



New South Wales

James Hardie (Civil Liability) Bill 2005

Explanatory note

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

This Bill is cognate with the *James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005*.

Overview of Bill

Background

Before February 2001, Jsekarb Pty Limited (now called Amaba Pty Limited and referred to as *Amaba* in this Bill) and James Hardie & Coy Pty Limited (now called Amaca Pty Limited and referred to as *Amaca* in this Bill) were subsidiaries of James Hardie Industries Limited (now called ABN 60 Pty Limited and referred to as *ABN 60* in this Bill). All of these companies (the *liable entities*) were, and continue to be, Australian companies.

The liable entities were originally registered as companies under the applicable companies law of New South Wales of the time. They are currently taken to be registered in New South Wales for the purposes of the *Corporations Act 2001* of the Commonwealth (the *Corporations Act*) and have their registered offices in the State. The liable entities had previously been manufacturers of products made from asbestos. As such, they had (and will continue to acquire) liabilities to persons who

sustained, or will sustain, personal injuries because of these products. A substantial proportion of these liabilities arise, or will arise, in New South Wales.

On 15 February 2001, the James Hardie group of companies (the **James Hardie Group**) was restructured. The principal features of the restructuring were as follows:

- (a) Amaca became and remains the parent company of Amaba.
- (b) Amaca was acquired by the Medical Research and Compensation Foundation (the **Compensation Foundation**) for no monetary consideration. The Compensation Foundation remains the parent company of Amaca.
- (c) As a result, both Amaca and Amaba ceased to be subsidiaries of James Hardie Industries Limited (now called ABN 60).
- (d) The Compensation Foundation was established for the purpose of meeting existing and future claims against Amaba and Amaca.

In October 2001, the Supreme Court of New South Wales approved a scheme of arrangement under the Corporations Act under which James Hardie Industries NV became the holding company for the James Hardie Group. James Hardie Industries NV is a company incorporated in the Netherlands and is registered as a foreign company under the Corporations Act. The materials before the Supreme Court concerning the scheme of arrangement and related reduction of capital indicate that the reduction was conditional on James Hardie Industries NV subscribing for partly paid shares in James Hardie Industries Limited (now ABN 60) and on James Hardie Industries Limited being able to call on that amount at any time in the future and from time to time. However, in March 2003 James Hardie Industries NV ceased to be the holding company for the Group when its shares in ABN 60 were cancelled.

Under Letters Patent dated 27 February 2004 and 30 June 2004, a Special Commission of Inquiry was commissioned to inquire into and report on certain matters relating to the establishment of the Compensation Foundation. On 21 September 2004, the Special Commission issued a report (the **Jackson Inquiry Report**) that found that the present value of the existing and future liabilities of Amaba and Amaca would not be less than \$1.5 billion and that the Compensation Foundation has no prospect of meeting those liabilities.

Negotiations were then held in late 2004 between James Hardie Industries NV, the State of New South Wales, the Australian Council of Trade Unions, Unions New South Wales and Mr Bernie Banton as the designated representative of certain Asbestos Victims Groups with a view to securing funding for asbestos-related personal injury claims against the liable entities. The parties to the negotiation entered into Heads of Agreement in December 2004 (the **Heads of Agreement**) as the basis for concluding a final agreement to secure such funding (the **Final Funding Agreement**).

The State and James Hardie Industries NV have been negotiating the terms of the Final Funding Agreement during the period since entering the Heads of Agreement. In late June 2005, the Parliament of New South Wales enacted the *James Hardie Former Subsidiaries (Special Provisions) Act 2005* in order to maintain the status quo in relation to the liable entities pending the conclusion of the Final Funding

Agreement. To this end, the Act provided for the external administration of the liable entities under the law of New South Wales and placed certain limitations on the ability of the liable entities and certain associated companies to reorganise their corporate structures during the period of the external administration.

The Final Funding Agreement was entered into on 1 December 2005 by the State of New South Wales, James Hardie Industries NV and LGTDD Pty Limited (a controlled entity of James Hardie Industries NV).

Principal objects of Bill

One of the preconditions under the Final Funding Agreement for obtaining funding from James Hardie Industries NV to assist in the payment of the asbestos-related personal injury liabilities of the liable entities is that the State enact legislation (which is within its legislative competence to enact) in order to extinguish certain liabilities of James Hardie Industries NV and other related companies, entities and individuals (the *protected entities*). These liabilities arise, or may arise, in connection with the corporate reorganisation of the James Hardie Group and the negotiation and entry into the Heads of Agreement, the Final Funding Agreement and certain related agreements (the *Related Agreements*).

One of the principal reasons for extinguishing these liabilities is to ensure that the commercial success of the protected entities (and James Hardie Industries NV in particular) will not be undermined during the winding up of the liable entities under the provisions of the proposed *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* by further examination of the corporate reorganisation of the James Hardie Group for the purpose of obtaining compensation.

Another principal reason for extinguishing these liabilities is to recognise that James Hardie Industries NV has agreed to pay compensation under the Final Funding Agreement and that it should be protected from further claims for compensation outside of that Agreement.

The extinguishment of these liabilities will accordingly ensure continued funding for the asbestos-related personal injury liabilities of the liable entities.

The principal objects of this Bill are:

- (a) to extinguish, in accordance with undertakings given by the State under the Final Funding Agreement, certain civil liability of James Hardie Industries NV and other related companies, entities and individuals in connection with the corporate reorganisation of the James Hardie Group and the negotiation and entry into the Heads of Agreement, the Final Funding Agreement and any Related Agreement, and
- (b) to confirm that the State is liable to pay damages for breach of contract if it undertakes certain legislative or regulatory action that is proscribed by the Final Funding Agreement or the Related Agreements if the breaches are of such a nature as to warrant an award of damages at common law, and

- (c) to provide that Amaca is liable for claims in respect of personal injury or death resulting from the asbestos mining activities of Marlew Mining Pty Limited (*Marlew*) in order to enable claimants to recover damages.

In order to achieve those objects, this Bill displaces certain provisions of the Corporations Act.

Outline of provisions

Part 1 Preliminary

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 its date of assent.

Clause 3 defines certain words and expressions used in the proposed Act.

In particular, it defines the term *assent day* to mean the day on which the proposed Act receives Royal Assent.

Clause 4 provides that the proposed Act is intended to have effect outside of the territorial limits of New South Wales as well as within the State.

Clause 5 provides that, in the event that a provision of the proposed Act or an instrument made under the Act has both valid and invalid applications, it is the intention of Parliament that the provision be construed as applying only to such of the applications of the provision as are valid.

Clause 6 provides that the proposed Act binds the State and, in so far as the legislative power of the Parliament of New South Wales permits, the other States, the Territories and the Commonwealth.

Part 2 Extinguishment of certain civil liability

Division 1 General

Clause 7 provides that the Part applies to civil liability of any kind (including liability arising at general law or under legislation). Certain liability in the nature of a civil penalty is also extinguished by the proposed *James Hardie (Civil Penalty Compensation Release) Act 2005*.

Clause 8 defines the expression *protected conduct*, which is used in the Part, to mean anything done or omitted to be done in connection with any of the following:

- (a) the transfer of the assets of, and the payment of dividends and management fees by, any liable entity, that is set out in Part 3 of the Jackson Inquiry Report,
- (b) the establishment and funding and underfunding of the Compensation Foundation and the Medical Research and Compensation Foundation Trust (including announcements or other representations made in relation to the effect or consequences of the establishment or funding),

- (c) the transfer of assets from ABN 60 to James Hardie Industries NV, the establishment in 2001 of the ABN 60 Foundation and the ABN 60 Foundation Trust and the allotment of shares in ABN 60 to the ABN 60 Foundation,
- (d) the corporate reorganisation of the James Hardie group of companies on 15 February 2001 (including announcements or other representations made in relation to the effect or consequences of the reorganisation),
- (e) the corporate reorganisation of the James Hardie group of companies between August and October 2001, including without limitation:
 - (i) the scheme of arrangement approved by the Supreme Court in October 2001 under which James Hardie Industries NV became the holding company for the James Hardie group of companies, and
 - (ii) announcements or other representations made in relation to the effect or consequences of that scheme (including representations made to the Supreme Court),
- (f) the entry into the 2001 Deed of Covenant and Indemnity and the 2003 Deed of Covenant, Indemnity and Access and the amendment of the 2003 Deed of Covenant, Indemnity and Access by the Deed of Rectification executed by the parties to it on 3 February 2004,
- (g) the issue by ABN 60 of shares in ABN 60 to James Hardie Industries NV and the cancellation of those shares in March 2003,
- (h) the negotiation of, and entry into, the Heads of Agreement, the Final Funding Agreement or any Related Agreement.

Division 2 Extinguishment of liability

Clause 9 provides that any civil liability to which the Part applies that is incurred (whether before, during or after the assent day) by any of the following persons in respect of any protected conduct of the person is extinguished:

- (a) any liable entity,
- (b) the Compensation Foundation,
- (c) James Hardie Industries NV,
- (d) any controlled entity of James Hardie Industries NV,
- (e) any person who engaged in the conduct in the person's capacity as a director or other officer, employee, advisor or agent of:
 - (i) any liable entity, or
 - (ii) the Compensation Foundation, or
 - (iii) James Hardie Industries NV, or
 - (iv) any controlled entity of James Hardie Industries NV.

Clause 10 provides that any civil liability to which the Part applies that is incurred (whether before, during or after the assent day) by any liable entity, James Hardie Industries NV or its controlled entities in respect of asbestos harm is extinguished to

the extent that it is a liability for economic loss, other than economic loss resulting from or attributable to personal injury or death.

Clause 11 specifies the time when liability that is extinguished by proposed section 9 or 10 is taken to have been extinguished.

Clause 12 provides that if civil liability is extinguished under the Division, then (to the full extent that the legislative power of the Parliament of New South Wales permits):

- (a) any person to whom the liability is owed cannot assert, continue or enforce a cause of action in respect of the liability in any civil proceedings unless and until the liability is subsequently revived under the Part, and
- (b) no court or other tribunal has any jurisdiction or power to entertain proceedings or grant any relief in respect of such liability unless and until the liability is subsequently revived under the Part.

Clause 13 sets out certain classes of civil liability that are not extinguished by the Division.

Division 3 Revival of liability

Clause 14 enables the Minister, by order published in the Gazette, to revive civil liability (or a class of civil liability) that is extinguished by Division 2. Any such order must specify a day for the revival of the liability that is no earlier than 14 days after the order is published in the Gazette. However, such an order may not revive any civil liability of a natural person or the Compensation Foundation that has previously been extinguished by Division 2.

The proposed section makes it clear that any such order may not be made if the making of the order would constitute a breach by the State of the terms of the Final Funding Agreement or a Related Agreement.

The proposed section also provides that any person whose civil liability is revived (or purportedly revived) by a reviving order (or purported reviving order) may not claim or otherwise assert in any proceedings that the order or purported order was not validly made unless the Minister is, or is subsequently joined as, a party to the proceedings.

The proposed section also enables the Minister to revoke such an order by a further order published in the Gazette (whether before, during or after the day fixed for the revival of the civil liability concerned).

The Minister must revoke a reviving order as soon as is reasonably practicable after the Minister becomes aware of the cessation of the breach or breaches of the Final Funding Agreement by another party to the Agreement that occasioned the reviving order.

Clause 15 provides that if extinguished civil liability is revived:

- (a) the civil liability is taken for all purposes never to have been extinguished and is enforceable accordingly by any person for whose benefit the liability accrues, and

- (b) any limitation period applicable to a cause of action for the liability is taken to have stopped running on the day on which the liability was extinguished and to have recommenced to run on the day on which the liability is revived.

Clause 16 provides that if extinguished civil liability is revived under the Division, a claim against a liable entity in respect of the liability becomes a payable liability for the purposes of the proposed *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* unless the Minister specifies otherwise by order published in the Gazette. Under the proposed *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005*, liable entities are only authorised to pay their payable liabilities while they are subject to winding up under its provisions.

Clause 17 provides for the effect of the revocation of an order under proposed section 14 that revives an extinguished civil liability.

Part 3 Contractual liability of State

Clause 18 defines the expression *legislative or regulatory action*, which is used in the Part, to mean:

- (a) the enactment or making of legislation by or on behalf of the State or an instrumentality of the State, or
- (b) the exercise of functions by officials, employees, authorities or agencies of the State that are conferred or imposed on them by legislation.

Clause 19 confirms that the State is liable to pay damages for breach of contract if it undertakes (or causes the undertaking of) legislative or regulatory action that is proscribed by the Final Funding Agreement or a Related Agreement if the breaches are of such a nature as to warrant an award of damages at common law.

Clause 20 makes it clear that nothing in the Part operates to render any legislative or regulatory action taken by or on behalf of the State invalid even if that action renders the State liable to pay damages for breach of contract. However, nothing in the proposed section limits the operation of proposed section 14 (3), which provides that a reviving order under proposed section 14 may not be made if the making of the order would constitute a breach by the State of the terms of the Final Funding Agreement or a Related Agreement.

Part 4 Baryulgil claims against Marlew Mining

Clause 21 defines certain words and expressions used in the Part. In particular, the following expressions are defined:

The expression *asbestos claim* is defined to mean a claim by any of the following persons for damages (whether arising before, during or after the assent day) in respect of personal injury or death arising from exposure to asbestos:

- (a) the person who sustains the personal injury,
- (b) the personal legal representative of a deceased person who sustained the injury or died as a result of the injury,

- (c) a relative of a deceased person who sustained the injury or died as a result of the injury.

The expression is also defined to include such a claim against a person pursuant to the joinder of the person as a party to proceedings.

The expression *Marlew asbestos claim* is defined to mean an asbestos claim in respect of personal injury or death arising from exposure to any asbestos in the course of or as a consequence of asbestos mining activities conducted by or on behalf of Marlew at Baryulgil, but only where that exposure occurred at or near Baryulgil.

The expression *Marlew contribution claim* is defined to mean a claim (whether arising before, during or after the date of assent to the proposed Act) for contribution against a person as a concurrent wrongdoer in relation to a Marlew asbestos claim.

Clause 22 provides that Amaca is liable in respect of a Marlew asbestos claim or Marlew contribution claim as if the asbestos mining activities conducted by or on behalf of Marlew at Baryulgil in respect of which the claim arises had been conducted by or on behalf of Amaca. However, Amaca's liability is limited to liability in respect of such a claim where the claim is:

- (a) a claim in proceedings against Amaca commenced on or after the commencement of the proposed section in the Dust Diseases Tribunal of New South Wales, or
- (b) a claim in proceedings against Marlew commenced before the assent day in any court, tribunal or other judicial body constituted in Australia.

Clause 23 provides that Amaca is not liable under the Part in respect of any Marlew asbestos claim or Marlew contribution claim that is a claim in respect of a liability that is the subject of an indemnity granted by the Minister for Mineral Resources by way of a release and indemnity agreement dated 11 March 1996 between that Minister and James Hardie Industries Limited (now ABN 60).

Clause 24 provides that Amaca is subrogated to the rights of Marlew in respect of a Marlew asbestos claim or Marlew contribution claim against Amaca.

Clause 25 makes special provision for Amaca's liabilities as a concurrent wrongdoer. In particular, the proposed section provides that a plaintiff is required to pursue recovery of the plaintiff's damages from the other concurrent wrongdoers and is only entitled to recover from Amaca as a defendant of last resort. Amaca's liability to the plaintiff as a defendant of last resort is liability solely to the extent (if any) that the plaintiff is unable to recover from any of the other concurrent wrongdoers.

Clause 26 provides the Part does not limit or otherwise affect any liability of an insurer under a policy of insurance that insures Marlew against liability in connection with a Marlew asbestos claim or Marlew contribution claim. It also provides that the Part does not give any such insurer a right of action against Amaca in respect of a Marlew asbestos claim or Marlew contribution claim that the insurer would not have against Marlew.

Clause 27 provides that Amaca is entitled to recover from Marlew as a debt the amount of any payment made by Amaca in satisfaction of any payable liability in

respect of a Marlew asbestos claim or Marlew contribution claim. It also provides that Amaca is entitled to prove as a creditor in respect of a debt arising under the proposed section in any winding up of Marlew.

The proposed section declares that its provisions are Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to Chapter 5 of that Act.

Part 5 Miscellaneous

Clause 28 provides that the provisions of the proposed Act are in addition to, and do not derogate from, the provisions of the proposed *James Hardie (Civil Penalty Compensation Release) Act 2005*.

Clause 29 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 30 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. In particular, it enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.



New South Wales

James Hardie (Civil Liability) Bill 2005

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New South Wales

James Hardie (Civil Liability) Bill 2005

No. , 2005

A Bill for

An Act to provide for the extinguishment of certain civil liability of companies and other persons associated with the James Hardie corporate group, to confirm certain contractual liabilities of the State and to make Amaca Pty Limited liable for certain personal asbestos liabilities of Marlew Mining Pty Limited arising from its mining activities at Baryulgil in New South Wales; and for other purposes.

Clause 1 James Hardie (Civil Liability) Bill 2005

Part 1 Preliminary

The Legislature of New South Wales enacts: 1

Part 1 Preliminary 2

1 Name of Act 3

This Act is the *James Hardie (Civil Liability) Act 2005*. 4

2 Commencement 5

This Act commences on the date of assent to this Act. 6

3 Definitions 7

(1) In this Act: 8

ABN 60 means the company registered under the Corporations Act immediately before the introduction day as ABN 60 Pty Limited (ACN 000 009 263) that was formerly called James Hardie Industries Limited, and includes any successor to or continuation of that company. 9
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ABN 60 Foundation means the company registered under the Corporations Act immediately before the introduction day as ABN 60 Foundation Limited (ACN 106 266 611), and includes any successor to or continuation of that company. 13
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Amaba means the company registered under the Corporations Act immediately before the introduction day as Amaba Pty Limited (ACN 000 387 342) that was formerly called Jsekarb Pty Limited, and includes any successor to or continuation of that company. 17
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Amaca means the company registered under the Corporations Act immediately before the introduction day as Amaca Pty Limited (ACN 000 035 512) that was formerly called James Hardie & Coy Pty Limited, and includes any successor to or continuation of that company. 21
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assent day means the day on which this Act received the Royal Assent. 25

Compensation Foundation means the company registered under the Corporations Act immediately before the introduction day as the Medical Research and Compensation Foundation (ACN 095 924 137), and includes any successor to or continuation of that company. 26
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concurrent wrongdoer, in relation to a civil liability, means a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the liability. 30
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controlled entity of James Hardie Industries NV has the same meaning as it has in section 32 of the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005*. 34
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Corporations Act means the *Corporations Act 2001* of the Commonwealth. 37
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Corporations legislation means the Corporations legislation to which Part 1.1A of the Corporations Act applies.	1
damages includes any form of monetary compensation.	2
economic loss includes damage to property.	3
exercise a function includes perform a duty.	4
Final Funding Agreement has the same meaning as it has in the <i>James Hardie Former Subsidiaries (Winding up and Administration) Act 2005</i> .	5
function includes a power, authority or duty.	6
general law means the common law and equity.	7
Heads of Agreement means the Heads of Agreement entered into on 21 December 2004 by the following persons and bodies:	8
(a) James Hardie Industries NV,	9
(b) the State,	10
(c) the Australian Council of Trade Unions,	11
(d) Unions New South Wales,	12
(e) Mr Bernie Banton as the designated representative of the Asbestos Victims Groups named in Schedule 1 to the Heads of Agreement.	13
introduction day means the day on which the Bill for this Act was first introduced into Parliament.	14
Jackson Inquiry means the Special Commission of Inquiry that was commissioned, by Letters Patent dated 27 February 2004 and 30 June 2004, to inquire into and report on certain matters relating to the establishment of the Compensation Foundation.	15
Jackson Inquiry Report means the report issued by the Jackson Inquiry on 21 September 2004 entitled "Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation".	16
James Hardie Industries NV means the foreign company incorporated in the Netherlands registered under the Corporations Act immediately before the introduction day as James Hardie Industries NV (ARBN 097 829 895), and includes such successors to or continuations of that company, or other entities having obligations under the Final Funding Agreement, as may be prescribed by the regulations.	17
legislation includes:	18
(a) any statute of a legislature (whether enacted or made in Australia or elsewhere), and	19

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- (b) any proclamation, regulation, rule, by-law, order or any other kind of subordinate legislation (however described) made under the authority of a statute (whether enacted or made in Australia or elsewhere). 1
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- liable entity** means each of the following: 5
- (a) ABN 60, 6
(b) Amaba, 7
(c) Amaca. 8
- Related Agreement** means any agreement as in force from time to time that is entered into (whether before, during or after the assent day) as contemplated by the terms of the Final Funding Agreement. 9
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11
- the 2001 Deed of Covenant and Indemnity** means the Deed of Covenant and Indemnity executed in February 2001 by: 12
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- (a) James Hardie Industries Limited (which was subsequently renamed as ABN 60), and 14
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(b) Jsekarb Pty Limited (which was subsequently renamed as Amaba), and 16
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(c) James Hardie & Coy Pty Limited (which was subsequently renamed as Amaca). 18
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- the 2003 Deed of Covenant, Indemnity and Access** means the Deed of Covenant, Indemnity and Access executed by James Hardie Industries NV and ABN 60 in March 2003, as amended by the Deed of Rectification executed by those parties on 3 February 2004. 20
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- the State** means the State of New South Wales. 24
- (2) In this Act, the following terms have the meanings given in section 9 of the Corporations Act: 25
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- ACN** 27
ARBN 28
company 29
director 30
foreign company 31
officer 32
- (3) If this Act provides for an event or other thing to occur on a particular day, that event or thing is taken to occur at the beginning of that day. 33
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- (4) Notes included in this Act do not form part of this Act. 35

4 Extraterritorial operation of Act	1
(1) It is the intention of the Parliament of New South Wales that the operation of this Act should, as far as possible, include operation in relation to the following:	2
(a) things situated in or outside the territorial limits of the State,	3
(b) acts, transactions and matters done, entered into or occurring in or outside the territorial limits of the State,	4
(c) things, acts, transactions and matters (wherever situated, done, entered into or occurring) that would, apart from this Act, be governed or otherwise affected by the law of another State, a Territory, the Commonwealth or a foreign country.	5
(2) Without limiting subsection (1), it is the intention of the Parliament of New South Wales that the provisions of this Act have an operation in relation to the things, acts, transactions and matters referred to in that subsection even if the rules of private international law (whether at general law or as provided by legislation) would require the application of a law other than this Act instead of the provisions of this Act.	6
5 Construction of legislation so as not to exceed legislative power	7
(1) Unless a contrary intention appears, if a provision of this Act or an instrument made under this Act:	8
(a) would, apart from this section, have an invalid application, but	9
(b) also has at least one valid application,	10
it is the intention of the Parliament of New South Wales that the provision is not to have the invalid application, but is to have every valid application.	11
(2) Despite subsection (1), the provision is not to have a particular valid application if:	12
(a) apart from this section, it is clear, taking into account the provision's context and the purposes or objects underlying this Act, that the provision was intended to have that valid application only if every invalid application, or a particular invalid application, of the provision had also been within the legislative power of the Parliament of New South Wales, or	13
(b) the provision's operation in relation to that valid application would be different in a substantial respect from what would have been its operation in relation to that valid application if every invalid application of the provision had been within the legislative power of the Parliament of New South Wales.	14
(3) Subsection (2) does not limit the cases in which a contrary intention may be taken to appear for the purposes of subsection (1).	15

(4)	This section is in addition to, and not in derogation of, section 31 of the <i>Interpretation Act 1987</i> .	1 2
(5)	In this section:	3
	application means an application in relation to:	4
(a)	one or more particular persons, things, matters, places, circumstances or cases, or	5 6
(b)	one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.	7 8
	invalid application , in relation to a provision, means an application because of which the provision exceeds the legislative power of the Parliament of New South Wales.	9 10 11
	valid application , in relation to a provision, means an application which, if it were the provision's only application, would be within the legislative power of the Parliament of New South Wales.	12 13 14
6	Act to bind State and other jurisdictions	15
(1)	This Act binds the State and, in so far as the legislative power of the Parliament of New South Wales permits, the other States, the Territories and the Commonwealth.	16 17 18
	Note. Section 21 (1) of the <i>Interpretation Act 1987</i> defines the term person to include a body politic.	19 20
(2)	Without limiting subsection (1), this Act has effect despite any privilege or immunity of the Crown in any of its capacities.	21 22
(3)	This Act does not make any State or Territory, the Commonwealth, or the Crown in any of its capacities, liable to be prosecuted for an offence.	23 24
(4)	A reference in this section to a State, Territory or the Commonwealth includes a reference to the Government of the State, Territory or Commonwealth.	25 26 27

Part 2	Extinguishment of certain civil liability	1
Division 1	General	2
7	Application of Part	3
(1)	This Part applies to civil liability of any kind, regardless of whether it arises:	4
	(a) at general law (whether in tort, contract or otherwise), or	5
	(b) by or under any legislation.	6
(2)	The provisions of this Part apply despite the provisions of any other legislation or any other law (whether written or unwritten).	7
8	Meaning of “protected conduct”	8
	For the purposes of this Part, <i>protected conduct</i> is anything done or omitted to be done in connection with any of the following:	9
(a)	the transfer of the assets of, and the payment of dividends and management fees by, any liable entity, that is set out in Part 3 of the Jackson Inquiry Report,	10
(b)	the establishment and funding and underfunding of the Compensation Foundation and the Medical Research and Compensation Foundation Trust (including announcements or other representations made in relation to the effect or consequences of the establishment or funding),	11
(c)	the transfer of assets from ABN 60 to James Hardie Industries NV, the establishment in 2001 of the ABN 60 Foundation and the ABN 60 Foundation Trust and the allotment of shares in ABN 60 to the ABN 60 Foundation,	12
(d)	the corporate reorganisation of the James Hardie group of companies on 15 February 2001 (including announcements or other representations made in relation to the effect or consequences of the reorganisation),	13
(e)	the corporate reorganisation of the James Hardie group of companies between August and October 2001, including without limitation:	14
	(i) the scheme of arrangement approved by the Supreme Court in October 2001 under which James Hardie Industries NV became the holding company for the James Hardie group of companies, and	15
	(ii) announcements or other representations made in relation to the effect or consequences of that scheme (including representations made to the Supreme Court),	16

Clause 9 James Hardie (Civil Liability) Bill 2005

Part 2 Extinguishment of certain civil liability

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- (f) the entry into the 2001 Deed of Covenant and Indemnity and the 2003 Deed of Covenant, Indemnity and Access and the amendment of the 2003 Deed of Covenant, Indemnity and Access by the Deed of Rectification executed by the parties to it on 3 February 2004, 1
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- (g) the issue by ABN 60 of shares in ABN 60 to James Hardie Industries NV and the cancellation of those shares in March 2003, 6
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- (h) the negotiation of, and entry into, the Heads of Agreement, the Final Funding Agreement or any Related Agreement. 9
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- Note.** The matters referred to in paragraphs (a)–(g) are described in the Jackson Inquiry Report. 11
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Division 2 Extinguishment of liability 13

9 Civil liability in relation to protected conduct extinguished 14

Any civil liability to which this Part applies that is incurred (whether before, during or after the assent day) by any of the following persons in respect of any protected conduct of the person is extinguished: 15
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- (a) any liable entity, 18
- (b) the Compensation Foundation, 19
- (c) James Hardie Industries NV, 20
- (d) any controlled entity of James Hardie Industries NV, 21
- (e) any person who engaged in the conduct in the person's capacity as a director or other officer, employee, advisor or agent of: 22
23
- (i) any liable entity, or 24
- (ii) the Compensation Foundation, or 25
- (iii) James Hardie Industries NV, or 26
- (iv) any controlled entity of James Hardie Industries NV. 27

10 Certain liability for economic loss for asbestos harm extinguished 28

- (1) Any civil liability to which this Part applies that is incurred (whether before, during or after the assent day) by any of the following persons in respect of asbestos harm is extinguished to the extent that it is a liability for economic loss, other than economic loss resulting from or attributable to personal injury or death: 29
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- (a) any liable entity, 34
- (b) James Hardie Industries NV, 35
- (c) any controlled entity of James Hardie Industries NV. 36
- (2) This section does not limit section 9. 37

(3) In this section:	1
<i>asbestos harm</i> means damage or loss sustained by any person	2
(including damage to or loss of property) arising from exposure to, or	3
the presence of, any asbestos or asbestos products that were mined,	4
manufactured, sold, distributed or used by or on behalf of a liable entity.	5
11 When civil liability extinguished	6
Civil liability that is extinguished by section 9 or 10 is extinguished:	7
(a) if the liability accrues during or before the assent day (but subject	8
to paragraph (c))—on the assent day, or	9
(b) if the liability accrues after the assent day (but subject to	10
paragraph (c))—on the day on which the liability accrues, or	11
(c) if the liability was revived under Division 3 and then	12
extinguished again under this Division as referred to in section	13
17 (1) (b)—on the day on which the order that revived the	14
liability is revoked by a revoking order under section 14.	15
12 Effect of extinguishment of civil liability under this Division	16
If civil liability is extinguished under this Division, then (to the full	17
extent that the legislative power of the Parliament of New South Wales	18
permits):	19
(a) any person to whom the liability is owed cannot assert, continue	20
or enforce a cause of action in respect of the liability in any civil	21
proceedings unless and until the liability is subsequently revived	22
under this Part, and	23
(b) no court or other tribunal has any jurisdiction or power to	24
entertain proceedings or grant any relief in respect of such	25
liability unless and until the liability is subsequently revived	26
under this Part.	27
13 Certain liability not affected by Division	28
(1) Nothing in this Part operates to extinguish:	29
(a) any civil liability incurred by a party to the Heads of Agreement,	30
the Final Funding Agreement or a Related Agreement to another	31
party to the Agreement where that liability arises under or in	32
relation to the Agreement or in connection with the negotiation	33
of, and entry into, the Agreement, or	34
(b) any civil liability incurred by an advisor or agent of James Hardie	35
Industries NV in connection with the negotiation of, and entry	36
into, the Heads of Agreement, the Final Funding Agreement or	37
any Related Agreement, or	38

- (c) any civil liability in respect of which proceedings are pending before a court or other tribunal immediately before 1 December 2005, or 1
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- (d) any civil liability of a person who is a concurrent wrongdoer with another person whose liability is extinguished under this Division in respect of the damage or loss to which the extinguished liability relates. 4
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- Note.** A person whose liability is extinguished under this Division is not liable as a concurrent wrongdoer in respect of that liability for the purposes of paragraph (d) even if the person is a concurrent wrongdoer with another person whose liability is also extinguished under this Division. 8
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- (2) The extinguishment of a liability by this Part operates even if the liability is the subject of proceedings commenced during or after 1 December 2005. The fact that any such proceedings are pending on the assent day does not prevent or limit the application of that provision or this Part in respect of the liability concerned. 12
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Division 3 Revival of liability 17

14 Revival of extinguished civil liability 18

- (1) A civil liability extinguished by operation of Division 2 may be revived as provided by this section, but not if the liability is a liability of a natural person or a liability of the Compensation Foundation. 19
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- (2) The Minister may, at any time, by order published in the Gazette (a **reviving order**) declare that specified civil liability, or a specified class of civil liability, extinguished by operation of Division 2 is revived on a day specified in the order. That day must not be earlier than 14 days after the day on which the reviving order is published in the Gazette. 22
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- (3) A reviving order may not be made if the making of the order would constitute a breach by the State of the terms of the Final Funding Agreement or a Related Agreement. 27
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- Note.** An exercise of the power to make a reviving order in a manner that breaches the Final Funding Agreement or a Related Agreement may also render the State liable to pay damages. See Part 3. 30
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- (4) Any person whose civil liability is revived (or purportedly revived) by a reviving order (or purported reviving order) may not claim or otherwise assert in any proceedings that the order or purported order was not validly made unless the Minister is, or is subsequently joined as, a party to the proceedings. 33
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- (5) A reviving order operates to revive the civil liability concerned on the day specified by the order. 38
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(6)	The Minister may, by order published in the Gazette (a <i>revoking order</i>), revoke a reviving order on a day specified in the order.	1 2
(7)	Without limiting subsection (6), the Minister must revoke a reviving order as soon as is reasonably practicable after the Minister becomes aware of the cessation of the breach or breaches of the Final Funding Agreement by another party to the Agreement that occasioned the reviving order.	3 4 5 6 7
(8)	A revoking order may be published before, during or after the day fixed by the reviving order for the revival of the civil liability concerned.	8 9
(9)	The revocation of a reviving order does not prevent publication of a further reviving order.	10 11
(10)	More than one reviving or revoking order may be made under this section.	12 13
15	Effect of revival of extinguished liability	14
	If extinguished civil liability is revived under this Division:	15
(a)	the civil liability is taken for all purposes never to have been extinguished and is enforceable accordingly by any person for whose benefit the liability accrues, and	16 17 18
(b)	any limitation period applicable to a cause of action for the liability is taken to have stopped running on the day on which the liability was extinguished and to have recommenced to run on the day on which the liability is revived.	19 20 21 22
16	Claims against liable entities in respect of revived liabilities	23
(1)	If extinguished civil liability is revived under this Division, a claim against a liable entity in respect of the liability becomes a payable liability of the entity.	24 25 26
(2)	The Minister may, by order published in the Gazette, order that a claim against a liable entity in respect of a specified liability or a liability of a specified class or description that is an extinguished civil liability revived under this Division is not a payable liability, and such an order has effect accordingly.	27 28 29 30 31
(3)	The Minister may make such an order before or after the liability concerned is revived under this Division.	32 33
(4)	If the Minister's order is made to take effect after the liability is revived, the effect of the order is as follows:	34 35
(a)	a claim against a liable entity in respect of the liability is a payable liability until the Minister's order takes effect,	36 37

(b) the claim remains a payable liability after the Minister's order takes effect but only for the purposes of and in connection with any proceedings commenced in respect of the claim before a court or other tribunal before the Minister's order takes effect and only if those proceedings are pending immediately before the Minister's order takes effect. 1
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(5) In this section, *payable liability* of a liable entity means a payable liability under and for the purposes of the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005*. 7
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17 Effect of revocation of reviving order 10

(1) If a reviving order under section 14 is revoked by a revoking order under that section, the revoking order has the following effect: 11
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(a) if it is published before or during the day fixed by the reviving order for the revival of a specified civil liability—the reviving order is taken never to have been published and, accordingly, the specified civil liability is not revived, 13
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(b) if it is published after the day fixed by the reviving order for the revival of a specified civil liability—the reviving order ceases to have effect on the day on which it is revoked and, accordingly, Division 2 operates (subject to subsection (2)) to extinguish again the specified civil liability. 17
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(2) Subsection (1) (b) does not operate to apply Division 2 to civil liability in respect of which proceedings were commenced before a court or other tribunal while the liability was revived if those proceedings are still pending immediately before the publication of the revoking order. 22
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Note. Subsection (2) extends to proceedings in respect of a claim that is a claim for a payable liability under section 16. 26
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Part 3	Contractual liability of State	1
18	Meaning of “legislative or regulatory action”	2
	For the purposes of this Part, <i>legislative or regulatory action</i> means any of the following:	3
		4
	(a) the enactment or making of legislation by or on behalf of the State or an instrumentality of the State,	5
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	(b) the exercise of functions by officials, employees, authorities or agencies of the State that are conferred or imposed on them by legislation.	7
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19	Right to compensation for enactment, making or enforcement of legislation confirmed	10
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	(1) This section applies to any provision of the Final Funding Agreement or a Related Agreement that provides for the State not to carry out, or not to cause the carrying out of, legislative or regulatory action of a kind specified by the Agreement.	12
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	(2) For the avoidance of doubt, it is declared that a breach by the State of a provision to which this section applies is capable of rendering the State liable to pay damages for breach of contract if the breach is of such a kind as to warrant an award of damages for breach of contract at general law.	16
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20	Validity of action not affected even if compensable	21
	(1) Nothing in section 19, the Final Funding Agreement or any Related Agreement operates:	22
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	(a) to prevent the introduction of any Bill in, or the passage of a Bill through, a House of Parliament or prevent assent being given to any Bill, or	24
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	(b) to prevent the making of any other legislation, or	27
	(c) to affect the validity of any legislation, or	28
	(d) to affect the validity of any action taken, or not taken, by the State or any its officials, employees, authorities or agencies.	29
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	(2) Nothing in subsection (1) limits the operation of section 14 (3) of this Act or section 9 (3) of the <i>James Hardie (Civil Penalty Compensation Release) Act 2005</i> .	31
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	Note. Section 14 (3) of this Act provides that a reviving order under section 14 may not be made if the making of the order would constitute a breach by the State of the terms of the Final Funding Agreement or a Related Agreement.	34
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Part 4 Baryulgil claims against Marlew Mining

21 Interpretation

(1) In this Part:

asbestos claim means a claim by any of the following persons for damages (whether arising before, during or after the assent day) in respect of personal injury or death arising from exposure to asbestos:

- (a) the person who sustains the personal injury,
- (b) the personal legal representative of a deceased person who sustained the injury or died as a result of the injury,
- (c) a relative of a deceased person who sustained the injury or died as a result of the injury,

and includes such a claim against a person pursuant to the joinder of the person as a party to proceedings.

asbestos mining activities means the mining or milling of asbestos and includes the disposal or other parting with of tailings (and other materials containing asbestos) that resulted from those mining or milling operations.

concurrent wrongdoer, in relation to an asbestos claim, means a person who is one of two or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

Marlew means the company registered under the Corporations Act immediately before the introduction day as Marlew Mining Pty Limited (ACN 000 049 650) that was formerly called Asbestos Mines Pty Limited, and includes any successor to or continuation of that company.

Marlew asbestos claim means an asbestos claim in respect of personal injury or death arising from exposure to any asbestos in the course of or as a consequence of asbestos mining activities conducted by or on behalf of Marlew at Baryulgil, but only where that exposure occurred at or near Baryulgil.

Marlew contribution claim means a claim (whether arising before, during or after the assent day) for contribution against a person as a concurrent wrongdoer in relation to a Marlew asbestos claim.

(2) For the purposes of the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005*:

- (a) a Marlew asbestos claim against Amaca is a **personal asbestos claim** under that Act against Amaca as a liable entity under that Act, and
- (b) a Marlew contribution claim against Amaca in respect of which a final judgment has been entered by a court or other tribunal

	against Amaca or a binding settlement has been entered into by	1
	Amaca is a <i>proven personal asbestos contribution claim</i> under	2
	that Act against Amaca as a liable entity under that Act.	3
(3)	This Part operates even if Marlew ceases or has ceased to exist or is or	4
	has been deregistered under the Corporations Act (and in such a case	5
	operates as if Marlew had not ceased to exist or been deregistered).	6
22	Amaca liable for asbestos claims and contribution claims against	7
	Marlew	8
(1)	Amaca is liable on and from the assent day in respect of a Marlew	9
	asbestos claim or Marlew contribution claim as if the asbestos mining	10
	activities conducted by or on behalf of Marlew at Baryulgil in respect	11
	of which the claim arises had been conducted by or on behalf of Amaca.	12
(2)	Amaca's liability under this Part is limited to liability in respect of a	13
	Marlew asbestos claim or Marlew contribution claim:	14
	(a) that is a claim in proceedings against Amaca commenced during	15
	or after the assent day in the Dust Diseases Tribunal of New	16
	South Wales, or	17
	(b) that is a claim in proceedings against Marlew commenced before	18
	the assent day in any court, tribunal or other judicial body	19
	constituted in Australia.	20
(3)	This Part extends to a claim in proceedings commenced against Marlew	21
	before the assent day, so as to require Amaca to satisfy the claim (as a	22
	proven personal asbestos claim under the <i>James Hardie Former</i>	23
	<i>Subsidiaries (Winding up and Administration) Act 2005</i>) but only to the	24
	extent that the claim has not already been satisfied by Marlew, and as if:	25
	(a) a final judgment entered by a court, tribunal or other judicial	26
	body against Marlew in respect of the claim were a final	27
	judgment against Amaca, or	28
	(b) a binding settlement entered into by Marlew in respect of the	29
	claim had been entered into by Amaca.	30
	Note. Pending proceedings against Marlew can continue to finality (with	31
	judgment being satisfied by Amaca), and Amaca will be liable for claims already	32
	finalised but not yet paid by Marlew.	33
(4)	This section does not prevent the discontinuance of any proceedings	34
	commenced before the assent day against Marlew and the	35
	commencement of separate proceedings against Amaca in respect of the	36
	claim concerned.	37
(5)	This Part does not entitle a person to recover more than once in respect	38
	of a Marlew asbestos claim or Marlew contribution claim, and a person	39
	who recovers against either Amaca or Marlew in respect of such a claim	40
	cannot also recover against the other in respect of the claim.	41

23 Amaca not liable for certain claims—rehabilitation of mine	1
(1) Amaca is not liable under this Part in respect of any Marlew asbestos claim or Marlew contribution claim that is a claim in respect of a liability that is the subject of an indemnity granted by the Minister for Mineral Resources by way of a release and indemnity agreement dated 11 March 1996 between that Minister and James Hardie Industries Limited (now ABN 60).	2 3 4 5 6 7
(2) The Minister is to cause a copy of the agreement referred to in this section to be published in the Gazette.	8 9
Note. The agreement referred to releases James Hardie Industries Limited from liability for asbestos related death or injury of employees of the Department of Mineral Resources or Fuller Earthmoving Pty Ltd in connection with the rehabilitation of an asbestos mine at Baryulgil.	10 11 12 13
24 Amaca to have all Marlew’s rights in respect of claim	14
(1) Amaca is subrogated to the rights of Marlew in respect of a Marlew asbestos claim or Marlew contribution claim against Amaca.	15 16
(2) Amaca also has all the rights that Marlew would have had in respect of a Marlew asbestos claim or Marlew contribution claim against Amaca (being the rights Marlew would have had if Marlew had not ceased to be liable in respect of the claim under this Part), including the following rights:	17 18 19 20 21
(a) rights of subrogation,	22
(b) rights of contribution against any concurrent wrongdoer in respect of the claim,	23 24
(c) rights that Marlew would have under any policy of insurance in respect of a Marlew asbestos claim or Marlew contribution claim (as if Marlew and not Amaca were liable on the claim).	25 26 27
25 Special provisions for Amaca liabilities as concurrent wrongdoer	28
(1) If Amaca’s liability under this Part pursuant to the settlement or determination of a Marlew asbestos claim is a joint liability as a concurrent wrongdoer in relation to the claim, the provisions of this section apply to Amaca’s liability and the liability of any other concurrent wrongdoer (collectively referred to in this section as the <i>other concurrent wrongdoers</i>) in relation to the claim.	29 30 31 32 33 34
(2) The plaintiff is required to pursue recovery of the plaintiff’s damages from Amaca as a defendant of last resort. Amaca’s liability to the plaintiff as a defendant of last resort is liability solely to the extent (if any) that the plaintiff is unable to recover from any of the other concurrent wrongdoers.	35 36 37 38 39 40

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- (3) None of the other concurrent wrongdoers is entitled to recover contribution from Amaca as a concurrent wrongdoer, and the other concurrent wrongdoers are liable for the purposes of rights of contribution as between themselves as if Amaca's share of contribution had been shared between them in proportion to their shares of contribution among themselves. 1
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- (4) Amaca is entitled to recover from the other concurrent wrongdoers any payment made by Amaca to the plaintiff in respect of Amaca's liability as a concurrent wrongdoer, and for that purpose: 7
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- (a) the other concurrent wrongdoers are jointly and severally liable to Amaca for the amount of any such payment made to the plaintiff by Amaca, and 10
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- (b) any such amount recoverable by Amaca is recoverable in a court of competent jurisdiction as a debt due to Amaca from the other concurrent wrongdoers, and 13
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- (c) any of the other concurrent wrongdoers from whom Amaca recovers in respect of any such payment to the plaintiff is entitled to recover contribution from the other concurrent wrongdoers (but not from Amaca) in proportion to their shares of contribution among themselves. 16
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- (5) For the purposes of this section, a plaintiff is considered to be unable to recover damages from a concurrent wrongdoer if, and only if, the plaintiff has made a demand for payment of damages by the concurrent wrongdoer after judgment in favour of the plaintiff takes effect and the concurrent wrongdoer has failed to pay the damages within 28 days after the demand for payment was made. 21
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- (6) The expression *other concurrent wrongdoers* includes a single concurrent wrongdoer if the concurrent liability of Amaca is a concurrent liability with only one other concurrent wrongdoer. 27
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- 26 Insurance** 30
- The operation of this Part: 31
- (a) does not limit or otherwise affect any liability of an insurer under a policy of insurance that insures Marlew against liability in connection with a Marlew asbestos claim or Marlew contribution claim, and 32
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- (b) does not give any such insurer a right of action against Amaca in respect of a Marlew asbestos claim or Marlew contribution claim that the insurer would not have against Marlew. 36
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27 Recovery of payments from Marlew

(1) Amaca is entitled to recover from Marlew as a debt the amount of any payment made by Amaca in satisfaction of any payable liability (within the meaning of the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005*) in respect of a Marlew asbestos claim or Marlew contribution claim.

(2) Amaca is entitled to prove as a creditor in respect of a debt arising under this section in any winding up of Marlew.

(3) Subsections (1) and (2) are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to Chapter 5 of the Corporations Act.

Note. Chapter 5 of the Corporations Act makes provision for the external administration of companies and certain other bodies.

Section 5G (11) of the Corporations Act provides that if a State law declares a provision of a State law to be a Corporations legislation displacement provision, any provision of the Corporations legislation with which the State provision would otherwise be inconsistent does not apply to the extent necessary to avoid the inconsistency.

However, section 5G (3) of the Corporations Act provides that section 5G will only apply to a provision of a law of a State or Territory enacted after the commencement of that Act if a law of the State or Territory declares the provision to be a Corporations legislation displacement provision for the purposes of that section.

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Part 5 Miscellaneous

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28	Relationship with James Hardie (Civil Penalty Compensation Release) Act 2005	2
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	The provisions of this Act are in addition to, and do not derogate from, the provisions of the <i>James Hardie (Civil Penalty Compensation Release) Act 2005</i> .	4
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29	Regulations	7
(1)	The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.	8
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(2)	The regulations may create offences punishable by a penalty not exceeding 100 penalty units.	12
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30	Savings, transitional and other provisions	14
	Schedule 1 has effect.	15

Schedule 1	Savings, transitional and other provisions	1
		2
	(Section 30)	3
Part 1	General	4
1	Regulations	5
(1)	The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts: this Act	6 7 8
(2)	Any such provision may, if the regulations so provide, take effect from: (a) the introduction day (in the case of this Act), or (b) the date of assent to the Act concerned (in the case of any other Act), or a later date.	9 10 11 12 13
(3)	To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as: (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.	14 15 16 17 18 19 20 21 22