

Australia: James Hardie signs non-binding agreement on asbestos victims' claims

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Giant building company James Hardie Industries (JHIL) signed a “Heads of Agreement” with the Australian Council of Trade Unions and asbestos victims groups at the end of December to provide an amount in the vicinity of \$A1.5 billion to \$A4 billion to fund the claims of thousands of people suffering asbestos-related diseases.

The agreement comes after months of negotiations following JHIL’s declaration on August 13 that it finally accepted “moral” responsibility to “fully fund” compensation for people affected by the asbestos in the company’s building products. It was announced on the closing day of the New South Wales Special Commission of Inquiry into the Medical Research and Compensation Fund (MRCF) set up by JHIL in February 2001, when it wound up its building material companies Amara and Amaba in Australia and moved its head office to the Netherlands. The inquiry found that the fund left behind by James Hardie to meet asbestos claims was “manifestly” inadequate.

Heralding the signing of the “Heads of Agreement”, JHIL chairwoman Meredith Hellicar apologised to asbestos sufferers for what she claimed was the “unintentional underfunding” of MRCF and declared: “We (the company) have held their welfare in our minds throughout these negotiations. At the end of the day, we are dealing with compensation for people who are terminally ill.”

Hellicar’s statement of concern was entirely cynical. There is now ample evidence that JHIL’s relocation to the Netherlands and its underfunding of MRCF was a deliberate attempt to firewall assets from the claims of asbestos victims.

In the latest negotiations, the company’s major concern was not the welfare of the people whose health it had ruined, but the protection of its assets. Hardie’s

continued obstinacy and determination to extract concessions ensured that the negotiations dragged on, causing even more anguish for those people in the process of dying because of the company’s use of asbestos long after it knew about the deadly effects.

Showing what really lay close to her heart, Hellicar went on to declare: “We also need to ensure that James Hardie continues to secure the support of its members and shareholders and continues to successfully grow in a competitive corporate environment.”

Jane Staley, spokeswoman for the Asbestos Diseases Society of Victoria, said the negotiations had been “long, tough and uncertain” and “the whole James Hardie saga has made it a difficult and distressing year for people with asbestos-related diseases”.

Even now there is no certainty that JHIL will meet its responsibilities or honour the terms in the Heads of Agreement. The document is not legally binding, serving only as a framework for the drawing up of a “Principled Agreement” to be “concluded” sometime in June.

If the “Principled Agreement” is realised—and there is no guarantee that it will—funding to meet asbestos claims will be deposited annually into a Special Purpose Fund. It is significant that, even though the proposed fund is yet to be created, there is agreement that the majority of its directors will be selected by JHIL, ensuring the company’s interests have top priority.

While there will be no cap on payouts to individual victims, as first demanded by JHIL, annual payments into the special purpose fund will be capped at 35 percent of the company’s free cash flow. Any shortfall will be made up from a \$250 million up-front cash buffer provided by James Hardie.

This means that, on the one hand, asbestos sufferers

will still have an uphill battle to receive appropriate payouts, but on the other, the cap will allow JHIL continued access to billions of dollars for investment and for providing lucrative dividends to its shareholders.

The company's interim chief operating officer Russell Chenu told a media conference that the proposed structure in the Heads of Agreement, "particularly the cash flow cap", ensured the company "has financial flexibility to fund its future growth".

According to Chenu, the arrangement will allow JHIL to fund maintenance capital expenditure to the tune of \$US40 million per annum and spend around \$60 million each year on the development of green-fields sites. Little wonder that the share market responded positively to the deal, with the company's stock hitting a high of \$6.69 on December 22, a gain of 7.4 percent.

Despite the obvious benefits it is set to reap, JHIL is looking for further concessions. Before signing any binding agreement, it is awaiting the outcome of a review ordered by NSW Labor Premier Bob Carr to identify "substantial" cost savings in the asbestos compensation system. This is expected by the end of March.

Carr ordered the review as a concession to JHIL when negotiations became grid locked because of the company's insistence on a number of demands. These included, limiting increases in the medical expenses of asbestos sufferers as well as their total claim costs.

JHIL is also hoping that the review will reduce legal costs from the current level of about 36 percent of all compensation costs to 20 percent or less. Measures being considered to reduce legal costs include, preventing claimants' lawyers from introducing more than one medical expert to back their clients' case and possibly restricting them to the use of a single "expert" provided by the Dust Diseases Tribunal.

Also under "review" is the ability of lawyers running asbestos cases to request documents from opposing parties "as a matter of course". While the restrictions would apply to both parties in a compensation claim, they are primarily designed to undermine asbestos claimants' full access to legal assistance.

The company has already signalled that if the government's review does not give it the cost savings it wants, it could walk away from the "Heads of Agreement", throwing the situation back to square one.

Asked what would happen if the review failed to deliver on the company's expectations, Chenu told AAP: "then the board needs to make a decision if it would take it (the deal) to the shareholders". Even if all the company's requirements were met, any settlement would still need the endorsement of 50 percent of shareholders.

While asbestos victims' representatives have welcomed the latest deal, it is a long way from assuring that their future claims will be met. Earlier this year, victims and their lawyers rejected an attempt by the Carr government to tie a settlement to the establishment of a statutory scheme that would impose caps on payments and restrict claimants' legal rights. Following this, Carr insisted that the Australian Council of Trade Unions (ACTU) play a central role in the negotiations, to ensure that a satisfactory deal was struck.

The resulting agreement ensures that the interests of the company will be primary and the future needs of asbestos victims will remain subservient to its profits requirements. The most telling passage reads: "Ultimately, the ability of the Fund to meet the claims of claimants will depend on the success of James Hardie's global business, the total number of claims made by claimants in the future and the financial investments and decisions taken by the Fund's managers. The parties to the Heads of Agreement have acknowledged the uncertainty inherent in predicting outcomes of these factors. No guarantees can be given about future events."

As soon as the Heads of Agreement was signed, the ACTU lost no time in calling for all bans on the company's products to be immediately lifted, declaring that the unions "did not wish to see any further conduct that would be harmful to the business of James Hardie".



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