

Australia: asbestos poisoning victims sacrificed to corporate profit

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The scandal that has erupted around giant building materials company James Hardie Industries (JHIL) reveals how—with the support of governments and unions—the health and welfare of ordinary working people is constantly sacrificed to corporate profit.

On September 21, the findings of the New South Wales Special Commission of Inquiry into JHIL were brought down. They confirm—albeit in very muted terms—that JHIL carried out a callous operation in 2001 to firewall its main assets against mounting asbestos compensation claims. This involved winding up its two building materials companies, Amara and Amaba, in Australia and moving its head office to the Netherlands.

The inquiry, commissioned by the New South Wales state government, found that JHIL had “manifestly” under-funded its Medical Research and Compensation Fund (MRCF). The fund was set up in February 2001, purportedly to meet the claims of thousands of people whose health had been wrecked by asbestos in building products manufactured and marketed by JHIL’s two subsidiaries over decades. NSW Premier Bob Carr decided on the inquiry when revelations of MRCF’s under-funding burst to the surface in October last year.

Handing down the findings, the head of the inquiry Commissioner David Jackson QC declared: “I find it difficult to accept that the management could really have believed that the funds of the foundation (MRCF) would have been sufficient to enable it to pay future legitimate asbestos related claims.”

He further stated that he found the “notion that the holding company would make the cheapest provision thought ‘marketable’ in respect to those liabilities so that it (JHIL) could go off to pursue its other more lucrative interests from those liabilities, is singularly unattractive”.

Evidence to the inquiry showed that the company was fully aware of the extent of the claims it faced and its actions were designed to avoid paying them. When JHIL applied to the NSW Supreme Court in 2001 for permission to liquidate Amara and Amaba and relocate to the Netherlands, it declared that MRCF was fully funded to meet all future liabilities of both asbestos sufferers and creditors. The fund, however, was provided with only \$293 million, massively short of the \$2.2 billion the company has since acknowledged would be needed.

Already 2,960 Australians have received compensation for exposure to James Hardie products. But an expert report to the inquiry estimated that another 7,900 would contract asbestos

related cancers over the next 40 years. Many more may also be at risk, in particular the legions of home owners now renovating older dwellings containing asbestos building materials.

During the inquiry, James Hardie claimed it acted in good faith in deciding MRCF’s funding and had relied on estimates provided by consulting firm Trowbridge Deloitte. In reality, JHIL knew that the Trowbridge estimate, based on data up to March 2000, grossly underestimated the actual number of likely claimants. Council assisting the inquiry, John Sheahan SC, stated: “The evidence suggests that rather than feeling reliant on Trowbridge... James Hardie saw Trowbridge as an instrument to be used for James Hardie’s ends.”

In 2001, JHIL informed the Supreme Court that it would also leave behind \$1.9 billion in shares with MRCF. However, the arrangement was withdrawn less than 18 months later at a secret board meeting. This decision was not relayed to the NSW Supreme Court, the Australian Stock Exchange or asbestos victim groups.

The cynical nature of this particular exercise was revealed in a note to James Hardie at the time from legal firm Allens, Arthur and Robinson, then working for the company. The note warned: “If this (the withdrawal of the \$1.9 billion in shares) was to occur too soon after the scheme, the implication would arise that the intention was present at the time of the scheme.”

That the “intention” behind the MRCF scheme was to enable JHIL to put its assets far beyond the reach of asbestos claimants was confirmed by a statement to the Australian Broadcasting Corporation by Hardie’s Chief Executive Peter Macdonald in October 2003. Macdonald declared that James Hardie Industries “is not involved in the foundation set up (MRCF) in anyway” and “has no legal obligation to provide further funding”. “We are confident of our legal position,” he added.

During the inquiry, Sheahan called on Commissioner Jackson to find that Macdonald had breached corporation law when he misled the Australian Stock Exchange by claiming MRCF was “fully funded”. While Jackson found that Macdonald gave “false and misleading” information to the Australian Stock Exchange, and that both he and the company’s Chief Financial Officer Peter Shafron “had breached their duties as officers of JHIL”, he stopped short of recommending their prosecution.

Despite the condemnation of Hardie’s actions and its two top executives, the market nevertheless welcomed the outcome. The company’s share value rose over two consecutive days, leaping 27 cents to \$A6.07 on September 22, extending a 3.8 percent jump

the previous day.

The source of investor satisfaction was Jackson's support for a JHIL proposal that a statutory body be created to process all asbestos claims. The company's barrister Tony Meagher made the proposal on August 13, the closing day of the six-month inquiry. He announced that, "while still not admitting liability" the company now "accepted their obligation to compensate all victims". The amount was based on a new estimate of the number of expected claimants calculated by KPMG Actuaries.

The offer to "fully fund" all claims was, however, tied to a proposal for a statutory scheme that, if accepted, would abolish common law actions that could amount to hundreds of millions of dollars in excess of even the latest estimate. The scheme would also mean claimants would have no recourse to legal advice and the amount of compensation awarded would be effectively capped.

Initially, both NSW Premier Bob Carr and the Australian Council of Trade Unions (ACTU) welcomed the proposal. Carr declared it a "massive vindication of our government's decision to set up the inquiry" while Australian Council of Trade Unions (ACTU) secretary Greg Combet proclaimed "a very significant threshold has been crossed" and the Hardie proposal, "appeared to remove the impact of its (JHIL's) October 2001 move to the Netherlands".

Carr's support was not surprising. The scheme was in line with a similar plan that he was considering last year as a means to cap payments to asbestos sufferers. According to a feature article in the *Australian Financial Review* (AFR) in May this year, Carr was looking favorably at a proposal sent to the government by the Insurance Council of Australia (ICA).

The ICA proposal—described by the AFR as a "way of dealing with asbestos claims discussed but not adopted anywhere else in the world"—would have capped exemplary damages and limited interstate claims. Under the scheme, the court process would be replaced by a medical board which would confirm what disease the claimant had contracted, and determine their level of exposure to asbestos in NSW.

But, in the face of mounting opposition by asbestos sufferers and their representatives to the JHIL proposal, both Carr and Combet have been forced to retreat. Australian Plaintiff Lawyers Association President Tom Goudkamp immediately condemned the proposal and warned: "It is obviously going to be something a lot less than the common law right. I think that's outrageous". He pointed out that other statutory schemes, such as the workers' compensation scheme introduced by the Carr government in 2001, "had simply meant that the victims received less compensation". Jack Rush QC, who represented asbestos affected victims during the inquiry, said that any plan that cut courts out of the system "was unacceptable as cases were complex and legal representation was crucial".

The ACTU and its affiliates have tried to regain some credibility by organising limited protests. They have also threatened to begin a campaign against JHIL in the United States, a market that accounts for about 75 percent of the company's sales. But union protests, like those on September 15 outside JHIL's shareholder meetings, are simply designed to let off steam, while ensuring that the ACTU remains in the loop. This is why Carr has insisted that

the company "now sit down with the ACTU" to negotiate what he describes as "a suitable outcome".

As for the ACTU's promise to wage an international campaign, this will amount to little more than appeals to union bureaucracies, such as America's peak union body the AFL-CIO, which may organise limited protest actions. Like similar union-sponsored global campaigns, these will be confined mainly to union officials and a few of their supporters. They will have little effect on JHIL, while creating the illusion that union leaders fight for workers' rights.

Over the last decade the various state union bodies and their affiliates have rallied behind their respective state governments to slash long-standing working conditions and workers' rights, including those associated with health and safety. The aim has been to make the regions "investor friendly" to attract globally mobile capital and corporate projects.

The statutory scheme for workers compensation, introduced in 2001 by the NSW Labor government to abolish common law actions and cap payouts, is a prime example. After an initial protest outside state parliament, the Labor Council of New South Wales and its affiliates called off all opposition, allowing the anti-worker legislation to go through.

More recently, the unions have all but ditched their call for industrial manslaughter laws, after Labor governments in all states (with the exception of the Australian Capital Territory) rejected it out of hand. Again, the unions raised the demand and called nominal demonstrations as a means of heading off growing anger among workers following a spate of workplace deaths.

The unions intervened into the James Hardie case, not to assist workers suffering asbestos-related diseases, but to limit the company's liability and get the issue off the agenda. Their overriding concern is to block workers from making a deeper examination of the role of the unions themselves in covering up for the activities of past and present corporate polluters—including steelmaker BHP and aluminium producer Alcoa—whose operations have devastated the health of thousands of workers and entire communities.

As for the federal Labor party: its attempts to pose as a "friend" of asbestos sufferers in the wake of the commission's findings—and in the midst of the federal election campaign—should be treated with the contempt it deserves.

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