

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

[2005-105]



New South Wales

## Status Information

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
[Miscellaneous Acts \(Local Court\) Amendment Act 2007 No 94](#) (not commenced)

### Authorisation

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New South Wales

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



New South Wales

An Act to facilitate funding by James Hardie Industries NV of compensation claims against certain former subsidiaries of the James Hardie corporate group for asbestos-related harm and to provide for the winding up of those former subsidiaries; and for other purposes.

## Part 1 Preliminary

### 1 Name of Act

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

### 2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by this section.
- (2) Part 2 is taken to have commenced on the day on which the Bill for this Act was first introduced into Parliament.
- (3) Clause 3 of Schedule 1 commences on the date of assent to this Act.

#### Note—

Clause 3 of Schedule 1 provides that any trust fund established as referred to in section 8 during or after the introduction day but before the assent day is taken to have been validly established for the purposes of the law of the State.

- (4) The provisions of Part 3 of Schedule 1 commence on the date of assent to the *James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Trust Funds) Act 2006*.

### 3 Principal objects of Act

- (1) The principal objects of this Act are as follows:
  - (a) to set up a State scheme for the winding up and other external administration over an extended period of certain companies that were formerly within the James Hardie corporate group,

- (b) to ensure that not only present, but also future, liabilities of those companies in respect of personal injury or death of persons arising from exposure to any asbestos or asbestos products that were mined, manufactured, sold, distributed or used by those companies are dealt with:
- (i) in accordance with the Final Funding Agreement, and
  - (ii) so that preference is given to those claims over other claims which are deferred to the future, and
  - (iii) in a manner that recognises that exposure to such asbestos or asbestos products, or personal injury or death arising from such exposure, may occur for an extended period into the future.
- (2) To achieve the objects set out in subsection (1), this Act displaces certain provisions of the Corporations Act and includes provisions for the establishment of a trust fund and the administration of the companies concerned during the winding up periods for the companies that are apposite to the unique circumstances of the winding up and administration of the companies.

#### 4 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.

**assets** means any legal or equitable estate or interest (whether present or future, whether vested or contingent and whether personal or assignable) in real or personal property of any description (including money), and includes securities, choses in

action and documents.

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

**claims processing expenses** of a liable entity means any of the following incurred by the entity (whether before or during the winding up period for the entity as provided by Part 4) 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),

but does not include any interest or legal costs payable by the entity to a claimant under a final judgment or binding settlement in respect of a proven personal asbestos claim or proven personal asbestos contribution claim.

**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.

**compensation funds** means the following:

- (a) the SPF,
- (b) the discretionary fund.

**concurrent wrongdoer**, in relation to a personal asbestos claim or other 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.

**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.

**discretionary fund** means any discretionary trust fund:



(a) established in accordance with the SPF trust deed and the Final Funding Agreement with respect to any income derived from assets that form part of the SPF, and

(b) in respect of which the SPF trustee is also the trustee.

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

**Final Funding Agreement** means the deed entitled “A deed in respect of a Final Funding Agreement in respect of the provision of long term funding for compensation arrangements for certain victims of Asbestos-related diseases in Australia” that was entered into by the State, James Hardie Industries NV and LGTDD Pty Limited (ACN 116 110 948) on 1 December 2005, as in force from time to time.

**finalisation day**, in relation to a liable entity, means the finalisation day in relation to the entity within the meaning of section 43.

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

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

**insurance proceeds right** means any right of a person to the proceeds (or part of the proceeds) of a contract of insurance or re-insurance of a liable entity that is conferred by or under section 30.

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

**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.

**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:

- (a) means any expenses, charges or other costs (including taxes and duties), other than claims processing expenses, incurred by the entity in carrying on its business (whether before or during the winding up period for the entity as provided by Part 4), and
- (b) includes any expenses, charges or other costs, other than claims processing expenses, incurred by the entity (including costs awarded against the entity) in connection with the making of an application to the Supreme Court under a provision of this Act.

**payable claimant** of a liable entity means any person to whom the entity has incurred a payable liability.

**payable liability** of a liable entity means a liability of the entity to pay any of following:

- (a) a proven personal asbestos claim made against the entity in an Australian court or other Australian tribunal, but only to the extent that the exposure to asbestos or asbestos products to which the claim relates occurred wholly within the territorial limits of Australia,
- (b) a proven personal asbestos contribution claim made against the entity in an Australian court or other Australian tribunal, but only to the extent that the exposure to asbestos or asbestos products to which the claim relates occurred wholly within the territorial limits of Australia,
- (c) a pre-commencement claim against the entity,
- (d) an operating expense of the entity,
- (e) a claims processing expense of the entity,
- (f) a claim for the payment of an insurance proceeds right that is declared to be a

payable liability by regulations made for the purposes of section 30,

- (g) an amount in respect of which the SPF trustee has a right to be indemnified by the entity under section 36 (2) (b),
- (h) a statutory recovery claim against the entity.

**Note—**

Section 32 (2) of this Act provides that certain proven personal asbestos claims made against a liable entity may not be paid during its winding up period if the claimant has already received compensation for the personal injury or death to which the claim relates from a specified person.

**personal asbestos claim** against a liable entity or concurrent wrongdoer 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 any asbestos or asbestos products that were mined, manufactured, sold, distributed or used by or on behalf of the liable entity or concurrent wrongdoer (as the case may be):

- (a) the person who sustains the personal injury,
- (b) the legal personal 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 liable entity or concurrent wrongdoer pursuant to the joinder of the liable entity or concurrent wrongdoer as a party to proceedings.

**Note—**

Part 4 of the [James Hardie \(Civil Liability\) Act 2005](#) provides that Amaca is liable for certain personal asbestos claims against Marlew Mining Pty Limited in connection with its asbestos mining operations in Baryulgil. That Part also provides that the claims for which Amaca is liable are to be treated as personal asbestos claims against Amaca for the purposes of this Act.

**personal asbestos claimant** means a person who has, or may at any time in the future have, a personal asbestos claim.

**personal asbestos contribution claim** against a liable entity means any claim against the entity by a concurrent wrongdoer for contribution (whether arising before, during or after the assent day) in respect of a personal asbestos claim that has been made against the wrongdoer.

**power** includes an authority.

**pre-commencement claim** against a liable entity means any claim that was made or brought in legal proceedings commenced before 1 December 2005.

**proven personal asbestos claim** against a liable entity means a personal asbestos claim against the entity in respect of which:

- (a) a final judgment has been entered by a court or other tribunal against the entity,  
or
- (b) a binding settlement has been entered into by the entity,

but only to the extent that the judgment or settlement gives rise to a liability of the entity (including any liability to pay damages, interest or legal costs to the claimant).

**Note—**

Part 4 of the *James Hardie (Civil Liability) Act 2005* provides that Amaca is liable for certain personal asbestos claims against Marlew Mining Pty Limited in connection with its asbestos mining operations in Baryulgil. That Part also provides that claims for which Amaca is liable and in respect of which final judgment has been entered or a binding settlement entered are to be treated as proven personal asbestos claims against Amaca for the purposes of this Act.

Section 32 (2) of this Act provides that certain proven personal asbestos claims made against a liable entity may not be paid during its winding up period if the claimant has already received compensation for the personal injury or death to which the claim relates from a specified person.

**proven personal asbestos contribution claim** against a liable entity means a personal asbestos contribution claim against the entity by a concurrent wrongdoer in respect of which:

- (a) a final judgment has been entered by a court or other tribunal against the entity,  
or
- (b) a binding settlement has been entered into by the entity,

but only to the extent that the judgment or settlement gives rise to a liability of the entity (including any liability to pay damages, interest or legal costs to the claimant).

**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.

**SPF** means the trust fund established as referred to in section 8 or, if that trust fund is terminated, such other trust fund as may be prescribed by the regulations.

**SPF trust deed** means the deed that established the SPF, as in force from time to time.

**SPF trustee** means the person who is the trustee of the SPF from time to time.

**statutory recovery claim** against a liable entity means any of the following claims:

- (a) a claim against the entity under section 8E of the *Workers' Compensation (Dust Diseases) Act 1942* for reimbursement of compensation paid or payable by the

Workers' Compensation (Dust Diseases) Board,

- (b) any other claim against the entity for the payment of compensation, or the reimbursement of compensation paid, under a statute enacted in Australia in circumstances of a kind prescribed by the regulations.

**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.

**winding up period** for a liable entity—see section 20.

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

**ACN**

**ARBN**

**ASIC**

**books**

**company**

**constitution**

**contributory**

**director**

**foreign company**

**insolvent**

**member**

**negotiable instrument**

**officer**

**public document**

**registered company auditor**

**registered office**

- (3) In this Act, a reference to winding up of a liable entity includes a reference to any scheme of arrangement, receivership or other form of external administration of the liable entity (including, without limitation, the administration of a liable entity by the SPF trustee and the Minister under this Act).
- (4) 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.
- (4A) Unless the context or subject-matter indicates or requires otherwise, a reference in this Act to the payment or discharge (whether in whole or in part) by the SPF trustee of a payable liability of a liable entity on the entity's behalf or for its benefit is a reference to the payment or discharge of such a liability by the SPF trustee in its capacity as the trustee of the SPF or the discretionary fund or in both capacities (as the case may be).
- (5) Notes included in this Act do not form part of this Act.

## **5 Extraterritorial operation of Act**

- (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:
  - (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.
- (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 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.

## 7 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 Establishment of SPF

### 8 SPF may be treated as charitable trust

- (1) For the avoidance of doubt, it is declared that a trust fund (the **SPF**) established by James Hardie Industries NV as contemplated by the Final Funding Agreement is a valid charitable trust for the purposes of the law of the State if:
- (a) the principal purposes for which the trust fund is established include the following purposes:
- (i) the purpose of receiving and providing funding for the payment, and paying, of payable liabilities of any liable entity,
  - (ii) the purpose of providing services with respect to the management and resolution of claims made against any liable entity, and
- (b) the instrument that establishes the trust fund makes provision for the trustee of the trust fund to be a company registered under the Corporations Act that is taken under section 119A of that Act to be registered in New South Wales.
- (2) Without limiting subsection (1), any of the purposes referred to in subsection (1) (a) is to be treated as being a charitable purpose for the purposes of the [Charitable Trusts Act 1993](#) and the general law relating to charitable trusts.
- (3) If the discretionary fund is for the time being authorised or required under the Final Funding Agreement or the SPF trust deed to receive and provide funding for the payment of, and to pay, any of the payable liabilities of any liable entity instead of or in addition to the SPF, any trust fund that was originally established for the purposes referred to in subsection (1) (a):
- (a) continues to be a valid charitable trust, and
  - (b) is taken to be administered by the SPF trustee for the purposes for which the trust fund was originally established,
- even though the fund is not the only trust fund being used during that time for the purpose referred to in subsection (1) (a) (i).

### 9 Application of law of charitable trusts to SPF

- (1) The [Charitable Trusts Act 1993](#) and the general law relating to charitable trusts apply to the SPF, subject to the following modifications:
- (a) the Supreme Court may not, despite section 6 of the [Charitable Trusts Act 1993](#) or any other law, grant leave to any person (other than the SPF trustee or James



Hardie Industries NV) to bring charitable trust proceedings or any other proceedings relating to the administration of the SPF,

- (b) charitable trust proceedings or any other proceedings relating to the administration of the SPF may only be brought by:
    - (i) the Attorney General (whether with or without a relator), or
    - (ii) the SPF trustee or James Hardie Industries NV, but only with the leave of the Supreme Court under section 6 of the *Charitable Trusts Act 1993*,
  - (c) for the purposes of determining whether the trust property of the SPF should be applied *cy pres*, it is to be presumed for all purposes that the only general charitable intention with which the trust property was given was for making or assisting the payment of compensation to personal asbestos claimants having claims against a liable entity,
  - (d) a scheme for the administration of the SPF under Part 4 of the *Charitable Trusts Act 1993* may be established subject to the following provisions:
    - (i) the scheme may only be established with the consent of the SPF trustee and James Hardie Industries NV,
    - (ii) section 14 of that Act does not operate to limit the circumstances in which such a scheme may be established,
    - (iii) section 18 of that Act does not enable a person other than the SPF trustee or James Hardie Industries NV to bring an appeal under that section.
- (2) Accordingly, no court or other tribunal has any jurisdiction or power to entertain charitable trust proceedings or any other proceedings relating to the administration of the SPF, or to grant relief in any such proceedings, unless the proceedings have been brought as provided by subsection (1) (b) by the Attorney General (whether with or without a relator), the SPF trustee or James Hardie Industries NV.
- (3) In this section, **charitable trust proceedings** has the same meaning as it has in Part 2 of the *Charitable Trusts Act 1993*.

## **10 Part does not alter law of charitable trusts generally**

Nothing in this Part authorises or permits any person other than James Hardie Industries NV to establish a charitable trust for a purpose that is not a charitable purpose at general law.

## **Part 3 Limitations on corporate restructuring**

### **Division 1 Interpretation**

#### **11 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**

#### **12 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 67 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) 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, and
  - (c) the provisions of paragraphs (a) and (b) have effect despite any other provisions of the constitution of the company.

### **13 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 67 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) 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, and
  - (c) the provisions of paragraphs (a) and (b) have effect despite any other provisions of the constitution of the company.

### **14 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 67 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**

### **15 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 67 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 16 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) It is taken to be a provision of the constitution of each liable entity that:
  - (a) shares in the entity cannot be transferred without the written approval of the Minister, and
  - (b) the provisions of paragraph (a) have effect despite any other provisions of the constitution of the entity.

### **16 Orders requiring transfer of shares in liable entities**

- (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 and any other relevant law (whether written or unwritten) to transfer any or all of the shares that it holds in a liable entity to the person or persons specified in the order during the day or 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 67 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.

- (3) If a relevant company 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 to the specified person or persons.
- (4) Nothing in subsection (3) prevents the Minister from requiring any shares in a liable entity to be transferred to the SPF trustee to be held in trust for the purposes of the SPF.
- (5) 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).
- (6) It is taken to be a provision of the constitution of each relevant company that, if the relevant company and its directors and other officers fail to comply with an order served on it under subsection (1) by the end of the day or period specified in the order:
  - (a) the shares in the liable entity are, by the operation of this subsection, taken to be transferred to the person or persons specified in the order at the end of that day or period, and
  - (b) the order is taken, for all purposes, to constitute a proper instrument of transfer for those shares, and
  - (c) the provisions of paragraphs (a) and (b) have effect despite any other provisions of the constitution of the company.

## **Division 4 Directors of relevant companies**

### **17 Minister may order directors of relevant companies to vacate office**

- (1) The Minister may, by order served on a relevant company, direct that:
  - (a) a specified director of the company ceases to hold office as a director on the day specified in the order, and
  - (b) a specified person is appointed instead of the specified director on that day or a subsequent day specified in the order.
- (2) The Minister may not make an order under subsection (1) in respect of a liable entity if the SPF trustee holds all of the shares in the liable entity for the purposes of the SPF.

- (3) A director of a relevant company in respect of whom an order is made under subsection (1) must not continue to act as a director of the company during or after the day specified in the order for the director to cease to hold office.

Maximum penalty: 1,000 penalty units.

- (4) It is taken to be a provision of the constitution of each relevant company that:
- (a) a director in respect of whom an order is made under subsection (1) 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 Minister in an order made under subsection (1), and
  - (c) this power of appointment has effect despite any other provision of the constitution of the relevant company.
- (5) A person who, by operation of this section, ceases to hold office as a director of a relevant company is not entitled to any remuneration or compensation because of the loss of that office.

## **Division 5 Expiry of Part**

### **18 When Part expires**

The provisions of this Part cease to have effect:

- (a) in relation to a relevant company that is a liable entity—at the end of the day on which the winding up period for that entity ends, and
- (b) in relation to a relevant company that is not a liable entity—at the end of 1 October 2007.

## **Division 6 Displacement of Corporations legislation**

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

The provisions of Divisions 2–5 (and section 67 in its application to contraventions of those provisions 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—**

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.

Chapters 2H and 2J of the Corporations Act make provision with respect to the issue of shares and transactions

affecting share capital.

Part 7.11 of the Corporations Act makes provision with respect to title and transfer of shares in a company. It includes provisions relating to the proper instrument of transfer (section 1071B).

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:

(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 (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.

## Part 4 Winding up of liable entities

### Division 1 General

#### 20 Winding up period

(1) For the purposes of this Act, the **winding up period** for a liable entity means the period:

(a) commencing on the day on which this section commences, and

(b) ending at the end of the day:

(i) appointed by the Governor under subsection (2) for the termination of the winding up under this Part, or

- (ii) on which the liable entity is deregistered under the Corporations Act, whichever first occurs.

**Note—**

Section 28 prevents the making of applications for the deregistration of a liable entity under the Corporations Act unless the Minister has consented to the application or the Supreme Court has made an order under section 52 for the deregistration application to be made.

- (2) At any time before the finalisation day in relation to a liable entity, the Governor may, by proclamation published in the Gazette, fix a day under subsection (1) (b) (i) for the termination of the winding up of the liable entity under this Part.
- (3) Different days may be fixed for the termination of the winding up of different liable entities.
- (4) 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.
- (5) A revoking proclamation has effect only if published before the day fixed under subsection (2) by the proclamation it revokes.
- (6) The revocation of a proclamation published under subsection (2) does not prevent publication of a further proclamation under that subsection.

## **21 Winding up under this Part**

- (1) During the winding up period for a liable entity:
  - (a) any winding up of the 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 winding up of the 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, **winding up** means any scheme of arrangement, receivership, winding up or other kind of external administration.

## **Division 2 Management of liable entities**

### **22 Management during winding up period**

Subject to the provisions of Part 3 and this Part, each liable entity is to be managed during the winding up period for the entity in accordance with any applicable provisions of the



Corporations Act or any other legislation, the constitution of the entity and the general law.

**Note—**

The provisions of the Corporations Act continue to apply to the liable entities as a federal law, except to the extent that the operation of the Corporations Act is displaced by the operation of this Part.

Section 21 provides that a liable entity may only be wound up as provided by this Part. Section 60 displaces the operation of Chapter 5 (External administration) and other provisions of the Corporations Act in favour of the provisions of this Part.

### **23 Conduct of business during winding up period**

- (1) Subject to this Part, the powers of each liable entity must be exercised during the winding up period for the entity so as to:
  - (a) carry on the business of the entity so far as is necessary or convenient for the management of claims made against the entity to ensure that only payable liabilities of the entity are paid in accordance with the provisions of this Part, and
  - (b) pay payable liabilities in accordance with the provisions of this Part, and
  - (c) apply any funds provided from the SPF only in accordance with the conditions on which the funding is provided.

**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 personal asbestos claimants or payable claimants or persons claiming to be such claimants or having or alleging that they have any personal asbestos claim or a claim for a payable liability (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 (including, without limitation, a concurrent wrongdoer) or other debtor or person apprehending liability to the entity, and
  - (c) act as a single claims manager in relation to the management of claims referred to in paragraph (a) or (b), and
  - (d) 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 winding up 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

(e) do all such other things:

(i) as are necessary for the purposes of exercising a power under subsection (1) or paragraph (a), (b), (c) or (d) or of the winding up 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 54 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 54 on any such application.

#### **24 Directions from SPF trustee**

(1) The SPF trustee may, by written order served on a liable entity, direct the entity to do, or not to do, any thing that the trustee is satisfied is necessary or appropriate for the winding up of the entity in accordance with the provisions of this Part or the carrying out of the terms of the Final Funding Agreement or any Related Agreement (or both).

(2) Without limiting subsection (1), the SPF trustee may direct a liable entity to enter into arrangements with another or other liable entities for the pooling of funds of the liable entities and for allocation of the pooled funds to payment of payable liabilities of any one or more of those entities.

(3) However, nothing in this section authorises the SPF trustee to direct a liable entity to pay proven personal asbestos claims (whether or not from funds provided from any of the compensation funds) in a manner that discriminates between claimants by reference to the nature or extent of the loss or damage sustained.

(4) 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.

#### **25 SPF trustee to provide management services**

(1) Without limiting section 24, the SPF trustee may, by written order served on a liable

entity, direct the entity:

- (a) to utilise such services provided by the SPF trustee in respect of the management of claims made against the entity (including acting as a single claims manager in relation to the management of such claims) as may be specified in the order, or
  - (b) to utilise such services provided by any other person specified in the order in respect of the management of claims made against the entity as may be specified in the order.
- (2) Without limiting subsection (1), the SPF trustee may provide such other services to a liable entity in connection with the winding up of the entity under this Part as may be agreed by the SPF trustee and the liable entity from time to time.
- (3) A liable entity is required and authorised to comply with any direction given to it in an order made under subsection (1) that is served on it.
- (4) The following are specifically authorised by this Act for the purposes of the *Trade Practices Act 1974* of the Commonwealth and the *Competition Code of New South Wales*:
- (a) a direction of the SPF trustee given under subsection (1),
  - (b) any conduct required by or under such a direction,
  - (c) the entering or making of a contract, agreement, arrangement or understanding as the result of such a direction,
  - (d) any conduct authorised or required by or under the terms or conditions of any such contract, agreement, arrangement or understanding.
- (5) Things authorised to be done by subsection (4) are authorised only to the extent (if any) that they would otherwise contravene Part IV of the *Trade Practices Act 1974* of the Commonwealth or the *Competition Code of New South Wales*.

## **26 Notification that liable entity under NSW administered winding up**

Each liable entity is authorised and required during the winding up period for the entity 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 administered winding up”.

## **27 Liable entity may continue to trade while insolvent**

A liable entity and its directors and other officers are specifically authorised during the winding up period for the entity 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.

## **28 Deregistration of liable entities**

A liable entity, any director, officer or member of such an entity or any other person may not make an application during the winding up period for the entity for the deregistration of the entity under the Corporations Act unless:

- (a) the Minister consents to the application, or
- (b) the Supreme Court makes an order under section 52 for the application to be lodged.

### **Note—**

Section 52 enables the Supreme Court, on the application of the SPF trustee, to order a liable entity or its directors to lodge an application for the deregistration of the entity under the Corporations Act.

## **Division 3 Accounts**

### **29 Funds to be paid into special accounts**

- (1) As soon as is reasonably practicable after the commencement of the winding up period for a liable entity, the entity must establish the following accounts (which are to be located within the territorial limits of the State) in one or more authorised deposit-taking institutions:
  - (a) an account to be known as the “asset realisation account”,
  - (b) an account to be known as the “insurance proceeds account”,
  - (c) an account to be known as the “SPF account”,
  - (d) an account to be known as the “general account”.
- (2) The following is to be paid into the asset realisation account:
  - (a) all money received from the sale or other realisation of any asset (other than a policy of insurance) of the entity that existed immediately before the day on which the winding up period for the liable entity commenced,
  - (b) all interest received in respect of investment of money in the account,
  - (c) all money directed to be paid into the account by or under this or any other Act.
- (3) The following is to be paid into the insurance proceeds account:
  - (a) all money received from an insurer of the entity in respect of insurance policies entered into before the day on which the winding up period for the liable entity commenced (whether by reason of recovery of amounts payable under insurance policies or the commutation of the proceeds of such policies) less any expenses of

or incidental to getting in that money,

(b) all interest received in respect of investment of money in the account,

(c) all money directed to be paid into the account by or under this or any other Act.

(4) The following is to be paid into the SPF account:

(a) all money received or contributed by the SPF trustee from the SPF,

(b) all interest received in respect of investment of money in the account,

(c) all money directed to be paid into the account by or under this or any other Act.

(5) The following is to be paid into the general account:

(a) all money received by or on account of the entity (other than money that is required by this section to be paid into the asset realisation account, insurance proceeds account or SPF account),

(b) all interest received in respect of investment of money in the account,

(c) all money directed to be paid into the account by or under this or any other Act.

(6) The SPF trustee may, by order served on a liable entity, direct that money received by the entity from another liable entity under a pooling arrangement referred to in section 24 (2) be paid into an account established under this section.

(7) A liable entity is authorised and required to comply with any direction given to it in an order made under subsection (6) that is served on it.

(8) Money held in an account required to be established by a liable entity under this section may be applied only for the payment of the payable liabilities of the entity of a kind, and in a manner, that is required, authorised or permitted by or under this Act.

## Division 4 Insurance

### 30 Entitlements to proceeds of contracts of insurance

(1) The regulations may make provision for or with respect to entitlements (during the winding up period of any liable entity) under or in relation to any contract of insurance or re-insurance of the entity entered into before that period (a **relevant insurance contract**) or to the proceeds of any such contract, including without limitation:

(a) the application of the proceeds of a relevant insurance contract (including, for example, the establishment of a regime for the application of the proceeds between claimants on a proportionate or other basis), and

(b) the conferral or extinguishment of rights (or the imposition or extinguishment of liabilities) in respect of a relevant insurance contract or the proceeds of such a

contract, including (without limitation) rights or liabilities of any of the following:

- (i) the payable claimants of the entity,
- (ii) any other persons to whom a liable entity has incurred, or will incur, liabilities,
- (iii) the liable entity itself,
- (iv) the insurer.

(2) Without limiting subsection (1), the regulations may:

- (a) declare that a right to the payment of the proceeds (or part of the proceeds) of a relevant insurance contract conferred on a person is a payable liability for the purposes of this Act, and
- (b) provide that any specified provision of the Corporations Act or any other legislation applies for the purposes of this section with such modifications (if any) as may be prescribed by the regulations.

(3) For the avoidance of doubt, it is declared that any regulation made for the purposes of this section may, if the regulation so provides:

- (a) take effect on a day that is earlier than the day on which the regulation is published in the Gazette, or
- (b) apply to transactions, acts, things or other matters arising or occurring before its commencement.

(4) The Minister is not to recommend the making of a regulation for the purposes of this section unless the Minister has received the written concurrence of the SPF trustee to the making of the regulation.

(5) If regulations made for the purposes of this section apply with respect to entitlements under or in relation to any relevant insurance contract of a liable entity or to the proceeds of such a contract (as the case may be):

- (a) the entity is authorised and required to apply the proceeds of a relevant insurance contract only in the manner provided by the regulations, and
- (b) the rights and liabilities of persons under the contract, or in relation to the proceeds of the contract, are subject to the provisions of the regulations.

(6) In the event of an inconsistency between the provisions of this section (including the regulations made under this section) and the provisions of an approved payment scheme under section 35, the provisions of this section prevail.

(7) The provisions of this section (including the regulations made under this section) have effect despite:

- (a) the provisions of any contract, arrangement or other agreement to the contrary, or
- (b) any other law (whether written or unwritten), including, without limitation, the provisions of section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* and section 601AG of the Corporations Act.

(8) In this section:

**modification** includes addition, exception, omission or substitution.

**proceeds** of a relevant insurance contract means any amount that has been or is received (or that is receivable or may in the future be received) by a liable entity from an insurer in respect of a liability to a third party incurred by the liable entity (whether before or during the entity's winding up period) for which the liable entity is or was insured under the relevant insurance contract.

## **Division 5 Making and payment of claims**

### **31 Claims that may be made during the winding up period**

- (1) During the winding up period for a liable entity, claims against the entity may be paid only in the manner permitted by this Part.
- (2) During the winding up period for a liable entity, a person cannot begin or continue with civil proceedings against the entity in a court or other tribunal unless the proceedings seek to enforce:
  - (a) any of the following kinds of claims of the person:
    - (i) a personal asbestos claim (whether or not a proven personal asbestos claim),
    - (ii) a personal asbestos contribution claim (whether or not a proven personal asbestos contribution claim), or
  - (b) a payable liability of the entity that was incurred to the person, or
  - (c) a right of the person against the liable entity (other than a right to be paid damages or receive other payment).

### **32 Kinds of claims that are payable**

- (1) During the winding up period for a liable entity, only payable liabilities of the entity (other than a liability to pay a claim that is excluded by subsections (2) and (3)) may be paid (whether by the entity itself or by the SPF trustee on the entity's behalf or for its benefit).
- (2) Despite any other provision of this Part or any other legislation or other law, a proven personal asbestos claim against a liable entity may not be paid (whether by the entity

itself or by the SPF trustee on the entity's behalf or for its benefit) during the winding up period for the entity if:

- (a) the claimant has already been paid compensation (whether on the basis of a cause of action arising at general law, under the Corporations Act or any other legislation) in respect of the same personal injury or death that is the subject of the claim, and
- (b) the compensation was paid by any of the following:
  - (i) another liable entity,
  - (ii) James Hardie Industries NV or any of its controlled entities,
  - (iii) any person whose liability to pay the compensation arose from the person acting in the capacity of a director or other officer, employee, advisor or agent of a liable entity, James Hardie Industries NV or any of its controlled entities,
  - (iv) any other person who has recovered the amount paid in compensation from an entity or person referred to in subparagraph (i), (ii) or (iii) pursuant to a legal entitlement to do so (whether at general law, under legislation or otherwise), and
- (c) the compensation paid to the claimant was paid pursuant to a final judgment entered by a court or other tribunal, or a binding settlement entered by a person or entity referred to in paragraph (b), in circumstances where the compensation was intended to compensate the claimant fully and finally for the personal injury or death concerned.

(3) Despite any other provision of this Part or any other legislation or other law, statutory recovery claims against a liable entity may only be paid (whether by the entity itself or by the SPF trustee on the entity's behalf or for its benefit) during the winding up period for the entity:

- (a) if the funding set aside under the Final Funding Agreement for the payment of such claims by the SPF trustee during a financial year (within the meaning of the Agreement) is or will be sufficient to cover all claims (whether actual or anticipated) within the year concerned, or
- (b) if such funding will not be sufficient for the financial year concerned, in accordance with the regulations.

(4) For the purposes of (but without limiting) subsection (3) (b), the regulations may make provision for or with respect to the following:

- (a) the deferral of payments of statutory recovery claims (whether in whole or in part),



- (b) the part payment of statutory recovery claims (whether in whole or in part),
- (c) any other matter concerning the rationing of payments of statutory recovery claims.

(5) The Minister is not to recommend the making of a regulation for the purposes of subsection (3) (b) or (4) unless the Minister has received the written concurrence of the SPF trustee to the making of the regulation.

(6) In this section:

**controlled entity** of James Hardie Industries NV means a person or other entity (other than a liable entity or the SPF trustee) that James Hardie Industries NV is required to include in its consolidated financial reports for a financial year by the US GAAP or such other generally accepted accounting principles as may be prescribed by the regulations.

**Note—**

It is intended that the prescription by the regulations of other generally accepted accounting principles for the purposes of this definition will be consistent with the terms of the Final Funding Agreement.

**US GAAP** means the Generally Accepted Accounting Principles in force from time to time in the United States of America, as developed by the Financial Accounting Standards Board for the United States.

### **33 Determination of whether sufficient funds**

- (1) In determining whether or not there are or will be sufficient funds for the payment of payable liabilities of a liable entity, regard is to be had to the amount of funding that is or will be available for the payment of such liabilities from any of the compensation funds as well as from the funds of the entity itself.
- (2) Without limiting subsection (1), regard is to be had to the amount of funding that is or will be available from the pooling of funds under an arrangement referred to in section 24 (2).
- (3) For the purposes of subsection (1), the amount of funding that is or will be available for payments to be made directly from any of the compensation funds by the SPF trustee that will operate to discharge the liability of a liable entity to a claimant is to be taken into account.

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

If there are sufficient funds to do so, a liable entity (or the SPF trustee on its behalf or for its benefit) is authorised to pay the payable liabilities of the entity as and when they fall due for payment, except as otherwise provided by this Part.

### 35 SPF trustee may apply to Supreme Court if insufficient funds

- (1) **Applications to Supreme Court for approved payment scheme orders** The SPF trustee may, with the approval of the Minister, apply to the Supreme Court for orders under subsection (5) if it appears reasonably likely that, for a period of time, there will be insufficient funds for all payable liabilities of a liable entity to be paid in full as and when they fall due for payment.
- (2) **Rationing directions from SPF trustee pending application approval** The SPF trustee may, by written order served on a liable entity (a **rationing direction**), direct the entity to defer the payment of payable liabilities (whether in whole or in part) in a manner consistent with the rationing requirements for a scheme set out in subsection (7) if:
  - (a) the SPF trustee has sought but not received approval from the Minister to make an application to the Supreme Court under subsection (1) in respect of the entity, and
  - (b) the SPF trustee is satisfied that the insufficiency of funds to pay the payable liabilities of the entity requires the urgent rationing of payments pending the receipt of approval from the Minister.
- (3) A liable entity is required and authorised to comply with any rationing direction given to it until the direction ceases to have effect.
- (4) Unless the Supreme Court orders otherwise (whether in an application under this section or under a provision of Division 9) or the rationing direction is earlier revoked by the SPF trustee, a rationing direction has effect until the Supreme Court determines the application in respect of which approval is sought from the Minister.

**Note—**

Division 9 contains provisions that enable certain persons (such as the Minister) to apply to the Supreme Court for orders to remedy or restrain a contravention of this Part (see section 54) or for advice or directions concerning the operation of this Part (see section 55).

- (5) **Supreme Court may make orders establishing approved payment scheme** On any application under subsection (1), the Supreme Court may, if satisfied that circumstances referred to in subsection (1) exist, make the following orders:
  - (a) an order declaring that there will be insufficient funds to pay the liable entity's payable liabilities in full as and when they fall due for payment for the period specified by the order (the **insufficient funds period**),
  - (b) an order approving a scheme for the payment by instalments of the full amount of payable liabilities due, or deferral of payment of payable liabilities of the entity, during the insufficient funds period (an **approved payment scheme**).
- (6) In specifying the insufficient funds period, the Supreme Court is to take into account the anticipated duration of the period before the liable entity will or is likely to have sufficient funds to pay payable liabilities in full as and when they fall due for payment

instead of paying them by instalments or deferring payment.

- (7) The Supreme Court may not approve a scheme for the payment in instalments or deferral of payment of payable liabilities of a liable entity during the 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 payable liabilities of the kind referred to in paragraph (b),
  - (b) subject to subsection (8)—the payment in instalments of payable liabilities that are liabilities to pay proven personal asbestos claims during the period (calculated on an appropriate proportionate basis among claimants whose claims are payable when the period commences or become payable during that period), but not in a manner that discriminates between claimants by reference to the nature or extent of the loss or damage sustained,
  - (c) the deferral during the period of the payment of payable liabilities that are liabilities to pay proven personal asbestos contribution claims,
  - (d) the deferral during the period of the payment of payable liabilities that are liabilities to pay pre-commencement claims (other than proven personal asbestos claims).
- (8) The Supreme Court may approve a scheme that takes into account:
- (a) any amounts that personal asbestos claimants may receive during the insufficient funds period under section 30 (including regulations made for the purposes of that section), and
  - (b) any payments, or deferral of payments, of payable liabilities made by a liable entity in accordance with any rationing direction in force immediately before the application to the Court was made.
- (9) **Liable entity and SPF trustee may make payments only in accordance with approved payment scheme** While an approved payment scheme is in force:
- (a) a liable entity is authorised to pay payable liabilities or to refuse to pay payable liabilities that are deferred, but only to the extent and in accordance with the terms of the scheme, and
  - (b) the SPF trustee may make payments under section 36 only to the extent and in accordance with the terms of the scheme.
- (10) **Applications to vary or revoke approved payment scheme orders** The SPF trustee may, with the approval of the Minister, apply to the Supreme Court for an order to revoke or vary any order made under subsection (5).

- (11) On any such application, the Supreme Court may revoke or vary the order concerned.
- (12) **Automatic revocation of approved payment scheme by notice** An order under subsection (5) is automatically revoked if the SPF trustee, with the approval of the Minister, gives the Supreme Court notice that sufficient funds are or will become available to pay in full the instalments provided for by the approved payment scheme, the ongoing operating expenses and claims processing expenses of the liable entity and any deferred claims.
- (13) **Effect of approved payment scheme and rationing directions** Despite the provisions of the *Limitation Act 1969* or any other legislation or law (whether written or unwritten), the following provisions apply if a payable liability is payable by instalments or is deferred under an approved payment scheme or a rationing direction:
- (a) The payable claimant may assert the liability (whether by making a claim to the liable entity or bringing proceedings to establish the amount payable in respect of the liability).
  - (b) If proceedings are brought or are pending before a court or other tribunal in respect of the liability:
    - (i) the court or tribunal may determine the amount payable in respect of the liability (if any), and
    - (ii) in the case of a liability payable by instalments—the instalments that are payable under the approved payment scheme may be recovered by the claimant during the insufficient funds period, and
    - (iii) in the case of a claim in respect of which payment is deferred—any amount awarded by the court or tribunal may not be recovered by the claimant until the liability ceases to be deferred under the approved payment scheme or rationing direction.
  - (c) If paragraph (b) operates to preclude the bringing, continuation or maintenance of proceedings in respect of the enforcement of the liability, any limitation period applicable to the enforcement of the liability 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.
- (14) An order under this section may not be made in relation to a liable entity after the finalisation day in relation to the entity.

### **36 Payments made by SPF trustee directly to claimants**

- (1) This section applies to any payment of funds from any of the compensation funds made by the SPF trustee directly to a payable claimant in order to discharge (whether

wholly or in part) a payable liability of a liable entity to the claimant that is made on the entity's behalf or for its benefit.

- (2) A payment to which this section applies operates:
- (a) to discharge the liability concerned to the same extent to which the liability would have been discharged if the payment had been made directly to the payable claimant by the liable entity, and
  - (b) except where the SPF trustee makes the payment from the discretionary fund—to confer on the SPF trustee a right against the liable entity to be indemnified for the amount of the payment (including any relevant interest), and
  - (c) except where the SPF trustee makes the payment from the discretionary fund—to confer on the SPF trustee the same rights to obtain contribution from third parties in respect of the subject-matter of the liability concerned as the liable entity would have had if it had made the payment directly.
- (3) The SPF trustee may require the liable entity to pay the amount the subject of the indemnity referred to in subsection (2) (b) on demand.
- (3A) Without limiting subsection (3), the SPF trustee may determine whether to make a requirement under that subsection after the end of the financial year (within the meaning of the Final Funding Agreement) in which the right to indemnity arose or at such other times as the SPF trustee may determine.
- (4) Any right of the SPF trustee conferred by subsection (2) (b) to be indemnified by the liable entity does not enable the SPF trustee to recover from the entity any amount that the SPF trustee has already recovered from a third party as a contribution under subsection (2) (c).
- (5) For the purposes of subsection (2) (b), **relevant interest** means an amount of interest calculated in accordance with the terms of the Final Funding Agreement for amounts in respect of which the SPF trustee is to be indemnified by a liable entity or calculated in accordance with such other method or methods as may be prescribed by the regulations.

**Note—**

It is intended that the prescription by the regulations of a method of calculating interest for the purposes of this definition will be consistent with the terms of the Final Funding Agreement.

## **Division 6 Reporting requirements, information and assistance**

### **37 Winding up accounts**

- (1) A liable entity must, within 1 month after the end of each financial year (within the meaning of the Final Funding Agreement), and within such other period as the SPF trustee may direct from time to time by order served on the entity, (the **reporting**

**period**) lodge with the SPF trustee:

- (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 reporting 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 reporting periods, and
  - (b) a statement in the form prescribed by the regulations relating to the position in the winding up, verified by a statement in writing.
- (2) Without limiting subsection (1), the SPF trustee may direct that a reporting period includes a period occurring before the commencement of the winding up period for a liable entity.
- (3) An account or statement is verified in writing for the purposes of subsection (1) if a director of the liable entity concerned makes a statutory declaration to the effect that the account or statement is true and fair.
- (4) The SPF trustee may:
- (a) cause the account and, where a statement of the position in the winding up 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 winding up 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 SPF trustee 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 SPF trustee causes to be undertaken under subsection (4) (a)—the SPF trustee 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 SPF trustee 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 SPF trustee causes to be undertaken under subsection (4) (a)—must be fixed by the SPF trustee, and
  - (b) form part of the operating expenses of the liable entity.
- (8) The SPF trustee must lodge with the Minister a copy of each statement or account lodged with the trustee, and any report prepared by an auditor in respect of an audit it causes to be undertaken, under this section.

### **38 Inspection of books**

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

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

- (1) During the winding up period for a liable entity, a director or other officer of the entity must:
- (a) attend on the SPF trustee (or a person specified by the SPF trustee), and
  - (b) give the SPF trustee (or a person specified by the SPF trustee) 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 SPF trustee may reasonably require.
- (2) During the winding up period for a liable entity, a director or other officer of the entity must do whatever the SPF trustee reasonably requires the director or other officer to do to help in:
- (a) the exercise of the SPF trustee's functions under this Part, and
  - (b) the winding up of the entity under this Part.

### **40 Minister may exercise SPF trustee's functions under the Division**

- (1) The Minister may, at the Minister's discretion, at any time exercise any function conferred on the SPF trustee under section 37, 38 or 39.
- (2) For the purposes of subsection (1), sections 37, 38 and 39 apply as if references to the SPF trustee included references to the Minister.
- (3) The Minister must, as soon as reasonably practicable after exercising any function conferred on the SPF trustee under section 37, 38 or 39, give the SPF trustee written notice of the exercise of the function.
- (4) In the event that a person cannot comply with both a requirement of the SPF trustee

made under section 37, 38 or 39 and a requirement of the Minister, the only requirement with which the person must comply is the requirement of the Minister.

#### **41 Reports to Minister**

- (1) The Minister may, by order in writing served on the SPF trustee, require the SPF trustee to report to the Minister from time to time, or on an ongoing basis, on any aspect of the exercise of the SPF trustee's functions under this Part.
- (2) In particular, and without limiting subsection (1), the Minister may require the SPF trustee to report to the Minister on any directions given by it to a liable entity under section 24.

### **Division 7 Removal of directors of liable entities**

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

- (1) The Minister or the SPF trustee may apply to the Supreme Court for orders to remove a director of a liable entity from office and to appoint 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 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.
- (5) The provisions of this section are in addition to, and not in derogation of, the provisions of section 17.



## Division 8 Completion of winding up

### 43 Interpretation

(1) In this Act:

**finalisation day**, in relation to a liable entity, means such day as the Minister may, by order published in the Gazette, direct under subsection (2).

**proof date**—see section 46 (1).

- (2) The Minister may make an order under this section in relation to a liable entity if the Minister is satisfied that the provisions of this Part are no longer of utility in achieving the objects of this Act and that the SPF trustee should proceed to the final stage of winding up of the liable entity in accordance with this Part.
- (3) More than one order may be made under subsection (2) in relation to different liable entities.
- (4) In the event of an inconsistency on or after the finalisation day between a provision of this Division and a provision of Division 1, 2, 3, 4 or 5, the provision of this Division prevails.

### 44 Duty of SPF trustee after finalisation day

As soon as practicable after the finalisation day in relation to a liable entity, the SPF trustee must cause the property of the liable entity to be collected and applied in discharging the outstanding liabilities of the liable entity on the finalisation day.

### 45 Powers of SPF trustee after finalisation day

- (1) The SPF trustee may, by written order served on a liable entity, direct the entity to do, or not to do, any thing that the SPF trustee is satisfied is necessary or appropriate for the purposes of collecting the property of the liable entity and discharging the outstanding liabilities on the finalisation day of the liable entity.
- (2) Without limiting subsection (1), the SPF trustee may, by written order served on a liable entity, direct the entity:
- (a) to carry on the business of the entity so far as is necessary or appropriate for those purposes, or
  - (b) to pay any claims (whether or not they are claims for payable liabilities) that are proven under this Division, or
  - (c) to make any compromise or arrangement with claimants or persons claiming to be claimants or having or alleging that they have a 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.

- (3) Any thing authorised to be done by a liable entity under section 23 is authorised to be done after the liable entity is given a direction by an order under this section only to the extent (if any) that the doing of the thing is consistent with the direction.
- (4) A liable entity is required and authorised to comply with any direction given to it under an order made under this section and served on it.

#### **46 Date for proof of claims**

- (1) On or after the finalisation day, the SPF trustee may, by notice published in a newspaper circulating generally in the State, fix a date (the **proof date**) on or before which claimants are to prove their claims or after which they will be excluded from the benefit of any distribution made before those claims are proved.
- (2) The notice must be published not less than 14 days before the proof date.

#### **47 Proof of claims**

- (1) A claim against a liable entity (including a claim other than a claim for a payable liability) that has not been admitted before the finalisation day is provable in accordance with this Division on or before the proof date.
- (2) A claim must be proved formally if the SPF trustee requires it to be proved formally.
- (3) A claim that is not required to be proved formally:
  - (a) may be proved formally, or
  - (b) may be proved in some other way, subject to compliance with the requirements of the regulations (if any) relating to the informal proof of claims.
- (4) A claim is proved formally if it satisfies the requirements of this Division relating to the formal proof of claims.

#### **48 Formal proof of claims**

- (1) A claim may be formally proved under this Division by delivering or sending by post a formal proof of claim to the SPF trustee.
- (2) A formal proof of claim is to be in a form approved by the Minister.
- (3) A formal proof of claim must contain detailed particulars of the claim sought to be proved.

#### **49 Costs of proof**

A claimant must bear the cost of proving the claimant's claim under this Division or of amending a proof of claim unless the Minister otherwise orders.

## **50 Priority payments**

Subject to this Part, in the winding up of a liable entity on or after the finalisation day the following claims outstanding against the liable entity at that day must be paid in priority to all other claims:

- (a) first, expenses (except deferred expenses) properly incurred by the SPF trustee in preserving, realising or getting in property of the liable entity, or in carrying on the liable entity's business,
- (b) next, the costs in respect of an application to the Supreme Court under section 51 or 52,
- (c) next, operating expenses of the entity,
- (d) next, payable liabilities other than those referred to in paragraph (c),
- (e) next, claims for the payment of liabilities (other than payable liabilities).

## **51 Orders**

- (1) A person with a claim against the SPF trustee or the Minister may apply to the Supreme Court for an order with respect to things to be done or not to be done to complete the winding up of a liable entity under this Division during or after the finalisation day.
- (2) On any such application, the Supreme Court may make such orders as it thinks fit to complete the winding up of a liable entity under this Division.
- (3) For the purposes of subsection (1), the winding up of a liable entity is completed by the realisation of all the property of a liable entity or so much of the property as can be realised without needlessly protracting the winding up, and the distribution of a final dividend (if any) to the outstanding claimants.

## **52 Deregistration of liable entity**

- (1) After the completion of the winding up of a liable entity, the SPF trustee may, with the written consent of the Minister, lodge an application with the Supreme Court for an order that the liable entity or a director of the liable entity lodge an application under the Corporations Act for deregistration of the liable entity.
- (2) The Supreme Court may make an order under subsection (1) only if the Court is satisfied that the SPF trustee has realised all the property of a liable entity or so much of the property as can, in the SPF trustee's opinion, be realised without needlessly protracting the winding up, and has distributed a final dividend (if any) to the outstanding claimants.
- (3) If an order is made under subsection (1), the liable entity or director to which the

order applies is specifically authorised to make an application for the deregistration of the liable entity under the Corporations Act even if none of the circumstances referred to in section 601AA (2) of the Corporations Act for the making of such an application are present.

## Division 9 Enforcement

### 53 Meaning of “authorised applicant”

- (1) For the purposes of this Division, each of the following persons is an **authorised applicant**:
  - (a) the SPF trustee,
  - (b) the Minister,
  - (c) in relation to a provision of this Division in which the expression **authorised applicant** is used—any other person who is authorised by the Minister under subsection (2) to be an authorised applicant for the purposes of the provision.
- (2) The Minister may, by written instrument, authorise any person to be an authorised applicant for the purposes of one or more specified provisions, 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 or no 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.

### 54 Enforcement of provisions of this Part

- (1) In this section, **contravention** includes a threatened or apprehended contravention.
- (2) An authorised applicant, and only 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.
- (4) Without limiting subsection (3), on any such application the Supreme Court may:

- (a) make an order setting aside a rationing direction made under section 35 if it is satisfied that the direction should not have been given or is no longer required, or
- (b) make an order setting aside a transaction, or requiring the repayment of money or the return of any other asset, (or both), if satisfied that the transaction or the disposition of the money or other asset (as the case may be) was in contravention of a provision of this Part.

#### **55 Advice or directions concerning provisions of this Part**

- (1) A liable entity or the SPF trustee may apply for advice or direction by the Supreme Court or the Minister on any matter relating to:
  - (a) the scope of the entity's or trustee's functions under this Part, or
  - (b) the exercise of any function by the entity or trustee under this Part, or
  - (c) 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:
  - (a) the scope of the Minister's, the SPF trustee's or a liable entity's functions under this Part, or
  - (b) the exercise of any function by the Minister, the SPF trustee or a liable entity under this Part, or
  - (c) any other matter relating to the operation of this Part.
- (3) Without limiting subsection (1) or (2), an application may be made with respect to any of the following:
  - (a) the giving of, or failure to give, a direction to a liable entity under section 24,
  - (b) the failure or refusal of the Minister to grant approval to the SPF trustee to make an application to the Supreme Court under section 35,
  - (c) the issuing of a rationing direction by the SPF trustee under section 35,
  - (d) an application, or failure to make an application, to the Supreme Court for an order under section 35,
  - (e) the exercise, or failure to exercise, any function conferred on the SPF trustee under Division 8,
  - (f) the failure or refusal of the Minister to grant written consent to the SPF trustee to make an application to the Supreme Court under section 52.
- (4) A written statement signed by the applicant is sufficient evidence of the matters set

out in it.

- (5) Unless the rules of court otherwise provide or the Supreme Court otherwise directs, it is not (except as provided by section 57) necessary to serve notice of an application under this section to the Supreme Court on any person, or to adduce evidence by affidavit or otherwise in support of the application.
- (6) 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.
- (7) An advice or direction given by the Supreme Court under this section is to be given by order.

**Note—**

Section 101 (Appeal in proceedings before the Court) of the [Supreme Court Act 1970](#) provides for appeals to the Court of Appeal from judgments or orders of the Supreme Court in a Division.

- (8) Without limiting subsections (6) and (7), if an application is made under this section to the Supreme Court in respect of the issuing of a rationing direction under section 35, the Supreme Court may make an order setting aside that direction if it is satisfied that the direction should not have been given or is no longer required.
- (9) An advice or direction given by the Minister under this section is to be given by order in writing.
- (10) 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.
- (11) In this section:

***applicant*** means a person who applies for advice or direction under this section.

## **56 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 winding up matters with respect to a liable entity to act in aid of, and be auxiliary to, the Supreme Court in the winding up 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:

**winding up matter** means a matter relating to any scheme of arrangement, receivership, winding up or other external administration of a company or other body outside of the territorial limits of the State (whether or not in Australia).

### **57 Notice requirement for certain proceedings**

A liable entity or the SPF trustee must give the Minister:

- (a) written notice of any application the liable entity or SPF trustee proposes to make to the Supreme Court under this Part at least 3 days before the application is made, and
- (b) copies of the originating process and of any written statement or other evidence filed with the Supreme Court in support of the application on the day on which the originating process, written statement or evidence is filed.

### **58 Right of Minister to intervene in proceedings**

The Minister may intervene and be heard personally or by a legal practitioner or agent in any proceedings before the Supreme Court under this Part.

### **59 Protection for exercise of certain functions during winding up 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 SPF trustee,
  - (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 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 of any protected function.

(5) However, nothing in this section prevents:

(a) any person (including a payable claimant) 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:

(i) bringing such proceedings, or

(ii) being granted such relief in those proceedings as may be authorised or permitted by this Part, or

(b) any party to the Final Funding Agreement or a Related Agreement from bringing proceedings, or being granted relief, in respect of any of the following:

(i) any civil liability incurred by another party to the Agreement or other person where that liability arises under or in relation to the Agreement,

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

(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 10 Displacement of Corporations legislation

### 60 Displacement of certain provisions of the Corporations Act

- (1) The provisions of Divisions 1–9 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 27 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.

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 42 (3) of this Act provides that certain provisions relating to the removal and appointment 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 26 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), sections 28 and 52 are declared to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act in relation to Part 5A.1 of that 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:
  - (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.

- (4) Without limiting subsection (1), section 30 is declared to be a Corporations legislation displacement provision for the purposes of section 5G of the Corporations Act in relation to section 601AG of the Corporations Act.

**Note—**

Section 601AG of the Corporations Act enables certain persons to recover amounts under an insurance contract previously held by a deregistered company.

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 5 Miscellaneous**

### **61 Holder of office not affected by appointment as director of SPF trustee**

The doctrine of incompatibility of office does not operate:

- (a) to prevent a person employed in a position as an officer of the Public Service (the **original office**) from being appointed to a position as an officer of the SPF trustee, or
- (b) to effect or require the surrender or vacation of the original office as a result of such an appointment.

## **62 This Act does not create liability for personal asbestos claims**

For the avoidance of doubt, it is declared that nothing in this Act operates to create any liability for a personal asbestos claim if the liability does not arise under another law.

## **63 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 16,
- (b) the entry into the Final Funding Agreement or any Related Agreement,
- (c) the establishment of the SPF,
- (c1) the establishment of the discretionary fund,
- (d) 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.

## **64 Tabling of copies of Final Funding Agreement and Related Agreements**

- (1) In this section:

**shareholder approval documentation** means notice of a meeting of the shareholders of James Hardie Industries NV (including explanatory memoranda and accompanying documentation) to seek the approval of shareholders for entry into, and the implementation of, the Final Funding Agreement and Related Agreements.

- (2) If James Hardie Industries NV sends shareholder approval documentation to its shareholders, the Minister is to cause copies of the Final Funding Agreement as in

force at the time it is signed and any Related Agreement to which the documentation relates (a **disclosed Agreement**) to be tabled in each House of Parliament as soon as is reasonably practicable after the documentation is sent.

(2A) If a House of Parliament is not sitting when the Minister seeks to table the copies of the disclosed Agreements, the Minister may present the copies to the Clerk of the House concerned.

(3) The copies of the disclosed Agreements:

(a) are, on presentation and for all purposes, taken to have been laid before the House, and

(b) may be printed by authority of the Clerk of the House, and

(c) if so printed, are for all purposes taken to be documents published by or under the authority of the House, and

(d) are to be recorded:

(i) in the case of the Legislative Council, in the Minutes of the Proceedings of the Legislative Council, and

(ii) in the case of the Legislative Assembly, in the Votes and Proceedings of the Legislative Assembly,

on the first sitting day of the House after receipt of the copies by the Clerk.

(4) For the avoidance of doubt, it is declared that the tabling of copies of the disclosed Agreements as provided by this section does not abrogate, limit or otherwise affect any right or liability of any person arising under or in relation to the Agreements.

## **65 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.

## **66 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:

(a) in the case of a natural person:

(i) by delivering it to the person personally, or

(ii) by 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—by 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.

### **67 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.

### **68 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.

### **69 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.

## **70 Repeal of James Hardie Former Subsidiaries (Special Provisions) Act 2005**

The *James Hardie Former Subsidiaries (Special Provisions) Act 2005* is repealed.

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

Schedule 1 has effect.

## **72 (Repealed)**

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

(Section 71)

## **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

*James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Trust Funds) Act 2006*

- (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.

## **Part 2 Provisions consequent on enactment of this Act**

### **2 Definitions**

In this Part:

**repeal day** means the day on which the repealed Act is repealed by this Act.

**repealed Act** means the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*.

### **3 Validity of SPF established before assent day confirmed**

Any trust fund that is established as referred to in section 8 during or after the introduction day but before the assent day is taken to have been validly established for the purposes of the law of the State.

### **4 Orders made under Part 2 of repealed Act**

- (1) Any order made under section 10 of the repealed Act that was in force immediately before the repeal day continues to have effect for the purposes of this Act as if it had been made by the Minister under section 14 of this Act, and may be revoked or amended accordingly.
- (2) Any order made under section 12 of the repealed Act that was in force immediately before the repeal day continues to have effect for the purposes of this Act as if it had been made by the Minister under section 16 of this Act, and may be revoked or amended accordingly.

### **5 Approvals given under Part 2 of repealed Act**

- (1) Any written approval given by the Minister under section 8 of the repealed Act for a relevant company:
  - (a) to change the address of its registered office to a location that is outside of the territorial limits of the State, or
  - (b) to have its registered office at a location that is outside of the territorial limits of the State,that was still in effect immediately before the repeal day continues to have effect for the purposes of section 12 of this Act unless the Minister revokes it.
- (2) Any written approval given by the Minister under section 9 of the repealed Act for a relevant company:
  - (a) to 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) to keep any Member Register of the company at a location that is outside of the

territorial limits of the State,

that was still in effect immediately before the repeal day continues to have effect for the purposes of section 13 of this Act unless the Minister revokes it.

- (3) Any written approval given by the Minister under section 11 of the repealed Act for a relevant company to transfer shares that it holds in a liable entity to another person that was still in effect immediately before the repeal day continues to have effect for the purposes of section 15 of this Act unless the Minister revokes it.

#### **6 Directions given under section 19 of repealed Act**

Any direction given to a liable entity by the Minister under section 19 of the repealed Act that was still in force immediately before the repeal day continues to have effect under section 24 of this Act as if the direction had been given by the SPF trustee, and may be revoked or amended accordingly.

#### **7 Approved payment schemes under section 26 of repealed Act**

Any approved payment scheme that was in force under section 26 of the repealed Act immediately before the repeal day continues to have effect as an approved payment scheme under section 35 of this Act as if it had been approved by the Supreme Court under section 35, but only until it is revoked or varied by the Supreme Court under that section.

#### **8 Requirements under Division 4 of Part 3 of repealed Act**

- (1) Any requirement of the Minister made under section 28 of the repealed Act that was still in force immediately before the repeal day continues to have effect under section 38 of this Act as if the requirement had been made by the SPF trustee, and may be revoked or amended accordingly.
- (2) Any requirement of the Minister made under section 29 of the repealed Act that was still in force immediately before the repeal day continues to have effect under section 39 of this Act as if the requirement had been made by the SPF trustee, and may be revoked or amended accordingly.

### **Part 3 Provisions consequent on enactment of [James Hardie Former Subsidiaries \(Winding up and Administration\) Amendment \(Trust Funds\) Act 2006](#)**

#### **Division 1 Interim funding arrangements**

##### **9 Rights and liabilities relating to Interim Funding Deed not affected**

- (1) For the avoidance of doubt, it is declared that nothing in the NSW administration legislation operates to abrogate, limit or otherwise affect any right or liability of any



person arising under or in relation to the Interim Funding Deed.

- (2) Accordingly, any provision of the NSW administration legislation that would (but for subclause (1)) have abrogated, limited or otherwise affected any such right or liability is to be read as if it did not have that effect.
- (3) The provisions of this clause are taken to have had effect on and from the day on which the Interim Funding Deed was entered into by the parties to the Deed.
- (4) In this clause:

**Interim Funding Deed** means the deed entitled “Interim Funding Deed” that was entered into by the following parties on 16 November 2006:

- (a) James Hardie 117 Pty Limited (ACN 116 110 948),
- (b) Amaca,
- (c) the Compensation Foundation,

as in force from time to time.

**NSW administration legislation** means any of the following:

- (a) the [James Hardie Former Subsidiaries \(Special Provisions\) Act 2005](#),
- (b) this Act,
- (c) any instrument made under an Act referred to in paragraph (a) or (b).

## **Division 2 Winding up and termination of MRCF trust fund**

### **10 Definitions**

In this Division:

**asbestos medical research provider** means a person or body that conducts, or that provides funding for the conduct of, medical research into asbestos-related diseases.

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

**modification** includes addition, exception, omission or substitution.

**MRCF trust deed** means the deed executed by James Hardie Industries Limited (ACN 000 009 263) in February 2001 that:

- (a) constituted a charitable private trust fund for the purposes of medical research into asbestos-related diseases, and
- (b) appointed the Compensation Foundation as the trustee of the fund,

as in force from time to time.

**MRCF trust fund** means the trust fund established by the MRCF trust deed.

**MRCF trustee** means the trustee of the MRCF trust fund from time to time.

**trust assets** means any assets held by the MRCF trustee for the purposes of the MRCF trust fund.

### **11 MRCF trustee to apply trust assets for certain purposes**

The MRCF trustee must, as soon as is reasonably practicable after the day on which it ceases to hold any shares in the liable entities, take such steps as are necessary to apply any trust assets as follows:

- (a) first, in payment of any amounts that are payable to any creditor of the MRCF trust fund,
- (b) second, transfer (for no consideration) the balance of any trust assets to one or more asbestos medical research providers prescribed by the regulations in such proportions as may be prescribed by the regulations.

#### **Note—**

Section 16 enables the Minister to order the trustee (namely, the Compensation Foundation) to transfer shares that it holds in a liable entity to a person or persons specified in the order.

### **12 Termination of MRCF trust fund**

- (1) The MRCF trustee must, within the period of 7 days after taking all of the steps referred to in clause 11, give the Minister a written notice (a **compliance notice**) stating that the trustee has complied with the provisions of clause 11.
- (2) The Minister may, by order published in the Gazette, terminate the MRCF trust fund if the Minister has been given a compliance notice.
- (3) The MRCF trust fund is terminated on the day specified in the order (being a day that is not earlier than the day on which the order is published in the Gazette) and, accordingly, the MRCF trustee ceases to be the trustee of the MRCF trust fund on that day.

### **13 Application to Minister for advice or direction**

- (1) The MRCF trustee may apply for advice or direction from the Minister on any matter relating to the scope or exercise of the trustee's functions under this Division.
- (2) In determining any such application, the Minister may decide to:
  - (a) approve or disapprove of any act proposed to be done by the MRCF trustee, or

(b) give such advice or direction as the Minister considers appropriate.

- (3) An advice or direction given by the Minister under this clause is to be given by order in writing.
- (4) Subject to clause 14, no proceedings lie, or civil or other liability arises, against the MRCF trustee or the Minister for or on account of any act, matter or thing done or omitted to be done by the trustee in accordance with any approval, advice or direction given under this clause.

#### **14 Applications to Supreme Court for compliance orders**

- (1) The Minister may apply to the Supreme Court for an order requiring the MRCF trustee to comply with the provisions of this Division.
- (2) On any such application, the Supreme Court may, if satisfied that the MRCF trustee has refused or failed to comply with a provision of this Division, make such order or orders as it thinks fit to require the trustee to comply with the provision.

#### **15 Effect of Division**

- (1) Any dealing by the MRCF trustee with the trust assets as required by or under this Division is not to be regarded as a breach of trust or otherwise as a civil wrong (whether for the purposes of any legislation of the State or the general law).
- (2) For the avoidance of doubt, any amounts drawn from the trust assets that are paid, or any trust assets that are transferred, as referred to in clause 11 are paid or transferred free of any equitable estates, interests, rights or obligations that attach to the assets by reason of the MRCF trust fund.
- (3) The provisions of this Division have effect despite anything to the contrary contained in the MRCF trust deed (in particular, clause 8 of that deed).

#### **16 Protection for exercise of functions under this Division**

- (1) The provisions of section 59 (other than subsection (5) (a)) are taken to apply to and for the purposes of this Division as if:
  - (a) a reference in that section to a protected person were a reference to the MRCF trustee or the Minister, and
  - (b) a reference in that section to a protected function were a reference to a function conferred or imposed by or under this clause, and
  - (c) a reference in that section to this Part (that is, Part 4 of this Act) were a reference to this Division, and
  - (d) the section provided that nothing in that section prevents the MRCF trustee or the Minister (as the case may be) from:

- (i) making an application under clause 13 or 14, or
  - (ii) being given advice or direction under clause 13 or granted relief by the Supreme Court under clause 14, and
- (e) any provision or provisions of that section specified by the regulations had effect subject to such modifications as may be prescribed by the regulations.
- (2) Nothing in this clause limits the operation of section 59 in its application to matters arising under or in relation to Part 4 of this Act.

### **Division 3 Discretionary fund**

#### **17 Establishment of discretionary fund by amendment of SPF trust deed**

For the avoidance of doubt, it is declared that for the purposes of the law of trusts of the State the discretionary fund may be established by amendment of the SPF trust deed in accordance with the provisions of that deed dealing with its amendment without the need to do anything else (including terminate the SPF and re-settle the assets that are the subject of the SPF into 2 new trusts).

### **Schedule 2 (Repealed)**