NSW Legislative Council Hansard

James Hardie Former Subsidiaries (Special Provisions) Bill

Extract from NSW Legislative Council Hansard and Papers Wednesday 22 June 2005.

Second Reading

The Hon. HENRY TSANG (Parliamentary Secretary) [3.25 p.m.]: I move:

That this bill be now read a second time.

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

Leave granted.

On 21 December 2004, the Government entered into a non-binding Heads of Agreement with James Hardie Industries NV, the Australian Council of Trade Unions, Unions New South Wales and Bernie Banton, representing asbestos victims.

The Heads of Agreement represent a major breakthrough for asbestos sufferers.

The Heads set out a framework for a legally binding agreement with James Hardie to provide long-term funding for the victims of its former subsidiaries' asbestos products.

The Heads record James Hardie's intention to provide annual contributions for at least the next 40 years to a Special Purpose Fund. The Fund will use that money to pay compensation to asbestos victims.

Since December, the Government and James Hardie have been negotiating the legally-binding final agreement.

The Government had expected that the final agreement would be settled in time to introduce supporting legislation this Budget Session.

Negotiations have proved to be slower and more complicated than expected, however, with many complex issues under Australian, Dutch and US law.

The Government now expects that the final agreement will be settled in late July or early August, after the Budget Session has concluded.

The Bill before the House is the first legislative step in implementing the long-term arrangements for James Hardie to provide funding for victims of its former asbestos subsidiaries.

The Bill will protect the rights of future claimants.

Tragically, some 9,000 Australians are predicted to develop asbestos diseases over the next 40 years as a result of exposure to James Hardie asbestos products.

This Bill will ensure that James Hardie's former asbestos subsidiaries remain in existence over that period so that these people can claim compensation.

As Honourable members will be aware, Commissioner Jackson highlighted the difficulty with the current arrangements available to the former subsidiaries under the Corporations Act to manage their liabilities.

As Commissioner Jackson recognised, none of the external administration mechanisms under the Corporations Act recognises the position of future asbestos victims.

Claimants cannot bring a claim until they have suffered damage, which may not occur for some thirty or forty years after their exposure to asbestos.

We know that these people will one day need to claim against the former asbestos subsidiaries, but we do not even know who they are at this stage.

The existing external administration provisions of the Corporations Act make no allowance for people in this position. They are unascertained, future creditors and their interests would not be considered if the former asbestos subsidiaries were to be wound up today.

In other words, if the former asbestos subsidiaries were to be wound up or deregistered, future claimants would go uncompensated because there would be no entity from which they could claim compensation.

The actual funding to pay future compensation claims will flow from the final agreement with James Hardie. This Bill is an important first step to preserve the former asbestos subsidiaries so that claimants will be able to make claims for compensation.

The Bill will also ensure that the status of the former subsidiaries does not change before any final agreement is settled and Parliament resumes.

This Bill will need to be amended in the Spring Session to reflect the detailed structure and governance arrangements in the final agreement and to include any additional matters from the negotiations.

In addition to including customised governance arrangements to reflect the final agreement reached with James Hardie, the further legislation next session will also need to deal with other matters.

This legislation will include necessary provisions to implement James Hardie's announcement that it will extend the compensation arrangements to cover asbestos mining operations in the Baryulgil community, both during and after the period in which James Hardie owned and operated the mine.

Legislation next session will also include necessary provisions to implement releases of James Hardie and its officers.

I note that the Bill now before the House does not contain any releases from liability for James Hardie or its officers.

These releases are subject to negotiation and will be settled as part of the final agreement with James Hardie.

The Heads of Agreement provide for James Hardie to be released from civil liability. The issue that has been in dispute is James Hardie's request that these releases extend to civil penalty orders under the Corporations Act.

The Government is obtaining legal advice on whether the New South Wales Parliament has any power to enact legislation to override the civil penalty provisions under the Commonwealth Corporations Act.

It is only if that legal advice shows that New South Wales does have such power that the Government will need to consider the policy issues involved.

The Government has received the views of the Australian Securities and Investments Commission on the policy issues and, of course, ASIC's views are very important.

If it becomes necessary to consider this issue further, the Government will also want to consult with the ACTU, Unions New South Wales and Mr Banton as parties to the Heads of Agreement.

Before I turn to the provisions of the Bill, I wish to say something about why this Bill is urgent and why the Government could not introduce it any earlier.

The Government is asking the Parliament to pass this Bill urgently this week. I thank Members for dealing with this Bill as a matter of urgency.

It is necessary that this Bill be passed before Parliament rises to ensure that there is no change in the underlying structure of the former subsidiaries.

The Government and James Hardie will conclude the final agreement on the basis of this underlying structure. Implementation of the final agreement will require the Government to make certain changes to that structure by legislation next session.

This Bill will ensure that implementation of the final agreement is not frustrated by changes in the structure of the former subsidiaries between now and the time when the final legislation is enacted.

The Government could not introduce this Bill any earlier in this session. In the absence of a final agreement with James Hardie, it is important that these controls on the former subsidiaries not be imposed any earlier than the last opportunity before Parliament rises.

The Government is only introducing this Bill now because it expects that a final agreement will be reached with James Hardie in the parliamentary recess. If the Government doubted that the final agreement would be concluded before Parliament resumes in September, it would not have introduced this Bill and requested its urgent passage before Parliament rises.

I turn now to the provisions of the Bill.

The Bill generally applies to James Hardie's former asbestos subsidiaries. The main companies are "Amaca Pty Limited" and "Amaba Pty Limited". The other relevant company is "ABN 60 Pty Limited", which used to be "James Hardie Industries Limited".

Part 2 of the Bill also applies to the corporations that own the shares in these former subsidiaries.

The "Medical Research and Compensation Foundation" and "MRCF (Investments) Pty Limited" ultimately own the shares in Amaca and Amaba.

The "ABN 60 Foundation Limited" owns the shares in ABN 60.

Part 2 of the Bill ensures that Amaca, Amaba, ABN 60 and the companies that own them will remain subject to New South Wales law.

Clause 8 of the Bill prevents their registered offices being moved outside the State without the approval of the Minister administering the Act. Clause 9 makes similar provision with respect to their Member Registers.

Clause 10 gives the Minister the power to issue instructions to the companies and their directors to relocate their offices or Members registers to New South Wales in the unlikely event that they are moved contrary to clauses 8 or 9.

Similarly, clause 11 of the Bill provides that the companies that own the shares in Amaca, Amaba and ABN 60 must not transfer any of those shares without the written approval of the Minister.

In the unlikely event that shares are transferred, clause 12 enables these transactions to be reversed by way of an order of the Minister to the company or its directors.

The Minister's power to issue orders in relation to these matters will apply to conduct between the date of introduction of the Bill and its assent, as well as after assent.

I want to emphasise that there is no suggestion that the entities or their directors are intending to take action to move outside the jurisdiction of New South Wales.

Nor does the Government believe that they would take such action.

While the Government has not had any particular reason to deal with the ABN 60 Foundation, the Government has received considerable support from the Medical Research and Compensation Foundation.

The Medical Research and Compensation Foundation assisted in bringing this issue to the Government's attention. It fully supported the Government in establishing the Special Commission of Inquiry and it has continued to assist in the course of the Government's negotiations with James Hardie.

I take this opportunity to thank the directors of the Foundation for their assistance and support.

These provisions in Part 2 of the Bill are simply intended to make absolutely certain that no changes occur in the structure of these companies between now and when legislation can be enacted to implement the final agreement with James Hardie.

The relevant clauses are declared to be Corporations legislation displacement provisions. This means that any provisions of the Corporations Act which are inconsistent with these clauses will not apply.

Part 3 of the Bill places Amaca, Amaba and ABN 60 under a NSW-supervised "external administration" regime.

Under clause 15, the external administration period will commence on the date of assent of the Act and will end on a day appointed by the Governor by proclamation.

Clause 16 provides that any external administration of Amaca, Amaba and ABN 60 can only proceed in accordance with the provisions of this Part of the Bill.

No proceedings may be brought in any Court or Tribunal for external administration, including liquidation or winding up proceedings, except in accordance with this Part of the Bill.

This displaces part of the Commonwealth Corporations Act and ensures that these companies cannot be wound up or deregistered under that Act.

At the request of the Commonwealth and the Australian Securities and Investments Commission, clause 16 now includes an express provision to put beyond all doubt the fact that the Bill does not limit the ability of the former subsidiaries to provide assistance to ASIC.

The affairs of the former subsidiaries generally will be subject to the supervision of the New South Wales Supreme Court and the Minister.

By enacting this legislation to place the former subsidiaries under NSW external administration, there is no suggestion that the companies are insolvent.

Nor does the Government wish to change the day-to-day management of the former subsidiaries in any practical sense. As I have already mentioned, the Government has received considerable support from the Medical Research and Compensation Foundation in this process to date and looks forward to this support continuing.

What is important in a legal sense is that the Bill will ensure that the former subsidiaries are placed in external administration under the supervision of the Minister and the Supreme Court.

Clause 18 of the Bill requires the former subsidiaries during the administration period to carry on their business so far as is necessary for the management of claims, including the payment or settlement of claims.

The intent of this provision is to ensure that the resolution of claims remains the core of their business and essentially their only business.

Division 3 of Part 3 of the Bill establishes a regime which will apply if at any time during the period of external administration insufficient funds are available to meet claims as they fall due.

If such a situation emerges, the Minister may apply to the Supreme Court for an order approving a scheme to prioritise the payment of claims against the companies.

The Government does not anticipate that any such priority scheme will be required. We understand that the former subsidiaries have sufficient assets to continue to meet claims as they fall due.

It is necessary, however, that we deal with this possibility—no matter how remote it is—to ensure that any shortage of funds is dealt with in a fair and sensible manner.

Clause 26 of the Bill provides that priority will be given under such a scheme, first to operating expenses and claims processing expenses, and second, to claims for damages for personal injury or death. This priority will be given over all other claims arising during the period.

Any priority scheme that might be required will ensure that the former subsidiaries can continue to function so that they can deal with claims by paying their day-to-day operating expenses.

After this, they will be required to give priority to personal injury claims over all other claims, such as commercial or pure economic loss claims.

Any priority scheme will require an application by the Minister and the approval of the Supreme Court. I must emphasise that the Government does not expect to have to make any application to the Court for a priority scheme—this measure is included for completeness only.

To ensure that the Government is kept informed of the position of the former subsidiaries, clause 27 imposes obligations on the companies to provide certain information, including verified accounts, while clause 28 provides for the inspection of records.

Clause 29 imposes general obligations on the former subsidiaries and their directors to co-operate with and assist the Minister as the Minister may reasonably require.

Divisions 5 and 6 address various matters relating to enforcement, including dealing with contraventions of Part 3.

The Supreme Court will have jurisdiction to enforce the requirements of Part 3.

The Bill provides for an authorised applicant, being the Minister or a person who has been authorised by the Minister, to apply to the Supreme Court for relief.

The Bill also enables the Minister to apply to the Supreme Court to remove any directors if they do not perform

their duties as directors or do not comply with the Bill.

Pursuant to clause 33, the former subsidiaries may apply to the Minister or the Supreme Court for advice or direction as to the discharge of their functions under Part 3.

Similarly, the Minister may apply to the Supreme Court for advice or direction on the exercise of the Minister's functions.

Division 7 of Part 3 displaces the operation of the Corporations Act in relation to matters in Part 3 of the Bill. This ensures that, where the Bill is inconsistent with the Corporations Act, the Corporations Act provisions will cease to apply.

As this legislation displaces the operation of parts of the Corporations Act, it has been necessary to obtain the approval of the Ministerial Council on Corporations.

I express my gratitude for the speed with which my colleagues were able to grant approval for the legislation to enable it to be introduced today.

The Government expects that a final, legally binding agreement with James Hardie will be settled in the coming weeks.

This legislation is intended to preserve the "status quo" until such time as that agreement is finalised and legislation can be introduced next session to implement the terms of the final agreement.

I commend the Bill to the House.