



James Hardie (Investigations and Proceedings) Bill 2004

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Law and Bills Digest Section

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James Hardie (Investigations and Proceedings) Bill 2004

Date Introduced: 2 December 2004

House: House of Representatives

Portfolio: Treasury

Commencement: The day after the Act receives Royal Assent

Purpose

To remove legal professional privilege from material arising out of the James Hardie Special Commission of Inquiry in New South Wales¹ to facilitate investigation and instigation of legal proceedings by the Australian Securities and Investments Commission (ASIC) or the Commonwealth Director of Public Prosecutions (DPP).

Background

History of the James Hardie asbestos controversy²

James Hardie Industries Limited (later called ABN 60 Pty Ltd) was first an importer, then a manufacturer of asbestos products. In 1937 the major part of the James Hardie group's asbestos business was taken over by a subsidiary, James Hardie & Coy Pty Ltd (later called Amaca Pty Ltd). That company carried on a major asbestos operation until the 1980s when it ceased production of asbestos products. In 1963 another company became involved in the manufacture of brake linings and friction products – Hardie Ferodo Pty Ltd (later called James Hardie Brakes Pty Ltd, Jsekarb Pty Ltd, and Amaba Pty Ltd). That company was sold by the Hardie Group in 1987.

Because of the health risks associated with asbestos, alternative products were developed and the James Hardie Group achieved considerable success with them. An emerging market for Hardie products was the United States. One problem with the group's expansion in the United States was its asbestos liabilities. Many US companies had suffered extensive claims for damages caused by exposure to asbestos and the Hardie Group's association with asbestos could have impeded its attempts to raise funds in the US.³ As a result the group began to consider how it might separate its asbestos liabilities.⁴

In 1996, in an attempt to quantify the amount of its asbestos liabilities, the Hardie Group obtained an actuarial assessment from John Trowbridge Consulting Pty Ltd. The report quantified the liability at \$258 million, less \$28 million that might be recovered from insurers.⁵ In 1998, Trowbridge prepared another report, this time quantifying the liability at \$281 million, less \$27 million to be recovered from insurers.⁶

In 1995 James Hardie & Coy Pty Ltd sold its 'core technology' to another member of the Hardie Group – James Hardie Research Pty Ltd. In 1998, many of James Hardie & Coy's

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assets were sold to other companies in the group and to James Hardie Australia Pty Ltd, not a member of the group but a subsidiary of the newly incorporated (in the Netherlands) James Hardie NV. The proceeds of these sales were used to repay loans due from James Hardie & Coy to other members of the group and to lend money to other members of the group.

The result of this restructuring was that, in the year 2000, James Hardie & Coy and Jsekarb Pty Ltd, both owned by James Hardie Industries Limited, bore the group's asbestos liabilities. A further report produced by Trowbridge now placed the group's asbestos liabilities at \$329 million, less \$35 million recoverable from insurers, leaving a net liability of \$294 million. It was around this time that the concept of establishing a trust in which to isolate the group's asbestos liabilities was discussed. The plan was to transfer ownership of James Hardie & Coy and Jsekarb Pty Ltd to a new company outside the group that would operate as a trust for the purpose of compensating victims of Hardie Group asbestos. There were discussion between the proposed directors of the new trust company. The proposed directors sought access to the Trowbridge report of 2000. Such access was not provided, but Trowbridge was engaged to provide an updated report, based on new methods of assessment of asbestos liability identified by Trowbridge employees. The new report was produced in February 2001 and assessed a 50 year high range liability of \$378.5 million.

In February 2001 the board of James Hardie Industries Limited resolved to proceed with the project to separate the group's asbestos liabilities. The Medical Research and Compensation Foundation Limited was established, together with a wholly owned subsidiary, MRCF Investments Pty Ltd. These companies became the owners of James Hardie & Coy, which in turn owned all the shares in Jsekarb Pty Ltd. The establishment of the MRCF was announced by James Hardie in a media release which included the following statements:

The foundation has sufficient funds to meet all legitimate claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL.

JHIL CEO Mr Peter Macdonald said that the establishment of a fully-funded foundation provided certainty for both claimants and shareholders.

“The establishment of the Medical Research and Compensation Foundation provides certainty for people with a legitimate claim against the former James Hardie companies which manufactured asbestos products,” Mr. Macdonald said.

After the establishment of the MRCF Trowbridge provided annual actuarial reports beginning in August 2001 which estimated the fund's liabilities at \$574 million, then October 2002 where the estimate increased to \$752 million and September 2003 when it increased to \$1089 million.

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Also after the establishment of the MRCF in 2001, moves began to effect the substitution of James Hardie Industries NV, a company incorporated in the Netherlands, for James Hardie Industries Limited as the holding company of the James Hardie Group. This was achieved by means of a scheme of arrangement under s. 411 of the *Corporations Act 2001*. The arrangement was approved by the Supreme Court of New South Wales. During the course of that Hearing, Justice Santow raised the question of James Hardie Industries Limited's ability to satisfy any asbestos liabilities. Justice Santow was assured that, because part of the arrangement involved ABN 60 having the ability to call on James Hardie Industries NV to pay amounts payable (approximately \$1.9 billion) on partly paid shares held by James Hardie Industries NV in ABN 60, the asbestos liabilities could be met. This assurance was 'pivotal to the court giving approval for the transfer of ABN 60's assets' to JHI NV in the Netherlands.⁷ But in March 2003 ABN 60 cancelled the partly paid shares 'without informing the court or the stock exchange'.⁸

When it became apparent that there would be insufficient funds to meet liabilities, the Foundation attempted to persuade James Hardie to provide further funds. Up until March 2003, the group offered only \$20 million in settlement of the Foundation's claims. Also in 2003, the James Hardie Group became worried that it still might have had asbestos liabilities via its connections to ABN 60. In an attempt to eliminate such liability a new foundation was formed – the ABN 60 Foundation – which became the parent corporation for ABN 60, with the result that ABN 60 was no longer part of the James Hardie Group.

These facts led to the establishment, by the New South Wales Government, of the Special Commission of Inquiry into the Medical Research and Compensation Foundation. The Commission reported on 21 September 2004. The key findings of the Commission include that:

- The Medical Research and Compensation Foundation's funds would be exhausted by about the middle of 2007 and that it had no prospect of meeting its liabilities in the medium to long term.
- That the James Hardie Group's assertions, at the time of the establishment of the MRCF, that the latter had sufficient funds to meet its asbestos liabilities were misleading.
- Current arrangements available to the Foundation under the Corporations Act will not assist the Foundation to manage its liabilities.
- The best long term solution for satisfying the asbestos liabilities of Amaca, Amaba and ABN 60 would be a statutory compensation scheme, for which that proposed by JHI NV might be a starting point.

Since the report of Commissioner Jackson was delivered, the New South Wales government has enacted the *Special Commission of Inquiry (James Hardie Records) Act 2004* (the James Hardy Records Act). That Act has a number of provisions directed at

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giving ASIC control over records of the Special Commission of Inquiry, and at abrogating legal professional privilege in certain instances.

According to the Treasurer, this Bill is required to remedy the fact that, despite a direct request from ASIC, the James Hardy Records Act did not address the legal impediments to the use of the special commission records by ASIC and the DPP in investigations or proceedings.⁹ The James Hardy Records Act does in fact contain various provisions aimed at facilitating the use of the records in proceedings but it seems that these are regarded as requiring augmentation by a Commonwealth Act. The primary object of the Bill is to abrogate legal professional privilege in James Hardie investigations and proceedings.

Legal professional privilege

Legal professional privilege has been regarded as enhancing the administration of justice. It is also known (more accurately) as ‘client privilege’. It excuses a lawyer from disclosing information otherwise required to be revealed to a court. Historically legal professional privilege has been used to stop confidential communications between a lawyer and client from compulsory production in court and similar proceedings. It has therefore promoted free consultation and disclosure between clients and lawyers leading to better legal representation for clients. This has been regarded as outweighing the alternative benefit of having all information available to facilitate the trial process.¹⁰

Under current case law, legal professional privilege can be claimed for lawyer/client communications that have been made for the ‘dominant purpose’ of contemplated or pending litigation or for obtaining or giving legal advice.¹¹ In relation to investigations by regulators, most federal statutes are silent on the availability of legal professional privilege. Some statutes, such as the *Australian Securities and Investment Commission Act 2001*, expressly state that the privilege applies.¹² Traditionally the High Court has held that privilege is available unless a contrary statutory intention is shown by express words or necessary implication.¹³

Few statutes expressly remove the privilege. An example where the privilege has been removed is section 123 of the *Evidence Act 1995* which provides that privilege does not apply to information that might prove the innocence of an accused person awaiting trial.

ASIC has argued that privilege needs to be removed for its investigations. ASIC argues that the difficulty of investigating misconduct in the financial and corporate sector, combined with the frequent involvement of legal advisers in the types of transactions that are investigated by ASIC, supports removal of the privilege. Therefore, removing privilege in some circumstances may assist regulators in improving compliance with legislation.

Some commentators however argue that removing the privilege may damage, rather than enhance, legislative compliance. Fear of compulsory disclosure may deter candid, careful,

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detailed written advice being given by lawyers to their clients and increase the amount of oral advice by lawyers.

Interesting arguments are also made when legal professional privilege is considered in the context of corporations. For a corporation's purpose, legal professional privilege applies not only to communications between corporations and external legal advisers. The privilege can also attach to in-house lawyers (i.e. treating the corporation as the 'client'), provided the adviser is suitably qualified and there is a 'professional relationship which secures to the advice an independent character notwithstanding the employment'.¹⁴

Main Provisions

Section 3 provides a number of important definitions.

An 'authorised person' is defined to be ASIC or an ASIC delegate, a person exercising the power to issue a warrant under the ASIC Act, the DPP or a person who has instituted a James Hardie proceeding.

The 'James Hardie Group' is given a broad definition including a number of specified entities as well as bodies corporate that are related to, or, more broadly, 'controlled by' James Hardie Industries NV or ABN 60 Pty Ltd.

According to the Explanatory Memorandum 'James Hardie investigation' is 'limited to matters that have been identified to date as involving possible misconduct, particularly conduct that may have contributed to the separation and underfunding of obligations to compensate people who have suffered loss or damage as a result of exposure to asbestos.'¹⁵ Whilst that may be the intention, however, the words of the Bill are broader and do not so limit the scope of an ASIC 'investigation' into James Hardie affairs.

'James Hardie material' is very broadly defined and is not limited to material that was before the Special Commission of Inquiry, but includes any information ASIC may request in relation to an investigation or proceeding.

'James Hardie proceeding' is defined to mean a proceeding instituted by ASIC or the DPP and, according to the Explanatory Memorandum, includes a civil proceeding under section 50 of the ASIC Act. That is a matter of some significance. Section 50 provides:

50 ASIC may cause civil proceeding to be begun

Where, as a result of an investigation or from a record of an examination (being an investigation or examination conducted under this Part), it appears to ASIC to be in the public interest for a person to begin and carry on a proceeding for:

- (a) the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed in connection with a matter to which the investigation or examination related; or

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(b) recovery of property of the person;

ASIC:

(c) if the person is a company—may cause; or

(d) otherwise—may, with the person’s written consent, cause;

such a proceeding to be begun and carried on in the person’s name.

The effect of this seems to be that ASIC could, for example, commence proceedings in the name of the MRCF against James Hardie Industries NV or other Hardie group companies and, in that proceeding, JHI NV would not have the benefit of claims to legal professional privilege. The result is that much evidence which would otherwise have been inadmissible would be admissible to prove the claims against Hardie Group companies.

Section 4 abrogates legal professional privilege in relation to James Hardie investigations and proceedings and specifically states that a claim of legal professional privilege does not prevent James Hardie material from being admitted in evidence in a James Hardie proceeding.

Section 5 preserves legal professional privilege in respect of James Hardie material for the purposes of certain provisions of the *Freedom of Information Act 1982*; the *Archives Act 1983*; and the *Proceeds of Crime Act 2002*.

Section 6 makes plain that the Bill does not affect the law relating to legal professional privilege other than in the specific respects outlined therein.

Section 7 enables the Governor-General to make relevant regulations.

Concluding Comments

Constitutional issues

The legal professional privilege enjoyed by client-lawyer relationships can be abrogated by statute.¹⁶ Yet, based on the importance of the privilege for the unrestricted communication between professional advisers and their clients, it has been argued that courts will not lightly infer that a statute has this effect.¹⁷ This point has been emphasised by the High Court in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, where the High Court required that the abrogation must occur either by express words or an unmistakable implication.¹⁸ This Bill is clear about abrogating the legal professional privilege which applies to certain James Hardie material. However, the Bill attempts to achieve two separate things:

- abrogation of legal professional privilege in relation to a clearly specified entity or group of entities (that is the James Hardie group) and certain specified transactions

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undertaken by this group with a view commencing legal proceedings against this group (proposed subsection 4(1) of the Bill), and

- a possible direction to the courts conducting James Hardie proceedings to disregard any claim of legal professional privilege in relation to James Hardie material (proposed subsection 4(4) of the Bill).

It is in relation to the latter aspect of the proposed legislation that a constitutional issue may arise, namely, whether the proposed legislation could be interpreted as an impermissible interference with the courts' judicial powers. This constitutional concern is based on the argument that interferences with the courts' exercise of judicial power could be contrary to the principle of separation of powers in the Australian Constitution.

The doctrine of separation of powers

The conceptual basis of the doctrine of separation of powers is its function to protect 'individual liberty from arbitrary power consistently with the rule of law.'¹⁹ In Australia, the doctrine has been acknowledged by the High Court in *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956)²⁰ (the *Boilermaker's case*). In subsequent cases, the High Court has reiterated the importance of the doctrine as a 'bullwark of freedom'.²¹ The separation between the judiciary on the one hand and the executive and legislature on the other, is a strict separation.²² The maintenance of this strict separation includes the prohibition to interfere with or usurp the judicial power of conferred upon the courts under Chapter III of the Constitution.²³

Is the James Hardie Bill an impermissible interference with judicial functions?

This area of constitutional law is unsettled. However, the core content of the 'constitutional offence' of impermissible interference with judicial functions has been identified recently as the element of 'legislative prescription or direction' to a Chapter III court in a pending case.²⁴ However, there has been an indication that such constitutional offence may not only include pending litigation, but also prospective legal proceedings against a person or entity.²⁵ The pertinent issue is whether the proposed legislation, or a provision within that proposed legislation, constitutes a direction to courts in a pending or prospective case, rather than a substantive change to the law.

There is no fully accepted test for when legislation will constitute an impermissible interference with judicial functions. The clearest exposition of various indicia can be found *Liyana v The Queen* (1967)²⁶, a case decided by the UK Privy Council. In this case, the Privy Council found that the Act usurped judicial power and consequently held it to be invalid.²⁷ Writing in the *Federal Law Review*, Peter Gerangelos, who examined the *Liyana case* in detail, extracted the following indicia of the constitutional offence, including:

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the ad hominem character of the legislation [i.e. legislation directed at a particular subject such as person or entity, not of general application]; retrospectivity; the delineation of a precise time period and types of offences to which the legislation is directed, an express or implied application in particular proceedings and in relation to particular legal issues in those proceedings, the very existence of pending proceedings and the extent to which the legislation appears to be designed with those proceedings in mind, relevance to the exercise of traditional judicial discretions such as those relating to sentencing and admissibility of evidence, the weight and conclusions to be drawn from evidence, the legality of warrants and arrest procedures and the true purpose of the legislation where this can be discerned.²⁸

Taken on their own, each indicia may not be able to render the measure unconstitutional, yet cumulatively, their effect may result in a finding that the proposed legislation has the effect of unconstitutionally interfering with the judicial functions of the courts. The main indicia this Bill arguably displays include:

- *ad hominem* character of the legislation—the legislation expressly names the James Hardie Group as defined in the Bill as the identified subject of the law and lacks the generality of the law which is usually required
- retrospectivity of the measure—the legislation will remove legal professional privilege retrospectively with respect to James Hardie material prepared in the past, and
- admissibility of evidence—the legislation specifically addresses the issue of admissibility of evidence, providing that a court has to disregard the privilege in James Hardie proceedings.

In *Liyanage*, the Ceylonese Parliament ‘passed special legislation blatantly designed to secure the conviction’ of alleged conspirators in a coup attempt.²⁹ The Privy Council’s decision received a mixed reception by the Australian courts. Australian cases indicate that without such direct intervention in the judicial process there will be no breach of the doctrine of separation of powers and in recent decisions, the courts have been reluctant to fully adopt the principle.³⁰ However, in some cases, the approach taken, and list of indicia applied, in *Liyanage* that may lead to the invalidity of such legislation has been at least partially endorsed by the courts.³¹ Whether the Bill is constitutional or not will depend on the reading of proposed new section 4(4) and whether the courts retain their full judicial discretion as guaranteed under the Constitution.

Endnotes

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- 1 Peter Costello, 'Second reading: James Hardie (Investigations and Proceedings) Bill 2004', House of Representatives, *Debates*, 2 December 2004, p. 1.
 - 2 The facts outlined herein are taken from: Special Commission of Inquiry into the Medical Research and Compensation Foundation, *Report*, (D.F. Jackson QC, Commissioner), New South Wales Cabinet, September 2004.
 - 3 *ibid*, p.18.
 - 4 *ibid.*, p. 19.
 - 5 *ibid.*, p. 20.
 - 6 *ibid.*
 - 7 Weekend Australian, 3.7.04, p. 27.
 - 8 The Australian, 3.8.04, p. 5.
 - 9 Costello, Second reading speech, *op. cit.*
 - 10 *Grant v Downs* (1976) 135 CLR 674.
 - 11 *Esso Australia Resources Ltd v Commissioner of Taxation* (1992) 201 CLR 49.
 - 12 Section 69.
 - 13 *Baker v Campbell* (1983) 153 CLR 52.
 - 14 *Waterford v Commonwealth* (1987) 163 CLR 54 at 62.
 - 15 Explanatory Memorandum, p. 14.
 - 16 J. Heydon, 'Cross on Evidence, Sixth Australian Edition', Sydney, 2000, paragraph [25280]
 - 17 *ibid.*
 - 18 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
 - 19 L. J. Kirk, 'Chapter III and Legislative Interference with the Judicial Process: *Abebe v Commonwealth* and *Nicholas v The Queen*', in A. Stone and G. Williams, *The High Court at the Crossroads*, Federation Press, Leichardt, 2000, p. 119.
 - 20 *R v Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
 - 21 *R v Quinn, Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, p. 11.
 - 22 Kirk, *op. cit.*, p. 121.
 - 23 *Re Tracey; Ex Parte Ryan* (1989) 166 CLR 518, p. 580.
 - 24 P. Gerangelos, 'The Separation of Powers and Legislative Interference with Judicial Functions in Pending Cases', *Federal Law Review*, Canberra, 2002, p. 7
 - 25 *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, p. 36.

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- 26 *Liyanage v The Queen* [1967] 1 AC 259
- 27 S. Ratnapala, 'Australian Constitutional Law, Foundations and Theory', Oxford University Press, Melbourne, 2002, p. 113.
- 28 Gerangelos, op. cit., p. 12.
- 29 S. Joseph and M. Castan, 'Federal Constitutional Law', Melbourne, 2001, p. 149.
- 30 Gerangelos, op. cit., pp. 13 – 33, referring to the majority in *Nicholas v The Queen* (1998) 193 CLR 173, for example the judgements delivered by Brennan CJ, Toohey and Hayne JJ.
- 31 Gerangelos, ibid. For example, the principle has been applied by Street CJ and Kirby P in *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 and, after his appointment to the High Court, by Kirby J in *Nicholas v The Queen* (1998) 193 CLR 173. Gerangelos also found a reinforcement of the principle in *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1. In *H A Bacharach Pty Ltd v Queensland* (1998) 198 CLR 547, the High Court made, according to Gerangelos, several comments which could be identified as the application of the principle.

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