

A billion-dollar case study in poor judgement

ANALYSIS by Elisabeth Sexton

22 December 2004

The Sydney Morning Herald

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Three weeks ago James Hardie Industries ran advertisements declaring “there are two sides to every story”, but there is only one angle to yesterday’s news: it is a triumph for community pressure.

James Hardie billed the deal as “the largest-ever voluntary compensation offer made in Australia’s history”. That is probably true, but it is not a mark of the company’s generosity. It indicates the depth of its misjudgements since early 2001. Still, it will long be remembered as providing a new benchmark for corporate ethics. In business jargon it is an example of “corporate social responsibility”, and James Hardie will be an enduring case study.

This is a company that six months ago was still insisting it had no intention to pay and that the directors’ duties to their shareholders prevented them from doing so. Victims of asbestos diseases, unions and every political party in the country could not believe their ears. If a company profited for 80 years from selling asbestos products, surely it should compensate people who contract terminal illness from them?

James Hardie’s long refusal provoked a tenacious grassroots campaign that fully justified the lively celebration that erupted outside the NSW Government offices yesterday.

The deal was also a victory for the ACTU secretary, Greg Combet, who got what he called “a hospital pass” from the Premier in September: the job of striking a deal even though a special commission of inquiry found the company had no legal obligation to pay.

With the Federal Government preparing for all-out assault on union power when it gains control of the Senate in July, Combet was in the market for a chance to demonstrate the ACTU’s continuing relevance. He needed a big, public, popular win. He got it yesterday.

“I call him Greg Combat,” said the prominent asbestosis sufferer Bernie Banton. “That’s because he’s down in the trenches with James Hardie.” Returning the compliment, Combet said Banton - who had a seat at the negotiating table beside him - “has been there every day and has lent to this entire process a decency and humanity that was sorely needed”.

The blunders began in 2001 when James Hardie set up a foundation to handle asbestos compensation with starting assets of \$293 million, barely a fifth of what it now expects to

pay. The head of this year's special commission of inquiry, David Jackson, QC, found the directors relied on a "wildly optimistic" report. While the directors were entitled to rely on a report from management, Jackson said: "Surely at least one director might have actually read the report which was said to indicate the level of the asbestos liabilities."

Instead of focusing on how much was needed, the board just set aside "the cheapest provision thought marketable".

The foundation told the company in April 2001 it had got it wrong. The first offer to fix it (with a long list of conditions attached) came more than three years later.

Yesterday Combet made the obvious point that the directors should have seen in 2001: "We simply don't know how many people will be unfortunate enough to get asbestos diseases from James Hardie products."

Asked if the deal would provide enough money, he said "no one can answer that with certainty at this time". But sufferers of diseases caused by James Hardie products can now look forward to their claims being treated the same way as cases against any other manufacturer of asbestos, such as CSR, or big asbestos users, such as BHP Billiton, power utilities and the navy.

Just as with other corporate defendants, the claimants can never be sure that James Hardie's business success will endure so that it is around in 10, 20 or 50 years to pay their compensation. The agreement tries to increase its durability by putting an annual cap on how much of the company's cash flow can be diverted to asbestos claimants.

But there is no solace for shareholders that they can be certain what the limit of their total contribution will be.

The company is correct when it points out that until now, no sufferer of an asbestos disease caused by its products has gone uncompensated. The foundation still has about \$125 million, enough to last until 2007.

But the prospect of the money running out 40 years and \$1.5 billion early caused great anguish to people diagnosed with at best debilitating and at worst swiftly fatal diseases. Hellicar, a director since 1992 and in the chair since August, apologised again yesterday, and repeated her comment to the annual meeting in September. "In retrospect, we could have responded differently, and more quickly."

As for shareholders, they are back where they were before the foundation was set up: diverting a rising and ultimately unknowable portion of the company's wealth to asbestos creditors.