

Explanatory note

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

Overview of Bill

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 with respect to the payment of certain asbestos-related liabilities (the payable liabilities) of former subsidiaries of the James Hardie group of companies (the liable entities). The Act also set up a State scheme for the winding up and other external administration over an extended period of the liable entities. Funding contributions to the SPF for the payment of the payable liabilities of the liable entities is governed by an agreement entered into by the State and James Hardie Industries NV (the Final Funding Agreement). The Final Funding Agreement requires James Hardie Industries NV to make funding contributions to the SPF during any particular financial year based on its free cash flow. If James Hardie Industries NV has negative free cash flow, it is not required to make any contribution for the relevant financial year. James Hardie Industries NV has not made any contribution to the SPF for the financial year of 2009–2010.

As a result, it appears likely that in the absence of alternative funding arrangements, the SPF will cease in the short term to be able to provide funding for the payment in full of all of the payable liabilities of the liable entities.

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

- (a) to authorise the trustee of the SPF (the SPF trustee) and the liable entities to enter into agreements to which the State is a party with respect to the provision of a loan facility (which will be partly funded by the Commonwealth) to the SPF trustee to assist in funding the payment of the payable liabilities of the liable entities, and
- (b) to make certain other amendments to the Act that facilitate the provision and use of funds under the loan facility, and
- (c) to clarify the powers of the Supreme Court in relation to the approval of a payment scheme under the Act for the payment of claims for payable liabilities of the liable entities.

Outline of provisions

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 on a day or days to be appointed by proclamation.

Schedule 1 Amendment of James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 No 105

Authorisation of loan facility

Schedule 1 [10] inserts a new Division in Part 4 of the James Hardie Former Subsidiaries (Winding up and Administration) Act 2005 (the Principal Act) to authorise the SPF trustee and the liable entities to enter into one or more agreements (the relevant loan facility agreements) to which the State is to be a party for the provision of a loan facility to the SPF trustee (an authorised loan facility) and the provision by the SPF trustee and the liable entities of guarantees and securities in respect of such an agreement or facility.

Schedule 1 [2] amends section 4 of the Principal Act to provide that a loan security expense of a liable entity is one of its operating expenses for the purposes of the Act.

Schedule 1 [1] also amends section 4 of the Principal Act to insert definitions of certain terms and expressions relating to an authorised loan facility that are used in

the amendments made to the Act, including a definition of loan security expense. The expression loan security expense is defined to mean any amount that a liable entity is required to pay under, or in connection with, a relevant loan facility agreement.

Schedule 1 [4] amends section 8 of the Principal Act to confirm that:

(a) funds provided to the SPF trustee under an authorised loan facility are provided for the purposes, and are subject to the trust requirements, of the SPF, and

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(b) the SPF trustee is acting within the terms of the SPF trust when making repayments in relation to an authorised loan facility.

Schedule 1 [7] amends section 24 of the Principal Act to enable the SPF trustee to give directions to a liable entity regarding compliance with the entity's obligations under a relevant loan facility agreement, the giving or granting of guarantees and securities in connection with an authorised loan facility or relevant loan facility agreement (or proposed authorised loan facility or relevant loan facility agreement).

Schedule 1 [5] amends section 23 of the Principal Act to confirm that a liable entity is acting within power when it complies with its obligations under a relevant loan facility agreement or acts in accordance with any such directions from the SPF trustee. Schedule 1 [6], [8] and [12] make amendments to the Principal Act that are consequential on the amendments made by Schedule 1 [5] and [7].

Schedule 1 [9] amends section 30 of the Principal Act to make it clear that the section (or any regulation made under that section) does not prevent or limit the making of loan repayments under an authorised loan facility or the giving of directions by the SPF trustee under section 24 (as amended by the proposed Act).

Schedule 1 [11] amends section 33 of the Principal Act to make it clear that any funding available under an authorised loan facility is relevant in determining whether or not there are sufficient funds for the payment of payable liabilities of a liable entity.

Schedule 1 [19] amends section 59 of the Principal Act to make it clear that the section does not prevent or limit the enforcement of a relevant loan facility agreement by the parties to the agreement.

Schedule 1 [20] amends section 63 of the Principal Act to provide that entry into a relevant loan facility agreement, or the giving of a guarantee or the granting of a security under or as contemplated by any such agreement, is not subject to State tax.

Schedule 1 [21] inserts proposed section 64A in the Principal Act to require the Minister to cause a copy of any relevant loan facility agreement to be tabled in each House of Parliament as soon as is reasonably practicable after it is signed.

Approved payment schemes

Schedule 1 [13]–[18] amend section 35 of the Principal Act to enable the Supreme Court to approve a payment scheme under the Act for the payment of claims for payable liabilities of the liable entities that:

(a) commences before the time when the SPF ceases to have sufficient funds to pay all of the payable liabilities of the liable entities as and when they fall due for payment, and

(b) sets an interest rate to be applied in calculating the interest payable on any part of the payable liabilities of the liable entities that would otherwise be payable as interest because that part is not paid during the currency of the scheme, and

(c) enables small claims to be paid in full during the currency of the scheme, and

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(d) allows claimants for the payment of proven personal asbestos claims to elect between different instalment options for the part payment of their claims during the currency of the scheme.

Schedule 1 [3] inserts proposed section 4A in the Principal Act to define the term small claim. Initially, a small claim is defined to mean a claim that does not exceed \$25,000. The proposed section provides for the indexation of this amount during each year that an approved payment scheme is in force, by order of the Minister, by reference to changes in the consumer price index.

Savings and transitional provisions

Schedule 1 [22] 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.