



New South Wales

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

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* enabled James Hardie Industries NV to set up a special purpose trust fund (the **SPF**) to provide funding with respect to the payment of certain asbestos-related liabilities (the **payable liabilities**) of former subsidiaries of the James Hardie group of companies (the **liable entities**). The Act also set up a State scheme for the winding up and other external administration over an extended period of the liable entities.

Funding contributions to the SPF for the payment of the payable liabilities of the liable entities is governed by an agreement entered into by the State and James Hardie Industries NV (the **Final Funding Agreement**). The Final Funding Agreement requires James Hardie Industries NV to make funding contributions to the SPF during any particular financial year based on its free cash flow. If James Hardie Industries NV has negative free cash flow, it is not required to make any contribution for the relevant financial year. James Hardie Industries NV has not made any contribution to the SPF for the financial year of 2009–2010.

As a result, it appears likely that in the absence of alternative funding arrangements, the SPF will cease in the short term to be able to provide funding for the payment in full of all of the payable liabilities of the liable entities.

The object of this Bill is to amend the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005*:

- (a) to authorise the trustee of the SPF (the **SPF trustee**) and the liable entities to enter into agreements to which the State is a party with respect to the provision of a loan facility (which will be partly funded by the Commonwealth) to the SPF trustee to assist in funding the payment of the payable liabilities of the liable entities, and
- (b) to make certain other amendments to the Act that facilitate the provision and use of funds under the loan facility, and
- (c) to clarify the powers of the Supreme Court in relation to the approval of a payment scheme under the Act for the payment of claims for payable liabilities of the liable entities.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act 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

Authorisation of loan facility

Schedule 1 [10] inserts a new Division in Part 4 of the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* (the **Principal Act**) to authorise the SPF trustee and the liable entities to enter into one or more agreements (the **relevant loan facility agreements**) to which the State is to be a party for the provision of a loan facility to the SPF trustee (an **authorised loan facility**) and the provision by the SPF trustee and the liable entities of guarantees and securities in respect of such an agreement or facility.

Schedule 1 [2] amends section 4 of the Principal Act to provide that a loan security expense of a liable entity is one of its operating expenses for the purposes of the Act. **Schedule 1 [1]** also amends section 4 of the Principal Act to insert definitions of certain terms and expressions relating to an authorised loan facility that are used in the amendments made to the Act, including a definition of **loan security expense**. The expression **loan security expense** is defined to mean any amount that a liable entity is required to pay under, or in connection with, a relevant loan facility agreement.

Schedule 1 [4] amends section 8 of the Principal Act to confirm that:

- (a) funds provided to the SPF trustee under an authorised loan facility are provided for the purposes, and are subject to the trust requirements, of the SPF, and

- (b) the SPF trustee is acting within the terms of the SPF trust when making repayments in relation to an authorised loan facility.

Schedule 1 [7] amends section 24 of the Principal Act to enable the SPF trustee to give directions to a liable entity regarding compliance with the entity's obligations under a relevant loan facility agreement, the giving or granting of guarantees and securities in connection with an authorised loan facility or relevant loan facility agreement (or proposed authorised loan facility or relevant loan facility agreement).

Schedule 1 [5] amends section 23 of the Principal Act to confirm that a liable entity is acting within power when it complies with its obligations under a relevant loan facility agreement or acts in accordance with any such directions from the SPF trustee. **Schedule 1 [6], [8] and [12]** make amendments to the Principal Act that are consequential on the amendments made by Schedule 1 [5] and [7].

Schedule 1 [9] amends section 30 of the Principal Act to make it clear that the section (or any regulation made under that section) does not 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 (as amended by the proposed Act).

Schedule 1 [11] amends section 33 of the Principal Act to make it clear that any funding available under an authorised loan facility is relevant in determining whether or not there are sufficient funds for the payment of payable liabilities of a liable entity.

Schedule 1 [19] amends section 59 of the Principal Act to make it clear that the section does not prevent or limit the enforcement of a relevant loan facility agreement by the parties to the agreement.

Schedule 1 [20] amends section 63 of the Principal Act to provide that entry into a relevant loan facility agreement, or the giving of a guarantee or the granting of a security under or as contemplated by any such agreement, is not subject to State tax.

Schedule 1 [21] inserts proposed section 64A in the Principal Act to require the Minister to cause a copy of any relevant loan facility agreement to be tabled in each House of Parliament as soon as is reasonably practicable after it is signed.

Approved payment schemes

Schedule 1 [13]–[18] amend section 35 of the Principal Act to enable the Supreme Court to approve a payment scheme under the Act for the payment of claims for payable liabilities of the liable entities that:

- (a) commences before the time when the SPF ceases to have sufficient funds to pay all of the payable liabilities of the liable entities as and when they fall due for payment, and
- (b) sets an interest rate to be applied in calculating the interest payable on any part of the payable liabilities of the liable entities that would otherwise be payable as interest because that part is not paid during the currency of the scheme, and
- (c) enables small claims to be paid in full during the currency of the scheme, and

- (d) allows claimants for the payment of proven personal asbestos claims to elect between different instalment options for the part payment of their claims during the currency of the scheme.

Schedule 1 [3] inserts proposed section 4A in the Principal Act to define the term *small claim*. Initially, a small claim is defined to mean a claim that does not exceed \$25,000. The proposed section provides for the indexation of this amount during each year that an approved payment scheme is in force, by order of the Minister, by reference to changes in the consumer price index.

Savings and transitional provisions

Schedule 1 [22] amends clause 1 of Schedule 1 to the Principal Act to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

First print



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No. , 2009

A Bill for

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.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>James Hardie Former Subsidiaries (Winding up and Administration) Amendment Act 2009</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6

Schedule 1	Amendment of James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 No 105	1
		2
		3
[1] Section 4 Definitions		4
	Insert in alphabetical order in section 4 (1):	5
	<i>authorised loan facility</i> means a loan facility provided under a relevant loan facility agreement.	6
		7
	<i>loan repayment</i> , in relation to an authorised loan facility, means:	8
	(a) the repayment of any part of the principal payable under the facility, or	9
		10
	(b) the payment of any interest (whether or not the interest is capitalised) payable under the facility, or	11
		12
	(c) the payment of any other amounts that are payable under, or in connection with, the facility.	13
		14
	<i>loan security expense</i> of a liable entity means any amount that the entity is required to pay under, or in connection with, a relevant loan facility agreement.	15
		16
		17
	<i>proceeds of asset realisations</i> of a liable entity includes the proceeds of a relevant insurance contract of the entity within the meaning of section 30.	18
		19
		20
	<i>relevant loan facility agreement</i> means any agreement that is authorised by section 30A, as in force from time to time.	21
		22
	<i>small claim</i> —see section 4A.	23
[2] Section 4 (1), definition of “operating expenses”		24
	Insert after paragraph (a):	25
	(a1) includes any loan security expenses of the entity, and	26
[3] Section 4A		27
	Insert after section 4:	28
4A Meaning of “small claim”		29
	(1) For the purposes of this Act, a claim is a <i>small claim</i> 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.	30
		31
		32
		33
	(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	34
		35
		36

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Administration) Act 2005 No 105

- amount that is to apply, as from the date specified in the order, for
the purposes of subsection (1). 1
2
- (3) The amount declared is to be the amount applicable under 3
subsection (1) (or that amount as last adjusted in accordance with 4
this section) that is adjusted: 5
- (a) in the case of the first adjustment that is required to be 6
 made following the commencement of this section—by 7
 the percentage change in the amount estimated by the 8
 Australian Statistician of the average weekly total earnings 9
 of full-time adults in Australia over the number of quarters 10
 since the commencement of this section that precede the 11
 date of the declaration for which those estimates are, at that 12
 date, available, or 13
- (b) in the case where an adjustment was made for 1 July of the 14
 previous year—by the percentage change in the amount 15
 estimated by the Australian Statistician of the average 16
 weekly total earnings of full-time adults in Australia over 17
 the 4 quarters that precede the date of the declaration for 18
 which those estimates are, at that date, available, or 19
- (c) in the case where the previous adjustment that was 20
 required to be made was for 1 July of a year before the 21
 previous year—by the percentage change in the amount 22
 estimated by the Australian Statistician of the average 23
 weekly total earnings of full-time adults in Australia over 24
 the number of quarters since the previous adjustment that 25
 precede the date of the declaration for which those 26
 estimates are, at that date, available. 27
- (4) An amount declared for the time being under this section applies 28
to the exclusion of the amount of \$25,000 or an amount 29
previously adjusted in accordance with this section. 30
- (5) If the Australian Statistician fails or ceases to estimate the 31
amount referred to in subsection (3), the amount declared is to be 32
determined in accordance with the regulations. 33
- (6) In adjusting an amount to be declared for the purposes of 34
subsection (1), the amount determined in accordance with 35
subsection (3) is to be rounded to the nearest \$500 (with the 36
amounts of \$250 and \$750 being rounded up). 37
- (7) A declaration made or published on the NSW legislation website 38
after 1 July in a year and specifying a date that is before the date 39
it is made or published as the date from which the amount 40
declared by the order is to apply has effect as from that specified 41
date. 42

[4] Section 8 SPF may be treated as charitable trust	1
Insert after section 8 (3):	2
(4) Despite anything to the contrary in the SPF trust deed or any legislation of the State or the general law:	3 4
(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	5 6 7 8 9
(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).	10 11 12 13
[5] Section 23 Conduct of business during winding up period	14
Insert after section 23 (2) (d):	15
(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	16 17 18
(d2) without limiting paragraph (d1) or (e), do such of the following as is directed by the SPF trustee from time to time:	19 20 21
(i) give guarantees with respect to obligations of the SPF trustee in connection with an authorised loan facility or proposed authorised loan facility,	22 23 24
(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	25 26 27 28 29 30
[6] Section 23 (2) (e) (i)	31
Omit “or (d)”. Insert instead “, (d), (d1) or (d2)”.	32
[7] Section 24 Directions from SPF trustee	33
Omit section 24 (2). Insert instead:	34
(2) Without limiting subsection (1), the SPF trustee may direct a liable entity to do any one or more of the following:	35 36
(a) enter into arrangements with another or other liable entities for the pooling of funds of the liable entities and for	37 38

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	allocation of the pooled funds to payment of payable liabilities of any one or more of those entities,	1 2
	(b) comply with the entity's obligations under any relevant loan facility agreement,	3 4
	(c) give guarantees with respect to obligations of the SPF trustee in connection with an authorised loan facility or proposed authorised loan facility,	5 6 7
	(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 9 10 11 12
[8]	Section 29 Funds to be paid into special accounts	13
	Insert "(a)" after "section 24 (2)" in section 29 (6).	14
[9]	Section 30 Entitlements to proceeds of contracts of insurance	15
	Insert after section 30 (6):	16
	(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.	17 18 19 20 21
[10]	Part 4, Division 4A	22
	Insert after Division 4 of Part 4:	23
	Division 4A Authorised loan facility	24
	30A Agreements concerning provision of loan facility	25
	(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:	26 27 28 29
	(a) the provision of funding to the SPF trustee by means of a loan facility,	30 31
	(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,	32 33 34
	(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,	35 36 37

(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.	1 2 3 4
(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)):	5 6 7
(a)	the entering into, or the carrying out of, an agreement that is authorised by this section does not:	8 9
(i)	affect the continued existence, or continued validity as a trust fund, of any compensation fund, or	10 11
(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	12 13 14
(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	15 16 17 18
(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.	19 20 21 22
(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.	23 24 25 26
(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.	27 28 29 30 31
[11]	Section 33 Determination of whether sufficient funds	32
	Insert “(including funds available under an authorised loan facility)” after “compensation funds” in section 33 (1).	33 34
[12]	Section 33 (2)	35
	Insert “(a)” after “section 24 (2)”.	36

[13] Section 35 SPF trustee may apply to Supreme Court to secure continuing funding of claims	1 2
Omit section 35 (5) and (6). Insert instead:	3
(5) Supreme Court may make orders establishing approved payment scheme	4 5
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 <i>approved payment scheme</i>) 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 <i>scheme period</i>).	6 7 8 9 10 11 12 13
(6) In specifying the scheme period:	14
(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	15 16 17 18 19
(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.	20 21 22 23 24 25 26
[14] Section 35 (7), (8) (a) and (13)	27
Omit “insufficient funds period” wherever occurring.	28
Insert instead “scheme period”.	29
[15] Section 35 (7) (b)	30
Omit “subsection (8)”. Insert instead “subsections (8) and (8A)”.	31
[16] Section 35 (7) (e)	32
Insert after section 35 (7) (d):	33
(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.	34 35 36 37

[17] Section 35 (7A)	1
Insert after section 35 (7):	2
(7A) An interest rate approved as referred to in subsection (7) (e):	3
(a) need not be a commercial interest rate, but is to be an	4
interest rate that the Supreme Court is satisfied is a rate that	5
makes reasonable allowance for inflation while	6
minimising the liabilities of the liable entity and the cost of	7
the scheme, and	8
(b) applies to the exclusion of any other interest rate that	9
would otherwise have been applicable in determining the	10
interest to be paid to any payable claimant in respect of any	11
part of a payable liability that is not paid during the scheme	12
period because of the operation of the scheme.	13
[18] Section 35 (8A)	14
Insert after section 35 (8):	15
(8A) In addition to the matters for which a scheme must provide under	16
subsection (7), the Supreme Court may approve a scheme that	17
provides for any or all of the following:	18
(a) the payment in full of liabilities to pay proven personal	19
asbestos claims that are small claims (but only if the	20
Supreme Court is satisfied that there will be sufficient	21
funding to make such payments and the payments referred	22
to in subsection (7) (a)),	23
(b) different payment options from which claimants may elect	24
to be paid for the payment by instalments of proven	25
personal asbestos claims that are not small claims	26
(including a default payment option in the event that a	27
claimant makes no election).	28
[19] Section 59 Protection for exercise of certain functions during winding up	29
period	30
Insert at the end of section 59 (5) (b):	31
, or	32
(c) any party to a relevant loan facility agreement from	33
bringing proceedings, or being granted relief, in respect of	34
any of the following:	35
(i) any civil liability incurred by another party to the	36
agreement or other person where that liability arises	37
under or in relation to the agreement,	38

	(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.	1 2 3
[20]	Section 63 Exemption from State tax	4
	Insert after paragraph (c1) of the definition of <i>exempt matter</i> in section 63 (1):	5
	(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,	6 7 8
[21]	Section 64A	9
	Insert after section 64:	10
64A	Tabling of copies of relevant loan facility agreements	11
(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.	12 13 14 15
(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.	16 17 18
(3)	The copy of the relevant loan facility agreement:	19
	(a) is, on presentation and for all purposes, taken to have been laid before the House, and	20 21
	(b) may be printed by authority of the Clerk of the House, and	22
	(c) if so printed, is for all purposes taken to be a document published by or under the authority of the House, and	23 24
	(d) is to be recorded:	25
	(i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and	26 27
	(ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly,	28 29
	on the first sitting day of the House after receipt of the copy by the Clerk.	30 31
(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.	32 33 34 35

James Hardie Former Subsidiaries (Winding up and Administration)
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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*

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