

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

Overview of Bill

On 1 December 2005, the State of New South Wales (the State), James Hardie Industries NV and LGTDD Pty Limited (a controlled entity of James Hardie Industries NV) entered into an agreement (the Final Funding Agreement) to secure funding for asbestos-related personal injury claims against certain former subsidiary companies (the liable entities) of the James Hardie corporate group.

The James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 (along with the James Hardie (Civil Liability) Act 2005 and the James Hardie (Civil Penalty Compensation Release) Act 2005) were enacted in order to give effect to certain matters contemplated by the Final Funding Agreement.

The James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 enabled 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. The Act provides that the trust fund is a charitable trust for the purposes of the law of New South Wales. Since the Final Funding Agreement was entered into, the trustee of the SPF (the SPF trustee) has also become a party to the Agreement by accession.

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The Final Funding Agreement sets out a number of conditions precedent that must be satisfied before the funding obligations under the Agreement come into force. One of these conditions precedent is that certain tax treatment for the funds paid into the SPF be obtained.

The Australian Tax Office (the ATO) has provided a ruling to James Hardie Industries NV that payments that it makes into the SPF will be income tax deductible. However, the ATO has also ruled that the SPF is not a charitable trust and, therefore, the SPF trustee will be liable to pay income tax on its income if the SPF continues to be structured as provided for by the Final Funding Agreement.

The ATO has now issued a binding private ruling to the SPF trustee for the purposes of Division 359 of Schedule 1 to the Taxation Administration Act 1953 of the Commonwealth to the effect that the SPF trustee will not be liable to pay income tax on its income if the income is subject to a discretionary trust of which the SPF trustee is also the trustee.

The parties to the Final Funding Agreement have agreed to amend the Final Funding Agreement and the deed that established the SPF (the SPF trust deed) to enable such a discretionary trust to be established.

The object of this Bill is to amend the James Hardie Former Subsidiaries (Winding up and Administration) Act 2005:

(a) to confirm that the SPF trust deed may be amended so as to establish a discretionary trust over income derived from funds in the SPF (the discretionary fund), and

(b) to confirm that the SPF does not cease to be a validly established charitable trust only because it is not the only trust fund that is being used to provide funding for the payment of certain liabilities of the liable entities that are payable under the Act (the payable liabilities of the liable entities), and

(c) to make various consequential amendments to the Act to give recognition to the fact that the payment of the payable liabilities of the liable entities may be funded from either or both the SPF and the discretionary fund, and

(d) to confirm that nothing in the Act or the James Hardie Former Subsidiaries (Special Provisions) Act 2005 affects any rights or liabilities arising under or

in relation to a certain agreement that provides interim funding to a liable entity, and

(e) to provide for the winding up and termination of the Medical Research and Compensation Foundation trust fund, and

(f) to make other amendments in the nature of statute law revision.

The Bill also makes an amendment to the James Hardie (Civil Liability) Act 2005 in the nature of statute law revision.

Outline of provisions

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

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Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, except for the following provisions which will commence on the date of assent to the proposed Act:

(a) proposed sections 1, 2, 4 and 5,

(b) Schedule 1 [1]–[10] and [23]–[27] (and proposed section 3 in its application to those items).

Clause 3 is a formal provision that gives effect to the amendments to the James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 set out in Schedule 1.

Clause 4 corrects a typographical error in the definition of asbestos claim in section 21 (1) of the James Hardie (Civil Liability) Act 2005. The definition currently refers to a “personal legal representative” instead of the correct term of “legal personal representative”.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced, the proposed Act will be spent and section 30 of the Interpretation Act 1987 provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of James Hardie Former Subsidiaries (Winding up and Administration) Act 2005

Creation of discretionary fund

Schedule 1 [2] amends section 4 of the James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 (the Principal Act) to insert, among other things, a definition of discretionary fund. The term is defined to mean 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.

Schedule 1 [27] inserts a new Part in Schedule 1 to the Principal Act that contains, among other things, a provision that confirms that the discretionary fund may be established by amendment of the SPF trust deed in accordance with its amendment provisions 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 1 [1] amends section 2 of the Principal Act to ensure that the new Part commences on the date of assent to the proposed Act.

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Charitable status of SPF not affected

Schedule 1 [5] amends section 8 of the Principal Act to make it clear that the SPF does not cease to be a validly established charitable trust for the purposes of the law of New South Wales only because some of the funding for the payment of the payable liabilities of the liable entities is being provided from the discretionary fund.

Consequential amendment of Principal Act

Schedule 1 [2] amends section 4 of the Principal Act to insert, among other things, a definition of compensation funds. The term is defined to mean the following:

(a) the SPF,

(b) the discretionary fund.

Schedule 1 [11]–[22] make various amendments to the Principal Act to recognise that payments may be made from any of the compensation funds. Schedule 1 [4] also amends section 4 of the Principal Act to make it clear that a reference in that 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).

Schedule 1 [24] amends section 63 of the Principal Act to ensure that the establishment of the discretionary fund will not attract State tax.

Interim funding agreement not affected

On 16 November 2006, James Hardie 117 Pty Limited entered into a loan agreement with one of the liable entities (namely, Amaca Pty Limited) and the Medical Research and Compensation Foundation under which it agreed to provide interim funding to the liable entity pending the commencement of funding under the Final Funding Agreement.

Schedule 1 [27] inserts a new Part in Schedule 1 to the Principal Act that contains, among other things, a provision that confirms that nothing in the Act or the James Hardie Former Subsidiaries (Special Provisions) Act 2005 affects any rights or liabilities arising under or in relation to the interim funding agreement.

Winding up and termination of Medical Research and Compensation Foundation trust fund

In February 2001, James Hardie Industries Limited established a charitable private trust fund (the MRCF trust fund) for the purposes of medical research into asbestos-related diseases.

A company called the Medical Research and Compensation Foundation was appointed as the trustee of the MRCF trust. That company, which continues to be the trustee of the MRCF trust fund, currently holds (either directly or indirectly) all of the shares in the liable entities for the purposes of the trust.

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Section 16 of the Principal Act (when commenced) will enable the Minister to order the trustee to transfer shares that it holds in a liable entity to a person or persons specified in the order.

Schedule 1 [27] inserts a new Part in Schedule 1 to the Principal Act that contains, among other things, provisions that:

(a) require the trustee to wind up the MRCF trust fund as soon as is reasonably practicable after it ceases to hold any shares in the liable entities by, first, paying off the trust's creditors and then transferring the balance of the trust's assets to one or more asbestos medical research providers prescribed by the regulations in such proportions as may be prescribed by the regulations, and

(b) enable the Minister to terminate the trust once this has happened.

Amendments in the nature of statute law revision

The proposed Act also makes a number of amendments in the nature of statute law

revision to clarify the operation of certain provisions of the Principal Act. All of these amendments will commence on the date of assent to the proposed Act.

Schedule 1 [3] corrects a typographical error in the definition of personal asbestos claim in section 4 (1) of the Principal Act. The definition currently refers to a "personal legal representative" instead of the correct term of "legal personal representative".

Schedule 1 [6], [7], [8] and [9] amend sections 12, 13, 15 and 16 of the Principal Act respectively to make it clear that the provisions in those sections that are deemed to be included in the constitutions of certain companies have effect despite any other provisions of the constitutions of those companies. These amendments ensure that the provisions of those sections are consistent with other similar provisions of the Principal Act, such as section 42.

Schedule 1 [10] amends section 18 of the Principal Act to provide that Part 3 (Limitations on corporate restructuring) of the Act expires on 1 October 2007 instead of 1 October 2006. Section 18 has not been commenced and, accordingly, Part 3 has not yet expired.

Schedule 1 [23] amends section 54 (Enforcement of provisions of this Part) of the Principal Act to make it clear that the Supreme Court may make an order under that section 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 Part 4.

Schedule 1 [25] amends section 64 (Tabling of copies of Final Funding Agreement and Related Agreements) of the Principal Act to make it clear that the copies of the Agreements that are required to be tabled in Parliament under that section may be tabled even when Parliament is not sitting.

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Savings and transitional regulations

Schedule 1 [26] amends clause 1 of Schedule 1 to the Principal Act to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.