

Agreement in Principle

Mr MICHAEL DALEY (Maroubra—Minister for Police, and Minister for Finance) [10.44 a.m.]: I move:

That this bill be now agreed to in principle.

The New South Wales Government is deeply concerned for asbestos victims. The Government's first priority has, and always will be, to seek justice for them. I acknowledge the presence in the gallery of Karen Banton, the wife of Bernie Banton and the Chief Executive Officer of the Bernie Banton Foundation. Her dignity, courage and tireless activity have inspired the nation, and we thank her for her efforts. As a brand new member of this place—I had only been here for about two months—I will remember the day that Bernie Banton sat in the gallery of this Chamber, with tears rolling down his cheeks, as the first of the James Hardie legislation was passed. Bernie received a standing ovation. No doubt that will be one of the most powerful things I will ever experience in this Parliament. It is good to see Karen here today. I know that Bernie is here in spirit.

In April this year the Asbestos Injuries Compensation Fund notified James Hardie and the New South Wales Government that it had determined that it was reasonably foreseeable that within two years the available assets of the fund were likely to be insufficient to fund the payment of all reasonably foreseeable liabilities. The gravity of that announcement cannot be underestimated. We are living in difficult times with unprecedented challenges. The financial crisis that started in the United States of America has deeply affected the bottom line of James Hardie. That financial crisis has now spread across the world causing a global recession, and whilst this has meant that James Hardie's payments to the fund are affected, it is bound by an agreement, underpinned by law, which it cannot resile from. The fact is this that James Hardie must pay its debt to its victims.

The Parliament enshrined in legislation the Final Funding Agreement, which is worth some \$1.78 billion in today's terms over the next 40 years. The agreement provides that there is no overall cap on James Hardie's liabilities or any cap on payments to individuals. Nothing about these challenging times means that compensation cannot or will not be paid. That is because the New South Wales and Federal governments are providing a loan to the fund. On 7 November 2009 Premier Rees and Prime Minister Rudd announced that the New South Wales and Federal governments would provide a loan of up to \$320 million to ensure that the victims of James Hardie's asbestos continue to receive full compensation payments. The bill enables that loan to proceed.

People who care about this issue, and there are many of them, have told us they are proud of both the State and Federal governments for their action in this regard. The Government will stand up for workers and their families. It had the determination in the past to stand up for victims and their families to deliver the justice that they deserved. It had the determination then. It has the determination now. There are two other matters I wish to raise before I turn to the detail of the bill.

Asbestos disease is a national issue in Australia. Tragically, cases of asbestos disease can, and do, arise in all Australian jurisdictions. When the New South Wales Government set up the Jackson Special Commission of Inquiry into Funding of the Medical Research Compensation Foundation in 2004, it did so because the then Federal Government was unwilling to take action. Again in 2005 and 2006 the New South Wales Government joined the unions and victims' groups in negotiating the Final Funding Agreement with James Hardie, because the then Federal Government was unwilling to address the issue. That is not a matter of politics; it is a matter of historical record.

It is with great pleasure that I acknowledge the significant contribution of the current Federal Government in addressing the prospective funding shortfall for the fund. The New South Wales Government had no intention of walking away from asbestos victims after all these years. However, it welcomes the recognition by the Federal Government that this prospective funding shortfall for the fund has to be dealt with and it is not one that New South Wales should have to deal with alone. Asbestos victims throughout Australia will gain greater security and certainty as a result of the loan funds to be provided by the New South Wales and Federal governments.

The other matter I will address is how the loan will affect James Hardie's obligation to make payments under the Final Funding Agreement. In short, the loan has no impact on James Hardie's obligation to pay under the Final Funding Agreement. The funding mechanism requires James Hardie to keep making payments until all claims are paid in full. Although the agreement limits the amount James Hardie has to pay in any year to a maximum 35 per cent of its free cash flow, there is no limit on its overall payments under the agreement. This means that the cash flow cap affects the timing of James Hardie's payment obligations but not James Hardie's obligation to pay in full under the agreement. The agreement to implement the loan will require the loan to be repaid as quickly as possible, as James Hardie's payments to the fund improve.

Since early 2007, James Hardie has made payments to the fund totalling \$302 million. It has also announced that it expects to be able to make a payment to the fund from the current year's cash flow. This amount will be

payable in the middle of 2010, although it may not be enough to cover claims payments for the 2010-11 financial year. James Hardie's payments under the Final Funding Agreement will, over time, catch up with the needs of the fund. While we are waiting for this to happen, for the next few years the loan from the New South Wales and Commonwealth governments will provide security and certainty for victims and their families. The loan will not in any way reduce James Hardie's obligation to pay.

I now turn to the details of the legislation. The main provision of the bill is item [10] of schedule 1, which inserts a new division in part 4 of the Act. Proposed section 30A will authorise the Asbestos Injuries Compensation Fund, as the SPF trustee, and the liable entities to enter into relevant loan facility agreements. The bill requires that the State be a party to any relevant loan facility agreement. Of course, for the particular loan we are currently negotiating, the State will be the lender of up to \$320 million. The provision in the bill is drafted more broadly so that it may be able to be used in the future for other loan arrangements that may become necessary. Requiring the presence of the State will ensure that the relevant loan facility agreements are in the interests of claimants.

Proposed section 30A also authorises the fund to give security for a loan facility, and it authorises the liable entities to guarantee the obligations of the fund and to provide security for their guarantees. For the particular loan we are currently negotiating, it is intended that the State will take security over a number of assets, including the proceeds of the insurance policies held by the liable entities. These proceeds are currently valued at about \$320 million. Proposed section 30A also ensures that the fund and the liable entities are authorised to comply with all of their obligations under an authorised loan facility agreement. This will ensure, among other things, that the fund is able to repay the loan and to pay any costs or charges associated with the loan.

The amendment in item [4] of schedule 1 makes it clear that an authorised loan facility does not change the status of the fund as a charitable trust and that repaying the loan is a valid application of the trust fund. The amendment in item [5] of schedule 1 ensures that the liable entities may comply with their obligations under any relevant loan facility agreement during the winding-up period under the Act, and the amendment in item [7] of schedule 1 allows the fund to issue directions to the liable entities in relation to any loan facility agreement and any authorised loan facility.

The amendment in item [19] of schedule 1 ensures that the protection currently in the Act for the exercise of certain functions during the winding-up period will not prevent any party from enforcing or taking action under a relevant loan facility agreement. Item [20] of schedule 1 proposes to extend the current exemption from State taxes to any relevant loan facility agreement, including any guarantee or security under a relevant loan facility agreement. As I have indicated, the Government is currently negotiating the documents for this particular loan of up to \$320 million. The relevant loan facility agreements are not yet finalised.

Item [21] of schedule 1 proposes to insert a new section 64A into the Act under which the Minister will table a copy of the relevant loan facility agreements as soon as is reasonably practicable after the agreement has been signed. This is the same approach the Government followed in relation to the Final Funding Agreement, and it will ensure that there is complete transparency in relation to the loan.

The bill also proposes to make some amendments to the approved payment scheme provisions in the Act. Although the Government hopes that payment by instalments will never be required, the fund has identified some possible improvements to these provisions in the course of all the work that it has done in considering an instalment scheme. Rather than waste this work, the Government is prepared to introduce the amendments requested by the fund. If the very unfortunate circumstances arise where payments need to be made by instalments, these amendments should ensure that the approved payment scheme is as fair as possible and operates in the interests of claimants as a group.

There are four elements to the approved payment scheme amendments proposed in the bill. First, the bill makes it clear that an approved payment scheme can commence before the fund completely runs out of money. Item [13] of schedule 1 clarifies that the scheme period may commence before the time at which there will be insufficient funds if the court is satisfied that this will result in claimants being treated more equally. Second, the bill allows the court to approve an interest rate to apply to deferred payments which compensates for inflation but which need not be a commercial interest rate. If the fund were required to pay interest on instalments at court interest rates, which are currently some 9 per cent, this would have the effect of extending the duration of the approved payment scheme by a number of years. Striking a balance between compensating for the delay in payment and minimising the need for instalment payments will better protect the interests of claimants as a group.

Third, the bill proposes that the fund be able to pay small claims in full, rather than by instalment. Item [3] of schedule 1 introduces a definition of "small claim". In short, it is any claim of \$25,000 or less, with the limit of \$25,000 to be adjusted for inflation. Very few if any claims are for \$25,000 or less, unfortunately, but the liable entities sometimes pay such amounts when they are contributing to a damages award with a number of other defendants. The fund has advised that some 11 per cent of claims currently cost the liable entities less than \$25,000 but represent less than 1 per cent of the total claims payments. Finalising these small claims without paying by instalments will simplify the administration of an approved payment scheme for the fund. It will not have any material impact on the fund's ability to meet instalment payments for larger claims.

Finally, the bill proposes to allow the court to approve a scheme that provides for different payment options to be offered to claimants so that they can make a choice. If there are two or more ways in which to divide payments, which are equally affordable to the fund, then it makes sense to allow claimants to make a choice. For some claimants, being paid in full in the fewest possible number of years might be most important, while other claimants might choose to be paid over more years provided that the amount of their first payment is maximised. If a scheme allows claimants a choice, the bill will also require that it specify a default payment option so that claimants are not forced to make a choice if they are unable to do so.

Yesterday it was four years ago to the day—on 1 December 2005—that the then Premier and Attorney General announced and introduced into this House legislation that was, and still is, a great victory for asbestos victims. It was an agreement—years in the making, and worth many hundreds of millions of dollars—led by the late great warrior Bernie Banton, of which we were, and are still, very proud. As I said at the outset of my speech, I honour the memory of Bernie and the many other victims who did not survive to see this day. It was truly an historic agreement, to stand the test of time. This legislation will assist at a time that represents the worst downturn since the Great Depression. We are in exceptional circumstances, and we have acted.

I take this opportunity to once again thank Karen Banton, Chief Executive Officer of the Bernie Banton Foundation; Paul Bastian of the Australian Manufacturing Workers Union; Barry Robson, President of the Asbestos Diseases Foundation of Australia; Mark Lennon of Unions New South Wales; Jeff Lawrence from the Australian Council of Trade Unions and all of their predecessors, and everyone who has worked absolutely tirelessly on this campaign for an extended period. I also acknowledge and thank them for their support of this bill. I am very pleased and proud to commend the bill to the House.