
CLAIMS MADE Vs ACTIONS BY JAMES HARDIE AND CSR



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Asbestos Awareness Australia



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‘There is a legitimate community expectation that Australian ... [companies] will develop and maintain a good corporate culture which ensures that their staff do not engage in illegal, unethical and unprofessional conduct and do not act in disregard of the interests of their customers ... the Australian public is entitled to expect that Australia’s major corporations act as exemplary corporate citizens wherever in the world they may operate.’¹

Our prior paper found that the cumulative levels of compensation and other contributions from James Hardie Industries Ltd “James Hardie” and CSR Limited “CSR” to mitigate the harms and minimise deaths caused by legacy asbestos likely total less than 3 billion dollars.

In contrast, we predict that the financial impositions of the asbestos crisis in Australia will almost certainly exceed tens of billions of dollars, with most of the required bills paid or payable by taxpayers, businesses, homeowners, and uncompensated victims. We conclude that asbestos is a classic case study of the ability of companies to benefit from short-term profits, while socialising most of the longer-term harms.²

¹ *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* (2016) 118 ACSR 124, 151 [123] (Wigney J).

² We define “harms” to include any adverse financial or non-financial impacts on society resulting from a company’s decisions or conduct. This definition is consistent with well-established corporate sustainability frameworks and is considerably more expansive than “damages” that might be compensable under law: GRI Standards. In these standards and in our content, “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.

The paucity of public and policy discourse on asbestos concerns has resulted in poor community awareness of asbestos risks and fatalities. In our view, this low public profile has enabled James Hardie and CSR to avoid continuing public scrutiny and odium and an appropriate allocation of the financial responsibilities and liabilities resulting from their prior activities.

This paper considers the continuing harms and externalities generated by the prior activities of James Hardie and CSR against the stated corporate sustainability and social license objectives and achievements of these publicly listed companies.

Corporate sustainability and social licenses

Debates concerning the roles and purposes of corporations within society are longstanding.³ Some scholars and practitioners view shareholder returns as the primary or sole driver of company board and executive decisions. Others adopt a broader perspective because companies necessarily rely on, interact with, and impact other stakeholders such as employees, customers, and the broader community.⁴

Corporate models that prioritise and encompass these broader stakeholder harms and impacts are referred to as, and reflected within, “corporate social responsibility” or “corporate sustainability” frameworks. When operating well, these frameworks require companies to publicly acknowledge and mitigate the societal harms caused by their activities. These models recognise that corporations are a legal creation, exist because of policy concessions, and require long term community support to continue to operate successfully.

³ See, eg, Adolph A Berle, ‘Corporate Powers As Powers In Trust’ (1931) 44 *Harvard Law Review* 1049; E Merrick Dodd, ‘For Whom Are Corporate Managers Trustees’ (1932) 45 *Harvard Law Review* 1145.

⁴ See, eg, Governance Institute of Australia, ‘Shareholder Primacy: Is There a Need for Change?’ (Discussion Paper 2014); Jean Du Plessis, ‘Corporate Social Responsibility And “Contemporary Community Expectations”’ (2017) 35 *Company and Securities Law Journal* 30; Pamela Hanrahan, ‘Corporate Governance in the “Exciting Times”’ (2017) 32 *Australian Journal of Corporations Law* 142.

Acceptance of the societal context within which corporations operate leads to a concept that individual companies require a “social license to operate”. The Minerals Council of Australia describes a social license as an “unwritten social contract”, that is about:

*operating in a manner that is attuned to community expectations and which acknowledges that businesses have a shared responsibility with government, and more broadly society, to help facilitate the development of strong and sustainable communities.*⁵

A focus by corporations on sustainability and social license concerns is rapidly becoming the norm in Australia and overseas.⁶ These principles are now encompassed within well developed and expanding corporate sustainability and responsible investment frameworks.⁷ The framework used by most large corporations to report on their sustainability objectives and progress is the Global Reporting Initiative framework.⁸

Sustainable corporate and investment trends are underpinned by community and investor expectations of corporate conduct. Sustainable investing is ‘about how a company does what it does’ and focuses on ‘understanding the full picture.’⁹

Responsible investing is:

*an umbrella term used to describe any process that considers environmental, social or governance practices in the investment process of research, analysis, selection and monitoring of investments.*¹⁰

⁵ Minerals Council of Australia, *Enduring Value: The Australian Minerals Industry Framework for Sustainable Development* (June 2005).

⁶ See, eg, Governance Institute of Australia, ‘Shareholder Primacy: Is There a Need For Change?’ (Discussion Paper 2014) 8; Sarah Baker and Maged Girgis, ‘A New COP on the Beat -Heightened Expectations for Corporate Sustainability Governance and Disclosure’ (Minter Ellison Publication, June 2016).

⁷ Commonly referred to as the GRI Standards.

⁸ See <https://www.globalreporting.org/>.

⁹ Money Management, ‘Navigating Responsible Investing’ (12 March 2018) viewed 1 July 2021 at <https://www.moneymanagement.com.au/features/expert-analysis/navigating-responsible-investing>.

¹⁰ Money Management, ‘Navigating Responsible Investing’ (12 March 2018).

Recent research found that 90 percent of Australians acknowledge the importance of responsible and sustainable investing.¹¹

There are well documented linkages between a company's capacity to manage its sustainability risks and impacts and its long term valuation.¹² These commercial linkages are driving investors, asset managers and others to value companies taking the longer-term impacts of environmental, social and governance concerns into account (including potential damage to a company's brands and reputation).¹³ These groups look behind the reported results and commentary to assess the broader strategies driving a company's decision-making and actions and their willingness to proactively minimise foreseeable environmental and social harms.¹⁴

When considering the prior and ongoing decisions and actions of any corporation, the timeframes used by its board are critical. For example, specific businesses that are highly profitable in the short term may become loss making when the longer term financial and non-financial harms (such as adverse environmental, social, and reputational impacts) are included.

Increasing investor and community concerns with corporate sustainability matters are reflected within existing company reporting obligations, corporate governance rules, and company director obligations in Australia,¹⁵ and are well documented and

¹¹ Money Management, 'Navigating Responsible Investing' (12 March 2018).

¹² For a summary outline of studies that empirically examine the links between commercial outcomes and the sustainability practices and reporting of corporations, see Gill North, 'Corporate Sustainability Practices and Regulation: Existing Frameworks & Best Practice Proposals' in Jean du Plessis and CK Low (eds), *Corporate Governance Codes for the 21st Century* (Springer Publishing, Switzerland, 2017). See also Gill North, 'Corporate Management & Communication of Environmental and Social Risks in Australia: Pressures are Mounting' (2018) 33 *Australian Journal of Corporate Law* 227.

¹³ See, eg, Gill North, 'Corporate Management & Communication of Environmental and Social Risks in Australia: Pressures are Mounting' (2018) 33 *Australian Journal of Corporate Law* 227. See also Paul von Nessen and Abe Herzberg, 'James Hardie's Asbestos Liability Legacy in Australia: Disclosure, Corporate Social Responsibility and the Power of Persuasion' (2011) 16 *Australian Journal of Corporate Law* 1 [79]; Edwina Dunn, 'James Hardie: No Soul to be Damned and No Body to Be Kicked' (2005) 27 *Sydney Law Review* 339.

¹⁴ A risk is foreseeable in law if it is not 'farfetched or fanciful': *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-48 (Mason J).

¹⁵ See, eg, *Corporations Act 2001* (Cth) ss 180, 299, 299A; ASX Listing Rule 4.10.17; ASX Corporate Governance Council, *ASX Corporate Governance Principles and Recommendations* (4th ed, February 2019) Recommendation 7.4.

discussed in business and law papers¹⁶ and case law. For example, the company director duty of care and diligence in s 180 of the *Corporations Act 2001* (Cth) requires a balance between the potential benefits to the corporation with the foreseeable risks of harm.¹⁷ Justice Edelman emphasises that the reference to “harm” in s 180 is not confined to financial harm and extends to any of the interests of the company, including non-pecuniary consequences such as the reputation of the corporation.¹⁸ Corporate governance obligations are therefore broadening, with sustainability factors becoming increasingly important for board accountability and investor decision making.¹⁹

The importance of sustainability credentials is reflected in the annual reports of James Hardie and CSR. Both companies claim that they prioritise and operate with values consistent with sustainability principles and or a social licence to operate.

James Hardie Industries Ltd

James Hardie is a publicly listed corporation that continues to manufacture and sell building products in Australia and elsewhere. The sustainability review within its annual report for the period ending 31 March 2020 highlights ‘zero harm initiatives’ and espouses ‘full lifecycle and product sustainability’.²⁰ The sustainability overview explains that its zero harm focus and approach to sustainability ‘puts people first with a focus on safety’.²¹ The indicator used to highlight its safety achievements is a global total recordable industry rate well below the industry average.

Recommendation 7.4 states that a listed entity should disclose whether it has any material exposure to environmental or social risks and if it does, how it manages or intends to manage those risks.

¹⁶ See, eg, Paul Redmond, ‘Directors’ Duties and Corporate Social Responsiveness’ (2012) 35 *University of New South Wales Law Journal* 317; Gill North, ‘Corporate Management & Communication of Environmental and Social Risks in Australia: Pressures are Mounting’ (2018) 33 *Australian Journal of Corporate Law* 227.

¹⁷ *ASIC v Rich* (2009) 75 ACSR 1, 62 [713].

¹⁸ See, eg, *Australian Securities and Investments Commission v Cassimatis [No 8]* (2016) 336 ALR 209, 301-302 [480-484].

¹⁹ See, eg, Gill North, ‘Corporate Management & Communication of Environmental and Social Risks in Australia: Pressures are Mounting’ (2018) 33 *Australian Journal of Corporate Law* 227.

²⁰ James Hardie, *2020 Annual Report* 20-21. The annual report of James Hardie for the year to 31 March 2021 is on Form 20-F. Form 20-F is the required reporting format under disclosure law in the United States and is generally limited to financial information. The 2021 Sustainability Report from James Hardie was not available when our report was released.

²¹ James Hardie, *2020 Annual Report* 18-19.

Further, the workplace safety page in this review states that

‘At James Hardie, we believe that safety is a non-negotiable value for business success, and we prioritize the protection of our people and those who use or interact with our products.’²²

The only mention of harm caused to those who interact with its legacy asbestos products comes in the final sections of the review. A highlighted box indicates that the company’s cumulative contributions to asbestos compensation total around \$1.6 billion.²³ Most of this reported compensation likely relates to personal injury payments, but as discussed in our prior report, James Hardie agreed to contribute to asbestos awareness endeavours and asbestos-related disease research under the Asbestos Injuries Compensation Fund (AICF) agreement.²⁴

Following an announcement by James Hardie in 2001 that it planned to move its headquarters to the Netherlands and potentially restrict the amount of monies available to asbestos-related victims, the levels of organised public protest and media scrutiny were intense and confrontational.²⁵ This scenario pressured James Hardie and the NSW State Government and led to the establishment of the AICF in 2006.²⁶ Under the relevant agreement, James Hardie is required to pay an annual agreed percentage of its free cash flow into the fund for forty years, with possible extensions if claims escalate.²⁷

²² James Hardie, 2020 Annual Report 18-19.

²³ James Hardie, 2020 Annual Report 18. Asbestos gross cash outflows for the 2021 fiscal year were A\$153.7 and as at 31 March 2021, the estimated aggregate asbestos liability was US\$1,135.8mn: James Hardie 2021 Annual Report on Form 20-F 101, 110.

²⁴ James Hardie Compensation Agreement [20].

²⁵ See, eg, Greg Combet, ‘The Bernie Banton Story’ in Lenore Layman and Gail Phillips (eds), *Asbestos in Australia* (Monash University Publishing, 2019) “Asbestos in Australia”.

²⁶ James Hardie Compensation Agreement. Recital A(m) indicates that James Hardie Industries asserts that a principal purpose of entering into this deed is to avert threats from the NSW Government, the federal government and other state and territorial governments to legislatively impose liability upon one or more members of the group in relation to asbestos related personal injury liabilities in excess of the available assets unless the group reached a voluntary settlement. The NSW government had drafted legislation to wind back Hardie’s move to the Netherlands as a means to force it to pay compensation: Matt Peacock, *Killer Company* (Harper Collins Publishers, 2009) 284.

²⁷ James Hardie Compensation Agreement Schedule 3.

KPMG audits the AICF fund liabilities and claims annually and its reports provide a useful picture of the changing profile of asbestos-related disease sufferers. The KPMG data is significant, as the mesothelioma claims paid by the fund in the 2020 financial year equated to around 60 percent of the notified mesothelioma cases in Australia.²⁸

Harmful exposure to asbestos is commonly described as arising in three waves.²⁹ The first wave impacted people directly involved in asbestos mining and production. The second wave encompasses tradespeople working with materials containing asbestos, and persons in close contact, such as those washing clothes with asbestos fibres on them or children playing in asbestos dust. The third wave includes people exposed more broadly to asbestos products, for example, during home renovations.

The significance of the second and third waves are highlighted in the AICF claims data. The KPMG report confirms that 52 percent of the mesothelioma claims from 2008 to 2019 involved home renovations,³⁰ including claimants with short periods and long periods of exposure, professional tradespersons, and DIY renovators.³¹ In the year ending March 2020, the number of mesothelioma claims reached a record 438, the proportion of the mesothelioma claims involving home renovations was 55 percent, and this category of claims was the highest ever at 240.³²

²⁸ 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). Total mesothelioma claims through the AICF reached a record 430 in 2019 and diagnoses recorded by the Australian Mesothelioma Registry during a similar period were 724: Australian Government, Australian Institute of Health and Welfare, *Mesothelioma in Australia 2019* (published August 2020).

²⁹ PJ Landrigan, 'The Third Wave of Asbestos Disease: Exposure to Asbestos in Place. Public Health Control. Introduction.' (1991) 643 *Annals of the New York Academy of Sciences* xv-xvi; Arthur W Musk, Nicholas H de Klerk, and Anna Nowak, 'Asbestos Exposure: Challenges for Clinicians' (2016) 204 *Medical Journal of Australia* 48.

³⁰ 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) 24. Defined by KPMG as 'claims for personal injury and / or death arising from asbestos exposure during home renovations by individuals or to builders involved in such renovations.'

³¹ 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. The KPMG statistics exclude cases settled by other schemes and uncompensated victims.

³² 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) 23, 27-28.

Notably, this source related data is excluded from the KPMG report released in 2021, perhaps because of political and commercial sensitivities following our use of these figures as evidence of the growing importance of exposure in homes.³³

CSR Limited & Wunderlich Limited

CSR is a leading building products company in Australia and is a publicly listed company. In 1969, CSR purchased Wunderlich Ltd, a manufacturer of asbestos cement roofing and wall-siding, and on sold this business to James Hardie in 1977.³⁴ The total levels of compensation paid by CSR and Wunderlich Ltd are not reported publicly.

The 2019 annual report from CSR states that '[o]ne of our key sustainability pillars is based on proactively maintaining our social license to operate through greater interaction and positive impacts on the community'.³⁵ This priority is reiterated in the 2021 annual report.³⁶

The 2020 annual report indicates that CSR's 'first and overriding priority is to protect the health and safety of all of our employees, contractors and customers.'³⁷ The corporate governance statement within this report highlights the company's aspiration to act legally and responsibly on all matters and to maintain the highest ethical standards.³⁸ This objective is repeated in the 2021 annual report.³⁹

Despite these stated objectives, discussion on CSR's asbestos related liabilities and impacts is limited to the material risk table and the notes to the financial report. The financial notes indicate that asbestos-related claims paid during the 2021 financial year totalled \$20.6 million including legal costs. These notes further suggest that the

³³ KPMG, *Valuation of Asbestos Related Disease Liabilities of Former James Hardie Industries Ltd Entities to be Met by the Asbestos Injuries Compensation Fund* (18 May 2021).

³⁴ Jock McCulloch, *Asbestos: Its Human Cost* (1986, St Lucia, Queensland University Press) 18.

³⁵ CSR Ltd, *Annual Report 2019* 19.

³⁶ CSR Ltd, *Annual Report 2021* 17.

³⁷ CSR Ltd, *Annual Report 2020* 9.

³⁸ CSR Ltd, *Annual Report 2020* 15.

³⁹ CSR Ltd, *Annual Report 2021* 91.

cumulative bill for asbestos-related compensation remains well below a billion dollars.⁴⁰

Werfel Case

In *Amaca Pty Ltd v Werfel*,⁴¹ Werfel was diagnosed with mesothelioma following brief periods as a fencing contractor in the late 1990s and do-it-yourself home renovations in 2000-2001 and in 2004. The Court ultimately held that James Hardie owes a duty of care to avoid injury to persons who might occasionally remodel, repair or remove its asbestos-cement products, and that this duty had been breached with respect to Werfel.

More broadly, the Werfel Case imposes a duty on James Hardie to warn homeowners, occupants, and tradespersons of the risks of contracting mesothelioma from occasional exposures to asbestos cement products and to provide appropriate advice on the necessary precautions. Their Honours suggest this duty might be satisfied by conducting mass media campaigns that acknowledge these risks and that provide appropriate guidance. They further note that a mass media public campaign could minimise incidences of future harm by alerting both occasional users and tradespersons working with asbestos cement products, thereby reducing future claimants.⁴²

This legal finding is seminal, as there have been no nationally coordinated large scale asbestos risk or public health awareness campaigns conducted in Australia.⁴³ Private discussions with people suggest the rationales underlying this inaction centre on:

⁴⁰ CSR Ltd, *Annual Report 2021* 91. Page 91 indicates that as of 31 March 2021, the provision for asbestos product liability decreased to \$231 million.

⁴¹ *Amaca Pty Ltd v Werfel* [2020] SASCF 125 “Werfel Case”.

⁴² Werfel Case [313, 317, 319].

⁴³ This fact was confirmed by the ASEA in an email to the authors. Existing public health and safety warnings on legacy asbestos threats are restricted to online guidance sheets and occasional messages through social media channels and community newspapers.

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- An inability to agree on the specific nature of the appropriate warnings to be given,
 - The difficulties in managing the public response, including the risk that panic or hysteria may ensue, and
 - Expected pressure from the public to resolve or respond to legacy asbestos risks when options to do so are costly.⁴⁴

These rationales lack credibility and prudent public health and safety considerations when the full risks and consequences of legacy asbestos are understood. Mass public warnings or campaigns that explain the specific risks of legacy asbestos in homes and the appropriate precautions are long overdue and are vital to prevent unnecessary mass deaths from avoidable diseases.

Chief Justice Kourakis and Justices Nicholson and Livesay highlight the problems arising from qualified and guarded public communications on asbestos risks. They indicate that if James Hardie had previously acknowledged the risks of occasional exposure during home renovations unequivocally and very publicly, this would have allowed government and non-government agencies, the public health and safety authorities, and the media to be less guarded in their commentary to the public.⁴⁵ This judicial analysis is well supported by our empirical research.

Our Summary & Views

The harms caused by James Hardie and CSR are at the pointy end of any debates on corporate sustainability and a social license to operate, as they involve large numbers of ongoing fatalities that should never be forgotten as mere statistics. As such, the zero harm, sustainability, safety, and social license claims made by James Hardie and CSR require deep reflection.

The continuing economic, environmental, and societal impacts resulting from the

⁴⁴ These were common oral responses given during telephone discussions with persons involved with asbestos-related matters. None of these persons wish to be named or to go on the record.

⁴⁵ Werfel Case [231].

prior sale of asbestos products in Australia are immense. We predict that annual fatalities from asbestos-related diseases will be in the thousands for the foreseeable future and tens of billions of dollars will be required to fully remediate or remove legacy asbestos products from properties across Australia.

Yet, discussion of asbestos matters in the 2020 report of James Hardie is limited to a box that highlights the reported funding to the AICF and CSR simply notes that all valid asbestos claims are met on an equitable basis. This commentary in the annual reports of James Hardie and CSR and the actions taken by these companies in response to the asbestos crisis have clearly not addressed the full extent of the societal harms caused by their prior activities.

Regardless of the board and executive motivations, the highlighted responses from James Hardie and CSR do not satisfy the full lifecycle and sustainability claims made or a reasonable notion of a social license to operate. The payment of compensation (when in fact this occurs) is merely an emergency response once the harm has occurred,⁴⁶ with the gravity of harm being the most extreme possible – the end of life. Nor can James Hardie or CSR claim that workplace safety is the top priority when the single largest cause of workplace deaths in Australia is almost certainly asbestos-related diseases.⁴⁷

As highlighted in prior reports, measures taken by James Hardie and CSR to warn Australian householders about the risks of legacy asbestos appear to be limited to

⁴⁶ This is sometimes referred to as an ambulance at the bottom of the cliff.

⁴⁷ See T Driscoll, D Nelson, K Steenland, James Leigh, M Concha-Barrientos, M Fingerhut and A Pruss-Ustun, 'The Global Burden of Disease Due to Occupational Carcinogens' (2005) 48 *American Journal of Industrial Medicine* 419. This paper finds that lung cancer and mesothelioma account for the most deaths and DALYs caused by workplace exposure to carcinogens. See also World Health Organization, 'WHO Calls for Prevention of Cancer through Healthy Workplaces' (Media release 27 April 2007); The Mesothelioma Center (US), 'Asbestos-Related Diseases' viewed 1 July 2021 at <https://www.asbestos.com/mesothelioma/related-diseases/>; SafeWork Australia, 'Fatality Statistics' viewed 30 June 2021 at <https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics>. The SafeWork Australia web page highlights the fact that 3,571 workers were fatally injured while working from 2003 to 2018 (equating to 250 deaths a year). The commentary notes that this figure excludes deaths because of disease, such as cancers, without explaining that asbestos-related cancers are manmade and result from corporate activities, and that tens of thousands of deaths from asbestos related diseases have occurred over the same period from occupational exposure.

minor contributions to a single asbestos awareness website.⁴⁸ The efficacy of this website has seemingly been minimal,⁴⁹ because it assumes that Australians are sufficiently aware of the dangers of asbestos to proactively search for and locate this advice, and then have the capacity to appropriately respond. Our household research suggests these assumptions are poorly founded.

Without further actions and commitments to prevent ongoing fatalities from asbestos-related diseases, notions of sustainability for James Hardie and CSR are arguably more about public relations than a substantive driver of behaviour. Bakan refers to such strategies as masks that corporations use to improve their reputation and hide their self-interested natures from public scrutiny.⁵⁰

James Hardie indicates that following discussions with its stakeholders, it will in future report against the GRI Sustainability Reporting Standards. These standards require disclosure of impacts the company has on the economy, the environment, and or society. It will be interesting to see if compliance with these standards will encourage (or require) James Hardie to report on the impacts of legacy asbestos beyond actuarial compensation matters.

Most investors of James Hardie and CSR probably know something about the history of asbestos in Australia and the compensation schemes. The extent to which they comprehend the magnitude of the continuing risks, deaths, and costs associated with legacy asbestos is less clear.

James Hardie and CSR would no doubt like to move on with the least possible damage to their commercial outcomes and reputation, but the real question is whether this is assessed on a short or longer-term basis. While the funding of mass publicity campaigns and warnings on the risks of *in situ* asbestos and further contributions to research of asbestos related diseases may not *prima facie* fit with

⁴⁸ Asbestos Awareness.com.au, 'Don't Play Renovation Roulette'

⁴⁹ See Werfel Case [281-286].

⁵⁰ Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Constable & Robinson Ltd, 2004) 28, 57, 62-63. See also Ronen Shamir, 'The De-Radicalization of Corporate Social Responsibility' (2004) 30 *Critical Sociology* 699.

their short-term profit objectives, such investments would make longer term commercial sense by assisting to reduce the number of future tort claimants⁵¹ and by enhancement of their longer-term reputations and social licenses. As emphasised in the Werfel Case, ‘a corporation may accept that it is necessary to take some steps to ensure long-term reputation, and sustainable profits, at the expense of its business short term profits.’⁵²

As discussed in our prior report, the AICF agreement prevents or makes it difficult to legally require funding from James Hardie to support the identification and removal of asbestos from homes and other properties or to recover other economic losses.⁵³ But there are no legal or other barriers that prevent James Hardie or CSR from taking further voluntary actions and or from making additional contributions in accordance with their stated sustainability principles when doing so enhances their long-term brand and reputation.⁵⁴

For James Hardie and CSR to achieve their promulgated sustainability objectives, we suggest urgent additional funding and actions are required to reduce the societal harms flowing from legacy asbestos. Most critically, we encourage the boards of these companies to do more to minimise or prevent deaths resulting from exposure to legacy asbestos in homes. Further, we call for investors and stakeholders of these companies who are concerned about the sustainability and reputation of these businesses to actively work together to achieve these aims.

In our view, James Hardie and CSR ought, at a minimum, to provide funding to pay for:

⁵¹ See, eg, Werfel [317].

⁵² Werfel Case [293].

⁵³ James Hardie Compensation Agreement.

⁵⁴ See, eg, Paul Redmond, ‘Directors’ Duties and Corporate Social Responsiveness’ (2012) 35 *University of New South Wales Law Journal* 317; Gill North, ‘Corporate Management & Communication of Environmental and Social Risks in Australia: Pressures are Mounting’ (2018) 33 *Australian Journal of Corporate Law* 227.

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- **Public health campaigns to properly warn all Australians about the risk and impacts of legacy asbestos and**
 - **Medical research to prevent asbestos related diseases or to mitigate the consequences of these diseases.**

Further, James Hardie and CSR ought to fully acknowledge their roles in creating the asbestos crisis and the continuing risks and harms of legacy asbestos. Such public acknowledgement is critical, because public discussion on, and warnings about, legacy asbestos in Australia remain heavily guarded, especially on the scale of related fatalities and the risks of brief, occasional and low dose exposure.⁵⁵

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.

⁵⁵ For discussion on the guardedness and qualifications of public warnings on asbestos risks, see Werfel Case [231][337]. See also Asbestos Awareness Australia Ltd, *Public Health Risk Warnings On Legacy Asbestos* (June 2021) available for download at <https://digitalfinanceanalytics.com/blog/when-is-a-warning-not-a-warning/>.