

## **Hardie finally accepts grim reality**

*Four years on, the company at last looks like doing the right thing, writes Ean Higgins*

*The Australian*

October 02, 2004

NEARLY four years after it hived off its nagging asbestos disease liabilities without enough money, creating one of the biggest corporate scandals in Australian history, James Hardie Industries is back to square one.

The company is set to virtually capitulate and do what it failed to do originally, and refused to do at several subsequent opportunities: make sure every future victim of the ghastly diseases its products create gets fair compensation decided by the courts.

The company has faced the political reality that the sort of scheme it originally wanted, in which the NSW Government would create a statutory tribunal where victims would appear without lawyers, and payouts to victims would be frozen at current levels adjusted for inflation, is dead in the water.

Yesterday, on the first day of talks with unions and asbestos group victims aimed at reaching agreement on a future funding scheme, Hardie chairman Meredith Hellicar said "we're not wedded to the mantra of a statutory scheme".

She has also indicated the company will not insist on a formula involving caps or cuts. The goal was "a proper solution for victims, a proper solution for shareholders, and a successful company going forward".

At press conferences during a break in the meeting in Sydney yesterday, both sides said they had made progress in establishing the outline for a long process of negotiations. "This is getting the skeleton. A lot of flesh has to go on those bones, but the structure is sound," vice-president of the Asbestos Diseases Federation Bernie Banton said. ACTU secretary Greg Combet said there was no way his side would accept a statutory scheme.

The almost certain outcome is that, with some modifications to reduce legal costs, possibly new regulations to streamline the existing court-based common law system, Hardie will regularly shell out a portion of its handsome profits to meet its asbestos liabilities.

At current levels, that would be about \$60million to \$70million per year, the amount paid out by the trust Hardie established in 2001 to meet its future asbestos liabilities, the Medical Research and Compensation Foundation. Against this figure, Hardie made a net operating profit of \$US125 million (\$173 million) last financial year and expects much higher profits this year. With some cost-saving, it is a painful but do-able scenario. The MRCF started with \$293 million in assets, but will run out of funds in about two years, leaving thousands of future victims exposed.

Back in 1989, Hardie's competitor, CSR, took exactly the course that Hardie is finally being forced into, and now comfortably pays its asbestos liabilities. Last financial year CSR made a \$160 million profit and paid out \$24.7 million in product liability claims. It has made provisions for \$324 million of asbestos claims in the future. One industry observer said: "CSR is managing it well, whereas Hardie took a different approach."

By contrast, Hardie is now facing potentially dire consequences because it wanted to separate itself from its Australian asbestos liabilities to appeal to investors in the US, now its biggest market. Its highly effective chief executive Peter Macdonald has stepped aside and could face possible criminal prosecution, after a NSW inquiry found evidence he misled the stock exchange, an allegation he denies. The entire board and senior management are under investigation by the Australian Securities and Investments Commission.

The prize Hardie sought from the restructure — a move to The Netherlands for tax purposes and a listing on the New York Stock Exchange — has been won financially, but it has been tarnished. The Dutch Government is inquiring about how it allowed Hardie to come to its tax haven, and officers at the New York Stock Exchange are believed to be leafing through the damning 600-page report of David Jackson QC's inquiry into the fiasco.

“We continue to monitor the company for disclosure and we have ongoing discussions with the company,” NYSE spokeswoman Diana Desocio said this week, while making clear there was no formal inquiry.

The all-powerful US Securities & Exchange Commission will not confirm whether it has launched an investigation, but NSW Premier Bob Carr this week urged it to do so.

Carr and former Hardie managing director David Say both said the company simply refused to learn the lesson: regardless of its legal position, it faces a moral responsibility and an overwhelming public demand to make up for the shortfall generally put at about \$1.5billion, but possibly up to \$2billion, in the MRCF.

The portion of legal costs here are the subject of debate, with estimates ranging from 17 to 40 per cent of the total compensation package. But some defendants say they need not be enormous, if dealt with properly. An executive with one of the many Australian companies and government authorities that have to deal with asbestos claims said legal costs in a typical \$250,000 payout would be about \$10,000 to \$15,000 on his side. The plaintiff's costs, he said, might be a bit more. He said his organisation settled about 90 per cent of cases without a court verdict.

Lawyers for both unions and companies have proposed some similar ideas for cutting costs within the existing system. One suggestion is to require the parties to exchange all relevant material at the outset, rather than in court.

A second idea would be for a plaintiff to have to present the case to a specialist barrister, who would make an objective assessment of what typical payout would be, and allow for some potential penalty on costs if the plaintiff did not accept it and received a lower amount from the court.