

Rough justice: even at the end, the road was potholed

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On September 21 the Premier, Bob Carr, handed the job of achieving justice for victims of asbestos diseases to the ACTU secretary, Greg Combet. Carr made it sound straightforward.

“[James Hardie]’s got the money,” he said.

“The money was earned from the trading of asbestos products. The money should be with the victims, and there needs to be a negotiated settlement.”

In fact, if a deal is struck this week it will be a remarkable achievement.

For at least a decade James Hardie has received advice from the top law firm Allens Arthur Robinson and some of Sydney’s best barristers that it had no legal obligation to meet the debts of its subsidiary companies. This included debts to people dying from cancer caused by the products of two asbestos-manufacturing subsidiaries. It applied before and after the subsidiaries were transferred to a new foundation in February 2001. It applied if the foundation ran out of money. That advice withstood the scrutiny of this year’s seven-month special commission of inquiry by a Sydney QC, David Jackson.

Although James Hardie was first alerted to a looming shortfall in the foundation’s funds in April 2001, it was not until Jackson’s inquiry was under way that the company sought a second opinion from KPMG Actuaries.

In July, three years of insistence by James Hardie that the directors’ duties to their shareholders prevented them topping up the foundation’s funds suddenly went out the window.

When KPMG delivered a report saying the position was even worse than the foundation had feared, the directors discovered a “moral obligation” to meet the bill.

But their offer was highly conditional and immediately criticised by unions and asbestos support groups.

By running a tough public investigation that exposed a corporate culture unable to see beyond its legal advice and shareholders’ rights, Jackson provoked the company’s initial offer to pay.

The challenge Carr handed Combet was to remove the conditions - and strike a deal acceptable to the noisiest interest groups.

The Premier's refusal to negotiate himself meant that if the outcome was unpalatable, the unions could not blame him. Nor could asbestos support groups, because Carr also gave a seat at the table to their prominent advocate, the former Hardie employee and asbestosis sufferer Bernie Banton.

The manoeuvre also left room for Carr to come in with a fall-back deal, which Jackson's report indicated might be needed.

The barrister concluded that suing James Hardie was unlikely to produce much by way of damages, and new laws forcing the company to pay were unlikely to stick in its home since 2001, the Netherlands.

When the talks began on October 1 the company was rock-solid in its conviction that it could not be forced by litigation or legislation to pay. It would therefore pay on its terms - chiefly, a big reduction in the legal costs of delivering compensation.

Jackson had some sympathy. Streamlining the court-based system could "have a significant impact on legal costs", he said.

However, he was concerned that James Hardie's proposal would transfer some costs to claimants by having them pick up some of the legal costs or take extra risks in pursuing cases with more than one defendant.

He also had reservations about the company's desire to limit increases in damages awards.

"Changes in medical knowledge, leading to new treatments and longer life expectancy ... may increase damages at a rate higher than ordinary inflation," the report said. "It would be inappropriate to shift the burden of those costs from James Hardie to claimants."

The company did not take the hint; it pushed for various ways of achieving savings. One was a guaranteed cut in legal and administrative costs from the 26 per cent of total claim costs to 10 per cent. Another was that increases in medical expenses be limited to the consumer price index plus 2 per cent; a third was that total claim costs not rise by more than an agreed inflation index. It also proposed that a panel assess each case, with access to the courts a last resort.

Combet publicly declared these demands "an impasse", and they came off the table when Carr ordered a Government review of the efficiency of the compensation system.

Jackson concluded that when James Hardie set up the foundation, in February 2001, it set aside "the cheapest provision thought marketable".

If the company agrees this week to meeting all legitimate claims at levels awarded by the courts and accepts that its only savings will come from the Government review, it will not

be a cheap deal. James Hardie's long road to rehabilitation can begin.

THE HARDIE WRIGGLE

February 16, 2001 James Hardie transfers two former asbestos-producing subsidiaries to the new Medical Research and Compensation Foundation .

"... This has effectively resolved James Hardie's asbestos liability." — CEO Peter Macdonald

October 29, 2003 The foundation says it will run out of money by 2007, leaving a shortfall of \$800 million.

"There can be no ... legitimate basis on which shareholders funds could be used to provide additional funds." — Mr Macdonald

February 25, 2004 Bob Carr appoints David Jackson, QC, to head a special commission of inquiry.

"We don't see any circumstances under which we would be obliged to supplement existing funds." — Mr Macdonald

July 14, 2004 James Hardie directors say they will recommend that shareholders make a voluntary contribution to meet the \$1.3 billion shortfall.

"This ... represented a radical departure from the position taken at the commencement of the inquiry." — Mr Jackson in his September report

August 12, 2004 The company says its offer would cover the number of people who fall ill as estimated in a new expert actuarial report. This "provided for a clear limit on the number of victims who would be compensated." — David Jackson

August 13, 2004 (last day of the inquiry): The company removes the limit on the number of victims, but declines to elaborate on how much each claimant would receive. "The intended meaning is a little elusive," Jackson said, pointing out that it was unclear whether the company intended victims to bear the cost of any future medical breakthroughs, or a greater proportion of legal costs than at present.

November 18, 2004 The NSW government announces a review of the costs of the asbestos compensation system.

"The review will not consider reforms to existing arrangements which would impact on the rights of victims or their compensation payments," — NSW Premier Bob Carr

December 8, 2004 The company issues a bulletin to shareholders about its intentions to

ensure that all legitimate claimants are paid, acknowledging “the number of claimants and the amounts that the courts may award cannot be known specifically at this time”.