

ASBESTOS SAFETY & ERADICATION AGENCY CONFERENCE NOVEMBER 2014

Litigation Trends and Asbestos Related Diseases

Anyone who doubts the importance of litigation in the arena of asbestos disease should note that the first product liability claim against James Hardie was filed by Armando Gardiman, the managing partner of Turner Freeman on behalf of Ronald Thomas Baker in the Supreme Court of New South Wales on 23 March 1982. Within a year James Hardie had commenced to remove asbestos from its products, the last products being made with asbestos in New South Wales at the end of 1983 and around Australia by the end of 1987.

Litigation and lawyers have played an important role as advocates for persons suffering from asbestos disease achieving far reaching results. It is the result of the work of lawyers and victim groups that persons suffering from asbestos diseases in most states in Australia are exempt from legislative restrictions introduced in relation to common law claims. In 1998 as a result of lobbying carried out by Turner Freeman Lawyers and the Asbestos Disease Foundation of Australia the NSW Government introduced legislative reforms for dust diseases claims which have been mirrored throughout the country including providing for general damages, that is damages for pain and suffering and loss of expectation of life, to survive the death of a plaintiff if proceedings have been filed in the person's lifetime, and the abolition of the *Limitation Act* in relation to dust diseases claims.

It is as a result of the lobbying of Turner Freeman in partnership with the Asbestos Disease Foundation Australia and the late Bernie Banton that the Asbestos Diseases Research Institute was established in Concord.

It is as a result of lobbying of Turner Freeman and the Asbestos Victims Association of South Australia lobbying on behalf of one of our clients and their member the late Melissa Haylock, a 42 year old mother of eight-year-old triplets who was dying as a result of her condition of mesothelioma that the Dust Diseases Act was introduced. The Act allowed Melissa to claim for her loss of ability to provide services to her children. The amendments introduced in South Australia have been copied to varying degrees in States all around Australia.

Perhaps the most striking example of the effectiveness of lawyers and victims groups joining forces is the campaign against James Hardie. At the commencement of the Jackson Inquiry

James Hardie was steadfast in its position that it had no obligation to pay asbestos claims. By the time of closing submissions, James Hardie put forward a proposal to fund asbestos claims for the next 40 years. Over the next two years there were extensive negotiations with James Hardie in relation to the funding agreement culminating in the signing on 21 November 2006 of the Amended Final Funding Agreement between James Hardie Industries NV now James Hardie Industries PLC, the NSW Government and the Asbestos Injuries Compensation Fund (AICF) which provides funding for Australian asbestos related personal injury claims up until 2045 with a re-occurring automatic ten year extension period thereafter if required.

The Amended Final Funding Agreement requires James Hardie to make an annual payment to the AICF of either 35% of its free cash flow that is net cash flow for the immediate preceding financial year or if it is lower the amount of the actual estimates of the expected proven claim liabilities for the financial year in which the payment is made and for the next two financial years plus an estimate of the reasonable operating expenses of the AICF less the AICF's net assets for the previous year.

Since the establishment of the AICF James Hardie has paid to the AICF \$US667.3 million. In the same period the company has made a profit of \$US2,516.8 million and has paid \$US556 million in dividends.

I have been acting for persons suffering from asbestos disease for over 20 years. When I started in the mid 1990s the vast majority of my clients were older males having worked in blue-collar professions. They were the employee's of James Hardie, Wunderlich and Bells Asbestos, they had worked on naval ships, in power stations, on the wharves, as ladders, electricians, plumbers and mechanics. It was rare to have a female client and even rarer to have a client under the age of 50.

Over the last 10 years we have seen the emergence of the third wave of asbestos victims, the first wave were the miners and those working in asbestos factories, the second wave were trades people- electricians, plumbers, dockyard workers, naval workers, builders, carpenters, mechanics, waterside workers etc. The third wave or bystander wave consists of persons exposed to small amounts of asbestos outside of work usually as a result of home renovations or washing work clothes. An article published in the Medical Journal of Australia in 2006 by Olsen & Ors in relation to a study of Western Australian residents noted that approximately 1631 people were diagnosed with mesothelioma between 1960 and 2008. From 1981 to 2008

there were 87 case of malignant mesothelioma attributed to asbestos exposure as a result of home maintenance or renovation. In the period 2005 to 2008, home renovators accounted for 8.4% of all men and 35.7% of all women diagnosed with mesothelioma.

When I started doing this work over 20 years ago the common understanding was the incidence of mesothelioma in Australia would peak in 2010. That peak is now not expected to be reached until at least 2017 if not later. The difficulty in determining the peak of mesothelioma claims is that vast amounts of asbestos remain in our community, most importantly in our homes. John Reid the then Chairman of James Hardie Asbestos Limited told shareholders in 1971 that two out of every three homes in Australia contain James Hardie products. James Hardie did not put any warning on products until 1978. Although fibro is a common term in our language, I still encounter people on a weekly basis who are shocked to find out that fibro sheets built in Australia before 1983 contain asbestos.

The Final Funding Agreement was based on the finding of the Jackson Inquiry that James Hardie's asbestos liabilities in the future would be approximately \$1.5 billion. This figure was based on estimates carried out by the accounting firm KPMG, who at the time predicted a peak in the level of mesothelioma claims in Australia to occur in 2014. In its latest report to the Asbestos Injury Compensation Fund, KPMG has cast serious doubts on this prediction, now suggesting a peak in 2016 to 2017. However, KPMG warn that this date could be pushed back due to an increasing number of mesothelioma claims. KPMG estimated that the number of claims by persons suffering from mesothelioma against James Hardie in 2014 would be 300. They were wrong. There were in fact 370 claims an almost 30% increase on expected numbers. As a result, KPMG have increased the number of expected mesothelioma claims for the next three years which in turn has increased the total future liabilities of the AICF by \$334.2 million.

As a result of the latest KPMG report the AICF on 15 September 2014 advised James Hardie and the NSW Government that its Board had determined that it is reasonably foreseeable that a shortfall in the funding of claims will arise in 2007 and that it was seeking to enter into discussions with James Hardie and the NSW Government in relation to an Approved Payment Scheme. An Approved Payment Scheme allows the AICF, with the approval of the NSW Attorney General, to apply to the NSW Supreme Court for approval of a scheme for payment by installments of the full amount of proven asbestos claims and the deferral of payment of contributions claims during the period of insufficient funds. This would result in the payment

of judgments to mesothelioma victims by instalments. This in the context of the average life expectancy of a person with mesothelioma being 155 days from diagnosis.

The AICF has announced that unless alternative arrangements can be made, it will seek the approval of the NSW Court to establish an approved payment scheme to operate from 1 July 2015.

On 9 December 2010, the AICF and the former James Hardie subsidiaries entered into a loan facility with the NSW Government which allows the AICF to borrow under certain conditions up to an agreed amount of \$320 million. The amount available to be drawn down depends on the value of the insurance policies benefiting the AICF, which as at 31 March 2014 is \$240.3 million. The NSW Government has entered an agreement with the Federal Government whereby the Federal Government pays 50% of the loan. The AICF are seeking from both the NSW Government and Federal Government that the amount available to be borrowed is not limited by the value of the insurance policies and that the full \$320 million be made available to the Fund. The AICF hope that by accessing this money there will be no need to enter into an Approved Payment Scheme. To date, the NSW Government has given initial support to providing its share of the full \$320 million with the Federal Government yet to confirm its position.

Given that James Hardie was by far the largest manufacturer of asbestos cement building products, and given the increasing number of claims by third wave victims, the number of claims against James Hardie will only increase. Many of the third wave victims tend to be younger which results in larger settlements or judgments as a result of claims for economic loss or for loss of capacity to provide services to children.

The end result is that the estimate of James Hardie's future asbestos liabilities on which the Final Funding Agreement is based is an underestimate of what its real liabilities will be. It will then be a matter for the Australian Governments, lawyers and asbestos victims to hold the company to account yet again and ensure that further money is made available to pay asbestos claims. It should be remembered that James Hardie is now largely an American company, James Hardie is a profitable company. It plans to spend \$US200 million a year over the next three years expanding plant capacity in the United States.

In the absence of James Hardie the question becomes whether claims can be brought against other defendants such as builders carrying out building work, architects who specify the use of asbestos product or Councils who approve building works using asbestos products without any precaution being taken. There may also be a question as to the liability of a landlord for renovation or building work carried out by tenants that exposes them to asbestos dust and fibre and, although unlikely given the recent decisions from the High Court, some liability may be attributed to vendors who failed to disclose friable asbestos when selling a house. As with the first claim brought against James Hardie, if such claims are brought against builders, landlords or vendors then we will likely see a change in attitude in relation to the disclosure of asbestos in residential homes and the desire to remove asbestos from homes.