Authority with the Murray-Darling Basin agreement and states' water management frameworks.

I now turn to the bill.

The bill refers specified matters to the commonwealth so that it can amend the commonwealth Water Act 2007. These matters include:

attaching the new Murray-Darling Basin agreement as a schedule;

expanding the functions and powers of the Murray-Darling Basin Authority and the basin community committee to include those set out in the new Murray-Darling Basin agreement;

inserting a new part into the commonwealth Water Act that requires the basin plan to deal with providing conveyance water and critical human water needs in accordance with the intent of the reform IGA;

replacing part 4 of the commonwealth Water Act to extend the reach of the water charge and water market rules within the basin to cover, respectively, all bodies that charge regulated water charges and all irrigation infrastructure operators;

inserting a new part 4A into the commonwealth Water Act to allow a referring state to choose to apply the water charge and water market rules in its jurisdiction beyond its portion of the Murray–Darling Basin;

providing for the staff, assets (other than those related to Murray River operations and Living Murray initiative) and liabilities of the Murray–Darling Basin Commission to be transferred to the authority in accordance with the reform IGA. Transitional matters are also provided for.

In accordance with normal protocol, the version of referred text agreed between the parties to cover these matters is formally tabled in only one state Parliament. I can inform the house that this text was tabled in the South Australian Parliament on 23 September 2008 by the Honourable Karlene Maywald, MP, Minister for the River Murray. For the information of members, a full copy of this referred text, which is referenced in this bill, is available from the parliamentary library.

Along with these specified referred matters, the bill also refers a limited subject matter amendment power to the commonwealth. In relation to this amendment power, Minister Garrett in his second-reading speech of 25 September 2008 presenting the commonwealth Water Amendment Bill 2008 to the House of Representatives noted that the commonwealth government has committed to securing the agreement of the basin states before proposing any amendments to the commonwealth Water Act based on these referred subject matters.

He further noted that in recognition of the cooperative underpinnings of the limited referral of power by the basin states, any amendments proposed by the commonwealth government would be consistent with the principles of the July 2008 reform IGA. The Victorian government welcomes this commitment.

Basin governments have come a long way from the flawed takeover proposed by the previous commonwealth government on Australia Day in 2007, proving cooperation offers the best way forward.

I commend the bill to the house.

Debate adjourned on motion of Dr SYKES (Benalla).

Debate adjourned until Thursday, 23 October.

The ACTING SPEAKER (Mr Nardella) — Order! I advise members that the Water (Commonwealth Powers) Bill 2008 makes reference to tabled text — namely, the text of the proposed commonwealth act as tabled in the House of Assembly of South Australia on 23 September 2008. Members are able to obtain a copy of the proposed act from the Assembly procedure office.

*ASBESTOS DISEASES COMPENSATION BILL

Statement of compatibility

Mr HOLDING (Minister for Finance, WorkCover and the Transport Accident Commission) tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

In accordance with section 28 of the Charter of Human Rights and Responsibilities (the charter), I make this statement of compatibility with respect to the Asbestos Diseases Compensation Bill 2008 (the bill).

In my opinion, the bill, as introduced to the Legislative Assembly, is compatible with the human rights protected by the charter. I base my opinion on the reasons outlined in this statement.

Overview of bill

The bill will allow for the awarding of provisional damages. This will enable a person to make an initial claim for an
asbestos-related condition and a subsequent claim if they develop a further asbestos-related condition. This bill will ensure that the Victorian position is consistent with most other states and territories and that there is interjurisdictional equity in the treatment of asbestos claimants.

The bill will insert a new section 135BB into the Accident Compensation Act 1985 (AC act) so that a worker who has an asbestos-related condition can have their serious injury application as well as their claim for damages heard at the one time. This provision will also allow a worker with an asbestos-related condition who is at imminent risk of death to have their hearing brought on quickly. The bill also provides that the serious injury threshold is satisfied if a person’s death results from the asbestos-related condition that is the subject of the proceedings.

The bill will also amend part III of the Wroongs Act 1958 to ensure that where a person has died from a dust-related condition, general damages recovered by a deceased’s estate are not taken into account in assessing damages to be paid to the deceased’s dependants in their own claims under part III of the Wroongs Act.

Human rights issues

1. Human rights protected by the charter that are relevant to the bill

The human rights relevant to the bill are discussed below.

Section 8: recognition and equality before the law

Section 8(3) of the charter provides that every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. Discrimination in relation to a person, means discrimination within the meaning of the Equal Opportunity Act 1995, on the basis of an attribute set out in section 6 of that act. A number of the provisions of the bill draw distinctions between different types of injuries or disabilities. Whether these distinctions have the potential to amount to discrimination depends upon whether the distinctions are drawn between persons who can properly be regarded as in the ‘same or similar circumstances’.

It is questionable whether persons who suffer from non-asbestos-related diseases are not in the same or similar circumstances as those who suffer from asbestos-related diseases, so as to amount to discrimination.

Further, section 8(4) provides that measures taken for the purpose of assisting or advancing persons or groups of persons who are disadvantaged because of prior discrimination, do not themselves constitute discrimination.

People making claims for asbestos-related conditions might be disadvantaged as a result of the ‘once-and-for-all’ approach to awarding damages. It can take many years for a person exposed to asbestos to know the full extent of their injuries and the initial award of damages may not provide adequate compensation for a fatal condition. The existing limitation periods may also disproportionately affect a person suffering from an asbestos-related condition. As the bill addresses that disadvantage, it could be regarded as a special measure within section 8(4) of the charter and therefore there is no limitation of the right under section 8 of the charter.

In any event, to the extent there may be a limitation on the right to equality, such limitation is reasonable and justifiable for the reasons set out below.

Clause 3: definition of an asbestos-related condition

Clause 3 of the bill defines an asbestos-related condition as asbestosis, asbestos-induced carcinoma, asbestos-related pleural diseases or mesothelioma. The definition will not include pleural plaques, psychiatric impairments or non-asbestos-related conditions. The definition will engage the right not to be subject to discrimination on the basis of impairment.

Pleural plaques

The exclusion of pleural plaques from the definition of an asbestos-related condition in clause 3 is based on medical advice that pleural plaques alone do not constitute a compensable injury. Rather, it is a marker of prior asbestos exposure. This has been accepted by the House of Lords in Johnston v NEI International Combustion and Others [2007] UKHL 39. In light of the current law and medical evidence, there is no limit on the equality right and there is no prima facie discrimination, as a person with pleural plaques does not have a compensable injury and is not in the same or similar circumstances as a person with an asbestos-related condition covered by the bill.

Non-asbestos-related claims

The definition of an asbestos-related condition will also mean that persons with non-asbestos-related injuries are not covered by provisional damages. This exclusion does not amount to prima facie discrimination. Persons who suffer from disabilities other than those listed in clause 3 are not in the same or similar circumstances as persons with an asbestos-related condition, so as to amount to discrimination.

In particular, the latency periods and consequences of asbestos-related diseases are sufficiently different so that individuals suffering from them cannot be compared fairly to those suffering from other diseases.

Psychiatric impairments

The exclusion of psychiatric impairments from the definition of an asbestos-related condition in clause 3 means that:

a person who suffers from a psychiatric impairment would not be able to obtain provisional damages for that impairment and would not be able to make a subsequent claim for an asbestos-related condition; and

a person who has asbestosis and develops a subsequent psychiatric impairment would not be able to make a claim for the subsequent condition.

It is questionable whether persons with psychiatric impairments are in the same or similar circumstances to those who suffer from an asbestos-related disease and go on to develop mesothelioma or another serious disease many years after their exposure to asbestos. However, if and to the extent it constitutes prima facie discrimination on the basis of impairment, the limitation is justified under section 7 of the charter for the reasons set out in section 2 of this statement.
Clause 9: actions by workers with asbestos-related conditions

Clause 9 of the bill provides for the insertion of a new 135BB into the AC act. Section 135BB will allow a worker with an asbestos-related condition to have their serious injury application as well as their claim for damages heard at the one time. This provision will also allow a worker with an asbestos-related condition who is at imminent risk of death to have their hearing brought on quickly. The serious injury threshold will also be satisfied if a person’s death results from an asbestos-related condition that is the subject of the proceedings.

These provisions will not be extended to other injuries and to the extent that some of those persons may be said to be in the same or similar circumstances, the provisions may limit the right to equality because the provisions constitute prima facie discrimination on the basis of the attribute of impairment. However, the limitation is justified under section 7 of the charter for the reasons set out in section 2 of this statement.

2. Consideration of reasonable limitations — section 7(2)

Limitations on section 8; clauses 3 and 9 of the bill

(a) the nature of the right being limited

The prohibition of discrimination is one of the cornerstones of the human rights instruments and is reflected in the preamble to the charter. The right to equality is not absolute and can be subject to the reasonable limitations in section 7 of the charter.

(b) the importance of the purpose of the limitation

The purpose of the limitation regarding the definition of an asbestos-related condition is to redress the disadvantage experienced by a significant number of persons who suffer from conditions that are directly caused by asbestos exposure.

The purpose of the limitation regarding section 135BB of the AC act is to produce greater consistency in the processes and procedures governing asbestos-related claims. The amendments also recognise the fact that the requirement to establish entitlements under existing thresholds and ceilings can be a time-consuming process that could unfairly affect workers with asbestos-related conditions.

Further reasons for the limitations contained in clauses 3 and 9 of the bill are that other injuries do not have the latency periods or the uncertainty of a subsequent and potentially fatal disease developing in the future.

(c) the nature and extent of the limitation

The bill limits the right to equality only to the extent that a person who does not meet the definition of an asbestos-related condition is not entitled to provisional damages.

The insertion of section 135BB into the AC act limits the right to equality only to the extent that the section will not apply to a person who does not have an asbestos-related condition or meet the terminal illness requirement. Persons with latent diseases in the same or similar circumstances as asbestos-related diseases would still be entitled to common-law damages or statutory compensation in the same way as all other impairments.

(d) the relationship between the limitation and its purpose

There is a direct relationship between the limitation and the purpose of addressing the disadvantage suffered by persons who have asbestos-related conditions.

There is a direct relationship between the limitation and the purpose of ensuring that the amendments to the AC act only apply to people with asbestos-related conditions, which may be fatal and have considerable latency periods. The purpose of the limitation is to ensure that there is equality between workers with different asbestos-related conditions.

(e) any less restrictive means reasonably available to achieve its purpose

In relation to the definition of an asbestos-related condition, there are no less restrictive means reasonably available to achieve the purpose of providing provisional damages for people exposed to asbestos. Provisional damages are being provided to people with asbestos-related conditions due to the long latency periods combined with the potentially fatal nature of the conditions arising from asbestos exposure. While it is theoretically possible to set up a scheme that inquires into the individual circumstances of each case, to determine whether provisional damages are necessary to address any disadvantage, such a scheme would be costly to administer and result in considerable uncertainty for employers, insurers and other businesses, which would ultimately translate to increased insurance premiums with flow-on effects for all Victorians.

By restricting the provisional damages in the manner proposed, the economic impact is also more readily identifiable, quantifiable and limited for asbestos-related conditions. Given the fact that the use of asbestos has been banned, claims are limited in number.

Any person with injuries or latent diseases, in the same or similar circumstances as a person with an asbestos-related condition, will continue to be entitled to compensation in the same way as all other impairments.

In relation to the insertion of a new section 135BB into the AC act, there are no less restrictive means reasonably available to achieve the purpose of providing a simplified, consistent and more expedient process for people with asbestos-related conditions. The amendments will also provide that the serious injury threshold is satisfied if a person’s death results from the asbestos-related condition that is the subject of the proceedings. A section is being inserted as existing provisions under the AC act may unfairly affect workers with asbestos-related conditions. It is not considered appropriate to extend these provisions to other conditions that do not have as long a latency period combined with a potentially fatal condition. The proposed amendments are also being made to streamline the processes and procedures for making asbestos-related claims under all three pieces of legislation covering asbestos exposure.

(f) any other relevant factors

Similar provisions allowing for the awarding of provisional damages exist in the South Australian Dust Diseases Act 2005. The definition of an asbestos-related condition in the Victorian bill almost mirrors the definition of a dust disease in the South Australian legislation. The only difference is the inclusion in the South Australian legislation of a disease or
pathological condition resulting from exposure to asbestos dust.

(g) conclusion

Accordingly, the definition of an asbestos-related condition and the amendments to the AC act are reasonable and justifiable limitations under section 7 of the charter.

Conclusion

I consider that the bill is compatible with the charter because to the extent that some amendments do raise such issues, these amendments do not limit human rights or amount to reasonable limits upon human rights.

TIM HOLDING, MP
Minister for Finance, WorkCover
and the Transport Accident Commission

Second reading

Mr HOLDING (Minister for Finance, WorkCover and the Transport Accident Commission) — I move:

That this bill be now read a second time.

The Asbestos Diseases Compensation Bill 2008 is a stand-alone piece of legislation that:

provides provisional damages for people suffering from asbestos-related conditions;

amends the Accident Compensation Act 1985 to provide expedient processes and procedures for workers with asbestos-related conditions; and

amends the Wrongs Act 1958 to ensure that where a person has died from a dust-related condition, no account is taken of the benefit a dependant received from general damages paid to the deceased’s estate in a subsequent dependant’s claim.

In May this year, the government announced that it would introduce legislation allowing Victorians suffering from asbestos-related conditions, to obtain damages on a provisional basis. This means that a person can make an initial claim for an asbestos-related condition and a subsequent claim if they develop a further asbestos-related condition. The government’s commitment to introduce provisional damages is being met today with the introduction of this bill.

There is no known cure for asbestos-related carcinomas or mesothelioma and people who suffer from these conditions have no recourse to surgical or medical intervention. What is frightening is that there is no safe exposure level and asbestos disease sufferers may not experience any signs or symptoms for many years. In some cases, it is 20 to 40 years until symptoms are evident and people who suffer from malignant diseases, such as mesothelioma or lung cancer, invariably die within 12 months of diagnosis.

The nature of asbestos-related conditions means that the traditional awarding of damages is inappropriate. Under common law, the principle of finality means that damages are assessed on a once-and-for-all basis. Once a cause of action is finalised, a further claim cannot be made if the injury worsens or a subsequent injury occurs.

Until now, Victorians with asbestos-related conditions have faced a difficult legal choice. They could either make a claim at an early stage of the disease and be prevented from receiving compensation if a fatal injury later developed or wait and risk the possibility of not being compensated for the original injury.

Victoria and Tasmania are the only states where provisional damages, or an administrative equivalent, are not available for asbestos-related conditions. This bill will bring Victoria in line with other states and provide greater equality and fairness in the treatment and compensation of asbestos-related claims.

During his lifetime, Bernie Banton and his wife Karen fought unceasingly to bring about justice for asbestos sufferers. Bernie’s well-publicised mesothelioma case has increased community awareness and understanding of asbestos-related conditions. Bernie’s story not only demonstrates the terrible suffering people experience as a result of asbestos-related conditions but also the importance of introducing provisional damages here in Victoria. Without provisional damages, Bernie would not have been able to receive compensation for his mesothelioma claim. These amendments will be of significant benefit to all workers exposed to asbestos, who like Bernie Banton were simply doing their jobs and they will also greatly benefit other members of the Victorian community who suffer from asbestos-related conditions.

Provisional damages

Currently, the Workers Compensation Act 1958, the Accident Compensation Act 1985 and the Wrongs Act 1958 govern asbestos-related claims. The existing legislation governing asbestos exposure will continue to apply after the passage of this bill.

This bill allows damages for asbestos-related conditions to be settled on a provisional basis. This means that a person can be awarded damages for an asbestos-related condition on the assumption that they will not develop another condition. A further award of damages can then be sought, if a person develops a subsequent condition from asbestos exposure. For example, if a person