Speech by

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LAW REFORM (CONTRIBUTORY NEGLIGENCE) AMENDMENT BILL

Mr SHINE (Toowoomba North—ALP) (11.48 a.m.): I rise to support the Law Reform (Contributory Negligence) Amendment Bill before the House, and I was pleased to hear the opposition's spokesman on these matters, the member for Southern Downs, say that those opposite are also supportive of this bill. After all, the bill is a piece of legislation designed to correct, if you like, a defect arising as a result of a recent High Court decision. Today in my contribution to the debate I will briefly set out the purpose of the legislation as I understand it, the prevailing view of the law applying before the High Court decision, the finding in that High Court case of Astley and Austrust, as referred to by the member for Southern Downs, briefly set out the facts of that case and give examples of the consequences of the decision in Astley were it not for this bill. I will also touch on the question of retrospectivity and the fundamental legislative principles that the member for Southern Downs referred to.

As I understand it, the purpose of the bill is to restore the position as it was assumed to be prior to the decision of the High Court in the case of Astley v. Austrust Ltd. Prior to that decision it was largely assumed that the apportionment of provisions of the Law Reform Act 1995 as originally contained in the Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952 extended to claims in contract for damage for breach of a contractual duty of care where the duty of care owed by the defendant is the same in contract as in tort.

In Astley's case it was held that prior decisions applying apportionment legislation to breaches of contract were wrong and should not be followed in this country. Thus, it has clearly established in a binding way that if a plaintiff chooses to sue a professional in contract only then the plaintiff's claim cannot be reduced for contributory negligence.

The facts of Astley's case can be summarised as follows. Austrust Ltd, subsequently called Austrust, was a trustee company and had acted as trustee of 'conventional' trusts such as deceased estates but in 1983 decided to enter into a new field of activity, acting as a trustee of trading trusts. As part of its new activity, Austrust decided to accept appointment as trustee of a trust to set up a piggery on land in New South Wales. Austrust sought general advice from a firm of solicitors, Astley, in relation to a proposed deed of trust. The request required the solicitors to examine the proposed deed of trust and to 'let us have your comments on it in due course'.

In May 1985 the unit-holders of the trust resolved to terminate the trust. The trust was subsequently wound up and it was found then that there were insufficient assets to meet the trust's liabilities. As a result Austrust, as trustee, incurred personal liability for the extensive losses of the trust.

Austrust alleged that Astley was negligent because it did not advise that Austrust would be personally liable in dealings with third parties unless it limited its liability to the extent of the trust assets. Astley claimed that it had not been retained to advise on those matters.

The issue of negligence turned on the scope of the solicitors firm's retainer. The issue was decided against the solicitors firm by the trial judge and on appeal by the Full Court of the Supreme Court of South Australia. The trial judge found that Austrust had become exposed to liability by reason of, firstly, its own failure to assess the financial worth of the trust and, secondly, the solicitors firm's breach of duty. The trial judge found that there had been contributory negligence by Austrust and ordered that the amount it recovered—that is, $1,436,837, being damages and interest—be reduced by 50 per cent under the Wrongs Act 1936 of South Australia. The trial judge held that the contributory

negligence of Austrust entitled Astley to have the damage reduced where the duty of care is the same in contract and in tort, and concurrent liability in both causes of action is pleaded.

So far as is relevant to a discussion of the bill before the House today, the question to be determined was: if a defendant is liable in both contract and tort—that is, concurrent liability—and the plaintiff sues in contract alone or on both causes of action, can the defendant rely on the plaintiff's contributory negligence as modified by the apportionment legislation in each state, and in Astley's case section 27A of the Wrongs Act 1936 of South Australia, as a defence to the action for breach of contract?

As I said earlier, the High Court held that in those circumstances the plaintiff's claim cannot be reduced for contributory negligence. Quite unjust and unfair consequences flow from that decision. Two examples are, firstly, the very facts of Astley's case, which I have just read, in that the plaintiff's damages as a result of that interpretation of the law by the High Court were not reduced by half to reflect the plaintiff's own degree of fault or neglect. Therefore, the solicitors firm Astley had to suffer the consequence of paying the entire loss of its client, Austrust, notwithstanding that Austrust was equally at fault. The consequences for legal advisers generally and of course their insurers would be extensive and burdensome in the extreme. One could not certainly apply Ogden Nash's 1935 statement any longer. He said—

Professional men, they have no cares. Whatever happens, they get theirs.

Seriously, though, the original common law effective defence of contributory negligence was altered and varied by legislation to reflect the community's standards and notions of justice. So, too, there is a need now to attend to the adverse legal consequences of the High Court decision.

The need to address this situation was brought home to us in Queensland when the Queensland Court of Appeal confirmed the applicability of the decision in Astley in the case of Wylie v. ANI Ltd, a WorkCover case of 2000. This in fact extended the application of the law from a professional contractual situation to a common law WorkCover type case. I will not read the facts in Wylie's case, but for the important aspects of it I will refer in part to the judgment of the President of the Court of Appeal, Justice McMurdo. The judgment states—

The respondent plaintiff was injured at work first on 1 July 1994 and again on 17 September 1996. He brought an action in the District Court against the appellant defendant, his employer, for damages for personal injuries, alleging both negligence and breach of an implied term in the contract of employment.

The learned trial judge found that only the first accident occurred through fault of the appellant; the appellant failed to take reasonable steps to provide a reasonably safe system of work; this failure constituted both negligence and a breach of contract; damages were assessed at $40,437; the respondent was 50 per cent contributorily negligent. As the appellant breached the contract of employment, his Honour did not reduce the damages for that breach to take account of the respondent's contributory negligence under s 10 *Law Reform Act* 1995 ...

In other words, the decision in Astley had to be applied. The learned President of the Court of Appeal commented on that as follows—

Since Astley, where an employee suffers injury in the workplace caused by the employer's breach of contract of employment, damages will no longer be able to be reduced because of the employee's contributory negligence.

The commendable spirit of modern workplace health and safety legislation requires that employer and employee cooperatively work together to develop and maintain a safe workplace. It is not inconsistent with that spirit to require workers to be accountable for their own negligence consistent with their tortious obligations and apportionment legislation. The effect of Astley goes well beyond cases involving personal injury in the course of employment. But it is for the legislature, not the courts, to consider whether the law should be changed to reflect the position generally thought to exist before Astley.

The effect of that judgment, of course, was to call on the legislature, in the form of this parliament, to rectify the effects of the decision in Astley. Similar calls were made throughout Australia. And as I understand it, the Queensland parliament is moving in line with that general trend, if not leading the trend in that regard.

The final aspect on which I wish to make some brief comments in respect to this legislation relates to the retrospective application of the act. The member for Southern Downs made some reference to that aspect, as well. Retrospective legislation often has unsavoury aspects because it offends a fundamental legislative principle. However, in this instance, as I understand it, what the bill achieves in a sense is the restoration of the law to the position it was presumed to be in prior to the Astley case. Hence one could not properly be concerned about the bill's retrospectivity in this instance. I commend the bill to the House.