



NSW Legislative Assembly Hansard

Special Commission of Inquiry (James Hardie Records) Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Tuesday 7 December 2004.

Second Reading

Mr BOB CARR (Maroubra—Premier, Minister for the Arts, and Minister for Citizenship) [3.44 p.m.]: I move:

That this bill be now read a second time.

Honourable members are by now fully aware of the shameless behaviour of James Hardie in its attempt to try to separate itself from its asbestos liabilities. Last month this Parliament passed the Special Commission of Inquiry (James Hardie Records) Act 2004 to transfer all the records of the Special Commission of Inquiry to the Australian Securities and Investments Commission [ASIC]. That legislation will speed up ASIC's investigation by several months. The Government introduced legislation at the first opportunity that it had and called on the Commonwealth Government to clarify the powers of ASIC to handle privileged information. Some five weeks later, I am pleased to see that the Commonwealth Government has responded to our call.

The Act made it clear that ASIC could transfer the records to other regulators to assist those bodies where they too are conducting investigations into James Hardie. The Australian Competition and Consumer Commission [ACCC] has now indicated that it will be scrutinising the conduct of James Hardie and its executives and it has sought access to the records. The ACCC will be considering whether the misleading and deceptive conduct identified by Commissioner Jackson may constitute a breach of the Trade Practices Act. This could result in litigation for the recovery of damages on behalf of the Medical Research and Compensation Foundation. The Government obviously wants to make sure that there is no doubt about the ACCC's ability to receive the records of the special commission.

There is a risk that people might object to any attempt to transfer the records to the ACCC. This risk exists because the documents obtained by the special commission were the subject of a number of claims of legal professional privilege by James Hardie. While Commissioner Jackson said those claims would, if challenged, be difficult to justify, the Government wants to avoid a situation where the ACCC is hobbled. Like ASIC, the ACCC needs to be able to get on with the job of scrutinising the conduct of James Hardie and its executives. The Special Commission of Inquiry (James Hardie Records) Amendment Bill—which has been requested by the ACCC—will put these matters beyond doubt. The bill will prevent a person from objecting to the transfer by ASIC of the records of the special commission of inquiry to the ACCC or any other person.

The bill also provides that the use in investigations of such records by the ACCC or other person who receives them from ASIC cannot be objected to on the ground of legal professional privilege or because of New South Wales law. The bill also provides that the records can be used and admitted into evidence by the ACCC in civil and criminal proceedings, despite any restrictions in New South Wales law, where Commonwealth law would permit this. The Commonwealth Treasurer has recently criticised the failure of the Special Commission of Inquiry (James Hardie Records) Act 2004 to wind back legal professional privilege more generally. While this was originally requested by ASIC, the New South Wales legislation did not do it.

This was because there is legal uncertainty as to whether ASIC's legislation permitted it to use such material, a point that is acknowledged in the explanatory note to the Commonwealth Government's bill. In addition, ASIC was seeking the removal of privilege even in respect of criminal proceedings, which is a serious step to take. What was Mr Costello suggesting? That the New South Wales Parliament should try to redefine or clarify the powers of a Commonwealth body? Leaving aside any possible constitutional issues, I am sure that he would not have thanked us if we had tried to do that. The powers of the Commonwealth regulator are a matter for the Commonwealth Parliament. The powers of New South Wales regulators are matters for this Parliament.

The New South Wales Government took the right action and swiftly drew to the Commonwealth's attention the need for clarifying legislation. The Attorney General wrote to the Commonwealth Treasurer on 20 October requesting that the Commonwealth Government fix this problem. While I welcome the Commonwealth's action on this issue some five weeks after the matter was brought to its attention, I am advised that the Commonwealth's legislation does nothing to assist the ACCC. I urge the Commonwealth Government to amend its bill to ensure that it applies to the ACCC, as well as ASIC, so that the ACCC can make full use of the records of the special commission of inquiry in any subsequent proceedings. We have to keep the pressure on James Hardie to ensure that it meets its current and future obligations to asbestos victims. I want to make this point to James Hardie: This will not be the last legislation this Government introduces if that is what is required to ensure that the company negotiates a satisfactory solution. I commend the bill to the House