



NSW Legislative Council Hansard

Special Commission of Inquiry (James Hardie Records) Amendment Bill

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

Second Reading

The Hon. JOHN DELLA BOSCA (Special Minister of State, Minister for Commerce, Minister for Industrial Relations, Assistant Treasurer, and Minister for the Central Coast) [5.29 p.m.]: I move:

That this bill be now read a second time.

As the second reading speech is lengthy, I seek leave to have it incorporated in *Hansard*.

Leave granted.

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.

This is one of the worst cases of corporate misconduct Australia has seen.

The Special Commission of Inquiry led by Commissioner David Jackson QC found the Medical Research and Compensation Foundation established by James Hardie was substantially under-funded.

James Hardie claimed that the Foundation was fully funded to meet all legitimate claims from current and future asbestos victims.

Commissioner Jackson described the press release where this claim was made as "*a pure public relations construct, bereft of substantial truth*".

Commissioner Jackson found that the company's CEO, Peter Macdonald "... *ought reasonably to have known that the information in the media release was false in material particulars, and materially misleading.*"

After it established the Foundation, James Hardie headed for The Netherlands.

On the way, it misled asbestos victims, unions, the share market, the Supreme Court, governments and the public.

Our priority is of course to secure funding from James Hardie to ensure that claims made by current and future asbestos victims are met.

We will keep the pressure on James Hardie so that they negotiate a satisfactory outcome for all concerned.

While the negotiations are the highest priority, we should not lose sight of the fact that the actions of James Hardie and its executives may have involved breaches of Australian law.

The full force of the law should be applied to this company and its executives so that they are held accountable for their conduct.

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.

That legislation will speed up ASIC's investigation by several months.

We introduced this legislation at the first opportunity that we 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 the Commonwealth 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 ACCC has now indicated that it will be scrutinising the conduct of James Hardie and its executives and 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 of Inquiry so it can investigate these matters fully.

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 by such objections.

Like ASIC, the ACCC needs to be able to get on with the job of scrutinising the conduct of James Hardie and its executives.

This legislation – 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 this.

This was because there is legal uncertainty as to whether ASIC's own legislation permitted it to use such material, a point which is acknowledged in the explanatory note to the Commonwealth's own Bill.

In addition, ASIC was seeking the removal of privilege even in respect of criminal proceedings, which is a very 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 NSW 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 October 20, 2004 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.

The NSW Government has taken many steps to ensure that James Hardie is held accountable for its conduct.

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 won't 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.