



## Legislative Assembly Hansard,

Extract from NSW Legislative Assembly Hansard and Papers Tuesday, 21 November 2006.

### Second Reading

**Mr MORRIS IEMMA** (Lakemba—Premier, Minister for State Development, and Minister for Citizenship) [3.31 p.m.]: I move:

That this bill be now read a second time.

It is nearly two years since the New South Wales Government joined the Australian Council of Trade Unions [ACTU], Unions New South Wales and Bernie Banton in signing the non-binding heads of agreement with James Hardie Industries for compensation for the victims of James Hardie asbestos. On 1 December last year I signed the historic 40-year final funding agreement to secure compensation for asbestos victims. Today it seems the last significant hurdle to the funding payments commencing has been overcome. Earlier today, accompanied by Bernie Banton, Greg Combet and Mark Lennon of Unions New South Wales—

**Mr Thomas George:** Mark Latham or Mark Lennon?

**Mr MORRIS IEMMA:** Mark Lennon. I signed the amended and restated final funding agreement with James Hardie.

[*Interruption*]

Thomas, give your leader some advice: tell him to get up and apologise. Last year, in his second reading speech on the James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005 and cognate bills, my distinguished colleague the Attorney General said that he did not wish to dwell on the history of this matter because the bills were about the future. That is also true of this bill. I do, however, wish to make some remarks about what has occurred since the final funding agreement was signed in December 2005. That agreement was conditional upon a number of matters, including the passage of the bill, a part of the deal this Parliament upheld. Importantly, it was also conditional on neither James Hardie's funding contributions nor the income of the special purpose fund being taxed.

We were not seeking a special deal for James Hardie; we were simply seeking the same taxation position as other Australian asbestos defendants. This tax outcome was essential to the affordability of the arrangements because there would not be enough money to pay asbestos victims if the Commonwealth taxed the funds. In June this year the Australian Taxation Office [ATO] ruled that James Hardie could claim tax deductions for its funding contributions under the so-called "black hole" legislation. However, the Australian Taxation Office also ruled that the special purpose fund was not a charity, a ruling that put the entire agreement in jeopardy. The New South Wales Government does not accept the correctness of that ruling. The fund's application for charitable status was supported by the unqualified advice of the Hon. Roderick Meagher, QC, a former judge of the New South Wales Court of Appeal and one of Australia's foremost legal authorities on charities and trusts.

The Australian Taxation Office's ruling could only be described as a triumph of form over substance. It did not accept that paying compensation to asbestos victims is for the public benefit. It did not even accept that paying compensation to asbestos victims is for the benefit of the victims themselves—truly a remarkable interpretation. Nor did it accept that the fund should pay the amount of damages determined by the courts—another remarkable determination. Instead, the Australian Taxation Office thought that the victims should have to prove all over again to the fund what loss and damage they have suffered. Nobody with even the smallest sense of justice could accept those propositions—and we did not. Instead we have spent the past five months seeking an alternative legal structure that would meet the ATO's concerns, while still delivering justice for the victims.

On 8 November this year the Australian Taxation Office issued a series of private, binding rulings in relation to an amended structure for the fund, achieving the same tax outcome as under the charity structure. Unfortunately, however, those rulings are considerably more complex. What was one relatively simple issue under the original final funding agreement has now become eight complex issues, involving months of additional uncertainty and considerable extra cost for New South Wales taxpayers. Thankfully, this unhappy story is now at an end, with the Prime Minister and the Federal Treasurer finally giving their support to the private, binding rulings issued on 8 November this year, an assurance to which we will certainly hold the Commonwealth.

I turn now to the bill itself. As a preliminary matter, I note that the Act defines the final funding agreement to be the agreement entered into on 1 December 2005, as in force from that time. The amended and restated final funding agreement that I signed earlier today is therefore now the final funding agreement for the purposes of

the Act and the bill. The amendments in the bill can be grouped into four areas. First, most of the provisions are designed to support the implementation of the amended structure agreed upon today. That amended structure involves maintaining the current charitable fund and creating a discretionary trust in respect of the income of the charitable fund. The bill therefore confirms that the existing trust deed establishing the special purpose fund may be amended to establish the discretionary trust fund.

The bill confirms that the special purpose fund continues to be a validly constituted charitable trust and that the trustee of the special purpose fund will also be the trustee of the discretionary fund. The bill then makes a number of consequential amendments to part 4 of the Act arising from the fact that there will now be both the special purpose fund and the discretionary fund. The second area addressed by the bill is confirmation that certain provisions in part 3 of the Act take effect despite anything to the contrary in the constitution of the relevant company or liable entity. These amendments are made for completeness only and are in the nature of statute law revision. The third area addressed by the bill is a transitional provision to support the interim funding deed.

The Government negotiated the interim funding deed with James Hardie to secure interim funding for Amaca Pty Limited so it could continue to pay claims. The transitional provision will ensure that the interim funding deed is not affected by the winding up and administration provisions of the Act. It will also ensure that the deed is not affected by the administration provisions that currently apply to Amaca Pty Limited under the James Hardie Former Subsidiaries (Special Provisions) Act 2005. The fourth, and final, area addressed by the bill is the issue of dealing with the remaining research funds held by the Medical Research and Compensation Foundation.

Honourable members may recall that when it set up the foundation James Hardie contributed \$3 million to fund medical research into asbestos-related diseases. Most of that funding is still held by the foundation. However, once today's agreement is fully implemented there will be no other work for the foundation to do. It will no longer own the liable entities and it will have no management or oversight role in respect of them. In these circumstances it does not seem appropriate to maintain the foundation only to distribute medical research funding. The bill therefore provides for the trust administered by the foundation to be terminated. The foundation will need to pay any of its creditors first, including any remaining grants that have already been awarded. The bill then requires the balance of the trust assets to be transferred to one or more asbestos medical research providers prescribed by the regulations.

There are at least two important initiatives under way currently in this area: the Asbestos Diseases Research Foundation, established at Concord with funding from the New South Wales Government and James Hardie; and the National Research Centre for Asbestos-Related Diseases in Perth. They are the sorts of bodies that might be suitable recipients of the remaining trust funds in the foundation, and the New South Wales Government wants to ensure that all research funding is put to the best and most productive use possible. One of the next steps for the Government is to nominate its two directors to serve on the Asbestos Injuries Compensation Fund board. James Hardie will appoint three directors to the board, including the chairperson, who will form the majority directors. The Government's directors will participate in the decision making of the board as minority directors.

It only remains for me to pay tribute to those who have made this historic achievement possible. I thank my colleagues Bob Carr, the Attorney General and the Hon. John Della Bosca. I thank the Government's team, led by one of the State's most outstanding public servants, Leigh Sanderson, Deputy Director General of The Cabinet Office. I thank Brian Wilson, Managing Director of Lazard, who provided excellent financial advice to the New South Wales Government. I thank Gilbert and Tobin for its equally excellent legal advice, particularly Tony Tobin, Mark Goldsmith, James Lewis, Elizabeth Grinston and Shirley Logan. I thank Ken Fowlie of Slater and Gordon, who very capably advised Greg Combet and Bernie Banton.

Above all, I pay tribute to the victims' groups and the union movement, and in particular two extraordinary Australians—Bernie Banton and Greg Combet. They never wavered, even when James Hardie seemed to have made good its escape. With today's agreement the last significant hurdle to the implementation of these arrangements will be overcome and the passage of this bill will fulfil one of the conditions to commence the Final Funding Agreement. It has been a long and difficult journey. But we kept faith with the victims and together we have been able to right a monstrous injustice. This is a bill of the utmost importance and I thank the House for giving it the priority it deserves. The James Hardie victims have waited long enough and the time for justice has arrived. I commend the bill to the House.