

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Industrial Relations, and Vice President of the Executive Council) [2.10 p.m.]: I move:

That this bill be now read a second time.

I seek leave to incorporate the second reading speech into *Hansard*.

Leave granted.

The New South Wales Government is deeply concerned for asbestos victims and our first priority has and always will be to seek justice for them.

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 the announcement cannot be underestimated.

We are living in difficult times with unprecedented challenges. The financial crisis that started in the US has deeply affected James Hardie's bottom line. That financial crisis has now spread across the world causing a global recession. And while this has meant that James Hardie's payments to the Fund are affected they are bound by an Agreement underpinned by law that they cannot resile from. The fact is this: they must pay their debt to their victims.

This 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. And that is because the NSW and Commonwealth Governments are providing a loan to the Fund.

On 7 November 2009, the Premier and Prime Minister announced that the New South Wales and Commonwealth Governments will provide a loan of up to \$320 million to ensure that victims of James Hardie's asbestos continue to receive full compensation payments. This bill enables that loan to proceed.

I am proud of this Government and the Federal Government for their action. We will stand up for workers and their families. We had the determination in the past to stand up for victims and their families—and deliver the justice that they deserve. We had the determination then. We have got 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, asbestos diseases cases arise in all Australian jurisdictions. When the New South Wales Government set up the Jackson Special Commission of Inquiry into the funding of the Medical Research Compensation Foundation in 2004, we did so because the then Commonwealth 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 Commonwealth Government was unwilling to address the issue. So it is with great pleasure that I acknowledge the significant contribution of the current Commonwealth 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. We welcome, however, the Commonwealth Government's recognition that this is not an issue we 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 Commonwealth and New South Wales Governments.

The other matter I wish to 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 percent 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 agreements 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 2010/2011 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. 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.

This 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 nine percent, 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, 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 percent of claims currently cost the liable entities less than \$25,000 but represent less than one percent 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 4 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. I honour the memory of Bernie—and the many other victims—who do 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 which represents the worst downturn since the great depression. We are in exceptional circumstances. And we have acted. I would like to take this opportunity to thank Karen Banton, CEO, Bernie Banton Foundation, Paul Bastian of the AMWU, Barry Robson President of ADFA, Mark Lennon of Unions NSW, Jeff Lawrence from the ACTU and others who have worked absolutely tirelessly on this campaign for an extended period. I also acknowledge and thank them for their support of this bill. I am pleased to commend the bill to the House.