

# HISTORY OF THE ASBESTOS CRISIS IN AUSTRALIA



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**Asbestos Awareness Australia**



Asbestos Awareness Australia Ltd is a registered not-for-profit company limited by guarantee, is a registered charity, and has endorsement from the Australian Taxation Office as a gift deductible recipient.

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# HISTORY OF THE ASBESTOS CRISIS IN AUSTRALIA

***‘The history of asbestos reveals that many corporations cynically disregarded the health and ultimately the lives of others by making commercial decisions to mine and manufacture asbestos decades after its dangers were publicly recognised.’<sup>1</sup>***

**The asbestos crisis in Australia is far from over,<sup>2</sup> and the ongoing risks and harms<sup>3</sup> are poorly documented and comprehended. A summary of the asbestos timeline is necessary to understand the current settings and to set the scene for evaluation of**

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<sup>1</sup> Peta Spender, ‘Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability’ (2003) 25 *Sydney Law Review* 223, 252.

<sup>2</sup> See, eg, Peter Franklin and Alison Reid, ‘The Ongoing Problem of Asbestos *In Situ*’ in Lenore Layman and Gail Phillips (eds), *Asbestos in Australia* (Monash University Publishing, 2019) “Asbestos in Australia”; M Soeberg, D Vallance, V Keena, K Takahashi and J Leigh, ‘Australia’s Ongoing Legacy of Asbestos: Significant Challenges Remain Even After Complete Banning of Asbestos Almost Fifteen Years Ago’ (2018) 15 *International Journal of Environmental Research & Public Health* 384. Soeberg et al conclude that the ‘Australian community needs to remain vigilant to the public health risk of asbestos exposure from existing asbestos or asbestos-containing materials as well as exposure to asbestos-containing materials that are brought into Australia despite regulations being in place’.

<sup>3</sup> The term “harm” is defined by us to include any adverse financial or non-financial impacts on society resulting from a company’s decisions or conduct. This definition is consistent with corporate sustainability frameworks and is much broader than “damages” that might be compensable under law. James Hardie intends to report in accordance with the GRI Sustainability Reporting Standards. Under these standards and in our papers, “impact” is defined broadly to include the effect an organization has on the economy, the environment, and or society, which in turn can indicate its contribution (positive or negative) to sustainable development: GRI, *Consolidated Set of GRI Sustainability Reporting Standards 2020* 44.

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**measures and policy options to minimise future fatalities from asbestos-related diseases.<sup>4</sup>**

## **1880s-1920s**

**Asbestos mining began globally in the 1880s, with mines opened in Canada, South Africa, America, Italy, and Russia.<sup>5</sup>**

**James Hardie Industries Ltd (“James Hardie”) began its business as an importer of asbestos and asbestos containing products in 1903, and initiated manufacturing of these products in 1916.<sup>6</sup>**

**In 1916, Wunderlich Ltd revived an asbestos mine in Anderson’s Creek in Tasmania.<sup>7</sup> Prior to 1969, the Wunderlich business was run by the Wunderlich brothers.**

**The dangers of asbestos fibres were being highlighted and discussed by medical experts and Commonwealth government departments during this period.<sup>8</sup>**

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<sup>4</sup> For more detailed discussion of the history of asbestos in Australia, see Jock McCulloch, *Asbestos: Its Human Cost* (1986, St Lucia, Queensland University Press) “Asbestos Cost”; Gideon Haigh, *Asbestos House: The Secret History of James Hardie Industries* (Scribe Publishing Pty Ltd, Melbourne, 2006) “Asbestos House”; Matt Peacock, *Killer Company* (Harper Collins Publishers, 2009) “Killer Company”; Asbestos in Australia.

<sup>5</sup> Asbestos Safety and Eradication Agency, ‘History of Asbestos’ at <https://www.asbestossafety.gov.au/about-asbestos/history-asbestos>.

<sup>6</sup> Edwina Dunn, ‘James Hardie Industries Ltd: No Soul to be Damned and No Body to Be Kicked’ (2005) 27 *Sydney Law Review* 339, 341. See also Asbestos Cost 13; David Jackson QC, *Report of the Special Commission of Inquiry into Medical Research and Compensation Foundation* (2004) 17; Lenore Layman, ‘The Asbestos Industry in Australia’ in Asbestos in Australia 16.

<sup>7</sup> Asbestos House 19.

<sup>8</sup> See, eg, Commonwealth Department of Health, *An Index to Health Hazards in Industry* (1922). See also WE Cooke, ‘Fibrosis of the Lungs due to the Inhalation of Asbestos Dust’ (1924) 2 *British Medical Journal* 147. For histories on asbestos science, see Montague Murray, *Commission on Compensation of Industrial Diseases* (1907); Morris Greenberg, ‘Knowledge of the Health Hazard of Asbestos Prior to the Merewether and Price Report of 1930’ (1995) 7 *Social History of Medicine* 493; Christy Barlow, Jennifer Sahmel, Dennis Paustenbach and John Henshaw, ‘History of Knowledge and Evolution of Occupational and Regulatory Aspects of Asbestos Exposure Science: 1900-1975’ (2017) 47 *Critical Reviews in Toxicology* 286.

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## 1930s-1940s

**By the early 1930s, there was significant medical and industry knowledge about the links between asbestos and asbestosis, a disease with significant long-term morbidity rates and associated mortality.<sup>9</sup> These dangers were highlighted in a report published by Merewether and Price in the United Kingdom in 1930,<sup>10</sup> and in a subsequent investigative report in Australia a year later.<sup>11</sup>**

**In April 1933, Johns-Manville (a large producer of asbestos-related products in the United States) privately settled 11 cases involving asbestosis.<sup>12</sup>**

**In 1939, the first court action against James Hardie for death caused by asbestos dust was initiated.<sup>13</sup>**

**In the early 1940s, CSR Ltd (“CSR”) began asbestos mining at Wittenoom in Western Australia, with financial support and encouragement from the West Australian State Government.<sup>14</sup>**

**During the 1940s, Malcolm King, a senior operations executive of CSR, travelled overseas to talk with other asbestos companies, including Johns-Manville in Canada**

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<sup>9</sup> See, eg, Lundy Braun, Anna Greene, Marc Manseau, Raman Singhal, Sophie Kisting and Nancy Jacobs, ‘Scientific Controversy and Asbestos: Making Disease Invisible’ (2003) 9 *International Journal of Occupational Health and Environmental Health* 194, 198; Christy Barlow, Jennifer Sahmel, Dennis Paustenbach and John Henshaw, ‘History of Knowledge and Evolution of Occupational and Regulatory Aspects of Asbestos Exposure Science: 1900-1975’ (2017) 47 *Critical Reviews in Toxicology* 286, 289. See also Asbestos House 27.

<sup>10</sup> ER Merewether and CW Price, ‘Report on Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry’ (1930, London, His Majesty’s Stationery Office).

<sup>11</sup> Asbestos Cost 52; Asbestos House 28-29. McCulloch states that James Hardie knew about the Merewether and Price report in 1930 and highlights subsequent publications in medical journals in Australia: see, eg, JV Sparks, ‘Pulmonary Asbestosis’ (1932) 15 *Medical Journal of Australia* 388.

<sup>12</sup> Jock McCulloch and Geoffrey Tweedale, *Defending the Indefensible: The Global Asbestos Industry and its Fight for Survival* (2008, Oxford University Press, Oxford) 267 “Defending the Indefensible”.

<sup>13</sup> *Jones v James Hardie and Co Pty Ltd* (1939) WCR NSW 129. See Edwina Dunn, ‘James Hardie Industries Ltd: No Soul to be Damned and No Body to Be Kicked’ (2005) 27 *Sydney Law Review* 339, 341. See also Brendan O’Connell, Paul De Langer, Greg Stoner and Alan Sangster, ‘Strategic Manoeuvres and Impression Management: Communication Approaches in the Case of a Crisis Event’ (2016) 58 *Business History* 903, 916.

<sup>14</sup> Asbestos House 19; Asbestos Cost 75.

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and Cape Asbestos in South Africa. King is cited as admitting that from these discussions ‘we were always aware of some danger from inhalation of asbestos fibre.’<sup>15</sup>

From 1940 to 1953, Wunderlich Ltd operated an asbestos mine near Baryulgil NSW. In 1953, control and management of this mine passed to James Hardie. From 1976, Woodsreef Mines Ltd operated it for a further three years.<sup>16</sup>

## 1950s-1960s

During the 1950s and 1960s, the number of lung cancer and mesothelioma diagnoses linked to asbestos exposure continued to mount.

In 1955, Doll published a seminal paper linking asbestos with lung disease.<sup>17</sup>

In 1960, Wagner et al published an equally significant paper on asbestos exposure and mesothelioma.<sup>18</sup>

From the 1960s, concerns regarding non-occupational exposures to asbestos were increasingly highlighted by medical experts.

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<sup>15</sup> Michael Gill, ‘A Decade On. CSR Ltd is Still Fighting’ *Australian Financial Review* 30 September 1988

<sup>16</sup> Asbestos Cost 134-135.

<sup>17</sup> R Doll, ‘Mortality from Lung Cancer in Asbestos Workers’ (1955) 12 *British Journal of Industrial Medicine* 81. Haigh indicates that the industry unsuccessfully attempted to have this study withdrawn or suppressed: Asbestos House 48. See also Lundy Braun, Anna Greene, Marc Manseau, Raman Singhal, Sophie Kisting and Nancy Jacobs, ‘Scientific Controversy and Asbestos: Making Disease Invisible’ (2003) 9 *International Journal of Occupational Health and Environmental Health* 194, 198; Defending the Indefensible 87. The links between lung cancer and asbestos were identified prior to publication of the Doll paper. For example, Britain established a national compensation scheme in 1931 and Germany made asbestos-related lung cancer a compensable disease in 1943: Defending the Indefensible 8, 157.

<sup>18</sup> JC Wagner, CA Sleggs, and P Marchand’ Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province’ (1960) 17 *British Journal of Industrial Medicine* 260. Haigh indicates that the industry tried to prevent publication of these results because they were viewed as a “bombshell”: Asbestos House 49. See also JC McNulty, ‘Malignant Pleural Mesothelioma in an Asbestos Worker’ (1962) 2 *Medical Journal of Australia* 953.

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For example, Wagner et al highlighted mesothelioma cases caused by environmental exposure in South Africa,<sup>19</sup> Newhouse and Thompson identified mesothelioma cases linked to household exposure in London,<sup>20</sup> and Lieben and Pistawka discussed mesothelioma cases linked to non-occupational exposure in the United States.<sup>21</sup>

Meanwhile, in Australia, Peter Russell (the Safety Officer of James Hardie) told the company management in April 1961 that asbestos was ‘one of the most dangerous of industrial poisons’.<sup>22</sup> He further advised them in 1964 that the company had a ‘moral obligation’ to asbestos product users to provide warnings of the dangers in using their products.<sup>23</sup>

In 1964, a landmark article by Selikoff et al highlighted cases of asbestos-related deaths from mesothelioma, asbestosis, lung cancer, (and other forms of cancer) in insulation workers with relatively light and intermittent exposure to asbestos. The authors concluded that the possibility of environmental exposure to asbestos had long been known and suggested many other types of tradespersons would likely suffer similar outcomes.<sup>24</sup>

In 1964, a study by Selikoff et al showed that asbestos workers who smoked had ninety times the risk of developing an asbestos related cancer than non-smokers with no exposure to asbestos.<sup>25</sup>

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<sup>19</sup> JC Wagner, CA Sleggs, and P Marchand ‘Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province’ (1960) 17 *British Journal of Industrial Medicine* 260. The industry tried to prevent publication of these results because they were viewed as a “bombshell”: Asbestos House 49. Eleven of the 30 cases studied by Wagner had not worked with asbestos and arose from non-occupational sources of exposure.

<sup>20</sup> ML Newhouse and H Thompson, ‘Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area’ (1965) 22 *British Journal of Industrial Medicine* 261.

<sup>21</sup> See, eg, J Lieben and H Pistawka, ‘Mesothelioma and Asbestos Exposure’ (1967) 14 *Archives of Environmental Health* 559.

<sup>22</sup> Gideon Haigh, ‘The James Hardie Industries Ltd Story’ in *Asbestos in Australia* 234.

<sup>23</sup> Gideon Haigh, ‘The James Hardie Industries Ltd Story’ in *Asbestos in Australia* 234.

<sup>24</sup> I J Selikoff, J Churg and E Cuyler Hammond, ‘Asbestos Exposure and Neoplasia’ (1964) 188 *Journal of the American Medical Association* 22.

<sup>25</sup> I J Selikoff, EC Hammond and J Churg, ‘Asbestos Exposure, Smoking, and Neoplasia’ (1968) 204 *Journal of the American Medical Association* 106.

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Publication of conference proceedings in 1965 stated that the ‘only safe amount of asbestos exposure [is] zero’ and that ‘as far as a safe level of asbestos dust is concerned ... there is no safe level. The safe level is nil and anything above the safe level is certain risk’.<sup>26</sup> The personnel manager of James Hardie distributed extracts of these papers in March 1966.<sup>27</sup>

A letter dated February 1965 from Professor Gandevia of the Prince Henry Hospital to the personnel manager of James Hardie indicated that:

[recent published work] leaves no doubt of this association [between asbestos and mesothelioma], and the exposure can be quite small.’<sup>28</sup>

In February 1966, the Chairman of James Hardie, Mr Reid, received a newspaper article published in October 1965 warning about the linkages between mesothelioma and exposure to families living with asbestos workers.<sup>29</sup>

In July 1966, the Chief Medical Officer of James Hardie warned the factory managers that cancer was a health risk, that there was no safe level of exposure to asbestos, and that sales may be effected.<sup>30</sup>

In 1966, the personnel manager of James Hardie sent an email responding to an article in the *Financial Times* regarding the dangers of mesothelioma stating that:

*The article is not new – it is merely one of many reports on world studies which have been conducted since 1935 when the association between exposure to dust and carcinoma of the lung, mesothelioma of the pleura, tumour of the bladder and uterus and other fatal complaints, was first recognised.*<sup>31</sup>

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<sup>26</sup> *Amaca Pty Ltd v Werfel* [2020] SASFC 125 [120] “Werfel Case” citing (1965) 132 *Annals of New York Academy of Sciences* 21-22. Underlining added by the authors for emphasis.

<sup>27</sup> Werfel Case [120-121].

<sup>28</sup> Werfel Case [115]

<sup>29</sup> Werfel Case [122].

<sup>30</sup> Werfel Case [121].

<sup>31</sup> Killer Company 4. See also Asbestos House 92. Underlining added by authors for emphasis.

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In 1966, CSR closed its mine in Wittenoom for business reasons.<sup>32</sup>

An article published in the *British Medical Journal* in 1967 observed that ‘there is a vast number of “do-it-yourself” enthusiasts who may be exposed intermittently to highly concentrated asbestos dust’.<sup>33</sup> The authors note that in some cases, extremely short exposures have been reported.<sup>34</sup>

In 1967, an article in the *Archives of Environmental Health* noted that: the occupational exposure of insulation workers or textile workers were certainly many thousands times higher than those of neighbourhood cases or family contacts.<sup>35</sup>

A paper presented at a conference in Sydney in 1968 highlighted the case of an electrician with mesothelioma whose exposure to asbestos was limited to half an hour twice a month over five years. A report of these proceedings was circulated within James Hardie.<sup>36</sup>

An article published in the *Medical Journal of Australia* in 1968 warned of the development of mesothelioma after minor exposure to asbestos.<sup>37</sup>

In 1968, the case of a 14-year-old boy with mesothelioma was highlighted in an article in *The New Yorker*. This boy had worked with his father sawing asbestos sheets.<sup>38</sup>

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<sup>32</sup> Killer Company 28. See also M Gill, ‘A Decade On. CSR Ltd is Still Fighting’ *Australian Financial Review* 30 September 1988.

<sup>33</sup> Werfel Case [125] citing ‘Asbestosis’ (1967) 5557 *British Medical Journal* 62, 62-63.

<sup>34</sup> Werfel Case [125]. Underlining added by authors for emphasis.

<sup>35</sup> Werfel Case [128] citing J Lieben and H Pistawka, ‘Mesothelioma and Asbestos Exposure’ (1967) 14 *Archives of Environmental Health* 559.

<sup>36</sup> Werfel Case [129]

<sup>37</sup> Werfel Case [131]. Underlining added by authors for emphasis.

<sup>38</sup> Werfel Case [130].

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In 1969, CSR purchased the asbestos cement sheeting business of Wunderlich Ltd and operated this company until it was on sold to James Hardie in 1977.<sup>39</sup>

## 1970s-1990s

In 1970, authors of a study of mesothelioma sufferers involving neighbourhood and domestic exposure in Germany noted the 'remarkable fact that this exposure may be very short.'<sup>40</sup>

In the 1970s, media coverage of the asbestos crisis heightened in Australia and unions commenced industrial action to ban the use of asbestos.<sup>41</sup>

In 1976 / 77, the World Health Organisation and the International Agency for Research on Cancer confirmed that there is no safe level of exposure to asbestos and that exposure risks extend to neighbourhoods.<sup>42</sup>

Despite this advice, sales of asbestos-containing materials in Australia continued to climb.<sup>43</sup>

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<sup>39</sup> CSR Ltd, *Annual Report 2019* 72.

<sup>40</sup> P Dalquen, AF Dabbert and L Hinz, 'The Epidemiology of Pulmonary Mesothelioma: A Preliminary Report on 119 Cases from the Hamburg Area' (1970) 15 *German Medical Monthly* 89. Underlining added by authors for emphasis.

<sup>41</sup> Lenore Layman, 'Tackling the Dust Hazard: The Response of Public Health' in *Asbestos in Australia* 104.

<sup>42</sup> International Agency for Research on Cancer, 'Asbestos' (1977) 14 *Monographs on the Evaluation of Carcinogen Risks of Chemicals to Man*; International Agency for Research on Cancer, 'Asbestos. An Overall Evaluation of Carcinogenicity' (1987); IARC *Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Humans*, suppl 7. Lyon, France: 106-116. See also World Health Organization, *Elimination of Asbestos-Related Disease*, (2006, Geneva) viewed 20 June 2020 at [https://apps.who.int/iris/bitstream/handle/10665/69479/WHO\\_SDE\\_OEH\\_06.03\\_eng.pdf;sequence=1](https://apps.who.int/iris/bitstream/handle/10665/69479/WHO_SDE_OEH_06.03_eng.pdf;sequence=1).

<sup>43</sup> Killer Company 140, 149; *Defending the Indefensible* 30-31; Peta Spender, 'Blue Asbestos and Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability' (2003) 25 *Sydney Law Review* 223, 253; Corie Gray, Renee Carey and Alison Reid, 'Current and Future Risks of Asbestos Exposure in the Australian Community' (2016) 22 *International Journal of Occupational and Environmental Health* 292, 292. Gray et al indicate that between 1880 and 1985, Australia's estimated consumption of asbestos was 1,888,036 tons.

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**In 1977, James Hardie opened a new state of the art asbestos cement pipe factory in Moss Vale NSW.<sup>44</sup>**

**In 1978, the chairman of James Hardie, John Reid, publicly boasted that:**

**[e]very time you walk into an office building, a home, a factory: every time you put your foot on a brake, ride in a train, see a bulldozer at work ... Every time you see or do any of these things, the chances are that a product from the James Hardie Group of Companies has a part in it.<sup>45</sup>**

**Less than a year later, the company that until then was called “James Hardie Asbestos Ltd”, (with a headquarters in Sydney known as “Asbestos House”), **changed its name to James Hardie Industries Ltd.** The prior names of the company and headquarters reflected the group’s primary focus on asbestos products.<sup>46</sup>**

**James Hardie continued to mass produce asbestos containing building products until the mid-1980s<sup>47</sup> and manufactured asbestos cement pipes until 1987.<sup>48</sup>**

**A Canadian owned asbestos mine at Woodsreef Mine near Tamworth continued with NSW state government support (in the form of royalty holidays and concessional loans) until 1983. The main domestic customer of this mine was James Hardie Industries Ltd.<sup>49</sup>**

**The first successful common law actions made on behalf of Australian asbestos-related disease victims arose during the 1980s, after many decades of private settlements.<sup>50</sup>**

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<sup>44</sup> Killer Company 141.

<sup>45</sup> Asbestos Cost 19 citing John Reid in ‘Hardie Ferodo 1000: James Hardie Industries Ltd Group and Activity Report’ (1978) 2.

<sup>46</sup> Lenore Layman, ‘The Asbestos Industry in Australia’ in Asbestos in Australia 40; Asbestos Cost 19.

<sup>47</sup> Werfel Case [131].

<sup>48</sup> Killer Company 140, 149.

<sup>49</sup> Killer Company 33, 39.

<sup>50</sup> Defending the Indefensible 167; Asbestos House 146-147.

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**Chrysotile asbestos was banned in building products across Australia in 1987.<sup>51</sup>**

**The first court victory for the Wittenoom victims was in the late 1980s. The Victorian Appeal Court ruled that CSR had acted with 'continuing, conscious and contumelious' disregard for its workers' safety.<sup>52</sup> Ian Burgess, the Chief Executive Officer of CSR, conceded that:**

**The company has been found negligent in regard to the dust. And I think, probably, properly negligent. I mean, you can't hide behind that. But the Mines Department did not close the mine down. And they had the power to do so.<sup>53</sup>**

**In the 1990s, studies were published on the lethal environmental exposure of residents in Wittenoom.<sup>54</sup>**

## 21<sup>st</sup> Century

**A total ban on the manufacture, use and sale of asbestos took effect at the end of 2003.<sup>55</sup>**

**A study published in 2008 confirmed the excess cancer risks of women and children who worked or lived in Wittenoom.<sup>56</sup>**

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<sup>51</sup> Corie Gray, Renee Carey and Alison Reid, 'Current and Future Risks of Asbestos Exposure in the Australian Community' (2016) 22 *International Journal of Occupational and Environmental Health* 292, 292.

<sup>52</sup> *Midalco Pty Ltd v Rabenalt* [1989] VR 461.

<sup>53</sup> Michael Gill, 'A Decade On. CSR Ltd is Still Fighting' *Australian Financial Review* 30 September 1988

<sup>54</sup> See, eg, J Hansen, NH de Klerk, JL Eccles, AW Musk and MS Hobbs, 'Malignant Mesothelioma after Environmental Exposure to Blue Asbestos' (1993) 54 *International Journal of Cancer* 578; J Hansen, NH de Klerk, JL Eccles, AW Musk and MS Hobbs, 'Environmental Exposure to Crocidolite and Mesothelioma Exposure-Response Relationships (1998) 157 *American Journal of Respiratory and Critical Care Medicine* 69; J Hansen, NH de Klerk, JL Eccles, AW Musk and MS Hobbs, 'Individual Exposure Levels in People Environmentally Exposed to Crocidolite' (1997) 12 *Applied Occupational and Environmental Hygiene* 485.

<sup>55</sup> Corie Gray, Renee Carey and Alison Reid, 'Current and Future Risks of Asbestos Exposure in the Australian Community' (2016) 22 *International Journal of Occupational and Environmental Health* 292, 292.

<sup>56</sup> See, eg, A Reid, G Berry, J Heyworth, NH de Klerk and AW Musk, 'Cancer Incidence Among Women and Girls Environmental and Occupationally Exposed to Blue Asbestos at Wittenoom, Western Australia' (2008) 122 *International Journal of Cancer* 2337. See also Alison Reid, 'Health Outcomes of the women and Children Who Lived at Wittenoom' in *Asbestos in Australia* 175, 178-79, 180. There were 437 incident cancers in the Wittenoom women diagnosed between 1960 and 2005. Eight four were former workers and the remainder

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**In 2010, the Australian federal government commissioned a review to make recommendations for the development of a national strategic plan to improve asbestos management in Australia.**

**In 2011, the first parliamentary group meeting on asbestos-related disease took place.<sup>57</sup>**

**The Workplace Health and Safety Act 2011 was introduced nationally as model legislation for the management of asbestos in workplaces. This model legislation was enacted by the States and Territories as Workplace Health and Safety Regulation to govern the handling of asbestos, removal of asbestos, training of persons working with asbestos, and the licensing requirements of abatement professionals.<sup>58</sup>**

**At the end of 2011, SafeWork Australia issued a Code of Practice that provides guidance on how to respond to asbestos risks and contains information on identifying asbestos materials, how to report asbestos properly, and how to manage the risk of exposure in a work setting.<sup>59</sup>**

**In 2012, the Asbestos Management Review considered the evidence and made a series of recommendations, including:**

- 1. The development of a national strategic plan and the establishment of an independent national agency to guide the implementation of this plan.<sup>60</sup>**

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were former residents. Of the former residents, 72 percent had lived with an asbestos worker and 35 percent reported washing the clothes of an asbestos worker. These Wittenoom women were found to have excess risks of lung cancer and mesothelioma relative to the general female population in Western Australia. The risks of developing cancer were also much greater for the Wittenoom children versus the general population.

<sup>57</sup> Asbestos Safety and Eradication Agency, 'History of Asbestos' at <https://www.asbestossafety.gov.au/about-asbestos/history-asbestos>.

<sup>58</sup> For example, *the NSW Work Health and Safety Act 2011 (NSW); NSW Work Health and Safety Regulation 2011*.

<sup>59</sup> SafeWork Australia, 'How to Manage and Control Asbestos in the Workplace - Code of Practice (October 2018) available at <https://www.safeworkaustralia.gov.au/resources-publications/model-codes-of-practice>.

<sup>60</sup> Management Report 17. The scope of this review encompassed work health and safety, environmental and public health issues, education and public awareness, removal, transport, and disposal of asbestos.

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2. The introduction of mandatory asbestos assessments of residential homes built prior to 1987, with a labelling system to alert potential buyers, tenants and renovators of identified threats.<sup>61</sup>
  3. A plan to provide for staged removal of all asbestos containing material from government and commercial buildings by 2030.<sup>62</sup>

The then Federal Government indicated that it supported these review recommendations, but so far, only the first step has been implemented.<sup>63</sup>

In 2012, the Office of Asbestos Safety was established. On 1 July 2013, the Office of Asbestos Safety was replaced by the Asbestos Safety and Eradication Agency.<sup>64</sup>

The Asbestos Safety and Eradication Agency is empowered under the *Asbestos Safety and Eradication Agency Act 2013* (Cth) to coordinate a framework for the Commonwealth, States and Territories to work together to prevent harmful exposure to asbestos and to eliminate asbestos-related diseases.<sup>65</sup>

The Asbestos Safety and Eradication Agency confirms that it was set up to ‘provide a national focus on asbestos issues which goes beyond workplace safety to encompass environmental and public health concerns.’<sup>66</sup>

Despite these worthy ambitions, our research suggests that public acknowledgment of asbestos issues in Australia beyond workplaces remains minimal and equivocal.<sup>67</sup> Our household survey results suggest the broader community remains largely unaware of the public health risks and impacts of legacy asbestos in homes. Further,

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<sup>61</sup> Management Report Recommendation 3 (c).

<sup>62</sup> Management Report Recommendation 4 (a)(b).

<sup>63</sup> David Twomey, ‘Labor Plans National Asbestos Removal Agency’ econews online, 4 September 2012 at <http://econews.com.au/20094/labor-plans-national-asbestos-removal-agency/>.

<sup>64</sup> Enacted under the *Asbestos Safety and Eradication Agency Act 2013* (Cth)

<sup>65</sup> The Agency is a statutory body established under the *Asbestos Safety and Eradication Agency Act 2013* (Cth).

<sup>66</sup> Asbestos Safety and Eradication Agency, ‘History of Asbestos’ at <https://www.asbestossafety.gov.au/about-asbestos/history-asbestos>.

<sup>67</sup> See, eg, Werfel Case [231].

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our analysis of available public health guidance suggests current warnings to householders about the health risks of asbestos exposure are qualified, incomplete, and poorly disseminated.

The only legal actions that we are aware of that have been brought against the company directors and executives of James Hardie, CSR or Wunderlich Ltd were civil proceedings initiated by the Australian Securities and Investments Commission against the directors and legal counsel of James Hardie for breaches of continuous disclosure law and the statutory duty of due care and diligence.<sup>68</sup> These breaches centred on misleading disclosures to the market about the sufficiency of funding available to asbestos-related disease claimants and did not extend to broader operational or safety matters.<sup>69</sup> Some aspects of these cases were appealed to the High Court, with its final judgment released in 2012.

Studies and meta-analyses of prior medical studies published in 2017 and 2018 found positive and strong associations between non-occupational exposure (including neighbourhood, domestic and household exposures) and the risk of mesothelioma.<sup>70</sup> Marsh et al conclude that mesothelioma risks from non-occupational asbestos exposure are consistent with the fibre-type potency response observed in occupational settings.<sup>71</sup> Other medical researchers highlight cases of mesothelioma

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<sup>68</sup> *Corporations Act 2001* (Cth) ss 180, 674. For an outline of the continuous disclosure and misleading and deceptive conduct law and relevant cases, see Gill North, *Company Disclosure in Australia* (Thomson Reuters, Sydney, 2013) 71-77. See also Anil Hargovan, 'Australian Securities and Investments Commission v MacDonald [No 11]: Corporate Governance Lessons from James Hardie Industries Ltd' (2009) 33 *Melbourne University Law Review* 984.

<sup>69</sup> *James Hardie Industries NV v ASIC* [2010] NSWCA 332. See also Gill North, *Company Disclosure* (Thomson Reuters, Sydney, 2013) 71-77.

<sup>70</sup> See, eg, Gary Marsh, Alexander Riordan, Kara Keeton and Stacy Benson, 'Non-occupational Exposure to Asbestos and Risk of Pleural Mesothelioma: Review and Meta-analysis' (2017) 74 *Occupational Environmental Medicine* 838. Renyi Xu, Frances Barg, Edward Emmett, Douglas Wiebe and Wei-Ting Hwang, 'Association Between Mesothelioma and Non-Occupational Asbestos Exposure: Systematic Review and Meta-Analysis' (2018) 17.90 *Environmental Health*.1.

<sup>71</sup> Gary Marsh, Alexander Riordan, Kara Keeton and Stacy Benson, 'Non-occupational Exposure to Asbestos and Risk of Pleural Mesothelioma: Review and Meta-analysis' (2017) 74 *Occupational Environmental Medicine* 838, 845.

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arising from much lower dosages in non-occupational settings than observed from occupational sources.<sup>72</sup>

A study released in 2019 predicts the mortality rates of women who worked or lived in Wittenoom.<sup>73</sup> Reid concludes that 'exposure to asbestos from the general environment, at levels lower than incurred occupationally, has had a catastrophic effect.'<sup>74</sup>

In 2019, the youngest person diagnosed with mesothelioma in Australia was 19.<sup>75</sup>

At the end of 2020, the Supreme Court of South Australia found that at least by 1980 James Hardie ought to have known that there was a material risk of contracting mesothelioma from even occasional exposure to asbestos dust which would arise from tradespeople and householders remodelling, repairing or removing asbestos-cement products in residential buildings.<sup>76</sup>

Importantly, awareness of the risks, suffering and deaths resulting from asbestos exposure in Australia was not limited to those working in the industry. Multiple sources note that the asbestos materials industry was permitted to continue to operate because it was able to influence, or had the support of many government officials, policy makers, public health administrators, medical and legal professionals, and researchers.

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<sup>72</sup> See, eg, Alison Reid, 'Health Outcomes of the Women and Children Who Lived at Wittenoom' in *Asbestos in Australia* 180; Werfel Case [128] citing (1967) *SA Medical Journal* 639, 641-642.

<sup>73</sup> See, eg, A Reid, G Berry, J Heyworth, NH de Klerk and AW Musk, 'Predicted Mortality from Malignant Mesothelioma Among Women Exposed to Blue Asbestos at Wittenoom, Western Australia' (2019) 66 *Occupational Environmental Medicine* 169. See also Alison Reid, 'Health Outcomes of the Women and Children Who Lived at Wittenoom' in *Asbestos in Australia* 175, 178-79, 180.

<sup>74</sup> Alison Reid, 'Health Outcomes of the Women and Children Who Lived at Wittenoom' in *Asbestos in Australia* 180.

<sup>75</sup> Australian Government, Australian Institute of Health and Welfare, *Mesothelioma in Australia 2019* (published August 2020).

<sup>76</sup> Werfel Case.

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Quotes from the sources below are those that, in our view, are most consistent with the documented history of asbestos and published scientific developments. This selection is not intended, in whole or in part, to be complete or balanced (whatever this means in the context of the asbestos crisis).

- **McCulloch suggests that the:**

*industry was allowed to decide what constituted the public good and what level of risk to employees and consumers was acceptable. Industry, of course, viewed the acceptability of risk as being a trade-off between its own special economic interests, which it equated with the common good, and the potential loss of profits which would result from morally responsible behaviour.<sup>77</sup>*

- **Brophy argues that:**

*All you really need to know about the root causes, the cover-ups, and the human impact of occupational cancer you can learn from the example of asbestos. It also tells you everything you need to know about the reality of our economic system, what it values and what it fails to protect. It teaches about the collusion between government and industry. It addresses the issue of so-called “junk science” and how the powers-that-be control information and public health policy. It reveals the hidden injuries of class... and it drives home the old axiom of working-class history- that everything you get in this society you must fight for<sup>78</sup>*

- **Haigh concludes that with only a few notable exceptions, the attitude of health authorities in Australia ‘was, at best apathetic; at worst, culpable’.<sup>79</sup>**
- **Peacock suggests that:**

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<sup>77</sup> Asbestos Cost 135.

<sup>78</sup> Defending the Indefensible 1 citing Jim Brophy, ‘Carcinogens at Work’ (Conference on Everyday Carcinogens: Stopping Cancer Before It Starts, McMaster University, Hamilton, Ontario, 27 March 1999).

<sup>79</sup> Asbestos House 403. See also Lenore Layman, ‘The Asbestos Industry in Australia’ in Asbestos in Australia 6.

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*[b]acked by a global network of industry PR and research, Hardie dominated key institutions in the public health bureaucracy, both state and federal, and influenced the crucial tasks of setting safe standards and monitoring asbestos dust and disease.<sup>80</sup>*

- **Peacock claims that James Hardie sought ‘to control Australian research on asbestos and to discredit professionals who sounded the alarm.’<sup>81</sup>**
- **McCulloch and Tweedale argue that the industry in alliance with governments and the medical profession delayed the recognition of the environmental hazards of asbestos worldwide from the 1960s.<sup>82</sup> They suggest this delayed recognition allowed the growth in the manufacture and sale of building products containing asbestos to mushroom during the 1970s and was a major contributor to the ensuing health disaster.<sup>83</sup>**
- **McCulloch and Tweedale claim that:**

*[N]ot only was the medical profession’s reaction to the asbestos hazard often feeble, but scientists have also been among the industry’s most strident defenders. There are two reasons why that was so: corporate suppression and intimidation meant that criticism of the industry came at a price ... and the convergence of the economic, political and social interests of the scientific establishment and commerce.<sup>84</sup>*

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<sup>80</sup> Killer Company 70. See also Killer Company 72, 88 90, 91, 100. Peacock provides examples of health bodies and researchers who spoke out about the dangers of asbestos.

<sup>81</sup> Killer Company 70. See also Lundy Braun, Anna Greene, Marc Manseau, Raman Singhal, Sophie Kisting and Nancy Jacobs, ‘Scientific Controversy and Asbestos: Making Disease Invisible’ (2003) 9 *International Journal of Occupational Health and Environmental Health* 194, 200; R Proctor, *Cancer Wars: How Politics Shapes What We Know and Don’t Know About Cancer* (Basic Books, New York, 1995).

<sup>82</sup> Defending the Indefensible 189-224. See also Lundy Braun, Anna Greene, Marc Manseau, Raman Singhal, Sophie Kisting and Nancy Jacobs, ‘Scientific Controversy and Asbestos: Making Disease Invisible’ (2003) 9 *International Journal of Occupational Health and Environmental Health* 194, 194, 203.

<sup>83</sup> Defending the Indefensible 223-224, 291.

<sup>84</sup> Defending the Indefensible 119.

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- **Braun et al extend the suggested network of entities that worked together to obscure the hazards of asbestos to ‘biomedical researchers, multinational companies, academic institutions, and nation states.’<sup>85</sup>**
  - **Braun et al suggest:**  
*the asbestos industry deployed a range of international strategies to control the population and dissemination of knowledge about asbestos. Such strategies include direct suppression of data from industry-sponsored research, selective publication of research findings, and the systematic use of scientific knowledge to create uncertainty.<sup>86</sup>*

**These authors note the willing participation of scientists in these endeavours.<sup>87</sup>**

- **Soeberg et al suggest that the asbestos ban in 2003 in Australia was ‘a significant victory for the trade union movement’ ... [but] ‘unfortunately represented a story of the lack of political will by governments at Federal and State levels to act in the health interests of their community.’<sup>88</sup>**
- **Smyth contends that:**  
*vested interests in the asbestos industry – the keepers of the secret – acted to thwart public disclosure in manifold ways ... The industry managed its intelligence and its image very carefully ... engaged the services of public relations firms, and established medico-scientific bodies to do its bidding.<sup>89</sup>*

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<sup>85</sup> Lundy Braun, Anna Greene, Marc Manseau, Raman Singhal, Sophie Kisting and Nancy Jacobs, ‘Scientific Controversy and Asbestos: Making Disease Invisible’ (2003) 9 *International Journal of Occupational Health and Environmental Health* 194, 194.

<sup>86</sup> Lundy Braun, Anna Greene, Marc Manseau, Raman Singhal, Sophie Kisting and Nancy Jacobs, ‘Scientific Controversy and Asbestos: Making Disease Invisible’ (2003) 9 *International Journal of Occupational Health and Environmental Health* 194, 203.

<sup>87</sup> Lundy Braun, Anna Greene, Marc Manseau, Raman Singhal, Sophie Kisting and Nancy Jacobs, ‘Scientific Controversy and Asbestos: Making Disease Invisible’ (2003) 9 *International Journal of Occupational Health and Environmental Health* 194, 194.

<sup>88</sup> M Soeberg, D Vallance, V Keena, Ken Takahashi and J Leigh, ‘Australia’s Ongoing Legacy of Asbestos: Significant Challenges Remain Even After Complete Banning of Asbestos Almost Fifteen Years Ago’ (2018) 15 *International Journal of Environmental Research & Public Health* 383, 384.

<sup>89</sup> Chris Smyth, ‘Uncovering the Story: Asbestos in the Media’ in *Asbestos in Australia* 22.

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**He suggests that contacts within the industry were reluctant to blow the whistle, the unions were compromised or complicit, publishers and broadcasters did not want to rock the boat, and asbestos executives carried favour with media management.<sup>90</sup>**

**These published views suggest blame or accountability for the continuing large-scale fatalities from asbestos-related diseases in Australia can be widely attributed.**

**Interestingly, the outlined views are generally historically framed and perhaps assume that the identified patterns and strategies have been resolved. Yet, our researchers observe the same patterns of suppression of information, careful management and restriction of public communications, limited media coverage, and passivity around asbestos threats in 2021.<sup>91</sup>**

**To be crystal clear; the asbestos crisis is far from over and the deaths from asbestos-related diseases will almost certainly continue under the current legal and other settings. Critics will undoubtedly call such discussion alarmist, but in this case, alarm is in fact warranted.**

**The present risks of exposure to legacy asbestos in Australia are as real and substantive as the prior risks of exposure to asbestos containing materials when these products were manufactured and sold legally. Australian households remain at risk of dying from occasional or brief durations of exposure to legacy asbestos in their homes, and our survey results suggest most are not properly informed about these risks.**

**Since 2008, 52 percent of the mesothelioma claims made through the Asbestos**

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<sup>90</sup> Chris Smyth, 'Uncovering the Story: Asbestos in the Media' in *Asbestos in Australia* 22.

<sup>91</sup> Soeberg et al highlight the ongoing risks of legacy asbestos, but do not discuss or recommend policy changes to minimise future incidences of harmful exposure to asbestos: M Soeberg, D Vallance, V Keena, Ken Takahashi and J Leigh, 'Australia's Ongoing Legacy of Asbestos: Significant Challenges Remain Even After Complete Banning of Asbestos Almost Fifteen Years Ago' (2018) 15 *International Journal of Environmental Research & Public Health* 383, 384.

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**Injuries Compensation Fund (established by James Hardie in 2006) have been categorised by KPMG (the auditor of this fund), as home renovation related. These percentages rose to 62 and 55 percent in 2018 and 2019 respectively, and the number of these types of claims reached a record number in 2019.<sup>92</sup>**

**Mesothelioma is a notifiable disease in Australia, with more than 830 recorded diagnoses in 2020.<sup>93</sup> There is no cure for this disease, and it has a stark prognosis. Professor Ken Takahashi, director of the Asbestos Diseases and Research Institute confirms that, '[w]e don't even have a drug to treat ... [mesothelioma] once a diagnosis is confirmed, much less one that will prevent its development once someone has been exposed to asbestos dust.' Vircondelet, a medical professor describes mesothelioma as perhaps 'the most terrible cancer known, in which the decline is the most spectacular, the most cruel'.<sup>94</sup>**

**Yet, despite the continuing horrors of a mesothelioma or lung cancer diagnosis:**

- There have been no nationally coordinated public health campaigns in Australia on asbestos threats.**
- The amount of federal, state, and other sources of funding provided for research of these diseases has been, and continues to be, disproportionately low for the burdens suffered.**
- There is incomplete state-based regulation governing the handling of asbestos in residential properties beyond workplace settings.**

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<sup>92</sup> KPMG, *Valuation of Asbestos Related Disease Liabilities of Former James Hardie Industries Ltd Entities to be Met by the Asbestos Injuries Compensation Fund* (19 May 2020) 27-28. KPMG audits and reports on the Asbestos Injuries Compensation Fund.

<sup>93</sup> Australian Government, Cancer Australia, 'Mesothelioma in Australia Statistics' viewed 23 June 2021 at <https://mesothelioma-cancer.canceraustralia.gov.au/statistics>. In Australia, diagnoses of mesothelioma must be reported to state based registries. Ultimately this data is consolidated by the Australian Mesothelioma Registry. See Australian Government, Australian Institute of Health and Welfare, Australian Mesothelioma Registry.

<sup>94</sup> A Vircondelet, *Mortel Aminate* (1998, A. Carriere, France) 15.

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- Committed systematic and timely asbestos eradication programs appear to have stalled across Australia.<sup>95</sup>

## Our Summary & Views

The published evidence, concessions, warnings, and statements (if true and accurate) provide important context when considering the accountability of those involved with the continued manufacture and marketing of asbestos containing products in Australia during the 20<sup>th</sup> century.

Views on when the leadership of James Hardie and CSR and the federal and state governments knew, or ought to have known, about the dangers and health impacts of asbestos on humans differ. Some industry participants and state governments continue to claim that their knowledge of deaths from asbestos-related diseases was limited until the latter decades of the 20<sup>th</sup> century.<sup>96</sup> We do not find these claims plausible.

In our opinion, evidence to hand today suggests that the directors and senior executives of James Hardie and CSR, the then governments, and the relevant public health sectors in Australia, knew, or ought to have known, about:

- The burden of asbestosis in the 1930s.
- The links between asbestos exposure and lung cancer in the 1950s.
- The fatal nature of mesothelioma in the 1960s, including the possibility of contracting this disease from non-occupational sources and from low dose and occasional periods of exposure.

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<sup>95</sup> More detailed discussion of each of these issues is planned.

<sup>96</sup> See, eg, Werfel Case [153]; NSW Government, *Asbestos Fact Sheet for Home Owners and Tenants* (March 2019).

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**We are not alone in these views.<sup>97</sup> For example, in the Werfel Case, Chief Justice Kourakis and Justices Nicholson and Livesay found that at least by 1980 James Hardie ought to have known that there was a material risk of contracting mesothelioma from even occasional exposure to asbestos dust which would arise from tradespeople and householders remodelling, repairing or removing asbestos-cement products in residential buildings. The Justices state at [153] that ‘we do not find the expert evidence on which James Hardie relies persuasive and indeed, in some respects, it supports a finding of foreseeability well before Mr Werfel’s exposure to asbestos.’ They note at [157] that ‘there is evidence on which foresight of that risk may well be attributed to James Hardie at an earlier time, and in particular the time of an Australian Conference’ in 1968.**

**The judicial analysis in Werfel may be generous to James Hardie because it assumes that the board were not aware of medical developments outside of Australia and that their knowledge was limited to academic sources. Published material suggests that sources of knowledge on the deadliness of asbestos-related diseases were not confined to the formal medical publications discussed above. Industry executives exchanged information globally regarding ongoing medical developments and lawsuits.<sup>98</sup> In addition, the industry conducted its own internal research, it had ongoing access to the health records of employees, it was aware of the dust level concerns, and it knew about the deaths of employees, families, and others.<sup>99</sup> Some of this evidence was kept secret for many decades and has only come to light publicly through legal proceedings.<sup>100</sup>**

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<sup>97</sup> See, eg, Lundy Braun, Anna Greene, Marc Manseau, Raman Singhal, Sophie Kisting and Nancy Jacobs, ‘Scientific Controversy and Asbestos: Making Disease Invisible’ (2003) 9 *International Journal of Occupational Health and Environmental Health* 194, 198; Defending the Indefensible 50, 262.

<sup>98</sup> See, eg, Defending the Indefensible 263-263, 267; Michael Gill, ‘A Decade On. CSR Ltd is Still Fighting’ *Australian Financial Review* 30 September 1988.

<sup>99</sup> See, eg, Lenore Layman, ‘Tackling the Dust Hazard: The Response of Public Health’ in *Asbestos in Australia* 93; *Asbestos House* 399-400. See also Defending the Indefensible 51-53, 262.

<sup>100</sup> *Asbestos House* 25, 152; John Gordon, ‘The History of Asbestos Litigation’ in *Asbestos in Australia* 242, 249; Defending the Indefensible 262-264. Most earlier cases seeking compensation for asbestos related diseases failed due to a lack of documentation. Thousands of records that were withheld or seemingly lost by various defendants were subsequently found and or discovered. For example, Turner and Newall’s managers exchanged letters in the late 1960s warning of asbestosis and mesothelioma in a ‘diverse character of

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Levels of naturally occurring asbestos in Australia that present potential risks to the public are minimal because such asbestos is located well underground and cannot release harmful fibres unless exposed or disturbed.<sup>101</sup> In contrast, the scale of harmful or potentially harmful asbestos products inbuilt within public, commercial and residential properties is thought by most experts to be extensive.<sup>102</sup> These products were originally manufactured and distributed by James Hardie, CSR and others to every sector of the economy and it is these legacy products that pose the greatest risks to Australians today.

As such, we believe that James Hardie and CSR are primarily responsible for the continuing mass deaths from mesothelioma in Australia, and for a portion of the lung cancer fatalities where exposure to asbestos is a material contributing factor. Subordinate responsibility perhaps lies with the many participants who passively sat by, and who are still, today, failing to take appropriate actions to prevent ongoing harmful exposure to asbestos, a lethal carcinogen.

The substantive questions NOW are:

1. When will the industry, federal and state leaders, the public health sector, scholars, and the media finally acknowledge the facts and evidence of the asbestos crisis publicly and unequivocally?
2. When will the industry, federal and state leaders, and the public health sector initiate the necessary preventative actions to minimise loss of life from asbestos-related diseases, especially in Australian homes?

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occupations', such as porters, plumbers, joiners and housewives: Defending the Indefensible 200 citing AB Boath to HC Lewinsohn, 5 September 1967. These files only reached the public domain during litigation in the 1990s.

<sup>101</sup> See, eg, NSW SafeWork, 'Naturally Occurring Asbestos FAQs' viewed 1 December 2020 at <https://www.safework.nsw.gov.au/resource-library/asbestos-publications/naturally-occurring-asbestos/naturally-occurring-asbestos-faqs2>. This website indicates that less than 1% of the land surface of NSW is estimated to have the potential for naturally occurring asbestos within 10 metres of the land surface.

<sup>102</sup> See Peter Franklin and Alison Reid, 'The Ongoing Problem of Asbestos *In Situ*' in Asbestos in Australia.

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**The longer these steps take, the greater the accountability of these cohorts for the avoidable lives lost in coming decades (and possibly centuries).**

## Asbestos Awareness Australia Ltd

**Asbestos Awareness Australia Ltd is a registered not-for-profit company limited by guarantee, is a registered charity, and has endorsement from the Australian Taxation Office as a gift deductible recipient. The company was set up:**

- **To promote and enhance public awareness and knowledge of the dangers and consequences of asbestos exposure in Australia.**
- **To advocate for legal and social reforms that prevent or minimise the harms from asbestos related disease in Australia.**
- **To promote actions that prevent or minimise the harms from asbestos related disease in Australia.**

**To achieve these objectives, the company provides public access to widely sourced information on asbestos risks and impacts, including the associated medical, legal, and political debates.**