



NSW Legislative Council Hansard (Proof)

James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Trust Funds) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 22 November 2006 (Proof).

Second Reading

The Hon. JOHN DELLA BOSCA (Minister for Finance, Minister for Commerce, Minister for Industrial Relations, Minister for Ageing, Minister for Disability Services, and Vice-President of the Executive Council) [11.32 a.m.]: I move:

That this bill be now read a second time.

Regardless of the great significance of this bill, and noting that it has already been read in the other place by the Premier, I seek leave to incorporate his speech in *Hansard*.

Leave granted.

It is nearly two years since the New South Wales Government joined the ACTU, Unions New South Wales and Bernie Banton in signing the non-binding Heads of Agreement with James Hardie Industries NV for compensation for the victims of James Hardie's 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 I signed the Amended and Restated Final Funding Agreement with James Hardie.

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 today.

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 bills I mentioned 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, simply 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 of this year, the Australian Taxation Office 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 this ruling. The Fund's application for charitable status was supported by the unqualified advice of the Honourable Roddy 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. They did not accept that paying compensation to asbestos victims is for the public benefit. They did not even accept that paying compensation to asbestos victims is for the benefit of the victims themselves. Nor did they accept that the Fund should pay the amount of damages determined by the courts. Instead, the Tax Office thought that victims should have to prove all over again to the Fund what loss and damage they had suffered.

Nobody with even the smallest sense of justice could accept those propositions—and we did not. Instead we 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 November 8 2006, 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, they 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 costs for the New South Wales taxpayer. 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 2006 an assurance to which we will certainly hold the Commonwealth Government.

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 time to 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 in the bill are designed to support the implementation of the amended structure agreed 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 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 so it can 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 which currently apply to Amaca 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. Members might recall that, when it set up the Foundation James Hardie contributed 3 million dollars to fund medical research into asbestos-related diseases. Most of this 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 which 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 in this area currently: the Asbestos Diseases Research Foundation, being 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. These 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 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 of 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, Bob Debus and 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 their equally excellent legal advice in particular 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 is being 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 wrong. 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 this bill to the House.