

Lives in the Dust

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In the end there was nowhere left to hide. The death toll was climbing, the inquiry forensic and the public anger near boiling point. Elisabeth Sexton and Tony Stephens report on James Hardie, its dirty work and the people left behind.

It's shocking to watch people die before your eyes. It's even more shocking when the dying is so public, when the people can see life escaping, and death clearly becomes part of life.

The people of NSW saw it clearly when its Governor, Sir David Martin, died in 1990. It all happened so quickly. He took the salute outside Government House, gasping and gulping air into his poisoned lungs before being driven in an open car through the city, smiling and waving bravely. His funeral service was a week later. Mesothelioma, the deadly lung cancer, had killed him, at 57.

The people saw similar sadness this week, when David Jackson, QC, delivered his report on James Hardie Industries' funding for victims of asbestos-related diseases. Men and women with asbestosis and mesothelioma, many with life sentences wondering how long life could last, came forward as witnesses to the unpleasant and unacceptable face of capitalism.

Greg Hayes stepped forward again. Now 56, diagnosed with mesothelioma and given three months to live on May 22, 2001 — "I'll never forget the date" — he sees it as his duty to help fellow sufferers. He has attended 20 "meso" funerals, as he calls them, and most of these were for people affected by Hardie products. "It's a shocking thing to watch people dying before your eyes," he said.

The Jackson inquiry suggests that executives at James Hardie found it so shocking that they averted their eyes from their part in man's exploitation of man.

Meredith Hellicar, the new chairman, has been on the board since 1992 but had never met a victim until Hayes turned up with his two young daughters at the shareholders' meeting on September 15. She apologised: "I do know that no apology can ever be enough to compensate you for this horrible disease but I do give it anyway and I give it very sincerely."

It was a new look for a company with a long history of avoiding unpleasant consequences of its actions.

James Hardie might have been excused for having paid little heed to Pliny the Elder, the Roman naturalist who observed in the first century AD that slaves wearing asbestos cloth grew ill and died, but, in 1935, the company set up a research arm at its factory at Camellia, near Rosehill Racecourse, to conduct "unceasing research and experimentation".

Samuel Jones, who worked in the Camellia factory, lodged a worker's compensation claim for asbestosis in 1938. He lost but Judge Jim Curtis, of the Dust Diseases Tribunal, said in 1999 that Hardie knew in 1938 of the health dangers posed by visible clouds of

asbestos dust.

The Medical Journal of Australia published in 1957 an article in which Dr D.L. Gordon Thomas stated that asbestos disease, once established, was “a grave threat to life and health”. Thomas pointed out that it was not only people handling asbestos in its raw state who were at risk but also anyone “sawing, cutting and finishing any product containing asbestos — for example brake linings, asbestos sheeting and various insulating materials”. The article went to Jock Reid, a Hardie director, with a note from a company officer: “I do not think there is anything in this which we do not already know.”

Yet it was not until 1977 that appropriate warning labels were included on Hardie products. They cautioned that “breathing asbestos dust may cause serious damage to health including cancer”.

The first public liability claim was heard in 1980. Mining of asbestos had stopped in Australia in 1966 and manufacture 21 years later, although imports were not banned until January this year, largely due to union pressure.

An asbestos fibre can sit in a lung for 40 years before mesothelioma develops. Those who have fallen ill to date have been compensated, but Hardie made itself one of Australia’s worst examples of corporate social irresponsibility by — until recently — refusing to guarantee payments to future victims.

A new actuarial review undertaken for the inquiry estimated that another 7900 Australians will qualify for compensation for illness caused by Hardie products, in addition to the 2960 who have received payment. This estimate does not fully allow for home renovators or others exposed to fibres by disturbing asbestos already installed in buildings. The incidence of mesothelioma in Australia is not expected to peak until 2011.

David Jackson described the company’s July discovery of a moral obligation to compensate in future as “a radical departure” from its stance as recently as February, when his inquiry began.

The blue-chip Hardie company will survive the public shame. It has had remarkable success in the tough United States market, with advanced, asbestos-free products. And the smart money worked out long before the Hardie board made any public concession that footing the bill was inevitable. The share price had just hit a record \$7.81, valuing the whole company at \$3.6 billion, when the \$800 million shortfall was forecast last October. By the time Hardie said it would pay up in July, it was trading at \$6.10, a market value of \$2.8 billion.

Nonetheless, Australians will long remember the famous Hardie name as one of the bad characters in a modern morality tale. For what has unfolded at Jackson’s inquiry is a sorry story of decisions by a small group of individuals to abandon the ill and dying.

Jackson is acknowledged by many peers as the leader of the Australian bar. He is working this weekend on a brief to take on Tuesday to the High Court, before which he appears regularly and to which many people expect him to be appointed. He is mild-mannered but his report makes plain there is no refuge for Hardie in pleading stupidity or ignorance. The key executives were “clearly intelligent and capable people”, he said.

The company explained itself by saying its dealings in asbestos were all above the law. But as *The Australian Financial Review* commented in an editorial: “The law is sometimes an ass, and those who stand behind it regardless risk being kicked.”

The day the inquiry was announced, Hardie’s chief executive, Peter Macdonald,

arranged a phone hook-up with stockbroking analysts to reassure investors. The company's legal advice "is and remains that [the parent company] is not responsible for the former subsidiaries of the company that produced asbestos products and we don't believe the inquiry will change that," he said on February 25.

Jackson agreed that Hardie's legal advice was sound. From 1937 until asbestos manufacture ceased in 1987, all Hardie's asbestos products were made by two wholly owned subsidiaries. If they had run out of money, the parent company — the one owned by shareholders — would have been perfectly entitled to let them slide into liquidation and leave thousands of future asbestos victims uncompensated.

Jackson found the company knew that the public outcry would be too great to allow it to rely on the narrow legal position. The political reality was that as long as the subsidiaries remained in the group, Hardie shareholders would have paid the compensation bills.

In February 2001 Hardie established a trust, the Medical Research and Compensation Foundation, with \$293 million to fund all its asbestos disease claims. The decision to transfer ownership of the two subsidiaries to the foundation was also within the law. In a nod to what internal Hardie papers described as the "moral reservations" of some directors, the assets of the subsidiaries were supplemented by a parting gift from the parent of \$80 million.

"There was no legal obligation for [Hardie] to put more funding into the foundation than it did," Jackson said. But there were "practical" risks to underfunding. "From an early point in consideration of restructuring it was recognised that there were potential spoilers in the process, and that they included unions, asbestos support groups, public opinion, and governments," he said.

This recognition that the community's moral standards would put victims ahead of shareholders led the company into its key error. It set aside what Jackson described as "the cheapest provision thought marketable". Then Macdonald told the stock exchange the foundation's starting assets would be enough to meet all legitimate future claims. He knew this was false, Jackson found.

Hardie compounded its mistake by not offering quick restitution when the alarm was sounded. The company adopted what Jackson described as "a culture of denial", presumably thinking the furore would come in 10 or 15 years, not in as many months. By then the political impact might be blunted.

The company and the foundation had eight meetings which led nowhere. In February last year, according to a file note made at the time by foundation director Dennis Cooper, the foundation put forward arguments Hardie could use to persuade its shareholders a voluntary payment to asbestos victims would be in the company's interest.

Cooper's note records Macdonald saying the proposal was "well considered", but accepting it might be difficult because of "the need to support his previous and current market statements". Macdonald would have known that misleading the stockmarket can have serious personal consequences, including criminal charges.

It was not until July that the company said publicly what Jackson found it knew all along — that the community's moral standards demanded that it foot the bill.

Jackson said: "To put it directly, [Hardie] still has in its pockets the profits made by dealing in asbestos, and those profits are large enough to satisfy most, perhaps all, of the

claims of victims of James Hardie asbestos.”

Jackson said he could understand why Macdonald, who joined Hardie in 1993, six years after asbestos manufacture ceased, referred to asbestos liabilities as “legacy issues” or part of “the rump”. But the board papers are full of references to the political potency of the issue. In February 2000 in-house lawyer Peter Shafron told the board: “There is a strong institutional bias against James Hardie and the other asbestos product manufacturers; it is apparent in courts, juries, and in government and is especially well developed in NSW.”

Jackson noted the board “overlooked” a warning from the company’s US lawyers that “any attempt at reorganisation that does not leave significant assets for the asbestos claims will, at a minimum, spawn lengthy and costly litigation with the plaintiffs’ bar, and may ultimately be unsuccessful”.

Jackson found that, while plenty of public relations advice went to the board, little attention was paid to making sure an amount of money was set aside which would withstand scrutiny. He was struck by “the absence of any substantive discussion ... on the actual amount of the asbestos liabilities”.

The company also utterly underestimated the public impact of the victims, people like Greg Hayes. “At last we have a report saying that James Hardie acted like a lot of whackers,” he said.

Meredith Hellicar invited Hayes to talk to the company about the problems he and fellow sufferers face. He expects a meeting next week. Meanwhile he will spend most of his time talking to the victims. “I give them what hope I possibly can,” he said. “There is no greater joy than to sit down with someone with a terminal disease and put a little hope in their hearts.”