



New South Wales

James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Trust Funds) Act 2006 No 108

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James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Trust Funds) Act 2006 No 108

Act No 108, 2006

An Act to amend the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* to give recognition to a discretionary trust fund to be administered by the SPF trustee that is to be a source of funding in addition to the SPF; and for other purposes. [Assented to 29 November 2006]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Trust Funds) Act 2006*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by this section.
- (2) The following provisions of this Act commence on the date of assent to this Act:
 - (a) sections 1, 4 and 5 and this section,
 - (b) Schedule 1 [1]–[10] and [23]–[27] (and section 3 in its application to those items).

3 Amendment of James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 No 105

The *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* is amended as set out in Schedule 1.

4 Amendment of James Hardie (Civil Liability) Act 2005 No 106

The *James Hardie (Civil Liability) Act 2005* is amended by omitting “personal legal representative” from paragraph (b) of the definition of *asbestos claim* in section 21 (1) and by inserting instead “legal personal representative”.

5 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 **Amendment of James Hardie Former Subsidiaries (Winding up and Administration) Act 2005**

(Section 3)

[1] **Section 2 Commencement**

Insert after section 2 (3) (and the note to that subsection):

- (4) The provisions of Part 3 of Schedule 1 commence on the date of assent to the *James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Trust Funds) Act 2006*.

[2] **Section 4 Definitions**

Insert in alphabetical order in section 4 (1):

assets means any legal or equitable estate or interest (whether present or future, whether vested or contingent and whether personal or assignable) in real or personal property of any description (including money), and includes securities, choses in action and documents.

compensation funds means the following:

- (a) the SPF,
(b) the discretionary fund.

discretionary fund means any discretionary trust fund:

- (a) established in accordance with the SPF trust deed and the Final Funding Agreement with respect to any income derived from assets that form part of the SPF, and
(b) in respect of which the SPF trustee is also the trustee.

SPF trust deed means the deed that established the SPF, as in force from time to time.

[3] **Section 4 (1), definition of “personal asbestos claim”**

Omit “personal legal representative” from paragraph (b) of the definition.

Insert instead “legal personal representative”.

[4] **Section 4 (4A)**

Insert after section 4 (4):

- (4A) Unless the context or subject-matter indicates or requires otherwise, a reference in this Act to the payment or discharge (whether in whole or in part) by the SPF trustee of a payable liability of a liable entity on the entity’s behalf or for its benefit is

a reference to the payment or discharge of such a liability by the
SPF trustee in its capacity as the trustee of the SPF or the
discretionary fund or in both capacities (as the case may be).

[5] Section 8 SPF may be treated as charitable trust

Insert after section 8 (2):

- (3) If the discretionary fund is for the time being authorised or required under the Final Funding Agreement or the SPF trust deed to receive and provide funding for the payment of, and to pay, any of the payable liabilities of any liable entity instead of or in addition to the SPF, any trust fund that was originally established for the purposes referred to in subsection (1) (a):
- (a) continues to be a valid charitable trust, and
 - (b) is taken to be administered by the SPF trustee for the purposes for which the trust fund was originally established,
- even though the fund is not the only trust fund being used during that time for the purpose referred to in subsection (1) (a) (i).

[6] Section 12 Registered offices to be within the State

Insert at the end of section 12 (2) (b):

- , and
- (c) the provisions of paragraphs (a) and (b) have effect despite any other provisions of the constitution of the company.

[7] Section 13 Member Register to be within the State

Insert at the end of section 13 (2) (b):

- , and
- (c) the provisions of paragraphs (a) and (b) have effect despite any other provisions of the constitution of the company.

[8] Section 15 Certain transfers of shares in liable entities prohibited

Omit section 15 (3). Insert instead:

- (3) It is taken to be a provision of the constitution of each liable entity that:
- (a) shares in the entity cannot be transferred without the written approval of the Minister, and
 - (b) the provisions of paragraph (a) have effect despite any other provisions of the constitution of the entity.

[9] Section 16 Orders requiring transfer of shares in liable entities

Insert at the end of section 16 (6) (b):

, and

- (c) the provisions of paragraphs (a) and (b) have effect despite any other provisions of the constitution of the company.

[10] Section 18 When Part expires

Omit “1 October 2006” from section 18 (b).

Insert instead “1 October 2007”.

[11] Section 24 Directions from SPF trustee

Omit “provided from the SPF” from section 24 (3).

Insert instead “provided from any of the compensation funds”.

[12] Section 32 Kinds of claims that are payable

Omit “(whether by the entity itself or by the SPF trustee for the entity)” from section 32 (1), (2) and (3) wherever occurring.

Insert instead “(whether by the entity itself or by the SPF trustee on the entity’s behalf or for its benefit)”.

[13] Section 33 Determination of whether sufficient funds

Omit “the SPF” from section 33 (1).

Insert instead “any of the compensation funds”.

[14] Section 33 (3)

Omit “the SPF by the SPF trustee”.

Insert instead “any of the compensation funds by the SPF trustee”.

[15] Section 34 Payments during period of sufficient funds

Omit “(or the SPF trustee on its behalf)”.

Insert instead “(or the SPF trustee on its behalf or for its benefit)”.

[16] Section 35 SPF trustee may apply to Supreme Court if insufficient funds

Omit “SPF” from the heading to section 35 (9).

Insert instead “SPF trustee”.

[17] Section 36 Payments made by SPF trustee directly to claimants

Omit “from the SPF” from section 36 (1).

Insert instead “from any of the compensation funds”.

[18] Section 36 (1)

Insert “that is made on the entity’s behalf or for its benefit” after “the claimant”.

[19] Section 36 (2) (b)

Insert “except where the SPF trustee makes the payment from the discretionary fund—” before “to confer”.

[20] Section 36 (2) (c)

Insert “except where the SPF trustee makes the payment from the discretionary fund—” before “to confer”.

[21] Section 36 (3A)

Insert after section 36 (3):

- (3A) Without limiting subsection (3), the SPF trustee may determine whether to make a requirement under that subsection after the end of the financial year (within the meaning of the Final Funding Agreement) in which the right to indemnity arose or at such other times as the SPF trustee may determine.

[22] Section 37 Winding up accounts

Insert “(within the meaning of the Final Funding Agreement)” after “financial year” in section 37 (1).

[23] Section 54 Enforcement of provisions of this Part

Omit section 54 (4). Insert instead:

- (4) Without limiting subsection (3), on any such application the Supreme Court may:
 - (a) make an order setting aside a rationing direction made under section 35 if it is satisfied that the direction should not have been given or is no longer required, or
 - (b) make an order setting aside a transaction, or requiring the repayment of money or the return of any other asset, (or both), if satisfied that the transaction or the disposition of the money or other asset (as the case may be) was in contravention of a provision of this Part.

[24] Section 63 Exemption from State tax

Insert after paragraph (c) of the definition of *exempt matter* in section 63 (1):
(c1) the establishment of the discretionary fund,

[25] Section 64 Tabling of copies of Final Funding Agreement and Related Agreements

Insert after section 64 (2):

- (2A) If a House of Parliament is not sitting when the Minister seeks to table the copies of the disclosed Agreements, the Minister may present the copies to the Clerk of the House concerned.

[26] Schedule 1 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

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[27] Schedule 1, Part 3

Insert after Part 2:

Part 3 Provisions consequent on enactment of James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Trust Funds) Act 2006

Division 1 Interim funding arrangements

9 Rights and liabilities relating to Interim Funding Deed not affected

- (1) For the avoidance of doubt, it is declared that nothing in the NSW administration legislation operates to abrogate, limit or otherwise affect any right or liability of any person arising under or in relation to the Interim Funding Deed.
- (2) Accordingly, any provision of the NSW administration legislation that would (but for subclause (1)) have abrogated, limited or otherwise affected any such right or liability is to be read as if it did not have that effect.
- (3) The provisions of this clause are taken to have had effect on and from the day on which the Interim Funding Deed was entered into by the parties to the Deed.

(4) In this clause:

Interim Funding Deed means the deed entitled “Interim Funding Deed” that was entered into by the following parties on 16 November 2006:

- (a) James Hardie 117 Pty Limited (ACN 116 110 948),
 - (b) Amaca,
 - (c) the Compensation Foundation,
- as in force from time to time.

NSW administration legislation means any of the following:

- (a) the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*,
- (b) this Act,
- (c) any instrument made under an Act referred to in paragraph (a) or (b).

Division 2 Winding up and termination of MRCF trust fund

10 Definitions

In this Division:

asbestos medical research provider means a person or body that conducts, or that provides funding for the conduct of, medical research into asbestos-related diseases.

hold a share includes hold a share on trust or for the benefit of another person.

modification includes addition, exception, omission or substitution.

MRCF trust deed means the deed executed by James Hardie Industries Limited (ACN 000 009 263) in February 2001 that:

- (a) constituted a charitable private trust fund for the purposes of medical research into asbestos-related diseases, and
- (b) appointed the Compensation Foundation as the trustee of the fund,

as in force from time to time.

MRCF trust fund means the trust fund established by the MRCF trust deed.

MRCF trustee means the trustee of the MRCF trust fund from time to time.

trust assets means any assets held by the MRCF trustee for the purposes of the MRCF trust fund.

11 MRCF trustee to apply trust assets for certain purposes

The MRCF trustee must, as soon as is reasonably practicable after the day on which it ceases to hold any shares in the liable entities, take such steps as are necessary to apply any trust assets as follows:

- (a) first, in payment of any amounts that are payable to any creditor of the MRCF trust fund,
- (b) second, transfer (for no consideration) the balance of any trust assets to one or more asbestos medical research providers prescribed by the regulations in such proportions as may be prescribed by the regulations.

Note. Section 16 enables the Minister to order the trustee (namely, the Compensation Foundation) to transfer shares that it holds in a liable entity to a person or persons specified in the order.

12 Termination of MRCF trust fund

- (1) The MRCF trustee must, within the period of 7 days after taking all of the steps referred to in clause 11, give the Minister a written notice (a *compliance notice*) stating that the trustee has complied with the provisions of clause 11.
- (2) The Minister may, by order published in the Gazette, terminate the MRCF trust fund if the Minister has been given a compliance notice.
- (3) The MRCF trust fund is terminated on the day specified in the order (being a day that is not earlier than the day on which the order is published in the Gazette) and, accordingly, the MRCF trustee ceases to be the trustee of the MRCF trust fund on that day.

13 Application to Minister for advice or direction

- (1) The MRCF trustee may apply for advice or direction from the Minister on any matter relating to the scope or exercise of the trustee's functions under this Division.
- (2) In determining any such application, the Minister may decide to:
 - (a) approve or disapprove of any act proposed to be done by the MRCF trustee, or
 - (b) give such advice or direction as the Minister considers appropriate.

- (3) An advice or direction given by the Minister under this clause is to be given by order in writing.
- (4) Subject to clause 14, no proceedings lie, or civil or other liability arises, against the MRCF trustee or the Minister for or on account of any act, matter or thing done or omitted to be done by the trustee in accordance with any approval, advice or direction given under this clause.

14 Applications to Supreme Court for compliance orders

- (1) The Minister may apply to the Supreme Court for an order requiring the MRCF trustee to comply with the provisions of this Division.
- (2) On any such application, the Supreme Court may, if satisfied that the MRCF trustee has refused or failed to comply with a provision of this Division, make such order or orders as it thinks fit to require the trustee to comply with the provision.

15 Effect of Division

- (1) Any dealing by the MRCF trustee with the trust assets as required by or under this Division is not to be regarded as a breach of trust or otherwise as a civil wrong (whether for the purposes of any legislation of the State or the general law).
- (2) For the avoidance of doubt, any amounts drawn from the trust assets that are paid, or any trust assets that are transferred, as referred to in clause 11 are paid or transferred free of any equitable estates, interests, rights or obligations that attach to the assets by reason of the MRCF trust fund.
- (3) The provisions of this Division have effect despite anything to the contrary contained in the MRCF trust deed (in particular, clause 8 of that deed).

16 Protection for exercise of functions under this Division

- (1) The provisions of section 59 (other than subsection (5) (a)) are taken to apply to and for the purposes of this Division as if:
 - (a) a reference in that section to a protected person were a reference to the MRCF trustee or the Minister, and
 - (b) a reference in that section to a protected function were a reference to a function conferred or imposed by or under this clause, and
 - (c) a reference in that section to this Part (that is, Part 4 of this Act) were a reference to this Division, and

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- (d) the section provided that nothing in that section prevents the MRCF trustee or the Minister (as the case may be) from:
 - (i) making an application under clause 13 or 14, or
 - (ii) being given advice or direction under clause 13 or granted relief by the Supreme Court under clause 14, and
 - (e) any provision or provisions of that section specified by the regulations had effect subject to such modifications as may be prescribed by the regulations.
- (2) Nothing in this clause limits the operation of section 59 in its application to matters arising under or in relation to Part 4 of this Act.

Division 3 Discretionary fund

17 Establishment of discretionary fund by amendment of SPF trust deed

For the avoidance of doubt, it is declared that for the purposes of the law of trusts of the State the discretionary fund may be established by amendment of the SPF trust deed in accordance with the provisions of that deed dealing with its amendment without the need to do anything else (including terminate the SPF and re-settle the assets that are the subject of the SPF into 2 new trusts).

[Second reading speech made in—

Legislative Assembly on 21 November 2006

Legislative Council on 22 November 2006]

BY AUTHORITY