

Asbestos trust to sue using mafia law

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THE trust James Hardie Industries set up for asbestos disease victims plans to sue the company under US anti-racketeering laws enacted to fight the mafia, described as a legal “neutron bomb” that could triple damages payouts.

The trust has contacted US plaintiff lawyers to develop a case alleging that Hardie engaged in a pattern of fraudulent behaviour to deny compensation to future sufferers of its asbestos products.

The move follows the release last week of the Jackson report, which found that the company knowingly underfunded the trust, the Medical Research and Compensation Foundation, by up to \$2 billion.

The foundation’s lawyer, Nancy Milne, from law firm Clayton Utz, told *The Australian* yesterday the suit could be filed under the US Racketeer Influenced and Corrupt Organisation Act.

The US Congress passed the RICO Act in 1970 to destroy the mafia, and prosecutors successfully used it against organised crime figures including Gambino family don John Gotti.

In recent years, RICO has been taken up by plaintiff lawyers, including against tobacco firms, because if a civil damages suit is won and racketeering proved, it provides for a trebling of the damages award.

“It’s the neutron bomb which you throw into litigation,” said Sydney-based US law expert Warren Scott, a partner at firm Coudert Brothers.

Hardie derives about 75 per cent of its revenue from the US and is subject to US law because it is listed on the New York Stock Exchange.

The foundation’s move comes ahead of critical negotiations, starting in Sydney tomorrow, between Hardie and unions and asbestos disease support groups over a compensation deal for future victims.

Ms Milne said the foundation was “certainly exploring actions in the US”, but that a preferable outcome would be for the negotiations to result in a settlement.

Mr Scott said US plaintiff lawyers used RICO to increase pressure on a company to settle, since it presented the prospects of a court case with prolonged public exposure of

alleged criminal activity and massive financial penalties if successful.

He said the legal technique involved “attaching” the RICO provision to the original claim for damages. To succeed, plaintiffs had to prove a pattern of criminal activity.

In his report, Mr Jackson found evidence that Hardie chief executive Peter Macdonald breached criminal laws when, in 2001, he issued public statements he allegedly knew to be untrue, saying the MRCF would be “fully funded” with \$293million.

Mr Macdonald -- who proclaims his innocence -- stepped aside from his position on Tuesday, as did the company’s chief financial officer, Peter Shafron, who was also criticised by Mr Jackson.

Hardie separated itself from its main asbestos liabilities in 2001 through the creation of the MRCF and a corporate restructure that involved the company moving its head office to The Netherlands.

Mr Jackson quoted Mr Shafron remarking in strategy papers ahead of the restructure that some US companies had separated from their asbestos-producing subsidiaries.

“But any attempt at reorganisation that does not leave significant assets for the asbestos claims will, at a minimum, spawn lengthy and costly litigation,” Mr Shafron wrote.

He cited two such cases in the US, in which companies had been alleged to have engaged in “fraudulent conveyances”, or separating assets to thwart potential claimants.

One company, Raymark, settled a class action involving 19,684 plaintiffs.