

Hardie is down but not out

by Marcus Priest

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The inquiry has exposed the exploitation by companies of corporate law.

“James Hardie Industries no legal obligation . . . upgrade to buy” was the headline on a Deutsche Bank research note to clients just after the release of the report by the Special Commission of Inquiry into the Medical Research and Compensation Foundation.

Deutsche looked beyond the noise about compensation coming from NSW Premier Bob Carr, unions and asbestos victims this week. It wasn't the only one. Stockbroking analysts cut through the nearly 600 pages of the first volume of the report by commissioner David Jackson, QC, to focus on one sentence: “There was no legal obligation for JHIL [James Hardie] to provide greater funding . . .”

Jackson catalogued the shabby way in which management set out to separate its profitable business from its deadly legacy. He excoriated chief executive Peter Macdonald and chief financial officer Peter Shafron and their advisers for alleged misleading and deceptive conduct in claiming in 2001 that the foundation was fully funded.

“The notion that the holding company would make the cheapest provision thought marketable in respect of those liabilities so that it could go off to pursue its other more lucrative interests insulated from those liabilities is singularly unattractive. Why should the victims and the public bear the cost not provided for?”

But if Jackson found James Hardie's actions unattractive, he could not hide the grim reality. “There was no fundamental legal impediment to JHIL, by its directors and management, devising and implementing a proposal to effect a separation of [asbestos subsidiaries] Coy and Jsekarb (and, accordingly, their asbestos liabilities). There may well have seemed good reasons why, in the interests of the shareholders in JHIL, it was desirable to explore, or implement, such proposals.”

And more bluntly: “Any claims which might be made seem unlikely to result in damages which would have a very significant effect on the likely life of the foundation.”

Carr, ACTU secretary Greg Combet and the public face of asbestos victims, Bernie Banton, said the report's findings against Macdonald, Shafron and other participants meant the company must now pay up. But privately, people campaigning against James Hardie say they are “shattered” by the report. They expected it to be much stronger.

The greatest disappointment was Jackson's finding on possible law reform to assist the MRCF meet current and future claims.

It was the smallest section of the report and highly circumspect. On the issue of limited liability and the corporate veil which had been central to the issue of separation Jackson pulled his punches. “The circumstances that have been considered by this inquiry suggest there are significant deficiencies in Australian corporate law . . . In addition, the circumstances have raised in a pointed way the question of whether existing laws concerning the operation of limited liability or the corporate veil within corporate

groups adequately reflect contemporary public expectations and standards,” Jackson said.

“I do not express any concluded view on these topics.”

So after about 60 days of hearings, thousands of transcripts and a heavy traffic of witnesses, there is confusion about what there is to show from the process.

It remains to be seen what negotiations between the ACTU and the company will produce. But two statements from James Hardie are revealing.

On October 29, 2003, Macdonald said: “Clearly there is no funding shortfall today . . . there can be no legal or legitimate basis on which shareholders’ funds could be used to provide additional funds.”

But then on July 14, 2004, James Hardie announced it would recommend shareholders approve the provision of additional funding to compensate all future claims. “The board is deeply concerned that asbestos-related claims are now projected to be far in excess of amounts anticipated at the time of establishment of the MRCF.”

That this about-face occurred before Jackson had even put pen to paper highlights that the value of a commission often lies in the process leading up to the report, rather than the report itself.

The public pressure forced James Hardie to undertake to provide more money. The issue now is whether the pressure will determine how it pays that money.

The wider legacy of the inquiry is that the exploitation of corporate laws by business to escape liability is now at the forefront of debate. A complex issue has been simplified by images of human suffering. But whether this means the law should be changed is a matter for politicians and the people who elect them, not for a commission of inquiry.