Bill introduced on motion by Mr Paul Lynch.

Agreement in Principle

Mr PAUL LYNCH (Liverpool) [10.10 a.m.]: I move:

That this bill be now agreed to in principle.

This bill is an attempt to deal with an anomaly and an unfairness resulting from the legislative response to date in New South Wales to the particular circumstances of those exposed to asbestos and of their relatives and dependants. The precise proposals in this bill represent the recommendations for legislative change made by the New South Wales Law Reform Commission in its report No. 131 entitled "Compensation to Relatives". It is a report dated October 2011 that was tabled in this Parliament by the Attorney General on 9 November 2011. I asked him a question concerning the recommendations on 20 November last year and he gave what can at best be described as a non-committal answer.

The report stemmed from a request by the then Attorney General who issued terms of reference in November 2010 to the commission. In May 2011 the commission issued a consultation paper, which is paper No. 14. This identified several possible options and invited submissions. The end result of that process was the commission's report, which is the basis for this bill. The relevant recommendations in the Law Reform Commission report that recommended legislative change are as follows:

> 2.1 Section 3(3) of the *Compensation to Relatives Act 1897* (NSW) should be amended to insert a direction that in assessing damages in a claim under that Act, a court is not to take into account any damages recovered or recoverable for the benefit of the estate of the deceased person under s 12B of the *Dust Diseases Tribunal Act 1989* (NSW).
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> 2.2 Section 2(2)(a)(ii) of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) should be amended to read as follows:
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> > (ii) any damages for the loss of the capacity of the person to provide domestic services or the loss of capacity of the person to earn, or for the loss of future probable earnings of the person, during such time after the person's death as the person would have survived but for the act or omission which gives rise to the cause of action.

Recommendation 3.1 provides as follows:

> 3.1 Section 12B of the *Dust Diseases Tribunal Act 1989* (NSW) should be amended:
>
> > (1) to allow recovery of damages for non-economic loss by an estate, so long as proceedings have been commenced by the victim before his or her death, or by the estate no later than 12 months after the victim's death; and

(2) to require, in the case of proceedings commenced after the victim's death, that both the Statement of Claim and the Statement of Particulars are filed and served within the 12-month limit.

Recommendation 3.2 reads as follows:

> 3.2 Section 12B of the *Dust Diseases Tribunal Act 1989* (NSW) should be amended to allow the joinder of defendants and cross defendants after the death of the victim.

This bill proposes to provide fair and just compensation for the relatives of victims of asbestos. Over some time Australian jurisdictions, and especially New South Wales, have provided particular and specific compensation regimes for victims of asbestos and their relatives. Regimes for compensation for injury vary widely in this State. An entitlement for compensation or not for injury varies depending on whether injury occurred while in the course of employment, while in a motor vehicle, while having a claim for public liability, whether it was caused by a public authority or not, whether it is above or below particular thresholds, which vary depending upon the case, and whether there is fault or not.

There are a number of factors that have shaped the current laws surrounding compensation to asbestos victims in this State. Australia has had the highest reported rates of mesothelioma in the world. Mesothelioma is the most common form of asbestos-related cancer. Around 7,000 Australians have died as a result of mesothelioma since 1945. It is estimated that that figure will rise to 18,000 by 2020. It is argued by some that also by 2020 other asbestos-related cancer deaths may reach 30,000 to 40,000. Mesothelioma is also one of the most lethal forms of cancer. The five-year survival rate is reported as five per cent. Most people die within 12 months of diagnosis. It is a truly awful disease. Of all the personal litigation in which I was professionally involved as an applicant and plaintiffs' solicitor for a decade and a half prior to entering this place, it is the mesothelioma cases that I remember most starkly—and I think they are probably etched in the memories of all those that are practitioners in this field.

The time between exposure to asbestos and diagnosis of mesothelioma is lengthy. It will rarely be less than 15 years and more often from 20 to 40 years. There are even cases of it being up to 60 years. White, brown and blue asbestos have all been mined in Australia. The best known mines in New South Wales were Baryulgil and Woodsreef. Australia imported asbestos as well, both in raw form and in already produced items. It was used extensively in Australia because it was resistant to fire, heat and corrosion. It was flexible and durable and could be woven into fibres. It was used in the manufacture of brakes, in products for the construction industry and in heat insulation, and it was used for various other applications. Sixty per cent of all products and 90 per cent of all consumption of asbestos fibre occurred in cement manufacturing. There were thus quite a number of groups of workers potentially exposed to asbestos. Those involved in mining and processing, those who lived nearby the mining and processing, those who transported it, either domestically or for export or import, those working in the manufacture of asbestos products, and those who used asbestos products in industry were all potentially at risk.

The use, reuse or sale of asbestos products in Australia is now banned. It was mined in Australia from 1918 to 1979. Products containing asbestos were manufactured in Australia until the 1980s. Much of the use expanded after the Second World War, with new houses and new power stations. In the 1950s this country became the world's highest user per capita of

asbestos. In New South Wales compensation for asbestos-related diseases is of two broad types—no fault workers' compensation payments and damages at common law for negligence and for breach of statutory duty. In New South Wales these latter claims are prosecuted through the Dust Diseases Tribunal. This bill concerns the latter of those two regimes, that is, the damages category.

The claim for damages can involve a number of components. Most relevantly here, one of the elements is for non-economic loss for pain and suffering, loss of amenities and loss of expectation of life. This is often referred to—as it was when I was in practice—as general damages. The general rule is that if a plaintiff who is bringing a claim for damages dies before the proceedings are completed then the claim for non-economic damages will not survive him or her. The claim for non-economic loss dies with the plaintiff. Other aspects of the claim, specifically economic loss, can be pursued by the executor of the deceased's estate. This is usually known as the estate claim. The economic loss that can be recovered includes medical and hospital expenses and gratuitous care expenses, loss of the deceased's earning capacity and funeral expenses.

In 1998, with Jeff Shaw as Attorney General, amendments were moved to the legislation that allowed the recovery of non-economic loss, the general damages by the victim's estate, despite the fact that he or she had died. This was applicable only to dust diseases cases and applicable only where proceedings had been commenced in the Dust Diseases Tribunal and were pending at the time of death. This variation from the usual rule was justified on the entirely reasonable basis that the swift onset of the disease meant that there were difficulties in claims being completed before death. Delays in hearings meant that victims' relatives did not gain the benefits of an award of general damages.

The 1998 amendments were entirely justified and entirely proper. They applied, however, only to cases where proceedings were instituted before death. There have been some further unintended consequences from that with which this bill attempts to deal. The first problem is what is known as the Strikwerda principle. This is named after a 2005 New South Wales court of appeal case. That case was called *B1(Contracting) Pty Limited v Strikwerda* [2005] NSWCA 288. It, in turn, had applied what is conceded was a longstanding principle of law. That principle is usually regarded as being best stated in the House of Lords decision in *Davies v Powell Duffryn Associated Collieries* [1942] AC 601. That principle in turn had been confirmed in Australia by the High Court in *Public Trustee v Zoanetti* [1945] 70 CLR 266.

The principle extracted from these cases was that where there is an estate action arising out of a person's wrongful death and where damages are recovered for non-economic loss, any part of these that filter through from the deceased's estate to a beneficiary who is also a dependant of the deceased must be taken into account when considering a dependency claim by the dependant. Such a dependency claim can arise under the Compensation to Relatives Act of 1897. In effect, there is the potential in some cases to rob dependants of the beneficial outcome intended by the 1998 amendments. That is, if a dependant got the benefit of a general damages component because of the 1998 amendments then it could simply be deducted from the dependency claim they would otherwise have recovered. This seems perverse and removing it seems entirely sensible.

Legislation has already been adopted in Victoria, South Australia and Western Australia to abolish the Strikwerda principle. The Strikwerda case applied the common law principle and

the Law Reform Commission has now recommended its abolition in this State.

The most obvious basis of the abolition is that the principle as it stands simply negates the 1998 amendments and this bill restores the original legislative intent from 1998. The arguments are broader than simply that although that of itself is a powerful argument. There is a fundamental unfairness in the way in which the Strikwerda principle might currently operate: People in fundamentally the same position might be treated differently and thus unfairly. This stems from the fact that for the principle to apply the non-economic loss must have flowed through to the beneficiary of the estate. If the deceased left assets by will to beneficiaries other than the dependants then there would be no deduction from the dependency claim. If, on the other hand, the deceased had left assets to the dependants there would be a deduction. So the level of compensation in a damages action would be determined by a deceased's will.

This treats dependants in a similar position to each other very differently, on a basis entirely unrelated to the characteristics of the dependants. It has the danger of encouraging asbestos victims to artificially structure their affairs by leaving assets to other than dependants when that is not what they actually would like to do. It also places at a comparative disadvantage those who are not aware of the Strikwerda principle and who do not arrange their affairs to counteract it. There is a further objection. I quote from paragraph 2.12 of the Law Reform Commission report:

> One submission argued that a victim who organised his or her testamentary affairs so as to give an appearance (contrary to the true facts) that a dependent would not benefit from any damages received in the estate action, would be behaving dishonestly. It was submitted that "recommending a course to effectively condone dishonesty should form no part of the appropriate policy in this area". It is not a strategy that we recommend as a solution to the Strikwerda question.

The commission's conclusion on the general issue of abolition of the principle was:

> We consider there is considerable force in the argument that the application of the Strikwerda principle in dependency actions effectively negates the beneficial purpose of the 1998 amendments that allowed the estate of dust disease victims to recover damages for non-economic loss.

The commission concluded that the principle "can operate in a way that is potentially unfair". That is, the outcome for dependants will vary depending upon whether a victim was able to finalise proceedings before they died or whether an action was commenced before death. There were a number of arguments made against the abolition of the principle. The commission considered these arguments and, in my view, provided logical arguments as to why they should not be adopted. One argument in opposition to abolition was that it would lead to over-compensation to dependants of asbestos victims. This would seem not to be the case—that was the view of the commission and it is also my view. The abolition simply means that dependants recover the sum substantially equivalent to what otherwise would have come to them. As the commission pointed out, the total amount of a claim to a dependant would in any event be less than the verdict to a victim before death because in the former the assessment is of the extent of the dependency upon the deceased, while in the latter it will be based upon loss of future earning capacity of the victim based upon actual earnings. The latter will always be greater than the former. Verdicts while victims are alive will thus be greater than dependency actions following a victim's death.

Another argument against abolition was that it would be likely to lead to an increase in the

number of cases commenced. The commission concluded that this was not a sufficient basis on which to reject the abolition of the principle. It makes a number of cogent arguments in relation to this. The clear reality—and certainly my experience from personal injury litigation—is that damages that are recovered while a plaintiff is alive will almost always be greater than in an estate action. Indeed it is very difficult to imagine a case where that would not be the case. This provides a very powerful incentive to limit the number of estate cases. It is better for victims and dependants if there is no estate case—that is, if the cases are finished before death. Moreover the commission points to anecdotal and completely understandable evidence that commencement and conclusion of proceedings will bring peace of mind to the victim. It is a natural and powerful response by victims to get their affairs in order, especially for their dependants. This is not likely to be influenced by abolishing the Strikwerda principle and therefore is unlikely to lead to a plethora of estate claims.

The commission points to other factors that "will limit the potential for a proliferation of dependency action". These factors include the following. Many victims will have retired by the time symptoms are exhibited, which is typical of the disease. That, in turn, makes it unlikely that a dependency claim would be justified—having retired they are unlikely to be able to provide financial support to dependants, thus there will be no dependency and no dependency action. Also, workers compensation death benefits payments to those eligible would often be the end of any dependency payments—there would be no point in bringing a dependency action. The commission provides an analysis of different recovery scenarios and its analysis of these confirms some of the points already made. Dependants of dust diseases victims will be financially better off if a claim is completed before death than those where the victim's claim is not completed before death. The conclusion of the analysis is that the Strikwerda principle "frustrates the near equality in outcome that might have been expected". It also suggests the strong incentive in completing claims before death.

Significantly, the commission concludes similarly in those cases where dust diseases workers compensation is not applicable. The pressure in these cases is also to commence and conclude actions before death—by definition they are cases where one is not proceeding against an employer. The long latency period also reduces the likelihood and degree of financial dependency. It also assumes in such cases, where the deceased was not employed by a defendant, that a defendant can actually be identified. They cannot be identified if there is no claim. In any event, identifying a defendant is much more likely while the victim is still alive. Submissions were also made to the commission that there were other factors that may in the future result in an increase in dependency action being commenced. The commission was unpersuaded by these arguments, which really do seem to be speculative and, in the end, not affected by abolishing the Strikwerda principle. These arguments are dealt with at paragraphs 2.84 to 2.92 of the report.

Apart from the argument that the abolition of the principle would lead to more dependency cases being commenced, there is a separate question of whether the abolition would have a significant impact on the cost of claims. If it did, then that would be a significant argument against abolition. The issues surrounding the funding of these claims and the fund itself are well known. I quote from paragraph 2.95 of the report:

> The claims costs argument essentially turns upon the possibility that the abolition of the Strikwerda principle will make the bringing of a dependency action more viable, for example, where there is a potential to recover damages for lost services. We recognise the possibility of this being so, yet the number of cases where this would arise would seem to be relatively small. For the

> majority of cases it appears likely that the dependants would continue to prefer to take the statutory benefits in preference to damages in a dependency action.
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> Otherwise the claims costs argument turns upon the concern that any increase in dependency actions, as a consequence of the abolition of the Strikwerda principle will result in increased legal and investigative costs. However, apart from the need to investigate any dependency issues, it would seem that much of the investigative and legal work would need to have been undertaken in relation to the estate action. If so, the extra costs associated with the dependency action would not seem to be excessive.

There is also an objection to the proposed abolition of the principle that those benefitting from this would be receiving a financial benefit unavailable to others who are dependants of persons killed in other types of injuries. This argument is easily disposed of by pointing out that there are already a whole range of differences in outcomes for claimants across the several different compensation schemes that already exist in New South Wales. In their wonderfully understated way, the commission report authors at paragraph 2.102 say:

> Comparative equality in outcome has not driven reform of the complex compensation systems that are in place in New South Wales.

The final argument considered by the commission is the James Hardie agreement and the impact that the proposed abolition of the principle may have on that. The amended final funding agreement between James Hardie and the Government and the Asbestos Injuries Compensation Fund to pay liabilities to asbestos victims affected by James Hardie products is a matter of record and well known to those interested in these matters.

Under the agreement regulatory or legislative change may give rise to an action for damages against the Government or a renegotiation of the agreement. There are several reasons why this is not a persuasive factor against abolishing the Strikwerda principle. First, James Hardie has not sought renegotiation in any of the three other States where the principle has already been abolished. Second, there is a real question about whether any action would justify the costs involved. Third, there is also an issue about whether the abolition would be a matter of such substance to justify renegotiation or an action for damages. If the argument I have presented, and which is that of the commission, is correct, there is not likely to be a significant increase in either the number of estate claims or in their cost. It is hard then to see how any action from James Hardie can rationally follow. The commission noted that it would be prudent for the Government to obtain independent actuarial advice but also notes that there is considerable difficulty in actually making predictions—that is, actuarial assessments are unlikely to significantly advance the argument one way or another.

The second substantial part of this bill and of the Law Reform Commission report is the removal of the requirement for actions for non-economic loss to be commenced prior to the victim's death. The commission recommends and the bill proposes the removal of that requirement. The fact that the commission made this recommendation is an eloquent justification and endorsement of the actions of the previous Attorney General in referring these issues last year to the commission. When the issue was publicly debated the only reform seriously prosecuted was the abolition of the Strikwerda principle. The then Attorney General's good sense in referring it to the Law Reform Commission meant that a much more considered and, indeed, broader reform package could be put forward. If the Attorney General in 2010 had simply moved to abolish the principle, the opportunity would have been lost to also remove the requirement of pre-death commencement of claims for non-economic loss.

Section 12B of the Dust Diseases Tribunal Act currently restricts the right of recovery of damages for non-economic loss by estates to cases commenced by the victim before death. The Law Reform Commission recommendation and provisions in this bill also allow the recovery of such damages by an estate if proceedings are commenced no later than 12 months after the victim's death.

The SPEAKER: Order! The time is 10.30 but the member can seek leave to continue his remarks.

By consent, General Business Orders of the Day for Bills postponed to permit the conclusion of the current debate.

Mr PAUL LYNCH: The Law Reform Commission's conclusion at paragraphs 3.41 to 3.43 is as follows:

> The problem identified in this chapter is a narrow one that appears to affect a very small number of asbestos victims and their families.
> The Parliament has previously recognised that it is appropriate to amend laws to take into account the special features attaching to asbestos related diseases, and the stress associated with the speed of their progression.
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> In light of the impact that the failure to commence proceedings in time can have on the defendants of asbestos victims, we are of the view that an amendment of s12B to remove the pre-death filing requirement, is appropriate. It would cater for those potentially rare cases where proceedings are not instituted before death, and it would remove a provision that can have arbitrary consequences.

The commission proposes also that there be a limitation of 12 months after death in which to bring the claim. The removal of the restriction is thus not open ended. Removing the restriction would provide fairness for those families that are completely and understandably overwhelmed by the horror and shock of a diagnosis of mesothelioma. The Law Reform Commission received evidence that the compressed time frames following symptoms and diagnosis mean that some families are not in a fit state to deal with lawyers and commence proceedings. They focus, once again understandably, on other things. There will perhaps be other families that do not realise that proceedings for non-economic loss must be commenced before death and the situation they are in precludes them from inquiring at the time. As well, there will be cases where the cause of death was properly identified only after death.

The arguments in favour of removing that restriction are thus sensitive and compassionate. The primary argument against the change related to the increase in claims and thus financial demands on the fund. These are serious matters that must be addressed. There were two elements to this concern. One is that claims would be deferred or delayed. The second is that new claims would now be brought that once would not have been. The first is a defendant concern that for tactical reasons claimants might delay bringing claims until after death because it will be harder for defendants to meet the claim. This seems to be wrong for two reasons.

First, as I have already mentioned, claims concluded before death are financially more valuable than those concluded after death. That is a powerful incentive against delay. Secondly, many victims want to complete claims before they die. They find comfort in

finalising issues for the benefit of their families. The commission did not find it likely that there will be a flood of new claims. The best evidence it adduced is that there are currently very few claims where the victim has not commenced proceedings before death. There are some cases where an asbestos-related disease was only discovered on autopsy. The Law Reform Commission states that this is not thought to be common, and I think that must be right. In light of current medical knowledge and treatment, I would have thought it was extremely rare.

The Law Reform Commission made two other comparatively minor recommendations for legislative change, and I have adopted both of those recommendations in this bill. Recommendation 3.2 is that section 12B of the Dust Diseases Tribunal Act be amended to allow the joinder of dependants and cross-defendants after the death of the victim. That is a sensible proposal to potentially benefit both defendants and plaintiffs, following a Court of Appeal decision in *Small Pty Ltd v Cremer*, [2006] 66NSWLR400. That is dealt with in the wording in the new bill and also in a note that is being added to section 12B of the Dust Diseases Tribunal Act.

Recommendation 2.2 is to amend section 2 (2) (a) (ii) of the Law Reform (Miscellaneous Provisions) Act. This aims to remove the possibility of double dipping if the Strikwerda principle is abolished. It was suggested to the Law Reform Commission that if the principle were abolished, then as a result of section 15B of the Civil Liability Act a dependency action might seek damages for the same dependency loss as recovered in the estate action. It may be that the current law would prevent such an occurrence. However, the amendment in the bill removes any doubt and clarifies any ambiguity.

Turning to the specific provisions of the bill, item [1] in schedule 1 amends section 3 of the Compensation to Relatives Act that provides for an action to be maintainable against any person causing death through neglect despite the death of the person injured. That implements recommendation 2.1 in the Law Reform Commission's report. It also extends to an action that arises before the commencement of the Act. Paragraph 1.2 of the schedule, new section 12B of the Dust Diseases Tribunal Act, provides that damages for non-economic loss can be recovered after the death of the plaintiff providing not only that proceedings were pending before the Dust Diseases Tribunal at the time of death but also that proceedings are commenced by the estate of the deceased no later than 12 months after the person's death. The commencement is specifically referred to as being the filing and service of the statement of claim and the statement of particulars. That implements recommendation 3.1.

Schedule 1.3, in line with the Law Reform Commission's recommendation 2.2, makes the amendment for more abundant caution in relation to issues concerning the possibility of double dipping to which I referred earlier. I turn briefly to some of the submissions that were made to the consultation paper issued by the Law Reform Commission. In particular, I refer to the submission from the New South Wales Bar Association, which stated in part:

> The Association acknowledged in its preliminary submission that notwithstanding that the *Strikwerda* principle was soundly based on the compensatory principle informing the rules relating to quantum in tort cases, its continuing operation may undermine the legislative purpose behind s12B of the *Dust Diseases Tribunal Act 1989*.
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> … Anecdotally, practising barristers would expect the reform to impact in a very limited number of cases. Accordingly, viewed broadly the financial

> consequences, one supposes, would be slight.
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> …
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> There seems no reason in principle why the entitlement to damages for non-economic loss in estate actions should be limited to actions commenced before death. But the usual policy underpinning statutes of limitation suggests pursuit of the right should not be unlimited. Pragmatically, a relatively short limitation period of 12 months from the date of death seems appropriate, particularly when one considers that the long latency period relating to many dust diseases, especially asbestos-related diseases, already exposes defendants and insurers to uncertainty when making financial provision for liabilities.

They are comments from the Bar Association and are quite supportive of the final conclusion in the Law Reform Commission's report. The second submission made to the Law Reform Commission to which I refer is quite appropriately by someone called Eileen Sylvia Strikwerda. Her husband was Hans Jurgen Strikwerda, who died from mesothelioma in April 2004. Of course, it was the estate claim relating to that death that resulted in this principle being adopted. I quote briefly from her submission:

> For the 32 years of our marriage, I was totally dependent on my husband for financial support.
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> After what began as "a pinched nerve" on the left side of his back in May 2003, and was diagnosed as Pleural Plaques in October, Hans was diagnosed with Mesothelioma on 21 December, 2003.
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> When Hans was diagnosed with an Asbestos disease, he immediately found a Solicitor to begin proceedings in the Dust Diseases Tribunal as he wanted to make sure I was well provided for should he not survive. If he did live for a time, he did not want to be solely dependent on Centrelink for the rest of his life.
>
> For such a strong man, in every area of his life, it was sad to see him fade before my eyes. In the last few weeks, he lost all dignity as his body succumbed to the ravages of the disease.
>
> Hans died on 5th April 2004 from the effects of Mesothelioma; a horribly painful, debilitating and deadly disease. My husband was 59½ years old and I was nearly 53 years old when he died!

Later in the submission she stated:

> There can be no such thing as "over-compensation". When a company or companies deliberately continue in the production and/or installation of a product that kills,
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> - o one of its own or someone else's employees,
> - o someone who has had contact with a person/clothes etc who has been exposed to that product, or
> - o a person who has come into passive contact with that product,
>
> then, that pain and suffering, and loss of life MUST be compensated for.

…

As to the likelihood that abolition of the current law will have significant financial consequences for defendants or insurers, it will possibly be so, but the salient point is, that it is the Dependent/s, of the person who has died from a Dust Disease, who will suffer significant financial consequences if the law is *not* abolished!

As for more claims being filed as a result of the abolition of the current law, that is the end result of a negligent industry who did not protect their workforce, or take measures to protect those who have come in contact with their product, either actively or inactively.

· It is not the concern of those who are suffering because of their inevitable loss of life, or those who are suffering the loss of a loved one, that those who caused their pain will "suffer" litigation.

I consciously chose to finish this speech with the comments of Mrs Strikwerda. While much of what I have said has been argued dispassionately and logically and has followed on from the Law Reform Commission's report, it is essential that one does not lose sight of the real human pain and suffering that is involved as a result of a diagnosis of mesothelioma and a consequent death.

The words of Mrs Strikwerda are not just entirely appropriate but very important when considering issues such as this. I commend the bill to the House.

Debate adjourned on motion by Mr Ray Williams and set down as an order of the day for a future day.