

James Hardie Former Subsidiaries (Special Provisions) Bill 2005

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

Overview of Bill

The objects of this Bill are:

- (a) to provide for the external administration of ABN 60 Pty Limited, Amaba Pty Limited and Amaca Pty Limited (the **liable entities**), which are companies that were formerly within the James Hardie corporate group and have certain asbestos-related liabilities, and
- (b) to place 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.

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 on the date of assent to the proposed Act.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 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 5 provides that the proposed Act and any instrument made under it is to be construed as operating to the full extent of, but so as not to exceed, the legislative power of the Parliament of New South Wales.

Clause 6 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 Limitations on corporate restructuring

Division 1 Interpretation

Clause 7 defines, among other things, the term **relevant company** for the purposes of the Part to mean the following:

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

Division 2 Registered offices and Member Registers

Clause 8 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.

Clause 9 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.

Clause 10 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).

Division 3 Transfers of shares by relevant companies

Clause 11 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).

Clause 12 enables the Minister to order a person to whom or which shares in a liable entity have been transferred by a relevant company in contravention of proposed section 11 to transfer those shares back to the company.

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 Expiry of Part

Clause 13 provides that the Part ceases to have effect at the end of the external administration period referred to in proposed section 15.

Division 5 Displacement of Corporations legislation

Clause 14 declares the provisions of Divisions 2 and 3 to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth (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 3 External administration of liable entities

Division 1 General

Clause 15 provides that, for the purposes of the proposed Act, the ***external administration period*** means the period:

- (a) commencing on the date of assent to the proposed Act, and
- (b) ending at the end of the day appointed by the Governor under the proposed section for the termination of the external administration under Part 3.

Clause 16 provides that during the external administration period a liable entity may only be externally administered in accordance with the provisions of Part 3.

Division 2 Management of liable entities

Clause 17 provides that a liable entity is to be managed during the external administration 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 2 and 3.

Clause 18 requires the powers of a liable entity to be exercised for certain limited purposes during the external administration period.

Clause 19 enables the Minister to give each liable entity directions about the conduct of its external administration.

Clause 20 requires a liable entity during the external administration period to include the expression "under NSW external administration" after its name in its public documents and negotiable instruments.

Clause 21 enables a liable entity and its directors and other officers to conduct the business of the entity as provided by Part 3 during the external administration period even while the entity is insolvent.

Clause 22 prevents the making of applications during the external administration period for the deregistration of a liable entity without the written consent of the Minister.

Division 3 Making and payment of claims

Clause 23 requires claims against a liable entity during the external administration period to be paid only in the manner permitted by the Division.

Clause 24 permits both the funds of a liable entity and funds to be provided by any other person 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 25 enables a liable entity to pay all claims against it in full and as and when they fall due for payment if there are sufficient funds to do so.

Clause 26 enables the Minister, if there are insufficient funds for a liable entity to pay all claims against it, 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.

However, 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 claims of the kind referred to in paragraph (b) or (c),
- (b) the payment of claims for damages for personal injury or death during the period:
 - (i) in full, or
 - (ii) in part (calculated on an appropriate proportionate basis among claimants whose claims are payable when the period commences or become payable during that period),
- in priority over claims of the kind referred to in paragraph (c),
- (c) the payment in part, or the deferral of the payment, of any other kinds of claims during the period.

Division 4 Reporting requirements, information and assistance

Clause 27 requires a liable entity to provide certain financial accounts and statements concerning the entity's external administration for the periods specified by the Minister.

Clause 28 requires a liable entity and its directors and other officers to provide the Minister with access to its books for inspection during the external administration period.

Clause 29 requires directors and other officers of a liable entity to provide the Minister with certain assistance during the external administration period.

Division 5 Removal of directors of liable entities

Clause 30 enables the Minister 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 6 Enforcement

Clause 31 provides that, for the purposes of the Division, an **authorised applicant** is:

- (a) the Minister, or
- (b) any other person who is authorised by the Minister under the proposed section.

Clause 32 enables an authorised applicant to apply to the Supreme Court for an order to remedy or restrain a contravention of a provision of Part 3.

Clause 33 enables a liable entity 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 34 enables the Supreme Court to request certain Australian and foreign courts and tribunals for assistance in the external administration of a liable entity under Part 3.

Clause 35 provides that the exercise (or failure to exercise) certain functions conferred or imposed on the Governor, the Minister or an authorised applicant under Part 3 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 7 Displacement of Corporations legislation

Clause 36 declares Divisions 1–6 of Part 3 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 21 specifically authorises a liable entity and its directors and other officers to conduct the entity's business as provided by Part 3 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 30 (3) provides that certain provisions relating to the removal 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 4 Miscellaneous

Clause 37 provides that a transfer of shares that the Minister has instructed under proposed section 12 is not subject to State tax.

Clause 38 enables the Minister to delegate his or her functions under the proposed Act to certain persons.

Clause 39 makes provision for the service of documents under the proposed Act.

Clause 40 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 41 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 42 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 43 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

Clause 44 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 proposed Act are excluded instruments for the purposes of that Act.