

James Hardie (Civil Liability) Bill 2005

Explanatory note

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

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

Overview of Bill

Background

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

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

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

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

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

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

Negotiations were then held in late 2004 between James Hardie Industries NV, the State of New South Wales, the Australian Council of Trade Unions, Unions New South Wales and Mr Bernie Banton as the designated representative of certain

Asbestos Victims Groups with a view to securing funding for asbestos-related personal injury claims against the liable entities. The parties to the negotiation entered into Heads of Agreement in December 2004 (the **Heads of Agreement**) as the basis for concluding a final agreement to secure such funding (the **Final Funding Agreement**).

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

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

Principal objects of Bill

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

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

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

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

The principal objects of this Bill are:

(a) to extinguish, in accordance with undertakings given by the State under the Final Funding Agreement, certain civil liability of James Hardie Industries NV and other related companies, entities and individuals in connection with the corporate reorganisation of the James Hardie Group and the negotiation and entry into the Heads of Agreement, the Final Funding Agreement and any Related Agreement, and

(b) to confirm that the State is liable to pay damages for breach of contract if it undertakes certain legislative or regulatory action that is proscribed by the Final Funding Agreement or the Related Agreements if the breaches are of such a nature as to warrant an award of damages at common law, and

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

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

Corporations Act.