



New South Wales

James Hardie Former Subsidiaries (Winding up and Administration) Amendment Act 2009 No 116

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James Hardie Former Subsidiaries (Winding up and Administration) Amendment Act 2009 No 116

Act No 116, 2009

An Act to amend the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* to make further provision with respect to the funding of claims against certain former subsidiaries of the James Hardie corporate group. [Assented to 14 December 2009]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *James Hardie Former Subsidiaries (Winding up and Administration) Amendment Act 2009*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 No 105

[1] Section 4 Definitions

Insert in alphabetical order in section 4 (1):

authorised loan facility means a loan facility provided under a relevant loan facility agreement.

loan repayment, in relation to an authorised loan facility, means:

- (a) the repayment of any part of the principal payable under the facility, or
- (b) the payment of any interest (whether or not the interest is capitalised) payable under the facility, or
- (c) the payment of any other amounts that are payable under, or in connection with, the facility.

loan security expense of a liable entity means any amount that the entity is required to pay under, or in connection with, a relevant loan facility agreement.

proceeds of asset realisations of a liable entity includes the proceeds of a relevant insurance contract of the entity within the meaning of section 30.

relevant loan facility agreement means any agreement that is authorised by section 30A, as in force from time to time.

small claim—see section 4A.

[2] Section 4 (1), definition of “operating expenses”

Insert after paragraph (a):

- (a1) includes any loan security expenses of the entity, and

[3] Section 4A

Insert after section 4:

4A Meaning of “small claim”

- (1) For the purposes of this Act, a claim is a *small claim* if it is a claim for an amount that does not exceed \$25,000 or any other amount adjusted in accordance with this section from time to time that is applicable at the time when a claim is payable.
- (2) If an approved payment scheme under section 35 is or will be in force on 1 July of any year, the Minister is to declare on or before that date, by order published on the NSW legislation website, the

amount that is to apply, as from the date specified in the order, for the purposes of subsection (1).

- (3) The amount declared is to be the amount applicable under subsection (1) (or that amount as last adjusted in accordance with this section) that is adjusted:
 - (a) in the case of the first adjustment that is required to be made following the commencement of this section—by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the number of quarters since the commencement of this section that precede the date of the declaration for which those estimates are, at that date, available, or
 - (b) in the case where an adjustment was made for 1 July of the previous year—by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the 4 quarters that precede the date of the declaration for which those estimates are, at that date, available, or
 - (c) in the case where the previous adjustment that was required to be made was for 1 July of a year before the previous year—by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the number of quarters since the previous adjustment that precede the date of the declaration for which those estimates are, at that date, available.
- (4) An amount declared for the time being under this section applies to the exclusion of the amount of \$25,000 or an amount previously adjusted in accordance with this section.
- (5) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (3), the amount declared is to be determined in accordance with the regulations.
- (6) In adjusting an amount to be declared for the purposes of subsection (1), the amount determined in accordance with subsection (3) is to be rounded to the nearest \$500 (with the amounts of \$250 and \$750 being rounded up).
- (7) A declaration made or published on the NSW legislation website after 1 July in a year and specifying a date that is before the date it is made or published as the date from which the amount declared by the order is to apply has effect as from that specified date.

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

Insert after section 8 (3):

- (4) Despite anything to the contrary in the SPF trust deed or any legislation of the State or the general law:
 - (a) any money provided to the SPF trustee under an authorised loan facility is taken to have been provided to the SPF trustee for the purpose referred to in subsection (1) (a) (i) and, consequently, to be subject to the trust established by the SPF trust deed, and
 - (b) the making of loan repayments in relation to an authorised loan facility by the SPF trustee from the SPF is taken to be a valid application of the trust fund for the purpose referred to in subsection (1) (a) (i).

[5] Section 23 Conduct of business during winding up period

Insert after section 23 (2) (d):

- (d1) comply with the obligations of the entity under any relevant loan facility agreement (whether or not directed to do so by the SPF trustee), and
- (d2) without limiting paragraph (d1) or (e), do such of the following as is directed by the SPF trustee from time to time:
 - (i) give guarantees with respect to obligations of the SPF trustee in connection with an authorised loan facility or proposed authorised loan facility,
 - (ii) grant interests in, or other entitlements to, any assets of the entity (or the proceeds of asset realisations of the entity) as security for any such guarantees or any other obligation under a relevant loan facility agreement or proposed relevant loan facility agreement, and

[6] Section 23 (2) (e) (i)

Omit “or (d)”. Insert instead “, (d), (d1) or (d2)”.

[7] Section 24 Directions from SPF trustee

Omit section 24 (2). Insert instead:

- (2) Without limiting subsection (1), the SPF trustee may direct a liable entity to do any one or more of the following:
 - (a) enter into arrangements with another or other liable entities for the pooling of funds of the liable entities and for

allocation of the pooled funds to payment of payable liabilities of any one or more of those entities,

- (b) comply with the entity's obligations under any relevant loan facility agreement,
- (c) give guarantees with respect to obligations of the SPF trustee in connection with an authorised loan facility or proposed authorised loan facility,
- (d) grant interests in, or other entitlements to, any assets of the entity (or the proceeds of asset realisations of the entity) as security for any such guarantees or any other obligation under a relevant loan facility agreement or proposed relevant loan facility agreement.

[8] Section 29 Funds to be paid into special accounts

Insert "(a)" after "section 24 (2)" in section 29 (6).

[9] Section 30 Entitlements to proceeds of contracts of insurance

Insert after section 30 (6):

- (6A) Nothing in this section (including any regulations made under this section) operates to prevent or limit the making of loan repayments under an authorised loan facility or the giving of directions by the SPF trustee under section 24 with respect to the facility or a relevant loan facility agreement.

[10] Part 4, Division 4A

Insert after Division 4 of Part 4:

Division 4A Authorised loan facility

30A Agreements concerning provision of loan facility

- (1) The SPF trustee and each of the liable entities are authorised to enter into one or more agreements with the State (or with both the State and any other persons) for any one or more of the following purposes:
 - (a) the provision of funding to the SPF trustee by means of a loan facility,
 - (b) the granting by the SPF trustee of interests in, or other entitlements to, assets (or proceeds of asset realisations) as security for a loan facility provided to the SPF trustee,
 - (c) the giving of guarantees by any liable entity with respect to obligations of the SPF trustee in connection with a loan facility provided to the SPF trustee,

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- (d) the granting by any liable entity of interests in, or other entitlements to, assets (or proceeds of asset realisations) of the entity as security for any such guarantees given by the entity or any other obligation undertaken by the entity.
 - (2) Despite anything to the contrary in the SPF trust deed or any legislation of the State or the general law (and without limiting subsection (1)):
 - (a) the entering into, or the carrying out of, an agreement that is authorised by this section does not:
 - (i) affect the continued existence, or continued validity as a trust fund, of any compensation fund, or
 - (ii) constitute a breach of trust or other civil wrong (whether for the purposes of any legislation of the State or the general law), and
 - (b) all acts, matters and things for or with respect to which provision is made in an agreement that is authorised by this section (including any guarantees or securities given or granted under the agreement) are also authorised, and
 - (c) all acts, matters and things that by an agreement that is authorised by this section are agreed, directed, authorised or permitted to be made, done or executed are also authorised.
 - (3) An agreement that is authorised by this section does not cease to be authorised only because it is amended or otherwise varied by the parties to the agreement in accordance with the terms of the agreement as in force from time to time.
 - (4) For the avoidance of doubt, nothing in section 35 or 36 (or in any approved payment scheme under section 35) operates to prevent or limit the making of loan repayments in connection with a loan facility granted under an agreement that is authorised by this section.

[11] Section 33 Determination of whether sufficient funds

Insert “(including funds available under an authorised loan facility)” after “compensation funds” in section 33 (1).

[12] Section 33 (2)

Insert “(a)” after “section 24 (2)”.

[13] Section 35 SPF trustee may apply to Supreme Court to secure continuing funding of claims

Omit section 35 (5) and (6). Insert instead:

(5) Supreme Court may make orders establishing approved payment scheme

If the Supreme Court is satisfied on an application under subsection (1) that it is likely that there will be insufficient funds for all payable liabilities of a liable entity to be paid in full as and when they fall due for payment, the Supreme Court may make an order approving a scheme (an *approved payment scheme*) for the payment by instalments of the full amount of payable liabilities due, or the deferral of payment of payable liabilities of the entity, during the period specified by the order (the *scheme period*).

(6) In specifying the scheme period:

- (a) the Supreme Court is to take into account the anticipated duration of the period before the liable entity will or is likely to have sufficient funds to pay payable liabilities in full as and when they fall due for payment instead of paying them by instalments or deferring payment, and
- (b) if the scheme period is to commence before the time it is anticipated that there will be insufficient funds—the Supreme Court is to be satisfied that the early commencement of the scheme period will result in claimants for proven personal asbestos claims being treated more equally in relation to the payment of their claims than would otherwise be the case.

[14] Section 35 (7), (8) (a) and (13)

Omit “insufficient funds period” wherever occurring.

Insert instead “scheme period”.

[15] Section 35 (7) (b)

Omit “subsection (8)”. Insert instead “subsections (8) and (8A)”.

[16] Section 35 (7) (e)

Insert after section 35 (7) (d):

- (e) the interest rate to be applied in calculating the interest payable on that part of any payable liability that would otherwise attract interest because it is not paid during the scheme period because of the operation of the scheme.

[17] Section 35 (7A)

Insert after section 35 (7):

- (7A) An interest rate approved as referred to in subsection (7) (e):
- (a) need not be a commercial interest rate, but is to be an interest rate that the Supreme Court is satisfied is a rate that makes reasonable allowance for inflation while minimising the liabilities of the liable entity and the cost of the scheme, and
 - (b) applies to the exclusion of any other interest rate that would otherwise have been applicable in determining the interest to be paid to any payable claimant in respect of any part of a payable liability that is not paid during the scheme period because of the operation of the scheme.

[18] Section 35 (8A)

Insert after section 35 (8):

- (8A) In addition to the matters for which a scheme must provide under subsection (7), the Supreme Court may approve a scheme that provides for any or all of the following:
- (a) the payment in full of liabilities to pay proven personal asbestos claims that are small claims (but only if the Supreme Court is satisfied that there will be sufficient funding to make such payments and the payments referred to in subsection (7) (a)),
 - (b) different payment options from which claimants may elect to be paid for the payment by instalments of proven personal asbestos claims that are not small claims (including a default payment option in the event that a claimant makes no election).

[19] Section 59 Protection for exercise of certain functions during winding up period

Insert at the end of section 59 (5) (b):

- , or
- (c) any party to a relevant loan facility agreement from bringing proceedings, or being granted relief, in respect of any of the following:
 - (i) any civil liability incurred by another party to the agreement or other person where that liability arises under or in relation to the agreement,

- (ii) a failure or refusal by another party to the agreement to carry out a function conferred or imposed on that party under the agreement.

[20] Section 63 Exemption from State tax

Insert after paragraph (c1) of the definition of *exempt matter* in section 63 (1):

- (c2) the entry into any relevant loan facility agreement or the giving of any guarantee, or the granting of any security, under or as contemplated by any such agreement,

[21] Section 64A

Insert after section 64:

64A Tabling of copies of relevant loan facility agreements

- (1) The Minister is to cause a copy of any relevant loan facility agreement as in force at the time it is signed to be tabled in each House of Parliament as soon as is reasonably practicable after the agreement is signed by the parties to it.
- (2) If a House of Parliament is not sitting when the Minister seeks to table a copy of the relevant loan facility agreement, the Minister may present the copy to the Clerk of the House concerned.
- (3) The copy of the relevant loan facility agreement:
 - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
 - (b) may be printed by authority of the Clerk of the House, and
 - (c) if so printed, is for all purposes taken to be a document published by or under the authority of the House, and
 - (d) is to be recorded:
 - (i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and
 - (ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly,on the first sitting day of the House after receipt of the copy by the Clerk.
- (4) For the avoidance of doubt, it is declared that the tabling of a copy of any relevant loan facility agreement as provided by this section does not abrogate, limit or otherwise affect any right or liability of any person arising under or in relation to the agreement.

James Hardie Former Subsidiaries (Winding up and Administration)
Amendment Act 2009 No 116

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

Schedule 1

[22] Schedule 1 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

*James Hardie Former Subsidiaries (Winding up and
Administration) Amendment Act 2009*

[Agreement in principle speech made in Legislative Assembly on 2 December 2009
Second reading speech made in Legislative Council on 2 December 2009]

BY AUTHORITY