

Passed by both Houses



New South Wales

James Hardie (Civil Penalty Compensation Release) 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 (Civil Penalty Compensation Release) Bill 2005

Act No , 2005

An Act to provide for the extinguishment of certain liability of companies and other persons associated with the James Hardie corporate group to pay compensation in connection with civil penalties; and for other purposes.

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.

Clause 1 James Hardie (Civil Penalty Compensation Release) Bill 2005

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *James Hardie (Civil Penalty Compensation Release) 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.

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.

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.

exercise a function includes perform a duty.

Final Funding Agreement has the same meaning as it has in the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005*.

function includes a power, authority or duty.

general law means the common law and equity.

Heads of Agreement means the Heads of Agreement entered into on 21 December 2004 by the following persons and bodies:

- (a) James Hardie Industries NV,
- (b) the State,
- (c) the Australian Council of Trade Unions,
- (d) Unions New South Wales,
- (e) Mr Bernie Banton as the designated representative of the Asbestos Victims Groups named in Schedule 1 to the Heads of Agreement.

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

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.

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".

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.

legislation includes:

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

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.

the 2001 Deed of Covenant and Indemnity means the Deed of Covenant and Indemnity executed in February 2001 by:

- (a) James Hardie Industries Limited (which was subsequently renamed as ABN 60), and
- (b) Jsekarb Pty Limited (which was subsequently renamed as Amaba), and
- (c) James Hardie & Coy Pty Limited (which was subsequently renamed as Amaca).

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.

the State means the State of New South Wales.

- (2) In this Act, the following terms have the meanings given in section 9 of the Corporations Act:

ACN

ARBN

company

director

foreign company

officer

- (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 Construction of legislation so as not to exceed legislative power

- (1) Unless a contrary intention appears, if a provision of this Act or an instrument made under this Act:
 - (a) would, apart from this section, have an invalid application, but
 - (b) also has at least one valid application,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.
- (2) Despite subsection (1), the provision is not to have a particular valid application if:
 - (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

- (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.
- (3) Subsection (2) does not limit the cases in which a contrary intention may be taken to appear for the purposes of subsection (1).
- (4) This section is in addition to, and not in derogation of, section 31 of the *Interpretation Act 1987*.
- (5) In this section:
 - application** means an application in relation to:
 - (a) one or more particular persons, things, matters, places, circumstances or cases, or
 - (b) one or more classes (however defined or determined) of persons, things, matters, places, circumstances or cases.

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.

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.

Part 2 Extinguishment of certain liability

Division 1 General

5 Application of Part

- (1) This Part applies to liability (including a liability imposed by or under legislation) to pay compensation for loss or damage resulting from conduct that is capable of being the subject of a pecuniary penalty of a civil nature imposed by or under legislation.
- (2) This Part applies to such a liability whether or not the conduct concerned is actually the subject of such a pecuniary penalty.
- (3) The provisions of this Part apply despite the provisions of any other legislation or any other law (whether written or unwritten).

6 Meaning of “protected conduct”

For the purposes of this Part, *protected conduct* is 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.

Note. The matters referred to in paragraphs (a)–(g) are described in the Jackson Inquiry Report.

Division 2 Extinguishment of liability

7 Liability in relation to protected conduct extinguished

- (1) Any 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:
 - (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) any controlled entity of James Hardie Industries NV, or
 - (iv) James Hardie Industries NV.
- (2) In this section, ***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*.

8 When liability extinguished

Liability that is extinguished by section 7 is extinguished:

- (a) if the liability accrues during or before the assent day (but subject to paragraph (c))—on the assent day, or

- (b) if the liability accrues after the assent day (but subject to paragraph (c))—on the day on which the liability accrues, or
- (c) if the liability was revived under Division 3 and then extinguished again under this Division as referred to in section 11 (1) (b)—on the day on which the order that revived the liability is revoked by a revoking order under section 9.

Division 3 Revival of liability

9 Revival of extinguished liability

- (1) A 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.
- (2) The Minister may, at any time, by order published in the Gazette (a **reviving order**) declare that specified liability, or a specified class of 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.
- (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.

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 of the *James Hardie (Civil Liability) Act 2005*.
- (4) Any person whose 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.
- (5) A reviving order operates to revive the liability concerned on the day specified by the order.
- (6) The Minister may, by order published in the Gazette (a **revoking order**), revoke a reviving order on a day specified in the order.
- (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.
- (8) A revoking order may be published before, during or after the day fixed by the reviving order for the revival of the liability concerned.

- (9) The revocation of a reviving order does not prevent publication of a further reviving order.
- (10) More than one reviving or revoking order may be made under this section.

10 Effect of revival of extinguished liability

If extinguished liability is revived under this Division:

- (a) the 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.

11 Effect of revocation of reviving order

- (1) If a reviving order under section 9 is revoked by a revoking order under that section, the revoking order has the following effect:
 - (a) if it is published before or during the day fixed by the reviving order for the revival of a specified liability—the reviving order is taken never to have been published and, accordingly, the specified liability is not revived,
 - (b) if it is published after the day fixed by the reviving order for the revival of a specified 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 liability.
- (2) Subsection (1) (b) does not operate to apply Division 2 to 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.

Division 4 Displacement of Corporations legislation

12 Displacement of Corporations legislation

Divisions 1–3 are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to the Corporations legislation generally.

Note. 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.

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Part 2 Extinguishment of certain liability

However, section 5G (3) of that 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.

Part 3 Miscellaneous

13 Relationship with James Hardie (Civil Liability) Act 2005

The provisions of this Act are in addition to, and do not derogate from, the provisions of the *James Hardie (Civil Liability) Act 2005*.

14 Regulations

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.