



NSW Legislative Council Hansard

Extract from NSW Legislative Council Hansard and Papers Thursday 1 December 2005.

Second Reading

The Hon. JOHN DELLA BOSCA (Special Minister of State, Minister for Commerce, Minister for Industrial Relations, Minister for Ageing, Minister for Disability Services, Assistant Treasurer, and Vice-President of the Executive Council) [5.19 p.m.]: I move:

That these bills be now read a second time.

Earlier today the Premier signed the historic 40-year agreement with James Hardie Industries NV to secure \$4.5 billion in compensation for the victims of James Hardie's asbestos. The final funding agreement implements the non-binding heads of agreement, which were signed last December by James Hardie, the Government, the Australian Council of Trade Unions [ACTU], Unions NSW, and Mr Bernie Banton on behalf of asbestos victims groups. I refer honourable members to the remarks the Premier made in the other place today. This is truly a historic agreement, for which Bernie Banton received a historic standing ovation in question time.

A lot has been said about the history of this matter, particularly as revealed by the Jackson Special Commission of Inquiry that was established by the Government in February 2004. The main elements of this history are set out briefly in the explanatory notes to these bills. I do not wish to dwell on this history now, partly because I am conscious that the time for debate on these bills is limited but primarily because these bills are about the future. James Hardie can do nothing that will change the past. But by making good its promise to provide compensation for asbestos victims, James Hardie should now be able to focus on the future success of its business without being held back by the stain of its past conduct.

In turning to the bills, I wish first to address, in clear and unambiguous terms, one of the issues that has been the subject of particular public debate in the course of the last year or so and which is affected by these bills. That is the issue of the extinguishment of liability in favour of James Hardie and other companies and individuals arising from the events investigated by the Special Commission of Inquiry. The extinguishment is contained in clause 9 of the James Hardie (Civil Liability) Bill and clause 7 of the James Hardie (Civil Penalty Compensation Release) Bill. These clauses provide for the extinguishment of certain liability for protected conduct. Protected conduct is defined to mean conduct in connection with the events investigated by the Special Commission of Inquiry that are listed in the definition. The persons who are to obtain the benefit of this extinguishment of liability are the liable entities—Amaca Pty Ltd, Amaba Pty Ltd and ABN 60 Pty Ltd; the Medical Research and Compensation Foundation; James Hardie Industries NV; all companies in the James Hardie group; and directors and other officers, employees, advisers and agents of those companies.

Under the James Hardie (Civil Liability) Bill, civil liability of any kind that is incurred by the specified persons in respect of any of the protected conduct is extinguished. This includes civil liability arising at general law, or by or under any legislation. Under the James Hardie (Civil Penalty Compensation Release) Bill, liability to pay compensation for loss or damage resulting from conduct that is capable of being the subject of a penalty order of a civil nature, imposed by or under legislation, is extinguished. There has been some debate between James Hardie and the Government in relation to the scope of this extinguishment of liability. There has also been some debate as to the extent of the New South Wales Parliament's power to legislate to extinguish liability for civil penalties imposed under Commonwealth legislation, including the Commonwealth Corporations Act.

The Government's legal advice is to the effect that the New South Wales Parliament has power to enact the extinguishment of liability by these bills. While the effectiveness of the extinguishment might be tested and ultimately determined in the courts, I want to make it very clear to honourable members what is intended by the extinguishment in relation to civil penalty orders. The bills are intended to extinguish liability for civil penalty orders to pay compensation. The Government's legal advice suggests that the James Hardie (Civil Liability) Bill would not be effective to extinguish liability for civil penalty orders to pay compensation. The James Hardie (Civil Penalty Compensation Release) Bill, accordingly, attempts to extinguish this liability in terms which the Government's advice suggests are more likely to be effective.

The Government accepts, however, that the law in this area is extremely complex and largely untested. The Government is very clear that liability for civil penalty orders to pay compensation should be extinguished. Whether that occurs only under the James Hardie (Civil Penalty Compensation Release) Bill or whether the James Hardie (Civil Penalty) Bill is, in fact, sufficient to achieve this intention is not important. The important point is that the Government intends, by these bills, to extinguish civil liability and liability to pay compensation which should be the subject of a civil penalty order for the events investigated by the Special Commission of Inquiry for the benefit of James Hardie and the other specified companies and individuals.

The extinguishment of liability is part of the price the Government, the ACTU and the victims' groups are willing to pay to secure James Hardie's agreement to fund compensation for victims of the asbestos products of its former subsidiaries. Importantly, the extinguishment of liability is intended to assist James Hardie to put the events investigated by the Special Commission of Inquiry behind it and to concentrate on being a successful business. Under the final funding agreement, this will be for the benefit not only of James Hardie shareholders, but also for the benefit of persons who have been injured by James Hardie's asbestos.

I will also make some brief comments on the liability that the Government is not intending to extinguish by these bills. These bills do not in any way affect any criminal liability, whether under the Corporations Act or otherwise. James Hardie has not sought the extinguishment of criminal liability in the final funding agreement, and the Government would not consider attempting to extinguish criminal liability. The heads of agreement entitled James Hardie and its executives to the extinguishment of civil liability without expressly dealing with civil penalty orders. The Government considers that civil penalty orders requiring the payment of compensation are in substance indistinguishable from civil liability. That is why these bills are intended to extinguish liability for such compensatory civil penalty orders.

However, the Government considers that all other civil penalty orders, including orders imposing fines and orders to ban persons from being directors, are more akin to criminal liability, although they are, of course, subject to the civil standard of proof. These bills are not intended to extinguish liability for any civil penalty orders other than compensatory civil penalty orders. They are not intended to extinguish liability for fines or to prevent the imposition of orders banning persons from being directors. The Government understands that the Australian Securities and Investments Commission [ASIC] would have preferred that no extinguishment be given in respect of civil penalty orders. The Government also understands, however, that ASIC accepts that the extinguishment of civil penalty orders for compensation is of less concern than ASIC's primary concern, which is, as the Government understands it, that the bills must not prevent ASIC from seeking any criminal penalties, or any civil penalty orders other than for compensation which might arise from its investigation into James Hardie. It is certainly the Government's intention by these bills to achieve that outcome.

There are three other matters I wish to mention briefly in relation to the James Hardie (Civil Liability) Bill. The first is the extinguishment of claims for pure economic loss. The Government has made a clear choice to favour persons suffering personal injury. No pure economic loss claim can compare to the suffering involved in asbestos personal injury claims. The Government wants to make sure that the funding James Hardie provides is available for personal injury claimants, their estates and their dependant relatives. The second point to note is that the extinguished liability can be revived if James Hardie is in breach of its key obligations under the final funding agreement. The Government believes that James Hardie is committed to implementing this agreement and making it work and we do not expect to have to use this power to withdraw the releases. It is important, however, to note that it is there.

Third, the bill imposes liability on Amaca Pty Ltd as a defendant of last resort for claims against Marlew Mining arising from exposure to asbestos in the Baryulgil community. In April James Hardie announced that it had agreed to extend the funding arrangements for the benefit of people exposed to asbestos in Baryulgil who would otherwise be uncompensated. The Government congratulated James Hardie for this decision at the time and it deserves credit for that again. Baryulgil claims were never part of James Hardie's restructuring in 2001 because it had long since sold the company that operated the mine at Baryulgil. However, that company has gone into administration under its current owners and it seems that it does not have any material assets.

Until James Hardie agreed to include these claims under the final funding agreement there was clearly some doubt as to whether people at Baryulgil who developed asbestos diseases would be able to recover compensation. I am pleased to say that the lung checks done by the New South Wales Dust Diseases Board suggest that there are very few cases of asbestos diseases in the Baryulgil community. However, it is important that the community has the certainty of knowing that compensation will be available for those of its members who are unfortunate enough to develop an asbestos disease.

I now turn to the main bill, the James Hardie Former Subsidiaries (Winding up and Administration) Bill. The bill implements and supports some of the important structural elements of the final funding agreement. Part 2 of the bill supports the establishment by James Hardie of the trust fund contemplated by the final funding agreement and called the Special Purpose Fund [SPF] in the bill. The SPF will receive the funding payments from the James Hardie group and will use the funding to pay payable liabilities of the liable entities. The SPF will also manage and resolve claims against the liable entities. Part 2 of the bill overcomes any doubt as to whether the SPF will be a valid charitable trust. It also ensures that the trustee of the fund must be a company that is taken, under the Corporations Act, to be registered in New South Wales.

Part 2 of the bill also modifies some aspects of the Charitable Trusts Act 1993 as they apply to the SPF. This will ensure that the SPF can operate as envisaged under the final funding agreement and the remaining provisions of the bill. Part 3 of the bill continues and expands a number of restrictions that were placed on the liable entities and the companies that own shares in them under the James Hardie Former Subsidiaries (Special

Provisions) Act. Honourable members will recall that this legislation was enacted at the end of the budget session to preserve the structure of the liable entities and to ensure that they remain subject to New South Wales law. These provisions continue in this bill, in an expanded form. The liable entities will continue with their current structure and status until the structural arrangements under the final funding agreement are to be implemented. At that stage the liable entities will be transferred to the SPF.

Part 4 of the bill will replace the New South Wales external administration of the liable entities established under the James Hardie Former Subsidiaries (Special Provisions) Act. The bill instead places the liable entities into New South Wales winding-up and external administration. This is proposed to be a very long-term winding up, to ensure that the liable entities remain in place so that asbestos-related personal injury claims can continue to be made against them. The SPF will manage the winding up and external administration of the liable entities, under the general supervision of the Minister and the Supreme Court.

Clause 35 of the bill makes provision for the Supreme Court to approve an approved payment scheme. This will permit rationing if it appears reasonably likely that, for a period of time, there will be insufficient funds to pay all claims. The modelling carried out to assess the adequacy of the funding arrangements first agreed to in the heads of agreement last December showed that if James Hardie performs as well as expected and the number of claims are as predicted, there will be sufficient funding to meet all asbestos personal injury claims against the liable entities. There is, however, inherent uncertainty in these sorts of calculations. Whether there is sufficient funding will depend on the success of James Hardie's global business and the total number of claims. Both of those factors involve some uncertainty, particularly over a period as long as 40 years. The provision to enable the Supreme Court to approve a temporary rationing scheme will ensure the available funding is shared fairly between claimants, with no discrimination between claimants by reference to the nature or extent of their injuries.

Finally, in part 5 of the bill, clause 64 requires the Minister to table the final funding agreement and the related agreements in both Houses of Parliament. This is required to be done as soon as James Hardie sends out information to its shareholders seeking formal shareholder approval of the agreement. The Government recognises the need for the orderly disclosure of information to the market to ensure that the market is properly informed. The final funding agreement and the related agreements will be tabled in Parliament under clause 64 of the bill as soon as James Hardie issues its shareholder approval documentation.

The enormous contributions of Greg Combet and Bernie Banton, who have campaigned over many years for justice in this matter and who are present in the President's Gallery today, have been rightly acknowledged, including by the House in question time today. On my own behalf and on behalf of other members of the Government, I extend the Government's thanks to those persons who have negotiated the final funding agreement on the Government's behalf over the past 11 months. I acknowledge in particular the work of Leigh Sanderson, Deputy Director-General of the Cabinet Office, who has been tireless and accurate in her advice for the entire duration of these matters. Brian Wilson, Managing Director of Lazard, has provided the Government's financial advice. He has been instrumental in finding a way through the commercial tensions inherent in such long-term and complex arrangements that can meet the needs of both sides. The deal could not have been done without him.

Gilbert and Tobin have provided superb service as the Government's Australian lawyers, as well as co-ordinating complex foreign legal input. I particularly wish to single out and thank Stephen Menzies and Paul Lam Po Tang for their contributions. I also acknowledge Ken Fowlie of Slater and Gordon, who advised Greg Combet and Bernie Banton throughout the negotiations. Ken Fowlie's involvement has given the Government team direct access to someone who represents claimants in the asbestos compensation system on a daily basis. The Government has not, of course, spent the past 11 months negotiating with itself. It is important that we acknowledge James Hardie's negotiating team. It was led by James Hardie's chief financial officer, Russell Chenu, with financial advice from Peter Hunt and Michael Harrison of Caliburn Partnership and legal advice primarily from John Atanaskovic and Mark Wilson of Atanaskovic Hartnell.

Finally, I extend particular thanks to John Ledda, senior legislative drafting officer in the Parliamentary Counsel's Office. He has drafted far more bills in relation to James Hardie than anyone should be asked to draft, including these three bills before the House. Today has truly been an historic occasion with an agreement concluded between the Government and James Hardie to provide funding for long-term compensation for asbestos victims.

The passage of these bills will fulfil one of the conditions to the full commencement of the final funding agreement. The bills are a vital step towards James Hardie making the first payment of funding. I thank honourable members for agreeing to deal with these bills on an urgent basis. The Government could not introduce the bills any earlier, as many people would understand, because the agreement was literally not signed until earlier this afternoon. The Government acknowledges that honourable members have not had a lot of time to consider the bills in detail. However, all honourable members can draw great comfort from the fact that the bills have been endorsed by Bernie Banton and Greg Combet, other senior officials of the Labor movement, the Government's advisors and James Hardie.

It would be remiss of me not to remark—and I do so in a multi-partisan fashion—that at the top end of all those deals and arrangements, in addition to everyone's hard work, a commitment has been required by the two Premiers, the leaders of the New South Wales Government, during the time of these negotiations. I have great personal admiration for both former Premier Bob Carr and Premier Morris Iemma. They have been absolutely unflinching, and prepared to give thought and action where appropriate to support the negotiating team and to make some very difficult calls, especially in the past five or six days. I acknowledge the work of all the people who negotiated this arrangement and the leadership of Bob Carr and Premier Iemma in bringing these bills to the Parliament. I commend the bills to the House.