NSW Legislative Assembly Hansard (Proof)

DUST DISEASES TRIBUNAL AMENDMENT (CLAIMS RESOLUTION) BILL

Second Reading

Debate resumed from 5 May 2005.

Mr CHRIS HARTCHER (Gosford) [7.33 p.m.]: The Dust Diseases Tribunal has the unique record throughout Australia of being a specialised tribunal which has long dealt with the difficult problems of individual suffering from different varieties of dust disease. It was originally established in relation to silicosis, a terrible disease that was prevalent in underground mining, especially in the Broken Hill area. In recent times the tribunal has expanded to cover various other forms of dust disease, the most recent being asbestosis and mesothelioma, two tragic diseases that are still with us today.

The Dust Diseases Tribunal has long been well regarded as a specialised tribunal. In fact, it is so well regarded that people from other States forum-shop to come to New South Wales to bring their applications before the tribunal. The tribunal has been well led, and its judges deserve high praise for their conscientiousness and the way in which they have sought to balance the law and the needs of the individuals who bring applications before the tribunal. I pay special tribute to John O'Meally, the current president of the tribunal, who has done fine work over a long period of time. I pay tribute also to the other judges whom I have met from time to time.

I pay personal tribute to Judge Peter Johns, who is now retired but who was a tireless servant of the law and of those who were afflicted. He acted always within the boundaries of the law and was anxious always to ensure that justice was done, in accordance with the law but with compassion. If there is one phrase that singles out the role of the Dust Diseases Tribunal it is to administer justice with compassion. Over the years these judges have held many bedside hearings with people who were breathing with great difficulty as a result of dust disease, especially silicosis and asbestosis, and suffering in their very last moments. Every person involved in those proceedings must have been greatly affected. The fact that the judges conducted the bedside hearings in accordance with the law yet still retained the respect of the community is truly a remarkable achievement. I believe that the entire community of New South Wales salutes the Dust Diseases Tribunal.

I think all members of this House would agree that the specialised role of the tribunal should continue. The Government, with the support of the Opposition, has brought about considerable amendment and reform to tort law in New South Wales, but the specialised role of the Dust Diseases Tribunal has been unaffected because of its wonderful work and the very real need for a specialised tribunal of this nature. Anybody who sees the victims of asbestosis or mesothelioma, as I have, or who sees the victims of silicosis—I have not, but I believe it is just as serious as asbestosis and mesothelioma—could not help but be moved by the plight of these individuals and the lengthy suffering that so many have had to endure. If society, through appropriate insurance, can make suitable recompense to these people, then I believe it is important that it do so.

The Dust Diseases Tribunal Amendment (Claims Resolution) Bill is, in fact, more than an amendment bill because it restructures the whole operation of the tribunal. I note from the Minister's second reading speech that it has the commitment and support of John O'Meally. I accept that unreservedly. Normally an Opposition would contact various interest groups and ask their views, but it is not appropriate for us to contact the president of a tribunal who is a senior judge. I accept unreservedly the Attorney's comments in that respect.

The function of the tribunal will switch from being adversarial to, essentially, a mediation process designed to minimise the amount of conflict and improve the way in which claims are resolved. As the Attorney has said—and I do not intend to revisit his second reading speech, which set out the matter with great clarity—the bill flows from a report that was commissioned and released on 8 March 2005. The Government agreed to accept the report on that day. I believe that some matters should be above political partisanship, and the redress of suffering for the afflicted should surely be one of them. We support, as would all people of goodwill, any process that can achieve justice with compassion, which has been the hallmark of the tribunal.

I do not intend to go through the history of this matter, which has been dealt with by the Attorney. It is appropriate that I place a number of points on the record. One is the concern that any person dealing with legal matters has in relation to Acts of Parliament which are themselves subject to regulation. There are

sections in the Dust Diseases Tribunal Act that expressly say the Act is subject to any regulation that might be made. Clearly, the regulations must be able to deal with problems and the various unfolding instances that arise. The Government will reply appropriately, through the Attorney, that the regulations are subject to review and disallowance by Parliament. The fundamental role of Parliament in our society is that it should make the law, and subordinate law should be just that. To have legislation which is expressly subject to regulation is, in that famous phrase that was once used, a Henry V111 clause: it allows the regulation to change the law promulgated by the Parliament.

I raise no objection to that because this legislation is an appropriate attempt to redress a serious evil, which is the suffering inflicted on people by diseases caused by their exposure to asbestos. It is, nonetheless, a point that should be placed on record. Such legislation should be avoided as far as possible. Whether it is possible to avoid it in this case, I do not know. The Government has the advantage of far more expert advice than that available to me. The Government has rightly commissioned a review of the legislation and it has the advantage of the report on James Hardie, the company which, more than any other single factor, has triggered this restructuring of the claims resolution system in the tribunal. All parties, including the Government, the court and James Hardie, are to be congratulated for working through a difficult process. It should be noted that James Hardie deserves to be congratulated because in the United States of America many companies in the position of James Hardie simply filed for bankruptcy and avoided any responsibility at all.

I am concerned that there is potentially a vast number of claims from people who have worked in government employment, especially for State Rail and the old Electricity Commission. These people have been exposed over many years to asbestos and there is no indication from the Government as to how it proposes to identify or fund these claimants. There are thousands of them. If one aspect stands out about the great powerhouses of the Electricity Commission and State Rail's workshops it is the extensive use of asbestos in those buildings. Asbestos was regarded as a cheap and efficient means of fire minimisation. I understand that many claims are building up as a result of exposure to asbestos because of employment at State Rail and the Electricity Commission.

The Attorney might appropriately say these claims will be dealt with by the tribunal. I have no objection to that: the tribunal sets up the process. However, it is important for the community that an attempt be made to identify those who were in government employment, especially in State Rail and the Electricity Commission, so that their future can be properly provided for. It is not enough for a government to set up a tribunal and say to its employees, "Go to the tribunal." Surely a government should be more proactive and seek to redress the problems of its former employees if it knows that the period of 30 to 40 years that it takes for asbestosis and mesothelioma to develop as a result of asbestos exposure is approaching.

They are the essential points I wish to raise. This is detailed legislation. With the goodwill and competence of the tribunal and the integrity shown by its members the legislation can work. It is important that legislation such as this be preceded by a carefully prepared and effective report. The Government is to be commended for so doing. The James Hardie world tragedy is significant because of the many people who have suffered through exposure to asbestos. It was important that all parties worked their way through that process. I urge the Government to make some attempt to identify what I believe to be the many thousands of its former employees who may be potentially affected. I commend the ongoing work of the tribunal. The Coalition does not oppose the legislation.

Ms LINDA BURNEY (Canterbury) [7.46 p.m.]: I am pleased and proud to speak on this bill. In essence, this bill epitomises decency. It is hard to put into words the emotion that surrounds those who are afflicted with diseases caused by asbestos, particularly asbestosis. The honourable member for Gosford has articulated that well. I welcome his bipartisan support for the bill, his congratulation of the Government for it and his acknowldgement of the worth of it. In the past three or four years in New South Wales and, indeed, across Australia we have come to understand more and more the nature and effect of diseases caused by exposure to asbestos. Essentially that is what we are talking about here. It was not something that industry alone had to worry about. In the past few years it became obvious that everyone must feel concerned about asbestos-related diseases, particularly as we now know that much of the damage done to individuals and communities was caused by a lack of understanding of the effect of asbestos fibres on the human body. Not everyone is completely innocent. We know for a fact that James Hardie knew about the effects of asbestos well before the it made it public to its workers. In many ways the company still does not willingly accept responsibility for the great destruction it has caused.

Not long ago I received a delegation of people from Baryugil who came to talk to me about the effects of asbestosis. Tony Mundine was in the delegation. He has since been found to have lung damage arising from working in the James Hardie mines in Baryugil. The whole community was affected by this dreadful disease as a result of working in the Hardie mines. Many years ago, when I knew nothing about this subject, I was involved in the Aboriginal education consultative group. We were being spoken to by parents and teachers involved with Baryulgil school. At that time asbestosis was misunderstood and the community was not informed about it. Potholes in the school grounds were filled with white asbestos dust. The kids played in it; it

was part of the school. I remember the horror I felt when I heard that information. The New South Wales Government and the Attorney can hold their heads high because of the way they have pursued the issues with James Hardie. In a sense, this bill reflects the deep concern of our Government about this issue and it decency in dealing with it.

The bill will improve the efficiency with which dust diseases compensation claims are resolved. The issue was first raised in the course of negotiations between James Hardie and the victims groups and unions. It is significant that this bill recognises that the victims of dust diseases, in particular asbestosis, have spent much of their lives worrying about not having an efficient system to deal with their claims. Therefore, many of them passed away before their claims were resolved. The bill will ensure that that is no longer the case. As I said, it is about dealing with dust diseases compensation claims efficiently and in a way that makes the victims and families feel safe. A review of legal and administrative costs in dust diseases compensation claims was conducted and the reforms contained in this bill were recommended. The aim of the bill is to reduce costs by promoting the early settlement of claims and streamlining processes and procedures. I underscore the words "early settlement of claims and streamlining processes and procedures". That is important to those who have ended up with dreadful diseases through no fault of their own.

The new claims resolution process will apply to asbestos-related claims and will provide a forum in which information can be exchanged and settlement discussions can be pursued. So it is being done in a consultative way; it is about negotiating and bringing people together. What better way to resolve issues than that! The new process will be commenced by the claimant filing his or her statement of claim with the tribunal. Urgent cases, or cases that become urgent, will proceed through the existing tribunal litigation process, as streamlined by the bill. I underscore the fact that the process has been streamlined. All other claims will proceed through the new claims process.

The key steps in this process will be as follows. First, claimants will complete a standard statement of particulars that will be served with the statement of claim. Second, defendants will prepare a standard form reply. That makes it clear that we are reducing red tape and putting in place standardised forms that people will be able to understand and fill out. Third, defendants will be required to join any other defendants within a fixed time and, fourth, informal settlement will remain an option at any time. Once again we are covering all the options. Fifth, defendants will seek to agree on apportionment of liability; if they cannot agree an independent contributions assessor will determine the apportionment using standard presumptions. The determination can be challenged but only after the claimant's claim is settled or determined. Once again, that is sensitive, sensible and extremely practical.

Sixth, if the claim is not resolved informally, compulsory mediation, to be conducted by an approved mediator, will occur between the claimant and defendants. This must be attended by a person with sufficient authority to make binding decisions on behalf of the party. The claimant will attend the mediation personally unless he or she is too ill. The mediator may require the defendant to be represented by a designated officer of the defendant, such as the defendant's claims manager. Once again, that makes practical sense as everyone involved as a claimant, defendant or whatever has an efficient and sensible say in the outcome. On many occasions parties have been in an adversarial situation and no resolution could be reached. However, we will now have a system in which a resolution is urgent because of the health of those involved.

Seventh, most claims should settle as a result of this mediation. So there will be a mediated process in which there is no overriding formality and an overriding persistence for an outcome. This is about mediation and about everyone involved having a say. Eighth, parties will be able to encourage settlement using offers of compromise, and amendments are being made to ensure that these are more effective. Some claims will return to the tribunal for determination. The bill also improves and streamlines existing procedures in the tribunal process. In a sense the bill provides a two-stream mediation process. I believe it will be successful because of the way it has been set up and because everybody will have equal rights and everyone will have input. If that is not successful, there will be back-up of offers of compromise.

Proposed legislation to introduce uniform civil procedures for courts in New South Wales will apply to the tribunal, modified where appropriate to take into account the tribunal's specialised jurisdiction and the new claims resolution process and, importantly, information on all claims that are settled or determined will be collected and recorded on a central database. This is extremely important. Recently there have been many debates about a range of issues relating to centralised databases. It is better for people to have a central place to which they can refer, and the fact that this will be put in place is commendable. The data will include information on the claimant's injury, the amount of damages obtained and details about the party's legal costs and disbursements.

The Government will be able to request that consolidated reports of the information contained in the database be prepared, and these reports will assist in the review of the reforms that will be conducted once data for the first 12 months is available. Once again, we are saying to the people of New South Wales that if we do not to get it right in the first instance there is a process in place for the next 12 months during which things can be refined and improved. At the end of the day at the heart of this are those who have been exposed to asbestos

and, as a result, are suffering extreme hardship, ill health and the probability of death. We cannot take that lightly, and it is at the heart of this bill. It is about making things speedier and more efficient in trying to get a resolution for victims and their families and communities in this situation. I referred to a particular community earlier in my speech.

It is in the interests of all parties, claimants and defendants, for the costs of claims to be reduced through earlier settlement of claims and through streamlined processes and procedures. I add that this bill removes the enormous wait that people who are ill and their families often go through because of extremely complicated court procedures. This bill is about making the process much more humane and sensible. It is in the interests of all parties and claimants that we pursue that goal. Under the new process, claims will be resolved more quickly and efficiently. The costs of all parties should be lower and asbestos victims will receive their compensation earlier. What better reason is there to support this bill than those three points—claims settled more quickly, at lower cost and victims will receive just compensation? On those positive, sensible and humane notes I commend the bill to the House.

Mr PAUL LYNCH (Liverpool) [8.00 p.m.]: I support the Dust Diseases Tribunal Amendment (Claims Resolution) Bill. As the Attorney noted in his second reading speech, it is intended that the new scheme will be in effect by 1 July this year. In turn, that suggests the need for dealing with this legislation expeditiously. I will accordingly make only some brief comments on the bill. The Dust Diseases Tribunal [DDT] has long been known for introducing new and different ways of dealing with claims. This legislation continues that tradition. The legislation flows from a review of legal and administrative costs in dust disease compensation claims. That review flowed from the negotiations between James Hardie and the other parties. Thus, this legislation should be supported for two reasons. One is that it came from those negotiations, and those negotiations are dependent upon it. The other is that it contains inherently good proposals. Any proposal to sensibly and fairly develop a quicker, streamlined dispute resolution process ought to be encouraged.

From my own time as a litigator acting for personal injury plaintiffs, including several cases in the Dust Diseases Tribunal, I welcome any changes that make it difficult for defendants to dispute the bleeding obvious. Putting claimants to the test of things that are obvious simply costs more time and money, and is a tactic traditionally much used by defendants, insurers and their legal representatives. The terms of reference of the review from which this legislation results meant that the review was to consider current processes for handling and resolving dust diseases compensation claims and to identify ways in which administrative, legal and other costs could be reduced within the current common law system. Desirably, and in my view essentially, this prevented any consideration of a statutory scheme, which is a mechanism so beloved of insurers and others happy to see claimants' entitlements reduced. The only sensible way not to reduce the compensation rights of claimants is to retain the common law system, as has been done in this proposal. The report of the review was released on 8 March this year. The Government adopted the recommendations of the review on the day it was released.

The minute details of the bill and regulation are fascinating to practitioners even if other people's eyes tend to glaze over when we talk about them. However, in common with the uniform civil procedures bill, focusing on the minute details should not obscure the primary point that this is good legislation that should be welcomed by everyone. The primary provisions in the legislation include the following. There is to be an early exchange of information between the parties. There will also be a commitment to the early apportionment of liability between defendants. This will mean that a claimant will not be delayed by disputes between different potential defendants. In the long run, this will mean savings to defendants. The early apportionment will be achieved by a number of mechanisms. Standard presumptions concerning apportionment will be used if defendants cannot agree. An independent contributions assessor is to be introduced to make a decision on apportionment. That can be challenged but only after the plaintiff's claim is resolved.

A single claims manager will be introduced for multiple defendants' claims. There will also be compulsory mediation. If mediation does not resolve a claim, then a list of facts and issues in dispute will be developed, which means only items in dispute have to be litigated. The DDT will remain to deal with those cases where a party fails to comply with the new process or for medical reasons, presumably where a plaintiff's health is failing. That is an area where the DDT has already done remarkable things. One of the most interesting aspects of these changes is in the development of a mechanism of legal costs reporting. There is simply no material available at the moment as to the real level of legal costs. That applies not only to asbestos-related claims, but to all such common law work, despite much of the dishonest rhetoric of those who pursued changes to civil law liability several years ago. These changes will mean that real and accurate data will be available although in a consolidated de-identified form. Obviously that is necessary if the effectiveness of these mechanisms is to be properly assessed.

I make just two comments about the contribution of the honourable member for Gosford. The first is his apparent complaint that not enough has been done for government employees who might be suffering from the effects of asbestos. I am a little perturbed by what he is suggesting. It seems to me he wants to treat those employees differently from other people who have been exposed to asbestos. That begins to sound like a statutory scheme. It begins to sound like government employees will not have access to the Dust Diseases

Tribunal and will not have an entitlement to get the same amounts of compensation as other injured workers. If that is what the honourable member is suggesting, that is an appalling proposition. He should think that through much more carefully. It is not something that anyone in their right mind would want to pursue. On the other hand, I agree with the justly flattering things he said about members of the Dust Diseases Tribunal, particularly the Chief Judge, John O'Meally. One can only have admiration for a judge who shares the name of a famous bushranger and who is delighted to remind every advocate who appears before him of precisely that.

Mr BOB DEBUS (Blue Mountains—Attorney General, and Minister for the Environment) [8.04 p.m.], in reply: I thank the honourable member for Canterbury and honourable member for Liverpool for their excellent contributions to the debate. I thank the honourable member for Gosford for so graciously supporting the propositions that the Government is making with respect to these alterations to the administration of the Dust Diseases Tribunal. I share the admiration that several members have expressed for the Chief Judge of the Dust Diseases Tribunal, Judge John O'Meally, and his colleagues. Perhaps we should accept an expression I have often heard Judge O'Meally use, "The blessings of all the Saints of Ireland be upon them."

The bill establishes a new claims resolution process for asbestos-related claims. Its aim is to reduce the time taken to resolve claims and, therefore, reduce the legal and administrative costs of those claims. As has been emphasised in the debate, there is a new process involving early exchange of information and compulsory mediation of claims, which should lead to quicker resolution and lower costs for asbestos victims, who will also receive their compensation earlier. It is obviously the case that both victims and defendants will benefit from the new process and from claims being resolved more efficiently. Again I emphasise that the review that has brought about this bill and the development of it involved extensive consultation with stakeholders. I formally thank those who contributed to that consultation in the period immediately before the presentation of the bill to the House. The bill establishes a process for achieving substantial cost savings and a reduction of time in settling claims.

I refer quickly to the observations made by the honourable member for Gosford that the bill is, in effect, implementing reforms more by way of regulation than legislation. The reforms are primarily prescribed by regulation because the new claims resolution process is very detailed and there is, nevertheless, a need to maintain flexibility. The requirements proposed by the regulation are broadly similar to those found in court rules, and that is the point. The new claims resolution process will make a number of changes to the way in which claims are resolved but it has to be capable of adapting to new circumstances as they arise. The features of the new claims resolution process, such as the information that has to be provided to parties, the forms to be completed and the specific time frames for that process, are detailed. To maintain flexibility the review recommended that much of the detail of the new claims resolution process should be prescribed by regulation. I refer to the analysis of the bill by the Legislation Review Committee. Its remarks go directly to the issue raised by the honourable member for Gosford. Paragraph 5 of the report of the Legislation Review Committee says:

Proposed section 32H provides wide powers for the making of regulations under the Act. These powers enable the new claims process to be implemented by regulation in the *Dust Diseases Tribunal Regulation 2001.* The Bill contains amendments to this Regulation to implement the new claims process.

The committee has gone on in two subsequent paragraphs to say these entirely relevant things:

The Committee will always be concerned to identify when a Bill provides that regulations should modify the application of or prevail over an Act.

I believe the committee is saying it is, in general, disposed to be very sceptical of Henry VIII-type situations. The committee says in its final paragraph:

However, given that the regulation making powers are limited to procedural issues relating to the claims process, the initial amendments to the regulation are included in the Bill, and the Parliament maintains the power to disallow any subsequent amendments, the Committee does not consider that proposed s 32H comprises an inappropriate delegation of the legislative power.

The committee makes no further comment on this bill, neither do I. I commend the bill to the House with some considerable pride.

Motion agreed to.

Bill read a second time and passed through remaining stages.

Proof, NSW Legislative Assembly Hansard, 24 May 2005, Pages 58 - (article 41)

« Prior Article this day | Next Article this day » | Full Day Transcript
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Home Hansard & Papers Committees Legislation Library Phonebook Admin Resources

- Subjects:
  Asbestos; Diseases:; Compensation
- Speakers:
  Hartcher Mr Chris; Burney Ms Linda; Lynch Mr Paul; Debus Mr Bob
- Speech Type:
  2R; Bill; Debate; Motion
- Printing Tips
- Print selected text