

**James Hardie Former Subsidiaries
(Winding up and Administration)
Bill 2005**

Explanatory note

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

The following Bills are cognate with this Bill:

- *James Hardie (Civil Liability) Bill 2005*
- *James Hardie (Civil Penalty Compensation Release) Bill 2005*

Overview of Bill

Background

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

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

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

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

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

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

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

The State and James Hardie Industries NV have been negotiating the terms of the Final Funding Agreement during the period since entering the Heads of Agreement. In late June 2005, the Parliament of New South Wales enacted the *James Hardie Former Subsidiaries (Special Provisions) Act 2005* in order to maintain the status quo in relation to the liable entities pending the conclusion of the Final Funding Agreement. To this end, the Act provided for the external administration of the liable entities under the law of New South Wales and placed certain limitations on the ability of the liable entities and certain associated companies to reorganise their corporate structures during the period of the external administration.

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

Principal objects of Bill

The principal objects of this Bill are:

- (a) to enable James Hardie Industries NV to set up a special purpose trust fund (the **SPF**) to provide funding to the liable entities under the Final Funding Agreement, and
- (b) to set up a State scheme for the winding up and other external administration over an extended period of the liable entities, and
- (c) to ensure that not only present, but also future, liabilities of the liable entities 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 entities 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, and
- (d) to repeal as a consequence the provisions of the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*.

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

Special features of the NSW winding up regime

In part because of its long-term nature, the NSW winding up regime will differ from a winding up or other form of external administration of a company under the Corporations Act.

With a winding up under the Corporations Act, it is typically the case that the company's property is taken into the custody of an external court-appointed liquidator and the powers of the directors and other officers of the company are suspended. The liquidator is at all times under the control of the court, and reports to creditors and to contributories (who may for that purpose together form a Committee of Inspection). The liquidator's role is, at its most elemental, to liquidate the company's assets, to collect in any money from contributories and to pay liabilities to (proven) creditors.

Under the NSW winding up regime, the directors of the liable entities will continue

to have day-to-day control of the companies. This is because of the very long-term nature of the winding up, and the fact that it will be necessary for the companies to continue their claims processing operations throughout their winding up periods. The liable entities will, however, be subject to an external administration in so far as they will be subject to the oversight and direction of the trustee of the SPF (the **SPF trustee**) and, in some circumstances, the Minister and the Supreme Court. The SPF trustee will itself be a company incorporated under the Corporations Act. The constitution of its board of directors will usually be controlled as to 60% by James Hardie Industries NV and as to 40% by the Government. The SPF trustee will, in a sense, be performing a dual role under the NSW winding up regime.

Firstly, the SPF trustee will take on many of the responsibilities that would otherwise fall to a liquidator. For example, it will collect in funds from “contributories” (ie., the James Hardie Group) on the one hand, and pay creditors on the other.

Secondly, through its board, the SPF trustee will also be performing a function that is similar in some respects to a joint Committee of Inspection under the Corporations Act. A Committee of Inspection is a body that is comprised of representatives of both contributories and creditors. Here, the contributory is the James Hardie Group, which will be entitled to appoint 3 of the 5 directors of the SPF trustee. The interests of the main creditors (namely, current and future personal asbestos victims) will be represented through the appointment by the Government of the other 2 directors to the board of the SPF trustee.

In addition to the Government’s contractual right under the Final Funding Agreement to appoint directors to the SPF trustee, the Minister will have additional powers under the legislation to act in the interests of creditors. For example, the Minister will be entitled to copies of accounts received by the SPF trustee from the liable entities, similar to the way in which a liquidator is required to lodge accounts with ASIC under a Corporations Act winding up. The Minister will also have the right to apply to the Supreme Court for certain orders and directions.

Outline of provisions

Part 1 Preliminary

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

Clause 2 provides for the commencement of the proposed Act (other than Part 2 and clause 3 of Schedule 1) on a day or days to be appointed by proclamation.

Part 2 will be taken to have commenced on the day on which this Bill was first introduced into Parliament. Clause 3 of Schedule 1 will commence on the date of assent to the proposed Act.

Clause 3 sets out the principal objects of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act. In particular, the following expressions are defined:

The expression **payable liability** of a liable entity is defined to mean 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 (being a claim made or brought in any legal proceedings commenced before 1 December 2005),
- (d) an operating expense of the entity,
- (e) a claims processing expense of the entity,

(f) a claim for the payment of a right to the proceeds of insurance of the entity that is declared to be a payable liability by regulations made for the purposes of proposed section 30,

(g) an amount in respect of which the SPF trustee has a right to be indemnified by the entity under proposed section 36 (2) (b),

(h) a statutory recovery claim against the entity.

A **payable claimant** of a liable entity is defined to mean any person to whom the entity has incurred a payable liability.

The expression **personal asbestos claim** against a liable entity or concurrent wrongdoer is defined to mean a claim by any of the following persons for damages (whether arising before, during or after the assent day) in respect of personal injury or death arising from exposure to 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 personal legal representative of a deceased person who sustained the injury or died as a result of the injury,

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

The expression is also defined to include such a claim against a liable entity or concurrent wrongdoer pursuant to the joinder of the liable entity or concurrent wrongdoer as a party to proceedings.

The expression **proven personal asbestos claim** against a liable entity is defined to mean 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).

The expression **statutory recovery claim** against a liable entity is defined to mean 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.

Clause 5 provides that the proposed Act is intended to have effect outside of the territorial limits of New South Wales as well as within the State.

Clause 6 provides that, in the event that a provision of the proposed Act or an instrument made under the Act has both valid and invalid applications, it is the intention of Parliament that the provision be construed as applying only to such of the applications of the provision as are valid.

Clause 7 provides that the proposed Act binds the State and, in so far as the legislative power of the Parliament of New South Wales permits, the other States, the Territories and the Commonwealth.

Part 2 Establishment of SPF

Clause 8 makes it clear that James Hardie Industries NV may establish, as contemplated by the Final Funding Agreement, a charitable trust fund (the **SPF**) for the following principal purposes:

(a) the purpose of receiving and providing funding for the payment, and paying, of payable liabilities of any liable entity,

(b) the purpose of providing services with respect to the management and resolution of claims made against any liable entity.

In particular, the proposed section overcomes any doubt as to whether a trust fund established for such purposes would be a valid charitable trust for the purposes of New South Wales law.

The proposed section also makes it clear that the trustee for the fund must be a company registered under the Corporations Act that is taken under section 119A of that Act to be registered in New South Wales.

Clause 9 makes it clear that the *Charitable Trusts Act 1993* and the general law relating to charitable trusts apply to the SPF, subject to certain modifications specified by the proposed section. The modifications include provisions that limit the persons who may bring proceedings relating to the administration of the SPF to the Attorney General (whether with or without a relator), the SPF trustee and James Hardie Industries NV.

Clause 10 makes it clear that nothing in Part 2 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 under the general law of New South Wales.

Part 3 Limitations on corporate restructuring

Division 1 Interpretation

Clause 11 defines, among other things, the term *relevant company* for the purposes of Part 3 to mean the following:

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

Division 2 Registered offices and Member Registers

Clause 12 makes it an offence for a relevant company to do any of the following 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,
- (b) have its registered office at a location that is outside of the territorial limits of the State.

The maximum penalty for the offence will be 1,000 penalty units (currently, \$110,000).

The proposed section also provides that the constitution of each relevant company is taken to include a provision to the effect 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.

The proposed section substantially re-enacts the provisions currently contained in section 8 of the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*.

Clause 13 makes it an offence for a relevant company to do any of the following without the written approval of the Minister:

- (a) change the location where any register of members of the company (a **Member Register**) is kept to a location that is outside of the territorial limits of the State,
- (b) keep any Member Register of the company at a location that is outside of the territorial limits of the State.

The maximum penalty for the offence will be 1,000 penalty units (currently, \$110,000).

The proposed section also provides that the constitution of each relevant company is taken to include a provision to the effect 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.

The proposed section substantially re-enacts the provisions currently contained in section 9 of the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*.

Clause 14 enables the Minister, by order served on a relevant company, to instruct it 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.

A failure to comply with such an order will be an offence. The maximum penalty for the offence will be 1,000 penalty units (currently, \$110,000).

The proposed section substantially re-enacts the provisions currently contained in section 10 of the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*.

Division 3 Transfers of shares by relevant companies

Clause 15 makes it an offence for a relevant company to transfer to any person any shares that it holds in a liable entity without the written approval of the Minister.

The maximum penalty for the offence will be 1,000 penalty units (currently, \$110,000).

The proposed section substantially re-enacts the provisions currently contained in section 11 of the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*.

Clause 16 enables the Minister to order a relevant company to transfer shares that it holds in a liable entity to a person or persons specified in the order.

A failure to comply with such an order will be an offence. The maximum penalty for the offence will be 1,000 penalty units (currently, \$110,000).

Division 4 Directors of relevant companies

Clause 17 provides that 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.

The proposed section makes it an offence for a director of a relevant company in respect of whom an order is made under the proposed section to continue to act as a director of the company after the day specified in the order for the director to cease to hold office. The maximum penalty for the offence will be 1,000 penalty units (currently, \$110,000).

However, the proposed section makes it clear that an order in respect of a liable entity cannot be made if the SPF trustee holds all of the shares in the entity for the purposes of the SPF.

The proposed section also provides that the constitution of each relevant company is taken to include a provision to the effect that:

(a) a director in respect of whom an order is made under the proposed section 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 the proposed section, and

(c) this power of appointment has effect despite any other provision of the constitution of the relevant company.

Division 5 Expiry of Part

Clause 18 provides that Part 3 ceases 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 2006.

Division 6 Displacement of Corporations legislation

Clause 19 declares the provisions of Divisions 2–5 to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act. Some of the provisions of section 5G on which reliance is placed include the following:

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.

Part 4 Winding up of liable entities

Division 1 General

Clause 20 provides that, for the purposes of the proposed Act, the *winding up period* for a liable entity means the period:

- (a) commencing on the day on which the proposed section commences, and
- (b) ending at the end of the day:
 - (i) appointed by the Governor under the proposed section for the termination of the winding up under Part 4, or
 - (ii) on which the liable entity is deregistered under the Corporations Act, whichever first occurs.

Clause 21 provides that during the winding up period, the winding up of a liable entity may be conducted only in accordance with the provisions of Part 4. The proposed section defines the term *winding up* for the purposes of that proposed section to mean any scheme of arrangement, receivership, winding up or other kind of external administration.

Division 2 Management of liable entities

Clause 22 provides that a liable entity is to be managed during its winding up period in accordance with any applicable provisions of the Corporations Act or any other legislation, the constitution of the entity and the general law. However, this will be subject to the provisions of Parts 3 and 4.

The provisions of the Corporations Act will 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.

Proposed section 21 provides that a liable entity may only be wound up as provided by this Part. Proposed 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.

Clause 23 requires the powers of a liable entity to be exercised for certain limited purposes during its winding up period.

Clause 24 enables the SPF trustee to give each liable entity directions about the conduct of its winding up.

Clause 25 enables the SPF trustee to direct a liable entity to utilise certain claims management services (whether provided by the SPF trustee or another person).

The proposed section also specifically authorises certain conduct done in connection with any such direction that might otherwise contravene Part IV of the *Trade Practices Act 1974* of the Commonwealth or the *Competition Code of New South Wales*.

The proposed section is not intended to limit the generality of the power to give directions conferred on the SPF trustee by proposed section 24.

Clause 26 requires a liable entity during its winding up period to include the expression “under NSW administered winding up” after its name in its public documents and negotiable instruments.

Clause 27 enables a liable entity and its directors and other officers to conduct the business of the entity as provided by Part 4 during its winding up period even while the entity is insolvent.

Clause 28 prevents the making of applications for the deregistration of a liable entity being made during the entity’s winding up period unless:

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

Division 3 Accounts

Clause 29 requires a liable entity to establish certain accounts to be located within the territorial limits of New South Wales in authorised deposit-taking institutions and to pay certain funds that it receives during its winding up period into particular accounts.

Division 4 Insurance

Clause 30 enables the regulations to 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.

The regulations may also declare that a right conferred on a person to the payment of

the proceeds (or part of the proceeds) of a relevant insurance contract is a payable liability for the purposes of the proposed Act.

However, the Minister is not to recommend the making of a regulation for the purposes of the proposed section unless the Minister has received the written concurrence of the SPF trustee to the making of the regulation.

If regulations made for the purposes of the proposed 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.

Division 5 Making and payment of claims

Clause 31 requires claims against a liable entity during its winding up period to be paid only in the manner permitted by Part 4.

Clause 32 provides that during the winding up period for a liable entity, only payable liabilities of the entity may be paid.

Clause 33 permits both the funds of a liable entity and funds to be provided by the SPF to be considered in determining whether or not there are or will be sufficient funds for the payment of claims against a liable entity.

Clause 34 enables a liable entity to pay all of its payable liabilities in full and as and when they fall due for payment if there are sufficient funds to do so.

Clause 35 enables the SPF trustee (with the approval of the Minister), if it appears reasonably likely that there will be insufficient funds for a liable entity to pay all of its payable liabilities, to apply to the Supreme Court for orders authorising the entity to pay some of its claims in part for a specified period and to defer the payment of other claims during that period.

The Supreme Court may not approve a scheme for the part payment or deferral of payment of claims against a liable entity during a 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) 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).

The proposed section makes it clear that paragraph (b) does not prevent the Supreme Court from approving a scheme that has regard to the amounts that personal asbestos claimants may receive during the period concerned under proposed section 30 (including regulations made for the purposes of that proposed section).

The proposed section also enables the SPF trustee to issue a rationing direction to a liable entity under the proposed section in a manner consistent with the rationing requirements for a scheme set out above if:

- (a) the SPF trustee has sought but not received approval from the Minister to make an application to the Supreme Court under the proposed section 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.

Clause 36 provides for the effect of payments of funds made from the SPF by the SPF trustee directly to a payable claimant in order to discharge (whether wholly or in part) a liability of a liable entity to the claimant.

The proposed section provides that such a payment 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) to confer on the SPF trustee a right against the liable entity to be indemnified for the amount of the payment (including interest), and

(c) 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.

Division 6 Reporting requirements, information and assistance

Clause 37 requires a liable entity to provide certain financial accounts and statements concerning the entity's winding up for the periods specified by the SPF trustee.

Clause 38 requires a liable entity and its directors and other officers to provide the SPF trustee with access to its books for inspection during the entity's winding up period.

Clause 39 requires directors and other officers of a liable entity to provide the SPF trustee with certain assistance during the entity's winding up period.

Clause 40 enables the Minister to exercise the SPF trustee's functions under proposed section 37, 38 or 39. In the event that a person cannot comply with both a requirement of the SPF trustee made under proposed section 37, 38 or 39 and a requirement of the Minister, the person must comply only with the requirement of the Minister.

Clause 41 enables the Minister to require the SPF trustee to report to the Minister (whether from time to time or on an ongoing basis) on any aspect of the exercise of the SPF trustee's functions under Part 4.

Division 7 Removal of directors of liable entities

Clause 42 enables the Minister or SPF trustee to apply to the Supreme Court for orders removing a director of a liable entity from office and for the appointment of another person as a director. Such orders may be made only if the Supreme Court is satisfied that the director 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 the proposed Act.

Division 8 Completion of winding up

Clause 43 enables the Minister, by order published in the Gazette, to specify a day for the finalisation of the winding up of a liable entity (the **finalisation day**) if satisfied that the provisions of Part 4 are no longer of utility in achieving the objects of the proposed Act and that the SPF trustee should proceed to the final stage of winding up of the entity in accordance with the Part.

Clause 44 requires the SPF trustee, as soon as practicable after the finalisation day, to 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.

Clause 45 enables the SPF trustee to give directions to the liable entity for the purposes of finalising its winding up under the Division.

Clause 46 enables the SPF trustee to fix a date (the **proof date**) on or before which claimants are to prove their claims and after which they will be excluded from the benefit of any distribution made before those claims are proved.

Clause 47 makes provision for how a claim is to be proved for the purposes of the Division on or before the proof date. In particular, it specifies when a claim needs to be formally proved and when it does not.

Clause 48 provides for how a claim may be formally proved.

Clause 49 provides that a claimant must bear the cost of proving the claimant's claim under the Division or of amending a proof of claim, unless the Minister otherwise orders.

Clause 50 sets out a regime for the priority of payments that are proved under the Division. The proposed section provides that the following claims outstanding against the liable entity on the finalisation 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 proposed 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).

Clause 51 enables a person with a claim against the SPF trustee or the Minister to 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 the Division.

Clause 52 enables the SPF trustee (with the written consent of the Minister), after the winding up of a liable entity has been completed, to apply to the Supreme Court for an order that the entity or a director of the entity lodge an application under the Corporations Act for deregistration of the entity.

Division 9 Enforcement

Clause 53 provides that, for the purposes of Division 9 of Part 4, an **authorised applicant** is any of the following:

(a) the SPF trustee,

(b) the Minister,

(c) any other person who is authorised by the Minister under the proposed section.

Clause 54 enables an authorised applicant to apply to the Supreme Court for an order to remedy or restrain a contravention of a provision of Part 4.

Clause 55 enables a liable entity or the SPF trustee to apply to the Supreme Court or the Minister for advice or direction concerning its functions or the operation of the Part. It also enables the Minister to apply to the Supreme Court for similar advice or direction in respect of the Minister's functions and the operation of the Part. An applicant who acts in good faith in reliance on such advice or direction is protected from certain civil liability.

Clause 56 enables the Supreme Court to request certain Australian and foreign courts and tribunals for assistance in the winding up of a liable entity under Part 4.

Clause 57 requires a liable entity or the SPF trustee to give the Minister written notice of any application it proposes to make to the Supreme Court at least 3 days before the application is made. The proposed section also requires copies of certain documents filed with the Court to be given to the Minister.

Clause 58 enables the Minister to intervene (whether personally or by a legal practitioner or agent) in any proceedings before the Supreme Court under Part 4.

Clause 59 provides that the exercise (or failure to exercise) certain functions conferred or imposed on the SPF trustee, the Minister or an authorised applicant under Part 4 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.

Division 10 Displacement of Corporations legislation

Clause 60 declares Divisions 1–9 of Part 4 to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act. Some of the provisions of section 5G on which reliance is placed include the following:

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. Proposed section 27 specifically authorises a liable entity and its directors and other officers to conduct the entity's business as provided by Part 4 even if the entity is insolvent. Part 5.7B of the Corporations Act prohibits a company and its directors and officers from trading while insolvent.

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 (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.

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. Proposed section 42 (3) 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.

Part 5 Miscellaneous

Clause 61 provides that the common law doctrine of incompatibility of office does not prevent an officer of the NSW Public Service from being appointed as an officer of the SPF trustee or require the officer to vacate or surrender office as an officer of the NSW Public Service.

Clause 62 provides that, for the avoidance of doubt, it is declared that nothing in the proposed Act operates to create any liability for a personal asbestos claim.

Clause 63 provides that a transfer of shares that the Minister has instructed under proposed section 16, the entry into the Final Funding Agreement or any Related Agreement or the establishment of the SPF is not subject to State tax.

Clause 64 requires the Minister to table in Parliament copies of the Final Funding Agreement and certain other related agreements as soon as is reasonably practicable after James Hardie Industries NV sends documentation to its shareholders seeking approval of the agreements.

Clause 65 enables the Minister to delegate his or her functions under the proposed Act to certain persons.

Clause 66 makes provision for the service of documents under the proposed Act.

Clause 67 provides for the circumstances in which directors and managers of corporations will be taken to be liable for offences committed by corporations under the proposed Act or regulations.

Clause 68 provides that proceedings for an offence against the proposed Act or the regulations may be dealt with summarily by a Local Court or the Supreme Court. However, if dealt with by a Local Court, the maximum monetary penalty that the Local Court may impose is 100 penalty units (currently, \$11,000).

Clause 69 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 70 repeals the *James Hardie Former Subsidiaries (Special Provisions) Act 2005*.

Clause 71 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

Clause 72 is a formal provision that gives effect to the amendment to the *Subordinate Legislation Act 1989* set out in Schedule 2.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Subordinate Legislation Act 1989

Schedule 2 amends the *Subordinate Legislation Act 1989* to ensure that regulations made under the following Acts are excluded instruments for the purposes of that Act:

- (a) the proposed Act,
- (b) the proposed *James Hardie (Civil Liability) Act 2005*,
- (c) the proposed *James Hardie (Civil Penalty Compensation Release) Act 2005*.