

Passed by both Houses



New South Wales

# James Hardie Former Subsidiaries (Special Provisions) Bill 2005

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*I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.*

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney, , 2005*



New South Wales

## **James Hardie Former Subsidiaries (Special Provisions) Bill 2005**

Act No , 2005

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An Act to provide for the external administration of certain former subsidiaries of the James Hardie corporate group and to place limitations on corporate restructuring by those subsidiaries and associated companies; and for other purposes.

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*I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.*

*Chairman of Committees of the Legislative Assembly.*

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**The Legislature of New South Wales enacts:**

## **Part 1 Preliminary**

### **1 Name of Act**

This Act is the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*.

### **2 Commencement**

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

### **3 Definitions**

(1) In this Act:

***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.

***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.

***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.

***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.

***assent day*** means the day on which this Act received the Royal Assent.

***claim*** means any claim, demand, action, cause of action or proceedings (whether based in tort, in contract, under legislation or otherwise).

***claims processing expenses*** of a liable entity means any of the following incurred by the entity in connection with the management of claims made against the entity:

- (a) expenses, charges or other costs for the provision of legal services to the entity,
- (b) expenses, charges or other costs for the provision of expert evidence or for the provision of other professional advice to the entity,

- (c) expenses, charges or other costs arising out of proceedings in a court or other tribunal or the use of any structured negotiation process for the settlement of claims (including mediation, conciliation or arbitration).

**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.

**contravene** includes fail to comply with.

**Corporations Act** means the *Corporations Act 2001* of the Commonwealth.

**Corporations legislation** means the Corporations legislation to which Part 1.1A of the Corporations Act applies.

**damages** includes any form of monetary compensation.

**exercise** a function includes perform a duty.

**external administration period**—see section 15.

**function** includes a power, authority or duty.

**general law** means the common law and equity.

**introduction day** means the day on which the Bill for this Act was first introduced into Parliament.

**legislation** includes:

- (a) any statute of a legislature (whether enacted or made in Australia or elsewhere), or
- (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).

**liable entity** means each of the following:

- (a) ABN 60,
- (b) Amaba,
- (c) Amaca.

**management** of claims includes the handling, finalisation or payment of such claims.

**Member Register** of a company means a register of members of the company kept under Chapter 2C of the Corporations Act.

**MRCF Investments** means the company registered under the Corporations Act immediately before the introduction day as MRCF (Investments) Pty Limited (ACN 095 926 837), and includes any successor to or continuation of that company.

*operating expenses* of a liable entity means any expenses, charges or other costs (including taxes and duties) incurred by the entity in carrying on its business during the external administration period as provided by Part 3, but does not include its claims processing expenses.

*power* includes an authority.

*the State* means the State of New South Wales.

*transfer* of a share includes:

- (a) an assignment (whether or not for consideration) of the share, and
- (b) an assignment or transfer, or the creation, of any legal or beneficial interest (or both) in the share.

*working day* means any day that is not a Saturday, Sunday or public holiday.

- (2) In this Act, the following terms have the same meanings as they have in the Corporations Act:

*ACN*

*ASIC*

*books*

*company*

*constitution*

*contributory*

*director*

*insolvent*

*member*

*negotiable instrument*

*officer*

*public document*

*registered company auditor*

*registered office*

*secretary*

- (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.

- (4) Notes included in this Act do not form part of this Act.

#### **4 Extraterritorial operation of Act**

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:

- (a) things situated in or outside the territorial limits of the State,

- (b) acts, transactions and matters done, entered into or occurring in or outside the territorial limits of the State,
- (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 Construction of legislation so as not to exceed the legislative power of Parliament**

- (1) This Act and any instrument made under this Act is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Parliament of New South Wales.
- (2) If any provision of this Act or any instrument made under this Act (or the application of any such provision to any person, subject-matter or circumstance) would, but for this section, be construed as being in excess of the legislative power of Parliament:
  - (a) it is a valid provision to the extent to which it is not in excess of that power, and
  - (b) the remainder of this Act or the instrument, and the application of the provision to other persons, subject-matters or circumstances, is not affected.
- (3) This section applies to this Act or an instrument made under this Act in addition to, and without limiting the effect of, any provision of this Act or the instrument.

**6 Act to bind State and other jurisdictions**

- (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.

**Note.** Section 21 (1) of the *Interpretation Act 1987* defines the term **person** to include a body politic.
- (2) Without limiting subsection (1), this Act has effect despite any privilege or immunity of the Crown in any of its capacities.
- (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.
- (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.



## Part 2 Limitations on corporate restructuring

### Division 1 Interpretation

#### 7 Definitions

In this Part:

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

**relevant company** means any of the following:

- (a) any liable entity,
- (b) the Compensation Foundation,
- (c) MRCF Investments,
- (d) the ABN 60 Foundation.

### Division 2 Registered offices and Member Registers

#### 8 Registered offices to be within the State

- (1) A relevant company must not, without the written approval of the Minister:
  - (a) change the address of its registered office to a location that is outside of the territorial limits of the State, or
  - (b) have its registered office at a location that is outside of the territorial limits of the State.

Maximum penalty: 1,000 penalty units.

**Note.** If a relevant company contravenes this subsection, section 40 operates to make each person who is a director of the company or who is concerned in the management of the company liable for the offence if the person knowingly authorised or permitted the contravention.

- (2) Subsection (1) is taken to extend to acts or omissions occurring during or after the introduction day but before the assent day.
- (3) However, if a relevant company has its registered office at a location outside of the territorial limits of the State on the introduction day, subsection (1) does not make the company liable for an offence provided that the address of the office is changed to a location within the territorial limits of the State within 5 working days after the introduction day.
- (4) It is taken to be a provision of the constitution of each relevant company that:

- (a) the registered office of the company be located within the territorial limits of the State unless the Minister gives written approval for it to be located outside the territorial limits of the State, and
- (b) the address of its registered office not be changed to a location that is outside of the territorial limits of the State without the written approval of the Minister.

### **9 Member Register to be within the State**

- (1) A relevant company must not, without the written approval of the Minister:
  - (a) change the location where any Member Register of the company is kept to a location that is outside of the territorial limits of the State, or
  - (b) keep any Member Register of the company at a location that is outside of the territorial limits of the State.

Maximum penalty: 1,000 penalty units.

**Note.** If a relevant company contravenes this subsection, section 40 operates to make each person who is a director of the company or who is concerned in the management of the company liable for the offence if the person knowingly authorised or permitted the contravention.

- (2) Subsection (1) is taken to extend to acts or omissions occurring during or after the introduction day but before the assent day.
- (3) However, if a relevant company keeps any of its Member Registers at a location outside of the territorial limits of the State on the introduction day, subsection (1) does not make the company liable for an offence provided that the location where the Register is kept is changed to a location within the territorial limits of the State within 5 working days after the introduction day.
- (4) It is taken to be a provision of the constitution of each relevant company that:
  - (a) any Member Register of the company be kept at a location within the territorial limits of the State unless the Minister gives written approval for it to be kept at a location outside the territorial limits of the State, and
  - (b) the location where a Member Register is kept not be changed to a location that is outside of the territorial limits of the State without the written approval of the Minister.

#### **10 Orders to relocate registered office or Member Register to the State**

- (1) The Minister may, by order served on a relevant company, instruct the company and its directors and other officers to take such steps as are necessary under the Corporations Act:
  - (a) to change the address of its registered office to a location that is within the territorial limits of the State within the period specified in the order, and
  - (b) to change the location where any Member Register of the company is kept to a location that is within the territorial limits of the State within the period specified in the order.
- (2) A relevant company on which an order made under subsection (1) is served must comply with the order.

Maximum penalty: 1,000 penalty units.

**Note.** If a relevant company contravenes this subsection, section 40 operates to make each person who is a director of the company or who is concerned in the management of the company liable for the offence if the person knowingly authorised or permitted the contravention.

### **Division 3 Transfers of shares by relevant companies**

#### **11 Certain transfers of shares in liable entities prohibited**

- (1) A relevant company must not transfer to any person any shares that it holds in a liable entity without the written approval of the Minister.

Maximum penalty: 1,000 penalty units.

**Note.** If a relevant company contravenes this subsection, section 40 operates to make each person who is a director of the company or who is concerned in the management of the company liable for the offence if the person knowingly authorised or permitted the contravention.
- (2) Without limiting subsection (1), an order of the Minister under section 12 instructing a relevant company and its directors and officers to transfer shares constitutes written approval of the Minister for the purposes of that subsection for the transfer of those shares.
- (3) Subsections (1) and (2) are taken to extend to transfers of shares occurring during or after the introduction day but before the assent day.

#### **12 Orders requiring transfer of shares back to relevant company**

- (1) If a relevant company transfers shares in contravention of section 11, the Minister may, by order served on the person to whom or which the shares were transferred, instruct the person (and, in the case of a company, its directors and other officers) to take such steps as are

necessary under the Corporations Act and any other relevant law (whether written or unwritten) to transfer those shares back to the relevant company during the day or within the period specified in the order.

- (2) A person must comply with any order made under subsection (1) that is served on the person.

Maximum penalty: 1,000 penalty units.

**Note.** If the person who contravenes this subsection is a corporation, section 40 operates to make each person who is a director of the corporation or who is concerned in the management of the corporation liable for the offence if the person knowingly authorised or permitted the contravention.

- (3) If a person holds shares to which an order under subsection (1) applies on trust or for the benefit of another person, any beneficial interest of the other person in the shares is extinguished on the transfer of the shares back to the relevant company.
- (4) No compensation is payable for any of the following:
- (a) the loss of any legal or beneficial interest in shares resulting from the transfer of the shares in compliance with an order under subsection (1) (including the extinguishment of a person's beneficial interest in shares by operation of subsection (3)),
  - (b) any costs or other expenses incurred by a person in complying with an order under subsection (1).

#### **Division 4 Expiry of Part**

##### **13 Part expires when external administration period ends**

The provisions of this Part cease to have effect at the end of the day on which the external administration period ends.

#### **Division 5 Displacement of Corporations legislation**

##### **14 Displacement of certain provisions of Corporations legislation**

- (1) Sections 8 and 9 (and section 40 in its application to contraventions of those sections by relevant companies) are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the provisions of the Corporations Act generally.

**Note.** Chapter 2B of the Corporations Act makes provision with respect to the registered offices of companies and places of business of companies. See also section 121 (Registered office) of that Act.

Chapter 2C of the Corporations Act makes provision for the keeping of registers (including Member Registers) by companies. See, in particular, sections 169 (Register of members), 172 (Location of registers) and 178 (Overseas branch registers) of that Act.

Section 5G (9) of the Corporations Act provides that if a provision of a law of a State or Territory provides that a provision is included, or taken to be included, in a company's constitution, the provision is included in the company's constitution even though the procedures and other requirements of that Act are not complied with in relation to the provision.

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.

- (2) Section 11 (and section 40 in its application to contraventions of that section by relevant companies) are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the provisions of the Corporations legislation generally.

**Note.** Chapters 2H and 2J of the Corporations Act make provision with respect to the issue of shares and transactions affecting share capital.

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.

- (3) Sections 10 and 12 (and section 40 in its application to contraventions of those sections by relevant companies) are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the provisions of the Corporations legislation generally.

**Note.** Section 5G (5) of the Corporations Act provides that if a provision of a law of a State or Territory specifically:

- (a) authorises a person to give instructions to the directors or other officers of a company or body, or
- (b) requires the directors of a company or body to:
  - (i) comply with instructions given by a person, or
  - (ii) have regard to matters communicated to the company or body by a person, or
- (c) provides that a company or body is subject to the control or direction of a person,

a provision of the Corporations legislation does not:

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- (d) prevent the person from giving an instruction to the directors or exercising control or direction over the company or body, or
  - (e) prohibit a director from complying with the instruction or direction, or
  - (f) impose a liability (whether civil or criminal) on a director for complying with the instruction or direction.

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.

## **Part 3 External administration of liable entities**

### **Division 1 General**

#### **15 External administration period**

- (1) For the purposes of this Act, the *external administration period* means the period:
  - (a) commencing on the assent day, and
  - (b) ending at the end of the day appointed by the Governor under subsection (2) for the termination of the external administration under this Part.
- (2) The Governor may, by proclamation published in the Gazette, fix a day for the termination of the external administration of each liable entity under this Part.
- (3) The Governor may, by proclamation published in the Gazette, revoke a proclamation published under subsection (2), in which case the revoked proclamation is taken never to have been published.
- (4) A revoking proclamation has effect only if published before the day fixed under subsection (2) by the proclamation it revokes.
- (5) The revocation of a proclamation published under subsection (2) does not prevent publication of a further proclamation under that subsection.

#### **16 External administration must be conducted under this Part**

- (1) During the external administration period:
  - (a) any external administration of a liable entity is to be conducted only in accordance with the provisions of this Part, and
  - (b) no proceedings may be brought or continued in a court or other tribunal for the external administration of a liable entity otherwise than in accordance with the provisions of this Part.
- (2) Nothing in this Part is intended to prevent or limit any liable entity or any of its directors or other officers from providing assistance to ASIC.
- (3) In this section, *external administration* means any scheme of arrangement, receivership, winding up or other kind of external administration.

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## Division 2 Management of liable entities

### 17 Management during external administration period

Subject to the provisions of this Part and Part 2, each liable entity is to be managed during the external administration period in accordance with any applicable provisions of the Corporations Act or any other legislation, the constitution of the entity and the general law.

### 18 Conduct of business during external administration period

- (1) Subject to this Part, during the external administration period the powers of each liable entity must be exercised so as to:
- (a) carry on the business of the entity so far as is necessary for the management of claims made against the entity, and
  - (b) pay claims made against the entity in accordance with the provisions of this Part.

**Note.** Part 2B.1 of the Corporations Act makes provision for the powers of companies and how they are to be exercised. In particular, section 124 of that Act provides that a company has the legal capacities and powers of an individual. However, section 124 (3) of that Act makes it clear that nothing in that section authorises a company to do an act that is prohibited by a law of a State or gives a right to a company that a law of a State denies to it.

- (2) Without limiting subsection (1), a liable entity may also:
- (a) make any compromise or arrangement with persons having or alleging that they have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the entity or by which the entity may be rendered liable, and
  - (b) enforce any calls, liabilities to calls, debts, liabilities capable of resulting in debts and any claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting or supposed to subsist between the entity and a contributory or other debtor or person apprehending liability to the entity, and
  - (c) compromise any call, debt, liability or claim referred to in paragraph (b), and all questions in any way relating to or affecting the property of the entity or the external administration of the entity under this Part, on such terms as are agreed, and take any security for the discharge of, and give a complete discharge in respect of, any such call, debt, liability or claim, and
  - (d) do all such other things:
    - (i) as are necessary for the purposes of exercising a power under subsection (1) or paragraph (a), (b) or (c) or of the external administration of the entity under this Part, or
    - (ii) that the entity is directed, required, authorised or permitted to do by or under this Part.



- (3) An exercise of a power by a liable entity is not invalid merely because it is exercised in contravention of subsection (1) or (2).
- (4) However, nothing in subsection (3) prevents:
  - (a) the making of an application to the Supreme Court under section 32 for an order to remedy or restrain a contravention of subsection (1) or (2), or
  - (b) the Supreme Court from granting any relief under section 32 on any such application.

**19 Directions from Minister**

- (1) The Minister may, by written order served on a liable entity, direct the entity to do, or not to do, any thing that the Minister is satisfied is necessary or appropriate for the external administration of the entity in accordance with the provisions of this Part.
- (2) A liable entity is required and authorised to comply with any direction given to it under an order made under subsection (1) that is served on it.

**20 Notification that liable entity under external administration**

Each liable entity is authorised and required during the external administration period to set out in every public document, and in every negotiable instrument, of the entity, after the name of the entity where it first appears, the expression “under NSW external administration”.

**21 Liable entity may continue to trade while insolvent**

A liable entity and its directors and other officers are specifically authorised during the external administration period to conduct the business of the entity in the manner directed, required, authorised or permitted by or under this Part even if:

- (a) the entity is insolvent, or
- (b) the entity will become insolvent by reason of conducting its business in such a manner.

**22 Deregistration of liable entities**

A liable entity, any director or other officer or member of such an entity or any other person may not make an application during the external administration period for the deregistration of a liable entity under the Corporations Act without the written consent of the Minister.

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### **Division 3 Making and payment of claims**

#### **23 Claims payable only as permitted by this Division**

- (1) During the external administration period, claims against a liable entity may be paid only in the manner permitted by this Division.
- (2) A person who has a claim against a liable entity may bring proceedings during the external administration period to enforce payment of the claim, but only to the extent authorised or permitted by this Division.
- (3) Accordingly, no court or other tribunal has any jurisdiction or power during the external administration period to entertain proceedings or grant any relief in respect of any claim against a liable entity other than in accordance with the provisions of this Division.

#### **24 Determination of whether sufficient funds**

In determining whether or not there are or will be sufficient funds for the payment of claims against a liable entity, regard is to be had to the amount of funding that is or will be available for the payment of such claims (whether from the funds of the entity itself or from contributions of funds made by any other person).

#### **25 Payments during period of sufficient funds**

If there are sufficient funds to do so, a liable entity is authorised to pay all claims against it in full and as and when they fall due for payment.

#### **26 Minister may apply to Supreme Court if insufficient funds**

- (1) If there are or will be insufficient funds for all of the claims against a liable entity to be paid in full as and when they fall due for payment, the Minister may apply to the Supreme Court for orders under subsection (2).
- (2) On any such application, the Supreme Court may, if satisfied that there are or will be insufficient funds for all of the claims against a liable entity to be paid in full as and when they fall due for payment, make the following orders:
  - (a) an order declaring that there will be insufficient funds to pay the liable entity's debts in full for the period specified by the order (the *insufficient funds period*),
  - (b) an order approving a scheme for the part payment or deferral of payment of claims against the entity during the insufficient funds period (an *approved payment scheme*).

- (3) The Supreme Court may not approve a scheme for the part payment or deferral of payment of claims against a liable entity during an insufficient funds period unless the scheme provides for the following:
- (a) the payment in full of the operating expenses and claims processing expenses of the entity during the period in priority over claims of the kind referred to in paragraph (b) or (c),
  - (b) the payment of claims for damages for personal injury or death during the period:
    - (i) in full, or
    - (ii) in part (calculated on an appropriate proportionate basis among claimants whose claims are payable when the period commences or become payable during that period),in priority over claims of the kind referred to in paragraph (c),
  - (c) the payment in part, or the deferral of the payment, of any other kinds of claims during the period.
- (4) The Supreme Court may, on the application of the Minister, revoke or vary any orders made under subsection (2).
- (5) While an approved payment scheme is in force, a liable entity is authorised to pay claims against the entity that are payable and to refuse to pay claims that are deferred, but only to the extent and in accordance with the terms of the scheme.
- (6) Despite the provisions of the *Limitation Act 1969* or any other legislation or law (whether written or unwritten):
- (a) if part payment of a claim is authorised under an approved payment scheme, a claimant is entitled to payment during the insufficient funds period of that part of the total amount payable as is permitted under the scheme (but without prejudice to the right of the claimant to recover the balance of the total amount payable after the end of the period), and
  - (b) if the payment of a claim is deferred under an approved payment scheme:
    - (i) any pending proceedings before any court or other tribunal in respect of the deferred claim may not be continued or maintained until payment of the claim ceases to be deferred under the scheme, and
    - (ii) any limitation period applicable to the making of the claim is taken to stop running on the day on which the insufficient funds period commences and to recommence to run on the day after the period ends.

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## **Division 4      Reporting requirements, information and assistance**

### **27      External administration accounts**

- (1) A liable entity must, within 1 month after the end of such period as the Minister may direct from time to time (a *specified period*) by order served on the entity, lodge with the Minister:
  - (a) an account in the form prescribed by the regulations verified by statement in writing showing:
    - (i) the entity's receipts and payments during the specified period, and
    - (ii) in the case of the second account lodged under this subsection and all subsequent accounts—the aggregate amount of receipts and payments during all preceding specified periods, and
  - (b) a statement in the form prescribed by the regulations relating to the position in the external administration, verified by a statement in writing.
- (2) Without limiting subsection (1), the Minister may direct that a specified period includes a period occurring before the commencement of the external administration period.
- (3) An account or statement is verified in writing for the purposes of subsection (1) if a director or secretary of the liable entity concerned makes a statutory declaration to the effect that the account or statement is true and fair.
- (4) The Minister may:
  - (a) cause the account and, where a statement of the position in the external administration has been lodged, that statement to be audited by a registered company auditor, who must prepare a report on the account and the statement (if any), or
  - (b) require a liable entity to have the account and, where a statement of the position in the external administration is to be lodged, that statement to be audited by a registered company auditor, who must prepare a report on the account and the statement (if any) for lodgment.
- (5) For the purposes of the audit under subsection (4), the liable entity must give the auditor access to such books and information as the auditor requires.
- (6) If the Minister causes an account, or an account and a statement, to be audited (or requires a liable entity to have the account, or account and statement, audited) under subsection (4):

- (a) in the case of an audit that the Minister causes to be undertaken under subsection (4) (a)—the Minister must give to the liable entity a copy of the report prepared by the auditor, and
  - (b) the preparation or publication of the report does not subject the Minister or the auditor personally to any action, liability, claim or demand.
- (7) The costs of an audit under this section:
- (a) in the case of an audit that the Minister causes to be undertaken under subsection (4) (a)—must be fixed by the Minister, and
  - (b) form part of the operating expenses of the liable entity.

### **28 Inspection of books**

During the external administration period, a liable entity and its directors or other officers must provide such access to its books for the purposes of inspection as the Minister may reasonably require.

### **29 Assistance from officers of liable entity**

- (1) During the external administration period, a director or any other officer of a liable entity must:
  - (a) attend on the Minister (or a person specified by the Minister), and
  - (b) give the Minister (or a person specified by the Minister) such information about the entity's business, property, affairs and financial circumstances, and
  - (c) attend such meetings of the members or creditors of the entity, as the Minister may reasonably require.
- (2) During the external administration period, a director or any other officer of a liable entity must do whatever the Minister reasonably requires the director or other officer to do to help in:
  - (a) the exercise of the Minister's functions under this Part, and
  - (b) the external administration of the entity under this Part.

## **Division 5 Removal of directors of liable entities**

### **30 Supreme Court may order removal of directors**

- (1) The Minister may apply to the Supreme Court for orders to remove a director of a liable entity from office and the appointment of another person as a director.
- (2) On any such application, the Supreme Court may make the following orders if satisfied that the director of the liable entity concerned has not faithfully performed or is not faithfully performing his or her duties as

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a director or has not observed or is not observing a requirement of the Court or of this Act:

- (a) an order that the director ceases to hold office as a director of the liable entity on the day specified in the order,
  - (b) an order that a specified person is appointed to be a director of the liable entity instead of the person who ceases to hold office as a director.
- (3) It is taken to be a provision of the constitution of each liable entity that:
- (a) a director in respect of whom an order is made under subsection (2) ceases to hold office as a director on the day specified in the order, and
  - (b) the vacancy in the office may only be filled by a person appointed by the Supreme Court in an order made under subsection (2), and
  - (c) this power of appointment has effect despite any other provision of the constitution of the liable entity.
- (4) A person who, by reason of an order made under this section, ceases to hold office as a director of a liable entity is not entitled to any remuneration or compensation because of the loss of that office.

## **Division 6      Enforcement**

### **31    Meaning of “authorised applicant”**

- (1) For the purposes of this Division, each of the following persons is an *authorised applicant*:
  - (a) the Minister,
  - (b) any other person who is authorised by the Minister under subsection (2) for the purposes of the provisions of this Division in which the expression *authorised applicant* is used.
- (2) The Minister may, by written instrument, authorise any person to be an authorised applicant for the purposes of any or all of the provisions of this Division that enable an authorised applicant to make applications to the Supreme Court.
- (3) The Minister may at any time and for any reason revoke a person’s authorisation under subsection (2) by written notice served on the person.
- (4) A document purporting to be an authorisation under subsection (2) and purportedly signed by the Minister is admissible in any proceedings and is prima facie evidence of the authorisation specified by it.

**32 Enforcement of provisions of this Part**

- (1) In this section, *contravention* includes a threatened or apprehended contravention.
- (2) An authorised applicant may apply to the Supreme Court for an order to remedy or restrain a contravention of a provision of this Part, whether or not any right of that applicant has been or may be infringed by or as a consequence of that contravention.
- (3) On any such application, the Supreme Court may, if satisfied that a contravention has occurred, or that a contravention will, unless restrained by order of the Court, continue or be committed, make such order or orders as it thinks fit to remedy or restrain the contravention.

**33 Advice or directions concerning provisions of this Part**

- (1) A liable entity may apply for advice or direction by the Supreme Court or the Minister on any matter relating to the scope of the entity's functions under this Part, the exercise of any function by the entity under this Part or any other matter relating to the operation of this Part.
- (2) The Minister may apply for advice or direction by the Supreme Court on any matter relating to the scope of the Minister's functions under this Part, the exercise of any function by the Minister under this Part or any other matter relating to the operation of this Part.
- (3) In determining any such application, the Supreme Court or Minister (as the case may be) may decide to:
  - (a) approve or disapprove of any act proposed to be done by the applicant, or
  - (b) give such advice or direction as the Supreme Court or Minister considers appropriate.
- (4) No proceedings lie, or civil or other liability arises, against an applicant for or on account of any act, matter or thing done or omitted to be done by the applicant in good faith and in accordance with any approval, advice or direction given under this section.
- (5) In this section:  
*applicant* means a person who applies for advice or direction under this section.

**34 Supreme Court may request non-NSW court or tribunal to act in its aid**

- (1) The Supreme Court may, on the application of an authorised applicant, request any of the following courts and tribunals that has jurisdiction in external administration matters with respect to a liable entity to act in

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aid of, and be auxiliary to, the Supreme Court in the external administration of the entity under this Part:

- (a) a court or other tribunal of another State or Territory (including an external Territory),
  - (b) a court or other tribunal of the Commonwealth,
  - (c) a court or other tribunal of a foreign country (or of a state, province or other part of a foreign country).
- (2) In this section:
- external administration matter*** means a matter relating to any scheme of arrangement, receivership, winding up or other kind of external administration of a company or other body outside of the territorial limits of the State (whether or not in Australia).

### **35 Protection for exercise of certain functions during external administration period**

- (1) This section applies to any function (a ***protected function***) conferred or imposed on any of the following persons (a ***protected person***) by or under a provision of this Part:
  - (a) the Governor,
  - (b) the Minister (including a delegate of the Minister),
  - (c) an authorised applicant.
- (2) Except as provided by this section, the exercise by a protected person of any protected function during the external administration period may not be:
  - (a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings, or
  - (b) restrained, removed or otherwise affected by any proceedings.
- (3) Without limiting subsection (2), that subsection applies whether or not the proceedings relate to any question involving compliance or non-compliance, by a protected person, with the provisions of this Part or the rules of natural justice (procedural fairness).
- (4) Accordingly (and except as provided by this section), no court of law or administrative review body has jurisdiction or power to consider any question involving compliance or non-compliance, by the protected person, with those provisions or with those rules so far as they apply to the exercise during the external administration period of any protected function.
- (5) However, nothing in this section prevents any person who is expressly authorised or permitted by a provision of this Part to bring proceedings (whether under this Part or otherwise) against a protected person from:



- (a) bringing such proceedings, or
  - (b) being granted such relief in those proceedings as may be authorised or permitted by this Part.
- (6) This section has effect despite any provision of this Act or other legislation or any other law (whether written or unwritten).
- (7) In this section:
- exercise* of functions includes:
- (a) the purported exercise of functions, and
  - (b) the non-exercise or improper exercise of functions, and
  - (c) the proposed, apprehended or threatened exercise of functions.
- proceedings* includes:
- (a) proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief, and
  - (b) without limiting paragraph (a), proceedings in the exercise of the inherent jurisdiction of the Supreme Court or the jurisdiction conferred by section 23 of the *Supreme Court Act 1970*.

## **Division 7 Displacement of Corporations legislation**

### **36 Displacement of certain provisions of the Corporations Act**

- (1) The provisions of Divisions 1–6 of this Part 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 (4) of the Corporations Act provides that a provision of the Corporations legislation does not:

- (a) prohibit the doing of an act, or
- (b) impose a liability (whether civil or criminal) for doing an act,

if a provision of a law of a State or Territory specifically authorises or requires the doing of that act. Section 21 of this Act specifically authorises a liable entity and its directors and other officers to conduct the entity's business as provided by this Part even if insolvent. Part 5.7B of the Corporations Act prohibits a company and its directors and officers from trading while insolvent.

Section 5G (8) of the Corporations Act provides that the provisions of Chapter 5 of that Act do not apply to a scheme of arrangement, receivership, winding up or other external administration of a company to the extent to which the scheme, receivership, winding up or administration is carried out in accordance with a provision of a law of a State or Territory.

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Section 5G (9) of the Corporations Act provides that if a provision of a law of a State or Territory provides that a provision is included, or taken to be included, in a company's constitution, the provision is included in the company's constitution even though the procedures and other requirements of that Act are not complied with in relation to the provision. Section 30 (3) of this Act provides that certain provisions relating to the removal of directors are taken to be part of the constitution of a liable entity.

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.

- (2) Without limiting subsection (1), section 20 is declared to be a Corporations legislation displacement provision for the purposes of section 5G of the Corporations Act in relation to the provisions of Part 2B.6 of that Act.

**Note.** Part 2B.6 of the Corporations Act makes provision for the use of names by companies.

Section 5G (6) of the Corporations Act provides that the provisions of Part 2B.6 and Part 5B.3 of that Act (which relate to the use of names) do not:

- (a) prohibit a company or other body from using a name if the use of the name is expressly provided for, or authorised by, a provision of a law of a State or Territory, or
- (b) require a company or other body to use a word as part of its name if the company or body is expressly authorised not to use that word by a provision of a law of a State or Territory.

- (3) Without limiting subsection (1), section 22 is declared to be a Corporations legislation displacement provision for the purposes of section 5G of the Corporations Act in relation to Part 5A.1 of the Corporations Act.

**Note.** Part 5A.1 of the Corporations Act makes provision for the deregistration of companies.

Section 5G (5) of the Corporations Act provides that if a provision of a law of a State or Territory specifically:

- (a) authorises a person to give instructions to the directors or other officers of a company or body, or
- (b) requires the directors of a company or body to:
  - (i) comply with instructions given by a person, or
  - (ii) have regard to matters communicated to the company or body by a person, or
- (c) provides that a company or body is subject to the control or direction of a person,

a provision of the Corporations legislation does not:

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- (d) prevent the person from giving an instruction to the directors or exercising control or direction over the company or body, or
- (e) prohibit a director from complying with the instruction or direction, or
- (f) impose a liability (whether civil or criminal) on a director for complying with the instruction or direction.

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.

## Part 4 Miscellaneous

### 37 Exemption from State tax

- (1) In this section:
- exempt matter* means any of the following:
- (a) the transfer of any shares in a liable entity that the Minister has instructed under section 12,
  - (b) such other matters in connection with this Act as may be prescribed by the regulations.
- State tax* means application or registration fees, duty under the *Duties Act 1997* or any other tax, duty, fee or charge imposed by any Act or law of the State.
- (2) State tax is not payable in relation to:
- (a) an exempt matter, or
  - (b) anything done because of, or for a purpose connected with or arising out of, an exempt matter.

### 38 Delegation

The Minister may delegate the exercise of any function of the Minister under this Act or the regulations (other than this power of delegation) to:

- (a) any member of staff of a Government Department, or
- (b) any person, or any class of persons, authorised for the purposes of this section by the regulations.

### 39 Service of documents

- (1) A document that is authorised or required by this Act or the regulations to be served on any person may be served by:
- (a) in the case of a natural person:
    - (i) delivering it to the person personally, or
    - (ii) sending it by post to the address specified by the person for the giving or service of documents or, if no such address is specified, the residential or business address of the person last known to the person giving or serving the document, or
  - (b) in the case of a body corporate—leaving it with a person apparently of or above the age of 16 years at, or by sending it by post to, the head office, a registered office or a principal office of the body corporate or to an address specified by the body corporate for the giving or service of documents.

- (2) Nothing in this section affects the operation of any provision of a law or of the rules of a court authorising a document to be served on a person in any other manner.

#### **40 Offences by corporations**

- (1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or has been convicted under the provision.
- (3) Nothing in this section affects any liability imposed on a corporation for an offence committed by the corporation under this Act or the regulations.
- (4) In this section:  
*corporation* includes a company or any other body corporate.

#### **41 Nature of proceedings for offences**

- (1) Proceedings for an offence under this Act or the regulations may be dealt with:
- (a) summarily before a Local Court, or
  - (b) summarily before the Supreme Court in its summary jurisdiction.
- (2) If proceedings are brought in a Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 100 penalty units, despite any higher maximum monetary penalty provided in respect of the offence.

#### **42 Regulations**

- (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.
- (2) The regulations may create offences punishable by a penalty not exceeding 100 penalty units.

#### **43 Savings, transitional and other provisions**

Schedule 1 has effect.

**44 Amendment of Subordinate Legislation Act 1989 No 146**

The *Subordinate Legislation Act 1989* is amended as set out in Schedule 2.

## **Schedule 1 Savings, transitional and other provisions**

(Section 43)

### **Part 1 General**

#### **1 Regulations**

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:  
this Act
- (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.
- (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.

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## **Schedule 2      Amendment of Subordinate Legislation Act 1989**

(Section 44)

### **Schedule 4 Excluded instruments**

Insert after item 26:

- 27**            Regulations under the *James Hardie Former Subsidiaries  
(Special Provisions) Act 2005*.