

Better the devil you know for Hardie

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A LOT that is happening in the stand-off between James Hardie Industries, the unions and victims' groups is just background noise, posturing and backside-covering. The inability, however, of the key participants to lock down an agreement-in-principle on the terms and conditions under which Hardie will fund claims against over the next 30 years has generated uncertainty and instability.

The reality of Hardie's position is that it has no choice but to fund the claims and very little ability to finesse the terms. Either it accedes to the demands of the unions and victims or the NSW Government, and other governments, will legislate and impose a statutory liability on the company. Any agreement negotiated commercially and voluntarily with the unions and victims would almost certainly be superior to a statutory scheme.

The knowledge that they have the big guns primed on the sidelines explains why the unions and victims have taken such a hardline stance in the negotiations and have imposed rigid deadlines (one of which appears to have passed yesterday afternoon without yet triggering explosions) for Hardie to agree the terms of its surrender.

Hardie's unwillingness to accept the hopelessness of its position probably relates to its need to demonstrate to the market, and its own shareholders in particular - they will have to ratify the deal - that it has fought as hard as it could to reduce the impact of the funding on its profitability and prospects and struck the best available deal.

That explains why the stumbling block in the negotiations has been Hardie's insistence that there should be structural changes to the claims processes to make them more efficient.

There is a lot at stake. With the estimated present value of future claims at about \$1.5 billion, legal costs alone are \$410 million, or about 27 per cent of the total costs. If those could be reduced by about seven percentage points, Hardie would save \$100 million. If they were reduced to close to best practice, the savings would be closer to \$200 million.

Ironically, both the ACTU and NSW Government accept the process should be more efficient. They understand it is in victims' interests that Hardie be viable for the next 30 years and that the burden of underwriting the claims should be as light as is feasible.

Hardie wants to know what it is committing itself to before it signs.

The Hardie position, given the alternatives available to the unions and government, is

unsustainable. At least it knows what the maximum cost ought to be, which provides a reasonable starting point given that it won't be entering into an unconditional deal.

There is no doubt Hardie will eventually agree to pay up - unless the behaviour of third parties derails the process.

The scary headlines this week warning Hardie victims may receive only cents in the dollar if the Medical Research and Compensation Fund - which has responsibility for administering and paying claims against Hardie - is successful in its application to the courts next week to have a provisional liquidator appointed were unnecessarily alarmist.

A provisional liquidator isn't a liquidator. The appointment of a liquidator would be alarming, given that in liquidation future claims would have no standing . That isn't, however, in contemplation and probably wouldn't be countenanced by the courts given that MRCF has two years of funding available to it and talks between Hardie and the ACTU will produce permanent funding.

The appointment of a provisional liquidator might, in fact, be helpful if it removes the board of MRCF from the picture. The concern of MRCF directors about their potential liability if future claims aren't met appears to be misguided, given that the courts have said future claimants aren't creditors and have also been ratifying existing payments retrospectively.

The fear of their own liability, shared by the directors of ABN 60, the vehicle which held much of the foundation's funding, is creating distraction and instability. Hardie has guaranteed indemnity to ABN 60 directors and the foundation funding. The courts have supported continuation of MRCF's payments to existing claimants.

There should be no reason for either entity to unsettle and distort the core process of achieving Hardie's commitment to the terms of future funding and securing the position of the key group in this process, victims.

Hardie is going to pay, in full, over time because it knows the alternatives are worse. It is better off having some influence, however modest, than risking the vagaries of the political process and the the type of statutory terms and conditions that might be imposed in the environment created by a complete breakdown in negotiations.

Given time and space, however, Hardie, the unions and victims groups should eventually get there because their mutual interest in a deal ought to be so much stronger than their mutual distrust and even, for some, loathing.

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