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# NSW Legislative Assembly Hansard

## SPECIAL COMMISSION OF INQUIRY (JAMES HARDIE RECORDS) BILL

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**Bill introduced and read a first time.**

### Second Reading

**Mr BOB CARR** (Maroubra—Premier, Minister for the Arts, and Minister for Citizenship) [3.35 p.m.]: I move:

That this bill be now read a second time.

People around Australia and overseas were outraged by the recent report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation. The report laid bare a long and unsavoury history of corporate manipulation and manoeuvring by James Hardie at the expense of ordinary workers and other victims of asbestos. The New South Wales Government shares the community shock and disappointment at the behaviour of James Hardie. The attitude of James Hardie and its managers towards workers and others struck down by lethal diseases—acquired from its products—defies comprehension. I again urge James Hardie to meet its obligations towards its former employees, their families, and other victims of its products without further delay.

This afternoon the Secretary of the Australian Council of Trade Unions, Greg Combet, and representatives of the victims groups, led by Bernie Banton, are talking to the appointed representatives of James Hardie. It could not be said that negotiations are moving with any speed, due to the position taken by the company. This may be hard to believe but that is the conclusion we are to draw from progress, if it can be called that, so far. The Government is not going to rely on James Hardie to do the right thing. This bill demonstrates the Government's commitment to do all it can to make James Hardie and its executives accountable for their actions. The bill will assist victims of James Hardie to pursue adequate compensation, and assist regulators, such as the Australian Securities and Investments Commission [ASIC], to investigate James Hardie's conduct. The measures in the bill will ensure that James Hardie cannot avoid its moral responsibilities by using legal technicalities to frustrate litigation that may be instituted against it.

The bill will achieve two main objectives. First, it will transfer the records of the special commission of inquiry to the Australian Securities and Investments Commission. It will ensure that government regulators can make use of those records in the continuing fight to make James Hardie accountable for its actions. Second, it will ensure that the Medical Research and Compensation Foundation, the body set up by James Hardie to handle the compensation process, can make full use of the material it holds in civil litigation against James Hardie where the Attorney General has given his approval. This will maximise recovery of further funding for the victims of asbestos diseases.

As honourable members will know, ASIC is the Commonwealth body charged with regulating companies and their officers under the Corporations Act and its predecessors. We set up the Jackson inquiry. The foundation came to us and said that it had been set up by James Hardie, by the company, to handle compensation, but that it had short-changed the foundation and that it is running out of money, that it has been underfunded and that the company has taken millions of dollars in shares offshore. The foundation came to the Government and said that, and the Government responded by setting up this public inquiry.

Commissioner Jackson conducted his inquiry and found that James Hardie and its management had breached a number of significant provisions of the Commonwealth Corporations Law. The commissioner particularly criticised James Hardie for making misleading public statements about the extent of its asbestos liabilities. James Hardie said the foundation would be fully funded. It said that to the Stock Exchange; it said it to the court; it said it to the unions; and it said it to the Federal Government and the State Government. It said it was setting up this foundation and that the foundation would be fully funded. It made these misleading statements before it then, some months later, abandoned Australia to set up shop in The Netherlands, taking along its valuable assets. The commissioner described James Hardie's announcement as "a pure public relations construct, bereft of substantial truth".

That statement was part of a pattern of deceit by James Hardie that continues to have far-reaching consequences for the company's victims. The commissioner noted that prosecuting the company and its officers for making false and misleading statements was now a matter for ASIC. ASIC has specifically requested that this Parliament enact legislation to transfer the inquiry's records to it. That is, all material gathered by the Jackson commission of inquiry—great crates of it, boxes of it—can, through passage of this legislation, be lifted from the State Government and invested in ASIC. It is estimated that that will shave 6 months to 12 months off the time ASIC would take to go about its prosecutions.

In other words, ASIC can roll up its sleeves and get right down to work. It does not have to go through the process of identifying documentation and setting up the procedures involved in a search. It gets the documents right out of our commission of inquiry and it can take the matter into court. ASIC requested this legislation and we are responding by seeing that it gets all of this material valuable to its purposes, as it was valuable to the purposes of the Jackson inquiry.

The bill will, as I said, save ASIC considerable time in pursuing its investigations. It is similar to legislation enacted by the Commonwealth Government following the HIH royal commission. This bill goes further, however, in that it also provides ASIC with the special commissioner's own internal records, not just the evidence it obtained.

The bill makes clear that ASIC may use the records for the purposes of its investigations regardless of any claim for legal professional privilege that might be made in respect of the records. Consider the importance of that: legal professional privilege, important as it is, being set aside to enable this matter to proceed. The bill provides that the records can be used in proceedings to challenge a claim of legal professional privilege in relation to the relevant records. In regard to other proceedings, the bill provides that the records are to be treated as documents obtained under ASIC's own legislation for the purpose of New South Wales legislation. ASIC will be able to use the documents in civil and criminal proceedings as if it had obtained them under Commonwealth law.

This means that any legal professional privilege and confidentiality in the records will be overridden despite the New South Wales Special Commissions of Inquiry Act 1983 to the extent provided for under ASIC's legislation and general powers. The bill will not give ASIC more power over these records than over any other records it uses to prosecute Commonwealth offences or to pursue civil penalties and other remedies. However, the bill ensures that New South Wales law will not limit the use of these records through protecting legal professional privilege or confidentiality. The Government recognises that legal professional privilege is an important common law right. But when abhorrent corporate conduct on this scale is uncovered the offenders should not be able to avoid prosecution or other proceedings by hiding behind spurious claims for legal professional privilege. The special commissioner's report found that James Hardie's records were littered with claims for legal professional privilege that would be very difficult to justify.

Clause 4 (2) of the bill also makes it clear that ASIC may provide the transferred records to third parties. This is very interesting and it recognises that conduct identified in the special commission's report raises criminal and disciplinary issues under other legislation and in other jurisdictions. The bill will ensure that the information transferred to ASIC can be used by other regulators. The bill will ensure that the information can be used in this way. For example, ASIC will be able to disclose the records to another regulator such as the United States Securities and Exchange Commission [SEC]. It was with great pleasure that I recently wrote to the director of the commission sending him the 1,000 pages, the fat two volumes, of Commissioner Jackson's report saying, "This company, now operating in the US—the bulk of its revenues arise from US activities—has engaged in activity that you may well be interested in." I want the SEC to consider whether James Hardie has breached any United States companies and securities legislation.

The Australian Prudential Regulation Authority will also be able to obtain records from ASIC. This will enable it to consider the conduct of the actuaries involved in the establishment of the foundation. Remember, the advice of the actuaries was, "There is enough money here to look after the needs of victims." Commissioner Jackson revealed that to be a hoax; there was not enough money there to look after the needs of the victims. Similarly, the conduct of lawyers can be scrutinised by the Office of the Legal Services Commissioner in New South Wales. ASIC's legislation allows information it obtained to be given to an agency of a State government. The bill will ensure that this can also occur in relation to the records of the special commission.

The second object of the bill is to support civil litigation by the foundation to recover more money for asbestos victims. The foundation appears to be in the best position to seek further compensation for victims from James Hardie through litigation. The Government remains hopeful, however, that it will not be necessary for the foundation to resort to further litigation. The bill will allow the records obtained by the foundation throughout the special commission to be used in civil proceedings brought by the foundation to which the bill applies. Under clause 11 the Attorney General will be able to make an order declaring that the provisions of part 3 of the bill will apply to particular proceedings. The Attorney will be able to make the order only where he believes that the proceedings are in the public interest. The primary public interest that the Government is seeking to advance in introducing the bill is the public interest in ensuring adequate compensation for James Hardie's asbestos victims. It is this public interest that the Attorney will consider before making an order under clause 11 of the bill.

The bill removes legal professional privilege over the records so that they can be used in these proceedings. The bill also makes it clear that orders made by the special commission restricting the publication of material no longer apply to the purpose of proceedings to which the Attorney General has given approval. While this aspect of the bill is unique, these measures are justified because of the impact that James Hardie's conduct has had on the ability of victims in the future to recover compensation for their illnesses. The public interest requirement and the application of part 3 of the bill only to civil proceedings recognise that it is a very serious matter to abrogate legal professional privilege and existing rights to confidentiality.

The rights of individuals in relation to avoiding self-incrimination, however, are not affected. At this stage this part of the bill is limited to proceedings to be instituted by the foundation and the former James Hardie subsidiaries Amaca and Amaba. If it appears that proceedings by other bodies might also assist in recovering sufficient funds for victims these additional bodies can be prescribed by regulation. James Hardie knows what it owes its current and former workers, their families and the other victims of its products. It also knows what it owes the Australian community. James Hardie has the financial capacity to act fairly. That was confirmed in the commissioner's report, in which he said—and I think these are the most eloquent words in the report:

To put it directly, JHI-NV still has in its pockets the profits made by dealing in asbestos, and those profits are large enough to satisfy most, perhaps all, of the claims of victims of James Hardie asbestos.

However, it remains to be seen whether the company has the ethical backbone to put victims before profit in providing the compensation they deserve. As I said, negotiations are continuing this very afternoon between the ACTU and victims

groups on the one hand and James Hardie representatives on the other. Those negotiations are taking longer than the victims or the unions expected. I am sure that every member of this House hopes to see James Hardie meet its responsibilities as soon as possible. I hope this legislation can pass with the expedition and broad support it deserves. I commend the bill to the House.

**Debate adjourned on motion by Mr Chris Hartcher.**

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