LEGISLATIVE COUNCIL

Thursday 17 February 2005

The PRESIDENT (Hon. R.R. Roberts) took the chair at 11 a.m. and read prayers.

STANDING ORDERS SUSPENSION

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

That standing orders be so far suspended as to enable petitions, the tabling of papers and question time to be taken into consideration at 2.15 p.m.

Motion carried.

STATUTES AMENDMENT (INTERVENTION PROGRAMS AND SENTENCING PROCEDURES) BILL

The Hon. P. HOLLOWAY (Minister for Industry and Trade) obtained leave and introduced a bill for an act to amend the Bail Act 1985, the Criminal Law (Sentencing) Act 1988, the District Court Act 1991, the Magistrates Court Act 1991 and the Supreme Court Act 1935. Read a first time.

The Hon. P. HOLLOWAY: I move:

That this bill be now read a second time.

The government is introducing this bill to parliament for the second time. An almost identical bill—the Statutes Amendment (Intervention Programs and Sentencing Procedures) Bill 2003—was laid aside by the Legislative Council on 30 June 2004 after the houses deadlocked over the terms of a schedule to the bill. The schedule was for the review of intervention program services. Aside from the disputed amendment to the schedule, the bill was passed by both houses in the form in which it was introduced and amended by the government. The bill I now introduce is identical to that bill, except for the schedule.

It can be reintroduced because the government and the opposition have now agreed on the terms of the schedule, and for that I wish to thank the Hon. Nick Xenophon. His efforts to broker a resolution of this dispute have been untiring and productive. As a result, the bill contains a new schedule to replace the one that was in dispute in June 2004. This is a bill to provide formal statutory backing for two practices that have developed in the courts. One is the practice of directing defendants to undertake programs of intervention that help them take responsibility for the underlying causes of their criminal behaviour.

The other is the use of sentencing conferences in sentencing Aboriginal defendants. The legislative framework for these practices is to be provided by amendments to the Bail Act 1985, the Criminal Law (Sentencing) Act 1998, the District Court Act 1991, the Magistrates Court Act 1991 and the Supreme Court Act 1935. The previous government consulted on legislative models for these practices in 2001. The people consulted included the Solicitor General, the Chief Justice, the Chief Magistrate, the DPP, the Department of Correctional Services, the Department of Human Services, the Attorney-General's Department, the Courts Administration Authority and the magistrates who work in courts who use the practices.

There was unanimous support for the practices and their need for a statutory basis. The Attorney-General continued to consult with the Minister for Police, the Minister for Health, the Minister for Social Justice, the Minister for Aboriginal Affairs and Reconciliation, the Minister for Regional Affairs, the Minister for Correctional Services, the DPP, the state's Courts Administrator, the Chief Magistrate, some individual magistrates and with those responsible in the Attorney-General's Department for the establishment and the operation of the various programs.

I will speak first about intervention programs. In appropriate cases the Magistrates Court will arrange for a defendant to be assessed for and, if suitable, to undertake a program of intervention (sometimes called diversion). This is an intensive program of treatment or rehabilitation or behaviour management designed to help a defendant to deal with the underlying causes of his or her criminal behaviour. There are presently three programs used by the court: the Drug Court Program; the Magistrates Court Diversion Program (dealing with mental impairment); and the Violence Intervention Program.

In the words of Justice Gray in the South Australian Court of Criminal Appeal decision of R v McMillan 2002, 81SASR, 540:

The coordination of [these] programs requires a range of expertise. The programs are undertaken in conjunction with government agencies and non-government professionals. Ideally all involved work together towards a common purpose—to address the specific needs of the individual and achieve a result which benefits not only them but provides protection for the community from further offending.

The justice and human services systems have developed the programs collaboratively. The programs do not divert people away from the courts like the Shop Theft Program and the Police Drug Diversion Program. They are court-directed programs under which criminal proceedings already begun are held over while the person undertakes treatment or rehabilitation or is connected with appropriate support services. The programs are rigorous and demand considerable commitment from the participant. An order to undertake a program is usually made as part of a bail agreement before trial or sentence. Satisfactory progress in a program will be reflected in the sentence.

The kind of treatment and rehabilitation offered in a program will depend on the circumstances of the defendant and the scope of the program. For a drug-addicted defendant the program will usually include detoxification and urinalysis. For a defendant whose offending takes place in a situation of family violence there is a range of behaviour management therapies. For some defendants, particularly those with a combination of behavioural problems, the program may include managed intervention other than treatment or rehabilitation in the strict sense, for example, help in obtaining supervised lodging or acquiring independent living skills.

The bill does not establish particular intervention programs or set guidelines for the approval or delivery of programs, this being the function of executive government. It is the government not the courts that should decide what, if any, programs it will provide and how these programs should be accredited and funded. The bill simply sets up a framework within which the government can provide existing programs or, should it so decide, develop additional programs to address behavioural problems (including problem gambling), substance abuse or mental impairment.

The bill provides a legal framework within which the courts may direct eligible defendants into whatever suitable

program exists at the time, and take account of their progress. In doing so it does not create a separate intervention jurisdiction in any court, nor confine the authority to make an intervention order to any one court. It is true that invention is usually offered in magistrates courts because it is here that a defendant first comes into contact with the court system. But the bill does not preclude a higher court ordering and supervising intervention (other than mental impairment intervention, and I will explain this later) if the infrastructure is in place and such orders are appropriate for a particular defendant.

At present, only a few selected magistrates courts offer invention. This means it is not available to every eligible defendant. The bill makes intervention possible, ultimately, for all eligible defendants by allowing intervention to be arranged by any criminal court. But it does not create a legal entitlement to intervention, because it makes the court's ability to order intervention subject not only to the eligibility of the defendant but to program services being available at a suitable place and time. The government of the day, not the courts, will determine how many eligible defendants have access to intervention by deciding how and where programs will be offered. The bill does not confine the invention to one cause of a defendant's criminal behaviour, even though this is the practice now. At present each program deals with a single cause of criminal behaviour, and only a specially designated court may direct a defendant to undertake that program.

The court making the intervention order does not assess for or direct defendants into more than one kind of invention, such as mental impairment as well as family violence invention, even though this may be suitable. The bill will allow but not compel a court to approve a defendant's participation in a combination of separate programs or in a program that combines more than one kind of intervention. A court's ability to make such an order will, of course, depend on whether the necessary assessment and intervention services are available to it.

Another important feature of the bill is that a person's legal rights and access to intervention options are determined by a judicial officer, while the programs themselves are administered and delivered by non-judicial officers under the direction of the court. The court determines a defendant's compliance with an order to be assessed for or to undertake an intervention program.

The bill gives the court the ability to include as a condition of bail or of a bond a requirement that the defendant be assessed for or undertake an intervention program. It may defer sentence to enable a defendant to be assessed for or undertake a program, or pending the defendant's completion of a program.

When determining sentence, the court may take a defendant's participation and achievements in an intervention program into account. Equally, it is important not to deter people from undertaking intervention by penalising them for failing in their attempt. There is a strong public interest in maintaining an incentive for people who come before the courts to overcome the underlying causes of their criminal behaviour, because the programs themselves are rigorous and demanding. The bill allows a sentencing court to give credit for an offender's participation in a program but also makes it clear that not participating in a program, or not being given the opportunity to do so, is not relevant to sentence. This will prevent sentence challenges by co-defenders or different offenders charged with like offences, when a lesser sentence is given to one of them in recognition of his or her participation in an intervention program.

A provision like this is consistent with the principles in section 10 of the Criminal Law (Sentencing) Act 1988. It reinforces that the bill does not create an entitlement to intervention nor oblige courts to offer it, and the bill is not intended to change sentencing principles about the weight to be given to the rehabilitation of offenders. Of course, if a person fails to meet the requirements of a program, this will be reported to the court. The court may treat it as a breach of bail or of a bond but has the discretion not to do so in appropriate circumstances, for example, when all that may be necessary to ensure a defendant's continuing participation is an adjustment to program conditions and a warning from the court.

A court may make an order for intervention only if the defender agrees to it. The court must also be satisfied that the defendant is eligible for the services offered by the program and that the services necessary to deliver the program to the defendant are available at a suitable time and place. This is important because, although the legislation will generally allow any court to order intervention, intervention programs are not now available through all courts.

The person advising the court about a defendant's eligibility for a program and the availability of services will be the intervention program manager, a person employed by the Courts Administration Authority to coordinate the orders of the court with the delivery of program services for defendants and to have oversight of all intervention programs. He or she will also let the court know when a person has not met the requirements of a program.

I turn now to some specific provisions within this general framework.

Deferral of Sentence

The first is the proposed clause 19(b) of the Criminal Law (Sentencing) Act 1988. This clause allows a court to adjourn proceedings after finding a person guilty, and release the defendant on bail before determining sentence. The purpose is to assess the defendant's prospects for rehabilitation, or allow the defendant to demonstrate that rehabilitation has taken place, or arrange for the defendant to be assessed for or undertake an intervention program. This kind of procedure is known as a Griffiths remand and is routinely used by the Drug Court. When proceedings resume on a specified date, as a general rule, no later than 12 months after the finding of guilt, the court may take into account the defendant's rehabilitation during the adjournment when determining sentence.

Because an intervention program may last longer than 12 months, the bill also allows a court to defer sentence for longer than 12 months, if satisfied that the defendant's participation or agreement to participate in an intervention program has shown a commitment to deal with the problems out of which his or her offending arose, and if satisfied also that unless proceedings are further adjourned, the defendant cannot complete or participate in the program and his or her rehabilitation will be prejudiced.

Mental impairment

The bill contains some special provisions about mental impairment. For the purposes of intervention, a person's mental impairment is such as to explain and extenuate, at least to some extent, the conduct that forms the subject matter of the offence. It is a less serious level of mental impairment than that to which part 8A of the Criminal Law Consolidation Act applies. Part 8A establishes procedures for determining

whether a mental impairment renders a person mentally unfit to stand trial or mentally incompetent to commit an offence. By contrast, intervention is not offered to people who are intending to contest the charge on any ground, including mental impairment.

An admission of guilt is not a prerequisite for a court ordering mental impairment intervention (or any other form of intervention for that matter). It could not be so in the case of mental impairment without a test of the defendant's mental capacity to admit or deny guilt (fitness to plead) under Part A of the Criminal Law Consolidation Act also having to be a pre-requisite. This would make the process of intervention cumbersome and capable of manipulation, and defeat its purpose—to help minor offenders (often those who have been de-institutionalised and have no-one supervising their medication or activities) to keep out of trouble.

To emphasise this, the bill limits the court's powers of dismissal and release under the mental impairment provisions to summary offences or minor indictable offences, and allows these powers to be exercised only by the Magistrates Court or the Youth Court or a court prescribed by regulation. Such a court may, if it finds a mentally impaired defendant guilty of a summary or minor indictable offence, release him or her without conviction or penalty or dismiss the charge in certain circumstances. This provision has been included at the insistence of the magistrates who preside over mental impairment intervention. They say that, without such authority, they have no option but to make a formal finding of guilt where police have not withdrawn charges. In some cases that finding may carry with it criminal sanctions that will negate valuable progress made by the defendant in learning to live independently and responsibly and to have regular and reliable access to medical and other support services.

Of course, a mentally impaired person who undertakes an intervention program will not automatically be released without conviction or penalty, or have charges against him or her dismissed. For a start, not all mentally impaired defendants are eligible for intervention (there being criteria for entry to the mental impairment intervention program that bar violent or repeat offenders) and, of those who are eligible, not all will qualify for consideration for release or dismissal of the charge.

Before releasing the defendant or dismissing charges against him or her, the court must be satisfied that the defendant understands that he or she has a mental impairment, understands that it affects his or her behaviour, and has made a conscientious effort to address this by completing or participating to a satisfactory extent in an intervention program. The court must also be satisfied that the release or dismissal of the charge will not endanger the safety of a particular person or the public. It may not dismiss charges if this would have the effect of denying a victim compensation by the defendant under the Criminal Law (Sentencing) Act 1988.

A victim who is injured as a result of conduct the subject of a charge that is dismissed under this part of the bill is in the same legal position, in making a criminal injuries compensation claim against the Crown, as a victim of the actions of a non-impaired person against whom charges are not proceeded with or are dismissed. The bill need make no special provision for this.

There is another option available to the court before it decides whether to dismiss charges against a mentally impaired defendant. If the defendant has begun but not yet completed an intervention program, the court may release him or her on an undertaking to complete the program. The defendant must come back to court if he or she completes the program or if he or she fails to complete it, so that the court can decide whether to dismiss the charge in the way I have described or to make a finding of guilt and proceed on that basis. If there is a finding of guilt, the court has a number of options. It may release the defendant without conviction or penalty under clause 19C(1) of the bill; it may proceed under other provisions of the Criminal Law (Sentencing) Act 1988 that come into operation after a finding of guilt (like placing the defendant on a bond); or it may defer sentence under clause 19B of the bill, to assess the defendant's prospects of rehabilitation.

Accessibility of evidence.

The bill also amends the Magistrates Court Act 1991, the District Court Act 1991 and the Supreme Court Act 1935 so that reports prepared to help the court determine a person's eligibility for, or progress in, an intervention program may be inspected by the public only with the permission of the court. These reports are part of the court record and are taken and received in open court. But they should not be available freely to the public, because they are relevant neither to guilt nor necessarily to sentence.

Review of intervention program services.

Schedule 1 to the bill allows either house of parliament, at any time 12 months after the commencement of the act, to ask the Ombudsman to investigate the services that are included on intervention programs. On receiving such a request, the Ombudsman is to investigate and report to that house on the value and effectiveness of all services included on intervention programs (within the meaning of the Bail Act 1985 and the Criminal Law (Sentencing) Act 1988). The investigation is to be for the 12 months from the commencement of the act or any other period specified by the house. It is to be conducted as if the investigation were initiated under the Ombudsman Act 1972.

It may well be that there is no need for an investigation. There has certainly been no call for one to date, in large part because the government has been evaluating the programs continuously since they began, and has made the results of those evaluations publicly available through the Attorney-General's office or online through the web site of the Office of Crime Statistics. The review provision has been included in the bill in case some special need arises.

Aboriginal sentencing procedures.

I now turn to the other court practice for which this bill provides legislative backing. The Magistrates Court has for some time used culturally appropriate conferencing techniques when sentencing Aboriginal offenders. These techniques are designed to promote an understanding of the consequences of criminal behaviour in the defendant, an understanding of cultural and societal influences in the court, and thereby to make punishment more effective.

The bill formalises this process. It allows any criminal court (not just the Magistrates Court), with the defendant's consent, to convene a sentencing conference and to take into consideration the views expressed at the conference. The conference must comprise the defendant (or, if the defendant is a child, the defendant's parent or guardian), the defendant's lawyer (if any), the prosecutor, and, if the victim chooses to attend, the victim (or, if the victim is a child, the victim's parent or guardian) and the victim's chosen support person. The court may also invite to the conference, if it thinks they

may contribute usefully to the sentencing process, one or more of these people:

- a person regarded by the defendant and accepted within the defendant's Aboriginal community as an Aboriginal elder, or
- a person accepted by the defendant's Aboriginal community as a person qualified to provide cultural advice relevant to the sentencing of the defendant, or
- a member of the defendant's family, or
- a person who has provided support or counselling to the defendant, or
- any other person.

An Aboriginal Justice Officer employed by the Courts Administration Authority helps the court convene the conference and advises it about Aboriginal society and culture. The Aboriginal Justice Officer also helps Aboriginal people understand court procedures and sentencing options and helps them comply with court orders. An Aboriginal offender's sentence, whether given using a sentencing conference or using standard sentencing procedures, may include a requirement to participate or continue in an intervention program.

Using a sentencing conference procedure does not change the matters to which a court must have regard when determining sentence under section 10 of the Criminal Law (Sentencing) Act 1988, or any other aspect of sentencing. It is just a way of informing the court, the defendant and his or her community about matters relevant to sentence in a more comprehensive and understandable way than is possible using standard procedures.

With regard to administration, because this bill formalises practices that already exist in the Magistrates Court, that court already has procedures in place for both intervention programs and sentencing conferences. The Courts Administration Authority has appointed an officer to manage and coordinate mental impairment intervention, drug and family violence programs, and this position is described in the bill as Intervention Program Manager. The position includes a delegate of that person. For each defendant who undertakes a program there is a case manager, whose role is also mentioned in the bill.

Additional administrative arrangements by the Courts Administration Authority include authorising registrars at metropolitan and country Magistrates Courts that use these programs to arrange services to these courts, drawing on existing retrained registry staff and the transfer of Aboriginal justice officers attached to the Fines Payment Unit to the Aboriginal court, reporting to the registrar of that court.

Because these are joint agency programs involving teams of professionals operating under different regimes, each program has its own steering committee comprising senior officers from the agencies involved. As well, an interdepartmental senior executive group has been established to coordinate and oversee the service delivery and funding of the various programs to make formal partnering agreements between the justice and human services portfolios, and to monitor unmet need to inform future government funding of court diversion programs.

In conclusion, giving legislative backing to these programs and procedures recognises their value to criminal justice and to the public. Intervention programs help people learn to take responsibility for the underlying causes of their behaviour and to live in a law-abiding way. Sentence conferencing helps to reduce the alienation of Aboriginal offenders that so often impedes their rehabilitation and compliance with court orders.

Without the work of the Hon. Nick Xenophon in negotiating a review clause that satisfies both the government and the opposition this important legislation would still be blocked, and a valuable component of the work of our courts would be at risk of legal challenge for want of a clear legislative backing. On behalf of the government I thank the honourable member for his contribution to this bill. I commend the bill to members. I seek leave to have the explanation of clauses inserted in *Hansard* without my reading it.

Leave granted.

EXPLANATION OF CLAUSES

Part 1—Preliminary

1—Short title

This clause is formal.

2—Commencement

This clause provides that the Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

This clause is formal.

Part 2—Amendment of *Bail Act 1985*

4—Amendment of section 3—Interpretation

This clause inserts into the interpretation section of the *Bail Act 1985* ("the Act") a number of new definitions necessary for the purposes of the measure. A *case manager* is a person responsible for supervision of a person's participation in an intervention program. An *intervention program* is a program designed to address a person's behavioural problems (such as problem gambling), substance abuse or mental impairment and may consist of treatment, rehabilitation, behaviour management, access to support services or a combination of these components, all of which are supervised. An *intervention program manager* is a person who has oversight of intervention programs and coordinates the implementation of relevant court orders.

5—Insertion of sections 21B and 21C

This clause inserts two new section into the Act. Under proposed section 21B, a court may make participation in an intervention program a condition of a bail agreement. Before imposing such a condition, the court must be satisfied that the person entering into the agreement is eligible for the services to be included on the program and that those services are available at a suitable time and place. A court cannot impose a condition that a person undertake an intervention program if the person does not agree to the condition. A court may, in order to determine an appropriate form of intervention program, and a person's eligibility for the services on the program, make appropriate orders for assessment of the person. The person may be released on bail on condition that he or she undertake the assessment.

A person released on a bail agreement that contains a condition requiring the person to undertake an intervention program (or an assessment for the purpose of determining his or her eligibility) must comply with the conditions regulating his or her participation in the program. A failure to do so may be regarded as a breach of the bail agreement. A person released on bail on condition that he or she undertake an intervention program may apply to the court for an order revoking or varying the condition.

If an intervention program manager considers that a person has failed to comply with a condition regulating the person's participation in an assessment or program, and that the failure suggests the person is unwilling to participate in the assessment or program as directed, the manager is required to refer the matter to the court, which is then required to determine whether the failure to comply amounts to a breach of the bail agreement.

A certificate signed by an intervention program manager as to the availability of particular services and the eligibility of a person for services to be included on a program, is admissible as evidence of the matter certified. A certificate signed by a case manager as to whether a particular person has complied with conditions regulating his or her participation in an assessment or program is also admissible as evidence of the matter certified.

Proposed section 21C provides that an intervention program manager may delegate a power or function under the Act to a particular person or to the person for the time being

occupying a particular position. A delegation may be by instrument in writing, may be absolute or conditional, does not derogate from the power of the delegator to act in a matter and is revocable at will. A power or function delegated may, if the instrument so provides, be further delegated.

Part 3—Amendment of *Criminal Law (Sentencing) Act 1988*

6—Amendment of section 3—Interpretation

This clause inserts into the interpretation section of the *Criminal Law (Sentencing) Act 1985* ("the Act") a number of new definitions necessary for the purposes of the measure. A *case manager* is a person responsible for supervision of a person's participation in an intervention program. An *intervention program* is a program designed to address a person's behavioural problems (such as problem gambling), substance abuse or mental impairment and may consist of treatment, rehabilitation, behaviour management, access to support services or a combination of these components, all of which are supervised. An *intervention program manager* is a person who has oversight of intervention programs and coordinates the implementation of relevant court orders.

7—Insertion of section 9C

Proposed Section 9C provides that a sentencing court may, before sentencing an Aboriginal defendant, convene a sentencing conference and take into consideration views expressed at the conference. A sentencing conference can only be convened under this section with the defendant's consent. An Aboriginal Justice Officer will assist the court in convening the conference. An *Aboriginal Justice Officer*, as defined in subsection (5), is a person employed to assist the court in sentencing of Aboriginal persons and convening of sentencing conferences. An Aboriginal Justice Officer also assists Aboriginal persons to understand court procedures and sentencing options and to comply with court orders.

Subsection (2) lists the persons who must be present at a sentencing conference and subsection (3) persons who may be present. A person included in the list under subsection (3) may be present if the sentencing court thinks the person may contribute usefully to the sentencing process.

A person will be taken to be an Aboriginal person for the purposes of section 9C if the person is descended from an Aboriginal or Torres Strait Islander, regards himself or herself as an Aboriginal or Torres Strait Islander (or, if a young child, at least one of the parents regards the child as an Aboriginal or Torres Strait Islander), and is accepted as an Aboriginal or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

8—Amendment of section 10—Matters to which sentencing court should have regard

This clause inserts two new subsections into section 10 of the *Criminal Law (Sentencing) Act 1988.* Proposed new subsection (4) provides that a court may treat a defendant's participation in an intervention program, and his or her achievements in the program, as relevant to sentence. Under proposed new subsection (5), the fact that a defendant has not participated in, or has not had the opportunity to participate in, an intervention program, is not relevant to sentence. The fact that a defendant has performed badly in, or failed to make satisfactory progress in, an intervention program is also irrelevant to sentence.

9—Insertion of sections 19B and 19C

Proposed section 19B provides that a court may, on finding a person guilty of an offence, adjourn proceedings to a specified date and grant bail to the defendant in accordance with the *Bail Act 1985*. The purposes for which a court may adjourn proceedings under this section include assessment of the defendant's capacity and prospects for rehabilitation, allowing the defendant to demonstrate that rehabilitation has taken place, and allowing the defendant to participate in an intervention program. As a general rule, proceedings may not be adjourned under section 19B for more than 12 months from the date of the finding of guilt. However, proceedings may be adjourned for more than 12 months if the defendant is, or will be, participating in an intervention program. Before adjourning the proceedings for more than 12 months, the court must be satisfied that the defendant has, by participating (or agreeing to participate) in the program, demonstrated a commitment to addressing the problems out of which his or her offending arose. The court must also be satisfied that if the proceedings were not adjourned for such a period, the defendant would be prevented from completing, or participating in, the intervention program and his or her rehabilitation would be prejudiced.

In considering whether to adjourn proceedings for more than 12 months, a court is not bound by the rules of evidence and may inform itself on the basis of a written or oral report from a person who may be in a position to provide relevant information. That person may be cross-examined on matters contained in his or her report.

Proposed section 19B does not limit any power a court has to adjourn proceedings or to grant bail in relation to a period of adjournment.

Section 19C(1) provides that a court (as defined for the purposes of this section) may, on finding a defendant guilty of a summary or minor indictable offence, release the defendant without conviction or penalty if satisfied that the defendant suffers from a mental impairment that explains and extenuates, at least to some extent, the conduct that forms the subject matter of the offence. The defendant must have completed, or be participating to a satisfactory extent in, an intervention program, recognise that he or she suffers from the impairment, and be making a conscientious attempt to overcome behavioural problems associated with it. The court must also be satisfied that the release of the defendant would not involve an unacceptable risk to the safety of a particular person or the community.

Under subsection (2) of proposed section 19C, a court (as defined) may, at any time before a charge of a summary or minor indictable offence has been finally determined, dismiss the charge if satisfied as to the same matters about which a court must be satisfied in order to release a person without conviction or penalty under subsection (1). Additionally, the court must be satisfied that it would not, if a finding of guilt were made, make an order requiring the defendant to pay compensation for injury, loss or damage resulting from the offence. If the defendant is participating in, but has not completed, an intervention program, the court may, instead of dismissing the charge under subsection (2), release the defendant on an undertaking to complete the intervention program and to appear before the court for determination of the charge either following completion of the program or in the event that the defendant fails to complete the program.

In deciding whether to exercise its powers under section 19C, the court may act on the basis of information it considers reliable without regard to the rules of evidence. The court should, if proposing to dismiss a charge under subsection (2) or release a defendant on an undertaking under subsection (3), consider any information about the interests of possible victims that is before it.

Court is defined for the purposes of this section to mean the Magistrates Court, the Youth Court or any other court authorised by regulation to exercise the powers conferred by the section.

Mental impairment is defined to mean an impaired intellectual or mental function resulting from a mental illness, an intellectual disability, a personality disorder, or a brain injury or neurological disorder (including dementia).

10—Amendment of section 42—Conditions of bond

This clause amends section 42 of the Act. Section 42(1) lists the conditions a sentencing court may include in a bond under the Act. This amendment has the effect of allowing a court to include a condition requiring a defendant to undertake an intervention program. This clause also makes a number of consequential amendments to section 42. The court must, before imposing a condition requiring a defendant to undertake an intervention program, satisfy itself that the defendant is eligible and that the services are suitable. The court may make orders for assessment of a defendant for the purpose of determining an appropriate form of intervention program and the defendant's eligibility for the services included on the program. The defendant may be released on bail on condition that he or she undertake an assessment as ordered.

Under subsection (8), a certificate apparently signed by an intervention program manager as to the availability of particular services and the eligibility of a person for services to be included on a program, is admissible as evidence of the matter certified. A certificate signed by a case manager as to

whether a particular person has complied with conditions regulating his or her participation in an assessment or program is also admissible as evidence of the matter certified.

11—Insertion of section 72C

Proposed section 72C provides that an intervention program manager may delegate a power or function under the Act to a particular person or to the person for the time being holding a particular position. A delegation may be by instrument in writing, may be absolute or conditional, does not derogate from the power of the delegator to act in a matter and is revocable at will. A power or function delegated may, if the instrument so provides, be further delegated.

Part 4—Amendment of *District Court Act 1991*

12—Amendment of section 54—Accessibility of evidence etc

Section 54(2) of the *District Court Act 1991* provides that a member of the public may inspect or obtain a copy of certain material only with the permission of the Court. This clause amends that section by adding to the list of such material any report prepared to assist the Court in determining a person's eligibility for, or progress in, an intervention program.

Part 5—Amendment of *Magistrates Court Act 1991*

13—Amendment of section 51—Accessibility of evidence etc

Section 51 of the *Magistrate Court Act 1991* provides that a member of the public may inspect or obtain a copy of certain material only with the permission of the Court. This clause amends that section by adding to the list of such material any report prepared to assist the Court in determining a person's eligibility for, or progress in, an intervention program.

Part 6—Amendment of *Supreme Court Act 1935*

14—Amendment of section 131—Accessibility of evidence etc

Section 131 of the *Supreme Court Act 1935* provides that a member of the public may inspect or obtain a copy of certain material only with the permission of the court. This clause amends that section by adding to the list of such material any report prepared to assist the court in determining a person's eligibility for, or progress in, an intervention program.

Schedule 1—Review of intervention program services

1—Review of services included on intervention programs

Clause 1 of the Schedule provides a mechanism for either House of Parliament to require the Ombudsman to carry out an investigation into the value and effectiveness of services included on intervention programs in the 12 month period following commencement of the Act or another period specified by the House. A House of Parliament cannot require the Ombudsman to undertake the investigation before the 12 month anniversary of the commencement of the Act.

In carrying out the investigation, the Ombudsman may exercise the same investigative powers as are conferred on the Ombudsman in relation to investigations duly initiated under the *Ombudsman Act 1972*.

After completing the investigation, the Ombudsman is required to submit a report on the investigation to the Presiding Officer of the House that requested the investigation.

The Hon. R.D. LAWSON secured the adjournment of the debate.

STATUTES AMENDMENT (LIQUOR, GAMBLING AND SECURITY INDUSTRIES) BILL

Second reading.

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

That this bill be now read a second time.

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

Leave granted.

This Bill incorporates a raft of amendments to the Security and Investigation Agents Act 1995, as well as amendments to the Liquor Licensing Act 1997 and the Gaming Machines Act 1992.

The amendments are intended to deal with two separate but related issues: firstly, the infiltration of organised crime into the security and hospitality industries and, secondly, violence and aggressive behaviour by crowd controllers working in licensed premises or at licensed events.

Representatives of the security and hospitality industries have been informed about the Government's intentions to introduce much-needed reforms to the crowd controller vocation and they have indicated support.

Organised crime infiltration

The measures designed to deal with organised crime's infiltration of the liquor and hospitality industries were crafted in light of police information indicating a significant level of involvement by, in particular, outlaw motorcycle gangs in these industries.

South Australia Police (SAPol) have substantiated evidence and intelligence that identifies the infiltration of licensed premises (particularly those providing entertainment that tends to be patronised by young people) and the security industry by organised crime, including outlaw motorcycle gangs.

A recent security industry review by SAPol's State Intelligence Branch identified the use by licensed premises and licensed events of security companies that have links to motorcycle gangs. SAPol's intelligence suggested that security companies controlled or linked to organised crime have or have formerly provided security to a high proportion of licensed premises within the C.B.D. SAPol and the Office of the Liquor and Gambling Commissioner also indicated concern over the level of past and present motorcycle gang association across licensed premises. Most are entertainment venues with high youth patronage.

Since that review one infamous security company with alleged links to a motorcycle gang folded as a result of police charges against the director of the company and pressure applied by police, licensing authorities and the Government. The Premier and the Attorney-General are determined to ensure that neither motorcycle gangs nor other organised crime are able to set up another security company under another name and new directors.

This association with and control of licensed premises provides an opportunity for money laundering and, more importantly, for the control and expansion of illicit drug distribution networks, with the associated environment of intimidation, threats and violence.

Liquor, gambling and security industries are attractive to, and susceptible to infiltration by, organised crime. This is reflected in the various regulatory regimes that provide for the licensing of industry participants using various tests of fitness and propriety. However, there is little consistency and the existing licensing regimes have proved not to be robust enough to combat infiltration.

Four factors contribute to this:

1 organised crime typically legitimises involvement in the industries through members without criminal convictions or 'cleanskin' associates;

2 law enforcement agencies possess intelligence that they are reluctant to disclose because it could prejudice current or future investigations or legal proceedings or could put the welfare of persons such as informants at risk;

3 current liquor licensing legislation does not allow for intelligence to be presented without challenge for consideration by the licensing authority. Consequently, the Liquor and Gambling Commissioner is often privy to intelligence that would indicate organised crime involvement but has been unable to use this information in making a determination; and

4 the licensing scheme for security agents and companies is not directed at all towards detecting applicants' actual or potential involvement in organised crime nor to detecting or dealing with such involvement by a licensee commencing after a licence is issued. There is no associate test and information about applicants' associates or in the nature of police intelligence is not sought from SAPol, nor could such information be presented confidentially or unchallenged.

The Bill amends the *Security and Investigation Agents Act* (the SIAA), *Liquor Licensing Act* (the LLA) and *Gaming Machines Act* (the GMA) to address these problems in the following ways:

· by introducing an associate test under the SIAA so that the licensing authority (the Commissioner for Consumer Affairs) must take into account the character of the associates of security licence applicants and licensees in assessing whether the applicant or licensee is fit and proper to hold a security agent's licence;

· by making investigation of associates by the licensing authority (Liquor and Gambling Commissioner) mandatory under the LLA;

· by making it mandatory for the relevant licensing authority to refer all applications under the SIAA and LLA to the Commissioner of Police so that the Commissioner may investigate the probity of those applicants. The Commissioner of Police will then be required to provide information to the relevant licensing authority about criminal convictions and other information held by the Commissioner relevant to whether an application should be granted;

· by providing police with a right of objection against an applicant, and of appeal against the grant of a licence, under the SIAA similar to the rights of intervention afforded to police under the LLA and GMA;

· by facilitating the use of police intelligence by protecting the confidentiality of that intelligence.

It is this last aspect of the Bill that is perhaps the most significant. The Bill amends the SIAA, LLA and GMA to facilitate the use of police intelligence in licensing decisions. The Bill provides that where police intelligence is used in any proceedings under those Acts, including in determinations of applications and disciplinary proceedings that can lead to cancellation of a licence or approval, that information or intelligence must not be disclosed, including to the applicant/licensee/approved person or his or her representatives. Where the licensing authority makes a determination of an application on the basis of this police information classified as criminal intelligence, it will not be required to provide reasons for that determination other than that to grant the application would be contrary to the public interest. A court hearing an appeal against a licence refusal or a disciplinary action against a licensee or approved person must hear the information in a court closed to all, including the applicant/licensee/approved person and that person's representatives.

These confidentiality of criminal intelligence provisions are modelled on provisions enacted in the Firearms Act by the *Firearms (COAG Agreement) Amendment Act 2003*. The provisions were included in that Act to prevent organised crime from obtaining firearms.

As in the Firearms Act, 'criminal intelligence' is defined as information about actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement. The classification of information as criminal intelligence may be made only by the Commissioner of Police personally or by a Deputy or Assistant Commissioner of Police.

The amendments will not be retrospective, however, in order to tackle the current extent of infiltration of organised crime in the security and hospitality industries the Government intends that criminal intelligence be used to take disciplinary action against existing licensees or approved persons, even where that criminal intelligence existed at the time a licence or approval was granted. It will be for the disciplinary authority (the Liquor Licensing Court (LLA), the Liquor and Gambling Commissioner (GMA) and District Court (SIAA)) to determine whether the information establishes a lack of probity in the licensee or approved person at the time of disciplinary action.

As is already the case under the LLA and GMA, the SIAA is amended to provide that police officers are authorised officers for the purposes of enforcing the SIAA and to allow police to prosecute offences under the SIAA that they detect in the ordinary course of their duties, which currently extend to policing licensed premises, including in conjunction with liquor licensing and consumer affairs officers.

Violence associated with crowd controllers and licensed premises

Crowd controllers employed at licensed premises or licensed events operate in a potentially volatile environment and are faced with unique liquor-related problems, thereby requiring regulation that differs from other security agents.

Crowd controllers are exposed to alcohol-related antagonism and often patrons are initially to blame for the anti-social behaviour that leads to physical confrontation. Neither SAPol nor the Office of Consumer and Business Affairs identify any particular violence problems associated with non-licensed premises security.

National research (Australian Bureau of Statistics 1998) shows under-reporting of assaults in licensed premises to be as high as 85.4% and studies, police statistics and observations show that crowd controllers contribute to a high proportion of the violence and assaults.

SAPol has surveillance tapes showing extreme acts of violence by crowd controllers including vicious attacks on women and running street bashings. Assault data shows that high proportions of the alleged assaults involve blows and kicks to the head region often requiring surgery.

This problem became tragic front page news when well-known former South Australian cricketer, David Hookes died in January of last year after a brutal assault by a crowd controller outside a hotel in Victoria. Even more shocking was the fact that the crowd controller in question was at the time of the assault on David Hookes already on a police charge for a previous serious assault.

The Government had already announced in late 2003 a package of measures designed to address organised crime infiltration and prevent assaults occurring in licensed premises. David Hookes's tragic death highlighted other limitations of the existing security agent licensing legislation—namely the lack of powers of the licensing authority to intervene quickly to suspend crowd controllers charged with assault or other relevant offences and the lack of a formal data matching capability to ensure that the licensing authority is informed immediately by police where a licensee is charged or convicted of a relevant offence. After David Hookes's death another package of amendments was announced—intended to make absolutely sure that the Rann Labor Government's commitment to zero tolerance of crowd controller misconduct was translated into law.

The SIAA does not give special powers to a crowd controller to deal with persons on licensed premises, or anywhere else for that matter. For licensed premises, powers are to be found in section 116 (power to require minors to leave licensed premises), section 124 (power to refuse entry or remove persons) and section 127 (power to remove or prevent entry of barred persons) of the LLA. These powers are not confined to licensed crowd controllers but extend to all authorised persons, who are defined to be the licensee or an agent or employee of the licensee, a responsible person for the licensed premises or a police officer.

This LLA definition of authorised persons is considered to be too broad because it authorises any employee or agent to use force to remove persons or to prevent their entry whether or not that person has been trained or approved for that purpose. Instead the Bill will limit 'authorised person' to include a licensee, a responsible person, a police officer or such other person as approved by the Liquor and Gambling Commissioner and to make it a condition for approval that the person must have the appropriate knowledge, skills and experience for the purpose.

Under the proposal, only an authorised person would be empowered to require, as distinct from request, a person to leave premises or to refuse entry. Further, if a person is to be removed from licensed premises using reasonable force this would have to be done under the direct supervision and control, and in the presence, of the responsible person on duty at the time. This would overcome the problem of management denying knowledge of the actions of crowd controllers and would place responsibility where it should rest, that is, with management.

Physical removal or prevention of entry can occur only after the person has failed to comply with a request to leave made by an authorised person.

The Bill will provide for an offence of *"fail to quit licensed premises"*.

The Bill also amends the LLA to enable the prescription of a 'formal process of removal or prevention of entry' and require recording of such removals, applicable to authorised persons. The Bill amends the LLA to widen the grounds for disciplinary action against the licensee, the responsible person and the authorised person to include failure to exercise their responsibilities or exceeding their authority in the removal from or prevention of entry of a person to licensed premises. This should go some way towards addressing the difficulties associated with securing a conviction against a crowd controller for assault.

It is currently difficult to obtain a conviction against a crowd controller for assault. Although many complaints are made and even charges laid, these are often dropped because of inadequate or insufficient evidence. The poor lighting conditions and consumption of alcohol by bystanders makes it difficult to obtain reliable identification evidence.

Although it may not be possible to take action against a crowd controller, these procedures will not only set guidelines designed to stop assaults occurring but provide alternative grounds upon which to take disciplinary action.

Power for Commissioner to suspend security agents' licence

The present disciplinary scheme under the SIAA is founded upon the presumption of innocence. The disciplinary authority is the Administrative and Disciplinary Division of the District Court. The Court has the power to order suspension or revocation of a licence on grounds including:

- the agent has acted unlawfully, or improperly, negligently or unfairly, in the course of performing functions as an agent; or
- events (eg conviction of a disentitling offence) have occurred such that the agent would not be entitled to be granted the licence if he or she were to apply for it.

The grounds must be proved on the balance of probabilities. This has tended to mean in practice that the Office of Consumer and Business Affairs (OCBA) will take disciplinary action following a successful prosecution of a licensee. However, it is common for there to be significant delays, up to a year or longer, between the laying of a charge and a conviction. This is aside from the time involved in meeting the Court's procedural and evidential requirements in the disciplinary action.

These delays undermine the consumer protection objective of the disciplinary provisions. A crowd controller who assaults another person, particularly in the work environment, presents a real risk to the public. This is particularly so given the environment in which crowd controllers work—coming into contact with intoxicated and aggressive people, which in turn can provoke an aggressive response. A crowd controller who sells drugs also presents a significant risk in light of the contact crowd controllers have with young people and the tendency for certain drugs to be taken in nightclubs and similar entertainment venues. It is questionable whether enough is done to protect the public from assaults and drug-related problems where someone suspected of having committed an assault or drug offence is allowed to continue working as a crowd controller until their charge is determined, especially where this can take up to a year.

These concerns are not necessarily confined to crowd controllers. Similar concerns might arise about security agents authorised to install alarms in consumers' houses or to guard premises where the licensee is charged with theft or, in particular, robbery.

Therefore the Bill vests in the Commissioner for Consumer Affairs the power to suspend a security agent's licence upon the agent being charged with a prescribed offence. The offences to be prescribed will depend on the functions authorised by the particular licence. It is intended to prescribe offences of violence as well as drug and firearms offences for licences authorising crowd control work, with the addition of theft and robbery offences in the case of licences authorising guarding work.

A licensee will have a right to be heard about a licence suspension, although the suspension will apply from service of the notice of suspension.

For additional certainty, the Bill also provides for mandatory suspension by the Commissioner of security agents' licences authorising crowd control work (crowd control licences) where the crowd controller is charged with certain offences, to be prescribed. It is intended to prescribe assault and drug offences for this purpose.

The Bill provides for a right of appeal against a decision of the Commissioner to suspend a licence.

Automatic licence cancellation

As is the case presently with licence suspension, only the District Court may revoke a security licence. This is on the same grounds and after discharging the same onus of proof as discussed with licence suspensions. This is different to a number of jurisdictions, such as New South Wales, Queensland, Victoria and Western Australia, where either the licensing authority has a power to revoke licences or automatic cancellation applies if the licensee is convicted of a disentitling offence.

Until relatively recently the Courts had interpreted disciplinary provisions of the SIAA such that a conviction of a disentitling offence necessitated an order for cancellation of a licence, because the licensee would not be able to obtain a licence if the licensee applied now (*CCA v Jefferies).* However, this is no longer the law and the Court will now look at what order is necessary to protect the public. In practice the Court has made orders ranging from cancellation (*CCA v Stamoulis),* placing conditions on a licence restricting a licensee from acting as a crowd controller (*CCA v Boynton*) to reprimanding the licensee and ordering the licensee to undergo anger management training (*CCA v Sollars).* Also, the Court has tended to look at the behaviour of a licensee in the period between commission of the offence and the disciplinary action, which is inevitably a significant period of time owing to the factors discussed above. If the licensee has not engaged in any further misconduct during that period, the Court has tended to take this as an indication of the level of risk the licensee poses to the public.

In order to achieve a certain outcome, and arguably the outcome that Parliament originally intended, the Bill provides for automatic cancellation of a security agent's licence where the licensee has been convicted of a relevant prescribed offence.

Fingerprinting security agents and applicants under the Liquor Licensing Act

SAPol proposed fingerprinting security licence applicants as part of the measures designed to deal with infiltration of organised crime into the security industry. There is sufficient evidence of criminal involvement by security agents and of identity fraud to justify this measure. The general concerns about criminal behaviour of members of this industry as well as recent incidents of identity fraud suggest that there is a need for this measure.

There are significant risks to the public if criminal history is not discovered and, as has been pointed out by researchers in this field, this industry has a particular *potential* for involvement in criminal activity owing to its nature, ie access to and information about security of homes and premises for which security is provided and the inherently volatile work environment of crowd controllers.

The Bill introduces a requirement for security agent licence applicants, and existing licensees on direction, to be fingerprinted by police.

As a result of the Government's concerns about the involvement of organised crime in the hospitality industry, the Bill provides also for a power to fingerprint applicants under the LLA. There are already provisions for the fingerprinting of casino employees under the *Casino Act* and applicants for licences under the *Gaming Machines Act.*

The Bill provides that the Commissioner of Police may, but is not required to, destroy fingerprints on the application of a former licensee/employee or refused applicant.

Random alcohol and breath testing of crowd controllers

Random drug testing of crowd controllers occurs in Western Australia. Discussions with officers responsible for licensing crowd controllers in Western Australia indicate that these powers have been successful in removing a significant proportion of the industry's unsavoury elements. Strike rates on random tests are now reported to be down considerably from what they were when the measures were first introduced, suggesting that those taking drugs have either left the industry or stopped using the prescribed substances.

Information published by the Drug and Alcohol Services Council (DASC) suggests that both being under the influence of, and long term use of, amphetamines can lead to aggressive behaviour. There is some evidence, although the evidence tends to be anecdotal only, of a link between steroid use and aggressive behaviour. DASC and other research indicates that the substance most closely linked with violent behaviour is alcohol.

Further, DASC research suggests that "*the risk of amphetamine related aggression is increased in crowded environments, when users are among strangers, and in situations with a high level of environmental stimulation"*. Crowd controllers work in often crowded premises, with loud music and varied lighting, coming into contact with intoxicated and aggressive people, which in turn can provoke an aggressive response. These circumstances fit with the environmental factors referred to in the DASC research as increased risks for amphetamine-related aggression.

The decision to include random alcohol testing reflects the Government's stated policy of zero tolerance to crowd controller violence as well as the research suggesting strong links between alcohol consumption and violence.

Upon passage of the drug and alcohol testing provisions, but before those provisions are brought into operation, arrangements will be made to establish procedures for carrying out this testing. Crowd controllers will be served with notices requiring them to attend at a designated time and place to give a sample of blood or urine to be tested for the presence of prescribed drugs. Alcotests will be performed by police on crowd controllers on the premises while the crowd controllers are on duty. In both cases, any detectable trace of a prescribed drug or alcohol will result in cancellation of a crowd controller's licence, as will failure to comply with a requirement to submit to testing.

Psychological assessment of crowd controllers

There are concerns that people are attracted to the crowd control industry because of a predilection for conflict. It is increasingly common for employers to carry out psychological assessments of potential employees to determine their suitability for a particular occupation. It is standard practice for police recruits to undertake

psychological assessment before their acceptance into the police force. For example, recruits into the Queensland police force are tested for characteristics including tolerance, self-control, conflict resolution skills and communication skills.

The Bill will allow the Commissioner for Consumer Affairs to require crowd controllers or applicants for a security agent's licence authorising crowd control work to undergo psychological assessment to demonstrate their fitness to hold a licence.

Refresher-training or continuing development

In keeping with the Government's stated object of increasing the training requirements for crowd controllers, in particular in conflict resolution and communication, the Bill provides a power for the Commissioner to require crowd controllers, once licensed, to undertake specified further training within a specified period of time. This will ensure that crowd controllers can be brought up-to-date on new industry practices and legislative requirements as well as reminded of skills necessary for the job, eg by undertaking further conflict resolution training to reinforce these skills.

In summary, I think members can be assured that this Bill contains a significant and wide-ranging package of amendments to security and liquor licensing legislation that will enable these industries to be comprehensively cleaned up. Organised crime will be starved of avenues to earn revenue and further their illegal activities by operating in these industries and measures put in place to ensure licensed venues are safe for members of the public.

I commend the Bill to Members.

EXPLANATION OF CLAUSES

Part 1—Preliminary

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.

3—Amendment provisions

This clause is formal.

Part 2—Amendment of *Gaming Machines Act 1992*

4—Amendment of section 3—Interpretation

A number of new definitions are inserted by this clause. An ***approved crowd controller*** is a person approved under Part 4 Division 10A of the *Liquor Licensing Act 1997* (as inserted by clause 30 of this Bill) to act as a crowd controller for licensed premises. An ***approved gaming machine employee*** in relation to the gaming operations conducted on licensed premises is a person who is approved under Part 4 of the *Gaming Machines Act 1992* as a gaming machine employee in respect of those operations.

A new definition of ***authorised person*** is inserted. The new definition includes two additional classes of person, namely, responsible persons and approved crowd controllers. ***Responsible persons*** for licensed premises are persons who are, in accordance with section 97 of the *Liquor Licensing Act 1997*, responsible for supervising and managing the business conducted under the liquor licence in respect of the licensed premises.

criminal intelligence is information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement.

5—Amendment of section 7—Conduct of proceedings

The amendment made to section 7 by this clause is consequential on the insertion by clause 6 of new section 12.

6—Insertion of Part 2 Division 4

Clause 6 inserts a new Division, dealing with criminal intelligence (as defined in section 3), into Part 4 of the Act. Under new section 12, no information provided by the Commissioner of Police to the Authority or the Commissioner is to be disclosed to any person, other than the Minister, a court or a person to whom the Commissioner of Police authorises its disclosure, if the information is classified by the Commissioner of Police as criminal intelligence.

If a decision by the Commissioner to refuse an application, take disciplinary action or revoke an approval is made because of criminal intelligence, the Commissioner is not required to provide any grounds or reasons for the decision other than that to grant the application would be contrary to the public interest, or that it would be contrary to the public interest if the licensee were to continue to be licensed, or that it would be contrary to the public interest if the approval were to continue in force

Subsection (3) relates to proceedings under the Act. The Commissioner is required, on the application of the Commissioner of Police, to take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives. The Commissioner may also take evidence consisting of or relating to information classified by the Commissioner of Police as criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent.

A copy of a notice of objection to an application lodged by the Commissioner of Police under the Act on the basis of criminal intelligence need not be served on the applicant. However, the Commissioner must, at least 7 days before the day appointed for the hearing of the application, advise the applicant in writing that the Commissioner of Police has objected to the application on the ground that to grant the application would be contrary to the public interest.

The Commissioner of Police may not delegate the function of classifying information as criminal intelligence for the purposes of the Act except to a Deputy Commissioner or Assistant Commissioner of Police.

7—Amendment of section 19—Certain criteria must be satisfied by all applicants

For the purposes of determining whether a person is fit and proper to hold a licence or to occupy a position of authority, Section 19 of the *Gaming Machines Act 1992* presently requires that consideration be given to the creditworthiness of the person and the honesty and integrity of the person's known associates. The amendments made by this clause will have the effect of requiring consideration to be given to the reputation, honesty and integrity of both the person and his or her known associates.

8—Insertion of section 20

New section 20 requires the Commissioner to provide a copy of each application for a licence under the Act to the Commissioner of Police. The Commissioner of Police must, as soon as reasonably practicable following receipt of an application, make available to the Commissioner information about criminal convictions relevant to whether the application should be granted. The Commissioner of Police may also make available other information to which he or she has access if the information is relevant to whether the application should be granted.

9—Amendment of section 24—Discretion to grant or refuse application

As a consequence of this amendment to section 24, the Commissioner will not be able to grant an application for a licence unless satisfied that to grant the application would not be contrary to the public interest.

10—Amendment of section 28—Certain gaming machine licences only are transferable

Section 28 deals with the transfer of licences. The effect of the amendment made by this clause is that the Commissioner may, for the purpose of determining whether a person is a fit and proper person to hold a licence or to occupy a position of authority in a trust or corporate entity that holds a licence, cause the person's photograph and fingerprints to be taken and must give consideration to the reputation, honesty and integrity (including the creditworthiness) of the person and his or her known associates.

11—Insertion of sections 28AA and 28AAB

Section 28AA provides that the Commissioner must give the Commissioner of Police a copy of each application for consent to the transfer of a gaming machines licence. The Commissioner of Police must, as soon as reasonably practicable following receipt of an application, make available to the Commissioner information about criminal convictions relevant to whether the application should be granted. The Commissioner of Police may also make available other information to which he or she has access if the information is relevant to whether the application should be granted.

Section 28AAB provides that the Commissioner has an unqualified discretion to grant or refuse an application for consent to the transfer of a gaming machines licence on any ground, and for any reason, that the Commissioner thinks fit.

The Commissioner should not grant an application for consent under section 28 as a matter of course without a proper inquiry into its merits (whether or not the Commissioner of Police has intervened in the proceedings or there are any objections to the application). The Commissioner cannot grant an application for consent under section 28 unless satisfied that to grant the application would not be contrary to the public interest.

12—Amendment of section 30—Objections

The amendment made by this clause is consequential on the insertion of provisions relating to criminal intelligence (see clause 6).

13—Amendment of section 31—Intervention by Commissioner of Police

Section 31(1), as recast by this clause, provides that the Commissioner of Police may intervene in any proceedings before the Commissioner on an application under Part 3 of the Act for the purpose of introducing evidence or making submissions and, in particular, may intervene on the question of—

(a) whether a person is a fit and proper person; or

(b) whether, if the application were to be granted, public disorder or disturbance would be likely to result; or

(c) whether to grant the application would be contrary to the public interest.

14—Amendment of section 36—Cause for disciplinary action against licensees

This amendment to section 36 has the effect of allowing the Commissioner to take disciplinary action against a licensee if satisfied that it would be contrary to the public interest if the licensee were to continue to be licensed.

This clause also adds an additional provision that allows the Commissioner, in determining whether there is proper cause for disciplinary action against a licensee, to have regard to such evidence of the conduct (no matter when the conduct is alleged to have occurred) of the licensee or persons with whom the licensee associates (or has associated at any relevant time) as the Commissioner considers relevant, including information that existed at the time the licence was granted, regardless of whether that information was known or could have been made known to the Commissioner at that time.

15—Insertion of section 41A

New section 41A provides that the Commissioner must give the Commissioner of Police a copy of each application for approval made under Part 4 (other than under section 40 or 41). The Commissioner of Police must, as soon as reasonably practicable following receipt of an application, make available to the Commissioner information about criminal convictions relevant to whether the application should be granted. The Commissioner of Police may also make available other information to which he or she has access if the information is relevant to whether the application should be granted.

16—Amendment of section 42—Discretion to grant or refuse approval

This clause inserts a new provision that has the effect of preventing the Commissioner from granting an application for an approval unless the Commissioner is satisfied that to grant the application would not be contrary to the public interest. In making a determination as to whether a person is fit and proper to carry out particular duties or assume a particular position, the Commissioner is required to consider the reputation, honesty and integrity (including the creditworthiness) of the person as well as the person's associates.

17—Amendment of section 43—Intervention by Commissioner of Police

Section 43(1), as recast by this clause, provides that the Commissioner of Police may intervene in proceedings before the Commissioner on an application for approval under Part 4 (other than under section 40 or 41) for the purpose of introducing evidence or making submissions and, in particular, may intervene on the question of whether the person to whom the application relates is a fit and proper person or whether to grant the application would be contrary to the public interest.

18—Amendment of section 44—Revocation of approval

The amendment made by this clause is consequential on the insertion of provisions relating to criminal intelligence (see clause 6). The Commissioner's duty to provide a statement of the reasons that justify revocation of an approval is now subject to section 12.

19—Amendment of section 58—Powers in relation to minors in gaming areas

Section 58 provides that an authorised person who suspects on reasonable grounds that a person who is in a gaming area or about to enter a gaming area is a minor may require the minor to leave the gaming area. New subsection (5), inserted by this clause, requires an authorised person to comply with procedures prescribed under section 116(3a) of the *Liquor Licensing Act 1997* in relation to the removal of minors from licensed premises by authorised persons.

20—Amendment of section 60—Power to remove persons who have been barred

New section 60(3) provides that an authorised person must comply with any procedures prescribed under the *Liquor Licensing Act 1997* in relation to the removal by authorised persons (within the meaning of that Act) of persons from licensed premises.

21—Amendment of section 67—Power to remove offenders

This amendment recasts section 67(1) so that an authorised person, rather than the holder of a gaming machine licence or an approved gaming machine manager, may remove certain offenders from licensed premises. Under new subsection (4a), the regulations may prescribe procedures to be observed by authorised persons in or in connection with the prevention of persons from entering gaming areas. An authorised person must comply with any procedures prescribed under subsection (4a) or under the *Liquor Licensing Act 1997* in relation to the removal by authorised persons of persons from licensed premises.

22—Insertion of section 70A

New section 70A provides that in any proceedings under Part 6 of the Act (Appeals), the Licensing Court of South Australia or the Independent Gambling Authority must, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives. The Court or Authority may take evidence consisting of or relating to information classified by the Commissioner of Police as criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent.

23—Insertion of section 85A

New section 85A applies to fingerprints taken under the Act in connection with an application that has been refused, or an application that has been granted but the licence or approval later revoked or surrendered. A person whose fingerprints have been taken under the Act may, if the fingerprints are fingerprints to which section 85A applies, apply to the Commissioner of Police to have the fingerprints, and any copies of the fingerprints, destroyed. The Commissioner of Police may grant or refuse the application as the Commissioner of Police sees fit.

Part 3—Amendment of *Liquor Licensing Act 1997*

24—Amendment of section 4—Interpretation

This clause inserts two new definitions. An ***approved crowd controller*** is a person approved under new Part 4 Division 10A to act as a crowd controller for licensed premises (other than a person whose approval has been suspended or revoked). ***Criminal intelligence*** is information relating to actual or suspected criminal activity (whether in this State or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement.

25—Amendment of section 17—Division of responsibilities between the Commissioner and the Court

This is a consequential amendment. The Commissioner is not required to attempt conciliation in relation to an application to which an objection has been lodged by the Commissioner of Police on the ground that to grant the application would be contrary to the public interest.

26—Insertion of Part 2 Division 6

Clause 26 inserts a new Division, dealing with criminal intelligence (as defined in section 4), into Part 2 of the Act. Under new section 28A, no information provided by the Commissioner of Police to the Authority or the Commissioner is to be disclosed to any person, other than the Minister, a court or a person to whom the Commissioner of Police authorises its disclosure, if the information is classified by the Commissioner of Police as criminal intelligence.

If a decision by a licensing authority to refuse an application, take disciplinary action or revoke an approval is made because of criminal intelligence, the licensing authority is not required to provide any grounds or reasons for the decision other than that to grant the application would be contrary to the public interest, or that it would be contrary to the public interest if the licensee were to continue to be licensed, or that it would be contrary to the public interest if the approval were to continue in force.

A copy of a notice of objection to an application lodged by the Commissioner of Police under Part 4 on the basis of criminal intelligence need not be served on the applicant. However, the licensing authority must, at least 7 days before the day appointed for the hearing of the application, advise the applicant in writing that the Commissioner of Police has objected to the application on the ground that to grant the application would be contrary to the public interest.

If the Commissioner or the Commissioner of Police lodges a complaint under Part 8 in respect of a person because of information that is classified by the Commissioner of Police as criminal intelligence, the complaint need only state that it would be contrary to the public interest if the person were to be or continue to be licensed or approved.

Subsection (5) relates to proceedings under the Act. The Commissioner, the Court and the Supreme Court are required to, on the application of the Commissioner of Police, take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives. The Commissioner or the Court may also take evidence consisting of or relating to information classified by the Commissioner of Police as criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent.

The Commissioner of Police may not delegate the function of classifying information as criminal intelligence for the purposes of the Act except to a Deputy Commissioner or Assistant Commissioner of Police.

27—Insertion of section 51A

New section 51A applies only in relation to the applications listed under subsection (1). The Commissioner is required under subsection (2) to provide the Commissioner of Police with a copy of each application to which the section applies. The Commissioner of Police must, as soon as practicable following receipt of an application from the Commissioner, make available to the Commissioner information about criminal convictions relevant to whether the application should be granted. The Commissioner of Police may also make available other relevant information to which he or she has access.

28—Amendment of section 53—Discretionary powers of licensing authority

Section 53 provides the licensing authority with an unqualified discretion (subject to the Act) to grant or refuse an application under the Act. New subsection (1a) provides that an application can only be granted if the licensing authority is satisfied that to grant the application would not be contrary to the public interest.

29—Amendment of section 55—Factors to be taken into account in deciding whether a person is fit and proper

This clause recasts section 55(1) so that a licensing authority must, in deciding whether a person is fit and proper for a particular purpose under the Act, consider the reputation, honesty and integrity of the person and the person's associates. This clause also inserts a new subsection that provides that for the purposes of determining whether a person is a fit and proper person for a particular purpose under the Act, the Commissioner may cause the person's photograph and fingerprints to be taken.

30—Insertion of Part 4 Division 10A

New Division 10A of Part 4 provides for the approval by the Commissioner of crowd controllers. Under section 71A, the Commissioner may, on application, approve a person to act as a crowd controller for licensed premises.

The Commissioner cannot approve a person to act as a crowd controller unless the person has the appropriate knowledge, experience and skills for the purpose. If an applicant for approval does not have the appropriate knowledge, experience and skills to act as a crowd controller, the Commissioner may nevertheless approve the person and impose a condition on the approval that the person undertake specified accredited training within a specified time of obtaining the approval.

An approved crowd controller must not use force to remove a person from licensed premises except under the direct supervision of the licensee or the responsible person for the premises. The Commissioner has an unqualified discretion to revoke an approval given under this Division on such ground or for such reason as he or she thinks fit. However, before exercising powers to revoke an approval, the Commissioner must give written notice of the proposed revocation to the person and allow the person a period of at least 21 days to show cause why the approval should not be revoked. The Commissioner may suspend an approval pending final resolution of the matter.

New Division 10A is in addition to, and does not derogate from, the *Security and Investigation Agents Act 1995*.

31—Insertion of section 75A

New section 75A, which adopts and expands the wording of section 76(1) (deleted by clause 32), provides that the Commissioner of Police may intervene in proceedings before a licensing authority for the purpose of introducing evidence, or making submissions, on any question before the authority. In particular, the Commissioner of Police may, if the proceedings are in connection with an application under Part 4, intervene on the question of—

(a) whether a person is a fit and proper person; or

(b) whether, if the application were to be granted, public disorder or disturbance would be likely to result; or

(c) whether to grant the application would be contrary to the public interest.

32—Amendment of section 76—Other rights of intervention

The amendment made by this clause is consequential.

33—Amendment of section 77—General rights of objection

The amendment made by this clause is consequential.

34—Amendment of section 116—Power to require minors to leave licensed premises

Section 116 provides that an authorised person who suspects on reasonable grounds that a person on licensed premises is under the age of 18 and on the licensed premises for the purpose of consuming liquor in contravention of the Act may require the minor to leave the premises. New subsection (3a), inserted by this clause, provides that the regulations may prescribe procedures to be observed by authorised persons in or in connection with the removal of minors from licensed premises. Subsection (3b) requires an authorised person to comply with such procedures. This clause also amends the definition of ***authorised person*** by removing the reference to agents or employees of licensees and adding approved crowd controllers.

35—Amendment of section 118—Application of Part

Part 8 (Disciplinary Action) does not apply to persons approved as crowd controllers under Part 4 Division 10A.

36—Amendment of section 119—Cause for disciplinary action

The insertion into section 119(1)(b) of new subparagraph (via) will mean that there will be proper cause for disciplinary action against a person if there has been a contravention of a provision of the *Liquor Licensing Act 1997* or the *Gaming Machines Act 1992* relating to the prevention of a person from entering, or the removal of a person from, licensed premises. There will also be proper cause for disciplinary action against a person if the person is or has been licensed or approved under the Act but it would be contrary to the public interest if the person were to be or continue to be licensed or approved.

New section 119(2) provides that, in determining whether there is proper cause for disciplinary action against a person who is or has been licensed or approved under the Act, regard may be had to such evidence of the conduct (no matter when the conduct is alleged to have occurred) of the person or persons with whom the person associates (or has associated at any relevant time) as the Court considers relevant, including information that existed at the time the licence or approval was granted, regardless of whether that information was before or could have been brought before the licensing authority at that time.

37—Amendment of section 120—Disciplinary action before the Court

The amendments made by this clause to section 120 are consequential on the introduction of the definition of criminal intelligence and the insertion of section 26A.

38—Amendment of section 124—Power to refuse entry or remove persons guilty of offensive behaviour

Section 124 provides that an authorised person may use reasonable force to remove from, or prevent entry to, licensed premises any person who is intoxicated or behaving in an offensive or disorderly manner. New subsection (1a), inserted by this clause, provides that the regulations may prescribe procedures to be observed by authorised persons in or in connection with the preventions of persons from entering, and the removal of persons from, licensed premises. Subsection (1b) requires an authorised person to comply with such procedures. This clause also amends the definition of ***authorised person*** by removing the reference to agents or employees of licensees and adding approved crowd controllers.

39—Amendment of section 127—Power to remove person who is barred

Under section 127, an authorised person may require a person on premises from which the person is barred to leave the premises. A person who is barred may, if he or she seeks to enter the premises or refuses or fails to comply with a requirement to leave the premises, be prevented from entering, or removed from, the premises by an authorised person using the force reasonably necessary for the purpose. New subsection (2a), inserted by this clause, provides that the regulations may prescribe procedures to be observed by authorised persons in or in connection with the prevention of persons from entering, and the removal of persons from, licensed premises. Subsection (2b) requires an authorised person to comply with such procedures. This clause also amends the definition of ***authorised person*** by removing the reference to agents or employees of licensees and adding approved crowd controllers.

40—Insertion of section 131A

This clause inserts a new offence of failing to leave licensed premises on request.

If a person who is under the age of 18 years and on licensed premises for the purpose of consuming liquor in contravention of the Act, or intoxicated or behaving in an offensive or disorderly manner, or barred from the licensed premises under Part 9 Division 3, or otherwise on the premises in contravention of the Act fails, without reasonable excuse, to leave the licensed premises immediately on being requested to do so by an authorised person, the person is guilty of an offence. The maximum penalty for this offence is a fine of $1 250.

41—Insertion of section 137A

New section 147A applies to fingerprints taken under the Act in connection with an application that has been refused, or an application that has been granted but the licence or approval later revoked or surrendered. A person whose fingerprints have been taken under the Act may, if the fingerprints are fingerprints to which section 137A applies, apply to the Commissioner of Police to have the fingerprints, and any copies of the fingerprints, destroyed. The Commissioner of Police may grant or refuse the application as the Commissioner of Police sees fit.

Part 4—Amendment of *Security and Investigation Agents Act 1995*

42—Amendment of section 3—Interpretation

This clause inserts into section 3 a number of definitions necessary for the purposes of the measure.

An ***approved psychological assessment*** is a form of psychological assessment approved by the Commissioner for the purpose of determining whether a person is fit and proper to hold a security agents licence. ***Criminal intelligence*** is information relating to actual or suspected criminal activity (whether in South Australia or elsewhere) the disclosure of which could reasonably be expected to prejudice criminal investigations, or to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement.

43—Insertion of sections 5A and 5B

Section 5A provides that police officers may exercise the powers of authorised officers under sections 77 and 78 of the *Fair Trading Act 1987*.

Under **section 5B**, no information provided by the Commissioner of Police to the Commissioner is to be disclosed to any person, other than the Minister, a court or a person to whom the Commissioner of Police authorises its disclosure, if the information is classified by the Commissioner of Police as criminal intelligence.

If a decision by the Commissioner to refuse an application for, impose a condition on or suspend a licence is made because of criminal intelligence, the Commissioner is not required to provide any grounds or reasons for the decision other than that to grant the application would be contrary to the public interest, or that it would be contrary to the public interest if the licence were to continue in force without the condition or that it would be contrary to the public interest if the licensee were to continue to be licensed.

A copy of a notice of objection to an application lodged by the Commissioner of Police under section 8A on the basis of criminal intelligence need not be served on the applicant. However, the Commissioner must, as soon as reasonably practicable after receiving the notice of objection, advise the applicant in writing that the Commissioner of Police has objected to the application on the ground that to grant the application would be contrary to the public interest.

If the Commissioner or the Commissioner of Police lodges a complaint under Part 4 in respect of a person because of information that is classified by the Commissioner of Police as criminal intelligence, the complaint need only state that it would be contrary to the public interest if the person were to be or continue to be licensed.

Subsection (5) relates to proceedings under the Act. The Commissioner and the Court are required, on the application of the Commissioner of Police, to take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence, including steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings and their representatives. The Commissioner or the Court may also take evidence consisting of or relating to information classified by the Commissioner of Police as criminal intelligence by way of affidavit of a police officer of or above the rank of superintendent.

The Commissioner of Police may not delegate the function of classifying information as criminal intelligence for the purposes of the Act except to a Deputy Commissioner or Assistant Commissioner of Police.

44—Insertion of sections 8A to 8C

Under **section 8A**, the Commissioner must either provide the Commissioner of Police with a copy of each application for a security agents licence or notify the Commissioner of Police of the identity of the applicant or, if the applicant is a body corporate, the identity of each director of the body corporate.

The Commissioner of Police must, as soon as reasonably practicable following receipt of an application or information as to the identity of an applicant, provide the Commissioner with information about criminal convictions relevant to whether the application should be granted. The Commissioner of Police may also make available other relevant information.

The Commissioner of Police may, following receipt of an application, or information in respect of an application, object to the application by notice in writing provided to the Commissioner within the prescribed period. A notice of objection must state grounds for the objection. A copy of the notice of objection must, subject to restrictions in relation to criminal intelligence, be served by the Commissioner on the

applicant as soon as reasonably practicable after the notice is received by the Commissioner. The Commissioner is required to provide an applicant with a reasonable opportunity to respond to a notice of objection.

Section 8B provides that an applicant for a security agents licence may be required by the Commissioner to have his or her fingerprints taken by a police officer. Failure to attend for the taking of fingerprints may give rise to delay in consideration of the application or refusal. The Commissioner of Police is required, after fingerprints have been taken from an applicant, to make available to the Commissioner such information to which the Commissioner of Police has access about the identity, antecedents and criminal history of the person as the Commissioner of Police considers relevant.

Section 8C provides that an applicant for a security agents licence who is seeking authorisation to perform the function of controlling crowds may be required by the Commissioner, for the purpose of determining whether the applicant is fit and proper to hold such a licence, to take part, at the cost of the applicant, in an approved psychological assessment. If a person fails to take part in a psychological assessment in accordance with such a request, the Commissioner may, by notice in writing, require the person, within a time fixed by the notice (which may not be less than 28 days after service of the notice), to make good the default. If the person fails to comply with the notice, the Commissioner may, without further notice, refuse the application but keep the fee that accompanied the application. The Commissioner is not required to consider an application in relation to which a request has been made until the applicant has been assessed and the results of the assessment provided to the Commissioner.

45—Amendment of section 9—Entitlement to be licensed

The amendments made to section 9 by this clause are consequential.

46—Insertion of section 9A

Section 9A, inserted by this clause, provides that, in deciding whether a person is a fit and proper person to hold a security agents licence, or to be the director of a body corporate that is the holder of a security agents licence, the Commissioner must take into consideration—

(a) the reputation, honesty and integrity of the person; and

(b) the reputation, honesty and integrity of people with whom the person associates.

If the Commissioner of Police has objected to an application for a security agents licence, the Commissioner must take into consideration the grounds for the objection when assessing the application. An application for a security agents licence can only be granted if the Commissioner is satisfied that to grant the application would not be contrary to the public interest.

47—Amendment of section 11—Appeals

Under new section 11(1a), the Commissioner of Police may appeal to the District Court against a decision of the Commissioner granting an application for a security agents licence.

48—Insertion of sections 11AB to 11AD

Section 11AB provides that the Commissioner may require a person who holds a security agents licence, or a director of a body corporate that holds a security agents licence, to have his or her fingerprints taken by a police officer. As soon as reasonably practicable after fingerprints have been taken from a person by a police officer pursuant to a requirement under section 11AB, the Commissioner of Police must make available to the Commissioner such information to which the Commissioner of Police has access about the identity, antecedents and criminal history of the person as the Commissioner of Police considers relevant.

Under **section 11AC**, the Commissioner may require the holder of a security agents licence that authorises the licensee to perform the function of controlling crowds to complete an approved security industry training course within a period specified by the Commissioner. If a licensed security agent has been required by the Commissioner to complete a training course, the security agent must, when next lodging an annual return (under section 12) following the end of the period within which he or she has been required to complete the course, provide the Commissioner with evidence that the course has been completed to a satisfactory standard.

Section 11AD provides that the Commissioner may, for the purpose of determining whether the holder of a security agents licence that authorises the licensee to perform the function of controlling crowds is a fit and proper person, require the licensee to attend at a specified time and place for the purpose of taking part in an approved psychological assessment.

49—Amendment of section 12—Duration of licence and annual fee and return etc

The amendments made to section 12 by this clause provide for administrative cancellation of the licence held by a security agent who fails to comply with a requirement or direction under section 11AB, 11AC or 11AD.

50—Amendment of section 12A—Employment of security agents or investigation agents

The purpose of this amendment is to limit the operation of section 12A to the employment of security agents and investigation agents only. Under new subsection (2), a person must not engage another to perform the function of controlling crowds unless the person personally performing the function holds a licence authorising him or her to do so.

51—Insertion of Part 3A

Part 3A contains provisions that apply in relation to security agents only.

Under **section 23A**, the Commissioner *may* suspend a security agents licence if the holder of the licence, or a director of a body corporate that is the holder of the licence, is charged with an offence of a class specified by regulation in relation to the functions authorised by the licence, or the Commissioner is satisfied, for any other reason, that it would be contrary to the public interest if the holder of a security agents licence were to continue to be licensed.

The licence must be suspended by notice in writing and takes effect immediately on service of a suspension notice advising that the licence has been suspended. A person on whom a suspension notice has been served may, within the period of 21 days following service of the notice, make written representations to the Commissioner as to why his or her security agents licence should not be suspended.

The Commissioner must, at the end of the period of 28 days following service of a suspension notice under this section, make a determination as to whether the suspension is to be confirmed or revoked and advise the holder of the licence of his or her decision. The Commissioner must, in determining whether to confirm or revoke suspension of a security agents licence, have regard to any representations received from the holder of the licence in accordance with the section.

The Commissioner may, at any time, on his or her own initiative, or on application by a person whose licence is suspended, revoke the suspension of a security agents licence under section 23A.

Section 23A is expressed to be subject to **section 23B**, which provides that the Commissioner must suspend (until further notice) a security agents licence that authorises the licensee to perform the function of controlling crowds if the licensee is charged with an offence of a class specified by regulation in relation to the functions authorised by the licence.

Suspension of a licence under section 23B takes effect immediately on service of a suspension notice advising that the licence has been suspended and may not be revoked by the Commissioner unless—

(a) the holder of the licence has been found not guilty by a court of the criminal charges relevant to the licence having been suspended, or those charges have been withdrawn or dismissed; and

(b) the Commissioner is satisfied that revocation of the suspension would not be contrary to the public interest.

Sections 23C and 23D deal with the content and service of suspensions notices. Under **section 23E**, a person whose security agents licence has been suspended under section 23A or 23B may appeal to the Court against the decision of the Commissioner to suspend the licence. **Section 23F** provides that no liability attaches to the Commissioner or the Crown for the exercise or purported exercise in good faith of the Commissioner's power to suspend a security agents licence.

Under **section 23G**, if the holder of a security agents licence is found guilty of an offence of a class specified by regulation in relation to the functions authorised by the licence, the licence is cancelled and the licensee must, within 7 days of

that finding, surrender the licence to the Commissioner. Failure to surrender a licence in accordance with the section is an offence.

Section 23H provides that if disciplinary action is taken on the prescribed number of occasions within the prescribed period against a person, or a number of persons, employed or otherwise engaged in the business of an agent carrying on business as a security agent, the Commissioner must review the licence of the agent to determine if the licence should be suspended or a complaint lodged in respect of the agent under section 26.

Section 23I contains definitions necessary for the purposes of Part 3A Division 2. This division deals with alcohol and drug testing of persons authorised to control crowds. For the purposes of this Division, ***licensee*** is defined to mean the holder of a security agents licence that authorises the licensee to perform the function of controlling crowds. The ***prescribed concentration of alcohol*** is any concentration of alcohol in the blood.

Section 23J provides that a police officer or an authorised officer may, by notice in writing, direct a licensee to attend at a specified time and place for the purpose of undertaking a drug testing procedure to determine the level of any prescribed drug in any form in the blood or urine of the agent.

Under **section 23K**, a police officer may require a licensee performing the function of controlling crowds to submit to an alcotest. If the alcotest indicates that the prescribed concentration of alcohol may be present in the blood of the licensee, a police officer may require the licensee to submit to a breath analysis. Performance of the breath analysis must be commenced within two hours after the licensee has submitted to the alcotest indicating that the prescribed concentration of alcohol may be present in the blood of the licensee. The regulations may prescribe the manner in which an alcotest or breath analysis is to be conducted. Sections **23L** and **23M** are evidentiary provisions, similar to those relating to alcotest and breath analysis included in the *Road Traffic Act 1961*. The Commissioner of Police is required under **section 23N** to advise the Commissioner whether or not a licensee has complied with a requirement to submit to an alcotest or breath analysis and, if the licensee has complied with the requirement, the result of the test or analysis.

The Commissioner may, under section **23O**, cancel a security agents licence if—

(a) the licensee fails, without reasonable excuse, to comply with—

(i) a notice or direction under section 23K(1) in relation to a requirement to submit to a drug test; or

(ii) a requirement or direction under section 23L in relation to an alcotest or breath analysis; or

(b) a sample of the blood or urine of the licensee taken in accordance with section 23K is found on analysis to be a non-complying sample (within the meaning of the regulations); or

(c) the results of a breath analysis undertaken in accordance with this Division demonstrate that the prescribed concentration of alcohol was present in the licensee's blood at a time when the licensee was performing the function of controlling crowds.

However, before exercising the power to cancel a licence under section 23O, the Commissioner must give written notice to the licensee of the proposed cancellation, including a statement of the reasons that the Commissioner considers justify the cancellation. The Commissioner must allow the licensee a period of 14 days (or such longer period as the Commissioner may in a particular case allow) to show cause why the licence should not be cancelled. At the end of that period, the Commissioner must determine whether or not to proceed with cancellation of the licence and advise the licensee by notice in writing of his or her determination. The notice must, if the licence is to be cancelled, specify the date from which the cancellation is take effect. That date may not be less than 14 days from the date of the notice. The notice must also set out the grounds for the Commissioner's decision.

A person whose security agents licence has been cancelled under section 23O must, under **section 23P**, within 7 days of the date on which the cancellation takes effect, surrender the licence to the Commissioner. Failure to surrender a licence in accordance with section 23P is an offence. The maximum penalty is a fine of $1 250.

Under **section 23Q**, there is a right of appeal to the District Court against a decision of the Commissioner to cancel a licence.

52—Amendment of section 25—Cause for disciplinary action

As a consequence of the amendment made by this clause, there will be proper cause for disciplinary action against a natural person licensed or formerly licensed as a security agent if—

(i) the person is not a fit and proper person; or

(ii) the person has contravened a provision of the *Liquor Licensing Act 1997* or the *Gaming Machines Act 1992* relating to the prevention of a person from entering, or the removal of a person from, licensed premises (within the meaning of the *Liquor Licensing Act 1997*); or

(iii) it would be contrary to the public interest if the licensee were to be or continue to be licensed.

There will be proper cause for disciplinary action against a body corporate licensed or formerly licensed as a security agent if a director of the body corporate is not a fit and proper person or it would be contrary to the public interest if the body corporate were to be or continue to be licensed.

53—Amendment of section 26—Complaints

Under section 26 of the Act, as amended by this clause, a complaint alleging grounds for disciplinary action may be lodged by the Commissioner, a police officer or any other person. At present, section 26 does not specify that a police officer may lodge a complaint.

54—Insertion of section 27A

Section 27A, inserted by this clause, provides that on the hearing of a complaint against a person licensed or formerly licensed as a security agent, the District Court is not bound by the rules of evidence but may inform itself as it thinks fit and must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms. In determining whether there is proper cause for disciplinary action against a security agent or former security agent, regard may be had to such evidence of the conduct (no matter when the conduct is alleged to have occurred) of the person or persons with whom the person associates (or has associated at any relevant time) as the Court considers relevant, including information that existed at the time the licence was granted, regardless of whether that information was known or could have been made known to the Commissioner at that time.

55—Insertion of section 36A

A person whose fingerprints have been taken for the purposes of the Act may, if the fingerprints are fingerprints to which section 36A applies, apply to the Commissioner of Police to have the fingerprints, and any copies of the fingerprints, destroyed. The Commissioner of Police may grant or refuse the application as the Commissioner of Police sees fit.

56—Amendment of section 39—Commissioner of Police to conduct investigations and make available relevant information

This amendment to section 39 has the effect of requiring the Commissioner to make information relevant to a matter that might constitute proper cause for disciplinary action under the Act available to the Commissioner as soon as reasonably practicable after becoming aware of the information.

57—Amendment of section 44—Prosecutions

Section 44 presently provides that a prosecution for an offence against the Act cannot be commenced except by the Commissioner, an authorised officer under the *Fair Trading Act 1987* or a person who has the consent of the Minister to commence the prosecution. This amendment adds police officers to the list of persons who may commence prosecutions.

Schedule 1—Transitional provisions

Schedule 1 contains transitional provisions.

An amendment to the *Gaming Machines Act 1992* effected by a provision of the *Statutes Amendment (Liquor, Gambling and Security Industries) Act 2004* ("the Act") applies in respect of an application under the *Gaming Machines Act 1992* if the application is determined after the commencement of the provision irrespective of whether the application was lodged before or after that commence-

ment. An amendment to the *Gaming Machines Act 1992* effected by a provision of the Act applies in respect of a licence or approval granted under the *Gaming Machines Act 1992*, or a person licensed or approved under that Act, whether the licence or approval was granted before or after the commencement of the amending provision.

Clauses 2 and 3 of Schedule 1 include similar transitional provisions applicable in respect of amendments made to the *Liquor Licensing Act 1997* and *Security and Investigation Agents Act 1995*.

Schedule 2—Statute law revision amendment of *Gaming Machines Act 1992*

Schedule 2 contains amendments to the *Gaming Machines Act 1992* of a statute law revision nature.

Schedule 3—Statute law revision amendment of *Security and Investigation Agents Act 1995*

Schedule 3 contains amendments to the *Security and Investigation Agents Act 1995* of a statute law revision nature.

The Hon. R.D. LAWSON secured the adjournment of the debate.

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

In committee.

(Continued from 16 February. Page 1123.)

Clause 32.

The Hon. R.D. LAWSON: My amendment to this clause was consequential on an amendment I moved earlier—amendment no. 10, I think—on which we had the debate about whether multi-employer enterprise agreements should be permitted. We are strongly opposed to multi-employer enterprise agreements for the reasons previously stated; however, as I indicated on that occasion, the vote on my amendment no. 10 in relation to the definition was a test vote. It was lost and, therefore, I will not be proceeding with the amendment I have on file. However, we will be opposing clause 32.

Clause passed.

Clause 33 passed.

Clause 34.

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

Page 18, after line 34—Insert:

(3a) An employer cannot be required, as part of any negotiations under this Part, to produce any financial records relating to any business or undertaking of the employer.

Before developing the argument in relation to this amendment I should say, by way of general introduction, that we are opposed to the whole of clause 34. In particular, we are opposed to the insertion of the section 76A dealing with the subject of best endeavours bargaining or, as the shadow minister in another place more correctly described it, best of luck bargaining.

This is one of the most serious alterations to our existing industrial relations regime. It will undermine the effectiveness and destroy the intent of enterprise bargains. I mentioned yesterday that this state has an unenviable reputation in industrial relations. It is one of the great selling points of our state in respect of industrial development. The Premier is happy enough to be out there on the front page of the newspaper demanding that we have new defence contracts, basing his argument largely on our good industrial relations record—a record which is based on the existing regime and which will be destroyed if this legislation comes in.

The Hon. R.K. Sneath: Why don't you congratulate the unions, then?

The Hon. R.D. LAWSON: I am very happy to congratulate the unions on the industrial record we have in this state.

The Hon. T.G. Cameron: What about the employers?

The Hon. R.D. LAWSON: The employers are entitled to congratulations. However, more importantly, the framework in which—

Members interjecting:

The Hon. R.D. LAWSON: I congratulate the unionists, even those deceased unionists on the AWA books. Our objections to best endeavours bargaining is very fairly put in a submission delivered to members of parliament by the South Australian Wine Industry Association Incorporated. I commend to the committee what that association has said. As I said yesterday, the Wine Industry Association is a body operating within one of the most vibrant sections of the South Australian economy, and it is one of the drivers of the growth in employment and economic activity. In relation to proposed section 76A, the association states:

> We make comments that, with the brief introduction of good faith bargaining in the federal sphere, this provided a period of increased litigation as the parties (unions) sought the commission's assistance to determine the boundaries of such a provision and develop case law in the area.

The reference there is to the fact that certainly in some state acts there is a notion of what is termed good faith bargaining. We in South Australia have now gone down this route of best endeavours bargaining; we have used a new expression. The point being made is that there is no doubt that when you introduce new expressions of this kind you will find a great deal of litigation to define precisely what is meant by it. The association continues:

> We have no reason to doubt that the inclusion of the term 'best endeavours bargaining' within the bill would also lead to a substantial testing of the term within the Industrial Relations Commission, leading to challenges, disputes, disruption and delays within the workplace prior to the making of an agreement. What evidence is there to suggest that the current system of enterprise agreement making requires this provision? We consider that no case has been made out to justify such a provision. Current enterprise agreement wine industry employers are extremely concerned with the possibility of its introduction, and small and medium size employers, (or their representatives) will not be encouraged into enterprise agreement making with a requirement such as this.

The submission goes on:

> Providing a greater role for the Industrial Relations Commission, as specified in [proposed] section 76A . . . is, in our view, an unjustifiable intrusion into the enterprise agreement process that simply provides for and legitimises a role for third party intervention to be used. . .

That is our great concern. Enterprise agreements ought be entered into between a particular work force and an enterprise. In most cases, there will be union involvement in the negotiation of enterprise agreements, and others will not have union involvement. The Employer Ombudsman has a specific role in relation to assisting such employees. The association continues:

> Recent wine industry experience indicates that this type of provision will provide outcomes that are not in the interests of the business but the view of the commission to resolve an impasse in the negotiation process. This provision provides a legitimacy for the commission to conciliate and/or arbitrate an outcome, effectively imposing a third party outcome on the business.

That is the nub of it. Presently, enterprise agreements are negotiated between parties. Third parties have no say in what the work force or an enterprise agree upon. However, this measure will enable third party intervention, because it has an arbitration at the end of it. The association continues:

The process of enterprise agreement making will no longer resemble its former self. Embarking on the process of endeavouring to negotiate an enterprise agreement will no longer have as an [possible] outcome 'failing to reach agreement'. The commission will determine it for you. Once on the enterprise agreement merry-go-round, you can't get off. The whole concept of enterprise agreements, as we have come to know them in South Australia, changes for the worse, not the better, with these provisions. The wine industry indicates that the South Australian system effectively proposes an arbitration system at both the award level and the enterprise agreement level.

The Hon. T.G. Cameron interjecting:

The Hon. R.D. LAWSON: The Hon. Terry Cameron says that that is nonsense. I beg to differ with him. At the moment, the system is one in which awards are negotiated and ultimately arbitrated if there is no agreement between the parties: that is the essence of an award. However, with enterprise agreements, there is no necessary outcome. It may be that the parties fail to reach an agreement. There is no requirement to go to arbitration; there is no third party intervention. Indeed, section 101, which is unaffected by this amendment specifically provides:

(1) In arriving at a determination affecting remuneration or working conditions, a State industrial authority must have due regard to and may apply and give effect to principles, guidelines, conditions, practices or procedures adopted by the Full Commission under this Part.

(2) However, principles adopted under this Part are not applicable to enterprise agreements.

That is enterprise agreements are to be negotiated between the parties. The wine industry continues :

Award regulation is governed by a set of wage fixing principles, an enterprise agreement determination by the Commission is not so regulated, any outcome is potentially possible. . . The new IR system becomes lower rates system (award) and a higher rates system (enterprise agreements). Wine industry employers do not support the introduction of best endeavours bargaining or intervention by a third party to determine (impose) outcomes as part of an agreement because it strongly promotes division within the workplace leading to the promotion of adversarial relationships, lost time, increases costs in defending actions within the Industrial Relations Commission and leads to unknown costs arising out of entering into agreement making or renewing an agreement. This is unacceptable to wine industry employer interests within South Australia.

Although those comments are specifically related to the wine industry, they apply across the board. The objections which the wine industry has identified are objections of a general nature. I apologise to the committee for reading an extensive passage into the record; however, I think it is important that those opposite understand that we in the opposition are not coming from an ideological opposition to this but that we are basing our objections on the experience of industry.

For those reasons we will be opposing section 76A in its entirety. However, we believe it is appropriate to endeavour to improve the section, that being part of the function of the committee stage, and my amendment seeks to insert a new clause after proposed subsection (3). Subsection (3) provides:

The Commission may, on the application of a party to any negotiations, give directions to resolve any dispute as to the composition of the group of employees for negotiating purposes.

That is a power to give directions which is wide, uncertain, not defined and not confined. We believe it would be appropriate if we were to adopt such a section to limit the commission's powers in this direction and what we seek to have inserted is a new subsection 3(a), as follows:

An employer cannot be required as part of any negotiations under this part to produce any financial records relating to any business or undertaking of the employer.

I do hope the government will be able to indicate its good faith by supporting that amendment.

The Hon. P. HOLLOWAY: The government opposes the amendment. The state commission may under the existing law of discovery gain access to, and potentially require the exchange of, some financial information about businesses involved in enterprise bargaining negotiations. In closing the second reading debate my colleague the Minister for Aboriginal Affairs and Reconciliation stated:

However in order that the commission or the courts in interpreting the legislation are clear as to what is intended, I say on behalf of the government that it is intended that clause 34 (section 76A(2)(c)) of the bill is intended to be interpreted consistently with Justice Munro's decision in the Alcoa clerks case, where he said:

> A party will not be required to produce documents where to do so would be oppressive; or where the demand for a production is a 'fishing expedition', in the sense that it is an endeavour not to obtain evidence to support a case, but to discover whether there is a case at all. Where the proper use of legal compulsion to produce documents is an issue, the tribunal will need to carry out an exercise of judgment on the particular facts in each case. That judgment requires a balance on the one hand of the reasonableness of the burden imposed upon the recipient and the invasion of private rights with, on th either hand, the public interest in new administration of justice and ensuring that all material relevant to the issues be available to the parties to enable them to advance their respective cases.

That adequately addresses the matter raised by the deputy leader, and that is why we oppose the amendment.

The Hon. IAN GILFILLAN: We do not object to this amendment. The committee would be aware that we are moving to delete subclauses (5), (6) and (7) in this clause. The principle I outlined in my second reading contribution is the one we adhere to here: that the role of the commission here is conciliation, not arbitration. It is an unholy union; I do not think it is a union of effectiveness if you have the same entity that is supposedly cajoling and encouraging a mutually agreeable enterprise agreement to be achieved but behind that commission's back there is a figurative cudgel that if the parties do not arrive at an agreement one or other of them will get it around the ears and we will just tell you what to do. That totally negates the atmosphere of negotiation in a constructive and conciliatory way.

As an indication of the opposition's position, could I ask the Hon. Robert Lawson: if the opposition is successful in its amendments to the clause, would it then support the clause?

The Hon. R.D. LAWSON: I have indicated to the committee that we would not support this clause because we object to the fundamental principle that there should be any third party intervention in enterprise agreement negotiations. However, it is incumbent upon us to endeavour to make the clause less bad. I should also indicate that, although we are specifically speaking at this time about the enforced production of documents, the minister in his response referred to case law on the subject of the discovery of documents.

In an arbitration on an enterprise agreement, it is highly likely that financial information might be relevant, in the strict legal sense, and that, applying the ordinary principles of discovery of documents, financial disclosure might have to be made. We do not believe that is appropriate in an enterprise agreement system where there should be a voluntary negotiation. Employees do not have to put all their cards on the table, but they may choose to. They may choose to divulge private information to which the business is not entitled. Similarly, the business may choose to divulge that information. We do not believe it is appropriate that the commission, which became involved in the arbitral process

at the end, should have a power to direct the production of financial records. We are seeking to make this clause better.

I also indicate that our opposition to the whole notion of best endeavours bargaining, as incorporated in the bill, concerns the uncertainty of it. Exactly what is meant by 'best endeavours'? In New South Wales there is a requirement, we acknowledge, for good faith bargaining, but there is no obligation in the New South Wales legislation to negotiate in good faith. There is a good faith provision, but there is no obligation. There is no sanction if one does not—

The Hon. T.G. Cameron interjecting:

The Hon. R.D. LAWSON: The honourable member says they should be able to negotiate in bad faith.

The Hon. T.G. Cameron interjecting:

The Hon. R.D. LAWSON: Either party to the negotiation is entitled to go into the negotiation with—

Members interjecting:

The Hon. R.D. LAWSON: It is whatever they want. They may be interested in talking or they may not be interested in talking. That is the element of free bargaining. We are not suggesting people go into it in bad faith or good faith. They should not be under any statutory requirement. But, more particularly, there should not be an arbitral process at the end—which is the critical element. Queensland does have, we acknowledge, an obligation to bargain in good faith, not to enter into best endeavours bargaining, but the factors there are different. Western Australia does have a good faith test, similar to ours, but there are differences. The point I raise about that is that there is no established case law or principle as to how these things will operate.

The Hon. T.G. Cameron interjecting:

The Hon. R.D. LAWSON: Well, there are differences in definition and there are differences in requirement. For example, in relation to best endeavours, you must disclose relevant and necessary information. We do not insist upon this when a person buys a house.

The Hon. G.E. Gago interjecting:

The Hon. R.D. LAWSON: Obviously, you are not allowed to tell lies or act dishonestly.

The Hon. T.G. Cameron interjecting:

The Hon. R.D. LAWSON: Not at all. There is no obligation on someone who wants to buy a property to disclose why he wants to buy it, where he got the money from, what he wants to do with it, whether he plans to subdivide it or whether he intends to put his grandmother in it. There is no obligation in negotiations to disclose things that you choose not to disclose, unless there is some specific legal obligation to make a disclosure. If there is a requirement to disclose a caveat or contaminated land, that is an obligation you must comply with. There is not an obligation to engage in best endeavours. You do not have to make your best offer. You do not have to do anything. You can walk along, make an offer, walk away and decide not to proceed. You do not have to negotiate. That is the essential failure of this provision.

Of course, most of us would say, without thinking or knowing the implications, 'Of course you enter into any negotiations in good faith. Of course you use your best endeavours.' If an umpire is behind you saying, 'You're not using your best endeavours. You said you could afford to pay only $200 000 for this place, but I know you can actually afford $205 000, so you are not using your best endeavours.' To say there is an obligation, either way on either party, or for the vendor to say, 'I will not accept less than $500 000 for this property,' knowing that he might accept $495 000, will you say that he is not using his best endeavours; therefore, some umpire is allowed to come along and say, 'The price is knocked down to you at $495 000'?

The Hon. T.G. Cameron: Isn't this clause meant to be a catalyst to the enterprise bargaining process?

The Hon. R.D. LAWSON: There are sufficient catalysts to the enterprise agreement practice. In relation to the enterprise agreement practice, the fundamental principle is a free bargaining process. If you do not want to go in the free bargaining process, but you want to go down the award route, well, go down the award route. If you want to take enterprise agreements, enter into an enterprise agreement as a freely entered into agreement.

The Hon. NICK XENOPHON: I indicate that I will be supporting the amendments of the Hon. Mr Lawson in terms of inserting subsection (3)(a) and deleting subsections (5), (6) and (7). With respect to the latter amendments, I share the concerns of the Hon. Mr Lawson and the Hon. Mr Gilfillan that it does not make sense for something that is supposed to be a system of bargaining based on parties freely entering into negotiations going down a different path than the award route. Basically, you turn something which, essentially, is voluntary and largely informal—compared to the award system—into an arbitration. That does not make sense to me.

I see that as being entirely counterproductive. I think that it would destroy the enterprise bargaining agreement as it now exists. In relation to the first amendment of the Hon. Mr Lawson, I can see that there are real difficulties as it stands with respect to subsections (1) and (2) in particular. It could lead to all sorts of arguments about what is and is not discoverable, and that would go way beyond any reasonable enterprise bargaining agreement. However, that begs a bigger question in relation to what is proposed here with respect to the best endeavours bargaining provisions. For instance, with respect to subsection (2)(a), how would one define 'reasonable times' and 'reasonable places'? How would that be defined? Could there be—

The Hon. R.K. Sneath interjecting:

The Hon. NICK XENOPHON: The Hon. Mr Sneath—and I acknowledge his considerable expertise in this field—would say that the commission would determine it. However, you go from having an informal system where people try to sort out something freely between themselves to having—

The Hon. R.K. Sneath interjecting:

The Hon. NICK XENOPHON: The Hon. Mr Sneath says that if a party gets sick of it they can make application—

The Hon. P. Holloway interjecting:

The Hon. NICK XENOPHON: No. I acknowledge what the minister is saying, but I am talking about the best endeavours bargaining provisions. I believe that they are fraught with difficulties, and I would like an explanation from the government about that. Subsection (2)(b) provides:

> must state and explain their position on the questions at issue to all other parties to the negotiations;

Will you have some extended argument about the pleadings or the form of the negotiations? What particulars must be provided? Subsection (2)(c) provides:

> must disclose relevant and necessary information;

There could be a huge bun fight over what one party considers relevant and the other party does not. The issue of acting openly and honestly, I think, is not in issue, but I would have thought that it is stating what is obvious. I would have thought that if parties mislead each other in the context

of negotiations there may well be some other sanctions at common law. Subsection (2)(e) provides:

must not alter or shift the ground of negotiation by capriciously adding matters for consideration or excluding matters from consideration;

What might be capricious for one party might be seen as justified and absolutely necessary for another. Capriciousness may well be in the eye of the beholder. Subsection (2)(f) provides:

must adhere to agreed negotiation procedures;

What happens if, down the track, new information has been provided. Let us say that the agreed negotiation procedures say, 'We will have only this information before us in the context of negotiations', but then something new pops up—maybe because one of the parties was not totally forthcoming. What happens to those agreed negotiation procedures? Subsection (2)(g) provides:

must adhere to agreed outcomes and commitments;

Again, until you sign on the dotted line, some further information could come forward which could change the whole nature of bargaining and which is not within the control of the two parties. There could have been a change to an industry, a government policy or a government contract, for instance. There could be some massive commercial reason which would change the whole nature of the negotiations. I do not understand what this will do and the mischief it is seeking to remedy.

The Hon. R.K. Sneath interjecting:

The Hon. NICK XENOPHON: Well, I do not understand the mischief it is seeking to remedy. If you accept that enterprise bargaining is working reasonably well, why have a range of rules and regulations? It seems to be anathema to the whole way in which enterprise bargaining is being dealt with. There is always the option for people to go down the award path, where you have your compulsory conciliation and arbitration. I just do not know—

The Hon. T.G. Cameron: It is not that simple. They are caught by the award.

The Hon. NICK XENOPHON: I acknowledge what the Hon. Mr Cameron says, and that is why I raise these questions.

The Hon. T.G. Cameron interjecting:

The Hon. NICK XENOPHON: I raise the question, and I acknowledge what the Hon. Mr Cameron says.

The Hon. T.G. Cameron interjecting:

The Hon. NICK XENOPHON: Yes. By virtue of having in place a range of rules, will that have the effect of discouraging people from going down the path of enterprise bargaining? Once you enter into that process you will need to comply with a range of matters. Is the government proposing, for instance, that there be some common form rules as to how these things would occur, or is it something that will evolve between the parties?

The Hon. P. HOLLOWAY: We have enterprise bargaining, and sometimes parties behave badly in those enterprise bargaining processes. All we are doing here is providing a code of conduct, if you like, or a touchstone as to how people should behave. This is a reasonable code of behaviour, if you like to put it in those terms, about how people should behave in relation to enterprise bargaining. The honourable member asked why paragraph (b) was there. It provides:

(b) must state and explain their position on the questions at issue to all other parties to the negotiations.

I think that covers the case where somebody just says no but does not give any reasons for why they are saying no. I think the expectation, if you have proper bargaining, is that you would at least expect reasons for the course of action. How can you have proper bargaining otherwise? Finally, I make the point that there is absolutely no expectation at all that this will discourage people from entering enterprise bargaining. In fact, I think you could probably make the case that, as it sets a code of behaviour, it might actually help and give them more confidence in the process.

The Hon. T.G. CAMERON: I do not want to make a contribution at this stage on this issue but merely respond to some of the comments that the Hon. Nick Xenophon has raised. Employers, employees and unions getting together to voluntarily sort out an agreement between the parties is nothing terribly new. I can go back 30 years in the good old days when I was working for an employer; I then went to work for the AWU. For example, we would negotiate with the Shop Assistants Union and would reach not an enterprise agreement but an industrial agreement—and under the old system you could sit down and negotiate with the employer.

If you could find common ground on variations that you wanted to the award, provided that you could satisfy various tests of fairness and the boss and the union had not cobbled together a deal which would screw the workers, you would sit down, sort out the negotiations and off you would go. Provided the commission was satisfied that it was not a secret deal to provide conditions and rates of pay that in aggregate were worse than the award, you got your industrial agreement registered. I do not see that process as entirely dissimilar to the process we have here with the enterprise agreements.

However, a union could have had an industrial agreement with an employer for a decade, just reregistering it every year, and it might be an industrial agreement that differed from the award only in minor areas, and more often than not it would be the spread of hours, or the number of hours people had to be at work, the overtime, etc, and they would vary slightly, and it would suit the union and the employers. However, that is not when you have the problem. The problem occurs, as I see it, when you have an existing industrial agreement, like it was in the old days, or an enterprise agreement that you have today, and you could have a situation where either the trade union or the employer does not want to continue with the existing enterprise agreement.

That may or may not advantage or disadvantage one side unfairly. If an employer, for example, enjoys an enterprise agreement with his staff; things get a bit tough; he does not want to continue with the enterprise agreement any more; and he would rather go back under the old award. As I see it, that is the way it worked in the old days. You could be creating situations where the employer is able to sit on their hands and say, 'We are just not going to negotiate with you.'

The Hon. Nick Xenophon: But you do not have to enter into negotiations.

The Hon. T.G. CAMERON: Yes, but we are talking about processes that have evolved over 30 or 40 years. We now have a situation where you could have had some enterprise agreements effectively become the award for this industry. Take the fast food industry. It has not operated under an award for over 30 years. As I see it, it would have these enterprise agreements. Depending upon the balance between the two parties to the enterprise agreement, if there is not some measure there trying to encourage and push the people together to reach an agreement, I can see a situation

developing where these enterprise agreements will start to disappear and we will all start moving back under the award.

Notwithstanding the legal argument we heard from the Hon. Robert Lawson, leaving out subsections (5), (6) and (7) (because there are two amendments we are dealing with) I would invite both of the lawyers here to demonstrate to me—because I have not made up my mind fully on this—where subsections (1), (2), (3) and (4) affect that balance. That seems to be what the argument is, that somehow or other we are creating conditions under this best endeavours bargaining that will be similar to a baseball bat with a velvet glove around it. The unions will get this and they will be able to rush off to the commission and belt the crap out of the employer. That is basically the Hon. Robert Lawson's argument in layman's terms.

The Hon. Ian Gilfillan: Subsections (5), (6) and (7) are going to come out.

The Hon. T.G. CAMERON: Am I going on a bit too long for the Hon. Ian Gilfillan? It does not feel too good, does it? My interjections to him of this nature have always met with an immovable force. I am sure he will understand if I ignore him and just soldier on. I would be interested to know in respect of subsections (1), (2), (3) and (4) just what the real objections are. I am concerned that we are going to give the union a capacity or a right to just walk in to the employer and demand access to their private financial records. I accept that a union has a legitimate right—it does not always have a lawful right, but it should have—to go in and inspect any wages records and records on superannuation. If unions had had the right to go in and check some of these things, the hundreds of millions of dollars that disappear from employees out of their super—it does not disappear; it just never gets put in—maybe we could do something about bringing that under control. I have to deal with people. One of them was my son. He worked for someone for three years and then found out that nobody had paid their super in for them.

The Hon. Nick Xenophon: Was he prosecuted?

The Hon. T.G. CAMERON: Well, I am not sure. He may be working under a federal award. All of these people lost tens of thousands of dollars—and my son's is only a small case—of their superannuation. Their wages record shows that it was being paid in, but there was no record in the office. Nobody discovered it until they went bankrupt because nobody had access to that record. I do not accept that a union should be able to go in and say, 'I want to have a look at your tax records. I want to see how much profit you are making.'

The Hon. Nick Xenophon: Couldn't inspectors have that power?

The Hon. T.G. CAMERON: No; I do not think they can go in and have access to all their financial records. I think it is limited, but, anyway, we have already dealt with that. Coming back to this, I would be interested to know why the use of the words 'best endeavours bargaining' is somehow going to be used to club employers back into the commission and force them to reach an agreement. As I see it, there is no compulsion for them to reach an agreement.

The Hon. Nick Xenophon: But don't you think there should be a compulsion to negotiate?

The Hon. T.G. CAMERON: Well, yes; there may be. You just cannot rush off to the commission and say, 'I've got a dispute here. Drag the boss in and force him to negotiate with me.' I worked in the industrial commission for 10 years. It would be pretty hard to try and convince those industrial commissioners at times that this is a valid industrial dispute. They would just say, 'Bugger off. Go away and talk to them and sort it all out.' I have had thousands of workers out on the grass—garbage piling up all over Adelaide. The commission cannot do anything about it; it is not an industrial dispute under the award. Someone was terminated. Well, the Supreme Court fixed that one. It was the Supreme Court that ordered the industrial commission and told them, 'You do have the power to fix this. Get the parties together and sort it out.' As I see it, this particular clause could often assist employers to sort out disagreements. What we have heard here is just one side of the argument: that this is bad news for employers. I have submissions coming out of my backside from employers. They have hardly mentioned this one, which is why I wanted to get a copy of what the honourable member got from the wine industry, because I had not run across that one.

This particular clause could be of considerable assistance to employers who want to continue an enterprise agreement with the union, but the union has got them over a barrel by saying, 'Give us this or go back under the award, comrade.' That is the choice they get. The employer then has to change all their rostering and overtime arrangements, reclassify people, switch people, or may even have to change the physical way they structure their shifts.

In the case of KFC, it will cost $200 000 a year. So, it could be the employer—heaven forbid!—dragging the shop assistants' union into the industrial commission saying, 'Negotiate in good faith.' You cannot hold the baseball bat over his head and say, 'Just get out there and work under the award, if you don't give us what we want.' That is basically what you have now. I can see plenty of situations where this particular clause would be of considerable assistance to employers to get some of those recalcitrant, difficult trade union officials—and I was one of those—into the commission to bang a few heads and get an agreement together.

The Hon. R.K. SNEATH: Perhaps this will help the Hon. Mr Xenophon to make a decision. I agree with the Hon. Terry Cameron. This will help employers and employees, of course. In all the enterprise agreements that I have done, I would hope that I went in there with the best intentions and threw everything on the table and, in most cases, the employer certainly threw everything on the table and did not try to hide too much. I want to give a couple of examples. Take affordability, for instance. Since enterprise agreements have been going, this has been raised by certain employers during enterprise bargaining negotiations, and this was early in the piece, too. We had made our intentions known that we were after 5 or 6 per cent a year, and the employers that have gone in with the best endeavours have openly said, 'We can't afford it. We just can't afford that because we are not making that much money. That will put us under, and we will have to close the doors 12 months up the track if that's what you are going to argue for and if you are successful.' The employees, when supplied with the proof that the company could not afford it during the enterprise agreement negotiations, have actually weakened their position.

An honourable member: Modified it.

The Hon. R.K. SNEATH: Yes; and taken fewer pay rises. A good example is CSR Emoleum—I am pretty sure that was the company—where they were wonderful. They came in and said, 'This is what we can afford.' They did a presentation to the workers and said, 'This is why we can't afford any more.' The workers appreciated that. It was done in the best spirits and endeavours, in openness, and they got the agreement that let them survive. Of course, the benefit to

the workers was that they kept their jobs and the companies kept going.

So, if we can do something that encourages that we should. The Hon. Mr Lawson says that industrial relations in South Australia have been good—and they have been—but there is no reason why they cannot get better, and I am convinced that this clause will make them better. An employer might come in and argue that they cannot afford to pay, and put no proof up, and the workers are sucked in, but in six months they see the financial statement that goes out to the shareholders with a record $50 million profit. All faith in that workplace is lost and the next time you go there the workers say, 'We are not falling for that again; hit them twice as hard.' Those are just a few examples where I am sure this can help.

The Hon. G.E. GAGO: I will be very brief, because I do not want to repeat some of the excellent comments made by my colleagues the Hon. Terry Cameron and the Hon. Bob Sneath. Best endeavours is about a very basic code of conduct, and it is about urging both parties to bargain in a genuine way.

I want to address this notion that if you do not want to bargain you can just go back to the award system. That is not as simple as it may sound. In workplaces, particularly smaller workplaces, if the employer has made a decision that they prefer to enterprise bargain it can put workers at that particular site under enormous pressure to go to the table. It is not easy to take on the employer if they want to bargain. The law says they can do otherwise, but in reality it can create an enormous amount of tension and conflict in a workplace.

I believe that, whoever decides that they want to proceed with bargaining, it is important that they do so with a view that they are going to proceed in a genuine way. Enterprise bargaining is an incredibly time-consuming process and can interrupt the workplace quite considerably—management delegations come together with employee delegations, and meetings have to take place. It can be very time consuming and protracted and it can affect the morale of both staff and management. There is potential for that to be incredibly disruptive and it is easy for it to result in conflict and divisiveness. I believe a simple provision that requires a best endeavour is in the interests of both the employer and the employee and efficient good workplace practice.

The Hon. NICK XENOPHON: I am grateful to my colleagues, who have had considerable experience in the union movement, for their positions. I still have reservations about financial records being required to be produced, whether there ought to be a requirement that if an employer is relying on issues of affordability or their financial circumstances, if they make a positive representation as to what their financial circumstances are, they cannot do that without at least showing their books. I do not know whether that is a path that you go down.

I understand what the Hon. Mr Sneath said in relation to the instance he gave where the company showed their books and took the workers into their confidence and that led to a moderation in the demands of the work force, but it concerns me that if a company is struggling, for instance, there may be some instances where, if that news gets out, it might be poison in the marketplace, it might accelerate the decline of that particular business. There might be good reasons not to let the books go out in those circumstances.

With respect to subsection (2) and the various matters that need to be adhered to from (a) to (h), if a party says, 'No, we are not going to; we have given you our position', but the other side says 'No, you have not', there could then be a dispute before the commission. In other words, whilst it is part of a code for a negotiating process if, for instance, there is a dispute as to whether the position was fairly stated, whether necessary information was disclosed, whether outcomes and negotiation procedures were adhered to, would the minister advise if we then have a situation where one of the parties can take the other to the commission and have a hearing as to whether these matters have been complied with? In other words, whilst you cannot force the outcome, you can have a huge dispute over the procedures leading to that outcome. How will it be dealt with? Will there be a degree of compulsion and sanctions to parties?

The Hon. Ian Gilfillan: What are the penalties?

The Hon. NICK XENOPHON: The Hon. Ian Gilfillan makes a good point that I was going to get to eventually, and I should thank the honourable member for revving me up and accelerating that. So, what are the penalties?

The Hon. P. HOLLOWAY: My advice is that, ordinarily, these matters would be the subject of conciliation before the commission.

The Hon. NICK XENOPHON: I understand what the minister says, that it would ordinarily be a matter for conciliation, but if a party says that the procedures had not been adhered or that information was not provided then could there not be an order made for further disclosure or that negotiation procedures be adhered to? In other words, it goes from conciliation to a mandatory outcome, at least in respect of procedures.

The Hon. T.G. CAMERON: I have an enormous amount of respect for the Hon. Nick Xenophon's legal knowledge and opinions: he never ceases to amaze me. However, with respect, the honourable member has not worked in the Industrial Relations Commission. The industrial commission operates differently from all other courts, and I think I have been in most of them at some stage or other during my life. The situation to which the honourable member is referring could arise, but an industrial commissioner knows that he has only to start ordering one side or the other side in relation to what to do and what not to do and he is defeating the real purpose for him being there, namely, to get the parties together, conciliate and to reach a negotiated outcome. You would rarely find the commissioner spitting the dummy and issuing orders against employees or employers.

The commission will issue orders if you start defying its orders about strike, bans and limitations. I think one commissioner had the bailiffs running around for a weekend trying to put me in gaol. They did not find me. I was able to hide in my bedroom, and they never got to me.

The Hon. Nick Xenophon interjecting:

The Hon. T.G. CAMERON: They got me the following day when the police arrested me and threw me in gaol. I think I am the last trade unionist in South Australia to be gaoled for being involved in an industrial dispute. There may have been someone since then; this was about 20-odd years ago. All I was guilty of was trying to fight hard to get some poor workers at the racecourses a few dollars more a week. The boss was a brigadier from the Army. The first time I went down there to meet him, he said, 'I don't talk to the unions. Leave my office.' Four hours later I was still sitting there; he left the office before I did. He did sit down and talk to me shortly thereafter. There might be a situation like that. We were able to get the commission together, and this brigadier, who did not talk to trade unions, was reminded that as an employer there were certain processes that could take place.

My observations about the Industrial Relations Commission are that in a situation like this the commission would be extremely loathe to do so, because they are not like industrial judges or magistrates in other areas. They are not legally trained people. Many of them, in fact, loathe the due processes of what can at times be legal processes which I think are there for the benefit and the egos of lawyers, rather than trying to sort out people's claims.

The Hon. G.E. Gago interjecting:

The Hon. T.G. CAMERON: I am just trying to give the honourable member an understanding. It is not a judicial court where you have orders of discovery and this, that and everything else. I think I worked in the commission for about 10 years, and, offhand, I cannot remember ever being ordered, although there might have been a couple of occasions when I was naughty. They sit down and try to get the parties to negotiate, and that is what I think they would try to do in relation to this process. In my opinion, it would be a long, exhaustive and tedious process of negotiation before an industrial commissioner spat the dummy and started ordering employers to produce documents. In my opinion, the orders that are likely to come out of this clause would be if the unions started to go slow or something; but not officially.

The Hon. Nick Xenophon: What about disclosure of financial information?

The Hon. T.G. CAMERON: As I have indicated, what worries me is the capacity for a union official to demand all sorts of records that have no relationship whatsoever to their dispute. I will deal now with the problem outlined by the Hon. Bob Sneath and the Hon. Gail Gago. There are many hundreds of these enterprise bargaining agreements around, and they all have to be renewed. I think we are now expanding these agreements from two to three years, which is a positive move. I do not share the fear the honourable member and I think the Hon. Ian Gilfillan have about how this would be misused, but I have the advantage of having spent 10 years working in the commission. I really think those fears in relation to the production of receipts and records, etc., are unfounded.

We are talking about an enterprise agreement. If an employer sits there and says, 'I can't continue with this enterprise agreement. You're going to have to cut the wages, and I want these conditions altered,' it is not dissimilar to chapter 11s under bankruptcy provisions in America, where an employer is in trouble.

The Hon. Nick Xenophon: We don't have that here, though.

The Hon. T.G. CAMERON: This would actually provide that kind of mechanism where, say, you had a recalcitrant employer. He might have only 12 guys working for him. His sales are down, and he has had a rough trot, and he says, 'Well, I can't afford that industrial agreement. Bugger you; you're going to have to go straight back under the award.' That may automatically represent a significant cut in wages and conditions. I know the honourable member would understand this, but I will just remind him. Awards prescribe only the legal minimum, and that is what seems to me lost a bit in this debate. Everyone talks about the award, but the award is only a legal minimum which the boss can pay. The fact that some 90 per cent of them choose to pay the legal minimum is a right they have.

Most people get the award rates of pay and conditions. I see the processes that would be set off by this as helping to assist the resolution of disputes that may result out of enterprise agreements not being renewed, where the only recourse a union would have was to pull the pin and engage in industrial action. They would soon get before the industrial commissioner then, but as a single employee they cannot negotiate under this award system. This provides almost a safety valve, if you like, where you have them batting their heads together and you need someone else.

How often as a lawyer have you been in the situation where you have been trying to put two parties together to get them to fix up their problems? That is the role a commissioner takes, and that is the role I think you would take, although I have seen some lawyers who will not assist the parties reach a negotiated outcome, because they want to go to court and get their $2 000 a day or what have you. I know the Hon. Robert Lawson will respond to some of the things I said here. We are talking about opinions here. He has an opinion that this will make it more difficult, etc. I have a difficult opinion, but I cannot prove my opinion to you, any more than he can, although he is better as at it than I am.

The Hon. R.D. LAWSON: I will respond to a couple of the points made by the Hon. Terry Cameron. Earlier in the committee discussion he asked me to indicate what the other states have in relation to good faith and good faith bargaining. That is particularly important, because what has not been disclosed here is that the South Australian prescriptions are far more prescriptive than those in other states. What is more—and this is a point I want to come to in a moment—this section goes quite markedly beyond what the Stevens report recommended.

The Hon. Gail Gago said that this is all about urging the parties to bargain. It is not actually urging: it is compelling. Subsection (2) provides 'must meet at reasonable times', 'must state', 'must explain', 'must disclose', 'must act openly'. Take something like 'must act openly'. What does that mean? You might say, 'You're not acting openly; you haven't shown me everything; you're playing your cards differently; you're negotiating the normal way people negotiate.' I say you are not acting openly because you did so-and-so and you say I am not acting using my best endeavours; therefore, the consequence is that we will have an arbitrated outcome. So, you have here a series of 'musts'.

If you look, for example, at the Queensland mechanism, what it provides generally in relation to conciliation is:

> The commission may make orders to—promote the efficient conduct of negotiations; or. . . to ensure the parties negotiate in good faith; or. . . to otherwise help the parties negotiate the agreement.

Fair enough; that would be reasonable. It does not say you must do this or that, etc. That is the sort of sensible provision that actually applies here; that is what you would expect an industrial commissioner to do—to give orders and direction—but this is laying down prescriptive commands and hoops to jump through. The Queensland act goes further to provide (and this is significant) that you can have an arbitrated resolution in certain circumstances.

If the commission considers that the conciliation has not been successful and industrial action becomes protracted, threatens life, or is threatening to endanger the personal health, safety or welfare of the community or part of it, those are the circumstances in which there can be an arbitrated outcome. That is, it requires not simply the failure to act in good faith but the fact that the public interest is being adversely affected by the failure to reach a conclusion. I was there referring to sections 146 to 149 of the Queensland Industrial Relations Act.

In the New South Wales Industrial Relations Act, section 134 refers under the subject of 'Conciliation' to good faith bargaining in subsection (4) as follows:

> The Commission, when dealing with an industrial dispute, must consider whether the parties have bargained in good faith and, in particular, whether the parties have. . . attended meetings they have agreed to attend, and. . . complied with agreed or reasonable negotiating procedures, and. . . disclosed relevant information for the purposes of negotiation. The Commission may make recommendations or give directions to the parties to bargain in good faith.

Once again, that would be a reasonable regime; that is the sort of thing you would expect an industrial commissioner to do, not lay down a target that 'you must meet at reasonable times, 'you must state your position,' 'you must disclose relevant and necessary information,' all of which will only give rise to argument, debate, etc. So, there is quite a difference. This is highly prescriptive. I am glad the Hon. Ian Gilfillan is in the chamber, because I know the respect in which he holds former commissioner Stevens, whose report has been called on in aid of certain provisions in this bill.

Former commissioner Stevens did not suggest that there be an arbitrated outcome to negotiations in the general course. The Hon. Terry Cameron should be aware that former commissioner Stevens did not recommend that there be arbitrated resolution where there was not good faith bargaining or a failure to agree.

The Hon. T.G. Cameron interjecting:

The Hon. R.D. LAWSON: A fine lineage the commissioner has! The government in some places in this bill has sought to rely on what the Stevens report recommended. In relation to this particular matter, commissioner Stevens said:

> If, following further attempts by the parties negotiating and by the Industrial Commission via conciliation, the negotiations are still at a standstill, then an application by the parties, the Industrial Commission could have the power to arbitrate the matter or part of the matter not agreed. In limited circumstances, for example in the public interest where all avenues have been explored, negotiations have stalled or the resultant industrial action (if any) is impacting on the delivery of essential services, the Industrial Commission could be provided with the discretionary power to arbitrate on the application of one of the parties.

What Mr Stevens was envisaging—

The Hon. P. Holloway interjecting:

The Hon. R.D. LAWSON: Well, this is an integral part of the system. What Mr Stevens envisaged was a power to arbitrate in limited circumstances. Where the bill comes in, of course, is at the end of this clause by providing for conciliation in new subsection (4) and for arbitration in subsections (5), (6) and (7). It is not limited to the sorts of circumstances we see in the Queensland legislation, but, rather, the resolution by arbitration, which shows that this government in this bill is endeavouring to undermine completely the basis on which enterprise agreements are entered into. I am not surprised. If one hears the minister on the radio or in the public arena, he has been a constant critic of enterprise bargaining. I am surprised to hear any Labor minister go in with the vehemence that minister Wright does to complain about enterprise agreements. He bitterly complains about them; he does not like them; he wants to get rid of them. One way to get rid of them and undermine them completely is to have them arbitrated.

The Hon. NICK XENOPHON: Arising out of brief discussions I have had with my colleagues the Hons Mr Cameron and Mr Gilfillan, I want to clarify something. Once the parties enter into negotiations, is it not the case that the requirements in paragraphs (a) to (h) inclusive need to be complied with? That could potentially be to provide financial statements in the course of such negotiations. For instance, if an employer is saying, 'I can't afford to pay this,' then the employee's representative under paragraph (c) could say, 'You should disclose necessary and relevant information. It is relevant because you have made assertions about your position to pay.' Therefore, of necessity, that would lock the employer into providing that information. I am not casting a valued judgment on that. I am trying to understand the process.

There is one view that it may be that you can walk away at that point. I would think that, once you sit down and say you will negotiate, you need to comply with these things. I acknowledge what the Hon. Gail Gago said; that is, it is a code to try to help facilitate these things. I am not taking issue with that. Is it the case under paragraph (c) that, once you have entered into negotiations, if the employer says, 'I can't afford to pay because my business is not going well,' and the employee's representative does not believe it, there would be a requirement to provide financial information as a matter of course—because that is now in issue? The party simply cannot say, 'I don't want to provide that information; I now step away from it.' My reading is that you cannot do that, but I would be grateful to hear the view of the government and of the Hon. Mr Lawson.

The Hon. P. HOLLOWAY: The provisions in paragraphs (a) to (h) do apply, in the context of Justice Munro's decision to which I referred and which limits access to information. Justice Munro said:

> A party will not be required to produce documents where to do so would be oppressive; or where the demand for a production is a 'fishing expedition'—

as we have sometimes seen with FOI applications—

> in the sense that it is an endeavour not to obtain evidence to support a case, but to discover whether there is a case at all.

Another important comment by Justice Munro is as follows:

> Where the proper use of legal compulsion to produce documents is in issue—

so where the proper use of compulsion to produce documents is an issue—

> the tribunal will need to carry out an exercise of judgment on the particular facts in each case. That judgment requires a balance on the one hand of the reasonableness of the burden imposed upon the recipient and the invasion of private rights with, on the other hand, the public interest in the new administration of justice and ensuring that all material relevant to the issues be available to the parties to enable them to advance their respective cases.

However, it is open to the parties to say, 'I no longer want to negotiate an agreement.' We know that new subsections (5) to (7) will be deleted. Clearly, we do not have the numbers for that. As such, there will be no arbitration under the provisions. If those things are knocked out—and it appears the numbers are such that they will be—there will be no arbitration under these provisions.

The Hon. NICK XENOPHON: I may be missing something fundamental, but my understanding is that this is about a code. Once you enter into negotiations, you must do all these things that must be done—not shifting your ground capriciously, adhering to negotiation procedures and disclosing relevant and necessary information—

The Hon. T.G. Cameron: When you are negotiating.

The Hon. NICK XENOPHON: When you are negotiating.

The Hon. T.G. Cameron: You are not compelled to negotiate.

The Hon. NICK XENOPHON: But what if, as part of that negotiation process, the employee says, 'Show us your books', the employer says no and the matter then goes to the commission in terms of process? The commission does have power to deal with this and an application can be made. You cannot then—

The Hon. T.G. Cameron interjecting:

The Hon. NICK XENOPHON: But if the commission then says, 'Yes, you should disclose this information because it is relevant and necessary', can the employer say, 'I'm walking away from this.' Can the employer do that? Can the employer say, 'I will not provide this information.'?

The Hon. P. HOLLOWAY: My advice is that if they walk away from the negotiation process, then, yes. Also, I point out that the proposal in the bill is not open-ended. Subsection (2)(c) of the proposed best endeavours bargaining provision requires the disclosure of 'relevant and necessary information', and Justice Munro's decision guides the interpretation of that. It must be relevant and necessary.

The Hon. IAN GILFILLAN: I have regarded this clause in its original state as a Trojan horse. In fact, it presents as a benign conciliation clause but, in fact, it is a camouflage for an arbitration activity and, under the basis of an arbitration activity, the details in subsection (2) are relevant because there is no escape. Because subsections (5), (6) and (7) will take out the arbitration aspect, this fear raised by the Hon. Nick Xenophon just will not apply, because conciliation cannot involve one arm being pushed up your back and forced into a position. That is not negotiation; that is not conciliation. As I say, in its original terminology, it was very much targeted towards arbitration, and that is why the Democrats are moving the amendment to delete subsections (5), (6) and (7).

The Hon. NICK XENOPHON: I would love to hear the deputy leader's learned view about this. Does he agree with the government's position: you enter into the negotiations, one of the parties says, 'You ought to disclose this financial information' (whatever that may be), the party refuses, the other party takes them to the commission and, at that stage, the parties can walk away from it? If that is the case, that solves my problems.

The Hon. R.D. LAWSON: I hope that my answer will satisfy the Hon. Nick Xenophon. I do not agree with the proposition that the government is putting forward that the principles of discovery enunciated by Justice Munro are relevant to this issue. Members will understand that there are certain obligations in relation to the production of documents in ordinary civil litigation. That is one thing. Negotiating an agreement is quite a different element entirely. What might be regarded as relevant and necessary for the purposes of a negotiation could include information far beyond that which would be ordinarily discoverable in litigation, because one party can say, 'I regard this as fundamental. I want to see your books. That is the most necessary, relevant and vital thing for me. In this particular negotiation we need to see it.'

They would be entitled to say, 'If you are not going to give it to me you are not actually using your best endeavours.' The compulsion in the act is to produce the document. Also, you could say, 'You are not acting openly.' There might be questions such as, 'What does 'openness' mean?' They could say, 'If you are open about this you would show me the books. Okay, you are not going to show me the books, you are not acting openly.' This act says that unless you are acting openly you are not using your best endeavours.

The Hon. Nick Xenophon interjecting:

The Hon. R.D. LAWSON: Well, it may not be as easy to walk away from it as the honourable member suggests. At the moment in enterprise bargaining negotiations either party can walk away. In this system that the government seeks to introduce, if you get on the escalator of negotiations you are obliged by certain rules laid down in this act. You must state these various things.

The Hon. NICK XENOPHON: Given the discussions I have had with some of my colleagues previously, I would like an opportunity to have a discussion with parliamentary counsel.

The Hon. P. HOLLOWAY: I will move that progress be reported. However, I would hope that, given that we have spent so long on this bill, we can get on with this matter this afternoon, because we have spent well over an hour on it.

Progress reported; committee to sit again.

[Sitting suspended from 12.59 to 2.15 p.m.]

ABORTIONS

A petition, signed by 170 residents of South Australia concerning abortions in South Australia and praying that the council will do all in its power to ensure that abortions in South Australia continue to be safe, affordable, accessible and legal, was presented by the Hon. Sandra Kanck.

Petition received.

PAPERS TABLED

The following papers were laid on the table:

By the Minister for Indusry and Trade (Hon. P. Holloway)—

Reports, 2003-04—
- Flinders Medical Centre
- Flinders Medical Centre—Financial and Statistical
- Independent Living Centre
- Leigh Creek Health Service Inc
- Metropolitan Domiciliary Care
- Northern and Far Western Regional Health Service
- Penola War Memorial Hospital Inc
- South East Regional Health Service Inc
- The Women's and Children's Hospital
- The Women's and Children's Hospital—Statistical and Financial
- Wakefield Health.

WORKCOVER

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I lay on the table a ministerial statement about WorkCover made today by the Deputy Premier.

QUESTION TIME

BALANCED SCORECARD

The Hon. R.I. LUCAS (Leader of the Opposition): I seek leave to make an explanation before asking the Leader of the Government a question about government accounting programs.

Leave granted.

The Hon. R.I. LUCAS: Yesterday, the Leader of the Government issued a press statement and made a number of public statements that were critical of a government program called the Balanced Scorecard. The Leader of the Government variously described it as 'a pet project of the former CEO' and 'not a government priority', and he described it as

'an in-house management system'. On ABC Radio he said that it certainly was not a priority of the new incoming government, and he went on to ask rhetorically, 'Why was it spent [the money] in this way?' In the *Australian*, the government is quoted as describing the Balanced Scorecard as 'a pop psychology, in-house management program'.

I refer the Leader of the Government to a copy of the annual report 2002-2003 of his department when he was the Minister for Primary Industries. I refer to one of the strategic priorities of the department in the annual report that he presented to the parliament. Under the heading Strategic Priority, it states:

> We manage for results. We manage our resources well. We provide leadership. Our business processes are effective and efficient.

The minister proudly indicated:

> A balanced scorecard approach has been adopted for monitoring operational areas. Some of the critical aspects measured on a monthly basis are customer satisfaction, staff satisfaction, resource utilisation, business plan implementation, opportunities available, data input accuracy, as well as several financial aspects. Important team and marketing strategies are also tracked against our annual strategic business planning schedule.

Further on, the minister was proud to proclaim that one of his targets for 2003-2004 was to develop a balanced scorecard for finance and business services within his own department. I also refer to a small selection from the South Australia Police Corporate Business Plan 2002-2004, as follows:

> SAPOL Strategic Management Services is developing a balanced scorecard/performance management system. The scorecard approach has the potential to act as a meaningful and concise, executive management information recording system.

I also refer to his colleague Dr Jane Lomax-Smith, the Minister for Tourism, when she launched the South Australian Tourism Plan 2003-08, where she proudly refers to the use of the Balanced Scorecard to help guide the South Australian Tourism Plan. I refer to the Energy SA Strategic Plan which, again, proudly refers to the Balanced Scorecard approach.

The Hon. J.F. Stefani interjecting:

The Hon. R.I. LUCAS: A nice own goal here, yes. I also refer to the annual report of the Auditor-General from 2000-01. We are still looking at his other reports. The Auditor-General himself says that the key performance indicators were developed on the Balanced Scorecard approach with the identification of core processes which link resource management learning and other key processes at the strategic level. Finally, I was interested to have my attention drawn to a major national conference which is being conducted in the next week or so at the Royal on the Park hotel in Brisbane, Queensland, on the subject of performance measures for state governments.

I was interested to see that in the afternoon of the first day under the heading 'Developing a performance measurement strategy to drive service delivery in a shared service environment' is a Mr Davis Leach. Mr Davis Leach is a manager of a shared services management group in the Department of Primary Industries and Resources—one of the departments reporting still to the minister and the Leader of the Government. Mr Leach is one of the keynote speakers who will talk about the Balanced Scorecard. Under the description in the corporate blurb that has gone out to potential delegates, it says that he is going to talk about many government agencies that are now reaping the benefits of the cost savings associated with implementing a shared service environment within key business functions. It continues, but I will not go through all the details of the wonderful contribution Mr Leach will provide to the delegates.

I understand the cost for each delegate at that conference is between $2 800 and $4 500 just for attending. Straight after Mr Leach speaks there is a champagne roundtable discussion 'assisted by freely flowing champagne' and, as the blurb states:

> This is your opportunity to reflect on what you have learnt during the first day—

obviously from Mr Davis Leach and others—

> You will be able to discuss concerns and establish new ideas and strategies that you can take back to your government agencies. Representatives from our leading speaker's faculty will host the roundtables.

My questions to the Leader of the Government on the Balanced Scorecard are:

1. Is it true that, when he was the minister responsible for PIRSA, he and the department listed the Balanced Scorecard as one of his strategic priorities in his annual report?

2. Given the references I have given to the South Australia Police Corporate Business Plan, the South Australian Tourism Plan and the Energy SA Strategic Plan, does he now admit that many Rann government ministers, departments and agencies have spent considerable sums of money in implementing the Balanced Scorecard as a means of efficient and effective management of taxpayers' resources?

3. Is it true that an officer in one of the departments reporting to him, from PIRSA, will be one of the keynote speakers at a conference in Brisbane on the issue of the Balanced Scorecard and related issues where the costs for each individual delegate vary from $2 800 to $4 500?

It is a disgrace.

The Hon. P. HOLLOWAY (Minister for Industry and Trade): Whereas I listened to the leader in silence, I am sure that I will not be given the same courtesy. The Leader of the Opposition just does not get it. The Leader of the Opposition has been defending the conduct of senior public servants who have acted in a way that the Auditor-General of this states describes as unlawful. That is what the Leader of the Opposition and some of his colleagues in the lower house have been doing—defending public servants who have behaved in an unlawful way and who have breached financial systems. I am happy for the opposition to do that because one of the issues at the election, when it is held, will be the fact that this opposition is backing conduct which is unlawful. In relation to the Balanced Scorecard, it is a priority, but what the Leader of the Opposition simply does not get—

Members interjecting:

The PRESIDENT: Order! There is too much interjection. Unfortunately, it is on both sides of the council. Interjections when a minister is orderly trying to debate an issue or give an answer are out of order. It is particularly disappointing when they are coming from members of his own party, but members of the opposition are breaching it to the fullest of the breach.

The Hon. P. HOLLOWAY: Of course, the Balanced Scorecard does have some merit, but the fact is that, when PIRSA had it, it did not pay it out of the Crown Solicitor's Trust Account; it did not put it away and record it as an expense before the money was actually spent. That is the point, but the Leader of the Opposition just does not get it. My questions and statements relate to the use of the Crown Solicitor's Trust Account in a way that the Auditor-General

of this state has found to be unlawful. Members opposite and their colleagues in the other house have been vigorously defending the people responsible for those actions. Well, the people will judge.

The other point in relation to the Balanced Scorecard approach is that the other matters I have raised publicly have been not the introduction of the Balanced Scorecard but rather how the money that was supposedly allocated to the Balanced Scorecard was spent. The public will certainly judge—

The Hon. T.G. Cameron interjecting:

The Hon. P. HOLLOWAY: Again, the Hon. Terry Cameron does not get the point. That was paid for out of the Crown Solicitor's Trust Account. If departments such as PIRSA improve accounting standards, that should be a priority—such a priority that it is paid for through the ordinary operating accounts of the department. They should not have to go and falsely secrete money into a Crown Solicitor's Trust Account described as an expense—even if the money has not been spent—but that is what the Auditor-General of this state has found. If it is a priority, it should be paid for out of the ordinary operating accounts of the department.

In relation to the Crown Solicitor's Trust Account, we know full well that, of something like $5.7 million from the Attorney-General's Department, only $2 million of it was spent anyway, yet the people that the Leader of the Opposition defends are those described as being involved in unlawful conduct by the Auditor-General of this state. They are condoning that sort of behaviour. In fact, if, as those officers claim, the money was being used for such noble purposes, why was it that it still remained in the fund some 18 months after it was first put there? Those are the questions that need to be asked, and those are the questions I put on the public record.

The Leader of the Opposition, in raising this, knows full well that I cannot refer to what is on the public record in relation to the committee of this council that is examining these matters in detail, but I invite anyone to look at the record and the comments that have been made. They will see the emphasis of the comments I have made in relation to those claims and the use and spending on that program through the Crown Solicitor's Trust Account. It is not the merits of the program per se: it is why the Crown Solicitor's Trust Account was used and why those programs were given a higher priority than other programs.

The Hon. R.I. Lucas: It was one of your priorities?

The Hon. P. HOLLOWAY: It is the claim! Again, the Leader of the Opposition does not get it. The claim has been made by the officers who acted unlawfully, according to the Auditor-General of this state, that they had to put money away to avoid a carryover policy of the government.

Members interjecting:

The PRESIDENT: Order! I have a point of order made by the Hon. Ms Gago that she cannot hear. It is not a point of order but it is certainly a fact, and it is because members are acting in contravention of the standing orders. The Hon. Mr Cameron is the lead offender, followed very closely by the Leader of the Opposition.

The Hon. T.G. Cameron: I shall call a point of order every time she interjects!

The PRESIDENT: Order! The Hon. Mr Cameron is again breaching the standing orders and I ask him to desist. We do not want to go through the process.

The Hon. P. HOLLOWAY: As I said, there was a finding from the Auditor-General that certain unlawful conduct took place in relation to the placement of money in the Crown Solicitor's Trust Account. What was the answer—

The Hon. R.I. Lucas: It's an own goal.

The Hon. P. HOLLOWAY: It is not an own goal.

The Hon. R.I. Lucas interjecting:

The Hon. P. HOLLOWAY: What the Leader of the Opposition finds uncomfortable is that the debate is turning, and now there is recognition of that. It does not matter what happens in here, because out there in the big wide world everyone knows that you are protecting people who indulge in unlawful conduct. What you are doing is defending shonky accounting practices and, when we go to the election in 12 months, everyone will know.

The Hon. J.S.L. DAWKINS: I rise on a point of order, Mr President. The minister has been here long enough to know that he should address his remarks through the chair.

An honourable member: And not point his finger.

The PRESIDENT: There is a point of order. Pointing your finger is a very dangerous thing, and the minister must desist from doing so.

The Hon. P. HOLLOWAY: I also know there are standing orders that require opposition members to listen in silence, but I have been here long enough to know that they would never obey that standing order. But, never mind, I am quite happy to spend the next hour talking about this if members opposite want to use it. The point is that I have been highly critical of the conduct of certain public servants, which the Auditor-General described as unlawful, in relation to the use of the Crown Solicitor's Trust Account. Those officers have claimed that they had to put money into the Crown Solicitor's Trust Account to avoid a carryover policy of government and to preserve essential programs of government. I think the words that have been used were 'improve services to the community and into the future.'

The point has been made and has come out of this debate, and I am quite happy for it to be covered in this place for as long as the chamber likes. The information that has been used here relates to the fact that these were used for mainstream programs. In fact, a whole lot of money that went into that account was not spent anywhere. In other words, the arguments that have been used are patently false. That was the point, and I am happy to go on making it.

The Hon. R.I. LUCAS: Was the Leader of the Government not telling the truth when he told Matt Abraham and David Bevan yesterday morning that the Balanced Scorecard was not a priority of the new incoming government?

The Hon. P. HOLLOWAY: The point is that the Balanced Scorecard should have gone through. The priorities of the Attorney-General's Department should have been decided by the government, not by the former chief executive or by the chief accountant, who did not tell anyone, particularly Treasury, that they put money into the Crown Solicitor's Trust Account. It should have been a mainstream program. We know that there was plenty of money within the Auditor-General's Department to fund some of these things. The duplicity and secrecy is the real issue here: the fact that they tried to avoid scrutiny. The program itself is irrelevant. It is up to government to decide the priorities, not the Chief Executive.

The Hon. R.I. Lucas: You are the minister.

The Hon. P. HOLLOWAY: No, it was the Attorney-General's Department. We are talking about the Crown

Solicitor's Trust Account. I know the Leader of the Opposition wants to avoid it; I know he wants to twist it; and I know he wants to get away from it. But he is not going to succeed. The issue is the use of the Crown Solicitor's Trust Account.

The Hon. R.K. Sneath interjecting:

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

COURT DELAYS

The Hon. R.D. LAWSON: I seek leave to make a brief explanation before asking the Leader of the Government, representing the Attorney-General, a question about court delays.

Members interjecting:

The Hon. T.G. CAMERON: I rise on a point of order, Mr President. I cannot hear the question because of the interjections coming from somewhere down there.

The PRESIDENT: Order! The point of order is upheld. Interjections are out of order. The Leader of the Government should abide by the standing orders; they apply to everyone, including ministers.

Leave granted.

The Hon. R.D. LAWSON: The 2004 annual report of the Courts Administration Authority was tabled recently in this place, and the contents of that report should be seen in the context of the following matters. In January this year Justice Nyland released on bail a person charged with murder, saying that she could not guarantee a trial in the Supreme Court on that charge before 2006. The Productivity Commission recently reported that the clearance rate of the South Australian Supreme Court was only 66.7 per cent, by far the lowest in Australia. Comparable figures are over 98 per cent in four of the Australian states. The Australian Bureau of Statistics last week released its latest statistics on the criminal courts. It indicates that in South Australia in the 2003-04 year the number of defendants finalised in the higher criminal courts had fallen from 1 131 to 869, and the number of defendants acquitted had risen to the highest percentage of any mainland state, at 9.5 per cent.

In the report of the Courts Administration Authority signed off by the Chief Justice of the Supreme Court, it is reported under the heading 'Overview of judicial workload' and the subheading 'target standards and actual achievements' that in the criminal courts the target for cases committed for trial and disposed of or tried within 180 days of first arraignment is 80 per cent. That is the target. Under the last year of the last administration this state achieved 46 per cent; the following year under this administration it fell to 29 per cent; and last year it had fallen to 17 per cent of criminal cases which meet the target disposal rate. In the civil jurisdiction, only 31 per cent of civil actions are disposed of within one year of the commencement of proceedings. That is against a target of 60 per cent. Comparable figures were: in 2001-02, 45 per cent; 42 per cent in 2003; and now down to 31 per cent.

Under the heading concerning the backlog of cases which, like the clearance rate, is one of the measures of efficiency of a court, the Chief Justice says:

> The backlog figures again show that the Supreme Court is not performing well against its target for disposals within six months of lodgment. The [figure] of 71 per cent shows that only about one-third of the matters are disposed of in a timely manner.

I should say that the Chief Justice refers to the fact that a criminal trial reform committee is being established under the chairmanship of Justice Duggan to work on some of these issues. My questions are:

1. Is the Attorney-General aware of the serious delays in our civil, criminal and magistrates courts?

2. When will the report of Justice Duggan's committee be delivered, and what role in that committee is the government playing?

3. When the Chief Justice raised these issues with the Attorney-General, was the Attorney-General reading from the form guide?

The PRESIDENT: I do not think that offensive remarks, even in jest, especially when they have been repeated two or three times, really uphold the dignity of the council.

POLICE COVER-UP

The Hon. A.J. REDFORD: I seek leave to make a brief explanation before asking the Leader of the Government, representing the Minister for Police, a question about a police cover-up.

Leave granted.

The Hon. A.J. REDFORD: Before I start, on behalf of the opposition I pass on our best wishes to the Hon. Terry Roberts and wish him a speedy recovery. Last year, I was approached by the wife of a police officer stationed at a police station in northern South Australia. She told me—and provided me with supporting documents—a story in which her husband, who is a serving police officer, was stationed at a random breath test unit in northern South Australia. While on duty, he observed another police officer—a detective—approach the random breath test unit, stop the car, jump out of the car and run into the bushes. The young constable sought advice from a senior police officer, who attended at the scene and telephoned the detective who had alighted from the vehicle. The detective said that he was not going back to the car and he was not going to the random breath test unit because he did not want to.

Of more serious concern is that on the following days the young constable was subjected to quite a deal of criticism from his fellow officers about what he had done at the random breath test unit. In fact, it got so serious that the wife of the constable, who was seven months pregnant at the time, was requested by SAPOL to leave her house and take up residence in a motel because there had been threats that explosives would be dropped through her bedroom window and that her life was in danger.

Following that, her husband was transferred to another police station and she sought explanations about why certain events had happened and how the matter had been dealt with. There were allegations that the detective concerned had two guns when he was entitled to only one, which is described in a Police Complaints Authority report as 'the throw-away gun'; allegations of incidents involving malicious damage to property; and allegations by the constable's wife that there had been a cover-up—certainly in the fact that the detective was not prosecuted.

She took up her complaint with the Police Complaints Authority. I would remind members that the Police Complaints Authority holds a very important constitutional role in our community. It is his or her role to protect us all from corrupt or inappropriate behaviour on the part of police officers in this state. She raised a number of issues. I will not go through them all, but, in simple terms, she was concerned that no action had been taken against the detective for not submitting himself to a random breath test and that this

officer had two guns. She did not receive any adequate explanation as to why—

The Hon. P. Holloway interjecting:

The Hon. A.J. REDFORD: I will come to that. She did not receive any explanation as to why she was put in a motel overnight, and various other things. In June last year, she received a letter from the Police Complaints Authority, which I will summarise briefly because it is a lengthy letter. In relation to the RBT incident, the Police Complaints Authority said that because it had been investigated by police it was 'not my responsibility to reinvestigate this matter'. He went on to say that the entire situation arising from the random breath testing station had been reported to the officer in charge. He also said that it was not for him to examine the internal investigation in relation to what occurred during that incident.

In relation to the throw-away gun, he said that it had been dealt with appropriately without any explanation as to exactly how it had been dealt with. In relation to the safe-house incident, he acknowledged that the constable had been advised as to the basis upon which the safe-house incident occurred, and acknowledged that she had been given no direct briefing. However, he went on and said, 'Having said that, this entire incredible situation was addressed initially by superintendent X, and subsequently by SAPOL as an organisation', and then he made no reference as to how the constable's wife should have been dealt with.

Further, in relation to the internal investigation branch, again, he said that, because it had been carried out, it was not within his jurisdiction. Indeed, the final page of his letter states:

> Given that my role in respect to this overall complaint is to ensure that none of the allegations made by the complainant have been swept under the carpet or ignored by SAPOL, and is not one of reinventing the wheel and carrying out an investigation into matters already investigated, it is clear to me that the complainant has not raised with me a single issue that SAPOL were not already aware of and had actually done something about—

That does not say what was done, what was raised and the level of investigation. After being appraised of these very serious allegations, and after checking the documents to ensure that these serious allegations had some veracity to them, I then wrote to the Minister for Police. In my letter of 3 November I requested that the Minister for Police should 'personally read' this material. Over the years—and I am sure that other members would agree with me—I have found that the Police Complaints Authority generally backs up the police. That is the impression I get. What the Minister for Police did was to flick it onto the Attorney-General. That was the last I heard of it, and that was 9 November. These are very serious matters. In the light of that, my questions are:

1. Does the minister believe that the Police Complaints Authority has adequately addressed my constituent's concerns?

2. Does the minister agree that a complaint that an officer jumped out of a car before getting to an RBT is 'not within the responsibility of the Police Complaints Authority'?

3. Is the minister of the view that it is not for the Police Complaints Authority 'to examine the internal investigation'?

4. Does the minister agree that it is a satisfactory answer to allegations of police misconduct that the matters complained of are 'matters that SAPOL were already aware'?

5. Why has the minister sat on my correspondence, which refers to very serious matters going to the heart of police integrity, since 3 November, and why has the Attorney-General sat on this matter since 9 November?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): It appears to me that, certainly, the honourable member is raising very serious allegations that effectively go against the Police Complaints Authority. The honourable member also appears to be suggesting that, because the allegations are against that authority, the Minister for Police had referred them to the Attorney-General's Department. I would have thought that was entirely appropriate behaviour given the information that he has suggested here. I must say that I think that anyone listening to the honourable member's question would need a lot more information before making any judgment. However, given that the matter has been referred on—certainly in my view appropriately—to the Attorney-General and given the nature of the allegations raised, I will refer that question to him and see what action has been taken.

The Hon. A.J. REDFORD: As a supplementary question: am I to understand from the minister's response that it is reasonable to expect, in the face of serious allegations of police misconduct, that we will have to wait 12 weeks for a response to those questions?

The Hon. P. HOLLOWAY: I would have thought that, if serious allegations were made against not just police misconduct—as I understood the question, the allegations were against the Police Complaints Authority—then I would have thought that it would require an extremely thorough investigation indeed. So, I am not surprised that those matters would take some time. The honourable member has made serious allegations, and if he wants them properly treated that will obviously take some time.

DIAMOND EXPLORATION

The Hon. R.K. SNEATH: I seek leave to make a brief explanation before asking the Minister for Mineral Resources Development a question about diamond exploration in South Australia.

Leave granted.

The Hon. R.K. SNEATH: On Tuesday, the minister mentioned the Argyle Diamond Mine in an answer to a question. The Argyle Diamond Mine in Western Australia is a significant producer of diamonds and provides jobs for local communities as well as royalties and wealth for Western Australia. My question is: does the minister have any information on diamond exploration in South Australia?

The Hon. P. HOLLOWAY (Minister for Mineral Resources Development): There is some very good news about diamond exploration in South Australia. Last Friday, Flinders Diamonds Limited commenced a drilling program to test a series of kimberlite targets in the Eurelia area near Orroroo in the Upper North of South Australia. This is part of a program of drilling and trenching which will be undertaken this February at various locations over Flinders Diamonds Limited's Flinders Ranges Project. Over 70 kimberlite targets were recognised in the December quarter of 2004, and the most promising and accessible of these are being tested in the current program, which is expected to test about 40 targets.

Targets are being tested in several widely spaced areas. From north to south these include: Kanyaka, Boolcunda, Moockra, Eurelia, Peterborough, Pitcairn, and Jamestown. If kimberlites are proven in some of these areas, it will signifi-

cantly increase the known size of the Flinders Ranges Kimberlite Province. Many of the targets were first identified by interpretation of South Australian government funded regional airborne magnetic surveys and have been located on the ground through detailed ground magnetic surveys carried out by Flinders Diamonds. This is further proof of the value of the government's geo-scientific data collection work that I mentioned yesterday.

The drilling program, which commenced on Friday, is aimed at testing those kimberlite targets thought to be covered by soil and gravel of 5 metres or more thick. Targets under less than 5 metres of cover will be tested by excavating a trench. The trenching program is scheduled to commence today and both programs are expected to be completed in February. If kimberlites are located, a 20 kilogram sample of each will be sent for micro-diamond determination. In the December quarter of 2004, Flinders Diamonds Limited discovered 11 new kimberlite dikes in the Eurelia area, three of which have since been found to be diamondiferous. As always, I wish Flinders Diamonds well in their exploration work and hope that they are successful in their search for diamonds in the near future.

AUDITOR GENERAL'S REPORT

The PRESIDENT: Just before we go on with question time, I table the report of the Auditor-General, a report pursuant to section 32 and 36 of the Public Finance and Audit Act 1987, matters associated with the 2001-2002 proposal concerning the establishment of an ambulance station at McLaren Vale.

The Hon. R.I. LUCAS: I rise on a point of order, Mr President. What is your ruling in relation to your normal practice in terms of tabling reports from the Auditor-General and, in particular, the reason for your decision to do it during the middle of question time?

The PRESIDENT: I have stopped the clock in respect of this matter. It is a matter that was overlooked earlier in the day. These reports have been tabled and distributed in the other house, so I am taking the opportunity to do this now. The Clerk is concerned that we would have a difference between the procedures of members of the other place and this place. I have stopped the clock to ensure that members' access to question time is not jeopardised.

LAND, FREEHOLD

The Hon. CAROLINE SCHAEFER: I seek leave to make a brief explanation before asking the minister representing the Minister for Environment and Conservation a question on freeholding of land.

Leave granted.

The Hon. CAROLINE SCHAEFER: When this government came to power, it made the mistake of attempting to change the long-held practice of perpetual lease title in this state without any understanding of what perpetual lease stood for. As a result of that, there was a select committee and a series of recommendations in another place. With no great pleasure, the holders of perpetual lease across the state applied to freehold, given that the cost of doing anything other than freeholding their property became prohibitive. As part of the process, an appeals panel was formed, where holders of perpetual lease who were not satisfied with the cost of freeholding could appeal to, as I recall, a retired judge, two nominees of the South Australian Farmers Federation and two nominees of the Department of Environment and Heritage.

Since then I have received a number of complaints with regard to the cost of freeholding, some of it in excess of $12 000 to $13 000. One of my constituents has recently been advised that there is a second round of appeals, but there is very little funding to cover the activities of that panel. My questions are:

1. How many holders of perpetual lease have appealed against their costs or against the process?

2. How much funding has been allocated for the appeals process and how much of it is left?

3. Why is the process not transparent?

4. What proportion of perpetual lease titles have been transferred to freehold since the process began?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I will refer those questions to my colleague the Minister for Environment and Conservation and bring back a reply.

CHRISTIE CREEK

The Hon. SANDRA KANCK: I seek leave to make an explanation before asking the Minister for Industry and Trade, representing the Minister for Environment and Conservation, a question concerning erosion of the bed and bank of Christie Creek on the seaside of the Southern Expressway.

Leave granted.

The Hon. SANDRA KANCK: Mr Rex Manson has been in contact with my office regarding damage to Christie Creek and the danger that poses to the Port Noarlunga reef as a consequence of the increase in silt washing out to sea. Christie Creek runs from the Southern Mount Lofty Ranges through Morphett Vale and Lonsdale before emptying into the sea at Christies Beach. As a consequence of the construction of the Southern Expressway, the bank of the creek under the expressway was damaged, leading to increased erosion of the bank and bed of the creek.

The Friends of Living Christie Creek, of which Mr Manson is a member, has been lobbying both local and state government since 2001 to remediate the damage that has occurred. In 2002 the group appeared before the Environment, Resources and Development Committee on this matter. Subsequently a reno mattress and gabion were installed on the north bank of the creek. The damage to the bank and bed at Christie Creek now extends some 400 metres downstream from the bridge over the Southern Expressway. My questions are:

1. Has the minister been made aware of the damage to Christie Creek?

2. Is the minister aware of the current coastal study being conducted by the CSIRO and the fact that study has identified high sediment flows out of Christie Creek?

3. What action has the minister taken to prevent further silt from Christie Creek damaging the surrounding coast, including Port Noarlunga reef and, as one of his fellow ministers accepted responsibility for the local erosion on 5 August 2003, is the government going to remediate and stabilise the area downstream? If not, why not?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I will refer those questions to my colleague the Minister for Environment and Conservation. I am sure that, because of the proximity of that area to his electorate, he will provide a very informed answer. I will bring back a response.

GAMBLERS REHABILITATION FUND

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

Leave granted.

The Hon. NICK XENOPHON: Last year, as a direct consequence of support from the opposition and my fellow crossbenchers during the committee stage of the Gaming Machines (Miscellaneous) Amendment Bill 2004, the Gamblers Rehabilitation Fund received a virtual doubling of taxpayer funding of an additional $2 million a year. This increased funding reflected the urgent need to improve woefully funded gamblers rehabilitation services in this state. The commitment of the government was restated in a media release by the Premier on 1 February 2005 where the Premier said, amongst other things:

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

Further, the government undertook that the additional funding would be pro rata for the current financial year—as I understand it, an additional $850 000—until 30 June 2005. However, I have been shocked by information that my office has received as recently as this morning that, despite the Premier's statement of 1 February 2005, it appears no additional funds have been provided and that those at the front line dealing with gambling counselling—namely, the Break Even network—have not even been consulted about this increased funding, and waiting lists for those in desperate need of help have not been reduced.

One service that I spoke to last week reported no change from last year's waiting list of four to six weeks. I also understand that the agenda for next Tuesday's Gamblers Rehabilitation Fund committee meeting, which is the committee responsible for supervising and allocating funding, does not even have the issue of increased funding that has been trumpeted by the government on its agenda. My questions to the minister are:

1. What advice or discussions have taken place between the government and the Break Even service providers as well as the Gamblers Rehabilitation Fund committee on increased funding, particularly for the funding that the Premier says has 'kicked in' since 1 February? Is it not the case that there has been no consultation, or virtually no consultation, or discussions about this funding, which raises serious questions about the accuracy of the Premier's statement of 1 February?

2. What strategies are in place to allocate additional funding for this and the next financial year? Is it not the case that there have been no discussions, or virtually no discussions, about this funding, which also raises serious questions about the accuracy of that statement?

3. Can the minister confirm that, for the GRF committee meeting next Tuesday, nothing has been put on the agenda for increased funding or to deal with such funds?

4. Will the minister provide an assurance that the entire additional pro rata funding of some $850 000 will be spent this financial year to reduce waiting lists and enhance services for problem gamblers? Further, how will this additional sum be allocated?

5. What consideration will be given to the highly regarded Flinders Medical Centre program of the Anxiety Disorders Unit being expanded to the northern suburbs of Adelaide, particularly Elizabeth and Salisbury, including the inpatient program for severe problem gamblers?

6. What plans are there to ensure continuity of services and certainty for current rehabilitation services beyond 30 June 2005?

7. Does the minister acknowledge that the Premier's statement of 1 February, given the information now obtained, means that the Premier was suffering from a case of premature exaltation?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I will refer the question to my colleague the minister responsible for gambling and bring back a response.

WATER SUPPLY, GLENDAMBO

The Hon. T.J. STEPHENS: I seek leave to make a brief explanation before asking the Leader of the Government, representing the Minister for Federal/State Relations, questions about Glendambo.

Leave granted.

The Hon. T.J. STEPHENS: Members, by now, are well aware of the Glendambo water situation. I have been issuing a positive outcome for the people of Glendambo for a number of months and, at best, I have received from the minister a half-hearted commitment to do something as soon as possible.

The Hon. J.S.L. Dawkins: Which minister was that?

The Hon. T.J. STEPHENS: Actually it has been a number of ministers. I was most recently informed that the working party looking at this issue was going to report by Christmas 2004. I can inform the council that, as far as I can ascertain, there has been no report handed down or any resolution for the people of Glendambo. My questions are:

1. When will the minister get serious about fixing this water problem?

2. Why, as a supposedly independent member of cabinet, does he engage in the Labor Party's practice of doing anything but answering the question and relying on a pending report?

3. Has this minister, or any other member of the cabinet, ever tried to quench their thirst with a pending report?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): The question of the water supply at Glendambo—or, indeed, in much of this state—is a very serious issue because, sadly; we do not have a great deal of water available in much of our state. No-one knows better than I do, as Minister for Mineral Resources Development, the implications of the lack of water resources in this state to development in the region.

I answered a question the other day from the Hon. Sandra Kanck on the use of water in relation to Western Mining, because there was a major feasibility study going on in relation to the expansion of a mine in which water was a big issue. One would also imagine that, with all the satellite areas around there, whatever solution is ultimately devised will possibly provide a long-term solution to water in that area. In relation to the specifics of the Glendambo situation, I will refer that to the minister who has responsibility for that area and bring back a reply.

TRADE FORUMS

The Hon. J. GAZZOLA: I seek leave to make a brief explanation before asking the Minister for Industry and Trade a question on trade forums.

Leave granted.

The Hon. J. GAZZOLA: Export growth is arguably the single most important driver of future economic prosperity for South Australia. This view has been expressed by the Economic Development Board in its report on South Australia's economy, and it is a view that is strongly endorsed by the South Australian government. A number of trade forums have been held by the government to assist current and upcoming exporters. What plans does the minister have with regard to trade forums?

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I thank the honourable member for his question. It is clear that we cannot ever be complacent. South Australia's small population and limited economic base means that our access to international markets is critical to wealth generation. To continue to expand our economy it is essential that we focus beyond our local markets to increasingly move our products both interstate and overseas. As a small state our very future relies upon increased export capability.

The necessity of export growth is a concept that should be embraced by all South Australians, because the benefits of exports are not solely in greater export dollars, job creation and domestic business growth, although these are important enough in themselves. There are other significant spin-offs in the form of higher levels of pay, increased profits, better trained staff, greater expenditure on research and development and improved business performance. I firmly believe that export growth will be best achieved with the government working in partnership with the community and business.

In the past, much of the state's input into commonwealth market access negotiations was based on ad hoc intelligence from companies. The state government's trade forums have become a mechanism by which local companies are able to voice their concerns on trade-related issues directly to the government as well as other key state and commonwealth bodies related to trade. The trade forums we have held in the past have without doubt given the government a better understanding of localised trade issues. They provide the government with a much more robust basis for developing and implementing its trade policy agenda and they complement other work in the trade policy area such as the development and implementation of a state export strategy.

There are a number of organisations that are responsible for assisting exporters within South Australia. As the Minister for Industry and Trade, I am committed to a cooperative approach to building our exports—we need to work with each other at both industry and government levels. Amongst other things, the results of these forums will feed directly into the government's efforts to influence commonwealth trade policy. We envisage that, as a result of the feedback received through the forums, the state government's lobbying of the commonwealth on market access issues will be more closely aligned with the problems and needs identified by business.

The forums will also be crucial for communicating the government's position on trade policy matters to industry and to inform participants of developments in the area as well as programs and events which are of interest. First and foremost, forums are about discovering concerns from those intending to export or who are already exporting. They are about answering questions and providing advice to help companies win export sales. Always in attendance are officers from the Department of Trade and Economic Development who are on hand to answer queries and follow up on any matters that arise. Topics for discussion can range from the activities within the World Trade Organisation and issues to do with free trade agreements, such as those with the United States, Singapore, Thailand, Malaysia, ASEAN or Japan, to issues surrounding (or the proposed ones, of course, in the latter three cases) transport, logistics and local impediments to exporting.

So far, the government has held trade forums in Mount Gambier, Adelaide, Port Lincoln, the Riverland and one with a creative industries focus in Adelaide. The forthcoming trade forum on Yorke Peninsula will be held on 23 March and will be quite different from the other trade forums we have held, due to the unique geography of that region that impacts on its trade activities. The Yorke Regional Development Board is helping to organise the meeting. The Yorke Regional Development Board supports the Yorke region, which is the area surrounded by the sea, with Spencer Gulf on the west side, Investigator Strait on the south side, Gulf St Vincent on the east side and, in the north, Port Wakefield to Port Broughton.

Encompassing an area of approximately 11 900 square kilometres, the Yorke region is centred around several agricultural business centres, including Balaklava, Maitland, Minlaton, Yorketown, Port Broughton, Owen, Snowtown, Mallala, Two Wells and Lewiston. The Yorke region (which we are considering in this program) covers the local government areas of the district councils of Barunga West, Mallala, Yorke Peninsula Copper Coast, and the Wakefield Regional Council.

The talking trade forum in the Yorke region will focus on the key agriculture sectors (such as grain, vegetables and livestock) and extractor sectors (such as limestone, dolomite gypsum and sand) in the region. I would imagine that there will also be issues surrounding bulk grain transport, the aquaculture industry and the tourism sector. The program will also involve site visits to businesses in these targets sectors, and from this we will obtain a deeper appreciation of the trade issues that the Yorke region faces. After the Yorke Peninsula forum, it is our intention to hold a forum in Adelaide, with a focus on the services sector. I believe these forums are a way of fostering our growing reputation in the global economy as an internationally renowned supplier and exporter to the world. I look forward to personally visiting the Yorke Peninsula region on 23 March.

ADOPTION

The Hon. KATE REYNOLDS: I seek leave to make a brief explanation before asking the Minister for Industry and Trade, representing the Minister for Families and Communities, a question about changes to adoption services.

Leave granted.

The Hon. KATE REYNOLDS: In recent weeks, I have asked the minister a number of questions about the government's decision to 'in-source' overseas adoption and post-adoption support services. Specifically, I have asked questions (which the minister has not yet answered) about the justification for this decision. I have read and consulted widely, and I have been contacted by many parents. However, I still cannot find reasons or recommendations from any of the reviews which have been conducted which suggest or imply that the AACAA should not continue as the contracted provider of these services.

Along with the member for Heysen, I attended and spoke at the rally of parents which was held today on the steps of Parliament House, and I listened to many parents outline their concerns in relation to both the government's decision and

the way in which it went about implementing that decision. In fact, one parent said:

> To base a government decision on figures that are spurious, and allegations (or notifications) that are unsubstantiated, is irresponsible. To present this process to the public as evidence of a balanced, consultative approach to governance is insulting, condescending and untruthful.

When he addressed the rally, the minister refused to guarantee the same range of services if he does de-fund AACAA and if the government agency AFIS is left as the sole assessment, placement and support agency. Parents who have contacted the minister directly have said that he has not offered them any explanation for his decision. So, we are all left wondering, with increasing frustration and scepticism: what is the real reason for this decision?

At a media conference after the rally, the minister made a number of claims about AACAA which, to the best of my knowledge, are not raised in any of the reviews, the latest of which was completed just a few months ago. I have also been told that AFIS staff have been instructed to not deal with AACAA staff during the transition period. So, my questions to the minister are:

1. Did any of the reviews commissioned by this government recommend that AACAA not proceed with overseas adoption and post-adoption services?

2. Did any of the reviews commissioned by this government recommend that AFIS be the provider of overseas adoption and post-adoption services?

3. Did any staff within AFIS or Community Youth and Family Services recommend that AFIS be the provider of overseas adoption and post-adoption services?

4. If so, what was the basis of the recommendation, when was it made and by whom?

5. If not, what is the basis of the minister's decision that AFIS be the provider of those services?

6. What will be the increased cost to government if the minister proceeds with insourcing the services?

7. Will the minister guarantee that AFIS will provide, at minimum, the same level of services as AACAA has provided at, I believe, $43 000 per annum, including after hours support and information services?

8. Will the minister agree to provide me with a confidential briefing so that he can provide evidence of the claims he made to the media today?

The Hon. P. HOLLOWAY: I will make sure the Minister for Families and Communities is made aware of the request the honourable member made in the latter part of the question. I will ensure she gets a response.

GOVERNMENT EXPENDITURE

The Hon. J.F. STEFANI: I seek leave to make a brief explanation before asking the Minister for Industry and Trade, representing the Premier, a question about the senior executive expenses employed by the state government.

Leave granted.

The Hon. J.F. STEFANI: During the last election campaign the Premier and Treasurer made much of the expenditure that had been incurred by the 'fat cats' employed by the government. The Premier and Treasurer both promised to adopt a new approach to public accountability and introduce drastic measures and controls to ensure that all public money spent by senior public servants would be properly justified. The Premier and Treasurer also promised that there would be a dramatic review on how public money was spent on consultancies. In view of the recent revelations of the expenditure of public money on the balanced score card program for the hire of consultants and the cost of accommodation for senior public servants at a luxury six star hotel, my questions are:

1. Will the Premier direct each of his ministers to make public all accommodation and travel expenditure from 1 January 2004 to 31 December 2004 incurred by senior public servants employed by each of the government departments when travelling interstate and overseas?

2. Will the Premier direct each of his ministers to make public the total cost incurred by the Labor government on consultants employed during the above mentioned period?

3. Will the Premier obtain and make public full details of all travel and accommodation costs incurred by the political advisers employed by the Labor government in each of the ministerial portfolio areas for the period 1 January 2004 to 31 December 2004?

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

BILLS, HOUSES OF PARLIAMENT

The PRESIDENT: Before we bring on business of the day, the Hon. Mr Lucas raised a matter with me yesterday during the proceedings of the council. I undertook to make a considered response to the matters raised with me. I think we are basically very close to what the facts of the matter were. I am advised that in this council yesterday the Hon. Mr Lucas questioned the introduction of the National Electricity (South Australia) (New National Electricity Laws) Amendment Bill by the Minister of Industry and Trade when an identical bill is set down on the *Notice Paper* of the House of Assembly at the second reading stage.

The two houses are quite distinct institutions and each is the master of its own destiny—and I think we all should remember that. Should the Legislative Council pass this legislation and it is referred to the House of Assembly, it would be for the Assembly to determine whether it would proceed with the legislation before it or, accordingly, withdraw the House of Assembly bill. Obviously, only one of these identical bills can be enacted by the parliament. However, if the Legislative Council's bill had passed the second reading in the council and the House of Assembly bill was to pass that house and be transmitted to the Legislative Council, I would be forced to rule in accordance with standing order 124, which provides:

> No question shall be proposed which is the same in substance as any question or amendment which during the same session has been resolved in the affirmative or negative, unless the resolution of the council on such question or amendment shall have been first read and rescinded. This standing order shall not be suspended.

Should the House of Assembly bill be amended or, for that matter, the Legislative Council amend its bill prior to transmission to the other house, it may be that the bill is not 'substantially the same' as the other house's bill. An entire bill is regarded as one question which is not settled until it is passed. Advice on a previous matter before this council warned:

. . . the Presiding Officer of the second house would need to be careful in ruling whether or not it was in order to discuss the bill brought from the first house on the ground that it was substantially the same as one already passed in the same session by his own house. . .

Therefore, at this stage I cannot determine whether the same rule will apply until this council is faced with having passed the bill now before it and is then in receipt of the legislation from the House of Assembly. I warn the minister that he should be careful in proceeding to a stage where a situation could arise and the 'same question' would apply, which would result in possible loss of the legislation. The introduction of the same bill in each house should not be used as a mechanism to allow debate to be conducted simultaneously in both houses.

MINISTER'S REMARKS

The Hon. R.I. LUCAS (Leader of the Opposition): I seek leave to make a personal explanation.

Leave granted.

The Hon. R.I. LUCAS: I claim to have been misrepresented by the Leader of the Government, both in this place and publicly. The Leader of the Government yesterday issued a press release headed 'Opposition defends improper accounting practices'. The Leader of the Government made a number of statements publicly. I understand that, should I have been a litigious and sensitive person, I may well have been able to take action against the leader but, in my 20 years-plus, I have not yet resorted to that means of funding extensions to my home.

The Leader of the Government has again made those statements in the council today. I place on the public record that I have not ever and would not ever support unlawful acts or the breaking of the law by anyone, including public servants or ministers such as the Attorney-General. I conclude by saying to the Leader of the Government that if at any place he can put on the public record that I have in any way indicated that I support the breaking of the law by any public servant, or anyone else, I challenge him to do so.

Members interjecting:

The PRESIDENT: Order! The personal explanation has been concluded; it is not open to debate.

CRIMINAL LAW CONSOLIDATION (CRIMINAL NEGLECT) AMENDMENT BILL

Adjourned debate on the question:

That this bill be now read a second time,

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

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

(Continued from 15 February. Page 1035.)

The Hon. T.G. CAMERON: I wish to make a brief contribution in relation to this bill. This bill was introduced by the government in response to the Macaskill case in 2003. The bill seeks to create a new offence of criminal neglect, whereby a carer of a child or a vulnerable adult can be charged if the person for whom they care is killed or seriously harmed as a result of a criminal act whilst they were in care. I understand that there is a motion to refer this bill to the Legislative Review Committee by the Hon. Robert Lawson, but I am not absolutely convinced that that is the way to go.

In the Macaskill case a baby died of non-accidental injuries whilst in the care of the baby's parents. Whilst the mother was charged there was conflicting and unreliable testimony, and no conclusive evidence as to who had caused the injuries. She was subsequently acquitted, though the court found that either the mother or the father must have been the killer. That does not result in a conviction, unfortunately. We have a case where there is at least one guilty party, perhaps two, yet the law cannot secure a conviction against either. The bill inserts a new division in the Criminal Law Consolidation Act 1935, which division creates an offence of criminal neglect.

Criminal neglect, as I am advised (not being a lawyer), is defined as a person breaching a duty of care to a victim, that is, they are a parent/guardian or had assumed responsibility for the victim's care and failed to prevent serious harm or death to the victim. The victim must be 16 or be significantly impaired in protecting themselves through mental or physical disability. As I understand it, the defendant will be guilty if they were or should have been aware of an appreciable risk of serious harm to the victim by the unlawful act, and that they failed to take steps that could reasonably have been expected to protect the victim, and that failure was so neglectful that it warrants punishment.

Again, I am not a lawyer but we have a tiered responsibility there. Basically, a person must be guilty of each count. I understand that the opposition has raised a number of concerns about this bill, and indicated that it wants to send it off to the Legislative Review Committee. My usual position is to support matters rather than make a mistake in this place. If we send it off to the Legislative Review Committee it will be back in three or four weeks and we can deal with it in a different light. However, before making a decision to do that, I would just like to listen to the debate.

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I thank those members who have indicated support for this bill, and I thank other members for their contributions. Contrary to what the Hon. Mr Lawson says, this bill is original. The Attorney-General had developed the first consultation draft by early March 2003, a year before the UK bill was introduced in March 2004. The first round of consultation on the Attorney's bill began in early July 2003 and, in his letter circulating the draft bill, the Attorney drew attention to the UK Law Commission's consultative report entitled 'Children—Their Non-Accidental Death or Serious Injury Criminal Trials' published in April 2003 which, as it happened, mirrored many of the concepts in this government's draft bill.

When the UK bill was introduced in March 2004 it was examined closely with a view to improving our bill. This bill has been a long time coming because such care has been taken over it. It is about difficult cases where two or more people had the exclusive opportunity to kill or maim a child or a vulnerable adult in their care and where that shared opportunity can shield each suspect from criminal liability. Any change to the law requires a fine balance between the presumption of innocence for each of the accused and the public interest in holding one or both of them criminally liable to the extent that they were responsible for what happened. At present, the balance is tipped too far one way

and can allow both to escape criminal liability altogether. The right balance can be achieved only by a law constructed with great attention to technical legal detail. That is why the government has consulted widely—indeed, nationwide—with experts in the criminal law in drafting this bill.

During that consultation, the need to protect the rights of people accused of crime was continually asserted, and the bill carefully drafted to preserve those rights. Indeed, not only members of and consultants to the Model Criminal Code Officers Committee but some of the directors of public prosecutions analysed the bill critically from a defendant's as well as a prosecution perspective. As mentioned in the other place, it is not true that the Law Society was not consulted on the bill. It was included in each round of consultation. The Law Society and the Bar Association were each invited to comment on the first draft of the bill in July 2003. They did not respond.

The next version of the bill came about after the wide consultation I have already spoken about, and comments were invited on it in July 2004. Three committees of the Law Society considered that version: the Criminal Law Committee, the Family Law Committee, and the Children and the Law Committee. The perspective of each committee is different. Although most other commentators welcomed the bill—and if they had criticisms expressed them constructively—the Law Society's views could not be characterised in this way. However, the Attorney-General took them into account when preparing the bill that we now have before us. I point out that the Law Society's letter concerned a draft of the bill that has since been superseded by the current bill. The Law Society, although invited, has provided no further comment on the bill as introduced.

The Attorney-General gave a detailed response to the Law Society's criticisms of the superseded version of the bill in the other place, which I will recap for the benefit of the council. The Law Society's letter expressed many fears and concerns, most of them unfounded. The main objections to the bill appear to be from the Law Society's Criminal Law Committee, a group of criminal defence lawyers whose clients, some might think, would naturally oppose the closure of this legal loophole. A more balanced view was put by the then president of the Law Society, David Howard, in his article in *The Advertiser* of 17 July 2004 entitled 'Bill takes scot-free out of the equation'. The article dealt carefully with all the legal principles affected by this bill and contained none of the misunderstandings in the Law Society's subsequent letter. Mr Howard said:

> The intention is to prevent avoidance of responsibility and absurd results in the case of (mainly) domestic violence to children and vulnerable adults. It is a challenging new concept. There will be differing views about this new development of duties of care. I think it has merit.

I will respond now to some of the points raised by the Law Society. Time does not permit me to answer all 38 of them, other than to say that they were all carefully considered in finalising the revised bill. The bill does not, as the Law Society asserts, encourage the criminalisation of innocent people. The bill says that carers who fail to take reasonable steps available to them in the circumstances to protect the child or vulnerable adult in their care from harm in certain circumstances are not innocent and may be guilty of the offence of criminal neglect. If each of two suspects owed a duty of care to the victim and each can be shown to have failed to take steps to protect the victim when he or she should have been aware that the victim was at an appreciable risk of harm, each one is a perpetrator of this new offence.

Of course, one of them must have done the unlawful act that killed or harmed the victim, but this law is not concerned with that. It allows each of these people to be convicted of a new offence that is different from the offence of committing the unlawful act itself. No injustice is done to the suspect who did not commit the unlawful act if the elements of the offence of criminal neglect are established beyond reasonable doubt against him or her. No injustice is done to the person who did commit the unlawful act. There is no criminalisation of innocent people. There is no shifting of any onus of proof.

The Attorney accepted the Law Society's point that the bill should contain a definition of serious harm, and the government amended the bill in the other place accordingly. The definition is drawn in the same terms as the definition passed by this house in the Statutes Amendment and Repeal (Aggravated Offences) Bill 2003. But the Law Society, and of course the Hon. Mr Lawson, says the concept of serious harm should not include psychological harm and that it should be restricted to physical harm. The government's view is that a person who allows another to inflict serious psychological harm on a child or a vulnerable adult in his or her care should be as liable to a charge of criminal neglect as one who allows the infliction of physical harm.

The Hon. Mr Lawson notes that the Privy Council in Chan Fook 1994 determined that 'actual bodily harm' is capable of including psychiatric illness, even where no physical injury is inflicted on the victim, but that it did not include mere emotions such as fear, distress, panic or hysterical or nervous conditions. He then goes on to suggest that there is some doubt about whether this interpretation should be applied to this bill and says it 'requires an examination by a parliamentary committee'. I find this hard to fathom. Chan Fook was approved and applied by the House of Lords in R v Ireland and R v Burstow in 1998.

The decision in Ireland and Burstow has been accepted as the law by Australian courts. In that case, a stalker who made persistent silent telephone calls to the victim was found guilty of causing grievous bodily harm because his actions caused the victim severe clinical depression. Applying Ireland and Burstow to this bill means that the offence of criminal neglect, which covers not only death but also serious harm, will include cases where the victim suffers a serious psychiatric illness. The prosecution will have to establish this, and that it results from an unlawful act. Any criminal court in Australia would interpret the bill in this way. We do not need the Legislative Review Committee to tell us this.

The main opposition to the bill from the Law Society was to its creating an offence of criminal negligence, or to the way it expresses the elements of criminal negligence, or both. I mentioned in introducing the bill that criminal negligence is not a new concept and that it already has a place in our law in other serious offences. Indeed, this parliament has just enacted a new offence of criminal negligence in the Criminal Law Consolidation (Intoxication) Amendment Act 2004.

The way this bill describes criminal negligence in proposed sections 14(1)(c) and 14(1)(d) precisely mirrors the High Court's test for criminal negligence, as did the offence in the act about intoxication. The Law Society may not be alone in being confused about that test, or in thinking the test cumbersome, but nonetheless that test must be used in this bill because it comes from the highest authority. The government does not accept the criticism that the bill encourages police not to investigate properly a report that a

child has died or been seriously harmed in apparently non-accidental circumstances. Inadequate investigation would, of course, jeopardise the prosecution case for intentional harm or death, but it would also lessen the chances of conviction for criminal neglect. It is true that the elements of that offence are not easy to establish. That cannot be helped. This bill does not set out to make things easier to prove.

The government does not accept the criticism that the bill will encourage the prosecution to present a weak case. The prosecution has no interest in doing this. If it can establish guilt of the primary charge, it will attempt to do so. That a lesser charge is available does not influence the prosecution to present a weak case on the higher charge. If that were the case, we would have very few murder trials.

The Law Society says that the legislation may create an incentive to lie as much as it creates an incentive to tell the truth. That is not so. The incentive to lie is always present in these kinds of cases, particularly when the relationship between the two suspects is fragile or transitory, and always presents practical problems for prosecutors in plea negotiations. But this law does not set out to help prosecutors in their difficult task of deciding which witness is the more credible or of deciding whether to give immunity from prosecution. Instead, the bill gives prosecutors an alternative lesser charge in cases in which, otherwise, the only possible charge is murder or manslaughter or an offence of causing serious harm. In so doing, the bill may encourage suspects to break their silence. That the silence may be a guilty silence is something prosecutors must always be alert to, and this law will not change that. The point is that the bill gives an incentive to tell the truth that was not there before.

The Law Society says that the term 'guardian' is not, and should be, defined, because it has 'numerous meaning[s] in the community, [and] has different meanings in different communities, particularly the Aboriginal community'. This is not a valid criticism. The bill attaches a duty of care to parents or guardians of the victim or to anyone who has assumed responsibility for the victim's welfare. When this bill says 'guardian', it invests it with the same meaning in the criminal law as it has elsewhere in the Criminal Law Consolidation Act (where it is also not defined). It occurs in section 33A (female genital mutilation), section 39 (common assault), section 49 (unlawful sexual intercourse), section 57 (indecent assault), and section 80 (abduction of a child under 16). There is no point in using the term 'legal guardian'. If the person is a guardian in a sense not recognised by the criminal law, the test will be whether he or she has assumed responsibility for the victim's welfare.

The Law Society says that the language and wording of the legislation is confused, confusing, contradictory, ambiguous, impractical, unnecessarily complex and, therefore, likely to lead to uncertainty and injustice. I point out that these comments were made before the bill was redrafted and by people who did not want the law changed. The comments were not particularly helpful, even then, because they did not indicate which words or language in this very short bill were thought to be so defective or offer suggestions for change. The government has taken extensive expert advice on the drafting of the offence and will stick with that advice.

The Law Society says that proposed section 14(1)(d) should describe the concepts of negligence in the traditional order; that is, the existence of a duty of care, identification of the requisite standard of care, a breach of care (whether by act or omission) and consequences of the breach of a duty of care. My answer to that is this. The existence of the duty of care is established in section 14(1)(b). The requisite standard is set in section 14(1)(c). Breach is described in section 14(1)(d). The consequences of the breach are implied in paragraph (d) and stated in section 14(1)(a)—that the child has suffered harm or has died or has been killed as a result of an unlawful act from which the defendant should have taken steps to protect the victim. There is no other way of saying this, and it is not so badly out of order anyway. No other commentator has thought it a fault. It does not need to be corrected.

The Law Society says that the concept of 'appreciable risk' is a novel one and suggests that it should be 'foreseeable risk'. This is not a good suggestion. The term 'appreciable risk' is used in section 14(1)(c) to describe one of the elements of the offence in this way:

> The defendant was, or ought to have been, aware that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act.

'Appreciable risk' is not a novel term in criminal negligence. It is the term used to describe the magnitude and probability of the risk, and that is something that the courts have distinguished from its foreseeability. Chief Justice Mason of the High Court made the distinction in Wyong Shire Council v Shirt and ors, and stated:

> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors.

In this bill, foresight is already covered by the phrase 'was, or ought to have been, aware'. 'Appreciable risk' and 'ought to have known' are part of the definition of criminal negligence manslaughter and manslaughter by unlawful and dangerous act. The case of R v Holzer gives this test of the offence of manslaughter by unlawful and dangerous act:

> The circumstances must be such that a reasonable man in the accused's position, performing the very act which the accused performed, would have realised that he was exposing another to an appreciable risk of really serious injury.

This formulation was adopted by the High Court in the leading case of Wilson v the Queen. The latest decision on point is from the NSW Court of Criminal Appeal in 2004 in R v Lavender, in which it was held:

> . . . to prove manslaughter by criminal negligence the Crown must establish: first, that the death was caused by the act (or, where relevant, the omission) of the accused; second, that that conduct was intentional and voluntary; third, that a reasonable person in the position of the accused would have realised [i.e. the accused ought to have known] that the conduct involved a high risk that death or grievous bodily harm would follow; fourth, that the accused realised that there was an appreciable risk of death or grievous bodily harm and continued despite it; and, fifth, that the conduct of the accused was so wicked or involved such grave moral guilt as to warrant criminal punishment.

The court explained the concept of 'appreciable risk' by distinguishing it from a 'probable result' in terms of culpability, as follows:

> To my mind, the distinction between manslaughter by gross negligence and murder by recklessness at common law is sufficiently made by the distinction between the realisation of the accused in the former case that he or she 'was creating an appreciable risk of really serious injury to another or others and that nevertheless he chose to run the risk', and, in the latter case. . . that intentional conduct causing death in the knowledge that death or grievous bodily harm was probable is murder.

The court held that part of the test of criminal negligence manslaughter is that a reasonable person, in the defendant's position, ought to have known that there was an appreciable risk of death or grievous bodily harm.

The Law Society says that some of the examples given in the second reading explanation are not clear cut, in that they make unwarranted assumptions about whether the suspects owe a duty of care to the victim. That is just nonsense. The examples in the second reading explanation do not make any assumptions; they put forward certain facts and show ways in which the bill might apply to them without claiming to cover all possible interpretations of those facts.

The Law Society says that section 14(3) of the bill gives rise to considerable conceptual difficulties, including views that it may involve a shifting of the onus of proof and that the wording is ambiguous and needs clarification. The wording has been clarified in the new section 14(2) but for different reasons than those mentioned by the Law Society. The old section 14(3) did not require the defendant to prove anything. It came into play only when the prosecution could prove beyond reasonable doubt that the perpetrator could only have been the defendant or some other person, and then it required every aspect of the offence to be proved beyond reasonable doubt against the defendant. I am surprised that the Hon. Mr Lewis repeats this criticism without mentioning the differences between the section that the Law Society referred to and the new section 14(2).

I would like to end by giving two quotations that exemplify the interest and support this bill has attracted in Australia. The first is from the Director of Public Prosecutions in the ACT, Richard Refshauge SC, in a letter dated 19 July 2004. He wrote:

> I found the bill to be an appropriate response to a difficult problem in criminal justice, namely where injury or death is caused by one of two or more people who have a duty to protect the victim but the actual perpetrator cannot be conclusively identified. Unfortunately, the situation is not uncommon and the present difficulties in successfully prosecuting the perpetrators of such offences means that the criminal justice system presently fails to discharge a fundamental purpose of the criminal law to protect the community and especially its weaker or defenceless members.
>
> I found the second reading speech, also forwarded, to be a refreshingly direct and helpful discussion of the bill which would prove extremely useful in any forensic argument about the construction of the section the bill proposes to insert into the Criminal Law Consolidation Act 1935. . . I shall watch the progress of the bill with interest and, if enacted, the section's operation and any prosecutions flowing from it.

The second quotation is from the Director of Public Prosecutions in Western Australia, Mr Robert Cock SC. In a letter dated 2 December 2004 he wrote:

> These amendments take the law to a new level in relation to criminal negligence. Again, I commend the Attorney for their introduction into parliament. I look forward to proposing to the Western Australian Attorney-General that similar legislation be enacted in this jurisdiction.

The government will oppose the amendment proposed by the Hon. Mr Lawson to refer this bill to the Legislative Review Committee. It is unjustifiable. I have mentioned the long gestation of the bill and the intensive consultations that have already taken place and I have also mentioned the changes to the bill that were made as a result of that consultation, changes made after the Law Society expressed its concerns and taking them into account. The policy underpinning the bill is clear, and it is not a matter for review by parliamentary committee.

The bill is a technical legal response to a specific problem, and creates a new offence when a child or vulnerable adult is killed or seriously harmed by an unlawful act. It does it in three steps:

1. It establishes a duty of care towards the victim when the defendant is the victim's parent or guardian or has assumed responsibility for the care of the victim.

2. It says what constitutes a breach of that duty of care. The breach can be established by proof that the defendant failed to take reasonable steps to prevent the victim being harmed when he or she was aware, or ought to have been aware, that there was an appreciable risk that serious harm would be caused to the victim by the unlawful act.

3. It makes that breach an offence of criminal neglect only if the defendant's failure to prevent the victim being harmed was, in the circumstances, so serious it warrants a criminal penalty.

In this way, people may be held criminally responsible for the death of, or serious harm to, a child or a vulnerable adult in their care, even though it cannot be proved that they personally inflicted the fatal or harmful act. What must be proved, however, is a serious dereliction of their duty to protect that child or vulnerable adult from harm. It is about serious dereliction that they are to be held criminally liable.

The Attorney's senior policy lawyers have worked with parliamentary counsel, taking advice from the Acting State Director of Public Prosecutions and senior DPP prosecutors to make this technical bill as clear as possible and to ensure that the bill has this effect and no other intended effect. In doing so, they have investigated in-depth all legal concepts, including accessorial liability, the doctrine of preconcert and the law of omission. There is nothing the Legislative Review Committee could bring to this bill that has not already been done, and done by people with the technical expertise. The government sees the Hon. Mr Lawson's amendment as nothing more than an excuse by the opposition to delay important government legislation and to ventilate more strongly the views of defence lawyers already known to the government when it prepared and introduced the redrafted bill to parliament in October last year.

The longer this law is delayed, the more people may escape liability for killing or seriously injuring children or vulnerable adults. Sadly, children are sometimes killed or seriously hurt by the people who are responsible for looking after them. Victim-based police statistics for reports of serious crimes against children under the age of 16 show that in the four years from 1999 to 2003 the person reported as the alleged perpetrator was a parent or guardian of the child, or a partner or de facto partner of the child's parent, in 12 of the 16 reports of murder, six of the 11 reports of attempted murder, the one report of manslaughter, and 10 of the 34 reports of assault occasioning grievous bodily harm. Of these, parents or guardians were the alleged perpetrators in 10 of the 12 murder cases, five of the six attempted murder cases, the one manslaughter case, and seven of the 10 cases of assault occasioning grievous bodily harm.

I realise that this law will not stop these crimes happening. It does not set out to do so. It has not been prepared, as the Hon. Mr Lawson puts it, as a 'glib solution', disregarding the need for prevention and early intervention'. Far from it. The bill was prepared against the backdrop of the government's child protection reform program. That program 'Keeping Them Safe' gives support to children, young people and families, ensures effective, appropriate interventions by

government agencies and departments, and gives substantial funding to supporting parents.

In 2004-05, the government injected a further $148.1 million over four years into child protection across government through the Department for Families and Communities' budget, as well as an extra $2.8 million as part of the Social Inclusion Unit's homelessness initiatives, targeting families with high needs. These initiatives represent this government's third and most comprehensive response to the recent reviews into our child protection system.

This is not a case of the government being happy with any old law so that it can tick off one more item in a list of achievements. This is a carefully prepared, carefully considered new law prepared in response to public disquiet at people getting away, literally, with the murder of defenceless babies. I think parliament can work out for itself whether the bill does the job, without referring it to any committee. The government opposes the Hon. Mr Lawson's amendment. I commend the bill to the council. I seek leave to conclude my remarks later. That will enable members to consider them.

Leave granted; debate adjourned.

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

In committee (resumed on motion).

(Continued from page 1147.)

Clause 34.

The CHAIRMAN: When the committee last met it was deliberating on an amendment of the Hon. Mr Lawson to page 18, after line 34.

The Hon. P. HOLLOWAY: I will clarify some matters raised before the lunch adjournment. It is important that members understand that this is not some totally unique idea that there be a provision that sets out the sorts of things that parties to negotiations ought to do. For example, section 146 of the Queensland Industrial Relations Act 1999 provides:

> When negotiating the terms of a proposed agreement, the proposed parties to the agreement must negotiate in good faith.

The section goes on to set out examples of what indicates negotiating in good faith, as follows:

> Examples of good faith in negotiating—
> agreeing to meet at reasonable times proposed by another party attending meetings that the party had agreed to attend
> complying with negotiation procedures agreed to by the parties
> not capriciously adding or withdrawing items for negotiation
> disclosing relevant information as appropriate for negotiations
> negotiating with all of the parties.

Clearly, this is very similar to the proposal we are now debating. Also, section 42B of the Western Australian Industrial Relations Act 1979 provides as follows:

> (1) When bargaining for an industrial agreement, a negotiating party shall bargain in good faith.
> (2) Without limiting the meaning of the expression, 'bargaining in good faith' by negotiating parties includes doing the following things—
> (a) stating their position on matters at issue, and explaining that position;
> (b) meeting at reasonable times, intervals and places for the purpose of conducting face-to-face bargaining;
> (c) disclosing relevant and necessary information for bargaining;
> (d) acting honestly and openly, which includes not acting capriciously adding or withdrawing items for bargaining;
> (e) recognising bargaining agents;
> (f) providing reasonable facilities to representatives of organisations and associations of employees necessary for them to carry out their functions;
> (g) bargaining genuinely and dedicating sufficient resources to ensure this occurs; and
> (h) adhering to agreed outcomes and commitments made by the parties.

Clearly, this is very similar to the government's proposal. These arrangements are in place in other states and my advice is that they are working well.

The Hon. Nick Xenophon, before progress was reported, raised a question about whether the employer could walk away from negotiations if they decided that they no longer wished to negotiate an agreement. The answer is a very clear yes. All this talk by the opposition about the arbitrary provisions is not relevant, because it is very clear that new subsections (5), (6) and (7) will be deleted from the bill—even though the government believes they should not be. We will deal with that matter with the next amendment. I also draw attention to the Stevens report which states:

> The review believes that the current act is deficient in not providing a guide or code to good faith within the bargaining process.

This clause provides such a guide.

The Hon. IAN GILFILLAN: I hope we are not going to revisit all the minutiae of the discussion that went on prior to the luncheon adjournment. It seems to me to be a reasonable consensus that this bill will be amended substantially by taking out new subsections (5), (6) and (7). We have had a reassertion of what I have believed all along; that is, players to this voluntary activity of conciliation for best endeavour bargaining could pull out without penalty at any stage. We just had that confirmed. It seems to me—and I hope I am not too presumptuous—that the committee is at a stage where it could vote. The amendment before us is one moved by the Hon. Robert Lawson and it is quite specific. I have indicated that the Democrats will oppose it, but the issues, in my mind, have been clarified. We do not need to have further comparisons with Queensland, Western Australia, California or whoever else.

The CHAIRMAN: Proceedings are in the hands of the committee. It is not for one individual member to stifle anyone else's debate; it is certainly not mine. I see that the Hon. Nick Xenophon wants to make a contribution.

The Hon. NICK XENOPHON: I will express an opinion of my own and, hopefully, it will be of use to the committee. One of my concerns about the best endeavours bargaining provisions is whether it led to a compulsion to parties having to—

The Hon. T.G. Cameron interjecting:

The CHAIRMAN: Someone has been taking their obstreperous pills again.

The Hon. NICK XENOPHON: I cannot even spell that: I hope *Hansard* can. I will not even attempt to pronounce it. I indicated that I have some concern about the disclosure of financial statements, but the point has been made to me in the course of debate, by the Hon. Mr Cameron and the Hon. Mr Sneath in particular, that, if in the course of enterprise bargaining, the company says to its work force, 'We're going broke, we can't afford to pay anything else,' and six months later they announce a record result—so they misled their work force—obviously, in terms of Justice Munro's decision, even though it was for a different piece of legislation, it would be relevant in terms of reasonableness. I foreshadow an amendment I will move—which, hopefully, will be

circulated shortly—in addition to having subsections (5), (6) and (7) deleted, to substitute a new subsection (5) which would provide that nothing in a preceding subsection prevents a party to negotiations for an enterprise agreement deciding to withdraw from the negotiations entirely. That makes it fairly clear that this is about having a code and practices in place to ensure that people do their best during negotiations.

That would satisfy me in the context of the whole issue of financial statements. I think that, if someone does not want to provide financial statements, they can always walk away from the process. However, I know that the Hon. Mr Cameron has had some quite legitimate concerns about financial records and the power of union officials, for instance, to demand them. Obviously, that is something that he can explore. From my point of view, if an amendment is passed along those lines that would satisfy my concerns, and, I think, give comfort to both employer and employees involved in this process.

The Hon. R.K. SNEATH: Would the Hon. Mr Xenophon's foreshadowed amendment have any effect on employers walking away from the table if they were asked to table anything else in connection with providing productivity increases to employees? As an example, say the council wanted to put its grader drivers on shift work and the people representing the employees asked for some proof as to the savings that would represent to council (because enterprise bargaining is all about productivity increases), an employee could say, 'Well, what savings does that represent to the council so that we can work out what we should get out of this?'

Say it was a 10 per cent saving to the council and it laid papers on the table to prove that, the employees could say 'Well, for us to change work patterns like that, that should be worth 1 per cent to us in the agreement.' If the employer says, 'We will not give you the proof of that', can they walk away from the table under the Hon. Mr Xenophon's amendment or does it apply only to financial papers?

The Hon. NICK XENOPHON: I welcome that question. I have had discussions with the minister's advisers in relation to this. The government has already stated that you can walk away. That is the government's understanding of the intention of the legislation. I would have thought that, given what the Hon. Mr Sneath and others have pointed out about the whole process of enterprise bargaining, if at the end of a process (and this amendment is about facilitating the process, and I do not take issue with that in the context of this amendment) you decide to walk away from it after 12 months, you are back to square one and you have put in an enormous amount of resources. I think in that case it would be seen as though the employer is acting in bad faith. I want to make it clear that there is no compulsion to continue. However, the legislation is attempting to provide a framework to help facilitate enterprise bargaining. That is my understanding. The proposed amendment is attempting to enshrine in legislation—

The Hon. R.K. Sneath interjecting:

The Hon. NICK XENOPHON: The honourable member wants me to sit down. I am glad that I have made the Hon. Mr Sneath happy.

The Hon. T.G. CAMERON: On reflection, hindsight is always a wonderful thing. I think that the Hon. Ian Gilfillan is probably right: we probably have reached the stage where it is about time that we decided this matter. It does get awfully confusing, even though you do have some experience in the industry. This is a challenge, I guess, to both the government and the Hon. Mr Lawson, but I am pretty much in the same position as the Hon. Mr Gilfillan. I will be supporting the government on subsections (1), (2), (3) and (4). The Hon. Ian Gilfillan has convinced me that there are problems with subsections (5), (6) and (7). I am saying this to assist the committee.

In relation to the amendment standing in the name of the Hon. Nick Xenophon, unless I am convinced to the contrary, it is my belief that it is already in the act. Whilst, from my point of view, the clause does not add anything to the act, I will support the clause.

We have had a couple of legal heavyweights going at it here today, but at the end of the day the Hon. Mr Xenophon (with his legal training) is not certain that something is there. If we put this in, it does make it more certain. So, even though I might not necessarily agree with you, it is another layer of safety, if you like, which makes it patently crystal clear that they can withdraw from the negotiations. Is that correct?

The Hon. Nick Xenophon: Yes.

The Hon. T.G. CAMERON: Well, unless I hear something to the contrary, I will support your amendment. In relation to the amendments standing in the name of the Hon. Robert Lawson—and I am absolutely certain about this—I will not support any resolution that gives a union official the right to have access to or demand access to the financial records of an employer unless that access is sanctioned by the Industrial Commission. If that provision is not there, I will vote against the entire clause, and I think that might ensure that it goes down. I am only trying to ensure one thing here, and I am pursuing the line adopted by the Hon. Bob Sneath, that is, that union officials do not want access to these records but, in the event of an industrial dispute with an employer relying on the fact that he cannot pay, there is a mechanism for them to test the validity of that claim. I have no problem if the validity of that claim is tested before the Industrial Commission. I see that as the appropriate way to deal with it. Like the Hon. Andrew Evans, when it gets intensely legal I get confused and things get horribly complicated.

The Hon. Nick Xenophon: So do lawyers.

The Hon. T.G. CAMERON: And so do lawyers, as we have seen in this debate. I will support the government on subsections (1), (2), (3) and (4). It does not have the numbers in respect of subsections (5), (6) and (7) anyway. The Hon. Nick Xenophon has the numbers for his amendment, I would suggest, unless we hear a tortuous rebuttal on superfluity and the possibilities of repetition. At this stage I will support his amendment (unless I am convinced otherwise) in order to make it crystal clear that financial records can be accessed only under the purvey of the Industrial Commission.

The Hon. R.D. LAWSON: I think I can reassure the Hon. Terry Cameron in relation to his last point on my amendment which seeks to insert subsection (3a). An employer cannot be required to produce financial details, and the only body that could actually impose a requirement would be the Industrial Commission, and it has the protection the honourable member seeks. In other words—

The Hon. T.G. Cameron: So, it's safe to support your amendment?

The Hon. R.D. LAWSON: Yes. If anybody is to require the production, that could only be by order, and it could only be by order of the commission, because—

The Hon. T.G. Cameron interjecting:

The Hon. R.D. LAWSON: Yes. We support the Hon. Nick Xenophon's amendment. It provides clarity to something that we consider is not clear, but I cannot leave off the debate on this without assuring members that we remain opposed to these requirements which say that parties must do something. Where you have a law which says you must do this and you must not do that, it may not provide any sanctions but there are many people in the community who always seek to conduct their affairs in accordance with whatever the legal requirements are. So, there is a very heavy compulsion on somebody who wants to be law-abiding to comply with these principles. They would see it as an obligation. That is foreign to the very notion of pre-bargaining. That is why we remain opposed. They can walk away.

The Hon. A.L. EVANS: My guiding light in this whole debate is fairness for the small person, freedom for business without too much red tape, and supporting the issues that the people who support me are concerned about. One of the groups who have supported us, not as a group but many of the people who are involved in that group and attend that group, is the Independent Schools Association. This organisation is apolitical, but there are hundreds of people who go to these schools who are our supporters. The association says the following:

> The 'best endeavours' bargaining proposal could lead to more disagreements about the process and less focus on the issues being negotiated for inclusion in an enterprise agreement. For example, the proposal that '. . . parties. . . must disclose relevant and necessary information' could be a matter of dispute which would be a distraction from the main objective of negotiating an enterprise agreement.
>
> It is unacceptable that an employer could be expected to provide confidential information that may be detrimental to them if disclosed to clients or competing organisations. Independent schools have commercially sensitive information such as finances, enrolment projections, marketing plans, and board minutes. There could be substantial disadvantage to a school if this type of information were disclosed in the course of negotiations in another school. Yet little could be done if a union official fails to keep the information confidential during his participation in enterprise agreements across schools.

In view of that request from that group, my decision is to oppose subsections (5), (6) and (7); to endorse the Hon. Mr Xenophon's amendment; and in relation to subsections (1), (2), (3) and (4), I certainly do not like the word 'must' either, so I will not be supporting it if it stays in that form.

The committee divided on the amendment:

AYES (9)

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

NOES (8)

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

PAIR(S)

Lensink, J. M. A.	Roberts, T. G.
Stefani, J. F.	Zollo, C.

Majority of 1 for the ayes.

Amendment thus carried.

The Hon. IAN GILFILLAN: I move:

Page 18, lines 37 to 40 and page 19, lines 1 to 24—Delete subsections (5), (6) and (7).

The amendment has, I must admit, been pre-announced. It covers the deletion of subsections (5, (6) and (7) and it removes the arbitration aspects of this provision and, if this amendment is successful, it will leave the new section as a gentle, potentially effective mechanism for encouraging the achievement of best endeavours in good faith to establish enterprise agreements. I do not think I need to go over again the arguments which have already been canvassed in the committee. I rest my case.

The CHAIRMAN: The Hon. Mr Xenophon seeks to substitute some other words as well; we will take that amendment at the same time.

The Hon. NICK XENOPHON: I move:

Page 18, lines 37 to 40 and page 19, lines 1 to 24—
Delete subsections (5), (6) and (7) and substitute:
(5) Nothing in a preceding subsection prevents a party to negotiations for an enterprise agreement deciding to withdraw from the negotiations entirely.

Honourable members can support the Hon. Mr Gilfillan's amendment, which would mean the deletion of subsections (5, (6) and (7). My alternative amendment is to delete those subsections but to insert a new subsection (5) to give absolute clarity to the government's intention. I think we have debated this extensively.

The Hon. R.D. LAWSON: Before the government indicates its position, I indicate that we support the Hon. Ian Gilfillan's amendment; in fact, we have an amendment on file (and have for some time) to the same effect. I have previously indicated to the committee that we support the Hon. Nick Xenophon's amendment.

The Hon. P. HOLLOWAY: The government supports the bill in its original form although, as I have already indicated, it is clear that we do not have the numbers in relation to retaining subsections (5), (6) and (7) in the bill; nevertheless, I think it is important to put on the record the reasons why the government believes they should be there.

These amendments propose to delete the provisions in the bill which provide for the arbitration of enterprise bargaining disputes in limited circumstances. We do not believe that the law of the jungle should apply in industrial relations and that outcomes should simply be determined by 'might is right'. This cuts both ways. Clearly, strong unionised workers achieve outcomes that they see as good outcomes from the law of the jungle just as employers, who have a strong advantage in terms of bargaining power, see it likewise. That does not mean that outcomes arrived at are necessarily fair or appropriate to the economic circumstances that are applicable.

The bill proposes that the commission may arbitrate if a party to the negotiation applies and either:

- an agreement has not been reached after a reasonable period for negotiations and, in the circumstances, there is no reasonable prospect of the parties reaching an agreement, and, there are good and cogent reasons for the commission to take action after taking into account the conduct of the parties and the genuineness of their participation in the bargaining process (especially on the part of the applicant), and such other matters as the commission thinks fit, or
- a party to the negotiations has unreasonably failed to adhere to any agreed outcome or commitment made during, or as a result of, the negotiations, and, there are good and cogent reasons for the commission to take action after taking into account the conduct of the parties and the genuineness of their participation in the bargaining

process (especially on the part of the applicant), and such other matters as the commission thinks fit.

We are talking about situations where:

- either the negotiations have become intractable, or a party is unreasonably failing to do what they said they would do, and
- there are compelling reasons to arbitrate taking into account how the parties have behaved;
- and how genuinely they have participated in the bargaining process—that is, how genuinely they have engaged with the other parties and acted in accordance with the requirements of subsection (2) of the provision and, in making such an assessment, particular emphasis is placed on the conduct of the party seeking the arbitration. They must come seeking arbitration with clean hands; and
- any other matter that the commission thinks fit.

This is not some capacity for the commission to arbitrate an outcome simply because one party feels that they should see as a better outcome than they are able to negotiate. I put those reasons on record to explain why the government supports the retention of subsections (5), (6) and (7) in the bill. But, as I said, there has been substantial debate on this matter already.

The committee divided on the Hon. N. Xenophon's amendment:

AYES (13)

Cameron, T. G.	Dawkins, J. S. L.
Evans, A. L.	Gilfillan, I.
Kanck, S. M.	Lawson, R. D. (teller)
Lucas, R. I.	Redford, A. J.
Reynolds, K.	Ridgway, D. W.
Schaefer, C. V.	Stephens, T. J.
Xenophon, N.	

NOES (4)

Gago, G. E.	Gazzola, J.
Holloway, P. (teller)	Sneath, R. K.

PAIR(S)

Stefani, J. F.	Roberts, T. G.
Lensink, J. M. A.	Zollo, C.

Majority of 9 for the ayes.

Amendment thus carried.

The committee divided on the clause as amended:

AYES (9)

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

NOES (8)

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

PAIR(S)

Roberts, T. G.	Stefani, J. F.
Zollo, C.	Lensink, J. M. A.

Majority of 1 for the ayes.

Clause as amended thus passed.

Clause 35.

The Hon. R.D. LAWSON: My amendment is consequential on an earlier amendment in which we sought to prohibit bargaining service fees. The committee did not agree to that amendment and, therefore, as indicated at the beginning, I will not be proceeding with this amendment.

Clause passed.

Clause 36.

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

Page 21, line 8—After 'duties by employees' insert 'or that relate to the remuneration of employees

This amendment seeks to delete the proposed transmission of business provisions. I indicate that the opposition will oppose the amendment to section 81 of the existing act. That section provides that enterprise agreements prevail over contracts of employment to the extent that the agreement is inconsistent with the contract. The section does allow that, if an employer and employee agree, at or after the time of entering into an enterprise agreement, that a term of a contract of employment that is more beneficial to an employee than the corresponding provision of the enterprise agreement is to prevail.

The government's bill seeks to introduce new provisions relating to transmission of business. It provides that if an enterprise agreement applies to employees or a particular class of employees and a new employer becomes the successor, transmittee or assignee of the whole or part of the business or undertaking, the new employer succeeds to the rights and obligations under the enterprise agreement. They are unsatisfactory amendments, because these new transmission of business provisions will restrict and impose costs and uncertainty on businesses and on business transactions without necessarily or clearly benefiting workers.

In the explanation of clauses that the minister tabled, the minister said:

South Australia does not have transmission of business provisions in its legislation. The federal legislation has had these provisions since early last century.

We submit that there is no place for forced transmittal of employment obligations in a system where all of the workers, irrespective of the nature of the industrial instrument regulating their employment, are protected by minimum entitlements, and that will be the case here. To this extent, analogies with the federal system and its transmission of business provisions are quite inappropriate.

There are examples in this state where the transmission of business provisions have operated to the detriment of businesses. I know, for example, of a meatworks in the South-East which had an enterprise agreement which was said to be very much more favourable to workers than the relevant federal award. The business, by reason of labour costs largely, was unable to succeed financially. The business was sold, and the new owners were tied to the provisions of an untenable enterprise agreement. Although they had every intention of negotiating a new enterprise agreement, they were frustrated and the business simply could not be revived and the meatworks lay idle for years. We do not want to introduce mechanisms of that kind here.

The Hon. P. HOLLOWAY: Under the government's proposal, the commission can vary or rescind an enterprise agreement in the circumstances of a transmission if—and I stress the word if—the variation or rescission will relate only to agreement provisions that regulate the performance of duties and there are exceptional circumstances to justify the making of the order and either of two things: the order, on balance, will not disadvantage employees; or the order will assist in a reasonable strategy on the part of the employer to deal with a short-term crisis or to assist in reviving the business. This is predominantly aimed at circumstances where a transmission occurs in the course of two or more

businesses being merged. In those circumstances, provisions relating to the performance of duties may be a real barrier to the amalgamation of two work forces, whereas other sorts of provisions are assessed as being of lesser significance. We therefore oppose the amendment. If necessary, I will refer to the comments in relation to the Stevens report.

The Hon. IAN GILFILLAN: The Democrats will support the amendment. The amendment relates, to a certain extent, to my foreshadowed amendment, which honourable members will see on file. I regard this as quite an enlightened clause. I believe it is one of those initiatives which may well save businesses, employment and activities which are located in South Australia either from disappearing entirely or being absorbed and moving elsewhere. So, the principle of the clause has our unqualified support. I rather naively anticipated that remuneration would be one of the aspects that could be considered by the commission. Honourable members will note that the Democrats believe that, for the good of the employees involved, there should be a token of sincerity by senior managers so that it is not the lower ranks of the employees who are left to bear the burden of any remuneration reduction.

The Hon. R.K. Sneath: I ask whether the Hon. Mr Lawson could supply the enterprise agreement that he referred to from the meat works in Mount Gambier, that is, the enterprise agreement that was in existence at the time the new owners took over, and a copy of the enterprise agreement that exists now or answer the question whether it is a fact that the new owners who took over the meat works with the enterprise agreement actually wanted to enter into agreements with their employees on the basis of individual contracts or AWAs.

The Hon. R.D. LAWSON: The meat works I referred to were not located in Mount Gambier. I said they were in the South-East, not Mount Gambier.

The Hon. R.K. SNEATH: The Hon. Mr Lawson did not answer my first question, namely, whether he could or would supply those two agreements to us. He also did not answer my second question, namely, whether the new employer was trying to get out of the existing enterprise agreement because it wanted to enter into AWAs or individual contracts.

The Hon. R.D. LAWSON: I do not have the particulars of the terms of the enterprise agreements. The matter to which I refer is well known in industrial and commercial circles in South Australia, and it is not necessary to descend to that detail. The example was intended to indicate that transition of business provisions can operate in a way which does not advance the public interest. In my opening remarks on this clause I indicated that we would be opposed to the whole of the provisions. The specific amendment I have moved which seeks to slightly ameliorate this unsatisfactory provision arises in subclause (7).

Subsection (5) provides that the commission may vary or rescind an enterprise agreement in certain circumstances. However, subsection (7) provides that the commission may make an order on application if (and only if) the order only relates to provisions that regulate the performance of duties. We seek to insert after the words 'performance of duties' the words 'or that relate to the remuneration of employees'. We think it is a seriously defective provision at the moment which provides that the commission can only make an order relating to the performance of duties but is quite specifically prevented from making any order in relation to the remuneration of employees.

The Hon. T.G. Cameron interjecting:

The Hon. R.D. LAWSON: The Hon. Terry Cameron asks whether it was the government's intent. One would have thought it was the clear intent of the legislation, because it provides that the commission may make order on application if, and only if, the order only relates to provisions that regulate the performance of duties. If it was the intention of the government to actually allow the commission in its wisdom to make these orders, it ought be given the freedom to examine remuneration as well, because remuneration obviously can be an extremely important element in any enterprise agreement.

The Hon. IAN GILFILLAN: I am surprised; in fact, I am amazed that the opposition opposes this. Maybe it is programmed to oppose every clause. This provision is almost designed to help employers and owners of businesses which would otherwise disappear. This is a rescue clause, and the opposition is now determined to put on the record that it opposes the rescue clause. That is my observation; perhaps I should not be surprised at the opposition's position. I would make another point, indicating deficiency in our understanding of the clause. Naively, I believed in our assessment of this (and we have been through it many times) that in fact the conditions that could be varied would include remuneration. It seemed a given, and I am glad it has been emphasised that that is not the case. Therefore, the amendment moved by the Hon. Mr Lawson puts into effect what the Democrats had believed naively was part of what the commission could determine. That is why we are supporting the amendment.

The Hon. NICK XENOPHON: I indicate my support for the amendment. The legislation makes clear that there must be exceptional circumstances, and this amendment must be read in conjunction with that. If it is a case of a business surviving or not surviving and this amendment gives some flexibility for the work force to stay there, albeit with some altered conditions, it would have to be a good thing whilst the business is trading its way through difficulties.

The Hon. P. HOLLOWAY: We will not divide on this occasion, but I reiterate that the government is opposed to the amendment.

The Hon. A.L. EVANS: I support the amendment. Conditions and circumstances occur at times where they need flexibility.

Amendment carried.

The Hon. IAN GILFILLAN: I move:

Page 21, After line 23—
Insert:

(8a) The Commission may, in setting rates of pay with respect to particular work under subsection (1), specify different rates according to the different levels of skill or experience that persons undertaking the work may possess.

For a situation to arise in which the commission will be asked to deal with this and in which it has a chance of effectively varying the enterprise agreement, there will have to be a fairly strong case made that the business is in a state of crisis; otherwise our expectation is that there would be little chance of any variation being approved by the commission—neither should it. Crisis—and choosing the word advisedly—means the 'standing or falling of a business' and that is the argument to be put to the commission so that conditions and wages of employees could be varied. One assumes the variation would be down rather than up; I think that stands without mentioning it.

It is the cause of some disquiet to the Democrats that this process could be entered into while those who are in senior

positions are well remunerated—and often those senior positions are very well remunerated. It is not my position to castigate them, because people in senior management positions have a lot of responsibility and they are entitled to reasonable salaries. However, if they want a particular group of the employees to suffer the pain, the Democrats believe that in token of the sincerity of that situation, leading by example, senior managers must show that they are prepared to take a reduction in the common cause of the survival of the business. I urge support for the amendment.

The Hon. P. HOLLOWAY: The government does not support the amendment. When a business is dealing with a crisis, the commitment and retention of experienced senior management is likely to be particularly important in saving the business. If senior management conditions are cut when they are facing particularly difficult times, good management staff will be tempted to leave—which is not helpful in restoring a business's position. Also, I am advised that when administrators are appointed—which of course is when particular difficulties are encountered—they presently may take action which could include dismissing senior management or retaining them on altered terms or conditions. This is about balance. We propose a limited exception to the transmission provisions, but this further limitation is not appropriate. We support balance and jobs, and this demonstrates our commitment to jobs and a strong economy.

The Hon. T.G. CAMERON: I have read the Hon. Ian Gilfillan's amendment a few times and his intention is quite clear. His intention is noble and honourable.

The Hon. Nick Xenophon interjecting:

The Hon. T.G. CAMERON: The Hon. Nick Xenophon interjects 'As always', and I find it difficult to disagree with that when the Hon. Ian Gilfillan is concerned. However, I am still not persuaded. I want to support his amendment on the basis that any award-bound employees under new section 81(7)(c) are required to take a 'substantial' reduction—and commissioners know what that means—in their terms and conditions of employment. Basically, that says that if the commissioner is going to cut workers' wages at an establishment, then he can do so only if he is satisfied that senior management have been required to take a substantial reduction; not the same reduction or more or less but, rather, a substantial reduction. We have to watch the Hon. Ian Gilfillan at times. He can slip all sorts of things under the mat.

The Hon. Ian Gilfillan interjecting:

The Hon. T.G. CAMERON: That is a compliment, don't get upset! Through the back door, the honourable member is trying to make it quite clear on the statute that any employer making an application to the commission to have the terms and conditions of their employees cut, before the commission can act, would be required to show true leadership in that they have already been required to take a substantial reduction in their own terms and conditions. On that basis it is hard to argue against what the honourable member wants to do. What worries me a little—and I am not sure whether it is enough to influence me to oppose your amendment—is that by the insertion of this clause into the award I am sure it would be seen by some people as almost an amber light, if you like, 'Gee whiz, have a look at this. The bosses are on $150 000 a year. If we can get them to take a $10 000 reduction, we can rush off to the commission and tender all this evidence that the bosses have taken a pay cut, shown leadership and it is now time for the workers.'

Even a percentage cut is not fair. If you are on $100 000 a year and you have your salary reduced by 10 per cent, it does a lot more to enable you to pay the weekly bills than if you are on $600 a week and you lose 10 per cent of your salary. I would like to hear from the Hon. Ian Gilfillan or anyone else. I am a little concerned that this might be interpreted by some people as half opening the door to rush off to the commission to set workers' rates of pays.

It is the bosses who will be making the application. They can say, 'There are four of us and we have 60 workers here. We will take a 10 per cent cut. We will get that back later through the backdoor. We will take a tax trade-off, or something.' They control the show. They can fix up their situation. I am just worried whether in any way this may be a catalyst to have an application made, and the workers will get their wages cut by the commission order. The management will just have to say, 'Well, we have taken a pay cut.'

One wonders, once the commission has made the decision (and this is what the workers get under the award), how binding the decision taken by the senior managers is to cut their conditions or wages. Three months later they might get a two year award, and three months later that situation has changed. That is what I am concerned about. I want to vote with the honourable member, but I am little concerned about that.

The Hon. IAN GILFILLAN: It is important to remember that this trigger can be fired only if there is a change of ownership, and that the commission is needing to be persuaded that the viability of the business on the change of ownership can survive only—and that would be the basis on which, I would suspect, any successful argument would have to be put—if there were a net cut in the costs to the business. It is with that in mind that we believe there ought to be a philosophical position and that the commission and any business approaching the commission to vary an enterprise agreement (which has been entered into in good faith previously with the previous owners) should make it plain that this is not just an attempt by the new owners to batter down the conditions and remuneration of the employees by putting up some sort of bogus case.

There ought be the demonstration that, in fact, they have led by example and these are the sacrifices they are prepared to make. The commission will not be persuaded by that act alone. It will not be conned because there is some sort of pretence of a reduction in the conditions and remuneration of the upper echelons that they then must automatically approve of whatever else is asked for. I do not think they are that silly. I am sure that no other members think they are that silly, either. But I believe that it is a reasonable restraint on those purchasers of new businesses—who are tempted to try to push down the conditions which were agreed to in an enterprise agreement by the previous owners—to show their good faith by demonstrating that they are prepared to take a reduction in their terms and conditions of employment as an example.

The Hon. T.G. CAMERON: I have been convinced by the Hon. Ian Gilfillan, notwithstanding that I still have a couple of concerns. On balance, I accept the honourable member's arguments. I will be supporting his amendment.

The Hon. R.D. LAWSON: The Liberal opposition will not be supporting this amendment, which we do not believe would effectively provide any benefits to the process of transmission of business.

The Hon. NICK XENOPHON: Whilst I understand the intent of the Hon. Mr Gilfillan's amendment, I cannot support

it in its current form. I am concerned that it refers to a 'substantial reduction' in terms and conditions of employment when, in fact, the workers on the factory floor of the enterprise may have had to sustain only a small reduction in their terms and conditions in order to keep the business going. If the amendment read 'similar reduction', I would be inclined to support it. I do not know what the Hon. Ian Gilfillan intends to do. I think that what is good for the goose is good for the gander. 'Substantial reduction' may lead to a situation where the managers are copping it in the neck much more than the workers on the floor, depending on the circumstances of the orders made by the commission.

The Hon. IAN GILFILLAN: It is quite clear that those of us who are thinking constructively about this amendment have not got the numbers—

The Hon. Nick Xenophon interjecting:

The Hon. IAN GILFILLAN: I know you are. The honourable member is one of the very small minority who does. I agree that there could be some alternative wording so that instead of 'substantial reduction' it could read 'proportionate reduction' in keeping with that reduction accepted by the employees. I will not take up the time of the committee attempting to wrestle this to an acceptable wording for the Hon. Nick Xenophon. I have indicated that I am not prepared to divide on it. We have spent a lot of time on what I regard, largely, as unnecessary divisions, and I do not intend to add another one. I will rest with the satisfaction that the Hon. Nick Xenophon does support the intention of the principle of the amendment but, as he often does, he has a problem with some of the minor detail. I am happy to let it rest at that.

The Hon. NICK XENOPHON: I can confirm that I do support the intent, but it is more than a minor detail: 'substantial' and 'similar' are quite different concepts. I qualify the damning and faint praise of the Hon. Ian Gilfillan. I do commend the honourable member for moving this amendment, I just wish that it were worded slightly differently.

The Hon. R.D. LAWSON: I have already indicated that we will not be supporting the Hon. Ian Gilfillan's amendment. I note that he will not be dividing on it. I have indicated to the committee that we oppose this clause. I am aware that we do not have the numbers to successfully have clause 36 excised from the bill. Therefore, we will not divide on it.

Amendment negatived; clause as amended passed.

Clauses 37 to 42 passed.

Clause 43.

The Hon. R.D. LAWSON: This clause is opposed. This is consequential upon earlier comments that I made in relation to the transmission of business provisions. We are opposed to this provision, but we will not divide on it, bearing in mind the comments made by other members in support of the government's position.

Clause passed.

Clause 44 passed.

Clause 45.

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

Page 24, line 20—Delete 'with a view' and substitute 'under an arrangement, agreed in writing, that indicates that it is a genuine trial with respect'.

In another place, the Hon. Bob Such moved for the insertion of proposed section 98B—'Special provision relating to trial work'. It provides that the commission may, by award, determine that a person who undertakes a specified category of work on a trial basis in an industry with a view to obtaining employment is entitled to payment. The commission may, by award, impose limitations on the performance of work on a trial basis in an industry and make other provisions relating to work on a trial basis as the commission sees fit.

We believe that the words 'with a view to obtaining employment' are too vague and general and that it ought to provide 'under an arrangement, which is agreed in writing' so that there is no doubt that this is trial work. That would indicate that it is a genuine trial with respect to obtaining employment. The infirmity in the language adopted by the Hon. Bob Such is that the words ' with a view to' is a very amorphous notion, and it is quite possible that people will say at the start of a particular arrangement that different parties to the arrangement had a different view of what was involved.

We think this ought to be specific, that there ought to be a requirement that there be an arrangement in writing that indicates that it is a trial, not the rather amorphous and loose notion of 'with a view to obtaining employment', which will be productive of uncertainty, litigation and probably in the end disappointment for the person who might be an applicant for work. We believe that we are supportive of trial work but we think that people should be in no doubt about what the arrangement is.

The Hon. P. HOLLOWAY: The reality of young workers performing trial work is that most of these arrangements are not in writing and are unlikely ever to be in writing. In the current proposal, new section 98B(1)(c) will give the commission the discretion to make any other award provisions relating to trial work it thinks fit. If there are aspects of these arrangements which need to be reduced to writing, that will be a matter for the commission. There is no need to place a statutory burden on the employer and the trial worker, and that is why we therefore oppose the amendment.

The Hon. IAN GILFILLAN: I find part of the contribution by the Hon. Robert Lawson, on the face of it, assisting in the weeding out of exploitative, so-called 'trial arrangements' where there is really no serious intention by the employer to offer the trialee long-term employment and so, on the face of it, it does have some appeal. I am rather concerned, however, that that may shut the door on some opportunities for those young people looking for trial work. The employer would be reluctant to offer them that trial work because a written document is locking them in. So, I must say it is an area where I am a little uncertain whether the amendment actually substantially helps or may, in fact, put up some barrier to offering the trial work.

In its purest form, the trial work is actually a very beneficial situation for young people, and there is no reason why the employer who offers the trial work should not have some advantage, have some work done, which is reasonable. Honourable members will know that I have an amendment on file which will offer the commission the opportunity of setting different rates of pay, sensitive to the fact that a caring employer should not be locked in to paying full tote odds if he or she has offered a young person an opportunity to get some work experience. But we are not at that yet, Mr Acting Chair, and I know you would pull me up very quickly if I were to expand on it at any length, so I will not. However, I feel that, on balance, because of the uncertainty that I feel about this amendment, however well-intentioned it may be, the effect of it may well be to reduce the areas and the volume of trial work that would be available to young people, and I think that would be most regrettable.

The Hon. R.D. LAWSON: I assure the honourable member that it is certainly not the intention of this amendment to limit opportunities for trial work.

The Hon. Ian Gilfillan: No, I did not say it was.

The Hon. R.D. LAWSON: No, and it must be borne in mind that this new provision has a fairly limited application. It enables the commission to make an award in particular circumstances, and there may well be cases where it is appropriate for the commission to do so, because the commission must be of the opinion that action under this section is justified in order to prevent the abuse of performance of work on a trial basis in the relevant circumstances.

However, we think it is important that, for both the person undertaking the trial work and the company engaging the trial worker, there be no misunderstanding as to the nature of the exercise being undertaken. One way to achieve that is by inserting the words we seek to insert; in other words, to delete the rather vague notion of 'with a view to' because different people can have different views. Different people can witness the same events through different eyes and come to different conclusions. That is, of course, a notorious fact. What we want to do is to ensure some certainty by insisting that these arrangements be agreed in writing, and the writing has to indicate that it is a genuine trial, not some other form of employment.

The Hon. R.I. LUCAS: I have a question to the minister in relation to this. My position, the same as my colleague's, is that I certainly support the reasonable provision of trial work options as being productive in helping some young people eventually get into the paid work force. Can the minister explain whether a third party can actually take this issue to a commission? I will give an example. If a young person is happy with a trial work arrangement with an employer—so both parties are happy, the employer and the young person are happy; there is no complaint—can a third party, in essence, activate these provisions and get something to the commission for an award? Can a union, for example, activate the process?

The Hon. P. HOLLOWAY: Parliamentary counsel will just check out the legal aspects. I do not know whether anyone else has any questions. We will come back to that.

The Hon. NICK XENOPHON: My understanding of the clause in its current form is that the words 'with a view' give some flexibility to trial work and that requiring that it be put in writing—and I am following on from what the Hon. Mr Gilfillan has put—may be counterproductive. I would like to hear from the Deputy Leader of the Opposition or the Leader of the Opposition on that.

I would have thought that this facilitates having work on a trial basis, and I certainly support that. I wonder whether parties might baulk at trying to formalise it beyond that, and that it would be a question of the evidence. Of course, if parties wanted to put it in writing, that would be evidence that could be used. I would imagine that, if that is the view of Business SA, it would be encouraging its members to do so; but, to require it might have the outcome, in some cases, of causing arguments about those that are not in writing—that, in fact, it is not trial work—whereas that was the intention of the parties.

The Hon. R.D. LAWSON: I think it is very important that I indicate to the committee that this is not a provision which will have general application to all trial work. This is a specific provision which empowers the commission in certain circumstances to make an award relating to trial work. There is a specified category of work and specified circumstances in a sector of an industry. We do not envisage—and I do not believe that the Hon. Bob Such envisages this—that the commission will just willy-nilly make trial work awards easily; and, in fact, the commission has to be satisfied that it is justified in order to prevent abuse.

We are not suggesting that every trial work arrangement has to be documented in writing and that every trial work situation has to be in a formal sense: we accept that there will be informal arrangements. However, when an award is to be made, it must be made in respect of a defined group of people who have entered into a defined contractual relationship, not some amorphous notion that they are undertaking trial work. That will encourage, no doubt, some to ensure that these arrangements are reduced to writing and specify that it is only trial work.

The Hon. IAN GILFILLAN: The more this discussion goes on, the more I have some concerns that we may be strangling the area for trial work. I am not convinced that the only genuine and effective trial work will be an attachment of a young person with a potential employer. Trial work can be very beneficial in circumstances where the end of that trial work may not even have been intended to be full-time employment. The risk, and it is abused already, is that trial work is taken in many cases as extremely cheap or even no-cost labour. I think that is the abuse to which I would like to feel that this clause is being targeted. I do not see that anyone—employers, unions or anyone involved—could have an objection to that. The abuse of trial work is clearly a disadvantage to those employers who do not abuse the system. It is a form of getting cheap labour where it is abused, and we will support anything that can help to deter that or, where possible, eliminate it.

In fact, because of the view that I am sharing with the committee now, even the insertion of 'with a view to obtaining employment' as being the criterion upon which trial work is judged for the sake of having some protection from an award, and that it is the only area where it will be protected, I find quite concerning. I have looked elsewhere in the act and in this bill for a definition of trial work, but I have not found it. It may be somewhere that I have not located yet. Maybe it is translated just in a simple understanding of what the two words mean in English but, quite often, there are other connotations. So, my concern is that the amendment may even compound more what I now have recognised, in my view, as a restriction on the application of protection for people who are involved in trial work.

The Hon. P. HOLLOWAY: The Leader of the Opposition asked a question earlier in relation to this. Section 194 of the Industrial Employees Relations Act provides the answer to this question, and basically it is yes. Those who can take proceedings before the commission are the minister, an employer or group of employers, an employee or group of employees, or a registered association of employers, or a registered association of employees, or the Trades and Labor Council.

The Hon. R.I. LUCAS: I indicate personally my concern at potentially that set of circumstances, because what the Leader of the Government is indicating is that you might have an arrangement similar to that hinted at by the Hon. Mr Gilfillan. You can have an individual (it does not have to be a young person) who is quite happy with the trial work arrangement and the employer is quite happy with the trial work arrangement—so no one is complaining about the abuse of the provisions. What the Leader of the Government has indicated is that a registered association (a union) could interpose themselves into this and use these particular—

The Hon. P. Holloway: Why would they?

The Hon. R.I. LUCAS: Because they may want to wipe out the opportunity in this particular area. Their argument might be that an employer should offer paid employment only to the people who undertake work. It would not be an uncommon position for a union to adopt in relation to these issues. I will give some examples. Some young people with whom I am familiar have fortunately found paid employment after varying levels of trial work; they are quite happily engaged in trial work. In some cases it is the sort of trial work you get of relatively short-term duration. It might be a day or a night at a cafe or bar or a couple of days work to trial as a glassy or as a cafe worker. I am aware of other examples where some young people who want to be paid journalists have offered their services for whole football or cricket seasons to commercial media outlets where the work they undertake is actually work that the media outlet does not pay for but it is additional work.

It might be taking additional statistics for a footy game or some other sporting coverage, but through that mechanism they have become known to the movers and shakers within that media outlet and, when an opportunity presents itself, in some cases months later, they have been successful in gaining part-time and, ultimately, full-time employment in their chosen profession. The young people I am aware of were very happy with the arrangements they had, but it may well be that the union was not happy about that set of circumstances.

I just indicate my concern. As I said, I do not think anyone would support the notion of the small number of employers who might, on a regular basis, persistently abuse these provisions, but on the other hand I hope that we can acknowledge that there are many examples where young people, in particular, have gained successful part-time and, ultimately, permanent employment, having been through a process of trial work.

Amendment negatived.

The Hon. IAN GILFILLAN: I move:

Page 24, after line 29—Insert:

(1a) The commission may, in setting rates of pay with respect to particular work under subsection (1), specify different rates according to the different levels of skill or experience that persons undertaking the work may possess.

I have partly outlined our position on this previously, discussing the matter in relation to the earlier amendment. Obviously, we do not have any sympathy for people who are exploiting the bogus work experience, trial work or trainees. An example was provided to me of a well-known sandwich chain that argued that it needed nine months to train sandwich-makers.

The Hon. Nick Xenophon interjecting:

The Hon. IAN GILFILLAN: I am not going to spoil your lunch. We also recognise that in some cases a person with little or no training or experience can demonstrate an aptitude to learn while employed on a trial basis. Where this is a genuine relationship it does not seem reasonable for this person to be paid a full wage when, clearly, they are not yet capable of doing the job. As I said before, we would hate to see this particularly valuable door closed in the face of young people seeking a toehold in the labour market, especially when the government is putting this clause forward with clearly good intentions. I urge support for our amendment.

The Hon. P. HOLLOWAY: The government does not see any particular problem with the proposal, so we will not oppose it.

The Hon. R.D. LAWSON: The Liberal opposition will also support the amendment.

The Hon. NICK XENOPHON: I also support this very sensible amendment.

The Hon. T.G. CAMERON: I suppose I should join the club, but I thought the commission could already specify rates of pay according to different levels of skill or experience.

The Hon. IAN GILFILLAN: If I can coin the phrase of my colleague, the Hon. Nick Xenophon: to make it crystal clear so that there is no doubt. This is the Xenophon trend of amendment, which makes it crystal clear.

Amendment carried; clause as amended passed.

Progress reported; committee to sit again.

MURRAY RIVER

The Hon. P. HOLLOWAY (Minister for Industry and Trade): I lay on the table a copy of a ministerial statement relating to the Murray River made on Thursday 17 February in another place by the Minister for the River Murray (Hon. K.A. Maywald).

BUS CONTRACTS

The Hon. P. HOLLOWAY: I lay on the table a copy of a ministerial statement relating to bus contracts made on Thursday 17 February in another place by the Minister for Transport (Hon. P.L. White).

PARLIAMENTARY COMMITTEES (PUBLIC WORKS) AMENDMENT BILL

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

ADJOURNMENT

At 5.47 p.m. the council adjourned until Monday 28 February at 2.15 p.m.