LEGISLATIVE COUNCIL

Tuesday 19 November 2002

The President (The Hon. Dr Meredith Burgmann) took the chair at 2.30 p.m.

The President offered the Prayers.

The PRESIDENT: I acknowledge that we are meeting on Eora land.

ADMINISTRATION OF THE GOVERNMENT

The PRESIDENT: I report the receipt of the following message from Her Excellency the Governor:

MARIE BASHIR | OFFICE OF THE GOVERNOR
GOVERNOR | SYDNEY 2002

Professor Marie Bashir, Governor of the State of New South Wales, has the honour to inform the Legislative Council that she re-assumed the administration of the Government of the State on 18 November 2002.

18 November 2002

LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) BILL

GAMING MACHINES FURTHER AMENDMENT BILL

ELECTRICITY SUPPLY AMENDMENT (GREENHOUSE GAS EMISSION REDUCTION) BILL

SECURITY INDUSTRY AMENDMENT BILL

STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (No 2)

RETAIL LEASES AMENDMENT BILL

CRIMES LEGISLATION AMENDMENT (CRIMINAL JUSTICE INTERVENTIONS) BILL

VICTIMS RIGHTS AMENDMENT BILL

CHILD PROTECTION LEGISLATION AMENDMENT BILL

BUILDING LEGISLATION AMENDMENT (QUALITY OF CONSTRUCTION) BILL

SUPERANNUATION LEGISLATION AMENDMENT BILL

SUPERANNUATION LEGISLATION FURTHER AMENDMENT BILL

Bills received.

Leave granted for procedural matters to be dealt with on one motion without formality.

Motion by the Hon. Michael Egan agreed to:

That these bills be read a first time and printed, standing orders be suspended on contingent notice for remaining stages and the second readings of the bills be set down as orders of the day for a later hour of the sitting.

Bills read a first time.

TABLING OF PAPERS

The Hon. Michael Costa tabled the following papers:

(1) Annual Reports (Departments) Act 1985—Reports for year ended 30 June 2002:

Judicial Commission of New South Wales
Department of Juvenile Justice
Ministry of the Arts

(2) Annual Reports (Statutory Bodies) Act 1984—Reports for year ended 30 June 2002:

Art Gallery of New South Wales
Australian Museum Trust
Chipping Norton Lake Authority
Dams Safety Committee
Historic Houses Trust
Library Council
Museum of Applied Arts and Sciences
New South Wales Film and Television Office
Royal Botanic Gardens and Domain Trust
State Records Authority
Sydney Opera House Trust
Zoological Parks Board

(3) Anti-Discrimination Act 1977—Report of Anti-Discrimination Board for year ended 30 June 2002

(4) Victims Compensation Act 1996—Report of Victims Compensation Tribunal for year ended 30 June 2002

Ordered to be printed.

COMMITTEE ON CHILDREN AND YOUNG PEOPLE

Report

The Hon. Peter Primrose, on behalf of the Chair, tabled report No 16, entitled "Promising Practice Strategies for Family Foster Care and Current Policy Challenges: Peter J. Pecora: The 4th Macquarie Street Lecture for Children and Young People, 30 August 2002".

Ordered to be printed.

DISTINGUISHED VISITORS

The PRESIDENT: Order! I draw attention to the presence in the President's Gallery of Mr Armando Machado and Mr Jamie Xavier, officers of the National Parliament of East Timor, who are spending this week with the New South Wales Parliament as part of a two-week training program in Australia, under the auspices of the Australian National Group of the Inter-Parliamentary Union. I welcome them to the Parliament.

AUDITOR-GENERAL'S REPORT

The Acting Clerk announced, pursuant to the Public Finance and Audit Act 1983, the receipt of the Auditor-General's Report 2002, Volume Five, dated November 2002.

The Acting Clerk announced that she had authorised that the report be printed.

BUSINESS OF THE HOUSE

Postponement of Business

Business of the House Notice of Motion No. 1 postponed on motion by the Hon. Don Harwin.

CIVIL LIABILITY AMENDMENT (PERSONAL RESPONSIBILITY) BILL

Second Reading

The Hon. MICHAEL EGAN (Treasurer, Minister for State Development, and Vice-President of the Executive Council) [2.43 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate the second reading speech made by the Premier in the other place. However, I also intend to make some further comments, at the request of the Opposition, in relation to specific issues raised by honourable members in the other place. I also foreshadow three Government amendments to the bill.

Leave granted.

The introduction of this bill today is a triumph for commonsense.

Personal responsibility will rightly assume a much higher profile in our law thanks to these reforms.

Simple pleasures enjoyed by the community will be able to continue because of them.

But, regardless of the commonsense of these reforms, we recognise that Parliament will be debating some of the most fundamental changes to the law of negligence ever made.

Thanks to the historic joint sitting last month and the assistance of four eminent speakers, I am sure that we will all have a much better appreciation of how the law of negligence has developed. I am hopeful the seminar will mean that this debate is of a high calibre.

Honourable Members might also be interested in the Senate economics committee report on public liability and professional indemnity insurance released only yesterday.

The bill I am introducing today is different to the consultation draft I released in early September. The consultation draft opened up some authentic consultation and the Government has listened. However, most of the changes implement or draw on the recommendations by the expert panel, which released its final report, "The Review of the Law of Negligence", late last month.

That report became known as the Ipp report after the Chair of the panel, Justice David Ipp.

The New South Wales Government has taken the lead in responding to the recommendations in the report, and the need for New South Wales to move quickly has been recognised by the other States, Territories and the Commonwealth who noted that the particular hardships faced by the New South Wales community, the most litigious in Australia, deserved prompt attention.

That is what we have done. We are further down the road than any other jurisdiction in Australia. However, the Government acknowledges that national consistency is desirable to some reforms in this area. For that reason we have modelled many of the new provisions in the bill following the original exposure draft on those recommendations in the Ipp report that are more likely to have a national impact on the Law of negligence.

I stress, however, that not all reforms in the bill or in the Ipp report need to be made in other jurisdictions or in exactly the same terms.

But it would be helpful to the community and the courts if those reforms dealing with basic principles of the law of negligence were consistent.

That is why we have been so ready to change the draft bill. I understand that the Queensland Government also proposes to introduce further reforms by the end of the year, and is considering this approach. I am confident that we now have a more comprehensive and finely honed bill to debate. Our stage one and proposed stage two reforms have already led to announcements by the insurance industry that new public liability insurance products will be made available to New South Wales community organisations.

But I emphasise that these reforms are not only a response to the current problems regarding insurance. It is important to remember that these reforms are not only about reducing premiums.

The insurance crisis served to highlight just how far the law has drifted away from the concept of personal responsibility. This is the Americanisation of our legal system.

I want this Parliament to seize the opportunity to wind back this culture of blame. If we do, we will help to preserve the community's access to socially important activities.

Our community deserves our best efforts to preserve the Australian way of life. That is what it is about. I turn now to the detail of the bill.

The bill modifies particular aspects of the common law. It does not establish a complete code.

We have adopted the approach in the Ipp report to the duty of care and causation. A risk has to be not insignificant before a court can find it was reasonably foreseeable. This will send a clear message to the courts that, under the current common law, liability for insignificant risk is too easily imposed.

Our new formulation will emphasise the community's reasonable expectation that people should have to guard only against risks that are a real possibility.

A court will not be able to rely solely on the benefit of hindsight, on evidence of subsequent remedial action by the defendant or the mere fact that a risk was easily avoidable. Although people might argue that these considerations are already the law, putting them in this bill will help to curtail the willingness of some courts to find a creative way around them.

The bill will also deal with causation. Its intention is to guide the courts as they apply a commonsense approach. The rules for factual causation are set out, including the very limited exception to the but for test.

This exception was developed by the court for those rare cases, often in the dust diseases context, where there are particular evidentiary gaps.

By including this exception in the bill it is not intended that the bill extend the common law in any way. Rather, it is to focus the courts on the fact that they should tread very carefully when considering a departure from the but for test. It is only for the most limited and exceptional circumstances where any departure can be justified.

The bill will limit claims that arise from an inherent or obvious risk, or from the plaintiff's own contributory negligence. There will be a presumption that a person is aware of obvious risks, as was recommended in the Ipp report.

Similarly, there will be no duty to warn of an obvious risk, providing that no written law requires such a warning in the particular case. Nor will there be any liability for the obvious risks of particularly dangerous sports and other risky activities.

The bill will also codify the current law so that there is no liability for the materialisation of inherent risks. Inherent risks are those risks that no amount of reasonable care and skill can avoid or minimise. If a person has a duty under the common law to warn of an inherent risk that is not obvious, that duty will not be affected by the bill.

The bill also refers to the common law position that plaintiffs cannot be found 100 per cent responsible for their own injury. If plaintiffs acted with such little regard for their own safety that they should not recover, the court will be able to find them 100 per cent contributory negligent.

As was the case under the consultation draft of the bill, there will be no liability for injury, death or property damage resulting from the risk of recreational activity in respect of which a risk warning has been given. Risk warnings will be effective for children and disabled people in certain circumstances. It is important because it would be unreasonable that a recreational service provider should not be able to rely on warnings given, for example, to parents before their child goes horse riding.

You cannot expect potential defendants to take better care of a child than the child's own parents would take. It is also important to note that risk warnings will be effective if given in such a way that most people would understand.

It will not matter that particular individuals say they did not see the sign, or could not read English, or could not understand clear symbols. The courts will have to apply an objective test about the effectiveness of the warning. A participant in a recreational activity will also be able to assume responsibility for an injury received and waive the implied contractual requirement that services be provided with due care and skill. The Commonwealth has recognised that, for many recreational service providers, the right to assume such a risk under a contract also requires amendments to the Trade Practices Act. That amendment is before the Senate.

Naturally, the new protections for risk warnings and waivers will be subject to compliance with the safety laws of the Commonwealth and the State. Shoddy operators will not be able to escape liability if they are in breach of specific safety laws. The bill will clamp down on plaintiffs who are injured while they are intoxicated. A defendant will not owe a plaintiff a higher standard of care simply because the plaintiff was intoxicated. Nor will personal injury damages be available for an intoxicated person unless the accident was likely to have occurred even if the person had not been intoxicated.

If the accident is likely to have occurred anyway, the intoxicated person's damages will be reduced on a presumption of contributory negligence of 25 per cent, or more if appropriate, unless the person's intoxication played no part in the accident. Very importantly, the bill will limit people claiming damages for injuries received while committing a crime. The general rule under the bill will be that no damages are payable if the injured person was engaged in conduct constituting a serious offence.

Serious offences include a very wide range of crimes: entering a dwelling house, breaking and entering, and escaping lawful custody. People who engage in such criminal conduct should not sue for slipping over while they do so.

Nor will any damages be available if the criminal was injured through reasonable self-defence. Also, no damages will be payable if the criminal was injured through excessive self-defence, unless the court considers the circumstances are exceptional. No damages will be available at all for pain and suffering for a criminal injured through self-defence.

The bill also creates an additional defence to alleged professional negligence if the professional acted in a manner that was widely accepted in Australia by pure professional opinion as competent professional practice.

This reflects the Ipp report. A court will still be able to find that peer opinion was irrational, where warranted. Irrationality is not the same as unreasonableness. We are making it much harder for the court to disregard experts in the field. We have ensured, however, that there is no change to any common law duty of a professional to advise, inform or warn about the risks of personal injury in the provision of the services.

Obviously, the most important application for this carve-out will be for medical practitioners. The carve-out is quite reasonable because patients—and clients of other professionals, where relevant—need to have enough information about the risk of personal injury to decide whether to proceed to obtain the service. The common law rule in the case of *Rogers v Whittaker* will, therefore, continue to apply in relation to any duty to warn in such situations.

The bill will also provide, as recommended by the Ipp Report, that non-delegable duty claims will be subject to the reforms contained in the bill. Proportionate liability will also be introduced for claims for economic loss or property damage, other than in personal injury claims. This means that a person jointly responsible with some other person or persons will be liable only to the extent of their responsibility.

The bill will make important changes to the way that courts deal with claims against public authorities. These changes simply recognise that services provided to the community by public authorities are not provided for commercial gain but for the public good.

The bill will not, therefore, sanction a public authority to act in a negligent or unsafe way. It will, however, require the courts to take into account principles relating to the financial and other resources available to the authority, the general responsibilities of the authority, and its compliance with general practices and applicable standards. The bill will also protect regulatory and roads authorities if they could have done something to avoid a risk but did not do so. It is more than reasonable that functions performed by a public authority are treated differently under the law. Public authorities carry out what is often a limitless task with necessarily limited resources. We must ensure, therefore, that it is not left to the courts to determine a public authority's expenditure on its tasks.

In keeping with this approach, the bill will also provide immunity for a public or other authority for breach of statutory duty, unless it has acted irrationally. An authority that has not exercised a regulatory function—such as a power to close a fishery—will also not be liable unless it could have been compelled by a court to exercise that power.

A "roads authority" that has not exercised a discretionary power to mend, for example, a pothole will not be liable unless it actually knew about the particular risk that led to the injury. This will reintroduce a protection for certain "non-feasance" on the part of roads authorities.

If a roads authority did know about the particular risk, it will still be able to rely on the general "resources" protection in the bill for public authorities. The bill will also protect the good faith actions of good Samaritans who come to the assistance of a person in danger. This will mean no liability for voluntary rescue organisations, such as surf life saving clubs, if a person is injured in the course of or in connection with a rescue.

Individual volunteers will also be protected from law suits where their actions were done in good faith. It is not intended to alter the potential liability of a community organisation by providing the individual members with immunity.

The Ipp Report recommended codifying the law in relation to mental harm. The bill follows these recommendations. Instead of using the imprecise term "nervous shock", the bill will provide that damages are only recoverable for a recognised psychiatric illness.

The bill also provides that the only people who can recover for mental harm are victims of the negligence, people present at an accident scene, or a family member of a victim.

This eliminates the relatives of criminals making a bid for $10,000 to compensate for the nervous shock they sustained. That is an unbelievable situation and is, in essence, why this legislation is required.

An apology by or on behalf of the defendant will also not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability. Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases end up in court. The bill will facilitate structured settlements by providing that the courts must give a further opportunity to parties to negotiate a structured settlement. Lawyers will also have to notify parties about the availability of such a settlement.

The Ipp Report recommends that personal injury actions should not be brought more than three years after the date of "discoverability". The new time period will run against every injured person, with three exceptions: first, if the person is a child or a disabled person without a capable parent or guardian to look after his or her interests; second, if an injury to a child was caused by a person in a close personal relationship with the child or the child's parents; and third, if a child's parents "irrationally" fail to bring a claim on the injured child's behalf. The new discoverability test should provide more certainty and limit applications for extensions of time. This bill is one of the most important pieces of legislation to be put before this Parliament in recent years. We need to get it right. That is why we had public consultation and took notice of what came out in Canberra's Ipp Report. It is fair to say that we have held public consultation and we have looked carefully at the Ipp Report. Now it is time for this House to debate a proposal for the most important reform of the laws of negligence in 70 years.

I commend the bill to the House.

This bill represents groundbreaking reform. The bill places New South Wales as the leading jurisdiction in tort law reform. The draft bill was released for public comment on 2 September 2002 and the bill before the House reflects the outcome of the consultation process. The bill also includes important new reforms that have been recommended by the Expert Panel on Negligence, or the Ipp committee. The Ipp panel's report was released only a month ago, on 2 October, and the speed with which the bill has been introduced by the Government reflects the overwhelming commitment of the Government to pursuing measured and principled tort law reform.

Some Opposition members in the other place have expressed the view that the Government has delayed dealing with the matters in the bill, while at the same time asserting that national uniformity is critical to tort law reform. As is quite obvious, the Government has moved with alacrity, overturning 30 years case law after just six months work—work that included a broad consultation process with all those interested in law reform, including industry groups, committee organisations, insurers, the legal profession and professional bodies.

As I have already indicated, the Expert Panel on Negligence reported only a month ago and the bill reflects many of the recommendations of the panel. Honourable members would also be aware that as Treasurer I met with other State and Territory Ministers and Senator Coonan last week in Brisbane to discuss the proposed reforms. I believe that the process which the finance Ministers and Senator Coonan has established is almost a model process. It has been so successful that some of us have suggested that we should contract ourselves out to other portfolio areas across government and we could solve a lot of problems. We might even have a go in the international arena. This was the fourth meeting of Ministers chaired by Senator Coonan and it was as successful as the previous three. I emphasise that the Ministers agreed that the New South Wales bill provides a model to develop nationally consistent reform.

The Attorney General also put forward the bill as a reform model to other Attorneys General when they met last week, and he has urged his State and Territory colleagues to follow our lead. The honourable member for Southern Highlands, among others, suggested that the reforms will not guarantee reductions in premium prices. Of course, the reforms do not offer a guarantee. It is nonsense, however, to assert that the reforms that comprised stage one and the impending changes in stage two of the Government's tort law reform process—in other words, those in the bill before the House now—have offered no relief.

Insurers have started to make public liability insurance more broadly available in New South Wales due to the Carr Government's reforms. The NRMA, QBE, Allianz and the Insurance Council of Australia have announced a new community insurance initiative to address the public liability insurance needs of organisations that have been experiencing difficulty in finding suitable cover. Implementation of this scheme is contingent upon passage of this bill, the Commonwealth proposed amendments to the Trade Practices Act and the approval of the ACCC. Suncorp GIO has also announced that it will make public liability insurance available to a much broader range of businesses, consumers and community organisations.

Suncorp GIO has said that reforms in New South Wales will reduce costs in the public liability system, providing an opportunity to make public liability insurance available at a reasonable price to more consumers. In recognition of the significant legislative changes implemented by the New South Wales Government, both groups have made the insurance available in New South Wales only. I emphasise that it is available in New South Wales only. Nor are the tort law reforms the only area in which the Government is acting. The honourable member for Vaucluse, in the other place, asked for clarification of the Government's position on a no-fault compensation scheme.

The New South Wales Government has already urged the Commonwealth to introduce a no-fault scheme to meet the future care costs of the catastrophically injured. The Government is continuing to press the case for a national scheme with the Commonwealth. We recognise that access to proper care is vital for catastrophically injured people. A sophisticated and civilised society should have in place a system that ensures these needs are met, without having to go to court to fight about the details of how much and by whom. The Commonwealth needs to show leadership on this issue. The honourable member for Vaucluse has also asked for elucidation of the provisions in the bill conferring protection on public authorities.

The bill first sets out matters that must be taken into account by the courts in deciding whether a public authority has breached its duty of care. These are commonsense matters, such as the budget, the broad range of functions of the authority, and compliance with the general procedures and applicable standards. This provision recognises the wide responsibilities and limited resources of public authorities and their duties to the public as a whole. It has been included in the bill to ensure that the lower courts, in particular, are aware of the importance of these matters when considering claims against public authorities.

The additional protections are carefully targeted to tackle extensions of the common law that have, over recent times in particular, seen public authorities bearing a disproportionate legal burden when compared to other defendants. The bill cuts back on these extensions while retaining the right to sue in negligence when an authority actually performs one of its functions badly and in breach of its duty of care. The bill will also allow other organisations to be prescribed as a public authority for the purpose of accessing the protections afforded by these new principles.

This regulation-making power recognises that some non-government organisations perform functions of a public character and that they should be treated in substantially the same way under negligence law. For example, in recent discussions with the Catholic Education Commission, the Catholic Commission for Employee Relations and the Association of Independent Schools, the Government was asked whether non-government schools could be prescribed for this purpose. The answer to that question is yes. Non-government schools are one of the group of entities that it is envisaged might be included in future regulations.

The bill also makes provision to limit the circumstances in which a claim can be made for a breach of statutory duty. It is important to understand the distinction between an action for breach of a statutory duty and a general common law claim of negligence. Clause 43 of the bill deals only with those cases in which breach of statutory duty is pleaded. It does not offer immunity from ordinary negligence claims. Special provision is also made in the bill in relation to regulatory functions, such as licensing. These are functions that can only be exercised by public authorities. Because these functions have a uniquely public character, a private person is not normally able to ask a court to order a public authority to carry them out. The bill recognises that under the current law it is anomalous that a private person could, nonetheless, seek damages from a public authority for not carrying out the same function. The bill will ensure that only those private persons who are entitled to force a regulatory authority to act are entitled to seek damages in relation to the failure to act.

Of course, if an authority exercises its regulatory powers negligently, the bill will not offer the authority any special protection. The bill also introduces a special protection for roads authorities in recognition of the difficulty of maintaining vast tracts of roads in remote areas. However, there will be no immunity if the authority knew about the risk that caused the injury. I will also foreshadow that the Government intends to move an amendment to this section to clarify that this new nonfeasance immunity cannot be construed as increasing the standard of care currently required by roads authorities. If the immunity does not apply, the authority will be judged by the ordinary principles of negligence, including those contained in clause 42 of the bill.

The honourable member for Vaucluse also suggested that the protection conferred by the bill on public authorities might unduly expose private contractors. However, this is a misunderstanding of the position. The bill will not increase the exposure of private contractors who undertake work on behalf of public authorities. On the contrary, it gives them, and other service providers, greater protection. In particular, the introduction of proportionate liability for claims involving pure economic loss will benefit contractors. The honourable member for Vaucluse also asked whether the definition of "recreational activities" should be confined to those activities involving a significant degree of physical risk.

The bill already restricts the new immunity for the materialisation of obvious risks to dangerous recreational activities. This is consistent with the Ipp report. However, the bill does not restrict the application of the risk warning and risk waiver protections to dangerous recreational activities. The bill must apply these protections to ordinary recreational activities if the risk warnings and risk waivers are to be of any use to the community. It is not just bungee-jumping operators who are facing problems with public liability: it is local festivals, organised school sports and even local sewing groups. These are not necessarily dangerous activities. The bill is intended to help schools whose students are playing softball, not just those who might be learning how to skydive. The bill is intended to help local jazz festivals as well as rodeos.

The honourable member for Lachlan asked the Government to clarify how the risk waiver provisions in the bill would apply to parents and guardians signing waivers on behalf of children. The bill will not change the law in relation to whether a waiver given on behalf of a child is valid. When children are involved the Government intends that the provisions relating to risk warnings—rather than risk waivers—will be of most benefit to recreational service providers. Warnings to parents under the bill will, therefore, be effective in relation to children. This is a fair and realistic position.

The honourable member for Wagga Wagga asked the Government to expand upon the benefits for medical specialists. The bill contains important benefits, such as a new peer acceptance defence and protection for giving apologies. The limitation provisions should also be of particular benefit to obstetricians, but without unfairly disadvantaging injured children. These protections should give medical or indemnity organisations considerable comfort about their long-term risk exposure. However, naturally the Commonwealth Government must develop a solution to the current insurance crisis facing doctors in private practice.

The honourable member for Wakehurst managed to misinterpret the intoxication provisions in the bill. If a person's intoxication does not contribute to the accident, then he or she will not automatically be found to be 25 per cent responsible for his or her injuries. The honourable member for Vaucluse and other members in the other place expressed the view that the protections afforded by the bill to volunteer rescue organisations may not be wide enough. I wish to take this opportunity to praise the role of the volunteer emergency and rescue bodies in this State, whose members risk their lives to save those of others. Their services are vital to the community as a whole.

The protection conferred by the bill was carefully formulated. It recognises the need to ensure that the unique and vital rescue and emergency services provided by the Volunteer Rescue Association and its affiliated bodies can be provided without fear of unwarranted litigation. However, the Government does not consider that blanket immunity for these organisations is appropriate, any more than it would be appropriate for a public authority or for a specialist doctor. There may be times when a person who is a member of a rescue organisation acts negligently and hurts someone. If that negligence did not happen in the course of a rescue or an emergency, it is difficult to see why the organisation itself should be completely immune. However, it is important to remember that the general provisions of the bill already offer considerable comfort to individual members of rescue and emergency organisations.

The bill provides that a volunteer will not incur any personal liability for an act or omission done or made by a volunteer in good faith when doing community work organised by a community organisation or as an office-holder of a community organisation. This provision will ensure that all of those members of the community who give their time to help others, including, for example, charity workers, members of community groups and sporting and educational organisations, will be protected from liability in the event of negligence. Therefore, volunteer rescue workers who perform other duties for the organisation will be protected by this bill, even if their actions were not in the course of an emergency or rescue.

The bill also affords protection to the very special group of people who come to the aid of a person who is apparently injured or at risk of being injured. A good Samaritan does not incur any personal civil liability for any act or omission done or made by the good Samaritan when assisting a person who is injured or at risk of being injured. This will also apply to members of volunteer rescue organisations. The general provisions under the bill relating to duty of care, obvious risks, contributory negligence, recreational activities and intoxication will also provide volunteer organisations with much greater certainty about their potential liabilities.

The bill implements a new scheme for limitation periods. The honourable member for Vaucluse asked whether the extension of time for children to sue when they are injured by a person in a close personal relationship to them, or their parents, would increase uncertainty for insurers. The answer is no. There will be very few cases that fall within this important exception. In the main, this exception will be used when a child has been the victim of abuse. It is highly unlikely that such an exception could detract in any way from the potential positive impact the changes will otherwise have on the availability and affordability of insurance. Another exception for children is when their parents irrationally fail to bring an action on their behalf. The honourable member for Vaucluse asked why the exception has been confined in this way and does not use the term "unreasonably".

The new scheme recognises that in the vast majority of cases parents or guardians can bring an action on behalf of the child before the child is an adult. The "irrational" exception will, however, operate to ameliorate any harshness brought about by the new limitation period. It will allow the courts to extend the period in cases when a parent fails to bring an action on behalf of their child and the court considers that the decision was not one that any rational person could have made. The term "irrational" will be a harder test to meet than "unreasonable". "Unreasonable" simply would not work in this area in practice, and would undermine the certainty that these reforms are designed to achieve. I foreshadow that the Government will be moving two other technical amendments to the bill. These amendments are being made following further consultation with the chair of the expert panel, Justice David Ipp. The Government is very grateful for the judge's valuable assistance.

The proposed amendments will more closely reflect the wording and intention of the panel's recommendations regarding causation and non-delegable duties. The changes to causation relate to new section 5D (2). Instead of codifying when the exception to the "but for" test should apply, the bill will leave the current position intact. This will ensure that it is clear that no departure from the current exceptions, wider or narrower, is being proposed by the bill. New section 5D (2) will require a court to consider expressly whether and why the circumstances are exceptional enough to warrant imposing liability, even though the "but for" test cannot be satisfied. The proposed changes to section 5Q clarify that the bill is not intended to abolish non-delegable duties altogether. Instead, this provision will reflect the approach of the Ipp report more closely by requiring the courts to treat a breach of such a duty as if it were vicarious liability. This approach will still ensure that plaintiffs cannot circumvent the reforms under the bill by framing an action as a breach of a non-delegable duty. The broader question of how the courts should formulate the test for whether a non-delegable duty exists will be given further consideration in the future. I look forward to constructive and positive debate on this bill. I commend the bill to the House.

The Hon. GREG PEARCE [3.01 p.m.]: I lead for the Opposition on this important bill. The Opposition will not oppose the bill, and I take this opportunity to thank the Treasurer for responding to many of the concerns raised by Opposition members in the other place. This bill is especially important given the work that has been done by the Federal Government—particularly the Assistant Treasurer, Senator Helen Coonan—to achieve a commitment of the States, to which the Treasurer referred, made last Friday to introduce consistent legislation across the country to implement the major recommendations of the Ipp report. I, too, congratulate the members of Justice Ipp's committee on their work on tort law reform. As I said, the Treasurer has responded to a significant number of the concerns raised in the other House, although on a couple of occasions I do not think he has completely responded to the issues as they were raised, and I shall come to them later.

In relation to the delay in bringing in this bill, the Opposition remains concerned that for a good six months it has offered to co-operate on a bipartisan basis to ensure that the Government brought in legislation as quickly as possible to deal with the crisis in public liability insurance. One cannot escape the conclusion that, notwithstanding that bipartisan support, the Premier sought to delay stage two of the reforms—that is, this bill—

until closer to the election to gain maximum political credit and to minimise the time for scrutiny of the effects of the legislation before the election. At a time when the community has been seeking leadership, and when the New South Wales Premier has claimed to be providing that leadership, he has again demonstrated his political opportunism. I have already mentioned the excellent work of Senator Helen Coonan in driving insurance law reform, and I am sure all members of this Chamber recognise that excellent leadership from the Federal Coalition Government.

There is an ongoing crisis in insurance for personal injury and death, which is primarily manifested in the virtual withdrawal of insurance companies from the field and extreme difficulty in obtaining insurance cover, particularly for community and volunteer groups but also for small business, and the high premiums that have been charged, certainly this year. However, notwithstanding the intensity of the debate, it has been difficult to give a meaningful insight as to the true extent of the problem. In the past four years the insurance industry has been impacted by losses on underwriting, increased provisioning required for costs of claims as a result of prudential regulation, the collapse of HIH and international factors. Australian Prudential Regulatory Authority figures, which are provided by insurers, indicate that the size of the national public and product liability market for the past three years was roughly $850 million in premium income nationally—that is probably about $380 million in New South Wales—and claims expenses were approximately $1.2 billion, with about $650 million of that in New South Wales. So there has been an average underwriting shortfall in New South Wales in the range of about $260 million each year.

The net discounted provision for claims—the tail—is about $2.5 billion nationally, with presumably about $1 billion of that in New South Wales. Trowbridge's March study showed that the major adverse trends were an increase in average claim costs, from $8,000 to $16,000 from 1993 to 2001, and a dramatic increase in large claims over $100,000. Smaller claims represent less than 20 per cent of total claims costs. The crisis developed as HIH left the market and insurers increased premiums and ceased to write business. Stage one of this legislation was then bulldozed through Parliament. As the honourable member for Vaucluse said in the other place, stage one was essentially a mathematical bill. It made changes to reduce the costs of claims and delivered for insurers. The Cumpston Sarjeant Pty Ltd report on the June 2002 amendments predicts a significant return to profits for insurers this year—17 per cent, compared with 6 per cent for compulsory third party. That report also predicts a windfall of an extra $120 million in savings. It is hard to test these figures. However, the changes will clearly produce significant savings for the insurance industry.

The Law Society commented on this in its release. In relation to the Civil Liability Act 2002, the Law Society claimed that backdating the cuts to the benefits will give insurance companies windfall profits of $100 million to $150 million, based on the figures released by consulting actuaries Cumpston Sarjeant, to which I have already referred. The Law Society complained that this was the first time the New South Wales Government has proposed and introduced legislation that took away the rights of innocent accident victims and did so retrospectively, effective from the day before the bill was even made public. The Premier needs to be taken to task for the retrospective manner in which he introduced the first piece of legislation. He mentioned retrospectivity for the first time in his speech in the lower House on 28 May 2002, in which he said that the bill would apply to proceedings commenced on or after 20 March 2002. He had not previously made that comment. It is a most unfortunate breach of our procedures that the Premier chose to make the legislation retrospective, notwithstanding that he did not mention that at the time he introduced the bill.

Today the community is struggling to get coverage and is struggling with very high premiums. The insurance industry is still telling the Government, as it did when the first bill was introduced, that there is no guarantee the reforms will result in a reduction in premiums. The Treasurer said that insurers are coming back into the field and that we will see a reduction in premiums in due course. I hope he is right. A reduction in premiums is important. It is something the Premier hung his hat on. On 28 May the Premier said in the other House:

> There will be a 17.5 per cent reduction in the cost of personal injury claims and a 14 per cent reduction in the cost of public liability claims.

The Premier claimed that the result would be cheaper premiums for consumers. We will see whether cheaper premiums eventuate. In the six months that the Government has taken to introduce this bill the media has highlighted numerous events that have been unable to proceed due to their difficulty in obtaining insurance. For example, parties and kite festivals have been cancelled. Let us hope there are no further cancellations. As I said, the Opposition does not oppose the bill. We look forward to the premium reductions.

The Hon. HELEN SHAM-HO [3.11 p.m.]: The Civil Liability Amendment (Personal Responsibility) Bill will amend the Civil Liability Act, which came into force early this year. This is the second stage of the Government's tort law reform. The draft bill, which was slightly different, was released for public comment in early September. As a result of consulting with peak professional groups and other interested parties, the Government has made some changes to the original version of the bill. The Treasurer advised the House that the Government will move three amendments during the Committee stage. The amendments are said to be of a technical nature, designed to ensure national consistency. I will elaborate on that point later. The changes to the draft bill and the Government's amendments are aimed at bringing the bill in line with the recommendations of the Ipp report.

The Ipp report was produced by a panel created by the Federal Government and made up of four eminent and qualified members. Its task was to review negligence law in light of the soaring public liability premiums being charged by insurance companies. One of the Ipp panellists was Professor Peter Cane, Professor of Law at the Australian National University. Honourable members will recall that Professor Cane took part in the recent parliamentary seminar on the reform of the law of negligence in a special joint sitting of Parliament. Other speakers at that seminar were Mr Bret Walker, President of the New South Wales Bar Council; Mr Michael Gill, a partner of Phillips Fox and an expert on the insurance industry; and Mr Geoff Atkins, an actuary and an insurance specialist. Their presentations gave all honourable members an insight into the issues surrounding tort law reform, many of which are complex and legalistic. I was disappointed that not many members of our Chamber attended that seminar, which was quite interesting and informative.

The Civil Liability Bill was introduced in June. It is necessary to tackle the crisis in insurance. I know only too well that high public liability premiums are crippling our community. All sectors of society are being affected. Small businesses, which make up approximately 97 per cent of businesses in Australia, are suffering. Increased premiums have caused some operations to close down entirely. Others have had to absorb the extra cost, causing them significant economic hardship. Many doctors are being forced out of practice because they can no longer meet medical indemnity costs. Local councils and sporting and cultural groups are cancelling events that the public would otherwise be able to enjoy. As I indicated previously, my husband, Councillor Ho, had to cancel his annual dragon dance because the cost of insurance cover was simply too high. The event is normally held in Chinatown as part of the Chinese New Year festivities. Activities such as these are an important part of our lives and naturally it is disappointing for the community to see them being struck off the cultural calendar.

Regional areas are suffering a great deal because they rely on local events. The entire social life of rural towns is based on annual functions such as the bachelor and spinster ball, fetes and race days. These activities are well planned and much anticipated, and they may be the only opportunity for country people to get together with friends and to meet new people. This is especially the case for people who are geographically very isolated. I agree with the Government: the pendulum has swung too far in one direction and needs to be brought back to a sensible and sustainable middle ground. In his second reading speech the Premier said that the bill shall wind back the culture of blame that has taken hold in this State. New South Wales is the most litigious State in the nation, which is of concern. However, the problem is not limited to New South Wales—the entire nation is adopting a litigious mindset. Per capita, Australia is second only to the United States in this regard. Most people would agree that we do not want to head any further down the American road.

The bill's title refers to "personal responsibility", which reflects the spirit of the bill. It intends to filter out unmeritorious claims and return tort law to a system that protects people who have been harmed by the bona fide negligence of others and who therefore deserve fair compensation. While I support this general idea, I have reservations as to whether it will lower insurance premiums. As the Hon. Greg Pearce said, we will see whether they reduce in due course. On Saturday 16 November I read in the *Sydney Morning Herald* that the firm PricewaterhouseCoopers performed an actuarial study of the likely economic impact of tighter negligence laws. While it reported that tort law reform of this sort could lower insurance premiums by up to 13.5 per cent, it was careful to add that cost reductions could not be guaranteed. This word of warning says it all.

As I pointed out in June, insurance companies are unregulated enterprises. They make hard-nosed commercial decisions to make profits, so they must take responsibility for the current crisis as well. As I understand it, the current blow-out in insurance premiums is the result of a variety of factors, including collapses in the reinsurance market after September 11 and recent corporate failures. A large part of the problem lies with the insurance industry. While I hope that premiums will fall significantly, I will not be holding my breath. The Hon. Greg Pearce said that he has reservations about whether the premiums will fall. I have concerns about the rights of injured people under the bill. The bill will rework the existing common law duty of care. The bill provides that a plaintiff shall not succeed in a court action unless the defendant knew, or ought to have known, that his or her actions posed a risk to the plaintiff and that the risk was not insignificant. The expression "not insignificant" is the most important aspect in this regard. It sets a new limit around the ambit of reasonable foreseeability, excluding acts that do not present a genuine possibility for harm.

The bill also establishes rules to determine causation. In relation to factual causation, the court must be satisfied that a person's negligence materially contributed to the plaintiff's injury before finding in his or her favour. If people engage in an activity where there is an inherent or obvious danger they might not be able to recover at all, or they may have their damages lowered on the basis of contributory negligence. The bill goes further by defining both those terms in detail. "Inherent" risks are those that simply cannot be prevented or reduced no matter how much reasonable care or skill is taken. "Obvious" dangers are risks that are patent or a matter of common knowledge. Importantly, there will be no general proactive duty to warn of obvious risks—for example, those involved in parachuting or skydiving. The bill also proposes to limit liability where the plaintiff was injured when engaging in a recreational activity.

On 12 November crossbenchers were briefed by the chief executive officer of the Law Society, Mark Richardson. He raised a very important point under this aspect of the bill which I took note of. For one, the meaning of "recreational activity" is extremely wide. I am not clear on what the Treasurer just said on this aspect. I will read it carefully in *Hansard*. The definition is far broader than the definition recommended by the Ipp committee, which was "an activity undertaken for the purposes of recreation, enjoyment or leisure which involves a significant degree of physical risk". The bill goes much further and covers "any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure". Under this definition it is possible that individuals who are harmed while taking part in activities which are very low risk or not really recreational may find themselves with no avenue for legal redress. An example would be where someone is hurt while attending a work-related event at a hotel. The Government might want to respond on this point.

The bill proposes to prevent people from suing when they suffer harm through their own intoxication, unless a court finds it was likely that the accident would have occurred even if the individual had not been under the influence of alcohol or drugs. This provision addresses the growing feeling in the community that the courts are being too generous when awarding damages and are frequently overlooking or downplaying the plaintiff's contribution to his or her misfortune. This public sentiment or feeling hit its peak earlier this year. Honourable members will recall the outcry over the $3.75 million payout to a young man who was paralysed when he dived into a sandbar at Bondi Beach. Many members of the public and I were concerned about the circumstances leading up to the accident: the young man not only had been drinking shortly before the accident occurred but he admitted that he had been taking drugs the previous night. In situations such as these I am not surprised that the community was frustrated and upset. As a result of the case many coastal councils considered abolishing their lifesaver services. There were even suggestions that entire beaches might be closed due to the risk of litigation.

While this sounds drastic, as I said earlier, I know of too many activities and services that are being withdrawn from the public. I agree with the Government that it is unfair that the community has to shoulder social and financial burdens that are a result of the recklessness and poor judgment of a handful of others. Having said that, I feel that the question of intoxication is vexed. The blanket reduction of 25 per cent based on contributory negligence leaves the judicial officer no discretion to assess how the individual became intoxicated in the first place. I think discretion should remain with judges. The existing provision could lead to considerable unfairness because it fails to recognise that sometimes people become intoxicated through no fault of their own. For example, they might have had their drinks spiked—it is common these days—or be from a culture in which people do not usually drink alcohol. In my opinion, the court should be free to examine the particular circumstances of the case before reducing the level of damages in situations such as this. The discretion of the court should not be limited.

Another change relates to notices and waivers in the context of recreational activities. If defendants forewarn people of the risk that a particular sport or entertainment activity holds—orally, in writing or by way of a sign—they will later be entitled to rely on that warning to limit their liability. Similarly, if a person agrees to reduce or relinquish their rights under a contract for the provision of recreational services, that agreement will stand. In relation to risk notifications, the bill provides that a defendant does not need to prove that the plaintiff either received or was capable of understanding the warning. That is not very fair. Premier Carr elaborated on this issue in his second reading speech, stating that people will no longer be able to benefit from saying that they did not see a particular billboard or were not able to read English or make out simple symbols. I have serious reservations about the provisions relating to risk warnings and waivers.

The mere fact that an individual sees a warning notice or signs a contract reducing or forfeiting their rights to sue should not allow defendants to escape liability when they have genuinely been negligent. The point is whether they have been negligent. Moreover, there are disabled people, foreign tourists and individuals from non-English-speaking backgrounds to consider. What if they do not comprehend a warning or cannot properly understand the contract they are signing, which happens very often? This aspect of the bill may put these people at considerable legal disadvantage. On 11 November 2002 I received a detailed submission from the Australian Plaintiff Lawyers Association [APLA]. In relation to risk warnings in particular the APLA pointed out that that there are Australian standards governing the effectiveness of warning signs. Quite rightly, the association argues that the bill should at least provide that these benchmarks must be met before defendants are able to limit their liability on these grounds. I agree that there should be some kind of benchmark.

Another area of reform relates to professional negligence. Presently the courts apply the test laid down by the High Court of Australia in *Rogers v Whittaker* in 1992. In that case the High Court held that the standard of care for professionals is one of the ordinary skilled person in the defendant's area of expertise. Under this approach it is essentially up to the court to decide whether a professional has been negligent. It need not pay attention to the practices or opinions of other practitioners in that field. I point out that the bill will not alter the common law duty that requires professionals to warn of any risk of personal injury before providing services. Therefore, at least in this regard *Rogers v Whittaker* will still apply. Having said that, the bill departs from *Rogers v Whittaker* in so far as it substitutes a peer-based standard of care. In other words, the court will judge the quality of a defendant's services by reference to the opinions of other similarly qualified practitioners in his or her field.

If defendants can establish that they acted in a fashion which at the time was widely accepted by colleagues then they will escape liability. There is one caveat, however: the court must be satisfied that the body of knowledge or practices that the professional is relying on is not "irrational". I point out that the exception in relation to "irrational" practices was not in the draft version of the bill. Obviously, the process of community consultation led the Government to include it. I say this because in September 2002 crossbenchers were briefed by Mr Barry Hart, a Chelmsford victim and a spokesperson from the Chelmsford Victims Action Group. They were concerned that the draft bill gave too much protection to professionals, in particular medical practitioners, and would enable individuals who perform reckless or unfounded procedures to escape liability. I concede the point.

Significantly, the bill does not define the term "irrational". Premier Carr did not elaborate on the meaning of this concept either. He merely said it was not the same as "unreasonableness". In my opinion, the term "irrational" is far too vague. More importantly, it is not a concept that is presently recognised at law, unlike the term "unreasonable". Surely it would have been better to comprehensively set out the meaning of irrationality rather than leaving it to the courts to interpret this concept. The bill also restricts the liability of public entities, including government bodies and roads authorities. I did not quite follow what the Treasurer just said in this regard. I think that what he said was to the effect that non-government organisations would also benefit from these provisions, but I was not clear what he meant.

The bill also restricts the liability of public entities, including government bodies and roads authorities. In essence, the bill returns the law to the pre-Brodie position by giving local councils and other such bodies immunity for acts of nonfeasance. Before Brodie's case, which was decided in the High Court in 2001, public entities, in particular those with duties to repair roads and highways, were liable only for acts of misfeasance. This meant that if they actively performed a task, and did so negligently, only then would a plaintiff's tort action succeed. After Brodie's case, it appears that the court may now allow people to sue for acts of nonfeasance as well. The Treasurer would say that that is the intent of the amendment. These are mere omissions or failures to take some specific precaution or step, without any related preceding action. The bill will largely wind back this development. It provides that, when determining the liability of public authorities, courts must consider the entire range of functions performed by the body in question, the economic context and any legitimate resource allocation decisions that were made before determining whether the public authority is liable. I do not agree that these bodies should have any greater protection from liability in this day and age. On the contrary, because they exist to provide services and amenity to the community, they should be held to even higher standards of care. I hope the bill does not act as a disincentive to public authorities to ensure and improve the safety of public facilities and places.

The bill also proposes to limit recovery in respect of mental harm. First, the bill provides that only plaintiffs with a recognisable psychiatric illness will be compensated. This will replace the common law notion of "nervous shock", which the Government believes is too ambiguous. Secondly, only certain individuals will be able to sue. These are people who are victims of negligence or a member of their family, or individuals who actually witness the accident. In addition, the bill provides that an apology made by or on behalf of an individual may no longer be used as evidence of liability. That seems fair. The mere fact that a person might say sorry, for example after a car accident, does not mean he or she is actually at fault. People often say things in the heat of the moment, particularly in situations of stress. They should not be penalised for their instinctive or spontaneous reactions. I reiterate that I support the spirit of the bill. Although I do have reservations about it, on balance it should go some way to addressing increasing levels of litigation in this State. Ultimately, that is in the community's best long-term interest. I commend the bill to the House.

The Hon. IAN COHEN [3.34 p.m.]: The Greens have significant concerns about the Civil Liability Amendment (Personal Responsibility) Bill. It attempts to deal with the crisis in insurance premiums. While that intention is laudable, the bill is so widely drafted that the Greens fear that once it is enacted it will be very difficult for injured people to obtain compensation for personal injuries. In the absence of any other scheme in New South Wales, such as a no-fault system, individuals who are injured and who are unable to obtain compensation through the courts will be forced to live off very meagre social security payments. This bill has gone too far and will lead to windfall profits for insurance companies with no guarantee that premiums will decrease. It is difficult to support such a bill despite the crisis in insurance premiums. Consumers will lose rights, but there is no corresponding obligation on insurance companies to reduce premiums. In summary, the bill modifies aspects of the common law and limits the situations in which injured people can claim compensation in the courts through an action in tort.

This bill has been introduced in response to a crisis in public liability insurance premiums, which have increased substantially over the past year. As a result, some sectors of the community, such as not-for-profit organisations, non-government service providers, community groups, councils, surf clubs and adventure tourism operators have been particularly hard hit. The impact of the increased premiums has caused some operators and events to close while others have been forced to absorb the cost of the increases, and this has caused considerable financial hardship. Insurance for many organisations and businesses operating in these sectors has been largely unaffordable, and some have found it impossible to secure insurance cover at any price. When I spoke on the stage one reforms I mentioned a range of services, activities and events that either were facing enormous increases in premiums or had to be cancelled because insurance companies would simply not cover them.

This bill has been introduced after the Ipp inquiry into negligence laws, so named after Justice David Ipp, who chaired a panel of experts appointed by the Federal Government to examine the issue. The final report of the panel was released in early October and its recommendations focused on limits to personal injury payouts and claims costs. There were no recommendations targeting the insurance industry. Although the bill reduces the rights of injured people and considerably tightens up the common law of torts, there is no guarantee that premiums will be reduced or that community groups and those organising events and activities will be able to obtain insurance when they have previously been refused. That is because the crisis substantially stems from the insurance industry itself, not increases in the claims or large payouts—a fact recognised by governments in other jurisdictions, which have decided not to go down the radical path taken by this Government. For instance, when the Australian Capital Territory Government introduced its tort reform into its Parliament in August this year, its Chief Minister and Attorney General, John Stanhope, pointed out that insurance companies have not been able to substantiate the causal link between the extra premium increases and the claims history of particular industries or activities. He said, quite rightly, that the blow-out in premiums had been caused by a combination of events, including the crash in the reinsurance market after September 11 and corporate collapses, particularly the collapse of HIH Insurance. Queensland and Western Australia have also declined to follow the lead of New South Wales.

Many organisations have been unfairly treated by insurance companies. Low-risk, not-for-profit organisations have experienced dramatic insurance premium increases, and some policies have been cancelled altogether, despite the fact that very few claims were made against the insurance companies in the first place. Dr Rhonda Galbally from Our Community, a national resource centre for community-based groups, conducted a survey of public liability premiums for not-for-profit organisations. The research found that 96 per cent of respondents to the survey had not made any claim, and 17 per cent had been operating without insurance during the crisis. Events unable to obtain insurance include street festivals, arts festivals, community festivals and potato festivals. Some non-government social service providers are also having difficulty obtaining insurance. It is interesting to look at the mixed messages being sent by the insurance industry. On the one hand insurance companies are pulling out of areas or raising premiums arguing that claims policies and payouts have soared. On the other hand they have made statements such as:

> IAG's underlying business achieved a record operational result. In addition, the Group has delivered double-digit growth in net earned premium ('NEP') in the last three years, and doubled its gross written premium ('GWP') in the last four years.

Similarly, an ABC finance reporter specified on 2 September this year:

> Last week QBE insurance reported earnings of $115 million dollars for the first half of this year. Its income from premiums is soaring. And its CEO says that conditions for insurance companies are the best they've been for some time. That's a statement that sits oddly with the notion of a crisis in the level of insurance claims.

As the Australian Plaintiff Lawyers Association pointed out:

> Despite the government's efforts to restrict civil rights, the insurance industry is still not promising reduced premiums rates. According to QBE premium rates in areas such as public liability can be expected to rise between 10-20% next year.

The Australian Competition and Consumer Commission [ACCC] released its insurance industry market pricing review in March this year. Commenting on the general issue of increased premiums, Professor Fels, chairman of the ACCC, said in a media release dated 26 March 2002:

> Until recently, a number of insurance companies have been chasing market share rather than managing risk in a sensible fashion.

He added:

> Companies should not try to justify price rises by using external factors rather than admitting past management mistakes.

He was referring to the events of September 11 and the collapse of HIH Insurance. He noted the general insurance industry as a whole had had low return on equity over the past nine years. Low returns had occurred due to a mix of factors for particular groups, including inadequate premium rates for some insurance such as domestic motor vehicle insurance; fire and industry risks; professional indemnity; product and public liability and travel; catastrophes such as the Sydney hail storms and South-East Queensland floods; realisation of the extent of past losses as liability provisions increase to reflect emerging claims; low investment returns, which represent a significant and important component of insurance profits; increasing reinsurance premiums resulting from continuing low profitability of the international reinsurance market; and liquidation of the HIH Insurance group potentially removing a barrier to price increases.

Before the collapse of HIH the company led a price war to increase market share. Other insurers engaged in the price war reduced their premiums to unsustainable levels. Justice Ipp recently lashed out at the industry, accusing it of refusing to provide information to the national inquiry into the laws of negligence. He also said the insurance industry was partly responsible for the insurance crisis. Justice Ipp said of the *Australian Financial Review* earlier this month that he had "no doubt that one of the causes of the insurance crisis was the negligence, incompetence or greed—or perhaps a combination of all three—of the insurance companies".

The industry had also refused to give the inquiry all the information sought by Justice Ipp, and had refused to give his committee undertakings that measures it was considering would have an impact on insurance premiums. These comments by Justice Ipp are extremely telling. The Queensland Government set up a task force to look at liability insurance. It reported in February of this year. The report contains interesting information about key trends in the insurance industry. Under the heading "General Insurance Trends" the report specifies:

> Over the last ten years the insurance industry has undergone a period of major change and adjustment. In particular, the industry has been going through a period of rationalisation and consolidation which has reduced levels of competition in the market.
>
> Since the early 1990s the number of major multiline insurers has decreased from over twenty to less than ten today. There are generally considered to be only six (6) major players including Allianz, CGU, IMA, QBE, R&SA, and Suncorp Metway competing to underwrite insurance in Australia.
>
> Numbers have been further reduced with the collapse of some major insurers, most notably HIH which effectively removed approximately 50% of the capacity in the local market for small and intermediate risks.
>
> There have also been major changes to the regulation of insurance in Australia following the collapse of HIH. The Australian Prudential Regulation Authority (APRA) now requires that insurers hold much higher minimum capital levels and is seeking to enhance the transparency of insurance operations.
>
> In terms of world events, the Australian market has been impacted severely by the flow on effects of the events of September 11. The terrorist attacks in the United States represent the highest cost incident in the world insurance market that has ever occurred with the total cost of all claims likely to exceed A$120 billion.

> Insurers invest premium revenue and the global economic downturn has meant that returns on investment are lower which in turn is impacting on the overall profitability of the business. Economic forecasts indicate that the low interest environment is set to continue with forecasts pointing to rates of around 5%.

The Greens argue that these events—and not an overall increase in claims or large payouts—has led to an increase in premiums. There has been a fundamental reassessment by insurance companies of risks and classes of insurance that are profitable. The industry has rushed out of public liability insurance and professional indemnity insurance. This has led to near monopolies in the provision of insurance for some activities. Without competition, insurance companies are free to charge what they want. As can be seen from this, the reason for the increase in premiums is extremely complex. Because of this complex set of domestic and global factors impinging on premiums, reforming the torts system—I refer to cuts in compensation to injured people—will, in the scheme of things, make very little difference. There has been no commitment by the insurance industry to reduce premiums if this legislation is passed.

After the exposure draft of this bill was released on Monday 23 September I hosted a discussion forum on the New South Wales civil liability reforms for the University of Sydney Law School, which secured a number of prominent people to speak at the forum, most notably Professor Harold Luntz, an expert in tort law from Melbourne Law School. Many of the academics, particularly Professor Luntz, expressed grave concerns about our current common law fault-based scheme, particularly its ability to deliver adequate and equitable compensation to injured people.

The following is a breakdown of where accidents occur: 55 per cent at home or in residential institutions, 10 per cent in sports and athletic areas, 16 per cent in schools and other public areas, 5 per cent in streets and highways, and 14 per cent in the workplace. Yet road accident victims are far more likely to make claims and receive tort compensation than any other group. Of these road accident victims, however, only 54 per cent of injured people recover some compensation. Many other injured people receive no compensation whatsoever.

A number of arguments are frequently put forward for the retention of common law negligence actions. However, there is inconclusive evidence to support these claims. The claims are as follows. Firstly, liability based on fault acts as a deterrent against conduct that is dangerous to others. According to the New South Wales Law Reform Commission, which looked closely at the issue of fault and transport accidents in 1984, there is very little evidence to support this assertion. The commission argued:

> Negligent motorists pay nothing extra for the additional risks or losses they create. Accordingly, to the negligent motorist, fault in the common law sense is irrelevant. It is the criminal law which, in a wide range of driving offences, is the instrument of deterrence … Contrary to confident assertions by the proponents of fault, it is difficult to find any empirical evidence which provides that, whether plaintiff or defendant at fault is made to pay, fault operates as an effective deterrent. It may be that other factors, such as fear for one's own safety, are much more likely to influence a person's conduct … As to the argument that public exposure of those found to be at fault can act as a deterrent …, commentators agree that to the extent that this may be true, it applies only in certain areas, such as manufacturers' liability for defective products, but not negligent driving.

The commission concluded:

> There is no reliable evidence to support the assertions concerning the connection between fault, community justice and deterrence. On the other hand, inherent in the concept of fault is the failure to compensate a substantial proportion of accident victims at all and a further proportion at less than the full extent of the injury on grounds of contributory negligence.

Similarly, in 1992 D. Dewees and M. Trebilcok conducted a review of studies of the tort system as a deterrent mechanism. They investigated five areas, namely, motor accidents, medical malpractice, product liability, environmental injuries and workplace injuries. They concluded that the "review of the empirical evidence leads … to a relatively bleak judgment about the properties of the tort system as a deterrent mechanism". The Australian Plaintiff Lawyers Association, on the other hand, argues that no-fault schemes lead to more accidents. It uses the New Zealand model as an example, and specifies:

> In the three years preceding the introduction of the Act in 1974, there was an average of 62,000 industrial accidents reported. By 1989, this number had risen to 143,000.

This number, however, could be due to an increase in the number of accidents reported since the introduction of the scheme. There is now an incentive to report accidents so that the injured person can receive compensation and access to rehabilitation services. Clearly, the evidence is inconclusive as to whether a no-fault system would lead to more negligence and more accidents or whether it would make no difference at all to the deterrence factor. The Greens would like to see an inquiry to get to the bottom of the competing claims and arguments. The Greens continue to retain an open mind on this issue.

A second argument put forward for retaining the common law system is that lump sum awards promote rehabilitation and encourage independence on the part of the accident victim. The commission argues that because of the common law process—which generally involves having a lengthy trial and having to prove, until the end of the trial, how injured and incapacitated the victim is—litigation can seriously undermine the rehabilitation process. The commission argued:

> Where a lump sum is the only form of compensation available, there is a financial incentive to maximise the damages payable by remaining as disabled as possible up to the date of trial or settlement …
>
> The necessity of proving the debilitating effects of an injury encourages and reinforces the prolonged adoption of the "sick role" by many injured persons.

Professor Luntz and D. Hambly in their recent book entitled *Torts, Cases and Commentary, 5th Edition*, *2002* give the example of a young man who was severely injured in a motor accident and who was not expected to walk again. He was awarded damages in a trial and the case went on appeal. Between the original trial and the appeal hearing, the man managed to walk again. His original damages were assessed on the basis that he would not walk again. However, through determination and effort, and with the assistance of family and friends, he taught himself to walk again. The man's affidavit states:

> I did not tell the doctors that I had been walking or doing the exercises designed to help me walk. I did not tell them because all the doctors who treated me and all the doctors who had seen me for medico-legal purposes prior to the trial had told me that I would never be able to walk again; I thought they had all written me off as far as walking was concerned. I felt proud of my achievement. I wanted to achieve for myself the ultimate goal of being able to walk and then I could show the doctors what I had done.

The Court of Appeal subsequently held that the original judgment should be set aside and a new trial ordered in the expectation that the damages assessed in the new trial would be less than originally awarded. In this situation, if the young man in question had remained in the "sick role" and had not done anything to help himself walk again, his damages may not have been significantly reduced. In this respect the common law does not provide an incentive to rehabilitate quickly.

Thirdly, the only individual assessment of the kind applied at common law takes into account the special needs and circumstances of the plaintiff and, therefore, provides full compensation. Finally, victims' rights are protected by the courts, which are best able to determine the appropriate level of compensation and are responsive to community needs and are not vulnerable to political control. The criticism of the last two points is that in order for a plaintiff to be provided with an appropriate level of compensation, a lengthy, stressful and costly trial usually has to occur. This aspect of the common law tort system is extremely undesirable. There are major disadvantages of the common law system and perceived advantages of a no-fault system. A major disadvantage of the tort system is that an injured person, or the family of a person who has been killed, can claim compensation only when it is proved that another person was legally at fault for the accident. The New South Wales Law Reform Commission looked at this issue in detail and remarked:

> When fault is a criterion of both liability and reduction of damages, as it is in the common law negligence action, an entirely innocent plaintiff who cannot prove fault, and therefore gets nothing, is worse off than the grossly negligent plaintiff who can prove fault but still recover a proportion of damages.

Luntz and Hambly argue:

> Since the tort system serves to compensate only a very small proportion of the victims of accidents, it cannot be seen as fulfilling the role of providing compensation to those in need.

The second report of the Ipp inquiry, entitled "Review of the Law of Negligence Report", specified at paragraph 1.29:

> Another important consideration underlying our deliberations is that only a small proportion of the sick, injured and disabled recover compensation through the legal liability system, and only a small proportion of deaths result in the payment of compensation. As a result, only a very small proportion of the total personal and social costs of personal injury and death are met by the imposition of legal liability to pay compensation. The vast majority of those who are injured or suffer disease or lose a breadwinner have to rely on their own resources and on other sources of assistance, notably social security.

Another disadvantage is that individuals who are unable to obtain compensation through the common law system have to rely on the benefits provided by the very meagre social security system to survive. These individuals would be unlikely to have their medical needs adequately catered for through Medicare and the social security system. A no-fault scheme could, on the other hand, properly provide for all injured individuals. A major advantage of the no-fault system is that it would encourage, rather than discourage, rehabilitation. This is because there is no incentive to remain in the "sick role" pending a court hearing. Because of long delays in getting cases finalised, injured claimants can incur substantial expenditure and suffer financial loss while waiting for their cases to be heard. Substantial resources can be consumed in legal and administrative expenses. Plaintiffs also face extreme stress caused by the long wait. They can wait years from the time they have the accident to settlement or judgment after trial. A no-fault system would largely do away with these problems.

There have been a number of reports and inquiries into alternative systems. Significant inquiries include an inquiry conducted in 1984 by the New South Wales Law Reform Commission into the transport accident scheme for New South Wales and a 1974 Federal inquiry into a national no-fault scheme. The New South Wales Law Reform Commission recommended in its report that the common law be replaced with a no-fault transport accident scheme for New South Wales. Sir Owen Woodhouse chaired the 1974 National Committee of Inquiry into Compensation and Rehabilitation in Australia. The inquiry recommended that a scheme, modelled on the New Zealand model, be introduced in Australia but that it also encompass sickness as well as accident. Legislation was introduced and passed the House of Representatives, but because of opposition from lawyers, doctors, trade unions and the insurance industry the bill was sent to a committee. On the issue of the cost of the scheme, estimates at the time recognised that a comprehensive accident scheme could be adequately funded from the money already being spent on liability insurance. As a result of the dismissal of the Whitlam Government in 1975 the bill never resurfaced.

There are a number of no-fault schemes operating in other jurisdictions. Victoria has a modified no-fault scheme for transport accidents. Only the most seriously injured—that is, the injured person must be assessed as being impaired to the extent of 30 per cent or more of the whole person according to Australian Medical Association guidelines—are allowed to use the common law system. The body administering the no-fault scheme—unlike insurers who for many years administered the compulsory third party motor vehicle insurance scheme based on the common law—has been proactive in establishing hospital and other facilities for the treatment of motor accident victims, providing rehabilitation services and undertaking safety measures and campaigns. The scheme has managed to maintain the costs to the motoring community at a reasonable level, and green slips are cheaper in Victoria than in New South Wales.

New Zealand has a comprehensive accident compensation scheme that provides compensation for everyone in New Zealand for "personal injury by accident". The scheme is based on five principles: community responsibility—the community as a whole should support and encourage physical and economic rehabilitation of all those who are adversely affected by injury; comprehensive entitlement—coverage 24 hours a day, seven days a week for everyone; complete rehabilitation; real or adequate compensation; and administrative efficiency. The big problem with the New Zealand model is that it is in debt to the tune of $7.14 billion, although that debt is now decreasing. There are also allegations that workplace injuries have increased. These claims need to be thoroughly investigated.

In summary, the common law system fails to deliver just and equitable outcomes for all injured people. The system creates two classes: those who get compensation because fault can be proved, and those who get nothing because fault cannot be proved. This is unfair and discriminatory. The Greens are concerned that while the bill attempts to fix a major problem, which is increased premiums and the inability of some sectors of the community to obtain insurance at any cost, it will not fix the problem. What it does do, however, is reduce consumers' rights. The provisions in the bill are very broad and go beyond the Ipp report's recommendations in some cases.

The Greens are concerned about the broad nature of division 5, which relates to recreational activities. Clause 5K defines two categories of activity: that relating to dangerous recreational activity and recreational activity. "Dangerous recreational activity" means a recreational activity that involves a significant risk of physical harm. A non-dangerous recreational activity is defined very broadly and includes virtually everything that one would be likely to do except if one were working or sleeping. It includes any sport, organised or not; any pursuit or activity engaged in for enjoyment, relaxation or leisure; and any pursuit or activity engaged in at a place such as a beach, park or other public open space, where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure. The definition seems to encompass schools, so it will encompass injuries sustained while at school.

The bill provides that where a duty of care might otherwise be owed, no duty of care is owed to a person who engages in a recreational activity if the risk was the subject of a risk warning. The risk warning can be given orally or in writing. Risk warnings are taken to be warnings that are reasonably likely to result in persons being warned of risks before engaging in recreational activities. However, it will not be necessary for the defendant to show that the injured person was aware of the warning or understood it. A general warning is sufficient. For instance, for people entering a rugby league match, it will be sufficient to warn that there are dangers associated with a large number of spectators being present at a game. It will not be necessary to warn that there may be flying objects, bottles and balls, or that one could get crushed or injured in a crowd as a consequence of brawls or the general unruly behaviour of intoxicated spectators.

There will be no duty of care to warn of an inherent risk—with some exceptions—and there will be no liability in negligence for harm suffered as a result of the materialisation of an inherent risk. An inherent risk is one that cannot be avoided by the exercise of reasonable care and skill. The definitions cover virtually all activities outside work and sleep, from sunbathing at the beach, to playing school sport, walking in the park, horse riding and bungee jumping. This is inconsistent with the Ipp report, which defined "recreational activity" as:

> An activity undertaken for the purpose of recreation, enjoyment or leisure which involves a significant degree of physical risk.

The report argues:

> We think that a narrower definition that identifies activities and involve significant risks of physical harm would be more appropriate. This is because such activities are the sort that people often participate in partly for the enjoyment to be derived from risk-taking.

The definition is so broad that so long as a risk warning was given, there will be no duty of care. If the risk were obvious, there would be no duty to warn and if the risk were inherent, there would be no liability at all resulting from—

Pursuant to sessional orders business interrupted.

QUESTIONS WITHOUT NOTICE

GOVERNMENT INFORMATION TECHNOLOGY CONTRACT

The Hon. MICHAEL GALLACHER: My question without notice is to the Special Minister of State, and Minister for Industrial Relations. What action will the Minister take to assist at least 20 Australian workers from Qvalent who have lost their jobs due to the Minister awarding the e-marketplace contract to a foreign-based consortium in which his wife's company was a shareholder? Further, what action will the Minister take to address the loss to the Hunter of the large number of jobs that Qvalent would have provided to the region if it had, in fact, won the contract?

The Hon. JOHN DELLA BOSCA: I think that question should be addressed to the spokesperson for the Minister for Public Works and Services. I am happy to refer it to the Minister for his answer.

WORLD TRADE ORGANISATION PROTEST

The Hon. JOHN HATZISTERGOS: My question is to the Minister for Police. What is the latest information on the police response to last week's violent World Trade Organisation [WTO] protests?

The Hon. MICHAEL COSTA: I gave a commitment last week that I would report back to the House on the matters associated with the WTO protests. I am sure that all right-minded members will join me in thanking our hardworking police for their efforts last week. As we feared, some activists joined the two days of protest with an agenda of violent conflict, inflicting damage and inciting chaos.

The Hon. Charlie Lynn: Who were they? The CFMEU?

The Hon. MICHAEL COSTA: No, that is not right. The Construction, Forestry, Mining and Energy Union had its own peaceful rally, as did all the unions in Hyde Park. From the outset the activists were intent on causing trouble, despite repeated police efforts to facilitate a peaceful rally. I have previously provided members of this House with information from web sites being used by organisers of the WTO protest clearly designed to incite violence against police. These include advice to protestors on the use of baseball bats, marbles, firecrackers and gas masks. There are also tips on swarming and other techniques—

The Hon. Michael Gallacher: Tips on what?

The Hon. MICHAEL COSTA: Swarming. If the Leader of the Opposition wants to find out about it, he should go to the Greens web site, which has a link to Sydney activists, which has a further link to this other group that talks about swarming. These are strategies designed to cause maximum disruption to the community by blocking city streets. Let me say that the ratbag element has failed. NSW Police displayed courage, professionalism and the no-nonsense attitude that the community expects, controlling the violent protests and minimising disruption in the central business district and at Homebush. Their efforts led to the arrest of 55 people, who were charged with 70 offences during the two-day meeting. I offer NSW Police my congratulations on behalf of the community and most members of this House, I would expect, on the job that was done.

The Hon. Michael Gallacher: All members.

The Hon. MICHAEL COSTA: All members, do you think?

The Hon. Michael Gallacher: I think all members would support them.

The Hon. MICHAEL COSTA: Certainly, most members of the House would support police on the job they did, and on behalf of the community we offer them our congratulations. The media coverage revealed the true colours of some of the protestors. I think we were all shocked to see the footage on Thursday and Friday, footage of ratbags abusing and provoking police officers doing their duty. This included a hysterical mob who complained about police so-called snatch squads but who obstructed police as they moved in to arrest violent troublemakers. These ratbags posed for newspaper photographers wearing balaclavas and holding mock molotov cocktails. They screamed insults and abuse at police and assaulted officers.

Police have estimated that the security operation alone cost at least $3 million and thousands of hours of police time—time and money that could have been better spent on frontline policing services. Instead, it was spent on protecting the community against this misguided, ratbag minority. Adding to concerns was the behaviour of the Greens in the run-up to and during these protects. They helped organise the protests and facilitated a so-called civil disobedience forum in this Parliament in the run-up to the protests. They repeatedly refused to provide assurances that the protests would not turn violent and they lapped up the publicity. One could not get Lee Rhiannon off the radio accusing police of police brutality and all sorts of things—before there was even a demonstration. I think the Greens' position is quite disgraceful, that is, all care and no responsibility. It is time that the Greens apologised to the Police Force and the community for wasting valuable time and resources. I have challenged them to explain to the community what the laws were that justified civil disobedience but they have refused to do that. It was an outrageous and deplorable action by some members of this House to not distance themselves early in the piece from what were potentially and clearly demonstrated violent actions by a minority.

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION MINING DIVISION POWERS

The Hon. DUNCAN GAY: My question is to the Minister for Mineral Resources. Is it a fact that under legislation developed by his department the Construction, Forestry, Mining and Energy Union [CFMEU] will be given exceptional, additional, non-negotiable powers relating to coalmine health and safety issues? Is it a fact that the mining division of the CFMEU donated more than $220,000 to the Australian Labor Party, as disclosed to the Australian Electoral Commission in the last annual return? Is this not just a case of the union paying its Labor mates for increased powers and that it is little more than a case of cash for certification?

The Hon. EDDIE OBEID: Mine safety and the health of mineworkers in this State are important issues. They are so important that the Government has spent more than $14 million to ensure that it has the most up-to-date, world-researched health and safety standards in its mines. The Deputy Leader of the Opposition, who has never asked a question about mineral resources despite this industry bringing the majority of employment to the regions, trivialises an issue that is very sensitive. We have conducted two reviews, which have resulted in more than 40 recommendations. Also, the Government will introduce into this House a health and mine safety bill, which will provide the Deputy Leader of the Opposition with an opportunity to fully debate the matter. He has taken a grubby attitude to mine safety, which is an important issue to those who work in mines in this State. This important and sensitive issue should be treated with respect.

Governments of all persuasions have recognised the benefits of working in partnership with non-government organisations on key initiatives, particularly mine safety, in a collaborative approach to addressing safety issues. Every government, regardless of its political persuasion, must work with the industry. We are proud of our record. We will work with the unions and with representatives of mineworkers at all times. For example, since 1984 New South Wales governments of both political persuasions have supported the CFMEU's district check inspector program. Both Coalition and Labor governments have supported the program to which honourable members opposite refer. This program contributes to better mine safety outcomes in a number of key ways.

The program facilitates the involvement of mineworkers in managing mine safety issues. It complements the work of the Department of Mineral Resources. Also, the Fahey and Greiner governments—unlike members opposite—sensibly recognised the value of working with mining unions on the issue of mine safety. When the Coalition was in government it provided $560,000 to the Construction, Forestry, Mining and Energy Union to help fund the district check inspector program. That was under the Coalition Government. We are doing exactly what all governments should be doing, that is, working closely with the unions that represent miners in this State, and we will continue to do so.

The PRESIDENT: Order! I call the Deputy Leader of the Opposition to order for the first time.

CANNABIS USE AND DRIVING

Reverend the Hon. Dr GORDON MOYES: I ask the Minister Assisting the Premier for the Central Coast a question without notice. Is it a fact that the journal of the Australasian College of Emergency Medicine recently reported that a survey of Central Coast records showed that more drivers died while intoxicated with cannabis than with alcohol? Is it a fact that young drivers may be substituting cannabis for alcohol in an attempt to beat the police booze bus operations, and that young people believe it is acceptable to drive while under the influence of cannabis? What action is the Government taking to educate young people about the harmful effects of cannabis, as a driver under the influence of cannabis is 6½ times more likely to have a fatal road crash than a driver under the influence of alcohol?

The Hon. JOHN DELLA BOSCA: I thank Reverend the Hon. Dr Gordon Moyes for a very sensible and intelligent question. I am pleased to tell him that the Government is aware of the issue he has raised.

The Hon. Dr Brian Pezzutti: I asked this question some time ago.

The Hon. JOHN DELLA BOSCA: But you did not ask it sensibly. You never do! The Government has had under close attention for some time the concern that young people are potentially shifting away from using alcohol as a recreational drug to using a drug like cannabis as they are worried about the detection of a prescribed content of alcohol in relation to traffic-related offences. The Government is concerned about it and is paying close attention to this issue.

The Hon. Dr Brian Pezzutti: No, it isn't.

The Hon. JOHN DELLA BOSCA: The honourable member would not know. If he listens, I will explain it. The Government has put in place a number of measures to ensure that young people are educated about the effects of cannabis. I have previously reported to the House on the successful family matters education program. That program is targeted mainly at parents and families looking for advice that they should give to young people about drug use and where to go for help in cases when drug use is evident. That program provides a whole range of practical, useful and retainable information for that purpose. In addition, the Z-card contains peer group material aimed at explaining to young people the potential legal and medical harms of using cannabis and other drugs.

The New South Wales Government has been actively addressing the issue of drug driving since it took office. The New South Wales drug driving prevention strategy, which ran from 1996 to 2000, and the drug driving prevention action plan 1996-97 were produced in 1996 to address concerns about young people driving under the influence of drugs. The drug smart card, which I mentioned, contains specific information for young people on the issue of drug driving. The smart card is aimed at young people aged 11 to 17 years. Some 360,000 cards were distributed around the State between April and June 2002. In February this year I established a new drug driving task force, chaired by the Motor Accidents Authority, to examine the existing legislation and new evidence regarding the harms of using cannabis and driving.

The task force includes representatives from Police, Health, the Office of Drug Policy, the Attorney General's Department, and the Roads and Traffic Authority. The task force is closely examining the issues of concern in relation to drugs and driving. The Government will be looking carefully at further measures to tackle the problem of drug driving in New South Wales. Specifically, the Government will be in a position shortly to launch a targeted advertising campaign looking at the use of cannabis by young people and encouraging young people to have due regard to the legal, safety and personal issues with respect to cannabis.

The Government has taken on the issue of cannabis substitution for alcohol and driving harm. We have been responding to the issue, but obviously more needs to be done. As Reverend the Hon. Dr Gordon Moyes pointed out, there are alarming statistics in a number of areas, and they are under close examination by the Government, especially the Minister for Police, the Minister for Health and me. I believe we have evolved a strategy to deal with this problem. Other measures that are being put in place will be the subject of announcements in the immediate future.

AUTOMOTIVE INDUSTRY WORK PRACTICES

The Hon. RON DYER: My question without notice is addressed to the Minister for Industrial Relations. Is the Minister aware of plans to trigger conflict between workers and employers in the car industry?

The Hon. JOHN DELLA BOSCA: Unlike some members opposite, I closely read the *Australian* every day. That helps me keep in touch with national events as well as issues that influence us. Honourable members will be very familiar with the co-operative approach to industrial relations in New South Wales. It is an approach that has delivered for business and for workers. However, other jurisdictions, do not always work that way. Sadly, the chief agent for conflict is the Federal Minister for Employment and Workplace Relations.

The Hon. Rick Colless: How predictable you are.

The Hon. JOHN DELLA BOSCA: It is on the front page of the national journal of record today. The Commonwealth Minister is now insisting that car companies establish a $1 million fighting fund if they are to receive a $2 billion industry assistance package from the Federal Government. That is straight out industrial blackmail. Governments of all persuasions have been spending a lot of energy on, and expressing concern about, issues relating to so-called industrial blackmail. The Commonwealth Government is setting an example for the Australian work force by practising industrial blackmail. This fighting fund will be used to send workers and their unions to the Federal Court, with the object of bankrupting them, in industrial disputes under Federal jurisdictions. It will ignore productive workplace practices.

The Australian car industry delivered a record sales figure of 820,000 motor vehicles this year. The four major car companies—Holden, Mitsubishi, Toyota and Ford—and hundreds of suppliers and specialist tool shops employed 55,000 Australians. Last year they turned over a record $17 billion in the Australian economy. Export receipts for the last financial year came in just below $5 billion. Annual exports are expected to top $10 billion by 2010. Unions and employers have delivered productivity increases of more than 50 per cent for the vehicle assembly industry and 90 per cent for components manufacturer over the past decade. This is according to Australian Bureau of Statistics data, not trade union data.

Australia is well down the list in terms of days lost through industrial action in the automobile industry worldwide. In the decade to 2000 South Korea averaged 7,250 working days lost per 1,000 employees through strikes and lockouts, Canada stood at 580, while Australia recorded only 223. Now there is talk by the Federal Minister of a fighting fund—not only that, he is insisting on a fighting fund. Tony Abbott sits on a six-figure salary, and talks about fighting 55,000 Australian car industry workers. A base trades worker in the car industry takes home about $600 a week. The people working the line in an Australian car plant are not fat cats; they are on $600 a week. Yet the Federal Minister wants a fighting fund to screw them even harder.

The Federal Minister wants to bring in an aggressive, conflict-driven system, which has failed to deliver in Victoria. The Coalition experiment of a single industrial relations system has not delivered. Tony Abbott's own submission to the Cole royal commission into the building and construction industry shows that building is 20 per cent to 30 per cent more expensive in Melbourne solely due to industrial practices. For the benefit of members opposite, the Federal Minister's submission is that his own system is less efficient to the extent of 20 per cent to 30 per cent solely due to his own industrial relations framework. And this incompetent boob wants to insist on bringing it to the whole work force throughout Australia. This view is not supported by the labour movement. It is not about the trade unions.

The PRESIDENT: Order! I call the Deputy Leader of the Opposition to order for the second time.

The Hon. JOHN DELLA BOSCA: A major builder in Victoria, Grocon, has delivered a damning report on the system that Mr Abbott has helped to deliver in Victoria. Tony Abbott has shown repeatedly that the Federal Government has already made up its mind about reform in industrial relations. [*Time expired.*]

WORLD TRADE ORGANISATION PROTEST

Reverend the Hon. FRED NILE: I wish to ask the Minister for Police a question without notice. Further to his earlier answer on the WTO protests, can the Minister indicate what the additional costs would be for the provision of the police security barriers, and so on—including police time and wages? And what was the estimated cost to the business community—truck drivers, courier drivers, and so on, by the WTO protestors deliberately blocking streets in the central business district and deliberately blocking Parramatta Road for a long period? Will the Government seek refunds or compensation from the 31 organisations, including the Greens party, that sponsored these violent WTO protests?

The Hon. Ian Cohen: Point of order: The honourable member asserted the Greens sponsored violent protests. That is not the case at all. We did not sponsor any violent demonstrations. I resent the imputation by the honourable member.

The PRESIDENT: Order! Honourable members are reminded not to make imputations against other members of the Chamber. The Minister may answer the question.

The Hon. MICHAEL COSTA: That is a very good question. All I have is preliminary advice about the $3 million cost. Certainly, wages costs and other costs to the community were not in that figure. We will try to make an estimate. It will be very difficult but we will come back at the next opportunity with an estimate for the honourable member.

The Hon. Duncan Gay: Make an estimate on the high side.

The Hon. MICHAEL COSTA: I might use PricewaterhouseCoopers, who seem to be the group doing all the estimates for the Coalition. It will be difficult, but we certainly can quantify in more detail the cost to the Government.

GOVERNMENT INFORMATION TECHNOLOGY CONTRACT

The Hon. JOHN RYAN: My question is to the Minister for Industrial Relations. What steps did the Minister take to ensure he was not briefed or given any information by the Minister for Public Works and Services about the awarding of the $25 million government information technology contract to the consortium in which his wife's company was a part?

The Hon. JOHN DELLA BOSCA: As the honourable member is aware, at all times I have complied with the Constitution (Disclosures by Members) Regulation and the ministerial code of conduct. I have previously informed the House in more detail than is required by either the law or reasonable probity about my finances and those of my family. It is in *Hansard*. It was put on the public record in June 1999, October 2000 and April 2001. As honourable members know, New South Wales has a rigorous independent tendering process, in which I have no role whatsoever. It is not overseen by Cabinet, by me or by any other Minister. My pecuniary interests are on the record. They are utterly clear.

In contrast, the interests of the Opposition are less clear. Details of the Opposition's finances are shrouded in a fog or a mist—perhaps a Northmist. For instance, the Hon. Greg Pearce has not said what his privately owned company Malueta Pty Ltd is up to. What are Malueta's interests or ownership? We do not know. All I hear is that old Tory laundry discreetly churning away in the corner. The Hon. Greg Pearce is also director and secretary of DakHill Moss Vale Pty Ltd and the mysteriously owned Summer School Managers—very discreet. The Hon. Patricia Forsythe has not informed Parliament of the holdings of Sagamore Pty Ltd, a family and investment trust, nor Dapajoko Pty Ltd, a superannuation trust. I said she would make a good poker player—she even has a company named after it. Parliament knows nothing and the people of New South Wales know nothing. It is kept secret from Parliament and the public. Some people holiday in the Greek islands, but the Hon. James Samios owns a few of them.

The Hon. John Ryan: Point of order: My question related to whether the Minister was briefed in relation to a particular government tender. The Minister is providing information regarding pecuniary interests declarations by members of the Opposition. My question does not even remotely concern pecuniary interests declarations. I do not believe anything the Minister is staying with regard to this section of his answer is relevant and I request that you draw him back to answer the question I asked, which was with regard to the tendering procedure.

The PRESIDENT: Order! I remind the Minister that sessional orders require answers be relevant to the questions asked.

The Hon. JOHN DELLA BOSCA: I thank the honourable member for bringing me back to the thrust of the question, which is about pecuniary interests. I am answering quite specifically about those. The Hon. George Souris lists a series of properties in Singleton, Scone, and Gunnedah.

The Hon. Duncan Gay: Point of order: The question was not about pecuniary interests. The Minister was asked to tell us what steps he took to ensure he was not briefed or given any information by the Minister for Public Works and Services. This man is a Minister of the Government—

The Hon. Amanda Fazio: Point of order—

The Hon. Duncan Gay: You can't move a point of order on a point of order, stupid!

The PRESIDENT: Order! The Deputy Leader of the Opposition will resume his seat. A point of order may be taken at any time during debate.

The Hon. Amanda Fazio: The point of order I want to raise is that the Hon. Dr Brian Pezzutti is making a call on his mobile phone while he is in the Chamber. That is entirely inappropriate behaviour.

The PRESIDENT: Order! Members should not use mobile phones in the Chamber.

The Hon. Jan Burnswoods: Point of order: I ask the Deputy Leader of the Opposition to withdraw the personal accusation he made against the Hon. Amanda Fazio. It is totally unparliamentary.

The PRESIDENT: Order! I have asked members at all times to be civil to other members of the House. Will the Deputy Leader of the Opposition withdraw the comment?

The Hon. Duncan Gay: I will withdraw the comment that the Hon. Amanda Fazio is stupid, because that would be an insult to stupid people.

The Hon. Jan Burnswoods: Point of order: I now have two points of order. One is that once again I draw your attention to the cat noises being made by the sexist pigs from the Opposition. The other point of order is to point out to the Deputy Leader of the Opposition that having said he was going to withdraw the comment he made that was so offensive, he did not do so.

The PRESIDENT: Order! I ask the Deputy Leader of the Opposition to withdraw the two comments made about the Hon. Amanda Fazio.

The Hon. Duncan Gay: Do you want to rule on the other one?

The PRESIDENT: On your original point of order?

The Hon. Duncan Gay: No, on the Hon. Jan Burnswoods' second one.

The PRESIDENT: I did not hear the so-called cat noises. However, I have warned members previously not to make sexist comments or sexist noises in the House. I regard cat noises made when women members are speaking as extremely sexist, and I will not stand for such behaviour.

The Hon. Henry Tsang: Point of order: I draw to your attention that the time for dealing with the question has expired. It is now time for me to ask a question.

The PRESIDENT: Order! The time allowed for the question has certainly expired, however, I will continue to hear the point of order.

The Hon. Duncan Gay: There was a specific question and it was about the Minister taking certain steps. He deliberately was not answering the question.

The Hon. Michael Egan: To the point of order: The Minister answered that part of the question thoroughly at the commencement of his answer.

The PRESIDENT: Order! The question certainly made implications about the Minister relating to his pecuniary interests, and the Minister was responding by referring to his pecuniary interests. However, the time for the answer has expired.

The Hon. JOHN RYAN: I ask a supplementary question. The Minister referred in his answer to something called the ministerial code of conduct. Would he care to obtain a copy of the ministerial code of conduct and table it in the House for the information of members?

The Hon. Michael Egan: That is not a supplementary question.

The Hon. JOHN DELLA BOSCA: It is not a supplementary question but it affords me the opportunity to complete my answer to the original question. I make it clear: Mr Souris does not have the guts to challenge me in a legitimate area—

The Hon. Dr Brian Pezzutti: Point of order: The Minister was asked a very specific question, as a true supplementary, about the ministerial code of conduct. I ask that you direct him to make his answer pertinent to the question.

The PRESIDENT: Order! Answers to questions must be relevant to the question asked. I remind the Minister that the supplementary question did refer to the ministerial code of conduct.

The Hon. JOHN DELLA BOSCA: I will not respond in kind to the Opposition. Mr Souris was a reckless Minister who punted away $156 million of public money on two projects alone.

The Hon. Dr Brian Pezzutti: Point of order: The Minister is clearly flouting your ruling. I ask that you direct him to be relevant to the question that was asked. It was about the code of conduct.

The PRESIDENT: Order! The supplementary question did refer to the ministerial code of conduct. The Minister will reply to the supplementary question.

The Hon. JOHN DELLA BOSCA: As I have said on previous occasions, at all times I comply with the Constitution (Disclosures by Members) Regulation and the ministerial code of conduct. The answer I have given is a comprehensive answer to the question asked by the Hon. John Ryan.

The PRESIDENT: Order! I call the Leader of the Opposition to order for the first time.

The Hon. JOHN DELLA BOSCA: I have at all times complied with the Constitution (Disclosures by Members) Regulation and the ministerial code of conduct. I have previously informed the House in more detail than is required by the law or reasonable probity about my finances and those of my family. [*Time expired*.]

COALITION FUNDING COMMITMENTS

The Hon. AMANDA FAZIO: Is the Treasurer aware of any further policy commitments by the Opposition? Will he provide details of these policies?

The Hon. MICHAEL EGAN: Last week I released a detailed costing of election promises made by the Coalition. At that time there were 45 promises costed to a total of more than $5.2 billion, more than $5,200 million, of promises from the Opposition—unbelievable promises from an Opposition which cannot be trusted and which cannot be relied upon. Today I wish to update the House on our progressive costing of further promises, and they amount to another $140 million. The total fully costed spending commitment from the Opposition is now some $5,340 million. The additional items in this wild spending spree we have now been able to cost are: a new bridge over the Clarence River at Grafton, $70 million over four years; a subsidy for rainwater tanks in country New South Wales, $50 million; the extension of JetCat services until 9 p.m., $8.8 million; increased funding for Police Legacy, $800 million over four years; a 20 per cent increase in funding for country libraries, a total of $5.68 million over four years; and construction of a roundabout at Seaforth costing $4 million.

The Hon. Greg Pearce: Point of order: The Minister is clearly anticipating debate on a bill that has been introduced into this House, the Public Finance and Audit Amendment (Costing of Election Promises) Bill. Therefore, he is in breach of the standing orders.

The Hon. MICHAEL EGAN: The answer I am giving has absolutely nothing to do with the bill.

The Hon. Greg Pearce: Further to the point of order: The bill that I have just referred to clearly sets out procedures which would lead to the costing of election promises, which is exactly what the Minister is speaking about at the moment. He is clearly anticipating debate.

The PRESIDENT: Order! I ask the Minister not to stray into an area that may anticipate debate.

The Hon. MICHAEL EGAN: I assure the House that I will not be canvassing the bill. All of these promises are documented and costed. They have all been made by the Coalition and the total has now hit $5.34 billion.

The Hon. Duncan Gay: Point of order—

The Hon. MICHAEL EGAN: They do not like it.

The PRESIDENT: Order!

The Hon. Duncan Gay: The Minister is clearly moving into the area of the bill. He is flouting your ruling. I ask you to sit him down. You cannot allow him to continue to flout your ruling. We have to obey the rules but so does he.

The PRESIDENT: Order! The Minister had not said anything. I wish to hear what the Minister is saying.

The Hon. MICHAEL EGAN: I will not be referring to the bill. Let me choose just one of these latest promises to illustrate the wild abandon with which the Leader of the Opposition and his colleagues are prepared to spend public money. They spend on the run. They cannot help themselves. On 10 November the Leader of the National Party promised a rebate of up to $650 for each householder in country New South Wales who installs a rainwater tank. That promise has now been costed, and costed very conservatively. If just one in every 10 country households were to take up that offer the cost would be $50 million. But just last Friday, on 15 November, on ABC radio the Opposition Leader could not help himself. He promised that the Coalition would pay a rebate of up to $650 to everybody in the State who installed a rainwater tank. [*Time expired*.]

The Hon. AMANDA FAZIO: I ask a supplementary question. Can the Minister please elucidate his answer?

The Hon. MICHAEL EGAN: There was an interjection from the Opposition claiming that that is wrong. Let me quote to the House the words of the Leader of the Opposition. He said, "We will extend that to all residents of New South Wales." So if just 10 per cent of country people take up this offer it will cost $50 million. If every household in New South Wales put in a water tank the cost would be enormous. In other words, it is another unbelievable promise. Given the $5,340 million in wild promises he has already made, how could he keep this one? He has already thrown billions in promises at city voters.

He has told Sydney's multimillionaires that he will scrap the tax on their mansions—a $56 million tax cut for the richest people in Sydney. He has also told Sydney's drivers on the North Shore that they will not have to pay the 80¢ impost on the Harbour Bridge toll. The $112 million raised by that over four years will go to country roads. But the Leader of the Opposition is going to scrap it. Where will he spend money on roads? People living at Mosman who zip down to Manly for a seafood lunch will be okay because he will build a $1.5 billion tunnel under the Spit Bridge. These and so many of his wild, reckless promises that now total $5.3 billion are simply unaffordable and unbelievable.

ASSISTANT COMMISSIONER OF POLICE Ms LOLA SCOTT

Ms LEE RHIANNON: I direct my question to the Minister for Police. In light of the inquiry of Task Force Retz into the activities of Assistant Commissioner Lola Scott, will the Minister suspend Ms Scott on full pay pending the outcome? Does he acknowledge that if Ms Scott is not suspended on full pay it will be an exception in terms of how most other police officers also under internal investigation are treated? Does he recognise that suspending Ms Scott on full pay for the duration of the investigation would send an important message to rank and file police officers that there is no division of accountability between ranks in the Police Force?

The Hon. MICHAEL COSTA: I am advised that Commissioner Moroney will receive a full briefing on Operation Retz when he returns from leave next Monday. He has indicated that he will assess the brief and take any necessary action at that point.

Ms LEE RHIANNON: I have a supplementary question. Will the Minister acknowledge that the way rank and file police view this will be pertinent to morale and, therefore, it is important that there be consistency in the treatment of all officers, irrespective of rank?

The Hon. MICHAEL COSTA: I am amazed that the Hon. Lee Rhiannon would make any comments about police morale in this House. She consistently comes into this place and undermines—

Ms Lee Rhiannon: Point of order: Under Standing Order 81 all imputations of improper motives and all personal reflections on members should be deemed disorderly. I believe that the Minister's comments are in that vein.

The PRESIDENT: Order! I have in the past made a distinction between imputations against a member and imputations about certain behaviour. However, I remind the Minister that I have asked all members to be civil to each other.

The Hon. MICHAEL COSTA: I will be civil to the honourable member. However, she asked me about issues that may well affect police morale. She indicated that the issue she raised may affect police morale. I have indicated that other issues affect police morale and many of them relate to her and her party's behaviour with regard to supporting police officers. It is in the public interest that the Greens be exposed on this issue. This party has a policy—which I have in front of me—to cap prison numbers at 1995 levels. If we were to apply that policy in New South Wales, 1,700 prisoners would be released into the community. Nothing upsets police morale more than having convicted criminals let off after police officers have done the hard work to get them before the court. The Greens' policy is very clear: they would put 1,700 criminals back into the community. They also have a clear policy to disarm our police officers. This is the greatest hypocrisy I have heard. The Greens would support the police if they were interested in police morale.

GOVERNMENT INFORMATION TECHNOLOGY CONTRACT

The Hon. DON HARWIN: I direct my question to the Minister for Industrial Relations. Given that the Minister's wife is a director of, and a significant shareholder in, a company that was part of a consortium awarded a $25 million contract by the New South Wales Government, can he give the House and the people of New South Wales an assurance that he has had no conversations with his wife regarding government tendering generally and, specifically, about the awarding of this $25 million contract?

The Hon. JOHN DELLA BOSCA: It is not a fair question. The phrasing and framing shows how low these people will go.

The PRESIDENT: Order! I call the Leader of the Opposition to order for the second time.

The Hon. JOHN DELLA BOSCA: I am happy to answer the question, although I should not have to. I have had no conversations with my wife about this contract, government tendering issues, specific tendering issues or anything else regarding tendering. I have answered the question in a way that I should not have had to, and members opposite know that.

The Hon. John Ryan: What about the questions asked of John Brogden?

The Hon. JOHN DELLA BOSCA: Let us see where the Hon. John Ryan's interjection leads the House. The Leader of the Opposition in the other place got $110,000, or $2,000 a month—the equivalent of most mortgage payments—and he will not say why he was given the money.

The Hon. Michael Gallacher: Point of order: I refer the Minister back to the question. It is a $25 million question and we want the answer.

The Hon. JOHN DELLA BOSCA: I realise that interjections are disorderly at all times; therefore, I will get back to my answer to the Hon. Don Harwin. It does not do him any honour or credit, as he well knows. He is a better person than the Hon. George Souris, who has led this ridiculous campaign. The Hon. George Souris does not have the guts to challenge me or any other member of the Government on a legitimate area of policy, governance or anything else. He attacked my family, but I will not respond in kind. He was a reckless Minister who punted away at least $156 million of public money on two projects.

The Hon. Patricia Forsythe: Point of order: The Minister made an allegation about the member for Upper Hunter, the Leader of the National Party in the other place. I believe that that sort of allegation can be made only by substantive motion.

The PRESIDENT: Order! I remind the Minister that members must not make imputations against other members of this Chamber or members of the other place.

The Hon. JOHN DELLA BOSCA: He is robust when it comes to unfair attacks on other members' families. He has no credibility and, above all, he has no honour. My calling card will be delivered to the Hon. George Souris—

The Hon. Rick Colless: Point of order: Madam President, I bring to your attention the point of order raised by the Hon. Patricia Forsythe a few moments ago. The Minister has done the same thing, and I ask you to ask him to withdraw that comment.

The PRESIDENT: Order! I have previously drawn a distinction between imputations about a member and a member's behaviour. The Minister was referring to the member's behaviour and is in order.

The Hon. Duncan Gay: To the point of order: The comment that the member has no honour certainly is a slur on his character. Madam President, I ask you to reconsider your ruling and direct the Minister to withdraw. Imputations of that nature can be made only in a substantive motion.

The Hon. JOHN DELLA BOSCA: I am happy to withdraw the remark about the honourable member in the other place. [*Time expired.*]

ABALONE STOCKS

The Hon. HENRY TSANG: I direct my question to the Minister for Fisheries. What has been done to protect abalone stocks on the New South Wales coast that have been severely depleted as a result of disease?

The Hon. EDDIE OBEID: I thank the honourable member for his interest in protecting this State's marine biodiversity. The New South Wales abalone industry is one of the most valuable fisheries in the State. Yesterday NSW Fisheries announced that abalone stocks from Port Stephens to Jervis Bay on the South Coast have been seriously affected by parasites. Acting on the advice of NSW Fisheries scientists, the Government has banned all harvesting of the marine snail in the area. It has taken this action to try to control the spread of the disease.

This Government wants to protect our abalone industry, which is worth more than $14 million a year. Fortunately, most commercial abalone fishing takes place on the South Coast, from Jervis Bay to the Victorian border. Abalone is also a popular species harvested by recreational divers, who are limited to 10 per day. Our research has shown that abalone populations off Sydney, Port Stephens and the upper South Coast have been depleted by the outbreak and spread of the disease called Perkinsus, an aquatic parasite that kills abalone. Recent surveys undertaken by NSW Fisheries scientists have shown that abalone stocks around Port Stephens, Jervis Bay and Sydney are continuing to decline.

From this Friday, commercial and recreational fishers will not be allowed to take abalone from this region. The ban will stay in place for the next five years. This will give abalone stocks sufficient time to recover from this outbreak. It currently takes about five years for abalone to reach breeding size. The New South Wales Government has worked with commercial and recreational fishers in relation to this ban. The Government will continue to monitor this serious issue. In the new year surveys will be undertaken north of Port Stephens to monitor the spread of the parasite. The Carr Government will work with the Commonwealth and other States to further investigate this disease and ways to control the parasite. We will continue to work with the abalone industry and recreational fishers to protect the sustainability of our abalone resource.

DRINK SPIKING

The Hon. HELEN SHAM-HO: My question without notice is directed to the Treasurer, representing the Minister for Health. I refer the Minister to a *Sun-Herald* newspaper report of Sunday 17 November which revealed a disturbing increase in the number of sexual assaults, particularly against women, as a result of deliberate drink spiking in bars, nightclubs and other public places. Given the impending Christmas party season, and that many young people are currently celebrating the conclusion of university and Higher School Certificate examinations, what immediate action or initiatives will the Carr Government take to protect people from drink-spiking assaults, apart from awaiting the outcome of an intergovernmental committee on drugs to be held in Perth next week?

The Hon. MICHAEL EGAN: I thank the Hon. Helen Sham-Ho for her important question. I am not sure what any government can do about such a serious problem.

The Hon. Helen Sham-Ho: Education.

The Hon. MICHAEL EGAN: Education, certainly. I would have thought that the spiking of drinks amounted to a serious offence. It is something that I think all people should look out for. The Hon. Helen Sham-Ho referred to women, but I would suggest that young people generally should watch out for their drinks being spiked. It is probably something that happens to most people in the course of their life, and it is not a very pleasant thing when it happens.

The Hon. John Ryan: I haven't had it happen to me.

The Hon. MICHAEL EGAN: It might not have happened to the Hon. John Ryan, but many other people have had it happen to them. Anyone who spikes another person's drink thinking it is good fun is very silly. However, I will certainly refer the question to my colleague the Minister for Health and await his response.

GOVERNMENT INFORMATION TECHNOLOGY CONTRACT

The Hon. JOHN JOBLING: My question without notice is to the Minister for Police, representing the Minister for Public Works and Services. Will the Minister outline to the House how Logica was granted the contract to develop the e-marketplace State Government purchasing system when the company did not have the required SAP accreditation until it purchased E-global Pacific on 12 September 2002, which was after the contract was awarded?

The Hon. MICHAEL COSTA: That is clearly a question of detail. I will therefore—

The Hon. John Jobling: But you don't know what the answer is.

The Hon. MICHAEL COSTA: Of course I do not know what the answer is. I will obtain the answer from the relevant Minister and get back to the House.

DRUG REHABILITATION BEDS

The Hon. JAN BURNSWOODS: My question without notice is directed to the Special Minister of State. Will the Minister inform the House about increases in drug rehabilitation beds around New South Wales?

The Hon. JOHN DELLA BOSCA: I thank the Hon. Jan Burnswoods for her question and her ongoing interest in drug rehabilitation. Honourable members will be aware of the Magistrates Early Referral into Treatment Program [MERIT], which now operates in 24 local courts around the State. The MERIT program diverts offenders into drug treatment, to help break the drug-crime cycle. Part of the program's success depends upon government and non-government organisations having the capacity to treat the people who seek their assistance. We are providing these resources.

Earlier this month I was able to announce funding for 28 new residential drug rehabilitation beds around the State. These residential beds are now helping non-government organisations around New South Wales to turn lives around. The 28 new beds will help boost MERIT's residential rehabilitation services in central and western Sydney, Wollongong, Cessnock, Nowra, Orange, the Northern Rivers, the mid North Coast and Leura. This expansion of treatment services has been made possible by the joint efforts of the New South Wales and Commonwealth governments under the national Illicit Drug Diversion Initiative of the Council of Australian Governments.

This initiative is part of an historic national approach to tackling illicit drugs, which compels drug users to take responsibility for their lives, stop their drug-taking and criminal behaviour, and avoid further damaging impacts on their families and the community. The 28 new beds are in addition to the 37 MERIT drug rehabilitation beds approved earlier this year. This increase in resources means that each year more than 260 people in the MERIT program will be provided intensive help to stop their drug problems and criminal offending. MERIT aims to reduce reoffending and substance abuse by providing intensive case management and treatment. The program commenced in Lismore in 2000 and is now operating in 24 local courts. There have been 266 MERIT graduates, with another 178 currently participating.

The organisations receiving beds in this round are the Wollongong Crisis Centre, We Help Ourselves at Hunter Valley and Redfern, the Salvation Army at Surry Hills, which received eight beds, the Oolong Aboriginal Corporation at Nowra, The Buttery at Bangalow, Bennelong's Haven at Kinchella Creek, West Mount Co-operative Society at Leura, Kathleen York House at Glebe, the Wayback Committee at Harris Park, and the Lyndon Community at Orange. The New South Wales Government's expansion of treatment places and options since the Drug Summit is impressive.

The PRESIDENT: Order! I call the Hon. Dr Brian Pezzutti to order.

The Hon. JOHN DELLA BOSCA: The Government's achievements include 46 new detoxification beds at Lismore, Nepean and Wyong hospitals, giving the capacity for almost 3,000 additional in-patient detoxifications each year; 62 more rehabilitation beds, enabling an extra 523 people a year to be treated; more than 2,800 extra places for methadone and buprenorphine treatment, significantly reducing waiting lists; an extra 2,000 people receiving detoxification treatments at home or as outpatients; an extra 200 people a month receiving drug and alcohol counselling in rural areas; naltrexone and buprenorphine introduced to provide more options for treatment of patients; eight new drug and alcohol counsellors in rural areas; and 17 doctor liaison officers to assist general practitioners and pharmacists manage and treat drug-dependent persons. The latest increase in treatment places will change the lives of those who take on the challenge to confront their drug addiction. I congratulate the organisations that gained additional places, and I wish them every success in their great work.

AUSTRALIAN PLUMBING STANDARD

The Hon. JOHN TINGLE: My question without notice is addressed to the Special Minister of State, representing the Minister for Land and Water Conservation. During this time of drought and threatened water restrictions in Sydney, is it a fact that New South Wales is the only State using a superseded version of the Australian Plumbing Standard, which governs all connections to the reticulated water system? Does a body known as the Committee on Uniformity of Plumbing and Drainage Regulation still insist on Sydney Water and Hunter Water using the 1995 version of Australian Standard AS 3500, which has been replaced by the 1998 version? Does this insistence on an obsolete standard mean that rainwater tanks cannot be cross-connected with the reticulated system, even though the 1998 standard does permit cross-connection provided a backflow prevention valve is installed? Is this antiquated approach preventing householders in Sydney and the Upper Hunter who might want to install a rainwater tank to conserve water and use rainwater for household functions such as toilets, washing machines, et cetera, from doing so? If so, what will the Government do to remedy this counterproductive arrangement?

The Hon. JOHN DELLA BOSCA: I thank the Hon. John Tingle for his very good and timely question relating to the water shortage and the drought currently being experienced in New South Wales. I will ask the Minister for Land and Water Conservation to provide me with an answer as soon as practicable.

GOVERNMENT INFORMATION TECHNOLOGY CONTRACT

The Hon. CHARLIE LYNN: My question is to the Special Minister of State. In answer to an earlier question the Minister said that he did not lobby for the Logica consortium, which included his wife's company, to help it win the $25 million information technology contract. Did he meet with Steve Proctor, the head of the consortium? If so, what did he discuss with him?

The Hon. JOHN DELLA BOSCA: It is an interesting coincidence that the Hon. Charlie Lynn should ask that question. Yesterday my office received an email from a *Sydney Morning Herald* journalist, whose name I do not recall. One of the questions asked in that email was: Have I ever dined with a gentleman named Steve Proctor? He is apparently somewhat senior in the Logica organisation. In response to the email I said, "No." In answer to the Hon. Charlie Lynn I say, "No."

The Hon. Michael Gallacher: Have you met him?

The Hon. JOHN DELLA BOSCA: Unless I happened to pass him one day in Martin Place and he asked me for a cigarette, I have never had any exchange—personal or otherwise—with Mr Steve Proctor.

INDEPENDENT ENTERTAINMENT NETWORK

The Hon. IAN WEST: My question without notice is to the Minister for Community Services, Minister for Ageing, Minister for Disability Services, Minister for Juvenile Justice, and Minister Assisting the Premier on Youth. Will the Minister inform the House of progress with the Government's youth entertainment program?

The Hon. CARMEL TEBBUTT: I am pleased to inform the House about progress with the Independent Entertainment Network, the Indent Program. I have spoken previously in this place about the Indent Program, but with a strong focus on safe, drug and alcohol-free entertainment options for young people. Following media reports over the past few days it is timely for me to refer to what the Government is doing with Indent. The Carr Government launched the Indent Program in October 2000, with a financial commitment of $750,000 over three years. The 2003 Indent partnership grants have now been finalised. These grants are awarded to 21 teams of young people around New South Wales. Working with local organisations, these teams will each stage at least four events in their community next year. Young people in our communities are gaining the skills, confidence and local support to run innovative programs. The 2003 Indent partnership grants will see events happening in Baulkham Hills, Parramatta, Bankstown, Campbelltown, Dapto, Newcastle, Wollongong, Gloucester, Port Macquarie, Tuncurry, Broken Hill, Griffith, Albury, Shoalhaven, Bega, Eurobadalla, Bombala, Inverell, Quirindi, Rylstone, and Muswellbrook.

All honourable members would agree that that is a good coverage of the State. For example, the Stepping Up Indent Committee in Quirindi will run four events that include hip-hop events, live bands and a film festival. The committee's proposal includes a strategy to establish a network of young artists and organisers in their community to help them create a sustainable program of youth entertainment. In Bankstown the Homebass Indent Committee will use its grants to conduct a series of workshops for local young people in breakdancing, disc jockeying and songwriting at the Homebass Youth Cafe, culminating in a live performance at an outdoor concert in Bankstown's Paul Keating Park. The Shoalhaven Indent Committee is planning a series of live music events, including the launch of a compact disc featuring bands from the Shoalhaven region. Many different events will occur as part of the 2003 grants, which represent a total of $88,000. A total of 80 all-age events will take place around the State in 2003.

The Government is providing more than just money. The Indent Program is also providing training, networking and support. This was recognised last weekend when young people from around the State came to Sydney for the annual Indent forum and awards. I congratulate all the young people who were involved in running events this year, particularly those who won awards. I was pleased to see many young people from rural and regional communities win awards, including the communities of Broken Hill, Deniliquin, Newcastle, Upper Hunter, Albury and Bega. They were all successful. Indent is now in its third year of operation. I look forward to continuing to report to the House on the success of Indent. I congratulate all young people who have been involved in the program.

The Hon. MICHAEL EGAN: If honourable members have further questions, I suggest they put them on notice.

Questions without notice concluded.

CIVIL LIABILITY AMENDMENT (PERSONAL RESPONSIBILITY) BILL

Second Reading

Debate resumed from an earlier hour.

The Hon. IAN COHEN [5.02 p.m.]: Earlier today I referred to the Ipp report. There is concern that the definition of "recreational activity" is so broad that so long as a risk warning is given there will be no duty of care, if the risk is obvious there will be no duty to warn and if the risk is inherent there will be no liability. For example, if a recreational activity is dangerous there will be no liability for harm resulting from an obvious risk.

The Greens believe that there will be very few actions taken under this legislation, even if there has been gross negligence. There will be no incentive, due to threat of legal action, for people to make playgrounds, parks, beaches and events safe. The standard of care will drop significantly, leading to far more avoidable accidents. With the threat of litigation almost entirely removed, there may be no need for organisations and organisers of events even to get insurance.

The Greens are particularly concerned about the broadness of the provisions relating to the liability of public and other authorities. Of particular concern is new section 44. In particular, the new section specifies that a public or other authority that has functions to prohibit or regulate an activity will not be liable in connection with a failure to exercise the function or to consider exercising the function unless the authority could have been held to exercise the function. According to the Australian Plaintiff Lawyers Association [APLA], the problem with this provision is that many public and other authorities are not statutorily bound to exercise certain functions—they have the power but not the duty to exercise such functions. For example, APLA referred to the power of the Department of Education and Training to maintain school buildings. However, it does not have a statutory duty to do so.

When this legislation is passed the department could decide to maintain selectively certain school buildings. For example, the department may fail to maintain a certain school. If the roof fell in and injured or killed a number of schoolchildren the department would not be liable if it could be found that it was not statutorily required to maintain the school, that it only had the power to maintain the school if it so wished. The Government has advised that the department would have a common law duty to maintain buildings. However, that is not clear in the bill and would have to be tested in the courts. New section 44 (1) specifies:

> A public or other authority is not liable in proceedings … to the extent that the claim is based on the failure of the authority to exercise or to consider exercising any function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function.

For example, if there were no statutory function for the department to maintain school buildings, the plaintiff would have to prove that it had a duty to carry out a common law function—that is, to maintain school buildings—to get around this provision. With the threat of legal action removed, it is likely that public and other statutory authorities will not have an incentive to ensure that places or services for which they are responsible are maintained to a safe level. The Greens are of the view that the current common law system fails to compensate adequately the vast majority of people who suffer personal injury or death. We should take a long, hard look at other systems, such as no-fault accident compensation schemes or mixed common law no-fault schemes, to ascertain whether anything contained in them would be useful in New South Wales.

The Greens believe that the Standing Committee on Law and Justice should undertake a comprehensive inquiry and examine all aspects of liability insurance in New South Wales, including regulating the insurance industry to ensure that community and public activities can acquire affordable liability insurance cover, whether insurance companies are providing affordable insurance in less profitable areas, the impact of global and market issues on the cost of insurance premiums—in particular, the collapse of HIH Insurance and the events of September 11—the establishment of a public insurance office and the role it could play in providing a range of accident insurance products, and mechanisms for enhancing the care and compensation of injured individuals including the consideration of elements of a no-fault accident compensation scheme. The Greens believe the Government could far better service the communities of New South Wales. The Greens have significant concerns with respect to this bill.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [5.08 p.m.]: The Australian Democrats oppose the Civil Liability Amendment (Personal Responsibility) Bill. It is the companion bill to the Civil Liability Bill, which I spoke against earlier this year. I refer honourable members to my speech on that bill. When I was researching this bill I read an extremely good speech by Mr Lynch, the honourable member for Liverpool in the other place. He referred to media hype and expressed concern about public liability. Mr Lynch referred to the essence of market failure where a small oligopoly, with reinsurance being allowed overseas, set premiums in an atmosphere of fear and trembling. Huge rises in premiums, which were assumed to be necessary because of the present market, have forced the Government to take action.

Tobacco industry documents revealed in the Minnesota settlement depict the long-term strategy to get rid of public liability by outspending in a Goliath versus David approach. It has such vast resources that it cannot be outspent. The tobacco industry had known for some time about the harm caused by tobacco products, yet it pretended ignorance. Therefore, health groups faced with a stony-wall denial by the tobacco industry agreed to carry out the research again, which essentially gave the tobacco industry a further decade or more. In

Chicago at the World Conference on Tobacco and Health some eminent scientists, who were world leaders on the effects of tobacco, carried out research not knowing that the industry had secretly done it more than a decade before. One scientist had spent virtually his whole life researching this matter and, when nearing retirement, was somewhat chastened to learn that the industry had conducted his research before him. In a sense, that con has allowed those who are callously happy to kill as many people as it takes to make a profit in almost 30 years of non-action.

With tort law becoming more sophisticated, small plaintiffs have clubbed together and the legal fraternity has pooled resources to overcome this giant, and they have started making money. However, the tobacco industry strategy was again clear—that is, a frenzy to beat up a fear campaign on tort law, its costs and insurance generally, and then seek a loophole through immunity, despite the industry knowing it had caused 40 years of harm. Governments believe they are traversing new fields and new issues, but all governments in the western world now consider issues within a year or two of each other. Some are a few years behind other governments in similar jurisdictions. I have a specific interest in tobacco in a global context and I am amazed at the extraordinary naivety of governments that refuse to learn from other governments. In their self-importance they examine the information as if they were the first to do so, but they are all fooled by the same trick. The industry picks off governments like an orchardist picks cherries. Governments make the same mistake, one after the other. This Government—full of pomp and circumstance—is foolishly making decisions by craven capitulation to an industry lobby group.

Despite the sensible contribution of the honourable member for Liverpool in another place on 30 October, he voted with the Government. There was no conscience vote on this issue. Only members who are not bound by party discipline will vote in opposition to this bill. Of course, party discipline prevents members from properly looking after the interests of their constituents. They must toe the party line, as Ben Disraeli taught them so that he could change his mind relatively easily. Party discipline prevents proper representation and results in the passing of foolish legislation such as this. The Government is intent on taking away the rights of people to be compensated for the wrongful action of others. The Opposition will meekly follow the Government, without thinking too much, and the insurance companies will once again be major winners from this misguided, ham-fisted legislation. The bill defines "recreational activity" so broadly that it covers shopping and sunbaking. The bill is a clumsy effort to fix a problem that has been blown out of proportion by the insurance companies. Broadly speaking, this bill will make it extremely difficult for people to recover damages for injury caused by the negligence of business or government.

I intend to introduce a bill entitled the Crimes (Corporate Manslaughter) Bill, which will be even more important if this bill is passed. If it is, there will be no incentive or sanction for businesses to maintain or execute their activities in a manner that will not endanger the public or their paying customers. There will be no civil sanction. My bill will at least put in place criminal sanctions for businesses, but it will not receive support from the Government or the Opposition. The Opposition said that I was just going after Nick Greiner, but that is not entirely true. I could cite many other cases of negligent corporations whose actions have resulted in death. Anyone who looks for evidence on this subject can find it. The concept of personal responsibility, on which this bill is based, is flawed. It cannot be argued that we should protect all people from all dangers all the time.

However, when people are injured through no fault of their own—and, indeed, through the negligence of others—the system fails. That is why we have the law of negligence. The Government seems to have overlooked the fact that elements of personal responsibility are already built into the law of negligence. There are principles of voluntary assumption of risk and contributory negligence. There is no need to change the system in the way that is proposed in the bill. I shall now outline the main elements of my concern. The main flaw in the bill is that there is no underpinning standard of safety. New sections 5M (7) and 5N (6) refer to standards that are contained only in State and Federal legislation. This represents a small percentage of standards that have been established for many forms of business activity. During the Committee stage I will move an amendment to require government and businesses to adhere to the Australian standards relevant to their industry or activity, otherwise they will be liable for any injury or death that results. Basically, we seek uniform, sensible standards. If we have the appropriate instruments in place to set the standards, we should be cognisant of what constitutes reasonable behaviour. I understand that neither the Government nor the Opposition will support my amendment. I am disappointed and annoyed, but not surprised.

I became involved in politics because I was aware of the immense harm caused by the tobacco industry and the resultant huge injection of resources required by the medical system, which is one corporate malfeasance I have followed for some years. The percentage of people in hospital with a tobacco caused disease is grossly conservative in that the figures refer to the number of cases rather than their severity. In financial terms, the statistics are understated. The number of people in intensive care units with complete body failure, rather than just the number in intensive care units, demonstrates that tobacco is costing a fortune. Simply injecting funds into the intensive care area of medicine is an appalling waste of money, in the same way that gaols waste money that should be spent on supporting families. Money should be spent on prevention. The Minister said that funding for tobacco has been boosted from approximately $1 million to $3.3 million. However, visiting Americans have said that that funding is only one-tenth of what it should be, so the Government is scrimping. I have told the Minister that for years, but to no avail.

Apart from the activists who sacrificed themselves to get rid of tobacco advertising by getting arrested and making such a case that the Government finally made New South Wales the first jurisdiction in the English-speaking world to get rid of tobacco advertising, the main driver of public health in the tobacco area in Australia has been tort law. A few people decided to sue the tobacco companies after years of having their body polluted by tobacco smoke, either because they were addicted or because they were unfortunate enough to work under the auspices of the Australian Hotels Association in hotels or in clubs, which those hotels and clubs fought to keep smoky because of a misguided notion that they would lose customers if they went smoke free or, indeed from pure venality. It is hard for me to work out to what extent the tobacco industry's nefarious deeds with regard to subsidising elements of the hotel industry have prolonged that situation more directly than merely a perceived and deceived self-interest.

But in this case the question is: Will the ability to sue remain? There are concerns with regard to three areas as defined in the bill. The first is obvious risk and assumption of risk in new division 4. Smoking may come within the definition of "obvious risk" and "assumption of risk" because everyone, except the tobacco industry, knows that it is a risk. Although smoking is addictive, it is nevertheless arguable. Smoking might come under the definition of "recreational activity" in division 5. It would fall within that division if people chose to recreate by poisoning themselves—that is, if they are not addicted again. Indeed, smoking might come under the definition of "intoxication" in division 6. Nicotine addiction could be an intoxication, and this would be the very thing that kept the person smoking—that is, the addiction would be the very thing that took away their right to compensation. That is a nice little irony.

If the bill is passed, it may well be the world's first tobacco industry immunity bill in the context of the McCabe case, which is the first Australian success in the area of passive smoking in the hotel industry. This would be a disgrace, but it would be a good investment from the tobacco industry's point of view. Indeed, Phillip Morris donated $53,000 to the Government and $5,000 to the Opposition, and Rothmans donated $20,000 each to both sides of Parliament. It is a complete abomination that the manufacturers of a highly addictive product, which people initially choose to smoke because they think it is tough and then find that they are unable to quit, would not then be liable for negligence. That is anathema to the law and legal principles, and it is counter to all public health considerations.

As this appalling lack of prevention goes ahead, the cost of treatment blows out horrendously in the intensive care unit and the least cost-effective end of the treatment spectrum because of a silly quest for uniformity in this bill and paranoia resulting from September 11, the collapse of HIH and perhaps the cyclical nature of the industry that has made this Government lose its rationality. I support the call by Mr Lynch in the other place for a government-owned insurer, as was apparently set up initially by Jack Lang because of the workers compensation situation in 1929, if I am to believe Mr Lynch—and I am sure he has researched the matter properly. However, this Government is so far from the reformist and looking-after-the-worker ideals of Jack Lang that it does not bear consideration in this Chamber.

I will move an amendment in Committee to exclude tobacco companies from immunity under this bill. That amendment would ensure that it does not preclude payment for injury or death resulting from the use of tobacco products or the passive effects of tobacco smoke. Indeed, it would retain the existing liability for both tobacco companies and people deliberately exposing other people or allowing people to be exposed to tobacco smoke. In terms of risk warnings and incapable people, new section 5M refers to risk warnings and recreational activities. As the bill now stands, a person in charge of a recreational activity cannot be held liable for injury received by a minor or disabled person, provided the person in charge of that minor or disabled person or their parent had been made aware of the risk warning. It does not require that the person understands the risk warning, which makes the whole concept grossly unfair.

I understand that the Australian Plaintiff Lawyers Association is of the same opinion, and I have correspondence which suggests amendments to rectify yet another flaw in this bill. The debacle of the green slips legislation should be fresh in the memory of honourable members, although we seem to learn little from mistakes, even if they are fairly recent. The people who will suffer under this legislation are the ones who always suffer. As the poem says, "The frail are pressed to the rail." People with limited means who are injured and unable to work have no savings to fall back on and are thrown on the scrap heap and the welfare system. They do not affect insurance company profits. People with means can buffer themselves to some extent from accidents, although people who lose their incomes due to physical or mental infirmity fairly soon become poor. That shows the importance of universal health insurance—another concept under threat in the dollar-driven and increasingly callous environment we are moving into.

I refer to green slips and how poorer people are punished. For an old car that a person cannot afford to have comprehensively insured, a green slip costs about $570. I contacted the NRMA and asked why this was the case. I was told that various matters are taken into account when setting a green slip price, including the age of the driver and the likelihood of accidents. The only trouble with that analysis is the price—for an old car that is comprehensively insured, the price of a green slip is the same for 20-year-olds, 30-year-olds and 40-year-olds. So the poor are subsidising the green slip prices of the rich. The price is not based on the likelihood of having an accident but on whether a person has other insurance. The same bent logic has been applied to public liability insurance. The cost of a green slip was $300 if a person had other insurance, which relates to my point about the higher green slip price of $570 for an old car.

The cost of public liability insurance for a fundraising fete has gone up, in some cases by 600 per cent. How dangerous is a cake stall? This bill was announced publicly at the Festival of the Winds at Bondi Beach, which is a kite festival. How dangerous is a kite festival? There is no correlation between the rise in premiums and the risk that is being covered. It can only be assumed that the insurance companies are cross-subsidising other areas of insurance, just as they do with green slips. In other words, the cake stall is subsidising other costs, and this will happen while an oligopoly works out premiums in dark rooms by magic without the slightest transparency and without any interference by the Government in this market failure. So the Government could and should set up an insurance company. If it simply managed an insurance company in a competent fashion, keeping its reserves adequate and its payouts and premiums reasonable, that would stabilise the market. If other people chose to have huge premiums going up and down, that would be on their heads.

When premiums went too high the government insurer would act as a brake; if premiums went too low the Government would lose business for a while but the other insurance companies presumably would go broke and the government insurance agency would provide some stability and ongoing continuity. That is what the Government should do. The question is: Is the Government willing to lead, or is it merely a fascinating and foolish thing conned by insurance companies, whatever the thrill of the moment, and possibly as part of worldwide strategies of larger forces? The Australian Democrats are not fooled. We do not support this bill. Indeed, if an insured person cannot sue anyone, we might wonder what is the purpose of anyone paying for insurance. After all, we are all subsidising Zurich for September 11, when it comes down to tintacks, and the Government is not being critical about that.

The Hon. Dr PETER WONG [5.28 p.m.]: From the outset, I state my support for this bill. I am particularly pleased with the level of commonsense that has accompanied the introduction of this bill. My remarks will be brief as my fellow members have already addressed many pertinent points explaining why this bill should be passed. My interest is to promote legislation that will service realistic and appropriate administration practices. I do not attempt to demean the suffering of genuine victims of negligence.

Fiscal reparation, however, must be practical and pragmatic. Many times this has not been the case and we are all paying the consequences. As a doctor I fear for the health of our State's medical profession. The recent record-breaking multimillion-dollar payout may only serve to exacerbate current staff shortages as demotivated, qualified medical practitioners leave the profession. I suggest that genuine claims would receive greater, appropriate and beneficial attention if they were not defined in simple monetary terms. The demarcation between liability claim and personal responsibility is not black and white. This bill will attempt to return some perspective and commonsense to the debate for compensation. If we hope to reduce the economic burden of this State by propping up an ailing industry, we must support legislation that will boost the appeal and, therefore, the competitiveness of the insurance industry.

Reverend the Hon. FRED NILE [5.30 p.m.]: The Christian Democratic Party is pleased to support the Civil Liability Amendment (Personal Responsibility) Bill, which amends the Civil Liability Act—the principal legislation, which was introduced and passed by Parliament earlier this year. Honourable members may remember that during that debate I said that negligence was an important aspect not covered in that bill and that I urged the Government to move as rapidly as possible in that regard. I congratulate the Government and the Premier, who has given personal leadership during this time of crisis in civil liability insurance in our State. The

Act was a step in the right direction, and this bill is a further refinement of the principles of the law of negligence with regard to all claims for damages as a result of harm from negligence. I will refer in a moment to the relevant provisions.

It is important that this matter be dealt with. It was bad enough when a number of insurance companies insisted on setting very high premiums, but a further problem arose when one could not get civil liability insurance no matter how much one paid in premiums. Time and again many organisations, particularly community organisations arranging such activities as Anzac Day marches and recreational horseriding, could not get insurance. There were a flood of reports in the daily newspapers that if such organisations could not get insurance they would have to close. There was a crisis at that stage. As the Premier said, if all these activities were stopped, our quality of life and our Australian way of life would be significantly impacted upon. I am pleased that the Government has responded with this second series of civil liability insurance reforms.

Many upper Houses members, although not all, attended the joint sitting in the other place to hear four qualified speakers on the law of negligence. I found that very helpful. I add a little postscript, however, that I believe joint sittings should be held only in the Legislative Council, in accordance with the conventions of the Parliament.

The Hon. John Jobling: Yes, it was not a true joint sitting.

Reverend the Hon. FRED NILE: I think the Clerk called it a joint meeting.

The Hon. John Jobling: Yes, it was a seminar.

Reverend the Hon. FRED NILE: I am not against having a seminar in the other place. I oppose, however, a reversal of the tradition of members of the Legislative Assembly knocking on the doors of this Chamber, seeking admittance to a joint sitting in this House, which has been the convention for centuries. The Christian Democratic Party supports the retention of that tradition and the recognition of the Legislative Council as a House of review.

The Government requested that a panel be established to review the law of negligence. Many of the recommendations of the panel, which was chaired by Justice David Ipp, have been taken up in this bill. The other challenge is to enact uniform legislation so that New South Wales does not go out on a limb, but rather works in co-operation with other States. In some ways I believe that the Federal Government should have given stronger leadership to achieve uniform legislation, but I know how difficult that is to achieve. I hope this legislation will be the model for other States to follow. I understand that the Queensland Government is moving towards similar reform at the end of this year.

We hope that as a result of the provisions of this bill community organisations will get insurance. Some media reports from the insurance industry suggest that there will be a reduction in premiums. We hope that will occur as well. There must be the availability of insurance to community organisations, including councils, as well as a reduction in premiums. Insurance company actuaries can now be more accurate in calculating the potential cost of insurance, and that, hopefully, will result in a reduction in premiums. This bill will allow the community to continue its important social and cultural activities—a most positive aspect of the legislation.

The recent huge payout of $3.75 million to Mr Guy Edward Swain of Mulgoa, a 28-year-old man who broke his neck in the surf at Bondi Beach, caught everyone's attention. On 14 November the *Daily Telegraph* reported that Waverley Council has appealed against the decision. We await with interest the outcome of that appeal. It is hoped that this legislation will prevent similar large payouts in the future, particularly in cases such as that which I have just mentioned in which it appears no sense of responsibility was displayed by the young plaintiff, who admitted he had been drinking and, as I understand it, using drugs. No-one knows what will happen when someone dives into the surf. Sandbars move, they disappear and reappear. I have always understood that a flagged area on a beach indicates that the area is being supervised by lifesavers. It is not suggested that nothing will happen to anyone who swims in that particular part of the beach. For example, a swimmer could be taken by a shark in a flagged area. The flags mean that the area is supervised by lifesavers, and swimmers who get into difficulty would have an expectation of being rescued if they waved their arms about to get the attention of the lifeguards. Anyone who dives headfirst into shallow water is a fool. Because the person in the case I referred to earlier was under the influence of alcohol and other substances he obviously did not take these matters into account.

This bill will restore personal responsibility. All of us have to take responsibility for our actions. It seems to me, as a layman, that the bill will require us to do just that. It will restore the obligation of personal responsibility and encourage people to avoid accidents and injury to themselves—although I realise it may be impossible to prevent all accidents. Over many years I have been involved in various parliamentary committee inquiries into workers compensation. From visits to factories and other workplaces it became clear to the members of those committees that, with care and personal responsibility, accidents could be dramatically reduced. Even if accidents are not reduced by 100 per cent, much can be done in that direction. Workers in a factory producing BHP steel and involving heavy machinery encounter more dangers than do people who are sunbaking on a beach. If we can make workplaces safe, surely we can make beaches and other places safe. But there must be personal responsibility. Factory workers are taking responsibility for their actions. For example, accidents can be caused by people tripping over things. As a new way of thinking, a policy was instituted requiring workers not to leave lying around on the ground tools or other objects that could be tripped over. This simple policy brought about a dramatic reduction in accidents.

The same attitude should be encouraged in public places. People may be injured after tripping on a slight rise or broken piece of concrete on a pathway. We must take care for our own safety when we are walking on a footpath. The pathway may have been hazard free when it was installed, but tree roots can push up concrete and pathways can be damaged by heavy vehicles, including trucks. People need to look where they are walking to prevent accidents. We are pleased to support the bill.

The Australian Plaintiff Lawyers Association and the Law Society have lobbied members of Parliament about the bill, which will affect the members of those organisations. They say that they are concerned about plaintiffs, but I believe they also have a degree of concern about their own future and, dare I say, perhaps their profits. On the other side, as other speakers have said, there is a distrust of insurance companies and people question whether insurance companies are putting up a phoney case and unjustified arguments to press the Government and the Parliament in a certain direction so that insurance companies can make more profits. So there are two profit factors that work: one involving the legal profession and the other the insurance industry.

I have previously suggested that we should monitor the insurance industry. It may not be easy but there should be some attempt at monitoring through the Independent Pricing and Regulatory Tribunal, the Australian Competition and Consumer Commission, insurance ombudsmen or even confidential inquiries. The financial affairs of the companies should be examined to ensure that all the savings are passed on to consumers through lower premiums and do not go into greater company profits. Members have received correspondence from both sides of the debate. A letter from the Insurance Council of Australia dated 29 October states the following in regard to profits:

> It is worth reiterating the poor experience of this class of business in recent years in Australia. In broad terms, the insurance industry has consistently lost $500m per annum for the past 4 years on public liability insurance classes. Whilst many causes have been suggested including the collapse of HIH, reinsurance costs and 11th September terrorist attacks, the fundamental issue that has caused the blow out (as found by Trowbridge Consulting when insurers opened their books) is claims costs. Unless claims costs can be brought to an affordable level, we will not have affordable insurance.

We can only take that statement on face value, but it is supported by Trowbridge Consulting and, therefore, is a genuine figure. So, contrary to what some members have implied in the debate, huge profits are not being made with public liability insurance. This bill is justified and deserves support. The Greens and the Australian Democrats often move many amendments in this Chamber. The Government, through its advisers and industry consultations, has produced balanced legislation meeting the concerns of insurance companies, the legal profession and the consumer. The negotiation process results in no-one being 100 per cent happy with the final bill, but sometimes amendments can tilt the scale one way or the other. The outcome may be perhaps more rewarding to insurance companies—this is unlikely because I do not believe anyone would move such amendments—or more rewarding to the legal profession. In bills such as this, every word can be critical and we should be reluctant to accept any amendments, even if they are moved in good faith, unless we can be sure that they will improve the operation of the bill.

If the scales are tilted in favour of the legal profession, insurance companies may consider that no progress has been made because the bill as amended is no longer in the form that was agreed to by the various stakeholders. The insurance companies may then decide that there is no justification for reducing premiums or they may even decline to offer public liability policies. I give that warning and state that the Christian Democratic Party will be reluctant to agree to any amendments to this type of bill. Any amendments should be considered very carefully by Opposition and crossbench members before being agreed to.

The Hon. RICHARD JONES [5.47 p.m.]: I concur with some of the remarks made by Reverend the Hon. Fred Nile. It is unfortunate that the bill is necessary, but it would not have been introduced if it were not necessary. It seems to have bipartisan support. It is a pity but it is a fact of life that somehow we have to reduce the enormous compensation payouts and ensure that people are more responsible for their actions. It seems absurd that a person should get a payout for tripping on an obvious pavement flaw. People who do not notice a raised piece of pavement, trip on it and break their ankle—if they are sighted and able to see it—should take responsibility for their own actions.

Public or other authorities are required to consider the financial and other resources that are reasonably available to them. An authority will not be liable for breach of statutory duty unless it has acted in a way that no reasonable public authority could act. A public or other authority that has functions to prohibit or regulate an activity will not be liable in connection with a failure to exercise the function or to consider exercising the function unless the authority could have been compelled to exercise the function. A roads authority—for example the Roads and Traffic Authority [RTA]—will not be liable to the extent that a claim is based on the failure of the authority to carry out or consider carrying out work unless the authority has actual knowledge of the particular risk at the time of the alleged failure.

Following the three inquiries into emissions from the M5 East stack and emissions within the M5 East tunnel, the RTA is now well aware of the risk to the health of people using the tunnel. To a lesser extent it is aware of and is able to quantify the risk to the people living near the stack. I raise a question for the RTA and also Baulderstone Hornibrook, the operator of the M5 East Tunnel. There is now enough evidence to show that the particulate matter within the tunnel is dangerous to motorists, particularly those who remain in the tunnel for a while with their ventilation open, including motorcyclists.

We received evidence yesterday that is on the public record that the levels of particulate matter within the tunnel reach 2,000 micrograms per cubic metre. The highest level allowed in the ambient area for those living around the stack is 50 micrograms per cubic metre. The particulate matter within the tunnel is predominantly PM 2.5 or less, which is the ultrafine particles that cause most of the damage, including cancer. We are looking at an emerging standard for PM 2.5s of 25 micrograms per cubic metre over 24 hours. The levels within the tunnel are up to 80 times the allowable level outside the tunnel. People stuck in the tunnel or even travelling through it for seven or eight minutes a day will suffer exposure at a level far higher than the ambient level if that measure is added to the ambient level. The emerging standard for the entire year is eight micrograms per cubic metre. Motorists and passengers will be exposed to that level in the tunnel in addition to any other particulate matter in the area. People travelling from pure air into the tunnel every day of the year would reach the standard level that is proposed for PM 2.5.

The RTA and Baulderstone Hornibrook are on notice that the tunnel is extremely unhealthy. Those exposures exclude the high levels of carbon monoxide, benzine, formaldehyde and other known carcinogens in the tunnel that are not being monitored. When they are monitored and the RTA knows what they are, it will be obliged to take action on behalf of motorists, RTA and Baulderstone Hornibrook workers and, of course, the residents around the stack who have reported suffering the effects of exposure to pollution. The RTA is on notice that it knows what is happening. As the Hon. Malcolm Jones knows, the Environment Protection Authority [EPA] has the power under condition No. 70 to ensure that the RTA installs filtration in the tunnel. Given that it knows those facts, the EPA must act. If it does not, it will be liable. Baulderstone Hornibrook and the RTA know that the tunnel is a risk to their employees and to motorists, particularly motorcyclists. They are on notice to take action.

Concerns have been expressed in relation to the provision that a professional will not be liable in negligence if the professional acts in a manner that is widely accepted in Australia by peer professional opinion as competent professional practice. The bill provides that peer professional opinion cannot be relied upon if the court considers that the opinion is irrational. However, the fact that differing opinions are widely accepted in Australia concerning a matter does not prevent any or one of those opinions being relied on. The peer opinion does not have to be universally accepted to be considered widely accepted. It has been contested that it is unacceptable that the determination of the standards demanded by the common law should be removed from the judgment of the courts and deferred to various professional bodies. The question is asked: What happens when professional standards drop so that a majority or a great number of medical practitioners, lawyers, accountants or other professionals are causing unnecessary harm or injury to their patients and clients? It is out of the question that low standards tantamount to carelessness could become accepted standard of practice amongst certain professions that would be sufficiently widely accepted to be considered peer professional opinion. Accounting practices in relation to Enron certainly slipped enormously, and HIH is an example closer to home. It is conceivable that standards could slip and not become irrational, but they could slip enough to do damage.

Last year the Legal Services Commissioner received 3,000 written complaints about lawyers and 9,000 telephone inquires. A couple of years ago the *Sydney Morning Herald* reported that more money is spent in

Australia fixing injuries caused by medical mistakes than on treating road accident victims. The figures from the Australian Institute of Health and Welfare show that more than $400 million—one sixth of all money spent treating injuries—was spent on patients made sicker by the medical treatment they received to deal with existing complaints. Between 10,000 and 20,000 patients in Australia die from iatric causes each year; that is, as a result of doctors and nurses making mistakes such as administering incorrect medication, leaving swabs inside patients and contracting golden staph. A friend of mine died last week from golden staph and an existing condition. The medical profession makes many mistakes in this country.

In *Rogers v Whitaker* (1992) the High Court qualified the role of *Bolam v Friern Hospital Management Committee* (1957) in Australian law. In Bolam's case it was held that it was for a reasonable body of medical opinion to determine standards of care. The High Court held that it was for a court to determine whether a medical practitioner's conduct fell below the accepted standards notwithstanding the fact that medical opinion determined otherwise. Until Roger's decision, the test in Bolam's case was generally understood to mean as follows in *Sidaway v Governors of Bethlem Royal Hospital* (1985):

> The *Bolam* principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment

That is, the Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a reasonable body of medical opinion even though other doctors adopt a different practice. In *Rogers v Whitaker* the High Court indicated that Australian courts ought not to apply Bolam in this sense, finding that it was for the court to determine standards of care applicable to the medical profession, not for the medical profession itself. In *Rogers v Whitaker* the majority said:

> In Australia, it has been accepted that the standard of care to be observed by the person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But, the stand is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade. Even in the sphere of diagnosis and treatment … the Bolam principle has not always been applied. Further, and more importantly, particularly in the field of non-disclosure of risk and provision of advice and information, the Bolam principle has been discarded and, instead, the courts have adopted the principle that, while evidence of accepted medical practice is useful for the courts, it is for the courts to adjudicate on what is the appropriate standard of care.

The point is that there could be a large pool of professionals practising substandard treatment and practice that a professional could call upon to support harmful practices and defend negligence claims. We know that that is happening in the medical profession given the large number of unnecessary operations being performed. It has been agreed that this legislation will wind the clock back to 1957 to a situation in which contradictory opinion can safely be used to defend a case in negligence. The Australian Plaintiff Lawyers Association [APLA] notes that the standard of care for professionals is very vaguely defined and is lower than the standard owed by other members of the community.

The Managing Director of the Network Economics Consulting Group, economist Henry Ergas, writes in the *Australian Financial Review* that the single most striking fact about the report from David Ipp's review panel into the law of negligence is that it does not contain a single fact. He says that most galling, and ultimately costly, is the panel's decision to effectively set aside some 40 years of research into the economics of liability law. The article states:

> The panel's disregard of even the simplest economics leads it into plain errors, followed by poorly thought-out proposals and, at times, inconsistent claims. Thus, the panel starts by incorrectly defining the costs of the system it is assessing. It says that these costs are the sum of compensation and the costs of obtaining that compensation. As every first-year economics student knows, this statement is wrong on two counts: it confuses costs and transfers; and even setting aside that error, the costs of the system are not manifested in the manner by which compensation is obtained.

It has been argued by Henry Ergas that it is bad economics to bar lawsuits for injury or death resulting from an obvious risk suffered while taking part in a recreational activity. As a result of this legislation, suppliers of recreational activities would find it cheaper to make their services available and prices would fall. Would customers be put off from using them by the higher risk to which they would now be exposed? All research suggests not. Moreover, since the provider does not owe the consumer a duty of care to warn of an obvious risk, the likelihood must be that more people must get sucked in. What happens if these risks eventuate? Ergas writes:

> Society would be left not merely with the financial burden of caring for the injured but even more importantly, with the shattered lives of more young people made disabled.

The Australian Plaintiff Lawyers Association is concerned that no duty of care is owed if a risk warning was given to a person engaged in a recreational activity because "recreational activity" is very broadly defined and applies to children and people with a disability. The association also says that the reduced entitlements for nervous shock and the provision of damages for loss of superannuation to be assessed at the statutory minimum amount negatively affects injured people. In addition, if intoxication in any way contributes to the plaintiff's injury, no matter how insignificantly, damages are reduced by at least 25 per cent. The definition of "intoxication" covers people who are affected by prescribed drugs.

With those few comments I broadly support the thrust of the bill. I believe it will cause some grief within the community, but I realise that the Government has to act, even though many people question the way it has gone about this. Perhaps the legislation goes too far for many people; nevertheless the Government must act. I reiterate that the Roads and Traffic Authority and Baulderstone Hornibrook are now on notice that they must make sure that their employees and all those who use the tunnel need to have a safe environment.

The Hon. MALCOLM JONES [6.01 p.m.]: I support the Civil Liability Amendment (Personal Responsibility) Bill. The problems associated with public swimming pools, particularly council swimming pools, have been almost commonplace since the early 1970s. I refer, for example, to people diving into shallow swimming pools. The celebrated case of the man who broke down a real estate agent's sign to use as a toboggan at Perisher, badly hurt himself, and then sued the National Parks and Wildlife Service and Perisher Blue is a travesty of justice and must not be repeated, or we will be forced to live in a very dull, boring and frightened society. Riding stables, surf-lifesaving clubs, all sorts of nature competitions, horseracing, rodeos, gymkhanas, sporting activities, gatherings of all types and country fairs will all be able to function again, as they should, when this bill is passed.

The Hon. Helen Sham-Ho spoke about the insurance industry and its decisions regarding self-interest. The Hon. Greg Pearce spoke about windfall profits of $150 million to insurers. However, I did not hear any member balance his or her comments regarding loss ratios of upwards of 200 per cent resulting in insurers' losses of billions of dollars. I did not hear members comment on the phenomenal pay-outs that have been made, or will have to be made, as a result of the events of September 11, which will probably be in excess of $US10 billion. Or are insurance company pay-outs simply taken for granted?

Insurance is a business, and, essentially, a business is set up to create profits for shareholders. However, some people can only see the upside of insurance investments, and do not recognise the risks. I have raised with various insurers the prospect of cheaper insurance premiums. The prospect of an immediate positive result is extremely unlikely. Reverend the Hon. Fred Nile referred to the losses from public liability insurance being $500 million per annum—that is, on one class of persons. Those losses have been sustained year in and year out for quite some time. If they continue, insurers will withdraw from the market. Insurance companies are reliant upon investor funds. Investor funds prop up the ability of insurers to insure.

Investors come and go, and investors must continually be attracted. Profits attract investors and losses deter investors. A loss of investors will result in companies not being able to operate effectively. Continued losses—and the losses have been massive, contrary to what misinformed members may say when voicing their personal prejudices—will destroy insurance companies and, ultimately, the insurance industry. To refute this is simply not to accept the reality of commerce. However, acceptance of commercial reality is not a commodity in great supply in this place. Whether or not this bill is passed, it is unlikely to reduce premiums. A lot of ground has to be made up. Of late too many insurers have been too hurt to re-enter the markets without the potential to recover losses.

The Hon. Ian Cohen wants to reinvent the GIO. Good luck to him. Those days of missionary charitable government ventures are long gone. Even the socialist utopians have learnt that lesson. The Hon. Dr Arthur Chesterfield-Evans wants to know how dangerous is a cake stall or a kite festival. If a cake stall causes food poisoning to 50 people, he will soon find out how dangerous it is. If a kite takes somebody's eye out, he will soon learn how dangerous a kite festival is. In raising these questions the honourable member is almost childish in his understanding of the problem. The Hon. Dr Arthur Chesterfield-Evans joined the Hon. Ian Cohen in wishing to recreate the GIO. Still, we have come to expect such contributions from the Hon. Dr Arthur Chesterfield-Evans. However, I am attracted to his amendment, which I will further consider. I support the bill.

The Hon. PETER BREEN [6.06 p.m.]: This is a very important bill. Prior to its being drafted there was a feeling in the community that people generally should be taking more responsibility for their actions. I recall that last year when my sister was walking down George Street she broke her ankle when she twisted it on a loose stone near a planter box. She asked me whether she could sue the council. I said, "I suppose you can; you might be entitled to compensation." At the time there was little question about her personal responsibility for the accident—in other words, whether she should have been keeping a proper lookout while walking down the street.

The Government has taken advice about the problems in the insurance industry, and has sought to address those problems by introducing this bill, which effectively changes the ground rules in relation to negligence and people claiming compensation for their injuries. Just last week I experienced a similar incident. At the time I could not help thinking how this bill will change the way we treat people who are injured. I was walking down Oxford Street in Darlinghurst. I walked up the step to a bottle shop, and my feet became entangled in some twine that was holding newspapers together.

The Hon. Charlie Lynn: It was a trap.

The Hon. PETER BREEN: It was a trap. I immediately fell onto my head, and I was knocked completely unconscious when I hit the ground. When I woke up I was in a complete daze. People in Oxford Street assumed that I was a drunk, lying on the steps. Indeed, I was quite sober; I had simply been knocked senseless as a result of hitting the ground. I looked around for the twine, but it was nowhere to be seen. The proprietor of the bottle shop came to my rescue, and said, "This is terrible. Here is a glass of water." I said, "Never mind the glass of water. Where's the twine?" He said, "I'm sorry, I don't know anything about any twine."

As a plaintiff under this new legislation, I would be in a very difficult position whereby I would have to establish that I had fallen down and cracked my head as a result of the negligence of the proprietor of the bottle shop. Walking into a bottle shop, I was not to expect that there would be twine on the ground in which I might get my feet tangled. This new law has completely shifted the onus of responsibility as to whether I or the shop proprietor were negligent. The law has effectively removed the duty of care of occupiers. This is a very serious and significant change in the law of negligence. It is a change that I do not think this Parliament has fully addressed in the provisions of the bill. It would not surprise me if, somewhere down the track, we find ourselves in the same position that former Premier Barrie Unsworth found himself in when he removed common law rights regarding workers compensation claims.

It was not long before the new Premier, Nick Greiner, found that he had to reintroduce the right to claim damages for common law injuries. It would not surprise me if somewhere down the track we find ourselves having to review the extent to which we have shifted the responsibility away from occupiers of premises to members of the public—citizens who, like me, may walk up the street, thinking about other things, having some measure of responsibility about what they are doing and where they are stepping, but not expecting the dangers that are in front of a shop, such as the bottle shop in Darlinghurst. With that question of responsibility for the bottle shop, there is a provision in the legislation which states:

> The defendant—

That is the occupier of the shop—

> is not liable in negligence for harm suffered by another person as a result of the materialisation of an obvious risk of a dangerous recreational activity.

In other words, recreational activities are excluded under this bill. The question is: Is going into a bottle shop to buy some wine a recreational activity? That is a matter that the courts now have to determine. It has to be determined for other shop proprietors as well. What types of shops will qualify as recreational activities as opposed to commercial premises, where the responsibility, in my opinion, should fairly belong with the shopkeeper to keep safe premises so that the public are protected when they go into shops.

I propose in Committee to introduce an amendment relating to the responsibility for people discovering a cause of action that is referred to in the bill as discoverable. I have been involved with a man named Fred Lettice from Camden, who could not gain access to his property because of a solicitor's negligence. The solicitor did not advise him that his right of way was deficient, and after about 20 years it was discovered that Mr Lettice could no longer access the rear of his property. The adjoining owner had put up a gate and said, "Goodbye, Mr Lettice. You can't go down the back of your property any more."

That resulted in an action for negligence against the solicitor who conveyed the property. Under this new law, unless that type of claim is made within three years it is lost. In other words, unless the solicitor's negligence becomes obvious within three years a claim cannot be made. I propose to move an amendment to the bill to protect people who receive faulty and defective advice from solicitors, or barristers for that matter. People who receive legal advice that they do not have a cause of action, or who have lost an action as a result of defective legal advice, are entitled to be protected. I hope that the Government will support my foreshadowed amendment, which is a sensible one, and follows the Court of Appeal's decision in the case of *Scarcella v Lettice*, the case I referred to. With those brief remarks, I offer my support for the bill.

The Hon. HENRY TSANG (Parliamentary Secretary) [6.13 p.m.], in reply: I commend the bill to the House.

Motion agreed to.

Bill read a second time.

In Committee

Clauses 1 to 4 agreed to.

Schedule 1

The Hon. JOHN HATZISTERGOS [6.15 p.m.]: I move Government amendment No. 1:

No. 1 Page 5, schedule 1 [1], proposed section 5D (2), lines 10-15. Omit all words on those lines. Insert instead:

> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

The proposed change to proposed section 5D (2) arises from the Government's further discussions with Justice Ipp. The proposed amendment will more closely reflect the intention behind the Ipp report's recommendations regarding causation. Instead of codifying when the exception to the "but for" test should apply, the bill will leave the current position intact. This will ensure that it is clear that no departure from the current exceptions—either wider or narrower—is being proposed by the bill. The wording of proposed section 5D (2) will require the court to consider expressly whether and why the circumstances are exceptional enough to warrant imposing liability even though the "but for" test cannot be satisfied.

The Hon. GREG PEARCE [616 p.m.]: As I said in my contribution to the second reading debate, the Opposition is taking a bipartisan approach to this legislation and will not oppose this amendment, which is designed to give effect to recommendations made by the Ipp report.

Amendment agreed to.

The Hon. IAN COHEN [6.16 p.m.], by leave: I move Greens amendments Nos 1 to 3 in globo:

No. 1 Page 7, schedule 1 [1], proposed section 5K, line 25. Insert "involving significant physical exertion or risk" after "any sport".

No. 2 Page 7, schedule 1 [1], proposed section 5K, line 28. Insert "in circumstances that expose individuals to significant physical risk" after "leisure".

No. 3 Page 8, schedule 1 [1], proposed section 5K, line 1. Insert "involving significant physical exertion or risk" after "activity".

The Greens believe that the definition of "recreational activity" is extremely vague, uncertain and broad. On one interpretation the draft could include any activity conducted in any public place. It seems to encompass everything that one does outside of work and sleep. It covers a range of activities such as sporting events—including school sporting events—horse riding and bungee jumping through to festivals, concerts, walking and sunbathing on the beach. The definition is far wider than that recommended by the Ipp inquiry. Justice Ipp and his panel, as many members would be aware, handed down their final report on the review of the law of negligence on 30 September 2002. The panel looked closely at definitions of recreational activities. The report outlined concerns about wide definitions of recreational activities. It argued that such definitions:

> … could cover activities that do not involve any significant degree of physical risk. We think that a narrower definition that defines activities that involve significant risks of physical harm would be more appropriate. This is because such activities are the sort that people often participate in partly for the enjoyment to be derived from risk taking.

The panel recommended that the definition of "recreational activity" is "an activity to be undertaken for the purpose of recreation, enjoyment or leisure which involves a significant degree of physical risk". If one compares this definition with the definition in the bill one can see that the definition in the bill makes no reference to a significant degree of physical risk. The definition of "recreational activity" is:

(a) any sport (whether or not the sport is an organised activity), and

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

(c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

If a risk warning has been given there will be no liability for harm resulting from a risk of a recreational activity. The Ipp report did not recommend risk warnings; instead it recommended the narrower definition of "recreational activity". The Greens amendments seek to implement the recommendations of the Ipp inquiry regarding the definition of "recreational activity". The Greens believe that this approach would be far preferable to the approach taken by this Government, which is a combination of a broader definition of "recreational activity" accompanied by risk warnings, particularly when one looks closely at the risk warning provisions which I will discuss in more detail in the next set of Greens amendments.

The Greens are concerned that the broad definition of "recreational activity" will absolve individuals and organisations of any liability and will lead to increased negligence and less incentive to take care and to take steps to lessen the impact of dangerous situations, such as the requirement of councils and other statutory bodies to keep places as safe as possible.

Examples include adequately maintaining play equipment used by children in playgrounds, discouraging people from swimming in dangerous areas, building safety fences to prevent people from falling over dangerous cliffs and tourist lookout areas, and taking safety precautions for individuals who attend festivals and concerts such as the Big Day Out. By this I mean the incentive to take safety precautions such as to hire adequate security staff, put in place adequate crowd control measures, ensure that plastic rather than glass is distributed at the events and make sure that there are sufficient water and first-aid staff available.

A recent coronial inquiry into the death of Jessica Michalik, a 15-year-old who was crushed to death at the 2001 Big Day Out concert, has recommended that festival organisers better assess the risks of crushing at such events. The Coroner recommended that festival organisers turn their minds to crowd reaction to particular performers and act accordingly and responsibly. This bill is a disincentive to risk assessment and management, and will not avoid such a tragic event from recurring. The bill allows concert organisers to put up a risk warning or to specify over loud speakers that concerts can be dangerous and people should enter at their own risk. This so-called general risk warning is specified in the bill as an adequate warning. Concert organisers are then absolved from liability if someone is injured or dies. The Greens are concerned that this legislation will discourage best-practice procedures and processes currently followed by individuals, organisations and those who organise events. I commend Greens amendments Nos 1, 2 and 3.

The Hon. JOHN HATZISTERGOS [6.21 p.m.]: The Government is unable to support the amendments. The Treasurer noted during his second reading speech that the bill already restricts new immunity for the materialisation of obvious risks to dangerous recreational activities and this is consistent with the report. However, the bill does not restrict the application of risk warning and risk waiver protections to dangerous recreational activities. The bill must apply these protections to ordinary recreational activities if the risk warnings and risk waivers are to be of any use to the community.

The law needs to be as certain as possible in this area and drawing distinctions between recreational activities will undermine that objective. As the Treasurer said, it is not just bungee-jumping operators who are facing problems with public liability; it includes local festivals and even local sewing groups, which are not necessarily dangerous activities. The bill must help organisers of softball games, not just people teaching others how to skydive. The bill must help local jazz and other arts festivals, not just rodeos and fun parks. For those reasons the Government is unable to support the amendments.

The Hon. GREG PEARCE [6.22 p.m.]: The Opposition also is unable to support the amendments. Although the Greens may be acting in good faith in moving the amendments—and superficially they appear to reflect a difference between the report's recommendations and what is being put forward by the Government—this is a significant change in the law and will be subject to a great deal of consideration and further work as time goes by. Therefore, we do not think it is appropriate to attempt to amend the legislation on the run.

The Hon. PETER BREEN [6.23 p.m.]: The amendments more accurately reflect the recommendations of the review, which used the words "significant degree of physical risk". There is no mention of the word "physical" in the bill. The bill refers to "materialisation of an obvious risk of a dangerous recreational activity". As I pointed out in my earlier remarks, that provides a wide interpretation of what might be a dangerous recreational activity. Is going into a bottle shop a dangerous recreational activity? Is going into a sex shop a dangerous recreational activity? These questions need to be determined and ought to be clarified in the legislation. It should not be left to the courts to determine these questions.

The whole thrust of the bill suggests that the courts are not doing an adequate job in the area of negligence. They are making it too complex and are not allowing plaintiffs the opportunity to recover damages for their injuries. By codifying the law of negligence it is to be hoped that we clarify these issues. However, by not using the words of the Ipp review and adopting other words that are more general opens up the possibility that many people will be excluded from otherwise legitimate claims. I therefore endorse the amendments and ask the Committee to support them.

The Hon. MALCOLM JONES [6.24 p.m.]: I oppose the amendments. I have difficulty with the words "involving significant physical exertion or risk" because that is too subjective. To some people, horse riding may be significant physical exertion but not a risk. To some people, snow skiing would be a significant physical exertion but not a risk; to others it may be both a significant physical exertion and a risk, simply a risk, or neither a significant physical exertion nor a risk. The amendments will lead to more confusion and may create more problems than they would solve. I therefore oppose the amendments.

Reverend the Hon. FRED NILE [6.26 p.m.]: Proposed section 5L, which is headed "No liability for harm suffered from obvious risks of dangerous recreational activities", makes it clear that the bill is referring to dangerous recreational activities. Proposed section 5M refers to no duty of care for a recreational activity where a risk warning is given. It would appear that the bill already covers these matters. If the amendments were passed, there would be a danger when "recreational activity" is defined as a sport, pursuit or activity for enjoyment, relaxation and leisure. Under these amendments anyone who fell over during a ball game and was hurt would be able to sue the council for injury. I believe that undermines the purpose of the bill.

Amendments negatived.

[*The Chairman left the chair at 6.27 p.m. The Committee resumed at 8.15 p.m.*]

The Hon. IAN COHEN [8.15 p.m.], by leave: I move Greens amendments Nos 4, 5, 6 and 7 in globo:

No. 4 Page 8, schedule 1 [1], proposed section 5M, line 17. Insert "and the plaintiff is not an incapable person" after "plaintiff".

No. 5 Page 8, schedule 1 [1], proposed section 5M, lines 32-34. Omit "The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.".

No. 6 Page 9, schedule 1 [1], proposed section 5M, line 14. Insert ", or a contravention of any voluntary safety standards or procedures previously implemented by the defendant or commonly applied in the industry to which the defendant belongs or other objective codes of practice such as the Australian Standards" after "safety".

No. 7 Page 10, schedule 1 [1], proposed section 5N, line 32. Insert ", or a contravention of any voluntary safety standards or procedures previously implemented by the defendant or commonly applied in the industry to which the defendant belongs or other objective codes of practice such as the Australian Standards" after "safety".

Greens amendments Nos 4, 5, 6 and 7 seek to tighten up the risk warning provisions. This is important as the primary purpose of a risk warning should be to prevent injury. It is important the provisions are adequate in order that individuals are properly warned of any risks. If a person who becomes injured or dies is an incapable person, that is a person who because of the person's young age or physical or mental disability lacks the capacity to understand the risk warning, he or she cannot sue the incapable person who is under the control of or accompanied by a capable person. The reasons for that is that there is an assumption that the capable person will relay the content of the risk warning to the incapable person or will ensure the person does not undertake the risk activity that is the subject of the risk warning.

Unfortunately, this is not always the case. The capable person may understand the risk warnings but fail to look after the incapable person. If the incapable person is injured or dies, it is just bad luck, there is no right to sue for negligence. With regard to parents, there is an additional exclusion of liability. If a parent were the subject of the risk warning and a child was under the control of, or accompanied by the parent, the child cannot sue in the event of injury or death that was due to the negligence of a person or organisation. Further to this, with regard to the risk warning itself, it is not necessary for the person the subject of the risk warning to receive or understand the warning or be capable of receiving or understanding the warning.

The Greens regard this as a serious flaw in the bill. Those who erect warnings should ensure, with threat of litigation, that the signs are fashioned in such a way as to guarantee that the person received and understood the warning. This will ensure warnings are adequate. The risk warning can be given orally or in writing and can be a general risk warning rather than one that warns of a specific risk. It can be seen from these provisions that the bill takes no account of an individual's different abilities to digest risk warnings. For instance, people from non-English-speaking backgrounds, including tourists, may not be in a position to understand risk warnings. Illiterate people, those with barriers affecting their mental capacity, people with intellectual disabilities or mental illness affecting his or her cognitive functions, and individuals with an inadequate grasp of English, if the signs are in English, will be disadvantaged. With regard to risk warnings the Law Society stated:

> Through allowing recreational activity operators to rely more heavily on warning statements and waivers, the bill may protect "shoddy" operators and remove incentives to safety improvements. This may decrease general safety standards throughout the industry and, as a result, potentially damage the hard earned reputation of the entire New South Wales tourism sector.
>
> Further, by increasing the ability of recreational activity operators to rely on waivers and warning statements, the proposed new laws may put entire groups within the community at a serious disadvantage, including those who, through no-fault of their own, are incapable of reading or understanding such documents—eg. disabled people and foreign tourists who do not speak English. Under the proposed new provisions, it is entirely likely that such people would be stripped of their right to sue for compensation on the basis of the presence of waivers or warning statements—which may not even have to be written. This is notwithstanding that these people may have no realistic opportunity to understand the magnitude of the potential risk that they are being exposed to or the fact that they would have no right to proper compensation in relation to any injuries arising as a result of these risks.

Greens amendment No. 5 deletes the provision that specifies that "the defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning". This will leave it up to the courts to decide whether the plaintiff received or understood or was capable of receiving or understanding the risk warning. There is no requirement for the risk warnings to be in signs rather than English, which would help overcome some of these barriers. There are Australian standards regulating signs to warn of risks. The bill does not require that these standards be met before the organisation qualifies for the restriction of liability. Greens amendment No. 6 ensures these standards should be complied with at a minimum in order for the warnings to be effective. I commend Greens amendments Nos 4, 5, 6 and 7 to the Committee.

The Hon. JOHN HATZISTERGOS [8.20 p.m.]: I will deal with each of the proposed amendments in turn. The Government is unable to accept Greens amendment No. 4. The amendment is just not necessary. Proposed section 5M (2) provides that risk warnings only operate in relation to incapable persons where the risk was the subject of a warning to an accompanying person or where a warning was given to a parent. This is a fair way to ensure the effectiveness of warnings, while still protecting the interests of children and disabled persons.

The Government is unable to accept Greens amendment No. 5. For the risk warning provisions to work, it is essential that the courts look at the warning from an objective perspective. Currently, risk warnings are too often the subject of pointless disputes about whether the plaintiff actually saw the sign or understood what it meant. This provision ensures the courts do not have to concern themselves about the particular characteristics of the plaintiff. Instead, the courts will simply have to consider whether, in the circumstances, it is reasonably likely that people would have been warned by the sign. The provision will still allow a court to find that a particular warning was inadequate because it would not have warned a reasonable person about the relevant risks. This is a fair protection for defendants who give reasonable risk warnings. It is consistent with the bill's intention that people accept some personal responsibility when they choose to engage in recreational activities.

The Government is unable to accept Greens amendment No. 6. The Government agrees that shoddy operators should not have the benefit of protection offered by the risk waiver and risk warning provisions of the bill. However, it is also essential that the protections offered to recreational service providers are as certain as possible. The proposed amendment would introduce great uncertainty into the law. It would be almost impossible for a court or an insurer to ascertain whether a provider was subject to or had complied with voluntary safety standards or other objective codes of practice, such as Australian Standards. The broad scope of such codes and standards would also mean that breaches that have nothing to do with safety were fatal to the effectiveness of risk warnings and waivers. Such uncertainty would undermine the reforms. That is why the bill refers to written laws of the State or Commonwealth. It is also worth noting that if a provider represents to a participant in a recreational activity that the risks are low because of compliance with voluntary codes, the provider will not be entitled to rely on a contradictory risk warning.

The Government is unable to accept Greens amendment No. 7. The Government agrees that shoddy operators should not have the benefit of the protection offered by risk waiver and risk warning provisions. However, it is also essential that protection offered to recreational service providers are as certain as possible. The proposed amendment would introduce great uncertainty into the law. It would be almost impossible for a court or an insurer to ascertain whether a provider was subject to or had complied with voluntary safety standards or other objective codes of practice, such as Australian Standards. The broad scope of such codes and standards could also mean that breaches that have nothing to do with safety were fatal to the effectiveness of risk warnings and waivers. Such uncertainty would undermine the reforms. That is why the bill refers to written laws of the State or Commonwealth. It is also worth noting that if a provider represents to a participant in a recreational activity that the risks are low because of compliance with voluntary codes, the provider will not be entitled to rely on a contradictory risk warning.

The Hon. GREG PEARCE [8.23 p.m.]: Changes to the law brought about by this legislation are already quite significant. We do not believe that these sorts of changes on the run will assist in any way.

Amendments negatived.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [8.24 p.m.], by leave: I move Democrats amendments Nos 1 and 2 in globo:

No. 1 Page 9, schedule 1 [1], proposed section 5M (7), line 12. Insert ', or a standard of Standards Australia,' after 'Commonwealth'.

No. 2 Page 10, schedule 1 [1], proposed section 5N (6), line 31. Insert ', or a standard of Standards Australia,' after 'Commonwealth'.

These amendments basically accept the precedent within the legislation that standards are set by Commonwealth legislation. It makes it easier for courts to decide what is a reasonable standard if a dispute arises. Standards Australia has a number of other standards that are formulated from workshops comprising people interested in the subject. I confess that I do not always agree with the actions of Standards Australia and believe that it should not be a self-funding body and it should have additional consumer representation. Nevertheless, Standards Australia produces standards that are accepted as good practice in Australia and it is important to have such standards. My amendments extend the concept of standards set out in legislation, which is a restricted number, to a wider variety of standards. This benchmark will reduce litigation because it will provide a standard that must be complied with. I commend the amendments to the Committee in the interests of fairness and an easier litigation process.

The Hon. JOHN HATZISTERGOS [8.26 p.m.]: For reasons similar to those given by me in relation to Greens amendments Nos 6 and 7, the Government is unable to accept these amendments by me.

The Hon. GREG PEARCE [8.27 p.m.]: The Opposition is unable to support these amendments.

Amendments negatived.

The Hon. IAN COHEN [8.27 p.m.]: I move Greens amendment No. 8:

No. 8 Page 11, schedule 1 [1], proposed section 5O, line 11. Omit "irrational". Insert instead "unreasonable".

Although the medical indemnity crisis has highlighted the fear of doctors being sued for professional negligence, the Government's proposal goes too far. Under the bill the Government will make professionals liable only in circumstances in which peer professional opinion is irrational. "Irrational" is not a legally understood concept in Australia and this measure will cause further litigation. In the Government's flurry to rewrite the law of negligence, it appears to be keen to introduce foreign concepts that will make the law even more uncertain. For this reason the Greens recommend that the word "irrational" be replaced with the word "unreasonable". After all, when will peer professional opinion, widely accepted in Australia, ever be irrational? I commend the amendment.

The Hon. JOHN HATZISTERGOS [8.29 p.m.]: The Government is unable to support the amendment. Substituting "unreasonable" for "irrational" would undo most of the benefits from the new peer acceptance test. The amendment essentially codifies existing law. That is not the Government's intention. The Ipp report recommended that a court could only be given the power to ignore peer opinion when the opinion was irrational. This formulation follows the decision in *Bolitho v City and Hackney Health Authority*, 1998 Appeals Cases at page 232. This strikes an appropriate balance between consumers and the fact that professionals are in a unique position to understand what is competent professional practice.

The Hon. GREG PEARCE [8.29 p.m.]: The Opposition is not able to support this amendment. It is interesting to note that although there is a great deal of the lawyer bashing in relation to these reforms, the

Australian Plaintiff Lawyers Association has raised concerns about these amendments and the arguments of the Greens appear to be based on those comments. Sometimes lawyers are a little like a canary in a coalmine; they pop off when the gas level becomes dangerous. Certainly, additional litigation will be required to explore the meaning of these provisions. The lawyers will be arguing that they are appropriate and will point out the problems.

Amendment negatived.

The Hon. JOHN HATZISTERGOS [8.30 p.m.]: I move Government amendment No. 2:

No. 2 Pages 11 and 12, schedule 1 [1], proposed section 5Q (1) and (2), line 26 on page 11 to line 3 on page 12. Omit all words on those lines. Insert instead:

(1) The extent of liability in tort of a person (***the defendant***) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.

The changes to proposed section 5Q clarifies the bill. It is not intended to abolish non-delegable duties altogether. The proposed changes arise from further discussions the Government has had with Justice Ipp. Instead, this provision will reflect the approach of the Ipp report more closely by requiring the courts to treat a breach of such a duty as if it were vicarious liability. This approach will still ensure that plaintiffs cannot circumvent the reforms under the bill by filing an action as a breach of a non-delegable duty. The broader question of how the courts should formulate the test for whether a non-delegable duty exists will be given further consideration in the future.

The Hon. GREG PEARCE [8.31 p.m.]: The Opposition does not oppose this amendment.

Amendment agreed to.

The Hon. IAN COHEN [8.31 p.m.], by leave: I move Greens amendments Nos 9 and 10 in globo:

No. 9 Page 16, schedule 1 [5], proposed section 30, line 21. Omit "the plaintiff". Insert instead "a dependent of the victim".

No. 10 Page 16, schedule 1 [5], proposed section 30, line 26. Omit "the plaintiff". Insert instead "a dependent of the victim".

These amendments relate to mental harm. Damages for nervous shock suffered by an innocent bystander or rescuer would be reduced by the amount of contribution the primary victim made towards his or her injuries. This is set out in proposed section 30 (3), which specifies:

> Any damages to be awarded to the plaintiff for pure mental harm are to be reduced in the same proportion as any reduction in the damages that may be recovered from the defendant by or through the victim on the basis of the contributory negligence of the victim.

The Greens see no reason why someone who had no relationship with or control over the primary victim should have their damages reduced because, unbeknown to the rescuer or the innocent bystander, the primary victim was partly responsible for his or her injuries. An example can be seen in the following: After a train crash a pedestrian, a rescuer, rushes in to help the driver in the driver's cabin, who has suffered horrific injuries. The rescuer suffers debilitating post-traumatic stress disorder as a result of witnessing the accident and the injuries of the other victims. It turns out that the driver was intoxicated at the time of the accident and therefore partly responsible for the accident. The driver's damages are reduced on the basis of contributory negligence and the damages of the rescuer are reduced on the same basis.

Why should the rescuer's entitlement to compensation be reduced because the train driver contributed to the accident? The rescuer did not know the train driver; nor was the rescuer in a position at any stage to stop the train driver from driving the train while intoxicated. It is unfair to financially punish the pedestrian for the fault of the train driver. The Greens are of the view that this bill should be amended so that plaintiffs totally unconnected with the victim should not have their damages reduced for mental harm due to the contributory negligence of the victim. Similarly, the bill specifies that a plaintiff will not receive damages for mental harm if the primary victim is unable to receive them because he or she is prevented from receiving them through this Act or any other Act. It is unfair that a plaintiff is prevented from recovering damages for mental harm because the primary victim is excluded from receiving such damages. I commend Greens amendments Nos 9 and 10 to the Committee.

The Hon. JOHN HATZISTERGOS [8.33 p.m.]: The Government is unable to support these amendments. It is of the view that it is anomalous that a bystander who suffers mental harm as a result of both the defendant's negligence and the victim's negligence can recover all the damages from the defendant alone. In cases in which the victim has been contributory negligent, the defendant is simply not responsible for all the damage done to the plaintiff. The Ipp report followed the lead of New South Wales in this regard and recommended that this approach be adopted by all jurisdictions. The proposed amendment would draw an unprincipled distinction between injured persons. Under the amendment, only dependent family members of victims would have their damages reduced. There is no particular logic in such an approach. The provision is currently a sensible provision that properly reflects responsibility for mental harm.

The Government is unable to support Greens amendment No. 10. The bill introduces a range of measures designed to increase personal responsibility. For example, this means that people who are injured because they are intoxicated or while committing serious criminal offences are not allowed to recover damages. Essentially, the bill states that it is not up to members of the community to bear responsibility for such injuries. Nor should they bear responsibility for any pure mental harm caused to bystanders or family members. In such cases the defendant is not truly responsible for the damage done to the plaintiff. It is actually the physically injured person who is primarily responsible for the damage.

It would be anomalous if a person who suffers pure mental harm could continue to recover while the person injured while intoxicated or committing a crime could no longer sue. The proposed amendment would also draw an unprincipled distinction between injured persons. Under the amendment, only dependent family members of victims would be prevented from recovering damages. There is no particular logic in such an approach. The provision is currently a sensible provision that properly reflects responsibility for mental harm.

The Hon. GREG PEARCE [8.35 p.m.]: The Opposition does not support these amendments.

Amendments negatived.

The Hon. IAN COHEN [8.35 p.m.], by leave: I move Greens amendments Nos 11 and 12 in globo:

No. 11 Page 22, schedule 1 [5], proposed section 43, lines 27-32. Omit all words on those lines. Insert instead:

(2) For the purposes of any such proceedings, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was unreasonable.

No. 12 Page 23, schedule 1 [5], proposed section 44, lines 1-13. Omit all words on those lines.

The bill effectively immunises the Government and all government instrumentalities from the consequences of a failure to exercise care for the public. The bill will result in the Crown, all government departments, public health organisations, including public hospitals, and public authorities such as the Roads and Traffic Authority and the Department of Education and Training escaping liability for causing injury to the citizens of New South Wales. The Greens are advised that these authorities will not be liable if they were not statutorily required to exercise a particular function. For instance, the Department of Education and Training has the power to maintain buildings. However, there is no statutory requirement for it to do so. If the department fails to maintain a particular classroom to the point at which a ceiling caves in and injures dozens of students and kills others, it would appear that those students have no remedy against the education department because there was no duty, only a discretionary power, on the department to maintain the building. The bill specifies clearly in proposed section 44:

> A public or other authority is not liable … to the extent that the claim is based on the failure of the authority to exercise or to consider exercising any function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in proceedings instituted by the claimant.

The Government advises that there is a common law duty for a statutory authority to maintain buildings. However, this is not clear in the legislation. The Greens believe that this will have to be tested in the courts. The way the legislation is currently drafted, it appears that if there is no statutory requirement for a public or other authority to do something and it fails to do it, it would not be held liable for negligent conduct. With regard to amendment No. 11, proposed section 43 (2) specifies that a public authority will not be liable for a breach of statutory duty unless it has acted in a way that no reasonable authority could act. This is known as the Wednesbury unreasonable test. This amendment replaces that very strict test with an ordinary unreasonable test. I commend amendments Nos 11 and 12 to the Committee.

The Hon. JOHN HATZISTERGOS [8.37 p.m.]: The Government is unable to support Greens amendment No. 11. To change the provision so that a public authority is only liable for a breach of statutory duty when it acted unreasonably may impose a higher duty than currently applies. The point of this amendment is to clarify that people cannot circumvent the other provisions in the bill for public authorities by making claims of a public law nature instead of negligence claims. As the Treasurer noted in his second reading speech, it is important to understand the distinction between an action for breach of a statutory duty and a general common law claim of negligence.

Proposed section 43 deals only with those cases in which breach of statutory duty is pleaded. It does not offer immunity from ordinary negligence claims. It is quite fair that the Wednesbury unreasonableness test, which is a public law test, applies to breach of the statutory duty cases. The Government is unable to accept Greens amendment No. 12. The amendment misunderstands the purpose of proposed section 44. As the Treasurer pointed out in his second reading speech, this section only applies to regulatory functions, such as licensing. These are functions that can only be exercised by public authorities. It will not cover ordinary maintenance functions, such as maintaining school buildings.

Because regulatory functions have a uniquely public character, a private person is not normally able to ask a court to order a public authority to carry them out. The bill recognises that, under the current law, it is anomalous that a private person could nonetheless seek damages from a public authority for not carrying out the same function. The bill will ensure that only those private persons who are entitled to force a regulatory authority to act are entitled to seek damages in relation to a failure to act. Of course, if an authority exercises its regulatory powers negligently, the bill will not offer the authority any special protection.

The Hon. GREG PEARCE [8.39 p.m.]: The Opposition does not support these amendments. The Treasurer made some comments today about public authorities. They were in part to address the concerns expressed by the honourable member for Vaucluse in the other place, who mentioned that the Opposition was concerned that the Government may well have been writing itself an open cheque with some of these provisions. We accept that the bill will be a model for legislation in other States. That has come about largely through the good work of the Federal Government, particularly the Assistant Treasurer, Senator Helen Coonan. We do not see any purpose in supporting these two amendments.

Amendments negatived.

The Hon. JOHN HATZISTERGOS [8.40 p.m.]: I move Government amendment No. 3:

No. 3 Page 23, schedule 1 [5], proposed section 45. Insert after line 20:

(2) This section does not operate:

(a) to create a duty of care in respect of a risk merely because a roads authority has actual knowledge of the risk, or

(b) to affect any standard of care that would otherwise be applicable in respect of a risk.

The Government is amending this clause to clarify that the new nonfeasance in unity cannot be construed as increasing the standard of care currently required by roads authorities. If the immunity does not apply the authority will be judged by the ordinary principles of negligence, including those contained in proposed section 42 of the bill.

The Hon. GREG PEARCE [8.40 p.m.]: The Opposition is pleased that the Government has moved this amendment and will not oppose it. However, we have some concerns about the Government's ability to manage insurance schemes and its obligations in relation to those schemes. I look forward to seeing the Government lift its game.

Amendment agreed to.

The Hon. IAN COHEN [8.41 p.m.], by leave: I move Greens amendments Nos 13 to 18 in globo:

No. 13 Page 26, schedule 1 [5], proposed section 52, line 3. Insert "reasonable" before "conduct".

No. 14 Page 26, schedule 1 [5], proposed section 52, lines 16 and 17. Omit "in the circumstances as he or she perceives them".

No. 15 Page 26, schedule 1 [5], proposed section 52, line 19. Insert "or serious injury" after "death".

No. 16 Pages 26 and 27, schedule 1 [5], proposed section 53, line 23 on page 26 to line 6 on page 27. Omit all words on those lines.

No. 17 Page 27, schedule 1 [5], proposed section 54, line 13. Omit "(on the balance of probabilities)".

No. 18 Page 27, schedule 1 [5], proposed section 54. Insert after line 30:

(6) A determination for the purposes of this section as to whether conduct constitutes an offence is to be made on the basis of the criminal standard of proof.

The Greens believe that part 7 of the bill, relating to self-defence and recovery by criminals, is extremely harsh. The part provides that there will be no civil liability for injury, death or damage to property arising from conduct carried out in self-defence if the conduct to which the person was responding was unlawful. While the conduct must be reasonable, to test for a reasonable response is totally subjective. In order for the conduct not to be classified as self-defence, it must not be a reasonable response in the circumstances as he or she perceives it. This negates the requirement that the conduct be reasonable. In the Greens' view the conduct should be a reasonable response as determined by the court in the circumstances of an objective test.

Proposed section 52 (3) specifies that the exclusion from liability will not apply if the person uses force that involves the intention or reckless infliction of death only. In other words, one can beat a person to within an inch of his or her life, cause brain damage, put the person on life support or in a coma, so long as the person does not die. By using the subjective test one can use excessive force to defend himself or herself or another person to stop the person depriving him or her of another person's liberty, protect property or prevent criminal trespass and escape liability so long as the person does not die. Greens amendment No. 15 inserts the words "serious injury" after "death". This will ensure that there will be civil liability if the conduct is reasonable but the person is seriously injured or dies.

The exclusion from civil liability provisions should be confined to giving protection in cases in which a person's conduct in self-defence was reasonable using our objective test. Amendments Nos 13 and 14 seek to achieve this. A subjective test will encourage assault by persons who can later claim they were acting in self-defence. This would be a very dangerous precedent, as it would enable any person, such as an abusive husband, to beat up his wife and then defend himself against a civil suit by claiming that he was acting in self-defence against unlawful assault. Similarly, provisions such as this will give those who take steps to protect themselves and their property, and police, security guards, bouncers and others, protection against liability for serious and unjustified assault. The Australian Plaintiff Lawyers Association points out that these provisions resemble the "make my day" laws introduced in some American States in the 1990s.

One such State is Florida. In the late 1990s a young Japanese exchange student, seeking directions to a party, was shot dead by a householder who later claimed protection under the law, arguing that he was in fear of his life. The Greens are also concerned about the use of the civil test—the balance of probabilities test—in proposed section 54 (1) (a), when referring to criminal matters. In criminal matters a different test is used—beyond reasonable doubt. The Greens believe this is the test that should be contained in the provision as it refers to criminal matters. There is no justification for changing the standard of proof simply because criminal matters are dealt with in legislation dealing with civil matters.

Amendment No. 17 deletes the balance of probabilities test, and amendment No. 18 inserts in the bill the requirement that a criminal standard of proof is required to ascertain whether conduct constitutes an offence. Amendment No. 16 deletes proposed section 53. This section specifies that there will be limitations on damages even if the self-defence was not reasonable. The section specifies as a general rule that even if the conduct of a defendant was not reasonable, he or she used excessive force. Damages will not be awarded unless the court is satisfied that the circumstances of the case are exceptional, and that a failure to award damages would be harsh and unjust. Proposed section 53 (2) sets out the limitations on damages, including that no damages may be awarded for non-economic loss, that is, pain and suffering. The Greens believe that if the self-defence by the defendant was excessive, the person injured should not be caught by these limitation provisions. I commend the amendments to the Committee.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [8.45 p.m.]: I support these amendments. Simply because someone appears to be committing a crime, it is important that there is not carte blanche to bash or kill them. If we are to have a penalty for a crime it should preferably be worked out by the courts rather than by Parliament, but within the framework set by Parliament and not by someone who is hotheaded at the time. There is a good story in the excellent speech delivered by the honourable member for Liverpool in the other place. Similarly, I was asleep in my house in Newtown when a person came through the window in the middle of the night. I was quite frightened, and I shouted and ran towards that person. Had I had a baseball bat perhaps I would have hit the person on the head. The person withdrew quickly.

Aborigines lived in the house next door, and when no-one was home they would enter through the window. It turned out that all the person had done was come to the wrong house. Had I killed this person with a baseball bat and then relied on that defence I would have had that on my conscience forever. The punishment should be in proportion to the crime and it should be applied in a fair and open fashion. This amendment simply gives statutory implementation to that commonsense approach. The interjectors from the Opposition suggest that anybody who appears to be committing crime has no rights and should be totally destroyed. That shows how little they have thought about the issue.

The Hon. JOHN HATZISTERGOS [8.47 p.m.]: The Government does not support Greens amendment No. 13. The Government recognises that there is a difference between reasonable and excessive self-defence. The bill gives complete immunity only for reasonable self-defence. However, people acting in self-defence who are motivated by fear may use force that a court later finds to have been excessive. The Government does not condone the use of excessive force but does not believe that homeowners and businesspeople who are simply acting to protect their lives or property should be faced with the risk of paying to their assailants damages for pain and suffering. The bill protects people who act in self-defence from the uncertainty that they may be liable if they are later found to have used excessive force. The court will retain a discretion to award damages for expenses, such as medical costs, in very exceptional circumstances.

For similar reasons the Government is unable to accept Greens amendment No. 14, and it is unable to support Greens amendment No. 15. As previously stated, the Government recognises that there is a difference between reasonable and excessive self-defence. The bill does not provide a person with immunity if he recklessly or intentionally kills another person in self-defence merely to protect property or prevent a trespass. However, the protection for self-defence would be rendered meaningless if serious injuries were also an exception to the rule. In almost every self-defence case the injuries could be serious. Although the Government in no way condones the use of excessive force to protect property, it is appropriate that the criminal law, not the civil law, deal with such cases. As previously noted, the court will retain a discretion to award damages for expenses, such as medical costs, in very exceptional circumstances.

The Government also is unable to accept Greens amendment No. 16. As previously mentioned, the Government recognises that there is a difference between reasonable and excessive self-defence. Deleting this provision would completely remove any immunity for excessive self-defence. That would mean that damages for pain and suffering could still be awarded to people committing criminal offences. This would be at odds with the need to ensure that people accept personal responsibility for the consequences of their unlawful actions. Otherwise, the same issues arise in relation to this amendment as the amendment to proposed section 52 (1).

The Government also opposes Greens amendments Nos 17 and 18. It is appropriate to use the civil standard to determine whether a criminal should obtain personal injury damages. The criminal standard applies only to criminal cases. The standard should not apply to a civil matter, in which the criminal is asking for damages, often from his or her victim. If these amendments were made, a criminal trial would have to take place every time a criminal sought civil damages. This would be a waste of time and money.

The Hon. GREG PEARCE [8.50 p.m.]: The Opposition does not support these amendments.

Amendments negatived.

Schedule 1 as amended agreed to.

Schedule 2

The Hon. IAN COHEN [8.51 p.m.], by leave: I move Greens amendments Nos 19 and 20 in globo:

No. 19 Page 34, schedule 2 [3], proposed section 3B, line 6. Omit "with intent". Insert instead "in circumstances reasonably likely".

No. 20 Page 34, schedule 2 [3], proposed section 3B. Insert after line 38:

(g) civil liability in respect of any conduct that constitutes an offence.

Currently the bill specifies that it will not apply if there is civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct except in the case of self-defence and recovery by criminals. However, people may cause death or injury as a result of unreasonable and highly dangerous intentional acts when they did not intend to cause injury or death. The Greens believe that the bill should be amended to deal with these situations. I commend Greens amendments Nos 19 and 20 to the Committee.

The Hon. JOHN HATZISTERGOS [8.52 p.m.]: The Government is unable to support Greens amendment No. 19. The proposed section as it stands exempts a narrow category of intentional torts from the bill, those torts which are intended to cause injury or death or that are sexual assault. The amendment would exclude a huge range of additional torts from the bill and in so doing would render it ineffective. It would undermine the Government's objective of ensuring that tort law reform applies as broadly as possible. The Government is unable to support Greens amendment No. 20. The Government has decided to exempt only conduct which constitutes a narrow range of serious offences from the bill in order to ensure that only serious criminal conduct is excluded from tort law reform. The amendment suggested by the Greens would allow a plaintiff to get around the tort law reforms by alleging that a minor offence, such as a parking offence, was committed at the same time as the injury occurred, even if the offence had no relevance to the injury.

The Hon. GREG PEARCE [8.53 p.m.]: The Opposition cannot support the amendments.

Amendments negatived.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [8.53 p.m.]: I move Australian Democrats amendment No. 3:

No 3 Page 34, schedule 2 [3], proposed section 3B. Insert after line 14:

(c) civil liability relating to an award of personal injury damages (within the meaning of Part 2) where the injury or death concerned resulted from smoking or other use of tobacco products or exposure to tobacco smoke—the whole Act,

The essence of this amendment is to retain the right of people to sue tobacco companies and to sue premises that still allow exposure to tobacco smoke. As people have known for 40 years if they read the *British Medical Journal*, or perhaps 42 years if they took any notice of what the Royal College of Physicians said, or only 38 years if they waited for the United States Surgeon General's report of 1964, tobacco is harmful. The tobacco industry has a long and undistinguished history of having denied that it causes any harm. As recently as the Senate committee inquiry in the United States, the industry stated that it did not believe that smoking is addictive; in fact it denied it. The whole research that the industry had already done was repeated in the public domain.

As I said in my second reading speech, a man who had given his life to experimenting with tobacco was told at the end of his life when the documents came out of Minnesota that the effects had already been known. So the industry is totally feral. It is very important that it not be let off from any responsibility for this, merely because there are some problems with civil liability insurance following the collapse of HIH and the events of September 11. Just because there is a crisis in the insurance industry does not mean that these people should get off. The Government has displayed an extremely poor attitude in its support of tobacco. Today the Minister stated that the Government had spent $3.3 million on the Quit campaign, which was twice what was being spent. I notice that $246 million has been spent on health education in California.

The Hon. Rick Colless: How many people live there?

The Hon. Dr ARTHUR CHESTERFIELD-EVANS: About 35 million; I am not sure exactly. Certainly the per capita consumption in California has dropped to 50 packets per adult per year, compared with United States consumption of 100 packets per adult per year. There is an immense cost benefit in taking stronger action. Smoking prevention is estimated to cost $US20 to $US40 per year of life gained; measles immunisation is estimated to cost $US15 to $US20 per year of life gained; cervical cancer screening is estimated to cost $US100 to $US500 per year of life gained; whereas treatment for lung cancer costs $US18,000 per year of life gained. In other words, treatment is cheaper than cure. The Government has been extremely remiss, as have all Australian governments, I confess—but this one is as bad as the others.

The ability to sue tobacco companies and hotels has been the only thing driving public health policy in Australia, the only thing that has made people go smoke free. Nothing has stopped tobacco companies: they have simply kept going as much as they can within the law. The only thing that has made workplaces go smoke free is the fact that they can be sued. We must not take away that ability with this bill. So I ask that the amendment be supported because it will allow people still to sue for damage caused by tobacco. Unfortunately, until the Government does something serious about tobacco such as making indoor air smoke free and running a decent Quit campaign, tort law is all we have to advance public health in New South Wales. That is why this amendment is vital—quite apart from the fact that it is extremely important for the individuals involved whose lives have been ruined by tobacco.

The Hon. JOHN HATZISTERGOS [8.58 p.m.]: The Government supports the bulk of the amendment. The Government accepts that tobacco companies should not receive any benefit from these reforms. It is clear that information is in the public domain that tobacco companies resort to all sorts of legitimate tactics to avoid legal liability for their products. The Government does not wish tobacco companies to take any comfort from these reforms. However, the Government cannot accept that a provision directed to tobacco companies should also apply to other businesses and members of the community. Accordingly, I move:

> That the amendment be amended by deleting the words "or exposure to tobacco smoke".

These words are specifically directed at covering passive smoking claims against defendants other than tobacco companies including pubs and clubs. The Hon. Dr Arthur Chesterfield-Evans is attempting by these words to achieve law reform which this Parliament has not yet supported. That is, he is trying to ban smoking in pubs and clubs. That is not the proper way to introduce such reforms. The Government cannot accept that pubs and clubs should be treated in the same way as tobacco companies. There is no suggestion that pubs and clubs have acted in the same reprehensible manner as tobacco companies. These words might also catch businesses other than pubs and clubs, such as restaurants and individuals.

It is important to remember that this bill does not apply to workers compensation claims. In moving to exclude passive smoking claims from the amendment the Government is not seeking to reduce the ability of workers to recover compensation when they are forced to endure exposure to tobacco smoke in their work. It is difficult to see why, in this day and age, people who choose to expose themselves to passive smoking should face easier tests of negligence than the tests that apply to people who are injured in other day-to-day situations. Similarly, there is no reason why people who choose to expose themselves to passive smoking should recover higher compensation than is available to everybody else. The Government's support for the bulk of the amendment is not based on any particular sympathy for people who take up smoking. People who take up smoking these days do so in the face of very explicit health warnings. But excluding tobacco companies from the benefits of these reforms is justified because of the behaviour of those companies. The same consideration does not apply to claims for passive smoking against persons other than tobacco companies.

The Hon. GREG PEARCE [9.00 p.m.]: The Opposition will not oppose the Hon. Chesterfield-Evans' amendment, as amended by the Government.

The Hon. Dr ARTHUR CHESTERFIELD-EVANS [9.00 p.m.]: I am not trying to ban smoking in New South Wales; I am merely trying to retain the existing law. This amendment will not give people any more rights than they have now. The Government has chosen not to change the law, which is slack of it, but that is another issue. I am attempting to retain the existing law with regard to the right to sue hotels. Hoteliers have had the right to declare their premises smoke free forever. They have not availed themselves of that right and, as such, have not been good to their customers.

The idea that people choose to expose themselves to passive smoking is also nonsense. In the past week I have been to two clubs for meetings, and both had appalling air quality. The rooms or restaurants I was in were serviced by the same airconditioning system that services the poker machine and smoking areas. I have not been to a pub for recreation for a long time because of the smoke. I feel excluded by the smoke in clubs and pubs because I do not like it and my choice is therefore restricted. The existing pressure on clubs and pubs is not adequate, but at least it is something. I do not accept the amendment but I will not divide on it.

The Hon. IAN COHEN [9.03 p.m.]: I support the amendment moved by the Hon. Dr Chesterfield-Evans. Passive smoking in hotels is an important issue. It affects many, including me, and restricts people from going to various areas in pubs and clubs. I commend the Hon. Dr Arthur Chesterfield-Evans for his ongoing diligence on such an important issue.

The Hon. RICHARD JONES [9.03 p.m.]: I support the original amendment moved by the Hon. Dr Arthur Chesterfield-Evans. We had a briefing today from officers of the Californian Department of Health detailing the impact of eliminating smoking in pubs and clubs. They pointed out that if smoking were eliminated in premises on one side of the street, premises on the other side would prosper. However, if smoking were eliminated in all the pubs, clubs and restaurants, business would increase considerably. All honourable members, and hopefully all Australians, know that tobacco is the single most dangerous drug in society. It kills 50 per cent of users.

It is much more dangerous than cannabis, heroin, crack or any other drug. However, by quirk of history it is legal. If it were to be introduced now people would be gaoled for life for having two or three kilograms. It is highly addictive but some members of the National Party still grow it legally. That is outrageous. This Government, which has been very slack in addressing this issue, should do whatever it can to prohibit smoking in every public place, and particularly where children are found, including in cars. The Government should accept the Hon. Dr Arthur Chesterfield-Evans' original amendment. I commend the work he is doing to improve the health of the people of Australia.

Reverend the Hon. FRED NILE [9.05 p.m.]: The Christian Democrats have always been concerned about the health effects of cigarette smoke. Our smoking regulation bill prohibited smoking in clubs and pubs, but the Government's amending bill allowed it. We sympathise with the amendment moved by the Hon. Dr Arthur Chesterfield-Evans. However, the Christian Democrats believe that the people affected should sue the tobacco companies, and I understand that this bill does not prevent that. We agree with the way the Government is handling this issue, but recognise the problem with passive smoking.

Amendment of amendment agreed to.

Amendment as amended agreed to.

Schedule 2 as amended agreed to.

Schedule 3 agreed to.

Schedule 4

The Hon. IAN COHEN [9.06 p.m.]: I move Greens amendment No. 21:

No. 21 Page 50, schedule 4.6 [9], proposed section 62A, lines 10-17. Omit all words on those lines. Insert instead:

(2) The court is to hear such of the persons likely to be affected by the application as it sees fit and may:

(a) if it decides that it is just and reasonable to do so, order the extension of the 12 year long-stop limitation period applicable to the cause of action for such period as the court determines, but not so as to extend that period beyond the period of 3 years after the date on which the cause of action is discoverable (within the meaning of Division 6 of Part 2) by the plaintiff, or

(b) if it decides that the case is an exceptional one and it is in the interests of justice to do so, order the extension of the 12 year long-stop limitation period applicable to the cause of action for such period as the court determines.

The bill proposes to change the law relating to when a plaintiff can bring a cause of action. The new limitation period will be three years starting from when the cause of action is discoverable or 12 years starting from the occurrence that gives rise to the claim, whichever occurs first. The 12-year period will be able to be extended at the discretion of the court but not beyond three years after the cause of action is discoverable. The suspension of a limitation period during incapacity will not apply to a child who has a capable parent or guardian, and discoverability of a cause of action by a minor will be assessed according to the knowledge of the parent or guardian.

The court will be able to extend a limitation period by up to one year if satisfied that the failure to bring an action on behalf of a minor was due to an irrational decision by a parent or guardian of the minor. If the minor was injured by a parent, guardian or close associate, the limitation periods will not start to run until the person turns 25 years of age. One of the limitation periods relating to children is problematic. There will be cases in which children are in the care of a parent or guardian and the limitation period will begin to run. The parents may be acting rationally, but not in the best interests of the child. Allowing an extension only in those cases in which a parent acted irrationally in not commencing proceedings on behalf of the child will result in unjust results. The Greens believe the courts should be allowed an open discretion to extend the limitation period in these cases. I commend the amendment to the Committee.

The Hon. JOHN HATZISTERGOS [9.08 p.m.]: The Government is unable to support this amendment. The new limitation scheme in the bill gives effect to the recommendation of the Ipp report. The report's recommendations were carefully thought through to balance consideration of fairness to plaintiffs on the one hand and the need to deliver certainty to defendants, especially doctors and other health service providers, on the other. The Government is committed to implementing these recommendations for the sake of national consistency and leads Australia in tort law reform. The Greens' amendment would defeat the purpose of the changes. Giving an open-ended discretion to the courts to extend the limitation period in this way will not help anyone. It will increase the cost of litigation and insurance and deter doctors, in particular, from treating people for fear of litigation.

The Hon. GREG PEARCE [9.09 p.m.]: Regrettably this package of legislation does not make everything that might be unfair fair. It is designed to achieve a balance between fairness and certainty. It does not, for example, rectify the situation we have in New South Wales, and in many other jurisdictions, in which one's occupation and work location may well impact on the compensation received, if any. Under the schemes in force in New South Wales, workers who are injured on their way to work receive different compensation than that for people who are injured in motor accidents. Others may receive no compensation at all. Whilst this is a difficult area in relation to limitation periods, the Opposition accepts that this package will be used as a model throughout Australia, and achieves a fair balance of certainty and fairness.

Amendment negatived.

Schedule 4 agreed to.

Title agreed to.

Bill reported from Committee with amendments and report adopted.

Third Reading

The Hon. CARMEL TEBBUTT (Minister for Community Services, Minister for Ageing, Minister for Disability Services, Minister for Juvenile Justice, and Minister Assisting the Premier on Youth) [9.11 p.m.]: I move:

That this bill be now read a third time.

The House divided.

Ayes, 30

Mr Breen	Mr Hatzistergos	Mrs Sham-Ho
Ms Burnswoods	Mr M. I. Jones	Ms Tebbutt
Mr Corbett	Mr Kelly	Mr Tingle
Mr Dyer	Mr Lynn	Mr Tsang
Mr Egan	Reverend Nile	Mr West
Ms Fazio	Mr Oldfield	Dr Wong
Mrs Forsythe	Mrs Pavey	
Mr Gallacher	Mr Pearce	
Miss Gardiner	Dr Pezzutti	*Tellers,*
Mr Gay	Mr Ryan	Mr Colless
Mr Harwin	Mr Samios	Mr Primrose

Noes, 4

Mr Cohen
Mr R. S. L. Jones
Tellers,
Dr Chesterfield-Evans
Ms Rhiannon

Question resolved in the affirmative.

Motion agreed to.

Bill read a third time.

COURTS LEGISLATION MISCELLANEOUS AMENDMENTS BILL

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT AMENDMENT BILL

MOTOR ACCIDENTS COMPENSATION FURTHER AMENDMENT (TERRORISM) BILL

INDUSTRIAL RELATIONS AMENDMENT (INDUSTRIAL AGENTS) BILL

WORKERS COMPENSATION AMENDMENT (TERRORISM INSURANCE ARRANGEMENTS) BILL

POLICE AMENDMENT (APPOINTMENTS) BILL

COAL MINE HEALTH AND SAFETY BILL

Bills received.

Leave granted for procedural matters to be dealt with on one motion without formality.

Motion by the Hon. Carmel Tebbutt agreed to:

That these bills be read a first time, and printed, standing orders be suspended on contingent notice for remaining stages and the second readings of the bills be set down as orders of the day for a later hour of the sitting.

Bills read a first time.

CRIMES (SENTENCING PROCEDURE) AMENDMENT (STANDARD MINIMUM SENTENCING) BILL

Second Reading

The Hon. CARMEL TEBBUTT (Minister for Community Services, Minister for Ageing, Minister for Disability Services, Minister for Juvenile Justice, and Minister Assisting the Premier on Youth) [9.22 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Government is pleased to introduce the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill. On 4 September 2002 the Premier announced the release of a consultation draft of the bill for public debate. A number of well-considered and constructive submissions on the draft bill were submitted during the consultation period. All submissions have been closely considered by senior lawyers providing advice to me on the bill, including the Solicitor General and the Crown Advocate. I am pleased to say that a number of recommendations made in submissions on the consultation draft of the bill have been incorporated in the bill. I thank all those organisations and individuals who took the opportunity to make a submission.

At the outset I wish to make it perfectly clear that the scheme of sentencing being introduced by the Government today is not mandatory sentencing. The scheme being introduced by the Government today provides further guidance and structure to judicial discretion. These reforms are primarily aimed at promoting consistency and transparency in sentencing and also promoting public understanding of the sentencing process. By preserving judicial discretion we ensure that the criminal justice system is able to recognise and assess the facts of an individual case. This is the mark of a criminal justice system in a civilised society. By preserving judicial discretion we ensure that when, in an individual case, extenuating circumstances call for considerations of mercy, considerations of mercy may be given.

In great contrast, the mandatory sentencing scheme proposed by the Opposition is a system that imposes the same penalty on all offenders, no questions asked. What the Leader of the Opposition proposes is not justice. As I have said in the House before, what he proposes is sentencing delivered by a slot machine. The Leader of the Opposition peddles a legal system in which the facts of any case simply do not matter, where sentences will be decided more often behind closed doors by the prosecutors, and not in open court by a judge. He wants to make judicial discretion a crime. Studies have also shown that mandatory sentencing laws have a disproportionate effect on both young offenders and indigenous people.

The Leader of the Opposition insists on pursuing those shallow and sensationalist proposals in full knowledge that they go against the weight of well-respected and considered legal and sociological opinion both in Australia and around the world. A report from the Law Council of Australia in September 2001 concluded that mandatory sentencing laws imposed unacceptable restrictions on judicial discretion, were an ill-conceived means of addressing crime rates and have resulted in unjust sentences when applied in other jurisdictions. The Commonwealth Senate Legal and Constitutional References Committee recently stated:

> … mandatory minimum sentencing is not appropriate in a modern democracy that values human rights, and it contravenes the Convention on the Rights of the Child.

These views are confirmed from numerous other international sources. The injustice that will flow from the Leader of the Opposition's proposals for mandatory sentencing is well demonstrated by taking some examples. Under the mandatory sentencing proposals of the Leader of the Opposition an offender with a long criminal record who cold-bloodedly plots and plans his crime will receive the same sentence as a young impetuous offender. The Leader of the Opposition proposes a system whereby the victim, subjected to prolonged physical or sexual abuse who finally snaps and turns on their abuser and kills them, or the loving elderly husband who assists in the mercy killing of his terminally ill wife will receive the same sentence as an armed robber who kills in cold-blood in the course of carrying out his evil crime. The potential for unjust and grotesque results is self-evident.

The Leader of the Opposition dishonestly seeks to suggest that obscene results will never occur in cases such as mercy killings because the offender will not be charged with murder, but with manslaughter. In making such a suggestion he once again demonstrates his complete ignorance of the operation and practise of the criminal law. If a person kills another with an intent to kill that person or to inflict grievous bodily harm upon that person, in almost every such case the person will be charged with murder. The battered wife who, after years of physical abuse at the hands of her husband, is provoked into killing him, will in almost every case be charged with murder, not manslaughter. Under our system of criminal justice invariably it is left to a jury, not the prosecutor, to decide whether the killing was a reasonable response in the circumstances and whether provocation at law is established to reduce the charge from murder to manslaughter.

The law imposes very strict criteria that must be met before provocation is established. If the battered wife is unable to meet the strict legal test of provocation, she will be convicted of murder. Under the Leader of the Opposition's mandatory sentencing regime she will be sentenced to 15 years gaol and, in his words, "no questions asked", with absolutely no mitigation. The Leader of the Opposition proposes a system under which no offender will ever have an incentive to plead guilty. This will mean that there will be more trials and these trials will be longer, meaning additional costs to the criminal justice system. This will also mean that victims of crime will be unnecessarily subjected to the ordeal of testifying and being cross-examined at a trial.

The trauma for victims does not stop there. Under the Coalition's proposals there will be increased numbers of outright acquittals as a result of the reluctance of juries to convict. It has been the experience in other jurisdictions that juries, and indeed judicial officers, have been found regularly to nullify laws and penalties that seem to them to be unjust, thereby completely subverting mandatory sentencing laws. It will turn trials into games of all or nothing. The Leader of the Opposition states that his proposals would make sentencing more consistent. The truth is that mandatory sentencing does not promote greater consistency by abolishing judicial discretion; discretion is simply given to others outside the court and beyond the public view—namely, to prosecutors. That is to say, mandatory sentencing laws will lead to a less transparent criminal justice system.

The Government's bill establishes a new sentencing scheme in new division 1A, part 4, of the Crimes (Sentencing Procedure) Act 1999—the principal Act—by setting standard non-parole periods for a number of specified serious offences set out in a table in the bill. Under the bill the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period for the offence. The bill also constitutes a New South Wales Sentencing Council to advise the Attorney General in connection with sentencing matters. As I have said, the reforms in the bill are aimed primarily at promoting consistency and transparency in sentencing and promoting public understanding of the sentencing process.

A fair, just and equitable criminal justice system requires that sentences imposed on offenders be appropriate to the offence and the offender, that they protect the community and help rehabilitate offenders to prevent them from offending in the future. The imposition of a just sentence in the individual case requires the exercise of a complex judicial discretion. The sentencing of offenders is an extremely complex and sophisticated judicial exercise. The High Court has described the various purposes and the necessary complexity of the sentencing exercise in the following terms:

> The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.

That is a quote from the judgment in *Veen v The Queen (No. 2)* from page 465 of 164 Commonwealth Law Reports by Chief Justice Mason and Justices Brennan and Dawson and also from the judgement of Justice Toohey at page 476. By introducing a regime of standard non-parole periods for a specified number of serious offences the Government will ensure not only greater consistency in sentencing but also that proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime. In conjunction with this proposed legislation the Government will continue to support the use of guideline judgments given by the Court of Criminal Appeal. Guideline judgments are another extremely useful tool in achieving consistency in sentencing and in taking into account community expectations as to the appropriate penalty to be imposed. The legislative and constitutional validity of guideline judgments in New South Wales was recently affirmed by the Court of Criminal Appeal in *R v Whyte*, New South Wales Court of Criminal Appeal 2002, page 343.

The issuing of guideline judgments has had, with respect to a number of offences, a significant impact in achieving both increases in the penalties imposed by the courts as well as overall consistency in sentencing. In particular, guideline judgments with respect to the offences of armed robbery, dangerous driving causing death or grievous bodily harm, and break, enter and steal have had a very positive impact in these areas. It is proposed that the guideline judgments already promulgated by the Court of Criminal Appeal should continue to be used by the courts when sentencing for these offences. Guideline judgments will also continue to play an important role with respect to offences that are not part of the standard non-parole period scheme. For example, I recently filed applications in the Court of Criminal Appeal for guideline judgments with respect to the offence of assault police and also in relation to taking account of other offences in sentencing. The court is to hear those applications shortly. I have also filed an application for a guideline judgment with respect to the offence of driving with a high-range prescribed concentration of alcohol. A hearing date for that application is expected to be set shortly.

I will now consider in detail some of the bill's more important provisions. The bill inserts a new section 3A into the principal Act, which sets out the purposes for which a court may impose a sentence on an offender. These purposes are to ensure that the offender is adequately punished for the offence; to prevent crime by deterring the offender and other persons from committing similar offences; to protect the community from the offender; to promote the rehabilitation of the offender; to make the offender accountable for his or her actions; to denounce the conduct of the offender; and to recognise the harm done to the victim of the crime and the community. The bill also recasts existing section 21A of the principal Act with a new section that sets out clearly identified and well-recognised aggravating and mitigating factors to be taken into account by sentencing courts in determining the appropriate sentence for an offence, if those circumstances are relevant and known to the court.

The court is also required to take into account any other objective or subjective factor that affects the relative seriousness of the offence. The requirement in proposed section 21A for a court to take into account aggravating and mitigating factors and other matters applies in sentencing for all offences, not just to offences that are subject to a standard non-parole period under proposed division 1A, part 4 of the principal Act. The identification of aggravating and mitigating factors in proposed subsections 21A (2) and (3) restate the application of such factors to the sentencing exercise as they presently apply at common law. This is made clear by proposed subsection 21A (1), which provides that the court is to take into account the aggravating and mitigating factors referred to in subsections (2) and (3) of section 21A "which are relevant and known to the court". For example, the aggravating factor under proposed subsection 21A (2) (d) that "the offender has a record of previous convictions" is to be taken into account if that factor is relevant to the sentencing exercise.

In the case of Veen (No. 2) in the High Court the majority stated how the antecedent criminal history of an offender can be relevant to sentencing. The majority stated that such a history can be relevant when it illuminates the moral culpability of the offender in the instant case or shows a dangerous propensity or a need to impose condign punishment to deter the offender and other offenders from committing similar offences. Proposed section 21A (4) provides that a sentencing court is not to have regard to any aggravating or mitigating factor specified in the section if it would be contrary to any Act or rule of law to do so. This provision makes it clear, for example, that a rule of law such as that expressed in *The Queen v De Simoni*, 1981, 147 Commonwealth Law Reports, page 383, is not affected. In the case of De Simoni the High Court held that a sentencing court may not take into account circumstances of aggravation that would have warranted a conviction for a more serious offence for which the offender was not charged. The De Simoni principle is further preserved by the operation of the concluding words of proposed section 21A (2).

Proposed section 21A (5) makes it clear that the fact that a specified aggravating or mitigating factor is relevant and known to the court does not require the court to automatically increase or reduce the sentence. Not all subjective factors present in a particular case will automatically result in the reduction or increase of a sentence. For example, the courts have consistently held that issues of youth, mental disability or cultural background will not in every case lead to a reduction of a sentence by way of mitigation. It is a well-accepted principle of sentencing that in the case of youth, general deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation. However, as the Court of Criminal Appeal recently reaffirmed in *Regina v AEM (Snr)*, *Regina v KEM*, *Regina v MM* (2002) New South Wales Court of Criminal Appeal Reports at page 58, there is a point at which the seriousness of the crime committed by a youth is of such a nature, is so great, that that principle must, in the public interest, give way.

As the High Court stated in the case of Veen (No. 2) the various purposes of punishment are guideposts to the appropriate sentence. These guideposts sometimes point in different directions. For example, the existence of a causal relationship between the commission of an offence and an offender's mental disability does not automatically produce the result that the offender will receive a lesser sentence. The presence of a mental disability in an offender may, in a particular case, be given little weight because of the overriding need to protect the community. This principle has been affirmed in a series of decisions of the Court of Criminal Appeal in New South Wales in *Regina v James Peter Engert* (1995) 84 Australian Criminal Reports at page 67, *Regina v Wright* (1997) 97 Australian Criminal Reports at page 48 and *Regina v Mitchell* (1999) 108 Australian Criminal Reports at page 85.

The bill replaces existing section 44 of the principal Act with a new section that requires the sentencing court to set a non-parole period for the sentence before setting the balance of the term of the sentence—that is, the period during which the offender may be released on parole. The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more. Current section 44 requires the court to set the total sentence and then fix the non-parole period. The replacement of the existing section is a necessary consequence of the introduction of the scheme of standard non-parole sentencing. The effect of proposed section 44 is to maintain, by a different method of calculation, the existing presumptive ratio between the non-parole period of a sentence and the period during which the offender may be released on parole.

The bill inserts a new division 1A—sections 54A to 54D—into part 4 of the principal Act. The proposed division provides for standard non-parole periods for a number of serious offences listed in the table to the division. Proposed section 54A provides that the standard non-parole period for an offence is the non-parole period set out opposite the offence in the table. The offences specified in that table include murder, wounding with intent to do bodily harm or resist arrest, certain assault offences involving injury to police officers, certain sexual assault offences, sexual intercourse with a child under 10 years of age, certain robbery and break and enter offences, car-jacking, certain offences involving commercial quantities of prohibited drugs and unauthorised possession or use of a firearm.

The standard non-parole periods set out in the table to the bill have been set taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence as shown by sentencing statistics compiled by the Judicial Commission of New South Wales. The community expectation that an appropriate penalty will be imposed having regard to the objective seriousness of the offence has also been taken into account in setting standard non-parole periods. The bill provides in section 54A (2) that the standard non-parole period for an offence represents the non-parole period for an offence in the middle of the range of objective seriousness for such an offence. The standard non-parole period provides a reference point or benchmark within the sentencing spectrum for offences that are above or below the middle of the range of objective seriousness for such an offence.

The concept of a sentencing spectrum is well known to sentencing judges and criminal law practitioners. The first important point of reference which must be considered in the sentencing exercise is the maximum penalty for an offence. The maximum penalty is said to be reserved for the "worst type of case falling within the relevant prohibition": *Regina v Tait and Bartley* (1979) 46 Federal Law Reports at page 386, the decision of Justices Brennan, Deane and Gallop at page 398. However, as the High Court observed in Veen (No. 2) at page 478, this does not mean that "a lesser penalty must be imposed if it be possible to envisage a worse case …". At the other end of the sentencing spectrum lie cases which might be described as the least serious or trivial.

The new sentencing scheme proposed in the bill introduces a further important reference point, being a point in the middle of the range of objective seriousness for the particular offence. The identification of a further reference point within the sentencing spectrum will provide further guidance and structure to the exercise of the sentencing discretion. Every sentencing exercise necessarily involves the identification by the court of where the offence lies in the spectrum of objective seriousness. In *Ibbs v The Queen* (1987) 163 Criminal Law Reports at page 447 the High Court referred at pages 451 and 452 to the need for a sentencing judge to identify where in the spectrum of objective seriousness an offence lies. Chief Justice Spigelman recently restated this principle in *Thorneloe v Filipowski* (2001) 52 New South Wales Law Reports, page 60 at page 69. The Chief Justice referred again to the principle in the case of Whyte when his Honour stated:

> However, in this State the principle of proportionality identified in Veen v The Queen (1978-1979 143 CLR 458 esp at 490; Veen v The Queen [No.2] (1987-1988) 164 CLR 465 esp at 472-3, 476 has long been held to permit, indeed to require, that a sentence should be proportionate to the objective gravity of the offence. This necessarily requires a sentencing judge to consider, at some stage in the reasoning process, the sentence that is appropriate for the particular circumstances of the crime without reference to the subjective case of the particular offender.

This principle was also enunciated by Justice Howie of the New South Wales Supreme Court in *R v Moon* (2000) New South Wales Court of Criminal Appeal Reports, page 534 at [67]-[68]. His Honour stated that after first having regard to the maximum penalty for the offence, a sentencing judge must then "consider where in the range of the conduct covered by the statutory offence, the particular criminal conduct committed by the offender falls". Proposed section 54B (2) provides that a court sentencing an offender to imprisonment for an offence set out in the table to the proposed division is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period which is longer or shorter than the standard non-parole period. Under proposed section 54B (3) the reasons for which the court may set a non-parole period longer or shorter than the standard non-parole period are only those matters referred to in proposed section 21A.

The court must make a record of its reasons for increasing or reducing the standard non-parole period, and must identify in the record of its reasons each factor to which it had regard—proposed section 54B (4). Under the bill the sentencing process remains one of synthesis of all the relevant factors in the circumstances of the case. The requirement for a court to identify each factor that it takes into account does not require the court to assign a numerical value to such a factor. That is, proposed section 54B does not require a court to adopt a mathematical or multi-staged approach to sentencing. Proposed section 54C requires a court that imposes a non-custodial sentence for an offence set out in the table to the proposed division to make a record of its reasons for doing so. The court must identify in the record of its reasons each mitigating factor that it took into account in coming to that decision.

Proposed section 54D provides that standard non-parole periods do not apply to the sentencing of an offender to imprisonment for life or for any other indeterminate period, or to detention under the Mental Health (Criminal Procedure) Act 1990. The Government recognises, however, that the question of the application of traditional sentencing principles to sentencing dispositions and detention under the Mental Health (Criminal Procedure) Act 1990 is a complex one. Accordingly, I have referred the question of whether the proposed standard non-parole period sentencing scheme should apply to sentencing dispositions and detention under that Act to the Mental Health (Criminal Procedure) Act Interdepartmental Committee, which is convened by the Criminal Law Review Division of my department.

Under proposed section 54D (2) standard non-parole periods do not apply if the offence for which the offender is sentenced is dealt with summarily. By way of consequential amendment, the bill excludes offences that are subject to standard non-parole periods from section 45 of the principal Act. That section enables a court sentencing an offender to imprisonment to decline to set a non-parole period. That is, the offender will serve the entire sentence in detention with no period of parole. The proposed amendment avoids the possibility that an offender sentenced under section 45 for an offence subject to a standard non-parole period would be subject to a shorter total sentence than an offender who was sentenced for the same offence under proposed section 44. The bill also inserts a new part 8B, sections 100I-100L, into the principal Act. The proposed part constitutes a New South Wales Sentencing Council.

The Sentencing Council is to have the following functions: advising and consulting with the Attorney General in relation to offences suitable for standard non-parole periods and their proposed length; advising and consulting with the Attorney General in relation to offences suitable for guideline judgments and the submissions to be made by the Attorney General on an application for a guideline judgment; monitoring and reporting annually to the Attorney General on sentencing trends and practices, including the operation of standard non-parole periods and guideline judgments; and, at the request of the Attorney General, preparing research papers or reports on particular subjects in connection with sentencing.

The Sentencing Council is to consist of 10 members appointed by the Attorney General, of whom one is to be a retired judicial officer, one is to have expertise or experience in law enforcement, and three are to have expertise or experience in criminal law or sentencing—including one person who has expertise or experience in the area of prosecution and one person who has expertise or experience in the area of defence—one is to be a person who has expertise or experience in Aboriginal justice matters and four are to be persons representing the general community, of whom two are to have expertise or experience in matters associated with victims of crime.

The bill inserts a new schedule 1A into the principal Act. Proposed schedule 1A contains provisions relating to the membership and procedure of the Sentencing Council. The Government is confident that this new Sentencing Council will provide an invaluable opportunity for the wider community to make a major contribution to the development of sentencing law and practice in New South Wales. It is not proposed at this time to include "attempt" offences, other than "attempt murder" offences, within the standard non-parole sentencing scheme. However, I propose to refer the question of whether "attempt" offences should be included in the scheme to the Sentencing Council for its consideration when it is constituted.

A new section 106 of the principal Act requires the Attorney General to review the amendments proposed by the bill relating to standard non-parole periods as soon as possible after two years and to report the results of the review to Parliament. The bill inserts a new section 101A in the principal Act that provides that a failure to comply with a provision of the principal Act may be considered by an appeal court in any appeal against sentence even if the Act declares that the failure to comply does not invalidate the sentence. The proposed section ensures that the courts are not relieved of the obligation to comply with the principal Act with respect to standard non-parole periods or other matters, but protects the validity of any sentence until such time as the matter is considered by an appeal court.

The bill also amends provisions of the principal Act and the Children (Criminal Proceedings) Act 1987 dealing with the suspension of a sentence of imprisonment. These amendments are consequential to the substitution of section 44 of the principal Act by the proposed Act. The bill also increases the maximum penalties for the offences of sexual intercourse with a child under 10 years of age, and attempted sexual intercourse with a child under 10 years of age—sections 66A and 66B of the Crimes Act 1900—from 20 years to 25 years imprisonment. These are abhorrent offences which call for the strongest denunciation by way of punishment. We must do all within our powers to protect young children from the evils perpetrated by sexual predators. The Government, therefore, believes that it is appropriate to increase the maximum penalties for these offences to reflect community values and expectations with respect to the protection of young children.

The Government further considers that it is appropriate to include the offence under section 66A in the standard non-parole sentencing scheme. That offence is, therefore, included in the table to the bill. A comprehensive review of child sexual assault legislation in New South Wales recently undertaken by the Criminal Law Review Division of my department revealed a number of inconsistencies and anomalies in maximum penalties for child sexual assault offences. For example, the offences of sexual intercourse and attempted sexual intercourse with a child under 10 years carry a maximum penalty of 20 years imprisonment. However, the offence of homosexual intercourse with a child under 10 years carries a maximum penalty of 25 years, whereas the offence of attempted homosexual intercourse with a child under 10 years carries a maximum penalty of only 14 years imprisonment.

The amendments to the Crimes Act 1900 proposed in the bill rationalise the maximum penalties for these offences by providing the same maximum penalty of 25 years imprisonment for sexual intercourse and attempted sexual intercourse with a child under 10 years regardless of whether the assault was homosexual in nature. In line with this rationalisation, the gender-specific and anachronistic offences of homosexual intercourse and attempted homosexual intercourse with a child under 10 years—sections 78H and 78I of the Crimes Act—will be repealed. This will mean that all sexual assault offences against children under 10 years of age will be brought under the same non-gender specific provisions. As I have said, the bill seeks to meet the community's legitimate expectation that the courts should impose sentences that are appropriate to the gravity of the offences. I commend the bill to the House.

The Hon. JAMES SAMIOS [9.23 p.m.]: I lead for the Opposition on this bill. The bill establishes a scheme of standard and minimum sentencing for a number of serious offences and constitutes a New South Wales Sentencing Council to advise the Minister in connection with sentencing matters. The reforms are aimed at promoting consistency and transparency in sentencing and promoting public understanding of sentencing. According to the overview of the bill in the explanatory note, the bill sets standard non-parole periods for a number of serious offences. A non-parole period is said to be a period of a sentence of imprisonment during which the offender must be detained and cannot be released on parole. Under the bill the sentencing court is to set the standard non-parole period as the non-parole period for an offence. Included in the proposed scheme, unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period for an offence, the court must make a record of its reasons for doing so and must identify in the record of its reasons each factor to which it had regard.

The bill also specifies the purposes of sentencing and indicates specific aggravating and mitigating factors that a court is required to take into account when determining the appropriate sentence for offences generally. The bill also reforms the law dealing with sexual assaults on children by, first, increasing the maximum penalty for sexual intercourse or attempted sexual intercourse with a child under the age of 10 from 20 to 25 years and, second, removing two redundant offences dealing with homosexual intercourse with a child under the age of 10. The Coalition will not oppose the second reading of the bill and supports the principle of minimum sentencing. However, it has grave concerns about new section 21A and the related provisions, and new section 54C. During the Committee stage I will move an amendment to delete these provisions.

The Coalition has a policy of minimum sentencing without discretion. However, the bill, which was introduced by the Government, indicates that the Government has a policy of minimum sentencing with discretion. New section 21A refers to the famous 13 mitigating factors. Paragraphs (a) to (m) detail the mitigating factors to be taken into account when determining the appropriate sentence for an offence. In essence, the section provides 13 mitigating factors that allow judges to reduce sentences below the standard minimum: excuse 1, the offending party did not cause substantial harm; excuse 2, did not plan the crime; excuse 3, was provoked; excuse 4, was acting under duress; excuse 5, is a first-time offender; excuse 6, is of good character; excuse 7, is unlikely to reoffend; excuse 8, may be rehabilitated; excuse 9, has said "Sorry"; excuse 10, did not realise they were doing wrong; excuse 11, pleads guilty; excuse 12, gives pre-trial disclosure of their defence; and, excuse 13, assists police in investigating crime.

The Coalition believes that those mitigating factors do not serve the interests of the public in providing for a minimum sentence. For that reason, we will move an amendment to delete the provision, together with the related sections of the legislation. The Opposition will also move an amendment in regard to proposed section 54C. The Coalition stands for minimum sentences without discretion, unlike the about-turn of the Government with its policy of pseudo-minimum sentences with discretion. The current system, which the Government intends to change, has a mechanism for discretion. The Government's bill merely continues the existing practice under the guise of minimum sentencing. The Opposition believes that its position on minimum sentences is acceptable to the general public.

The Opposition's policy stipulates that a sentence will not change and will be public knowledge. The result will be twofold: potential offenders will be deterred from committing crimes because mitigating circumstances will no longer mean that they receive a lenient sentence, and those who commit serious offences will go to gaol and be punished accordingly. The Opposition will move to delete new section 21A (3) and make related and ancillary amendments. We wish to delete Labor's 13 excuses, which vary from saying "sorry" to special pleading on grounds of character. It is simply a device by which the judge can ignore the set minimum sentence and give a lesser sentence. The 13 excuses make a mockery of the concept of minimum sentencing. The Coalition is determined to show up the Government for its hypocrisy.

Under proposed section 54C a judge does not have to impose a prison sentence, provided that reasons are given. In other words, a judge can allow a criminal to go free even for murder. The judge need only give reasons. However, it is a paradox because even if the judge does not give reasons, the sentence still stands, and the Coalition has obtained legal opinion to that effect. Under Labor's much flaunted standard minimum sentencing a criminal can be convicted of any crime, walk out of the court without any reason being given, and there is no redress. Subject to the Opposition moving those amendments in Committee, it does not oppose the bill.

The Hon. HELEN SHAM-HO [9.31 p.m.]: The Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill was introduced by the Government in response to community concerns. The Opposition has sought to compete with the Government in responding to community concerns. Many members of the public believe that serious offenders are not receiving adequate punishment under existing sentencing practices. In my view, there is no doubt that people should have a say when it comes to the punishment of criminals as too often they are the victims of crime. Therefore, it is only fair that their expectations of justice are met. However, as honourable members would be aware, the bill has been introduced against the backdrop of a highly politicised law and order debate. Both the Government and the Opposition have announced their intention to crack down on crime. Each has formulated harsher methods with which to do so. From listening to the Hon. James Samios, there is no doubt that they are trying to outdo one another.

Given that reducing crime is such a serious issue, it is critical that this debate does not get out of hand. As members of Parliament we need to approach the matter rationally and responsibly. We must be sure to look for long-term solutions that address the deeper social causes of crime. Most important, we must not use community fears for political gain. In his second reading speech the Minister said that the reforms would give members of the judiciary greater guidance when sentencing offenders and will produce a higher level of consistency in terms of actual outcomes. The bill aims to ensure that the punishment meted out by the courts reflects the seriousness of the crime. The bill differs to some extent from the consultation draft, which was released in September for a month of public debate. During that time a range of well-informed submissions were made to the Government. Amongst them were representations from the Law Society of New South Wales and the New South Wales Bar Association. Nevertheless, the overall substance of the bill has not changed.

The major reforms to be introduced by this bill are as follows. First, the bill sets out in detail the purposes of sentencing. Some examples are punishment, prevention, deterrence and rehabilitation. This aspect of the bill is not contentious so I shall not refer to it. As I understand it, it codifies the existing common law in relation to the underlying aims of sentencing. More controversial is the bill's proposed system of standard minimum sentencing. The bill provides for 20 serious offences including, among other things, murder, sexual assault, certain drug-related crimes and acts involving injury to police. It also contains the murder of workers who are more vulnerable to violence because of the nature of their employment. This group consists of members of the police force, but also covers emergency service employees, teachers, health professionals and members of the judiciary, to name a few.

For the 20 offences that are listed, the bill provides a minimum non-parole period—in other words, a base-line term that the offender should serve in prison. For example, in the case of the murder of a person in this newly created category of special workers, the standard non-parole period that the bill applies is 25 years. I point out that the statistics from the judicial information research system show that the standard minimum sentences set out under the bill are significantly longer than current average sentences. For example, the present average non-parole period for murder of ordinary individuals—those not in this special category—is 14 years. The new standard term is set at 20 years. The current average for attempted murder is five years. The bill would lift that to 10 years. Sexual assault would be lifted from two years to seven years. Further, the bill sets out a range of aggravating and mitigating factors that the court may take into account in order to lengthen or reduce the standard minimum. It is this power to depart from the standard minimum sentence that sets the scheme apart from a mandatory sentencing scheme.

I believe that this is the difference between the Government and the Opposition. I will give some examples. If an offence were committed in company the judicial officer could extend the prison term beyond the standard minimum. I assume that the Government had in mind the recent public outrage over the spate of gang rapes that took place in Sydney in 2000 when it drafted this provision.

Another aggravating factor is a hate crime or if the crime involved gratuitous cruelty. I do not have a problem with any of the aggravating factors that are listed. As I see it, all are issues that increase the moral culpability of an offender and are a further affront to the community's sense of decency and stability. In my opinion, they certainly should have some bearing on a criminal's sentence. As I said, the bill also uses a range of mitigating circumstances that the court may take into account in order to reduce the standard minimum prison term. Examples include, amongst other things, if the judicial officer is of the opinion that an individual is not likely to reoffend or shows positive prospects of rehabilitation.

In my view, only one of the mitigating factors is contentious. New section 21A (3) (j) provides that an individual's sentence may be reduced if the court finds that "the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability". The difficulty I have is that it does not explicitly include the mental condition of an offender as a mitigating factor. As a former social worker and lawyer, I know that a significant proportion of crime is committed by people with psychological or intellectual impairments. For example, the Department of Corrective Services has reported that approximately 13 per cent of our inmate population has a mental disability. Moreover, sometimes offenders who are either intellectually impaired or mentally ill are conscious of the ramifications of their acts but still do not really realise that their behaviour is wrong. I do not understand why the bill does not expressly cover other mental problems.

Still on the subject of mitigating and aggravating circumstances, members of the crossbench were briefed by representatives of the New South Wales Bar Association this morning. I have also received correspondence from this group, including a copy of its submission to the Government in relation to the original consultation draft of the bill. The Bar Association has made it clear that it opposes this bill. It concedes that the Government's bill is the lesser of two evils when compared with the Opposition's proposed mandatory sentencing regime. I am dismayed at the Opposition's response to the Minister's second reading. It is ridiculous to suggest that there should be no mitigating factors in sentencing. Over and above that, the Bar Association pointed out that the actual operation of clause 21A, which is the main provision on aggravating and mitigating circumstances, is not clear. I agree with the Bar Association. Indeed, I think the point is that the circumstances are not broad enough; they do not include the common law principles.

I understand that the Hon. Peter Breen will move an amendment that will resolve the problem. It will ensure that judicial officers will be able to refer to common law principles when determining appropriate sentences. When a court varies the non-parole period, the bill provides that it must produce reasons for the variation. In particular, the court must list any aggravating or mitigating factors, or refer to any common law principle taken into account, when arriving at the different sentence. Again, while this is not contentious, it is largely unnecessary because members of the judiciary are already obliged to write reasons for their decisions. I was surprised to hear that the Opposition proposes to delete proposed section 54C, which states that the court must give reasons if a non-custodial sentence is imposed. I do not understand why the Opposition wants to delete that provision, because judicial officers are already supposed to give reasons for imposing certain sentences. I state categorically that I will not support the Opposition's amendment.

The bill proposes to establish a 10-member strong Sentencing Council charged with advising the Attorney General in relation to sentencing issues in this State. In particular, it will make recommendations as to what other offences might be suitable for standard minimum prison terms or guideline judgments. I see this as a good and innovative approach. The Sentencing Council will bring together a diverse panel of experts and lay people alike. It will comprise one retired judicial officer, one law enforcement expert, three authorities on criminal law or sentencing, one person with knowledge or experience in indigenous justice issues, and four persons representing the general community, two of whom are to have expertise or experience in matters associated with victims of crime.

By setting up an advisory entity that deliberately provides for community representation, the Government hopes to listen more to the concerns of ordinary people. That is a good thing. It is intended that the Sentencing Council will allow members of the public to have a greater say over what constitutes justice in our criminal law system. I hope that the Sentencing Council will keep members of the judiciary abreast of the community's views and values so that more appropriate sentences will be issued.

I also received correspondence from the New South Wales Law Society regarding this bill. As I said before, the criminal law committee made a detailed submission to the Attorney General on the consultation version of the bill. In it, the Law Society criticised the new sentencing regime on the basis that it threatened judicial discretion and stood to undermine the independence of the courts. I agree with the Law Society. Furthermore, the Law Society pointed out that research both here and abroad demonstrated that by legislating away judicial discretion governments—and now Oppositions—have actually caused injustice rather than dispensed it. Moreover, studies have shown that this lifts administration costs.

Offenders are less likely to enter guilty pleas, electing instead to go to trial. This of course costs time and money, increases court delays and strains court resources. Ultimately, this is an economic burden that the community must bear. On 30 October I received another letter from the Law Society in which it made clear that the changes that have been made to the consultation draft have done little to address its concerns. Ultimately, the Law Society has maintained strong opposition to the standard sentencing scheme from the beginning. As I said before, the Bar Association also opposes the bill. I refer honourable members to an article written by Mr Stephen Odgers, SC, who is the chair of the Bar Association's criminal law committee. The article entitled "Sentencing debate has fallen victim to political expediency" was published in the *Sydney Morning Herald* on 26 September 2002.

In the article Mr Odgers pointed out that over the past 10 years courts have in fact steadily increased average sentences. Despite that trend, there has been no decrease in crime. For many of us, this merely confirms what we already know. As I have said so many times before in this House, complex problems require complex solutions. Simply imposing harsher sentences does little to address the diverse and deeply entrenched conditions that give rise to crime. Indeed, there is strong evidence that imprisonment worsens the problem by institutionalising and brutalising inmates. Mr Odgers also referred to research that found that when people understand the entire factual context of the case and the subjective features of the offender they often set shorter sentences than judges.

This is an important point. It goes to show that the public's frustration over recent sentencing outcomes stems largely from a lack of information. I note that the New South Wales Young Lawyers criminal law committee opposes the bill as well. They too argue that the reforms reflect a lack of faith in the judiciary. They also say that despite recognising rehabilitation as a purpose of sentencing, in reality the bill overwhelmingly favours punishment and deterrence. That is absolutely true. Both the Government and the Opposition are trying to outdo one another by favouring punishment and deterrence. I do not think punishment necessarily deters as indicated by the research. Indeed, the New South Wales Young Lawyers go even further to argue that the bill ignores other settled aims of sentencing, such as proportionality, totality, parity and mercy. As I said, I have grave reservations about this bill. The Hon. Peter Breen's amendment should improve the bill, and I foreshadow my support for the amendment. I do not support this bill, but I will not oppose it by causing a division.

The Hon. IAN COHEN [9.47 p.m.]: The Greens strongly oppose the Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill, which establishes a scheme of standard minimum sentencing. The Greens are opposed to any legislation that seeks to curb or influence judicial discretion. Judges will feel compelled to hand down the minimum sentence, even though, looking at all the circumstances of the case and the mitigating circumstances, he or she may be of the view that a lesser penalty is warranted. This bill will again lead to increased imprisonment rates, with no corresponding reduction in crime rates. Incarceration rates continue to soar under the policies of the Carr Government.

There were 6,407 inmates in 1995, when I was elected, but by 30 June 2001 there were 7,750, and that number is expected to increase to more than 8,200 for the 2002-03 financial year. The cost of holding a prisoner in gaol can be as high as $64,486, compared with $3,150 per year for community-based options. The Government is spending more than $500 million a year on maintaining prisons, which is about $80 a year for every man, woman and child in New South Wales. This figure does not include the capital cost of building extra prisons to accommodate the ever-expanding population of prisoners. The millions of dollars spent on incarcerating individuals would be much better spent on programs that reduce crime, such as early intervention programs and education and social support programs.

This bill is well on the way to mandatory sentencing-that most despicable, discredited unjust and discriminatory sentencing regime that operates in parts of Australia. While mandatory sentencing continues to operate in Western Australia, it has been wound back in the Northern Territory since the Labor Party was elected to govern there. When it was operating in the Northern Territory, mandatory sentencing led to some inhumane, cruel and frankly bizarre results. The most tragic case is that of James Wurramarrba, known as Johnno, who hanged himself a couple of days short of completing a 28-day sentence imposed for stealing stationery worth about $50. This sad young man should never have been in detention. Since his death it has emerged that he was coming off drugs and petrol. He suffered chronic headaches and was angry, lonely, moody, sometimes violent, and complained of hearing voices. He had suggested that he was mad and once threatened to kill himself.

Another case is that of an Aboriginal mother of three who walked into a flat through an open door, took food from a table in the flat and went outside and fed her children on the footpath. She was sent to gaol and her children stayed with her family. Other cases include that of a 29-year-old homeless man who stole a towel and was sentenced to 12 months in prison. It came to light during sentencing that he was cold and had used the towel to keep himself warm at night. A 22-year-old man stole biscuits and cordial and received 12 months, a 16 year old was sentenced to 28 days for receiving a bottle of stolen spring water worth $1; an 18-year-old woman got 28 days for receiving two litres of stolen petrol; and a 30-year-old man who stole two cartons of eggs was sentenced to 14 days imprisonment.

When it was operating, the Northern Territory legislation did not reduce crime rates whatsoever. Australian Bureau of Statistics figures show that in 1997, robbery and property offences fell by almost 500 cases, but when mandatory sentencing was introduced in 1998 they rose, with an 8.8 per cent increase in offences involving unlawful entry with intent, which includes burglary and break and enter offences. The same occurred in Western Australia, where the number of property offences rose after the introduction of mandatory sentencing.

Rather than introduce minimum sentencing and mandatory sentencing, the Government could show leadership and implement a policy flagged by the New South Wales Bureau of Crime Statistics and Research [BOCSAR], which examined the idea of abolishing all prison sentences of six months or less and replacing them with non-custodial penalties such as fines, community service orders and home detention. Ross Gittins of the *Sydney Morning Herald* reported on this idea on 30 October in the following terms:

> Each of these punishments would be a lot cheaper than incarceration. The dearest of them—home detention—costs about $60 a day.
>
> The study—by Bronwyn Lind and Simon Eyland—found that most of the prisoners serving sentences of six months or less were in for less-serious offences, such as theft, minor assault or a driving or traffic offence.
>
> More than 20% of them were Aborigines or Torres Strait Islanders, even though such people make up only 2% of the overall population.
>
> It found that abolishing short sentences would reduce the number of admissions to prison by 40%—from about 150 a week to 90. And this would reduce the size of the prison population by about 10%

The Greens would support such an initiative. This bill is a comprehensive failure in its supposed attempts to improve the delivery of justice. It fails on every count. It will undermine the judicial system, fail perpetrators of crime and victims alike, and most importantly it will fail the community at large. The purpose of having magistrates and judges decide on sentencing is to ensure that each case is considered on its merits. This is a basic concept—and our criminal justice system is built around it. To undermine this aspect of our legal system is to fundamentally misunderstand what it endeavours to achieve. The Greens are strongly opposed to this bill on that basis. Many groups are opposed to this bill, and that demonstrates how ill-conceived it is. The Law Society, for example, has opposed this bill on the basis that it will undermine the traditional sentencing function of the court.

The Government claims that it will further the delivery of justice by increasing consistency in sentencing and the length of maximum sentences. Justice is not about consistency in sentencing for particular crimes. It is about the consideration of circumstances and ensuring that the punishment fits the crime. The measure of a civilised society is the way in which our society treats its most vulnerable. Often the most vulnerable members of our community are those who commit offences. In New South Wales statistics relating to the prison population show that 75 per cent of inmates have an alcohol or other drug problem, 64 per cent of inmates have no stable family and many suffered child abuse or neglect, 60 per cent are not functionally literate or numerate, 60 per cent did not complete year 10, 44 per cent are long-term unemployed, 20 per cent are homeless prior to imprisonment, 21 per cent of prisoners have attempted suicide, 25 per cent to 33 per cent of prisoners have a mental illness, and 73 per cent of female inmates were previously admitted to psychiatric or mental health units.

There has been some shocking public information recently about the state of our prisons. The *Good Weekend* reported that according to David Heilpern, a New South Wales magistrate, up to 25 per cent of young men in New South Wales gaols have been raped, some every day. Other experts interviewed by the *Good Weekend* thought Mr Heilpern's figure was conservative. Other inmates are contracting serious and sometimes fatal diseases in gaol, such as hepatitis and HIV-AIDS. Inmates, and more generally those who offend, and repeat offenders, are deserving of our compassion and they deserve to be treated fairly and to have their rights respected. The Government, in introducing this bill, is failing to appreciate how the judicial system currently aims to deliver justice at this level. By slapping a standard sentence on anyone who commits a particular crime is not justice; it is the reverse. It is draconian and backward. With this bill the Government has fallen victim yet again to populism and lowest common denominator solutions to the law and order problem.

The so-called problems with our legal system are often supported by anecdotal and ill-informed examples of judicial decision making. This bill buys into this very mentality. It is an indictment of the Government, and the Government ought to be ashamed of it. This bill, and its related regime, will only serve to increase social dislocation and add a further economic cost upon society by increasing incarceration rates, as well as diverting resources away from real and lasting solutions that could address the underlying causes of crime. For example, in September this year, an interim report was handed down after an inquiry into mental health services in New South Wales that was undertaken by a committee of this House. The report highlighted the need for a revolutionary improvement of the mental health system, as it is marred by a lack of funding, beds and qualified staff, and a total absence of services in some regional and rural areas. This shameful situation is not being tackled by the Government, and yet would be an obvious area to tackle if the Government was serious about crime prevention.

At present it is fashionable to scapegoat lawyers and the judiciary rather than face up to complex social problems. There appears to be an increasing tendency in political forums and in the popular media to denigrate lawyers, prosecutors and, in particular, the judiciary. The Government seems to enjoy buying into this populist mentality, as it makes it easier for it to win votes and to avoid having to tackle complex social problems. This is an irresponsible and pitifully short-sighted approach, and ultimately this approach will fail because it is poorly motivated. In taking this approach the Government is feeding public expectations that complex social problems can be solved by instant and poorly conceived legislative solutions—an example of irresponsible government and a style we have sadly come to expect from the current Government. The Greens have received compelling submissions from legal academics and organisations regarding this bill. For instance, Professor David Brown argued in an article published in the latest *Law Society Journal*:

> The standard minimums set out constitute a significant increase in current tariff levels. They range from a 25% increase in the case of murder - from a current average non-parole period of 14 years to 20 years standard minimum - to a more than 300 per cent increase in relation to aggravated sexual assault and supply commercial quantities of drugs - from three years to 10 years. Quite how the particular minimums were arrived at is not known.

Professor Brown continued:

> There are many objections to the Government's policy; for example, it will produce distorting effects elsewhere in the system, prosecutorial discretion will be enhanced, plea-bargaining pressures will increase, and the prison population will increase even further at considerable social and economic cost, expending resources which could more usefully be devoted to crime prevention and social programs.
>
> A key object to the proposed legislation is that, at a stroke, current tariffs for a wide range of offences are being increased dramatically. Contrary to the process on a guideline sentencing application before the Court of Criminal Appeal in relation to a specific offence category, these increases cover a swathe of offences and have been formulated in secret without consulting interested parties, including the judiciary, on undisclosed criteria.

He concluded:

> The Government's proposed standard minimum sentencing policy has been conceived in secrecy and haste, and amounts to a significant escalation in sentencing tariffs across a range of offences without consultation and on unarticulated criteria, and constitutes a considerable shift towards sentencing by Parliament, prey thereafter to a never-ending populist escalation.

The Bar Association opposes the bill because it imposes fetters on judicial discretion. Proposed section 54B (2) is likely to be interpreted as a statutory presumption that significantly fetters sentencing discretion; and the bill is likely to result in a substantial increase in the length of prison sentences for the nominated offences without sound policy justification. An eminent legal scholar, Stephen Odgers, SC, recently commented on the bill as follows:

> In sentencing offenders, judges are expected to focus on the welfare of the community and the balance of public interests. Politicians also have an obligation to act in the public interest—not to resort to populism with expensive and ineffective panaceas, not to sacrifice what is just for political expediency.

The Greens are strongly opposed to the bill.

Debate adjourned on motion by the Hon. Dr Arthur Chesterfield-Evans.

ADJOURNMENT

The Hon. MICHAEL EGAN (Treasurer, Minister for State Development, and Vice-President of the Executive Council) [10.02 p.m.]: I move:

> That this House do now adjourn.

KHANCOBAN COMMUNITY TECHNOLOGY CENTRE

The Hon. RON DYER [10.02 p.m.]: On Tuesday 5 November I represented the Hon. Kim Yeadon, Minister for Information Technology, at the opening of the Khancoban Community Technology Centre in the Wagga Wagga State electorate. The *CTC@NSW* program is a joint Commonwealth-State initiative, and the

Commonwealth Government is providing a total of $8.2 million through its Networking the Nation Program to help establish and operate centres in the CTC program. The total budget jointly provided by the State Government and the Commonwealth amounts to an impressive $15.5 million. In the case of Khancoban the community received $131,495 to fund equipment, office space and the employment of a centre manager. In addition to the many new services and opportunities provided by CTCs, Khancoban CTC plans to offer a range of specialist programs for young people, including study groups and homework clubs. These programs allow young people to meet in a warm and informal atmosphere and work together to solve problems, share experiences and learn useful tips about researching and learning online.

Khancoban has joined the *CTC@NSW* network, which provides it with a dedicated web site for the CTC, free access to New South Wales Government online services and professional guidance in marketing and business development. Computer training, access to the Internet and digital equipment hire are also services on hand at the new CTC in the Khancoban shopping centre. Important training programs in everything from how to use a computer or send an email to digital camera training are available. It is vital in the information age to use new technologies to empower all people, including those living in rural and regional communities. The Khancoban project would not have got off the ground were it not for the hard work of the Khancoban United Volunteers Association and members of the Khancoban community. However, the hard work and commitment demonstrated by the Khancoban community is well rewarded in that CTCs offer exciting new learning opportunities including daily access to the specialist skills of the CTC staff, especially its enthusiastic centre manager, Jane Saxton.

One of the most successful programs at the Khancoban CTC comprises the after school, homework and study clubs. It is a reality of our modern information-based economy that almost every new job demands basic computer skills. In addition, the trend towards jobs that require increasingly sophisticated skills levels is continuing. It is no exaggeration to say that the opportunity to access computers in a local CTC could change a young person's life. Young people are by no means the only ones to benefit from the resources of a CTC; mature age students have found great advantage from the CTC. If we are to meet the technological needs of all Australians, irrespective of background or circumstance, we need strong commitment, not only from government but also from local authorities, business, education providers and community and voluntary groups. The Khancoban CTC already has a strong commitment to developing community business and government partnerships that work for everyone's benefit.

One of the most powerful potentials of new technologies and the Internet is that they enable work and education to come to people. I was delighted to learn at Khancoban that there are many talented young music students living in regional New South Wales who are now able to participate in music lessons at the Sydney Conservatorium of Music through the videoconferencing facilities at their local CTCs. Through these facilities the Sydney conservatorium, one of Australia's leading cultural learning institutions, can extend to music students and teachers in remote and regional areas opportunities for music training and performance. At this early stage, in collaboration with CTCs, the Sydney Conservatorium of Music has delivered over 200 music lessons to students in several regional centres in New South Wales, with more joining as the success of the program spreads. I am confident that the new CTC at Khancoban will be an important addition to the resources of this small and remote local community.

MURRAY IRRIGATION LTD

The Hon. RICK COLLESS [10.06 p.m.]: Murray Irrigation Ltd is based in Deniliquin and supplies irrigation, stock, town and domestic water to nearly 800,000 hectares of farmland in southern New South Wales, mostly in the electorates of Murrumbidgee and Murray-Darling. The area is suffering its worst ever water supply year in the 60-years since it was established. Murray Irrigation is looking at every possible option to help it survive this season, and to help its shareholders survive this season given the record low allocation of water. These measures include entering into agreements to bring forward 2003-04 releases from the Snowy scheme into autumn 2003; reducing all unnecessary expenditure and commencing a four-day week for the entire work force through to winter next year; conducting a series of workshops for shareholders to provide information and exchange of ideas on how to survive this dry year; and facilitating trade for its shareholders by eliminating all commissions on annual water trades and transfers.

It is therefore disappointing that at this time Murray Irrigation should be distracted by the type of ill-founded, baseless attack contained in the document "Troubled Waters at Murray Irrigation Limited" tabled in this Chamber on Wednesday 25 September 2002. Although it is not a public document and under the standing orders is accessible only by members of the Legislative Council, it has been widely circulated throughout the electorate of Murrumbidgee, causing damage to Murray Irrigation Ltd. The front page of the document says that it is prepared for the New South Wales Parliament, the Minister for Land and Water Conservation, the Minister for Police, the Commissioner of Police and others. This suggests that the report has been commissioned by the Parliament, which it was not. The front page of the document says that it is produced by Geoffrey Moss, a consultant for a company called CAAB Pty Ltd. Records of the Australian Securities and Investments Commission [ASIC] indicate that strike-off action is in progress against this company, which has no directors or office bearers, and has not had for years, and thus is in breach of ASIC requirements for the filing of statutory returns.

The company is said to be associated with the co-author of the report, Geoffrey Moss. Geoffrey Moss is Geoffrey Leonard Wilberforce Moss, who was made bankrupt in 1995 and delayed filing a statement of affairs until 22 July 2000. Because of his complete lack of co-operation with his trustee in bankruptcy an order was obtained from the court extending his bankruptcy to 2008. The honourable member for Murrumbidgee has advised me that he has read articles published in the Brisbane *Courier Mail* concerning Mr Moss, who has figured prominently in the last 10 or 12 years. In 1986 Mr Moss was accused in the Queensland State Parliament of impersonating an agent of the Australian Security Intelligence Organisation to obtain political information to discredit then Townsville deputy mayor Tony Mooney. An article on Friday 26 February 1999 appearing in the *Courier Mail* alleged that he was a former senior One Nation adviser with, at that time, outstanding warrants for his arrest as a result of several court judgments including one for failing to pay wages and superannuation to his employees.

Mr Moss has been associated with a number of companies other than the almost defunct CAAB Pty Ltd. These companies include Tareran Pty Ltd and Golden Arch Waste Systems Pty Ltd. While Mr Moss does not appear as an office bearer, being an undischarged bankrupt, Tareran lists as director and secretary his girlfriend, Angela Baxter, who resides at the same address given by Mr Moss to his trustee in bankruptcies, 50 Rayner Court, Yarra Junction. The director of Golden Arch, the other company, by coincidence lives next door. I mention these two companies because they figured in a Federal Court case taken by a Mr Cole, accountant of Melbourne, as liquidator of Total Management Melbourne Pty Ltd endeavouring to claw back assets that the company in liquidation had tried to claw back after liquidation.

In this case, the court set aside documents that it found had been backdated as part of a scheme to make it appear that the company had disposed of its assets to Moss's companies before liquidation when the directors knew that that had in fact not taken place. It is apparent that this person makes a living out of helping insolvent companies to defeat their creditors. In conclusion, I would like honourable members to appreciate that the "Troubled Waters" document has precisely the same credibility as its authors, Geoffrey Leonard Wilberforce Moss and CAAB Pty Ltd—that is, absolutely none whatsoever.

CHINESE MANUFACTURING

The Hon. MALCOLM JONES [10.11 p.m.]: Booming markets of the late 1990s and the early years of this century were followed by declines in markets due to terrorism, threats of war and exceptionally high unit prices of labour in the West compared with cheap labour in Third World countries, especially China. One issue which has been emerging consistently over the past 20 years, and especially in the past 10 years, and which has received a great deal of publicity—in my opinion the impact has been discussed only by a collection of esoteric people—is the industrial impact of manufacturing in China. I recently visited China and went armed with only a limited knowledge of what was taking place in that ancient land. I have to report to the House my amazement at what I saw. The growth of the manufacturing sector is staggering. China now manufacturers more consumer goods than the rest of the world put together. I met an official in Guandong who had been involved in the establishment of 15,000 foreign multinational businesses over 20 years and providing housing for the five million work force required.

Western companies are moving to establish manufacturing in China. Even RM Williams, the most Australian of institutions, has moved part of its manufacturing to China. The cutting of red tape, the very low price of labour and the absence of labour laws make manufacturing in that country very attractive. I invite honourable members to scan the labels of clothing and electrical goods to see where they are made. What does the growth of this colossus mean? Until China raises its unit price of labour as a result of shortages of labour, which is unlikely, or improvements are made to working conditions or union activity, also unlikely, the manufacturing sector in the West will decline further. Would anyone consider establishing a non-high-tech business other than in China? Even if a western-based company believed it was protected by patents, it would start off at a distinct disadvantage when competing with a China-based competitor whose base costs would be a fraction of those of other new proprietors.

Therefore, as the manufacturing base moves, as it must, to China, deflation will follow—deflation of western manufacturing, deflation of employment opportunities and probably deflation of profits for companies traditionally used to making profits. Investment norms will change. Blue-chip companies may cease to be blue chip and new companies will spring to prominence. As the new manufacturers improve quality control and reinvest in technology they will become competitive with the so-called household names or the blue-chip companies. Cheap or inexpensive products eagerly sought by western consumers will cause deflation. The values of established blue-chip companies can come under pressure. This deflation will distress superannuation funds, retirement planning and the investment industry, which is used to servicing clients in a traditional way, and property values will be hit, which could have a domino effect on societies overextended with credit, which is dependent on overvaluation of property caused by previous periods of inflation. Unions will be hit because unemployment in the manufacturing sector will be very real.

This may appear to be all doom and gloom. If we do nothing to counter the effects of what is happening, doom and gloom is all we will get. However, if we understand what is happening, make moves to take advantage of it and are prepared to harness the opportunities—particularly in the provision of services, education, information technology and finance—we can ultimately survive and prosper. Before that can happen, as a society we must be prepared to focus on the goals and to change our methods of doing things, particularly in the areas of labour, tariffs, immigration visas and education. In the meantime, we should not expect the usual startling recovery of markets. Over the next five years it is unlikely that we will return to the bull markets to which we have become accustomed. Rethinking and reconstruction are the challenge. We must face globalisation or suffer drastic reductions in our standard of living. The choices are to face it and reinvent ourselves or to fight it and become dinosaurs.

NATIONAL STATE EMERGENCY SERVICE AWARENESS WEEK

The Hon. IAN WEST [10.16 p.m.]: I wish to raise in some detail National State Emergency Service Awareness Week, which was held between 9 and 16 November. The State Emergency Service [SES] has more than 230 units across New South Wales and more than 7,000 volunteers. The New South Wales budget provided almost $30 million for the SES this year to appropriately equip it and pay the wages of a few paid staff. This year's budget also included a subsidy to cover the service's operating costs, thereby taking the pressure off volunteers to raise funds for their local units. The SES is the principal combat agency for flood and storms in New South Wales, as stipulated in the State Emergency Service Act 1989. Each year floods cost the State an average of $150 million in damages—more than any other disaster or hazard. However, our regional colleagues would be quick to remind me at this stressful time of drought that that is not an imminent problem. The SES also has responsibility for providing general rescue operations and assistance to other emergency services such as the police, fire and ambulance services. The excellent effort during the Thredbo landslide in 1997 is a good example of the SES co-operating with those other agencies.

The SES was first established in 1955 as the State Emergency Service and Civil Defence Organisation by the McGirr Labor Government in response to serious flooding and because some were concerned about the threat of nuclear war during the cold war years. If such an attack occurred, the SES would provide civil defence. It is interesting to note that fact in light of current international events. Naturally, there would be a significant role for the SES should the State be subjected to an unthinkable terrorist attack. In 1972 the SES was afforded its own Act extending statutory protection to the volunteer members of the organisation. However, it was still recognised that war remained at the top of the order of priority of action. It is no coincidence that the evacuation plans now used for floods are effective—they are based on evacuation plans to be implemented in the event of a tactical strike.

On a lighter note, it is important to stress that the SES has a special relationship with the community. As a volunteer organisation, it is part of the community, especially in rural and regional areas. SES units have valuable local knowledge because of the community members who form them. It is important and appropriate to be grateful and appreciative to those women and men for the time and effort and the risks they take on our behalf. Indeed, their assistance should be recognised for saving the State money and resources in responding to emergencies. The April 1999 hailstorm in Sydney was by far the biggest event in terms of damage caused and assistance provided by the SES. The damage bill for that storm was estimated at $2.2 billion. There were more than 40,000 calls for assistance and the cleanup lasted longer than six months. The assistance of the SES in that operation undoubtedly helped thousands of people and saved millions of dollars.

Employers should be encouraged to support their employees if they are involved in the SES by being flexible and accommodating about work. I can think of few better definitions of corporate responsibility than companies embracing their employees' requests for volunteer leave to serve in the SES. Indeed, I was appalled to see last March that the Prime Minister John Howard rejected requests from Premier Carr to extend ex gratia payments covering income lost to SES volunteers who assisted with the bushfire emergency that lasted 23 days from Christmas Day last year. Although bushfire service volunteers received payments, SES volunteers did not. These people sacrificed Christmas, New Year and paid leave to assist in that emergency, but that was how the Prime Minister of Australia decided to see out the 2001 Year of the Volunteer. Naturally, the union covering these volunteers—the State Emergency Service Volunteer Association—was also disgusted by the Prime Minister's double standards. Fortunately, the majority of people in New South Wales recognise of importance of the SES and the selfless manner in which those men and women volunteer their time to provide the community with assistance in floods, storms, fires and other natural disasters. Hopefully the SES will not be required to assist in any disasters caused by human hand. I commend the SES and its good works.

WAR ON TERRORISM

Reverend the Hon. FRED NILE [10.20 p.m.]: I wish to make some remarks concerning the war on terrorism and recent developments which indicate that the war on terrorism is no longer on our doorstep but is now within Australia. I am sure all Australians were shocked by the release of Osama bin Laden's latest message dated 13 November, which, for the first time, was particularly directed at Australia. The latest assessment is that the message was probably released from Yemen. I will read a couple of extracts that are relevant to Australia. In his message Osama bin Laden said:

> From the slave of God [Allah], Osama bin Laden, to the peoples of the countries allied with the tyrannical US Government …
>
> Reciprocal treatment is part of justice. The incidents that have taken place since the raids on New York and Washington—like the killing of Germans in Tunisia and the French in Karachi, the bombing of the giant French tanker in Yemen, the killing of marines in Kuwait and the British and Australians in the Bali explosions, the recent operation in Moscow—are only reactions and reciprocal actions.
>
> These actions were carried out by the zealous sons of Islam in defence of their religion …
>
> We warned Australia before not to join in [the war] in Afghanistan, and [against] its despicable effort to separate East Timor.
>
> It [Australia] ignored the warning until it woke up to the sounds of explosions in Bali.
>
> Its Government [the Australian Government] falsely claimed that the Australians were not targeted.

He concluded the message with these words:

> It is time that we get even. You will be killed just as you kill, and will be bombed just as you bomb.
>
> And expect more that will further distress you.
>
> In conclusion, I ask God [Allah] to help us champion His religion and continue jihad for His sake.

I am sure honourable members are alarmed by the report in today's media that the Federal police have charged a Muslim follower in Perth with conspiracy to bomb the Israeli embassy in Canberra and the Israeli consulate in Sydney. Similar events have occurred in London, where three men have been charged with conspiracy to plan the release of a poisonous gas into London's underground railway network. Last Monday Prime Minister Tony Blair made the following statement concerning that matter:

> These dangers … it can strike at any time.
>
> Today's breed of terrorist knows no bounds—of geography, of inhumanity or of scale. They are looking for ever-more dramatic and devastating outrages to inflict on the people they claim to be their enemy.

It was also reported that Mr Blair had rejected suggestions by MI5 to delay arresting the group, to discover more about its links to Al Qaeda. I know that there has been criticism of the raids by ASIO and the Federal police in Perth and Sydney on the basis that they seem to have used heavy-handed action in breaking into houses. However, the purpose of those raids was not to arrest anyone but to gather intelligence information. As these groups use Internet communications, it was important to get into the houses before computers could be wiped of information or documents destroyed. that is why such heavy-handed action was necessary.

I understand from today's ABC evening news that the Federal Government has just issued a new terrorist alert, and that it has some alarming information. The Federal Government has not released detailed information, and it has said it does not know of any specific target. However, something has been discovered which has caused the Federal Government to make the announcement, which was supported by the Leader of the Opposition. I am sure all members would share the concerns of Australians about these developments, and will work and pray to ensure that no-one in Australia, regardless of their background, is hurt or injured as a result of any terrorist attacks that might occur in the future, and that our intelligence organisations will be successful in disarming any terrorist organisation before it can cause harm.

WORLD'S FIRST LABOR GOVERNMENT

The Hon. PETER PRIMROSE [10.25 p.m.]: One hundred and three years ago, in 1899, in the Legislative Assembly of the Queensland Parliament, a debate took place on a railways bill, the Railways Standing Committee Bill. The bill was carried to the second reading stage only, at 34 votes to 32.

The Hon. Rick Colless: Was Joh Bjelke-Petersen a member of that Government?

The Hon. PETER PRIMROSE: Young Joh Bjelke-Petersen may have been a member of that Government; I am not sure. A number of amendments were put forward to the Opposition during the committee stage. After intense debate, the voting on amendments was very close. The Premier of the day had proposed that he would regard any endorsement of Opposition amendments to the Railways Standing Committee Bill as motions of no confidence. On Wednesday 22 November the Government of the day actually won by one vote, 33 to 32. However, the Premier regarded that as a motion of no confidence, and he resigned. Accordingly, a new government was brought in. On Saturday 21 November 1899, when Queensland's Governor, Lord Lamington, was overseas in England, the Premier tendered his resignation to the Lieutenant Governor, Sir Samuel Griffith. A new Premier, a man called Anderson Dawson, the member for Charters Towers, was then sworn in. The first-ever Labor Government in the world was also sworn in. That Government lasted from 1 to 7 December 1899.

The Hon. Michael Egan: Who was the Treasurer?

The Hon. Rick Colless: Was he as good as our Treasurer?

The Hon. PETER PRIMROSE: Yes. If members are interested, I can give them a full list of the ministry. However, it is worth pointing out that this albeit short-lived Government electrified the Labor movement throughout all New South Wales colonies. Anderson Dawson went on to become Queensland's first Senator and Minister for Defence in Australia's first Federal Labor Government. During that time Anderson Dawson achieved great things, but none greater than becoming the world's first Labor Premier. For those who are proud of the Labor Party's traditions and heritage, this is an anniversary well worth recording. For honourable members who are interested, there is a short but well-compiled book by Dr Ross Fitzgerald, professor of history and politics at Griffith University, who goes into great detail about that event. The book is entitled *Seven Days to Remember—The World's First Labour Government—Queensland, 1-7 December 1899*. I commend that book and this anniversary to all members who are interested in Australian political history.

FIREWOOD COLLECTION AND USE

The Hon. IAN COHEN [10.28 p.m.]: New South Wales households using firewood consume, on average, 1.2 to 1.7 million tonnes of firewood annually. This volume is roughly the same as the total annual harvest of sawlogs, woodchips and other products from all New South Wales State forests. Collected firewood consists mainly of fallen timber but also comprises standing dead timber. Firewood collection is causing serious ecological damage, especially in areas where it is mostly sourced, the few remaining woodland areas west of the Great Dividing Range. This is yet another threat to the ironbark forests I have mentioned previously, the Brigalow Belt South bioregion. Firewood smoke is also responsible for serious community health problems.

A national approach to firewood collection and use was adopted by all States, including New South Wales, and the Federal Government in 2001. In 2002 all States and Territories agreed to a code of practice for retail firewood merchants, which is a component of the national approach. The implementation of the measures outlined in the national approach needs to occur at a State level through an action plan. Unfortunately, in New South Wales there has been no leadership on addressing the impacts of firewood collection. The State Government has established an interagency task force on firewood, but we are still awaiting the delivery of a relevant action plan, due for 2002. The bureaucratic consideration of this issue is occurring in a very insular and exclusionary manner. Little consideration has been given to environment groups or to those within the industry that this will affect. The anticipated release of an action plan without the option of a mandatory code will result in widespread disappointment.

In 1999 the Australian Capital Territory Government launched a firewood strategy that included a voluntary code of practice for the industry. By the end of the firewood season within the same year only six merchants had signed on to it. This clearly indicates that there is little market advantage for a voluntary code. The merchants who did sign up found that they were financially disadvantaged when trying to compete against those who did not sign up. There was no level playing field. The Australian Capital Territory Government recognised this and made it mandatory through the introduction of legislation that requires licensing. This is now operating effectively.

Given the lack of leadership by the New South Wales Government, environment groups, supported by the Commonwealth Government, decided to invite all New South Wales and Australian Capital Territory firewood merchants to a meeting in Sydney to see what they might have in common. Merchants stated that more action is needed and most thought that a voluntary code would not work. The majority of merchants in attendance supported a compulsory code with a process of endorsement for sustainable collection practices.

Many merchants recognised that their industry was clouded with negative public opinion that is affecting their businesses. Merchants believe that their industry decline will not change unless the firewood industry can demonstrate that it is more responsible. A mandatory code for merchants is the best way to achieve this. Sustainable firewood sources exist and should be promoted where possible. These sources consist primarily of wood from plantations and woodlots established on land previously cleared for agriculture. Other alternatives include wood that is not chemically contaminated and salvaged from construction sites or waste management facilities which has no higher value use. Firewood from slow-growing woodland trees such as ironbark, redgum and box should be particularly avoided.

The New South Wales Scientific Committee has made a preliminary listing of the removal of dead trees, dead wood and logs as a key threatening process. The Greens and environment groups support this listing. While this will result in the preparation of a threat abatement plan, we do not consider it as a substitute for a strong New South Wales firewood action plan. In fact, we believe that this threat cannot be abated without a mandatory code for merchants, and resources provided for measures such as improved enforcement and education. I urge the Government to take strong action to reduce a major threat to the State's biodiversity and air quality by firewood collection and use, and to secure the future of a sustainable firewood industry.

[*Debate interrupted.*]

SUMMARY OFFENCES AMENDMENT (SPRAY PAINT CANS) BILL

PUBLIC FINANCE AND AUDIT AMENDMENT (COSTING OF ELECTION PROMISES) BILL

Bills received.

Leave granted for procedural matters to be dealt with on one motion without formality.

Motion by the Hon. Michael Egan agreed to:

That these bills be read a first time and printed, standing orders be suspended on contingent notice for remaining stages and the second readings of the bills be set down as orders of the day for the next sitting day.

Bills read a first time.

ADJOURNMENT

[*Debate resumed.*]

Motion agreed to.

The House adjourned at 10.34 p.m.