**Parliamentary Joint Committee on**
**Corporations and Financial Services**

**Inquiry into corporate responsibility**

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## A. INTRODUCTION

1. This supplementary submission has two purposes. First, it elaborates some reform options that the writer considers are available to the Committee under its Terms of Reference relating to the legal duties of directors. The possibility of this elaboration was anticipated in the writer's primary submission. The second is to reflect on the James Hardie restructuring in light of the conditional settlement formalised since the primary submission was lodged in September 2005. The writer argues that this restructuring raises questions directly relevant to this inquiry and important to resolution of the issues before it. Indeed, the issues raised by the James Hardie restructuring appear to have been the moving cause of the parallel inquiry by the Corporations and Markets Advisory Committee (CAMAC) into CSR and directors' duties if not the Parliamentary Committee's own inquiry. These two concerns of the supplementary submission are closely connected.

2. Attached to this supplementary submission, as an Appendix, is a summary account of the Hardie restructuring, its background and the 2005 settlement.

## B. SHAREHOLDER PRIMACY AND THE PROBLEM OF SOCIAL COST

3. The legal responsibility issue posed by the James Hardie restructuring should not be seen primarily in terms of parent company liability for its subsidiary's torts. At the base of this question is a wider one: might the James Hardie directors have lawfully applied its funds to meet the deficit in funding of compensation claims against its asbestos subsidiaries? Did the duties imposed on directors and managers preclude them from doing so and obscure the human dimensions of the issues before them? What are the social costs of shareholder primacy?

### The justification for shareholder value maximization

4. Fiduciary duties are imposed on directors and managers to ensure the company is run in shareholders' interest. Company law also gives shareholders a bundle of rights

with respect to the governance of the company and does so exclusively. These comprise voting rights (including the right to appoint the directors), the right to transfer control of the company through the sale of their shares and the right to enforce directors' duties and other governance rights. This privileged status is often justified on the basis of shareholders' superior capacity through portfolio diversification to bear the risk of enterprise failure. Shareholders are the ultimate risk bearers in the firm in that their financial claims are postponed to those of creditors in the winding up of the company; further, it is argued that their entitlement to surplus income during the firm's life, within limits protective of creditors, gives them an incentive to ensure that the firm's resources are used efficiently. Second, it is argued that other stakeholders may protect themselves by contract.[1] These and other justifications for corporate law's shareholder orientation are disputed on several grounds.[2] Present attention is upon one negative consequence of the exclusive shareholder focus evident in the James Hardie imbroglio, namely, its incentive for corporations to externalize (that is, impose on others) some costs of their operations.

**The structural incentive to externalize enterprise costs**

5. There are costs to the legal model that defines the interests of the company solely in terms of the collective interests of shareholders and which permits recognition of non-shareholder interests only where they advance shareholder value. However, it is the legal structure of the corporation itself, and not governance rules alone, that encourages externalization of the risk and costs of enterprise. Limited liability itself creates a moral hazard through its incentive to externalize enterprise risk. The combined effect of separate personality and limited liability doctrines within corporate groups is to encourage shifting of the costs of operations away from shareholders and onto stakeholders or wider society, perhaps especially those stakeholders with the non-transferable investments of human and other capital that employees, suppliers, and local communities often develop in a particular firm. Legal structure favours the externalization of enterprise costs through the simple calculus of self-interest: limited liability and the shareholder value focus encourage the corporation and its managers to isolate a risky activity in separate corporate

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[1] See, for example, F H Easterbrook & D R Fischel, *The Economic Structure of Corporate Law* (Cambridge, Mass: Harvard U P, 1991), pp 11, 28-39.

[2] See, eg, G Kelly & J Parkinson, "The Conceptual Foundations of the Company: A Pluralist Approach" in J Parkinson, A Gamble & G Kelly, *The Political Economy of the Company* (Oxford: Hart Publishing; 2000), p 113 (non-shareholder stakeholders are also exposed to residual risk and should be represented in corporate governance structures); D Millon, "Communitarianism in Corporate Law: Foundations and Law Reform Strategies" in L E Mitchell (ed), *Progressive Corporate Law* (1995), p 4 (bargaining by non-shareholder stakeholders to protect rights is infeasible as a general norm and should not be the true measure of their entitlement under corporate law); M M Blair & L Stout, "A Team Production Theory of Corporate Law" (1999) 85 Va L Rev 247 at 278 (shareholder primacy is inadequate to secure the buy-in necessary for effective team production).

structures, and thereby insulate group assets from the risk of its failure, and to slough off other costs of enterprise that it can avoid internalising. While some interests will be protected by contract or specific protection, it is fanciful to think that all of the costs of corporate operations will be imposed by legislation upon the corporation; there will inevitably be a time lag in legislation and gaps in its reach. Legislation is slow to be introduced and slow to be adjusted; it relies on minimum rather than aspirational standards. In addition, the inevitable barriers to and costs of enforcement create opportunities to disregard legal obligations. If a company voluntarily assumes social costs that it might effectively externalize, it risks its long-term survival against competitors who do otherwise.

6. The James Hardie restructuring demonstrates the opportunity presented by the combined operation of these doctrines to shift and confine enterprise risk. That the group was ultimately unsuccessful in shifting enterprise costs onto victims and government was due to the extraordinary community and political pressure brought to bear on the company, and not any protection afforded by corporate law. Rather, corporate law created the social problem that was resolved by exogenous means.

7. The narrower moral compass of the corporation also favours externalization of enterprise costs. For individuals the press of self-interest is moderated in varying degrees by the sense of personal responsibility for actions; in corporations, individual moral restraint in often blurred by the demands of corporate role and lost in the anonymity of group decision and action. This is not to suggest that corporate officers and other employees are morally deficient relative to the rest of society. It is simply to recognise the group character of corporate decision-making and the consequent inevitable diffusion of individual responsibility for decisions and action taken with many inputs. That is compounded where the ultimate purpose of group action is conceived simply in terms of an abstract standard such as shareholder value maximisation.

8. As noted in the primary submission, these problems are also compounded in relation to transnational enterprise in host countries with relatively powerless governments and poor institutions for legal enforcement, difficulties accentuated by the mobility of and competitive auction for foreign investment capital. Economic liberalisation offers wider opportunities for externalization under these power differentials since globalisation simultaneously integrates on the economic dimension and fractures on the political.[3]

[3] W H Reinicke & J M Witte, "Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords" in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, pp 77-78 (D Shelton ed, 2000) ); see generally P Redmond, "Transnational enterprise and human rights: Options for standard-setting and compliance" (2003) 37 *International Lawyer* 69.

**The influence of directors' duties in Hardie's decisions**

9. Through the long process of discussing restructuring models, Hardie's directors and managers were persistently advised that "directors could not provide … more than that for which JHIL was legally responsible, without honestly believing that … what they were doing was of benefit to JHIL's shareholders".[4] When the Foundation's funding had been clearly revealed as inadequate, the company justified its refusal to augment funding on the grounds that "there can be no legal or other legitimate basis on which [JHIL] shareholder's [sic] funds can be used to provide additional funds to the Foundation and the duties of the company's directors preclude them from doing so".[5] Like advice was earlier given that directors' duties would prevent provision for future claimants.[6] James Hardie received first-tier legal advice; it is not unreasonable to assume that such advice is given in other Australian boardrooms in like contexts. With such advice it is not surprising that the decisions taken by James Hardie directors were made. Three stand out for particular scrutiny of the inhibiting influence of directors' duties and the thrall of shareholder value.

10. The first was the decision taken to cut the asbestos subsidiaries adrift without adequate funding to meet future claims. The company asserts that the underfunding was unintentional. Yet, separation had been under consideration for a number of years when the decision was taken in February 2001 to eliminate the subsidiaries from the group. The board's focus, and that of management which was actively pushing the separation, was not on the needs and interests of asbestos victims but the financial advantage to be obtained by separation. It is difficult to resist the conclusion that Hardie management, at least, were aware of the inadequacy of the Foundation's funding.[7] As for the directors, the Commissioner noted that:

> nothing was contained in the Board Papers that would provide any satisfactory basis for identifying what those liabilities might be. One gains the clear impression from the Board Papers that the Board was being urged to go ahead with separation, to bite the bullet and get it over with, whatever might be the likely true level of such liabilities.[8]

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[4] *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation,* D F Jackson QC, Commissioner, September 2004, para 2.1 (here cited as the "*Jackson Report*"), para 14.45 (d) (testimony of chair of the James Hardie board).

[5] *Jackson Report*, para 30.22, quoting media release of October 2003.

[6] G Haigh, *Asbestos House: The Secret History of James Hardie Industries* (Melbourne: Scribe; 2006), p 211 quoting legal advice to the board: "Directors need to be cognisant of the rights and interests of shareholders who could legitimately argue that it is not part of the business of the company to give money away to unproven potential creditors or to lock up capital indefinitely".

[7] See Haigh, n 6, p 264.

[8] *Jackson Report*, para 14.29. The Commissioner also found that "there was an absence of any substantive discussion in the Papers on the actual amount of the asbestos liabilities" (para 14.13). The chief executive's observations accompanying the papers acknowledged that

11. Second, even if the initial underfunding was unintentional, the Foundation quickly informed Hardie of the inadequacy. Yet, for over three years, Hardie obdurately refused to supplement funding. It made its first, limited, offer in July 2004, for a statutory scheme that would cap claim numbers and payouts. Third, the decision to cut the potential funding lifeline for asbestos victims constituted by the partly paid shares in JHIL held by JHI NV. For this release of an obligation of $1.9 bn, JHIL received no advantage. Of course, JHIL itself was then buried in a second foundation created for the purpose.

12. Each of these decisions was driven by the interest of Hardie shareholders. What is missing in each is a concern for their effect upon those injured by past asbestos operations. That effect was profound and direct. The issues before directors and managers posed are seen in terms of the legal construction of the social reality of the situation, rather than in terms of their effect on individuals whose lives have been or will be painfully diminished by making or using the group's products. The human lives affected by the decisions are obscured from view, not part of the utility calculus except in so far as they may generate adverse governmental action. The legal imperatives of directors' duties and shareholder value, no less than those of separate personality and limited liability, conspired to obscure the human dimension of the problem. Their logic diminished the range of perspectives brought to the board table and displaced concern for the human consequences of the decisions. That none of the directors and managers had any personal connection with or responsibility for Hardie's asbestos past does not excuse their collective tunnel vision; it may, however, have contributed to the depersonalised consideration given to the issue.

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"current and potential liabilities have the potential to exceed their [viz, the subsidiaries] net worth" (quoted in para 14.13).

**Do the directors' duties permit them to fully fund the Foundation?**

13. Did directors' duties compel directors to the decisions they took, in accordance with the legal advice given? Might the Hardie directors have lawfully made a commitment to adequate funding of the asbestos subsidiaries in 2001? As noted in the primary submission (paras 15-22), directors must act bona fide for the benefit of the company as a whole. One aspect of this duty, under the general law and the statutory supplement in *Corporations Act* 2001 (Cth) s 181, is to consider and act by reference to the "interests of the company": it is the duty of directors of a company "to consult [the company's] interests and its interests alone" in their decisions.[9] Surprisingly, in view of the importance of the question, there is a rather exiguous body of case law that identifies whose interests are "the interests of the company". This case law points to the company's interests being those of current shareholders considered as a group; they do not include the interests of the company as a commercial entity.[10] Directors may consider and advance other stakeholder interests only where they are not inconsistent with those of shareholders as a group.[11] Thus, in *Parke v Daily News Ltd* in 1962, a company sold its two newspapers which had been making substantial losses over a long period. The sale would dispose of substantially all of the company's assets and result in the redundancy of the overwhelming majority of its employees. The directors proposed to apply the balance of the sale money as *ex gratia* payments to workers made redundant by the closure of the plant. (Redundancy payments were not required by award, industrial agreement or legislation.) The court restrained the payment. Plowman J in the Chancery Division said that:

> The view that directors, in having regard to the question what is in the best interests of their company, are entitled to take into account the interests of the employees, irrespective of any consequential benefit to the company, is one which may be widely held. … But no authority to support that proposition as a proposition of law was cited to me; I know of none, and in my judgment such is not the law.[12]

14. The position then is that directors' duties do not prevent directors and managers for having regard to stakeholder interests. Sometimes, solicitude for those interests will

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[9] *Walker v Wimborne* (1976) 137 CLR 1 at 6 per Mason J.
[10] *Ngurli v McCann* (1953) 90 CLR 425 at 438-439.
[11] However, since the 1980s a clear body of case law requires that creditor interests supplant those of shareholders where the company is facing the threat of insolvency: see *Kinsela v Russell Kinsela Pty Ltd (In Liq)* (1986) 4 NSWLR 722; *Nicholson v Permakraft (NZ) Ltd (in liq)* (1985) 3 ACLC 453.
[12] [1962] Ch 927 at 962. The judge relied upon the 1883 decision of the English Court of Appeal concerning gratuitous corporate payments in *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 at 671: "There is … a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose."

be necessary in the interests of shareholders. Often there will be a derivative benefit to shareholders from action that benefits other stakeholders. What the duties appear to preclude is the conferring of benefits upon stakeholders, or acting by reference to their interests solely, where doing so secure no commercial advantage to the company or its shareholders.[13] If Hardie's business were entirely operated in Australia, the voluntary provision of funding to meet the shortfall in the asbestos subsidiaries' resources would have been unproblematic since it was matched by a significant reputation boost for the company that is necessary for its successful business operation. However, with only 15 per cent of revenue arising from Australia, and the company's future even more firmly directed off-shore, it might be argued that the derivative benefit to shareholders is disproportionate to that provided to Australia asbestos victims. When James Hardie ultimately agreed to the compensation settlement, its agreement was subject to approval by its shareholders. Presumably, this was done because stock exchange listing rules require such approval in view of the size of the commitment made in the settlement, rather than because its entry involved breach of duty by the directors that requires shareholder ratification and forgiveness. That question will be clarified when the resolutions to be moved at the shareholders meeting are proposed. Nonetheless, directors' duties require that stakeholder interests must be threaded through the eye of the needle of shareholder value. James Hardie demonstrates the artificiality of this process and the constraints it imposes.

15. But there is a more powerful cultural inhibiter upon directors and managers than their legal duties—the market forces that drive the current shareholder value culture. These forces are discussed in the primary submission at paras 5-9. They underpin the commonly accepted notion that maximization of shareholder value as expressed in the company's share price is the sole purpose of corporate activity and measure of performance. The sharpness of the share price focus in business and investment culture is relatively recent. Until the 1970s or even later, a managerialist ethic prevailed in the United States, United Kingdom and Australia. It assumes that managers enjoy some degree of independence from shareholder control and allows the accommodation of stakeholder interests in their own right. The modern concentration of voting power in institutional investors, the emergence of the hostile takeover and its resulting market for corporate control and the growth of the equity component of executive remuneration all contribute powerfully to this culture.

## C. RETHINKING DIRECTORS' DUTIES

[13] See R P Austin, H A J Ford & I M Ramsay, *Company Directors: Principles of Law and Corporate Governance* (Australia: LexisNexis Butterworths, 2005), para 7.13.

16. In Australia the public response to the hearings of the Jackson Inquiry and the Commissioner's report have generated two parallel inquiries into corporate responsibility, one by the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) and the other by CAMAC. The central issue posed in the terms of reference of each inquiry concerns the recognition that directors and managers should accord the interests of stakeholders other than shareholders, and those of the broader community. As the Committee is well aware, the PJCCFS is asked whether the current legal framework governing directors' duties encourages or discourages this recognition. CAMAC is asked whether the *Corporations Act* should require directors to take into account the interests of specific classes of stakeholders or the broader community when making corporate decisions; alternatively, should the Act be revised to clarify the extent to which directors may take into account the interests of stakeholders or the broader community? Two questions are implicit here:

    - should directors and managers be *required* by law to have regard for the interests of non-shareholder stakeholders and the broader community and
    - if not, should they be *permitted* to do so?

17. The inquiries will address the justification for the exclusive shareholder focus of directors' duties in light, inter alia, of the incentive for externalization of enterprise costs. If the company is not to be run in the interests of its shareholders exclusively, whose interests should govern? Several alternatives are available. Two models might be called pluralist models. A *mandatory pluralist* model would require directors and managers to exercise their powers by reference to the interests of a wider group of stakeholders, according shareholders no special preference; *discretionary pluralism* would permit them to do so. The UK is enacting legislation to give effect to a model of *enlightened shareholder value* which takes an "inclusive" view of shareholder primacy, one in which the corporate purpose lies in maximising of shareholder interests but that is effected by paying proper attention, in the shareholders' interest, to the maintenance of productive relationships with those whose cooperation is necessary for long term commercial success. A fourth model is a narrower version of the discretionary pluralist model in that it would explicitly permit the internalisation of negative corporate externalities even if the cost to the company is not demonstrably supported by corresponding reputational or other advantage. A fifth model would permit directors and managers to act by reference to the interests of the company conceived as a commercial entity. These five models are briefly sketched below.

**Pluralist models**

*The emergence of pluralist models*

18. The most radical alternative is the proposal for a mandatory pluralist model, creating a multifiduciary duty requiring directors and managers to run the company in the interest of all those with a stake in its success, balancing the claims of shareholders, employees, suppliers, the community and other stakeholders.[14] The claims of each stakeholder are recognised as valuable in their own right and no priority is accorded shareholders in this adjustment; their interest may be sacrificed to that of other stakeholders. The discretionary pluralist model would permit, but not require, directors to sacrifice shareholder interests to those of other stakeholders. One or other of these models would formalise the managerialist practice that has been displaced by the current shareholder value culture. In view of their significant common features, they are discussed together here although differences are relevantly noted.

19. Pluralist models are based on a theory of the corporation as community that responds to the harm to which other stakeholders are exposed by a management focus solely upon shareholder interests. Communitarian theories were prompted by the hostile takeover boom of the 1980s in the United States that saw massive plant closure or relocation to extract higher post-acquisition returns for shareholders. To communitarians, these gains are often achieved through wealth transfers from non-shareholders such as lenders whose security is weakened by the assumption of additional debt, employees who have made firm-specific human capital investments over many years, and the local communities whose financial and social investments were made with the expectation of continuing long-term relationship with the corporation.

20. In a permissive form, the pluralist model has been adopted in a majority of States in the United States (but not in Delaware, the seat of incorporation of many major US corporations) which permit (but typically do not require) directors to take into account in decision-making the interests of other stakeholder constituencies and community interests. Approximately, half of these constituency statutes (as they are called) grant the licence only in the context of a hostile takeover or other corporate control transaction; indeed, the licence has principally been invoked by directors in response to an unsolicited takeover bid. Generally, the statutes do not give non-shareholder stakeholders standing to take enforcement action against directors and they make no provision for representation in governance of non-shareholder interests.[15]

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[14] Stakeholders are variously defined as those with an interest in or dependence relationship with the company or, alternatively, as those upon whom it depends for its survival.

[15] See Corporations and Markets Advisory Committee, *Corporate Social Responsibility: Discussion Paper* (November 2005), para 3.2.3; for a summary of constituency statutes, see K Hale, "Corporate law and stakeholders: Moving beyond stakeholder statutes" (2003) 45 Arizona L Rev 823.

21. UK company law has had a provision since 1979, introduced by the Thatcher Government, that, on one view at least, adopts a mandatory pluralist model with respect to one group of company stakeholders, its employees. Section 309(1) of the *Companies Act* 1985 provides that the matters to which directors to "are to have regard in the performance of their functions include the interests of the company's employees in general, as well as the interests of its members." The duty is owed to "the company (and the company alone) and enforceable in the same way as any other fiduciary duty owed to a company by its directors" (s 309(2)).

*The case for pluralist models*

22. There are several arguments made for pluralist models. One rests on concerns as to the feasibility of non-shareholder protection through contract with managers and, indeed, "the corrosive effect [of] interpreting social life as a continuous, self-interested negotiation".[16] The complexities and contingencies of corporate operations and their time scale deny the efficacy of contract as an instrument of stakeholder protection.

23. A second justification asserts that the protective role of law, including company law:

> It asserts that, even if self-protection through bargain were entirely feasible in a technological sense, disparities in bargaining power would prevent at least some non-shareholder constituencies from obtaining adequate protection from the costs of shareholder wealth maximization. This argument appeals to a conception of justice that insists that people are entitled to more than merely what they can bargain and pay for. Or, stating the same idea in terms of obligation rather than entitlement, community members owe each other duties of mutual regard and support.[17]

24. A third justification is offered in efficiency terms. Wealth generation will best occur when participants are encouraged to make the investments of human capital and other resources that will maximise that wealth. These investments are often of a firm-specific type, that is, that are not transferable at full value to another firm. They arise, for example, when employees invest in the acquisition of skills or a supplier commits to a mode of production that are specific to a particular firm. Those commitments may be essential to the firm's success. It is argued that pressures from shareholders and the primacy accorded their interests "have inhibited long-term investment in value-creating internal and external relationships" by other participants in enterprise.[18] The refusal to treat the commitments of non-shareholders as investments

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[16] W T Allen, "Contracts and Communities in Corporation Law" (1993) 50 Wash & Lee L Rev 1395 at 1402.
[17] Millon, note 2, p 4.
[18] *Modern Company Law for a Competitive Economy: The Strategic Framework*, A consultation document from the Company Law Review Steering Group (February 1999), para 5.1.10 (here

deserving the same consideration as those of shareholders destroys the mutual trust and voluntary cooperation that is essential to the "team production" required for value maximising enterprise.[19] Unlike shareholders whose investment risk is reduced through diversification, stakeholders' investments may be highly firm specific. Aggregate welfare—including that of shareholders—is reduced by this disincentive to stakeholder investment.

25. A related argument is that shareholders are no longer, if they ever were, the sole bearers of residual risk of corporate failure.[20] That risk is shared with other stakeholder groups; indeed, denial of recognition of their interests in their own right exposes other stakeholders to the further risk of opportunistic wealth transfers such as occur in takeovers whose financial logic rests on shareholder value generation from redundancies and plant closures. Further, non-shareholder stakeholders often lack the capacity that shareholders have for risk reduction through portfolio diversification; their investments are truly firm-specific, their stake in and relationship with the enterprise may be much greater than that of a transient body of shareholders, where there is a very rapid, high turnover in the company's share register.

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called "*Strategic Framework*") (the Steering Group notes these arguments although it ultimately rejects pluralist approaches); see also Kelly & Parkinson, n 2; S Deakin, "The Coming Transformation of Shareholder Value" (2005) 13(1) Corporate Governance 11.

[19] See Blair & Stout, n 2 ("the primary job of the board of directors of a public corporation is not to act as agents who ruthlessly pursue shareholders' interests at the expense of employees, creditors, or other team members. Rather, the directors are trustees for the corporation itself—mediating hierarchs whose job is to balance team members' competing interests in a fashion that keeps everyone happy enough that the productive coalition stays together" (at 280-281)).

[20] *Strategic Framework*, para 5.1.10.

*Critiques of pluralist models*

26. Pluralist models are vulnerable to criticism on several grounds. The first is that they supply no criterion for the adjustment of conflicting stakeholder interests (the problem of indeterminacy); from the directors' perspective, the model is perceived as one that would leave them confused as to their responsibilities and vulnerable to litigation.[21] In 1989 the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee) considered that "with no firm standard by which to judge directors' actions the law 'abandons all effective control over the decision maker'".[22] If company law were to impose "contradictory duties … directors' fiduciary duties could be weakened, perhaps to the point where they would be essentially meaningless."[23]

27. Second, pluralism is criticised for what is seen as its inevitable concentration of management power: "if managers are empowered to set constituency against constituency, in the end all power will fall into management's hands."[24] Thus, the recent United Kingdom company law review rejected pluralist models on the grounds that, if directors had a *duty* to take other stakeholder considerations into account, this would require a wide discretion to be given to the courts. If, however, directors merely had the *power* to decide whose interests should override those of shareholders, this would confer a broad, and largely unpoliced, policy discretion on directors, funded by the company's resources. The UK review considered that both models seek to achieve external benefits which are often better served by specific legislation which bears on business activity as a whole, such as employment, environmental, planning and fair trading and competition law.[25]

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[21] See "Hardie changes divide lawyers", *Sydney Morning Herald*, 8 November 2004, p 3; American Bar Association Committee on Corporate Laws, "Other Constituencies Statutes: Potential for Confusion" (1990) 45 Business Lawyer 2253 at 2269, cited in Corporations and Markets Advisory Committee, note 15, p 68.

[22] Senate Standing Committee on Legal and Constitutional Affairs, *Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors* (1989), paras 6.46, quoting L S Sealy, "Directors' 'Wider' Responsibilities—Problems Conceptual, Practical and Procedural" (1987) 13 Mon L Rev 164 at 175.

[23] Senate Standing Committee on Legal and Constitutional Affairs, n 22, para 6.51.

[24] R M Green, "Shareholders as Stakeholders: Changing Metaphors of Corporate Governance" (1993) 50 Wash & Lee L Rev 1409 at 1417.

[25] *Modern Company Law for a Competitive Economy: Developing the Framework*, A consultation document from the Company Law Review Steering Group (March 2000), para 3.24 (here called "*Developing the Framework*") <http://www.dti.gov.uk/cld/modcolaw.htm>. The Steering Group also considered that both pluralist models were objectionable since they would enable directors to frustrate takeover bids against the wishes of shareholders where a wider public interest (which might even include the "character" of the company) was though to requires it; the US constituency statutes are designed precisely to confer such a discretion upon directors in the interest of other stakeholders. The Steering Group had other, more technical, objections to the pluralist approach: see *Developing the Framework*, paras 3.26-3.31.

28. There are also issues of legitimacy and competence to be addressed in pluralist models. As a matter of distributive justice, is it fair to treat all stakeholder interests as commensurable so that directors and managers may make the adjustment between them? Are they equipped to make this adjustment which invokes wider criteria than commercial advantage, including social and community impacts and ethical considerations?

29. There is also a range of difficult practical issues. Thus, the Cooney Committee was also troubled by problems of enforcement presented by a duty to have regard to non-shareholder stakeholder interests. If the multifiduciary duty were owed to and enforceable by the company only, as in the case of the directors' duty under UK company law to have regard to the interests of employees, it would be ineffective since there is no mechanism for employees to seek a direct remedy.[26] If the duty was owed to the stakeholders directly, the duties would be "diverse and often directly opposed …[t]he question of who would enforce the duties would also be difficult".[27]

30. The traditional Anglo-Australian conception sees the company as constitutional structure under which the members—the shareholders—delegate management functions to directors and those whom they appoint as managers. Accordingly, fiduciary duties promote shareholder interests. Thus, the Cooney Committee approached the question of a multifiduciary duty from the perspective that:

> [i]t is the shareholders' investment that creates the company. Director's fiduciary duties are premised on this fact and are designed to protect that investment.[28]

31. This constitutional conception is undermined in Australia by the abolition in 1998 of the requirement for a constituting document whose registration secures the incorporation of the company. Incorporation no longer clothes constitutional association but is effected simply by written application. The effect is to move the Australian company closer to the US conception where directors' powers are conferred by statute and not the company's constitution.[29]

[26] Senate Standing Committee on Legal and Constitutional Affairs, n 22, paras 6.15-6.16, 6.42(c), 6.43. The provision is contained in *Companies Act* 1985, s 309 which will be repealed as part of the changes currently before the UK Parliament.
[27] Senate Standing Committee on Legal and Constitutional Affairs, n 22, paras 6.45, 6.47.
[28] Senate Standing Committee on Legal and Constitutional Affairs, n 22, para 6.51.
[29] Thus, the *Corporations Act* s 198A now provides for the vesting of management powers in directors in terms familiar to US statutes; it does so now through a "replaceable rule" for those companies that have not provided for the delegation in their own constitution.

*Concluding observations*

32. The mandatory pluralist model rests on a social, not a property, view of the corporation.[30] It identifies the corporate purpose with the maximization of total constituency utility. In light of its objectives, and relative to the model that merely confers a power to consult stakeholder interests, this model has the virtue of confronting directly the market forces and social norms that sustain the current shareholder value culture. In this light, the discretionary pluralist model appears quixotic since its impulse is contrary to the forces driving the present culture of shareholder value. It is no surprise that its partial counterpart in s 309 of the *Companies Act* (UK) appears to have had no effect at all upon boardroom practice. However, appropriately framed, the discretionary model has the considerable virtue of making explicit that which was troublingly unclear to the James Hardie directors and their advisers, namely, that shareholder primacy does not prevent directors and managers from paying a decent respect to the interests of parties affected by corporate operations even if at the expense of short and medium term shareholder benefit. The model would permit directors to address egregious stakeholder impacts where the cost to the company of doing so outweighs the commercial benefit it receives.

33. However, aggregate constituency utility is an indeterminate outcome measure that faces particular difficulty in translation into a legally enforceable duty. Among other difficulties is the question who should be entitled to enforce such a duty—shareholders only or the wider group of interested or affected stakeholders? The indeterminacy of the criteria for decision and performance measurement also points to a probable loss of accountability for directors since it offers broad scope to justify many decisions. However, while these difficulties are formidable, they need not be insuperable. Thus, it is not clear that the UK review's concern that a multifiduciary duty would necessarily require a broad jurisdiction in the courts to oversee directors' decisions is well founded—the criteria for review might involve a lighter touch, for example, through the adoption of a rule of reasonableness test such as has been adopted in other contexts.[31] The problem of enforceability might be addressed in several ways. The most radical, of course, is granting broader constituency representation upon company boards.[32] A less radical solution is to allow a wider group of people to apply to the court to bring proceedings on behalf of the company (to whom the duty might continue to be owed, rather than to stakeholders

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[30] For a general elaboration of such a view see Allen, n 2, 1396.
[31] See, for example, in relation to the assessment of shareholder resolutions making fundamental changes to the corporate constitution: *Shuttleworth v Cox Bros & Co (Maidenhead) Ltd* [1927] 2 KB 9 at 18 (is the resolution "so extravagant that no reasonable men could really consider it for the benefit of the company").
[32] Such a solution is discussed and advocated in Kelly & Parkinson, n 2.

individually) under the statutory derivative suit procedure contained in *Corporations Act* Pt 2F.1A. A third way is by recognising a duty owed to stakeholders individually in the same way that breach of certain rights (for example, the right to vote granted by the corporate constitution[33]) are recognised as giving rise to a personal action on the part of shareholders, and not a corporate cause of action. It is not suggested that this enforcement option is without difficulty.

34. Little serious consideration has been given in Australia to the question of how a multifiduciary duty might be framed and enforced. The Cooney Committee's rejection of the notion on the basis of the primacy of the shareholders' investment overlooks other forms of investment that are necessary for enterprise success. The interdependence of financial and human capital inputs is elaborated in the extensive literature on team production.[34] Other inputs are also necessary. It is difficult to resist the conclusion that in Australia the multifiduciary model has not been tried and found wanting; it has simply been thought difficult and left untried.[35]

**"Enlightened shareholder value" model**

35. Another approach is that adopted in the UK after its company law review and contained in the Company Law Reform Bill currently before the Parliament. The model derives from the company law review conducted by a Steering Group appointed by the Department of Trade and Industry. The approach responded to concerns that shareholder primacy, especially in an active takeover market, might place directors under pressure to take a narrow short term focus on shareholder interests at the expense of the longer term value of the enterprise to shareholders.[36] The Steering Group found evidence that "the obligation to look beyond the short term was not widely recognised by directors or members."[37] The solution it proposed lies in retaining shareholder primacy but adopting an "inclusive" approach to the reformulation of directors' duties that seeks to cultivate cooperative relationships with other participants. A second element of its approach was to require disclosure of the value of those relationships to shareholders. The two elements were described as "mutually reinforcing".[38]

*The formulation of directors' duties*

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[33] *Pender v Lushington* (1877) 6 Ch D 70.
[34] See, for example, Blair & Stout, n 2.
[35] These words adapt a phrase of G K Chesterton used in a quite different context: see *What's Wrong With the World* (1910), pt 1 "The Unfinished Temple".
[36] *Strategic Framework*, para 5.1.17.
[37] *Modern Company Law for a Competitive Economy: Completing the Structure*, A consultation document from the Company Law Review Steering Group (November 2000), para 3.18 (here called *Completing the Structure*).
[38] *Developing the Framework*, para 2.22.

36. The formulation of duty contained in the Bill follows the traditional expression in terms of the collective shareholder interest: "[a] director must act in the way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole".[39] However, the so-called enlightened shareholder value approach taken in the Bill qualifies this duty by requiring the director, "so far as reasonably practicable", to have regard to factors such as the long-term consequences of business decisions and the impact of the company's activities on employees, the community and the environment.[40] This is a closed group of stakeholders whose impacts are to be nominated; what regard must (or may) be given to other stakeholder interests, such as those of consumers of the company's products and its major suppliers, is not indicated although it may be that they are comprehended within "community" impacts.

37. This approach addresses the problem of indeterminate decision-making criteria by privileging the collective shareholder interest over that of other stakeholders but only after directors consider the consequences of the decision for those interests. However, consideration of non-shareholder interests is instrumental only in that those interests are to be considered not for their own sake but only to the extent that they promote shareholder interests.[41] The *enlightenment* in this model of shareholder value lies in the forced scanning of stakeholder impact for the purpose of extracting maximum shareholder advantage in corporate decision-making. The model might equally, or more accurately, be called *enhanced* shareholder value since its purpose in requiring directors to pay regard to impacts on other stakeholder relationships is to ensure that the negative effect of these impacts is not overlooked in the calculation of shareholder advantage. Where the impact on stakeholders is negative it is not, as in multifiduciary models, weighed directly against its shareholder benefit; rather, that negative impact is to be taken into calculation in the calculus of shareholder advantage from the decision. What is weighed in the balance under this model is the effect of negative stakeholder impact *on shareholders*, not on the stakeholders themselves.

38. The enlightened shareholder value model does nothing to address the problem of the externalization of enterprise cost save in the negative sense of confirming the problem through its mandating of an enhanced shareholder focus. That is starkly demonstrated by considering what effect this formulation would have had upon the Hardie directors' decision whether or not to augment the resourcing of its asbestos subsidiaries to meet current and future compensation claims. In the situation where the company's economic interest in Australia is minor relative to its global

[39] Company Law Reform Bill, cl 156(1).
[40] Company Law Reform Bill, cl 156(3).
[41] P L Davies, "Enlightened Shareholder Value and the New Responsibilities of Directors", W E Hearn Lecture, University of Melbourne Law School, October 4, 2005, p 5.

operations, the model would make it more difficult for directors to justify the compensation commitment since its cost appears disproportionate to the reputational gains in its major market, the US, where the company's asbestos history is barely known and where a much lower compensation standard applies by reason of the Chapter 11 facility for bankruptcy restructuring.[42] Another model, discussed below, specifically addresses this problem (see paras 41-45).

*Stakeholder protection through wider mandatory disclosure*

39. Under the enlightened shareholder value model, stakeholder interests were to be protected not through directors' duties but through an enhanced mandatory disclosure requirement for larger companies contained in an annual Operating and Financial Review. The OFR was designed to "demonstrate stewardship of a wide range of relationships and resources, which are of vital significance to the success of modern business, but often do not appear effectively, or at all, in traditional financial accounts.[43] One member of the Steering Group has said that "in the eyes of many people [the OFR is] the other side of the bargain [for the adoption] of a relatively traditional formulation of directors' duties."[44] In 2004 draft regulations were circulated requiring an Operating and Financial Review as part of the Annual Report describing "future strategies, resources, risks and uncertainties", including policies with respect to employees, customers and suppliers as well as environmental and social impacts where relevant to future strategy and performance of the company. The commonly adopted reporting standard was intended to assist external monitoring and the mobilization of public opinion.[45]

40. However, in November 2005 the Government announced that the mandatory OFR was to be discarded in favour of an enhanced Business Review complying with the European Accounts Modernisation Directive. The Business Review, which will now apply to listed as well as unlisted companies, also requires disclosure of information that is material to understanding the development, performance and principal risks affecting the business, including on environmental matters, employees, social and community issues, albeit on a reduced scale.[46] The abolition was justified on the grounds of reducing the regulatory burden on business. While welcomed by some representatives of large business, abolition was criticized by the principal accounting body and some users of reporting. The writer is not in a position to judge to what

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[42] See below, text at fn 93.
[43] *Completing the Structure*, para 3.4. The Steering Group saw its model resting on the "twin pillars" of directors' duties and the OFR: *Completing the Structure*, para 3.2.
[44] See Davies, n 41, pp 3-4.
[45] *Draft Regulations on the Operating and Financial Review and Directors' Report: A consultative document* (Dept of Trade and Industry (UK), May 2004).
[46] *Explanatory Memorandum to the Companies Act 1985 (Operating and Financial Review) (Repeal) Regulations 2005* < http://www.opsi.gov.uk/si/em2005/uksiem_20053442_en.pdf>.

extent, if at all, this abolition upsets the balance of the model proposed by the Steering Group. The question is highly germane to the issues before the PJCCFS.

**A licence to internalize social costs**

41. A fourth approach specifically addresses the problem of social cost by expressly permitting directors to assume the impacts of company or group activities which might lawfully be disavowed (a *social cost licence*). This approach responds to the structural incentive to externalize enterprise costs and the lack of an unambiguous licence in current law to assume such costs voluntarily and the state of professional opinion and practice as revealed in the James Hardie inquiry (see above, paras 5-14). It is often said that commercial and reputational advantages to the company will be sufficient to justify the directors' decision to internalize enterprise costs voluntarily. The James Hardie experience indicates that this is not the case (without considerable community and political pressure, at least), and that the law on directors' duties may be a significant deterrent to any impulse to do so where cost outweighs short or medium term benefit. Of course, many companies do not deal in public product and services markets and so do not have even the reputational investment to ground this assumed incentive.

42. Of course, the social cost licence model assumes a willingness on the part of directors to internalize those costs in the first place in spite to the considerable market and cultural pressures that will often militate against internalization. It might be strengthened by a safe harbour provision such as that provided from the duty of care by the business judgment rule in *Corporations Act* s 180(2). It is a weakness of the UK company law review, the writer suggests, that this problem was not addressed in its deliberations beyond the issue of negative impacts on participants whose direct input is needed for commercial success.

43. Not all negative externalities are unavoidable and their internalization is not necessarily desirable in every instance. Plant closure and relocation, redundancy and the termination of long term supply contracts will inevitably be unavoidable in some instances if the enterprise is to succeed and prosper. The licence accorded under this model, a narrower version of the licence accorded under the discretionary pluralist model, dispenses with the need for the decision to be taken by sole reference to the criterion of shareholder value and protects directors who might feel exposed to legal liability for voluntary internalization.

44. The American Law Institute has adopted a model which sets limits to the discretion albeit that the discretion is not framed by reference to the specific problem of risk externalization. It allows (but does not require) directors to sacrifice commercial

advantage to ethical considerations: directors "may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business".[47]

45. A narrower formulation of the duty is addressed to the problem of social cost and would require directors simply to act reasonably to avoid injury to non-shareholder stakeholders.[48] Of course, this throws a great deal of weight upon the concept of reasonableness and its justiciability in this context.

**A "stewardship of enterprise" approach**

46. A fifth approach would grant a licence to directors to have regard to the long term success or long run value of the enterprise itself.[49] This licence would encourage a longer-term stakeholder investment and engagement through a "*stewardship of enterprise*" approach. The UK Bill's formulation, which requires directors to "promote the *success of the company* for the benefit of its members", appears to recognise the entity status of the corporation distinct from its members although it does not assign any weight to its interests as distinct from those of its members.

47. This model embodies a conception of the corporation broader than that of the shareholder-centred model, one that sees in large corporations an institutional existence and reality that is not wholly reducible to that of its shareholders, managers and other stakeholders. One consequence of the shareholder value focus is that the company is seen as a set of income claims and property rights rather than as an autonomous enterprise with its own existence, a complex set of relationships between staff and with suppliers of external inputs, with its own distinctive traditions, culture, reputation and rights. There is a richer institutional enterprise model in European conceptions in which wider social and employee claims are more clearly recognized and represented.

## D. IMPLICATIONS OF THE JAMES HARDIE RESTRUCTURING FOR THE PJCCFS INQUIRY

48. The James Hardie restructuring experience points to the need to permit and encourage directors and managers to attend to the human dimensions and consequences of their decisions. If directors' duties stand in the way of provision for sick and dying people

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[47] The American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations*, Vol 1, § 2.01(b)(2) (1994).
[48] L E Mitchell, "A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes" (1992) 70 Tex L Rev 579 at 585.
[49] As proposed by M Jensen, "Value Maximization, Stakeholder Theory, and the Corporate Objective Function" (2001) 14(3) J Applied Corporate Finance.

caused through the negligence of group operations, especially where the company's present wealth is founded upon the profits from those operations, there is something seriously wrong with company law. If it was the misunderstanding of the exactions of those duties by leading law firms, their exactions need to be clarified. We owe the sick and the dying this much at least.

49. The Parliamentary Joint Committee on Corporations and Financial Services is privileged to be able to reflect on recent experience with respect to corporate responsibility, especially that of the James Hardie restructure. It is hoped that its recommendations help restore to the corporation its proper place as a vital and respected institution, a tool for social amelioration and the common good as well as the development and enrichment of its direct stakeholders. We would be in the Committee's their debt if they did so.

Paul Redmond
6 March 2006

## Appendix

## JAMES HARDIE'S ASBESTOS LEGACY

The Australian urban landscape is dotted with homes, schools and other buildings made from asbestos cement sheeting. Particularly in the post-World War 2 building boom, asbestos cement (or "fibro", as it is popularly known) became a staple of Australian domestic life because of its low cost, durability, fire retarding qualities and its fit with the Australia climate which does not require high levels of winter insulation. Most Australians have more than a passing contact with fibro and a sentimental fondness for its unpretentious simplicity. Australia became one of the largest consumers of asbestos products in the world through products such as fibro sheeting and roofing, pipes, insulation material, brake linings and other friction products. Other uses of asbestos products were in shipping, motor vehicles and electrical and power generation plants. James Hardie was one of the great business successes of post-War Australia. It housed the rapidly growing population especially in the new suburbs of Sydney and Perth.

However, it has been clear for some time that exposure to asbestos had substantial health effects, causing asbestosis (a chronic disease of the lungs), lung cancer and mesothelioma (cancer of the chest cavity) which might be contracted from very slight exposure to asbestos fibres. Mesothelioma may not manifest itself for 40 years after exposure but, when it does, the course of the disease is short, painful and terminal.[50] Asbestos dust is released from actions such as cutting, breaking, perhaps sanding, products in which it is used. The future repair and demolition of many buildings in Australia will, unless careful precautions are taken, release the dust; dust may also be released by the decay of or damage to those products and affect those living or working close by. Since legal liability does not arise until harm is occasioned, potential claims against the manufacturers and distributors of asbestos products may extend well into the future.[51] In view of the long latency period between exposure to asbestos fibres and manifestation of disease, compensation claims for asbestos related disease in Australia are not expected to peak for some time.[52]

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[50] *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation,* D F Jackson QC, Commissioner, September 2004, para 2.1 (here cited as the "*Jackson Report*"). The report is available at <www.cabinet.nsw.gov.au/publications.html>. See generally on the events related in this case study Haigh, n 6.

[51] Thus, there are three distinct waves of asbestos diseases. The first affected those working in asbestos mining or milling, the second those employed in the manufacture of asbestos products or their industrial or construction applications, and the third those who have been or will be affected by exposure to asbestos installed in homes or other buildings, or by its removal. The third wave will probably continue for some decades.

[52] The Asbestos Diseases Society of Australia Inc estimates that the peak will occur around 2023: see<www.asbestosdiseases.org.au/asbestosinfo/medical_research.htm>.

Two groups of Australian companies manufactured asbestos products, the James Hardie and CSR[53] groups, with James Hardie having by far the major share in the building products market. Companies in the James Hardie group had been importing asbestos fibre and manufacturing and selling asbestos products since 1916, initially through James Hardie Industries Ltd (JHIL) and, from 1937, through JHIL's wholly-owned subsidiary, James Hardie & Coy Pty Ltd (here called Coy) which manufactured and marketed asbestos products until 1987 when it ceased all asbestos operations because of health and safety concerns with the product. Another subsidiary, Jsekarb Pty Ltd, manufactured brake linings; however, Coy was the principal operating subsidiary and, for simplicity's sake, it is referred to here as though it were the only Hardie asbestos subsidiary.

JHIL would therefore be responsible for injury through negligence arising from asbestos operations before 1937 and Coy would be for responsible for claims from operations in the period from 1937 to 1987. From the 1970s increasing numbers of former employees and others injured in the manufacture or use of its asbestos products sued Coy for compensation. Scientific evidence of the health dangers of asbestos had been reported in medical journals from the 1920s. Asbestosis was acknowledged as a health problem from the 1930s; by the early 1960s at least, the medical literature recognised the dangers of contracting mesothelioma from relatively trivial exposure to asbestos fibres.[54] Hardie's workers were unaware of the risks to which they were exposed; Hardie failed in its duty to warn and protect them and others exposed to like dangers through use of its products. A body of evidence indicates that it preferred engineering solutions that minimised commercial disruption to those that focussed on the needs of the workers and users themselves.[55]

Three generations of the Reid family had been the driving management force in the business, and the controlling equity block, virtually from the outset and until the abandonment of asbestos.[56] Hardie's successful corporate reinvention sets it apart from

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[53] The letters refer, not to any notion of corporate social responsibility, but to the company's former name, the Colonial Sugar Refining Company, which reflected its original activity. Its expansion into asbestos mining and manufacture was part of diversification of business operations. While CSR's asbestos manufacturing operations were relatively short lived, asbestos mining and milling operations in Western Australia caused enormous loss of life among its workers and their families by reason of the low occupational safety standards in place among those working with the lethal asbestos fibres; see B Hills, *Blue Murder: Two thousand doomed to die–the shocking truth about Wittenoom's deadly dust* (Melbourne: Sun Books, 1989). James Hardie did not itself mine or mill asbestos except for a single small operation.

[54] *Frost v Amaca Pty Ltd* [2005] NSWDDT 36 at [44] (the Dust Diseases Board of New South Wales, the tribunal hearing asbestos claims in that State, asserting its own "specialist knowledge" on the topic).

[55] See Haigh, n 6, chapter 6.

[56] The original 19th century founder of the business, James Hardie, whose personal name continues in the corporate, is a much less significant influence than the Reid family; see Haigh, n 6, pp 14-15.

the other major asbestos companies in the United States and the United Kingdom. The transition from an asbestos business was completed by a new group of managers and directors with no connection with the asbestos operations.[57] However, the manner in which they handled the responsibilities presented by the company's asbestos past generated another set of problems. Essentially, James Hardie's history is a story of two distinct enterprises, two distinct sets of actors, and two distinct tragedies. With some continuity between the old and the new Hardie, the second tragedy might have been avoided. But that is to anticipate the present account.

James Hardie developed a substitute building product, a fibre cement that did not use asbestos. This product enjoyed spectacular success especially in United States markets where it now generates the bulk of its revenue and its operational headquarters are located; Australian revenues now represent a mere 15 per cent of global operations.[58] By the late 1990s, the group's future seemed bright, dampened only by what management saw as "legacy issues" arising from compensation claims arising out of its earlier Australian asbestos operations. Since Australia was seen as a mature market offering relatively little in the way of new ventures or profit opportunities, Hardie management decided that it was time to cut ties with its Australian seat of incorporation and its asbestos-tainted past. That decision took the group down a path that led in 2004 to the establishment of a Special Commission of Inquiry; its hearings and report (the Jackson Report, named for the Commissioner, its author) gave further impetus to the political and community pressures to make the parent company responsible should the asbestos subsidiaries be unable to meet future compensation claims.

## JAMES HARDIE'S RESTRUCTURING

In the late 1990s the idea emerged that a restructuring of the group would unlock greater value for James Hardie shareholders.[59] It would also reduce foreign withholding tax paid in Australia on US earnings; the quarantining of asbestos liabilities from operating companies in the group soon emerged as a distinct goal. Hardie's aim was to separate the subsidiary with asbestos liabilities, Coy, from the group. JHIL asserted that other group companies were not legally responsible for the asbestos liabilities except, in the case of JHIL, for any claims that might arise from its pre-1937 operations. However, separation of the asbestos subsidiary would enable the group to operate more effectively in US

[57] The corporate makeover was gradual; in 1979 the stock exchange listed company, James Hardie Asbestos, changed its name to James Hardie Industries (JHIL) and the group's headquarters was renamed James Hardie House from Asbestos House; see Haigh, n 6, p 126.
[58] Refer to AR for cite. ???
[59] The idea of restructuring originated in a corporate shareholder whose 25 per interest in JHIL, quickly accumulated in the mid-1990s, eclipsed that of the Reid family. The shareholder was a leading exponent to financial engineering techniques to maximise shareholder returns. The shareholder obtained board representation through which it promoted the restructuring proposal: see Haigh, n 6, pp 179-183.

capital markets where investor sensitivity to asbestos liabilities was judged to have a depressing effect on stock price.

The restructuring to remove Coy from the group occurred against the background of fears that asbestos victims groups, labour unions and governments (upon whom the health costs of asbestos diseases would otherwise fall) would place the issue onto the political agenda unless they were satisfied with Coy's capacity to meet future claims. Specifically, Hardie management feared that, if the group were seen as not having made adequate provision for future asbestos liabilities, adverse public opinion would force the national and State governments to legislate to make other group companies liable in addition to Coy;[60] direct intervention by government was seen as the most significant risk facing the group.[61] The threat of such legislation made the options of putting Coy into liquidation or JHIL (its parent company) declaring that it would provide no further financial support for it "practically unacceptable".[62]

**Core asset separation**

Separation of the asbestos subsidiary was effected by stages. In the first, from 1995 to 1998 Coy transferred its operating assets and core business to other companies in the James Hardie group. Full value was paid on these asset transfers. After the asset sales, Coy paid a substantial dividend and sums described as "management fees" to its parent, JHIL. Second, in 1998 an initial public offering of stock through the New York Stock Exchange was aborted when investor interest fell short of expectations, a failure attributed to fears of asbestos related claims. The position now was that Coy bore the asbestos liabilities but the operating assets and businesses were now located in other companies in the group. However, there remained the overhanging risk of legislative intervention to make other group companies answerable in the event of Coy's inability to meet compensation claims. This threat was to be addressed by eliminating Coy from the group.

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[60] *Jackson Report*, paras 12.16-12.24.
[61] *Jackson Report*, para 14.20.
[62] *Jackson Report*, para 12.24.

## Excising the asbestos subsidiary from the group

This excision was made in February 2001 when JHIL established the Medical Research and Compensation Foundation to administer future claims against the asbestos subsidiaries; its chair was a longstanding JHIL director who was retiring from the board.[63] The JHIL board approved an agreement with the Foundation under which JHIL transferred to the Foundation the whole of the capital of Coy together with promises of further payments to be made over time. The provision of additional funds was made since Coy did not have positive net worth after taking account of likely future asbestos claims.[64] In agreeing to additional future payments, the JHIL board maintained the position that no group company (apart from Coy, of course) had any legal responsibility for asbestos compensation.

In consideration for the additional payments to be made to the Foundation, Coy released JHIL from any claims that Coy might have against JHIL arising from past dealings between them, such as the dividends and management fees paid after the assets sales by Coy, and indemnified JHIL against liability under any asbestos related claims that might be made against it.[65] The release and indemnity were given on behalf of Coy by its board of directors then comprising two Hardie group executives. They resigned as directors of Coy immediately afterwards in favour of persons appointed by the Foundation.[66]

The transfers and funding to the Foundation were made after a management presentation based on an actuarial assessment of future asbestos liabilities that, on the worst outcome, would have seen Coy able to meet claims for around 20 years.[67] (No member of the board, including the chief executive, had read the actuary's report.) That assessment was later found to provide no satisfactory basis for the assertion that the Foundation would have sufficient assets to meet future claims since the actuary had not been informed of the purpose for which it was to be used, namely, the separation of the asbestos subsidiaries. Further, produced under considerable pressure from Hardie management, the actuary's report did not take into account the most recent asbestos litigation figures showing a significant increase in outgoings for asbestos claims.[68]

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[63] A reason for urgency in this decision was the impending introduction in Australia of an accounting standard that would require JHIL to include in its financial statements the net present value of future asbestos liabilities: *Jackson Report*, para 1.12.
[64] *Jackson Report*, para 11.51.
[65] *Jackson Report*, paras 21.6, 21.6, 28.8-28.16.
[66] *Jackson Report*, para 21.1.
[67] *Jackson Report*, para 14.45(c).
[68] *Jackson Report*, para 1.10. What the Commissioner found "striking" about the management paper for the board meeting is the absence from it of any substantive discussion of the actual quantum of asbestos liabilities (para 14.13). Nothing in the board papers would provide any satisfactory basis for identifying what the asbestos liabilities might be (para 14.29).

Notwithstanding, in its announcement of the separation to the Australian Stock Exchange, JHIL stated that

> [t]he Foundation has sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL … the establishment of a fully-funded Foundation provide[s] certainty for both claimants and shareholders.[69]

Coy was thus now excised from the group and had agreed to indemnify its former parent, JHIL, against any asbestos liability. (Its name was also changed to Amaca to which further reference will now be made.) However, Hardie management still considered that JHIL, the group parent company, was tainted by association with asbestos. It would in time be excised from the group. First, however, a new parent company had to be created.

**Moving to the Netherlands: creating a new parent company**

In October 2001 a capital reconstruction substituted a new company, James Hardie Industries NV (JHI NV), incorporated in the Netherlands, for JHIL as the ultimate holding company of the group. This was effected through a scheme of arrangement which required approval by JHIL shareholders and the Supreme Court of New South Wales. The scheme proposal that was put to JHIL shareholders justified the Dutch incorporation on the basis of foreign withholding tax benefits and its greater appeal to international investors relative to incorporation in the United States.[70] Under the scheme, shareholders in JHIL received an interest in JHI NV in exchange for their shares in JHIL. These shares were then cancelled leaving as the only issued capital in JHIL those shares held by JHI NV. JHIL then transferred to JHI NV at market value its shares in group companies which owned operating businesses and assets. No money changed hands in these transfers: the purchase price was treated as a loan from JHI NV to JHIL which was satisfied by JHIL paying a dividend to JHI NV and effecting a capital reduction without cancelling the shares in JHIL held by JHI NV.

Under the scheme of arrangement, the capital reduction was conditional on JHI NV subscribing for partly paid shares in JHIL. Under the terms of issue of these partly paid shares, JHIL could call on JHI NV for up to $1.9 billion if needed to maintain solvency.[71] During the hearing to approve the transaction, the court raised the issue of JHIL's ability to satisfy any asbestos related liabilities and was assured that JHIL's right

[69] *James Hardie Resolves its Asbestos Liability Favourably for Claimants and Shareholders*, Media Release, 16 February 2001, quoted in *Jackson Report*, para 2.35.
[70] *Jackson Report*, paras 25.6-25.7, 11.12.
[71] The amount unpaid on the shares was calculated by reference to the market value of the James Hardie group less the money that JHI NV had paid for its capital in JHIL: see *Jackson Report*, paras 2.44 (e) & (f), 2.47.

to make calls on the partly paid shares held by JHI NV would satisfy that liability.[72] JHIL shareholders and the court approved the scheme.

**Excising JHIL from the group and cancelling the partly paid shares**

All the assets of the group were now in companies formed outside Australia and which were not in existence during the asbestos period. Nonetheless, Hardie management considered that the mere existence of arrangements with the Foundation was prejudicial to future capital rising.[73] In the process of establishing the Foundation, Amaca had agreed with JHIL that it would, if called upon to do so, acquire all the issued capital of JHIL for a nominal consideration. The effect of such a transaction would be to turn Amaca's former parent, JHIL, into its subsidiary as well as removing JHIL entirely from the Hardie group. It would also effectively terminate any claims that Amaca might have against JHIL that were not encompassed within the release and indemnity given by Amaca since JHIL would then be suing its own controlled entity.[74] Amaca would not, of course, be able to meet future obligations to pay calls on the partly paid shares in JHIL held by JHI NV.

Amaca was now a wholly owned subsidiary of the Foundation whose directors indicated that, if JHIL were to exercise the put option, they would contest its right to do and seek to reopen the February 2001 transactions. It had now become clear to the Foundation that asbestos litigation costs had been underestimated and that Amaca's resources would be exhausted in a relatively short time. JHI NV had rejected the Foundation's requests for additional funds.[75]

After negotiations with the Foundation broke down, JHI NV formed a new foundation to acquire its shares in JHIL and used JHIL's funds to pay the remaining sums due to Amaca under the deed of covenant made in February 2001. Before doing so, however, JHIL agreed with JHI NV to cancel the partly paid shares that the latter held in JHIL. In March 2003, following a resolution of the JHI NV board directing them to do so, the only two directors of JHIL (both executives of Hardie group companies) resolved to cancel the partly paid shares, thereby releasing JHI NV from any liability upon them. JHI NV gave nothing of value in exchange for the cancellation. Although the appropriate return was lodged with the corporate regulator, notice of the cancellation was not given to the stock exchange. The cancellation was made at a time when there was a prospective shortfall in Amaca's ability to meet its asbestos related liabilities.[76] JHIL had earlier

[72] *Jackson Report*, para 2.48.
[73] *Jackson Report*, para 27.21.
[74] *Jackson Report*, para 21.52.
[75] In the discussions leading to the formation of the Foundation, its proposed directors had sought but been denied access to the actuarial reports on projected asbestos liabilities. They accepted office nonetheless.
[76] Of the two JHIL directors, one did not give "any real, independent consideration to the transaction" and the other displayed a willingness bordering on enthusiasm for cancellation

informed the court in the scheme hearing that JHIL "has access to the capital of the group through the partly paid shares".[77]

The cancellation of the partly paid shares and transfer of the shares in JHIL to the new foundation completed the separation of ownership interests between JHI NV and the former Australian companies in the group. With JHIL now also cut adrift, the group included none of the former companies from its asbestos period. However, if it thought that it had distanced itself from the earlier asbestos experience, it was wrong.

## THE SPECIAL COMMISSION OF INQUIRY

Public warnings by the Foundation as to the inadequacy of its funding focussed attention on the James Hardie restructure, asset transfers and the obstacles to legal action against JHI NV in the absence of agreements for the reciprocal enforcement of civil judgments. Following agitation by labour unions and asbestos victims groups, in February 2004 the New South Wales Government[78] established a Special Commission of Inquiry into the Foundation and its funding. After public hearings, Commissioner David Jackson QC reported in September 2004.

### The findings and recommendations of the Commissioner

The Commissioner's terms of reference directed him to inquire into the current financial position of the Foundation and Amaca and whether the circumstances of Amaca's separation from the group and the restructuring contributed to any insufficiency of assets to meet future asbestos liabilities. When the hearings were well advanced, JHI NV accepted that the Foundation had been very significantly underfunded.[79] The Commissioner found that the net present value of likely asbestos related claims in future years was about $1.5 billion; net assets of Amaca and the Foundation were a mere $180 million.

However, the Commissioner considered that there was no legal obligation upon JHIL, as the then holding company of Amaca, to provide it or the Foundation with additional funding to meet any shortfall with respect to its asbestos related liabilities.[80] Accordingly, upon separation of Amaca from the group, there was no legal obligation on

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even though it achieved no useful object for the releasing company: *Jackson Report*, para 27.90.

[77] The judge asked: "Is there any possible basis upon which a call of partly paid shares upon a Dutch Company could be resisted under Dutch law? [His concern was] to ensure that there is no blockage in the flow of funds to Australia": *Jackson Report*, para 25.21. JHIL consistently denied that it had any liability with respect to compensation claims except for any with respect to its pre-1937 operations.

[78] New South Wales is the State of the Australian federation in which James Hardie had its principal Australian operations and the majority of employees. It is also the place of incorporation of its former asbestos subsidiaries.

[79] *Jackson Report*, para 1.22.

[80] *Jackson Report*, para 1.8.

JHIL to provide Amaca with any additional funds. Although it could not be said that Amaca's separation from the group had contributed to a possible insufficiency of assets to meet future asbestos claims, the Commissioner found that

> in practical terms separation was … likely to have an effect of that kind. If separation has not taken place in February 2001 it seems likely that, for the indefinite future, the asbestos liabilities would have been treated, as they had been for years, as one of the annual expenses of the Group. It may well have been that consideration would be given to different schemes for dealing with the emerging asbestos liabilities, but whatever was done would have been likely to involve significantly greater funding from the Group.[81]

The Commissioner also found that the cancellation of the partly paid shares in JHIL was "almost inevitable" after the scheme of arrangement, that it "achieved no useful object" for JHIL considered separately from JHI NV, and that its main impact was to destroy any hope for recovery by asbestos claimants if, contrary to the group's legal advice, claims were successfully made against JHIL as parent of the inadequately funded subsidiary, Amaca.[82]

The Commissioner found that there had been misleading and deceptive conduct in JHIL's announcement to the stock exchange about the formation of the Foundation which was not "fully-funded" as JHIL had claimed, but was massively underfunded. The Commissioner also found that the announcement was seriously misleading in the impression it conveyed that JHIL's determination of the amount of funding needed for the Foundation had been checked by independent experts.[83]

He also concluded that by failing to disclose that the separation of JHIL, and consequent cancellation of the partly paid shares, was likely in the short to medium term, JHIL and its lawyers were in breach of their duty of disclosure in the court proceedings to approve the scheme of arrangement. However, he found that the failure to make such disclosure was not deliberate. While the lawyers were likely to have breached their duty of care to JHIL, it was not clear that the breach caused any loss to JHIL. Nor was it clear that, if disclosure had been made to the court, subsequent events would have turned out differently.[84]

**Community and political pressure**

The hearings and especially the report of the Special Commission were something of a surprise to many. There appeared to be an expectation, including among some in government, of a finding that the separation out of the asbestos subsidiaries and related asset transfers had been undertaken to enable the group to escape compensation

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[81] *Jackson Report*, para 1.21.
[82] *Jackson Report*, para 27.90.
[83] *Jackson Report*, para 1.15.
[84] *Jackson Report*, para 25.91.

obligations. These expectations had arisen partly since enforcement of asbestos claims against the new Dutch parent company would be more difficult in the absence of a reciprocal agreement between Australia and the Netherlands for the recognition of money judgments in each country's courts. Instead, the Commissioner found that Amaca had not been stripped of assets but had retained them; indeed, they had been augmented in exchange for the indemnity and release that Amaca had given to JHIL. However, during the public hearings probing the adequacy of the Foundation's funding, James Hardie came under intense public pressure to change its position that it had no responsibility for compensation beyond the arrangements it had made with the Foundation. Towards the close of the hearings, JHI NV responded to this pressure by proposing a compensation scheme that would cap both the number of victims to be compensated and the compensation to be paid.[85] It would require legislation to establish and administer the scheme, by-passing the courts in favour of administrative determination of claims.[86]

The New South Wales Government responded to the Jackson Report by delegating to the peak labour organisation, the Australia Council of Trade Unions, the conduct of initial negotiations with James Hardie. The New South Wales and Commonwealth Parliaments passed legislation to facilitate investigation by the national corporate regulator and prosecution of matters arising from the Special Commission.[87] When negotiations between James Hardie and the labour organisation appeared to stall, the New South Wales Government announced that it was drafting legislation to allow asbestos victims to claim compensation from JHI NV, wind back the 2001 restructure and relocation to the Netherlands, and rescind the cancellation of the partly paid shares in JHIL.[88] On December 21, 2004 James Hardie Industries NV (hereafter called either James Hardie or JHI NV) signed Heads of Agreement with the New South Wales Government, the Australia Council of Trade Unions and asbestos victims groups. The Heads of Agreement was an interim, non-binding agreement intended to be replaced with

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[85] *Jackson Report*, para 30.27.

[86] *Jackson Report*, para 30.27. James Hardie's had long been concerned with the level of legal costs in asbestos litigation.

[87] *Special Commission of Inquiry (James Hardie Records) Act 2004* (NSW); *James Hardie (Investigations and Proceedings) Act* 2004 (Cth). The legislation abrogates legal professional privilege (the privilege against disclosure to a court of communications with a lawyer concerning litigation or potential litigation) in investigations or proceedings into matters referred to in the Special Commission. The abrogation applies to material obtained by the Special Commission or the regulator under compulsory powers. The Commission's powers overrode the claims of legal professional privilege; the legislation therefore extends this displacement of legal professional privilege for the purpose of the investigation of James Hardie and related proceedings, civil and criminal. The Commonwealth Act was judged to be a necessary augmentation of the New South Wales legislation in view of the division of legislative competence under the Australian federal system. Other New South Wales legislation ensured that Amaca, JHIL and the Foundation remained subject to its law and provided a scheme of external administration which protected future asbestos claimants should the Foundation's resources prove inadequate for current claims: *James Hardie Former Subsidiaries (Special Provisions) Act* 2005 (NSW).

[88] *Premier Foreshadows New James Hardie Legislation*, News Release, 28 October 2004.

a binding and legally enforceable agreement in substantially similar terms. That Final Funding Agreement was signed on December 1, 2005. It is undoubtedly the largest corporate settlement reached in Australia.

## JAMES HARDIE'S SETTLEMENT

The twin aims of the Final Funding Agreement are to allow James Hardie to "remain profitable, financially strong and to fund growth" while allowing compensation payments to be made to all existing and future proven claimants.[89] James Hardie will provide funding on a long-term basis to a Special Purpose Fund to compensate asbestos sufferers with claims against the former Hardie subsidiaries. The Fund will be substituted by legislation for the former asbestos subsidiaries as the entity responsible for James Hardie asbestos compensation. James Hardie will appoint a majority of the governing board of the Fund. At the start of each year James Hardie will ensure that the Fund has a two-year rolling cash "buffer" plus one year's contribution in advance, based on an annual actuarial assessment of expected claims for the next three years. The company's annual contribution is subject to a Cash Flow Percentage Cap, initially set at 35 per cent of James Hardie's net operating cash flow for the preceding year.[90] There is provision for "step down" of the Cash Flow Percentage Cap in five per cent increments if the company's previous four-year contribution is below the next five per cent level down; the step down may be reversed by reference to the same criterion. The final payment to the Fund will be made in 2045 although the New South Wales Government may extend this term. While it is not intended that there will be any cap on payments to individuals who establish their claim, no assurance is given that all claims will be met in view of the uncertainty as to the number of future claims, the quantum of future compensation awards and James Hardie's own financial performance over this period. The estimate of future asbestos liabilities released with the Agreement is A$1.568bn discounted for net present value; the undiscounted estimate is A$3.306bn.[91] The Fund is available only to Australian-based personal injury claims against the former asbestos subsidiaries.[92]

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[89] This account of the Final Funding Agreement is substantially based upon the Company Statement issued by James Hardie on 1 December 2005 entitled "*James Hardie Board Approves Final Funding Agreement – Agreement to be Signed Today*", its attached "*Final Funding Agreement – Briefing Note*" and the James Hardie briefing document entitled "*Long-term funding of personal injury claims against former subsidiary companies*" (December 1, 2005): see <http://www.ir.jameshardie.com.au/homepage.jsp?xcid=1>.

[90] For the purposes of the cap, net operating cash flow is defined as the cash flow provided by operating activities after tax, interest and changes in working capital and asbestos payments to the Special Purpose Fund. Accordingly, from the company's perspective, not less than 65 per cent of its net operating cash flow will be available for other corporate purposes such as capital expenditure, dividends, buy-backs, capital returns, debt reductions and/or acquisitions.

[91] KPMG Actuaries Pty Ltd, *Valuation of Asbestos Related Disease Liabilities of Former James Hardie Entities to be Met by the Special Purpose Fund*, December 1, 2005; see <http://www.ir.jameshardie.com.au/homepage.jsp?xcid=1>.

[92] James Hardie was a joint venturer in companies which manufactured asbestos products in Malaysia from 1966 and Indonesia from 1969. It disposed of its interests in these joint

The Agreement provides for legislation to be enacted to give the New South Wales Government the power to prevent any restructuring of group companies that would diminish the rights of asbestos victims.[93] The Agreements also restricts transactions and distributions by group companies that might impair its capacity to meet its obligations. The New South Wales Government also agrees that it will not undertake any adverse legislative or regulatory action directed at any member of the James Hardie group on asbestos related matters. If the Commonwealth or other State governments take such action, this may reduce JHI NV's funding obligations under the Agreement.

The New South Wales Government will also introduce legislation to provide releases to members of the group, its directors, officers, employees and advisers from any individual obligation to compensate asbestos victims; this release ensures that recovery is limited to the arrangements made through the Special Purpose Fund. However, despite requests from the company, there will be no release from directors and officers' duties under corporate law and the sanctions for their breach.[94] Indeed, the Commonwealth Government has provided special funding to the corporate regulator for the investigation and litigation of issues arising from the Jackson Report.[95]

The Agreement is conditional upon approval by James Hardie's lenders and shareholders and the company being satisfied that its payments to the Special Purpose Fund are tax-deductible expenses. It is likely that the group's principal lenders have been consulted with respect to the terms of the Agreement and given tacit approval at least. Shareholder approval will be sought at an Extraordinary General Meeting in mid-2006; that the company's stock price rose upon announcement of each of the Heads of Agreement and the Full Funding Agreement suggests that shareholders will vote to approve the Agreement.[96] However, securing favourable taxation treatment for payments to the Special Purpose Fund may not be straightforward. The Australian Taxation Office

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ventures in the mid-1980s. The Malaysian and Indonesian governments continue to allow the manufacture and distribution of asbestos products. James Hardie maintains that any compensation obligations remain in the joint venture vehicles and that it has not received any claim for asbestos related compensation from those countries: James Hardie Company Statement, *James Hardie Responds to Asia Compensation Queries*, January 27, 2005.

[93] "Venue change breaks Hardie deadlock", *Australian Financial Review*, December 1, 2005, p 8. Principal among these concerns was that James Hardie might enter into a voluntary restructuring under Chapter 11 of Title 11 of the *United States Code*, forcing future claimants to look to the bankruptcy court for recovery, ranking behind secured creditors.

[94] However, it appears that the release may apply to the statutory remedy to require directors and officers to compensate their company for loss or damage it has suffered in through breach of their statutory duties of good faith and care. Whether this is so or not, it seems clear that the release does not apply to the other sanctions for breach of these statutory duties (that is, pecuniary penalty and disqualification orders) or to the corresponding duties and remedies under the common law of companies which co-exist with the statutory duties and remedies.

[95] See Commonwealth of Australia, House of Representatives, *Official Hansard*, November 28, 2005, pp 28-29 (the Treasurer).

[96] James Hardie's chairman is reported as saying that "there is no indication from our major shareholders that we do not have their support": "Tax break could sweeten deal", *Australian Financial Review*, December 2, 2005, p 4.

ruled early in 2006 that the payments would not be allowable deductions under the general deduction rules of Australian taxation law since they are related to liabilities incurred by companies that are no longer part of the Hardie group.[97] However, James Hardie expects that they will be deductible under specific tax rules or under foreshadowed measures for tax relief for expenditures that fall within gaps in the tax system; the company maintains that tax deductibility is essential to the Fund's affordability.[98]

It was only community and political pressure, backed by a rare social consensus as to the impropriety of Hardie's public position and conduct, that forced its commitment to fund compensation payments. That pressure rested on no firmer foundation than threats of public shaming in Australia.[99] That a majority of the Hardie board were Australian residents and therefore more susceptible than outsiders might be to the weight of community opinion, undoubtedly assisted. The company's shareholders are also predominantly Australian based. Nonetheless, the parent company is incorporated in the Netherlands and is subject to Dutch law; the group also has its operational headquarters, assets and principal markets in the United States. Australia is home to its principal liabilities, but also, fortuitously for asbestos victims, a majority of its directors and shareholders. The negotiated outcome sees victims enjoying rights that they were denied when the group was based in Australia and amenable to its corporations and tort law. These rights are substantially greater than those enjoyed in the United States under the trust established by the biggest asbestos producer, Johns-Manville Inc, where only 5-10 per cent of the liquidated value of claims is being paid.[100]

Assuming satisfaction of the conditions to which the Agreement is subject, a remarkable partnership has been forged through this settlement between labour, capital and the community in one corporate group. Payments to victims depend upon James Hardie's continuing profitability. Labour unions, asbestos victims, governments and the company itself share a long-term interest in the group's financial health and its growth to meet future claims from asbestos operations that ceased almost 20 years ago. A delicate balance has been achieved between the competing interests of each member of this partnership and their common interest in the enterprise's success. While James Hardie

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[97] "ATO lobs Hardie ball into Treasury's court", *Australian Financial Review*, December 17, 2005, p 10. Hardie's difficulty is compounded the position it has consistently taken that the parent company had no legal responsibility for compensation liabilities of the subsidiaries.
[98] *Chairman's Address to 2005 Annual Meetings*, p 3; see <http://www.ir.jameshardie.com.au/homepage.jsp?xcid=1>. The company expects to generate sufficient profits in Australia against which it can deduct payments to the fund. Effectively, the company is itself seeking in these arrangements and in the structuring of the Special Purpose Fund to undo the effect of its relocation offshore in 2001-2002.
[99] The threat of legislation to undo the restructuring and relocation to the Netherlands faced formidable obstacles, in constitutional law as well as practical implementation, in view of the global character of the group and the body of intervening transactions.
[100] See Manville Personal Injury Settlement Trust <http://www.mantrust.org>.

may struggle to regain a respected place in Australian business, there is a broad mutuality of interest in restoring the company from its recent pariah status.