James Hardie's asbestos fund running on empty
Marcus Priest
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The directors of the company created by James Hardie to compensate victims of asbestos disease are threatening to have it wound up within weeks following the shock revelation that it will run out of money to pay claims by April next year.

Unless James Hardie and union representatives can resolve the Medical Research and Compensation Foundation's $1.5 billion funding shortfall by Saturday, the directors say they will apply to the NSW Supreme Court early next month to have the foundation put into provisional liquidation.

This would have the effect of stopping payments from the foundation, triggering a new crisis for unions and asbestos claimants battling to secure more money from James Hardie for current and future victims.

They have also been angered by James Hardie's decision to make termination payments of more than $US7.3 million ($9.8 million) to former chief executive Peter Macdonald and former finance chief Peter Shafron after they resigned on Friday.

A letter to James Hardie chairman Meredith Hellicar from MRCF managing director Dennis Cooper, obtained by The Australian Financial Review, says the bleak outlook for the foundation is based on a review of the expected cash flow position until April 2005 and in the longer term.

"The position is that, if the present trends continue, the foundation has sufficient funds to meet compensation payments and its other operating expenses until about April 2005, at which time the foundation is expected to run out of funds," Mr Cooper said.

"If claims accelerate, cash would run out earlier."

Previous estimates had the foundation running out of money within three years.

Pressure is now mounting on the federal government to act on its promise made during the election campaign to not "stand by" and watch a company avoid its liabilities.

But the chances of resolving the deadlocked negotiations appear remote.

James Hardie made its first offer of settlement in the middle of last week, before it agreed to pay Mr Macdonald and Mr Shafron their severance payments.

The company has moved away from its proposal for a statutory scheme and is now prepared to accept allowing victims to pursue compensation through the existing common law claims system, via the Dust Diseases Tribunal.

The company would make yearly payments to a fund, possibly the MRCF, and the level of the payment would be determined by an annual actuarial review.

But there would be large financial penalties for plaintiff lawyers if they reject, on behalf of their clients, an offer that is later determined to be the appropriate amount of compensation.

The company's annual liability to the fund will be enforceable against James Hardie's Dutch parent company, which was formed as part of its 2001 restructure.

James Hardie's proposal also includes timelines for the settlement of claims, the provision for independent medical assessments and for the mediation of claims.

But negotiations are believed to have been delayed by the MRCF's failure to provide up-to-date claims data.

While Ms Helicar declined to comment yesterday, a spokesman said the company had asked for further financial information from the MRCF, but it had not been forthcoming.

"The company would like to point out that we have sought to meet the MRCF on several occasions and they have not seen fit to do so," the spokesman said.

He said the offer the company put to the Australian Council of Trade Unions was not a final offer and it was planning to give more details of its offer today.

But the ACTU has rejected the offer.

"We still have not resolved key issues with James Hardie and there is now a seriously tight time line to get a resolution on the key issues," ACTU secretary Greg Combet said on Friday.

Sources said there were concerns the company appeared to be regularly "flip flopping".

"It is not clear who is making decisions and who has responsibility," one source close to the negotiations said. "They don't appear to have done any work. It is really quite frightening, and there is a disconnect between the head office [in the US] and Australia."

The acting president of the Asbestos Diseases Foundation of Australia, Bernie Banton, said it appeared James Hardie directors were taking a long time to come to grips with the problems facing the company. "The negotiations have been typical of Hardie's," he said.

"When you go to the Dust Diseases Tribunal with James Hardie and their lawyers, they have to be grabbed by the throat and dragged kicking and screaming, and this is nothing different from any negotiations."

In order to put more pressure on James Hardie to reach a settlement, NSW Premier Bob Carr this week may announce legal action against the company to try to unwind its restructuring in 2001 when it moved to the Netherlands. The action may also reverse the company's cancellation of $1.8 billion worth of partly paid shares, which contributed to the MRCF's underfunding.

The NSW Attorney-General Bob Debus has sought legal advice on the restructure from inside and outside his department, and that advice is due this week. He is also awaiting advice on whether James Hardie legal adviser, Allens Arthur Robinson, misled the Supreme Court in 2001.

The following week, the nation's attorneys-general are expected to discuss possible federal laws to pierce the corporate veil.

The MRCF's financial position has been made worse by the refusal of the old Australian James Hardie shell company, ABN 60, to make an expected payment of $85 million to the foundation unless the MRCF affirms an indemnity for ABN 60 from future legal action by the MRCF.

The MRCF has refused to affirm this indemnity because it believes it has reasonable legal causes of action against ABN 60.

In addition, the MRCF has been unable to convert one of its assets into a lump sum: an old James Hardie converted insurance policy with QBE, under which QBE has been paying $23 million in instalments.

QBE will not pay in a lump sum.