repairs in that capacity (eg, 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 (eg, employed by one or more of the volunteers) carrying out work for the association (clause 5(8)). Hiring a contractor (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, high-risk work); or
- for work to be carried out at a particular place (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, treating one job applicant less favourably than another (clause 105(1)(b)); and
- certain actions relating to commercial arrangements (eg, 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 (eg, 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 (eg, 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 (eg, 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 3 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, lawyer), or a person assisting the inspector (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 (eg, 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 2 years after the offence first came to the regulator's attention; or
- within 1 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. T.J. Stephens.

TOBACCO PRODUCTS REGULATION (FURTHER RESTRICTIONS) AMENDMENT BILL

Second reading.

The Hon. R.P. WORTLEY (Minister for Industrial Relations, Minister for State/Local Government Relations) (16:25): I move:

That this bill be now read a second time.

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

Leave granted.

This Bill seeks to amend the *Tobacco Products Regulation Act 1997* and is about further protecting the community from passive smoking.

The Minister for Mental Health and Substance Abuse introduced this Bill into the other place and it was passed on 23 November 2011. I introduced this Bill into the House on 24 November. However, since that time Parliament has been prorogued and I am now reintroducing it.

We have known for a long time that second hand tobacco smoke can lead to serious health problems, including coronary heart disease and lung cancer in adults, and asthma and other respiratory illnesses in children. This Government has already taken strong steps to improve air quality for indoor environments by banning smoking in all enclosed public places, workplaces, shared areas and also in vehicles when children under 16 years are present. These measures have been very effective and well supported by the South Australian public.

We know that there is no safe level of exposure to second hand tobacco smoke, inside or outside. Research demonstrates that outdoor smoking is a potential hazard, particularly around larger numbers of active smokers and under certain wind conditions. This means that passive smoking is a risk for those who spend time in confined outdoor public places and this is especially so for children and people with a pre-existing health condition.

In 2010, 71 per cent of South Australians surveyed reported that they were concerned about exposure to someone else's cigarette smoke, while 66 per cent reported that they actually had been exposed in the previous two weeks. SA Health regularly receives complaints from the general public about smoke drift and passive smoking in outdoor public places. These include areas where smokers congregate, such as outdoor public events and bus stops.

This Bill proposes to ban smoking in a number of public areas to protect the community from the dangers of passive smoking. For this reason we want to make all covered passenger transport waiting areas free of tobacco smoke. This includes bus, tram and train stops, as well as taxi ranks and any other covered outdoor area where people need to congregate to wait for public transport. This will allow passengers to access public transport, while seeking protection from the weather, without the risk of passive smoking, due to the confined nature of covered transport stops. Given that the South Australian public are concerned about passive smoking and support smoking bans in outdoor areas, it is likely that this initiative, like others before it, will establish a self regulating norm in these areas.

This Bill being brought before the House today is also about protecting children from thinking that smoking is normal. Children are not only vulnerable to exposure to tobacco smoke, but they are also influenced by seeing adults smoking. It is proposed that smoking be banned within 10 metres of children's playground equipment that is located in a public area. This would include all playground equipment in public areas, such as parks, as well as in areas such as fast food outlets and other venues. The distance of 10 metres is in line with similar bans already introduced in Queensland and Western Australia, and being introduced in Tasmania in March 2012. In 2010, restricting smoking in children's playgrounds had the highest level of public support with 96 per cent of South Australians surveyed supporting a restriction in these areas.

With this Bill we also propose to allow local councils and other incorporated entities to apply to SA Health to have an area or event declared smoke-free. This allows the Government to respond effectively to known and unforseen localised smoking problems but also gives local councils and other bodies the flexibility to identify and apply to have a certain area or an event declared non-smoking under the Act.

The intent is that the following types of events or areas could be declared non-smoking:

- one-off, time-limited major events such as the Christmas Pageant; and
- popular public places, for example an unenclosed shopping mall.

It is not intended that this Bill be used to regulate seated outdoor drinking and dining areas that are part of the normal day to day business operations of premises.

Effective enforcement that is consistent is crucial, and so under this Bill we propose to give enforcement officers the option to issue expiations to people 15 years and over. The rationale for this is that young people are likely to congregate in the areas affected by the Bill, particularly in regard to passenger transport areas. The *Expiation of Offences Act 1996* allows for other Acts to set the minimum age of a person who can be given an expiation notice. Lowering that age to 15 years in the *Tobacco Products Regulations Act 1997* will allow for the effective enforcement of these amendments and is also consistent with the *Passenger Transport Act 1994*.

The Bill, when introduced in the other place, had a proposed implementation date of 2 January 2012. However, given that the Bill's passage was delayed due to the Parliamentary schedule late last year, this date has now changed. Should the Bill be passed by the Parliament, the provisions will be brought into operation on 31 May 2012. This is World No Tobacco Day, an appropriate date to introduce significant measures that will benefit all South Australians.

I commend this Bill to the House.

Explanation of Clauses

Part 1—Preliminary

1—Short title

2—Commencement

3—Amendment provisions

These clauses are formal.

Part 2—Amendment of *Tobacco Products Regulation Act 1997*

4—Insertion of sections 49, 50 and 51

This clause inserts new sections into the principal Act as follows:

49—Smoking banned in certain public transport areas

This section proscribes smoking in a prescribed public transport area. Subsection (5) defines what a prescribed public transport area is, namely any part of a bus stop, tram stop, railway station, taxi rank, airport or similar place that is a public place, is used, or is intended to be used, by passengers boarding or alighting from public transport and is wholly or partly covered by a roof.

The section also clarifies when a person will be taken to be in a prescribed public transport area and sets out evidentiary matters.

The maximum penalty for a contravention of the section is a fine of $200.

50—Smoking banned near certain playground equipment

This section proscribes smoking in public areas within 10 metres of playground equipment (being playground equipment that is itself in a public area).

The section also clarifies when a person will be taken to be in a public area and sets out evidentiary matters.

The maximum penalty for a contravention of the section is a fine of $200.

51—Minister may ban smoking in public areas

This section allows the Minister, by notice in the Gazette, to declare that smoking is banned in the public area or areas specified in the notice. Signs setting out the effect of the ban must be erected so as to be seen by members of the public using the area.

The section also sets out procedural matters in relation to a notice under the section, as well as clarifies when a person will be taken to be in a public area and sets out evidentiary matters.

The maximum penalty for contravening a notice under the section is a fine of $200.

5—Insertion of section 83

This clause inserts new section 83 into the principal Act allowing expiation notices for offences against the Act to be given to a child who is 15 years of age or older.

Debate adjourned on motion of Hon. T.J. Stephens.

VOCATIONAL EDUCATION AND TRAINING (COMMONWEALTH POWERS) BILL

Second reading.

The Hon. R.P. WORTLEY (Minister for Industrial Relations, Minister for State/Local Government Relations) (16:26): I move:

That this bill be now read a second time.

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

Leave granted.

One of our ongoing challenges, for the country and for this State, is ensuring that all Australians, and all students who come here from overseas to study, have access to the best available education and training that will enable them to operate and compete in a globalised world.

A key step to achieving this is by becoming more nationally consistent and rigorous in the way we register, accredit and monitor courses and providers and the way we enforce performance standards in the vocational, education and training sector (the *VET* sector).

Earlier this year, the Commonwealth Parliament passed the *National Vocational Education and Training Regulator Act 2011* and the *National Vocational Education and Training Regulator (Transitional Provisions) Act 2011*. This legislation provides for the establishment of a national regulator (the National VET Regulator) that will drive better quality standards and regulation across the Australian VET sector.

This legislation gives effect to the 2009 Council of Australian Governments (*COAG*) agreement to create a national VET regulator, responsible for registering training organisations and accrediting courses. The National VET Regulator will also regulate services to overseas students by VET providers under the *Education Services for Overseas Students Act 2000* of the Commonwealth.

The National VET Regulator will operate under a referral of powers from the States. The legislation before the House is to allow for the transfer of South Australian powers through the adoption of the abovementioned Commonwealth Acts.

The 2 non-referring states, Victoria and Western Australian, who were not signatories to the 2009 COAG agreement, will enact mirror legislation to ensure consistent application of the national standards, noting the COAG agreement that all registered training organisations wishing to operate in more than 1 jurisdiction or enrol international students will be registered through the National VET Regulator.

The matters that are being referred to the Commonwealth are limited to those necessary for the effective operation of the national regulator, combined with a further referral which will allow the Commonwealth Parliament to make amendments to the Commonwealth law in consultation with States and Territories.

There will be consequential amendments that will need to be made to the *Training and Skills Development Act 2008* arising from the referral of powers to the Commonwealth. Early in 2012, the *Tertiary Education Quality and Standards Agency Act* of the Commonwealth will also come into effect for the regulation of higher education providers. Once full transition to both regulators has been achieved, consequential amendments to the State's *Training and Skills Commission Act 2008* will be brought forward.

Funding for the National VET Regulator will be provided by the Commonwealth Government for a period of 4 years and it will then operate on a cost recovery model. There will be no budget impact on the general operating costs for the State Government resulting from the transition to the national regulator, as reductions in regulatory fee revenue will be offset by a reduction in expenditure on regulatory activities.

Following enactment of this Bill, State regulation for VET will transition to the National VET Regulator (the Australian Skills Quality Agency (*ASQA*)) toward the end of this year. The Department has been working with ASQA and the providers to ensure a smooth transition.

Establishing the National VET Regulator is one of the most significant reforms to the sector in years. It is an initiative strongly supported by VET practitioners and providers, and by employers, industry skills councils and unions. It will work collaboratively with these stakeholders and other regulators to provide targeted, rigorous and transparent compliance regulation to assure the highest quality of VET delivery for students, industry and community.

As noted in the introduction, ensuring rigorous quality assurance of vocational education and training is critical to increasing the skills and qualifications of individuals which will drive up the productivity of our economy. Moving towards a national regulation system is critical to achieving this outcome. It will maximise the efficacy and efficiency of the VET sector, and provide greater assurances about the quality of our VET providers and the outcomes of that provision, which will benefit training organisations, learners and industry.

This Bill before you is a critical step along this path and I therefore commend it to the members of this House.

Explanation of Clauses

1—Short title

This clause is formal.

2—Commencement

This clause provides that the measure will come into operation on a day to be fixed by proclamation. The clause also disapplies the operation of section 7(5) of the *Acts Interpretation Act 1915* in relation to the measure.

3—Definitions

This clause sets out the definitions of words and phrases used in the measure. See, in particular, the following definitions:

National VET legislation means—

(a) the *National Vocational Education and Training Regulator Act 2011* of the Commonwealth; and

(b) the *National Vocational Education and Training Regulator (Transitional Provisions) Act 2011* of the Commonwealth,

as in force from time to time;

relevant version of the National VET legislation means—

(a) the *National Vocational Education and Training Regulator Act 2011* of the Commonwealth; and

(b) the *National Vocational Education and Training Regulator (Transitional Provisions) Act 2011* of the Commonwealth,

as in force immediately before the commencement of clause 4 of the measure.

4—Adoption of National VET legislation

Clause 4 provides that the *relevant version of the National VET legislation* is adopted within the meaning of section 51(xxxvii) of the Constitution of the Commonwealth. The adoption will have effect only for the period beginning when this clause commences and ending at the end of the day fixed for that purpose (if any) under clause 5.

5—Termination of adoption

This clause makes provision for the Governor, by proclamation, to fix a day as the day on which the adoption is to terminate. Such a proclamation may be revoked by further proclamation (provided that the revocation proclamation is published before the day fixed in the earlier proclamation for termination of the adoption).

6—Referred VET matters

This clause sets out each of the matters that is a *referred VET matter*. These are as follows:

- the registration and regulation of vocational education and training organisations;
- the accreditation or other recognition of vocational education and training courses or programs;
- the issue and cancellation of vocational education and training qualifications or statements of attainment;
- the standards to be complied with by a vocational education and training regulator;
- the collection, publication, provision and sharing of information about vocational education and training;
- investigative powers, sanctions and enforcement in relation to any of the above.

The clause then provides that a referred VET matter does not include the matter of making a law that excludes or limits the operation of a State law (that is, any Act of the State or any instrument made under such an Act) to the extent that the State law makes provision with respect to—

- primary or secondary education (including the education of children subject to compulsory school education); or
- tertiary education that is recognised as higher education and not vocational education and training; or
- the rights and obligations of persons providing or undertaking apprenticeships or traineeships; or
- the qualifications or other requirements to undertake or carry out any business, occupation or other work (other than that of a vocational education and training organisation); or
- the funding by the State of vocational education and training; or
- the establishment or management of any agency of the State that provides vocational education and training.

7—Reference of matters

This clause makes provision for the *amendment reference*. Each referred VET matter is referred to the Parliament of the Commonwealth, but only to the extent of the making of laws with respect to such a matter by making express amendments of the National VET legislation.

The reference of a matter under this clause has effect only—

- if and to the extent that the matter is not included in the legislative powers of the Parliament of the Commonwealth (otherwise than by a reference under section 51(xxxvii) of the *Constitution of the Commonwealth*); and
- if and to the extent that the matter is included in the legislative powers of the Parliament of the State.

The amendment reference will have effect until terminated under clause 8.

8—Termination of reference

This clause makes provision for the Governor, by proclamation, to fix a day as the day on which the amendment reference is to terminate. Such a proclamation may be revoked by further proclamation (provided that the revocation proclamation is published before the day fixed in the earlier proclamation for termination of the amendment reference).

9—Amendment of Commonwealth law

This clause is included to avoid doubt and provides that it is the intention of the Parliament of the State that—

- the National VET legislation may be expressly amended, or have its operation otherwise affected, at any time by provisions of Commonwealth Acts the operation of which is based on any legislative powers that the Parliament of the Commonwealth has on account of a reference of any matters, or the adoption of the relevant version of the National VET legislation, under section 51(xxxvii) of the Constitution of the Commonwealth; and
- the National VET legislation may be expressly amended, or have its operation otherwise affected, at any time by provisions of Commonwealth Acts the operation of which is based on legislative powers that the Parliament of the Commonwealth has apart from a reference of any matters, or the adoption of the relevant

version of the National VET legislation, under section 51(xxxvii) of the Constitution of the Commonwealth; and

- the National VET legislation may have its operation affected, otherwise than by express amendment, at any time by provisions of National VET instruments.

10—Effect of termination of amendment reference before termination of adoption of Commonwealth Acts

This clause provides that if the amendment reference is terminated but the adoption of the relevant version of the National VET legislation is not terminated, the termination of the amendment reference does not affect—

- laws that were made under the amendment reference (but not repealed) before that termination (whether or not they have come into operation before that termination); or
- the continued operation in this State of the National VET legislation as in operation immediately before that termination or as subsequently amended or affected by—
  - (i) laws made under the amendment reference that come into operation after that termination; or
  - (ii) provisions referred to in paragraph (b) or (c) of clause 9.

Accordingly, the amendment reference continues to have effect for the purposes of this clause unless the adoption is terminated.

Schedule 1—Ancillary arrangements

1—Interpretation

This clause contains definitions of *Commission* and *National VET Regulator* for the purposes of clause 2 of the Schedule.

2—Commission may provide information and assistance to National VET Regulator

This clause provides that, despite any other Act or law, the Commission is authorised to provide to the National VET Regulator or an agency of the Commonwealth (whether at the request of the Regulator or the agency or otherwise)—

- such documents and other information in the possession or control of the Commission that may reasonably be required by the Regulator or agency in connection with the performance or exercise of its functions or powers under the National VET legislation; and
- such other assistance as is reasonably required by the Regulator or agency to perform or exercise a function or power under the National VET legislation.

3—Regulations

This clause provides the Governor with the ability to make regulations of a saving or transitional nature consequent on—

- the enactment of this measure; or
- the transition from the application of provisions of the *Training and Skills Development Act 2008*, or any other law of the State otherwise relating to vocational education and training, to the application of provisions under the National VET legislation.

Debate adjourned on motion of Hon. T.J. Stephens.

ARKAROOLA PROTECTION BILL

Second reading.

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (16:27): I move:

That this bill be now read a second time.

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

Leave granted.

The Arkaroola area is a significant place for the Adnyamathanha People, whose connections with this place remain strong and vibrant.

It is a region defined by towering granite peaks, razor back ridges, and deep gorges. Arkaroola also encompasses ancient sea beds which hold fossils that are up to 650 million years old. Geologists have stated that the ancient Arkaroola Reef is of tremendous scientific importance and includes a reef framework containing calcified organisms that may represent the remains of the oldest animals on Earth. Arkaroola is also home to over 160 species of birds, and the rare Yellow-footed Rock-wallaby. It is a unique combination of superlative natural phenomena.

The purpose of this legislation is to protect the cultural, natural and landscape values of Arkaroola in perpetuity. This legislation will establish the Arkaroola Protection Area, and provide for the proper management and care of that area. The legislation also specifically prohibits all forms of mining activities within the Arkaroola Protection Area.

This unprecedented legislation, in conjunction with other measures initiated by the Government, will result in Arkaroola being protected for all time.

In 2009 a draft policy document, *Seeking a Balance*, generated considerable interest across the community, with nearly 500 submissions being received, the vast majority of which were overwhelmingly in favour of protecting Arkaroola from mining.

Having been delivered this unequivocal message from the people of South Australia (and further afield), on 22 February 2011, the Government undertook a consultation process on identifying the best conservation management framework for Arkaroola. In doing so, we considered all of the available options to preserve the iconic Arkaroola area, including a definitive ban on mining at Arkaroola.

The Minister for Mineral Resources Development and I personally undertook consultation with directly affected parties. This included the Adnyamathanha People, the Arkaroola and Mount Freeling Pastoral Lease Holders and all exploration and mining companies with an interest in the area. Following this process and Cabinet consideration of the consultation outcomes, the conclusion was that exploration and mining access should be excluded from a defined area of Arkaroola as a first step in protecting its landscape and conservation values, and to meet community expectations.

Accordingly, on 22 July 2011, the Government announced a series of measures that will permanently protect Arkaroola. The first step, as an interim measure, has been to reserve the land from the operation of the *Mining Act 1971* and the *Opal Mining Act 1995*. His Excellency, the Governor in Executive Council, made these proclamations on 29 July 2011.

The Premier has also recently written to the Prime Minister, the Hon Julia Gillard MP, signalling the South Australian Government's intention to pursue the listing of Arkaroola on Australia's National Heritage List and to seek to have the area inscribed on the World Heritage List. As a precursor to these National and World Heritage nominations, the Premier also recently nominated Arkaroola to be assessed for its State heritage significance and the South Australian Heritage Council has since resolved to enter Arkaroola in the South Australian Heritage Register.

The most powerful protection, however, comes from this special purpose legislation. The *Arkaroola Protection Bill 2011* will protect the cultural, natural and landscape values of a defined area to be known as the Arkaroola Protection Area, and will exclude exploration and mining within the area.

These measures in combination will give Arkaroola the highest level of protection that can be afforded by the Parliament of South Australia.

An important element in considering this Bill is that the Arkaroola Protection Area will meet international and national standards for what is considered a protected area. The International Union for the Conservation of Nature has devised a series of protected area management categories, which are recognised by the Convention on Biological Diversity as a way of categorising the incredible variety of protected area management types in the world.

Indeed, not only will it meet the IUCN definition of a protected area, but the Arkaroola Protection Area will specifically meet the definition of a 'category II National Park' under the IUCN framework. This Bill is therefore unique in enabling us to establish the Arkaroola Protection Area so as to have the same legal status in South Australia as a National Park under the *National Parks and Wildlife Act 1972*, as well as being internationally recognised as a protected area.

The Bill spatially defines the Arkaroola Protection Area, via a deposited plan that will only be capable of amendment by further Act of Parliament.

Through its objects the Bill provides for the conservation of features of cultural and natural significance, including the conservation of habitat, ecosystems, biological diversity, geological features and landscapes.

The native title rights of the Adnyamathanha People will be fully respected by this legislation, and Aboriginal heritage will continue to be protected. Accordingly, the Bill has a specific provision to support the conservation of objects, places or features of cultural value to the Adnyamathanha People. Rather than affecting the determined native title rights of the Adnyamathanha, this legislation supports the continued existence, enjoyment and exercise of those rights.

The Bill contains objects to support scientific research and environmental monitoring that is in keeping with the other objects of the Bill. It also contains an object to foster public appreciation, understanding and enjoyment of the cultural and natural features of the Arkaroola Protection Area.

To ensure the proper management and care of the area, the Bill requires that the Minister for Environment and Conservation must develop a management plan for the Arkaroola Protection Area. The management plan must be consistent with, and seek to further, the objects of the proposed *Arkaroola Protection Act 2011*.

The management plan will be an expression of policy and does not in itself affect rights or liabilities. It will, however, be a powerful tool in establishing the rules relating to matters such as grazing and incompatible development within the area. Significantly, the Bill requires any person or body involved in the administration of any

other Act to exercise their powers and functions in relation to the Arkaroola Protection Area in a manner that is consistent with and seeks to further the Arkaroola management plan.

The role of the management plan is further strengthened by the requirement for the Minister responsible for the administration of the *Development Act 1993* to review any Development Plan relating to the Arkaroola Protection Area to ensure its consistency with the management plan.

Preparation of the management plan will commence once this legislation has passed. In order that the native title rights of the Adnyamathanha people remain unaffected, the management plan must be developed in a manner which is not inconsistent with the continued exercise and enjoyment by the Adnyamathanha People of their determined native title rights and interests. The Bill, therefore, requires that the Adnyamathanha People (and all other persons or bodies holding an interest in the area) be consulted about, and be involved in, developing the management plan.

The Bill specifically provides that no mining rights or operations or regulated activities under the *Mining Act 1971*, the *Opal Mining Act 1995* or the *Petroleum and Geothermal Energy Act 2000* can be acquired or exercised in relation to land within the Arkaroola Protection Area. The definition of this land is the same as that contained in the *Acts Interpretation Act 1915* and will include the subsurface land within the area. This includes both existing and future operations and activities related to exploration or production.

The unique nature of the region justifies the decision to end mining access at Arkaroola but suggestions that this decision will increase South Australia's sovereign risk are clearly refutable. This Government remains unashamedly pro-mining.

The decision to ban mining in a small, clearly defined area of the State does not change the overall ground rules for mining access in the South Australia, nor does it have any implications beyond Arkaroola—hence the need for special purpose legislation relating only to Arkaroola.

The intent of the proposed legislation is only to prohibit exploration and mining within the Arkaroola Protection Area—if a tenement boundary crosses into the Arkaroola Protection Area, only that part of the licence within the Arkaroola Protection Area will not be available for exploration and mining. Mining operations or regulated activities under a mining Act will remain permissible in the part of the licence not within the Arkaroola Protection Area.

The Bill also includes the provision to allow the Governor to make such regulations as are contemplated by, or necessary or expedient for the purposes of, the proposed legislation.

The Bill also makes related amendments to:

- the *Development Act 1993*, so that the Planning Strategy will be taken to include the objects of the proposed *Arkaroola Protection Act 2011*, and to establish arrangements for the amendment of the development plan to ensure consistency with the proposed *Arkaroola Protection Act 2011;*
- the *Natural Resources Management Act 2004* so that the Regional NRM plan, when adopted (or amended), is to be consistent with the management plan for the Arkaroola Protection Area; and
- the *Pastoral Land Management and Conservation Act 1989* so that pastoral leases relating to land in the Arkaroola Protection Area will include conditions requiring the lessee to use that land in accordance with the management plan.

The *Arkaroola Protection Bill 2011* and the related initiatives provide the framework by which we will protect an iconic part of South Australia for future generations to enjoy and appreciate.

Explanation of Clauses

1—Short title

2—Commencement

These clauses are formal.

3—Interpretation

This clause defines certain terms used in the measure.

4—Objects

This clause sets out the objects of the measure.

5—Administration of Act

The administration of the measure is to be committed to the Minister administering the *National Parks and Wildlife Act 1972*.

6—Interaction with other Acts

Except where the contrary intention is expressed, the measure is in addition to and does not derogate from other Acts.

7—Native title

This clause confirms that the measure is not intended to affect native title rights existing over the Arkaroola Protection Area.

8—Management plan

This clause provides for the development of a management plan for the Arkaroola Protection Area. Whilst the management plan is an expression of policy and does not, of itself, affect rights or liabilities, the provision requires persons and bodies involved in the administration of Acts to act consistently with, and to seek to further, the management plan in exercising powers and functions in relation to the Arkaroola Protection Area.

9—Review of Development Plans

This clause requires that the Minister responsible for the administration of the *Development Act 1993* ensure that any Development Plan under that Act that relates to the Arkaroola Protection Area, or a part of the Area, is reviewed within 6 months after publication of the management plan for the purpose of determining whether any amendments should be made to the Development Plans to promote consistency with the management plan.

10—Prohibition of mining operations and regulated activities

This clause provides that after the commencement of this section, rights to undertake mining operations or regulated activities cannot be acquired or exercised pursuant to a mining Act in respect of the Arkaroola Protection Area (despite any other law). The clause also makes express provision to the effect that nothing in the Act affects the rights of an adjacent tenement holder in respect of any land comprised in the tenement that is outside the Arkaroola Protection Area.

11—Regulations

This clause provides for the making of regulations for the purposes of the measure.

Schedule 1—Related amendments

Part 1—Preliminary

1—Amendment provisions

This Part is formal.

Part 2—Amendment of *Development Act 1993*

These related amendments would ensure that the objects of the measure are incorporated in the Planning Strategy and make provision in relation to amendment of Development Plans to promote consistency with the management plan.

Part 3—Amendment of *Natural Resources Management Act 2004*

This related amendment requires a regional NRM plan to be consistent (as far as practicable) with the management plan under the measure.

Part 4—Amendment of *Pastoral Land Management and Conservation Act 1989*

This related amendment provides for the inclusion, in relevant pastoral leases, of land management conditions providing for the lessee's obligation to use the land in accordance with the management plan. Under the existing section 22(1a) of the Act, this condition will be taken to be a condition of the existing pastoral leases, but may be varied by the Board if the variation of condition is accepted by the lessee (see section 26 of the Act).

The Hon. M. PARNELL (16:28): The Greens welcome this legislation to protect the Arkaroola Wilderness Sanctuary from inappropriate development, including mining. The decision made by the government last year was the right decision, and it was also a decision that was welcomed by the community.

Members are now well aware of the importance of Arkaroola; we have been debating it in this place for the last five years. We all know that Arkaroola is an important habitat for native animals, it has important vegetation, and it is a geological wonderland that is used by students from around the world to study the origins of our planet and the origins of life on our planet.

We know many of the species of plants and animals there are rare and endangered and we also know that we do not actually know everything that is there. In fact, it was as recently as 2010 when the first new species of frog to be identified in South Australia in 45 years was found at Arkaroola. Certainly, from my discussion with the scientists, they know that there is a lot more there yet to be discovered. It is a very important part of South Australia and the Greens are delighted that we are now moving to entrench the commitments that have already been made to protect this area into legislation.

I first raised this matter in state parliament back in 2007. At that point, I introduced the National Parks and Wildlife (Mining in Sanctuaries) Amendment Bill. As members might recall, the Arkaroola Wilderness Sanctuary is a declared sanctuary under the National Parks and Wildlife Act. It is not the most common categorisation of protected area and, certainly, in terms of sanctuaries in South Australia, Arkaroola, by area, represents 60 percent of sanctuaries. That bill failed.

Since 2007, I have raised the protection of Arkaroola in this place dozens and dozens of times. I have introduced stand-alone bills. I have introduced amendments to the Mining Act. I have asked numerous questions, made matters of interest speeches and moved motions for the protection of Arkaroola. As members will recall, just last year on 8 June, a couple of days after World Environment Day, the Legislative Council, in its wisdom, passed a Greens motion calling for Arkaroola to be protected.

I will just remind members that the motion, voted on 8 June 2011, called on the state government 'to urgently guarantee permanent protection for the iconic and majestic mountains of Arkaroola'. Now, people sometimes wonder whether successful motions in the Legislative Council have much of a bearing on the decisions of executive government, but I think by that stage the government realised that there had been enough mucking around and it was time to actually stand up and protect Arkaroola once and for all.

So, I was delighted to personally congratulate and thank the premier. When I say personally, I think by Twitter was the approved format in those days, but I have since spoken to the former premier and I certainly acknowledged that this was the right call for the government to make. So, having been fighting for this protection for five years, the Greens are now delighted that the end of the campaign is now in sight. Whilst it has been a frustrating exercise waiting for the government to do the right thing, we are now almost there. Here is a bill that will enshrine protection.

I also have no doubt that, once we have got this bill through the parliament, the scientific investigations that need to be put in place to investigate Arkaroola better will be done and that we will eventually see a nomination for World Heritage status for Arkaroola. My experience with World Heritage nominations is that some of them are a bit half baked. This one, I think, is the full bottle. I think Arkaroola, on any assessment, is a special place of global significance.

I hope that the state government, in conjunction with the commonwealth government, acts with all haste to meet the next deadline. As I understand it, there is a date in February each year when World Heritage nominations are lodged and I think we should be aiming for February 2013.

I briefly want to mention the issue of the government decision to compensate Marathon Resources for not being able to mine in the Arkaroola area. I make no bones about the fact that I think the government made the wrong call in that regard: 5 million to a cowboy operation. I am not the only person who has used the word 'cowboy'. The former premier used that word as well.

This is a company that is not entitled under law to compensation and, by their behaviour, they do not under any moral test deserve any compensation. I think and the Greens believe that $5 million could be far better spent in so many ways. We can talk about Keith hospital, we can talk about unmet needs in disability, we can talk about education—the list is endless of better ways of spending $5 million than handing it over unnecessarily to an undeserving mining company.

I do need to take this opportunity to mention that the mining minister, the Hon. Tom Koutsantonis, has been fairly loose with the truth when he has debated me and made comments on radio. He seems to delight—and I think that his predecessor did as well—in simply saying, 'Well, those Greens are just anti-mining.' If you say something often enough, no doubt within some sectors of the community it might stick.

This is not about being anti-mining. Protecting Arkaroola is about protecting our important places. As I have said in this place many times before, the vast bulk of South Australia is open for mining. Three-quarters of our national parks, by area, are open for mining. Most of the Aboriginal freehold land is open for mining. There is only a small number of special places that are protected, and Arkaroola is now being added to that list. About 95 per cent of the state is available for mining.

So, protecting Arkaroola does not equate to being anti-mining. If the minister had been a bit more accurate he would have confined his remarks about the Greens to uranium mining. We make no bones about the fact that we do not support uranium mining. In fact, just this week I attended a talk at the University of South Australia by former diplomat Richard Broinowski. The topic of his talk was 'Fukushima and the future of nuclear power'.

Members might be aware of the former diplomat Mr Broinowski's views. He has thoroughly researched this industry over many years, and his assessment is that many countries are now backing away from nuclear energy at a very rapid rate of knots. The connection, of course, between South Australian uranium and the Fukushima disaster is that there is every likelihood—in

fact, it is as close to a certainty as you can get—that South Australian uranium is implicated in that nuclear disaster.

We know that the Tokyo Electric Power Company is the biggest buyer of Australian uranium. We know that most Australian uranium comes from Olympic Dam. It comes from South Australia, and therefore we have that direct link to Fukushima. I do not propose to go into it any further than that. If members want to look at my contribution to the Olympic Dam expansion legislation, I put a lot more facts on the table at that point.

The other point that has come out in the debate over the compensation package to Marathon Resources is this idea—it is a fact, in fact—that permission to explore does not equal permission to mine. The government has acknowledged that and yet it still saw fit to offer $5 million to Marathon Resources. There is another way of looking at this whole issue, and that is to have a look at Marathon Resources, their track record and their history, and under any reasonable interpretation you have to say that they have form for making stupid investment decisions. They have form for trying to go into places where on no reasonable assessment are they ever going to be allowed to get away with mining.

The first example, and one some members might be aware of, goes back to 2006, when they were seeking to explore for uranium at Yankalilla, near Myponga. Local residents were up in arms. We are talking about an area about 10 kilometres from the Myponga reservoir, and in the end the premier stepped in and basically said that there would be no mining of uranium while he was premier. In fact, an interesting article at that time (I think it was in the *Victor Harbor Times*), was written by one Amy Brokenshire who, I am reliably informed, is daughter of our honourable colleague. In her article on 5 October, in relation to Marathon Resources she says:

> The company has issued a 'Notice of Entry' to landowners on the Yankalilla side of Myponga but have said their project is purely for research and they do not plan to open a uranium mine.

It goes on and quotes the Chief Executive Officer of the company:

> We are not specifically looking for a mine. We don't expect to find a mine significant enough to be able to develop. The area demands to be looked at because we know mineral resources have been found in the area before.

What do these people take us for? The residents were not fooled. The residents knew that this was not some philanthropic, geological, public-interest exercise on behalf of the company. They were looking for minerals and, if they found them, they wanted to mine them. They did not have any inclination, it seems, that they were up against a massive battle to try to get a uranium mine so close to Adelaide and in one of our prime food producing areas.

It was interesting that former premier Mike Rann's response was that 'his cabinet would never approve a uranium mine anywhere near the Myponga Reservoir'. The quote from the premier's statement was:

> Under Don Dunstan's 1971 Mining Act companies have a legal right to explore, but while I'm premier of the state there will be no uranium mining established anywhere near the Myponga Reservoir.

So, Marathon Resources clearly did not learn from that exercise. It has gone away from the Fleurieu Peninsula and gone up to another area where they must have known that they had Buckley's chance of getting permission to mine. They have gone into one of the most well-loved, iconic outback wilderness areas, the mountains of Arkaroola.

I want to also mention some of the amendments I have foreshadowed—I think they have been tabled, and we will debate them in the next week of sitting, as I understand. Because this piece of legislation is a stand-alone piece of legislation, that makes it all the more important to get it right because of the precedent it sets. One of the things I want to make sure we get right in this legislation is that we provide proper recognition for the Adnyamathanha people, who have responsibility for this part of our state. That is what the Greens' amendments attempt to do.

The words in the legislation are very important, and we need to make sure we get them right. Last week I travelled to Port Augusta to meet some of the Adnyamathanha people. I met with the Anggumathanha Adnyamathanha Elders, a group also known as the Camp Law Mob, to talk about a range of issues, including this legislation before us to protect Arkaroola.

I have to say that it was an absolute privilege to be in a room with such dignified, graceful and wise South Australians. They really do care about Arkaroola. They feel a great sense of responsibility to Arkaroola and, as one of the people said to me, 'We might live in towns, we might shop in supermarkets, but this is our country and we need to look after it'.

I take the opportunity to put on the record my thanks to the Aboriginal people I met: Enice, Vera, William, Cheryl, Vicky, Reg, Wilfred, Ivan, Gil, Linda, Rin, Rhonda, Lil, Martha, Charlie, Lesley and Deidre, as well as Linda and Krystal, for meeting with me and for imparting their deep sense of responsibility and custodianship of their sacred lands.

The Adnyamathanha Elders are scattered throughout South Australia: Port Augusta, Beltana, Quorn, Mallala and Gladstone are some of the places they are now living, but according to the co-ordinator of their group, Aunty Enice Marsh, 'they are all in the same boat when it comes to protecting our land'. The Adnyamathanha people have a long and evolving relationship with the land and they deserve an opportunity to help shape the management of this area into the future.

I should say also that I have had a discussion with Vince Coulthard of the Adnyamathanha Traditional Lands Association, and we have to acknowledge that that group are the formal native title holders, and they are a key part of any future of Arkaroola as well.

In relation to the camp law mob that I met with last week, these are people who are descended from elders who have all championed and opposed the restriction of mining in the sacred lands of Arkaroola. As they said to me, they were brought up to follow their father's law, and they still follow it. They call it camp law. As one person said to me:

> Our fathers sat us down and said 'no mining at Arkaroola'. The boys were told by their fathers, the grandmothers and mothers as well to their girls—you must protect.

Certainly these Aboriginal people expressed strong concerns about Arkaroola, but they also expressed very strong concerns about the Four Mile mine and Beverley, as well as the activities of Marathon Resources. One person said, 'I can't take my kids anywhere I used to go 'cause there is mining activity everywhere'. Another said, 'I am no longer able to drink water out of the creek'. Another one said, 'We crave for water in our creeks but now it's all polluted'. For these people, the area around Mount Gee is regarded as Anngurla Yarta, which is spiritual land.

One of the people I met, Uncle Gil Coulthard, who has been an important voice in favour of protection, talked with reverence about the importance of Mount Painter near Mount Gee. He said, 'My forefather was born just near Mount Painter'. When we were talking about the potential for mining in different locations, he said:

> You can't break the connection between the land. Once you put a tunnel through one mountain, the spirit is ripped out of it.

I should also mention that these elders have a good and happy connection and a lot of respect for Marg and Doug Sprigg, and that is a reciprocated relationship.

What I seek to do through these amendments is make sure that the minister consults all relevant Aboriginal people. In that way, the chance of things falling through the crack will be reduced and the chance for the best possible management plan will be enhanced.

There are really only two amendments that I have put forward. The second one is to insert the word 'spiritual' into the description of values that are sought to be protected by this legislation and by the ban on mining. The word 'culture' is there, but that is a term that is debatable. You have to have continual practice of your culture in order for it to be recognised. If culture is not continually practised, it can often be challenged, but the spiritual values are enduring, and they continue on. So, I think that is an important recognition. Spirit is inherent, and I think it more appropriately acknowledges the enormous importance of and the deep connection to this region that the elders have.

A number of other issues came out of the meeting which I do not need to go into in detail now. I know that there are concerns about the way native title works. One of the people said:

> I put in for native title because I thought it would protect our rights. Now it is being exploited by mining companies.

I think that is a debate that we have to continue. I also understand now that the Aboriginal Heritage Act is likely to come before us at some stage, and I think that will be an important occasion on which to debate some of these issues as well and make sure that we get the best possible legislation. With those words, the Greens are delighted that we have this legislation before us. It is the culmination of many years of work by many people, and we look forward to the committee stage of the debate.

The Hon. J.M.A. LENSINK (16:49): I rise to indicate the Liberal Party's support for this bill. Arkaroola and the protection of it is a matter that has been debated several times in these

chambers in recent years. I apologise to the council if I have made some of these comments before, but I think it is important to place them on the record again in relation to this bill, which will provide ongoing protection for the Arkaroola Wilderness Sanctuary.

A number of Liberal members visited Arkaroola in 2010, I think it was in August, including our leader Isobel Redmond. There were probably nine of us all up, and we were very grateful to the Sprigg family and the locals who showed us around. We were able to come to a good understanding of what the unique values of that special place are and the need to protect it for future generations.

The most environmentally and geologically significant parts of Arkaroola fall within what is called an environmental class A zone. This zone sets out the conditions under which mining activities may be permitted; that is, 'that a deposit's exploitation is in the highest national or state interest that all other environmental, heritage or conservation considerations may be overridden'. The potential uranium deposit at Mount Gee in Arkaroola is supposedly approximately some 30,000 tonnes.

In October 2009, the Labor government sought to water down the provisions of the environmental class A zone with the release of its paper 'Seeking a Balance', which as a document supposedly to facilitate the co-existence of protecting the environment with mining activities was short on detail, substance or reference material. It was a hastily constructed document containing motherhood statements, with much space devoted to coloured photographs. The consultation period having to be extended by six weeks was an admission that the government had rushed the process to fit in with the upcoming election.

Arkaroola Wilderness Sanctuary contains a number of endangered species of plants, birds, frogs, fish and the nationally threatened yellow-footed rock wallaby. Its mountains provide a refuge for temperate endemic species which are less likely to survive in other parts of a bioregion, especially in times of extended drought, and the existing zone for this area recognises the vulnerability of this region and expresses an appropriate level of caution regarding our future development activities. We were opposed to the government's attempt to water down that class A zone and my leader in this place tabled a bill which would have enshrined its protection by amending the Development Act.

When the state government granted Marathon a 12-month extension on its exploration licence in December 2010, it failed to tell South Australians whether or not it would be allowing mining in the wilderness sanctuary. At that stage, our leader had called on the government to come clean about whether or not it supported mining.

This bill extends the proclamation made on 29 July 2011, a proclamation that mining be prohibited in the Arkaroola region under section 8 of the Mining Act. However, exploration was permitted to continue. Marathon Resources has been engaging in uranium exploration in the Arkaroola Wilderness Sanctuary for several years, most notably through its tenement at Mount Gee. However, its exploration licence is due to expire shortly with no right of renewal.

This bill establishes the Arkaroola protection area (APA) in which mining and exploration are prohibited. The bill makes related amendments to the Development Act 1993, the Natural Resources Management Act 2004 and the Pastoral Land Management and Conservation Act 1989. One of the key sections of the bill is section 7, which refers to the management plan, which I note has no statutory review period and I would appreciate some comments from the government as to when it envisages that the management plan may be reviewed.

The minister will be required to develop a management plan for the APA, with the primary objective of environmental protection. The minister must consult with any groups or people who hold interests in and around the APA—well, it will not be Marathon Resources but would have been—native titleholders and the Sprigg family.

Section 8 is the review of a development plan; that is, the minister must review any development plans relating to the APA within six months of the management plan being published. The zoning of the APA will likely be revised. I would appreciate knowing whether the government envisages that the class A zoning will be removed.

Section 9 prohibits mining operations and regulated activities. Mining rights and rights to undertake regulated activities will not be able to be acquired or exercised, and that does not affect tenements adjacent to the APA. Section 10 allows for regulations which the Governor may make

inside the APA prohibiting the removal of native plants and the imposing of fines not exceeding $10,000.

I am grateful for the briefing I received from the minister's office and the department in November. I did ask at that time to be provided with status regarding Marathon's negotiations for compensation. They had their annual meeting not long after that period, and certainly there had been missives in the press that had indicated that they were having arguments with the government. I did not receive any formal information from the government. I am told that that should have been provided to me by minister Koutsantonis, but the silence on that issue was quite deafening.

As I have said, mining has been banned in Arkaroola since the Governor's proclamation on 29 July. This bill largely transfers that protection into legislation. A key addition is the abolition of mining exploration and the requirement for a management plan. So, much of the detail will be referred to the management plan, which must be consistent with nature conservation; conservation of objects, places or features of cultural value to the Adnyamathanha people; supporting scientific research and environmental monitoring; and fostering public appreciation, understanding and enjoyment of the Arkaroola area. I would also appreciate knowing for the record whether that management plan will be published and where it will be available.

I note that pastoral leases rights are unaffected by the bill. I was told in the briefing that the bill itself does not seek to extinguish pre-existing rights for compensation, and that crown law advice is that the bill adds no legal liability to the government with regard to compensation, and those details have not been provided to either house of parliament. That was one of the concerns in relation to whether that bill was to be passed last year.

I would like to spend a few moments making some remarks about the way in which this has been done. It is the Liberal Party's firm view that this is yet another complete stuff-up by this government. It is a good outcome for Arkaroola, but it has not been a good outcome for the taxpayers and it certainly has not been a good outcome for Marathon shareholders in that they were given a right to explore and the rug was pulled out from under them.

I understand that, for several months, the government would not talk to them about their particular claim for compensation. That has now been settled, but it falls well short of the mark. It is certainly not ideal that the taxpayer should be funding these sorts of things but, in our view, the government had the opportunity on several occasions not to renew the lease, yet it did so. Then, in order to provide himself with some sort of legacy, the former premier, in his vanity and at great expense to the taxpayer, has taken this action.

It was interesting to note that, prior to the retirement of the previous premier, there was a segment on ABC Radio that was looking at his legacy. Several different commentators were asked to be interviewed, including Professor David Paton. The compere asked him:

> David Paton, when you hear Mike Rann say that he wanted to look at the triple bottom line and he wanted to make sure that the environment was improved as well, in the 10 year period that you had the Rann Foley Government how did the environment fare?

The compere had mentioned the protection of one of the great icon sites of South Australia, Arkaroola. Dr Paton said:

> ...if you put a 10 year sort of comparison across that, the environment's actually probably deteriorated over that time and so has the level of funding that's actually given to environmental areas.

So, that is the view of at least one of our academics in this whole post-Rann period. I am not sure that Marathon wrote to all members, but they certainly wrote to me at the end of November, following the passage of this bill in the House of Assembly, from which the comments of the former premier had been reported in *The Advertiser*. In that, they stated that Marathon has spent $17,173,662 in direct exploration costs in Arkaroola and had sought that the proclamation be declared void.

I am amazed that exploration was ever allowed in this particular site but, having allowed them in, the government has treated that particular company very shabbily indeed. I think it will have an impact on other companies that may seek to do business in South Australia because they will look at this particular situation and know that there is some sort of political prerogative that any of the rights they may have under other situations may well be pulled out from under them.

Now that they have reached a settlement this issue is all done and dusted, but it is an expense that the taxpayer should never have had to pay and Marathon should never have been led

up the garden path to think that they may be allowed to continue activities in that area. I am pleased that Arkaroola will be protected and, with those comments, I commend the bill to the house.

The Hon. I.K. HUNTER (Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Disabilities, Minister for Youth, Minister for Volunteers) (17:01): In closing this debate, I would like to thank the Hon. Mr Parnell and the Hon. Ms Lensink for their contributions, and I am grateful for their offer of support for this legislation. I look forward to having the debate around the amendments that have been foreshadowed when we come to the committee stage on the next day of sitting. With that, I commend the bill to the house.

Bill read a second time.

At 17:05 the council adjourned until Tuesday 28 February 2012 at 14:15.